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• *Crime and Punishment, and Punishment?* •

MANDATORY MINIMUMS: DON'T GIVE UP ON THE COURT

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Erik Luna and Paul Cassell have given us an extraordinarily thorough and persuasive treatment of an important topic.[1] I have little doubt that the world would be a better place if Congress heeded their advice and adopted the reforms they propose for federal mandatory minimum sentencing laws.[2] Will Congress actually do so? Drawing on an eclectic mix of insights from behavioral science, political science, and legal theory, Luna and Cassell present a case for guarded optimism.[3] On the other hand, in his insightful response to Luna and Cassell, Ronald Wright identifies various institutional features of congressional decisionmaking that seem likely to blunt the gathering momentum for mandatory minimum reform.[4] Whether or not Wright is ultimately too pessimistic regarding Congress, his argument should cause us to consider whether other branches of government might realistically be expected to fill the void created by legislative inertia and timidity.

For instance, what about the Supreme Court—might the Court play a meaningful role in paring back the penal excesses of our federal mandatory minimums? Luna and Cassell dismiss the possibility. They write, "[T]he Supreme Court's jurisprudence in this area, described by some as an abandonment of the field, makes clear that judicial review will not provide much of a check on excessive punishment. . . . [S]ignificant reform will come, if at all, by Congress."[5]

They may reach this conclusion too quickly. Their analysis is based entirely on the Supreme Court's Eighth Amendment jurisprudence. However, they disregard an emerging body of *statutory*

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

2 *Id*. at 60-76.

3 *Id*. at 34-60.

4 Ronald F. Wright, *Portable Minimalism in Sentencing Politics*, 2011 CARDOZO L. REV. DE NOVO 9, 10-18.

5 Luna & Cassell, *supra* note 1, at 28-29.

interpretation jurisprudence in which the Court has acted with surprising boldness in narrowing the scope of the Armed Career Criminal Act, one of the most draconian of the federal mandatory minimum statutes.[6] The ACCA cases suggest that the Court may be more willing to regulate mandatory minimums through statutory than through constitutional interpretation. More speculatively, another very recent decision, *United States v. O'Brien*,[7] may point the way to more robust *procedural* regulation of mandatory minimums, including a right to have a jury find the facts that trigger a mandatory minimum beyond a reasonable doubt.

I don't mean to suggest that the Court is likely to move so aggressively as to obviate the need for Congress to adopt legislative reforms. I do think, however, that the Court has moved beyond the utter passivity that characterized its approach to mandatory minimums from 1991 through at least 2003. The Court may thus play a meaningful role in reining in minimums in the coming years. It is to be hoped that the Court will do so alongside the sort of legislative reforms that Luna and Cassell advocate.

In developing these points, this comment proceeds as follows. Part I reviews the Court's Eighth Amendment jurisprudence as it relates to mandatory minimums, concluding that Luna and Cassell are probably correct to doubt that much progress will occur on this front. Part II suggests various theoretical reasons to expect that the Court will be more active in narrowing the reach of mandatory minimums when it is wearing its statutory interpretation hat than when it is wearing its constitutional interpretation hat. Part III presents the ACCA case study as an illustration of the Court playing this narrowing role. Part IV supplements the ACCA story by considering a couple of non-ACCA cases. Part V discusses *O'Brien* and the prospects for procedural regulation. Finally, Part VI, a conclusion, considers in a preliminary way the appropriateness of the Court regulating mandatory minimums through statutory interpretation.

I. THE COURT'S TIMID EIGHTH AMENDMENT JURISPRUDENCE

Luna and Cassell identify several important objections to mandatory minimums.[8] In my view, the most important of these is that mandatory minimums commonly violate the proportionality principle—the ideal of just deserts, that the punishment ought to fit the crime in some manner closely tied to harm and culpability. At first blush, it would seem that the Eighth Amendment Cruel and Unusual Punishments Clause is the most sensible and direct legal mechanism for

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6 *See* Johnson v. United States, 130 S. Ct. 1265 (2010); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008).

7 130 S. Ct. 2169 (2010).

8 Luna & Cassell, *supra* note 1, at 13-17.

addressing the proportionality problem, for the Court has long recognized that the Clause includes a proportionality requirement.[9] And, indeed, the Court has regularly used this proportionality requirement in recent years to narrow the reach of the death penalty.[10]

In the realm of *noncapital* punishment, however, the Court has been far more reluctant to use the Cruel and Unusual Punishments Clause to overturn or narrow state sentencing laws. To be sure, the Court did overturn a sentence of life without parole for the crime of passing a bad check in *Solem v. Helm*.[11] But later cases revealed *Solem* to be a jurisprudential dead end. Most notably, the Court upheld a mandatory sentence of life without parole for a drug offense in *Harmelin v. Michigan*[12] and a mandatory sentence of twenty-five years in prison for a retail theft in *Ewing v. California*.[13] Both decisions strike me, along with many other commentators, as very nearly a de facto rejection of the proportionality requirement in noncapital sentencing.[14]

What's going on in these cases? Justice Kennedy is the pivotal figure in these 5-4 decisions, and it is his views that are crucial to unpack. His influential concurring opinion in *Harmelin* outlined a series of "principles that give content to the uses and limits of proportionality review."[15] "The first of these principles," he wrote, "is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts."[16] As a second principle, Kennedy asserted that "the Eighth Amendment does not mandate adoption of any one penological theory. The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."[17] As a third principle, Kennedy invoked federalism: "Our federal system recognizes

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[9] *See* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[10] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (banning capital punishment for nonhomicide crimes); Roper v. Simmons, 543 U.S. 551 (2005) (banning capital punishment for juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (banning capital punishment for the mentally retarded).

[11] 463 U.S. 277 (1983).

[12] 501 U.S. 957 (1991).

[13] 538 U.S. 11 (2003).

[14] *See, e.g.*, Richard S. Frase, Graham's *Good News—and Not*, 23 FED. SENT. REP. 54, 54 (2010) (characterizing "post-1983 decisions upholding severe prison sentences as an abdication of the Court's constitutional responsibility to protect politically powerless criminal defendants from excessive penalties"); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695 (2005) (arguing that *Ewing* "all but defines the right against excessive punishment out of existence").

[15] 501 U.S. at 998 (Kennedy, J., concurring).

[16] *Id.* (internal quotation marks and citation omitted).

[17] *Id.* (citations omitted).

the independent power of a State to articulate societal norms through criminal law."[18] Putting it all together, Kennedy concluded, "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime."[19]

Although Kennedy did not write in *Ewing*, the plurality opinion of Justice O'Connor (which Kennedy joined) expressly relied on the principles articulated in the *Harmelin* concurrence.[20] And the plurality's application of these principles made clear how very deferential they were: "To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."[21] Concurring in the judgment, Justice Scalia properly questioned what this incapacitation-based rationale for the sentence had to do with proportionality, that is, "the notion that the punishment should fit the crime."[22] As Scalia observed, once the plurality looked beyond the gravity of the offense to consider whether the sentence could be justified on other grounds, "the game [was] up."[23] Transforming a proportionality test into an inquiry—deferential on federalism and separation-of-powers grounds—into whether there is *any* justification for the challenged sentence effectively reduces the test to rational-basis review. Very few, if any, noncapital sentences will ever be found unconstitutional under such a test.

Of course, the Court has very recently provided some hope for more robust Eighth-Amendment review in *Graham v. Florida*.[24] In a majority opinion authored by—who else?—Justice Kennedy, the Court held that the Eighth Amendment prohibits the sentence of life without parole for juveniles in nonhomicide cases.[25] Does this mean that Kennedy has retreated from the positions he took in *Harmelin* and *Ewing*? There is little basis to think so. For one thing, *Graham* described the Kennedy concurrence as the "controlling opinion" in *Harmelin* and treated its deferential "grossly disproportionate" test as good law.[26] For another, the Court laid heavy emphasis on the unique character of the life without parole sentence. Noting that the sentence "deprives the convict of the most basic liberties without giving hope of restoration," the Court concluded that "life without parole is the second

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18 *Id*. (citation omitted).
19 *Id*. (internal quotation marks and citation omitted)
20 538 U.S. at 23-24 (plurality).
21 *Id*. at 30 (plurality).
22 *Id*. at 31-32 (Scalia, J., concurring in judgment).
23 *Id*. at 31 (Scalia, J., concurring in judgment).
24 130 S. Ct. 2011.
25 *Id*. at 2034.
26 *Id*. at 2021-22.

most severe penalty permitted by law."[27] Moreover, the Court also relied heavily on the diminished culpability and other particular characteristics of juvenile offenders.[28] Finally, echoing *Ewing*, the Court canvassed all four of the traditional purposes of punishment in order to determine whether any of them supplied an adequate justification for imposing life without parole on a juvenile convicted of a nonhomicide offense.[29] Although the Court answered the question in the negative, the mode of analysis suggests that incapacitative purposes would still provide an adequate basis to affirm most long sentences mandated by recidivism statutes.[30]

To be sure, *Graham* does provide a plausible basis for challenging many life without parole sentences. However, even in the draconian world of federal sentencing, mandatory life without parole is rare. *Graham* may also give grounds for juveniles (and perhaps others with deeply diminished culpability, such as the mentally retarded) to challenge lesser mandatory minimums. But *Graham* offers no clear sign of a retreat from the basic holdings of *Harmelin* and *Ewing*—indeed, if anything, the Court went out of its way to endorse Kennedy's decisive opinion in *Harmelin*. And, as long as *Harmelin* and *Ewing* stand,[31] there seems little jurisprudential basis for the Court to use the Eighth Amendment to do any more than nibble at the margins of the system of federal mandatory minimums.

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[27] *Id*. at 2027 (internal quotation marks and citation omitted).

[28] *Id*. at 2026-27.

[29] *Id*. at 2028-30.

[30] At least one commentator would view *Graham* as making a more significant break from *Ewing* in this regard than I suggest here. Parsing the language of *Graham* against the backdrop of the Court's capital sentencing jurisprudence, Youngjae Lee concludes that "the purposes of punishment test is doing little work in the Court's analysis, because the implication here is that the potential incapacitation or deterrence effects are not strong enough to overcome the deficiencies of the punishment as a retributivist matter." Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT. REP. 58, 60 (2010). Lee thinks that the Court might be heading in the direction of a sort of sliding scale test: if a sentence is disproportionate based on the offender's culpability, then the strength of any incapacitation- or deterrence-based justifications would have be correspondingly greater. In my view, such an approach would be a significant improvement on the rational-basis review implicitly adopted in *Ewing*. However, as Lee acknowledges, "The *Graham* Court made only tentative gestures in this direction . . . ." *Id.*

[31] I should note here that *Graham* did suggest a new way to distinguish *Harmelin* and *Ewing* in future challenges to noncapital sentences. The Court characterized Graham's argument as fundamentally different from those made in the earlier noncapital cases in this sense: "[H]ere a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id*. at 2022-23. But the distinction does not withstand scrutiny and seems unlikely to hold up over time. *See* Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT. REP. 49, 50 (2010) ("Certainly the dissent is correct that a case-specific challenge can be rephrased into a categorical one with relative ease . . . ."). Although categorical challenges could theoretically become the exception that swallows the rule of *Harmelin* and *Ewing*, I agree with Carol and Jordan Steiker that "Justice Kennedy intended no such dramatic recasting of noncapital proportionality law." Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT. REP. 79, 81 (2010) .

II. WHY STATUTORY INTERPRETATION MIGHT BE DIFFERENT

This Part suggests why statutory interpretation might be different. I'll draw on the reasons that Luna and Cassell supply for optimism as to congressional action (although I'll organize the points a bit differently). First, they note the "value of small moves": even where big reforms are not possible, similar effects can be achieved over time through incremental "nudges."[32] Narrowing interpretations of federal mandatory minimum statutes are smaller moves than constitutional decisions like *Graham* in at least three respects. First, a statutory interpretation decision can be overturned by Congress, while an Eighth Amendment decision may not. Second, a statutory interpretation decision applies only to the federal criminal-justice system, while an Eighth Amendment decision would also apply to all fifty state systems. Finally, a narrowing interpretation of a statute would apply only to that statute, while an expansion of Eighth Amendment rights would potentially affect the application of many statutes. For these reasons, justices who would like to see the federal mandatory minimums reined in, but who resist bold moves (as a matter, for instance, of jurisprudential principle or fear of political backlash), might be more willing to accept a series of narrowing interpretations of particular statutes than, say, a sudden reversal of *Ewing*. Like the small legislative moves that Luna and Cassell discuss, such a series of modest decisions by the Court might over time help to strengthen the proportionality norm in the criminal-justice system.[33]

Second, Luna and Cassell point to the existence of statesmen: "[H[istory is marked by officials who disregarded or downplayed their self-interests to do what is best for society. . . . [T]hey take positions that could be perceived as unpopular and politically dangerous, and then seek to change the views of others through sensible lines of reasoning supported by reliable evidence."[34] Of course, when we think about what institution is best-positioned to moderate American penal excesses, the Supreme Court stands out precisely because it is designed to support statesmanship. The nine life-tenured justices are insulated from the sort of electoral accountability that makes members of Congress reluctant to act as statesmen in the face of public support for tough-on-crime legislation.[35] Indeed, the justices are even freed from the indirect political pressure created by the desire for higher office that is doubtlessly felt by many life-tenured lower-court judges—the justices

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[32] Luna & Cassell, *supra* note 1, at 34-36.

[33] Indeed, as Luna and Cassell suggest, there may be a "tipping point" effect, such that a few small moves might produce dramatic norm shifts. *Id*. at 36-38.

[34] *Id*. at 38.

[35] *See* Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24 (discussing public support for harsh punishment).

have reached the pinnacle of their profession, and it is almost unheard of for one to seek another office.

On the other hand, it is possible to overstate the justices' lack of public accountability. Although the justices may face no realistic possibility of losing office,[36] their work is closely scrutinized by the press, the political branches, and political interest groups. No one relishes the prospect of public vilification. A desire to avoid harsh public responses may soften a justice's tendency to support an unpopular position, as may a sense of loyalty to the politicians and the interest groups that made possible the justice's elevation to the Supreme Court. Even apart from these considerations, a justice's concern for preserving the institutional legitimacy of the Court may also, at least at the margins, prompt some reluctance to take positions that risk substantial political backlash.

Here, too, we may see important differences between constitutional and statutory interpretation. Constitutional interpretation seems to attract much more public attention than statutory, and may thus be less conducive to statesmanship. Eighth-Amendment jurisprudence, in particular, has a long history as a political lightning rod.[37] By contrast, statutory interpretation cases seem more likely to fly under the radar screen. As a crude illustration, try a Google search on "*Graham v. Florida*" and "*Begay v. United States*," a statutory interpretation case that will be discussed in the next Part. I get more than ten times as many hits for *Graham*,[38] even though *Begay* has been around for two years longer than *Graham* and even though *Begay* and its progeny may very well affect the sentences of far more defendants than *Graham*. Similar disparities are evident in searches of newspaper and law review databases.[39] If *Begay*'s relative neglect accurately reflects public

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[36] Only one justice has ever been impeached, and that was more than two centuries ago. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 94 n.25 (2002).

[37] *See, e.g.*, Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 GEO. L. J. 433, 442 (2010) (noting "large public explosion of vituperation" that occurred in response to the Court's citation of international law in *Atkins v. Virginia*, *Roper v. Simmons*, and *Lawrence v. Texas*, the first two of which were Eighth Amendment cases); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 410-411 (1995) ("[T]he Court's sweeping edict in *Furman [v. Georgia]*, which eliminated in one fell swoop almost every extant death penalty law in the United States, galvanized massive public outcry and political opposition and thus rendered impossible public dialogue and more moderate avenues of capital punishment reform through the politically accountable branches of government.").

[38] I ran the search on April 13, 2011. I got 692,000 hits for *Graham* and 67,600 for *Begay*.

[39] A search of "*Graham v. Florida*" in the Westlaw "United States Papers" database reveals extensive coverage of the decision immediately following its release, with articles in the *New York Times*, *Washington Post*, *Miami Herald*, *Omaha World-Herald*, *Baltimore Sun*, and many other newspapers in large and small markets alike. By contrast, the database seems to contain only one article devoted to *Begay* that appeared in the month following the decision in a general-circulation newspaper—and that newspaper was in the state from which the case emerged. *See* Scott Sandlin, *DWI Not Violent Crime, Justices Rule*, ALBUQUERQUE J., April 17, 2008, at A1, 2008 WLNR

disinterest in the interpretation of mandatory minimum laws, then the justices should feel relatively secure in acting as statesmen in such cases.

Third, and finally, Luna and Cassell find hope for legislative reform in the possibility of "overlapping consensus" and "incompletely theorized agreements."[40] The basic idea is this: The debate over mandatory minimums implicates a variety of competing social values that are viewed quite differently by different people, such that a consensus is unlikely to coalesce around any particular theoretical critique of mandatory minimums. For instance, although proportionality may at some high level of generality be widely accepted as an important penal objective, it may be impossible to reach agreement as to any precise meaning of proportionality or as to the notion that proportionality should trump any other particular objective of the criminal-justice system when they come into conflict. However, Luna and Cassell reassure us, the fractured state of public opinion does not preclude progress because mandatory minimums are actually in tension with a wide range of social values, not just proportionality.[41] The trick is to fashion a "minimalist" reform program that will appeal to many of these values. Such a program may succeed politically even in the absence of any consensus as to the underlying theory of reform.

This line of thinking can be translated to the Court, too. Indeed, as Luna and Cassell observe, the notion of the "incompletely theorized agreement" was originally developed to account for judicial behavior.[42] So what are the prospects for overlapping consensus on the Court when it comes the mandatory minimums? If Eighth Amendment litigation is the vehicle, we've already seen some major obstacles. As Kennedy's *Harmelin* concurrence highlights, an expansion of Eighth-Amendment rights runs counter to state autonomy and constricts the range of legislative policy-making authority—results that are highly disfavored by at least some of the justices. In particular, as the Kennedy opinion also indicates, some of the justices seem unwilling to constrain the ability of legislatures to emphasize the objectives of incapacitation and deterrence in their penal systems, as would almost certainly happen if proportionality review were made more robust. Finally, there is the originalist objection: As Justice Thomas put it in *Graham*, "[T]here is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing."[43] In light of their strong originalist views on the Eighth Amendment, it is highly unlikely that Justices Thomas, Scalia, or Alito would ever be part

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7146326. Meanwhile, a search of the Westlaw JLR database on April 13, 2011, found 131 journal articles mentioning "*Graham v. Florida*," but only 80 mentioning "*Begay v. United States*."

40 Luna & Cassell, *supra* note 1, at 44-46.

41 *Id*. at 47-50.

42 *Id*. at 45.

43 130 S. Ct. at 2044 (Thomas, J., dissenting).

of an overlapping consensus on the Court in favor of using the Eighth Amendment to regulate mandatory minimums. With only six justices even conceivably in play, any justice-statesman seeking to rein in mandatory minimums has little room for error.

Note, however, that these obstacles are not present, or not present to nearly the extent, when the Court considers narrowing interpretations of federal mandatory minimum statutes. There is no threat to state autonomy and little threat to legislative supremacy, for Congress could "overturn" any interpretation adopted by the Court.[44] Nor does the originalist objection have any currency, since the objection is tied quite specifically to the text and history of the Eighth Amendment.

So what jurisprudential values, aside from proportionality, potentially support narrowing interpretations and provide grounds for incompletely theorized agreements? The values cited by Luna and Cassell seem to have salience in the judicial sphere no less than the legislative: separation of powers, constitutional roles, federalism, equality, and truth & transparency.[45] Rather than repeating what they have to say about these values, I'll highlight some jurisprudential considerations that are of particular significance in the statutory interpretation context.

First, there is the rule of lenity: "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."[46] The rule is justified on grounds of fair warning[47] and separation of powers.[48] Of particular significance for the goal of overlapping consensus, the rule has sometimes been embraced most warmly by the Court's conservatives—the very justices who are most skeptical of enforcing proportionality in punishment.[49] Moreover,

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[44] Congress has indeed exercised this authority on several occasions, and there is evidence that the Court takes this possibility into account in its statutory interpretation cases. For instance, in connection with an opinion holding in favor of a defendant based on the rule of lentiy, Justice White wrote, "Of course, the saving grace in our Statutory Construction cases is that Congress may have its way if it does not like the product of our work." WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 867 (3d ed. 2001) (quoting from White memorandum contained in the Thurgood Marshall Papers).

[45] Luna & Cassell, *supra* note 1, at 47-50.

[46] McNally v. United States, 483 U.S. 350, 359-60 (1987).

[47] *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

[48] *See, e.g.*, United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

[49] A good recent example comes from United States v. Hayes, 129 S. Ct. 1079 (2009), in which the Court affirmed the defendant's conviction under a federal firearms statute. Pushing a

Justice Breyer has recently presented a good argument why the rule should apply with special force when the Court is interpreting mandatory minimum statutes.[50]

Second, there is the principle, implicated in some mandatory minimum cases, that punishment should require a guilty mental state. Here is how the principle has been discussed by Justice Thomas (another of the Eighth Amendment conservatives who is not in play in *constitutional* proportionality cases):

> [W]e must construe [statutes] in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."
>
> There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common-law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it." Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.[51]

Third, there is the avoidance canon:

> [W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. It is out of respect for Congress, which we assume legislates in the light of constitutional limitations, that we

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narrower interpretation of the statute, the Court's two dissenters prominently invoked the rule of lenity. *Id*. at 1093 (Roberts, C.J., dissenting). Who were the two "softies"? Chief Justice Roberts and Justice Scalia. As noted above, Scalia flatly rejects proportionality review under the Eighth Amendment. Roberts, for his part, voted with the majority in *Graham*, but wrote separately to articulate a narrower ground of decision, 130 S. Ct. at 2036 (Roberts, C.J., concurring in judgment), which suggests that he is to the right even of Kennedy on proportionality review. *Hayes* this nicely illustrates how the rule of lenity can potentially bring conservative skeptics of proportionality into play in reining in mandatory minimums.

50 "That is because, in the case of a mandatory minimum, an interpretation that errs on the side of *exclusion* (an interpretive error on the side of leniency) still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence (because of the court's interpretation of the statute) is not legislatively *required*." Dean v. United States, 129 S. Ct. 1849, 1860 (Breyer, J. dissenting). "On the other hand, an interpretation that errs on the side of *inclusion* requires imposing . . . additional imprisonment on individuals whom Congress would not have intended to punish so harshly." *Id.* at 1861.

51 Staples v. United States, 511 U.S. 600, 605-06 (1994) (citations omitted).

> adhere to this principle . . . .[52]

What sorts of constitutional problems might the Court avoid in adopting a narrowing construction of a mandatory minimum statute? There are many possibilities. An obvious candidate would be Eighth Amendment problems. To be sure, the justices who do not believe there is any Eighth Amendment proportionality requirement would not likely find a need to avoid Eighth Amendment difficulties. But other justices might be drawn to avoidance-based decisions so as to advance the proportionality principle in a way that is less directly threatening to state autonomy and legislative supremacy than a more straightforward Eighth Amendment decision would be. Other constitutional provisions that might be implicated in mandatory minimum cases include the First Amendment (for instance, in cases involving minimums for distribution of pornography), Second Amendment (for minimums based on gun possession), the Commerce Clause (for minimums based on conduct that is arguably beyond Congress's authority to regulate), the Ex Post Facto Clause (for minimums with retroactive dimensions[53]), and the Equal Protection Clause (for minimums that establish seemingly arbitrary distinctions between classes of offenders).

Fourth, some justices might be inclined to interpret mandatory minimums narrowly so as to minimize the extent to which they displace 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information" a sentencing court may consider "concerning the [defendant's] background, character, and conduct." Any mandatory minimum statute can be thought of as carving out an exception to the general mandate of § 3661, which embodies a profoundly differently vision of the nature of sentencing. We can thus conceptualize any interpretive decision regarding the scope of a minimum as establishing a boundary between the statutes—a broad interpretation constricts the reach of § 3661, while a narrow interpretation does the opposite. If § 3661 is thought to better reflect the traditions or highest ideals of the federal sentencing system, that might provide support for interpreting competing statutes narrowly.[54]

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[52] Jones v. United States, 526 U.S. 227, 239-40 (1999).

[53] With respect to the Commerce Clause and the Ex Post Facto Clause, I am particularly thinking of 18 U.S.C. § 2250, which has been the subject of serious constitutional challenges on many different grounds, *see, e.g.*, United States v. Johnson, 632 F.3d 912, 917-18 (5th Cir. 2011), and which contains a mandatory minimum, 18 U.S.C. § 2250(c).

[54] Although the case did not involve a mandatory minimum, the Court's recent decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), has something of this flavor. Justice Sotomayor's opinion for the majority went on at some length regarding the history of § 3661, framing the statute as an embodiment of a "uniform and constant" aspect of the "federal judicial tradition," namely, the consideration of "every convicted person as an individual." *Id*. at 1239-40. Indeed, Sotomayor asserted, the tradition of "wide discretion" in sentencing extended all the way back to the colonial period. *Id.* at 1240. In light of this tradition, Sotomayor concluded (contrary to the holding of the court below) that district court judges may take into account a

Fifth, and finally, minimums might instead be interpreted narrowly to minimize their displacement of yet another aspect of federal sentencing law: the sentencing guidelines. The guidelines are detailed sentencing instructions for judges that take into account a large number of variables.[55] They went into effect in 1987, originally in the form of binding mandates. In 2005, however, the Court held that the guidelines were merely advisory in light of Sixth Amendment concerns.[56] Despite this holding, the Court has also held that the guidelines should continue to be "the starting point and the initial benchmark" in the sentencing process,[57] and that judges must "give respectful consideration" to the guidelines.[58]

Although the guidelines, like mandatory minimums, are in tension with § 3661's vision of highly discretionary, individualized sentencing, the guidelines should not be confused with minimums. The guidelines not only reflect a much more nuanced approach that is sensitive to a much wider range of variables than most mandatory minimums, but they normally emerge from an independent, expert agency, the United States Sentencing Commission, rather than from the political branches of government. The Court—and Justice Breyer, in particular—has often extolled the value of Commission expertise in setting sentencing policy.[59]

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defendant's post-sentencing rehabilitative efforts at resentencing. *Id*. at 1241. Along the way, Sotomayor rejected arguments based on portions of a different statute, 18 U.S.C. § 3553(a). *Id.* at 1249. Although Sotomayor did not expressly find the statutes in conflict, it is hard to escape the impression that the mandates of § 3553(a) were interpreted narrowly in light of the principles embodied by § 3661.

55 I have described the history, structure, and purposes of the guidelines at length in Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006).

56 United States v. Booker, 543 U.S. 220, 245 (2005).

57 Gall v. United States, 552 U.S. 38, 49 (2007).

58 Kimbrough v. United States, 552 U.S. 85, 101 (2007).

59 For instance, Justice Breyer has written,

> Rather than choose among differing practical and philosophical objectives, the Commission took an "empirical approach," beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like.
>
> The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate. . . .
>
> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart . . . . The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.
>
> The result is a set of Guidelines that seek to embody the [18 U.S.C.] § 3553(a) considerations, both in principle and in practice. . . . [I]t is fair to assume that the

Because mandatory minimum statutes sometimes require sentences above the recommended sentencing guidelines range, determining the scope of a minimum has implications for the force and effectiveness of the guidelines regime. And because the guidelines themselves are authorized by statute,[60] including the command that they be "consider[ed]" by sentencing judges,[61] cases requiring the Court to interpret mandatory minimum statutes can thus present another dimension of statutory conflict in addition to that involving § 3661. Justices, like Breyer, who strongly favor the integrity of the guidelines regime and embrace the statutory vision of expert-led sentencing, might be drawn to narrowing interpretations of mandatory minimums in order to maximize the guidelines' reach.

In sum, statutory interpretation cases present quite different jurisprudential dynamics than Eighth Amendment cases—dynamics that seem considerably more conducive to the development of a constructive overlapping consensus. Indeed, in contrast to the stereotypical liberal-conservative divide that controls the Eighth Amendment cases, we might easily imagine a "strange bedfellows" majority adopting a narrowing interpretation of a mandatory minimum, comprised of, say, Scalia and Roberts on rule-of-lenity grounds, Ginsburg on proportionality grounds (perhaps to avoid an Eighth Amendment problem), Breyer as a matter of supporting the guidelines system, and Sotomayor as a matter of maximizing judicial discretion.

III. THE ACCA CASE STUDY

Is there any evidence of such a dynamic in practice? A good example is supplied by the Court's recent decisions narrowing the reach of the Armed Career Criminal Act. The ACCA establishes a fifteen-year mandatory minimum for felons found in possession of a firearm who have three prior convictions for violent felonies or serious drug offenses.[62] In the absence of the ACCA, a felon in possession would face a *maximum* of ten years.[63]

It is hard to reconcile the ACCA with the proportionality principle. For those sentenced under the law, the term of imprisonment is driven by their criminal history, not the offense for which sentence is formally being imposed (unlawfully possessing a firearm). This is not making

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> Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve §3553(a)'s objectives.

Rita v. United States, 551 U.S. 338, 349-50 (2007). Breyer's particular affection for the guidelines is perhaps unsurprising in light of the fact that he was a member of the original Commission and helped to develop the guidelines' basic architecture. O'Hear, *supra* note 55, at 778.

60 28 U.S.C. § 994(a)(1).

61 18 U.S.C. § 3553(a)(4).

62 18 U.S.C. § 924(e)(1).

63 18 U.S.C. § 924(a)(2).

the sentence fit the crime, but the criminal.[64] Moreover, the fifteen-year length of the sentence seems extraordinarily long, given that the defendant need not have caused nor intended to cause any injury with the firearm. The ACCA imposes the same sentence, without discrimination, on gun possessors who intended to rob, rape, or kill as on gun possessors who merely intended to hunt or to protect their homes. Fifteen years is a long sentence in the United States even for a violent crime,[65] let alone a crime of possession.[66]

From an interpretive standpoint, the real difficulty with the ACCA has been in deciding what counts as a prior "violent felony." Here how the term is defined in the statute:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .[67]

The crucial "or otherwise" language, which has occasioned much litigation, is often referred to as the residual clause.[68]

A. *BEGAY*

The Supreme Court's 2008 *Begay* decision fundamentally altered understandings of the residual clause. The defendant, Larry Begay, had

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64 Desert theory ascribes little or no weight to criminal history as a sentencing factor. Andrew von Hirsch, *Penal Theories, in* THE HANDBOOK OF CRIME AND PUNISHMENT 659, 670 (Michael Tonry ed. 1998).

65 THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEPT. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 13 (indicating that median length of prison terms imposed for violent crimes was four years, while mean was just under eight years).

66 In its original form, as introduced by Senator Arlen Specter, the ACCA presented less of a proportionality problem, for it was intended to be a sentence enhancement for robberies and burglaries. James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546 (2009). However, the bill prompted federalism concerns because robbery and burglary had traditionally been matters for state prosecution. Resistance to the proposed expansion of federal jurisdiction led to a fundamental change in the Specter bill, as the minimum came to target the offense of being a felon in possession of a firearm, which was already a federal crime. *Id*. at 546-47. Thus amended, the ACCA became law in 1984. *Id*. at 547.

67 18 U.S.C. § 924(e)(2)(B).

68 David C. Holman, *Violent and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 212 (2010).

several felony convictions for DUI.[69] After an armed altercation with members of his family, Begay was arrested and later pled guilty in federal court to being a felon in possession of a firearm.[70] The sentencing judge determined that Begay's DUI convictions counted as violent felonies under the ACCA residual clause, thus triggering the fifteen-year minimum.[71] In reversing, the Supreme Court established an entirely new framework for deciding whether a prior offense falls under the residual clause.

In essence, the Court added a new requirement for a prior offense to qualify, namely, that the offense involved "purposeful, violent, and aggressive" ("PVA") conduct.[72] This terminology appears nowhere on the face of statute—Justice Scalia was not entirely unjustified in asserting in his concurring opinion that the majority was not "remotely faithful to the statute that Congress wrote."[73] Here was the rather thin textual basis for the majority's holding:

> In our view, the provision's listed examples—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another." If Congress meant the latter, *i.e.*, if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all. Without them, clause (ii) would cover *all* crimes that present a "serious potential risk of physical injury."[74]

Yet, as Scalia argued, a more natural reading of the statute would seemingly focus on the degree of "potential risk of physical injury," not the defendant's mental state, as the key variable; the listed examples (burglary, arson, etc.) are not superfluous, but define the minimal level of risk necessary for a prior offense to qualify.[75]

The majority was perhaps on firmer ground in connecting the PVA requirement to the ACCA's purposes:

> When viewed in terms of the Act's basic purposes, this distinction [between PVA and strict-liability offenses] matters considerably. As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. In order to determine which offenders fall into this category, the Act looks to past crimes.

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69 553 U.S. at 140.

70 *Id.*

71 *Id.*

72 *See id.* at 148 ("[W]e hold only that, for purposes of the particular statutory provision before us, a prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior in a way that the former are not.").

73 *Id.* at 150 (Scalia, J., concurring in judgment).

74 *Id.* at 142 (citing 18 U.S.C. § 924(e)(2)(B)(ii)).

75 *Id.*a t 149-52 (Scalia, J., concurring in judgment).

This is because an offender's criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun.

In this respect—namely, a prior crime's relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime. In both instances, the offender's prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.[76]

The extent to which one finds this reasoning persuasive will turn, in large part, on one's general feelings toward interpretive use of what Scalia sneeringly referred to as "that ever-ready refuge from the hardships of statutory text, the (judicially) perceived statutory purpose."[77]

In any event, the majority's repeated characterization of DUI as a strict-liability crime (and hence beyond the scope of the residual clause) calls to mind the Court's earlier decisions rejecting strict-liability interpretations of criminal statutes.[78] To be sure, as a formal matter, the question in *Begay* was what punishment should be imposed for the offense of being a felon in possession of a firearm, not what punishment should be imposed for the earlier strict-liability crimes. Still, with so much incremental prison time riding on the earlier offenses, the technical distinction seems blurred in the ACCA context. Indeed, reading *Begay*, one might be excused for thinking that the instant offense *was* DUI—there is a great deal said about the character of DUI as a criminal offense, and hardly anything at all about being a felon in possession. For that reason, it may be fair to think that *Begay* reflects in part the principle that criminal statutes should be interpreted so as to avoid punishment in the absence of mens rea.

This principle may have been an aspect of an "incompletely theorized agreement" in *Begay*. Certainly there are other signs of such an agreement, including how maddeningly vague the new PVA test is, which has caused no end of difficulty for the lower federal courts.[79] Additionally, there is the ideologically odd alignment of justices who joined the majority opinion (at least by reference to the Eighth Amendment proportionality cases). Liberals Breyer, Ginsburg, and Stevens (*Ewing* dissenters all) were joined by Kennedy and Roberts,

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[76] *Id*. at 146 (citation omitted).

[77] *Id*. at 152 (Scalia, J., dissenting).

[78] *See, e.g.*, Staples v. United States, 511 U.S. 600 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994).

[79] *See, e.g.*, Holman, *supra* note 68, at 214-15 (discussing different approaches used in the lower courts).

who support much weaker versions of the proportionality requirements in noncapital cases (as evidenced Kennedy's vote with the plurality in *Ewing* and Roberts's concurrence in *Graham*). Finally, Breyer's authorship of the majority opinion also stands out: it's hard to avoid the suspicion that his narrowing interpretation of the ACCA was motivated, at least in part, by his strong (if, in this case, unspoken) preference for the sentencing guidelines over mandatory minimums.[80]

Scalia's *Begay* concurrence also merits attention. Although Scalia agreed with the majority that DUI convictions do not trigger the ACCA mandatory minimum—an even more striking defection from the Eighth Amendment conservative block than Kennedy and Roberts—he reached that conclusion by a quite different path. Indeed, he characterized the majority opinion as unprincipled[81]—which seems not much different from saying that it embodies an "incompletely theorized agreement." As indicated above, Scalia's preferred approach to the residual clause focuses not on subjective state of mind, but objective risk:

> In my view, the best way to interpret § 924(e) is first to determine which of the enumerated offenses poses the least serious risk of physical injury, and then to set that level of risk as the "serious potential risk" required by the statute. Crimes that pose at least that serious a risk of injury are encompassed by the residual clause; crimes that do not are excluded. In my judgment, burglary [is] the least risky crime among the enumerated offenses . . . .[82]

For Scalia, then, *Begay* boiled down to one question, which he answered by reference to the rule of lenity: "Does drunk driving pose at least as serious a risk of physical injury to another as burglary? From the evidence presented by the Government, I cannot conclude so. Because of that, the rule of lenity requires that I resolve this case in favor of the defendant."[83]

B. *CHAMBERS*

The Court returned to the ACCA less than a year later in *Chambers v. United States*.[84] The residual clause was once again at issue, as the Court had to decide whether the crime of failing to report to prison

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[80] *See, e.g.*, Harris v. United States, 536 U.S. 545, 570 (Breyer, J., concurring in part) ("Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.").

[81] *See, e.g.*, 553 U.S. at 150 (Scalia, J., concurring in judgment) (calling the PVA test a "*deus ex machine*" and a "gimmick").

[82] *Id*. at 149 (Scalia, J., concurring in judgment).

[83] *Id*. at 153 (Scalia, J., concurring in judgment).

[84] 129 S. Ct. 687 (2009).

counted as a "violent felony." Following a 1998 robbery conviction in an Illinois court, Chambers was sentenced to eleven *weekends* in prison, but failed to report on four of the weekends, which led to a conviction for the Illinois crime of failing to report to a penal institution.[85] Following a subsequent guilty plea in federal court to being a felon in possession of a firearm, Chambers was sentenced under the ACCA, based in part on the failure-to-report offense.

Chambers presented the Court with an opportunity to clarify *Begay*'s PVA requirement. Chambers' offense involved a *knowing* failure to report,[86] and was thus potentially distinguishable from Begay's strict-liability offenses. But the Court had almost nothing to say about the PVA requirement beyond the brief assertion, almost made in passing, that "the [failure-to-report] crime amounts to a form of inaction, a far cry from . . . purposeful, violent, and aggressive conduct."[87] The shift from *Begay*'s emphasis on state of mind to *Chambers*' neglect is particular striking given that Justice Breyer was also the author of *Chambers*.

What seems to have happened in *Chambers* is that Justice Scalia was brought into the incompletely theorized agreement, and the analysis was modified to reflect his emphasis on objective dangerousness. Indeed, it was on this basis—a lack of objective dangerousness—that the Court held in favor of Chambers.[88] Cited prominently in support of this holding was Scalia's *Begay* concurrence,[89] without any acknowledgement of the fact that Scalia's basic approach had been expressly rejected by the *Begay* majority. Consistent with Scalia's call for statistical analysis of dangerousness, the heart of the new majority's opinion was an assessment of Sentencing Commission data on failure-to-report cases,[90] which indicated that none of the 160 cases studied had involved violence.[91]

Put alongside *Begay*, *Chambers* thus seems to represent a further narrowing of the residual clause's reach: not only may a prior conviction be excluded based on the absence of a sufficiently culpable state of mind, but also based on the absence of a sufficiently high degree of dangerousness. A great deal remains uncertain, however. We know that a strict liability offense will not satisfy the PVA requirement, but how about intermediate levels of culpability like negligence or recklessness? Does the PVA requirement involve more than just

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85 *Id.*at 690.

86 *Id.* at 691.

87 *Id.* at 692 (internal quotation marks and citation omitted).

88 *See id.* at 691 ("And, more critically for present purposes, [failure to report] does not involve conduct that presents a serious risk of physical injury to another." (internal quotation marks and citations omitted)).

89 *Id.* at 691-92.

90 *See id.* at 695 (Alito, J., concurring in judgment) ("Today's decision, for example, turns on little more than a statistical analysis of a research report prepared by the United States Sentencing Commission." (citation omitted)).

91 *Id.* at 692.

culpability considerations? How does the objective dangerousness requirement relate to the PVA requirement: is it an entirely separate requirement, or is it encompassed within the PVA requirement, or is there some more complicated relationship between the two (as in, for instance, a sliding-scale test)? What exactly is the minimal degree of dangerousness required (the Court said nothing about Scalia's view that the dangerousness of burglary should control)? Does the government bear the burden of proof on dangerousness and must it be satisfied through statistical evidence (as is implied by Scalia's *Begay* concurrence)?

Breyer and Scalia seem to have reached some sort of mutual accommodation in *Chambers*, but the majority opinion indicated very little about the nature of the accommodation, and Scalia himself declined to write separately to explain his move into the majority coalition. The result is what appears, even more clearly than *Begay*, to be a product of an incompletely theorized agreement: the Court's reasoning in *Chambers* is superficial, lacking any grounding in deep principles or any overarching theory of the ACCA (like *Begay*'s future dangerousness theory), and very little guidance is provided to lower courts for deciding future cases.

C. *JOHNSON*

Chambers remains the Court's most recent pronouncement on the residual clause, although another residual clause case has since been argued and awaits decision.[92] In the meantime, the Court interpreted the "use of physical force" clause in *Johnson v. United States*.[93] Once again, the Court adopted a narrow interpretation. At issue was Johnson's Florida battery conviction. Under Florida law, battery covers *any* unwanted physical touching, no matter how slight.[94] The Court thus had to consider whether such a crime involves a use of "physical force."

Strictly as a matter of text, I suspect that many readers will find the question a toss-up, as do I. Dictionaries suggest a range of definitions, some of which might encompass a slight touching and others of which do not.[95] In the common law definition of battery, "force" does include slight touchings, which some might view as decisive; as the dissenters in *Johnson* put it, "When Congress selects statutory language with a well-known common-law meaning, we generally presume that Congress intended to adopt that meaning."[96] On the other hand, the fact that the term "force" appears in the definition of "violent felony" suggests that

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[92] Michael O'Hear, *Sykes Oral Argument: Clarification of Culpability Requirement May Have to Wait*, http://www.lifesentencesblog.com/?p=1272.

[93] 130 S. Ct. 1265 (2010).

[94] *Id*. at 1269-70.

[95] *See id*. at 1270 (discussing various dictionary definitions).

[96] *Id*. at 1274 (Alito, J., dissenting) (citations omitted).

"force" ought to be interpreted so as to require some violence.

In the end, the latter argument carried the day—based, at least, on how the majority opinion was written.[97] As in *Chambers*, however, the articulated reasoning seems remarkably thin and unprincipled. One suspects that at least some of the justices' votes may have been motivated by unarticulated considerations (Breyer's desire to preserve the integrity of the sentencing guidelines system, Scalia's preference to interpret ambiguous criminal statutes in favor of the defendant, and so forth). This sense of unarticulated reasoning is strengthened when one realizes how closely the voting pattern of *Johnson* tracks that of *Chambers*, even though the two opinions involved different statutory provisions and were decided (on the face of things) on quite different grounds. Aside from the substitution of Sotomayor for Souter (whom she had replaced on the Court in the interim), the seven-justice majority in *Johnson* was precisely the same as the seven-justice majority in *Chambers*. This seems rather good evidence of an incompletely theorized, and presumably tacit, agreement to narrow the ACCA's reach, at least when there is a plausible textual basis to do so.[98]

IV. NON-ACCA ILLUSTRATIONS

To focus on the ACCA cases, as I have, risks creating one of two misimpressions. On the one hand, one might suppose that the Court always favors narrowing interpretations of mandatory minimum statutes, regardless of the specific interpretative question. On the other hand, one might suppose that there is something unique about the ACCA context that puts the conservative justices into play; perhaps, then, the familiar Eighth Amendment dynamics are more apparent with respect to other mandatory minimums. Two recent non-ACCA decisions should help to dispel both misimpressions.

First, *Abbott v. United States*[99] demonstrates that the Court does not automatically prefer narrowing interpretations. At issue was 18 U.S.C. § 924(c), which imposes a five-year mandatory minimum for the possession of a firearm in connection with a drug trafficking crime, "[e]xcept to the extent that a greater minimum sentence is otherwise

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[97] *Id*. at 1270-71.

[98] The latter qualification may be critical. For instance, in a case decided shortly before *Begay*, the Court *unanimously* rejected the defendant's proposed narrowing interpretation of the ACCA. Logan v. United States, 552 U.S. 23 (2007). The Court noted, correctly I think, that the defendant's interpretation had little textual support. *See id*. at 32 ("Opposing a plain-meaning approach to the language Congress enacted, Logan relies dominantly on the harsh results a literal reading could yield . . . ."). It is possible that the willingness of the Court's liberals to join with the conservative textualists in rejecting arguments like Logan's helps to build trust among the justices in the statutory interpretation cases and thereby makes possible the strange-bedfellow coalitions that one sees in *Begay*, *Chambers*, and *Johnson*.

[99] 131 S. Ct. 18 (2010).

provided . . . by any other provision of law." Because Abbott possessed a firearm in furtherance of a drug-trafficking crime, he qualified for the five-year minimum under § 924(c).[100] But, based on his extensive criminal history, Abbott's gun possession also triggered the ACCA's fifteen-year minimum.[101] Did this minimum preempt the five-year minimum under the "except" clause? The Court *unanimously* held no, thus permitting the two minimums to be stacked and raising Abbott's sentence from fifteen to twenty years.[102] In the Court's view, the "except" clause only preempted the § 924(c) minimum when the defendant received a greater minimum sentence under a statute proscribing the very same conduct as that which was proscribed by § 924(c)[103]; although the ACCA also targeted gun possession, the ACCA minimum required a particular criminal history, while the § 924(c) minimum required that the gun be possessed in connection with a particular contemporaneous offense.

In justifying this expansive reading of § 924(c), the Court's opinion relied most heavily on legislative history. It was undisputed that Abbott's sentences would have been properly stacked under the pre-1998 version of § 924(c).[104] The "except" clause was introduced in 1998 among a set of changes reorganizing and extending the reach of the statute.[105] In light of these purposes of the 1998 law, the Court found it "implausible" that Congress intended to reduce § 924(c)'s severity as it related to defendants like Abbott: "We doubt that Congress meant a prefatory clause, added in a bill dubbed 'An Act [t]o throttle criminal use of guns,' to effect a departure so great from § 924(c)'s longstanding thrust, i.e., its insistence that sentencing judges impose *additional* punishment for § 924(c) violations."[106]

Abbott thus provides a helpful reminder of an important limitation on the jurisprudential dynamics we see in the ACCA cases. I earlier suggested that the statutory interpretation setting is typically different from the Eighth Amendment setting inasmuch as a pro-defendant holding does not, in principle, represent a challenge to legislative supremacy. A pro-defendant interpretation of a statute does not purport to *override* but to *implement* legislative intent—or perhaps, more modestly, to select an outcome that is within the range of holdings permitted by uncertain legislative language. But sometimes, as in *Abbott*, the defendant's proposed interpretation will clearly run counter to legislative intent. In such cases, we can expect the Court's views on legislative supremacy to reassert themselves—perhaps even more

100 *Id*. at 23.
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 25.
105 *Id.*
106 *Id*. at 27.

decisively than in the Eighth Amendment context because of the absence of any countervailing constitutional duty to constrain majoritarian overreaching.

Second, *Flores-Figueroa v. United States*[107] demonstrates that the narrowing interpretations in *Begay*, *Chambers*, and *Johnson* do not reflect jurisprudential dynamics that are unique to cases involving either the ACCA specifically or recidivism-based minimums more generally. At issue was the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), which mandates a consecutive two-year prison term for any offender convicted of certain listed offenses if he or she "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[108] The term "knowingly" indicates there is a *mens rea* requirement, but it is not clear on the face of the statute precisely what the defendant must have known.

The facts of *Flores-Figueroa* illustrate the problem. A citizen of Mexico, Flores-Figueroa illegally obtained a job in the United States by providing his employer with counterfeit Social Security and alien registration cards.[109] It turned out that the numbers on these cards had been assigned to other people.[110] Federal authorities soon discovered the ruse and charged Flores-Figueroa with aggravated identity theft and two predicate immigration-related offenses.[111] Although Flores-Figueroa knew that he was using a means of identification that was not his, there was no evidence that he knew the identification numbers belonged to other people.[112] The case thus squarely presented the "knowledge of what" question for the Court.

And the Court ruled unanimously in favor of the defendant, holding that the government must prove "that the defendant knew that the means of identification at issue belonged to another person."[113] In so holding, the Court relied on its earlier decisions favoring more robust *mens rea* requirements as a precondition for punishment.[114] Indeed, the Court's broadly worded phrasing of the rule drew brief concurring opinions from Justices Scalia and Alito urging more restrained approaches.[115] Notably, however, two of the Court's other skeptics of

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107 129 S. Ct. 1886 (2009).

108 18 U.S.C. § 1028A(a)(1).

109 129 S. Ct. at 1889.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 1894. Justices Scalia, Thomas, and Alito concurred in part and concurred in the judgment, but did not disagree with the majority's basic holding.

114 *See id.* at 1891 ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." (citation omitted)).

115 Scalia acknowledged the common-law tradition of establishing "a *mens rea* requirement where Congress has not addressed the mental element of a crime," but disagreed with the majority's endorsement of a general rule as to statutes with an express knowledge requirement.

constitutional proportionality requirements in non-capital cases, Kennedy and Roberts, joined the majority opinion without any apparent reservation. Of course, the principle of statutory interpretation articulated by the majority in *Flores-Figueroa* is functionally a *sub-constitutional* presumption in favor of proportionality.

V. *O'BRIEN* AND THE POTENTIAL FOR PROCEDURAL REGULATION

The application of mandatory minimums is greatly facilitated by treating them merely as enhancements to sentences imposed for other underlying offenses. By contrast, if a mandatory minimum statute were regarded as creating a separate offense, the government would have to prove the elements beyond a reasonable doubt and the defendant would have a right to a jury trial on those elements. Such a minimum would less likely be sought or imposed than if the government were able to activate the sentence by proving facts to a judge by a preponderance of the evidence.

Whether a mandatory minimum statute creates a new offense is in part a matter of statutory interpretation and in part a matter of constitutional law. The relevant constitutional principles come from *Apprendi v. New Jersey*[116] and *Harris v. United States*.[117] In *Apprendi*, the Court held that if a statute increases the *maximum* sentence to which a class of defendants is subject, then the statute creates a new offense, and defendants have a right to jury fact-finding beyond a reasonable doubt.[118] Two years later, in *Harris*, the Court distinguished statutes that merely raise the *minimum*; the facts triggering a minimum may be proved to a judge using the preponderance standard.[119] Crucial to the outcome in this 5-4 decision was the vote of Justice Breyer, who could not see a principled way of distinguishing *Apprendi*, but who continued to believe that *Apprendi* was wrongly decided—his vote in *Harris* was really just intended to express his opposition to *Apprendi*.[120]

Because *Harris* blocked robust constitutional regulation of mandatory minimum procedures, the statutory analysis becomes all the more important. *Harris* also supplies important precedent in this regard. As noted above, 18 U.S.C. § 924(c) establishes a five-year minimum when a firearm was used or possessed in connection with a

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Id. at 1894 (Scalia, J., concurring in part and concurring in judgment). Alito was willing to accept a general rule, but only if framed as a rebuttable presumption. *See id*. at 1895 (Alito, J., concurring in part and concurring in judgment) ("In interpreting a criminal statute such as the one before us, I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption.").

116 530 U.S. 466 (2000).

117 536 U.S. 545 (2002).

118 530 U.S. at 490.

119 536 U.S. at 567.

120 *Id*. at 569-70 (Breyer, J., concurring in part and concurring in the judgment).

crime of violence or a drug trafficking crime. However, the minimum increases to seven years if the firearm was brandished.[121] In *Harris*, the Court held, as a matter of statutory interpretation, that brandishing was merely a sentencing factor and could be proven to a judge using the preponderance standard.[122] In so doing, the Court particularly emphasized the form of § 924(c) and the fact that Congress had placed the brandishing minimum into a separately numbered subsection from the basic five-year penalty.[123] Although the analysis in *Harris* was closely tied to the specific text and history of the brandishing minimum, the case may also be understood more broadly as an indication that the Court feels no particular obligation or desire to avoid interpretations that minimize the procedural rights of defendants (as might be favored, for instance, by the avoidance canon).

The Court's very recent decision in *United States v. O'Brien*,[124] however, raises questions about the continued vitality of both the constitutional and the statutory dimensions of *Harris*. At issue was yet another provision of § 924(c) that raises the mandatory minimum to *thirty years* if a machinegun was used.[125] The Court unanimously agreed that the use of a machinegun was an element that had to be proven to a jury beyond a reasonable doubt.[126]

Although the majority did not address the constitutional question, Justice Breyer made a tantalizing comment at oral argument that suggested he may be reconsidering his decisive vote on the constitutional question in *Harris*.[127] As Justice Stevens remarked in a concurring opinion, "It appears . . . that the reluctant *Apprendi* dissenter may no longer be reluctant."[128] If Stevens is correct, it now appears possible that the Court will soon take a very significant step in reining in mandatory minimums through constitutional procedural requirements.

In addition to the constitutional issue highlighted by the Stevens concurrence, the majority opinion implicitly raised questions about the statutory analysis from *Harris*. To be clear, the Court did not expressly challenge anything said in the earlier opinion. Yet, from a structural standpoint, there is little to distinguish the brandishing and machine-gun

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121 18 U.S.C. § 924(c)(1)(A)(ii).

122 536 U.S. at 556.

123 *Id.* at 553.

124 130 S. Ct. 2169 (2010).

125 18 U.S.C. § 924(c)(1)(B)(ii).

126 130 S. Ct. at 2180. Justice Thomas filed a separate opinion reaching the same result as the majority by a different means.

127 In a concurring opinion, Justice Stevens quoted the Breyer comment at follows: "But in *Harris*, I said that I thought *Apprendi* does cover statutory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi* because it's the law and has been for some time. So if . . . if that should become an issue about whether mandatory minimums are treated like maximums for *Apprendi* purposes, should we reset the case for argument?" *Id.* at 2183 n.6 (Stevens, J., concurring).

128 *Id.* at 2183 (Stevens, J., concurring).

provisions of § 924(c); the Court's decision in favor of O'Brien thus causes one to wonder if structure has become less important in the Court's thinking. What *did* seem to impress the Court as a distinction from *Harris* was the severity of the minimum. Citing the relatively small increase in sentence length at issue in *Harris* (from a five-year minimum to a seven-year), the Court observed, "This is not akin to the 'incremental changes in the minimum' that one would 'expect to see in provisions meant to identify matters for the sentencing judge's consideration'; it is a drastic, sixfold increase that strongly suggests a separate substantive crime."[129]

The Court then suggested an intriguing presumption regarding congressional intent in cases with large sentence enhancements: "It is not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase. . . . [T]he severity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary."[130] This formulation sounds like a nascent canon of statutory construction, similar to the presumption against strict-liability crimes described above. Depending on where the line is drawn for an "extreme sentencing increase," this canon might prove a potent tool for enhancing the procedural protections available in mandatory minimum cases.[131]

VI. CONCLUSION

Luna and Cassell may dismiss too quickly the potential for the Supreme Court to play a meaningful role in reining in the excessive use and severity of federal mandatory minimums. They are probably correct that, absent a marked change in the ideological alignment of the justices, the Court is unlikely to be very responsive to Eighth-Amendment challenges to mandatory minimums. *Graham* does raise the possibility of

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129 *Id*. at 2177 (quoting *Harris*, 536 U.S. at 554).

130 *Id.* at 2178.

131 A recent case in which the canon might have made a decisive difference was *United States v. Krieger*, 628 F.3d 857 (2010). Krieger pled guilty to distributing drugs and was found at sentencing to be subject to the twenty-year mandatory minimum of 21 U.S.C. § 841(b)(1)(C), which applies when death or serious bodily injury results from certain drug offenses. The judge made the relevant factual findings using the preponderance standard. On appeal, Krieger argued that § 841(b)(1)(C) is not merely a sentencing statute, but instead defines a separate offense whose elements must be proven to a jury beyond a reasonable doubt. Treating *O'Brien* as merely a "reiterate[ion]" of *Harris*, the Seventh Circuit rejected Krieger's argument and found, as a matter of statutory interpretation, that the § 841(b)(1)(C) fact-finding could be performed using the more relaxed sentencing procedures. Like *Harris*, *Krieger* emphasized the formal organization of the statute as decisive. However, it might have been more in keeping with *O'Brien* to emphasize the extraordinary increase in Krieger's minimum sentence (from zero to twenty years) and to find in favor of Krieger because, in the words of *O'Brien*, "It is not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase." 130 S. Ct. at 2178.

constitutional limitations on the use of the most severe minimums against juveniles and other defendants with diminished capacity, but this is not likely to amount to more than nibbling around the edges.

What Luna and Cassell may disregard, however, is the potential for the Court to play a more robust role outside the context of Eighth-Amendment adjudication. Eighth-Amendment cases seem to trigger particularly strong negative responses from the Court's conservatives—due in large part, no doubt, to the impressive combination of conservative hot buttons pressed by Eighth-Amendment claims, including the association with the Warren Court's rights revolution for criminal defendants; the anti-originalist, self-consciously evolutionary character of much of the Eighth Amendment jurisprudence; and the threats to state autonomy and legislative supremacy in making criminal-justice policy. Other lines of attack, however, do not press these buttons or press them less forcefully, raising the possibility of coalitions forming across ideological lines. For instance, a particularly intriguing possibility highlighted by *O'Brien* would involve the expansion of procedural rights for defendants facing mandatory minimums. Underscoring the way that the familiar ideological divisions break down outside the Eighth-Amendment context and create opportunities for "incompletely theorized agreements," the Court's two leaders in pressing for more robust procedural protections have been the liberal Stevens[132] and the conservative Thomas.[133]

In this commentary, I have focused particularly on the potential for the Court to rein in mandatory minimums through narrowing statutory interpretations. There is no doubt that the Court has done so with some consistency in recent years. And it is equally clear that these cases dissolve the Court's stereotypical ideological divides no less than the procedural cases. Nor is there anything inevitable or easy about the outcomes in these cases. I've tried to show, for instance, that the majority's PVA test in *Begay* was not well-grounded in the ACCA's text and that the interpretive question in *Johnson* was very close as a textual matter. Moreover, the Court reversed lower-court decisions in all of the cases I've discussed and in some of them upset the established law in multiple circuits.[134]

Other common characteristics also mark some or all of the majority opinions: thin reasoning, a failure to articulate overarching principles or purposes that animate the decisions, and an absence of clear guidance to help lower courts deal with related issues in future

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132 *O'Brien*, 130 S. Ct. at 2183 (Stevens, J., concurring).

133 *Id*. at 2184 (Thomas, J., concurring in judgment).

134 For instance, *Flores-Figueroa* overturned precedent in the Fourth, Eighth, and Eleventh Circuits, 129 S. Ct. at 1890, while *Chambers* reversed the law in the First and Seventh Circuits, 129 S. Ct. at 690. Another recent case adopting a narrowing interpretation, *Watson v. United States*, overturned precedent in the First, Third, Fourth, Fifth, Eighth, and Ninth Circuits. 552 U.S. 74, 78 n.5 (2007).

cases. The ad hoc, tentative character of the opinions no doubt helps to explain why they have received very little attention in the scholarly literature. Yet, if we consider them not individually, but collectively, interesting patterns emerge. For instance, we may note that three conservative justices, Scalia, Kennedy, and Roberts, are consistently joining with the pro-defendant majority, generally without any written explanation of their views. This may help to explain the way that the opinions are written: they are—as Luna and Cassell might put it—"minimalist" opinions designed to bring together justices with a wide range of jurisprudential values. The opinions suggest that the Court may be no less capable than Congress of reaching "incompletely theorized agreements" in the area of mandatory minimums.

The aim of this commentary has been descriptive, not normative. I've just assumed, and will continue to assume, that any incremental narrowing of the reach of our federal mandatory minimums would be a good thing. But I would like to pause briefly on a separate normative question: is it appropriate to the Court's role to rein in mandatory minimums through statutory interpretation?

I should not like this commentary to be seen as endorsing naked policy choice by the justices.[135] Fidelity to text remains a central obligation of judges engaged in statutory interpretation. Yet, legal texts are rarely, if ever, wholly determinate as to the full range of questions that arise in their application. Indeed, it is the cases without clear textual answers that are most likely to be litigated and eventually to find their way to the Supreme Court. The real normative question, I think, is whether there are jurisprudentially appropriate grounds in these cases of indeterminacy for the Court *systematically* to favor narrowing interpretations of mandatory minimum statutes.

Although a full treatment of this question lies beyond the scope of this commentary, I do think that such grounds may exist. One possibility would be the rule of lenity (bearing in mind Justice Breyer's interesting argument that the rule should be applied with particular force in the mandatory minimum setting[136]). Additionally, when a *mens rea* requirement is at issue, the Court could look to other established jurisprudential principles, namely, the presumptions against strict penal liability and in favor of applying express state-of-mind requirements to all elements of an offense. The avoidance canon may also appropriately come into play in a diverse range of cases.

These considerations may be controversial because they involve

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135 There is, to be sure, an established body of empirical scholarship asserting that naked policy choice is precisely what the justices do. *See, e.g.*, SEGAL & SPAETH, *supra* note 36, at 351 (discussing competing models of decisionmaking by the Court and concluding that only the attitudinal model (which is based on the justices' policy preferences) is "well supported by systematic empirical evidence").

136 Dean v. United States, 129 S. Ct. 1849, 1860 (Breyer, J. dissenting).

looking beyond text and legislative history, and thus arguably contravene the principle of legislative supremacy. On the other hand, they come into play only in cases in which Congress has not clearly made its preferences known. Moreover, Congress is free to amend a narrowly interpreted minimum in order to "correct" the Court. In this sense, narrow interpretations may be thought of as deliberation-forcing devices. They put the matter back into Congress's hands to rethink the underlying purposes of a mandatory minimum—with due regard, we may hope, to Luna and Cassell's call for statesmanship and "minimalism."