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Campbell v. Georgia: Mandatory Minimum Sentencing Survives Separation of Power Attacks, Remaining a Viable Option for the Legislature in its War on Crime

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CAMPBELL v. GEORGIA: MANDATORY MINIMUM SENTENCING SURVIVES SEPARATION OF POWER ATTACKS, REMAINING A VIABLE OPTION FOR THE LEGISLATURE IN ITS WAR ON CRIME

Brian D. Boreman†

INTRODUCTION

Nearly "[seventy] percent of American citizens believe crime is a problem which requires 'emergency action . . . .'"[1] As a result, legislators have enacted mandatory minimum sentences for certain crimes, usually violent felonies, deemed to be the most harmful to society.[2] Communities strongly support these measures to incarcerate offenders so they are not "back on the streets, preying on innocent citizens."[3] But are mandatory minimum sentences constitutional, or do they violate the

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1. Ilene M. Shinbein, Note, *"Three-Strikes and You're Out": A Good Political Slogan To Reduce Crime, but a Failure in Its Application*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 175 (1996) (quoting Rorie Sherman, *Crime's Toll on the U.S.: Fear, Despair and Guns*, NAT'L L.J., Apr. 18, 1994, at A1, A19).

2. For a discussion on the legislative enactment of mandatory minimum sentences in response to societal needs for protection against crime, see *infra* Part I.A.

3. Marc Mauer, *Politics, Crime Control... and Baseball?: "Three Strikes and You're Out,"* 9 CRIM. JUST. 30, 30 (1994).

separation of powers doctrine inherent to our tripartite system of government? In *Campbell v. Georgia*,[4] the Georgia Supreme Court faced this issue and concluded that no separation of powers violation occurs through the implementation of mandatory minimum sentencing.[5]

This Article asserts that the court in *Campbell* correctly decided that mandatory sentencing does not violate the separation of powers doctrine. Part I addresses the societal fear of a perceived increase in crime and the legislative response to the citizens' desire to incarcerate criminals for the full length of their sentences. This Part also identifies the ways in which courts have determined whether a separation of powers violation occurs when the legislature enacts mandatory minimum sentencing statutes and when the executive branch indicts individuals under such statutes. Part II analyzes the decision in *Campbell* by reviewing the facts and the precedent the court used to make its decision. Finally, Part III evaluates whether the court's decision in *Campbell* was correct by considering three issues: (1) whether a functionalist or formalist approach should be taken for determining separation of power violations; (2) whether mandatory minimum sentencing impedes upon a core duty of the judiciary; and (3) whether any pragmatic reasons bolster support for the court's decision in *Campbell*. The Article concludes that no violation of separation of powers occurs through the implementation of mandatory minimum sentences.

I. BACKGROUND

A. The Need for Mandatory Minimum Sentences

The United States is founded upon the proposition that its citizens are due "[l]ife, [l]iberty and the [p]ursuit of [h]appiness ...."[6] The most significant impediment to the fulfillment of this ideal, however, is crime.[7] Major cities, such as New York and

4. 485 S.E.2d 185 (Ga. 1997).
5. *See id.* at 186.
6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
7. *See Justice System Lacks "Truth in Sentencing,"* ATLANTA INQUIRER, Nov. 16, 1996, at 4; *see also* Shinbein, *supra* note 1, at 175 (stating that "people can never really pursue the American dream" without government assurance of "law and order").

even the nation's capital, have experienced societal "meltdowns" resulting from high crime rates.[8] Residents are afraid to live and work in certain areas because attempts by police organizations to "take back the streets" have not been fully successful.[9]

Criminal homicide, by definition,[10] most clearly denies a person all of his guaranteed, aforementioned rights.[11] Although the murdered person is directly affected, a homicide also leaves other members of society with a lifetime of pain and regret.[12] Other crimes, such as domestic violence, also impede the enjoyment of inalienable rights, albeit not as obviously as criminal homicide.[13] For example, domestic violence deprives children and women of a life with security and stability.[14] Often such violence escalates into murder, thereby depriving the victims of their lives.[15]

As a result of escalating crime, citizens are demanding that federal and state politicians protect their rights through the enactment of anti-crime legislation.[16] Because politicians need public support to win elections, it is no surprise that there is an "electoral necessity" to "be tough on crime."[17] In the federal spectrum, President Reagan attempted to curb the public's fear of drug-related violence by declaring a "War on Drugs" that

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8. *See Internight: Crime and Punishment in America, and How It Affects Society at Large* (NBC television broadcast, Feb. 25, 1997).

9. *See id.*

10. The Model Penal Code states that "[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." MODEL PENAL CODE § 210.1(1) (Proposed Official Draft 1962).

11. The total number of murders committed in 1994 totaled over 22,000, approximately 2.5 times the number of murders committed in 1965. *See* INFO. PLEASE ALMANAC 852 (50th ed. 1997) (citing FED. BUREAU OF INVESTIGATION, *Uniform Crime Reports for the United States, 1994* (released 1995)).

12. *See, e.g., Birchwood Deaths: Unchecked Rage, Unspeakable Violence*, ANCHORAGE DAILY NEWS, Oct. 28, 1996, at B4 [hereinafter *Birchwood Deaths*] (relating how the murder of a policeman in the line of duty affected the community and will ultimately affect the life of his unborn baby); Nancy Watkins Carothers et al., *Aren't 2,000-Plus Murdered Clerks Enough?*, VA.-PILOT & LEDGER-STAR (Norfolk), Dec. 28, 1996, at A8 (describing how the murder of a night clerk affected his three children).

13. *See Birchwood Deaths*, *supra* note 12.

14. *See id.*

15. *See id.*

16. *See Justice System Lacks "Truth in Sentencing," supra* note 7.

17. Charles Wheeler, *Books: Go Straight to Jail, Do Not Pass Go*, DAILY TELEGRAPH (London), Feb. 1, 1997, at 3.

continues three administrations later.[18] More recently, President Clinton endorsed the use of mandatory minimum sentences[19] for people who commit certain violent crimes.[20] This approach, termed the "three strikes and you're out" policy,[21] states that upon conviction of a third violent felony, the sentencing court will impose a mandatory minimum sentence of life in prison.[22]

State legislatures face even more pressure to enact tough anti-crime legislation than their federal counterparts because constituents tend to hold state representatives more accountable for the welfare of the community.[23] Unlike Washington-based federal officials, state representatives usually live within the community and see first-hand the effects of crime.[24] Furthermore, many of the crimes that society fears most are state-delineated crimes.[25] Since the state defines these crimes, only the state government may address the particular sentencing of these offenses.[26] Thus, many states have adopted their own versions of the "three strikes and you're out" policy through mandatory minimum sentencing.[27]

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18. *See Drug War Must Be Won*, SAN DIEGO UNION-TRIB., Sept. 17, 1986, at B6. The "War on Drugs" led Congress to increase punitive penalties for anyone possessing or dealing illegal narcotics. *See id.*

19. This Article does not attempt to decipher whether mandatory minimum sentences serve a deterrent or retributive effect. While it is obviously important to consider "why" a person is being punished, it is outside the scope of this Article. For materials describing deterrence and retribution as theories of punishment, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d ed. 1986).

20. *See* John J. DiIulio Jr., *Let 'em Rot*, WALL ST. J., Jan. 26, 1994, at A14.

21. William Claiborne, *'3 Strikes' Crime Approach Rethought, Fiscal Consequences Trouble Lawmakers*, DENV. POST, Aug. 14, 1994, at A2.

22. *See* DiIulio, *supra* note 20.

23. *See* Wheeler, *supra* note 17.

24. The laws of many states require that elected representatives be citizens of the state and residents of the district they represent. *See, e.g.*, GA. CONST. art. III, § 2, ¶ 3(a)-(b) (stating that both state senators and representatives must be "citizens of [Georgia] for at least two years" and "residents of the territory embraced within the district from which elected for at least one year").

25. Crimes such as murder, rape, and armed robbery are all crimes defined by the state. *See, e.g.*, O.C.G.A. §§ 16-5-1, 16-6-1, 16-8-41 (1999).

26. *See* U.S. CONST. amend. X. This amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ." *Id.*

27. *See, e.g.*, Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 4 n.7 (discussing the various "strike-type" statutes in different states).

The California legislature passed one of the first "three strikes and you're out" laws in the country as a result of public fear surrounding the murder of twelve-year-old Polly Klaas.[28] Klaas was abducted from her bedroom by Allen Davis and subsequently murdered; authorities found her body nearly two months later lying in a ditch.[29] Previously, the police had arrested Davis *seventeen* times, three times for kidnapping and sexual abuse.[30] California legislators quickly amended the California Penal Code to prescribe a twenty-five year to life sentence for anyone convicted of a felony with two prior "serious felony" convictions.[31]

Following California's lead, states such as Indiana, New Mexico, and Tennessee have instituted mandatory life-imprisonment sentences upon conviction of a third specified felony.[32] The state of Mississippi created an even tougher law by enacting a mandatory life imprisonment sentence for anyone convicted of a third felony if just one of the prior convictions was for a "'crime of violence' and [the] offender was sentenced and served more than one year for each prior felony."[33] Other states have enacted mandatory minimum sentences, but on more lenient terms, such as a "four strikes and you're out policy."[34]

In Georgia, as in other states, legislative action for mandatory minimum sentencing arose from public outrage over rising crime rates.[35] In an informal poll, Georgians resoundingly professed that "punishment for crimes [should] be made more severe."[36] Citizens believe that the "average prisoner . . . serves far less [prison time] than . . . he should."[37] On average, in 1995,

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28. *See* Shinbein, *supra* note 1, at 189 n.112.

29. Christine Markel, Note, *A Swing and a Miss: California's Three Strikes Law*, 17 WHITTIER L. REV. 651, 652 (1996) (citing Daniel Franklin, *The Right Three Strikes*, WASH. MONTHLY, Sept. 1, 1994, at 25).

30. *Id.* at 653.

31. *See* Shinbein, *supra* note 1, at 190 (citing Hallye Jordan, *Conviction out of State Not a Strike*, L.A. DAILY J., July 22, 1994, at 3).

32. *See* Hargis, *supra* note 27, at 4 n.7 (citing IND. CODE ANN. § 35-50-2-8.5 (Michie 1994); N.M. STAT. ANN. § 31-18-23 (Michie 1994); TENN. CODE ANN. § 40-35-120 (1994)).

33. *Id.* (quoting MISS. CODE ANN. § 99-19-83 (1994)).

34. *Id.* (citing NEV. REV. STAT. 207.010 (1992)).

35. *See Justice System Lacks "Truth in Sentencing,"* *supra* note 7.

36. *Id.*

37. *Id.*

prisoners sentenced to serve 5.87 years were released after only 2.33 years.[38] Furthermore, recidivism statistics in 1991 showed that forty-five percent of prisoners were on parole or probation when convicted for their latest offense.[39]

As a result of the public outcry against crime, the Georgia General Assembly passed the Sentence Reform Act of 1994.[40] This Act imposes stricter mandatory minimum sentencing than any other state.[41] The Act provides for a mandatory minimum sentence of ten years for any person "convicted for the first time[[42]] of [a] 'serious violent felon[y]'[[43]] with the sentence to be served in its entirety."[44] If a jury convicts a person of a second serious violent felony, the mandatory minimum sentence is life in prison without the possibility of parole.[45] In effect, Georgia has reduced the "three strikes" to "*two strikes* and you're out."

B. Separation of Powers

The separation of powers doctrine provides a system of checks and balances between the three branches of government

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38. *Id.*

39. *Id.*

40. 1994 Ga. Laws 1959, § 1.

41. *See* Hargis, *supra* note 27, at 4 n.7 (illustrating that Georgia is the only state to impose a mandatory minimum sentence of life imprisonment upon conviction of a second violent felony).

42. A first time conviction of a serious violent felony "means that the person has never been convicted of a serious violent felony under the laws of this state or of an offense under the laws of any other state or of the United States . . . ." O.C.G.A. § 17-10-6.1(d) (1997).

43. For purposes of the Sentence Reform Act of 1994, the term "serious violent felony" means:

> (1) Murder or felony murder, as defined in Code Section 16-5-1; (2) Armed robbery, as defined in Code Section 16-8-41; (3) Kidnapping, as defined in Code Section 16-5-40; (4) Rape, as defined in Code Section 16-6-1; (5) Aggravated child molestation, as defined in Code Section 16-6-4; (6) Aggravated sodomy, as defined in Code Section 16-6-2; or (7) Aggravated sexual battery, as defined in Code Section 16-6-22.2.

1994 Ga. Laws 1959, § 11, at 1966 (codified at O.C.G.A. § 17-10-6.1(a) (1997)).

44. *Review of Selected 1994 Georgia Legislation*, 11 GA. ST. U. L. REV. 159, 159 (1994). Prisoners must also serve a sentence imposed beyond the mandatory minimum sentence, with the exception of life or capital punishment sentences, in its entirety without the possibility of sentence reducing measures. *See id.* Additionally, the Act applies "to juveniles whom the court will try as adults because of another bill" that was passed by the Georgia General Assembly. *Id.* at 165 (citing O.C.G.A. § 15-11-5 (1999)).

45. O.C.G.A. § 17-10-7(b)(2) (1997).

to ensure that one branch will not become dominant.[46] Although the United States Constitution does not expressly contain a provision for such a separation of powers, "it is implied in the allocation of legislative, executive, and judicial power under Articles I, II, and III of the Constitution."[47] The Georgia Constitution, however, does have an express provision stating "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others . . . ."[48] This provision "dictates the relationships between institutional actors and ensures that the system satisfies its two fundamental tenets: independence and interdependence."[49] But to what extent must one branch of government remain separate and distinct from another branch?

Chief Justice, and former President, William H. Taft wrote that a "rigid separation, while theoretically attractive, is practically impossible, because a government is a unit . . . ."[50] While some states have attempted to maintain a rigid separation of powers between each branch of government, other states have generally allowed a blending of functions between the branches.[51] This blending is permissible provided that one branch does not infringe upon the "core duties" of another branch.[52] While the definition of core duties differs from state to state, Georgia does not include the duty of defining criminal sentence terms as a core function of the judiciary.[53] Hence,

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46. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.5 (5th ed. 1995).

47. Douglas S. Onley, Note, *Treading on Sacred Ground: Congress's Power To Subject White House Advisers to Senate Confirmation*, 37 WM. & MARY L. REV. 1183, 1204 (1996) (citing Louis Fisher, *The Allocation of Powers: The Framers' Intent*, *in* SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 19, 20-21 (1986)).

48. GA. CONST. art. I, § 2, ¶ 3.

49. Peter S. Guryan, Note, *Reconsidering* FEC v. NRA Political Victory Fund *Through a Bolstered Functionalism*, 81 CORNELL L. REV. 1338, 1341 (1996) (citing Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-35 (1987)).

50. William H. Taft, *The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government*, 25 YALE L.J. 599, 600 (1916).

51. *See* James D. Robertson, Case Note, Spradlin v. Arkansas Ethics Commission: *A Hard-Line Approach to Separation of Powers*, 48 ARK. L. REV. 755, 760-61 (1995).

52. *See id.*

53. *See* Johnson v. Georgia, 152 S.E. 76, 78 (Ga. 1929); Hill v. Georgia, 53 Ga. 125, 127 (1874).

Georgia case law recognizes that the General Assembly, in defining crimes and appropriate punishment, does not infringe upon a core function of the judiciary.[54]

1. Legislative Power To Define Sentences

State legislatures generally have the power to define crimes and their corresponding sentences.[55] The Georgia General Assembly is no exception.[56] Georgia adheres to the view that the legislature, not the judiciary, has power to "exercise discretion in fixing the quantum of punishment" for criminals.[57] Furthermore, a "judge is a mere agent of the law. He has no discretion except as it is given him. The *penalty* is affixed *by law*."[58] Thus, as demonstrated by over one hundred years of case law, the power to establish mandatory minimum sentences is within the province of the legislature.[59]

The Supreme Court of Georgia has followed the decision in *Harmelin v. Michigan*,[60] holding that the choice of sentencing by the legislature "is insulated from judicial review unless it is wholly irrational or so grossly disproportionate to the severity of the crime that it constitutes cruel and unusual punishment."[61]

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54. *See* Isolm v. Georgia, 408 S.E.2d 701, 702 (Ga. 1991); Knight v. Georgia, 257 S.E.2d 182, 183-84 (Ga. 1979).

55. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368 (1983) (holding that the legislature of Missouri may establish offenses and "prescribe the scope of punishments" to which the defendant may be subjected); Pennsylvania v. Williams, 496 A.2d 31, 41 (Pa. Super. Ct. 1985) (affirming the exclusive power of the legislature to define and punish criminal offenses); *see also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (ruling, with regard to the *federal* legislature, that "[i]t is the legislature, not the Court, which is to determine a crime, and ordain its punishment").

56. *See generally Isolm*, 408 S.E.2d at 701; *Knight*, 257 S.E.2d at 182.

57. *Johnson*, 152 S.E. at 78.

58. *Hill*, 53 Ga. at 127 (emphasis in original).

59. *See id.*

60. 501 U.S. 957 (1991). In *Harmelin*, the United States Supreme Court found that a Michigan statute, which imposed a mandatory minimum sentence of life imprisonment on anyone possessing more than 650 grams of cocaine, did not constitute cruel and unusual punishment. *See id.* The Court held that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . . ." *Id.* at 994.

61. *Isolm*, 408 S.E.2d at 702 (citing *Harmelin*, 501 U.S. 957). The United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted*." U.S. CONST. amend. VIII (emphasis added). The Georgia Constitution declares that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted;* nor shall any person be abused in being arrested, while under arrest, or in prison." GA.

Cruel and unusual punishment includes both barbaric or excessive punishment.[62] The reviewing court "must confine its inquiry to whether conditions of confinement 'shock the conscience,' are greatly disproportionate to the offense, or offend evolving notions of decency."[63] Therefore, unless a mandatory minimum sentence violates either the federal or state constitutional provision against cruel and unusual punishment, it is valid. In most determinations regarding the constitutionality of mandatory minimum sentences, the Georgia judiciary has affirmed the General Assembly's choice of punishment.[64]

2. Executive Power To Prosecute

The power to prosecute a case is inherently a function of the executive branch of government.[65] In Georgia, a prosecutor[66] has the "power to choose which statute to use as a basis for prosecution" against a defendant.[67] A prosecutor also has the power to seek any penalty against a defendant provided that the penalty is within the legislative guidelines for punishment.[68] Thus, a prosecutor's discretion "comes into play under every criminal statute . . . ." [69] For example, a prosecutor in a homicide

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CONST. art. I, § 1, ¶ 17 (emphasis added).

62. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that a sentence of capital punishment for the crime of rape constitutes excessive punishment, thus violating the constitutional proscription against cruel and unusual punishment).

63. United States v. Thevis, 526 F.2d 989, 991 (5th Cir. 1976) (rejecting defendants' contention "that a three year sentence, to be served consecutive to a five year sentence imposed in another prosecution, is cruel and unusual").

64. *See, e.g.*, Paras v. Georgia, 274 S.E.2d 451, 452-53 (Ga. 1981) (concluding that a mandatory fifteen year sentence and $250,000 fine for the crime of trafficking cocaine did not constitute cruel and unusual punishment); Cox v. Georgia, 244 S.E.2d 1, 2 (Ga. 1978) (finding that a mandatory prison sentence of one to five years for operating a vehicle after multiple license revocations did not violate the proscription against cruel and unusual punishment).

65. *See* GA. CONST. art. VI, § 8, ¶ 1(d) (stating that "[i]t shall be the duty of the district attorney to represent the state in all criminal cases").

66. A district attorney prosecutes criminal cases on behalf of the State of Georgia. *See id.* Each judicial circuit has a district attorney who, upon winning a circuit-wide election, serves for a term of four years. *See* GA. CONST. art. VI, § 8, ¶ 1(a).

67. Isolm v. Georgia, 408 S.E.2d 701, 703 (Ga. 1991) (citing Knight v. Georgia, 257 S.E.2d 182, 184 (Ga. 1979)).

68. *See Knight*, 257 S.E.2d at 184.

69. *Id.* (citing Nebraska v. Martin, 206 N.W.2d 856, 856 (Neb. 1973)). The discretion of a prosecutor is so broad that it allows him to "charge under one statute rather than

case has discretion to charge a defendant with either first or second degree murder, each of which have a different culpability level. Whichever charge the prosecutor pursues determines the level of punishment the defendant may receive.[70]

Critics of mandatory minimum sentences fear that such statutes enable a prosecutor to fix a sentence against a defendant because the court must administer the mandatory sentence upon conviction.[71] They assert that prosecuting a case with a mandatory sentence imposes upon a core function of the judiciary because it renders the judiciary powerless in sentencing; thus, the prosecutorial action violates the separation of powers doctrine.[72]

While this is a concern, most states,[73] including Georgia, have ruled that a prosecutor's decision to indict a person under a statute does not violate the separation of powers doctrine.[74]

II. *CAMPBELL v. GEORGIA*

In *Campbell v. Georgia*,[75] the Supreme Court of Georgia upheld the constitutionality of mandatory minimum sentences.[76] Defendants Robert Campbell and Willie Frank Jones, Jr., pled guilty to a single count of armed robbery.[77]

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another [when his decision] is based [solely] on the sentence available upon conviction." Daniel W. Stiller, Note, *Initiative 593: Washington's Voters Go Down Swinging*, 30 GONZ. L. REV. 433, 447 (1995) (citing United States v. Batchelder, 442 U.S. 114, 125 (1979)).

70. LAFAVE & SCOTT, *supra* note 19, § 7.7. *Cf.* O.C.G.A. § 16-5-1(d) (1999) (stating that a court shall sentence a person convicted of first degree murder to death or life imprisonment); *id.* § 16-5-2(b) (stating that upon conviction of voluntary manslaughter, the defendant "shall be punished by imprisonment for not less than one year nor more than 20 years").

71. *See* Stiller, *supra* note 69, at 447.

72. *See Knight*, 257 S.E.2d at 183-84.

73. *See, e.g.*, Pennsylvania v. Wright, 494 A.2d 354, 361 n.4 (Pa. 1985) (holding that a mandatory minimum sentencing act did not unconstitutionally delegate power to the prosecutor in the executive branch); Washington v. Thorne, 921 P.2d 514, 526 (Wash. 1996) (en banc) (affirming the constitutionality of the Persistent Offender Accountability Act because it did not impermissibly grant the prosecutor a "veto" power over the judiciary).

74. *See generally* Isolm v. Georgia, 408 S.E.2d 701 (Ga. 1991); *Knight*, 257 S.E.2d 182.

75. 485 S.E.2d 185 (Ga. 1997).

76. *Id.* at 186.

77. *Id.* In total, the State charged the defendants with "two counts of armed robbery, two counts of aggravated assault, and two counts of possession of a firearm during the

Consequently, the court sentenced each defendant to the prescribed mandatory minimum sentence of ten years.[78] While the defendants acknowledged that mandatory minimum sentences are not per se unconstitutional, they argued that the statute was unconstitutional as applied to them because it embodied cruel and unusual punishment, violated the separation of powers doctrine, deprived them of due process of law, and transgressed the Equal Protection Clauses of the United States and Georgia Constitutions.[79]

The Georgia statute authorizing mandatory minimum sentences specifies that:

> any person convicted of a serious violent felony ... shall be sentenced to a mandatory minimum term of imprisonment of ten years and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and shall not be reduced by any form of pardon, parole, or commutation of sentence ....[80]

The statute includes armed robbery[81] in its definition of "serious violent felony."[82]

The court refuted the defendants' proposition that the statute violates the separation of powers doctrine of the Georgia Constitution,[83] which states that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct ...."[84] The court noted that "[t]raditionally, it is the task of the legislature, not the courts, to define crimes and set the range of sentences."[85] Judicial review is only appropriate if the legislature's choice for sentencing is "so grossly disproportionate to the

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commission of a crime ...." *Id.*

78. *Id.*

79. *Id.* at 186-87.

80. O.C.G.A. § 17-10-6.1(b) (1997).

81. Armed robbery occurs when "[a] person ... with [the] intent to commit theft, ... takes property of another from the person or the immediate presence of another by the use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." *Id.* § 16-8-41.

82. *Id.* § 17-10-6.1(a).

83. *Campbell*, 485 S.E.2d at 186.

84. GA. CONST. art. I, § 2, ¶ 3.

85. *Campbell*, 485 S.E.2d at 186.

severity of the crime that it constitutes cruel and unusual punishment."[86]

The Georgia Supreme Court determined that the statute did not violate the proscription against cruel and unusual punishment under the Eighth Amendment to the United States Constitution or under Article I, Section I, Paragraph XVII of the Georgia Constitution.[87] A punishment violates these provisions only if it "is nothing more than the purposeless and needless imposition of pain and suffering; or . . . is grossly out of proportion to the severity of the crime."[88] Furthermore, the mere fact that a sentence is mandatory does not necessarily make it cruel and unusual.[89] The court determined that a ten-year sentence for armed robbery is not cruel and unusual punishment.

The court also held that the statute did not deprive the defendants of due process of the law simply because they did not have an opportunity for allocution.[90] Allocution is not a recognized right upon entering a guilty plea.[91] Additionally, the court noted that "due process does not require individualized sentencing in non-capital cases."[92]

Finally, the court rejected the defendants' claim that the statute violated the Equal Protection Clauses of both the state and federal constitutions.[93] A criminal statute violates these

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86. *Id.* (quoting Isolm v. Georgia, 408 S.E.2d 701, 702-03 (Ga. 1991)); *see also* Knight v. Georgia, 257 S.E.2d 182, 184 (Ga. 1979) (concluding that a twenty year sentence for "burglary with intent to commit rape" is not per se cruel and unusual punishment).

87. *Campbell*, 485 S.E.2d at 186.

88. *Id.* (quoting Cox v. Georgia, 244 S.E.2d 1, 2 (Ga. 1978)).

89. *Id.* (citing Ortiz v. Georgia, 470 S.E.2d 874, 875 (Ga. 1996)).

90. *Id.* at 187. Allocution is a "court's inquiry of [a] defendant as to whether . . . he would like to make a statement on his behalf and present any information in mitigation of [his] sentence." BLACK'S LAW DICTIONARY 76 (6th ed. 1990).

91. *Campbell*, 485 S.E.2d at 187 (citing Barksdale v. Ricketts, 209 S.E.2d 631, 632-33 (Ga. 1974)).

92. *Id.*

93. *Id.* The Georgia Constitution explicitly states that "[n]o person shall be denied the equal protection of the laws." GA. CONST. art. I, § 1, ¶ 2. The United States Constitution provides equal protection to citizens from state actions under the Fourteenth Amendment: "[N]or shall any [s]tate . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The United States Constitution does not explicitly ensure equal protection from federal actions; however, it implicitly ensures citizens equal protection vis-à-vis substantive due process guaranteed under the Fifth Amendment: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

clauses only when it does not comply with proper legislative intent and is arbitrary and discriminatory.[94] Defendants failed to produce any evidence indicating that the statute unfairly discriminated against them.[95] Therefore, since the court refuted all of the defendants' constitutional assertions upon appeal, it held that the minimum mandatory sentence statute was constitutional.[96]

III. EVALUATION

The Georgia Supreme Court in *Campbell v. Georgia* decided that the Georgia statute authorizing mandatory minimum sentencing does not violate the separation of powers doctrine.[97] Precedent indicates that the power to define crimes and punishment for such crimes resides within the legislative branch.[98] Furthermore, Georgia case law establishes that it is constitutionally permissible for a prosecutor to charge a defendant with a crime that imposes a mandatory sentence upon conviction.[99] Is this precedent correct, or did the court in *Campbell* rely on flawed case law when determining whether a separation of powers violation exists? For the following reasons, the court in *Campbell* correctly held that no separation of powers violation occurred through the use of mandatory minimum sentencing.

A. Functionalism Prevails over Formalism

Over "two hundred years of constitutional history has failed to produce a cogent and consistent approach to separation of

94. *Campbell*, 185 S.E.2d at 187; *see also* Flemming v. Zant, 386 S.E.2d 339, 341 (Ga. 1989) (concluding that a legislative decision regarding an effective date in a statute does not discriminate against defendants, even though its application in previously tried cases and future cases produces different outcomes).

95. *Campbell*, 185 S.E.2d at 187.

96. *Id.*

97. *Id.* at 186.

98. For a discussion of the legislature's ability to define criminal sentences, see *supra* Part I.B.1. *See also* Paras v. State, 274 S.E.2d 451, 452-53 (Ga. 1981); Hill v. State, 53 Ga. 125, 127 (1874).

99. For a discussion of prosecutorial discretion, see *supra* Part I.B.2. *See also* Isolm v. Georgia, 408 S.E.2d 701, 703 (Ga. 1991); Knight v. Georgia, 257 S.E.2d 182, 183-84 (Ga. 1979).

powers . . . ." [100] Scholars, however, have noted that " there exists [sic] two distinct schools of thought which punctuate the debate: formalism and functionalism." [101] The Supreme Court has not "embrace[d] a particular mode of analysis . . . [and refuses to adopt] one approach over the other." [102] However, certain Justices have spoken out in favor of a particular approach.[103]

The formalist approach embraces the idea that "all government power must be allocated into three mutually exclusive categories of legislative, executive, and judicial power and that the boundaries . . . are clearly defined in the Constitution . . . ." [104] Formalists insist that since the Constitution, within its first three articles, establishes three distinct branches of government, the functions of each branch should remain distinct.[105] Thus, distinct boundaries between the branches are necessary to prevent a violation of the separation of powers doctrine.[106]

The other viewpoint, termed as the functionalist approach, "views the doctrine [of separation of powers] as . . . flexible and adaptive." [107] It allows for "an overlapping of powers and a blurring of lines between departments."[108] This overlapping is permissible provided that one branch of the government does

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100. Eric D. Greenberg, *Falsification of Functionalism: Creating a New Model of Separation of Powers*, 4 SETON HALL CONST. L.J. 467, 505 (1994) (citing E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 506 (1989)).

101. Guryan, *supra* note 49, at 1344.

102. Onley, *supra* note 47, at 1207.

103. Justice White appeared to be "the foremost functionalist." *Id.* at 1205 n.132 (citing INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting)). Justice Scalia remains "the Court's chief formalist." *Id.* (citing Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting)).

104. Katy J. Harriger, *Who Should Decide? Constitutional and Political Issues Regarding Section 4 of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 563, 569 (1995) (citing Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493 (1987)).

105. *See* Onley, supra note 47, at 1205 (citing Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 536 (1988)).

106. One scholar perceives that the "three branches [are] . . . hermetically sealed" and "strictly cabined by the specific wording of the Constitution." Greenberg, *supra* note 100, at 505.

107. Harriger, *supra* note 104, at 569. Functionalism seeks to "maintain[] the proper balance between the coordinate government branches." Guryan, *supra* note 49, at 1346 (citing Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984)).

108. Harriger, *supra* note 104, at 569.

not impede upon the "core functions" of another branch.[109] Thus, distribution of powers between branches remains constitutional "except where it would effectively disable a branch from performing its defined core role in the constitutional scheme."[110]

The functionalist approach seems to be the better alternative for assessing separation of power inquiries. Strict adherence to distinct lines between branches "often misses the meaning of the Constitution in light of its open-endedness and the implicit nature of its philosophy."[111] In essence, "formalism treats separation of powers as . . . mechanical" in an area that requires non-rigid application to ensure a functional government.[112] Thus, because functionalism seems to be the better alternative, the court in *Campbell v. Georgia* correctly allowed for blending of powers between the three branches on the issue of mandatory minimum sentencing. Only when an action impedes upon a "core function" of a particular branch does a constitutional violation against the separation of powers doctrine occur.

B. Core Functions Remain Unscathed

Case law indicates that the power to define criminal sentencing resides within the legislative branch of government.[113] This power includes the ability to prescribe mandatory sentences for individuals convicted under criminal statutes.[114] Precedent also indicates that the executive branch, via prosecutorial discretion, may indict a person on a charge that requires the judiciary to institute a mandatory minimum sentence.[115] But do mandatory minimum sentences impede upon a core duty of the judiciary? Do such statutes

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109. *See* Greenberg, *supra* note 100, at 505.
110. *Id.*
111. *Id.*
112. *Id.*
113. For a discussion of the legislature's ability to define criminal sentences, see *supra* Part I.B.1.
114. *See, e.g.*, Knight v. Georgia, 257 S.E.2d 182, 183 (Ga. 1979) (enunciating the "power of the legislature to direct the punishment to be prescribed for second offenders and to leave *no discretion* to the trial judge") (emphasis added).
115. For a discussion affirming prosecutorial discretion when indicting an individual with a charge prescribing a mandatory minimum sentence, see *supra* Part I.B.2.

impermissibly bind the hands of judges during sentencing? The answer to both questions is no.

In a democracy, citizens elect legislators for representation in government.[116] Legislators have a responsibility to their constituents to advocate the needs of the community.[117] If a legislator fails to effectively represent his constituents, the citizens will likely not re-elect him during the next campaign.[118] Thus, legislators must be responsive to the needs of the community to win elections and remain in office. In addition, citizens' needs will only be properly addressed when the community has a course of redress against government representatives.

A judge, on the other hand, "does not answer to the people in the same fashion as a [legislator]."[119] For example, because federal judges are appointed for life, they "are not accountable to the public."[120] Some states, however, require that members of the state judiciary win elections to take office.[121] While both legislative and judicial candidates run for office in these states, the campaigns, ideally,[122] take divergent paths.[123] Candidates for

116. *See* Amy S. Lowndes, Note, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 FLA. L. REV. 417, 431 (1992).

117. *See* Leslie Combs, Note, Spallone v. United States: *One Less Brick in the Wall of Federalism*, 43 BAYLOR L. REV. 211, 231 (1991).

118. *See* Marci A. Hamilton, *Discussion and Decisions: A Proposal To Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 541-42 (1994).

119. Jeffrey K. Brown, Note, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense*, 13 HOFSTRA LAB. L.J. 181, 205 (1995).

120. *Id.*

121. *See, e.g.*, SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 142 (1990) (noting that states requiring partisan elections for members of the judiciary include Pennsylvania, Illinois, and North Carolina, and states that elect judges through non-partisan elections include Georgia, Nevada, and Washington).

122. Specifying ethical guidelines for campaigns and enumerating specific examples of campaigns are outside the scope of this Article. While candidates from any branch of government may manipulate the campaign process to insure a political victory, this Article assumes that the candidates are representing themselves to their constituents in a manner reflective of the office they seek.

123. *See* Jason M. Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 87 (1997) (explaining that campaign agendas are quite different between the judiciary and the other branches of government); *see also* SUPREME COURT OF OHIO'S CODE OF JUDICIAL CONDUCT Canon 7 B(1)(c) (2001) (prohibiting judges from

the bench present themselves as unbiased individuals whose duty is to interpret the law, while legislative candidates run as advocates for their future constituents, representing the will of the people.[124] Thus, citizens will not hold judges accountable, as they will legislators, for the needs of the community.[125]

Furthermore, the judiciary does not have the "institutional abilities to ascertain and weigh facts" as does the legislature.[126] The role of the judiciary is not to "make[] democratic choices among alternative solutions to social and economic problems."[127] Thus, the judiciary should not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[128] Therefore, since the legislature is more apt to deal with the needs of society, the court in *Campbell v. Georgia* correctly held that mandatory minimum sentences do not transgress any core function of the judiciary.

C. Pragmatic Concerns

Mandatory minimum sentencing statutes have created concern over the growing number of incarcerated people in prisons and the costs of operating such facilities.[129] In 1988, "$19.1 billion was devoted to financing correctional institutions."[130] This figure "represents an increase of [thirty-one] percent since 1985 . . . ."[131] Both the federal and state governments have become burdened by the rising costs of prison expenditures.[132] On the federal level, President Clinton

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"[making] pledges or promises of conduct in office" during a campaign).

124. *See generally* Chief Justice Ann K. Covington, State of the Judiciary Address (1994), *in* J. MO. B., Mar./Apr. 1994, at 71.

125. *See* Levien & Fatka, *supra* note 123, at 87.

126. Lowndes, *supra* note 116, at 431 (citing Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971)).

127. *Id.* (quoting Schweiker v. Wilson, 450 U.S. 221, 230 (1981)).

128. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

129. *See* Juliet M. Casper & T. Markus Funk, *Criminal Law and Criminology: A Survey of Recent Books*, 85 J. CRIM. L. & CRIMINOLOGY 281, 290 (1994).

130. Note, Wilson v. Seiter, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 233 (1993) (citing BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT 1988, at 2 (1990)).

131. *Id.* (citing BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT 1988, at 1 (1990)).

132. *See* Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 695 n.75 (1996).

proposed to pay for increased prison expenditures by "cut[ting] the federal work force . . . by 270,000 positions."[133] State governments, such as those in Connecticut and Michigan, have been forced to "shift . . . resources from education to prisons . . . ."[134] These figures have led some to criticize the overall effectiveness of mandatory minimum sentencing.

Proponents of mandatory minimum sentencing, however, "argue that the cost of crime is much more than the cost of [implementing these statutes]."[135] They believe "citizens may save money because they will not have to suffer the price of being robbed or raped."[136] As a result of incarcerating criminals for prescribed minimum sentences, supporters note that society will "save on medical costs, pain and suffering, and property loss . . . ."[137]

Determining whether mandatory minimum sentencing outweighs the costs associated with the implementation of these statutes is outside the scope of this Article. Citizens must determine whether mandatory minimum sentences effectively reduce crime without overburdening society. Currently, public opinion seems to be in favor of mandatory minimum sentences.[138]

Due to society's support for mandatory minimum sentencing statutes, legislatures must appropriate funds to ensure that detention facilities will be able to manage the increasing number of criminals convicted under these statutes. Thus, the legislature remains in a position to weigh society's needs against the costs of fulfilling these needs. The legislature, if it determines that mandatory sentencing statutes are too burdensome on the economy, can establish other ways to combat citizens' fear against increasing crime.

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133. Shinbein, *supra* note 1, at 199.

134. Freeman, *supra* note 132, at 695 n.75.

135. Shinbein, *supra* note 1, at 199. Some studies estimate that the total cost society pays as a result of crime reaches "425 billion dollars annually." *Id.* at 200.

136. Markel, *supra* note 29, at 685 (citation omitted).

137. *Id.*

138. In a nation-wide poll, more than seventy-five percent of the people surveyed favor mandatory minimum sentencing statutes. *See* Shinbein, *supra* note 1, at 177 (citing Rorie Sherman, *Crime's Toll on the U.S.: Fear, Despair and Guns*, NAT'L L.J., Apr. 18, 1994, at A1, A19).

The judiciary, however, cannot maintain such a position. Judges do not appropriate money for prisons.[139] They are not responsible for policy decisions, as are the members of the legislative branch.[140] Therefore, only the legislature stands in a position suitable to institute mandatory minimum sentencing statutes because only it can control the factors needed to implement such statutes properly.

CONCLUSION

The Georgia Supreme Court in *Campbell v. Georgia* correctly decided that mandatory minimum sentencing statutes do not violate the separation of powers doctrine.[141] When evaluating a possible separation of powers violation, a court should determine if an action by one branch of government impermissibly impedes upon the core function of another branch.[142] Because legislatures have the power to determine crimes and affix penalties for such crimes, a core function of the judiciary is not impaired when judges must sentence individuals under mandatory minimum sentences.[143] Furthermore, pragmatic reasons, such as allowing the legislature to coordinate the enactment of mandatory minimum sentencing statutes along with the funding necessary to enforce these statutes, support existing precedent finding no violation of the separation of powers doctrine.[144]

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139. *See* U.S. CONST. art. I, § 8, cl. 1 (stating that the power to appropriate money for the welfare of the country rests within the legislative branch of government).
140. *See* Robert P. Crouch, *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-In-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419, 423 (1995).
141. *See* Campbell v. Georgia, 485 S.E.2d 185 (Ga. 1997).
142. *See* Robertson, *supra* note 51, at 760-61.
143. *See* Hill v. State, 53 Ga. 125, 127 (1874).
144. *See* Shinbein, *supra* note 1, at 177.