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Blame Congress, not prosecutors, for the absurdity of mandatory minimums

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Thursday, December 19, 2013

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Litigation

Jackson attorneys object to \$900,000 of defense's expenses

Panish, Shea & Boyle calls O'Melveny's bill for fighting Michael Jackson's wrongful death suit 'excessive' and 'unreasonable.' Among the expenses is a \$540,000 tab for exhibits, including a single exhibit costing \$117,000.

Criminal

Blame Congress, not prosecutors, for the absurdity of mandatory minimums

The public needs to hold their politicians directly accountable for the runaway sentences, not the prosecutors who must play on the field laid out for them. By **Wes Porter**

Real Estate

Real Estate Deals

A roundup of recent real estate activity and the lawyers involved.

Labor/Employment

Female Costco employees settle for \$8 million in damages

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Alternative Dispute Resolution

Firm loses arbitration bid after litigating for six months

Korean media concern waived right by delaying arbitration request, appeals court says.

Law Practice

Akin Gump sets sights on Orange County

As part of a plan to capitalize on Southern California's growing intellectual property market, the firm intends to open an office in Irvine on Jan. 2.

Mergers & Acquisitions

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Acquisition of IMG by William Morris Endeavor

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Blame Congress, not prosecutors, for the absurdity of mandatory minimums

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Contrary to public perception, prosecutors do not "coerce" or "threaten" otherwise innocent people to plead guilty using mandatory minimum sentences. "Mandatory minimums," as they are called, are minimum terms of imprisonment for specific offenses imposed by statute instead of a judge. Judge John Gleeson of the U.S. District

Court for the Eastern District of New York joined the chorus of critics in an October 2013 court statement, when he said that "[p]rosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one - not even the prosecutors themselves - thinks are appropriate." Of course, some federal prosecutors do act badly - lazily, unfairly, unethically and even criminally. Prosecutors can act badly in all phases of the criminal justice process including during plea negotiations. But we need to stop the false narrative related to the prosecutor's evil use of mandatory minimums.

Prosecutors are not to blame. Blame Congress and its inevitable "tough on crime" campaign platform for mandatory minimums. Federal prosecutors have been thrown under the bus in this controversy. So much so that the lead prosecutor Attorney General Eric Holder recently promised to review the proliferation of mandatory minimums for low-level drug offenders. But Holder doesn't bear the responsibility for the overcriminalization madness, Congress does. Because prosecutors have been implicated, federal law enforcement improperly stretches to work around Congress' draconian laws. For example, federal agents currently resort to drafting less detailed reports so to not describe conduct that would trigger statutory sentencing enhancements. Prosecutors now under-describe offenses in initial charging documents designed to avoid harsher sentencing outcomes. These measures are not the proper fix and prosecutors shouldn't be doing the fixing.

Legislators created this playing field that is riddled with federal criminal statutes and mandatory minimums. Politicians, each hoping to appear "hard on crime," continually sponsor new criminal legislation. Yet, no politician ever takes a criminal measure off the books. Overcriminalization has led directly to the absurdity of modern criminal law. Congress absolutely should revisit the harsh effect mandatory minimums. More importantly, the public needs to hold their politicians directly accountable for the runaway sentences, not the prosecutors who must play on the field laid out for them.

At last, some leaders in Congress appear "reasonable on crime" and have proposed a bill that reins in the runaway train of mandatory minimums. The Smarter Sentencing Act (S. 1410) is a bipartisan bill sponsored by committee chairman Sen. Patrick Leahy, D-Vt., and Sen. Rand Paul, R-Ky., which would allow federal judges to bypass mandatory minimum sentences. This legislation can have its desired effect almost immediately. I also hope that the Congress also repeals mandatory minimum provisions in some statutes. Many lawmakers, however, remain on the fence about S. 1410 and mandatory minimums generally. Our politicians aren't sure whether undoing the very situation they created is politically savvy at this time. Legislators have that

luxury while prosecutors take the brunt of the criticism.

Even though prosecutors are not to blame for mandatory minimums and the debacle in federal sentencing, contrary misconceptions have controlled. Most people understand that criminal defendants plead guilty to avoid harsher punishment. In most criminal cases, the government has charging options available to it - options with different severity in punishment. With typical federal cases involving drugs or guns, the government's charging options often include allegations that carry mandatory minimum terms of imprisonment. A federal prosecutor may have options that include charges with and without a mandatory minimum, or with higher and lower mandatory minimums.

The public needs to hold their politicians directly accountable for the runaway sentences, not the prosecutors who must play on the field laid out for them.

State criminal practice drives the common misperception about prosecutors and mandatory minimums. The public believes that all prosecutors charge a defendant to the hilt and then permit the defendant to "plead down" to some subset or lesser charge. Any criminal defense attorney will tell you that the federal system doesn't work that way. Specifically, a federal prosecutor may begin a plea discussion with the less severe (and more reasonable) charging option - possibly the option without a mandatory minimum. Conversely, many federal cases could carry more severe punishment. The federal prosecutors can and do continue to investigate post-indictment, learn more information from cooperators, and return to the grand jury to "supersede" the allegations. This process is entirely proper despite the misconceptions. The "ultra-harsh" results, like the "enhanced mandatory sentences," belong to Congress, not prosecutors.

Some current plea practices actually favor criminal defendants as compared to other recent eras of federal practice. In the early 2000s, former Attorney General John Ashcroft sought to constrain all forms of prosecutorial discretion and required all federal prosecutors to charge the "most readily provable offense" - or the offense that carried the most severe punishment. Federal prosecutors then could not opt to avoid a defendant's prior drug offenses or turn over less detailed reports to avoid triggering statutory sentencing enhancements. Further, for nearly 20 years (1988-2005), including Ashcroft's reign, all federal sentences carried mandatory minimum sentences under the then-mandatory federal sentencing guidelines. Federal judges now, in cases without mandatory minimums, enjoy complete discretion at sentencing and judges have imposed increasingly lower sentences every year since 2005.

Nearly all federal criminal defendants - over 95 percent - plead guilty to the crimes alleged. Some prosecutors do act badly during plea negotiations. Most do it the right way.

Most of the cases resolved by guilty pleas represent the less severe and more reasonable charging option available to the government.

Most prosecutors do their job honorably, even amidst the current federal sentencing absurdity and while they are blamed for Congress' creation.

When defendants plead guilty, the prosecutor did not "coerce" or "threaten" an innocent person. The defendant committed the offense charged - and the punishment could often be more severe. These are not innocent citizens ensnared in an unfair process. Congress created the unfair sentencing results, not the prosecutor's plea bargaining using those harsh outcomes. The next time you read about a criminal defendant sentenced to an overly harsh, "mandatory" punishment after a guilty plea, think: When will Congress fix that mess in federal sentencing that they created?

Wes Porter is an associate professor of law at Golden Gate University School of Law and he previously served as a senior trial attorney with DOJ's Criminal Division and as an assistant U.S. attorney. He can be reached at wporter@ggu.edu.

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Obituaries

M.O. Sabraw, 1926-2013

The longtime California jurist, who presided over a famous kidnapping case and whose descendants include several judges, died on Nov. 30. He was 87.

Entertainment & Sports

A generation of incorrect Talent Agencies Act rulings

An incorrect holding has been the basis of five decades of determinations where personal managers - and now attorneys - lose the benefit of their labors. By **Rick Siegel**

Securities

Day of reckoning for securities class actions

After years of growing attacks, the efficient-market hypothesis, along with the fraud-on-the-market theory, is now on the chopping block. By **Christina Lincoln**

Labor/Employment

Fuzzy law on employers' use of arrest records

The state of Texas sued the EEOC requesting a federal district court to declare invalid the EEOC's enforcement guidance the use of arrest and conviction records. By **Brett Burns and Anna Suh**

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Court of Appeal Justice 2nd District, Division 6 (Ventura)

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