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KANT'S CATEGORICAL IMPERATIVE AND MANDATORY MINIMUM SENTENCING

CRAIG TURNER*

ABSTRACT

Deterrence-based punishment systems are scattered throughout history, and exist in the American legal system today. One such method of deterrence prescribes mandatory punishments for violations of certain crimes, without regarding to underlying circumstances or an assessment of the the individual accused of such crimes. These types of sentencing requirements restrict judicial discretion and are designed to serve as an example for other would-be offenders. While perhaps justifiable under a utilitarian code of ethics, mandatory minimums are morally suspect when assessed through the lens Immanuel Kant's Categorical Imperative.

The fundamental premise of the second formulation of Kant's Categorical Imperative rests upon human freedom and autonomy. By forcing individuals to personally serve punishments meant to deter others from committing the same crime can have the effect of treating such individual merely as a means to some other end. Because of this, mandatory punishments which seek to deter, and not rehabilitate offenders likely violate Kant's Categorical Imperative. This Note examines the historical and current status of mandatory sentencing laws, and applies Kantian ethics to assess these laws' morality.

INTRODUCTION

Immanuel Kant's moral philosophy is rooted in his formulation of the Categorical Imperative.¹ The purpose of his Categorical Imperative is to serve as an analytical framework by which Kant theorized mankind could judge the morality of all human actions.² Though scholars have analyzed deterrence-based punishment systems from a philosophical perspective,³

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1. See generally IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (18th ed. 2012) [hereinafter, GROUNDWORK].

2. R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 273–75 (2002).

3. *Id.* at 285–86.

they have not examined how Kant’s moral philosophy provides a unique framework to assess the morality of mandatory minimum sentencing for certain crimes. While criminal punishment is justifiable under Kant’s moral framework,⁴ the nature of mandatory minimum sentencing adopted as a deterrent to would-be criminals fails to satisfy Kant’s Categorical Imperative.

This Note begins by examining the history, evolution, and current state of mandatory minimums to support the idea that mandatory minimum sentencing fails to satisfy Kant’s Categorical Imperative. To this end, this Note will explain the rationale behind the adoption of mandatory minimums across both historical and modern societies. Next, this Note describes Kant’s second formulation of his Categorical Imperative first espoused in his *Groundwork of the Metaphysics of Morals*.⁵ The analysis briefly addresses Kant’s views on punishment in the criminal context. Finally, this Note shows that mandatory minimum sentencing fails to comport with Kant’s moral code.

I. THE WORLD HISTORY OF MANDATORY MINIMUMS

Mandatory minimums are not a modern conception. Notions of mandatory punishments date back to ancient times and span across cultures.⁶ Although not explicitly dubbed “mandatory minimums,” traces of the implementation of automatic sentencing are present throughout history.⁷ Scholars assert that “[a]ll theories of retribution . . . require that punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.”⁸ Proportionality, at its most basic level, stands for this principle: For a crime of a certain kind and under certain circumstances, there is an implicit limit on the

4. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 6:331–6:332 [hereinafter, *METAPHYSICS*].

5. See *GROUNDWORK*, *supra* note 1, at 4:427.

6. See, e.g., *Deuteronomy* 19:21 (King James) (“And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”); Erik Luna, *Testimony to the United States Sentencing Commission, Mandatory Minimum Sentencing Provisions Under Federal Law*, THE CATO INSTITUTE (May 27, 2010), at n.3, <http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law> (citations omitted). The “eye for an eye” aspect of religious codes is similar to the idea of proportional response to certain crimes. Modern mandatory minimum sentences typically involve a term of years in prison, not the literal proportionality of ancient codes.

7. See Luna, *supra* note 6.

8. *Id.*; see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 52–54 (5th ed. 2012).

government's power to execute a sentence that is more severe than the act.⁹

Mandatory minimums are contrary to the idea of proportionality because they “eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call for a below-minimum sentence.”¹⁰ However, there are some who argue that mandatory minimums are just and proportionate value judgments because democratically elected representatives create these automatic punishments through legislation.¹¹ Regardless of whether mandatory minimums actually comply with proportionality concerns, history frequently demonstrates the tension between the desire for proportional punishments and the adoption of mandatory punishments.

Both the Holy Christian Bible and the Code of Hammurabi contain “eye for an eye” idioms.¹² This phrase is commonly understood to mean that a punishment for a crime should be commensurate to the offense in question.¹³ However, while this language could be interpreted as expressing a desire for proportional punishment, there are contradictions to this inference found throughout religious texts.¹⁴ The Bible, for example, is replete with specific, mandatory punishments for certain

9. DRESSLER, *supra* note 8, at 52 (“Retributivists justify punishment on the ground that a crime has been committed. The offender owes a debt to society; punishment is the mode of repayment. The payment due varies with the crime committed: punishment must be proportional to the offense committed[.]”); see also Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L. J. 263, 284–85 (2005) (asserting that “even if a state were to abandon retribution, deterrence, rehabilitation, and incapacitation in favor of some other penal purpose, basic principles of liberal democracy would still impose a proportionality requirement as an upper limit on criminal sentences.”).

10. See Luna, *supra* note 6.

11. See Evan Bernick & Paul Larkin, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUNDATION (Feb. 20, 2014), available at <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms> (“[A] number of parties defend the use of mandatory minimum terms of imprisonment. They argue that mandatory minimum sentences reflect a societal judgment that certain offenses demand a specified minimum sanction and thereby ensure that anyone who commits such a crime cannot avoid a just punishment.”).

12. See *supra* note 6 and accompanying text.

13. See, e.g., Robert A. Creo, *Retribution, Revenge, Justice & Closure*, 31 ALTERNATIVES TO THE HIGH COST OF LITIG. 138 (2013). “*Lex talionis*, is Latin for the law of talion, which means a retaliation or punishment authorized by law that corresponds in kind and degree to the wrong or injury—in its classic formulation, an eye for an eye.” *Id.* “[A]ny laws, such as the Babylonian laws, achieved justice by principles of reciprocity, so a person causing the death of another would be put to death under . . . the Code of Hammurabi . . . [Hammurabi’s Code] states that if a man put out the eye of another man, his eye shall be put out. The Bible books of Exodus and Leviticus also contain this language.” *Id.*

14. See Luna, *supra* note 6.

actions.¹⁵ Further, these punishments were neither constrained by questions of offender culpability nor directed at preventing future wrongdoing.¹⁶ The punishments, therefore, were justified on their own grounds, which is a common aspect of mandatory minimum punishments.¹⁷

The conflict between proportional response as reflected in judicial discretion and the existence of mandatory punishments was present in ancient Greece. In the seventh century B.C.E., Draco, the first legislator of Athens, replaced the old system of oral law with a written code to be enforced solely by the courts.¹⁸ He prescribed mandatory sentences (usually death or exile) for even the most trivial offenses.¹⁹ Draco's laws,²⁰ which even today remain infamous for their severity, exemplified mandatory punishments in ancient Greece. However, in 350 B.C.E., Aristotle declared that it was the judge's duty to impose a punishment that was *equivalent* to the crime committed.²¹

The tension between proportionality and mandatory sentences also existed in ancient Rome. There, Cicero, the renowned Roman politician, "proclaimed the maxim that the punishment should fit the offense."²² At the same time, the Roman Army instituted mandatory punishments, such

15. See, e.g., *Leviticus* 20:1–20:27 (King James). This passage contains punishments such as: "for every one that curseth his father or his mother shall be surely put to death: he hath cursed his father or his mother among you" and "if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast." *Id.*

16. *Id.* The punishments outlined in *Leviticus* were not written as optional.

17. See *infra* note 69.

18. See Harry Keyishian, *Henry DeBracton, Renaissance Punishment Theory, and Shakespearean Closure*, 20 *LAW AND LITERATURE* 444, 447 (2008).

19. *Id.* "Motive is the key to determining whether or not an act is punishable. Considerations of 'intent' are so integral to the fabric of modern law that we can easily forget its radical quality. Draco's law did not concern itself with such intent; punishment was matched to the deed, not to the character or motive of the actor of the deed." *Id.*

20. In response to an aristocrat's attempt to take over the city, Draco was appointed by the Athenian aristocracy "to codify and rectify the existing law" in an attempt to "reinforce the old aristocratic system." Deirdre Dionysia von Dornum, *The Straight and the Crooked: Legal Accountability in Ancient Greece*, 97 *COLUM. L. REV.* 1483, 1489 (1997). Draco then published the first legal code of Athens. *Id.* What remains of Draco's laws details elaborate "procedures for settling disputes arising out of homicide" and "combined fixed remuneration (expressed in terms of oxen) with generous use of the death penalty." *Id.* While Draco's laws were unsuccessful in their initial purpose of curing political issues in the city, they did provide Athenian citizens with "indisputable knowledge of the laws that governed them," unlike the previous legal code which was largely oral. *Id.* The man and his laws are also the origin of the commonly used English adjective "draconian." *BLACK'S LAW DICTIONARY* 566 (9th ed. 2009).

21. ARISTOTLE, *THE NICHOMACHEAN ETHICS* 179–82 (J.A.K. Thomson trans., 1976).

22. See Luna, *supra* note 6 (citing CICERO, *DE RE PUBLICE, DE LEGIBUS* 513 (Clinton Walker Keyes trans., 1928)).

as *fustuarium*,²³ for dereliction of one's duties.²⁴ Thus, while the state appeared to espouse a sliding scale system of punishment for its citizens, the state's military utilized punishments for soldiers that were both mandated and severe.

French thinkers also advocated for proportionality in the mid-to-late eighteenth century.²⁵ Montesquieu wrote that justice is served "when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions [when] the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing."²⁶ However, even in his own country, the French Penal Code of 1791 contained legislatively fixed sanctions for each offense category with zero discretion allowed when sentencing individual offenders.²⁷

Similarly, British jurisprudence struggled to strike a balance between severity of punishment and proportionality. Great Britain actually attempted to set this principle in statute in 1553, under the rationale that:

the security of the kingdom depended more upon the love of the subject toward the king than upon the dread of laws imposing rigorous penalties and that laws made for the preservation of the commonwealth without great penalties were often more obeyed and kept than laws made with extreme punishments.²⁸

Great Britain was unique with regard to *statutorily mandated* sentencing because such statutes only first appeared in British law in the Crime

23. See WILLIAM SMITH, D.C.L., LL.D.: A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES (John Murray ed., 1875). *Fustuarium* is "a capital punishment inflicted upon the Roman soldiers for desertion, theft, and similar crimes." *Id.*

24. POLYBIUS, THE COMPLETE HISTORIES OF POLYBIUS 353 (W.R. Paton trans., 2009). Polybius describes the process and ritual of *Fustuarium* as follows:

The tribune takes a cudgel and just touches the condemned man with it, after which all in the camp beat or stone him, in most cases dispatching him in the camp itself. But even those who manage to escape are not saved thereby: impossible! for they are not allowed to return to their homes, and none of the family would dare to receive such a man in his house.

Id.

25. See MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. trans., 1989).

26. *Id.* at 207–08.

27. See Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 529 (1958), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2764&context=lcp> (last visited Nov. 22, 2014).

28. RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (1959). This text also examines the prohibition against "cruel and unusual punishment" that existed in British jurisprudence, and eventually extended into the United States Constitution. *Id.* This idea was based "on the longstanding principle of English law that the punishment should fit the crime." *Id.*

(Sentences) Act of 1997.²⁹ Even today, the United Kingdom imposes statutory minimum sentencing for only a few offenses, preferring to leave discretion to judges.³⁰ Historically, British common law did, however, practice automatic, non-statutory capital punishment for certain crimes.³¹ While British jurisprudence's preference for proportionality and judicial discretion infiltrated colonial law and early state constitutions significantly, statutorily mandated punishments have only been a part of the American judicial system since the late eighteenth century.³²

II. AMERICAN HISTORY OF MANDATORY MINIMUMS

Early American colonial society appeared to limit the use of mandated punishment.³³ Even early, post-revolution state constitutions contained language that appeared to favor proportionality of sentencing, such as the Charter of Maryland, which spoke about punishments in relation to the "Quality of the Offense."³⁴ The Federal Constitution grants Congress the power to institute criminal offenses and to set certain punishments for violation of those offenses.³⁵ That being said, no federal crimes existed at

29. See Crime (Sentences) Act, pt. I, §§ 2–4, (1997), http://www.legislation.gov.uk/ukpga/1997/43/pdfs/ukpga_19970043_en.pdf (last visited on Nov. 22, 2014). For example, this law creates a mandatory life sentence where a person is convicted of a second serious offense such as attempted murder, rape, or a robbery while in possession of a firearm or imitation firearm. *Id.* The Act also extended to drug offense, imposing a mandatory seven-year sentence for a third Class A drug trafficking offense. *Id.*

30. See Josh Guetzkow & Bruce Western, *The Political Consequences of Mass Imprisonment*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 228, 233 (Joe Soss et al. eds., 2007).

31. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (detailing how at common law, all non-justified, unexcused homicides were automatically punished by death).

32. United States Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011), at 7 [hereinafter Comm'n Rept.].

33. See Woodson, *supra* note 31, at 289 ("Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England, the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy. As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death."). However, "Colonial legislatures [still] established fixed penalties for most criminal offenses and allowed courts little or no flexibility when imposing punishment in individual cases." Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL L. REV. 61, 68 (1993). Some of these punishment included fines, whipping, forced labor, and death. *Id.*

34. See PERRY, *supra* note 28, at 107.

35. U.S. CONST., art. I, § 8, cl. 18. This grant of power is well-settled and based in Congress's enumerated powers under the Constitution. In *United States v. Comstock*, the Court stated:

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to counterfeiting, treason, or Piracies and Felonies committed on the

all until the passage of the 1790 Crimes Act,³⁶ which contained twenty-three federal crimes.³⁷ The passage of these federal crimes also included the first mandatory statutory sentencing under federal law.³⁸ Under the Act, capital punishment was mandated for “treason, murder, three offenses related to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime.”³⁹ Several of these crimes are still punished with a mandatory penalty today.⁴⁰ Although these were the first statutorily mandated sentences in the United States, this codification actually significantly limited the types of offenses that required capital punishment at common law.⁴¹

Throughout the late 1700s and the early 1800s, Congress enacted its first mandatory prison terms.⁴² Beginning in the early 1800s, Congress sporadically enacted laws that generally backed away from mandatory minimum sentencing⁴³ but also affirmed their use in certain specific contexts.⁴⁴ Then, during the Civil War, Congress utilized mandatory minimum sentencing to “target[] individuals allied with the Confederacy.”⁴⁵ While it is difficult to determine exactly how many offenses carried mandatory penalties up to this point in American history,⁴⁶ Congress created the Revised Statutes in the 1870s, which first codified the federal law.⁴⁷ At this point, “[a]t least 108 offenses codified in the Revised Statutes carried a mandatory penalty. . . . Of these 108 offenses, 16 mandated death” and “at least 92 of those offenses carried a mandatory term of imprisonment.”⁴⁸

high Seas or against the Law of Nations, nonetheless grants Congress broad authority to create such crimes. And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.

560 U.S. 126, 135–36 (2010) (internal quotations and citations omitted).

36. Comm’n Rept., *supra* note 32, at 7.

37. *Id.*

38. *Id.* at 7.

39. *Id.*

40. *Id.* at 8 n.22.

41. *Id.* at 9 (“[T]he debates and Congress’s decision to impose death for seven offenses and discretionary terms of imprisonment for the others was a departure from the prevalent use of mandatory death penalties during the colonial period.”).

42. *Id.* at 9.

43. *See id.* at 10 n.43.

44. *Id.* at 11.

45. *Id.* at 13.

46. *Id.* at 15.

47. *See id.* at 15 (citation omitted).

48. *Id.* at 15–16.

In the early 1900s, Congress set out to revise its laws and formed a commission charged with revising the federal code.⁴⁹ The United States Sentencing Commission advised Congress to repeal many of the mandatory minimum penalties for many crimes that were “not punishable by death.”⁵⁰ As a result of the Commission’s recommendations and reasoning,⁵¹ the 1909 Criminal Code “repealed at least 31 of the mandatory minimum terms of imprisonment” codified in the Revised Statutes.⁵² Following this mass repeal of mandatory sentencing, Congress once again instituted mandatory punishments to give teeth to legislation in the Prohibition Era.⁵³ However, these mandatory punishments were repealed by the passage of the Twenty-First Amendment in 1935.⁵⁴

Even with the glut of Congressional activity surrounding mandatory minimums, they remained rare in the federal system until the passage of The Boggs Act of 1951⁵⁵ and the Narcotics Control Act of 1956.⁵⁶ The Narcotics Control Act of 1956 “imposed stiff mandatory minimum sentences for drug importation and distribution in an effort to more effectively deter those offenses.”⁵⁷ Like the mandatory punishments adopted during the era of the Civil War, these new Acts were largely reactionary, responding to a dramatic increase in drug use following World War II.⁵⁸ However, these mandatory minimums differed from those

49. *Id.* at 18.

50. *Id.*

51. *Id.* at 19. In their recommendations to Congress to repeal certain mandatory minimum sentences, the committee reasoned the following:

The committee has also adopted a uniform method of fixing in all offenses not punishable by death the maximum punishment only, leaving the minimum to the discretion of the trial judge. The criminal law necessarily subjects to its corrective discipline all who violate its provisions. The weak and the vicious, the first offender and the atrocious criminal, the mere technical transgressor and the expert in crime are alike guilty of the same offense. In the one case the utmost severity of punishment can scarcely provide the protection to which society is entitled; in the other anything except a nominal punishment may effectually prevent the reclamation of the offender.

Id.

52. *Id.* at 20.

53. *Id.* at 21.

54. *See id.*; *see also* U.S. CONST. amend. XXI.

55. Comm’n Rept., *supra* note 32, at 22 (citing Pub. L. No. 82-255, 65 Stat. 767 (1951)).

56. *Id.*; *see also* The Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (1956) (repealed 1970), available at <https://www.gpo.gov/fdsys/pkg/STATUTE-70/pdf/STATUTE-70-Pg567.pdf>.

57. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200–01 (1993).

58. *See* Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 285–86 (2010) (“In the post-World War II period, the incidence of illegal narcotics use in the United States increased substantially. Congress responded in 1951 with passage of the Narcotics Drugs Import and Export Act, which for the first time introduced

in the past in that they called for lengthier penalties and applied to “offenses not traditionally covered by such penalties.”⁵⁹ The Acts implemented harsh mandatory sentences for drug-related offenses including a minimum sentence of five to twenty years for a first-time offense of marijuana importation.⁶⁰ In 1970, Congress repealed “nearly all” of these laws with the Comprehensive Drug Abuse Prevention and Control Act of 1970 and declared that they had failed to meet their intended goals of deterrence, instead resulting in injustices toward offenders.⁶¹

Nevertheless, since the 1980s, Congress has enacted many new mandatory minimum punishments for offenses.⁶² Not only did this round of legislation include some drug offenses that were repealed in 1970,⁶³ it also extended mandatory sentencing to certain firearms offenses,⁶⁴ sexual offenses toward children,⁶⁵ and identity theft.⁶⁶ Since the 1980s, the number of federal crimes has increased at a rate of 56.5 new crimes per year, and “the number of criminal offenses in the United States Code [has] increased to 4,450” as of 2008,⁶⁷ not including criminal offenses promulgated by various government agencies.⁶⁸ A total of 83,946 federal criminal cases were heard in 2010; 19,896 defendants were tried and convicted under federal statutes containing a mandatory minimum penalty.⁶⁹ Currently, “there are over 100 mandatory minimum sentence

severe mandatory minimum prison sentences for certain drug offenses. In 1956, following highly publicized hearings . . . [with] agents in the Bureau of Narcotics, Congress passed yet another provision increasing prison sentences and fines for drug offenses.”)

59. Vera Institute of Justice, *Report To Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 FED. SENT. R. 185 (2012).

60. See Narcotics Control Act of 1956, *supra* note 56.

61. Comm’n Rept., *supra* note 32, at 22.

62. *Id.* at 23–29.

63. See *id.* at 23 (citing The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986)).

64. 18 U.S.C. § 924(c) (1988 & Supp. II 1990). See also *Bailey v. United States*, 516 U.S. 137, 142–43 (1995) (“924(c)(1) requires the imposition of specified penalties if . . . there is a [sufficient showing of] *active employment* of the firearm by the defendant . . . in relation to the predicate offense.”) (internal quotation marks and citations omitted).

65. See e.g., 18 U.S.C. § 2251.

66. See 18 U.S.C. § 1028A(a).

67. Comm’n Rept., *supra* note 32, at 65 (quoting John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION MEMO NO. 26 at 1 (June 16, 2008)).

68. *Id.*; see also *Overcriminalization: An Explosion of Federal Criminal Law*, HERITAGE FOUNDATION FACT SHEET NO. 86 (Apr. 27, 2011), available at <http://www.heritage.org/research/fact-sheets/2011/04/overcriminalization-an-explosion-of-federal-criminal-law>. The Heritage Foundation stated that even “the Congressional Research Service itself admitted that it was unable to even count” the offenses to a certainty. *Id.* However, they estimate the number to be in the “tens of thousands.” *Id.*

69. See Comm’n Rept., *supra* note 32, at 66–67.

provisions in the federal code.⁷⁰ While there have been recent pushes to limit their use,⁷¹ mandatory minimums are still prevalent in the federal system.

Mandatory minimum sentencing remains a source of controversy in the current political and judicial landscapes in the United States.⁷² In *United*

70. Maggie E. Harris, *The Cost of Mandatory Minimum Sentences*, 14 FLA. COASTAL L. REV. 419, 424 (2013). Some of the most common and recognizable examples of federal crimes that contain mandatory statutory minimums include: domestic drug trafficking, *e.g.*, 21 U.S.C. § 841(a) (2012) (triggering mandatory sentences starting at ten years and up to life whenever a drug trafficking crime involves, for example, more than one kilogram of heroin or more than 280 milligrams of crack cocaine); drug importation and exportation, *e.g.*, 21 U.S.C. § 960(a) (2006) (minimum of 10 years where for a first offense involving the importation of drugs where no serious bodily injury results); using a gun during the commission of a crime, *e.g.*, 18 U.S.C. § 924(c)(1)(A)(i) (2012) (mandating five added years to the sentence when using or carrying a firearm during a crime of violence or a drug trafficking crime); immigration-related crimes, *e.g.*, 8 U.S.C. § 1324(a)(2)(B)(i) (2006) (mandating a three year sentence for harboring an alien with the intent that the unlawful alien will commit a felony); identity theft, *e.g.*, 18 U.S.C. § 1028A(a)(1) (2005) (two years added to the underlying charge when it includes aggravated identity theft); sex offenses directed toward children, *e.g.*, 18 U.S.C. § 1591(b)(1) (2012) (requiring fifteen years for the sex trafficking of children under fourteen by means of fraud or coercion); the three strikes law, *e.g.*, 18 U.S.C. § 3559(c)(1) (2012) (life in prison upon the conviction of a serious felony where the offender has two or more prior serious violent felony convictions); crimes involving explosives or airplane hijackings, *e.g.*, 42 U.S.C. § 2272(b) (2014) (thirty year minimum sentence for using, attempting to use, or threatening while possessing, an atomic weapon); murder and crimes against children, *e.g.*, 18 U.S.C. § 1114 (2014) (mandating life imprisonment or death for the first-degree murder of federal officers); obstruction of justice, *e.g.*, 2 U.S.C. § 192 (2014) (one month mandatory sentence for refusing to testify before Congress); crimes involving food stamps, *e.g.*, 7 U.S.C. § 2024(b)(1) (six month mandatory sentence for a second offense of illegal food stamp activity); and kidnaping, *e.g.*, 18 U.S.C. § 1201(g)(1) (twenty year minimum for a the kidnaping of a minor); certain types of fraud, *e.g.*, 22 U.S.C. § 4221 (2014) (one year minimum for the forgery of a notary seal); organized crime, *e.g.*, 18 U.S.C. § 225(a) (2014) (ten year minimum for running a criminal enterprise). *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS (Feb. 25, 2013), <http://fam.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

71. *See, e.g.*, U.S. Sentencing Comm'n, *Press Release*, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014) http://www.usc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf; Liz Halloran, *How Long Is Too Long? Congress Revisits Mandatory Sentences* (Jan. 9, 2014), <http://www.npr.org/blogs/itsallpolitics/2014/01/08/260797831/how-long-is-too-long-congress-revisits-mandatory-sentences>; Fair Sentencing Act of 2010, Pub. Law No. 111-220, <http://www.gpo.gov/fdsys/pkg/BILLS-111s1789enr/pdf/BILLS-111s1789enr.pdf> (eliminating the mandatory minimum sentence of 21 U.S.C. 844(a) for simple possession of cocaine).

72. *See* Letter from Karen J. Mathis, President, American Bar Association, to The Honorable Bobby Scott, Chair, Subcommittee on Crime, Terrorism, and Homeland Security & The Honorable Randy Forbes, Ranking Member, Subcommittee on Crime Terrorism, and Homeland Security (July 3, 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_1.authcheckdam.pdf. Leading criminal justice organizations such as the American Bar Association oppose the use of mandatories. *Id.* (“[T]he American Bar Association supports repeal of federal mandatory minimum sentencing laws. We urge the Judiciary Committee to conduct further hearings on this subject.”). Many American judges have criticized Congress’ use and application of mandatory minimums. Notably, Justice Breyer, who was the “architect of the Sentencing Guidelines” has expressed criticism. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 872 n.13 (2009) [hereinafter *Institutional Design*]. Justice Breyer stated: “[m]andatory minimum statutes are

States v. Booker,⁷³ the United States Supreme Court held that 18 U.S.C. § 3553(b)(1), which made the Federal Sentencing Guidelines mandatory,⁷⁴ could not coexist with the jury trial requirement of the Sixth Amendment. Justice Breyer concluded that the Guidelines, in order to avoid unconstitutionality, must be read as merely “advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”⁷⁵ While some organizations expressed “cautious optimism”⁷⁶ regarding the

fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.” *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in judgment.). Even conservative politicians have come out against mandatory minimums. See 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, 194–95 (1993). Conversely, politicians sometimes “view being tough on crime as a badge of honor that wins points with voters.” *Institutional Design*, at 873 n.14 (detailing various politician’s statements on the Congressional Record which demonstrate support for mandatory minimum penalties because it deters or is tough on crime).

73. 543 U.S. 220 (2005). In *Booker*, the defendant’s sentence was enhanced based on findings of the judge, and were not given to the jury for reasonable doubt determinations pursuant to the Sixth Amendment. *Id.* at 233. The Court concluded that the sentencing guidelines were merely advisory, severing the mandatory language from the statute. *Id.* This holding dealt only with the sentencing guidelines issued by the Sentencing Commission and did not affect statutorily created mandatory minimums. *Understanding Booker and Fanfan: Federal Sentencing Guidelines Are Advisory, but Mandatory Minimum Sentences still stand*, FAMILIES AGAINST MANDATORY MINIMUMS, available at <http://famm.org/Repository/Files/Booker%20Fanfan%20Fact%20Sheet.pdf> (last accessed Apr. 23, 2016).

74. 18 U.S.C. § 3553(b)(1) (2012). This section of the statute states:

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Id.

75. *Booker*, 543 U.S. at 246. “Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute. . . . It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance and that Justice Stevens' approach would undermine.” *Id.* at 253–54 (internal citations omitted).

76. See *Understanding Booker and Fanfan*, *supra* note 73.

holding of *Booker* for placing more sentencing discretion for certain crimes, *Booker* only affected those sentencing guidelines promulgated by the United States Sentencing Commission.⁷⁷ Post-*Booker*, the mandatory sentencing minimums and statutory maximums enacted by Congress still govern unless some exception applies.⁷⁸

Currently, there are only two exceptions to mandatory minimum sentences: the “substantial assistance”⁷⁹ exception and the “safety valve”⁸⁰ exception. Criminal defendants can use the substantial assistance exception by providing information that substantially assists the Government “in the investigation or prosecution of another person who has committed an offense.”⁸¹ In *Wade v. United States*,⁸² the United States Supreme Court clarified this exception by holding that sentencing courts may depart from mandatory minimum requirements only when a motion is made to do so by the government.⁸³ *Wade* further held that courts “may review the government’s refusal to bring a substantial assistance motion only if the government based the refusal on a constitutionally impermissible motive.”⁸⁴ Thus, it is almost completely at the discretion of the prosecutor as to whether such a motion will be brought. The use of substantial assistance exception motions is quite common, and their use has remained fairly consistent in cases over the past two decades.⁸⁵ This exception has also been included in the Federal Rules of Criminal Procedure to allow for a motion to be made within one year following sentencing⁸⁶ and even after a year has passed under certain

77. See *Booker*, 543 U.S. at 246.

78. See *infra* notes 79–81.

79. 18 U.S.C. § 3553(e) (2012).

80. 18 U.S.C. § 3553(f) (2012).

81. 18 U.S.C. § 3553(e) (2012).

82. 504 U.S. 181 (1992).

83. *Id.* at 185.

84. Julie Gyurci, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1253–54 (1994).

85. In 1992, 15 percent of all defendants sentenced using the federal guidelines benefited from substantial assistance downward departures at sentencing. U.S. Sentencing Comm’n, 1992 Annual Report 125 (1993). In 2013, the Government filed a motion of substantial assistance in approximately 12.1 percent of all cases. U.S. Sentencing Comm’n, 2013 Annual Report 39 (2014), available at <https://www.ncjrs.gov/pdffiles1/Digitization/152376NCJRS.pdf> (last accessed Apr. 23, 2016).

86. See Fed. R. Crim. Pro. 35(b)(1) (“Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”); see also Fed. R. Crim. Pro. 35(b)(4) (“When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.”).

circumstances.⁸⁷ Criticisms of the substantial assistance exception are what led, in part, to the adoption of the safety valve exception for certain drug offenses.⁸⁸

By the mid-1990s, more than 100 federal judges declined to preside over cases involving low-level drug offense cases requiring the application of mandatory minimum sentences.⁸⁹ Judge Frank Easterbrook of the Seventh Circuit Court of Appeals harshly criticized mandatory minimums and asserted that the substantial assistance exception is of no use to a low-level drug offender.⁹⁰ In his view, low-level drug offenders used as drug mules “lack the contacts and trust necessary to set up big deals, and they know little information of value. Whatever tales they have to tell, their bosses will have related.”⁹¹ Additionally, he stated that “[d]efendants unlucky enough to be innocent have no information at all, and are more likely to want vindication at trial, losing not only the opportunity to make a deal but also the 2-level reduction the sentencing guidelines provide for accepting responsibility.”⁹² The result of this type of exception alone is the potential for inverted sentencing,⁹³ favoring the more serious offenders because of the information to which they had access.

Due to these inequitable results, Congress enacted the safety valve exception.⁹⁴ The safety valve applies only to non-violent, first-time,

87. Fed. R. Crim. Pro. 35(b)(2) (“Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the defendant’s substantial assistance involved: (A) information not known to the defendant until one year or more after sentencing; (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.”).

88. See *infra* note 89.

89. Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1863 (1995).

90. See *United States v. Brigham*, 977 F.2d 317, 317–18 (7th Cir. 1992).

91. *Id.* at 317.

92. *Id.* at 317–18.

93. Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor’s Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 209 (1997) (providing an example of case where a more culpable defendant received lighter sentence). Inverted sentencing is a phenomenon where those who have actually committed more serious offenses get less harsh sentences because of their ability to exchange information they learned in their capacity as a major player in the criminal enterprise. See Schulhofer, *supra* note 57, at 213 (“[M]andatory system can become an inverted pyramid”). But cf. Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 48–50 (1999) (arguing that inverted sentencing is very rare).

94. See Oliss, *supra* note 89, at 1886 (detailing the reasons for the addition of the safety valve).

federal drug offenses and requires application of a rigid five-part test.⁹⁵ This test must be satisfied in order for a judge to issue a sentence below the statutorily required minimum. Under the safety valve statute, if the defendant meets the elements of the test,⁹⁶ the judge is required to go through the case “as if sentencing a defendant who is not subject to mandatory minimum sentence.”⁹⁷ The judge then applies the sentencing guideline’s mitigating factors to determine an appropriate sentence.⁹⁸ The comments of Judge Easterbrook and the two exceptions enacted by Congress are evidence of pushback against the rigid application and unintended effects mandatory minimum sentencing can create. However, the safety valve exception, due to its narrow scope and application, does not fully address Congress’s purpose of correcting sentence disparities resulting from federal mandatories.⁹⁹

95. See Comm’n Rept. 34-36. There is a five-part test to obtain downward sentencing relief under the safety valve exception. *Accord* 18 U.S.C. § 3553(f) (1994). The statute states:

[T]he court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Id.

96. The defendant has the burden of proof under the statute to demonstrate they meet the requirements of the test. *See, e.g.*, *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996).

97. Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L REV. 1471, 1498 (2000).

98. *Id.* at 1496–97.

99. Oliss, *supra* note 89, at 1855. First of all, the statute is only limited to low-level drug offenses, and does not address many of the other federal crimes for which there are mandatory sentences. *Id.* Additionally, there are many instances of cases where low-level drug offenders fail to meet one of the elements. *See, e.g.*, *United States v. Bazel*, 80 F.3d 1140, 1144 (6th Cir. 1996) (denying safety valve relief for a defendant because the defendant had a criminal history); *United States v. Chen*, 127 F.3d 286, 291 (2d Cir. 1997) (denying relief under the safety valve because defendant was in possession of a firearm during the commission of the offense); *United States v. Contreras*, 136 F.3d 1245, 1246 (9th Cir. 1998) (denying defendant sentencing relief under the safety

While the two discussed exceptions are clear examples of attempts to ameliorate some of the more draconian consequences of mandatory minimum penalties, Professor Rachel Barkow contends that legislators “lack the incentives to enact [sentencing] reforms as long as they reap political rewards for looking tough on crime.”¹⁰⁰ In addition to the political gains from appearing to be tough on crime, the families, communities, and people who are most affected by mandatory sentencing provisions do not form a very powerful interest group¹⁰¹ compared to groups who support sentencing rules that favor the government.¹⁰²

III. ARGUMENTS IN FAVOR OF MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL CODE

The principal rationales of mandatory sentencing laws are utilitarian in nature.¹⁰³ Proponents of mandatory minimums offer many reasons supporting mandatories, such as keeping chronic offenders off the streets.¹⁰⁴ While long prison sentences for “recidivists, drug traffickers, and those who commit violent crimes isolate them from the general community . . . [m]andatory sentencing provisions are also designed to deter, sending the message to potential offenders that harsh consequences

valve because the statements he made were not to the government’s lawyer, but to his probation officer); *United States v. Marin*, 144 F.3d 1085, 1095 (7th Cir. 1998) (holding that “the district court committed error in granting [the defendant], who did not provide a complete and truthful account during his presentencing interview, repeated opportunities throughout the sentencing hearing to change his story in order to avail himself of the safety valve.”).

100. *Institutional Design*, *supra* note 72, at 873 n.13.

101. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (presenting a detailed discussion on political and interest groups’ effects on sentencing guidelines). There are some interest groups that do advocate for sentencing reform like Families Against Mandatory Minimums, the Western Prison Project, and the American Civil Liberties Union. *Id.* However, in many states felons are barred from voting, which further weakens and already less than powerful interest group. *Id.*

102. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993). Donald Dripps compared groups that support sentencing guidelines favorable to the government and groups that support sentencing guidelines favorable to defendants, and stated that “[y]ou don’t need a calculator to figure out that more will be bid on behalf of the government than will be against it.” *Id.*

103. U.S. Sentencing Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* at 13–15 (1991). Utilitarianism is “a doctrine that the useful is the good and that the determining consideration of right conduct should be the usefulness of its consequences.” MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/utilitarianism> (last accessed Jan. 25, 2015).

104. See Comm’n Rept., *supra* note 32, at 87; see also Donald E. Lewis, *The General Deterrent Effect of Longer Sentences*, 26 BRIT. J. CRIM. 47, 60 (1986) (illustrating the deterrent effect from longer prison sentences).

follow from their criminal conduct.”¹⁰⁵ Future criminals are deterred because the minimum penalties are certain, preventing potential criminals from being able to factor judicial leniency into their risk-taking behavior.¹⁰⁶ Dr. David Mulhausen of the Heritage Foundation stated that “[i]ncreasing the certainty, swiftness, and severity of punishment will result in the utilitarian goal of reduced crime.”¹⁰⁷ In the same vein, this deterrence assists local law enforcement in coercing cooperation.¹⁰⁸ Deterrence is founded upon the utilitarian mandate to maximize happiness and good in the world because there is less crime at the expense of those who are subject to mandatory minimums.¹⁰⁹

In addition to the specific (incapacitation) and general (diversion) deterrence of crime, some also see mandatory minimums as “promoting uniformity and reducing unwarranted disparities” in sentencing “because such penalties require courts to impose similar sentences for similar offenses.”¹¹⁰ The idea is that allowing too much discretion to judges leads to a greater variation in sentencing, thereby undermining “the goals of sentencing to treat like offenders alike.”¹¹¹ Mandatory sentencing prevents this.

Another argument, and perhaps the one that first comes to one’s mind when considering mandatory minimum punishments, is retribution.¹¹² The retributivist argument posits that there are some crimes that are so terrible that they necessitate a sentencing floor to demonstrate society’s contempt

105. Lowenthal, *supra* note 33, at 67.

106. *Id.* at 77–78.

107. David B. Mulhausen, *Theories of Punishment and Mandatory Minimum Sentences*, THE HERITAGE FOUNDATION (May 27, 2010), <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences>.

108. Comm’n Rept., *supra* note 32, at 89. According to the report, “Commissioner Raymond Kelly of the New York Police Department testified that the potential application of more severe penalties in federal court ‘has convinced a number of suspects to give up information.’ Similarly, the Department of Justice views mandatory minimum penalties as an ‘essential’ and ‘critical tool’ in obtaining ‘cooperation from members of violent street gangs and drug distribution networks.’” *Id.*

109. *See, e.g.*, JEREMY BENTHAM, *Anarchical Fallacies*, in WORKS 501 (J. Bowring ed., 1843) (stating that “[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts” in support of the idea that the punished individual is an instrument for the betterment of society).

110. Comm’n Rept., *supra* note 32, at 85.

111. *Id.* at 85–86.

112. *See* Mulhausen, *supra* note 107 (“mandatory minimum sentences that establish long incarceration or death sentences for very serious and violent crimes can be justified based solely on the doctrine of just deserts”).

for the offense.¹¹³ This is certainly convincing when one looks at some the offenses for which Congress establishes mandatory punishments.¹¹⁴

IV. ARGUMENTS AGAINST MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL CODE

There are a multitude of practical arguments against the imposition of mandatory minimums in federal sentencing. First, opponents take issue with what proponents believe to be an argument *for* mandatory minimums: uniformity in sentencing.¹¹⁵ Opponents believe there can be too much uniformity in sentencing without adequate adjustments for offender culpability, resulting in criminals with differing levels of blameworthiness receiving identical sentences.¹¹⁶

Opponents also criticize mandatory minimums for “producing sentences that are excessively harsh relative to the gravity of the offense committed.”¹¹⁷ Disproportionate sentencing affects minor offenders because when Congress enacted these laws, they only envisioned those who committed very serious versions of the offense.¹¹⁸ These disproportionate sentences result because, by mandating uniformity, individualized sentencing is made impossible.¹¹⁹ The judge no longer has the ability to take different factors into account when sentencing a criminal, for if he is found guilty of the basic elements of the crime in question, the sentence is prescribed.¹²⁰ As a result, the consideration of a defendant’s particular situation is less determinative of a judge’s sentence than the charge initially brought by the prosecutors. This essentially transfers a discretion traditionally reserved for the judge to the prosecutor.¹²¹ This sort of rigidity inevitably results in situations where

113. Comm’n Rept., *supra* note 32, at 88; *see generally* IMMANUEL KANT, THE PHILOSOPHY OF LAW 197–98 (W. Hastie trans., 1887) (“It is morally fitting that an offender should suffer *in proportion* to [his] desert or culpable wrongdoing.”) (emphasis added).

114. *See generally supra* note 70.

115. Comm’n Rept., *supra* note 32, at 90.

116. *Id.* at 90–91; *see also id.* at 90–91 n.486; THE PHILOSOPHY OF LAW, *supra* note 113. The idea that different criminals who are more or less guilty or culpable could receive identical punishment directly conflicts with Kant’s stance that criminals should receive their just “deserts.” THE PHILOSOPHY OF LAW, *supra* note 113.

117. Comm’n Rept., *supra* note 32, at 92.

118. *Id.*

119. *Id.* at 95.

120. *See supra* note 70.

121. Comm’n Rept., *supra* note 32, at 96–97. In *State v. Barger*, 810 P.2d 191 (Ariz. Ct. App. 1990), a defendant was charged under a state statute that mandated a sentence of life imprisonment when he committed an aggravated assault while on parole for a violent offense. At sentencing, the trial judge expressed his frustration:

“the facts are bargainable” as a way for prosecutors to avoid imposing automatic minimum sentencing on those whom they think may not deserve such a punishment.¹²² Similarly, opponents criticize mandatory minimum penalties for their apparent unfair impact on racial minorities and those who are economically disadvantaged.¹²³

Studies show that there is little to no correlation between mandatory penalties and deterrence.¹²⁴ Scholars have rejected the idea that mandatory minimums prevent criminals from engaging in criminal activity because of prospective harsh consequences.¹²⁵ Some studies have demonstrated that criminal defendants are more likely to opt for plea agreements and forgo their right to trial.¹²⁶

While many strictly utilitarian legal philosophers see a deterrent-based system of punishment as a means to achieving more moral good in the world,¹²⁷ there are legal philosophers who see such a system as directly

Mr. Barger, I am inclined to agree with your attorney that under all the circumstances of this case, the sentence that I am required to impose by law is wholly inappropriate. Unfortunately, there is not a thing in the world I can do about it other than state on the record that under no circumstances, even if the court had discretion, would I ever impose a sentence this severe for the actions that you took on that date. . . . I have seen many cases where the aggravated assaults were far more serious than what you did, and the punishment was far, far less. The prosecutors do this every day. I don't know why this was prosecuted this way, but they have the discretion to prosecute you in the way that they see fit, and this Court doesn't have any discretion in what it has to do.

Id. at 197–98.

122. See Luna, *supra* note 6.

123. Comm'n Rept., *supra* note 32, at 101; see also David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 311 (2001) (demonstrating “large differences in the length of sentence exist on the basis of race, gender, education, income, and citizenship.”).

124. See, e.g., Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (“The safest conclusion from the literature thus far would be that the perception of certain legal and extralegal sanctions does seem to act as a modest deterrent factor, but that the perceived severity and celerity of punishment do not appear to be effective deterrents to crime, and we know virtually nothing about celerity.”).

125. See, e.g., Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 90–100 (2009); see also Luna, *supra* note 6 (“certain offenses subject to mandatory minimums can draw upon a large supply of potential participants; with drug organizations, for instance, an arrested dealer or courier is quickly replaced by another.”).

126. See, e.g., Lowenthal, *supra* note 33, at 84–85. Less than a decade following the enactment of the mandatory statutes described in *Barger*, the trial rate in that county went from 10.40% to 3.77% of all cases. *Id.* However, other studies show that this has not resulted in a reduction in crime, but merely an increase in guilty pleas, resulting in substantial increases in the costs of incurred by prison populations. *Id.* at 85 (“[T]he same mandatory sentence laws that induce guilty pleas have contributed substantially to recent increases in the cost of correctional services as prison populations have multiplied. Thus the fiscal consequences of charge-based mandatory punishment statutes are probably greater than legislatures anticipated.”).

127. See BENTHAM, *supra* note 109.

violating the very nature of human existence and believe free will and rationality to form the basis of humanity.¹²⁸ A system that utilizes only incapacitation violates free will because it “does not leave those subjected to it free, as responsible agents should be left free, to determine their own future conduct, but seeks to pre-empt their future choices by incapacitating them.”¹²⁹ However, not even Kant would say that criminals should run free, for he believed that a penal system is a categorical imperative in itself.¹³⁰ There are also arguments against deterrence being a goal of punishment as it treats humans as something less than human. The Idealist philosopher Georg Wilhelm Friedrich Hegel asserted strongly that while deterrent laws may give citizens a reason to obey a law, such laws treat a human “as a dog.”¹³¹

Another argument against adopting a policy and system of mandatory minimum punishments is the fiscal consequences.¹³² Many states have adopted mandatory minimum sentencing similar to those found in the federal code.¹³³ However, adoption of these mandatory sentences has resulted in unintended consequences to both the state and the members of the community. In the adoption of these severe sentences, states have imposed so-called “‘credit-card-sentencing polic[ies],’ in which the legislature enacts several severe penalties without any concern for whether the state has the necessary resources to shoulder the increased sentences.”¹³⁴ According to Robin Campbell, these financial considerations have caused many former supporters of mandatory minimums to reconsider their positions on the subject.¹³⁵ In Michigan, “the

128. See GROUNDWORK, *supra* note 1, at 4:447–448; see also DRESSLER, *supra* note 8, at 19–20.

129. ANTHONY DUFF, *Legal Punishment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/entries/legal-punishment/>.

130. ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 6–20 (1993).

131. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 99 (S.W. Dyde trans., 1896) (1820) (“A threat assumes that a man is not free, and will compel him by vividly presenting a possible evil. Right and justice, how ever, must have their seat in freedom and in the will, and not in the restriction implied in menace. In this view of punishment it is much the same as when one raises a cane against a dog; a man is not treated in accordance with his dignity and honour, but as a dog.”).

132. See Barkow, *supra* note 101, at 805–06.

133. *Id.* at 806. Tennessee and Florida have created sentencing commissions and adopted mandatory minimum penalties for certain offenses. *Id.*

134. See *id.* (quoting Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345, 355 (1993)).

135. See generally Robin Campbell, *Dollars & Sentences: Legislators' Views on Prisons, Punishment, and the Budget Crisis*, VERA INST. OF JUSTICE (Jan. 29, 2016), http://www.vera.org/publication_pdf/204_398.pdf (noting that the budget crisis, combined with reduced public concern about crime, has led to current reforms in sentencing). See also Barkow, *supra* note 101, at 805–06. Barkow writes that if legislators “were dealing with a budget surplus or a rapidly rising crime rate, the

repeal of mandatory minimum drug sentences was projected to save the state \$41 million dollars” and would “free up existing prison beds” to “make prison space available for more serious offenders.”¹³⁶ While the financial consequences of mandatory minimum sentencing certainly appear to put a strain on state treasuries, the tough-on-crime rhetoric and political considerations appear to have outweighed the urgency for reform.¹³⁷ For example, at a roundtable discussion by state legislators on the subject, some of the participants expressed concern that, if some inmate who was let out of prison early as a result of sentencing reform commits a “headline-making offense,” it could cause a “political backlash.”¹³⁸

V. THE SECOND FORMULATION OF KANT’S CATEGORICAL IMPERATIVE

Utilitarianism is a moral theory characterized by its focus on the maximization of happiness in a community.¹³⁹ Jeremy Bentham has stated the utilitarian view of punishment is justified only “in as far as it promises to exclude some greater evil.”¹⁴⁰ The utilitarian does not care only about “future consequences”¹⁴¹ when considering a present decision. Punishment under this moral theory is justifiable only if the “punishment can be shown to promote effectively the interest of society . . . otherwise it is not.”¹⁴²

legislatures might not care as much about rationalizing prison resources if they see a greater benefit from get-tough rhetoric . . . [b]ut where the legislature has a reason to care about costs, these impact statements can have tremendous influence.” *Id.* She goes on to say that “state legislatures are interested in these resource impact statements when they face budget pressures, especially if crime rates are stable or declining.” *Id.* One state legislator from Texas stated “It is no longer fiscally possible, no matter how conservative you are, to incarcerate people and spend \$150,000 each on them when a fraction of that money would probably get them free of their habit and in productive society.” *Id.* (citing Campell, *supra* note 135, at 8). Furthermore, he added, “Every 19-year-old first-time offender who sleeps in a prison bed in a prison that’s full denies me an opportunity to put an armed robber in a bed.” *Id.* Another representative stated “[t]here are some blocks in New Orleans that cost us \$10 million [a year],” he said, referring to the criminal justice costs incurred for offenders who live in these specific areas[.] . . . How do we redirect those dollars to try to turn the tide?” *Id.* (citing Campell, *supra* note 135, at 9).

136. See *Administering Crime*, *supra* note 101, at 807.

137. *Id.*

138. Campell, *supra* note 135, at 8.

139. See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT vi (2d ed. 1823) (“[I]t is the greatest happiness of the greatest number that is the measure of right and wrong[.]”) (italics omitted).

140. JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in WORKS, *supra* note 109, at 83.

141. JOHN RAWLS, TWO CONCEPTS OF RULES, IN THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969).

142. *Id.*

This type of future good is not limited to teaching a criminal not to commit such an act again.¹⁴³

Unlike the Utilitarian school of thought, Kant's Categorical Imperative eschews notions of economic value or emotive responses to ethical dilemmas.¹⁴⁴ Widely considered to be one of the forefathers of deontological ethics,¹⁴⁵ the "fundamental premise" of Kant's ethical framework stems from the idea that "liberty, autonomy, and human dignity are basic rights, whose restrictions require special justifications."¹⁴⁶

Deontology is the theory of moral obligation.¹⁴⁷ Deontology judges morality by examining the actions taken by individuals. This is a break from utilitarianism, which focuses more on the consequences of actions.¹⁴⁸ Kant's moral philosophy stands for the principle that the ends do not necessarily justify the means.¹⁴⁹ His concern with utilitarian consequentialism is that the actor cannot always know the actual consequences of his actions.¹⁵⁰ How can we assess moral value by looking toward the effects and consequences of an action when those results are not necessarily what the actor intended? Deontology is the answer to this apparent indeterminacy of utilitarianism and "takes it to be a demand of reason that ethics—true ethics—be universally applicable."¹⁵¹ Kant created a famous formula, the Categorical Imperative, to measure moral worth.¹⁵²

143. See DRESSLER, *supra* note 8, at 50–52.

144. Michael Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity As a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 309 (2013). The two major, competing philosophies of normative ethics are deontology, which is grounded in an "individual's moral rights and obligations," and utilitarianism, which is grounded in "the consequences of actions and on evaluating which actions most contribute to human happiness." *Id.* John Rawls writes, "by viewing people as subjects of desires and inclinations and assigning value to their satisfaction as such, (classical) utilitarianism is at odds with Kant's doctrine at a fundamental level." JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 188* (Barbara Herman ed., 2000).

145. See *infra* note 150.

146. *Id.*

147. MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/deontology> (last accessed Jan. 29, 2015).

148. Compare KANT, *supra* note 1, with A FRAGMENT ON GOVERNMENT, *supra* note 139.

149. PAUL GUYER, KANT 186 (Brian Leiter ed., 4th ed. 2008).

150. ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 185 (1993).

151. William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try a Rat?*, 143 U. PA. L. REV. 1889, 1998–99 (1995). Ewald writes that for Kant "[t]he moral law must be valid, not just for all greengrocers or all Scandinavians or even all human beings, but for all rational creatures, everywhere, at all times. And for Kant this means that the moral law must be both necessary and a priori – that is, independent of and logically (although not historically) prior to all experience." *Id.*

152. GUYER, *supra* note 149, at 179–80.

In *Groundwork of the Metaphysics of Morals*, Kant established three formulations of the Categorical Imperative: (1) act only in accordance with that maxim through which you can at the same time will that it become a universal law; (2) act, whether toward yourself or toward others, in such a way so that you are using humanity as an end in itself and not merely as a means; and (3) and every rational being must so act as if he were through his maxim always a legislating member in a universal kingdom of ends.¹⁵³ Kant's second formulation, treating others not merely as means but as ends in themselves, is best suited to apply his moral framework in relation to mandatory minimums.

Kant's Categorical Imperative focuses on an individual's relationship with humanity.¹⁵⁴ By humanity, Kant most likely is referring to:

those of our powers and capacities that characterize us as reasonable and rational persons who belong to the natural world. . . . These powers include, first, those of moral personality, which make it possible for us to have a good will and a good moral character; and second, those capacities and skills to be developed by culture: by the arts and sciences and so forth.¹⁵⁵

Further, in *Groundwork*, when Kant refers to humanity, he is referring to those who possess rationality and are able to participate in the universal moral framework.¹⁵⁶ Indeed, Kant means "something more like biological human being insofar as they are also rational beings, and it is the embodiment of rational being rather than human life as such that he is declaring to be an end in itself."¹⁵⁷

Kant's earlier works espoused the importance of human freedom.¹⁵⁸

153. GROUNDWORK, *supra* note 1, at 4:420–4:429; *see also* GUYER, *supra* note 149, at 184–86.

154. *See* GROUNDWORK, *supra* note 1, at 4:428.

155. RAWLS, LECTURES, *supra* note 144.

156. CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 110 (1996) ("Kant interchanges the terms of humanity and rationality" in his *Groundwork of the Metaphysics of Morals*).

157. GUYER, *supra* note 149, at 186.

158. Free will is a very important consideration in Kant's early works. For example, in *Observations on the Feeling of the Beautiful and Sublime* Kant wrote:

The human being has his own inclinations, and by means of his capacity of choice a clue from our nature to conduct his actions in accordance with these. Nothing can be more appalling than that the actions of a human stand under the will of another. Hence no abhorrence can be more natural than that which a person has against servitude. On this account a child cries and becomes bitter if it has to do what another wants without having made an effort to make that pleasing to him. And it wishes only to become a man quickly and to operate in accordance with its own will.

IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 125 (Patrick Frierson et al. trans., 2011).

According to Paul Guyer, the rule is that one's "use of freedom on one occasion be consistent with my continued use of it on all other possible occasions, and that my use of freedom be consistent with everyone else's use of their freedom."¹⁵⁹ Human love for autonomy is present in Kant's formulations of his Categorical Imperative, for if one were to universalize a faulty maxim¹⁶⁰ or use another person merely as a means to achieve another end, the freedom of some will be affected. Humanity's *capacity* to make *free* moral choices is not dynamic but the same in every human being, for it is the capacity of rational thought, not the realization of such, that entails membership in Kant's "kingdom of ends."¹⁶¹

Kant provides four prominent examples in *Groundwork of the Metaphysics of Morals* on how to apply the second formulation of the Categorical Imperative: "one each a perfect duty to self, a perfect duty to others, imperfect duty to self, and imperfect duty to others."¹⁶² Kant

159. GUYER, *supra* note 149, at 178.

160. *Id.* at 182. This would be how to analyze the moral worth of an act under Kant's first formulation of the Categorical Imperative. "A maxim is the principle on which one actually acts[.]" *Id.* Take for instance Guyer's example maxim, "I will enrich myself at all costs." This "could not be acted on by everyone, because something that [one person] might do under that maxim is bound to conflict with something somebody else would do." *Id.*

161. GROUNDWORK, *supra* note 1, at 4:433; ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 115 (1999); see also *Treating Persons as Ends in Themselves*, *supra* note 2, at 276 ("[D]ignity attaches because of mankind's mere capacity for rational moral willing, and not because a person actually does the right thing or acts from the right motive."); Buchhandler-Raphael, *supra* note 144, at 309 ("Kant therefore contended that humanity, so far as it is capable of morality, is the only thing which has dignity, and that this capacity provides every person an intrinsic dignity that every other person must respect."). In the *Groundwork*, Kant describes the Kingdom of ends as follows:

By a *kingdom* I understand a systematic union of various rational beings through common laws. Now since laws determine ends in terms of their universal validity, if we abstract from the personal differences of rational beings as well as from all the content of their private ends we shall be able to think of a whole of all ends in systematic connection[.] . . . For, all rational being stand under the *law* that each of them is to treat himself and all others *never merely as a means* but always *at the same time as ends in themselves*. But from this there arises a systematic union of rational beings through common objective laws, that is, a kingdom, which can be called a kingdom of ends . . . because what these law have as their purpose is just the relation of these being to one another as ends and means.

GROUNDWORK, *supra* note 1, at 4:433.

162. GUYER, *supra* note 149, at 196. Briefly, duties are those things that are required of humans by the three formulations of the Categorical Imperative. *Id.* at 194–96. Kant uses examples of perfect and imperfect duties in the *Groundwork*. GROUNDWORK, *supra* note 1, at 4:429–431. Perfect duties are those that one must always do or perform, and imperfect duties are those that one must not ignore, but for which there are multiple ways to achieve that duty. GUYER, *supra* note 149, at 196–98. This distinction is discussed further *infra*. However, when Kant uses the word "duty" he "does not mean to say that duties are constituted by inflexible, inviolable moral rules, nor does he think that when a duty is in question we may never consult our inclinations concerning what to do." KANT'S ETHICAL THOUGHT, *supra* note 161, at 44. Instead the distinction between perfect and imperfect is more accurately characterized as "owed" and "meritorious" respectively. *Id.* Imperfect duties are "wide" and require us to "set ends." *Id.* Finally, Kant makes a distinction between those duties that are done "in

describes the prohibition against suicide as perfect duty to one's self.¹⁶³ He argues that one cannot "dispose of a human being in [one's] own person by maiming, damaging, or killing him."¹⁶⁴ Kant says this violates the second formulation because if one "destroys himself in order to escape from a trying condition he makes use of a person *merely as a means* to maintain a tolerable condition up to the end of life."¹⁶⁵ In Kant's view, to commit suicide is to use or destroy one's own humanity to achieve a certain condition (i.e. relief).¹⁶⁶

While the prohibition against suicide is one example,¹⁶⁷ Kant instead uses the prohibition of false promises as an example of a perfect duty to others.¹⁶⁸ In illustrating how false promises would treat others merely as a means, Kant states that when one makes a promise with no intention of keeping that promise, he fails to treat others as ends in themselves because their capacity to choose their own ends freely has been limited.¹⁶⁹ This application shows that the Categorical Imperative stands not just for the continued existence of others' freedom, but also the "capacity to exercise their freedom by choosing their own ends."¹⁷⁰ The examples that Kant

conformity with duty" and those that are done "from duty." GROUNDWORK, *supra* note 1, at 4:397–98. While actions performed in conformity with duty are not worthless, it is an act "[o]nly . . . done *from duty*, Kant says, [that] have true moral worth or moral content." KANT'S ETHICAL THOUGHT, *supra* note 164, at 27.

163. GROUNDWORK, *supra* note 1, at 4:429; *see also* GUYER, *supra* note 149, at 196–97. Kant was very familiar with the topic of permissible suicide that existed in Stoic and Epicurean Philosophies, and frequently discussed such topics with his students in his lectures. Suicide was also a "fashionable topic in eighteenth-century Germany after the publication of Johann Goethe's bestseller *The Sorrows of Young Werther* (1774)." *Id.* at 196.

164. GROUNDWORK, *supra* note 1, at 4:430. In Kant's lectures, he clarifies this concept stating that suicide is a unique topic due to "the fact that man uses his freedom to destroy himself, when he ought to use it solely to live as a man." GUYER, *supra* note 149, at 197. He goes on to say that man may certainly "dispose" of all things that have to do with his person, but "not over the person itself, not can he use freedom against himself." *Id.* For Kant, the act of suicide is a manifestation of free will, an important pillar for Kant's ethical framework. *Id.* However, this "one free act" would prohibit any future free act. *Id.* Kant's assertion of humanity as freedom means that no free act "can be considered in isolation," but freedom is "an on-going condition" that must be preserved. *Id.* Kant's lectures appear to hedge slightly on his opinion of the prohibition of suicide as a perfect duty to self. *Id.* To illustrate discusses the martyrdom of Cato in Ancient Rome, who "killed himself not to escape the tyranny of Julius Caesar personally but rather to . . . save many more free beings." *Id.* This discussion shows that preservation of humanity, or freedom, should always be the end, but that does not necessarily mean one has a duty to increase humanity. *Id.* at 197–98.

165. GROUNDWORK, *supra* note 1, at 4:430.

166. GUYER, *supra* note 149, at 196. According to Guyer, Kant would probably make the same type of argument against homicide of any kind—not just suicide. *Id.*

167. *Id.* at 198 (demonstrating that the rationale behind suicide also applies to homicides).

168. GROUNDWORK, *supra* note 1, at 4:429–430.

169. *Id.*

170. GUYER, *supra* note 149, at 199. This does not mean that people are not permitted to make promises to others that they intend to keep (e.g., through a contract). *Id.* This type of relationship,

uses that exemplify perfect duties to self and others “can plausibly be analyzed as duties to *preserve* the existence and the possibility of the exercise of humanity, as the capacity to set and pursue ends freely.”¹⁷¹

Kant specifies two imperfect duties that are relevant to mandatory minimum sentencing: the duty to cultivate one's own talents and skills, and the duty to aid others.¹⁷² The idea behind these imperfect duties is that no human is born having perfected oneself.¹⁷³ When young or inexperienced, one depends on both one's own practice and the assistance of others to develop one's abilities.¹⁷⁴ The reason to set ends in this way and to assist others in achieving their ends is not based in the utilitarian notion that the result would be an increase of happiness in the world. Instead, Kant argues that the more that we do these meritorious acts, the more people will be able to freely pursue ends in the world.¹⁷⁵

A “categorical imperative,” as it fits into Kant's morality, is a required action that is not at all influenced by one's inclinations or reservations.¹⁷⁶ If it is to be independent of all wants and desires, this law must be pure in nature. Kant writes that “it is a question of objective practical laws” that hold true for all people regardless of what their lower faculties tell them.¹⁷⁷ Punishments by a court raise concerns under this second formulation of his moral philosophy.

Kant frequently lectured on law.¹⁷⁸ However, according to William Ewald, “it is not entirely clear whether Kant's legal philosophy is consistent with his general moral philosophy, let alone (as Kant claims) derivable from it.”¹⁷⁹ Nonetheless, the Categorical Imperative is certainly “at the top of the hierarchy” of Kant's system of legal philosophy.¹⁸⁰ Kant's philosophy of punishment is largely considered to be retributivist¹⁸¹

where one voluntarily allows oneself to be used as a means because he is *at the same time* being treated as an end in oneself. *Id.* This satisfies the second formulation so long as the contract is entered into freely. *Id.*

171. *Id.* at 199.

172. GROUNDWORK, *supra* note 1, at 4:430.

173. GUYER, *supra* note 149, at 202–03.

174. *Id.* at 200.

175. *Id.* at 201.

176. *See id.* at 186.

177. GROUNDWORK, *supra* note 1, at 4:427.

178. Ewald, *supra* note 151, at 1997.

179. *Id.*

180. *Id.* at 2001.

181. *See* DRESSLER, *supra* note 8, at 16–18.

in nature, but the foundation for his philosophy is very clearly grounded in his moral philosophy. Kant wrote:

Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it. Now, everything that is unjust is a hindrance to freedom according to universal laws. Coercion, however, is a hindrance or opposition to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just.¹⁸²

From this, it is clear that certain limitations on freedom are necessary and just, according to Kant, when actions will affect others' freedom. However, Kant's *Philosophy of Law*¹⁸³ stands for the principle that punishment can never be administered as a means for promoting some other good. Of the justifications proponents advance to justify the use of mandatory minimums, nearly all point to a goal that treats the criminal defendant merely as a means and not as an end in himself.¹⁸⁴

VI. MANDATORY MINIMUMS AND TREATING HUMANS AS ENDS IN THEMSELVES

Kant directly addresses criminal punishment in his *Metaphysics of Morals*.¹⁸⁵ While he maintains that punishment by a court “can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society[,] [punishment] must always be inflicted upon [the criminal] because he has committed a crime.”¹⁸⁶ Thus, Kant does not close the door on punishment, nor does he even close the door on deterrence-influenced criminal justice system, as such a system runs the risk of treating criminals merely as a means.¹⁸⁷ Kant's objection to certain

182. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 231 (J. Ladd trans., 1965).

183. Ewald, *supra* note 151, at 2002 (“The Categorical Imperative has a double use in Kant's late legal philosophy—a juridical use and an ethical use. The distinction comes down to a distinction between external behavior and internal motivation. The use is juridical when the Categorical Imperative is applied to external actions; that is, when it is used to say whether a particular bit of external behavior, like paying a debt, is legally right or not—regardless of the motive from which it is performed.”).

184. *See supra* Part IV.

185. *METAPHYSICS*, *supra* note 4, at 6:331–6:332.

186. *Id.*

187. *See* Wright, *supra* note 2, at 273–75.

deterrence-based punishments is not that defendants are treated as a means; rather, it is an objection “to treating persons merely as a means, or as a means and not at the same time as ends in themselves.”¹⁸⁸

Certain punishments, even mandatory punishments, could be both deterrence-based and not treat those charged merely as means. For example, mandatory imprisonment for certain drug offenses¹⁸⁹ may, in certain circumstances, deter individuals from trafficking drugs, but still have the effect of rehabilitating those convicted, treating them as an end-in-themselves. However, there are certainly instances under the federal mandatory sentencing that have the effect of “making some persons utterly incapable of choice would presumably fail to treat such persons as ends.”¹⁹⁰ For example, a mandatory minimum sentence of life imprisonment under the three-strikes law¹⁹¹ might appear to have a hint of evenhandedness insofar as it punishes all criminals similarly. It might even be a law, consented to by citizens as rational beings, free to consent to whatever social contracts one wishes.¹⁹² However, the legislative intent behind such guidelines overlooks Kant's second formulation and thus fails to be moral in the Kantian sense. The defendant has been removed from society entirely. There is no apparent goal of rehabilitation or reintegration for a criminal charged under the three-strikes law. A law such as this one essentially amounts to a preventive detention of one's future conduct.¹⁹³ Thus, while not all statutorily mandated minimum sentencing violates Kant's second formulation, when such a punishment's only apparent goal is to deter future wrongdoers and take preventive measures not in proportion to the crime, it fails to respect human dignity (rationality). Statutes like the three-strikes law are inapposite to Kant's philosophy.

CONCLUSION

This Note has argued that mandatory minimum sentencing in the current federal code fails to be moral under the second formulation of Kant's Categorical Imperative: treating others not merely as a means, but as ends-in-themselves. The implementation of mandatory punishments has

188. *Id.*

189. *See, e.g., supra* note 70.

190. *See Wright, supra* note 2, at 290.

191. *See supra* note 70.

192. *See Wright, supra* note 2, at 314 (“Kant's own explicit logic is contractarian, but his underlying logic should be one of universality, reason, and intrinsic worth.”).

193. *Id.* at 287 (“Certainly, Kant seems committed to limiting punishment to cases of the actual commission of a crime, and thus, to oppose preventive detention.”).

been present since ancient times. Today, lawmakers and proponents often point to the deterrent effects of mandatory sentencing requirements. However, the use of the lengthy incarceration as a deterrent fails to recognize prisoners as being rational ends-in-themselves.