

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is centered within the hourglass.

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Federal Mandatory Minimum Sentencing Statutes

Charles Doyle, American Law Division

December 27, 2007

Abstract. Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. Among other things, they cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They have been a feature of federal sentencing since the dawn of the Republic. They circumscribe judicial sentencing discretion, although they impose few limitations upon prosecutorial discretion, or upon the President's power to pardon. They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentencing and a certain means of incapacitating the criminally dangerous. This report is an overview of federal statutes in the area and a discussion of some of the constitutional challenges they have faced.

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Federal Mandatory Minimum Sentencing Statutes

Charles Doyle
Senior Specialist in American Public Law

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Summary

Federal mandatory minimum sentencing statutes limit the discretion of a sentencing court to impose a sentence that does not include a term of imprisonment or the death penalty. They have a long history and come in several varieties: the not-less-than, the flat sentence, and piggyback versions.

Critics argue that mandatory minimums undermine the rationale and operation of the federal sentencing guidelines which are designed to eliminate unwarranted sentencing disparity. Counter arguments suggest that the guidelines themselves operate to undermine individual sentencing discretion and that the ills attributed to other mandatory minimums are more appropriately assigned to prosecutorial discretion or other sources.

State and federal mandatory minimums have come under constitutional attack on several grounds over the years, and have generally survived. The Eighth Amendment's cruel and unusual punishments clause does bar mandatory capital punishment, and apparently bans any term of imprisonment that is grossly disproportionate to the seriousness of the crime for which it is imposed. The Supreme Court, however, has declined to overturn sentences imposed under the California three strikes law and challenged as cruel and unusual. The constitutional rule – that any fact that increases the *maximum* penalty for crime must be charged in the indictment, presented for jury determination, and proven beyond a reasonable doubt – has no application to a fact that triggers a *mandatory minimum* penalty, at least with regard to facts traditionally considered sentencing factors. It does mean, however, that federal sentence guidelines remain important considerations but are no longer binding. Double jeopardy, ex post facto, due process, separation of powers and equal protection challenges have been generally unavailing.

Lists of various federal mandatory minimum sentencing statutes are appended as is a bibliography of legal materials.

This report is available in an abbreviated form without its footnotes, citations to authority, or appendices as CRS Report RS21598, *Federal Mandatory Minimum Sentencing Statutes: An Abbreviated Overview*, by Charles Doyle.

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Introduction

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction.¹ Among other things, they cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They have been a feature of federal sentencing since the dawn of the Republic. They circumscribe judicial sentencing discretion,² although they impose few limitations upon prosecutorial discretion,³ or upon the President's power to pardon.⁴ They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentencing and a certain means of incapacitating the criminally dangerous. This is a brief overview of federal statutes in the area and a discussion of some of the constitutional challenges they have faced.⁵

Types of Mandatory Minimums

Mandatory minimums come in many stripes, including some whose status might be disputed. The most widely recognized are those that demand that offenders be sentenced to imprisonment for “not less than” a designated term of imprisonment.⁶ Some are triggered by the nature of the

¹ Although others may differ, this report does not classify as mandatory minimum sentencing statutes those statutory proscriptions that call for a mandatory minimum fine unless they also call for a mandatory minimum term of imprisonment.

² Commentators have defined mandatory minimums in a number of ways, see e.g., *Mandatory Minimum Sentences Coupled with Multi-Facet Interventions: An Effective Response to Domestic Violence*, 6 UNIVERSITY OF THE DISTRICT OF COLUMBIA LAW REVIEW 51, 68 (2001), quoting, *Determinate Sentencing and Judicial Participation in Democratic Punishment*, 108 HARVARD LAW REVIEW 947 (1995) (“mandatory minimums require judges to impose a specified minimum prison term if an offense meets certain statutory criteria”); Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIFORNIA LAW REVIEW 61, 64 (1993) (“mandatory sentencing statutes generally provide that when a specified circumstance exists in connection with the commission of a crime (1) the court must sentence the defendant to prison and (2) the duration of the defendant’s incarceration will be substantially longer than it would have been in the absence of the circumstance”); Bernstein, *Discretion Redux—Mandatory Minimums, Federal Judges, and the ‘Safety Valve’ Provision of the 1994 Crime Act*, 20 UNIVERSITY OF DAYTON LAW REVIEW 765, 768 (1995) (ellipsis in the original) (“[m]andatory minimums, which are most commonly applied in drug cases, are statutory provisions calling for a sentence of ‘no less than . . .’ for a given offense (adjusted for criminal record)”).

The definition used here – i.e., any statute that effectively requires a federal judge, at a minimum, to sentence a convicted defendant to a term of imprisonment is a mandatory minimum – is designed to avoid exclusion of any provisions that should arguably be listed.

³ E.g., 18 U.S.C. 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. . .”) (emphasis added). Prosecutorial discretion is somewhat confined, however, by the courts’ authority to accept or reject plea bargains, F.R.Crim.P. 32, and their consideration of relevant but uncharged misconduct under the federal Sentencing Guidelines, U.S.S.G. §1B1.3.

⁴ E.g., U.S.Const. Art.II, §2 (“The President . . . shall have power to grant reprieves and pardons for offenses against the United States . . .”).

⁵ Various parts of the report are drawn from earlier reports, principally, CRS Report RL30281, *Federal Mandatory Minimum Sentencing Statutes: A List of Citations with Captions, Introductory Comments, and Bibliography*, by Charles Doyle (Aug. 14, 1999).

⁶ E.g., 18 U.S.C. 924(c)(1)(A) (“. . . any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States uses or carries a firearm . . . shall in addition to the punishment provided for such crime . . . (i) be sentenced to a term of imprisonment of not less than 5 years . . .”).

offense,⁷ others by the criminal record of the offender.⁸ A few members of this “not less than” category are less “mandatory” than others, because Congress has provided a partial escape hatch or safety valve. For example, several of the drug-related mandatory minimums are subject to a “safety valve” for small time, first time offenders that may render their minimum penalties less than mandatory, or at least less severe.⁹ Some of the other “not-less-than” mandatory minimums purport to permit the court to sentence an offender to a fine rather than to a mandatory term of imprisonment.¹⁰

A second generally recognized category of mandatory minimums consists of the flat or single sentence statutes, the vast majority of which call for life imprisonment.¹¹ Closely related are the

⁷ *E.g.*, 18 U.S.C. 844(f)(1) (“Whoever maliciously damages or destroys . . . by means of fire or an explosive any . . . personal or real property . . . owned or possessed by . . . the United States . . . shall be imprisoned for not less than 5 years and not more than 20 years . . .”).

⁸ *E.g.*, 18 U.S.C. 2252(b)(1) (“Whoever violates . . . paragraphs (1), (2), or (3) of subsection (a) [relating to commercial activities with respect child pornography] shall be fined under this title and imprisoned not less than 5 years and not more than 20 years. . .”).

⁹ “Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

“(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

“(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

“(3) the offense did not result in death or serious bodily injury to any person;

“(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

“(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement,” 18 U.S.C. 3553(f).

When the “safety value” can be claimed, the Sentencing Guidelines call for a minimal offense level of 17, if the otherwise applicable mandatory minimum is at least 5 years, U.S.S.G. §5C1.2(b). An offense level of 17 translates to a permissible sentencing range of between 2 and 2.5 years’ imprisonment, U.S.S.G. Ch.5 Pt.A (Sentencing Table), and is beyond the level for which an offender may be sentenced either to probation or to split sentence of imprisonment and some other less restrictive form of supervision, *Id.*; U.S.S.C. §5C1.1.

¹⁰ *E.g.*, 2 U.S.C. 390 (“Every person who, having been subpoenaed as a witness under this chapter [relating to Congressional contested elections] to give testimony or to produce documents, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the contested election case, shall be deemed guilty of a misdemeanor punishable by fine of not more than \$1,000 nor less than \$100 or imprisoned for not less than one month nor more than twelve months, or both”)(emphasis added).

Although these might seem to stretch the definition (*i.e.*, statutes that require a judge to impose a minimum sentence of imprisonment), they are mentioned because the Sentencing Commission included them within its definition of mandatory minimums, United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Commission Report)*, 4-5 (1991) (“Under some statutes, a mandatory prison term is only required when the court otherwise determines to impose a sentence of imprisonment”).

Moreover, they highlight instances where Congress might have been thought to establish a mandatory minimum but where its treatment of the fine to be imposed may leave its intentions in doubt. *See e.g.*, 18 U.S.C. 242 (Whoever. . . willfully subjects any person . . . to the deprivation of any rights . . . if death results . . . shall be fined under this title, or imprisoned for any term of years or for life, or both. . . .”)(emphasis added).

¹¹ *E.g.*, 18 U.S.C. 1651 (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and (continued...)”)

capital punishment statutes that require imposition of either the death penalty or imprisonment for life, or death or imprisonment either for life or for some term of years.¹²

The “piggyback” statutes make up a third class. The piggyback statutes are not themselves mandatory minimums but sentence offenders by reference to underlying statutes including those that impose mandatory minimums.¹³

Until the Supreme Court intervened in *Booker v. United States* to eliminate the binding effect of the Sentencing Guidelines,¹⁴ the final and least obvious group was comprised of statutes whose violation resulted in the imposition of a mandatory minimum term of imprisonment by operation of law, or more precisely by operation of the Sentencing Reform Act and the Sentencing Guidelines issued in its name.¹⁵ After *Booker* and the line of cases that followed, the Guidelines cannot fairly be characterized as a source of mandatory minimum sentences, although they continue to tilt heavily towards incarceration.¹⁶

(...continued)

is afterwards brought into or found in the United States *shall be imprisoned for life*”(emphasis added).

¹² E.g., 18 U.S.C. 1201(a)(“Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . if death of any person results, shall be punished by death or life imprisonment”).

Most observers might exclude from this category capital crimes made punishable by death, life imprisonment, *or imprisonment for any term of years*, under the theory that a sentence of imprisonment for zero years is a sentence of “any term of years.” Yet this can hardly have been the intent of Congress given the seriousness of the offense to which the sentence attaches.

¹³ E.g., 18 U.S.C. 1114 (“Whoever kills . . . any officer or employee of the United States . . . shall be punished – (1) in the case of murder, as provided under section 1111. . .”).

¹⁴ 543 U.S. 220 (2005). *Booker* left the Guidelines in place and essentially intact, but they continue to have a large, rather than a commanding, presence within the federal sentencing scheme, *see e.g., Rita v. United States*, 127 S.Ct. 2456 (2007)(appellate courts may consider a sentence within the accurately identified Guideline range reasonable); *Gall v. United States*, 128 U.S. 586 (2007)(sentencing courts must begin by determining the appropriate Guideline range for the case at hand and then consider the other sentencing factors identified in 18 U.S.C. 3553(a); they may not consider a sentence within the Guideline range per se reasonable nor one outside that range per se unreasonable; appellate courts are to review trial court sentences under a deferential abuse of discretion standard).

¹⁵ The Sentencing Commission did not consider its Guidelines mandatory minimum provisions, *Commission Report*, at 4 (footnote 3 of the Commission’s *Report* in brackets) (“‘Mandatory minimums,’ ‘mandatory minimum sentencing provisions,’ and related terms refer to statutory provisions requiring the imposition of at least a specified minimum sentence when criteria specified in the relevant statute have been met. [Consistent with the intent of the statutory directive for this Report, only minimums required by statute are considered to be ‘mandatory minimums.’ Not included in the definitions (and in fact contrasted with mandatory minimums in a later chapter of this Report) are sentences required by the federal sentencing guidelines . . .].”). The Sentencing Guidelines, however, are promulgated pursuant to statutory authority and before *Booker* often curtailed the authority of a sentencing court to impose a sentence that did not include a term of imprisonment – upon conviction for violation of a statute which on its face is not a mandatory minimum.

¹⁶ This is particularly so because the Guidelines impose constraints on the option of probation that make a sentence other than incarceration more uncommon than was once the case: “Prior to the [Sentencing Reform Act], the prison to probation ratio in federal criminal sentencing was about sixty to forty. Congress said nothing in the statute about abolishing or even drastically curtailing probation. . . . The Commission, however, drafted guidelines containing a presumptive sentence of imprisonment for every felony in the United States Code. Near the bottom of the scale of crimes, it established several ranges in which a court could select either prison or probation. . . . The result is that the incidence of probation since the guidelines has been cut by more than half (15.5%),” Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE LAW JOURNAL 1681, 1706-707 (1992). According to the most recent, publicly available statistics, the current incidence of probation is 7.5% with an additional 3.9% of offenders sentenced to some mix of incarceration and probation, *United States Sentencing Commission, Federal Sentencing Statistics by State, District & Circuit (October 1, 2005, through September 30, 2006)*, (continued...)

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History

Mandatory minimums have been with us from the beginning. In fact, the history of our criminal sentencing practices is the story of increased reliance upon judicial or administrative discretion in order to mute the law's severity in individual cases,¹⁷ followed by increased limitations on such discretion in order to curb the resulting arbitrary and discriminatory disparities in punishment.¹⁸ It is a saga in which "competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline," *Harmelin v. Michigan*, 501 U.S. 957, 999 (Kennedy, J. concurring).

Severity and a want of discretion marked the early criminal law. The sentence which followed a felony conviction was death; except in rare instances no other punishment could be imposed. Over time the courts were given some discretion over sentencing, but the choices were hardly lenient; and corporal punishment and banishment were common.¹⁹

Yet even early on there were efforts to ease the law's severity. Both the accused and the convicted could be pardoned at the King's will.²⁰ While Parliament regularly increased the number of crimes, it often replaced common law capital offenses with statutory crimes defined as misdemeanors or subject to the benefit of clergy. The result was the same in either case, a reduced

(...continued)

Table 4, available on Dec. 21, 2007 at <http://www.ussc.gov/JUDPACK/JP2006.htm>.

¹⁷ Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765); Chitty, *A PRACTICAL TREATISE ON CRIMINAL LAW* (3d Amer. ed. 1836); Stephen, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883); Rubin, *THE LAW OF CRIMINAL CORRECTION* (2d ed. 1973).

¹⁸ Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Frankel, *Lawlessness in Sentencing*, 41 *UNIVERSITY OF CINCINNATI LAW REVIEW* 1 (1972); O'Donnell, Churgin & Curtis, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977); Stith & Cabranes, *FEAR OF JUDGING* (1998).

¹⁹ Blackstone's summary on the eve of the Revolutionary War marks the evolution of English sentencing law to that point: ". . . [T]he court must pronounce that judgment, which the law hath annexed to the crime . . . Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies; others in loss of liberty, by perpetual or temporary imprisonment. Some extent to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender by slitting the nostrils, or branding the hand or face. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and theses are inflicted chiefly for crimes, which arise from indigence, or which render even opulence disgraceful. Such as whipping, hard labour in the house of correction, the pillory, the stocks, and the ducking stool." 4 Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 369-70 (1769).

²⁰ *Id.* at 390; Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 *TEXAS LAW REVIEW* 569, 583-89 (1991).

number of capital offenses.²¹ In our own country, state legislatures drastically curtailed the number of capital offenses soon after the Revolution.²²

When the first Congress assembled, it enacted several mandatory minimums, each of them a capital offense.²³ The nineteenth century, however, witnessed the appearance of a host of discretionary schemes designed to ease the harshness of criminal law in individual cases. The courts could suspend sentence and were vested with broad authority in the selection of those sentences they chose to impose.²⁴ Probation and parole were born and became prominent.²⁵

By late in the century at the federal level, the number of mandatory capital offenses had been reduced,²⁶ and while the number of mandatory minimums had increased,²⁷ most federal criminal statutes merely established a maximum penalty and left to the discretion of the courts sentences to imposed within the maximum. The 1909 federal criminal code revision eliminated most mandatory minimums;²⁸ soon thereafter federal prisoners were made eligible for parole after

²¹ Hall, *THEFT, LAW AND SOCIETY*, 114-32 (1952); Rubin, *supra* footnote 20 at 180.

²² 1 Blumstein, Cohen, Martin & Tonry, *RESEARCH ON SENTENCING: THE SEARCH FOR REFORM*, 58 (1983); Rothman, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC*, 61 (rev.ed. 1990).

²³ The Act of April 30, 1790 declared that “persons . . . adjudged guilty of treason against the United States . . . shall suffer death,” 1 Stat. 112; the same sentence awaited those who committed murder within the exclusive jurisdiction of the United States, 1 Stat. 113, or engaged in piracy, 1 Stat. 113-14, or counterfeiting, 1 Stat. 115.

²⁴ Rubin, *supra* footnote 20 at 180-84.

²⁵ Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 *WAYNE LAW REVIEW* 45 (1977); Lindsay, *Indeterminate Sentence and Parole System*, 16 *JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 9 (1925); Rubin, *THE LAW OF CRIMINAL CORRECTION*, 205-208, 619-22 (2d ed. 1973).

²⁶ Even treason, at the discretion of the court, was made punishable by imprisonment at hard labor for not less than five years rather than by death, Rev.Stat. §5332; and the penalty for forgery or counterfeiting of U.S. securities was reduced from death to imprisonment for not more than fifteen years, Rev.Stat. §5414.

²⁷ Mail robbery, for instance, became punishable by imprisonment at hard labor for not less than five years and not more than ten years; by imprisonment for life for a 2d offense or if the custodian of the mail were wounded or his life placed in jeopardy by the use of dangerous weapons, Rev.Stat. §5472.

²⁸ As the Joint Committee on Revision of the Laws explained: “The committee has also adopted a uniform method of fixing in all offenses not punishable by death the maximum punishment only, leaving the minimum to the discretion of the trial judge.

“The criminal law necessarily subjects to its corrective discipline all who violate its provisions. The weak and the vicious, the first offender and the atrocious criminal, the mere technical transgressor and the expert in crime are alike guilty of the same offense. In the one case the utmost severity of punishment can scarcely provide the protection to which society is entitled; in the other anything except as nominal punishment may effectually prevent the reclamation of the offender.

“The argument most frequently urged against leaving the minimum punishments to the discretion of the trial judge is that it affords parties convicted of crime of a heinous character an opportunity to obtain immunity because of the weakness or dishonesty of judges. It has been well said by a distinguished authority upon this subject that—

Instances of the former are rare, and of the latter none is believed ever to have existed. The purity of our judiciary is one of things which calumny has as yet left untouched.

“This recommendation will be found to be in accordance with the humane spirit of advanced criminal jurisprudence. The early English statutes were proverbially cruel; the gravest crimes and the most trivial offenses alike invoked the penalty of death. Our own crimes act of 1790 reflected this barbarous spirit and denounced the death penalty for thirteen distinct offenses, but this spirit of vindictive retribution has entirely disappeared. We have abolished the punishment of death in all except three cases—treason, murder, and rape—and have provided that even in these cases it may be modified to imprisonment for life; and as humane judges in England availed themselves of the most technical irregularities in pleadings and proceedings as an excuse for discharging prisoners from the cruel rigors of the common law, so jurors here often refuse to convict for offenses attended with extenuating circumstances rather than submit the offender to what in their judgment is the cruel requirement of a law demanding a minimum punishment,” S.Rep.No.10, (continued...)

service of a third of their sentences (after fifteen years in the case of prisoners with life sentences);²⁹ and federal courts shortly thereafter received the authority to suspend the imposition or execution of sentence and impose probation.³⁰ The 1948 federal criminal code revision took much the same tack as its predecessor: it eliminated many, but not all, of the “not-less-than” mandatory minimums and continued in place most of the “flat” sentence mandatory minimums.³¹

By mid-twentieth century, a well respected commentator could observe that “[t]he individualization of penal dispositions, principally through the institutions of the indeterminate sentence, probation, and parole, is a development whose value few would contest.”³² The contest was joined soon thereafter.³³

Driven by concerns that broad discretion had led to rootless sentencing, unjustifiable in its leniency in some instances and in its severity in others, legislative bodies moved to curtail discretionary sentencing on several fronts. Determinate sentencing,³⁴ sentencing commissions and guidelines,³⁵ and mandatory minimum sentences became more prevalent.³⁶ Parole and probation were abolished or greatly restricted in several jurisdictions.³⁷

(...continued)

60th Cong., 1st Sess. 14 (1908).

²⁹ Act of June 25, 1910, §1 36 Stat. 819, and Act of Jan. 23, 1913, 37 Stat. 650.

³⁰ Act of March 4, 1925, 43 Stat. 1259.

³¹ “The minimum punishment provisions were omitted because of the court’s power, under 3651 of this title, to suspend sentence whenever the crime or offense is not punishable by death or life imprisonment, and, also, to conform with policy adopted by the codifiers of the 1909 Criminal Code,” H.R.Rep. 304, 80th Cong., 1st Sess. *Reviser’s Notes* A16 (1947).

³² Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARVARD LAW REVIEW 904, 915 (1962).

³³ Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Packer, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

³⁴ A determinate sentence is a sentence for a fixed period of time, a flat sentence; an indeterminate sentence is one whose duration is specifically fixed but is determined by prison and/or parole authorities, BLACK’S LAW DICTIONARY 1367 (7th ed. 1999); *see generally, Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 SOUTHERN CALIFORNIA LAW REVIEW 1717 (1997); Gardner, *The Determinate Sentencing Movement and The Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE LAW JOURNAL 1103, 1104-105; *Do Judicial “Scarlet Letters” Violate the Cruel and Unusual Punishments Clause of the Eighth Amendment?*, 16 HASTINGS CONSTITUTIONAL LAW QUARTERLY 115, 118-19 (1988) (contrasting 7 indeterminate sentencing structure states with 9 determinate sentence states).

³⁵ Robinson, *A Sentencing System for the 21st Century?*, 66 TEXAS LAW REVIEW 1, 24-5 (1987). Sentencing guidelines do not necessarily circumscribe judicial sentencing discretion; the guidelines may simply be advisory. In whatever form, guidelines are or have been authorized for almost half of the states: Ala.Code §§12-25-1 to 12-25-12; Ark.Code Ann. §§16-90-801 to 16-90-804; Cal.Penal Code §1170 (repealed); Conn.Gen.Stat. Ann. §51-10c; Del.Code Ann. tit.11, §§6580, 6581; Fla.Stat. Ann. §§921.001 to 921.242; Ill. Comp.Stat. Ann. ch.730, §5/5-10-1 (repealed); Kan.Stat. Ann. §§21-4701 to 21-4728; La.Rev. Stat. Ann. §§15:321 to 15:326 (repealed); Md.Crim.Pro. §§6-201 to 6-213; Mass.Gen.Laws Ann. ch.221E, §§1-4; Mich.Comp.Laws Ann. §§769.31 -739.34; Minn.Stat. Ann. ch.244 App.; Mo. Ann.Stat. §558.019; N.M.Stat. Ann. §§31-18A-1 to 31-18A-9 (repealed); N.C.Gen. Stat. §§164-35 to 164-47; Ohio Rev.Code Ann. §§181.21 to 181.56; Okla.Stat. Ann. tit. 22 §§1501-1516; Ore.Rev.Stat. §§137.667 to 137.671; Pa.Stat. Ann. tit. 42, §§2151-2155; S.C. Code §§24-26-10 to 24-26-50; Tenn.Code Ann. §§40-37-101 to 40-37-105 (repealed); Utah Code Ann. §§63-25a-301 to 63-25a-306; Va.Code §§17.1-800 to 17.1-806; Wash.Rev. Code Ann. §§9.94A.310 to 9.94A.420; Wis.Stat. Ann. §§973.017, 973.30.

³⁶ *Do Judicial “Scarlet Letters” Violate the Cruel and Unusual Punishments Clause of the Eighth Amendment*, 16 HASTINGS CONSTITUTIONAL LAW QUARTERLY 115, 119 n.32 (1988) (listing 33 states with mandatory minimum sentencing structures).

³⁷ *See e.g.*, Alaska Stat. §§12.55.125 to 12.55.185; Cal.Pen.Code §1170; Colo.Rev.Stat. §§16-11-304, 18-1-105; (continued...)

The Sentencing Reform Act of 1984 brought this trend to the federal criminal justice system.³⁸ It repealed the authority of the federal courts to suspend criminal sentences, 18 U.S.C. 3651 (1982 ed.). It abolished federal parole, 18 U.S.C. 4201 to 4218 (1982 ed.). It created a sentencing guideline system, applicable within the statutory maximum and minimum penalties established by Congress, that tightly confined the sentencing discretion of federal judges, 28 U.S.C. 991 to 998. The armed career criminal, three strikes, and several of the other prominent drug and gun related mandatory minimums followed in the ensuing years.³⁹

Mandatory Minimums and the Sentencing Guidelines

Even though the guidelines work to reduce judicial sentencing discretion and might once have been characterized as creating a host of new members of the species of mandatory minimums, the not-less-than mandatory minimums have been criticized as incompatible with the federal sentencing guidelines. Perhaps most prominent among its critics has been the Sentencing Commission itself. Its report, after sketching the arguments traditionally offered in support of mandatory minimums,⁴⁰ observed that

- only 4 of the 60 mandatory minimums were regularly prosecuted;⁴¹

(...continued)

Ind.Code Ann. §35-50-6-1; Minn.Stat. Ann. §244.05; N.M.Stat. Ann. §§31-18-15, 31-21-10. Note that some of the jurisdictions that have abolished parole as a discretionary means of reducing an offender's term of imprisonment authorize "reentry parole" or terms of "supervised release" under which the offender is subject to supervision after service of his or her full term of imprisonment.

³⁸ The Sentence Reform Act is chapter II, 98 Stat. 1987, of the Comprehensive Crime Control Act of 1984, 98 Stat. 1976, enacted as title II of P.L. 98-473, 98 Stat. 1837 (1984).

³⁹ The mandatory minimum applicable when a firearm is used during the course of a federal crime of violence, 18 U.S.C. 924(c), originated in the same legislation as the Sentence Reform Act, P.L. 98-473, 98 Stat. 2138 (1984). The armed career criminal provisions, 18 U.S.C. 924(e), first surfaced in the Firearms Owners Protection Act, P.L. 99-308, 100 Stat. 458 (1986); the mandatory minimums for drug trafficking, 21 U.S.C. 841(b), in the Anti-Drug Abuse Act of 1986, P.L. 99-570, 100 Stat. 3207-2; the mandatory minimums for crack possession, 21 U.S.C. 844, in the Anti-Drug Abuse Act of 1988, P.L. 100-690, 102 Stat. 4370; and the three strikes provisions, 18 U.S.C. 3559(c), in the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 1982.

The drug kingpin mandatory minimum, 21 U.S.C. 848, enacted as part of the original Controlled Substances Act in 1970, P.L. 91-513, 84 Stat. 1265 (1970), and most of the mandatory minimums cited in the appendix predate their more well known fellows.

The safety valve feature of 18 U.S.C. 3553(f) available to nonviolent, first-time drug offenders and passed in 1994, P.L. 103-322, 108 Stat. 1985, might be seen as a break in the trend towards greater use of mandatory minimums even though it does not enhance federal judicial sentencing discretion.

⁴⁰ "*Retribution or 'Just Deserts.'* Perhaps the most commonly-voiced goal of mandatory minimum penalties is the 'justness' of long prison terms for particular serious offenses. . . . *Deterrence.* By requiring the imposition of substantial penalties for targeted offenses, mandatory minimums are intended both to discourage the individual sentenced . . . from further involvement in crime . . . and, by example discourage other potential lawbreakers *Incapacitation, Especially of the Serious Offender.* Mandating increased sentence severity aims to protect the public by incapacitating offenders *Disparity.* Indeterminate sentencing systems permit substantial latitude in setting the sentence, which in turn can mean that defendants convicted of the same offense are sentenced to widely disparate sentences. *Inducement of Cooperation.* Because they provide specific lengthy sentences, mandatory minimums encourage offenders to assist in the investigation of criminal conduct by others [in order to take advantage of the escape hatch 18 U.S.C. 3553(e) supplies to those who cooperate with authorities]. . . . *Inducement of Pleas* . . . [P]rosecutors express the view that mandatory minimum sentences can be valuable tools in obtaining guilty pleas. . ." *Commission Report* 13-4.

⁴¹ *Commission Report* at ii, 11 ("four statutes account for approximately 94 percent of the cases . . . 21 U.S.C. 841 (continued...)

- mandatory minimums induce new sentencing disparities;⁴²
- due to plea bargaining, 35% of the defendants who might have been charged and sentenced under mandatory minimums were not;⁴³
- “disparate application of mandatory minimum sentences . . . appears to be related to race;”⁴⁴
- mandatory minimums lack the capacity to consider the range of aggravating and mitigating circumstances that may attend the same offense and as a consequence produce unwarranted sentencing uniformity;⁴⁵

(...continued)

[illicit drug trafficking], 21 U.S.C. 844 [illicit drug possession], 21 U.S.C. 960 [drug smuggling], and 18 U.S.C. 924(c)[armed career criminals]”).

⁴² *Commission Report* at ii. (“[The] lack of uniform application creates unwarranted disparity in sentencing and compromises the potential for the guidelines sentencing system to reduce disparity”). *But see*, Stith & Cabranes, FEAR OF JUDGING, 106 1998 (“Our analysis suggests four major conclusions: 1. Inter-judge sentence variation was not as rampant or as ‘shameful’ in the federal courts under the pre-Guidelines regime as Congress apparently believed 2. No thorough empirical study has demonstrated a *reduction* in the total amount of disparity under the Guidelines. 3. While reduction of inter-judge disparity is a worthwhile goal . . . it is a complex goal, and a myopic focus on this objective can result in a system that too often ignores other, equally important goals of a just sentencing system. . . . 4. Important sources of disparity remain in the Guidelines regime”); Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONNECTICUT LAW REVIEW 569 (1998)(discussing sentencing disparity under the guidelines between two adjacent federal court districts); Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts*, 17 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 337 (1997) (suggesting that inter-judge disparity exists the guidelines notwithstanding).

⁴³ *Commission Report* at iii (“Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised”). “There are two basic responses to this critique. First, prosecutors undoubtedly do, through charging decisions and plea bargains, sometimes seek, or agree to, lower than the maximum possible sentences. They have always done that. With respect to charging decisions, the Guidelines themselves do not even attempt to limit the historical practice. Indeed, it is difficult to imagine a system which could eliminate prosecutorial charging discretion. Nonetheless, the Justice Department recognized at the outset . . . that unrestrained pre-indictment bargaining over charges would undermine the Guidelines Therefore, it issued internal directives that prosecutors are to charge the most serious readily provable offense consistent with the nature of the defendant’s conduct. . . . As for plea bargains after indictment, the primary justification of the relevant conduct guideline is to ensure that prosecutors cannot manipulate sentences by dismissing courts. As long as the judge knows all the facts, the precise charge of which a defendant is convicted is usually of little consequence except to set the statutory maximum sentence Thus, in order to really control sentences through plea bargaining, a prosecutor must be willing to hide facts from the court. . . . The truth is that most prosecutors, most of the time, play the sentencing game straight down the middle. To achieve plea bargains, they will give defendants the benefit of close class on the provability of certain facts, or on the applicability of certain enhancements to the undoubted facts of a given case. But they will not lie and they will not conceal evidence. The consequence is that prosecutors, too, have had their discretion restrained by the Guidelines,” Bowman, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal, Sentencing Guidelines*, 1996 WISCONSIN LAW REVIEW 679, 727-28.

⁴⁴ *Commission Report* at iii. The disparate impact of the federal sentencing practices, including mandatory minimums, has been the subject to extensive debate; *see e.g.*, Albonetti, *The Effects of the “Safety Valve” Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender’s Ethnicity*, 87 IOWA LAW REVIEW 401 (2002); CRS Report 97-743, *Federal Cocaine Sentencing: Legal Issues*, by Paul Starett Wallace Jr. (April 25, 2002); A “*Second Look*” at Crack Cocaine Sentencing Policies: *One More Try for Federal Equal Protection*, 34 AMERICAN CRIMINAL LAW REVIEW 1211 (1997); Sklansky, *Cocaine, Race, and Equal Protection*, 47 STANFORD LAW REVIEW 1283 (1995).

⁴⁵ *Commission Report* at 26 (“Sentencing guidelines look to an array of indicators to determine offense seriousness, including the offense of conviction, any relevant quantity determinant (*e.g.*, the amount of drugs in a trafficking offense, dollar loss in fraud offense), weapon use, victim injury or death, the defendant’s role in the offense, and whether the defendant accepted responsibility for the offense or, on the other hand, obstructed justice. Mandatory (continued...)”)

- uneven application deprives mandatory minimums of their potential to deter;⁴⁶
- mandatory minimums breed disparity by transferring judicial discretion to the prosecution;⁴⁷
- in contrast to the calibrated approach of the guidelines, mandatory minimums create cliffs where minuscule factual differences can have enormous sentencing consequences;⁴⁸
- the amendment process of the sentencing guidelines makes them perpetually self-correcting, while mandatory minimums are single-shot efforts at crime control;⁴⁹ and
- the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines, permitting the sophistication of the guidelines structure to work, rather than through mandatory minimums.⁵⁰

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minimums, in contrast, typically look to only one (or sometimes two) measurements of offense seriousness. . . . Thus, for example, whether the defendant was a peripheral participant or the drug ring's kingpin, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, have no bearing on the mandatory minimum to which each defendant is exposed"). These arguments would seem to be most persuasive in the case of flat sentence mandatory minimums; in other instances the range between the mandatory minimum and the statutory maximum would seem to provide ample room for the type of distinctions just mentioned.

⁴⁶ *Commission Report* at iii ("While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty. The consequences of this bifurcated pattern is likely to thwart the deterrent value of mandatory minimums"). Proponents might suggest that incapacitation and the prospect of minimal punishment were always the principal objectives. Deterrence is at best challenging to judge; the fact that not all possible cases receive mandatory minimum treatment is no reason to abandon incapacitation for those that are ensnared; and the result is one more properly laid to the door of prosecutorial discretion than to mandatory minimums.

⁴⁷ *Commission Report* at iii ("Since the power to determine the charge of conviction rests exclusively with the prosecution for 85 percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution. To the extent that prosecutorial discretion is exercised with preference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced"). This presumes that unwarranted disparity existed before the guidelines, that the guidelines have reduced or eliminated it, and that mandatory minimums returned it to the system – three propositions upon which there is no consensus. Even if one accepts all three, the question remains whether disparity, produced by plea agreements that make possible the conviction of other wrongdoers, is unwarranted or appropriately laid to the door of mandatory minimums.

⁴⁸ *Commission Report* at 29 ("The 'Cliff' Effect of Mandatory Minimums. Related to the proportionality problems posed in mandatory minimums already described are the sharp differences in sentence between defendants who fall just below the threshold of a mandatory minimum compared with those whose criminal conduct just meets the criteria of the mandatory minimum penalty. Just as mandatory minimums fail to distinguish among defendants whose conduct and prior records in fact differ markedly, they distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness"). Critics might suggest that such cliffs are natural, necessary, and frequently occurring in the law (*e.g.*, the age of majority, alcohol-blood levels, statutes of limitations) or that few cliffs are as high as the one that stands between a crime committed the day before the effective date of the guidelines and one committed the day after.

⁴⁹ *Commission Report* at iv. Critics might note that the perpetual need for self-correction neither inspires great confidence nor dilutes the prospect of disparity.

⁵⁰ *Commission Report* at iv.

The Commission's report was quickly followed by a Department of Justice study that concluded that a substantial number of those sentenced under federal mandatory minimums were nonviolent, first-time, lower level drug offenders.⁵¹

Congress responded with the safety valve provisions of 18 U.S.C. 3553(f) under which the court may disregard various drug mandatory minimums and sentence an offender within the applicable sentencing guideline range as long as the offender was a low level, nonviolent participant with no prior criminal record who has cooperated fully with the government.

Constitutional Boundaries

Defendants sentenced to mandatory minimum terms of imprisonment have challenged them on a number of constitutional grounds ranging from cruel and unusual punishment through ex post facto and double jeopardy to equal protection and due process. Each constitutional provision defines outer boundaries that a mandatory minimum must be crafted to honor; none confine legislative prerogatives in any substantial way.

Cruel and Unusual Punishment

Mandatory minimums implicate considerations under the Eighth Amendment's cruel and unusual punishments clause.⁵² The clause bars mandatory capital punishment statutes, *Woodson v. North Carolina*, 428 U.S. 280 (1976). And although the case law is somewhat uncertain, it seems to condemn punishment that is "grossly disproportionate" to the misconduct for which it is imposed, *Ewing v. California*, 123 S.Ct. 1179 (2003); a standard which a sentence imposed under a mandatory minimum statute might breach under extreme circumstances.

Proportionality

During the first century of its existence, there was little recourse to the Amendment's protection,⁵³ and the early cases involved its proscriptions against particular kinds of punishment rather than of punishments of a particular degree of severity.⁵⁴ In *O'Neil v. Vermont*, 144 U.S. 323 (1892), however, three dissenting justices expressed the view that the cruel and unusual punishments clause's prohibitions extended to "all punishments which by their excessive length or severity are greatly disproportionate to the offences charged."⁵⁵

⁵¹ *United States Department of Justice: An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, reprinted in, 54 CRIMINAL LAW REPORTER 2101 (1994).

⁵² The Eighth Amendment to the United States Constitution states in its entirety, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁵³ In *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866), the Court held that the clause applied to the federal government and not the states; the first substantive cruel and unusual punishment case apparently did not arrive before the Supreme Court until *Wilkerson v. Utah*, 99 U.S. 130 (1878), Mulligan, *Cruel and Unusual Punishment: The Proportionality Rule*, 47 FORDHAM LAW REVIEW 639, 642 (1979).

⁵⁴ See, *Wilkerson v. Utah*, 99 U.S. 130 (1878) (challenging execution of the death penalty by firing squad); *In re Kemmler*, 136 U.S. 436 (1889) (challenging execution of the death penalty by electrocution).

⁵⁵ 144 U.S. at 339-40 (Field, J.)(dissenting); see also, 144 U.S. at 371 (Harlan with Brewer, JJ.)(dissenting) ("The judgment before us by which the defendant is confined at hard labor. . . for the term of. . . fifty-four years. . . inflicts punishment, which, in view of the character of the offences committed must be deemed cruel and unusual"). O'Neil, a mail order liquor dealer licensed in New York, was convicted for filling mail orders sent to Vermont where he had no (continued...)

The views of the *O'Neil* dissenters gained further credence after they were quoted by the Court in *Weems v. United States*, 217 U.S. 349, 371 (1910), when it invalidated a territorial sentencing scheme which it found both disproportionate in degree and cruel in nature.⁵⁶

Perhaps because of the unusual nature of the penalties involved, the proportionality doctrine suggested in *Weems* lay dormant for over sixty years.⁵⁷ It reappeared in the capital punishment cases following *Furman v. Georgia*, 408 U.S. 238 (1972).⁵⁸

When the capital punishment statutes enacted in response to *Furman* came before the Court, one of the threshold questions was whether capital punishment was a per se violation of the cruel and unusual punishments clause. For a plurality of the Court that question could only be answered by determining whether capital punishment was of necessity “grossly out of proportion to the severity of [any] crime,” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). “[W]hen a life has been taken deliberately by the offender, [the Court could not] say that the punishment is invariably disproportionate to the crime.” 428 U.S. at 187.

In *Coker v. Georgia*, a plurality of the Court found “that death is indeed a disproportionate penalty for the crime of raping an adult woman,” 433 U.S. 583, 597 (1977). It did so after considering the general repudiation of the death penalty in such cases by the legislatures of other jurisdictions; the infrequency with which juries in Georgia had been willing to impose the death penalty for rape of adult woman; and the comparative severity Georgia used to punish other equally or more serious crimes. The Court employed much the same method of analysis in later capital punishment cases which raised the proportionality doctrine.⁵⁹

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license. The majority opinion disposed of the case on jurisdictional grounds and did not reach the Eighth Amendment question.

⁵⁶ *Weems* was convicted of falsifying public documents for which he was sentenced to fifteen years imprisonment and “accessories” which meant that while imprisoned he would “carry a chain at the ankle, hanging from the wrists, . . . [would] be employed at hard and painful labor, and receive no assistance whatsoever from without the institution” and that after release he would forever continue under a form of civil death during which he could not vote or hold public office or receive a pension, could not hold or dispose of property, and would be subject to lifelong probation. 217 U.S. at 364.

The Court pointed out that the sentence was more severe than might be imposed for some degrees of homicide, for misprision of treason, inciting rebellion, conspiracy to destroy the government, robbery, larceny, or forgery. 217 U.S. at 380.

From the Court’s perspective the legislation establishing the sentencing scheme had “no fellow in American legislation. . . . It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.” 217 U.S. at 377.

⁵⁷ There are a few cases in the interim in which the Court may have applied the proportionality doctrine, sub silentio, because it found no infirmity in the sentences challenged, see e.g., *Graham v. West Virginia*, 224 U.S. 616 (1912); *Badders v. United States*, 240 U.S. 391 (1916). Statements in *Trop* that might be thought to confirm the doctrine’s existence are dicta suggesting the Court’s awareness, although not necessarily its endorsement, of the doctrine, *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (“Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime.”).

⁵⁸ In *Furman*, the Court found that the Eighth Amendment’s cruel and unusual punishments clause, made binding upon the states by the due process clause of the Fourteenth Amendment, precluded imposition of the death penalty at the unguided discretion of the judge or jury.

⁵⁹ In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court held that the death penalty was a disproportionate punishment for a felony murder in which the defendant neither killed nor intended to kill and whose culpability was limited to (continued...)

Initial efforts to carry the proportionality doctrine to noncapital cases proved unsuccessful. Shortly after *Coker*, a petitioner, convicted under a recidivist statute which called for an automatic life sentence upon a third felony conviction, sought to persuade the Court that the Eighth Amendment precluded such a sentence based upon a comparative analysis of the severity of the treatment of recidivism in other jurisdictions, *Rummel v. Estelle*, 445 U.S. 263 (1980). The majority of the Court was not persuaded. The proportionality doctrine had only been employed in capital punishment cases and *Weems*, it noted. Both involved punishments, different in nature, from those in *Rummel*, 445 U.S. at 272-74.

Moreover, the petitioner had failed to convincingly establish any objective criteria to evidence gross disproportionality. Without some objectively identifiable “bright light” marking disproportionality, the Court feared application of the proportionality doctrine would constitute subjective policy making, a task more appropriately left to the legislative bodies, 445 U.S. at 275.⁶⁰

Any thoughts that the proportionality doctrine might have been abandoned were dashed almost immediately by *Solem v. Helm*, 463 U.S. 277 (1983). *Solem* declared that imposition of a mandatory term of life imprisonment under a state recidivist statute constituted cruel and unusual punishment. The “objective criteria” which guided a proportionality analysis included, “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on the other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions,” 463 U.S. at 292.⁶¹

Individualized consideration. Consideration of the defendant’s unique circumstances is one of the foundations of the Court’s Eighth Amendment jurisprudence in capital punishment cases. *Furman* found that the Eighth Amendment’s cruel and unusual punishments clause, made binding upon

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participation in the predicate felony. On the other hand, defendants who were major participants in the predicate felony and who acted with at least reckless indifference to the risk to human life thereby created might be sentenced to death without breaching the proportionality doctrine, *Tison v. Arizona*, 481 U.S. 137 (1982). In both instances, the Court examined the practices in other jurisdictions and the seriousness of the defendant’s conduct.

⁶⁰ See also, *Hutto v. Davis*, 454 U.S. 370, 372-73 (1982), which summarized *Rummel* as follows: “Like the respondent in this case, Rummel argued that the length of his imprisonment was so ‘grossly disproportionate’ to the crime for which he was sentenced that it violated the ban on cruel and unusual punishment of the Eighth and Fourteenth Amendments. In rejecting that argument, we distinguished between punishments – such as the death penalty – which by their very nature differ from all other forms of conventionally accepted punishments, and punishments which differ from others only in duration. This distinction was based upon two factors. First, this ‘Court’s Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.’ And second, the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years.’ Thus, we concluded that ‘one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.’ Accordingly, we held that Rummel’s life sentence did not violate the constitutional ban on cruel and unusual punishment.”

⁶¹ Rummel with prior two nonviolent felony convictions was sentenced to life imprisonment for obtaining \$120 under false pretenses. Helms, the *Solem* defendant with six prior nonviolent felony convictions was sentenced to life imprisonment for uttering a \$100 “no account” check. The Court distinguished *Solem* from *Rummel* on at least two grounds. *Solem* was ineligible for parole, while Rummel enjoyed the advantage of a fairly liberal early release scheme; in *Solem* the life sentence without possibility of parole was imposed as a matter of judicial discretion, while the life sentence in *Rummel* was required as a matter of legislative policy, 463 U.S. at 300-303.

the states by the due process clause of the Fourteenth Amendment, precluded imposition of the death penalty at the unguided discretion of the judge or jury.

The states initially travelled one of two paths to avoid the problems of unguided discretion identified in *Furman*. Some eliminated discretion; others provided guidance. The second approach passed constitutional muster, *Gregg v. Georgia*, 428 U.S. 153 (1976); the first did not, *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Mandatory capital punishment offended the Eighth Amendment on three grounds, *Woodson* declared. It was contrary to the evolving standards of decency which mark the threshold of the Amendment's protection, 428 U.S. at 288-301. It failed to address the objections of *Furman* to imposition of the death penalty at the *unguided* discretion of the judge or jury, 428 U.S. at 302. And it failed to permit consideration of individual characteristics of the crime and offender:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death 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. . . .

Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. 428 U.S. at 304 (citations omitted).⁶²

The Court regularly and consistently recognized the individual considerations requirement in subsequent capital punishment cases.⁶³ Although the language cited above and other dicta⁶⁴ would seem to apply with similar force in noncapital cases, the Court emphasized that the doctrine was limited to capital cases.⁶⁵ Although the gravity of the offense appears to be the most critical factor in non-capital cases, the seriousness of the offense may be judged at least in part by the record of the individual who committed it.

⁶² *Woodson's* rejection of mandatory capital punishment seemed to lose none of its force because two members of the five justice majority considered all capital punishment – discretionary or mandatory, guided or unguided – contrary to the demands of the Eighth Amendment. The two justices in question, Brennan and Marshall, subsequently joined in a majority opinion holding a Nevada mandatory death penalty statute unconstitutional for failure to adhere to the individualized capital sentencing doctrine, *Sumner v. Shuman*, 483 U.S. 66 (1987).

⁶³ See e.g., *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 477 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Sumner v. Shuman*, 483 U.S. 66 (1987).

⁶⁴ “The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society’s rejection of the belief that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,” *Roberts v. Louisiana*, 428 U.S. at 333; *Sumner v. Shuman*, 483 U.S. at 75 n.3.

⁶⁵ “We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes,” *Lockett v. Ohio*, 438 U.S. at 604-605.

Gravity of the offense. The defendant in *Harmelin v. Michigan*, 501 U.S. 957 (1991), was a first time offender convicted of possession of 672 grams of cocaine, enough for possibly as many as 65,000 individual doses. Under the laws of the State of Michigan, the conviction carried with it a mandatory sentence of life imprisonment without the possibility of parole.

Harmelin contended that the sentence violated both the individual consideration and proportionality doctrines of the Eighth Amendment. A majority of the Court rejected the individual considerations argument and a plurality refused to accept the proportionality assertion.

The Court noted that in its opinions “[t]he penalty of death differs from all other forms of criminal punishment. . . in its total irrevocability,” *inter alia*, 501 U.S. at 995, quoting *Furman v. Georgia*, 408 U.S. at 306 (Stewart, J.)(concurring). In view of the differences, the majority saw no reason “to extend this so-called individualized capital-sentencing doctrine to an individualized mandatory life in prison without parole sentencing doctrine.” 501 U.S. at 995 (citations omitted).

The proportionality question proved somewhat more difficult. Justice Scalia and Chief Justice Rehnquist simply refused to recognize an Eighth Amendment proportionality requirement, at least in noncapital cases, 501 U.S. at 994. For three other justices, Kennedy, O’Connor and Souter, a sentence which satisfies the first of the *Solem* tests, seriousness of the offense, need not survive or even face comparisons with sentences for other crimes in the same jurisdiction and for the same crime in other jurisdictions, 501 U.S. at 1004.

More precisely, the plurality emphasized that “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime,” 501 U.S. at 1001.⁶⁶ In the case of Harmelin, the sentence was not grossly disproportionate because of the severity of his crime, *i.e.*, “the pernicious effects of the drug epidemic in this country. . . demonstrate that the. . . legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount

⁶⁶ Four principles dictate a high proportionality threshold for a plurality of the Court: “The first. . . is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts. . . . The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. . . .

“The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. The principles which have guided criminal sentencing. . . have varied with the times. The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. And competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic.

“Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise. And even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

“The fourth principle. . . is that proportionality review by federal courts should be informed by objective factors to the maximum possible extent. . . . [O]ur decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years. . . . Although no penalty is per se constitutional, the relative lack of objective standards concerning terms of imprisonment has meant that outside the context of capital punishment, successful challenges to the proportionality of particular sentences are exceedingly rare,” 501 U.S. at 998-1001 (citations omitted).

of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole,” 501 U.S. at 1003.

The plurality opinion also contains several useful observations about the constitutionality of mandatory sentences per se.⁶⁷

Deference to legislative judgment notwithstanding, when the Court later applied the same gross disproportionality standard in an excessive fines context, it seemed to imply that misconduct legislatively classified as a fairly serious crime (a felony) might lack the gravity to support boundless sanctions. *United States v. Bajakajian*, 524 U.S. 321 (1998), involved the confiscation of \$357,144 as a consequence of trying to carry it out of the United States without reporting it, a willful act punishable by imprisonment for not more than 5 years, 31 U.S.C. 5322. In the eyes of the Court, the crime involved a “minimal level of culpability.” Moreover, “[t]he harm . . . caused was also minimal. Failure to report this currency affected only one party, the Government, and in a relatively minor way. . . . Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country Comparing the gravity of respondent’s crime with the \$357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense,” 524 U.S. at 338-40.

Did this mean that long mandatory minimum terms of imprisonment triggered by misconduct that a court might treat as a misdemeanor under California’s three strikes law might fall because it could result in gross disproportionate sentences? Four justices said yes, but three said no, and they were joined by two others who said the law survived constitutional scrutiny regardless of proportionality.

The question arose from the sentencing of an oft-convicted defendant to imprisonment for not less than 25 years pursuant to the California recidivist statute as a result of his attempt to steal three golf clubs valued at just under \$400 a piece, *Ewing v. California*, 538 U.S. 11 (2003).⁶⁸

⁶⁷ “It is beyond question that the legislature ‘has the power to define criminal punishments without giving the courts any sentencing discretion,’ *Chapman v. United States*, [500 U.S. 453, 467 (1991)]. Since the beginning of the Republic, Congress and the States have enacted mandatory sentencing schemes. To set aside petitioner’s mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry. We have never invalidated a penalty mandated by a legislature based only on the length of sentence, and, especially with a crime as severe as this one, we should do so only in the most extreme circumstance.

“In asserting the constitutionality of this mandatory sentence, I offer no judgment on its wisdom. Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum. On the other hand, broad and unreviewed discretion exercised by sentencing judges leads to the perception that no clear standards are being applied, and that the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge. The debate illustrates that, as noted at the outset, arguments for and against particular sentencing schemes are for legislatures to resolve,” 501 U.S. at 1006-1007.

⁶⁸ Ewing was sentenced to life imprisonment, but would be eligible for parole after serving 25 years, 538 U.S. at 16, 20. His case came to the court directly from the California appellate courts. At the same time but without reaching the merits, the Court disposed of another California three strikes case that reached it by way of habeas review from the Ninth Circuit, *Lockyer v. Andrade*, 538 U.S. 63 (2003). The habeas statute binds the federal courts to any state court interpretation of a constitutional issue unless the decision of the state courts was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. 2254(d)(1). Relying on *Rummel*, the California courts had rejected Andrade’s Eighth Amendment challenge of his sentence under the three strikes law. In doing so, a majority of the Court concluded that the California appellate decision foreclosed federal habeas review, since the California decision was neither contrary to the Court’s Eighth Amendment jurisprudence nor unreasonably applied it, 538 U.S. at 74-7.

Under California law, the trial court might have chosen to avoid the three strikes statute either by sentencing the attempted theft as a misdemeanor or by ignoring the nature of the earlier convictions, 538 U.S. at 16-7. It chose not to. The California appellate courts rejected Ewing's Eighth Amendment challenges, 538 U.S. at 20. As did a majority of the Members of the Supreme Court.

Justices Scalia and Thomas “concluded that the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’ [is] not a ‘guarantee’ against disproportionate sentences” and that Ewing’s sentence did not constitute cruel and unusual punishment in violation of the Eighth Amendment, 538 U.S. 31-2 (Scalia, J. concurring in the judgment); 538 U.S. at 32 (Thomas, J. concurring in the judgment). Justice O’Connor, joined by Justice Kennedy and Chief Justice Rehnquist, believe that the cruel and unusual punishments clause includes a “narrow proportionality principle that applies to noncapital sentences,” 538 U.S. at 20. They note that standing alone the theft of property valued at nearly \$1,200 “should not be taken lightly,” 538 U.S. at 28. Moreover, “[i]n weighing the gravity of Ewing’s offense, we must place in the scales not only his current felony, but also his long history of felony recidivism,” 538 U.S. at 29.⁶⁹ Thus, “Ewing’s sentence of 25 years to life in prison, for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments,” 538 U.S. at 30-1.

Juries, Grand Juries and Due Process

The Constitution demands that no person “be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury” and that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” U.S.Const. Amends. V, VI. Moreover, due process requires that the prosecution prove beyond a reasonable doubt “every fact necessary to constitute the crime” with which an accused is charged, *In re Winship*, 397 U.S. 358, 364 (1970). After *Winship*, the question arose whether a statute might authorize or require a more severe penalty for a particular crime based on a fact – not included in the indictment, not found by the jury, and not proven beyond a reasonable doubt. Pennsylvania passed a law under which various serious crimes (rape, robbery, kidnapping and the like) were subject to a mandatory minimum penalty of imprisonment for five years, if the judge after conviction found by a preponderance of the evidence that the defendant had been in visible possession of a firearm during the commission of the offense.⁷⁰ Had the Pennsylvania statute created a new series of crimes? For example, had it supplemented its crime of rape with a new crime of rape while visible in possession of firearm? And if so, did the fact of visible possession have to be proven to the jury beyond a reasonable doubt?⁷¹

⁶⁹ Prior to his three strike triggering conviction for stealing the golf clubs, Ewing had been convicted of: theft in 1984, grand theft auto in 1988, petty theft in 1990, battery in 1992, burglary in January of 1993, possession of drug paraphernalia in February of 1993, appropriating lost property in July of 1993, trespassing and unlawful possession of a firearm in September of 1993, robbery and three counts of burglary in December of 1993, 538 U.S. at 18-9.

The four dissenting Justices found the proportionality standard applicable and would have found Ewing’s sentence grossly disproportionate to the gravity of his offense consequently in violation of the Eighth Amendment, 538 U.S. at 32 (Breyer, J. with Stevens, Souter, and Ginsburg, dissenting).

⁷⁰ 42 Pa.Cons.Stat. 9712 (1982), reprinted in *McMillan v. Pennsylvania*, 477 U.S. 79, 81-2 n.1 (1986).

⁷¹ The right to grand jury indictment was not implicated since the Sixth Amendment right to grand jury indictment applies only to federal prosecutions, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

The Supreme Court concluded that visible possession of a firearm under the statute was not an element of a new series of crimes, but was instead a sentencing consideration that had been given a legislatively prescribed weight, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). As such, the Pennsylvania statutory scheme neither offended due process nor triggered any right to a separate jury finding, 477 U.S. at 84, 93.

There followed a number of state and federal statutes under which facts that might earlier have been treated as elements of a new crime were simply classified as sentencing factors. In some instances, the new sentencing factor permitted imposition of a penalty far in excess of that otherwise available for the underlying offense. For instance, the Supreme Court found no constitutional defect in a statute which punished a deported alien for returning to the United States by imprisonment for not more than 2 years, but which permitted the alien to be sentenced to imprisonment for not more than 20 years upon a post-trial, judicial determination that the alien had been convicted of a serious crime following deportation, *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

Perhaps uneasy with the implications, the Court soon made it clear that, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt,” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)(emphasis added). Side opinions questioned the continued vitality of *McMillan*’s mandatory minimum determination in light of the *Apprendi*.⁷²

A majority of the Members of the Court, however, are unwilling to extend *Apprendi* to mandatory minimums, *Harris v. United States*, 536 U.S. 545, 568 (2002):

Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that the federal provision at issue, 18 U.S.C. §924(c)(1)(A) (ii), is constitutional. Basing a 2-year increase in the defendant’s minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments. Congress “simply took one

⁷² “Thus, the Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed – which, by definition, must include increases or alterations to either the minimum or maximum penalties – must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*,” 530 U.S. at 533 (O’Connor, with Kennedy, Breyer, JJ., and Rehnquist, Ch.J., dissenting).

“[T]his traditional understanding – that a crime includes every fact that is by law a basis for imposing or increasing punishment – continued well into the 20th century, at least until the middle of the century. . . . I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence. . . . [A defendant’s] expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum entitles the government to more than it would otherwise be entitled Thus, the fact triggering the mandatory minimum is part of the punishment sought to be inflicted; it undoubtedly enters into the punishment so as to aggravate it, and is an act to which the law affixes punishment. Further . . . it is likely that the change in the range available to the judge affects his choice of sentences. Finally, in numerous cases . . . the aggravating fact raised the whole range – both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law,” 530 U.S. at 518, 521-22 (Thomas, J., concurring); see also, *Rethinking Mandatory Minimums After Apprendi*, 96 NORTHWESTERN UNIVERSITY LAW REVIEW 811 (2002); Levine, *The Confounding Boundaries of “Apprendi-land”*: *Statutory Minimums and the Federal Sentencing Guidelines*, 29 AMERICAN JOURNAL OF CRIMINAL LAW 377 (2002).

factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor.” *McMillan*, 477 U.S. at 89-90. That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.⁷³

Separation of powers

While “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another,” *Loving v. United States*, 517 U.S. 748, 757 (1996), the Supreme Court has observed that “Congress has the power to define criminal punishments without giving the courts any sentencing discretion,” *United States v. Chapman*, 500 U.S. 453, 467 (1991). Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation of powers grounds,⁷⁴ and the Supreme Court has denied any separation of powers infirmity in the federal sentencing guideline system which might be thought to produce its own form of mandatory minimums, *Mistretta v. United States*, 488 U.S. 361 (1989).⁷⁵

Crack and Equal Protection

The equal protection objections to the mandatory minimums that attach to the sale and possession of cocaine base (crack), 21 U.S.C. 841, 844, flow from the disparate treatment afforded the two forms of cocaine. The penalties for possession with intent to distribute 50 grams of crack are the same as those for possession with intent to distribute 5,000 grams of cocaine powder, 21 U.S.C.

⁷³ Of course, *Harris* was not meant to serve as either an endorsement or condemnation of mandatory minimum sentencing as such: “The Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. These criticisms may be sound, but they would persist whether the judge or the jury found the facts given rise to the minimum,” 530 U.S. at 568.

“I do not mean to suggest my approval of mandatory minimum sentences as a matter of policy. During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter concern to judge and to legislators alike.

“Mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality – a key element of sentencing fairness that demands that the law punish a drug ‘kingpin’ and a ‘mule’ differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. They rarely are based upon empirical study. And there is evidence that they encourage subterfuge leading to more frequent downward departures (on a random basis), thereby making them comparatively ineffective means of guaranteeing tough sentences,” 530 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment).

⁷⁴ *United States v. Kaluna*, 192 F.3d 1188, 1199 (9th Cir. 1999); *United States v. Rasco*, 123 F.3d 222, 226-27 (5th Cir. 1997); *United States v. Washington*, 109 F.3d 335, 338 (7th Cir. 1997); *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997).

⁷⁵ *Mistretta*, sentenced under the guidelines to 18 months’ imprisonment for conspiracy to distribute cocaine, argued that the guidelines constituted an unconstitutional delegation of Congress’ legislative authority and that the service of judges upon the Commission constituted extrajudicial service at odds with the separation of powers doctrine. The Court rejected both arguments concluding “that in creating the Sentencing Commission . . . Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches,” 488 U.S. at 412.

841(b)(1)(A)(ii), (iii). The 100:1 ratio between the two continues through the federal sentencing structure with one exception. There is no mandatory minimum for simple possession of powder cocaine, but simple possession of 5 grams or more of crack is punishable by imprisonment for not less than 5 years, 21 U.S.C. 844. The sentencing difference has a racially disparate impact that invites equal protection analysis.⁷⁶

The Fifth Amendment due process clause embodies an equal protection component confining federal action in the manner that the Fourteenth Amendment equal protection clause confines state action, *United States v. Armstrong*, 517 U.S. 456, 464 (1996).⁷⁷ Statutes are subject to strict scrutiny under the equal protection clause when they contain express racial classifications as well as when, though race neutral on their face, they are motivated by a racial purpose or object, *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Although insufficient on its own, a racially adverse impact is one factor to be considered in the determination of whether a facially neutral statute is racially motivated, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977). A statute will survive strict scrutiny only if narrowly tailored to serve a compelling governmental interest, *Miller v. Johnson*, 515 U.S. at 920. A statutory classification that is not racially motivated or similarly suspect and thus not subject to strict scrutiny will pass constitutional muster if it is based on some rational justification, *Heller v. Doe*, 509 U.S. 312, 320 (1993).

One federal court concluded that the disparate penalties had a disparate racial impact, were subject to, and could not withstand equal protection strict scrutiny, *United States v. Clary*, 846 F.Supp. 768 (E.D.Mo. 1994). The decision was overturned on appeal under an analysis that rejected, as have other courts, strict scrutiny in favor of a rational basis standard, *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994).⁷⁸

⁷⁶ United States Sentencing Commission, *Cocaine and Federal Sentencing Policy*, 62-63 (2002)(Blacks make up 30.5% of powder cocaine offenders and 84.7% of crack offenders).

⁷⁷ “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S.Const. Amend.V. “. . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S.Const. Amend. XIV, §1.

The exercise of prosecutorial discretion on the basis of race offends equal protection, 571 U.S. at 464-65. In *Armstrong*, the defendant sought discovery in order to determine whether racial factors influenced the decision of which crack defendants should be tried in federal court and which to be left to the less severe jeopardy of state law. The Court held that in order to be entitled to discovery, a defendant must show that similarly situated offenders of other races were not prosecuted. *Id.*

⁷⁸ Each of the federal circuits has rejected equal protection challenges to the 100:1 cocaine sentencing scheme: *United States v. Eirby*, 262 F.3d 31, 41 (1st Cir. 2001); *United States v. Moore*, 54 F.3d 92, 96-9 (2^d Cir. 1995); *United States v. Frazier*, 981 F.2d 92, 95 (3^d Cir. 1992); *United States v. Perkins*, 108 F.3d 512, 518-19 (4th Cir. 1997); *United States v. McKinney*, 53 F.3d 664, 678 (5th Cir. 1995); *United States v. Washington*, 127 F.3d 510, 516-18 (6th Cir. 1997); *United States v. Jones*, 54 F.3d 1234, 1293-294 (7th Cir. 1995); *United States v. Patterson*, 258 F.3d 788, 791 (8th Cir. 2001); *United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir. 1996); *United States v. Williams*, 45 F.3d 1481, 1485-486 (10th Cir. 1995); *United States v. Matthews*, 168 F.3d 1234, 1250-251 (11th Cir. 1999); *United States v. Johnson*, 40 F.3d 436, 439-41 (D.C.Cir. 1994).

The Minnesota Supreme Court has held that a 10:3 crack/powder sentencing ratio found in state law fails to satisfy the rational basis standard of the Minnesota equal protection clause, *State v. Russell*, 477 N.W. 886 (Minn. 1991). See generally, CRS Report 97-743, *Federal Cocaine Sentencing: Legal Issues*, by Paul Starett Wallace Jr. (May 4, 1999).

Recidivism, Ex Post Facto and Double Jeopardy

Double jeopardy bans trying a defendant twice for the same offense⁷⁹ and ex post facto bars retroactive criminal statutes.⁸⁰ More precisely, the double jeopardy clause “protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense,” *Monge v. California*, 524 U.S. at 727-28. The ex post facto clauses, on the other hand, preclude laws that “retroactively alter the definition of crimes or [retroactively] increase the punishment for criminal acts,” *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995).

Some argue that recidivist mandatory minimums offend both the double jeopardy and ex post facto clauses. They are contrary to double jeopardy, it is said, because by using a first conviction to justify an increased penalty for a second conviction they are in effect punishing the first offense twice. They contravene ex post facto proscription when they are used to sentence a defendant whose first conviction predates the recidivist statute, or so it is contended. The courts have rejected both arguments.

As the Supreme Court explained when it rejected the double jeopardy challenge to the California “three strikes” statute:

Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an “offense,” see *e.g.*, *Nichols v. United States*, 511 U.S. 738, 747 (1994)(noting that repeat-offender laws “penaliz[e] only the last offense committed by the defendant”). Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence “because of the manner in which [the defendant] committed the crime of conviction.” An enhanced sentence imposed on a persistent offender thus “is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes” but as “a stiffened penalty for the latest crime which is considered to be an aggravated offense because a repetitive one.” *Monge v. California*, 524 U.S. at 728 (some citations omitted).

Courts confronted with ex post facto challenges to recidivist statutes have similarly focused upon the “latest crime” and not upon the first.⁸¹

⁷⁹ “. . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .” U.S.Const. Amend.V; the double jeopardy clause is binding on the states through the due process clause of the Fourteenth Amendment, *Monge v. California*, 524 U.S. 721, 727 (1998).

⁸⁰ “No . . . ex post facto law shall be passed” U.S.Const. Art.I, §9. “No state shall . . . pass any . . . ex post facto law . . .” U.S.Const. Art.I, §10.

⁸¹ *Gryger v. Burke*, 334 U.S. 728, 732 (1948)(“Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive. . . .”); *United States v. Kaluna*, 152 F.3d 1069, 1073 (9th Cir. 1998); *United States v. Rasco*, 123 F.3d 222, 227 (5th Cir. 1997); *United States v. Washington*, 109 F.3d 335, 337-38 (7th Cir. 1997); *United States v. Farmer*, 78 F.3d 836, 839-41 (8th Cir. 1996).

LIST OF FEDERAL MANDATORY MINIMUM SENTENCING STATUTES

(* Mandatory Minimum Term of Imprisonment *or* a Fine)⁸²

(+ Safety Valve Offenses)

Imprisonment for not less than a specified term of years or life

2 *U.S.C. 192* (contempt of Congress: imprisonment for not less than 1 nor more than 12 months)

2 *U.S.C. 390** (contempt of Congress in a contested election case: imprisonment for not less than 1 nor more than 12 months *or* a fine of not less than \$100 nor more than \$1000)

7 *U.S.C. 13a** (failure to comply with certain Commodities Futures Exchange Commission cease and desist orders: a fine of not more than \$500,000 *or* imprisonment for not less than 6 months nor more than 1 year or both) (+ imprisonment at the discretion of the court)

7 *U.S.C. 13b** (failure to comply with certain Commodities Futures Exchange Commission cease and desist orders: a fine of not more than the higher of \$100,000 or 3 times the monetary gain, *or* imprisonment for not less than 6 months nor more than 1 year or both) (+ imprisonment at the discretion of the court)

7 *U.S.C. 15b* (violation of regulations relating to cotton futures contracts: a fine of not less than \$100 nor more than \$500 and at the discretion of the court imprisonment for not less than 30 nor more than 90 days)

7 *U.S.C. 195** (failure to comply with certain orders of the Secretary under the Packers and Stockyards Act: a fine of not less than \$500 nor more than \$10,000, *or* imprisonment for not less than 6 months nor more than 5 years or both) (+ imprisonment at the discretion of the court)

7 *U.S.C. 2024* (2d conviction for fraudulent use of a food stamp access device worth between \$100 and \$5,000: imprisonment for not less than 6 months nor more than 5 years)

8 *U.S.C. 1324* (unlawfully bringing in aliens for profit or knowing the alien will commit a felony within the U.S.: a fine and imprisonment for not less than 3 nor more than 10 years (1st and 2d violations) and imprisonment for not less than 5 nor more than 15 years (3d and subsequent violations))

8 *U.S.C. 1534** (disclosure of classified information by a special attorney in immigration removal cases: imprisonment for not less than 10 nor more than 25 years)

12 *U.S.C. 617** (price fixing by officers of corporations organized to do foreign banking: a fine of not less than \$1,000 nor more than \$5,000 *or* imprisonment for not less than 1 nor more than 5 years, or both in the discretion of the court)

⁸² The lists do not include offenses under the Uniform Code of Military Justice, the District of Columbia Code, or any of the criminal codes of the various territories, commonwealths, or possessions over which Congress has authority.

- 12 U.S.C. 630* (embezzlement by officers of corporations organized to do foreign banking: imprisonment for not less than 2 nor more than 10 years)
- 15 U.S.C. 8** (trusts in restraint of import trade: a fine of not less than \$100 nor more than \$5000 and imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months)
- 15 U.S.C. 1245* (possession of a ballistic knife during the commission of a federal crime of violence: imprisoned not less than five years and not more than ten years, or both)
- 16 U.S.C. 413** (damaging structures or vegetation on a national military park: a fine of not more than \$1000 *or* imprisonment for not less than 5 nor more than 30 days or both)
- 16 U.S.C. 414** (trespassing for hunting purposes on a national military park: a fine of not more than \$1000 *or* imprisonment for not less than 5 nor more than 30 days or both)
- 18 U.S.C. 33* (destruction of commercial motor vehicles or their facilities involving high-level radioactive waste: any term of years but not less than 30 years)
- 18 U.S.C. 175c(c)(1)*(unlawful possession of variola virus: imprisonment for not less than 25 years or for life)
- 18 U.S.C. 175c(c)(2)*(unlawful use, attempted use, or possession and threat to use variola virus: imprisonment for not less than 30 years or for life)
- 18 U.S.C. 225* (continuing financial crimes enterprise: imprisonment for not less than 10 years and “may be life”)
- 18 U.S.C. 844(f)** (burning or bombing federal property: imprisonment for not less than 5 years nor more than 20 years; not less than 7 nor more than 40 years’ imprisonment if the offense involves personal injury or a substantial risk of personal injury; if death results, death or imprisonment for not less than 20 years or life)
- 18 U.S.C. 844(h)* (use of fire or explosives to commit a federal felony or possession of explosives during the commission of a federal felony: imprisonment for 10 years’ imprisonment for 1st offense, 20 for the second and any subsequent offense)
- 18 U.S.C. 844(i)** (burning or bombing property affecting interstate commerce: imprisonment for not less than 5 years nor more than 20 years; not less than 7 nor more than 40 years’ imprisonment if the offense involves personal injury or a substantial risk of personal injury; if death results, death or imprisonment for not less than 20 years or life)
- 18 U.S.C. 844(o)* (transfer of explosives knowing they will be used to commit a crime of violence or drug trafficking offense: imprisonment for 10 years)
- 18 U.S.C. 924(c)(1)* (use of or possession of a firearm during the commission of a crime of violence or drug trafficking: imprisonment for not less 5 years generally; imprisonment for not less than 7 years if the firearm is brandished; imprisonment for not less than 10 years if the firearm is discharged or involves a short-barreled rifle or shotgun; imprisonment for not less than 25 years for second or subsequent offenses; imprisonment for not less than 30 years

for a machinegun or silencer; life imprisonment for second or subsequent machinegun or silencer offense)

18 U.S.C. 924(e)(1) (possession of firearm by a three time violent felon or serious drug dealer: not less than 15 years' imprisonment)

18 U.S.C. 929 (use of armor piercing ammunition during the commission of a crime of violence or drug trafficking: not less than 5 years)

18 U.S.C. 1121(b) (killing a state law enforcement officer by a federal prisoner or while transferring a prisoner interstate: not less than 20 years and may be punishable by death or life imprisonment)

*18 U.S.C. 1122** (selling HIV infected blood: not less than 1 nor more than 10 years)

18 U.S.C. 1201 (kidnapping a child by an adult who is not a relative: not less than 20 years)

18 U.S.C. 1591 (sex trafficking using force or children, imprisonment for any term of years not less than 10 years or for life; not less than 15 years or for life if the child is under 14 years of age at the time)

18 U.S.C. 1658(b) (causing a shipwreck for plunder or preventing escape from a shipwreck: imprisonment for not less than 10 years)

18 U.S.C. 1661 (robbery ashore by pirates: imprisonment for life)

*18 U.S.C. 1917** (interfering with civil service examinations: imprisonment for not less than 10 days nor more than 1 year *or* a fine of not less than \$100 or both)(+ imprisonment at the discretion of the court)

18 U.S.C. 1992 (wrecking a train carrying high level radioactive waste or spent nuclear fuel: imprisonment for any term of years not less than 30 or for life)

18 U.S.C. 2113(e) (killing or hostage taking during the course of robbing a federally insured bank: not less than 10 years; death or life imprisonment if death results)

18 U.S.C. 2250 (unregistered sex offender who commits a federal crime of violence: imprisonment for not less than 5 years nor more than 30 years)

18 U.S.C. 2251 (sexual exploitation of children: imprisonment for not less than 15 nor more than 30 years; upon a 2d conviction, imprisonment for not less than 25 nor more than 50 years; upon a 3d conviction, imprisonment for not less than 35 years nor more than life; where death results, death or imprisonment for any term of years not less than 30 years or life)

18 U.S.C. 2252(b) (trafficking in material related to sexual exploitation of children: imprisonment for not less than 5 nor more than 15 years; 2d and subsequent offenses, not less than 15 years nor more than 30 years)

18 U.S.C. 2252A(b)(1) (trafficking in material related to sexual exploitation of children including by computer: imprisonment for not less than 5 nor more than 15 years; 2d and subsequent offenses, not less than 15 years nor more than 30 years)

- 18 U.S.C. 2252A(b)(2)* (2d or subsequent conviction for possession of child pornography: imprisonment for not less than nor more than 10 years)
- 18 U.S.C. 2257* (2d and subsequent violation of the recordkeeping requirements concerning sexual exploitation of children: imprisonment for not less than 2 nor more than 10 years)
- 18 U.S.C. 2257A* (2d and subsequent violation of the recordkeeping requirements concerning simulated sexual activity: imprisonment for not less than 2 nor more than 10 years)
- 18 U.S.C. 2260(a)* (production material involving sexual exploitation of children for importation into the U.S.: imprisonment for not less than 15 nor more than 30 years; upon a 2d conviction, imprisonment for not less than 25 nor more than 50 years; upon a 3d conviction, imprisonment for not less than 35 years nor more than life; where death results, death or imprisonment for any term of years not less than 30 years or life)
- 18 U.S.C. 2260(b)* (trafficking in material related to sexual exploitation of children for importation into the U.S: imprisonment for not less than 5 nor more than 15 years; 2d and subsequent offenses, not less than 15 years nor more than 30 years)
- 18 U.S.C. 2260A* (federal sex offenses by registered sex offenders: imprisonment for a consecutive 10 years)
- 18 U.S.C. 2261(b)(6)* (stalking in violation of court order: imprisonment for not less than 1 year)
- 18 U.S.C. 2332g(c)(1)* (unlawful possession of an anti-aircraft missile: imprisonment for not less than 25 years or for life)
- 18 U.S.C. 2332g(c)(2)*(use, attempted used, or possession and threat to use an anti-aircraft missile: imprisonment for not less than 30 years or for life)
- 18 U.S.C. 2332h(c)(1)*(unlawful possession of a radiological dispersal device: imprisonment for not less than 25 years or for life)
- 18 U.S.C. 2332h(c)(2)*(unlawful use, attempted used, or possession and threat to use an radiological dispersal device: imprisonment for not less than 30 years or for life)
- 18 U.S.C. 2381* (treason: death or imprisonment for not less than 5 years)
- 18 U.S.C. 2422* (coercing or entice a child to engage in sexual activity: imprisonment for not less than 10 years or for life)
- 18 U.S.C. 2423* (transportation of a child for immoral purpose: imprisonment for not less than 10 years or for life)
- 18 U.S.C. 3559(c)* (3 strikes: an offender convicted of a serious violent felony after having been convicted for 2 or more serious violent felonies or serious drug offenses must be sentenced to life imprisonment)
- 18 U.S.C. 3559(e)* (2 strikes: an offender convicted of a serious sex offense against a child after having been convicted of an earlier serious sex offense must be sentenced to life imprisonment)

- 19 U.S.C. 283 (failure to pay duty on saloon stores: not less than 3 months nor more than 2 years imprisonment)
- 21 U.S.C. 212* (offenses involving the practice of pharmacy in the consular districts of China: a fine of not less than \$50 nor more than \$100 *or* imprisonment for not less than 1 month nor more than 60 days, or both) (+ imprisonment at the discretion of the court)
- 21 U.S.C. 622 (bribery of a meat inspector: not less than 1 nor more than 3 years' imprisonment)
- 21 U.S.C. 841(b)(1)(A)+ (drug trafficker where the offender has 2 or more prior convictions for violation of 21 U.S.C. 849(drug dealing at a truck stop), 859 (dealing to minors), 860 (dealing near a school), 861 (using minors to deal): mandatory life imprisonment)
- 21 U.S.C. 841(b)(1)(A)*+ (drug trafficking in very substantial amounts of controlled substances (e.g., a kilogram or more of heroin: imprisonment for not less than 10 years nor more than life; imprisonment for not less than 20 years nor more than life if the offender has a prior felony drug conviction or if death or serious bodily injury results)
- 21 U.S.C. 841(b)(1)(B)*+ (drug trafficking in substantial amounts of controlled substances (e.g., 100 grams of heroin: imprisonment for not less than 5 nor more than 40 years; imprisonment for not less than 20 years nor more than life if death or serious bodily injury results; imprisonment for not less than 10 years nor more than life if the offender has a prior drug felony conviction)
- 21 U.S.C. 841(b)(1)(C)*+ (drug trafficking in schedule I or II controlled substances or 1 gram of flunitrazepam: imprisonment for not less than 20 years nor more than life if death or serious bodily injury results; imprisonment for not less than 10 years nor more than life if the offender has a prior drug felony conviction; imprisonment for life if the offender has a prior drug felony conviction and death or serious bodily injury results)
- 21 U.S.C. 844*+ (simple possession of a controlled substance: imprisonment for not less than 5 nor more than 20 years for possession of cocaine base (crack); imprisoned not less than 90 days nor more than 3 years if the offender has 2 or more prior drug convictions; imprisonment for not less than 15 days nor more than 2 years if the offender has a prior drug conviction)
- 21 U.S.C. 846 *+(attempts and conspiracies to violate any of the offenses in the Controlled Substances Act carry the same sentences as the underlying offenses)
- 21 U.S.C. 848(a) (drug kingpin - continuing criminal enterprise violations: imprisonment for not less than 30 years nor more than life for previous offenders, not less than 20 years nor more than life otherwise)
- 21 U.S.C. 848(b) (drug kingpin violations involving large enterprises: life imprisonment)
- 21 U.S.C. 848(e)(1) (killing in furtherance of a serious drug trafficking violations or killing a law enforcement official in furtherance of a controlled substance violation: death, life imprisonment, or imprisonment for a term of years not less than 20 years)
- 21 U.S.C. 859 (distribution of controlled substances to those under 21 years of age): imprisonment for not more than twice the otherwise applicable maximum term, but not less

than the greater of the otherwise applicable minimum term or 1 year imprisonment; three times the otherwise applicable maximum term for 2d offenders)

21 U.S.C. 860 (distribution of controlled substances near schools and colleges: imprisonment for not more than twice the otherwise applicable maximum term, but not less than the greater of the otherwise applicable minimum term or 1 year imprisonment; three times the otherwise applicable maximum term but not less than the greater of the otherwise applicable minimum term or 3 years' imprisonment for 2d offenders)

21 U.S.C. 861 (distribution to a pregnant person or use of those under 21 years of age to distribute controlled substances: imprisonment for not more than twice the otherwise applicable maximum term, but not less than the greater of the otherwise applicable minimum term or 1 year imprisonment; three times the otherwise applicable maximum term)

21 U.S.C. 960(b)(1)*+ (illicit drug importing/exporting of very substantial amounts of controlled substances (e.g., a kilogram or more of heroin): imprisonment for not less than 10 years nor more than life; imprisonment for not less than 20 years nor more than life if the offender has a prior felony drug conviction or if death or serious bodily injury results)

21 U.S.C. 960(b)(2)*+ (illicit drug importing/exporting of substantial amounts of controlled substances (e.g., 100 grams of heroin): imprisonment for not less than 5 nor more than 40 years; imprisonment for not less than 20 years nor more than life if death or serious bodily injury results; imprisonment for not less than 10 years nor more than life if the offender has a prior drug felony conviction)

21 U.S.C. 960(b)(3)*+ (illicit drug importing/exporting of schedule I or II controlled substances or 1 gram of flunitrazepam: imprisonment for not more than 20 years, but not less than 20 years nor more than life if death or serious bodily injury results; imprisonment for not more than 30 years if the offender has a prior drug felony conviction; imprisonment for life if the offender has a prior drug felony conviction and death or serious bodily injury results)

21 U.S.C. 963*+ (attempt or conspiracy to commit any of the drug import/export offenses are subject to the same penalties as the underlying offense)

22 U.S.C. 4221 (perjury before consular officers: imprisonment for not less than 1 nor more than 3 years)

33 U.S.C. 410* (violation of floating timber regulations: a fine of not less than \$500 nor more than \$2,500 or imprisonment for not less than 30 days nor more than 1 year, or both in the discretion of the court)

33 U.S.C. 411* (certain navigable waters offenses: a fine of not more than \$2,500 or imprisonment for not less than 30 days nor more than 1 year, or both in the discretion of the court)

33 U.S.C. 441* (deposit of refuse in various harbors: a fine of not less than \$250 nor more than \$2,500 or imprisonment for not less than 30 days nor more than 1 year, or both "as the judge before whom conviction is obtained shall decide") (+ imprisonment at the discretion of the court)

33 U.S.C. 447 (bribery of harbor employees: not less than 6 months' nor more than 1 year imprisonment)

*46 U.S.C. App. 1228** (violations of the Merchant Marine Act: a fine or "imprisonment for not less than one year or more than five years, or by both fine and imprisonment")

47 U.S.C. 13 (refuse to afford telegraph service: a fine of not more than \$1000 and imprisonment for not less than 6 months)

*47 U.S.C. 220** (false entries in communication common carrier records: a fine of not less than \$1,000 nor more than \$5000 *or* imprisonment for not less than 1 nor more than 3 years)

Death or imprisonment for any term of years or for life

8 U.S.C. 1324(1) (bringing in or harboring aliens where death results)

*18 U.S.C. 36** (drive-by shooting constituting 1st degree murder)

18 U.S.C. 37 (violence at international airports where death results)

18 U.S.C. 175 (development or possession of biological weapons)

*18 U.S.C. 241** (conspiracy against civil rights where death results)

*18 U.S.C. 242** (deprivation civil rights under color of law where death results)

*18 U.S.C. 245** (discriminatory obstruction of enjoyment federal protected activities where death results)

*18 U.S.C. 247** (obstruction of the exercise of religious beliefs where death results)

18 U.S.C. 351 (conspiracy to kill or kidnap a Member of Congress if death results)

18 U.S.C. 351 (kidnapping a Member of Congress if death results)

18 U.S.C. 794 (espionage)

18 U.S.C. 844(d) (use of fire or explosives unlawfully where death results)

18 U.S.C. 924(j)(1) (murder while in possession of a firearm during the commission of a crime of violence or drug trafficking)

18 U.S.C. 1512 (tampering with a federal witness or informant involving murder)

18 U.S.C. 1513 (retaliating against a federal witness or informant involving murder)

18 U.S.C. 1751 (kidnapping the President where death results)

18 U.S.C. 1751 (conspiracy to kill or kidnap the President where death results)

18 U.S.C. 1992 (terrorist attack on mass transit where death results)

- 18 U.S.C. 2119* (car jacking where death results)
- 18 U.S.C. 2241* (aggravated sexual assault of a child under 12 years of age in the special maritime and territorial jurisdiction of the U.S.: death, imprisonment for any term of years not less than 30, or for life)
- 18 U.S.C. 2245* (sexual abuse where death results)
- 18 U.S.C. 2251* (sexual exploitation of children where death results)
- 18 U.S.C. 2280* (violence against maritime navigation where death results)
- 18 U.S.C. 2281* (violence against maritime fixed platform where death results)
- 18 U.S.C. 2282A* (interference with maritime commerce where death results)
- 18 U.S.C. 2283* (unlawful maritime transportation of explosive, biological, chemical, radioactive or nuclear material where death results)
- 18 U.S.C. 2291* (destruction of vessels or maritime facilities where death results)
- 18 U.S.C. 2332** (terrorist murder of an American outside the U.S.)
- 18 U.S.C. 2332a* (use of weapons of mass destruction where death results)
- 18 U.S.C. 2332b* (acts of terrorism transcending national boundaries where death results)
- 18 U.S.C. 2332f* (bombing public places where death results)
- 18 U.S.C. 2340A* (torture where death results)
- 18 U.S.C. 2441** (war crimes where death results)
- 18 U.S.C. 3559(f)* (murder of a child in violation of federal law: death, life imprisonment or imprisonment for not more than 30 years)

Death or imprisonment for life

- 15 U.S.C. 1825(a)(2)(C)* (1st degree murder of those enforcing the Horse Protection Act)
- 18 U.S.C. 34* (destruction of aircraft, commercial motor vehicles or their facilities where death results)
- 18 U.S.C. 115* (kidnapping with death resulting of the member of the family of a federal official or employee to obstruct or retaliate)
- 18 U.S.C. 115* (1st degree murder of the member of the family of a federal official or employee to obstruct or retaliate)
- 18 U.S.C. 229A* (unlawful possession of chemical weapons where death results)

- 18 U.S.C. 351* (1st degree murder of a Member of Congress)
- 18 U.S.C. 930(c)* (1st degree murder while in possession of a firearm in a federal building)
- 18 U.S.C. 1091** (genocide where death results)
- 18 U.S.C. 1111* (1st degree murder within the special maritime and territorial jurisdiction of the U.S.)
- 18 U.S.C. 1114* (1st degree murder of a federal officer or employee)
- 18 U.S.C. 1116* (1st degree murder of a foreign dignitary)
- 18 U.S.C. 1118* (murder by a federal prisoner)
- 18 U.S.C. 1119* (1st degree murder of an American by an American overseas)
- 18 U.S.C. 1120* (1st degree murder by an escaped federal prisoner)
- 18 U.S.C. 1121* (1st degree murder of one assisting in a federal criminal investigation)
- 18 U.S.C. 1201* (kidnapping where death results)
- 18 U.S.C. 1203* (hostage taking where death results)
- 18 U.S.C. 1503* (1st degree murder committed to obstruction of federal judicial proceedings)
- 18 U.S.C. 1716* (mailing injurious articles with intent to injury or damage property where death results)
- 18 U.S.C. 1751* (1st degree murder of the President)
- 18 U.S.C. 1958** (use of interstate facilities in furtherance of a murder-for-hire where death results)
- 18 U.S.C. 1959** (murder in aid of racketeering activity)
- 18 U.S.C. 1992* (attempting to wrecking trains where death results)
- 18 U.S.C. 3559* (federal violent felony or violation of 18 U.S.C. 2422 (coercing or enticing interstate travel for sexual purposes), 2423 (transporting minors for sexual purposes), or 2251 (sexual exploitation of children) resulting in the death of a child under 14 years of age)
- 21 U.S.C. 461* (1st degree murder of a poultry inspector)
- 21 U.S.C. 675* (1st degree murder of a meat inspector)
- 49 U.S.C. 46502* (air piracy where death results)

Imprisonment for any term of years or life

- 15 U.S.C. 1825(a)(2)(C)* (2d degree murder of those enforcing the Horse Protection Act)
- 18 U.S.C. 36** (drive-by shooting constituting murder other than 1st degree murder)
- 18 U.S.C. 38** (fraud involving aircraft or space vehicle part whose failure results in death)
- 18 U.S.C. 43* (animal enterprise terrorism where death results)
- 18 U.S.C. 81** (arson within the special maritime and territorial jurisdiction of the United States)
- 18 U.S.C. 115* (kidnapping or conspiring to kidnap the member of the family of a federal official or employee to obstruct or retaliate)
- 18 U.S.C. 115* (2d degree murder of the member of the family of a federal official or employee to obstruct or retaliate)
- 18 U.S.C. 115* (conspiracy to murder the member of the family of a federal official or employee to obstruct or retaliate)
- 18 U.S.C. 175** (unlawful possession of biological weapons)
- 18 U.S.C. 229A** (unlawful possession of chemical weapons: imprisonment for any term of years)
- 18 U.S.C. 241** (conspiracy against civil rights involving attempts to kill, or kidnap, attempted kidnapping, sexual assault or attempted sexual assault)
- 18 U.S.C. 242** (deprivation of rights under color of law involving attempts to kill, or kidnap, attempted kidnapping, sexual assault or attempted sexual assault)
- 18 U.S.C. 245** (discriminatory obstruction of enjoyment federal protected activities involving attempts to kill, or kidnap, attempted kidnapping, sexual assault or attempted sexual assault)
- 18 U.S.C. 248** (interference with access to clinic entrances where death results)
- 18 U.S.C. 351(c),(d)* (attempt or conspiracy to kill or kidnap a Member of Congress)
- 18 U.S.C. 351(b)* (kidnapping a Member of Congress)
- 18 U.S.C. 351(a)* (2d degree murder of a Member of Congress)
- 18 U.S.C. 831* (prohibited transactions in nuclear material where death or serious bodily injury results)
- 18 U.S.C. 924(o)* (conspiracy to violate 18 U.S.C. 924(c)(use of or possession of a machinegun or firearm equipped with a silencer during the commission of a crime of violence or drug trafficking))
- 18 U.S.C. 930(c)* (2d degree murder while in possession of a firearm in a federal building)

- 18 U.S.C. 956* (conspiracy to murder or kidnap in a foreign country)
- 18 U.S.C. 1030** (intentionally causing computer damage that results in death)
- 18 U.S.C. 1038** (terrorism hoax where death results)
- 18 U.S.C. 1111* (2d degree murder within the special maritime and territorial jurisdiction of the U.S.)
- 18 U.S.C. 1114* (2d degree murder of a federal officer or employee)
- 18 U.S.C. 1116* (2d degree murder of a foreign dignitary)
- 18 U.S.C. 1117* (conspiracy to commit murder in violation of 18 U.S.C. 1111 (within the special maritime and territorial jurisdiction of the U.S.), 1114 (of a federal officer or employee), 1116 (of a foreign dignitary), or 1119 (of an American by an American overseas)
- 18 U.S.C. 1119* (2d degree murder of an American by an American overseas)
- 18 U.S.C. 1120* (2d degree murder by an escaped federal prisoner)
- 18 U.S.C. 1121* (2d degree murder of one assisting in a federal criminal investigation)
- 18 U.S.C. 1201* (kidnapping or conspiracy to kidnap)
- 18 U.S.C. 1203* (hostage taking)
- 18 U.S.C. 1347** (health care fraud resulting in death)
- 18 U.S.C. 1365** (tampering with consumer products where death results)
- 18 U.S.C. 1366* (destruction of energy facilities where death results)
- 18 U.S.C. 1503* (2d degree murder committed to obstruction of federal judicial proceedings)
- 18 U.S.C. 1581** (peonage involving kidnapping or rape or where death results)
- 18 U.S.C. 1583** (enticement into slavery involving kidnapping or rape or where death results)
- 18 U.S.C. 1584** (sale into involuntary servitude involving kidnapping or rape or where death results)
- 18 U.S.C. 1589** (forced labor involving kidnapping or rape or where death results)
- 18 U.S.C. 1590** (slave trafficking involving kidnapping or rape or where death results)
- 18 U.S.C. 1591** (sex trafficking in children under 14 years of age)
- 18 U.S.C. 1751* (2d degree murder of the President)
- 18 U.S.C. 1751* (kidnapping the President)

- 18 U.S.C. 1751* (attempting to kill or kidnap the President)
- 18 U.S.C. 1751* (conspiracy to kill or kidnap the President)
- 18 U.S.C. 1751* (aggravated assault of the President)
- 18 U.S.C. 1864** (booby traps on federal lands where death results)
- 18 U.S.C. 1952* (Travel Act violations (interstate travel in aid of racketeering enterprises) where death results)
- 18 U.S.C. 1959* (kidnapping in aid of racketeering activity)
- 18 U.S.C. 1993** (attack on mass transit resulting in death)
- 18 U.S.C. 2118** (robbery or burglary involving controlled substances where death results)
- 18 U.S.C. 2155* (destruction of national defense material where death results)
- 18 U.S.C. 2199** (stowaways on vessels or aircraft where death results)
- 18 U.S.C. 2242* (sexual abuse committed in special maritime or territorial jurisdiction of the United States)
- 18 U.S.C. 2261* (interstate domestic violence if death results)
- 18 U.S.C. 2261A* (interstate stalking if death results)
- 18 U.S.C. 2262* (interstate violation of protection order if death results)
- 18 U.S.C. 2272* (destruction of vessel by owner)
- 18 U.S.C. 2280* (maritime transportation of terrorists)
- 18 U.S.C. 2332* (terrorist conspiracy to murder an American outside the U.S.)
- 18 U.S.C. 2332a* (use of weapons of mass destruction)
- 18 U.S.C. 2332b* (acts of terrorism transcending national boundaries involving a kidnapping)
- 18 U.S.C. 2339A* (providing material support to terrorists where death results)
- 18 U.S.C. 2339B* (providing material support to terrorist organizations where death results)
- 18 U.S.C. 2441** (war crimes)
- 18 U.S.C. 3559(f)(2)*(kidnapping or maiming of a child in violation of federal law: imprisonment for any term of years or for life but not less than 25 years)

18 U.S.C. 3559(f)(3)(a crime of violence involving serious injury or use of a dangerous weapon committed against a child in violation of federal law: imprisonment for any term of years or fore life but not less than 10 years)

21 U.S.C. 461 (2d degree murder of a poultry inspector)

21 U.S.C. 675 (2d degree murder of a meat inspector)

42 U.S.C. 2000e-13 (killing EEOC personnel)

*42 U.S.C. 2272** (atomic energy violations to injure the U.S. or aid a foreign nation)

*42 U.S.C. 2274** (communication of restricted data)

*42 U.S.C. 2275** (receipt of restricted data)

*42 U.S.C. 2276** (tampering with restricted data)

42 U.S.C. 2284 (sabotaging nuclear facilities where death results)

*42 U.S.C. 3631** (housing discrimination where death results)

49 U.S.C. 46503 (interfering with airport security screening personnel while armed with a dangerous weapon)

49 U.S.C. 46504 (interference with flight crew involving a dangerous weapon)

49 U.S.C. 46505 (carrying a weapon or explosive on an aircraft where death results)

49 U.S.C. 60123 (damaging pipelines where death results)

Imprisonment for life

18 U.S.C. 175c(c)(3)(unlawful possession of variola virus where death results)

18 U.S.C. 924(c) (2d conviction for commission of a crime of violence or drug trafficking while armed with a machinegun or firearm with a silencer)

18 U.S.C. 1651 (piracy)

18 U.S.C. 1652 (piracy)

18 U.S.C. 1653 (piracy)

18 U.S.C. 1655 (seaman laying violent hands upon a commander)

18 U.S.C. 1963 (racketeer and corrupt influenced organization (RICO) offenses where the predicate offense)

18 U.S.C. 2332g(c)(3) (unlawful possession of an anti-aircraft missile where death results)

18 U.S.C. 2332h(c)(3)(unlawful possession of a radiological dispersal device where death results)

Imprisonment for not more than some multiple of the sentence for a predicate offense

18 U.S.C. 2 (aiding and abetting any of the offenses listed – offenders are treated as principals in the predicate offense)

18 U.S.C. 2247 (doubles the otherwise applicable penalties for sexual abuse violations if the offender has a prior sex offense conviction)

18 U.S.C. 2426 (doubles the otherwise applicable penalties for Mann Act (transportation for illegal sexual activity) violations if the offender has a prior sex offense conviction)

21 U.S.C. 846 (attempts or conspiracies to violate any provision of the Controlled Substance Act is subject to the same penalties as the completed offense)

21 U.S.C. 860(c) (use of one under 21 years of age to distribution of controlled substances near schools and colleges: imprisonment for not more than three times the otherwise applicable sentence)

21 U.S.C. 962 (violation of the drug import/export law by an offender with a prior conviction for violation of those provisions is punishable by imprisonment for twice the term otherwise authorized)

21 U.S.C. 963 (attempts or conspiracies to violate any provision of the Controlled Substance Import and Export Act are subject to the same penalties as the completed offense)

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Author Contact Information

Charles Doyle
Senior Specialist in American Public Law
cdoyle@crs.loc.gov, 7-6968

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