JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE PAUL G. CASSELL
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BEFORE

THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"MANDATORY MINIMUM SENTENCING LAWS – THE ISSUES"

June 26, 2007

STATEMENT ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference of the United States and its Criminal Law Committee to discuss the damage mandatory minimum sentences do to logic and rationality in our nation's federal courts.

Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases, producing what the late Chief Justice Rehnquist has aptly identified as "unintended consequences."[1]

Mandatory minimum sentences not only harm those unfairly subject to them, but do grave damage to the federal criminal justice system – damage that will be the focus of my testimony today. Perhaps the most serious damage is to the public's belief that the federal system is fair and rational. Mandatory minimum sentences produce sentences that can only be described as bizarre. For example, recently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder,

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[1] *See* William H. Rehnquist, *Luncheon Address* (June 18, 1993), *in* United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993) (suggesting that federal mandatory minimum sentencing statutes are "perhaps a good example of the law of unintended consequences").

espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison – the maximum suggested by the Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

Irrational sentences like Angelos' harm the system in various ways. Such sentences harm crime victims. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract "war on drugs."

Irrational mandatory sentences also misdirect our resources. It will cost the taxpayers more than a $1,000,000 to incarcerate Mr. Angelos (assuming that he doesn't end up needing extra taxpayer dollars to pay for his medical care while he is incarcerated in his elderly years). This money could be far more productively spent to fight crime by putting extra law enforcement officers on the street or prosecutors into courtrooms.

Finally, unduly harsh mandatory sentences bring the system into disrepute in the eyes of the public. When the public learns about illogical federal sentences that span several decades (like the 55 years for Mr. Angelos), they may respond in ways that will harm the ability of the system to do justice. For example, if jury members become convinced that the federal system does not mete out justice, they may refuse to convict even dangerous criminals.

In my testimony today on behalf of the Judicial Conference, I will address four points. In Part I, I will describe the Weldon Angelos case in greater detail, demonstrating how the 55 year sentence in that case was cruel and unusual, unwise and unjust. I will also briefly review the case of Marion Hungerford, sentenced to more than 150 years in federal prison for gun charges,

even though she never actually touched a weapon. In Part II, building from these illustrations, I will explain why the Judicial Conference's has long opposed mandatory minimum sentences. In Part III, I will demonstrate that the Judicial Conference's position is nearly universally shared, particularly by those disinterested observers who have most closely studied the issue such as the United States Sentencing Commission. In Part IV, I will conclude by providing the Committee with some preliminary thoughts about alternatives to prevent the injustices created by mandatory minimum sentences.

I. TWO EXAMPLES OF INJUSTICE: MANDATORY MINIMUM SENTENCES IN THE FEDERAL COURTS

A. The Case of Weldon Angelos

It is hard to explain why a federal judge is required to give a longer sentence to a First-time offender who carried a gun to several marijuana deals than to a man who murdered an elderly woman. Our mandatory minimum sentencing scheme recently forced me to do exactly that.

In 2004, I had to sentence Weldon Angelos. He was a twenty-four-year-old, first-time offender who was a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agreed that Mr. Angelos should serve about six to eight years in prison. But there were three additional firearms offenses for which I had to impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insisted that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urged me to

sentence Mr. Angelos to a prison term of no less than 61½ years–six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relied on a mandatory minimum statute–18 U.S.C. § 924(c)–which requires a court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produced 55 years of additional punishment for carrying a firearm.

I believed that to sentence Mr. Angelos to prison for the rest of his life was unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) indicates is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeded what the jury recommended to me. It was also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeded what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55-year additional sentence was decreed by § 924(c).

My role in evaluating § 924(c) was quite limited. A judge can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, I reluctantly concluded that I had no choice but to impose the 55-year sentence. While the sentence appeared to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, I had to find either that the statute had no conceivable justification or was so grossly disproportionate to the crime that no reasonable argument could be made on its behalf. Under

controlling precedents in this case, I had to reject Mr. Angelos' constitutional challenges. Accordingly, I sentenced Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

One of the terrible ironies of this case is that this particular mandatory minimum works a special injustice. Our laws frequently require longer sentences for true recidivists: repeat offenders or hardened criminals who do not learn from the punishments imposed for their first and subsequent mistakes. Criminal history plays a role in increasing sentences for example and drug dealers who have been convicted and served time and who reoffend are subject to sentences twice as long or longer depending on the circumstances. But this particular sentencing scheme required that I sentence a first-time offender to a sentence fit for a hardened recidivist. That is because it treated each instance of possessing a weapon in connection with the marijuana deal as a separate conviction, and the law demands that every conviction after the first be punished with a 25-year consecutive sentence.

It is the mandatory nature of the punishment that forbade me from correcting what was so obviously an unjust sentence. To correct what appeared to be an unjust sentence, I called on the President – in whom our Constitution reposes the power to correct unduly harsh sentences – to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, I recommended that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended.

But Mr. Angelos is, of course, not alone and for that reason I also called on Congress to modify § 924(c) so that its harsh provisions for 25-year multiple sentences apply only to true recidivist drug offenders – those who have been sent to prison and failed to learn their lesson.

Because of the complexity of these conclusions, it might be useful for me to explain them at greater length.

1. Factual Background of the **Angelos** *Case*

Weldon Angelos was twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father, Mr. James B. Angelos, with only minimal contact with his mother. Mr. Angelos had two young children by Ms. Zandrah Uyan: six-year-old Anthony and five-year-old Jessie. Before his arrest, Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in his case were three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant and arranged a sale of marijuana. On May 21, 2002, Mr. Angelos completed a sale of eight ounces of marijuana to the informant for $350. At that time, the informant observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with the informant, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. The government informant again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction, so no § 924(c) count was charged.

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. Officers also discovered two bags which contained approximately three pounds of marijuana. Officers also recovered two other guns in a locked safe, one of which was confirmed as stolen. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana,[2] one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The

[2] 18 U.S.C. § 841(b)(1).

five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps belatedly recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations, offering to plea to one count of drug distribution, one § 924(c) count, and one money laundering count. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the three handguns at Mr. Angelos' home. The jury found him not guilty on three counts – including the two additional § 924(c) counts for the two guns at his girlfriends' home. (I dismissed one other minor count.)

After the conviction, Mr. Angelos' sentence was presumptively governed by the Federal Sentencing Guidelines. Under governing Guideline provisions, the bottom line is that all counts but the three § 924(c) counts combine to create a total offense level of 28.[3] Because Mr. Angelos had no significant prior criminal history, he was treated as first-time offender (a criminal history category I) under the Guidelines. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts was 78 to 97 months.

After the Guideline sentence was imposed, however, I then had add the § 924(c) counts. Section 924(c) prescribed a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction.[4] This meant that Mr. Angelos was facing 55 years (660 months) of

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[3] Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

[4] 18 U.S.C. § 924(c)(1)(A)(i) & (C)(i).

mandatory time for the § 924(c) convictions. In addition, § 924(c) mandated that these 55 years run consecutively to any other time imposed.[5]

2. The Irrationality of § 924(c)

Mr. Angelos contended that § 924(c) effectively sentenced him to life in prison and that the statutory scheme was irrational as applied to him. In particular, Mr. Angelos contended that § 924(c) led to unjust punishment and created irrational distinctions between different offenders and different offenses.

a. Unjust Punishment from § 924(c)

Mr. Angelos argued that his sentence was irrational because the enhancement provided by § 924(c) increased his sentence by 55 years, whereas were the Guidelines alone to be applied, his sentence would be enhanced by only two years.[6] Indeed, one of the pernicious effects illustrated by cases such as *Angelos* is that the government can choose between charging defendants under § 924(c) or relying on the Guidelines' enhancement. As the Eleventh Circuit has noted, "'The relationship between § 924(c) and [the Guidelines enhancement] is an "either/or" relationship at sentencing. If a defendant is convicted [under § 924(c)], he must receive a five year consecutive sentence, but he cannot also have his base offense level enhanced pursuant to [the Guidelines enhancement] because such enhancement would violate the Double Jeopardy Clause of the United States Constitution. However, a defendant who is not convicted of a violation of § 924(c), may receive an enhancement of his base offense level for possession

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[5] 18 U.S.C. § 924(c)(1)(D)(ii).

[6] § 2D1.1(b)(1) (gun enhancement for drug offenses).

of a firearm in connection with a drug offense."[7] The government in the Angelos case chose to pursue § 924(c) counts rather than enhancements under the Guidelines after Mr. Angelos opted to exercise his constitutional right to a trial by jury.

The Guidelines, Mr. Angelos argued, reflect the judgment of experts appointed by Congress to determine "just punishment" for federal criminal offenses. Because his sentence produced by section 924(c) is so at odds with the Guidelines determination of "just punishment," Mr. Angelos argued that such a lengthy sentence would be irrational.

In imposing sentences in criminal cases, a judge is required by the governing statute – the Sentencing Reform Act[8] – to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act]."[9] To give some real content to the Sentencing Reform Act's directives, Congress established an expert body – the United States Sentencing Commission – to promulgate sentencing Guidelines for criminal offenses. The Sentencing Commission, after extensive review of sentencing practices across the country established a comprehensive set of sentencing guidelines. The Commission has carefully calibrated the Guidelines through annual amendments, and Congress has had the opportunity to reject and amend Guidelines that were not to its satisfaction.

The Guidelines provide clear guidance on what is just punishment for federal offenses. To be sure, the Guidelines are advisory only.[10] But the substantive content of the Guidelines is what is relevant here. Both sides agreed that the Guidelines should be considered as providing

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[7] *United States v. Mixon*, 115 F.3d 900, 902 (11th Cir. 1997) (citation omitted).

[8] 18 U.S.C. § 3551 et. seq.

[9] 18 U.S.C. § 3553(a).

[10] *United States v. Booker,* 543 U.S. 220 (2005).

guidance on the appropriate penalty. Moreover, Congress has directed that courts must follow the Guidelines in imposing sentence unless some unusual factor justifies a departure.[11] As a result, Congress has in essence instructed the courts that the Guidelines provide "just punishment" for criminal offenses. It could hardly be otherwise, as Congress would not have gone to the trouble of having an expert body promulgate sentencing guidelines if those guidelines failed to prescribe the appropriate sentences. In short, the views of the Sentencing Commission are entitled to "great weight because the Sentencing Commission is the expert body on federal sentencing."[12]

In the *Angelos* case, neither side offered any good reason for concluding that a Guidelines sentence would fail to achieve just punishment. The Guidelines specify sentences for all crimes covered by the federal criminal code, including all the crimes committed by Mr. Angelos. Setting aside the three firearms offenses covered by the § 924(c) counts, all of Mr. Angelos' other criminal conduct resulted in an offense level of 28. Because Mr. Angelos was a first-time offender, the Guidelines then specified a sentence of between 78 to 97 months. It is possible to determine, however, what a Guidelines sentence would be covering all of Mr. Angelos conduct, including that covered by the § 924(c) counts. If this conduct were punished under the Guidelines rather than under § 924(c), the result would have been an additional two-level enhancement,[13] increasing the offense level from a level 28 to a level 30. This, in turn, would have produced a recommended Guidelines sentence for Mr. Angelos of 97 to 121 months. Thus,

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[11] 18 U.S.C. § 3553(b)(1).

[12] *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995); *see also Mistretta v. United States*, 448 U.S. 361, 379 (1989) (noting Commission's status as "an expert body").

[13] U.S.S.G. § 2D1.1(b)(1).

the Guidelines suggested that Mr. Angelos' possession of firearms should increase his sentence by no more than 24 months (from a maximum of 97 months to a maximum of 121 months).

Bearing firmly in mind the conclusion of Congress' expert agency that 121 months is the longest appropriate prison term for all the criminal conduct in this case, it came as a something of a shock to then consider the § 924(c) counts. Because Mr. Angelos' possession of firearms was punished not under the Guidelines but rather under § 924(c), I was required to impose an additional penalty of 660 months (55 years) instead of the 24 month enhancement provided for by the Guidelines. It is not at all clear how to reconcile these two sentences. Knowing that the congressionally-approved Guidelines provide for an additional 24 month penalty for the firearms at issue, could a judge conclude that an additional 660 months is a "just punishment"? One architect of the Guidelines has recognized the problem of the discrepancy:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. . . . Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[14]

There is, of course, the possibility that the Sentencing Guidelines are too low in this case and that mandatory minimums specify the proper sentence. The more I investigated, however,

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[14] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993); *see also Neal v. United States*, 516 U.S. 284, 292 (1996). *See generally* U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS 5-15 (1991) (numbers inserted and justifications reordered) (hereinafter SENTENCING COMM. MANDATORY MINIMUM REPORT).

the more I found evidence that the § 924(c) counts led to unjust punishment of Mr. Angelos. For starters, I asked the twelve jurors in this case what they believed was the appropriate punishment for Mr. Angelos. Following the trial – over the government's objection – I sent each of the jurors the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos. Nine jurors responded and gave the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7) 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years. Not one of the jurors recommended a sentence closely approaching the 61½ year sentence created by § 924(c).

At oral argument, I asked the government what it thought about the jurors' recommendations and whether it was appropriate to impose a sentence so much higher than what the jurors thought appropriate. The government's response was quite curious: "Judge, we don't know if that jury is a random representative sample of the citizens of the United States . . . ."[15] Of course, the whole point of the elaborate jury selection procedures used in the case was to assure that the jury was, indeed, such a fair cross section of the population so that the verdict would be accepted with confidence. It was hard to understand why the government would be willing to accept the decision of the jury as to the guilt of the defendant but not it recommendation as to the length of sentence that might be imposed.

More important, the jurors' answers appeared to be representative of what people across the country believe. The crimes committed by Mr. Angelos were not uniquely federal crimes.

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[15] Tr. 9/14/04 at 60.

They could have been prosecuted in state court in Utah or elsewhere across the country. I asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there. The Probation Office reported that Mr. Angelos would likely have been paroled after serving about two to three years in prison. The government gives a substantially similar estimate, reporting that on its understanding of Utah sentencing practices Mr. Angelos would have served about five to seven years in prison.[16] Even taking the higher figure from the government, the § 924(c) counts in the *Angelos* case resulted in punishment far beyond what Utah's citizens, through its state criminal justice system, provides as just punishment for such crimes. On top of this, the government conceded that Mr. Angelos' federal sentence after application of the § 924(c) counts is more than he would have received in *any* of the fifty states.[17]

Of course, one way of determining what people across the country believe is to look to the actions of Congress. Congress serves as the nation's elected representatives, so actions taken by Congress presumably reflect the will of the people. The difficulty here is that Congress has taken two actions: (1) it created the Sentencing Commission and (2) adopted § 924(c). As between these two conflicting actions, the sentences prescribed by the Sentencing Commission more closely reflect the views of the country. And, indeed, empirical research has demonstrated that the Sentencing Guidelines generally produce sentences that are at least as harsh as those that the public would wish to see imposed.[18]

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[16] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23 n.19 (Apr. 8, 2004).

[17] *Id.* at 23 n.18.

[18] PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1998).

b. Irrational Classifications from § 924(c)

1. Classifications between Offenses

Mr. Angelos contended that his § 924(c) sentence was not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. Perhaps realizing where this evaluation would inevitably lead, the government initially argued that any comparison is futile because, as the Supreme Court suggested in its 1980 decision *Rummel v. Estelle*, different "crimes . . . implicate other societal interests, making any comparison inherently speculative."[19] At some level, this argument is correct; fine distinctions between the relative severity of some kinds of crimes are hard to make. But general comparisons of crimes are possible. As the Supreme Court clarified three years after *Rummel* in *Solem v. Helm*, "stealing a million dollars is viewed as more serious than stealing a hundred dollars."

In evaluating the § 924(c) counts, I started from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that leaves an injured victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in the *Angelos* case, the penalties provided by § 924(c) were simply irrational. Section 924(c) imposed on Mr. Angelos a sentence of 55 years or 660 months. Added to the minimum 78-month Guidelines sentence for a total sentence of 738 months, Mr. Angelos faced a

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[19] *Rummel v. Estelle*, 445 U.S. 263, 282 n.27 (1980).

prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months),[20] a terrorist who detonates a bomb in a public place (235 months),[21] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[22] a second-degree murderer,[23] or a rapist.[24] Table I, *infra*, sets out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[25] In contrast to the serious violent felonies listed in Table I, the crimes committed by Mr. Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin*, Justice Kennedy quite properly called such an assertion "false to the point of absurdity."[26] In his case, however, Mr. Angelos would have been completely punished for his marijuana trafficking by the 78-97 month Guidelines sentence. The § 924(c) counts pile on an additional 55 years *solely* for

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[20] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[21] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[22] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[23] U.S.S.G. § 2A1.2 (base offense level 33).

[24] U.S.S.G. § 2A3.1 (base offense level 27).

[25] *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring).

[26] *Id.* at 1002 (Kennedy J., concurring).

three offenses of possessing firearms in connection with that trafficking. Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape).

Table I
Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old. in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

2. Irrational Classifications between Offenders

Mr. Angelos also argued that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection."[27] This language could have been interpreted in two different ways. One construction would have been that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.[28]

Another, far more expansive construction would have been that an offender who is convicted of two or more counts is subject to an enhanced penalty for each count after the first count of conviction. In 1993 in *Deal v. United States*,[29] the Supreme Court adopted this second construction, reading the "second or subsequent" language in § 924(c) to apply equally to the recidivist who is convicted of violating § 924(c) on separate occasions after serving prison time and to the defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the times at which the convictions took place.[30] In addition, all time imposed for each

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[27] 18 U.S.C. § 924(c)(1).

[28] *United States v. Abreu*, 962 F.2d 1447, 1450 (10th Cir. 1992) (en banc)(*cert. granted, judg. vacated*, 508 U.S. 935 (1993)).

[29] 508 U.S. 129 (1993).

[30] *Id.* at 132-33.

§ 924(c) count must run consecutively to any other sentence.[31] This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. As John R. Steer, Vice Chair of the United States Sentencing Commission, has explained:

> [C]onsider the effects if prosecutors pursued every possible count of 18 U.S.C. § 924(c) . . . . The statute provides for minimum consecutive sentence enhancements of 25 years to life for the second and subsequent conviction under the statute, even if all the counts are charged, convicted, and sentenced at the same time. Pursuing multiple § 924(c) charges at the same time has been called "count stacking" and has resulted in sentences of life imprisonment (or aggregate sentences for a term of years far exceeding life expectancy) for some offenders with little or no criminal history.[32]

Consider the way in which the § 924(c) counts stacked up on Mr. Angelos. He was 24 years old when sentenced. He was to receive at least 78 months for the underlying marijuana offenses. Stacked on top of this was another 5 years for the first § 924(c) conviction. Stacked on top of this was another 25 years for the second § 924(c) conviction. And finally, another 25 years was stacked on top for the third § 924(c) conviction. Even assuming credit for good time served, Mr. Angelos will be more than 55-years-old before he even begins to serve the final 25 years his sentence. This happens not because Mr. Angelos "failed to learn his lessons from the initial punishment" and committed a repeat offense. Section 924(c) jumps from a five-year mandatory sentence for a first violation to a 25-year mandatory sentence for a second violation, which may occur just days (or even hours) later.

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[31] 18 U.S.C. § 924(c)(1)(D)(ii).

[32] Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm'n before the ABA Justice Kennedy Comm'n 19 (Nov. 13, 2003).

Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first-time offenders and subsequent offenders. California's tough three-strikes-and-you're-out law can serve as a convenient illustration. Prompted by violence from career criminals who had been in prison and released,[33] California passed a law requiring lengthy prison terms for third-time offenders, even where the third offense could be viewed as relatively minor. In *Ewing v. California*,[34] the Supreme Court upheld a twenty-five to life sentence under California's three-strikes law. While defendant Ewing's third offense was merely stealing $399 worth of golf equipment, the controlling opinion noted that the policy of the law was to "incapacitat[e] and deter[] repeat offenders who threaten the public safety. The law was designed 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.'"[35] In the end, the Court concluded that Ewing's sentence was justified "by his own long, serious criminal record [including] numerous misdemeanor and felony offenses . . . nine separate terms of incarceration . . . and crimes [committed] while on probation or parole."[36]

While some might raise theoretical objections to such recidivist statutes, their underlying logic is at least understandable. But no such logic can justify § 924(c), at least when applied to first offenders such as Mr. Angelos. In cases such as his, the statute blindly draws no distinction between recidivists and first-time offenders.

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[33] *See generally* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[34] 538 U.S. 11 (2003).

[35] *Id.* at 15 (O'Connor, J.) (quoting Cal. Penal Code Ann. § 667(b)).

[36] *Id.* at 30.

The irrationality only increases when section § 924(c) is compared to the federal "three strikes" provision. Criminals with two prior violent felony convictions who commit a third such offense are subject to "mandatory" life imprisonment under 18 U.S.C. § 3559(c) – the federal "three-strikes" law. But then under 18 U.S.C. § 3582(c)(1) – commonly known as the "compassionate release" provision – these criminals can be released at age 70 if they have served 30 years in prison. But because this compassionate release provision applies to sentences imposed under § 3559(c) – not § 924(c) – offenders like Mr. Angelos are not eligible. Thus, while the 24-year-old Mr. Angelos must serve time until he is into his 70's, a 40-year-old recidivist criminal who commits second-degree murder, hijacks an aircraft, or rapes a child is potentially eligible for release at age 70. In other words, mandatory life imprisonment under the federal three-strikes law for persons guilty of three violent felony convictions is less mandatory than mandatory time imposed on the first-time offender under § 924(c). Again, the rationality of this arrangement is dubious.

The possibility that Angelos will spend longer in prison than career criminals is no mere hypothetical. The same day I sentenced Weldon Angelos, I had before me for sentencing Thomas Ray Gurule.[37] Mr. Gurule is 54-years-old with a lifelong history of criminal activity and drug abuse. He has spent more of his life incarcerated than he has in the community. He has sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons. His most recent conviction (in a trial before me) was for carjacking. In August 2003, after failing to pay for gas at a service station, Mr. Gurule was pursued by the station manager. To escape, Mr. Gurule broke into the home of a young woman, held her at knife point, stole her jewelry, and forced her to drive him away from the scene of his crimes. During the drive, Mr. Gurule threatened both the woman and her family.

[37] *United States v. Gurule*, No. 2:04-CR-209-PGC.

For this serious offense – the latest in a long string of crimes for which he has been convicted – I had to sentence Mr. Gurule to "life" in prison under 18 U.S.C. § 3559(c). But because of the compassionate release provision, Mr. Gurule is eligible for release after serving 30-years of his sentence. Why Mr. Gurule, a career criminal, should be eligible for this compassionate release while Mr. Angelos is not, is not at all obvious.

c. Demeaning Victims of Actual Violence and Creating the Risk of Backlash

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's argument–one that may have some validity in the classroom but little salience in the real world. So what, some may say, if Angelos spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

This is no mere academic point, as a case from my docket will illustrate. The same day I sentenced Mr. Angelos, I imposed sentence in *United States v. Visinaiz*, a second-degree murder case.[38] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. One evening, while drinking together, the two got into an argument.

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[38] *United States v. Visinaiz*, No. 2:03-CR-701-PGC.

Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who responded by beating her to death by striking her in the head with a log at least three times. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river weighted down with cement blocks. Following his conviction for second-degree murder, Mr. Visinaiz came before me as a first-time offender for sentencing. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.[39] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. I followed that recommendation. Yet on the same day, I am supposed to impose a sentence of 738 months for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the *Visinaiz* case–not to mention victims of a vast array of other violent crimes–can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions–to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

d. Undermining Public Confidence in Sentencing

Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice and potential backlash. As shown earlier, applying § 924(c) to cases such as this one leads to sentences far in excess of what the public believes is appropriate. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror

[39] U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

who is worried about unjust sentencing to "hang" a jury and prevent a conviction. This is not an abstract concern. In the case of *United States v. Molina,*[40] the jury failed to reach a verdict on a § 924(c) count which would have added 30 years to the defendant's sentence. Judge Weinstein, commenting on "the dubious state of our criminal sentencing law"[41] noted that "[j]ury nullification of sentences deemed too harsh is increasingly reflected in refusals to convict."[42] In the last several drug trials before me, jurors have privately expressed considerable concern after their verdicts about what sentences might be imposed. If federal juries are to continue to convict the guilty, those juries must have confidence that just punishment will follow from their verdicts.

Moreover, maintaining a secure society and protecting citizens from crime depends in large measure on the cooperation of citizens. To the extent that the criminal justice system is seen as producing unreliable outcomes, including unjust sentences, the willingness of ordinary law-abiding citizens to step up to assist authorities could be undermined. This concern has been raised most recently in a different sentencing context by the United States Sentencing Commission with respect to the penalty structure for crack cocaine sentencing. Crack penalties are perceived by many to promote unwarranted sentencing disparity based on race. As the Commission pointed out "[a]lthough this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system." [43] Mandatory sentences

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[40] 963 F.Supp. 213 (E.D.N.Y. 1997).

[41] *Id.* at 213.

[42] *Id.* at 214.

[43] UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, viii (May 2002).

that produce unjust results that injustice create the same disrespect for and lack of confidence in the federal criminal justice system.

3. Justifications for § 924(c)

Given these many problems with § 924(c) as applied to the *Angelos* case – its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims of actual criminal violence – what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes such as § 924(c):

> (1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty, (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.[44]

These six justifications potentially apply to § 924(c). In its skillfully-argued defense of the § 924(c) sentence for Mr. Angelos, the government did not rely on the first rationale – the "just punishment" rationale – presumably because the sentence imposed on Mr. Angelos was unjust by any reasonable objective measure.

Nor did the government advance the second rationale: that § 924(c) eliminates sentence disparities. Again, the reasons are easy to see. Section 924(c) displaces a carefully-developed sentencing guideline system that would assure that Mr. Angelos receives equal punishment with other similarly-placed offenders. Indeed, § 924(c) creates the potential for tremendous sentencing disparity if federal prosecutors across the country do not uniformly charge § 924(c) violations. Such concerns are founded in real world data. In 1991, the Sentencing Commission

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[44] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra* note 14, at 5-15.

found that only about 45 percent of drug offenders who qualified for a § 924(c) enhancement were initially charged under the statute, and for 26 percent of these offenders the counts were later dismissed.[45] In 1995, the Commission again found that only a minority of qualified offenders–between 24 and 44 percent–were convicted and sentenced for applicable § 924(c)'s.[46] Again in 2000, the Commission found a pattern of inconsistent application. Only between 10 and 30 percent of drug offenders who personally used, carried, or possessed a weapon in furtherance of a crime received the statutory enhancement.[47]

The Justice Department recently took partial steps to reduce charging disparities stemming from § 924(c). A directive from the Attorney General – the so-called "Ashcroft Memorandum" – required prosecutors to file the first readily – provable § 924(c) count and a second count in certain circumstances:

> (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
> (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are *crimes of violence*, federal prosecutors shall, in all but exceptional cases, charge and pursue the first *two* such violations.[48]

As applied to the facts of the Angelos case, the Ashcroft Memorandum seems only to highlight the problem of disparity rather than resolve it. First, when three or more violations of § 924(c) are involved, the directive requires federal prosecutors to "pursue the first *two*

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[45] *See id.* at 57-58.

[46] *See* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41 (2000).

[47] Statement of John R. Steer to the ABA Justice Kennedy Commission, *supra*, at 17.

[48] Memo. to All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphases added).

violations." In this case, the prosecutors pursued *five* violations, ultimately obtaining convictions on *three*. It seems likely that the prosecutors' charging decisions in this case would not have been replicated in other parts of the country. Second, the directive requires federal prosecutors to pursue at least two § 924(c) counts when the predicate offenses are "crimes of violence." Here, the predicates were drug crimes, which the directive does not discuss. Thus, the directive offers no guidance as to whether the prosecutors handling this case should have pursued multiple § 924(c) counts and, if so, how many.

There is also a lack of guidance to federal agents investigating these crimes. In this case, for example, the government did not arrest Mr. Angelos immediately after the first "controlled buy," but instead arranged two more such buys, which then produced one of the additional § 924(c) counts. It is not clear that other law enforcement agents would have allowed Mr. Angelos to continue to deal drugs after the first buy rather than taking him into custody immediately. Of course, one of the rationales for the "stacking" feature of § 924(c) is that each additional criminal act demonstrates need for further deterrence. In Angelos' case, though, the additional criminal acts were in some sense procured by the government's decision not to arrest him.

Because of the lack of guidance on these prosecutory and investigative issues, Mr. Angelos received a sentence far in excess of what many other identically-situated offenders will receive for identical crimes in other federal districts. I had been advised by judges from other parts of the country that, in their districts, an offender like Mr. Angelos would not have been charged with multiple § 924(c) counts, particularly the third count. This is no trivial matter. The decision to pursue, for example, a third § 924(c) count in this case makes the difference between a 36-year-sentence and 61-year sentence. In short, § 924(c) seems to create the serious risk of

producing massive sentencing disparities between identically-situated offenders within the federal system. And the problem of disparity only worsens if it is acknowledged that Mr. Angelos would not have been charged with federal crimes in many other states. For all these reasons, the government did not try to defend § 924(c) on an eliminating-disparity rationale.

The government did not advance the third rationale – judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty,[49] there is always the nagging suspicion that the practice is unseemly. In the Angelos case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. The superceding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. Moreover, if its plea-inducing properties justify § 924(c), then it is important to understand who will be induced to plead. Section 924(c) will not visit its harsh punishment "on flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial)."[50] For all these reasons, it is understandable that the government would not want to publicly defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor did the government argue that § 924(c) was needed to provide incentives for drug

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[49] *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

[50] Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 203 (1993).

traffickers to inform on others in their organization.[51] Instead, the rationale advanced by the government was deterrence and incapacitation: the draconian provisions of § 924(c) were necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rested on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home. The Supreme Court has specifically noted "the deterrence rationale of § 924(c),"[52] explaining that a fundamental purpose behind § 924(c) was to combat the dangerous combination of drugs and firearms.[53] Congress is certainly entitled to legislate based on the belief that § 924(c) will "persuade the man tempted to commit a Federal felony to leave his gun at home."[54]

Congress' belief was, moreover, supported by empirical evidence. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison population produces about a 1% to 3% decrease in serious crimes.[55] For example, one recent study concluded that California's three strikes law prevented 8 murders, 4000 aggravated

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[51] *Cf.* Jay Apperson, *The Lock-'em Up Debate: What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994 at C1.

[52] *Simpson*, 435 U.S. at 14.

[53] *Smith v. United States*, 508 U.S. 223, 240 (1993).

[54] 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff).

[55] *See, e.g.*, Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996); James Q. Wilson, *Prisons in a Free Society*, 117 PUB. INTEREST 37, 38 (1998).

assaults, 10,000 robberies, and 400,000 burglaries in its first two years of operation.[56] One study found that Congress' financial incentives to states to which (like the federal system) force violent offenders to serve 85% of their sentences decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant.[57] While no specific study has examined § 924(c), it was reasonable to assume – and Congress was entitled to assume – that it has prevented some serious drug and firearms offenses.

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs more than $24,000 per year,[58] the 61-year-sentence I was asked to impose on Angelos would cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55-years) about $1,320,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could be far more effectively spent on other law

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[56] *See, e.g.*, Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

[57] Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002).

[58] MEMORANDUM TO ALL CHIEF PROBATION OFFICERS FROM THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS REGARDING COSTS OF INCARCERATION AND SUPERVISION (May 9, 2007).

enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.[59]

If I were to evaluate these competing tradeoffs, I would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to simply be "tough" on crime. Given limited resources in our society, we also have to be "smart" in the way we allocate our resources. But these tradeoffs are, in the final analysis, for Congress – not the courts. In *Busic,* referring to *Simpson*, the Supreme Court recognized that § 924(c) could lead to "seemingly unreasonable comparative sentences" but that "[i]f corrective action is needed it is the Congress that must provide it. It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[60] The Court further noted that "in our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal.'"[61]

Accordingly, I had no choice but to impose a 55-year-sentence on Mr. Angelos. While that sentence was unjust and created irrational classifications, there was a "plausible reason" for Congress' action. As a result, my obligation was to follow the law and to reject Mr. Angelos' equal protection challenge to the statute.

B. The Case of Marion Hungerford

[59] *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27J. LEGAL STUD. 1 (1998).

[60] *Busic,* 446 U.S. at 405 citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

[61] *Id.* at 410.

It is difficult to imagine a case that might make the result in the *Angelos* case almost appear reasonable, but such an example can be found in *United States v. Hungerford*,[62] a case from the Ninth Circuit Court of Appeals. This case demonstrates that the federal courts of appeals are bound by unjust mandatory minimum sentences no less than the federal trial courts. In *Hungerford*, the appellate court rejected the defendant's constitutional challenges to her sentence. Although Marion Hungerford never held a weapon during the robberies that her boyfriend carried out, she was involved in the planning of the crimes and enjoyed the spoils of the offense. Accordingly, when she would not agree to a plea bargain, she was convicted of conspiracy and seven counts of robbery and using a firearm in relation to a crime of violence.[63] Because of the seven stacked § 924(c) counts, Hungerford was sentenced to slightly more than 159 years in prison.[64] Although the evidence indicated that Marion Hungerford suffered from a severe case of borderline personality disorder,[65] Ninth Circuit followed established precedent, rejected her claims, and affirmed her sentence.[66] In his concurrence, Judge Reinhardt lamented the injustice of the sentence:

> Not only is the sentence cruel, it is absurd. It imposes a term of imprisonment of 159 years, under which Hungerford would be incarcerated until she reached the age of 208. The absurdity is best illustrated by the judge's reading to Hungerford the terms of supervised release which she would be required to undergo when she emerged from prison toward the end of the first decade of her third century. The judge told Hungerford that "[w]ithin 72 hours of release from custody," – in the year 2162 – she must "report in

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[62] 465 F.3d 1113 (2006).

[63] *Id.* at 1114.

[64] *Id.* at 1119.

[65] *Id.*

[66] *Id.* at 1118.

> person to the probation office," and while on supervised release she must "participate in substance abuse testing to include not more than 104 urinalysis tests." He further ordered Hungerford to "participate in a program for mental health," and "pay part or all of the cost of this treatment, as determined by the U.S. probation officer." ... Certainly, requiring a defendant and a district judge to engage in a charade of this nature cannot increase respect for our system of justice.[67]

Mandatory minimum sentencing laws are blunderbusses – powerful, but crude, lacking the ability to meaningfully distinguish between serious offenders and those who are relatively inculpable. With mandatory minimum sentences, there is no discretion afforded to judges at either the trial or appellate level. In fact, when mandatory minimum sentences are in play, the only individuals with discretion are the prosecutors (who are themselves bound to seek the most serious provable offense by the Ashcroft memo)[68] and the President (who, under extraordinary circumstances, may grant executive clemency).[69]

II. THE JUDICIAL CONFERENCE'S OPPOSITION TO MANDATORY MINIMUM SENTENCES

Because of the injustices mandatory minimums produce in cases like Weldon Angelos' and Marion Hungerford's, the Judicial Conference has consistently opposed mandatory minimum sentences for more than fifty years. At its September 1953 meeting, the Conference

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[67] *Id.* at 1120-21.

[68] *See supra* note 48.

[69] *See* United States Attorney's Manual, Standards for Consideration of Clemency Petitions. Grants of clemency are statistically rare, however. *See* Presidential Clemency Actions by Administration (1945 to 2001), at http://www.usdoj.gov/pardon/actions_administration.htm. The current administration has been particularly cautious in conferring pardons, issuing only 113 in six years, "fewer than any president in 100 years." Michael Isikoff & Mark Hosenball, *The Problem with Pardoning Libby*, NEWSWEEK, Mar. 7, 2007, at: http://www.msnbc.msn.com/id/17507199/site/newsweek/.

endorsed a resolution from the Judicial Conference of the District of Columbia Circuit, opposing enactment of laws that compelled judges to impose minimum sentences and that denied judges the ability to place certain defendants on probation.[70]

Since then, the Judicial Conference of the United States has condemned mandatory minimum sentences with some regularity. In September 1961, the Conference considered several criminal bills pending before Congress.[71] The Conference took no position on the substantive merits of the bills, but "disapproved in principle those provisions requiring the imposition of mandatory minimum sentences."[72] By the next year, opposition to mandatory minimum sentences was considered to be the official position of the Judicial Conference. In March 1962, the Conference supported a bill easing parole restrictions, "consistent with the *established policy* of the Conference concerning mandatory minimum sentences."[73] Legislation containing mandatory minimum sentencing provisions was opposed on these grounds in 1965,[74] 1967,[75] and 1971.[76]

In 1976, the Conference affirmed its opposition, noting that there was no demonstrated need for legislation imposing mandatory minimum terms for certain offenses, and concluding

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[70] JCUS-SEP 53, pp. 28-29.

[71] JCUS-SEP 61, pp. 98-99.

[72] *Id.* at 99.

[73] JCUS-MAR 62, p. 22 (italics added).

[74] JCUS-MAR 65, p. 20.

[75] JCUS-SEP 67, pp. 79-80 ("The Conference approved a recommendation of its Committee confirming the general opposition of the Conference to mandatory minimum sentences.").

[76] JCUS-OCT 71, p. 40 ("The Conference reaffirmed its disapproval of mandatory minimum sentences.").

that such legislation would "unnecessarily prolong the sentencing process and engender additional appellate review and would increase the expenditure of public funds without increase in additional benefits."[77]

In 1981, the Conference opposed a bill that would have imposed extended and strengthened mandatory penalties for the use of firearms in federal felonies.[78] The Conference noted that proposed legislation typically required the imposition of a minimum term while prohibiting probation and parole eligibility.[79] The Conference noted, "Statutes of this type limit judicial discretion in the sentencing function and tend to increase the number of criminal trials and the number of appeals in criminal cases. Upon the recommendation of the Committee the Conference reaffirmed its opposition to legislation requiring the imposition of mandatory minimum sentences."[80]

In March 1990, the Conference noted that the Third, Eighth, Ninth, and Tenth Circuits had all passed resolutions against mandatory minimum sentences, and voted to "urge the Congress to reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities."[81] In May 1990, the Executive Committee of the Judicial Conference, acting on the Conference's behalf, reaffirmed this position in the form of approving a recommendation of the Federal Courts Study Committee that mandatory

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[77] JCUS-APR 76, p. 10.

[78] JCUS-SEP 81, p. 90.

[79] JCUS-SEP 81, p. 93.

[80] *Id.*

[81] JCUS-MAR 90, p. 16.

minimum sentencing provisions be repealed, whereupon the U.S. Sentencing Commission should reconsider the guidelines applicable to the affected offenses.[82] The Conference's longstanding opposition to mandatory minimum terms was reaffirmed in July and August of 1991 by the Executive Committee when it opposed amendments to the Violent Crime Control Act of 1991.[83]

In September 1991, the Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.[84] The Conference noted that "[w]hile the judiciary's overriding goal is to persuade Congress to repeal mandatory minimum sentences, for the short term, a safety valve of some sort is needed to ameliorate some of the harshest results of mandatory minimums."[85]

In March 1993, in the context of a long-range planning initiative, the Conference again agreed to renew efforts to reverse the trend of enacting mandatory minimum prison sentences.[86] Later, in September 1993, the Conference considered the Controlled Substances Minimum Penalty – Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the U.S. Sentencing Commission that attempted to reconcile mandatory minimum sentences with the sentencing guidelines.[87] "The Committee on Criminal Law believed that,

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[82] JCUS-SEP 90, p. 62.

[83] JCUS-SEP 91, p. 45 (opposing mandatory minimum sentencing amendments to S. 1241, 102nd Congress).

[84] JCUS-SEP 91, p. 56.

[85] *Id.*

[86] JCUS-MAR 93, p. 13.

[87] JCUS-SEP 93, p. 46.

although the proposed legislation would not solve all of the problems associated with mandatory minimum sentences, it addresses the essential incompatibility of mandatory minimums and sentencing guidelines and represents a promising approach."[88] On recommendation of the Committee on Criminal Law, the Conference endorsed the concept.[89]

On May 17, 1994, the Executive Committee agreed not to oppose retroactivity of "safety valves" included in pending crime legislation to ameliorate some of the harshest results of mandatory minimum sentences despite the burden that retroactivity may impose upon the judiciary.[90]

The Long Range Plan for the Federal Courts, adopted in 1995, reiterated the Conference position that Congress should be encouraged not to prescribe mandatory minimum sentences.[91] More recently, when considering the appropriate responses to the Supreme Court's decision in *Booker*, the Conference resolved to "oppose legislation that would respond to the Supreme Court's decision by (1) raising directly the upper limit of each guideline range or (2) expanding the use of mandatory minimum sentences."[92] In 2006, the Conference also considered the consequences of mandatory minimum terms in opposing the existing differences between crack and powder cocaine sentences.[93]

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[88] *Id.*

[89] *Id.*

[90] JCUS-SEP 94, p. 42.

[91] JCUS-SEP 95, p. 47.

[92] JCUS-MAR 05, pp. 15-16.

[93] JCUS-SEP 06, p. 18 ("Under the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570), 100 times as much powder cocaine as crack cocaine is needed to trigger the same mandatory minimum sentences.").

Thus, for more than fifty years, since before I was born, the Judicial Conference has consistently opposed mandatory minimum sentencing. The Conference has noted that mandatory minimum sentences diminish judicial discretion, increase the number and cost of trials and appeals, and prolong the sentencing process. For these reasons, the Conference has steadfastly opposed these provisions.

III. OPPOSITION TO MANDATORY MINIMUM SENTENCES IS WIDESPREAD

The Judicial Conference has considerable company in opposing mandatory minimum sentences. Over the years, dozens of academics have criticized such provisions,[94] and scores of federal judges have echoed the condemnation of the Judicial Conference in questioning the wisdom of mandatory minimum terms.[95]

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[94] *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentences*, 152 U. PENN. L. REV. 33 (2003) (suggesting that mandatory minimum sentences invade the function of the judge and the jury); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing,* 48 J. L. & ECON. 591 (2005) (challenging the belief that mandatory minimums decrease sentencing disparity and eradicate overly lenient sentencing); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004) (identifying mandatory minimums as the cause of distortions that skew sentencing authority); Schulhofer, *supra* note 50 (noting that the existence of a "cooperation paradox" in which more culpable offenders get shorter sentences because they possess substantial assistance [information] to offer the prosecutor for a sentence below the mandatory minimum, while less culpable offenders, possessing little or no information to offer, must serve the mandatory term); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992) (noting difficulties in harmonizing mandatory minimum sentences with the federal sentencing guidelines); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform,* 30 FED. B. NEWS & J. 158 (1993) (suggesting that mandatory minimum sentences have distorted the entire structure of federal sentencing).

[95] *See, e.g.*, United States v. Harris, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment) ("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."); United States v. Powell, 404 F.3d 678 (2d Cir. 2005), (vacating the sentence of the district court while recognizing the district court's reluctance to impose a

Even individual Supreme Court justices have challenged the wisdom of legislatively-mandated minimum penalties. In 1993, Chief Justice William Rehnquist criticized mandatory minimum sentences, noting that they are often enacted as legislative gestures of outrage, with no real consideration of their impact upon other aspects of the federal sentencing system:

> Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to "get tough on crime." Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines, as a whole. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.[96]

Ten years later, Justice Anthony Kennedy declared, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[97] The Kennedy Commission of the American Bar

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mandatory life sentence); United States v. Hiveley, 61 F.3d 1358, 1363 (8th Cir. 1995) (Bright, Senior Circuit Judge, concurring) ("These unwise sentencing policies which put men and women in prison for years, not only ruin lives of prisoners and often their family members, but also drain the American taxpayers of funds which can be measured in billions of dollars."); United States v. Abbott, 30 F.3d 71 (7th Cir. 1994) (quoting the district court, "This [sentence]...perhaps is another illustration of the lack of wisdom in mandatory minimum sentences, but I cannot take it upon myself to change the law that Congress has written because I think it is an inappropriate disposition. That, in sum and substance is the reason for this court imposing the sentence. Congress has told me that I must." (internal quotations omitted)); United States v. Brigham, 977 F.2d 317 (7th Cir. 1992) ("Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor."); John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (resigning from the bench because "[w]hile I might have stayed on despite the inadequate pay, I no longer want to be part of our unjust criminal justice system").

[96] Speech of Chief Justice William H. Rehnquist, *supra* note 1.

[97] Speech of Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

Association has echoed these views, urging states, territories, and federal government to repeal mandatory minimum sentence statutes.[98] Justice Stephen Breyer also has been critical of mandatory minimum penalties, noting that they are fundamentally inconsistent with the federal sentencing guideline system established by Congress in the landmark piece of criminal justice legislation, the Sentencing Reform Act of 1984.[99]

> [S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.[100]

But criticism of mandatory minimum sentencing provisions has not been limited to legal academics and members of the judiciary. Members of the national legislature have also expressed reservations about the prudence of mandatory minimums. Like Justice Breyer, Senator Orrin Hatch from my home state has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.[101]

But congressional doubt about the wisdom of mandatory minimum sentences been expressed many times. In 1970, Congress reconsidered the proliferation of mandatory minimum

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[98] American Bar Association, Justice Kennedy Commission, *Reports with Recommendations to the House of Delegates* 9 (Aug. 2004).

[99] Pub. L. No. 98-473, 98 Stat. 2019 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[100] Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), *reprinted at* 11 FED. SENT. REP. 180, 184-85 (1999).

[101] *See* Hatch, *supra* note 14.

provisions that it had effectuated for more than a decade and passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,[102] repealing virtually all of the mandatory drug provisions in the criminal code. Supporters of the Act noted that mandatory minimum sentences alienate youth from mainstream society,[103] infringe upon "the judicial function by not allowing the judge to use his discretion in individual cases,"[104] and impede successful re-entry, obstructing "the process of rehabilitation of offenders."[105]

Like Congress, the public appears to have doubts about the wisdom of mandatory minimum sentencing. At first glance, there appears to be some public support for mandatory minimum sentences. When people were asked if they supported a mandatory "three-strikes" law for offenders convicted of a third violent felony, almost 90 percent of Americans were in favor.[106] But while mandatory minimum sentences enjoy widespread support in the abstract, support decreases significantly when people are asked to apply mandatory sentences to specific cases. In one study, support dropped precipitously from 88 percent to a mere 17 percent when subjects are asked to apply mandatory sentences to specific hypothetical cases.[107] The authors concluded that "these findings suggest that citizens would endorse three-strikes policies that

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[102] Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE (1997).

[107] *See* B. Applegate, et al., *Assessing Public Support for 3-strikes and You're Out Laws: Global Versus Specific Attitudes*, CRIME AND DELINQUENCY, 42, 517 (1996).

focus on only the most serious offenders and *that allow for flexible application.* "[108] Support for mandatory minimum sentences also appears to be waning. In 1995, more than half of the sampled public in the United States held the view that mandatory sentences were a good idea; by 2001, the percentage had declined to slightly more than one-third of respondents.[109] In fact, over half the polled public now favor the elimination of "three-strikes" mandatory sentences,[110] and more than three-quarters support allowing judges to set aside mandatory sentences "if another sentence would be more appropriate."[111] This kind of judicial discretion, authorizing courts, where exceptional circumstances exist, to impose a lesser sentence than the prescribed mandatory sentence, exists in most jurisdictions that impose mandatory minimum sentences.[112]

This public skepticism of inflexible sentencing is warranted. A number of research agencies have concluded that mandatory minimum sentences do not result in expected reduction of general crime rates. In its 1994 report on the consequences of mandatory minimum prison terms, the Federal Judicial Center concluded that "evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals

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[108] *Id.* at 517.

[109] *See Julian Roberts, Public Opinion and Mandatory Sentencing*, CRIM. JUST. & BEHAVIOR, 30 (4), 483 (2003).

[110] *See* Peter D. Hart Research Associates, *Changing Public Attitudes toward the Criminal Justice System* (2002).

[111] *See* Eagleton Institute of Politics Center for Public Interest Polling, *New Jersey's Opinions on Alternatives to Mandatory Minimum Sentencing* (2004); *see also* Quinnipiac College Polling Institute for the New York Law Journal, *69% of New Yorkers Polled Favor Sentencing Discretion over State-Mandated Sentences* (1999).

[112] *See* Julian Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* (2005).

of the criminal justice system."[113] Similar conclusions have been reached by RAND,[114] a National Academy of Sciences Panel,[115] and the General Accounting Office (now the Government Accountability Office).[116] The United States Sentencing Commission, the federal government's premiere authority on matters of penology and punishment, concurs. In the Commission's 1991 special report to Congress on mandatory minimum sentencing,[117] the agency concluded, among other things, that mandatory minimums are not uniformly applied and thus create unwarranted disparity;[118] result in distorted plea negotiation and bargaining that undermine truth in sentencing;[119] result in unwarranted uniformity among differently situated

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[113] Vincent & Hofer, *supra* note 96, at 1.

[114] RAND Corporation Drug Policy Research Center, Mandatory Minimum Drug Sentencing: Throwing Away the Key or the Taxpayers' Money (1997) (concluding that mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing cocaine consumption or drug-related crime).

[115] *See* Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., Understanding and Preventing Violence 6 (1993) (finding that even tripling the length of punishment would result in only negligible reductions in crime). Because the same impulsive offenders who commit many of the offenses resulting in long sentences also suffer from situational, social, or biological deficits that cause them to discount the risk and duration of lengthy imprisonment, even long and mandatory terms of incarceration are unlikely to have significant effects on deterrence. *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173 (2004).

[116] General Accounting Office, GAO-04-105, Federal Drug Offenses: Departures from Federal Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001, at 14-16, 79 (Oct. 2003) (finding that more than half of the drug sentences imposed under mandatory minimums fell below the minimum sentence, typically because of prosecutor's substantial assistance motions, fast-track reductions, and safety-valve reductions).

[117] *See* SENTENCING COMM. MANDATORY MINIMUM REPORT.

[118] *Id.* at ii-iii.

[119] *Id.* at iii.

offenders;[120] and transfer sentencing power from the court to the prosecution.[121] The Commission opined that, although mandatory minimums and the Sentencing Guidelines were motivated by similar concerns for certainty, uniformity, and truth in sentencing, the two systems are "structurally and functionally at odds."[122]

IV. ALTERNATIVES TO INJUSTICE

It is said that those who do not learn from history are doomed to repeat it. After the mandatory minimum sentences enacted by the Narcotic Control Act of 1956 failed, Congress tried to rectify the situation by passing the Comprehensive Drug Abuse Prevention and Control Act of 1970. Perhaps it is once again time for history to repeat. Perhaps this Congress can undo some of the mischief created by twenty years of runaway mandatory minimum sentences.

Alternatives to mandatory minimums have been offered by numerous segments of the criminal justice system over the past several years. One obvious and sensible "quick fix" for at least part of the problem would be to "unstack" the mandatory minimum sentences under § 924(c) so that the statute would be a true recidivist statute – that is, the second 924(c) conviction with its 25-year minimum would not be triggered unless the defendant had been convicted for use of a firearm, served time, and then failed to learn his lesson and committed his crime again. Other options include total repeal, selective repeal, "safety valves," congressional oversight, and enhanced operation of the sentencing guidelines. While the ultimate decision rests with the Congress, there is no shortage of support for these alternatives. In this section, I

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[120] *Id.*

[121] *Id.*

[122] *Id.* at 25.

want to highlight, first, the idea of unstacking the section 924(c) penalties and then, second, discuss how Congress might sensibly approach broader reforms of mandatory minimum sentences.

A. Unstacking Section 924(c) Penalties

In considering whether the § 924(c) penalties should be "unstacked," it is helpful to understand the history of this particular statute. Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime."[123] Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,[124] and only a few statements made during floor debate are available.[125]

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. When passed in 1968, § 924(c) imposed an enhancement of "not less than one year nor more than ten years" for the person who "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States" or "carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the

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[123] H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

[124] *Cf. Jung v. Association of American Medical Colleges*, __ F.Supp.2d ___, 2004 WL 1803198 at * 11 (D.D.C. 2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

[125] *Busic v. United States*, 446 U.S. 398, 405 (1980).

United States."[126] If the person was convicted of a "second or subsequent" violation of § 924(c), the additional penalty was "not less than 2 nor more than 25 years," which could not run "concurrently with any term of imprisonment imposed for the commission of such felony."[127]

One of the first questions involving the provision was whether a defendant could be sentenced under § 924(c) where the underlying felony statute already included an enhancement for use of a firearm. In 1972 in *Simpson v. United States*,[128] the Supreme Court, relying on floor statements from Representative Poff, held that "the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for the use of a dangerous weapon" and that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(c) would violate the established rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[129] In 1980 in *Busic v. United States*,[130] the Court reaffirmed its decision in *Simpson* and went one step further, holding that prosecutors could not file a § 924(c) count instead of the enhancement provided for in the underlying federal statute. Supporting its conclusion, the Court noted that in 1971 the Department of Justice had advised prosecutors not to proceed under § 924(c) if the predicate felony statute provided for "'increased penalties where a firearm was used in the commission of the offense.'"[131]

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126 *Simpson v. United States*, 435 U.S. 6, 7-8 (1978) (citing 18 U.S.C. § 924(c) (1968)).

127 *Id.*

128 435 U.S. 6 (1977).

129 *Id.* at 13, 14.

130 446 U.S. 398 (1980).

131 *Id.* at 406 (quoting 19 U.S. Atty's Bull. No. 3, p.63 (U.S. Dept. of Justice, 1981)).

In response to *Simpson* and *Busic*, in 1984 Congress amended § 924(c) "so that its sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'"[132] The 1984 amendment also established a five-year mandatory minimum for use of a firearm during commission of a crime of violence.[133]

In 1986, as part of the Firearms Owner's Protection Act, Congress made § 924(c) specifically applicable to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.[134] In later amendments, Congress increased the penalty for a "second or subsequent" § 924(c) conviction to a mandatory minimum of twenty years (then ultimately to twenty-five years).[135]

The increased penalties for "second or subsequent" § 924(c) convictions produced litigation over whether multiple convictions in the same proceeding were subject to enhanced penalties. In essence, the issue was whether Congress intended § 924(c) to be a true recidivist statute or one that increased penalties for first offenders. Most courts, including the Tenth Circuit, did not apply the twenty-year penalty when the "second" conviction was just the second § 924(c) count in an indictment.[136] But in *Deal v. United States*,[137] the Supreme Court, in a six-

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[132] *United States v. Gonzales*, 520 U.S. 1, 10 (1997)(citing Comprehensive Crime Control Act of 1984, Pub. L. 98-47. § 1005(a), 98 Stat. 2128-39).

[133] *Id.*

[134] Pub. L. No. 99-308, § 104(a)(2)(A)-(F).

[135] Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

[136] *See, e.g., United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

[137] 508 U.S. 129 (1993).

to-three decision, construed the statute more broadly. In *Deal*, the defendant was convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years for each of the other five § 924(c) charges – a total of 105 years. In affirming his sentence, the Court held that a "second or subsequent" conviction could arise from a single prosecution.[138] To hold otherwise, the Court noted, would simply encourage prosecutors to file separate charges and try the defendant in separate prosecutions.[139]

Less than two weeks after *Deal*, the Court again interpreted the statute in *Smith v. United States*.[140] In *Smith*, the Court held that exchanging a gun for drugs constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime." The Court rejected the defendant's argument that "use" of a firearm required use as a *weapon*.[141] The majority noted than when Congress enacted the relevant version of § 924(c) it was no doubt responding to concerns that drugs and guns were a "dangerous combination."[142] Justice Scalia argued in dissent that it was "significant" that the portion of § 924(c) relating to drug trafficking was affiliated with the pre-existing provision pertaining to use of a firearm in relation to a crime of violence.[143] He

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[138] *Id.* at 133-34.

[139] *Id.* at 134.

[140] 508 U.S. 223 (1993).

[141] *Id.* at 228.

[142] *Id.* at 239.

[143] *Id.* at 244 (Scalia J., dissenting).

therefore thought that the word "use" in relation to a crime of violence means use as a weapon, and that this definition of use carried over to the addition of drug trafficking to the statute.[144]

The Court again interpreted § 924(c) in *United States v. Gonzales*[145] and held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.[146] Finally, in *Muscarello v. United States*,[147] the Court held that, as used in § 924(c), "carries" is not limited to the felon who carries the firearm on his person, but includes a gun brought to a drug transaction in the glove compartment of his vehicle.

At a minimum, Congress should return to the original concept of section 924(c) – as a recidivist statute. Particularly in cases (like the Angelos case) that do not involve direct violence, Congress should consider repealing this feature and making § 924(c) a true recidivist statute of the three-strikes-and-you're-out variety. In other words, Congress should consider applying the second and subsequent § 924(c) enhancements only to defendants who have been previously convicted of a serious offense, rather than to first-time offenders like Mr. Angelos. This is an approach to § 924(c) that the Tenth Circuit[148] and Justices Stevens, O'Connor, and Blackmun[149] believed Congress intended. It is an approach to sentencing that makes good sense.

B. Other Alternatives

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144 *Id.*

145 520 U.S. 1 (1997).

146 *Id.* at 9-10.

147 524 U.S. 125 (1998).

148 *United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987).

149 *United States v. Deal*, 508 U.S. at 137 (Stevens, J., dissenting).

While unstacking the penalties of § 924(c) would be a good place to start in reforming mandatory sentencing, a broader perspective is needed. A variety of mandatory minimum sentences are found throughout the federal criminal code and any reform should ultimately consider all of them. Justice Anthony Kennedy recently commented on the roles of courts and legislatures in specific reference to mandatory minimums:

> The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws.[150]

In considering how to respond to the injustices created by mandatory minimum sentences, Congress can draw on the views of many knowledgeable observers who have considered the question. The Judicial Conference has offered several ideas in the past, which might usefully serve as a basis for reform now. For instance, in September 1991, the Judicial Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.[151] In 1993, the Conference endorsed a proposal offered by Judge William W. Wilkins, Jr., in his capacity as chair of the U.S. Sentencing Commission, in which the guidelines would "trump" the statutory mandatory minimum.[152]

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[150] Speech of Justice Anthony Kennedy, *supra* note 97.

[151] *Supra* note 84.

[152] *Supra* note 87. *See also* Paul J. Hofer, *The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENTENCING REP. 2, at 63 (September 1993) (explaining that Judge Wilkins' proposal was seen as "too sweeping" by Congress).

Over the years, several Members of Congress have likewise proposed alternatives to mandatory minimum sentences. In February 1993, Representative Don Edwards introduced the Sentencing Uniformity Act of 1993. The Act sought to amend the federal criminal code and other federal laws to abolish mandatory minimums.[153] Although the bill had 36 co-sponsors, it never left the subcommittee. Later that year, Senator Orrin G. Hatch, citing the Sentencing Commission's special report on mandatory minimums, suggested that Congress should begin using methods other than mandatory minimums to shape sentencing policy. Among the recommendations cited were: (1) specific statutory directives to the Sentencing Commission (e.g., instructing the Commission to adjust the guidelines by a specific number of levels), (2) general directives (e.g., highlighting Congress' concerns for the Commission's consideration when amending the guidelines), (3) increased statutory maximums, and (4) diligent oversight of federal sentencing policy (e.g., relying on data and research, conducting oversight hearings).[154]

Other alternatives to mandatory minimums have been offered in recent years as well. One option, endorsed by the American Bar Association[155] and the Sentencing Project,[156] is the outright repeal of all mandatory minimums. Another option, endorsed by the Constitution Project, calls for the enactment of mandatory minimum sentences "only in the most extraordinary circumstances."[157]

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[153] H.R. 957, 103rd Congress (February 7, 1993).

[154] Hatch, *supra* note 14.

[155] American Bar Association, *supra* note 98.

[156] Ryan S. King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (2007), available at http://sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf.

[157] Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report* (March 15, 2006), available at

Advocacy groups like Families Against Mandatory Minimums (FAMM) have repeatedly challenged "inflexible and excessive penalties required by mandatory sentencing laws."[158] FAMM promotes sentencing policies that give judges discretion to sentence individuals according to their role in the offense, seriousness of the offense, and potential for rehabilitation. The group supports three primary strategies to be used in lieu of mandatory minimums.

First, they recommend restoring sentencing discretion to judges. To insure a judge's decision will meet standards for appropriate punishment, the prosecutor or the defendant can appeal the judge's sentence. This safeguard and sentencing guidelines prevent judges from delivering sentences that are too soft or too tough.[159] Second, FAMM supports the use of sentencing guidelines. Even the now-advisory guidelines help prevent wildly disparate sentences for similar crimes, while allowing sentence adjustments based on culpability.[160] Finally, FAMM recommends that Congress consider sentencing alternatives – such as substance abuse treatment, drug court supervision, probation, and community correctional programs – as well as incarceration.[161]

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http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf. It may be relevant to point out that I served as a member of the Project.

[158] Families Against Mandatory Minimums, FAMMGRAM, *The Case Against Mandatory Minimums* (Winter 2005), available at http://www.famm.org/Repository/Files/PrimerFinal.pdf.

[159] *Id.* See also, Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259 (July 2002) (suggesting that prosecutorial sentence appeals maintain judicial discretion while at the same time providing a mechanism for correcting judicial mistakes, including "unreasonable" sentences).

[160] *Id.*

[161] *Id.*

All of these ideas have a good deal to commend them. But rather than explore any of them at length, I want to conclude my testimony by offering my own personal thoughts on how Congress might usefully proceed in evaluating these problem.[162]

Congress ought to rely on its expert agency – the Sentencing Commission – as the starting point for reform. Congress created the Commission in 1984 as part of its efforts to help eliminate sentencing disparities and improve the transparency of federal sentencing. The irony now, though, is that Congress has in some cases created *two* conflicting federal sentencing systems – the Guidelines system and the mandatory minimums.

A common criticism of mandatory minimums is that they interfere with Congress' efforts to create a fair sentencing system through the use of guidelines.[163] While guidelines and mandatory minimums can occasionally be reconciled,[164] far more often they seem to cut in opposite directions. As the Sentencing Commission has cogently explained, the two systems are "structurally and functionally at odds."[165] In the *Angelos* case, for example, the guidelines recommended a sentence for Mr. Angelos that was more than forty year's lower than what he ultimately received. Moreover, because of the transparency of the Guidelines system, it was possibly for me to catalogue precisely how far Angelos' sentence exceeded what he would have received for committing such crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape.

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[162] *See generally* Paul G. Cassell, *Too Sevvere? : A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

[163] *See, e.g., supra* note 95.

[164] *See, e.g.*, 18 U.S.C. §§ 3553(e) and (f).

[165] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra* note 14, at 25.

In reforming the system today, Congress should focus on cases where mandatory minimums produce sentences significantly different from those produced by the Guidelines. Perhaps the simplest way to give the Guidelines more prominence in sentencing would be to allow the court to "depart" from the mandatory minimum sentence to impose any sentence that is proper under the Sentencing Guidelines when the Guidelines advised a sentence significantly different from that called for by mandatory minimums.[166] This alternative, which is similar to proposals previously endorsed by the Judicial Conference,[167] is the subject of a soon-to-be released article by Erik Luna and me in our capacities as professors of the University of Utah's S.J. Quinney College of Law.

The advantages of such a system are manifold. Most important, the public could have confidence whenever a judge imposed a sentence that it was consistent with that called for by the nation's expert sentencing agency. The Sentencing Commission, it should be noted, has never (to my knowledge) been charged with being an unduly lenient body. And Congress has the opportunity to review all Guidelines promulgated by the Commission before they take effect and to make adjustments if necessary. In short, the Sentencing Commission's Guidelines form a rational backbone for any sentencing system. That backbone should take precedence over the ad hoc system of mandatory minimums that has grown up over the years.

CONCLUSION

Congress should act to reform mandatory minimum sentences so that they no longer serve as engines of injustice. Today, Weldon Angelos has approximately 52 years left to serve

[166] A similar proposal has been introduced in the House of Representatives for the State of Massachusetts as they consider ways to reconcile guidelines and mandatory minimums. *See* House Bill No. 813 (2005).

[167] *Supra* notes 84 and 87.

on his sentence and Marion Hungerford has approximately 157 remaining years. As the public learns about sentences such as these – far longer than those imposed on even convicted murderers -- its confidence in the nation's federal sentencing system is diminished.

My predecessor as chair of the Criminal Law Committee of the Judicial Conference, Senior Judge Vincent L. Broderick, nicely summarized all these points when he testified about mandatory minimum sentences before the House Judiciary Subcommittee on Crime and Criminal Justice of the House Committee in 1993. What he said then still makes a good sense today:

> I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality. In our view, the Sentencing Commission is the appropriate institution to carry out this important task.[168]

I hope that Congress will act swiftly to reform mandatory minimums to eliminate the great injustices that they are creating.

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[168] Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Judicial Conference Committee on Criminal Law in testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993.