

PORTABLE MINIMALISM IN SENTENCING POLITICS

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Erik Luna and Paul Cassell shoot every arrow in the academic quiver.<sup>1</sup> They collect the arguments, pro and con, regarding mandatory minimum sentences in the federal criminal justice system.<sup>2</sup> They touch on various theories about crime politics that could explain the riotous growth of mandatory minimum sentences in the federal criminal code.<sup>3</sup> Most importantly, their article spells out a theory of legislative action that might allow us to climb back down the ladder and repeal some mandatory minimum statutes.<sup>4</sup> Luna and Cassell adapt a “minimalist” theory from more general accounts of human behavior, which others have applied to the work of courts. Their theory of minimalism allows them to propose an experience-based vision of what the U.S. Congress might accomplish, based on precious little congressional experience. They even draft legislative language and suggest a multi-stage legislative agenda.<sup>5</sup> In this effort, Cassell and Luna perform the full range of academic roles, from historians of congressional trends, to social and institutional theorists, to reformers who advocate a specific agenda. The project is virtuosic and helpful.

Nevertheless, I believe that Luna and Cassell’s theory of federal crime legislation is misplaced – in the literal sense that it is directed to the wrong place. In this comment, I explore some reasons to think that a minimalist strategy faces higher barriers in the federal legislative process than it might in state legislatures. Any change to federal crime legislation faces many procedural barriers, most prominent among them the use of the filibuster in the Senate. The

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1 See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

2 *Id.* at 9-17.

3 *Id.* at 20-24.

4 *Id.* at 34-39.

5 *Id.* at 60-64, 74-77.

terrain there is inhospitable to change, particularly change that reduces the reach of government. Given this institutional landscape, it is not surprising that Congress hardly ever repeals mandatory minimum statutes. Institutional rules, rather than individual views of legislators, produced this result in the past and will dominate efforts to repeal these laws in the future.

State legislatures, on the other hand, offer some modest hope for minimalism. The legislative process in many states is not so oriented towards inaction. The experience in state crime politics is also slightly more encouraging than in federal crime politics, since one can point to a larger stockpile of repealed mandatory minimums at the state level. In recent years, state legislatures have reduced sentences – particularly for drug crimes – driven by fiscal concerns and a genuine search for new public safety strategies. Happily, it matters enormously what happens in the state legislatures because that is where most criminal law enforcement still happens. Criminal justice remains overwhelmingly a function of state and local government.

The core issue, then, is the portability of minimalism. The social science foundations of the theory posit behavioral rules for individuals, but individuals work within particular institutions, with their particular decision rules and traditions. Does a theory about individual action, such as minimalism, still offer insights when transported to the work of legislatures? And more specifically, how well does it work in the institutional setting of the U.S. Congress, where partisan linkage among issues and a lack of budget discipline distort the preferences of individual legislators?

Part I of this commentary explores some of the special challenges of applying Luna and Cassell's minimalist theory to the work of legislatures, most particularly the U.S. Congress of the current day. Part II then discusses the promise of the idea when it is carried to the state legislative arena.

## I. MINIMALISM IN THE FEDERAL LEGISLATIVE CONTEXT

The minimalist theory that Luna and Cassell present in their article derives from the *social* sciences, but it is at bottom a theory of *individual* behavior. The story starts with the insights of public choice theory, which conceptualizes a public official as a rational actor for purposes of economic analysis. The rational actor – that is, the legislator – predictably acts in ways that maximize his or her personal welfare, usually defined as an increased probability

of re-election.<sup>6</sup> The rational legislator's interest in re-election explains at least some part of the support for mandatory minimum sentencing.<sup>7</sup> Public choice theory also predicts that prosecutors and law enforcement officials will favor any expansion of the criminal code.<sup>8</sup>

This portrait of the individual legislator is incomplete, and the tools of behavioral economics add more depth to the picture. According to this discipline, which draws insights from psychology, people are predictably irrational in their choices. Various mental shortcuts lead them to overvalue some risks or benefits, and to undervalue others.<sup>9</sup> A few of these heuristics might heighten the appeal of mandatory minimum sentences. For instance, the "availability heuristic" might lead voters (and their legislators) to give undue weight to a few notorious examples of harms from drug usage or similar crimes, such as the death of basketball star Len Bias from cocaine.<sup>10</sup> Cognitive dissonance may explain how evidence of the effects of mandatory minimum sentences makes no impression on legislators who have already committed themselves to this strategy.<sup>11</sup>

Luna and Cassell, however, explore the bright side of legislator irrationality. While some mechanisms of behavioral economics predict legislative support for mandatory minimums, others predict a series of restrictions and repeals of those laws. For instance, criminal law enforcers who are ambivalent about a social norm might resist a strong push to change that norm, while they might react more positively to a gentler "nudge" from the legislature.<sup>12</sup>

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<sup>6</sup> See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL FOUNDATIONS OF DEMOCRACY* (1962); GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

<sup>7</sup> Given the existential nature of the threat that violent crime presents, reinforced by the structure of the media, voter reaction to crime issues is likely to be intense. See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 441-46, 471-76 (2006); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 *passim* (2000).

<sup>8</sup> See Luna & Cassell, *supra* note 1, at 26-27; see also William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (distinguishing effects of public choice dynamic on substantive criminal law from effects on sentencing and enforcement measures).

<sup>9</sup> See Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1997); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

<sup>10</sup> See Luna & Cassell, *supra* note 1, at 22-23.

<sup>11</sup> See *id.* at 30-32.

<sup>12</sup> See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-08, 644-45 (2000). While Kahan explores the use of this technique to expand the reach of criminal sanctions, Luna and Cassell suggest tentatively that the same dynamic could reduce the reach of the criminal law. See Luna & Cassell, *supra* note 1, at 35-36, 39-40. I am not convinced that this dynamic operates in both directions. While enforcement

While these minimalist moves each produce less change than more ambitious legislation, in the long run they create greater changes in practice, both because they provoke less resistance from enforcement officials and because early modest changes can lead to a series of later modest changes. A bit of movement at the start can produce a “tipping point” or “cascade effect” that makes each step easier than the last one.<sup>13</sup>

Theoretical dynamics such as nudges and tipping points might predict the behavior of individuals as they interact with other individuals in generic settings. Some legal scholars and political scientists, however, have applied this work to understand how officials in particular governmental institutions behave. Cass Sunstein explains and predicts judicial behavior by using the concept of “incompletely theorized agreements.”<sup>14</sup> Multi-member judicial panels are better able to reach agreement when they explain their decisions on the narrowest available rationale.<sup>15</sup> While there is reason to question whether this technique produces desirable results in some subject areas,<sup>16</sup> it does appear that this method produces more agreement among judges as to the outcomes of cases, and probably produces more long-term change in common law doctrine.

What happens when the generic individuals of behavioral economics become the women and men who are elected to the United States Senate or the United States House of Representatives? A minimalist theory might describe how these legislators form their personal views about sound policy. A small change in mandatory minimum sentences could prove attractive to legislators who hold different general views on crime control and federalism. This technique, therefore, could help convince a majority of legislators that a bill that modestly restricts mandatory minimum sentences embodies a sound policy.

A majority tally of legislators who favor a bill, however, does not produce a new law in the federal system. Bottlenecks at several

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officials always have discretion to under-enforce the criminal law to resist a “hard push” toward greater criminal penalties, they may face greater challenges if they insist on over-enforcement of the criminal law after a “hard push” toward narrower coverage.

<sup>13</sup> See generally MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *INTERNATIONAL ORGANIZATION* 887 (1998); Geoffrey Heal & Howard Kunreuther, *Social Reinforcement: Cascades, Entrapping, and Tipping*, 2 *AM. ECONOMIC JOURNAL: MICROECONOMICS* 86 (2010).

<sup>14</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1733-38 (1995).

<sup>15</sup> See *id.* at 1754-60.

<sup>16</sup> See Ronald F. Wright, *When Do We Want Incomplete Agreements? A Comment on Sunstein's Holmes Devise Lecture*, 31 *WAKE FOREST L. REV.* 459 (1996) (resort to broader principle is more normatively desirable for questions relating to reach of judicial power).

different points in the system might prevent the majority who favor a bill from ever voting on the bill.<sup>17</sup> If the chair of the relevant committee in the House or the Senate does not favor the bill, it may never arrive on the committee agenda for a vote.<sup>18</sup> If a majority of committee members do not favor the bill, it will not make it out of committee for a floor vote.<sup>19</sup> In a bicameral system, a large majority in one chamber does not pass legislation without cooperation from the other chamber. The list goes on, but the point is this: institutional rules in the U.S. Congress lead to inaction on many bills that attract the support of a majority of legislators.

Most recently, the most vivid example of this institutional bias towards inaction is the use of the filibuster in the U.S. Senate. Senate rules and traditions allow a minority of Senators to block a bill from reaching the floor for a vote on the merits. At earlier points in Senate history, the filibuster embodied the ideal of unlimited debate. But in its current usage, 40 Senators can block a bill without actually extending debate.<sup>20</sup> Traditional justifications for the filibuster suggest that it is appropriate to allow Senators from a particular party or region – think of Southern Democrats on civil rights questions in the 1950s and 1960s – to insist on careful deliberation about policies that they oppose with particular intensity. The minority party’s use of the filibuster, however, has steadily increased from Congress to Congress; it is now a de facto supermajority requirement for all legislation in the Senate. Consider the following graph, tracking the number of cloture motions filed in each session of Congress between 1919 and 2010.<sup>21</sup> These motions do not capture every filibuster or threatened filibuster, but they do indicate the decision by a legislative majority to attempt to end a filibuster that the minority actually pursued.

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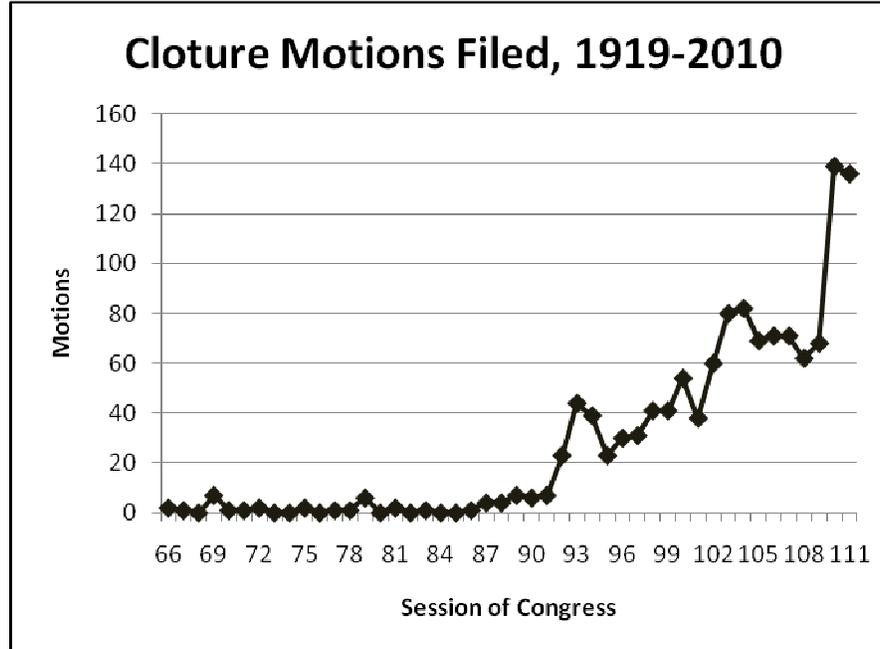
<sup>17</sup> See GARY W. COX & MATHEW D. MCCUBBINS *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (1997).

<sup>18</sup> See *id.*

<sup>19</sup> See Ralph K. Huitt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340 (1954); Keith Krehbiel, *Obstruction and Representativeness in Legislatures*, 29 AM. J. POL. SCI. 643 (1985).

<sup>20</sup> See GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); Sarah A. Binder, Eric D. Lawrence, & Steven S. Smith, *Tracking the Filibuster, 1917 to 1996*, 30 AM. POLITICS RESEARCH 406 (2002).

<sup>21</sup> The graph was created by the author and is based on data from [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm). “Cloture” is “[t]he only procedure by which the Senate can vote to place a time limit on consideration of a bill or other matter, and thereby overcome a filibuster.” U.S. Senate, Glossary | Cloture, [http://www.senate.gov/reference/glossary\\_term/cloture.htm](http://www.senate.gov/reference/glossary_term/cloture.htm) (last visited Feb. 25, 2011).



The increased use of the filibuster is partially counteracted by the decline in importance of the committee structure in both houses, and by the use of the reconciliation process in the Senate. Nevertheless, the use of the filibuster on balance represents a long-term trend: this is bipartisan endorsement of inaction in the Senate, strengthening over time regardless of the current political party in control.

A second dynamic in the federal legislative process also makes it difficult for the true policy views of legislators to translate into majority votes for legislation. When Congress is relatively active and passes a large number of noteworthy statutes, the credit tends to go first to the President, and second to the party in control of each house of Congress. This is particularly true when the media portrays the legislation as a “bipartisan” achievement.<sup>22</sup> Thus, when a single political party controls the White House and the congressional majority in at least one legislative house (a situation that describes 8 of the 15 sessions of Congress since the start of the Reagan Administration)<sup>23</sup> the minority party has an especially weak incentive to cooperate on legislation that will strengthen the voter appeal of their opponents in the next election. Even if legislators agree on the merits of a given bill, they may vote against the bill for

<sup>22</sup> See generally FRANCIS E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE (2009); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

<sup>23</sup> This partisan alignment describes the 111th, 109th, 108th, 107th, 103rd, 99th, 98th, and 97th Congresses.

the sake of long-term electoral success for their party.<sup>24</sup> The long-term increase in the strength of party leadership makes it ever more likely that a given legislator will see a bill through the partisan lens of electoral credit.

This combination of procedural bottlenecks and electoral credit lenses makes the U.S. Congress a difficult place to pass bills that attract votes from both parties. These hurdles probably explain the failure of the 111th Congress to pass any legislation to address immigration or climate change, topics that presented opportunities for minimalist theory to work its magic. The Congress did pass an extraordinary amount of legislation, but this was largely due to the fact that Democrats held unusually large majorities in both chambers. The legislation that finally passed was either a declared top priority of the majority party (such as the Patient Protection and Affordable Care Act<sup>25</sup>), or legislation that attracted far stronger polling numbers than was reflected in the final congressional vote. For instance, the December 2010 repeal of the “Don’t Ask, Don’t Tell” policy, which barred the service of homosexuals in the armed forces, attracted only 63 votes in the Senate to invoke cloture,<sup>26</sup> at a time when polls indicated that over 70 percent of the public favored repeal of the older policy.<sup>27</sup>

The passage of the Fair Sentencing Act of 2010 itself suggests just how difficult it was, and remains, to thread the legislative needle when it comes to reducing mandatory minimum sentences. Consider, first, the long gestation period for this statute. It partially repeals drug sentences enacted 24 years earlier.<sup>28</sup> The original drug law was highly visible, and subject to widespread critique from its earliest years. That critique came from sitting legislators and from judges, including those appointed both by Democratic and

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<sup>24</sup> For example, if Republicans were to hold both legislative chambers and White House, they might receive credit from the voters for the bipartisan achievement of small reductions in mandatory minimums. In such a context, however, Democrats might hold out for larger reductions and filibuster the inadequate Republican alternative.

<sup>25</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>26</sup> See Mark Arsenault, Senate votes to repeal ‘don’t ask, don’t tell,’ Boston Globe, Dec. 18, 2010, available at [http://www.boston.com/news/politics/politicalintelligence/2010/12/dont\\_ask\\_dont\\_t.html](http://www.boston.com/news/politics/politicalintelligence/2010/12/dont_ask_dont_t.html) (describing cloture vote).

<sup>27</sup> See Washington Post-ABC News Poll, WASH. POST., Dec. 13, 2010, available at [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_12132010.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_12132010.html) (77 percent); CNN/Opinion Research Corp. Poll, CNN, Nov. 17, 2010, available at <http://i2.cdn.turner.com/cnn/2010/images/11/17/re116e.pdf> (72 percent). These levels of support were lower in polls conducted earlier in 2010. See Poll: U.S. Voters Say Gays in Military Should Come Out, Quinnipiac University Poll Finds, QUINNIPIAC UNIV., Feb. 10, 2010, available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1422> (66 percent describe “don’t ask, don’t tell” as discrimination); CBS News/NY Times Poll, Gays in the Military, CBS NEWS, Feb. 11, 2010, available at [http://www.cbsnews.com/htdocs/pdf/poll\\_021110\\_2pm.pdf](http://www.cbsnews.com/htdocs/pdf/poll_021110_2pm.pdf) (58 percent favor gay men and lesbians serving openly).

<sup>28</sup> See Anti-Drug Abuse Act of 1986, P.L. 99-570, 100 Stat. 3207.

Republican presidents.<sup>29</sup> The administrative agency that Congress entrusted to monitor and improve federal sentencing policy, the U.S. Sentencing Commission, recommended repeatedly over the years that Congress should reduce the gap between the punishments for powder cocaine and crack cocaine.<sup>30</sup> This statute became a major flash point for arguments about racial injustice in criminal punishments; it never lacked for attention, and always remained at the top of the legislative wish list for groups that wanted to see reductions in federal mandatory minimums.<sup>31</sup> Yet with all of these advantages, the effort to reduce the punishments under this one federal statute took almost a quarter century.

Consider also the level of compromise necessary to attract the necessary votes from the minority party. The bill that ultimately became the Fair Sentencing Act was introduced by Senator Richard Durbin and several other Democrats in October 2009.<sup>32</sup> The bill was revised in two significant ways in committee. First, legislators restored part of the gap between crack and powder sentences to attract the necessary votes. Under the 1986 law, possession of five grams of crack triggered a five-year mandatory minimum, the same sentence that applied to a person convicted of distributing 500 grams of powder.<sup>33</sup> Durbin's original bill completely eliminated the disparity in the amount of crack and powder necessary to trigger a mandatory minimum sentence.<sup>34</sup> Under the final version of the legislation, the five-year minimum would apply to someone in

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<sup>29</sup> See Marcia Coyle, *Judges Give Thumbs Down to Crack, Pot, Porn Mandatory Minimums*, NAT'L L.J., June 16, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202462732111&slreturn=1&hblogin=1> (describing results of U.S. Sentencing Commission survey of federal judges); see also U.S. Sentencing Comm'n, Results of Survey of United States District Judges January 2010 through March 2010 (2010), available at [http://www.ussc.gov/Research/ResearchProjects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research/ResearchProjects/Surveys/20100608_Judge_Survey.pdf).

<sup>30</sup> The Commission amended the federal sentencing guidelines to reduce the differential between punishments in 1995 but Congress overturned the amendments. In 2002, the Commission recommended that Congress itself should reduce the ratio, but the legislators took no action. Then in May 2007, the Sentencing Commission took action on its own, amending the crack cocaine guidelines to eliminate any reliance on a 100-to-1 ratio, even though mandatory minimum penalty statutes remained in place to trump the guideline sentences in some cases. The Commission also recommended again that Congress amend the statute. See U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (May 2007), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>31</sup> See, e.g., Marc Mauer, *The Impact of Mandatory Sentencing Policies in the United States*, Oct. 28, 2009, available at [http://www.sentencingproject.org/doc/publications/sl\\_mandatory\\_sentencing\\_canadatestimony.pdf](http://www.sentencingproject.org/doc/publications/sl_mandatory_sentencing_canadatestimony.pdf).

<sup>32</sup> See Carrie Johnson, *Bill Targets Sentencing Rules for Crack and Powder Cocaine*, WASH. POST, Oct. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101501992.html>.

<sup>33</sup> See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

<sup>34</sup> See Sen. Dick Durbin, *Durbin Introduces Bill to Eliminate Sentencing Disparity Between Crack and Powder Cocaine* (Oct. 15, 2009), available at <http://durbin.senate.gov/showRelease.cfm?releaseId=318978>.

possession of 28 grams of crack, which set the new disparity between crack and powder at an 18-to-1 ratio.<sup>35</sup>

Second, the legislation increased penalties for some drug offenders, based on violent acts that defendants commit in connection with their drug offenses.<sup>36</sup> This allowed Senators to vote for a package that increased some sentences while decreasing others, avoiding a clear-cut vote to reduce sentences.

Support for the revised bill came from all of the Republican Senators on the Judiciary Committee<sup>37</sup> and from the Department of Justice.<sup>38</sup> Advocacy groups for reductions in drug sentences, such as Families Against Mandatory Minimums, endorsed the legislation as the best available bill in the current political environment.<sup>39</sup> The legislation earned a unanimous vote in the Judiciary Committee, and was approved by voice vote on the Senate floor in March 2010.<sup>40</sup> A voice vote can only occur with unanimous consent.

Although the House would have preferred a bill that came closer to a true equalization of crack and powder penalties, the House leadership eventually concluded that no further concessions would come from the Senate, and passed the Senate version of the bill. Only one Representative, Lamar Smith of Texas, spoke against the bill, asking why the Congress was willing to risk “another surge of addiction and violence by reducing penalties,”<sup>41</sup> and concluding that the reduced penalties amounted to “coddling some of the most dangerous drug traffickers in America.”<sup>42</sup>

This bill was a nudge rather than a push. But it is difficult to view the statute as a “tipping point” or the start of any “cascade effect” that would lead to the repeal or reduction of many other federal mandatory minimum sentencing statutes. None of the Senators framed this statute as the first in a series of amendments to the sentencing laws; indeed, even sentencing reform advocates did not pursue this hope. The attention of advocates did not turn to additional federal statutes to propose as further candidates for

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<sup>35</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

<sup>36</sup> *See id.* § 5.

<sup>37</sup> *See* Sen. Jeff Sessions & Sen. Orrin Hatch, Sessions, Hatch Commend Bipartisan Compromise on Drug Sentencing (Mar. 11, 2010), *available at* [http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord\\_id=4edd4f5e-019d-1f8e-129d-d463e1424d49](http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=4edd4f5e-019d-1f8e-129d-d463e1424d49).

<sup>38</sup> *See* Att’y Gen. Eric Holder, Statement of the Attorney General on Senate Judiciary Committee’s Approval of the Fair Sentencing Act (Mar. 11, 2010), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100311.html>.

<sup>39</sup> *See* Families Against Mandatory Minimums, Senate Judiciary Votes to Reform Federal Crack Law (Mar. 11, 2010), *available at* <http://www.famm.org/NewsandInformation/PressReleases/SenateJudiciaryVotestoReformFederalCrackLaw.aspx>.

<sup>40</sup> *See id.*

<sup>41</sup> Luna & Cassell, *supra* note 1, at 32 (quoting 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Lamar Smith)).

<sup>42</sup> *Id.* at 5.

amendment. Instead, they began arguing for retroactive application of the Fair Sentencing Act.<sup>43</sup>

The fact that the Fair Sentencing Act of 2010 attracted no meaningful Republican opposition is significant. Inaction remains the first option in the federal legislative process. A given policy position might prove substantively attractive to a majority of legislators in the House and the Senate, but it will not become law. A change to mandatory minimum sentences might even appeal to a majority of Congressmen and 60 members of the Senate (enough to invoke cloture to break a filibuster), but it still will not be enough. Senators in the minority party will continue to oppose sentencing reform legislation until it gains the approval of virtually every other Senator in the minority party.

Luna and Cassell's theory of minimalism offers some reason to believe that individual legislators will become convinced from time to time that changes to the sentencing laws are worthwhile. That personal conversion may happen more frequently if the reforms are presented in small steps, based on modest rationales. But the institutional decision rules in the federal legislative process tell us that the vote count will have to approach unanimity before any change will occur. One small reduction in sentences enacted every 24 years is a realistic – and underwhelming – prediction of what we might expect from the federal system.<sup>44</sup>

## II. MINIMALISM AND THE STATE LEGISLATIVE CONTEXT

Is minimalism any more likely to work in the state legislative process? Here, there are a few reasons for optimism. To begin with, the experience in the state legislative context has been a bit more positive for the reduction or repeal of mandatory minimum sentences. At the end of 2009, advocates for the repeal of mandatory minimums could point to 11 states that had repealed or reduced such sentencing laws over the previous decade.<sup>45</sup> A year later, they could point to new repeal or reduction statutes in New Jersey, Rhode Island, Massachusetts, and South Carolina, for a total of 15 states taking such action during roughly one decade.<sup>46</sup>

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<sup>43</sup> See Letter from Marc Mauer, Exec. Director, Sentencing Project, to Sen. William K. Sessions, Chair, U.S. Sentencing Commission (Aug. 16, 2010), *available at* [http://www.sentencingproject.org/doc/publications/dp\\_CommissionLetterFSA Retroactivity.pdf](http://www.sentencingproject.org/doc/publications/dp_CommissionLetterFSA Retroactivity.pdf).

<sup>44</sup> Note that minimalism works better for judges because inaction is not an option for judges. Judges must decide the case that litigants present to them.

<sup>45</sup> See FAMILIES AGAINST MANDATORY MINIMUMS, 19 FAMMGRAM 3, at 9 (Fall 2009), *available at* <http://www.famm.org/Repository/Files/FGfall09FINAL.pdf>.

<sup>46</sup> See FAMILIES AGAINST MANDATORY MINIMUMS, 21 FAMMGRAM 3, at 10 (Fall 2010), *available at* <http://www.famm.org/Repository/Files/FGfall10final.pdf>. (Massachusetts and

Changes to sentencing laws, of course, move in both directions. Some states did increase their penalties during this same period.<sup>47</sup> But the state legislative record does suggest that the process at the state level does not end with inaction as often as the federal process does.

What might explain a greater level of legislative activity at the state level than in the U.S. Congress? For one thing, a legislature that eliminates a mandatory minimum sentencing statute does not eliminate the possibility of high sentences in aggravated cases. When the state legislature passes a new sentencing statute that delegates to prosecutors and judges the power to choose among a wider range of punishments for a defendant, those other officials will take the blame for any future low sentences that attract public disapproval. In this sense, repeal of mandatory minimum sentences operates like any other “delegation” to an administrative agency, allowing the legislature to endorse popular general principles and leaving the difficult concrete tradeoffs for some other actor to finish.<sup>48</sup>

This traditional benefit of delegation to administrative experts may have more obvious appeal to state legislators because the administrative infrastructure for criminal law enforcement and corrections is relatively strong in the states. The sentencing commissions in the states have, for the most part, developed long-term credibility with their legislatures as reliable sources of information about the cost of crime legislation and the systemic effects of changes to a single sentencing law.<sup>49</sup> Even in states without a sentencing commission, state corrections departments number among the largest bureaucracies in the state, overseeing one of the largest budgets in state government.<sup>50</sup>

State legislators may also find the delegation strategy especially attractive because they have relatively small legislative staffs and therefore cannot build independent expertise on many

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South Carolina legislation); FAMILIES AGAINST MANDATORY MINIMUMS, 21 FAMMGRAM 2, at 9-10 (Spring 2010), available at <http://www.famm.org/Repository/Files/FGSpring10.pdf> (New Jersey legislation); FAMILIES AGAINST MANDATORY MINIMUMS, 20 FAMMGRAM 1, at 10 (Winter 2010), available at [http://www.famm.org/Repository/Files/FGwinter10Final\\_Issue.pdf](http://www.famm.org/Repository/Files/FGwinter10Final_Issue.pdf) (Rhode Island legislation).

<sup>47</sup> See Douglas A. Berman, *Looking Closely at the Tougher Sentences Approved by Oregon Voters in Measure 73*, SENT’G L. & POL’Y BLOG (Nov. 4, 2010, 7:50 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2010/11/looking-closely-at-the-tougher-sentences-approved-by-oregon-voters-in-measure-73-.html](http://sentencing.typepad.com/sentencing_law_and_policy/2010/11/looking-closely-at-the-tougher-sentences-approved-by-oregon-voters-in-measure-73-.html) (expanding minimums for drunk driving and sex offenses).

<sup>48</sup> See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748-53 (2002); see also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).

<sup>49</sup> See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194-98, 1203-07, 1219 (2005).

<sup>50</sup> See Cal. Dep’t of Corrections & Rehabilitation, *Growth in Bureaucracy* (Background Briefing Paper, 2009), available at <http://www.assembly.ca.gov/acs/committee/c423/031109/background%203.11.2009.pdf>.

issues.<sup>51</sup> Some states rely on part-time legislators, further eroding their capacity to address complex topics without the guidance of a full-time bureaucracy.<sup>52</sup>

State legislatures may also take small steps away from mandatory minimum sentences because the criminal justice budget matters more in the states than in the federal system.<sup>53</sup> While the federal prison and corrections system is one of the larger systems in the country, it makes up a negligible percentage of the total federal budget.<sup>54</sup> On the other hand, the state corrections budget tends to be among the largest lines in a state budget.<sup>55</sup> Any savings in the use of prison could free up a relatively large portion of the available tax dollars for competing worthy uses. Note also that fiscal discipline carries its own strong tradition in many states, sometimes reinforced by a balanced budget provision written into the state constitution.<sup>56</sup>

States could also benefit in a fiscal sense from the repeal of mandatory minimum sentences because such changes in the law give local district attorneys less power over state expenditures. The district attorneys, who are elected by voters at the *local* level, make the choices that determine how much the *state* taxpayers must spend on corrections.<sup>57</sup> These misaligned incentives could produce a spending spree, with each local prosecutor attempting to use a disproportionate share of state correctional resources, asking taxpayers statewide to subsidize the local public safety.<sup>58</sup> A repeal of mandatory minimum sentences makes the prosecutor relatively less important as a driver of state corrections resources, and serves as a partial answer to the problem of spending other people's money.

These hopeful signs in the state legislatures are institutional advantages, not individual ones. Members of the legislature at the state and the federal levels are equally committed, as individuals, to

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<sup>51</sup> See *Full and Part-Time Legislatures*, NAT'L CONF. OF ST. LEGISLATURES (June 2009), available at <http://www.ncsl.org/?tabid=16701>.

<sup>52</sup> See *id.*

<sup>53</sup> See Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 128 (2005).

<sup>54</sup> See *id.* at 126 & n.28.

<sup>55</sup> See *id.* at 128; *Actions and Proposals to Balance FY 2011 Budgets: Criminal Justice Cuts*, NAT'L CONF. OF ST. LEGISLATURES (July 2010), <http://www.ncsl.org/?tabid=19645> (last visited Feb. 25, 2011); PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1, 11-14 (Mar. 2009), available at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf).

<sup>56</sup> See *State Balanced Budget Provisions*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 2010), <http://www.ncsl.org/?tabid=12651> (last visited Feb. 25, 2011).

<sup>57</sup> See Adam Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 75-77 (2008).

<sup>58</sup> See *id. passim*; Ronald F. Wright, *Prosecutor Elections and Overdepth in Criminal Codes*, in CRIMINAL LAW CONVERSATIONS 537 (Paul H. Robinson, Kimberly Kessler Ferzan, and Stephen P. Garvey eds., 2009).

their own diagnoses of public safety threats.<sup>59</sup> They are equally likely to respond well, as individuals, when reductions to a popular strategy, such as mandatory minimum sentencing statutes, are framed in minimalist terms to avoid any fundamental conflicts with the legislator's core guiding principles.

The differences between the federal government and the states appear instead at the institutional level. Voting rules in the legislature that create fewer bottlenecks make it easier for voting outcomes to reflect the preferences of a current majority. In states where this is true, the voting rules create a space where minimalist proposals to individual legislators have a greater chance to succeed. Similarly, where state practices make it harder to ignore the fiscal burdens of criminal law enforcement, a minimalist framing of punishment changes will receive a longer and more serious look. Where state institutions encourage legislators to depend more heavily on the advice and perspective of experts in the field, minimalist efforts to reduce the legislator's role in sentence selection will win more often. In short, if a minimalist theory can change the mindset of a legislator, the institutional context tells us how often the change of individual mindset will matter to the outcome of a vote. The current federal institutional context suggests that a change of some individual views will not matter very much; the answer may be different in the institutional context for some states.

#### CONCLUSION

While minimalism works better in some institutional contexts than others, larger changes in the cultural context might, in the long run, overwhelm these current institutional differences. Mandatory minimum sentences are built on the traditional criminal law framework of legislatively specified punishment for the commission of specified criminal acts. If you do the crime (that is, the government proves each statutory element of a particular offense), you must do the time (the minimum sentence specified in the statute).

That model, focused on particular acts of offenders, might be on the wane. Instead of waiting for people to commit wrongful acts to punish them, we are finding ways to identify people who present the greatest threats of future harms, and detaining them to prevent those harms before they happen.<sup>60</sup> A combination of factors might help us

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<sup>59</sup> See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 149 (2006).

<sup>60</sup> See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

identify the threats – including the prior lesser bad acts of the person, his or her mental health status, age, and socioeconomic circumstances. This prevention paradigm is becoming more dominant in our civil commitment practices,<sup>61</sup> our immigration enforcement,<sup>62</sup> and in some types of criminal adjudications and sentences.<sup>63</sup>

As the prevention paradigm grows, mandatory minimum penalties may seem less and less helpful, and even counterproductive. The paradigm requires state officials to keep many options open to respond to threats and to assert control. A mandatory minimum penalty is a restriction of options for the state. Thus, the reduction or repeal of mandatory minimum sentences does not necessarily mean a reduced scope in the reach of social control.

The minimalist strategy is likely to take years to show substantial results – probably even more years for the federal system than for some states. As decades and generations pass, if the prevention paradigm continues to grow, the minimalist strategy may succeed just as it becomes irrelevant.

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<sup>61</sup> See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 121-30, 165-66 (2005); see also *id. passim* (discussing objections to preventative model and concluding a modified preventative model would “civilize” criminal justice).

<sup>62</sup> See David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism* (Jan. 2011) (unpublished manuscript) (on file with author).

<sup>63</sup> See Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. (forthcoming 2011), available at [http://papers.ssrn.com/5013/papers.cfm?abstract\\_id=1753262](http://papers.ssrn.com/5013/papers.cfm?abstract_id=1753262); Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: Ten Objections and Ten Rebuttals*, SAN DIEGO L. REV. (forthcoming 2011) (symposium paper, on file with author).