

Statement of

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Judge Sessions, Members of the Commission:

Thank you for giving me the opportunity to testify today on the important subject of mandatory minimum sentences in the federal criminal justice system.

I am currently the Robert B. McKay Professor of Law at New York University. I have taught criminal law and studied the criminal justice system for more than 35 years, for much of that time with a particular emphasis on sentencing. I worked closely with those who drafted the 1984 Sentencing Reform Act, and I was actively involved in the work that went into the establishing this Commission and drafting its initial set of sentencing guidelines.

From the beginning, many of us involved in this process were preoccupied with the problem of insuring that sentencing standards mandated by Congress and by this Commission would be respected on the front lines by the prosecutors, judges and probation officers entrusted with applying them. As part of that effort, the Commission launched an ambitious project to investigate sentencing not only through reported data but through intensive study of confidential case files and candid discussions with the front-line officials who had made crucial, low-visibility decisions in individual cases.

Together with one of the members of the initial Commission, Commissioner Ilene Nagel, I was privileged to lead this study, which continued over a period of nearly six years, spanning the administrations of Presidents Ronald Reagan, George H.W. Bush and Bill Clinton. With the full support of this Commission, its staff and the Department of Justice, we gave close attention to sentencing practices in a diversity of districts, large and small, in all regions of the country.

That experience, and my study of the subsequent evolution of charging, bargaining and sentencing practices, informs my testimony today. I begin with a brief introduction to the issues, in order to make clear a simple descriptive point: So-called mandatory minimum sentences are not really mandatory at all. They are *discretionary* punishments, with many of the very worst consequences that sentencing discretion can imply. Following this introduction, I will identify the specific goals that Congress sought to achieve, and then explain why the federal mandatories fail to achieve – and in fact undermine – them. Finally, I will offer my suggestions for reform.

I. Introduction

For almost two decades, the Commission has been on record as being firmly opposed to the mandatory minimum sentences imposed by federal statutes. The Commission has repeatedly and unanimously implored Congress to repeal them. That position has been endorsed, with almost equal unanimity, by ideologically and politically diverse criminal justice professionals across a wide spectrum, including the late Chief Justice Rehnquist,¹ Justice Stephen Breyer,² the 1990 Federal Courts Study Committee,³ Senator Orrin Hatch,⁴ and – on many occasions – the Judicial Conference of the United States.⁵ But until now Congress has not been moved to act, except in one exceedingly

¹ William H. Rehnquist, Luncheon Address (June 18, 1993), quoted in Paul Cassell, Statement on Behalf of the Judicial Conference of the United States, 19 Fed. Sent. Rptr. 344 (2007).

² *Harris v. United States*, 536 U.S. 545 (2002) (concurring opinion).

³ Federal Courts Study Committee, Report 133-34 (1990).

⁴ Orrin G. Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185 (1993).

⁵ See Cassell, *supra* note 1, at 344-345.

narrow area.⁶ Congress's recent directive instructing the Commission to submit a report on federal mandatories may signal that the time is finally ripe for legislative reconsideration of this issue.

In order to assist in that reconsideration, I want to distinguish two schools of thought among those who have been urging reform. First are the many thoughtful criminal justice professionals who believe that federal sentences, especially in drug cases, are overly harsh, inflicting disproportionate punishment at great expense with no net crime control gain, or indeed with counter-productive crime control effects. These reformers in essence reject the underlying premise of the mandatories and conclude that their principal objective – which is to insure that certain offenders receive truly severe sanctions – is fundamentally unsound.

A second group of reformers accepts that the goal of insuring severe penalties either is desirable in itself or at least is a matter within Congress's ultimate competence to determine. These reformers respect Congress's priorities but conclude that mandatories do not achieve and actually disserve the goals that Congress itself has sought to achieve.

In my remarks today, I will set aside the first set of objections. I will assess mandatories solely from the perspective of those, in and out of Congress, who subscribe to their basic goals. And I urge the Commission to do likewise in its report to Congress. Although it is appropriate for the Commission to draw attention to aspects of the federal punishment regime that it considers overly harsh, that is a matter on which its expertise is incomplete and on which Congress's political judgment is entitled to play a role. The decisive point – the one on which every criminal justice professional agrees – is that

⁶ Congress has enacted a "safety valve" that permits a sentence lower than a mandatory minimum, but only in the case of certain first-time, non-violent low-level drug offenders. See 18 U.S.C. §3553(f).

mandatories in operation are far different creatures from the stringent, inescapable deterrent sanctions that Congress pictures when it enacts them.

On the statute books and in the minds of many voters, mandatories appear to be a simple, straightforward way to send potential offenders a chilling and unequivocal message. In operation, mandatories are nothing of the sort and never can be. In ways that every experienced professional understands, the criminal justice system makes congressional aspirations for clarity and uniform severity impossible to achieve.

For starters, charging criteria and charging practices are complex and multifaceted. Moreover, the underlying basis for charging decisions rarely is fully transparent, and in most cases, it cannot be. The same is true for plea agreements, which consistently account for more than 95% of all federal convictions.⁷ The state and local officials who control case referrals, the federal investigating agencies, Main Justice, and the U.S. Attorney's offices are all permeated with discretion, multiple layers of it. And the pervasive lack of transparency in turn shapes these layers of discretion and insulates them from all but modest oversight.

To name these features is not to indict federal criminal justice as a rogue system. Most of the structural features I have mentioned are valuable in their own right and are in any event largely beyond human capacity to change. The point that must be underscored, as emphatically as possible, is that these structural givens make the very idea of a "mandatory minimum sentence" a cruel fiction.

⁷ United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (14th ed. 2009), Figure C and Table 11.

Ironically, Congress has tried hard to induce the states to follow “truth in sentencing” practices,⁸ so that the public may understand the reality of punishment policies and not merely their superficially clear appearances. Congress should now be helped to understand that with its so-called mandatory sentences, it has put itself in violation of its own mandate for political candor. At most, so-called mandatory minimums are mandatory only in certain narrow, often haphazard circumstances, and when they operate as advertised, their effects often are a far cry from what Congress intended. In short, mandatory minimums are mandatory in name only. They are *discretionary* punishments triggered by statutes that leave discretion to operate in one of the worst possible ways.

In the remainder of my remarks, I will identify in more detail the goals that mandatories aim to achieve and explain why they fail so dramatically to achieve their purposes.

II. Congressional Goals

Four goals are stressed by congressional supporters of mandatory minimums: assuring “just” (i.e. appropriately severe) punishment, more effective deterrence, more effective incapacitation of serious offenders, and the elimination of unwarranted sentencing disparities.⁹ Two other potential advantages of mandatories should also be mentioned: creating stronger inducements for knowledgeable defendants to cooperate in

⁸ See “Truth-in-Sentencing Incentive Grant Program,” Pub. L. No. 103-322 § 20102 (1994); “Violent Offender and Truth in Sentencing Incentive Programs,” 42 U.S.C. § 13704 (2009).

⁹ See U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System: a Special Report to Congress* 13-15 (1991); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 *Wake Forest L. Rev.* 199, 201-02 (1993).

the investigation of other offenders, and achieving greater efficiency through the increased pressure on defendants to plead guilty.

Prosecutors who support mandatories often stress these last two goals, and the first of them – inducing cooperation – has explicit Congressional support.¹⁰ The second goal is more problematic. Justice Department policies over the years have repeatedly sought to discourage the tactic of bargaining away mandatories to induce a plea. But the tactic no doubt continues to be used and awareness of it may figure in the background for some supporters of mandatories. In any case, the twin goals of inducing cooperation and inducing guilty pleas – to the extent they are legitimate and to the extent they are actually pursued – stand in direct opposition to the ostensibly dominant objectives of stringent punishment, effective deterrence and the reduction of disparity.

The most important factor frustrating Congress's aim of clear, uniformly severe punishments is that so-called mandatories are not really mandatory and in practice are haphazardly applied. The best way to understand why this occurs is to trace what happens when mandatories are applied faithfully as written. In the next section I describe those consequences, and in the following section, I detail the evidence that establishes beyond any doubt that these often-intolerable consequences produce haphazard but frequent, widespread departures from the sentences ostensibly mandated by statute.

III. Mandatory minimums that are applied as written

When mandatory minimum statutes are actually applied to all fact situations falling within their scope, predictable and severe sentences are achieved. The results are

¹⁰ See 18 U.S.C. §3553(e) (permitting a sentence below the mandatory minimum, when prosecutor moves for lower sentence on basis of defendant's substantial assistance in the prosecution of others).

longer prison terms, increased correctional costs, and (probably) some enhanced deterrence.¹¹ Because mandatorics normally prevent judges from awarding a discount for a guilty plea,¹² the likelihood that the defendant will insist on going to trial rises sharply. Finally, when mandatorics are truly mandatory, equal treatment of similarly situated offenders is achieved. But this virtue of mandatorics is also a vice, because equal treatment is attained through deliberate inattention to context.

This inattention to context produces many anomalous effects. For day-to-day participants on the front lines of federal criminal justice, some of these anomalies can be accepted as imperfections that are the inevitable price of Congress's binding decision to go the mandatory route. But the anomalies often seem grossly unfair or even cruel, and not just in the eyes of the defendant and his family. These anomalies often seem intolerable to prosecutors and judges who are fully committed to vigorous enforcement of the laws but who also see up close and in three dimensions the lives that will be affected.

Because many consequences of inflexibility are inherently unpredictable, they are difficult to catalogue exhaustively, but four are especially important: cliffs, misplaced equality, the cooperation paradox, and the cooperation backlash. These effects, along with others less predictable, undermine the willingness of prosecutors and judges to apply mandatorics with the consistency that Congress assumes; the human consequences often can simply be too stark for prosecutors and judges to bear.

¹¹ A necessary qualification is that severe mandatorics increase the risk of jury nullification and tend to deter cooperation by law-abiding citizens who might otherwise be willing to share important information; both factors tend to reduce overall probabilities of conviction and to that extent tend to offset any deterrence gains associated with increased severity. See *infra*, text at notes 24-26 and Appendix, *infra*, Tables 1 - 4.

¹² Mandatorics do, however, leave room for a guilty plea discount in cases that could draw a sentence above the mandated minimum.

When that happens, the mandatories may or may not be applied as written. Haphazard, low-visibility discretion rules the day. Some prosecutors and judges, despite grave misgivings, follow the facts to their logical but unfair conclusion.¹³ Others find ways to avert the anomalies, but only by covert adjustments that make sentencing in ostensibly mandatory cases even less transparent and less predictable than the process would be if no mandatory statute were in the picture at all. The dynamics that produce these results are complex and largely unappreciated by Congress and the public, so they are worth spelling out in detail.

1. Cliffs

Cliffs result when an offender's conduct just barely brings him within the terms of a mandatory minimum. For example, a first offender who helps sell 495 grams of cocaine would, with adjustments for minimal role and acceptance of responsibility, face a guideline sentence of 27-33 months – just over two years. For an identical offender who sells just five grams more, the sentence doubles, because the five-year mandatory minimum applicable to sales of 500 grams kicks in. Conversely, an offender subject to the five-year mandatory minimum can obtain a dramatic decrease in his sentence if he can establish a very small reduction in the quantity for which he is held accountable.

Cliff effects can occur in almost all mandatories, even those that are not quantity-driven. They often occur, for example, in the mandatory five-year enhancement for defendants who “use or carry” a firearm when committing a crime of violence or a drug offense.¹⁴ But cliff effects are especially dramatic in drug cases; small quantities have

¹³ See, e.g., *United States v. Angelos*, 345 F. Supp.2d 1227 (D. Utah 2004).

¹⁴ 18 U.S.C. §924(c). For concrete examples, see Schulhofer, *supra* note 9, at 204-205.

enormous importance, while many other factors bearing on culpability and dangerousness have no importance at all.

2. *Misplaced equality*

Ensuring equal treatment of offenders who fall within the terms of a mandatory minimum prevents an important sort of unfairness - unwarranted disparities in the punishment of similarly situated offenders. But when the offenders subject to a mandatory minimum are *not* similarly situated, the elimination of disparity creates a form of unfairness that often is even more troubling – *excessive uniformity*. Drug lords and other very serious offenders receive very severe sentences – appropriately so. But excessive uniformity means that low-level offenders receive the same stringent punishment – a result that often seems so harsh as to defy common sense.

The quantity-driven drug distribution mandates present numerous examples of this phenomenon, but it recurs throughout the mandatory sentencing statutes. For example, the organizer of a “continuing criminal enterprise” is subject to a mandatory minimum sentence of life imprisonment. But because a person who aids and abets a criminal offense is subject to the same penalty as the principal, some courts of appeals have held that the mandatory life sentence is applicable to any subordinate who assists the enterprise, even when he does so in an entirely peripheral way.¹⁵

This kind of uniformity – at extremely severe levels – is inevitable, because of two inherent features of statutory sentencing mandates: their oversimplified culpability metrics and the severity mismatch on which they are invariably based.

¹⁵ E.g., *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989). The Second Circuit has taken the contrary view. See *United States v. Aiello*, 864 F.2d 257, 264 (2d Cir. 1988).

Mandatory minimum statutes necessarily rely on *oversimplified culpability metrics* – they single out just one or a very small number of factors to determine the minimum sentence (drug quantities, prior record, or carrying a weapon). As a result, they automatically exclude all other circumstances relevant to culpability and dangerousness – except as potential reasons to impose a sentence even greater than the mandatory minimum.

This feature – the use of an oversimplified measure of culpability – would not in itself generate intolerable sentencing results, provided that the minimum sentence was set at a relatively modest level. There would then be room for sentencing judges, following structured guideline adjustments, to increase the sentence when the nature of the offense or the prior record was especially serious. For example, if Congress mandated a minimum sentence of one year in prison for distribution of 500 grams of cocaine, judges would feel free to add additional time for defendants who had an especially significant role in the offense. Excessive uniformity could be avoided because judges would have realistic options for imposing more severe punishments on more culpable offenders.

But Congress does not set minimum sentences in this way. Instead a *severity mismatch* invariably skews congressional judgment when it sets minimum sentences. Congress does not link the minimum to its picture of the *least serious* version of an offense. Instead, Congress typically thinks about an especially serious offender, and chooses as the “minimum” sentence the punishment that it considers appropriate for him. As a result, Congress sets “minimum” sentences that are far too severe.

As I have stressed, punishment levels are in part a function of political value judgments that lie quintessentially within Congress’s domain. The problem I am

describing here is not that Congress sets severity levels inconsistent with the values of federal judges or Sentencing Commissioners. The problem is that the process of setting minimum sentences by legislation leads Congress to disregard *its own* value judgments; Congress tends to choose as a *low-end* (“minimum”) sentence the punishment that it considers appropriate for the typical *high-end* offender. It therefore leaves no room for reasonable enhancements for more dangerous offenders and places both the “big fish” and the “small fry” in the same very severe punishment category. Even for prosecutors and judges most committed to stringent enforcement, the resulting “equality” seems manifestly unfair and intolerably harsh as applied to the low-level offender.

In drug cases, this kind of misplaced equality becomes especially egregious because of two additional factors – the structure of drug distribution and its interaction with the concepts of “relevant conduct” and co-conspirator liability.

Drug distribution is by definition a conspiratorial crime, and each seller or street-corner look-out knows that every small transaction requires an extensive network of importers and distributors handling large quantities. Even one-shot couriers and “mules” know that their co-conspirators have to be repeat players, whose foreseeable activities are broad indeed. Although some careful appellate decisions suggest theories that can help avoid saddling low-level participants with responsibility for the near-infinite quantities managed by their superiors,¹⁶ other appellate courts have upheld quantity aggregation approaches that cast a wide net.¹⁷ One appellate court has even suggested that the

¹⁶ See, e.g., *United States v. Willis*, 49 F.3d 1271, 1274 (7th Cir. 1995), (street dealers not ordinarily accountable for quantities they understand higher-ups to be distributing through others); *United States v. Edwards*, 945 F.2d 1387 (7th Cir. 1991).

¹⁷ See, e.g., *United States v. Jones*, 145 F.3d 959 (8th Cir. 1998) (street dealer with IQ of 56 held responsible for 71.5 kg of heroin and received 360-month sentence); *United States v. Joyner*, 924 F.2d 454, 458-59 (2d Cir. 1991) (“a dime bag seller on the street” who distributed two vials of crack held accountable for 586 vials found in the possession of his supplier.)

Commission “was mistaken” if it intended to require that the standard of responsibility for co-conspirator conduct be more restrictive in the sentencing context than it is when determining guilt of substantive offenses at trial.¹⁸ As a result, the practical reality is that the scope of a conspiratorial agreement is elastic, unpredictable, and to a considerable extent consigned to the discretion of the charging prosecutor.

In tying drug mandatories to the weight of the controlled substances involved in an offense, Congress acted on the plausible intuition that larger drug quantities mark the more important players and serve as a workable proxy for culpability and propensity for violence. But the legal doctrines applicable in drug cases render this reasonable intuition nonsensical in practice. The organizational dynamics of drug trafficking interact with quantity-dominated mandatories, co-conspirator liability and the *Pinkerton* “reasonable foreseeability” test to produce almost unlimited upside sentencing potential for virtually any drug defendant, because minor players can be tied to the same quantities as the kingpins with whom they conspire. Again, the result is “equality” that seems manifestly unfair and intolerably harsh as applied to the low-level offender.

The oversimplified punishment metric and the severity mismatch produce acute anomalies not only between offenders convicted of the same offense but also between offenders who commit entirely different crimes. These distortions arise primarily because minimum sentences skyrocket in crimes that lend themselves to a quantifiable metric, while minimum sentences are generally absent in crimes that do not, even when they are much more serious. Thus, there is a mandatory minimum for carrying a gun when making a drug purchase, even if the gun is never brandished or fired, but there is no

¹⁸ *Id.*, at 458.

mandatory minimum for committing rape or second-degree murder with a weapon other than a gun.

One recent case dramatically illustrates the bizarre sentences that result. Weldon Angelos, a first-time offender who had bought small amounts of marijuana on four occasions, faced a mandatory minimum of 55 years in prison, merely because he had carried (but not displayed) a firearm at the time of these purchases. Angelos came to court for sentencing on the same day as an offender convicted of second-degree murder. Angelos received the 55-year term mandated by statute, even though the murderer got 22 years, the maximum suggested by the Sentencing Guidelines for that offense. While reluctantly imposing the sentence required in the marijuana case, the sentencing judge noted that that sentence far exceeded the punishment that Angelos would have received for committing aircraft hijacking, espionage, kidnapping, aggravated assault or rape.¹⁹

3. The cooperation paradox

Prosecutors have long used their charging discretion to afford sentencing inducements to defendants who offer substantial assistance in the prosecution of others, and Congress has formalized this practice by rendering the mandatories inapplicable in such cases.²⁰ But defendants who are most in the know, and thus have the most “substantial assistance” to offer, are typically those who are most centrally involved in conspiratorial crimes. The most culpable offender often is the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or

¹⁹ United States v. Angelos, 345 F. Supp.2d 1227, 1258 (D. Utah 2004); see Cassell, *supra* note 1, at 344.

²⁰ 18 U.S.C. §3553(e).

responsibility, have little to offer. As a result, these small fry can wind up with far more severe sentences than the principal culprit in the offense.

There are countless illustrations of this dynamic, but it is worth mentioning a few to underscore the scope of the problem. In a Seventh Circuit case, a low-level driver for a drug organization received a 120-month sentence, while the organization's kingpin received only an 84 month sentence.²¹ In a Tenth Circuit case, four underlings received sentences of 210 months, 292 months, 295 months, and life, while the organization's leaders received sentences of probation!²² In an Eighth Circuit case, a street dealer with an IQ of 56 received a 360 month sentence, while one of the organization's high-ranking middlemen received only an 84-month sentence.²³

Of course, sentence concessions for helping the government have always been part of the federal sentencing system and always will be. The vice of the escape hatch for "substantial assistance" steps from its interaction with the unqualified rigidity that the mandatories otherwise impose. As already noted, long-standing rules of co-conspirator liability leave low-level drivers, runners and look-outs accountable for the same conduct as the conspiracy's leaders. Nonetheless, prior to the mandatories, low-level offenders normally could receive lower sentences because of their relatively minor role in the offense. But the mandatories mean that all participants start by facing the same high sentence, regardless of their role in the offense or any mitigating personal circumstances. The leaders and the foot-soldiers begin at the identical minimum, but only the leaders can

²¹ United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992) ("The more serious the defendant's crimes, the lower the sentence – because the greater his wrongs, the more information and assistance he has to offer.")

²² United States v. Evans, 970 F.2d 663, 676-78 (10th Cir. 1992).

²³ United States v. Jones, 145 F.3d 959 (8th Cir. 1998).

benefit from the escape hatch, and the sentencing concessions they receive tend to increase with the depth of their involvement in the offense.

The result is that leaders often get very big sentence reductions while the small fry are left to face the draconian sanctions that the statute mandates only for them. Instead of the scale of punishments that Congress and the public envisage when they think of escalating mandatories (a pyramid of liability with long sentences only for the few at the top of the organizational ladder), the result is an inverted pyramid, with stiff sentences for the many minor players and much more modest punishments for the few knowledgeable insiders who can cut favorable deals.

4. The cooperation backlash

Despite their acknowledged potential for requiring harsh, unfair penalties, severe mandatories are widely thought to have one unambiguous advantage – their powerful ability to elicit cooperation. In fact, however, even this seemingly straightforward benefit is in part illusory, for two reasons. The first is that the Guideline sentencing reduction for cooperation (§5K1.1) offers an alternative that achieves this advantage almost as effectively and in a much more flexible manner. The second reason is that the gains from any additional offender cooperation can be offset by increased difficulty in getting cooperation from others; when sentencing practices are viewed as overly severe, many citizens become reluctant to assist the law enforcement effort.

One way this happens is through jury nullification, a widely discussed but probably minor impediment to conviction in drug cases.²⁴

²⁴ See Paul Butler, *Racially Biased Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L. J.* 677 (1995).

A far more serious effect is that perceptions of undue severity can chill the willingness of citizens to cooperate with law enforcement at the early stages of investigation and arrest. Social science research has repeatedly shown that police need community help in suppressing drug activity and other social disorder.²⁵ Yet neighborhood residents who would normally be motivated to assist the authorities often hesitate to do so when they believe that youth involved in dealing drugs and other wrongdoers could face draconian sanctions if these offenders come to the attention of the police. As a result, severe mandatories have effects that point in two opposing directions. They can increase cooperation by offenders facing severe punishment, but they can decrease cooperation by law-abiding citizens whose support is also essential.

Although it is difficult to estimate the extent of the latter effect, recent empirical research is suggestive. In analyzing data from a recent survey of New York City residents, my collaborators and I found that willingness to work with the police on community crime control measures increased 20% when respondents believed that law enforcement policies were made and enforced fairly, and willingness to report suspicious activity more than doubled (from 32% to 67%). Among Hispanics in this sample, willingness to work with the police was 54% higher among those who considered law enforcement policies to be fair, and willingness to report suspicious activity rose by 94%. Among African-Americans, willingness to work with the police remained low even when law enforcement policies were considered fair, but even for these New Yorkers,

²⁵ See R.J. Sampson, S. W. Raudenbush, and F. Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918 (1997).

willingness to report suspicious activity rose by 76% when law enforcement policies were considered fair.²⁶

The research just mentioned does not focus specifically on community attitudes toward mandatory minimum sentences or on cooperation in the context of the particular crimes affected by them. Indeed, to my knowledge, there is currently no research that targets this issue specifically. But the consistency of the social science findings of this sort over a wide range of law enforcement situations gives every reason to suspect that the same dynamic – the chilling of cooperation by law-abiding citizens – is likely to have significant impact in contexts like drug offenses, where public awareness of inflexible, draconian punishments is high. Indeed, a strong and persistent finding in this research is that a principal component of perceived fairness is the willingness of authorities to take individual circumstances into account in rendering their decisions.²⁷

The upshot of the preceding discussion is that mandatorics, when applied according to their terms, inevitably give rise to grave problems, because of cliffs, misplaced equality, the cooperation paradox and the cooperation backlash. Indeed, for the front-line judges and prosecutors entrusted with applying these statutes, the sentences they require often appear to be grossly unfair, intolerably harsh and even counter-productive.

IV. Mandatory Minimums in Practice: Haphazard Enforcement

²⁶ See Appendix, *infra*, Tables 1 - 4.

²⁷ See J. Sunshine and T. R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *L. & Soc. Rev.* 555 (2003).

Two major studies have undertaken to assess empirically the extent to which mandatory minimum statutes are in fact applied as written. The first is this Commission's 1991 report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*.²⁸ This report, now almost 20 years old, remains by far the most complete available empirical assessment of mandatories, with a rigorous statistical analysis of the way these statutes are applied.

The Commission's 1991 Report found that only 74% of defendants were charged with the highest mandatory indicated by their conduct, and the willingness to charge mandatories where applicable was much lower in certain especially problematic contexts. Only 55% of drug defendants who appeared eligible for the 924(c) weapons enhancement were so charged, and among defendants who appeared eligible for prior-record enhancements, only 37% - far less than half - were so charged. Further attrition occurred after indictment. Of defendants who entered plea agreements (i.e. roughly 90% of all convicted defendants), *more than half were sentenced below the mandatory level for which they appeared eligible*.²⁹ Even more troubling, the attrition of cases did not appear to be random. Almost half the whites eligible for a mandatory minimum were sentenced below the mandatory level, while less than a third of the blacks received similar leniency.³⁰ And these differences remained statistically significant, even after the Commission controlled for factors related to the nature of the offense and prior criminal record.

One limitation of the Commission's statistical analysis was that it necessarily relied primarily on written case files, which did not afford access to the case prosecutor's

²⁸ Sentencing Commission Report, *supra* note 9.

²⁹ *Id.*, at 56-58.

³⁰ *Id.*, at 76-82.

reasoning or a full picture of possible evidentiary problems in the case. A useful qualitative complement to the statistical analysis is therefore provided by the district visits and in-depth, case-specific studies I conducted with Commissioner Ilene Nagel. This qualitative material was analyzed in a number of published articles³¹ and in a detailed report filed with the Commission.³² This qualitative study strongly corroborated the Commission's finding of inconsistency and widespread disregard of the statutory mandates. Our estimates, though necessarily approximate, suggested that prosecutors had evaded applicable legal requirements under Guidelines and mandatories in roughly 20% to 35% of all guilty plea cases, with evasion being considerably more frequent in cases to which mandatory minimums applied. Taking mandatories alone, we estimated that statutory requirements had been evaded in roughly 30-50% of all guilty plea cases.³³

Further confirmation of the problem was observed when we looked closely at the tools we found prosecutors to be using when they manipulated charges to avoid mandatory minimums. Prominent among these was the so-called telephone count (21 U.S.C. §843), a drug offense not subject to a mandatory minimum. Nationally, only two percent of guilty pleas in drug cases resulted from pleas to this offense during the period studied, but such convictions represented a substantial share of all drug convictions in such districts as New Hampshire (18%), Northern Texas (14%), and Colorado (25%).³⁴

³¹ Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta* Period, 91 Nw. U. L. Rev. 1284 (1997); Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231 (1989).

³² Ilene H. Nagel & Stephen J. Schulhofer, Plea Negotiations under the Federal Sentencing Guidelines: An Empirical Examination of the Post-*Mistretta* Experience (Final Report, Dec. 1994) (on file with the U.S. Sentencing Commission).

³³ See Schulhofer, *supra* note 9, at 219, 220.

³⁴ See *id.*, at 219.

Unless drug dealers in these places have an extraordinary need to use the telephone and extraordinary ability to avoid touching any actual drugs, the drug mandatories were almost certainly being evaded on a massive scale in these jurisdictions.

A similar pattern was evident in the frequency of guilty pleas to the drug offense of simple possession (21 U.S.C. §844). Nationally, only seven percent of guilty pleas in drug cases resulted from pleas to this charge, but in some districts such pleas accounted for up to 25% (and in one district 34%) of all drug convictions.³⁵ Again, absent bizarre patterns of drug distribution in particular districts or an unusual prevalence of weak evidence there, the inference of commonplace evasion of the drug mandatories in these districts was compelling.

Elsewhere, the preferred vehicle for evading mandatories appeared to be the substantial assistance motion. During the period studied, such motions were made in 12% of all drug cases nationally, but they were almost routine in Eastern Pennsylvania (41%), Western North Carolina (37%), and Northern Florida (36%), among others. This raw data cannot preclude legitimate explanations for the frequent use of these motions.³⁶ When quizzed, the U.S. Attorney for one of these districts explained, “Well, we are extremely good at getting cooperation.” But one is entitled to doubt that cases of genuine, important cooperation could be distributed so unevenly among the districts. The inference of pervasive discretion in the deployment of the mandatories, with sharp variations in this phenomenon across the country, was strong.

The most recent sentencing statistics make clear that the use of these charging and bargaining tools continues to vary widely from district to district, for no apparent

³⁵ Id.

³⁶ Id., at 219-220.

legitimate reason. In fiscal 2009, §843 (the communications facility charge) accounted for only 2% of all drug convictions nationally, but in some districts that proportion was more than five times higher, and in one district (Eastern California) it was ten times higher, accounting for 20% of all drug convictions. Similarly, guilty pleas to §844 (simple possession) represented only 3% of all drug convictions nationally, but in several districts they accounted for well over 15% of all drug convictions. Substantial assistance motions were made for 26% of all drug trafficking convictions nationally, but in many districts they were made in well over half of such cases. When the three tools most often used for count manipulation (simple possession, the telephone count and the §5K1.1 motion) are combined, they account for less than 30% of all drug convictions nationally, but in several districts, they account for more than two-thirds of all guilty pleas in drug cases.³⁷

One might have expected that reliance on these tools for sentencing flexibility would diminish in the post-*Booker* period, because plea bargains and judicial sentencing decisions on ordinary drug-trafficking counts can now more easily reach a sentence below the applicable guideline range, without any need to manipulate the facts or the charges. That prosecutors in some districts nonetheless continue to make heavy use of simple possession charges, telephone counts and substantial assistance motions, in ways far out of line with national averages, is a highly suggestive indication that these charging behaviors are often motivated by a perceived need to evade the mandatory minimums.

Of course, charging, bargaining and cooperation agreements inevitably depend on complex, subjective judgments, and thus scientific precision in studying their impact can

³⁷ Statistics in this paragraph were computed from U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, October 1, 2008 through September 30, 2009, Tables 1, 3 and 10.

not be expected. But the available studies, approaching the problem from diverse directions and with distinct research strategies, all point to the same conclusion: Both within and across districts, the federal mandatories were and still are widely disregarded in practice. And this disregard of the mandatories happens in haphazard, unpredictable ways, with little transparency or oversight.

The result is a system with many of the worst features of indeterminate sentencing. Severity gains are undercut by uncertainty in the way mandatories are applied and by their tendency to chill the cooperation of law-abiding citizens. At the same time, rigidity remains real when prosecutors and judges feel obliged to set aside misgivings and apply the mandatories literally, or when defendants with plausible defenses choose to reject a plea offer and run the risk of conviction at trial. In such cases, the mandatories may indeed be applied as written, but the sentences that result, though they may have seemed fair when judged in the abstract in the halls of Congress, often strike all the front-line participants as grossly unfair when seen up close in the context of actual cases.

Most tragically, these injustices are altogether unnecessary, because Congress's legitimate aspirations for uniform, deservedly severe punishments can be achieved without reliance on mandatory minimum sentences. In the final section of this statement, I suggest several paths to reform.

V. Remedies

This Commission's 1991 Report on mandatory minimums suggested four techniques for replacing the mandatories with a more flexible system of congressional

input into the sentencing process.³⁸ In a thoughtful article, Senator Orrin Hatch endorsed these proposals and added several others.³⁹ All of these ideas are constructive, and the choice among them obviously depends in part on what Congress can be persuaded to accept. To help focus the discussion, however, I suggest one simple but far-reaching solution. Thereafter, as a less attractive alternative, I suggest three more limited approaches to reform.

A. Truth in Sentencing.

It is of vital importance that the Commission urge Congress to focus not on technical flaws but instead on the core concept of purporting to impose a specific sentence by statutory mandate. More technical recommendations may seem less likely to draw political heat, but they will preclude a clear understanding of the issues and prevent a framing of the problem in a way that can draw near universal support from criminal justice professionals.

The idea that lies behind mandatory minimums should be challenged head on. As I have stressed, so-called mandatories are in fact not mandatory at all. They create a highly misleading, highly discretionary system of punishment that permits discretion to operate without transparency or accountability, with many of the worst features of the pre-Guidelines sentencing system.

The required remedy therefore is not so much to “repeal” mandatories as it is to replace their highly deceptive label with an accurate one. The basic proposal, which I would call “The Truth in Sentencing Act of 2010,” would provide that all statutory

³⁸ Sentencing Commission Report, *supra* note 9, at 119-124.

³⁹ Hatch, *supra* note 4, at 195-198.

minimum sentences would become mandates to the Sentencing Commission to set the minimum of the guideline range at a level no lower than that specified by statute.

If necessary to address congressional concern about a lack of control over downward departures, Congress could mandate that a departure *below* the guideline range (an issue not controlled by *Booker*'s holding with respect to applicable maximums) would be subject to the limitations that were in place pre-*Booker*.⁴⁰

B. More Limited Reforms

If Congress is unwilling to make this fundamental correction, there remain several more limited steps that could mitigate some of the mandatories' worst features. For example, as has often been suggested, Congress should certainly be willing to rectify the Supreme Court's several decisions giving overly expansive reach to the gun mandatories applicable under §924(c).⁴¹

Without understating the importance of fixing those problems, however, I want to focus here on several corrective measures that are less frequently discussed and more structural in nature.

⁴⁰ Congress similarly might deem it desirable to reintroduce pre-*Booker* limitations on any downward adjustments to the guideline range. Constraints of this sort would not imperil the basic transparency and flexibility that would be achieved by transforming mandatories in the manner suggested.

Under Supreme Court precedent as it currently stands, the facts required to establish such a Guideline minimum would not need to be found beyond a reasonable doubt by trial or plea, even if departures below that minimum were tightly constrained; indeed under current law the facts required to establish an entirely inflexible statutory minimum need not be established beyond a reasonable doubt. See *Harris v. United States*, 536 U.S. 545 (2002). Nonetheless, since the holding in *Harris* may be open to reconsideration, it would seem prudent for legislation of the kind suggested here to require that when certain facts trigger a presumptively binding Guideline minimum, those facts must be established beyond a reasonable doubt by trial, stipulation or plea.

⁴¹ *Muscarello v. United States*, 524 U.S. 125 (1998) (firearm is "carried" when left behind in glove compartment of car); *Smith v. United States*, 508 U.S. 223 (1993) (firearm is "used" when traded for drugs but not used as a weapon); *Deal v. United States*, 508 U.S. 129 (1993) ("second" conviction need not be based on conduct subsequent to a prior conviction; can include conviction on additional count same prosecution).

1. *Co-conspirator liability.* As described above, one of the most destructive features of the mandatories is their impact on peripheral participants in wide-ranging criminal conspiracies. These peripheral offenders typically lack the culpability Congress posits when it envisages the offender who is responsible for a large quantity of drugs or for other extremely serious criminal conduct. Yet the *Pinkerton* rule, which holds peripheral players liable for the “reasonably foreseeable” acts of others in furtherance of a conspiracy,⁴² has the effect of placing the insignificant foot-soldier at the same mandatory minimum level as the kingpin of the entire enterprise.

This vicarious liability of co-conspirators is a persistent source of bizarre sentencing results and egregious injustices when mandatories are applied against the background of pre-existing criminal law doctrines of accountability. Indeed, many states, recognizing the overbroad potential of the “reasonable foreseeability” test, have rejected the *Pinkerton* rule entirely.⁴³ In the federal system, of course, *Pinkerton* liability is well-settled as a basis for conviction of substantive crimes. But that consensus developed at a time when sentencing discretion and later the Guidelines were available to adjust the degree of punishment to a defendant’s role in the offense.

A mandatory minimum should never be triggered by conduct for which a defendant is accountable only on a *Pinkerton* “reasonable foreseeability” theory. Congress should instruct sentencing courts to apply mandatories only on the basis of conduct committed by the defendant himself as a principal.

2. *Accomplice liability.* The concern about derivative liability applies with less force when accountability is based on a theory of aiding and abetting rather than on

⁴² *Pinkerton v. United States*, 328 U.S. 640 (1946).

⁴³ E.g., *State v. Stein*, 144 Wash.2d 236, 27 P.3d 184 (2001); *People v. McGee*, 49 N.Y.2d 48, 399 N.E.2d 1177 (1979); accord, Model Penal Code and Commentaries, Comment to §2.06 (3) at 307 (1985).

Pinkerton alone. The defendant who is guilty as an accomplice under 18 U.S.C. §2 could be a low-level assistant, but he could also be the kingpin or one of the other lieutenants who do not have direct personal liability because they merely supervise those who carry out the prohibited acts.

The best solution to this problem would be to specify that a mandatory minimum “does not apply to conduct for which an offender is accountable as an accomplice under 18 U.S.C. §2, unless the offender had a substantial leadership role in the jointly undertaken criminal activity.”

It is important to stress here that for mandatory minimum purposes, it is not sufficient merely to allow an exception from liability when an offender plays a tangential part. That approach would likely prove inadequate because in analogous contexts, courts have often held that marginal participants did not have a “minor” role, even when they had no leadership responsibility and no significant involvement in the conduct for which they were held accountable.⁴⁴ Thus, Congress should make clear that for purposes of applying any mandatory minimum to a mere accomplice, liability must depend on an affirmative showing that the defendant had a “substantial leadership role” in the conduct on which the mandatory minimum is based.

3. Guidelines Adjustments. Some of the noxious effects of the mandatories percolate through the Guidelines themselves, in ways that the mandatories do not directly dictate. Even if Congress itself fails to reform the mandatories, the Commission can, without disrespecting congressional intent, mitigate some of these unnecessary consequences of statutory minimum sentences.

⁴⁴ E.g., *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985) (person who acted as translator in a drug negotiation held liable under *Pinkerton* for a murder later committed by one of the principal offenders; rejection of “minor” role claim was in the context of *Pinkerton* rather than 18 U.S.C. §2).

In *quantity-based Guidelines*, I do not support the often-suggested proposal to set Guidelines substantially below the level of the mandatories, with mandatories operating as trumps in cases where they apply. However, the Commission can peg its Guidelines to the congressionally set minimum without being obliged to extrapolate beyond the congressionally set level when the applicable quantities are greater. Above the quantities used as statutory benchmarks, the Commission need not rely on a quantity-based metric. Instead, the Commission can – and as a matter of sound policy *should* – regard the statutory benchmark as exhausting the normal relevance of quantity alone. Additional sentence enhancements should be based on behaviorally relevant circumstances – leadership role in conduct more extensive than that indicated by the base level quantity, personal involvement in acts of violence, prior record and so on.

The Guideline principles for determining “*relevant conduct*,” when read in connection with the Application Notes to §1.B.1.3(a), avoid much of the potential overbreadth of *Pinkerton* by rejecting automatic liability for foreseeable conduct that furthers the conspiracy as a whole. Instead §1.B.1.3(a) limits a defendant’s responsibility to reasonably foreseeable conduct that furthers the *jointly undertaken* criminal activity. Nonetheless, the application of this test is often vague or otherwise problematic, especially in the context of drug offenses. As the Application Notes themselves acknowledge, “the scope of the jointly undertaken criminal activity may depend upon [how] . . . the particular circumstances . . . [are] more appropriately viewed”⁴⁵ Moreover, the reasonable foreseeability test – under *any* formulation – tends to impose

⁴⁵ U.S. Sentencing Guidelines §1B1.3, Application Note 2(c)(8) (2009).

overly broad liability, as the Model Penal Code Commentaries and the many state decisions rejecting *Pinkerton* have demonstrated.⁴⁶

Pinkerton is embedded in federal criminal law as a test of culpability for substantive offenses, but it is not required – and it often has inappropriate effects – when used as a basis for computing relevant conduct for Sentencing Guideline purposes. This problem becomes especially acute in the drug guidelines because three distorting circumstances interact: downward adjustments for role in the offense are limited, relevant conduct is quantity driven, and finally – of crucial importance here – those relevant-conduct quantities in turn are driven not by behaviorally significant circumstances but instead by arbitrary drug weights specified by statute. As a result, the untoward effects of the mandatories infect Guideline sentencing even in cases to which the mandatories do not directly apply.

As a remedy for this problem, I suggest that the definition of relevant conduct under §1B1.3(a) (1) should extend only to conduct that meets the test for accomplice liability under §1B1.3(a)(1)(A). In other words, §1B1.3(a)(1)(B) should be deleted, either generally or at least with respect to the determination of drug quantities for purposes of §2D1.1. The merits of this proposal can be tested by applying it to the various examples provided in §1B1.3, Application Note 2. In every instance in which accountability for the conduct of a co-felon is appropriate, it should be possible to reach that result under §1B1.3(a)(1)(A), without reliance on the “reasonable foreseeability” test of §1B1.3(a)(1)(B).

⁴⁶ See note 43, *supra*.

Again, I am very grateful for this opportunity to address the issues raised by
mandatory minimum sentences.

APPENDIX

Cooperation in Law Enforcement

(percentage willing to cooperate, by perceptions of procedural justice)

**Table 1: All Respondents
(N = 1653)**

Procedural justice quartiles	Work with the police	Report crime
Low	51	32
	55	46
	53	48
High	61	67
Difference	+10 (+20%)	+35 (+109%)

**Table 2: White Respondents
(N = 550)**

Procedural justice quartiles	Work with the police	Report crime
Low	39	28
	39	47
	42	52
High	55	72
Difference	+16 (+41%)	+44 (+157%)

**Table 3: African American Respondents
(N = 455)**

Procedural justice quartiles	Work with the police	Report crime
Low	54	33
	56	47
	56	44
High	58	58
Difference	+4 (+7%)	+25 (+76%)

**Table 4: Hispanic Respondents
(N = 410)**

Procedural justice quartiles	Work with the police	Report crime
Low	50	34
	62	48
	67	47
High	77	66
Difference	+27 (+54%)	+32 (+94%)

Source: T. Tyler & S. Schulhofer, Tables constructed from data described in T. R. Tyler & J. Fagan, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?, 6 Ohio St. J. Crim. L. 231 (2008).