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### Public Choice and the Mandatory Minimum Temptation

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#### INTRODUCTION

Contemporary debates over the problem of mass incarceration have often explored the relationship between booming prison populations and mandatory minimum sentencing schemes<sup>1</sup>—provisions in state and federal law that constrain the sentencing discretion of the court system, requiring convicted persons to endure a fixed punishment prescribed by specific provisions of criminal law. For decades, proponents of criminal justice reform have critiqued this sentencing model at great length, noting how it perpetuates racial disparities and strips adjudicators of the ability to consider potential mitigating factors.<sup>2</sup>

On some fronts, progress has been made. But in the wake of the much-reported Brock Turner rape case, recent legislative developments in California have revealed a previously unforeseen vulnerability in criminal justice reform efforts: what happens when, under conditions of public uproar, institutional pressures work to actively *roll back* reform projects? The forces identified by public choice theory help explain this phenomenon. Even within an ostensibly progressive state, structural incentives may operate to unintentionally thwart efforts to make the criminal justice system more humane.

This Comment evaluates the persistent intractability of this problem and proposes a path forward: future state-level efforts to reform or abolish mandatory minimum sentencing schemes should take the form of state constitutional amendments instead of session laws, through a political strategy this Comment terms the plebiscitary approach.<sup>3</sup> Entrenching mandatory minimum reform

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1. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 90–93 (2012).
2. See, e.g., Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 427 (2007) (offering empirical support for this proposition).
3. A plebiscitary approach, as conceived here, would employ referenda on distinct ballot questions as a way of insulating mandatory minimum repeal efforts from short-term political pressures faced by stakeholders. Such referenda need not nec-

measures via a maximally democratic process helps overcome the barriers articulated by public choice theory and provides a stronger foundation for subsequent criminal justice reforms. This strategy undoubtedly poses its own set of challenges, but ultimately may prove to be the best way of achieving lasting change in lieu of fragile quick-fix solutions.

Given the far broader range of potential crimes addressed by state criminal law than by federal criminal law, this Comment's focus is generally limited to the context of state law. While mandatory minimum sentencing is problematic on both the federal and state levels (for the same structural and ethical reasons), much talk of reform has centered only on federal mandatory minimum laws. This analysis aims to advance the ongoing conversation in the context of sentencing reform at the state level.

#### I. MANDATORY MINIMUM SENTENCING AND THE PROGRESSIVE DILEMMA

A longstanding literature has already explored the problem of mandatory minimum sentencing and its connection to mass incarceration.<sup>4</sup> This Comment does not seek to repeat old debates about the legitimacy or normativity of such schemes. Instead, this Comment accepts the premise that repealing mandatory minimum schemes is an important goal for criminal justice reformers, and seeks to explore the best means of accomplishing that end.

Mandatory minimum sentencing schemes have become particularly tempting to policymakers at times of great public outcry, when a perceived miscarriage of justice has occurred. The criminal case of Brock Turner, a Stanford University student convicted of raping a classmate, made headlines around the country—particularly when Turner received a sentence perceived by many court-watchers as outrageously lenient.<sup>5</sup> In the wake of widespread public discontent, California legislators recently signed into law AB 2888, a mandatory minimum sentencing scheme for convicted rapists.<sup>6</sup> In the words of one proponent of AB 2888, state Senator Loni Hancock:

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essarily be citizen-initiated, but ought to occur in the form of a statewide vote to authorize constitutional change.

4. See, e.g., ALEXANDER, *supra* note 1, at 8; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200 (1993) (“Conscientious crime control advocates should favor the repeal of mandatories.”); Matthew C. Lamb, Note, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 128 (2015) (“After the proliferation of . . . mandatory minimum sentences, the prison population skyrocketed.”); Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995).
5. See Janette Gagnon & Emanuella Grinberg, *Mad About Brock Turner’s Sentence? It’s Not Uncommon*, CNN (Sept. 4, 2016, 4:28 PM), <http://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/> [<http://perma.cc/P8QN-SGAF>].
6. 2017 Cal. Legis. Serv. 863 (West).

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One of the things I've learned over 14 years in the [l]egislature is that everything is nuanced. . . . It's very hard to say never a mandatory minimum or always a mandatory minimum. In this particular case, I feel to bring the cultural change that we want, it has to be underscored that, "Fellows, this really isn't behavior that's going to be tolerated."<sup>7</sup>

The legislation sparked tension among different progressive factions. On one side were certain feminist groups and public safety advocates, appalled by Judge Aaron Persky's perceived inattention to the pervasiveness and harms of sexual assault.<sup>8</sup> On the other side were criminal justice reformers, acutely aware of the relationship between mandatory minimums and mass incarceration.<sup>9</sup>

These reform advocates, including the American Civil Liberties Union,<sup>10</sup> have argued for decades, at great length, that both federal and state mandatory minimum sentences are fundamentally inappropriate instruments for addressing the problem of sexual assault in society.<sup>11</sup> As Harvard Law School professor

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7. Liam Dillon, *In Wake of Stanford Sexual Assault Case, Lawmakers Once Again Pitch Mandatory Prison Time*, L.A. TIMES (Aug. 6, 2016), <http://www.latimes.com/politics/la-pol-sac-stanford-rape-prison-sentences-20160806-snap-story.html> [<http://perma.cc/2CUP-FS95>]; *see also id.* ("I think we need to make a clear statement to say this is unacceptable," said Assemblyman Evan Low (D-Campbell), one of the bill's authors.')
  8. *See, e.g.*, Hilary Beaumont, *Brock Turner Would Be in Prison Right Now Under a Proposed California Law*, VICE NEWS (Sept. 2, 2016), <http://news.vice.com/article/brock-turner-is-out-of-jail-three-months-early> [<http://perma.cc/2JQY-TAM2>] (quoting Laurie Smith, Santa Clara County Sheriff, as stating that "[a]s the Sheriff of Santa Clara County and a mother, I believe the interests of justice are best served by ensuring sexual predators are sent to prison as punishment for their crimes").
  9. *See, e.g.*, Nora Caplan-Bricker, *Mandatory Minimum Sentences for Rape Are the Wrong Response to the Brock Turner Case*, SLATE (Aug. 30, 2016, 4:28 PM), [http://www.slate.com/blogs/xx\\_factor/2016/08/30/california\\_passes\\_a\\_mandatory\\_minimum\\_sentencing\\_bill\\_in\\_response\\_to\\_brock.html](http://www.slate.com/blogs/xx_factor/2016/08/30/california_passes_a_mandatory_minimum_sentencing_bill_in_response_to_brock.html) [<http://perma.cc/4LQJ-67ZD>] ("One could see this as a sign that stopping rape is finally where it belongs on the liberal agenda. There's just one problem: The same is true of repealing mandatory minimum sentencing laws—which, after helping create our present era of mass incarceration, have become a rare and promising point of bipartisan convergence. Not for the first time in the case of Brock Turner, progressives have allowed one righteous cause to eclipse another.').
  10. Jesselyn McCurdy & Sarah Solon, *The 1980s Called. They Want Their Mandatory Minimums Back*, ACLU (Sept. 18, 2013), <http://www.aclu.org/blog/1980s-called-they-want-their-mandatory-minimums-back> [<http://perma.cc/PL5K-LYGN>] ("With . . . too many people locked up for far too long, it's high time we reevaluate the effectiveness of overly harsh, unnecessarily long, and expensive mandatory sentences.').
  11. *See, e.g.*, Lamb, *supra* note 4, at 145 ("[M]andatory minimums have neither deterred criminal behavior nor reduced recidivism rates, . . . [and] have not produced a net increase in public safety.').

and former federal judge Nancy Gertner argued, “We shouldn’t be passing laws that sort of do nothing but express our spleen at . . . this particular event. There were ways of dealing with this that was [sic] not necessarily passing a law.”<sup>12</sup> A better critique of Judge Persky’s ruling, from the standpoint of an intersectional feminism that more prudently weighs the interconnectedness of social disparities, might have focused on the systematically disparate penalties assigned to defendants based on race, class, and socioeconomic status.<sup>13</sup> In other words, when the whole social picture is taken into consideration, laws like AB 2888 are likely to impact low-income persons of color far more severely than well-off white students like Turner.

This reality reflects a longstanding problem. Amplifying punishment in the criminal justice system can readily lead to tragic and unintended consequences, among them the racial inequities that often result from mandatory minimum sentencing schemes. California’s recent feminist proponents of mandatory minimum sentences were likely not motivated by “racial bias” in the sense that such a term is commonly used in discussions of criminal justice reform: namely, that Brock Turner is white. Yet the burden of such laws is nonetheless likely to fall disproportionately on non-white defendants, perpetuating a carceral cycle that severely disadvantages persons of color.<sup>14</sup>

It is easy enough to criticize the California legislature’s decision, but from the perspective of the agents involved in the controversy, the dilemma presented by this situation proves fiendishly difficult to resolve. Voters want politicians who are seen as “tough on crime,” but simultaneously express opposition to mandatory minimum sentencing schemes—an apparent cognitive dissonance that tugs policymakers in competing directions. Any successful approach to challenging mandatory minimum schemes must ultimately take into account the individual incentives facing stakeholders.

12. Nancy Gertner, *Brock Turner’s Sentencing Revives Mandatory Minimums Debate*, NAT’L PUB. RADIO (Sept. 3, 2016, 8:50 AM), <http://www.npr.org/2016/09/03/492516923/brock-turners-sentencing-revives-mandatory-minimums-debate> [<http://perma.cc/5ZMQ-6B2L>].
13. Cf. Alexandra Brodsky & Claire Simonich, *Helping Rape Victims After the Brock Turner Case*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/11/opinion/rape-victims-deserve-better-mandatory-minimums-wont-help.html> [<http://perma.cc/GWX2-5CKM>] (“None of this is to say that Mr. Turner and the judge are not worthy of our disgust. There are better ways, though, to make courts responsive to rape and its victims.”).
14. ALEXANDER, *supra* note 1; Bridgette Dunlap, *How California’s New Rape Law Could Be a Step Backward*, ROLLING STONE (Sept. 1, 2016), <http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-step-backward-w437373> [<http://perma.cc/KP3G-5GPQ>] (“[T]he bill that stemmed from the backlash against this unusually privileged felon will inevitably have a disproportionate impact on the same people mandatory minimum laws generally do—poor people of color.”).

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## II. THE PUBLIC CHOICE PROBLEM

Individual legislators face powerful short-term pressures that inevitably distort their decision-making. Public choice theory has extensively explored the relationship between political actors and the other stakeholders within their sphere.<sup>15</sup> As David Mayhew wrote in 1976, reelection is the primary goal of any legislative incumbent<sup>16</sup>—a goal that distinctly shifts the ways in which legislators will respond to circumstantial pressures from their constituents and from other actors within the system.

Under high-pressure political circumstances, like the Brock Turner controversy, no single legislative actor can be held uniquely culpable for the inevitable problems that result from the imposition of a mandatory minimum sentencing scheme (hence why criminal justice reformers often speak of the need for *systemic* or *structural* change). If the public demands that legislators take particular actions against crime—even if those actions will compromise important national values or undermine previously expressed philosophical commitments—legislators are strongly incentivized to respond accordingly. These incentives affect all legislators to some degree: criminal justice reformists are perpetually at risk of finding themselves the “odd ones out,” calling for an ethic of restoration when the public is (momentarily) demanding retribution.

The core principle that legislators should be “tough on crime” is a value deeply entrenched within the American political lexicon,<sup>17</sup> and mandatory minimum schemes are an extension of that value. Voters demand that politicians signal their commitment to public safety, and promising stiffer sentences for repeat criminal offenders is an easy way for politicians to meet that demand. The broader problem of overcriminalization—an ongoing proliferation of criminal laws that enmesh individuals in the justice system—is a phenomenon similarly attributable to this dynamic.<sup>18</sup> It stands to reason that reform efforts

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15. See generally THEORY OF PUBLIC CHOICE: POLITICAL APPLICATIONS OF ECONOMICS (James M. Buchanan & Robert D. Tollison eds., 1972) (comprehensively laying out this analytical paradigm).
  16. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1976); see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988) (further discussing this tendency).
  17. Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order*, in DEFENDING JUSTICE 48 (2005), <http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf> [<http://perma.cc/P6F9-89DW>] (“This rhetorical emphasis on crime was part of a political strategy, developed after the 1964 elections, aimed at weakening the electoral base of the Democratic Party: the New Deal coalition.”); see also 13TH (Netflix 2016) (discussing the origins of this language in greater depth).
  18. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 721 (2013) (“All of the incentives lead political actors to use criminal

will inevitably face a corollary pressure that resists change. Accordingly, a legislator who champions criminal justice reforms, with the aim of reducing mass incarceration, unavoidably opens himself to the criticism that he's being too "soft" on criminals. The "tough on crime" norm thereby engenders a race-to-the-bottom where criminal justice reform is concerned: electoral dynamics are such that voters, in many cases, will swiftly punish any deviation from this norm. Subjecting mandatory minimum sentencing reform to the contingencies of legislators' individual preferences—finely attuned to the whims of a potentially fickle electorate—risks making reform altogether impossible.

Viewed in light of American history, the problem takes on a darkly ironic dimension: the founding fathers sought to use representative government as an instrument for *mitigating* the passions of the populace rather than magnifying them.<sup>19</sup> But the ever-present electoral imperative risks forcing legislators to channel unreservedly the fluctuating sentiments of their voting bases, no matter how antagonistic those sentiments may be to the orderly functioning of government or the preservation of individualized justice.

In sum, structural policy reforms that adjust or eliminate mandatory minimum sentencing schemes must be somewhat insulated from the everyday political process in order to have any long-term impact. Otherwise, they simply become ammunition for the guns of legislators' political opponents.

### III. A PLEBISCITARY APPROACH TO COMBATING MANDATORY MINIMUM SENTENCING

State constitutions have a unique capacity for entrenching core principles against seesawing public whims. Despite their structural suitability, state constitutions have proven an underexplored avenue for solidifying commitments to reform mandatory minimums. This should change. All such constitutions include provisions addressing issues of criminal sentencing,<sup>20</sup> which could be readily expanded to include explicit bars on mandatory minimum legislation. Advocates' previous inattention to this strategy may simply stem from widespread unfamiliarity with the role that state constitutions can play in the criminal process. In the words of one scholar researching these issues, it behooves "litigators, courts, and scholars to be less 'Fed-centric'" in seeking strategic op-

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law as the first resort to a social problem (and often the second, the third, the fourth, and so on), not the last.").

19. Cf. THE FEDERALIST NO. 10 (James Madison) (arguing that, in a state of pure democracy, "[a] common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual").
20. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64–65 (2008).

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portunities for criminal justice reform.<sup>21</sup> The precise mechanics of this strategy would assuredly vary across individual states, but as a general approach to fixing the perverse incentives at play in mandatory minimum reform efforts, it likely offers a valuable starting point.

Politically speaking, challenging mandatory minimums via the plebiscitary approach would undoubtedly be a difficult and fraught project on the front end: greater amounts of deliberative time enable powerful advocacy forces to be marshaled for and against reform. The time horizon afforded by the plebiscitary approach—a time horizon involving campaigns both to get measures onto the ballot and to pass those measures—would likely result in the typical proliferation of impassioned speeches, attack ads, slogans, and ideological baggage associated with any contentious proposal. That said, trends and data suggest that when momentary public passions are set aside, general opposition to mandatory minimum sentencing appears to be widespread and growing.<sup>22</sup>

This time horizon also means that the plebiscite process is naturally less reactive to any single circumstance. While a certain level of risk remains that an inopportunistically timed controversy (i.e., a Brock Turner-type case shortly before election day) could thwart efforts to reform mandatory minimum schemes via state constitutional change, a more attenuated deliberative process allows proponents of criminal justice reform to lay out a comprehensive argument for the injustice of these sentencing methods. Assuming reform advocates can effectively make a front-end persuasive case to the public that mandatory minimum schemes are improper, constitutional changes once enacted are more likely to remain stable over the long run,<sup>23</sup> and thus more likely to resist momentary political pressures.

More importantly, a plebiscitary approach sidesteps the aforementioned choice problem: if mandatory minimum sentencing schemes are abolished via state constitutional change, no single legislator—or voter—can be punished for

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21. *Id.* at 64.

22. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 34 (2010) (“Because public opposition to mandatory minimums appears to be growing . . . careful reforms would neither fly in the face of legal and empirical studies nor be met by uniform hostility from pundits and the populace.”); Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 *CRIM. JUST. & BEHAV.* 483, 490–95, 504 (2003) (“The public appears to be more concerned with desert-based sentencing, which emphasizes proportional punishments to which mandatory minima are anathema. . . . Findings from several countries suggest that public support for mandatory sentencing is quite limited.”).

23. Charles Press, *Assessing the Policy and Operational Implications of State Constitutional Change*, 12 *PUBLIUS* 99, 106 (1982) (“The issue dies out quickly once the constitutional clause is changed. This is because the clauses were so out of harmony with the current political reality that, once deleted, they appear politically indefensible.”).

deviating from the “tough on crime” norm.<sup>24</sup> Furthermore, codifying opposition to mandatory minimum sentencing schemes on the state constitutional level, by way of direct citizen voting, affords a fundamentally democratic legitimacy to criminal justice reform efforts in a way that legislative deal-making otherwise might not. While Paul Larkin, writing in 2013, contended that “the evidence has not yet reached the critical mass necessary to persuade the public, or to prompt policymakers to make that attempt [to resist further expansion of incarceration policy],”<sup>25</sup> criminal justice advocates should seriously consider the possibility that the time to move for plebiscitary change may have finally arrived. This tactic allows for the debate to finally move beyond the public-choice framework within which legislators work, and provides opponents of persistent mass incarceration with the opportunity to decisively make their case. The potential gains are substantial.<sup>26</sup>

The plebiscitary approach does, however, reveal an underlying tension: how might members of the public be persuaded to support a constitutional bar on mandatory minimum sentencing if, at the same time, their “tough on crime” preferences produce the public choice incentive structure that induces legislators to adopt more punitive policies?

The answer, as suggested previously, is likely found in the fact of cognitive dissonance within voters’ individual preference hierarchies.<sup>27</sup> A controversial and widely publicized case like the Brock Turner trial may impel voters to temporarily espouse punitive sentiments that, upon further reflection, have consequences and implications they would decidedly reject. Politicians, in turn, are incentivized to react rapidly to these expressed preferences—rather than voters’ underlying preferences,<sup>28</sup> which might be dramatically opposed—due to the

24. While many legislators would assuredly express their opinions on an unfolding public debate, no legislator could be personally assigned responsibility for spearheading or supporting mandatory minimum repeal legislation. Whereas handling these matters through the legislative process would *force* legislators to express yes-or-no preferences on mandatory minimum repeal, a plebiscitary approach would give legislators the option to avoid formally weighing in.

25. Larkin, *supra* note 18, at 765.

26. Naturally, such an approach ought to be employed prudentially to avoid risking an electoral loss that might embolden mandatory minimum proponents. Advocates for mandatory minimum repeal would do well to research, prior to mobilizing politically in support of a repeal measure, how a plebiscitary approach might be received by the majority of voters.

27. See STEPHEN COLEMAN, HOW VOTERS FEEL 158 (2013) (suggesting that “political identities are layered and internally inconsistent rather than settled and coherent”); Kent D. Messer et al., *Social Preferences and Voting: An Exploration Using a Novel Preference Revealing Mechanism*, 94 J. PUB. ECON. 308, 314 n.10 (2010) (adopting an analytical framework that acknowledges the presence of inconsistency within voter preferences).

28. See Roberts, *supra* note 22, at 504.



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persistence of campaign dynamics and the need to align their actions with the preferences of their voter base.<sup>29</sup>

The deliberation time inherently associated with a plebiscitary strategy—which includes the time spent formulating a proposed ballot measure, garnering the requisite support to place it on voters' ballots, and subsequently campaigning in support of the measure—helps mitigate the political incentives that favor mandatory minimum sentencing. The evidence disfavoring mandatory minimum sentencing and linking it to the problem of mass incarceration is robust, and should be presented comprehensively. Debating these issues outside a singular “heat of the moment” period helps correct for the possibility of occasional moments of public outrage that would otherwise stand as roadblocks to policy reform and larger-scale attitudinal change.<sup>30</sup> It also provides the opportunity to mount a more sustained conceptual challenge to the longstanding “tough on crime” narrative against which politicians are continually evaluated.<sup>31</sup>

No single criminal justice reform measure is likely to be an across-the-board solution; battles over mandatory minimum sentencing schemes will likely continue well into the foreseeable future. However, by adopting a plebiscitary strategy—thereby prioritizing the long-term entrenchment of institutional change over a perpetually unstable legislative regime rife with public choice dynamics—criminal justice reform advocates can make greater long-term headway in addressing the problems of mass incarceration and procedural injustice. The time for mounting a broad challenge to state mandatory minimum sentencing regimes may be at hand, but reformists must do so effectively. In order to succeed over the long term, opponents of mandatory minimum sentencing should incorporate plebiscitary approaches into their strategies for political action.

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29. See generally SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN* (1980) (arguing that once in office, elected officials never truly stop campaigning to retain that office).
  30. See Gerry Mackie, *Does Democratic Deliberation Change Minds?*, 5 *POL., PHIL., & ECON.* 279, 279–81 (2006) (applying network theory and the insights of empirical research to offer a theory of democratic deliberation as a method of changing voters' minds).
  31. The political valence of mandatory minimum repeal efforts through a plebiscitary approach might potentially vary between progressive and conservative states. The risk of such variability, however, is belied by the recent emergence of bipartisan consensus—at least on the federal level—in the area of mandatory minimum sentencing reform. See, e.g., Press Release, Office of U.S. Senator Mike Lee, Lee, Durbin Introduce Smarter Sentencing Act of 2015 (Feb. 12, 2015), <http://www.lee.senate.gov/public/index.cfm/2015/2/lee-durbin-introduce-smarter-sentencing-act-of-2015> [<http://perma.cc/SA5H-MCYB>] (announcing a proposal to give federal judges increased discretion in the realm of nonviolent drug offense sentencing). Whether this bipartisanism at the federal level is cross-applicable to the state context remains an open question, but advocates of a plebiscitary approach may have grounds for optimism that this issue can transcend persistent cultural-political gridlock.