**Leahy and Paul plan on mandatory sentencing makes sense**

**By** [**George F. Will**](http://www.washingtonpost.com/george-f-will/2011/02/24/ABVZKXN_page.html)**, Published: June 5**

Libertarians believe government should have a compelling reason before it restricts an individual’s liberty. Today’s liberals believe almost any reason will do, because liberty is less important than equality, fraternity, fighting obesity and many other aspirations. Now, however, one of the most senior and liberal U.S. senators and one of the most junior and libertarian have a proposal that could slow and even repair some of the fraying of society.

[Seven-term Democrat Pat Leahy’](http://www.judiciary.senate.gov/about/chairman.cfm)s 38 Senate years have made him Judiciary Committee chairman. [Republican Rand Paul](http://www.paul.senate.gov/?p=about_senator) is in his third Senate year. They hope to reduce the cruelty, irrationality and cost of the [current regime of mandatory minimum sentences](http://thehill.com/blogs/congress-blog/judicial/289265-paul-leahy-sentencing-bill-will-ensure-time-fits-the-crime) for federal crimes.

Such crimes are multiplying at [a rate of more than 500 a decade](http://www.maglaw.com/publications/articles/00227/_res/id%3DAttachments/index%3D0/070091016Morvillo.pdf), even though the Constitution explicitly authorizes Congress to criminalize only a few activities that are national in nature (e.g., counterfeiting, treason, crimes on the high seas). The federal government, having failed at core functions, such as fairly administering a rational revenue system, acts like a sheriff with attention-deficit disorder, haphazardly criminalizing this and that behavior in order to express righteous alarm about various wrongs that excite attention.

Approximately [80,000 people are sentenced in federal courts each year](http://www.npr.org/2012/01/31/146081922/gop-seeks-big-changes-in-federal-prison-sentences). There are an estimated [4,500 federal criminal statutes](http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html) and tens of thousands of regulations backed by criminal penalties, including incarceration. There can be felony penalties for violating arcane regulations that do not give clear notice of behavior that is prescribed or proscribed. This violates the [mens rea requirement](http://www.law.cornell.edu/wex/mens_rea) — people deserve criminal punishment only if they intentionally engage in conduct that is inherently wrong or that they know to be illegal. No wonder that the [federal prison population](http://www.fas.org/sgp/crs/misc/R42937.pdf) — currently approximately 219,000, [about half serving drug sentences](http://www.sentencingproject.org/doc/publications/inc_federalprisonpop.pdf) — has expanded 51 percent since 2000 and [federal prisons are at 138 percent of their supposed capacity](http://www.gao.gov/assets/590/588284.pdf).

The Leahy-Paul measure would expand to all federal crimes the discretion federal judges have in many drug cases to impose sentences less than the mandatory minimums. This would, as Leahy says, allow judges — most of whom oppose mandatory minimums — to *judge*. [Paul says mandatory minimum sentences](http://www.rollcall.com/news/leahy_paul_bill_would_relax_federal_sentencing_laws-223332-1.html), in the context of the proliferation of federal crimes, undermine federalism, the separation of powers and “the bedrock principle that people should be treated as individuals.”

Almost everyone who enters the desensitizing world of U.S. prisons is going to return to society, and many will have been socially handicapped by the experience. [Until the 1970s, about 100 per 100,000 Americans](http://www.law.berkeley.edu/files/Steven%282%29.pdf) were in prison. [Today 700 per 100,000 are](http://www.pewtrusts.org/our_work_report_detail.aspx?id=29967). America has nearly 5 percent of the world’s population [but almost 25 percent of its prisoners](http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all&_r=0). [African Americans are 13 percent of the nation’s population](http://quickfacts.census.gov/qfd/states/00000.html) but [37 percent of the prison population](http://www.bop.gov/news/quick.jsp#1), and [one in three African American](http://www.jstor.org/discover/10.1525/sp.2011.58.2.257?uid=3739584&uid=2&uid=4&uid=3739256&sid=21102367880797) men spends time incarcerated. All this takes a staggering toll on shattered families and disordered neighborhoods.

The House Judiciary Committee has created an [Over-Criminalization Task Force](http://judiciary.house.gov/hearings/Markups%202013/mark_05072013/Task%20Force%20Resolution%20Text.pdf). Its members should read “[Three Felonies a Day: How the Feds Target the Innocent](http://www.amazon.com/gp/product/1594035229/ref%3Das_li_qf_sp_asin_il_tl?ie=UTF8&camp=1789&creative=9325&creativeASIN=1594035229&linkCode=as2&tag=slatmaga-20),” by [Harvey Silverglate](http://www.harveysilverglate.com/About.aspx), a libertarian lawyer whose book argues that prosecutors could indict most of us for three felonies a day. And the task force should read the short essay “[Ham Sandwich Nation: Due Process When Everything Is a Crime](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203713)” by [Glenn Harlan Reynolds](http://law.utk.edu/people/glenn-h-reynolds/), a professor of law at the University of Tennessee. Given the axiom that a competent prosecutor can persuade a grand jury to indict a ham sandwich, and given the reality of prosecutorial abuse — particularly, compelling plea bargains by overcharging with “kitchen sink” indictments — Reynolds believes “the decision to charge a person criminally should itself undergo some degree of due process scrutiny.”

He also suggests banning plea bargains: “An understanding that every criminal charge filed would have to be either backed up in open court or ignominiously dropped would significantly reduce the incentive to overcharge. . . . Our criminal justice system, as presently practiced, is basically a plea-bargain system with actual trials of guilt or innocence a bit of showy froth floating on top.”

U.S. prosecutors win more than 90 percent of their cases, [97 percent of those without complete trials](http://www.nationalreview.com/node/341562/print). British and Canadian prosecutors win significantly less, and for many offenses, the sentences in those nations are less severe.

Making mandatory minimums less severe would lessen the power of prosecutors to pressure defendants by overcharging them in order to expose them to draconian penalties. The Leahy-Paul measure is a way to begin reforming a criminal justice system in which justice is a diminishing component.