

Statement of

William G. Otis
Adjunct Professor of Law
Georgetown University Law Center

Former Assistant U.S. Attorney and Chief of the Appellate Division,
Eastern District of Virginia (1981-1999).

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It's hard to recognize Ronald Reagan's America in the landscape we see today. President Reagan believed in strength, resolve and accountability for bad actors, both foreign and domestic. What we see now is doubt, decline and retreat – retreat as the not-so-former Soviet Union invades the Ukraine and, at home, as the Administration, and some in our party, seem to want to find a way to be more accommodating to drug dealers.

In recent months, many Members of Congress have advocated for “reform” in federal sentencing law. However, it would be more accurate to say that the advocates for federal sentencing “reform” are less interested in “reform” than a slashing of the minimum sentences for trafficking in a large variety of dangerous drugs. The most direct beneficiaries of such an approach will be heroin salesmen, it will give more power to ideologically-driven judges for whom no criminal is without an excuse, and it will pave the way for the creeping return of irrational disparity in sentencing.

In this way, many advocates of so-called sentencing “reform” would all but dismantle the last monument of Reagan's signature achievement in criminal law – the system of determinate sentencing. When Eric Holder and a politicized Department of Justice tell us that this system is “broken,” they're not telling the truth. As determinate sentencing and existing mandatory minimums have taken hold over the last generation, crime is down by 50%. Not only is the system of determinate sentencing not broken, it is very likely the most successful domestic initiative of the last half century. For a tiny fraction of the money we've spent building the dependency state and financing the unrestrained growth of government, we have achieved, through more serious and uniform sentencing, an improvement in public well-being that other kinds of social spending, though massively greater, have not even approached.

The criticisms of existing mandatory minimums are familiar by now: That they have helped swell the prison population, are excessively harsh, target non-violent offenses, disproportionately harm minorities, and inappropriately tie the hands of judges.

None of this is true. The attacks have gained traction only because the critics ignore how mandatory sentencing came about, how it actually works, and how widespread its benefits have been.

Two generations ago in the Sixties and Seventies, federal law had an unguided sentencing system – that is, a system with no mandatory guidelines or statutory minimum sentences. We were convinced that rehabilitation works, and that we could trust judges to get it right at sentencing with only tepid, or with no, binding rules from Congress.

For our trouble, we got a national crime wave. In the two decades after 1960, crime went up by well over 300%. It was twice what it is now. Whole neighborhoods in our major cities, including our nation's capital, became free-fire zones, largely because of the gunplay inevitably associated with drug dealing.

In the Eighties, Congress got the message, and embraced determinate sentencing. That meant, for a few very serious offenses – child pornography, firearms trafficking, and drugs including methamphetamine, PCP, cocaine and heroin – that Congress embraced mandatory minimums below which even the most willful judge cannot go.

Although seldom mentioned in the current critiques, the country got something vital in exchange for the reforms that made sentencing conform to law instead of taste. From the early Nineties to the present day, we have enjoyed a massive reduction in crime, to levels not seen since your parents were in grade school.

This increase in our ability to live in peace and safety has been a moral

and an economic boon. According to Bureau of Justice statistics (<http://www.disastercenter.com/crime/uscrime.htm>), there are more than 4,000,000 fewer serious crimes per year in America today than there were a generation ago. The financial benefits alone of having so much less crime are enormous, but seem invisible to those who want to cut back on the relatively small costs of imprisonment. But most important are the human benefits. Crime reduction has given a more secure life to every American, but has especially helped the disadvantaged. The hundreds, if not thousands, of people who were being gunned down in the streets of our big cities were mostly members of minority groups. Just as they were disproportionately victims of crime in those days, they have been disproportionately the beneficiaries of the drop in crime as stiff sentencing has taken hold.

It's true that sentencing laws and increased imprisonment have not alone produced these benefits, but they have contributed significantly. The late Prof. James Q. Wilson agreed with a University of Chicago study finding that increased imprisonment in the Nineties accounted for a quarter or more of the decrease in crime.ⁱ

The most prominent arguments for slashing today's successful sentencing system miss the mark because of the mileage they get from three very clever, because largely unspoken, misconceptions.

The first is that this "reform" is about marijuana – that is, making sure that a kid who smokes a joint or two doesn't wind up with a judge who is forced to send him off to federal prison for years and thus ruin his life. Many of the most vivid horror stories we hear about the excesses of mandatory sentencing are designed to convey the impression that this is what goes on.

It isn't. The on-the-ground reality is that essentially no one goes to jail *at all* for simple possession of pot. For the very few who do – after two or three repeat performances – you might see a sentence of 30 or 60

days. In the real world, mandatory minimums are reserved almost exclusively for trafficking, and for trafficking in the hard drugs the bill's backers prefer to keep quiet about because, after all, heroin and PCP just aren't all that popular.

The second clever but powerful misconception is that the health of the criminal justice system is measured, not by the crime rate, but by the incarceration rate. This is what Eric Holder means when he says the system is "broken." It's true that the prison population generally, and the federal prison population in particular, has risen dramatically over the last 20 years. But if you'd ask people on Main Street, what's the problem with the criminal justice system, would they say, "We've caught too many criminals"?

I don't think so. They'd say, "We've still got too much crime." The tacit centerpiece of the argument for sentencing "reform" – that the true measure of the system's health is the incarceration rate – is not merely wrong but absurd. The true measure is the crime rate. The obsession with people who are incarcerated – incarcerated because of their own criminal choices – while discounting any consideration of the huge, law-abiding majority – is something that could happen only inside the Beltway. Ordinary people must be wondering, "What *are* they thinking about?"

This is related to the third powerful misconception: That a bigger prison population is, *per se*, a bad thing. One might as well say that having more criminals in jail, *rather than in your neighborhood*, is a bad thing. When criminals are not incarcerated, they don't just disappear. Studies over many years have shown that the majority go back to crime. Those proposing to cut the prison population through watered-down sentencing seldom deal seriously with this fact. If we cut sentencing now, we'll repeat what happened when we cut it in the Sixties and Seventies: We'll get more crime.ⁱⁱ

Those advocating for reform promise, however, that it will be different this time. One can almost hear in the background Eric Holder's soothing words: "If you like your crime reduction, you can keep your crime reduction."

The unspoken premise here is that "non-violent" drug transactions, that is, those conducted without a gun, aren't all that serious. But the question for punishment purposes is not just whether there was violence; the question is whether there was **harm**.

The trafficking and consumption of hard drugs is one of the most harmful and socially destructive enterprises going on in America today. Even if a particular drug defendant does not engage in violence, his participation in the drug business creates the conditions in which history tells us that violence is certain to occur. The crack wars were not a myth, and neither is the gunplay that is still a commonplace feature of drug conspiracies from the organizers to the street dealers.

Let me give an analogy. People sometimes ask why mere consumers (as opposed to producers) of child pornography should get long sentences. The answer is that the consumers create the market in which the producers thrive. A criminal is properly held accountable for the harms he knowingly facilitates, not just those he directly causes.

While many drug crimes are "*non-violent*" (because they are consensual sales), they are anything but *non-harmful*. Indeed, they can be lethal, and often are. Recently, the actor Philip Seymour Hoffman died as a result of what was almost certainly a "non-violent" heroin transaction. But he's just as dead as if he'd been shot through the heart. So are the 13,000 to 14,000 heroin addicts who overdose every year. Selling heroin to an addict has the same moral valence as selling a loaded gun to a desperate, suicidal man, but results in vastly more fatalities.

It is in part for these reasons that a myriad of law enforcement organizations, as well as the National Association of Assistant US Attorneys, have opposed significant changes to federal penalties. The opposition of Assistant U.S. Attorneys is particularly noteworthy. AUSA's are career prosecutors – non-political appointees hired in administrations of both parties. They have taken the very unusual, and for them the very risky, step of publicly opposing the Attorney General and his support for the significant reform of federal criminal penalties. They have done so because they know that this “reform” will drastically handicap their efforts to break down and prosecute the bigger and more violent drug conspiracies that states hand off to the federal government.

Finally, let me address the argument that existing law routinely traps low-level defendants in draconian sentences. That's not so. Existing law provides at least four escape hatches for deserving defendants facing a mandatory minimum.

First and most commonly, they can plea bargain their way to a lesser charge; such bargaining is overwhelmingly the way federal cases are resolved, and, as you would think, the most lenient bargains are offered to the least culpable offenders.

Even if convicted under a mandatory minimum charge, however, the judge on his own can sidestep the sentence if the defendant has a minor criminal history, has not engaged in violence, was not a big-time player, and makes a clean breast of his crimes. This “safety valve,” as it is known, has been in the law for almost 20 years.

Separately, a defendant can avoid a mandatory minimum by helping prosecutors bring his cohorts to justice. Prosecutors correctly regard this as an essential tool in encouraging cooperation and, thus, breaking down large conspiracies.

Finally, for very unusual cases, there is Presidential clemency.

Recently, in a nearly unprecedented move, the President exercised this power, granting to inmates convicted of crack cocaine offenses the second largest number of commutations in a single day in 43 years. With the President's power as the ultimate failsafe based on truly exceptional circumstances, there is no need, and considerable hazard, in adopting a meat-axe approach, as many proponents of sentencing reform have advocated.

One last thought. When we consider proposals to dramatically "reform" federal penalties, let's not lose sight of the central, prepossessing question: Are we going to lose our nerve?

Are we going to retreat, to turn away from a system we know succeeds to start back down the path to one we know fails? Forgetfulness about our past naiveté, and complacency about the crime reduction we've achieved, are the calling cards of decline. We already tried watered-down sentencing and hoping for the best with the scattershot ideologies of several hundred federal district judges. We learned what happens. It confounds the rule of law, overestimates judicial discipline, and endangers the public. If we ignore these lessons, our children will be the ones who pay the price.

CONCLUSION

In conclusion, I would like to address an additional argument for sentencing "reform": namely, that, with tight budgets and so much borrowing, we cannot keep spending more on prisons; and second, that mandatory minimum sentences under existing law are excessive, given the arguably sympathetic circumstances of some of the defendants serving them.

Assuming *arguendo* that these arguments had merit early last year when support for sentencing reform started percolating to the surface, times have changed.

1. As to the cost argument, two developments are particularly noteworthy. First, last August, the Attorney General directed that, for certain federal drug offenders, federal prosecutors are no longer to seek mandatory minimum sentences. They are to do this by declining to include in (some might say “airbrush”) indictments the drug amounts that, if they had been stated, would require such a mandatory minimum sentence upon conviction. This new policy, which has effectively all but eliminated mandatory minimums (because they simply do not get charged) has been the state of play for close to a year as of this writing. In other words, to the extent advocates of reform would shift discretion back in the direction of judges, the deed has been done.

The Attorney General’s unilateral action has been highly effective – perhaps too effective for some prominent advocates of sentencing reform. For example, in his keynote address to the Federalist Society’s May 2014 Conference on Executive Branch review, Senator Ted Cruz decried Mr. Holder’s charging directive as essentially the kind of executive branch overreach that undermines Congress’s preeminent role in writing law, and is likely to be seen as a species of disrespect to the legislative branch that will *discourage* Congressional advocates of “reform”.

Second, in April 2014, the Sentencing Commission adopted a sweeping, all-comers-accepted two-level reduction in Guidelines offense levels for

drug traffickers. Although the Guidelines do not *per se* affect mandatory minimum sentences (statutory sentences trumping guideline calculations), they will produce a significant savings in the federal prison budget by reducing the sentences of the majority of prisoners – a majority who are *not* serving mandatory minimum sentences. As the Commission announced when it promulgated the reductions, the result will be very significant savings.

The Commission's two-level reduction theoretically will not be implemented until November 2014, but in practice it has already begun. The Attorney General, again acting preemptively, has ordered line prosecutors not to object when defense counsel seek immediate application of the reduced guidelines. For any real-world purpose, then, this means that the reductions are already at work reducing costs (and, as I have argued, beginning the reduction in public safety as well).

2. The idea that there are hundreds or even thousands of offenders serving unjust and excessive sentences is, in my view, considerably overstated. Even assuming it were correct, however, these circumstances will be addressed in short order by the Administration's unprecedented and aggressive clemency program announced in April 2014 by Deputy Attorney General James B. Cole.

Department documents show that the program could result in slashed sentences for up to 23,000 drug dealers. The actual number is likely to be less than that – perhaps 5000, as Professor Douglas Berman has estimated – but in any event is all but certain to include every “horror

story” touted by advocates of “reform”. This is true not least because, as Mr. Cole has said, the defense bar nationwide will itself be actively involved in recommending candidates for clemency. The Attorney General has brought in a new Pardon Attorney whose thinking mirrors the Department’s new and different approach, and has told prosecutors that clemency applications will be reviewed with an eye toward remedying what he sees as past excesses.

Finally, obviously, lopping years from thousands of offenders’ sentences will swell the already considerable savings stemming from the charging and Sentencing Commission changes noted above, changes already underway.

3. In addition to the recent developments undermining the most important rationales for the reform of federal penalties, there has been at least one other development calling into question the wisdom of adopting it at all.

Specifically, DEA Administrator Michele Leonhart told Congress, in a way that cannot be viewed as other than a rebuke to those supporting sentencing reform, that strong mandatory minimum sentences are essential to the success of her agency’s fight against dangerous drugs. In particular, she told the Senate Judiciary Committee in her testimony on April 29, 2014:

Having been in law enforcement as an agent for 33 years [and] a Baltimore City police officer before that, I can tell you that for me and for the agents that work at the DEA, mandatory minimums

have been very important to our investigations. We depend on those as a way to ensure that the right sentences equate the level of violator we are going after.

This is a truly remarkable statement from a Department official who worked her way up from Baltimore beat cop to become President Obama's choice to head the country's front-line drug fighting agency.

To summarize: In just the last weeks and months, there have been far-reaching developments that both call into question the central rationales for significant reform of federal criminal penalties and the wisdom *ab initio* of going down that path. America has lived with its present regime of mandatory minimum sentences for at least a generation – a generation in which crime has decreased by half, to the enormous benefit of our citizens. At the minimum, before Congress slashes those sentences, it should give itself and the rest of us time to assess these recent developments and, in particular, to see whether the promises of big cost savings and no crime increases will be kept.

¹The author of the University of Chicago study, Professor Stephen Levitt, has more recently said that as the crime rate continued to drop and the prison population continued to grow, the increase in public safety has diminished. As he told The New York Times in 2013, "In the mid-1990s I

concluded that the social benefits approximately equaled the costs of incarceration.” But today, “I think we should be shrinking the prison population by at least one-third.”

Prof. Levitt’s remarks do not rebut *or purport to rebut* his 2004 finding that the increased use of incarceration accounts for “a quarter or more” of the decrease in crime since 1990 (that is, in the era of mandatory minimums). See Stephen Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177-79 (2004). Nor do they rebut his specific finding that, “The evidence linking increased punishments to lower crime rates is very strong,” *id.* at 178.

Prof. Levitt has never said that either of those findings was erroneous or misleading, and the late Prof. James Q. Wilson of UCLA agreed with both in his 2011 piece in the Wall Street Journal. James Q. Wilson, *Crime and the Great Recession*, Wall St. Journal (May 28, 2011), available at

<http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870>.

Wilson said (emphasis added):

So we have little reason to ascribe the recent crime decline to jobs, the labor market or consumer sentiment. The question remains: Why is the crime rate falling? One obvious answer is that many more people are in prison than in the past. Experts differ on the size of the effect, but *I think that William Spelman and Steven Levitt have it about right in believing that greater incarceration can explain about one-quarter or more of the crime decline*. Yes, many thoughtful observers think that we put too many offenders in prison for too long. For some criminals, such as low-level drug dealers and former inmates returned to prison for parole violations, that may be so. But it’s true nevertheless that when prisoners are kept off the street, they can attack only one another, not you or your family.

The criticisms based on Professor Levitt’s remarks to the NEW YORK TIMES elide a crucial distinction: The difference between *returns* to the dollar and *diminishing marginal returns* to the dollar. Levitt said that the increase in public safety “diminished” as the prison population continued to grow in the 2000’s; he didn’t say that it had “stopped,” and it hasn’t. It has slowed because the law of diminishing marginal returns to scale applies to imprisonment just as it applies to everything else. The critics’ argument is merely a loud truism.

Returns are still returns, now as in the past. And it remains the case that increased incarceration was a very significant factor in the decrease in crime over the last generation.

Moreover, Professor Levitt's more recent remarks were not specifically about the *federal* prison population, and he has not expressed a view on that to my knowledge. More importantly, that Prof. Levitt believes we should reduce the prison population in general may be his opinion as a citizen, but that is hardly the same as his findings as a social scientist. He has never doubted or in any way moderated his findings that increasing the number of criminals put in prison helps decrease the amount of crime.

ⁱⁱ There is a fourth misconception of growing popularity: That because several states, notably Texas and Michigan, have slightly reduced their prison populations in recent years and have still seen crime decrease, the federal government can do the same thing with the same results.

As noted, the increased use of incarceration has accounted for about a quarter of the decline in crime. See Stephen Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177-79 (2004). What this means is that about three quarters of the decline is attributable to other factors (things such as hiring more police and improved and proliferating private security measures). When three quarters of the factors responsible for the decrease in crime are still on-going, crime is very likely to continue to decrease. What reducing the prison population will do, by putting recidivist criminals back on the street, is slow the *rate* of the decrease. And that is, in fact, what's been happening. As some large states have been marginally lowering their prison populations, crime has continued to decrease, but at a slower rate.

In addition, crime is a lagging indicator, and crime statistics lag even more. Criminals generally do not return to crime and get caught immediately. It typically takes several years. And crime statistics lag even further; the statistics available today reflect only what was the state of play two or three years ago.

To the extent we have more recent data, they come from California, the state laboring under the effects of the *Plata* decision, ordering it to make substantial cuts to its prison population. Accordingly, and because of its very large size to begin with, California has had a greater reduction in its prison population than any other state. Result: crime is up, including a nearly 7% increase in property crime. See Ken Scheidegger, *California Crime Update*, Crime and Consequences Blog (July 30, 2013), available at <http://www.crimeandconsequences.com/crimblog/2013/07/california-crime-update.html>; Ken Scheidegger, *FBI Releases Final 2012 Crime Stats*, Crime and Consequences Blog (Sept. 16, 2013), available at <http://www.crimeandconsequences.com/crimblog/2013/09/fbi-releases-final-2012-crime-.html>.

Even if prison reduction programs work for the states, however, they are not going to work for the federal government. The Department of Justice prosecutes precisely the kind of drug gangs, and drug offenders, who are the most violent, the most entrenched, and the most prone to recidivism. The kind of offender one sees coming out of the county courthouse is a choir boy compared to what comes out of the federal courthouse.

Finally, to the extent there is doubt about this question, who should have to bear the risk of that doubt? The public, or drug dealers?