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August 29, 2011

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Attention: Public Affairs – Priorities Comment

**Re: Public Comment on USSC Notice of Proposed Priorities for Amendment
Cycle Ending May 1, 2012**

Dear Judge Saris:

Attached to this letter are the Federal Public and Community Defender's detailed views regarding Proposed Priority #1, specifically the Commission's upcoming report on mandatory minimum penalties. We remain hopeful that the Commission will maintain its historic opposition to these harmful statutes. Because the report is scheduled for completion later this year, and because the current Chair was not yet serving during the Commission's May 2010 hearing on mandatory minimums, we wish to take this opportunity to restate our view of the evidence and our hopes and concerns for this important report.

The attachment is an excerpt from a larger report on post-*Booker* sentencing that the Federal Defenders have been preparing to help inform the public debate on this crucial criminal justice issue. The attachment contains extensive citations, statistical analyses, and other documentation in support of the following findings and conclusions:

- ❖ For nearly sixty years, the Judicial Branch has consistently opposed mandatory minimum penalty statutes. The Commission's 1991 report on mandatory minimums has stood for two decades as the definitive statement of the serious problems caused by these statutes and their incompatibility the system of sentencing guidelines. It would be a tragic legacy for this longstanding consensus to be broken. (pp. 2-4).

- Opposition to mandatory minimums is shared by an ideologically diverse range of organizations and interest groups. Academic research has also found that mandatory penalties are ineffective and unfair.
- ❖ The change to advisory guidelines has improved the system, allowed the guidelines to operate in the manner in which they were originally intended, and has not created new problems that can be addressed by mandatory minimums.
 - Alleged instances of unduly lenient sentences under the advisory guidelines have proven to be fair and reasonable sentences upon closer inspection. Appellate review remains available to check potential undue leniency and is effective, but it is rarely used by prosecutors.
- ❖ Mandatory minimums are especially problematic for advisory guidelines, because they undermine confidence that the guidelines' recommendations conform to the requirements of 18 U.S.C. § 3553(a). Mandatory minimums distort guideline development and make it impossible for the guidelines to evolve in light of judicial feedback, empirical data, and national experience. (pp. 4-5).
- ❖ There is no possibility that mandatory minimum statutory penalties can "work together" with a system of guidelines because of the political dynamics of how mandatory minimums are enacted. (pp. 5-9).
 - The Commission can develop guidelines comprehensively, with an eye toward the proportionality of punishments for different crimes and the availability of correctional resources. Mandatory minimums are enacted piecemeal.
 - Mandatory minimums will never be set at the levels needed to integrate with the sentencing guidelines. Rather than set at levels appropriate for the *least* serious and *least* dangerous offenders who fall under the statutes' broad terms, they are often motivated by particularly heinous crimes and reflect an incomplete understanding of the types of crimes actually subject to their terms.
 - Mandatory minimums do not reflect public opinion about appropriate punishment levels for real defendants.
- ❖ Mandatory minimums override the judgment of the Commission and sentencing judges and allow prosecutors to directly control sentences in many cases every year. (pp. 11-12).
 - While there is no evidence that mandatory minimums are needed to prevent undue leniency, there is overwhelming evidence that they cause disparity and excessive punishment, both by elevating guideline levels and by trumping the guideline range.

- ❖ Many types of evidence point to the conclusion that mandatory minimums are the greatest source of unwarranted disparity in federal sentencing today. (pp. 12-15).
 - Department of Justice policies regarding charging and plea bargaining could not in principle, and have not in practice, prevented disparity from prosecutor's uneven and arbitrary use of mandatory penalties.
 - The Commission's own research has consistently documented disparate use of mandatory minimum statutes.
- ❖ Mandatory minimums have a demonstrable adverse impact on racial minorities and their use by prosecutors correlates with race, even in cases involving apparently similar criminal conduct. (pp. 20-22).
- ❖ Mandatory minimums do not deter or reduce crime, and may increase it. (pp. 22-25).
 - There is no evidence that mandatory minimums add to the deterrent effect of criminal sentences, that they are targeted at the most dangerous offenders, or that they are needed for innovative law enforcement programs.
- ❖ The safety valve does not solve the problems created by mandatory minimums. (pp. 25-27).
 - The safety valve's criteria exclude too many non-serious and non-dangerous offenders.
- ❖ By giving prosecutors power to require judges to impose excessively harsh punishments, mandatory minimums have upset the checks and balances of the criminal justice process. (pp. 27-29).
 - The scholarly consensus is that mandatory minimums have helped drive trial rates to the lowest levels in history, with corresponding dangers to the fairness and truth-seeking function of the criminal justice process.
 - By threatening defendants with excessive punishment, prosecutors can coerce defendants into testifying against others, waiving their rights to file motions, make arguments for sentence mitigation to the judge, appeal their sentences, and waiving many other protections important to the fairness and integrity of the criminal justice process.
- ❖ There is no evidence that mandatory minimum are needed to obtain guilty pleas or assistance in the prosecution of other persons. (pp. 30-32).
 - The guidelines themselves contain structured incentives—in the form of sentence *reductions*, not penalties above the otherwise applicable guideline levels—for guilty pleas and cooperation. But these have never been allowed to work as intended.

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- ❖ The Commission has exclusive access to data by which the effects of mandatory minimums might be evaluated. This places a special responsibility on the Commission to evaluate these penalties fully and fairly, and to release these data as quickly as possible so others can evaluate its work and contribute to this important national debate. (p. 32).

As always, we appreciate the opportunity to submit comments on this proposed priority. We look forward to continuing our work with the Commission to improve federal sentencing policy.

Very truly yours,

/s/ Miriam Conrad

Miriam Conrad
Federal Public Defender
Vice-Chair, Federal Defender Sentencing
Guidelines Committee

/s/ Marjorie Meyers

Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosure

cc (w/encl.): William B. Carr, Jr., Vice Chair
Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Commissioner
Dabney Friedrich, Commissioner
Hon. Beryl A. Howell, Commissioner
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Judith M. Sheon, Staff Director
Kenneth Cohen, General Counsel

Proposed Priority #1: Mandatory Minimums

The Federal Public and Community Defenders look forward to the Commission's new report on mandatory minimum penalties and remain hopeful that the Commission will maintain its historic opposition to these harmful statutes. Because the report is scheduled for completion later this year, and because the current Chair was not yet serving during the Commission's May 2010 hearing on mandatory minimums,¹ we wish to take this opportunity to restate our hopes and concerns for this important report.

For two decades, the Commission's 1991 report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*,² has stood as the definitive statement of the many problems created by these blunt statutory punishments.³ We hope that the new report, like the previous one, will inform Congress and the public about how these penalties conflict with a system of individualized sentencing informed by guidelines – a conflict that is even more obvious now that the guidelines are advisory. The Commission is in a unique position, with exclusive access to data that can illuminate problems and address concerns about federal sentencing, judicial discretion, and the negative consequences of mandatory minimum penalties.

No evidence shows that mandatory minimums are needed to ensure fair and effective sentencing. The few examples that prosecutors have offered of sentences that represent undue judicial “leniency” have proven to be fair and reasonable upon closer examination.⁴ Even if judges sometimes sentence more leniently than prosecutors might wish, appellate review is already available under the advisory guidelines to correct sentences outside the bounds of reason. In fact, the government rarely seeks appellate review of sentences below the guideline range, even though it is often successful when it does.⁵ Mandatory minimums cause unnecessary punishment far more frequently than they prevent judicial “leniency.”

¹ Statement of Michael Nachmanoff Before the U.S. Sentencing Comm'n, Washington, D.C., at 77-90. (May 28, 2010).

² USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) (hereinafter *1991 Report*).

³ A Google Scholar search found 299 published articles citing the report, some in foreign languages.

⁴ See, e.g., Statement of Jacqueline A. Johnson Before the U.S. Sentencing Comm'n, Chicago, Ill., at 35-36 (Sept. 10, 2009) (providing additional facts in several cases cited by prosecutors as involving unwarranted judicial disparity).

⁵ See *United States v. Ovid*, 2010 WL 3940724, at *9 (E.D.N.Y. 2010) (noting that “with respect to the eight sentences specifically identified in the DOJ Letter, which are presumably the most egregious examples of what it describes as ‘unacceptable’ fraud sentences, the government either didn’t appeal or withdrew its appeal in all but one of them.”). In fiscal year 2010, there were 14,565 sentences classified as “non-government sponsored below range,” a large portion of which the government agreed to or did not oppose. The government appealed only 156 sentences that year, 30 of which were based on the

While no evidence shows that mandatory minimums are needed, much evidence shows that they create huge problems, especially under the advisory guidelines system. Mandatory minimums distort the guidelines and override the judgments of both the Commission and sentencing judges. Mandatory minimums place sentencing power in the hands of sometimes overly zealous prosecutors to use as they see fit and are the greatest source of unwarranted disparity in federal sentencing today. Mandatory minimums misdirect federal law enforcement and correctional resources by requiring lengthy sentences for offenders who are not dangerous or highly culpable. And mandatory penalties upset the balance that helps ensure fair procedures. This imbalance has corrosive effects throughout the criminal justice process. Both the guidelines and federal sentencing practice would improve by the elimination of mandatory minimum statutes.

A. Judicial and Scholarly Opposition to Mandatory Minimums Have Been Longstanding and United.

We believe it would be a tragic legacy for this Commission to break the nearly sixty years of consensus in the Judicial Branch that mandatory minimums are unjust and counterproductive and should be repealed. The Judicial Branch has consistently opposed mandatory minimum statutes since 1953. Justice Breyer,⁶ Justice Kennedy,⁷ the late Chief Justice Rehnquist,⁸ and numerous other judges have spoken out against the harsh and inflexible sentences required by mandatory minimum statutes.⁹ Several district judges and appeals courts

application of § 3553(a) and the government prevailed in 60% of them, and 95 of which were based on guideline issues and the government prevailed in 66% of those. Defendants appealed 1,471 sentences based on the application of § 3553(a) and prevailed in only 5.4% of those appeals. USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbls. 57, 58 (2010) (hereinafter *2010 Sourcebook*).

⁶ Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180 (1999); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

⁷ Justice Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting*, Aug. 9, 2003, http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

⁸ Chief Justice William H. Rehnquist, Luncheon Address (June 18, 1993), in USSC, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States*, 286-87 (1993).

⁹ See, e.g., *Mandatory Minimums and Unintended Consequences*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 111th Cong. 34 (statement of Hon. Julie E. Carnes, Chair of the Committee on Criminal Law of the U.S. Judicial Conference), <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf>; David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. Colo. L. Rev. 1 (2008); Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 Notre Dame J.L. Ethics & Pub. Pol'y 311 (2004); Hon. Jack B. Weinstein, *Every Day Is A Good Day For A Judge To Lay Down His Professional Life For Justice*, 32 Fordham Urb. L.J. 131 (2004); Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives On the Federal Sentencing Guidelines*, 15 Fed. Sent'g Rep. 215 (2003); Hon. Gerard E. Lynch, *Sentencing Eddie*, 91 J. Crim. L. &

have recently found mandatory minimums to be cruel and irrational, even if not unusual by Eighth Amendment standards.¹⁰ The position of the Judicial Conference remains the same after *Booker v. United States*, 543 U.S. 220 (2005) and the vast majority of judges do not believe mandatory minimum statutes are appropriate or necessary in light of advisory guidelines.¹¹

Opposition to mandatory minimums is shared by others who have studied their effects on crime and how they are applied in practice. The scholarly verdict is unanimous: mandatory minimum penalties are unfair, ineffective, and discriminatory.¹² An ideologically diverse range of organizations oppose mandatory minimums. These include the U.S. Conference of Mayors, the American Bar Association's Justice Kennedy Commission, Grover Norquist of Americans for Tax Reform,¹³ the Constitution Project's Sentencing Initiative,¹⁴ and religious organizations,

Criminology 547 (2001); Molly T. Johnson & Scott A. Gilbert, Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* (1997); Marc Miller & Daniel J. Freed, *Editors' Observations: The Chasm Between the Judiciary and the Congress over Mandatory Minimum Sentences*, 6 Fed. Sent'g Rep. 59 (1993).

¹⁰ See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1244 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir. 2006); *United States v. Looney*, 532 F.3d 392, 396-97 (5th Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113, 1118-23 (9th Cir. 2006) (Reinhardt, J., concurring).

¹¹ Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n, at 3 (Mar. 16, 2007) (reviewing history); *Mandatory Minimums and Unintended Consequences, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives*, 111th Cong. 34 (July 14, 2009) (statement of Hon. Julie E. Carnes) (reviewing history), <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf>; *Mandatory Minimum Sentencing Laws - The Issues, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives*, 110th Cong (June 26, 2007) (statement of Hon. Paul Cassell), <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf>; *United States v. Booker: One Year Later – Chaos or Status Quo?*, *Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives*, 109th Cong. 59-65 (March 16, 2006) (statement of Hon. Paul J. Cassell).

¹² Paul G. Cassell, *Too Severe?: A Defense of The Federal Sentencing Guidelines (And A Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017 (2004); Martin, *supra* note 9; Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87 (2003); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

¹³ *Mandatory Minimums and Unintended Consequences, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives*, 111th Cong. 70 (statement of Grover G. Norquist, President, Americans for Tax Reform) (“Viewed through the skeptical eye I train on all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America’s taxpayers.”), http://judiciary.house.gov/hearings/printers/111th/111-48_51013.PDF.

including the National Council of Churches and many individual denominations.¹⁵ A group of former government officials and academics, including Newt Gingrich and Edwin Meese, recently made “the conservative case for reform,” including reconsideration of mandatory minimum penalties.¹⁶ Even the Department of Justice has expressed interest in the elimination or reduction of at least some mandatory minimums,¹⁷ and former prosecutors and Attorneys General have described the unfairness of mandatory minimum penalties.¹⁸

As Congress itself concluded when it repealed mandatory minimums in 1970,¹⁹ mandatory minimums do not reduce crime; rather, they hamper rehabilitation, infringe on the judicial function, treat casual offenders as severely as hardened criminals, and prevent individualized sentencing.²⁰

If the Commission now reverses its longstanding opposition to mandatory minimums, any momentum for reform now or in the future will be greatly damaged.

B. Mandatory Minimums Especially Conflict with Advisory Guidelines.

As the Commission noted in its 1991 report, mandatory minimum statutes are “policies in conflict” with a system of sentencing guidelines.²¹ The change to advisory guidelines has not

¹⁴ See U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006); American Bar Association, Justice Kennedy Commission, *Report With Recommendations to the ABA House of Delegates* (2004); Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

¹⁵ Inter-Faith Drug Policy Initiative, *Fact Sheet on Mandatory Minimum Sentences*, http://www.idpi.us/downloads/pdf/factsheet/mm_factsheet.pdf.

¹⁶ See *Right on Crime, Priority Issues: Prisons* (“Consider eliminating many mandatory minimum sentencing laws for nonviolent offenses. These laws remove all discretion from judges who are the most intimately familiar with the facts of a case and who are well-positioned to know which defendants need to be in prison because they threaten public safety and which defendants would in fact not benefit from prison time.”), <http://www.rightoncrime.com/priority-issues/prisons>.

¹⁷ Lanny A. Breuer, *The Attorney General’s Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent’g Rep. 110, 112 (2010).

¹⁸ Amici Curiae Brief in *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006) (amici curiae included 163 individuals, including former United States Attorneys General, retired federal judges, former United States Attorneys, and other former high ranking U.S. Dep’t of Justice officials).

¹⁹ Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums* (2008), http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf.

²⁰ See *1991 Report*, *supra* note 2, at 6-7.

²¹ Chapter 4 of the *1991 Report* is entitled “Policies in Conflict.”

increased the need for mandatory minimums and many of the problems with the statutes identified in 1991 have only become more obvious. Mandatory minimums have distorted guideline development and amendment, which damages the guidelines' reputation at a time judges must evaluate the guidelines' recommendations in light of the purposes and factors at 18 U.S.C § 3553(a). Guidelines linked to mandatory minimums undermine confidence that the guidelines recommend sentences that are "sufficient, but not greater than necessary" to achieve the statutory purposes of sentencing.

Mandatory minimums hinder evolution of the guideline system, as envisioned by the Supreme Court in its recent guidelines cases and by Congress in the SRA. Mandatory penalties impede the Commission from receiving and taking account of valuable feedback from judges, and using empirical research and national experience to make its guidelines persuasive. The Commission is unable to honestly explain the evidentiary bases for guidelines tied to mandatory minimums and how they aim to achieve the purposes of sentencing because Congress's reasons for enacting such penalties are often unclear and inconsistent. Congress does not have the same obligations it gave to the Commission under the SRA, or that it gave to judges when they impose sentence in individual cases. There is no reason to believe that the legislative process leading to mandatory minimums results in penalties that reliably comply with § 3553(a). Indeed, substantial reasons exist to be especially skeptical of such policies and the guidelines linked to them.

1. Mandatory Minimum Statutes and Guidelines Cannot Work Together.

The Department of Justice has suggested that mandatory minimum penalties and guidelines are designed to "work together."²² But neither the legislative history of the SRA nor common sense supports this view.²³ The Commission was established to develop penalties for all federal offenses comprehensively, with an eye to the proportionality of punishments among all types of crime as well as the amounts and types of correctional resources that are available. Mandatory minimum statutes, on the other hand, are enacted piecemeal and under conditions likely to inflate the relative seriousness of the particular type of crime subject to the legislation. Congress cannot anticipate how the statutory minimums will be integrated into the guidelines,

²² Statement of Sally Quillian Yates Before the U. S. Sentencing Comm'n, Washington, D.C., at 5 (May 27, 2010).

²³ See, e.g., Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 194 (1993) (noting that "in certain fundamental respects, the general approaches of the two systems are inconsistent"); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 57 Fed. Probation 9, 9 (1993) ("Congress is of two minds on sentencing reform. One mind is dispassionate and learned, deliberating for decades in search of a rational comprehensive solution. The other is impulsive, reckless, driven by unquenchable political passions.").

how they will interact with other guideline provisions, and how they will affect the proportionality of punishment among different offenses.

The important sentencing principle of “just desert” requires that the severity of the sentence match the seriousness of the offense. This requires that a full range of punishments are available to judges, who can evaluate the “the nature and seriousness of the harm” caused by the offense and “the offender’s degree of culpability in committing the crime, in particular, his degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity.”²⁴ For mandatory minimum statutes to conform with this principle, the statutory minimum must be sufficiently low for the *least* harmful offense that might arise under the statute, committed by the *least* culpable and *least* dangerous offender. In all but perhaps the most egregious of violent crimes, such as premeditated murder, the principle of just deserts means that a judge should always have the option of imposing a non-prison sentence on the least culpable, least dangerous offender.²⁵

The political dynamics of mandatory minimum legislation will never work to create statutory punishments that can be integrated with the guidelines to conform to the principles and purposes of sentencing. Some might argue that legislation is the best measure of the public’s view of the seriousness of an offense. But mandatory minimum legislation reflects a bumper-sticker mentality and knee-jerk reaction to caricatures of criminal offenders and fails to reflect informed public opinion. Mandatory penalties attach to generic crime categories – “drug traffickers,” “child pornographers” – that invoke stereotypes of the worst types of offenders, not actual defendants. Congress often enacts such legislation in response to an especially heinous crime, even naming legislation after victims.²⁶ The legislation is meant to “send signals” and symbolically convey how *seriously* Congress takes the public’s revulsion toward these stereotypes, which is fundamentally inconsistent with setting penalties at the level appropriate for the *least* serious offense and *least* dangerous offender that fall under the statute’s broad terms. Mandatory minimums also are often used in a partisan competition to prove who is the

²⁴ Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571, 590 (2005).

²⁵ For this reason, the suggestion made by Sally Yates, in response to Commissioner Friedrich’s question about “low-level mandatory minimums” for white-collar offenders would not comply with the principles of just deserts. See Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 52-54 (May 27, 2010). Nor, as discussed herein, would Congress set the minimum penalty to account for the least culpable offender who commits the least culpable form of a particular offense.

²⁶ For example, the Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-246 (July 27, 2006) begins with a list of 15 victims of crimes over the previous two decades, including Polly Klaas and Elizabeth Smart. Section 202, sub-titled Jetseta Gage Assured Punishment for Violent Crimes Against Children, added new mandatory penalties, as did other provisions of the Act.

“toughest” on a particular type of offense or offender.²⁷ The result is harsh and inflexible statutory punishments that cannot be integrated into a rational system of proportionate punishment or a system designed to allocate prison resources to the most dangerous offenders.

Research with juries and public opinion surveys have shown how badly mandatory minimum penalties misrepresent public opinion about actual offenders. The public is *not* more harsh than the judiciary, and considerably *less* harsh than policymakers believe them to be.²⁸ Survey findings have shown that the public believes judges are best qualified to determine sentences and that guidelines based on political policymaking, rather than empirical research, are overly harsh.²⁹ Public opinion about the seriousness of various offenses can, of course, be distorted by media coverage.³⁰ This is one reason why philosophers of criminal punishment believe seriousness rankings should not be based on public perceptions, but instead should be based on empirical measurement of the harms caused by various types of offenses.³¹

The most compelling evidence of the public’s true feelings about appropriate punishment is revealed when judges ask juries what sentence they would impose on the people they have just convicted, after hearing all of the evidence of the defendants’ guilt. The recommended sentences are far shorter than the mandatory minimums applicable to the cases. In *United States v. Angelos*, Judge Paul Cassell was required to impose a sentence of 55 years on a marijuana dealer with no previous convictions, a real job, and a family. The mean juror recommendation was 18 years imprisonment.³² Judge Jack Weinstein was required to impose a five-year mandatory

²⁷ As Justice Rehnquist noted in 1993: “Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’ Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.” Chief Justice William H. Rehnquist, *supra*, note 8, at 286-87.

²⁸ Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 *Crime and Justice* 99, 134 (M. Tonry, ed., 1992).

²⁹ A 2008 survey found that 78% of Americans feel that the courts, not Congress, are best qualified to decide sentences, 59% oppose mandatory minimums for some non-violent crimes. Families Against Mandatory Minimums, *Omnibus Survey* (2008), <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>. A 1997 opinion poll revealed that the public viewed the sentences produced by many of the guidelines as too severe, even before the further increases over the past fourteen years. Among other things, the guidelines produced “much harsher” sentences in drug trafficking cases than survey respondents would have given. See Peter H. Rossi & Richard A. Berk, *U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes* (1997).

³⁰ Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *Wm. & Mary L. Rev.* 397 (2006).

³¹ Dierdre Golash & James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy*, 22 *Am. J. Crim. L.* 703 (1995).

³² *Angelos*, 345 F. Supp. 2d at 1242.

minimum for receipt of child pornography when most of the jurors believed the defendant should receive treatment and not be imprisoned. Three jurors would have acquitted had they known of the five-year mandatory minimum.³³

Judge James S. Gwin and his colleagues polled jurors in twenty-two cases, eighteen of which involved drug trafficking guidelines set at or above mandatory minimums or a consecutive mandatory sentence under 18 U.S.C. § 924(c). In each case the median juror recommendation was dramatically lower than what the guidelines and mandatory minimums required.³⁴ Among the study's conclusions was that "mandatory-minimum sentences and the Sentencing Commission's reaction to those mandatory minimums have only further diminished the connection between community sentiment and criminal punishment."³⁵ Any suggestion that mandatory penalties accurately reflect the citizenry's opinions about criminal sentencing badly underestimates the thoughtfulness and compassion of the majority of the American people.

Apart from overall severity, integrating mandatory minimums with guidelines is impossible due to the simplistic way the statutes characterize different crimes. By requiring a minimum punishment for any crime involving just one fact (e.g., drug quantity, drug type, receipt of child pornography, firearm possession, a prior conviction, aggravated identity theft), the statutes give disproportionate weight to that fact while ignoring others that are equally or more important. In theory, guidelines can take into account many considerations and weigh each according to its importance compared to the others. In addition, particularly when they are advisory, guidelines recognize that no set of rules can anticipate every relevant fact or how the real circumstances may combine to affect the appropriate sentence.³⁶ Mandatory minimums, however, assume that every single defendant whose crime involves that one fact deserves at least the minimum punishment.

In contrast to state commissions,³⁷ the federal commission sought to avoid "cliffs" by incorporating the severity required by the statutes into the guidelines for first-time, non-violent

³³ *United States v. Polizzi*, 549 F. Supp. 2d 308, 339-41 (E.D.N.Y. 2008), *rev'd*, 564 F.3d 142 (2d Cir. 2009).

³⁴ Hon. James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173 (2010). The ratio of the guidelines median to the jury median was 444%, 421%, 881%, and 1113% in the five drug trafficking cases; 542% in the one drug trafficking case with a consecutive § 924(c); 258%, 168%, 185%, and Life/300 months in the four robbery or carjacking cases with a consecutive § 924(c); 650% and 145% in the two child pornography cases; and 183%, 286%, 1533%, 160%, 588%, and 436% in the six felon-in-possession cases. *Id.* at 196-200.

³⁵ *Id.* at 185-86.

³⁶ See USSG, Ch. 5, Pt. H, intro. comment.

³⁷ Michael Tonry, *Sentencing Matters* 96-98 (1998) (discussing state commission rejection of real offense sentencing).

offenders.³⁸ Aggravating factors were then added on top of these already severe punishments. This incorporation, which is not required by law,³⁹ exaggerated the effect of the statutes while ignoring, truncating, or overriding mitigating factors. The Commission has also looked to statutory minimums, as well as statutory maximums, as signals about how Congress views the seriousness of various types of offenses. But the *extremes* of the statutory range do not logically signal the punishment appropriate for *typical* cases falling under a statute and its corresponding guideline. Despite the Judicial Conference’s warning that “proportionality should not become a one-way ratchet for increasing sentences,”⁴⁰ harsh statutory minimum penalties and the “proportionality principle” have been used to justify increased guideline ranges for firearms offenses,⁴¹ economic crimes,⁴² and child pornography offenses.⁴³

For all of these reasons, any hope that existing mandatory minimums might “work together” with a guidelines system is unfounded.

³⁸ For a discussion of the concept of cliffs and how they can be caused by mandatory minimum penalties, see *1991 Report, supra* note 9, at 30. See also Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Atlanta, Ga., at 25-26 (Feb. 10 & 11, 2009) (remarks of Commissioner Howell) (explaining that guidelines were designed to be proportional to mandatory minimums); *id.* (remarks of Judge Tjoflat) (countering that mandatory minimums are arbitrary and without empirical support).

³⁹ The Supreme Court has made clear that the Commission is not required to incorporate the statutory minimum penalties into the guidelines and the Commission itself has not done so for a small number of offenses, such as LSD and marijuana plants. See *Kimbrough v. United States*, 552 U.S. 85, 102-05 (2007); *Neal v. United States*, 516 U.S. 284, 295 (1996). In addition, the general requirement added by the PROTECT Act in 2003 that the guidelines be “consistent with all pertinent provisions of any Federal statute,” 28 U.S.C. § 994(a), does not require that guidelines be calibrated to mandatory minimums. USSG § 5G1.1(b) explicitly states that a mandatory minimum trumps a lower guideline. See Cassell, *supra* note 11.

⁴⁰ Letter from Hon. Sim Lake, Chair of the Judicial Conference Committee on Criminal Law, to Members of the U.S. Sentencing Comm’n (Mar. 8, 2004).

⁴¹ The base offense level under §2K2.1 was raised in 1991 from 12 to 20 if the defendant had one prior conviction for a “crime of violence” or “controlled substance offense” and from 12 to 24 if the defendant had two or more such prior convictions, in order to make the guideline consistent with the mandatory minimum punishment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). See USSC, *Firearms and Explosive Materials Working Group Report* 8, 10 (1990), http://www.src-project.org/wp-content/uploads/2009/08/ussc_report_firearms_19901211.pdf.

⁴² See Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio St. J. Crim. L. 373, 387-435 (2004) (guideline ranges for fraud offenses increased because of the “penalty gap” between these and drug offenses).

⁴³ See USSG, App. C, Amend. 664 (Nov. 1, 2004) (“As a result of these new mandatory minimum penalties . . . the Commission increased the base offense level for these offenses.”).

2. Mandatory Minimums Create Additional Problems for Advisory Guidelines.

Mandatory minimums create a new set of problems with advisory guidelines by lessening the credibility of the guidelines and thwarting their evolution. Sentencing recommendations based on “empirical data and national experience” and criminological expertise – not partisan politics – are the most likely to comply with the 3553(a) factors.⁴⁴ Indeed, the extent of explanation a judge must provide for a sentence depends in part on whether it rests “upon the Commission’s own reasoning.”⁴⁵ But when a guideline is based on a mandatory minimum, the real explanation is that Congress enacted a minimum penalty statute, which the Commission felt bound to incorporate into the guidelines. Mandatory minimums thus undermine respect for the guidelines and make compliance with them less likely.

Mandatory minimums also impede the Commission’s ability to receive and consider feedback from judges, and to use empirical research to make its guidelines persuasive. A judge’s “reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors,” was intended to provide “relevant information” to the Commission so that the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw.”⁴⁶ But as Justice Breyer has correctly described, mandatory minimums thwart the evolution of the guidelines: “[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. Mandatory minimums will sometimes make it impossible for the Commission to adjust sentences in light of factors that its research shows to be directly relevant . . . , they skew the entire set of criminal punishments, . . . and their existence then prevents the Commission from . . . writ[ing] a sentence that makes sense.”⁴⁷

While some have argued that guidelines that reflect Congressional policy are especially worthy of compliance, the Supreme Court has made clear that guideline recommendations based on Congressional policies may be rejected if they fail to comply with 18 U.S.C. § 3553(a).⁴⁸

⁴⁴ *Kimbrough*, 552 U.S. at 101, 109; *Rita v. United States*, 551 U.S. 338, 348-50 (2007) (explaining that the Commission’s use of, and ability to use, empirical data, makes it “fair to assume that the guidelines reflect a rough approximation of § 3553(a) objectives”).

⁴⁵ *Id.* at 357.

⁴⁶ *Id.* at 351, 358.

⁴⁷ Justice Breyer, *supra* note 6.

⁴⁸ *Kimbrough*, 552 U.S. at 109-10 (Where a guideline “do[es] not exemplify the Commission’s exercise of its characteristic institutional role,” because the Commission “did not take account of ‘empirical data and national experience,’” it is not an abuse of discretion to conclude that the guideline “yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”).

Indeed, if judges were bound to comply with guidelines that reflect Congressional policy, these guidelines would be mandatory and thus unconstitutional. Mandatory minimums thus make it more difficult to persuade judges to accept the guidelines' recommendations at the very time it is no longer possible to compel judges to conform to the guidelines.

C. Mandatory Minimums Override the Judgment of Both Judges and the Commission and Allow Prosecutors to Control Sentences.

For most offenders, the Commission's incorporation of mandatory minimum severity levels into the guideline structure ratcheted sentences far above the requirements of the mandatory minimums themselves, and even farther above the sentence that would best comply with 18 U.S.C. § 3553(a). For other offenders, however, the statutory minimums create a sentencing floor that prevents the few mitigating adjustments in the guidelines from operating as the Commission intended, and also prevents judges from considering additional relevant mitigating factors that might appropriately lower the sentence. In such cases, the statutory minimum overrides both the Commission's policies about mitigation and the judge's duty to consider all relevant factors under 18 U.S.C. § 3553(a).

This problem of statutory override affects thousands of cases a year and is even worse under the advisory guidelines than it was earlier in the guidelines era. In its 1991 report, the Commission found that the statutory minimum was within the guideline range in 22.6% of cases with a conviction carrying a mandatory minimum, and that in 5.9% of cases, the mandatory minimum exceeded the *top* of the guideline range.⁴⁹ The Commission appeared to view this last category as the most problematic, as it forces the judge to impose a sentence greater than even the most severe sentence the Commission contemplated for an ordinary case sentenced under the guideline.⁵⁰ In FY 2010, the problem was even worse. In cases with a mandatory minimum penalty, the minimum was within the range in 15.1% of cases (2,935 of 19,535 cases with complete information) and was above the top of the range in 39.5% of cases (7,709 of 19,535).⁵¹ In other words, in nearly 40 percent of cases involving conviction under a statute carrying a mandatory minimum, the mandatory minimum trumped the top of the guideline range.

Prosecutors have argued that judges create disparity when they sentence outside the guideline range, and by implication that mandatory minimums are necessary to avoid such disparity.⁵² These data show, however, that mandatory minimums – not judicial discretion –

⁴⁹ *1991 Report*, *supra* note 2, at tbl. 27.

⁵⁰ *Id.* at 53.

⁵¹ USSC, FY 2010 Monitoring Dataset.

⁵² Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors, *Department Policies and Procedures Concerning Sentencing* (Jan. 28, 2005); Statement of Karin J. Immergut Before the U.S. Sentencing Comm'n, Palo Alto, Cal., at 2, 6-7, 9-10 (May 27, 2009).

cause sentences to be outside the guideline range in a large number of cases. In cases where the statutory minimum trumps the guideline range, the only way for a defendant to receive a sentence even within the range is to cooperate and hope for a government motion for reduction of the sentence, or to qualify for the safety valve. Both the charging decision and the decision to file a motion for substantial assistance are in the hands of prosecutors, creating the potential for significant disparity and draconian sentences far longer than even the Commission recommends. In FY 2010, 1,286 defendants received sentences above the guideline range and exactly equal to the mandatory statutory minimum applicable to their cases, including sentences of 10, 15, 20 years, and longer. For these defendants, the decision of the prosecutor to charge counts carrying mandatory minimums – made behind the scenes, motivated by a variety of institutional and personal interests, and unchecked by judicial review – was the final and unreviewable sentencing decision and resulted in sentences longer than the guidelines recommend.

D. Mandatory Minimums Are the Leading Cause of Unwarranted Disparity.

All available evidence – empirical data, case histories, field studies, and survey research – point to the conclusion that mandatory minimums are the greatest source of unwarranted disparity in federal sentencing today. This disparity arises well before sentencing through disparate charging and plea bargaining practices. The penalties themselves create structural disparity, including unwarranted uniformity, by making one or two facts about a case controlling elements in the punishment imposed. The statutes assign undue weight to those facts and no weight to others, thus failing to track the seriousness of the offense or the dangerousness or risk of recidivism of the defendant. Persons concerned about unwarranted disparity today should be concerned, first and foremost, about mandatory minimum penalty statutes.

1. Department of Justice Policies Have Not Required, and Could Not Require, Uniform Practices Regarding Mandatory Minimums.

Sentences for similarly situated offenders vary dramatically depending on the charging and plea bargaining decisions of individual prosecutors.⁵³ The Department of Justice has been reluctant to acknowledge the power mandatory minimums give prosecutors, or that these statutes are fundamentally incompatible with the guidelines and with the goals of sentencing reform, especially the reduction of unwarranted disparity. Instead, it has paid lip service to

⁵³ See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 84-85, 89-91, 102-04, 106, 141-42 (2004) (hereinafter *Fifteen Year Review*); see also Statement of John R. Steer, Member and Vice Chair of the U.S. Sentencing Comm'n Before the ABA Justice Kennedy Comm'n 17 (Nov. 13, 2003); Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41, 54-58 (2000).

Congressional concerns about disparity,⁵⁴ but put in place policies that could not, and did not, achieve fair and proportionate sentences.

The details of the Department's charging and plea bargaining policies have changed somewhat through successive administrations, but the fundamental principles have remained largely the same.⁵⁵ The premise has been that disparity caused by mandatory minimums can be avoided simply by uniform and complete charging of those penalties. Chapter 9-27 of the *United States Attorney's Manual* (USAM) directs prosecutors to "initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct."⁵⁶ The term "most

⁵⁴ Memorandum from Associate Attorney General Stephen S. Trott, U.S. Dep't of Justice, to All Litigating Division Heads and All United States Attorneys, *Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines* (Nov. 3, 1987), reprinted in 6 Fed. Sent'g Rep. 342 (1994) ("Under the new system, the nature of the charge to which a defendant pleads is particularly important because it will more precisely than ever determine the defendant's actual sentence."). More recent Administrations have echoed this concern:

The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.

Memorandum from Attorney General John Ashcroft, Dep't of Justice, to All Federal Prosecutors, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing* (Sept. 22, 2003) (hereinafter Ashcroft Memo), http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

⁵⁵ See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420 (2008), for a more detailed discussion of these changes and the inability of Main Justice to control local discretion and resulting disparity.

⁵⁶ The principle of charging "the most serious readily provable offense" has been echoed in memoranda by successive administrations. See, e.g., Memorandum from Attorney General Richard Thornburgh, U.S. Dep't of Justice, to All United States Attorneys, *Plea Policy for Federal Prosecutors, Plea Bargaining Under the Sentencing Reform Act* (Mar. 13, 1989) (also known as Thornburgh Blue Sheet), reprinted in 6 Fed. Sent'g Rep. 347 (1994). These policies were modified slightly under the Clinton administration in ways that some perceived as more flexible and honest, but that provoked a round of protest from some members of Congress. Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 Fed. Sent'g Rep. 310 (1994). Attorney General Ashcroft again tightened the policies by directing that "if the most serious readily provable charge involves a mandatory minimum sentence that exceeds the applicable guideline range, counts essential to establish a mandatory minimum sentence must be charged and may not be dismissed." Ashcroft Memo, *supra* note 54. At the time of this writing, Attorney General Holder has recently issued another round of modifications. Memorandum from Attorney General Eric H. Holder, U.S. Dep't of Justice, to All Federal Prosecutors, *Department Policy on Charging and Sentencing* (May 19, 2010), <http://sentencing.typepad.com/files/holder-charging-memo.pdf>. The new policy again repeats the principle of charging "the most serious offense consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," but

serious” offense is defined as that which “generally ... yields the highest range under the Sentencing Guidelines.” *United States Attorneys’ Manual* 9-27.300. Guidelines section 5G1.1 provides that statutory minimums that exceed the guideline range become the nominal guideline sentence. Thus, although somewhat ambiguous, the principle appears to require prosecutors to fully charge every readily provable offense carrying a mandatory minimum penalty that would increase the guideline range.⁵⁷

The Department has presented these policies as if they were consistent with the guidelines and the goals of sentencing reform. If taken literally, however, they would override the Commission, the guidelines, and sentencing judges in an even larger portion of cases than are today sentenced to the mandatory statutory minimum. Moreover, if taken seriously, these policies would quickly outstrip federal correctional resources as tens of thousands more defendants a year would be sentenced to long mandatory sentences. In stark contrast to the sentencing reform goals of honesty, transparency, and avoidance of unwarranted disparity, the present system of mandatory minimum penalties relies on hidden, discretionary charging decisions made by prosecutors simply to remain feasible. Instead of sentencing by judges to advance the purposes of sentencing, as required by 18 U.S.C. § 3553(a), mandatory minimums enable bargaining and sentencing by prosecutors to advance bureaucratic and institutional interests.

In practice, the Department’s charging and plea bargaining policies are interpreted and applied at the local level. The “experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that the Justice Department cannot meaningfully restrain local United States Attorney’s Offices from adopting locally convenient plea bargaining practices.”⁵⁸ The policies provide U.S. Attorneys and individual prosecutors with sufficient “wiggle room” to adapt their practices to local conditions and the exigencies of individual cases as they see fit.

pairs it with the need for an “individualized assessment of the extent to which the particular charges fit the specific circumstances of the case.” *Id.* at 2.

⁵⁷ In some versions of the policies, the role of the prosecutor explicitly supplants that of the judge. For example, the prosecutor’s view of the “proportionality” of the resulting sentence could be considered in some versions – effectively establishing the prosecutor as the judge of what sentence this principle requires. *See* Beale, *id.*, at 310. Even under the nominally strictest versions, prosecutors were able to request permission to forego the filing of charges or statutory enhancements, but “*only* in the context of a negotiated plea agreement.” Ashcroft Memo *supra* note 54, at 4. In other words, prosecutors were encouraged to use mandatory minimums as a plea bargaining bludgeon to win a defendant’s acceptance of a plea agreement.

⁵⁸ Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 193 (2005).

Of course mandatory minimums should not be charged in every case in which they are available. But the current system relies on prosecutors to *not* charge fully in order for the system to remain workable, for the guideline range to have relevance, and for judges to have any significant role in sentencing at all. Prosecutors' power to control the sentence, trump the guideline range, and threaten defendants with punishment far longer than required by the principles and purposes at 18 U.S.C. § 3553(a) gives them an outsized role in sentencing that is not in the best federal tradition of individualized sentencing performed by judges.

2. Commission Data Document Disparate Prosecutorial Practices and Structural Disparities.

Given the practical impossibility of following Department policy literally, and the ample discretion afforded prosecutors in practice, it is not surprising that the Commission has consistently found vast unwarranted disparities in how mandatory minimum penalties are invoked and pursued. In its 1991 report, the Commission found that 74 percent of offenders who engaged in conduct that qualified them for a mandatory minimum were initially charged with the most serious count, but only 60 percent were ultimately convicted and sentenced at that level or above.⁵⁹ Later research found far lower rates of use and actual imposition of many mandatory minimum and sentence enhancement provisions, demonstrating that these statutes give prosecutors a range of punishments that, though rarely applied, are available to threaten and coerce defendants.

For defendants who are not offered, or do not accept, bargains to avoid mandatory minimums, the resulting sentence is not only disparate but grossly unfair and disproportionate to the seriousness of the offense. For offenses involving weapons, the resulting sentence is almost always greater than what the Commission determined was appropriate, and greater than identical offenders who were not charged under the statute.⁶⁰ For offenses involving drugs, offenders who played only a minor or minimal role in the offense, and/or accepted responsibility, are treated the same as the principals in the offense and offenders who did not accept responsibility. Offenders whose mitigating characteristics or conduct would be considered by the judge under § 3553(a) are treated the same as serious and dangerous offenders. The mandatory minimum requires unwarranted uniform treatment of very different offenders.

a. 18 U.S.C. § 924(c)

The enhancements at 18 U.S.C. § 924(c), which require mandatory sentence increases for possession or use of a firearm in connection with violent or drug trafficking crime, are especially subject to prosecutorial abuse. Mere possession of a gun, even in a car or in a closet in a house

⁵⁹ 1991 Report, *supra* note 2, at 56-58.

⁶⁰ See Hofer, *supra* note 53, at 67 (reviewing data showing conviction under 18 U.S.C. § 924(c) results in sentences longer than would application of the guideline's adjustment for possession or use of a weapon).

and not carried personally, and even if never brandished or used in any way, is subject to sentence enhancements of five years or longer, depending on the type of weapon. Brandishing or discharging the weapon results in additional sentences of at least seven or ten years. Possession or use by a co-defendant, even if the defendant himself never used or even possessed the weapon, is subject to the same penalties.

Problems caused by these enhancements were made worse by the Supreme Court's interpretation of the statute in the 1993 case of *Deal v. United States*.⁶¹ The statute provides that for a "second or subsequent conviction," an additional minimum consecutive penalty of 25 years applies, or for some types of weapons, life without parole. The Court held that the 25-year minimum enhancement for a "subsequent conviction" applies even to multiple convictions in the same case. Thus, possession of a firearm on different occasions of drug selling can each be charged separately, and invoke multiple consecutive minimum penalties, even if the defendant is convicted and sentenced on all counts at the same time.

For example, a first count for possession of a simple handgun requires a mandatory minimum term of five years in prison. If the defendant possessed a handgun on a different occasion, a second count requires an additional 25 years. A third requires another 25 years, and so on. Three sales of marijuana by a person with a gun under the seat in his car results in a 55-year mandatory prison term in addition to the sentence for the sale of marijuana. These sentences apply to first time offenders without any previous convictions for any crime. If a firearm had a silencer or was a more dangerous type of weapon, the first count requires 5 years of additional imprisonment and the second count requires a sentence of life without parole. The availability of such penalties has led to extreme abuses.

Research has consistently found uneven use of the mandatory enhancement for possession or use of a firearm during a violent or drug trafficking offense under 18 U.S.C. § 924(c). The guidelines already provide for an upward adjustment of two levels when a judge finds that a weapon was possessed or used in connection with such an offense. Prosecutors thus have the option to seek the guideline enhancement or to bring one or more charges under § 924(c). The result is that similar offenders receive different increases. Some receive one or more mandatory § 924(c) enhancements, some receive the guideline adjustment, and some receive no increase at all.⁶² Notably, research has consistently shown that prosecutors' choice of mandatory § 924(c) enhancements has an adverse impact on African American offenders.⁶³

⁶¹ 508 U.S. 129 (1993).

⁶² In 1991, the Commission reported that only about 45% of drug offenders who qualified for a § 924(c) enhancement were initially charged with it. The count was later dismissed for 26% of the offenders initially charged. Analysis of 1995 data found that only 34% of offenders who qualified for the enhancement based on use of a firearm received the enhancement. Thirty percent received the two-level guideline increase instead, while 35% received no weapon increase of any kind. In 2000, just 20% of

b. 21 U.S.C. § 851

Under 21 U.S.C. § 841, prior convictions for drug trafficking can double the mandatory minimum sentences applicable to a new offense or even require life without parole. But the increases apply only if the government files an information under 21 U.S.C. § 851 invoking the increased minimums. This vests extraordinary bargaining and punishment power in prosecutors. Moreover, like the career offender guideline based on prior drug convictions, the increases override the guidelines' normal criminal history rules. There is no empirical basis or coherent justification for this special treatment of prior drug offenses at the sole discretion of prosecutors. Commission research has shown that prior drug trafficking offenses are not good predictors of recidivism.⁶⁴ And there is no rationale for considering repeat drug offenders more culpable than other repeat offenders.

The little data that has been available shows that the increases are rarely applied.⁶⁵ However, prosecutors in some districts use them regularly when available even as neighboring districts in the same state do not, leading to stark inconsistencies.⁶⁶ The enhancements are frequently threatened and foregone only if the defendant agrees to the terms of the government's plea offer. Defendants who remain subject to the harsh increases do so at the whim of particular prosecutors or because they insist on exercising their constitutional rights.

c. Mandatory Minimums for Drug Offenses Fail to Track Offense Seriousness.

The Anti-Drug Abuse Act of 1986 made minimum sentences of five, ten, or more years depend on the weight of the "mixture or substance containing a detectable amount" of a controlled substance involved in the crime. The legislative history surrounding the Act suggests that Congress intended a three-tier penalty structure with severity of punishment linked to an offender's position within the drug manufacturing and distribution network.⁶⁷ The ten-year minimum was intended for "major traffickers," defined as "manufacturers or the heads of

offenders who used a firearm received the statutory enhancement, 35% received the guideline enhancement, and 49% received neither. *See Fifteen Year Review, supra* note 53, at 90.

⁶³ *Id.*

⁶⁴ *Id.* at 133-34.

⁶⁵ *Id.* at 89.

⁶⁶ *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Wash., D.C., at 44-46 (May 27, 2010) (remarks of Commissioner Beryl Howell) (describing "stark inconsistencies in application of the 851 based on our preliminary data analysis").

⁶⁷ Narcotics Penalties and Enforcement Act of 1986, H.R. Rep. No. 99-845, pt. 1, at 16-17 (1986), 1986 WL 295596.

organizations.” The five-year minimum was intended for “serious traffickers,” defined as “managers of the retail level traffic . . . in substantial street quantities.”⁶⁸ To remain proportionate, the penalties for less serious offenders, such as street-level retail dealers, couriers, and mules, should fall below the five-year level.

The quantity thresholds in the statute were selected hastily based on erroneous information suggesting that certain amounts of drugs were associated with certain positions in the drug market.⁶⁹ Without determining whether this was so and without being directed to do so, the Commission incorporated these thresholds into the Drug Quantity Table and extrapolated them to create 17 thresholds to set base offense levels under the drug trafficking guideline.

It soon became evident that the threshold quantities resulted in the lengthy sentences Congress intended for kingpins to be imposed on many minor offenders, such as street-level dealers and couriers.⁷⁰ The General Accounting Office reported that the drug trafficking

⁶⁸ USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 118–21 (1995); 132 Cong. Rec. 27, 193–94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, *supra* note 67.

⁶⁹ In 1986, Eric Sterling was subcommittee counsel principally responsible for developing the Anti-Drug Abuse Act of 1986, which created the 5- and 10-year mandatory minimum sentences for drug offenses. In 2007, he testified:

The Subcommittee’s approach in 1986 was to tie the punishment to the offenders’ role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to specify and prove and ‘is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.’ [H.R. Rep. 99-845, pt. 1, at 11-12 (1986)] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.

Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary, House of Representatives, 110th Cong., 1st Sess., at 166, 169-79 (June 26, 2007) (statement of Eric Sterling).

⁷⁰ *Special Issue: The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 Fed. Sent’g Rep. (1994); Miles Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent’g Rep. 22 (1994); Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995) (RAND corporation working group concludes that “[f]ederal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out. . . . The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”); Steven B. Wasserman, *Sentencing Guidelines: Toward Sentencing Reform for Drug Couriers*, 61 Brook. L. Rev. 6443 (1995); Jane L.

guideline was the most often-cited problem with the sentencing guidelines.⁷¹ Judges chafed at the unfair penalties they were required to impose and the Judicial Conference of the United States criticized the guidelines' emphasis on drug quantity.⁷² The Commission's empirical examination of the types of offenders who were subject to the mandatory minimum and guideline penalties demonstrated conclusively that large percentages of the offenders receiving prison terms intended for "major" and "serious" offenders were in fact minor offenders.⁷³ Subsequent research outside the Commission further established that quantity is a poor measure of offender culpability or role in the offense.⁷⁴

With the exception of the 5- and 50-gram thresholds for crack cocaine, the mandatory minimum penalties based on badly flawed assumptions remain on the books. Indeed, mandatory penalties for many drugs were added or increased during the guideline era, and the Commission incorporated the increases into the guideline ranges. One result of this piecemeal legislation and guideline amendment is that the severity of penalties for various drugs fails to track both the culpability and role of the defendants *or* the inherent dangerousness of the drug. For example, mandatory minimums and guideline ranges for many drugs that are less addictive and deadly than heroin are punished more severely than heroin.⁷⁵ Piecemeal legislation and faulty guideline

Froyd, *Comment: Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471 (2000).

⁷¹ General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees; examples of unwarranted disparity attributed to guideline).

⁷² See Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U. S. Sentencing Commission 2* (1995) ("[T]he Judicial Conference ... encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.").

⁷³ See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 48-49 (2002) (drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (low-level crack and powder cocaine offenders exposed to lengthy penalties intended for more serious offenders); *Fifteen Year Review*, *supra* note 53, at 50-52 (evidence of numerous problems in operation of drug trafficking guidelines). The largest proportion of powder offenders are couriers and mules, and the largest proportion of crack offenders are street-level dealers. *Id.* at 19-21, 85. In crack and powder cocaine cases, 71-81% of street-level dealers, couriers, and other minor participants (*e.g.*, lookout, renter, enabler) receive mandatory minimum sentences of five or ten years or more. *Id.* at 28-29.

⁷⁴ Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (describing results of empirical study showing that drug quantity "is not significantly correlated with role in the offense," and that this "lack of association" provides "fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing").

⁷⁵ See, *e.g.*, David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 The Lancet 1047 (Mar. 24, 2007).

implementation has resulted in Sudafed™ being one of the most harshly sentenced drugs in the federal system.

d. Mandatory Penalties for Child Pornography Offenses Create Bizarre Anomalies and Disparities.

Whenever a mandatory minimum penalty based on a single fact requires a sentence that fails to track the purposes of sentencing, unwarranted disparity and bizarre anomalies can and do result. The guideline range for a first offender convicted of merely possessing child pornography, never having touched a child, commonly exceeds the guideline range for an offender who engages in repeated sex with a child.⁷⁶ Child pornography offenders who “receive” images are subject to a five-year mandatory minimum, while those who “possess” images are not, though there is no meaningful difference since one must receive in order to possess. This gives prosecutors the choice to subject similarly situated defendants to either 0-10 years or 5-20 years. Because they are such blunt instruments and account for only one or two facts, mandatory minimums draw arbitrary distinctions that result in uniform treatment of very different offenders, and give prosecutors unlimited discretion to create unwarranted disparity among similarly situated offenders.

3. Mandatory Minimums Have an Adverse Impact on Racial Minorities and Their Use by Prosecutors Correlates with Race.

Mandatory minimums adversely affect minority defendants in several different ways. Enhancements for prior criminal records, for example, may reflect unfair disadvantages earlier in some offenders’ lives, either prior offending due to social and economic disadvantage or a greater likelihood of accruing a criminal record due to inconsistent or discriminatory law enforcement practices.⁷⁷ Penalties that are far greater than necessary to achieve the purposes of sentencing and that fall disproportionately on certain groups have an unfair adverse impact and create unwarranted disparity among groups. The Commission’s *Fifteen Year Review* concluded that mandatory minimums for drug offenses and guidelines tied to them have been “a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders” in the guidelines era.⁷⁸

The leading example of adverse racial impact was, of course, the 100:1 quantity ratio between powder and crack cocaine. Fifteen years after the Commission first recommended that Congress eliminate the disparity, the Fair Sentencing Act of 2010 ameliorated, but did not

⁷⁶ See, e.g., *United States v. Dorvee*, 604 F.3d 84, 97-98 (2d Cir. 2010) (providing examples, and describing child pornography guideline as an “eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”).

⁷⁷ *Id.* at 134.

⁷⁸ *Fifteen Year Review*, *supra* note 53, at 48.

eliminate it. Adverse impacts are not limited to crack, however. Mandatory minimums in general have consistently had an adverse impact on minority defendants. The Commission reported that in FY 2008, African Americans were 24% of the total defendant population, but 35.7% of defendants convicted under statutes carrying a mandatory minimum, and 31% of those affected by trumping mandatory minimum.⁷⁹ Among the 24,263 drug trafficking offenders with complete information, 74.4% of African American defendants and 66.7% of Hispanic defendants received a mandatory minimum for drug trafficking, compared to 60.1% of white defendants.

Disparate charging and plea bargaining practices regarding mandatory minimum penalties have been repeatedly shown to “disproportionately disadvantage minorities.”⁸⁰ In 1991, the Commission found that the “disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant.”⁸¹ In 2004, the Commission found that the use of mandatory minimums, particularly those under § 851 and § 924(c), varies depending on the decisions of individual prosecutors, and that these decisions “result in unwarranted disparity and sentences that are often disproportionate to the seriousness of the offense” and “disproportionately disadvantage minorities.”⁸²

The problem remains today. For example, among the 72,262 federal offenders in FY 2010 for whom the Commission received complete information, 7.8% of black defendants, but only 1.2% of Hispanic defendants and 2.0% of white defendants received a mandatory minimum under § 924(c).⁸³ Some of these differences are likely due to different rates of actual gun possession. Some of the differences, however, appear to result from how prosecutors choose to use § 924(c) instead of the more modest adjustments the guidelines provide for weapon possession.

The effects of different treatment of similar offenders can be seen by looking only at drug trafficking offenders who received *either* a guideline adjustment *or* a § 924(c). Because the legal criteria for applicability of the two adjustments are very similar, prosecutors have considerable discretion to decide which adjustment to pursue – the harsh mandatory minimum or the generally shorter increase under the guidelines. About 36% of black defendants but only 26% of white defendants received the § 924(c) instead of the guideline adjustment.⁸⁴ This data provides clear

⁷⁹ USSC, *Overview of Statutory Mandatory Minimum Sentencing*, tbl.1 (2009) (hereinafter *Overview*).

⁸⁰ *Fifteen Year Review*, *supra* note 53, at 91.

⁸¹ *1991 Report*, *supra* note 2, at ii, 76, 82.

⁸² *Fifteen Year Review*, *supra* note 53, at 89-91, 142.

⁸³ USSC, FY2010 Monitoring Dataset.

⁸⁴ USSC, FY 2010 Monitoring Dataset. These percentages were obtained by comparing the WEAPSOC with GUNMIN1 variables in the Commission’s FY 2010 Monitoring dataset for the 3,722 offenders whose primary sentencing guideline (GDLINHI= 2D1.1) and who received some form of weapon

evidence that § 924(c) has an adverse impact on black defendants. The Department has not made available data with which researchers can assess whether these disproportionalities might arise from legitimate prosecutorial criteria or whether they reflect the operation of unconscious stereotypes or other forms of bias. The effect, in any case, is to further aggravate the appearance and reality of racial and ethnic unfairness in sentencing.

E. Mandatory Minimums Do Not Deter or Reduce Crime, and May Increase It.

Research has shown that mandatory minimums are not effective in fighting crime. Congress has often cited deterrence as a reason that mandatory penalties are required, but “there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.”⁸⁵ This is especially true of federal mandatory minimums, which are not applied to the types of offenses for which deterrence or crime prevention is even a theoretical possibility. The Commission reported that “[d]rug offenders . . . represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty . . . with 16,198 (82.5%) of the 19,628 offenders convicted under such statutes [in FY 2008] having committed a drug offense.”⁸⁶ Research has shown that drug crimes are “uniquely insensitive to the deterrent effects of sanctions,” because, as many studies have shown, “[m]arket niches created by the arrest of dealers are . . . often filled within hours.”⁸⁷ For many crimes, including “drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducing to the crime.”⁸⁸

Mandatory minimums do not deter because potential offenders do not know the law, and even if they did, could not possibly know how prosecutors will treat their case. Mandatory sentences are determined by prosecutors through charging decisions, bargaining decisions, and departure motions based on substantial assistance, all of which vary dramatically from district to district, prosecutor to prosecutor, and case to case.⁸⁹ The Commission heard testimony at its regional hearings about a defendant who was offered 15 years to plead guilty. When she decided

enhancement (WEAPON =1). (A few cases where WEAPON indicates some form of adjustment do not show up in the specific enhancement variables, but this is a very close estimate.) Only cases with complete information (SOURCES=1) were included.

⁸⁵ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65, 100 (2009).

⁸⁶ USSC, *Overview*, *supra* note 79.

⁸⁷ Tonry, *supra* note 85, at 102 (“Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”); USSC *Fifteen Year Review*, *supra* note 53, at 134.

⁸⁸ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 29 (2006).

⁸⁹ Statement of Michael Nachmanoff Before the U.S. Sentencing Comm’n, New York, N.Y., at 11-13 (July 9, 2009).

to go to trial, the government superseded with mandatory minimums totaling 45 years, which she received when convicted. Her co-conspirator, involved in the very same conduct but prosecuted in a different district, got 37 months.⁹⁰ An imaginary offender attempting to predict what sentence he may receive simply could not know.

Innovations in law enforcement have shown promise for reducing crime, but these do not depend on mandatory minimum penalties. Among the best known of these innovations are programs in Chicago, Boston and High Point, North Carolina, which have been successful in reducing gun violence. Researchers who evaluated the Chicago program testified that the important feature of the program was positive interactions between potential offenders and police and community leaders.⁹¹ Warnings to potential offenders that they will be prosecuted and punished can be part of such a program. But program designer Professor David Kennedy testified that the certainty of a criminal justice response – whether two days for a supervision violation, a low-level state conviction, or a federal five-year mandatory minimum – is what counts, not the severity of potential punishment.⁹² Professor Kennedy warned that extreme federal punishments are not only unnecessary but can be counter-productive by creating destructive community backlash:

Extreme federal sanctions are often seen in the affected communities as illegitimate, racially motivated, and unfairly imposed. This contributes to a culture of principled disengagement from law enforcement that is dramatically undercutting the ability of the criminal justice system to function, and even to what should be taken as a withdrawal from the rule of law and civil society.⁹³

For the vast majority of would-be offenders who do not participate in these programs and have no idea what the potential punishment might be, the existence of stiff mandatory minimums has no effect whatsoever.

The Department of Justice has sometimes argued that the drop in the crime rate can be attributed, at least in part, to the dramatic increase in federal incarceration over the past three

⁹⁰ Statement of Jason D. Hawkins Before the U.S. Sentencing Comm’n, Austin, Tex., at 4-6 (Nov. 19, 2009).

⁹¹ Tracy Meares, Andrew Papachristos, & Jeffrey Fagan, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program* (Project Safe Neighborhoods in Chicago, Jan. 2009), http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf.

⁹² Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Chicago, Ill., at 171, 175, 177-78, 182, 183-84 (Sept. 9-10, 2009).

⁹³ Testimony of David M. Kennedy Before the U.S. Sentencing Comm’n, Part VII (Sept. 9, 2009).

decades and the role of mandatory minimums in particular.⁹⁴ Mandatory minimums have certainly been the main reason for growth in the federal prison population. As the Commission predicted,⁹⁵ and as confirmed by later research,⁹⁶ the quantity-based minimum penalties in the Anti-Drug Abuse Act of 1986 have been the primary cause of the severe over-crowding the Bureau of Prisons now faces.

The cost-effectiveness of incarceration depends, however, on how well sentencing laws target the most dangerous and crime-prone offenders. Federal mandatory minimums are especially bad at allocating prison resources. Instead, they have resulted in the lengthy incarceration of many tens of thousands of non-violent, low-level drug offenders with little or no criminal history and relatively low risks of recidivism.⁹⁷ Most federal offenders who are subject to mandatory minimums do not need to be incapacitated for lengthy periods to protect the public.

Of 23,409 defendants convicted of drug trafficking in FY 2010, nearly two thirds (15,388) were subject to a drug mandatory minimum, with most subject to more than ten years and 165 sentenced to life without parole. But the Commission has reported that 83.6% had no weapon involvement; 94.0% played no aggravating role or a mitigating role, and 63.1% had only zero to three criminal history points.⁹⁸ Except in Criminal History Category I, drug trafficking offenders have the lowest, or second lowest, rate of recidivism across criminal history categories.⁹⁹ Far from reducing crime, locking up nonviolent, low-level offenders for long periods is likely to increase recidivism by disrupting employment, reducing prospects of future

⁹⁴ Statement of Sally Quillian Yates Before the U.S. Sentencing Comm’n, Washington, D.C., at 5-6 (May 27, 2010) (“Congress enacted mandatory minimum sentencing statutes to work together with the federal sentencing guidelines. . . . As a result of these sentencing reforms, many other criminal justice reforms, and larger cultural changes in society, crime rates have been reduced dramatically . . . Mandatory sentencing laws increase deterrence and cooperation by those involved in crime.”).

⁹⁵ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 74 (1987).

⁹⁶ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed Sent’g Rep. 26 (1990).

⁹⁷ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 & Ex. 11 (2004) (hereinafter *Measuring Recidivism*). An early indication of the misallocation of prison resources was the Department of Justice’s own internal study, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 4, 1994) (unpublished manuscript on file with the Sentencing Resource Counsel). This study found that 20% of the federal prison population at the time could be classified as low level drug offenders, with an average prison term of over five years – 150% longer than past practice, when many such offenders would have received probation. The study proved instrumental in the creation of the “safety valve” as described in a later section, although, as enacted, the scope of the safety valve did not reach all low level offenders.

⁹⁸ *2010 Sourcebook*, *supra* note 5, tbls. 37, 39, & 40.

⁹⁹ *Measuring Recidivism*, *supra* note 97, at 13 & Ex. 11.

employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.¹⁰⁰

F. The Safety Valve Does Not Solve the Problems Created by Mandatory Minimums.

In the wake of its 1991 report on mandatory minimums, the Commission went to Congress in 1993 with a proposal to “reconcile” the drug mandatory minimums with the drug guidelines. Among other things, the legislation as first proposed by Commissioners would have amended § 3553 to provide an “override” provision to allow the applicable guideline range or any appropriate downward departures to “trump” the mandatory minimum penalty.¹⁰¹ The next year, Congress passed the so-called “safety valve” statute, a narrower version of the Commission’s proposal, which provides partial relief from mandatory minimums for a limited class of drug trafficking defendants.¹⁰² The Commission incorporated the new law into the guidelines and also reduced by two levels the offense level of any drug defendants who satisfied these criteria, regardless of whether a statutory mandatory minimum penalty applied to them.¹⁰³

The present criteria for application of the safety valve are too restrictive and exclude from relief many non-dangerous offenders. “The safety valve . . . falls short of Congress’s goal . . . because it is too restrictive with respect to the class of defendants to which it applies.”¹⁰⁴ The

¹⁰⁰ See Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974–2002*, 6 *Criminology & Pub. Pol’y* 589 (2007); see also USSC, Staff Discussion Paper, Sentencing Options under the Guidelines 19 (1996) (recognizing imprisonment has criminogenic effects including “contact with more serious offenders, disruption of legal employment, and weakening of family ties”).

¹⁰¹ Paul J. Hofer, *Mandatory Penalty Reform: The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 *Fed. Sent’g Rep.* 63 (1993) (describing Judge Wilkins’ proposal).

¹⁰² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (codified at 18 U.S.C. § 3553(f)); see 139 Cong. Rec. S14,536 (daily ed. Oct. 27, 1993) (statement of Senator Kennedy) (introducing the bill that would become the safety valve and acknowledging that “mandatory minimums interfere with the Commission’s effort to devise a rational sentencing system” and interfere with the guidelines’ “far more sophisticated opportunity to channel judicial discretion,” as well as improperly “transfer discretion from judges to prosecutors”); *id.* (describing the bill as “a small but important step in the effort to recapture the goals of sentencing reform”); 140 Cong. Rec. S14,716 (daily ed. Oct. 7, 1994) (statement of Senator Kennedy) (recognizing Judge Wilkins for his leadership in producing the Commission’s 1991 report on mandatory minimums and developing a proposal that would later become the safety valve).

¹⁰³ Defendants who are otherwise subject to a five-year mandatory minimum receive an offense level of 17, corresponding to a minimum term of imprisonment of 24 months. USSG §§ 2D1.1(b)(11), 5C1.2. Defendants who qualify for the safety valve may also benefit from departures or variances below the guideline range if a judge determines a reduction is appropriate.

¹⁰⁴ Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 *Nw. U. L. Rev.* 1471, 1498 (2000).

Commission's 2010 survey of judges found that most believe the safety valve should be expanded to allow additional types of offenders to qualify. Two thirds of judges believe offenders in Criminal History Category II should be eligible, and 69% believe it should be expanded to cover offenders subject to all types of mandatory minimums.¹⁰⁵

The problems caused by mandatory minimums exist for all offenders subject to them, but the safety valve applies only to a limited class of drug trafficking offenders. Some defendants are excluded because the waiver is limited to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960 and 963. In some districts where substantial portions of towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. § 860 for the purpose of preventing safety valve relief for low-level offenders with little or no criminal history who would otherwise qualify.¹⁰⁶ Many other non-dangerous, low-level offenders remain subject to excessive statutory minimums. By requiring no more than one criminal history point, the safety valve excludes many offenders who were not involved in any violence and whose role in the offense was not serious. African-American defendants are less likely to receive safety valve relief because they have a higher risk of arrest and therefore more criminal history points than similarly situated white defendants.¹⁰⁷ And while the number may be small, 260 people were excluded from safety valve relief in FY 2009 merely because of an offense the Commission classifies as "minor," presumably traffic offenses.¹⁰⁸

Many have called for other changes to the criteria to expand application of the safety valve. For example, while the first three criteria are intended to separate more culpable offenders from low-level ones, they do not consider important factors such as knowledge of the offense, money earned from the offense, or the functional role played by the defendant.¹⁰⁹ In addition, while conceived as a way to avoid excessive sentences for low-level, first time, non-violent offenders, the final criterion departs from considerations of culpability altogether and instead is yet another incentive for defendant cooperation. It was added at the request of prosecutors to protect the leverage to obtain information from defendants prosecutors believe mandatory minimums provide, even though motions for departures below the guideline range or below the mandatory minimum for cooperation remain under the control of prosecutors.

¹⁰⁵ USSC, Results of Survey of United States District Judges January 2010 through March 2010, tbl.2 (2010).

¹⁰⁶ In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. *United States v. Koons*, 300 F.3d 985, 993 (8th Cir. 2002); Statement of Nicholas T. Drees Before the U.S. Sentencing Comm'n, Denver, Colo., at 8 (Oct. 21, 2009).

¹⁰⁷ *Fifteen Year Review*, *supra* note 53, at 134.

¹⁰⁸ USSC, *Impact of Prior Minor Offenses on Eligibility for Safety Valve* 5 (2009).

¹⁰⁹ Froyd, *supra* note 104, at 1498.

The safety valve is an incomplete solution that remains too restrictive and in the end cannot solve the many problems created by mandatory minimums. In the words of Justice Breyer, the safety valve “is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.”¹¹⁰

G. Mandatory Minimums Have a Corrosive Effect on the Entire Criminal Justice Process.

Mandatory minimum statutes vest prosecutors with “indecent power” to coerce defendants into foregoing important constitutional rights.¹¹¹ These rights are not only crucial to ensure fair procedures but also central to the truth-seeking function of the criminal justice system. Because they deprive judges of any ability to check prosecutorial decisions, mandatory minimum penalty statutes are the most susceptible to abuse. Prosecutors file, or threaten to file, charges with harsh mandatory minimum sentences not because they result in appropriate sentences, but for the purpose of extracting guilty pleas, cooperation, appeal waivers, and various other concessions. Indeed, the Department has sought more and harsher mandatory sentencing laws, “not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage.”¹¹²

¹¹⁰ Breyer, *supra* note 6.

¹¹¹ “[T]he decades-long enterprise provided prosecutors with indecent power relative to both defendants and judges, in large part because of prosecutors’ ability to threaten full application of the severe Sentencing Guidelines.” Stith, *supra* note 55, at 1425.

¹¹² See Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. Pa. L. Rev. PENNumbra 226, 236 (2007); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.25 (Feb. 2005) (same); *Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcommittee on Crime, Terrorism, & Homeland Security of the Committee on the Judiciary, House of Representatives*, 108th Cong. 6 (2004) (statement of Catherine M. O’Neil, Assoc. Deputy Att’y Gen.) (arguing in support of increased mandatory minimum sentences in some drug cases, because the threat of longer sentences allows the government to move “effectively up the chain of supply using lesser distributors to prosecute larger dealers, leaders and suppliers”); Sue Reisinger, *Government Seeks Tougher Sentences*, Nat’l L.J., Mar. 10, 2003, at A20 (quoting a senior Justice Department official as arguing for across-the-board economic crime sentence increases to provide leverage to secure cooperation from smaller-time defendants); *Federal Cocaine Sentencing Policy: Hearing Before the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary*, Senate 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) (arguing against a reduction in the penalties for crack cocaine, in part because it would reduce incentives for defendants to cooperate with prosecutors); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the Comm. on Gov’t Reform*, House of Representatives, 106th Cong. 62 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Div., Dep’t of Justice) (stating that mandatory minimum sentences for drug crimes provide “an indispensable tool for prosecutors” to induce defendants to cooperate).

Recent research indicates that federal trial and acquittal rates are at an all-time low in large part because mandatory rules in the hands of prosecutors make it too costly to go to trial, even for those with an excellent defense and even sometimes for the actually innocent. When the difference between the sentence after trial and the sentence after plea is as high as it often is in the federal system, and prosecutors have a monopoly on granting the discount, the system produces less reliable results.¹¹³

Mandatory minimums also threaten the truth-seeking function of the criminal justice system by creating powerful incentives for informants and cooperators to provide exaggerated and false information – information that in most cases will never be tested because the risk of challenging it is too great. The Innocence Project has found that in “more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant. Often, statements from people with incentives to testify . . . are the central evidence in convicting an innocent person.”¹¹⁴ This demonstrates that the adversarial system is not enough to correct prosecutors’ or juries’ mistaken judgments regarding the veracity of these witnesses.¹¹⁵ While surveys show that most prosecutors believe they can tell which witnesses are truthful,¹¹⁶ research shows that the average person can tell whether they are being told the truth only about 55% of the time, and that the more confident one is that he can tell a truth from a lie, the more likely it is that he is wrong.¹¹⁷

¹¹³ Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 117 (2005); see also Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006). (“[P]lea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences. And those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial. Plea bargaining therefore fails to serve the interests of the public, as it tends to undermine the legitimacy and accuracy of the criminal justice system.”).

¹¹⁴ Innocence Project, *Understand the Causes*, <http://www.innocenceproject.org/understand/Snitches-Informants.php>.

¹¹⁵ See, e.g., *United States v. Wallach*, 935 F.2d 445, 455-57 (2d Cir. 1991) (reversing convictions based on perjured testimony of key witness who received favorable treatment on his own criminal charges in exchange for his testimony, and noting that “given the importance of [the witness’s] testimony to the case, the prosecutors may have consciously avoided recognizing the obvious – that is, that [the witness] was not telling the truth”); *United States v. Kimble*, 719 F.2d 1253, 1256-57 (5th Cir. 1983) (witness “admitted that he perjured himself, he admitted lying in over thirty different statements motivated by his sense of self-preservation”).

¹¹⁶ Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth-Telling and Embellishment*, 68 Fordham L. Rev. 917, 943-45 (1999).

¹¹⁷ Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 Cardozo L. Rev. 809, 810 (2002).

One former federal prosecutor wrote from his experience that prosecutors' gut reactions can be woefully wrong. To illustrate, he provided a chilling account of two cases from his career in which defendants had lied about their own involvement in criminal acts. One believed he would be accused of lying if he denied his involvement in a murder in which he was not involved, and that if he claimed that he was present he would avoid being rejected as a cooperator as well as reap the benefits of providing information about the murder as well as other incidents in which he was involved. The other defendant had an extensive criminal past he felt he needed to overcome and thus simply manufactured crimes that he claimed he and others had committed.¹¹⁸ "In both of these examples, the defendants – prior to the discovery of their lies – were particularly valuable as cooperators because they were describing events about which the government had little useful information," which also "made it easier for the defendants to fool the prosecutors because there was no meaningful base of information against which to compare the information being proffered."¹¹⁹

The risk of false and embellished testimony is heightened in cases involving mandatory minimums because the penalties are so severe and cooperation is the only way out. Federal Public Defender Julia O'Connell testified before the Commission about two cases in which mandatory minimums resulted in fabricated cooperation and guilty pleas by innocent people.¹²⁰ In a case in the Western District of Louisiana, Judge Melancon found that the drug trafficking convictions of a mother and her sons were based on an entirely false story manufactured by informants housed together in a federal facility. These informants traded photographs of the defendants and their home and colluded together to produce their story out of whole cloth. The judge overturned the convictions, reviewed several other similar cases in the district, and found that the problem was "systemic."¹²¹ In other cases, informants make up, exaggerate, or instigate

¹¹⁸ Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 *Cardozo L. Rev.* 817, 823-24 (2002).

¹¹⁹ *Id.* at 824.

¹²⁰ Statement of Julia O'Connell Before the U.S. Sentencing Comm'n, Austin, Tex., at 12-14 (Nov. 19, 2009); *see also* Omer Gillham, *TPD officers under investigation; A federal agent is also being scrutinized for possible corruption*, *Tulsa World*, Nov. 1, 2009, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20091101_11_A1_Severa232734; Karl Turner, *DEA Agent Lee Lucas indicted on perjury, civil rights charges; pleads not guilty*, *The Plain Dealer*, May 13, 2009, http://blog.cleveland.com/metro/2009/05/dea_agent_lee_lucas_indicted_o.html; Mike Tobin, Amanda Garrett, and John Caniglia, *DEA snitch Jerrell Bray says he decided to come clean*, *The Plain Dealer*, July 30, 2007, <http://www.cleveland.com/dea/plaindealer/index.ssf?/dea/more/073007.html>; John Caniglia, *Judge to free 15 convicted on drug informant's tainted testimony*, *The Plain Dealer*, Jan. 23, 2008, <http://www.cleveland.com/dea/plaindealer/index.ssf?/dea/more/012308.html>. *See generally* http://blog.cleveland.com/metro/lee_lucas/index.html (last visited Jan. 17, 2011).

the drug amount, for the very purpose of serving up a higher mandatory minimum or guideline sentence.¹²²

Abuse of mandatory minimum penalty statutes occurs in nearly every district in the United States.¹²³ The courts have described the government's actions with such terms as "irrational, inhumane and absurd," as "immensely cruel, if not barbaric," as "unjust, cruel and even irrational." Department of Justice policies have failed to control abuses and in some ways have encouraged misuse of mandatory minimums for bureaucratic goals instead of the proper purposes of sentencing. These practices diminish the stature and reputation of the courts and the Department of Justice because the participants and the informed public recognize that what is happening is abusive, wrong and unjust. No charging policy can prevent the unfair and arbitrary use of mandatory minimums as long as they remain on the books.

H. There Is No Evidence that Mandatory Minimums Are Needed to Induce Cooperation.

Congress and the original Commission included structured rewards within the guideline system to encourage defendants to assist in the prosecution of other persons. USSG §5K1.1. Prosecutors often claim, however, and may well believe, that additional incentives in the form of mandatory minimum statutes are essential to their ability to obtain cooperation. But there is no sound evidence that this is so because the guidelines' system of incentives has never been allowed to work. In any case where there is both a mandatory minimum and cooperation, it is impossible to tell whether the prosecutor charged a mandatory minimum because he thought it

¹²¹ See Order Ruling on Defendant's Motion for New Trial, *United States v. Colomb*, No. 02-CR-60015, (W.D. La. Aug. 31, 2006), available on PACER, Docket No. 531; Order dismissing charges with prejudice, *United States v. Colomb*, No. 02-CR-60015 (W.D. La. Dec. 15, 2006), available on PACER, Docket No. 558.

¹²² See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline range from 87-108 months to 168-210 months).

¹²³ See *Mandatory Minimums and Unintended Consequence*, Hearing Before the Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary, House of Representatives, 111th Cong. 8 (July 14, 2009) (statement of the Honorable Judge Julie E. Carnes, Chair of the Criminal Law Committee on Behalf of the Judicial Conference wherein she describes proliferation in use of mandatory minimum laws), <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf> (last visited July 28, 2009).

was necessary to obtain cooperation, or the defendant cooperated because he was charged with a mandatory minimum.

The experience of Federal Public Defenders is that defendants cooperate if they have information to give in the hope of receiving a reduced sentence, whether or not a mandatory minimum applies. Defense attorneys sometimes counsel clients against cooperation because of an unacceptable risk of being labeled a “snitch,” and because prosecutors do not always move for a reduced sentence when it is justified. Despite these warnings, many cooperate to obtain the government’s recommendation of a lower sentence. It does not matter how high or low the likely sentence is, whether it is mandatory or not, or how uncertain it is that the prosecutor will move for a departure.

It is very difficult to assess the effect of mandatory minimums on cooperation by examining statistics. The effects can pull in opposite directions and affect different offenders in different ways. Some might be frightened by the possibility of a lengthy sentence and cooperate to reduce it; others might be so frightened or angered by the punishment that they refuse to cooperate and even choose to go to trial. It is not clear what pattern of findings would prove that mandatory minimums work as an incentive, much less that they are needed. Would we expect high rates of cooperation in cases where mandatory penalties *were* imposed (applicability of a mandatory minimum induced cooperation) or *were not* imposed (applicable mandatory minimum induced cooperation by being withdrawn)? Data are not available indicating whether a mandatory penalty was threatened in cases that did not receive one. And cooperation rates are affected by many other factors. The rate is naturally lower in cases where there is ordinarily no one to cooperate against, such as burglary, larceny, embezzlement, sexual abuse, possession of pornography, and assault.

We do know from the Commission’s statistics that cooperation is routinely obtained in cases involving types of offenses that do not carry mandatory minimums. In 2010, the rate of substantial assistance departures in drug trafficking cases was 24.6%.¹²⁴ The rate was comparable or higher in many kinds of cases that do not carry mandatory minimums: 50% in antitrust cases, 22.7% in arson cases, 32.3% in bribery cases, 23.7% in kidnapping cases, 24.5% in money laundering cases, and 22.2% in racketeering/extortion cases.

The threat of mandatory minimums is not the key to securing truthful and successful cooperation of defendants; it requires an agreement tailored to the circumstances of each individual defendant. In reality, the risks of cooperation may not be worth the foreseeable benefits. In some districts, oversight of cooperation is nearly non-existent, contributing to corrupt actions by officers and agents who “handle” cooperating defendants. The uncertainty of favorable treatment induces unreliable and sometimes fabricated cooperation.¹²⁵ Rather than

¹²⁴ 2010 Sourcebook, *supra* note 5, at tbl. 27.

¹²⁵ See Gillham, *supra* note 120.

threats of draconian punishment that can drive defendants to desperate and sometimes dangerous actions, what is needed is a system of predictable and reasonable rewards for cooperation administered under the supervision of the sentencing judge.

I. The Need for Comprehensive and Transparent Empirical Assessment

The greatest contribution of the new report to the national debate over mandatory minimums may come from the empirical data that it provides. The congressional directives call for “detailed empirical research study of the effect of mandatory minimum penalties,” including their effects on the prison population, on “the elimination of unwarranted disparity,” and on other sentencing goals. These directives clearly require more than simple counts of the numbers of offenders convicted under statutes carrying these penalties, or eligible for relief under various provisions, as in the Commission’s Memorandum of July 15, 2009, *Overview of Statutory Mandatory Minimum Sentencing*. The directives call for measurement, analysis, and assessment of the effects of these statutes in light of the purposes of sentencing and the goals of sentencing reform.

The range of empirical questions relevant to comprehensive assessment of mandatory minimums is daunting. As a result of its own data-release policies and practices, however, the Commission is the only research group with access to the resources and datasets needed to answer to these crucial questions. Specialized datasets – such as the Intensive Study Samples and the Recidivism Dataset, which contain rich information relevant to assessment of mandatory minimum penalties – have not been made public, despite repeated requests from outside researchers. In 2009 the Commission received an Open Letter from 34 scholars and researchers who study federal sentencing requesting release of these specialized datasets so that they could be used to inform policy making. But to date the datasets remain under the sole control of the Commission.

These datasets should be mined by the Commission for its report. They should also be released to the public so that others can contribute to the assessment of mandatory minimum penalties. Any data the Commission uses in its new report should be made public prior to, or simultaneous with, the release of the report so that others can replicate and expand on the Commission’s analyses.