

**Statement of Michael Nachmanoff
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**Public Hearing Before the
United States Sentencing Commission**

**Mandatory Minimum Sentencing Provisions Under Federal Law
May 27, 2010**

Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders regarding mandatory minimum sentencing.

The Commission's 1991 report, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) (1991 Mandatory Minimum Report), demonstrated that mandatory minimums shift discretion from judges to prosecutors, fail to reflect important differences among offenses and offenders, prevent judges from taking account of such differences, punish minor offenders as harshly as serious offenders, are used in a manner that creates unwarranted disparity, and interfere with the Commission's development of fair and rational guidelines. The Commission's report remains, after twenty years, the most authoritative analysis of mandatory minimums and the foundation for the many critics who believe that a guideline system with appropriate judicial discretion is far preferable.

Chief among these fellow critics is the Judicial Conference. The Conference has opposed mandatory minimums since 1953, during the indeterminate sentencing era, during the different periods of guideline sentencing before and after *Koon v. United States*, 518 U.S. 81 (1996), during the PROTECT Act period, and today in the advisory guideline era following *Booker v. United States*, 543 U.S. 220 (2005).¹ Many prominent jurists, including Justice Breyer,² Justice Kennedy,³ the late Chief Justice Rehnquist,⁴

¹ Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission, at 3 (Mar. 16, 2007) (reviewing history), http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf; Hon. Julie E. Carnes, Chair of the Committee on Criminal Law of the U.S. Judicial Conference, Testimony before the U.S. House of Representatives Committee on the Judiciary at 8-13, July 14, 2009 (reviewing history), available at <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf>; Statement of Paul G. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee, Hearing on Mandatory Minimum Sentencing Laws (June 26, 2007), <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf>; Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 59-65 (Mar. 16, 2006).

² 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).

and numerous other judges and former prosecutors,⁵ have spoken out against the harsh and inflexible sentences required by mandatory minimum statutes.

Mandatory minimums continue to be the most serious obstacle to fair, effective, and efficient sentencing today. The guidelines system has vastly improved since the Supreme Court rendered the guidelines advisory. While the guidelines remain the focal point, judges can now individualize sentences to fit the offense and the offender, and they can correct for unwarranted disparities that are built into some of the guidelines and that are sometimes caused by prosecutorial practices and policies. However, the problems with mandatory minimums that the Commission identified in 1991 not only remain, but have increased over time.

It has been suggested that because the guidelines are now advisory, the Commission may reconsider its historic opposition to mandatory minimums. The Commission should not back away from its principled stance against mandatory minimums. Advisory guidelines do not reduce the problems created by mandatory minimums, nor do they make mandatory minimums any more necessary. There is no evidence that judges would impose unduly lenient sentences on serious and dangerous offenders without a statutory floor. There is, however, overwhelming evidence that mandatory minimums require excessive sentences for tens of thousands of less serious offenders who are not dangerous.

³ Justice Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

⁴ William H. Rehnquist, Luncheon Address (June 18, 1993), in *U.S. Sentencing Comm'n, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993).

⁵ See, e.g., Hon. Julie E. Carnes, Chair of the Committee on Criminal Law of the U.S. Judicial Conference, Testimony before the U.S. House of Representatives Committee on the Judiciary, July 14, 2009, available at <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf>; Testimony of Hon. Jeffrey R. Howard, Before the U.S. Sentencing Commission, New York, Transcript at 45-46 (July 9, 2009); 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. & 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. Sentencing Rep. 59 (1993); Brief Amici Curiae of 145 Individuals Including Former United States Attorneys General, et al., 2005 WL 2347343 (June 22, 2005), *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

Mandatory minimums impede the Commission’s ability to receive and take account of valuable feedback from judges, and to use empirical research to make its guidelines persuasive. With judges now required to consider all of the purposes and factors set forth in § 3553(a), it is even more apparent that mandatory minimums and guidelines that are tied to them are unsound. As the Supreme Court has noted, “the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.”⁶ The Commission cannot persuasively explain such guidelines. Mandatory minimums thus undermine respect for the guidelines and make compliance with them less likely.

If the Commission were to retreat from its opposition to mandatory minimums, it would break nearly sixty years of consensus in the Judicial Branch that mandatory minimums are unjust and counterproductive and should be repealed. That would be a tragic legacy for this Commission.

We urge the Commission to continue to educate Congress about mandatory minimums and to recommend that they be abolished. As Congress concluded when it wisely repealed mandatory minimums in 1970, 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. *See* 1991 Mandatory Minimum Report at 6-7. We recognize that complete repeal is unlikely in the near future, a sad reality reinforced by the stalled passage of a law that everyone recognizes is necessary to reduce the unjustified severity of mandatory minimums for crack cocaine. We therefore suggest that the Commission adopt and recommend interim measures to ameliorate the harm of mandatory minimums and to show Congress that they are not necessary.

I. MANDATORY MINIMUMS COMPROMISE THE PURPOSES OF SENTENCING, CREATE UNWARRANTED DISPARITY, AND ARE THE PRIMARY CAUSE OF PRISON OVERCROWDING.

A. Mandatory Minimums Require Unjust Punishment and Unwarranted Uniformity.

Under “just deserts” philosophy, punishment should be proportionate to “the nature and seriousness of the harm,” 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.”⁷ To avoid injustice and permit

⁶ *See Gall v. United States*, 552 U.S. 38, 46 & n.2 (2007); *see also Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

⁷ Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571, 590 (Feb. 2005).

proportionate punishments, the statutory minimum and maximum should encompass the full range of punishments appropriate for any violation that could arise under the statute's broad terms. The minimum should be set for the least harmful offense that could be committed by the least culpable offender under the statute.

Mandatory minimums, however, focus on extreme examples rather than the most mitigated case. They are passed in reaction to the headlines of the day and political competition, and are not based on empirical research.⁸ Thus, mandatory minimums are set with the most serious offense and the most culpable offender in mind, but are not in fact tailored to those offenders. For example, Congress set the ten-year mandatory minimum under 21 U.S.C. § 841 for “major traffickers,” defined as “manufacturers or the heads of organizations,” and the five-year mandatory minimum for “serious traffickers,” defined as “managers of the retail level traffic . . . in substantial street quantities.”⁹ But, because quantity is not an accurate measure of offense seriousness and does not correlate with role in the offense,¹⁰ minor offenders are subject to mandatory minimums intended for “major” and “serious” offenders.¹¹ The mandatory minimum then prevents judges

⁸ 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.” William H. Rehnquist, Luncheon Address (June 18, 1993), in *United States Sentencing Comm’n, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993).

⁹ USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 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, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

¹⁰ See USSC, *Cocaine and Federal Sentencing Policy*, at 28-30 (2007) (low-level crack and powder cocaine offenders exposed to lengthy penalties intended for more serious offenders); USSC, *Cocaine and Federal Sentencing Policy*, at 48-49 (2002) (drug quantity not correlated with offender function); USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, at 47-55 (Nov. 2004) (Fifteen Year Review) (evidence of numerous problems in operation of drug trafficking guidelines); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-73 (1992) (imbalance between aggravating and mitigating circumstances in all of the guidelines, with the problem many more times as frequent and serious in drug cases); 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”).

¹¹ The largest proportion of powder offenders are couriers and mules, and the largest proportion of crack offenders are street-level dealers. USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 19-21, 85 (May 2007). 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

from considering factors that bear on reduced culpability, such as mitigating role and factors not included in the guidelines, such as *mens rea*, motive, addiction, or the government's role in facilitating the crime or influencing the quantity.

Recent data show that the distortions caused by mandatory minimums have worsened since the Commission issued its first report on them. In 1991, the Commission reported that in cases with a mandatory minimum conviction, the minimum was within the guideline range in 22.6% of cases, was lower than the guideline range in 71.5% of cases, and was higher than the guideline range in 5.8% of cases. 1991 Mandatory Minimum Report, Table 27. The Commission appeared to view the last category as the most problematic, as it forces the judge to sentence above the guideline range. *Id.* at 53.

In FY 2008, mandatory minimums trumped or truncated the guideline range far more often than reported in 1991. In cases with a mandatory minimum conviction, the minimum was within the guideline range in 16.1% of cases (3,254 of 20,127), was lower than the range in 42.7% of cases (8,581 of 20,127), and was higher than the range in 41.3% of cases (8,292 of 20,127). In other words, the guideline range was inoperative or restricted in over half the cases involving a mandatory minimum.¹²

It is noteworthy that in that same year, judges imposed sentences below the guideline range without a government motion in 9,972 cases, that is, in fewer cases than they were compelled to sentence above the bottom of a guideline minimum because of a statutory minimum. Prosecutors have argued (wrongly in our view) that judges create disparity when they sentence outside the guideline range based on mitigating factors and the purposes of sentencing, explained in open court.¹³ But prosecutors' unreviewable behind-the-scenes decisions to charge mandatory minimums restrict judges' discretion, or force judges to sentence above the range, in more cases than judges sentence below the range for reasons grounded in § 3553(a) and identified in open court.

The indirect effects of mandatory minimums, through incorporation into the guidelines, cause additional problems. Mandatory minimum punishment levels are used as starting points for guidelines for offenses to which mandatory minimums apply. Thus, for example, the drug trafficking guidelines are set at or above the mandatory minimum for offenders in Criminal History Category I. As a result, the more serious offenders for whom the mandatory minimums were intended are subject to guideline ranges even higher than the mandatory minimum. As noted above, in FY 2008, the guideline range was entirely above the mandatory minimum in 42.7% of cases.

¹² USSC, FY 2008 Monitoring Dataset.

¹³ Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005); Testimony of Karin J. Immergut, USSC Regional Hearing, Palo Alto, California, May 27, 2009, at 2, 6-7, 9-10.

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

The scholarly verdict is that “the clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.”¹⁴ 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.”¹⁵ 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.”¹⁶

Besides these structural circumstances, mandatory minimums do not deter because potential offenders do not know the law, and even if they did, they could not know what the sentence would be. Sentence length is determined by prosecutors through charging decisions, bargaining decisions, and substantial assistance departure recommendations. As I testified in July, this varies dramatically from district to district, prosecutor to prosecutor, and case to case.¹⁷ As one specific example in a single case, Jason Hawkins testified before the Commission last fall about a client who was offered 15 years to plead guilty. When she decided 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.¹⁸ An imaginary offender attempting to predict what sentence he may receive simply could not know.

The Commission has heard testimony about programs in Chicago, Boston and High Point, North Carolina, that have been successful in reducing gun violence. The researchers who evaluated the Chicago program made no mention of federal prosecutions or any kind or length of sentence as the cause of the project’s success; the important thing was positive interactions with police and community leaders.¹⁹ Even with explicit

¹⁴ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65, 100 (2009) (hereinafter Tonry, *Mostly Unintended*); see also *id.* at 69, 91-100.

¹⁵ *Id.* at 102. “Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” Fifteen Year Review at 134.

¹⁶ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 29 (2006).

¹⁷ Statement of Michael Nachmanoff at 11-13, Public Hearing Before the U.S. Sentencing Commission, New York, NY, July 9, 2009.

¹⁸ Statement of Jason D. Hawkins at 4-6, Hearing Before the U.S. Sent’g Commission, Austin, Nov. 19, 2009.

¹⁹ Tracy Meares, Andrew Papachristos, and Jeffrey Fagan, *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program* (Project Safe

advance warning, the length of a prison term is not important. As David Kennedy testified, whether potential offenders know they will receive two days for a supervision violation, a low-level state conviction, or a federal five-year mandatory minimum, the certainty that it will occur is what counts, not the severity.²⁰ Extreme federal punishments are not necessary to deter, and create destructive community backlash, described by Kennedy as follows:

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.²¹

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. As David Kennedy testified, people do not know in advance what will move them from the state to the federal system, or what triggers a mandatory minimum, and that when they find out, after they have already been charged, “they literally collapse in tears.”²²

Finally, most federal offenders who are subject to mandatory minimums do not need to be incapacitated for lengthy periods to protect the public. Of 24,918 defendants convicted of drug trafficking in 2009, nearly two thirds (16,052) were subject to a mandatory minimum of five, ten, or more than ten years.²³ But 83.2% of all drug trafficking offenses involved no weapon, 94.1% of defendants in these cases played no aggravating role or a mitigating role, and 63.1% had only zero to three criminal history points.²⁴ Except in Criminal History Category I, drug trafficking offenders have the lowest, or second lowest, rate of recidivism across criminal history categories.²⁵ Locking up nonviolent, low-level offenders for long periods is likely to increase recidivism by

Neighborhoods in Chicago, Jan 2009), available at http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf (visited Oct 2, 2009).

²⁰ USSC, Public Hearing, Chicago Illinois, Sept. 9-10, 2009, Transcript at 171, 175, 177-78, 182, 183-84 (Chicago Transcript).

²¹ Hearing Testimony of David M. Kennedy, Part VII, Sept. 9, 2009.

²² Chicago Transcript at 187.

²³ USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 43.

²⁴ *Id.*, Tables 37, 39 & 40.

²⁵ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (May 2004).

disrupting employment, reducing prospects of future employment, breaking family and community ties, and exposing less serious offenders to more serious offenders.²⁶

C. The Public Does Not Support Mandatory Minimums.

The American public does not support the rigidity or severity of mandatory minimums. A survey conducted for FAMM in 2008 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, and 57% are likely to vote for a candidate who wants to end mandatory sentences for non-violent crimes.²⁷ A public opinion survey conducted for the Commission in 1997 found that the guidelines produced “much harsher” sentences in drug trafficking cases than survey respondents would have given, and that “there was little support for sentences consistent with most habitual offender legislation.”²⁸

Judges have recently been asking juries, a fair cross section of the community, what they believe the appropriate sentence is for defendants they have just convicted after hearing all of the evidence of guilt. In *Angelos*, where Judge Cassell was required to impose a sentence of 55 years, the mean juror recommendation was 18 years.²⁹ In a child pornography case before Judge Weinstein, where the five-year mandatory minimum for receipt applied, most of the jurors believed that the defendant should be treated and not imprisoned at all, and three jurors would have acquitted had they known of the five-year mandatory minimum.³⁰ Judges Gwin, Pratt and Kennelly polled jurors in twenty-two cases and found that “the median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges.”³¹ Eighteen of the cases involved guidelines set at or above mandatory minimums or a consecutive § 924(c). In each of those cases the median juror recommendation was

²⁶ See Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974–2002*, 6 *Criminology & Public Policy* 589 (2007).

²⁷ Families Against Mandatory Minimums, Omnibus Survey, Sept. 2008, available at <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>.

²⁸ See Peter H. Rossi & Richard A. Berk, *Public Opinion on Sentencing Federal Crimes* (Mar. 14, 1997), http://www.ussc.gov/nss/jp_exsum.htm.

²⁹ 345 F. Supp. 2d at 1242.

³⁰ *United States v. Polizzi*, 549 F. Supp. 2d 308, 339-341 (E.D.N.Y. 2008), *rev'd*, 564 F.3d 142 (2d Cir. 2009).

³¹ Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 *Harv. L. & Pol’y Rev.* 173, 175 (forthcoming 2010).

dramatically lower than what the guidelines and mandatory minimums would require.³² 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."³³

D. Mandatory Minimums Have an Adverse Impact on Racial Minorities, and Their Use Correlates with Race.

Penalties that are far greater than necessary to achieve the purposes of sentencing and that fall disproportionately on certain groups, such as crack cocaine penalties, have an unfair adverse impact and create unwarranted disparity. Other penalties, such as enhancements for prior criminal records, may reflect unfair disadvantages earlier in an offender's life, such as a greater likelihood of accruing a criminal record due to uneven or discriminatory law enforcement practices. Other unexplained differences among groups, such as a greater likelihood of receiving a mandatory consecutive sentence enhancement under 18 U.S.C. § 924(c) rather than the two-level guideline adjustment for use of a firearm (the "gun bump"), result from prosecutorial decisions about which little data is available. All of these types of disproportionality are evident in the use of mandatory minimum statutes.

In 1991, the Commission found that the "disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant." 1991 Mandatory Minimum Report at ii, 76, 82. The Commission has since reported that mandatory minimums and guidelines for drug offenses have been "a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders."³⁴ In 2004, the Commission found that the use of mandatory minimums, particularly § 851s and § 924(c)s, varies depending on the decisions of individual prosecutors, and that these decisions "result in unwarranted disparity and sentences that are often disproportionate to the serious of the offense" and "disproportionately disadvantage minorities."³⁵ The Commission recently reported that in FY 2008, African Americans were 24% of the

³² The ratio of the guidelines median to the jury median was 444%, 421%, 881%, and 1113% in the 5 drug trafficking cases; 542% in the 1 drug trafficking case with a consecutive § 924(c); 258%, 168%, 185%, and Life/300 months in the 4 robbery or carjacking cases with a consecutive § 924(c); 650% and 145% in the 2 child pornography cases; and 183%, 286%, 1533%, 160%, 588%, and 436% in the 6 felon in possession cases. *Id.* at 196-200. Felon in possession cases are included here because 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 ACCA. *See USSC, Firearms and Explosive Materials Working Group Report* at 8 & 10 (Dec. 11, 1990).

³³ *Id.* at 185-86.

³⁴ Fifteen Year Review at 48.

³⁵ Fifteen Year Review at 89-91, 142.

defendant population, but 35.7% of defendants convicted under statutes carrying a mandatory minimum.³⁶ That same year, African Americans were 31% of those affected by mandatory minimum trumps.³⁷

Mandatory minimums for drug trafficking have consistently had an adverse impact on minority defendants. The most recent available data show that, among the 24,263 drug trafficking offenders in FY 2008 with complete information, 74.4% of black defendants and 66.7% of Hispanic defendants received a mandatory minimum for drug trafficking, compared to 60.1% of white defendants. An additional mandatory enhancement under § 924(c) was received by 9.6% of black defendants, 3% of Hispanic defendants, and 4.2% of white defendants.³⁸ Because mandatory minimums are more severe than necessary to achieve the purposes of sentencing, this adverse impact is unjustified.

Previous Commission research has consistently reported an unexplained difference between black and white offenders in the portions receiving enhancements under § 924(c), and the most recent data show the same disproportionality. Among the total 66,113 offenders in FY2008 with complete information, 7.7% of black defendants, 1.5% of Hispanic defendants, and 2.2% of white defendants received a mandatory minimum under § 924(c). Most troubling, because it largely reflects a discretionary choice by prosecutors, are differences in the rate different groups receive an enhancement under § 924(c) *instead of* the less severe two-level gun bump under the guidelines. Looking only at FY2008 drug trafficking offenders who received *either* a two-level guideline enhancement for possession of a firearm or a § 924(c), about 35% of black defendants but only 26% of white defendants received the § 924(c).³⁹

E. Mandatory Minimums Directly and Indirectly Cause Prison Overcrowding.

The federal prison population currently stands at 211,353 inmates,⁴⁰ a fivefold increase since mandatory minimums and mandatory guidelines became law. The “major cause” of the prison population explosion is the increase in sentence length for drug

³⁶ USSC, Overview of Statutory Mandatory Minimum Sentencing, Table 1.

³⁷ USSC, FY 2008 Monitoring Dataset.

³⁸ USSC, FY 2008 Monitoring Dataset.

³⁹ These percentages were obtained by comparing the WEAPSOC, WEAPON, and GUNMIN1 variables in the Commission’s FY 2008 Monitoring dataset. A few cases do not show up in all three variables, but this is a very close estimate. Only cases with complete information (SOURCES=1) were included.

⁴⁰ Federal Bureau of Prisons, *Weekly Population Report*, at http://www.bop.gov/locations/weekly_report.jsp (last visited May 20, 2010).

trafficking, from 23 months before the guidelines to 73 months in 2001.⁴¹ Approximately 75% of the average time served is due to mandatory minimums, and 25% is due to guideline increases above mandatory minimum levels.⁴² The average time served in 2009 was 68 months, even after the Commission's amendment of the guidelines applicable to crack cocaine.⁴³

II. MANDATORY MINIMUMS TRANSFER THE SENTENCING FUNCTION FROM NEUTRAL JUDGES TO PROSECUTORS, WHO USE THEM FOR TACTICAL ADVANTAGE OR AS A SEVERE PENALTY FOR THE EXERCISE OF CONSTITUTIONAL RIGHTS. THIS CREATES EXTREME DISPARITIES AND CORRODES THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

As I testified last July,⁴⁴ prosecutors often charge or use mandatory minimums as leverage in plea negotiations not because they result in appropriate punishment, even in the view of the prosecutor, but to pressure defendants to plead guilty and waive other constitutional rights. Charging and plea bargaining practices vary widely among districts, individual U.S. Attorneys, and individual prosecutors, resulting in disproportionately harsh sentences for some and wildly different outcomes. While these problems may be exacerbated by DOJ policy that emphasizes severity and tactical advantage,⁴⁵ no charging policy can prevent the unfair and arbitrary use of mandatory minimums. For the past 200 years, every system of mandatory punishment, no matter what constraints were placed on the decision-makers, has produced wide disparities

⁴¹ See Fifteen Year Review at 48. The average time served in drug cases before mandatory minimums were enacted and the guidelines were promulgated was approximately 23 months. USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements at 69–70, June 18, 1987.

⁴² See Fifteen Year Review at 54.

⁴³ See USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 13. Estimated time served is obtained by multiplying the average sentence imposed by 0.87 to account for potential good time credits.

⁴⁴ Statement of Michael Nachmanoff at 9-14, Hearing Before U.S. Sent'g. Commission, New York, July 9, 2009.

⁴⁵ The Ashcroft Charging Memorandum directs prosecutors to “charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence,” including any “charge involv[ing] a mandatory minimum sentence that exceeds the applicable guideline range.” Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I (Sept. 22, 2003). The use of § 851s (doubling the mandatory minimum or requiring mandatory life) and § 924(c)s (adding a consecutive minimum of 5, 7, 10, 25, or 30 years—or more, if stacked) are “strongly encouraged” whenever available, but can be foregone, only through a negotiated plea, to provide an incentive to plead guilty. *Id.*

among comparable cases.⁴⁶ Mandatory minimums are foregone or dropped in some cases and used to impose extremely unjust sentences in other cases. These decisions are not made openly, transparently or accountably.⁴⁷

This is the inevitable result of mandatory minimums. They exist as a potent tool in the hands of prosecutors. As advocates in an adversarial process, prosecutors may be motivated by a wide variety of factors, including inexperience or poor judgment, the desire for professional advancement, or vindictiveness.⁴⁸ In the words of Justice Kennedy, this “transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided.” It “gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge . . . , the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.” Justice Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003).⁴⁹

Under this system, defendants who choose not to capitulate and go to trial are ultimately sentenced not only for their misconduct, but for declining to plead guilty on the prosecutor’s terms. A few well-known examples bear repeating. In *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), a severely mentally ill 52-year-old woman who had led a completely law-abiding life was sentenced to 159 years in prison, 150 years of which was for seven stacked § 924(c) counts. She was unable to plead guilty on the prosecutor’s terms because she held a fixed belief, due to her mental illness, that she was innocent. The man she had taken up with after her husband left her, and who was the

⁴⁶ See Tonry, *The Mostly Unintended Effects*, *supra* note 14, at 65, 67-68, 71-90, 101 (reviewing history and studies of mandatory minimum systems over the past 200 years).

⁴⁷ *Id.*

⁴⁸ “Today, it is scarcely debatable that prosecutors exercise vast and largely unchecked discretion at each stage of the criminal process. Likewise, most agree that this discretion is subject to outrageous abuses, due to the belligerent nature of American adversarialism, the politicization of the criminal justice system, and the self-interests of prosecutors, whose success and career prospects are often measured by the quantity and notoriety of their convictions.” Erik Luna, *The Curious Case of Corporate Criminality*, 46 Am. Crim. L. Rev. 1507, 1513 (2009). See also Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. L. J. Crim. L. 369, 373-90 (2009); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1600 (2005); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134-35 (2004); Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* 207 (2004); Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 85-86 (2001); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 Law & Soc’y Rev. 247 (1998).

⁴⁹ Available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

actual robber and put lives at risk, received a shorter sentence for testifying against her. According to the prosecutor, “There is no one to blame here but Marion Hungerford herself.”

In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006), after the defendant declined a plea to drug trafficking and one § 924(c) count with a 15-year sentence, the government stacked five § 924(c)s, two of which were “in some sense procured by the government” in arranging additional controlled buys after the first one, which would have produced a 105-year sentence for the § 924(c) counts alone. Angelos was acquitted of two of the counts, resulting in a 55 year sentence for a twenty-four-year-old first offender with a good job and two young children. In *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008), a 53-year-old woman with no prior convictions received a 45-year sentence, ten years of which was for drug conspiracy and possession with intent to distribute drugs, and thirty years of which was for two counts of possessing guns in furtherance of drug trafficking. As the Fifth Circuit observed, there was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house,” but she “was given effectively a life sentence,” and “it is the prosecutor’s charging decision that is largely responsible.”

These are examples of what can happen to defendants who decline to accept a guilty plea under the prosecutor’s terms. But unjust punishment is threatened everyday, and in most cases, the defendant understandably surrenders. Most defendants plead guilty whether subject to a mandatory minimum or not, and most defendants cooperate if they have truthful information to give.⁵⁰ The problem with mandatory minimums is that they have a coercive effect. “Were there no mandatories, defendants . . . would simply no longer face out-of-the-ordinary – and therefore unfair – pressures resulting from the rigidity and excessive severity of many mandatory minimum sentencing laws.”⁵¹ This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.⁵²

⁵⁰ See USSC, 2009 Sourcebook of Federal Sentencing Statistics, Tables 11, 27.

⁵¹ Tonry, *The Mostly Unintended Effects*, *supra* note 14, at 67 n.1.

⁵² “[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.” Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006). See also Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1598-99 (2005) (“Prosecutors employ a variety of tools to secure information or testimony from witnesses, such as immunity or sentence discounts and threats of prosecution against the witness or his family members if he refuses to testify. These incentives raise obvious risks of inaccuracy in testimony.”).

This problem is not merely hypothetical. My colleague Julia O'Connell testified before the Commission last November about two cases in which mandatory minimums resulted in fabricated cooperation and guilty pleas by innocent people. In one case, a confidential informant in the Northern District of Ohio, working with a DEA agent, framed twenty-six innocent people, eight of whom were acquitted, but seventeen of whom pled guilty after seeing the first innocent defendant get convicted at trial and receive a ten-year mandatory minimum. The informant confessed, the DEA agent was indicted, and all of the cases were dismissed and all of the defendants released. In the Northern District of Oklahoma, a father and daughter were convicted of an entirely fabricated drug transaction based on testimony by an informant under threat of a mandatory minimum and the corroborating testimony of his law enforcement handlers. They were released from prison last fall after serving a year in prison.⁵³ Just recently, as a result of the grand jury investigation, the ATF agent involved has been indicted, and eight additional people who were convicted or accused based on fabricated evidence have been released from prison or had charges dismissed.⁵⁴ Obviously, the problem is not always caught and remedied.

Some prosecutors contend that mandatory minimums are *necessary* for cooperation and that the Commission should consider this alleged justification in evaluating the wisdom of mandatory minimums. Based on all of the above and the Commission's role as a neutral expert body, we do not believe that the Commission should consider this as a rationale in support of mandatory minimums. But assuming that this question is nonetheless on the table, in our experience, defendants cooperate if they

⁵³ Statement of Julia O'Connell at 12-14, Hearing Before the U.S. Sent'g Commission, Austin, 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, front page, 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, January 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.

⁵⁴ Omer Gillham, *Grand Jury investigates police corruption*, Tulsa World, May 11, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100511_11_A1_Amnsri485093; Omer Gillham, *Former ATF agent accused of leading drug ring pleads guilty*, Tulsa World, May 6, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100506_14_0_Afreee569158.

have truthful information to give and might receive a reduced sentence, whether or not a mandatory minimum applies.

The Commission's statistics bear this out. In drug trafficking cases in 2008, the rate of substantial assistance departures was 25.9% overall.⁵⁵ For the 380 cases involving Oxycodone, Oxycontin, Oxymorphone and Hydrocodone, in which no mandatory minimum applies, the rate was 31.6%.⁵⁶ In 2009, the rate of substantial assistance departures in drug trafficking cases was also 25.9%. The rate was comparable or higher in many kinds of cases without mandatory minimums: 85% in antitrust cases, 25% in arson cases, 32.2% in bribery cases, 17.7% in civil rights cases, 26.8% in kidnapping cases, 24% in money laundering cases, and 19.7% in racketeering/extortion cases.⁵⁷ The rate is naturally lower in cases where there is ordinarily no one to cooperate against, such as burglary, larceny, embezzlement, sexual abuse, pornography/prostitution, and assault.

The routine use of mandatory minimums as a system of carrots and sticks has desensitized us to what, just twenty five years ago, was viewed as a dangerous threat to the exercise of constitutional rights. When the original Sentencing Commissioners were considering a mere two-level reduction for acceptance of responsibility, they were concerned about the fine line between providing leniency to those who plead guilty and punishing those who go to trial. The Commission felt that it had resolved the problem by placing the decision in the hands of the sentencing judge, and making clear that the reduction did not automatically apply based on a guilty plea and was not automatically precluded if the defendant went to trial.⁵⁸ Mandatory minimums, of course, are solely in the hands of prosecutors, not judges, and are used to punish or threaten to punish defendants with decades in prison for exercising the right to trial. The more severe the punishment, the more desperate those under its threat become to avoid it. As proved by the examples above, this corrodes the integrity of the criminal justice system, and the Commission should not support it.

⁵⁵ USSC, 2008 Sourcebook of Federal Sentencing Statistics, Table 27.

⁵⁶ USSC, 2008 Monitoring Dataset.

⁵⁷ USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 27.

⁵⁸ William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 190-92 & n.64 (1988).

III. MANDATORY MINIMUMS ARE INCOMPATIBLE WITH ANY KIND OF GUIDELINE SYSTEM, AND INTERFERE EVEN MORE ACUTELY WITH THE JUDICIAL SENTENCING FUNCTION AND THE COMMISSION'S WORK UNDER THE ADVISORY GUIDELINE SYSTEM.

The 1991 Mandatory Minimum Report was clear that mandatory minimums and the sentencing guidelines are “policies in conflict.”⁵⁹ The report explained the many ways that the statutory penalties interfere with guideline development and the “self-correcting, hopefully ever-improving” evolution of the guidelines. 1991 Mandatory Minimum Report at iii. It demonstrated how mandatory minimums distort the determination of the guideline range and prevent judicial discretion in particular cases. The report noted the “charge specific” nature of mandatory minimums, the unwarranted uniformity caused by “tarrifs,” and the anomalies caused by “cliffs.” These problems remain and if anything have worsened, and we hope the Commission will reiterate that mandatory minimums represent a “betrayal of sentencing reform.”⁶⁰

Justice Breyer has described how mandatory minimums thwart the evolution of the guidelines as contemplated by the Sentencing Reform Act: “[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.” Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 1999 WL 730985 *8 (Feb. 1, 1999).

The conflict between mandatory minimums and the Commission’s core responsibilities under the SRA is only more obvious and more consequential under the advisory guideline system. The Commission’s core responsibilities under the SRA form the very foundation of the advisory guideline system. The Commission’s “characteristic institutional role” is to develop guidelines based on “empirical data and national experience.”⁶¹ Judges provide feedback to the Commission by departing, by determining that a particular guideline fails properly to reflect § 3553(a) considerations, or by finding

⁵⁹ This was the title of Chapter 4 of the report.

⁶⁰ Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 40 FED. BAR NEWS & J. 158, 159 (1993).

⁶¹ *Kimbrough v. United States*, 552 U.S. 85, 101, 109 (2007); *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”).

that the guidelines do not treat relevant defendant characteristics in the proper way.⁶² A judge’s “reasoned sentencing judgment, resting upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors,” provides “relevant information” to the Commission so that the guidelines can “constructively evolve over time, as both Congress and the Commission foresaw.”⁶³ The extent of the judge’s explanation depends in part on whether it rests “upon the Commission’s own reasoning.”⁶⁴

Mandatory minimums interfere with the robust feedback made possible by advisory guidelines, and hinder the Commission from taking account of advances in empirical research regarding penological goals. Guidelines that are linked to mandatory minimums suffer from the same lack of empirical basis as do the mandatory minimums themselves.⁶⁵ This makes it difficult, if not impossible, for the Commission to persuasively explain its guidelines.

IV. THE ADVISORY NATURE OF THE GUIDELINES PROVIDES NO REASON FOR THE COMMISSION TO SUPPORT MANDATORY MINIMUMS.

Mandatory rules were thought to be necessary to curtail “unfettered” judicial discretion in the pre-guidelines era, 1991 Mandatory Minimum Report at iii, but that is not the system we have today. The guidelines, while advisory, remain the focal point of sentencing five years after *Booker* was decided. The guidelines are the “starting point and initial benchmark.”⁶⁶ They exert a gravitational pull as the only § 3553(a) factor with a number affixed.⁶⁷ As the Commission’s data shows, changes in length of

⁶² *Rita*, 551 U.S. at 351, 357.

⁶³ *Id.* at 358.

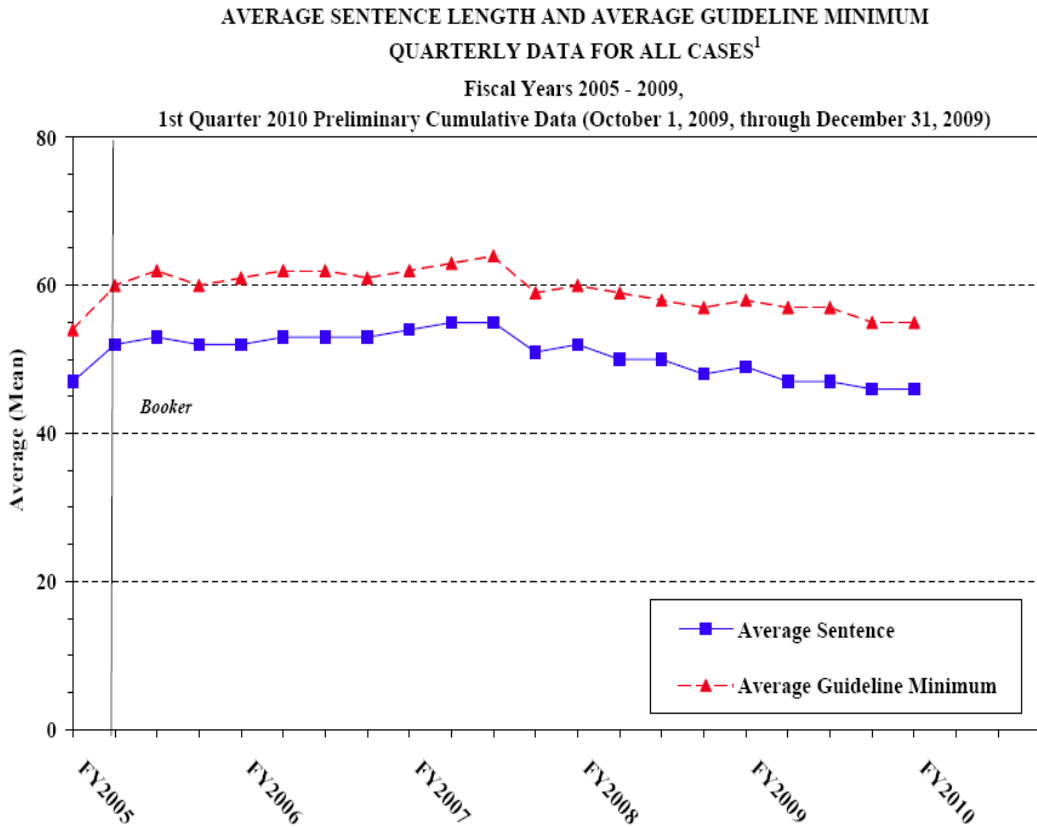
⁶⁴ *Id.* at 357.

⁶⁵ See *Gall*, 552 U.S. at 46 & n.2; *Kimbrough*, 552 U.S. at 96

⁶⁶ *Gall*, 552 U.S. at 49.

⁶⁷ The psychological phenomenon of “anchoring” to a number has often been noted in connection with post-*Booker* sentencing. See Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 127 (2006) (“Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.”), <http://www.thepocketpart.org/2006/07/gertner.html> (quotations omitted); Panel Discussion, *Federal Sentencing Under “Advisory Guidelines”*: *Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006) (Judge Lynch describing research on “anchoring”: “Whether people like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact. I think it is psychologically inevitable that the Guidelines will have a powerful influence on sentences, even if they are purely advisory.”).

sentences imposed mirror changes in length of sentences recommended by the guidelines, up or down, with the extent to which judges depart or vary to better meet the purposes of sentencing remaining consistent since *Booker* was decided.⁶⁸



There is no evidence showing that a floor is needed to prevent unreasonable judicial leniency. Prosecutors may provide examples of sentences they describe as unduly lenient, but these claims collapse when the true facts are known.⁶⁹ The complaint that reasonableness review is ineffective or causes “needless litigation”⁷⁰ is also overstated. The government has successfully appealed many cases on the ground that the sentence imposed was substantively unreasonable.⁷¹ When cases are reversed as

⁶⁸ USSC, First Quarter 2010 Preliminary Quarterly Data Report, Figures C-H.

⁶⁹ See, e.g., Statement of Jacqueline A. Johnson at 35-36, Hearing Before the U.S. Sent’g Commission, Chicago, Sept. 10, 2009.

⁷⁰ Comments of Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, Department of Justice, at the Nineteenth Annual National Seminar on the Federal Sentencing Guidelines, St. Petersburg, Florida (May 15, 2010).

⁷¹ *United States v. Ressay*, 593 F.3d 1095 (9th Cir. 2010) (in a terrorism case, reversing as both procedurally and substantively unreasonable below-guideline sentence of 22 years where

unreasonable, whether on procedural or substantive grounds and whether inside or outside the guidelines, the district courts usually impose a different sentence on remand.⁷²

guideline range was 35 years to life); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010) (in a child pornography case, reversing as substantively unreasonable sentence of a partial day in the custody of the United States Marshal's Office and three years of supervised release in a child porn case where the recommended guideline range was 27 to 33 months in prison); *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (in a tax evasion case, reversing sentence of 4 years' probation as both procedurally and substantively unreasonable where the guideline range was 24 to 30 months' imprisonment); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (in a child pornography case, vacating as substantively unreasonable a below guideline sentence (no prison term imposed where guideline range was 30 to 37 months)); *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009) (reversing as substantively unreasonable a 57-month sentence for a defendant classified as a career offender convicted of bank robbery, where advisory guideline range was 151 to 188 months); *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (in a wire fraud case, vacating as substantively unreasonable sentence of 36 months because the sentencing judge failed to offer a compelling justification for a sentence so far below the applicable guideline range of 87 to 102 months, and because nothing in the record supported such a reduced sentence); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (reversing as substantively unreasonable ("a clear error of judgment") a sentence of probation in a child porn case; stating that "an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished"); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (in health care fraud case, reversing as substantively unreasonable sentence of five years' probation (where guidelines recommended range of 27 to 33 months) because district court may have relied on factor (the defendant's possible innocence) that "cannot be legitimately relied upon"); *United States v. Hughes*, 283 Fed. App'x 345 (6th Cir. 2008) (unpublished) (in a bank fraud case, reversing as substantively unreasonable sentence of one day in prison and five years' supervised release); *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008) (in a bank fraud case, reversing as both procedurally and substantively unreasonable two below guideline sentences (one for a year and a day in prison where guideline range was 78 to 87 months, the other for three years' probation where guideline range was 108 to 135 months); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (in a terrorism case, reversing as substantively unreasonable sentence of 360 months' imprisonment and 360 months' supervised release, stating "we decline to adopt the view that *Gall* eviscerated any form of appellate review of trial court sentencing" and emphasizing that "*Gall* did not substitute a regime of total unreviewability for the fallen regime of Guidelines rigidity").

⁷² See *United States v. [Davis] Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (on government's appeal, reversed as substantively unreasonable; higher sentence imposed on remand); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (same); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (same); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008) (same); *United States v. Hughes*, 283 Fed. App'x 345 (6th Cir. 2008) (unpublished) (same); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (same); *United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008) (on defendant's appeal, reversed as substantively unreasonable; lower sentence on remand); *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009) (same); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (same); *United States v. Paul*, 561 F.3d 970, 973-74 (9th Cir. 2009) (same); *United States v. Marroquin-Frias*, 2010 WL 510640 (9th Cir. Feb. 12, 2010) (unpublished) (same); *United States v. Lopez*, 343 Fed. App'x 484 (11th Cir. 2009)

A substantial benefit of advisory guidelines is that, now that judges must impose a sentence that is sufficient but not greater than necessary to achieve sentencing purposes in light of all relevant factors, there is less *unwarranted* disparity overall. Many judges are correcting for unfairness built into some of the guidelines due to mandatory minimums and congressional directives,⁷³ the unfair piling on of consecutive mandatory minimums,⁷⁴ and other unfair practices and policies of prosecutors and law enforcement agents.⁷⁵ Differences among judges are more transparent today than during the

(same); *see also* *United States v. Levinson*, 543 F.3d 190 (3d Cir. 2008) (on government's appeal, reversed as procedurally unreasonable; higher sentence on remand); *United States v. Gaskill*, 318 Fed. App'x 251, 259 (4th Cir. 2009) (same); *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) (same); *United States v. Sevilla*, 541 F.3d 226, 232-33 (3d Cir. 2008) (on defendant's appeal, reversing due to insufficient explanation; lower sentence on remand); *United States v. Grant*, 323 Fed. App'x 189, 192 (3d Cir. 2009) (same); *United States v. Shambry*, 343 Fed. App'x 941 (4th Cir. 2009) (same); *United States v. Cameron*, 340 Fed. App'x 872 (4th Cir. 2009) (same); *United States v. Raby*, 575 F.3d 376, 381-83 (4th Cir. 2009) (same); *United States v. Terry*, 2009 WL 1845598, *3 (4th Cir. June 29, 2009) (same); *United States v. Batts*, 317 Fed. App'x 329, 331-33 (4th Cir. 2009) (same); *United States v. Maynor*, 310 Fed. App'x 595, 597 (4th Cir. 2009) (same); *United States v. Troupe*, 307 Fed. App'x 715, 717-18 (4th Cir. 2008) (same); *United States v. Strickland*, 2010 WL 235080 (4th Cir. Jan. 21, 2010) (same); *United States v. Simmons*, 568 F.3d 564, 569-70 (5th Cir. 2009) (same); *United States v. Moreno-Florean*, 542 F.3d 445, 457 (5th Cir. 2008) (same); *United States v. Aguilar-Rodriguez*, 288 Fed. App'x 918, 921 (5th Cir. 2008) (same); *United States v. Tisdale*, 264 Fed. App'x 403 (5th Cir. 2008) (same); *United States v. Blackie*, 548 F.3d 395, 401-02 (6th Cir. 2008) (same); *United States v. Barahona-Montenegro*, 565 F.3d 980 (6th Cir. 2009) (same); *United States v. Steward*, 339 Fed. App'x 650, 653 (7th Cir. 2009) (same); *United States v. Lovelace*, 565 F.3d 1080, 1088-93 (8th Cir. 2009) (same); *United States v. Vieczas-Soto*, 562 F.3d 903, 906 (8th Cir. 2009) (same); *United States v. Smith*, 573 F.3d 639, 662 (8th Cir. 2009) (same); *United States v. Oba*, 2009 WL 604936, at *1 (9th Cir. Mar. 9, 2009) (same); *United States v. Santillanes*, 274 Fed. App'x 718, 718-19 (10th Cir. 2008) (same); *United States v. Simone*, 2009 WL 2168944, *2 (11th Cir. July 22, 2009) (same); *United States v. Phalo*, 283 Fed. App'x 757, 765 (11th Cir. 2009) (same).

⁷³ *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007) (crack); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009) (career offender); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (same); *United States v. Dorvee*, ___ F.3d ___, 2010 WL 1852930 (2d Cir. May 11, 2010) (child pornography).

⁷⁴ A number of appeals courts have approved variances from the guideline range to lessen the impact of excessive consecutive mandatory § 924(c)s. *See, e.g., United States v. Angelos*, 433 F.3d 738, 754 (10th Cir. 2006); *United States v. Barriera-Vera*, 354 Fed. App'x 404, 410-11 (11th Cir. 2009); *United States v. Guthrie*, 557 F.3d 243, 256 (6th Cir. 2009).

⁷⁵ Judges may vary to correct for manipulation of the type and quantity of drugs. *See, e.g., United States v. Torres*, 563 F.3d 731, 736 (8th Cir. 2009); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005). In most circuits, judges may grant the equivalent of a fast track departure where there is no fast track program. *See, e.g., United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008). And judges may take the defendant's

mandatory era, and this is healthy. The answer, as the Supreme Court has said, is for the Commission to revise the guidelines to better reflect sentencing purposes and actual sentencing practices.⁷⁶

Focusing on inconclusive evidence that disparities may arise when judges perform their duty to impose sentences that best reflect sentencing purposes in light of all relevant factors,⁷⁷ only diverts attention from the greatest causes of unfairness in sentencing today: mandatory minimums that are not justified by legitimate sentencing purposes, guidelines that are linked to them, and unfair manipulation, charging and bargaining by prosecutors and law enforcement agents. The evidence is overwhelming that mandatory minimums and the way in which they are used have a profound and unfair impact on minorities.⁷⁸ This has been so for the past twenty-three years.⁷⁹ “Today’s sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.”⁸⁰

substantial assistance into account though the government refuses to file a § 5K1.1 motion. *See, e.g., United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App’x 408, 409 (5th Cir. 2008).

⁷⁶ “[O]ngoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’” *Kimbrough*, 552 U.S. at 107; *see also Rita*, 551 U.S. at 358 (guidelines can “constructively evolve over time, as both Congress and the Commission foresaw”).

⁷⁷ Compare USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* (Mar. 2010) with Ulmer, Light, Eisenstein, and Kramer, *Does Increased Judicial Discretion Lead to Increased Disparity? The “Liberation” of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577238. “Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution.” Douglas C. McDonald and Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* at 106, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (1993).

⁷⁸ 1991 Mandatory Minimum Report, Chapter 5; Fifteen Year Review at 89-90, 133-35.

⁷⁹ Studies of federal sentencing prior to the guidelines found that differences by race or ethnicity were uniformly small or insignificant, *but* that there were substantial aggregate differences by race and ethnicity after mandatory minimums and mandatory guidelines went into effect, and this was because of factors built into the rules. Douglas C. McDonald and Kenneth E. Carlson, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* at 1-2, 24-25, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (1993).

⁸⁰ Fifteen Year Review at 135.

V. THE NEED FOR COMPREHENSIVE AND TRANSPARENT EMPIRICAL ASSESSMENT

The greatest contribution of the Commission's 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 other 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 these crucial questions. The annual Monitoring dataset for FY2009 has not yet been released. 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. Last year the Commission received an Open Letter from thirty-four scholars and researchers who study federal sentencing requesting release of these specialized datasets so that others could supplement and replicate the Commission's analyses. 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 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. The recent reports on demographic differences in sentencing following *Booker* have demonstrated the value of replication and the need for multiple perspectives on these and other issues.⁸¹

⁸¹ USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis* (March 2010); Ulmer et al., *Does Increased Judicial Discretion Lead to Increased Disparity: The Liberation of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577238.

A. Intensive Study Samples, Recidivism Dataset, and the Purposes of Sentencing

Beginning in 1995, and repeated to some extent in 2000 and 2005, the Commission gathered data on a random sample of cases to supplement the data routinely collected as part of case monitoring. The purpose of these Intensive Study Sample Datasets was to explore empirical questions that cannot be answered with the more limited annual Monitoring datafiles. Collecting data at five-year intervals would permit longitudinal evaluation of changes in federal sentencing. Several questions of particular importance to the debate over mandatory minimums are answerable only with datasets like these.

The Intensive Study Samples continued a Commission program, which was begun in 1991 with the first Mandatory Minimum report and the Four Year Evaluation,⁸² of gathering data on offenders' actual criminal conduct. This program was seen as essential to the Commission's mandate to study the effects of charging and plea bargaining decisions on sentencing disparity.⁸³ The federal guidelines are the only sentencing guidelines that base sentences to a large degree on real offense conduct. Probation officers are instructed to report real offense conduct in the presentence report. This makes the Commission uniquely positioned to collect data of this type. In addition, several Intensive Study Samples collected data on the charges on which defendants were initially indicted but were later dropped, as well as new charges that were added through superseding indictments. These could then be compared to the charges of which defendants were ultimately convicted and sentenced.

The 1991 Mandatory Minimum report included Figure 5, titled "Processing Patterns for Defendants with Mandatory Minimum Behaviors." This figure examined defendants whose actual criminal conduct made them eligible for a mandatory minimum penalty. It then showed the portion of these who were initially charged, eventually convicted, and ultimately sentenced at the levels specified in the statutes and the mechanisms by which the penalties were waived or otherwise avoided. Data like these shed useful light on the actual workings of the criminal justice process and added realism to the tough rhetoric that often accompanies debates over sentencing.

A great deal of offender information, such as any history of substance abuse, mental health conditions, and aspects of defendant's educational background, upbringing,

⁸² USSC, *The Federal Sentencing Guidelines A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* Vol. II (December 1991) (see especially pages 394-418).

⁸³ Congress has been concerned since the debates surrounding the SRA that charging and plea bargaining would undermine the uniformity sought by sentencing reform, and directed the Commission to both study this possibility and take steps to prevent it, including recommending statutory changes to Congress. *See, e.g.*, Pub. L. No. 98-473, Title II, § 236, (Oct 11, 1984) (directing Commission to submit a report to include "an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing.").

and family life, were also collected. All of this can help paint a more complete portrait of the types of people subject to mandatory minimum penalties, and particularly their need for treatment and training.

The Intensive Study Samples also contained rich information on drug offenders' functional roles in drug trafficking. This data was proven valuable in several Cocaine Sentencing reports, which showed the types of persons to whom mandatory minimum penalties apply.⁸⁴ The ISS datasets contain a great deal of additional information that could illuminate the actual operation of the penalties, such as the types of activities that contributed to the drug quantities for which defendants were held accountable (sales, negotiated amounts, projections, etc.) as well as the investigation methods used by law enforcement. Some datasets collected information on the number of transactions and the time frames involved in the trafficking. All of this helps demonstrate how quantity-based penalties can operate arbitrarily and are subject to manipulation.

Most important, some of the data collected for the Commission's Recidivism Dataset was specifically intended to inform the debate over mandatory minimum penalties. Legislative history suggests that a major justification offered for mandatory minimum penalties is that they help deter criminal conduct. Other research as discussed above has failed to detect a deterrent effect of mandatory penalties. An empirical test by the Commission of their deterrent effect would be especially persuasive to federal policymakers. The sample of offenders for the recidivism dataset was selected to include persons subject to five-year mandatory penalties. The plan was to compare the recidivism rates of these offenders with similar offenders who were *not* subject to mandatory penalties. No Commission report to date has used this data to test the deterrence hypothesis. The new report presents a valuable opportunity to answer this vital question.

The Recidivism Dataset has also been used to measure incapacitation effects through crimes averted modeling.⁸⁵ In this type of study, data on past offending is used to predict, along with other variables such as age, the number and types of crimes offenders would be likely to commit if they were not incarcerated. Ideally, the Commission could demonstrate through crimes-averted modeling that repeal of the mandatory minimum statutes, and amendment of the guidelines with a focus on imprisonment of only truly dangerous offenders, could result in savings far greater than any cost in increased crime.

⁸⁴ *Cocaine and Federal Sentencing Policy* at 48-49 (2002); *Cocaine and Federal Sentencing Policy* at 28-29 (2007).

⁸⁵ See, e.g., Charles Loeffler, *Crime Impact: A Method for Estimating Crimes Prevented by Alternative Sentencing Laws – A Preliminary Report to the Commission* (June 7, 2004).

B. Measuring How Mandatory Minimums Create Unwarranted Uniformity and Disparity

There is little doubt that mandatory minimums are the greatest source of unwarranted disparity in the federal sentencing system today. The available data, case histories, field research, and anecdotal evidence all point to this conclusion.⁸⁶ This disparity arises through disparate charging and plea bargaining practices, through the tariff and cliff effects that make one or two facts about a case controlling elements in the punishment imposed, and through other structural disparities that assign undue weight to certain facts, such as the presence of past convictions. Quantifying the amount of disparity caused by the statutes and comparing it to other sources is a difficult challenge for the Commission, but the report should attempt to do it so that the severe problems caused by mandatory minimums can be assessed in perspective.

As noted above, whenever a mandatory minimum penalty based on a single fact requires a sentence above the otherwise applicable guideline range, or limits a judge's use of that range, or prevents a departure or variance in a case warranting a below-range sentence, unwarranted disparity has been created. The data from FY2008 show that trumping and truncating above the ends of the guideline range by statutory minima happens *more* frequently than does sentencing below the range by judges through departures or variances based on mitigating factors and the purposes of sentencing. Mandatory minimum trumping and truncating results from charging and bargaining decisions by prosecutors that do not need to be justified in open court, or on facts, such as drug weight, that can be purposefully influenced by agents or affected by fortuitous circumstances. As a result, these variations from the guideline range are much more likely to represent unwarranted disparity than are departures or variances. The Commission's report should measure the extent of trumping and truncating of the guideline range.

The flat mandatory minimum statutory enhancements for possession or use of a firearm under 18 U.S.C. § 924(c) are among the worst sources of disparity. They are incompatible with the proportionate enhancements for weapon use provided by the guideline's specific offense characteristics, which through their impact on offense levels adjust sentences as a percentage of the otherwise applicable sentence.⁸⁷ Different offenders arbitrarily receive different enhancements – statutory, guideline, or none at all – depending on the unexplained decisions of prosecutors. Previous research has shown an adverse impact of these decisions on African American offenders.⁸⁸ The Commission's

⁸⁶ Fifteen Year Review at 82-92.

⁸⁷ For a description of the incompatibilities, see Paul J. Hofer, *Federal Sentencing For Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects For Improvement*, 37 Am. Crim. L. Rev. 41, 48-53 (2000).

⁸⁸ Fifteen Year Review at 90.

report should document these and other disproportional impacts so that this source of demographic differences in sentencing can be compared to other sources. Stacking of § 924(c) counts result in the most egregiously severe sentences and its frequency and effect should also be reported.

Enhancement of sentences for prior felony drug convictions, based on the filing of an information under 21 U.S.C. § 851, vests extraordinary punishment power in prosecutors. These increases override the Commission's normal criminal history rules applicable in the case. They require sentences twice as long or life without parole. There is no doubt that, like the career offender guideline based on prior drug convictions,⁸⁹ there is no coherent justification for these increases. They do not target offenders in need of incapacitation better than the normal criminal history rules. There is no rationale for considering repeat drug offenders more culpable than repeat tax evaders or swindlers. And they do not deter. Moreover, the little data that has been available shows that the increases are used rarely and arbitrarily.⁹⁰

The Commission does not regularly report data on the use of § 851 enhancements. Nor is data available on their use in the publicly released Monitoring dataset. This leaves a gaping hole in our understanding of the drug mandatory minimums. Commission staff may be able to estimate the frequency of their use indirectly, based on comparisons between the drug mandatory minimum penalties applicable to cases and the quantities of drugs involved in a case. Once defendants who receive the enhancement have been identified, the new report should document their rate of use in drug trafficking cases in different parts of the country. The types of offenders most likely to receive the enhanced penalties should also be reported. Data from the ISS or Recidivism files could also identify rates of use among offenders who qualify based on the specifics of their past criminal record.

Because the Commission has felt obliged to link the guideline ranges to the statutes, mandatory minimum penalties have an indirect effect on sentences even when they do not directly control the sentence imposed. Commission research has demonstrated that penalties associated with crack cocaine, as well as other drugs, do not reflect the seriousness of the offense. The quantity levels and associated punishments are grossly disproportionate to the true harms caused by many types of drugs.⁹¹ The quantity levels associated with many other drugs also routinely fail to match the severity of punishment to offenders' functional roles and culpability in the manner the legislative history of the Anti-Drug Abuse Act suggests Congress intended. The Commission's report should review the evidence on this mis-targeting of resources and should supplement that work with data from more recent years.

⁸⁹ *Id.* at 133-34.

⁹⁰ *Id.* at 89.

⁹¹ *See, e.g.,* Nutt et al, *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 *The Lancet* 1047 (Mar. 24, 2007).

More generally, whenever mandatory minimum penalties place a floor on the sentencing range, they prevent consideration of relevant mitigating factors and result in unwarranted uniformity. Mitigating role, acceptance of responsibility, and other important mitigating factors not included in the guidelines are not taken into account. The Commission's report should document how very dissimilar offenders are treated the same and how less serious crimes and less culpable offenders are subject to punishments appropriate for more serious offenses.

Recently, unlike the Commission's first fifteen years, the Commission has not undertaken studies of the effects of prosecutorial practices on sentencing disparity. Congress, however, believed that charging and plea practices could result in unwarranted disparity,⁹² and the Commission's own policy statements recognize this as well.⁹³ The tradition of critical assessment of the effects of charging and plea bargaining practices should be renewed with the report on mandatory minimums. The report should evaluate how prosecutors use these statutes, including variations among prosecutors and regions, and the adverse impacts of these decisions on different demographic groups.

C. The Realities of Prison Crowding and the Myth that Mandatory Minimums Promote Certainty and Uniformity

The Department of Justice has sometimes argued that disparity caused by mandatory minimums can be avoided simply by uniform and complete charging of those penalties. If taken seriously, this would routinely result in draconian punishments that far exceed the guideline range and are far greater than necessary to achieve the purposes of sentencing, and would quickly outstrip federal prison resources. The point is not that these charges *should* be pursued in every case. Of course they should not be. But even assuming that uniform and complete charging of mandatory minimums would result in appropriate sentences, Commission data has consistently demonstrated that mandatory minimums are not uniformly or completely charged, and could not be for the system to remain workable. The new report should summarize and update the extremely important and long-standing findings that show uneven charging and plea bargaining throughout the modern mandatory minimum era, as documented in the 1991 Mandatory Minimum Report, in the Fifteen Year Review, and in other Commission studies.

Mandatory minimum penalties simply could not be applied to all offenders subject to their literal terms without overwhelming the correctional system. Rough

⁹² Fifteen Year Review at 10.

⁹³ See USSG, Introductory Commentary, Chapter 6, Part B (indicating that policy statements regarding acceptance of plea agreements are intended "to ensure that plea negotiation practices . . . (2) do not perpetuate unwarranted sentencing disparity"). These policy statements have been largely ignored, in part because plea agreements have been a primary means of relief from the excessively harsh penalties required by mandatory minimum sentences and the guidelines based on them. Fifteen Year Review at 84, 92.

estimates of the portion of offenders potentially eligible for firearms enhancements, or repeat offender enhancements, can be obtained from the Intensive Study Samples. Using its prison impact model, the Commission can estimate the number of beds and the cost that would result from literal and complete application of the statutes. This would demonstrate – in stark contrast to the sentencing reform goals of *honesty*, *transparency*, and *uniformity* -- that the present system, to remain feasible, relies on hidden, discretionary charging decisions controlled by prosecutors instead of judges.

Even so, mandatory minimum penalties and the policies they represent are the primary cause of the severe over-crowding the Bureau of Prisons now faces. As the Commission predicted,⁹⁴ and as confirmed by later research,⁹⁵ the quantity-based minimum penalties in the Anti-Drug Abuse Act of 1986, in part through their incorporation into the sentencing guidelines, have been the primary cause of the explosion in the federal prison population.

Moreover, these penalties have failed to focus prison resources on the most serious and dangerous offenders. 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.⁹⁶ Congress should be made aware of the full costs and limited benefits of quantity-based sentencing. Ideally, the Commission could demonstrate through crimes-averted modeling that repeal of mandatory minimum statutes, and amendment of the guidelines with a focus on incapacitation of only truly dangerous offenders, could result in considerable savings at little cost in increased crime.⁹⁷

VI. POLICY RECOMMENDATIONS

First, we urge the Commission to renew its opposition to mandatory minimums, to educate Congress about their detrimental effects, and to urge their repeal.

Second, failing complete repeal, the Commission should recommend repeal of those provisions that create the most egregiously severe sentences and that are most subject to abuse.

⁹⁴ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 74 (1987).

⁹⁵ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed Sent'g Rep. 26 (1990).

⁹⁶ U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 1994); USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Exh. 11 (May 2004).

⁹⁷ See, e.g., Loeffler, *supra* note 85.

The stacking of § 924(c) counts is a new and serious problem since the Commission’s 1991 Mandatory Minimum Report. Since then, the Supreme Court interpreted “second or subsequent conviction” to refer to convictions in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993). This has led to extreme abuses such as those in *Angelos*, *Hungerford*, and *Looney*. The Commission should recommend to Congress that it revise the statute to be a true recidivist statute, *i.e.*, to provide that “second or subsequent conviction” means a conviction for an offense committed after the defendant was previously convicted, imprisoned and released.

The Commission should recommend that Congress repeal statutory increases for “prior convictions for a felony drug offense” under 21 U.S.C. §§ 841 and 851. As noted above, this overrides the criminal history score, and gives the government sole power to double the mandatory minimum or require mandatory life, and also increases the statutory maximum and thus the offense level under the career offender guideline. This creates “unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions.”⁹⁸

The Commission should also recommend that Congress repeal 18 U.S.C. § 924(e). Like § 851s, the ACCA casts too wide a net and overrides the otherwise applicable criminal history score.

Third, we join the Judicial Conference,⁹⁹ and the many judges who testified at the Commission’s regional hearings,¹⁰⁰ in urging the Commission to review the guidelines presently linked to mandatory minimums and set guideline levels based on data and research. This would give judges advice they could rely on in cases where no mandatory minimum applies, and could be used to educate Congress.

Although we believe that the Commission “may abandon its old methods in favor of what it has deemed a more desirable approach,” *Neal v. United States*, 516 U.S. 284, 295 (1996), we understand that the Commission feels bound to set the guidelines at least as high as mandatory minimums.¹⁰¹ The Commission should therefore request

⁹⁸ USSC, App. C, Amend. 506 (1994).

⁹⁹ Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007), http://www.ussc.gov/hearings/03_20_07/walton-testimony.pdf.

¹⁰⁰ USSC, Public Hearing, Atlanta, Georgia, February 10-11, 2009, Transcript at 24 (Judge Tjoflat); USSC, Public Hearing, Stanford, California, May 27, 2009, Transcript at 6-22 (Judge Walker); USSC, Public Hearing, Chicago, Illinois, September 9-10, 2009, Transcript at 70-71 (Judge Carr and Judge Holderman); USSC, Public Hearing, New York, New York, July 9-10, 2009, Transcript at 92, 139-41 (Judge Newman).

¹⁰¹ We do not believe that the general phrase, “consistent with all pertinent provisions of any Federal statute,” 28 U.S.C. § 994(a), requires that the guidelines be set to match or exceed mandatory minimums. The Commission has always had the power to de-link the guidelines from

permission from Congress to independently formulate the guidelines pursuant to its core responsibilities under § 991(b)(1)(A), (B) and (C) and § 994(g).

The Commission could accompany such a request with a proposed set of guidelines, for example, a set of drug trafficking guidelines based primarily on functional role in the offense, with quantity given lesser weight. The Commission could use its prison impact model to show Congress how the prison population and its costs would be reduced if Congress were to repeal mandatory minimums and permit a reasonable set of guidelines to take effect. Such a proposal should be welcome. After all, Congress thought that quantity would approximate functional role, but empirical research and experience have shown that it was mistaken.¹⁰²

Fourth, the Commission should reduce the drug guidelines by two levels across the board. Since the drug guidelines are set two levels higher than necessary to capture the mandatory minimum for a defendant in Criminal History Category I, the Commission can reduce all of the drug guidelines by two levels without special permission from Congress.

Fifth, the Commission should recommend expansion of the safety valve. The safety valve does not solve the problems caused by mandatory minimums because it is too narrow in scope. It excludes many low-level offenders who deserve relief. The Commission should recommend that Congress expand the safety valve to ensure that more defendants are eligible for it and to prevent prosecutors from using their charging power to evade application of the safety valve.

In fiscal year 2009, only 5,447 (35%) of defendants subject to a mandatory minimum qualified for the safety valve, while 10,085 (65%) did not.¹⁰³ Yet, 83.2% of all drug trafficking offenses involved no weapon, 94.1% of drug trafficking defendants played no aggravated role or a mitigated role, 51.4% had zero to one criminal history points, and another 11.7% had two to three criminal history points.¹⁰⁴ 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. The safety valve does not distinguish between high- and low-level offenders based on role in the offense, but instead distinguishes among low-level offenders who differ little from each

mandatory minimums, *Kimbrough*, 128 S. Ct. at 573 (Congress did not require the guidelines to be tied to mandatory minimums), and has exercised that power, for example, with marijuana and LSD. The guidelines are “consistent with” any applicable mandatory minimum because a mandatory minimum trumps a lower guideline range as explicitly stated in USSG § 5G1.1(b).

¹⁰² See USSC, *Cocaine and Federal Sentencing Policy* at 28-30 (2007); USSC, *Cocaine and Federal Sentencing Policy* at 48-49 (2002); Fifteen Year Review at 47-55; Sevigny, *supra* note 10, at 155, 171.

¹⁰³ USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 44.

¹⁰⁴ *Id.*, Tables 37, 39 & 40.

other, *i.e.*, by one criminal history point.¹⁰⁵ And while the percentage may be small, 260 people were excluded from safety valve eligibility because of an offense the Commission classifies as “minor,” presumably mostly traffic offenses.¹⁰⁶ Further, African American defendants are less likely to receive safety valve relief because they have a higher risk of arrest and prosecution than similarly situated white defendants.¹⁰⁷ As long as mandatory minimums remain, the Commission should recommend to Congress that it expand the safety valve to include defendants in all Criminal History Categories, or at least Criminal History Category II.

We also urge the Commission to recommend to Congress that it expand the safety valve to apply to all mandatory minimums. At present, it applies only to offenses under 21 U.S.C. §§ 841, 844, 846, 960 and 963. *See* 18 U.S.C. § 3553(f). The problems caused by mandatory minimums are present for all offenses subject to them. Worse, prosecutors in some districts exercise their charging discretion to require mandatory minimum sentences for defendants who would otherwise qualify for the safety valve. For example, in 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 offenders who would otherwise qualify.¹⁰⁸ The Commission should urge Congress to expand the safety valve to all mandatory minimums to prevent this manipulation, and also because there is no rational basis for excluding offenses not currently on the list.

Even with these expansions, however, the safety valve is an incomplete solution that cannot cure the fact that mandatory minimums do not accurately reflect the purposes of sentencing across the board, and prevent judges from imposing sentences that are proportional and just. *See* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 (Jan./Feb. 1999) (The safety valve “is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.”).

Sixth, as in its 1991 Mandatory Minimum Report, the Commission should encourage Congress to participate in sentencing policy through directives to study and amend if necessary, and to permit the Commission to function as an independent expert body. 1991 Mandatory Minimum Report at 119-24.

¹⁰⁵ *See* Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-99 (2000).

¹⁰⁶ USSC, *Impact of Prior Minor Offenses on Eligibility for Safety Valve* (Mar. 2009), available at http://www.ussc.gov/general/20090316_Safety_Valve.pdf.

¹⁰⁷ *See* Fifteen Year Review at 134.

¹⁰⁸ In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. *See* Statement of Nicholas T. Drees at 8-9, Public Hearing before the U.S. Sentencing Commission, Denver, CO (Oct. 21, 2009); *United States v. Koons*, 300 F.3d 985, 993 (8th Cir. 2002).