

## POLICY VIEWS ABOUT MANDATORY MINIMUM PENALTIES

### A. INTRODUCTION

This chapter presents an overview of the policy views of stakeholders in the federal criminal justice system about mandatory minimum penalties.<sup>458</sup> This chapter first presents a discussion of the policy views favoring mandatory minimum penalties, followed by a discussion of policy views disfavoring mandatory minimum penalties.

### B. POLICY VIEWS IN FAVOR OF MANDATORY MINIMUM PENALTIES

#### 1. *Promotion of Uniformity in Sentencing and Avoidance of Unwarranted Disparity*

Some view mandatory minimum penalties as promoting uniformity and reducing unwarranted disparities because such penalties require courts to impose similar sentences for similar offenses.<sup>459</sup> For example, according to Dr. David B. Mulhausen of the Heritage Foundation, “[i]f judges tend to impose sentences at the minimum required by the mandatory statutes, then similar offenders convicted of the same offense should receive the same sentences.”<sup>460</sup> Indeed, Congress enacted many mandatory minimum penalties, together with the then-mandatory guidelines system, as part of its effort in the 1980s to narrow judicial sentencing discretion and curb what it viewed as unduly disparate and lenient sentences.<sup>461</sup>

According to some, the importance of mandatory minimum penalties in ensuring uniformity has increased after *Booker*. The Department of Justice has observed that sentencing

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<sup>458</sup> See Chapter 1 for a discussion of the methodology the Commission used to obtain the views of various stakeholders regarding mandatory minimum penalties. By presenting an overview of contemporary perspectives on mandatory minimum penalties, this chapter complements the discussion in Chapter 2 of the historical development of mandatory minimum penalties and the various views of stakeholders over time regarding their efficacy.

<sup>459</sup> See Prepared Statement of Sally Quillian Yates, U.S. Attorney, Northern District of Georgia, to the Commission, at 8 (May 27, 2010) (on behalf of the U.S. Department of Justice); Prepared Statement of David Hiller, National Vice President, National Fraternal Order of Police, to the Commission, at 4 (May 27, 2010).

<sup>460</sup> Prepared Statement of David B. Mulhausen, Senior Policy Analyst, Heritage Foundation, to the Commission, at 10 (May 27, 2010); see Stanley Sporkin & Asa Hutchinson, Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1295 (1999) (statement of Rep. Hutchinson) (“[Y]ou have to have a sentencing pattern that has uniformity across it, that sends the right signals . . .”).

<sup>461</sup> See Yates, *supra* note 459, at 8; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (recounting the history of the Federal indeterminate sentencing system and the legislative history of the Sentencing Reform Act); see also William Austin & Thomas A. Williams, III, *A Survey of Judges’ Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306 (1977) (finding judges imposed different sentences under pre-guidelines sentencing system based upon identical case information); Judge Marvin E. Frankel, *Lawlessness in Sentencing*, 41 CINN. L. REV. 1 (1972) (discussing problems with the pre-guidelines sentencing system, especially the wide-range of discretion granted sentencing judges that the author argued resulted in disparate sentences).

disparities have increased under the advisory guidelines system because for “offenses for which there are no mandatory minimums, sentencing decisions have become largely unconstrained as a matter of law.”<sup>462</sup> According to the Department of Justice, “this has led to greater variation in sentencing,” which “in turn undermines the goals of sentencing to treat like offenders alike, eliminate unwarranted disparities in sentencing, and promote deterrence through predictability in sentence.”<sup>463</sup> After *Booker*, some prosecutors have charged offenses carrying mandatory minimum penalties in order to narrow the sentencing court’s discretion.<sup>464</sup> One judge testified that, even if mandatory minimum penalties presented problems under the pre-*Booker* sentencing scheme, they now serve to ensure needed sentencing uniformity.<sup>465</sup>

## 2. *Protection of the Public through Certainty in Punishment, Deterrence, and Incapacitation*

Another policy rationale in favor of mandatory minimum penalties is that they protect the public. For example, the Department of Justice believes that, working hand-in-hand with the advisory guideline system, “mandatory minimum statutes remain important to promote the goals of sentencing and public safety.”<sup>466</sup> Indeed, law enforcement officials have historically urged the enactment of mandatory minimum penalties.<sup>467</sup>

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<sup>462</sup> Yates, *supra* note 459, at 7. In 2003, the last full fiscal year before the Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which held that a sentence imposed under Washington State guidelines violated Sixth Amendment right to jury trial, 69.4% of all sentences were within the applicable guideline range, 22.2% were government-sponsored below range sentences, 7.5% were non-government-sponsored below range sentences, and 0.8% were above the guideline range sentences. See U.S. SENT’G COMM’N, ANNUAL REPORT 37 (2003). In 2010, five years after the Supreme Court’s *Booker* decision, 55.0% of all sentences were within the applicable guideline range, 25.4% were government sponsored below range sentences, 17.8% were non-government sponsored below range sentences, and 1.8% were above range sentences. See U.S. SENT’G COMM’N, ANNUAL REPORT 33 (2010); see also U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (March 2010).

<sup>463</sup> Yates, *supra* note 459, at 7; see also 155 CONG. REC. S10,704 (daily ed. Oct. 22, 2009) (statement of Sen. Specter) (“Since [*Booker*], sentencing judges have wide discretion to impose sentences on criminal defendants unless mandatory minimum sentences are applicable . . . . [Without mandatory minimums], there will be no certainty of punishment nor effective deterrence for serious [] crimes.”).

<sup>464</sup> See Testimony of Patrick J. Fitzgerald, U.S. Attorney, Northern District of Illinois, to the Commission, at 252 (Sept. 2009) (“[A] prosecutor is far less willing to forego charging a mandatory minimum sentence when prior experience shows that the defendant will ultimately be sentenced to a mere fraction of what the guidelines range is.”).

<sup>465</sup> See Testimony of Judge Dennis W. Shedd, U.S. Court of Appeals for the Fourth Circuit, to the Commission, at 27 (Feb. 2009) (“I do understand how people saw mandatory minimums as a problem for the guideline sentencing scheme as it existed pre-*Booker*. I’m not sure it’s a problem now. I think it may be one way to get some uniform sentencing in some dire cases . . . . I think maybe the world has flipped on mandatory minimums.”).

<sup>466</sup> Yates, *supra* note 459, at 8.

<sup>467</sup> See, e.g., U.S. Department of Justice, *Attorney General’s Task Force on Violent Crime: Final Report* 30 (Aug. 17, 1981) (recommending “legislation to require a mandatory sentence for those convicted of the use of a firearm in the commission of a federal felony . . . [that is] severe enough to have the necessary deterrent force.”); *Armed Career Criminal Act of 1983: Hearing on S. 52 Before S. Comm. on the Judiciary*, 98th Cong. 22 (1983) (statement of William Cahalan, Prosecuting Attorney, Wayne County, Michigan) (“I’m particularly impressed with the

According to those who hold this view, mandatory minimum penalties deter crime by imposing certain, predictable, and generally severe punishment.<sup>468</sup> Because mandatory minimum penalties require a certain term of incarceration, they are viewed as “an effective means of alerting would-be offenders to the consequences of certain illegal conduct.”<sup>469</sup> According to the Department of Justice, sentencing reforms in the 1980s, including the enactment and enhancement of many mandatory minimum penalties, helped reduce crime rates.<sup>470</sup> Some prosecutors and police officers report that the certainty of punishment provided by mandatory minimum penalties is “critical” to law enforcement efforts.<sup>471</sup> Furthermore, some scholars believe that the severity of mandatory minimum penalties increases their deterrent effect by raising the “cost” of committing crime to would-be offenders.<sup>472</sup>

In addition to their deterrent effect, some policymakers assert that mandatory minimum penalties reduce crime by incapacitating criminals and protecting the public from their potential future offenses.<sup>473</sup> For example, law enforcement officers have reported to the Commission that

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mandatory minimum sentence . . . because I think that puts real teeth in [the proposed law.]”); *Comprehensive Drug Penalty Act: Hearing on H.R. 3272, H.R. 3299, and H.R. 3725, Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 155 (1983) (statement of Jeffrey Hochman, Special Counsel, Fort Lauderdale Police Department) (“I am glad to see that the Federal Government . . . realiz[es] that the only thing that people that [traffic in drugs] understand is . . . minimum mandatory jail sentences, which in Florida . . . are pretty tough these days.”).

<sup>468</sup> See, e.g., Hiller, *supra* note 459, at 3 (“The effectiveness of deterrence is difficult to quantify, but the establishment of specific and hopefully harsh penalties for serious crimes is to deter individuals from engaging in these crimes in the future, leading – in theory – to a reduction in crime.”); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Rep. Hutchinson) (“[A] five-year mandatory minimum for someone who has 5.1 grams of crack cocaine [has] a positive impact on the deterrence of crime and that is good for society . . . .”); Charles R. Tittle & Alan R. Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 SOC. FORCES 455 (June 1974) (finding that certainty of imprisonment deters the commission of offenses); Greg Pogarsky, *Identifying “Deterrable” Offenders: Implications for Research on Deterrence*, 19 JUST. Q. 431, 445 (2002) (“[T]he present study found that among deterrable offenders, sanction severity provided a greater deterrent than sanction certainty.”); David McDowall, Colin Loftin, & Brian Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes*, 83 J. CRIM. L. & CRIMINOLOGY 378, 379 (1992) (suggesting mandatory sentencing enhancements for firearms deterred homicides but had an inconclusive effect on assaults and robberies); Donald E. Lewis, *The General Deterrent Effect of Longer Sentences*, 26 BRIT. J. CRIMINOLOGY 47, 60 (1986) (finding evidence of deterrent effect from longer sentences).

<sup>469</sup> Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT’G REP. 230, 230 (1992).

<sup>470</sup> See Yates, *supra* note 459, at 5-6 (noting that the “experience of law enforcement reinforces this research [showing that sentencing and correction policies reduced crime] and shows that there are tangible benefits to law enforcement and public safety from mandatory sentencing laws”).

<sup>471</sup> See *id.* at 8; Hiller, *supra* note 460, at 155; see also Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y. 13, 37-38 (2011) (finding strong evidence that certainty of punishment has a large deterrent effect); Tittle & Rowe, *supra* note 468, at 455.

<sup>472</sup> See Mulhausen, *supra* note 460, at 9-10 (“Incentives matter; Raising the costs of crime will deter a significant number of crimes and protect potential victims.”); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968) (“The cost to each offender would be greater the longer the prison sentence, since both foregone earnings and foregone consumption are positively related to the length of sentences.”).

<sup>473</sup> *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Rep. Forbes); Mueller, *supra* note 469, at 230 (“Furthermore, the imposition of prescribed minimum prison terms enhances public safety by

incapacitation through mandatory minimum penalties has reduced methamphetamine- and firearm-related crime.<sup>474</sup> Chief Maxwell Jackson of Harrisville, Utah, who testified before the Commission on behalf of the nation’s rural law enforcement officers, explained that federal charges in rural communities are brought only against the “worst of the worst” drug offenders and the mandatory minimum penalties “remove these most extreme offenders from society for long periods of time.”<sup>475</sup>

### 3. Retribution

Some view mandatory minimum penalties as an important means of expressing society’s disdain for an offense. Congressman Asa Hutchinson argued that the “strongest justification” for mandatory minimum penalties is that they give society the “means of expressing its outrage toward certain offenses that are so harmful to the public.”<sup>476</sup> Dr. Mulhausen similarly testified that some mandatory minimum penalties can be justified solely by reference to retributive goals: “While utilitarian principles of deterrence and incapacitation can add additional support, some crimes are so heinous that legislatures have a moral responsibility to establish sentencing floors that do not involve probation or fines.”<sup>477</sup>

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incapacitating dangerous offenders for substantial periods, thus preventing numerous instances of death, injury, and loss of property.”); *see also* Sporkin & Hutchinson, *supra* note 460, at 1283 (statement of Rep. Hutchinson) (“[M]andatory minimum penalties appear to be effective. Violent crime has declined seven years in a row. Murder is down thirty-one percent since 1991. Robbery is down thirty-two percent. . . . [M]andatory minimum sentences and tough penalties has [sic] had the effect of a lower crime rate in the United States.”); Joan Petersilia & Peter W. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, RAND Corp. (Oct. 1977) (demonstrating that the mandatory incarceration of offenders to minimum prison terms of various durations prevent additional crimes committed by the offenders); Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC’Y REV. 581 (1975) (suggesting violent crime can be significantly reduced by mandatory incarceration due to the incapacitation of offenders).

<sup>474</sup> *See* Prepared Statement of Maxwell Jackson, Chief of Police, Harrisville, Utah, to the Commission, at 2 (May 27, 2010); Hiller, *supra* note 459, at 4; *see also* *Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. at 3 (July 1999) (statement of Peter Reuter & Susan Everingham, RAND Drug Policy Research Center) (suggesting that mandatory minimum penalties applied only to high-level drug dealers might be more cost-effective than conventional enforcement).

<sup>475</sup> Jackson, *supra* note 474, at 2; *see* Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, & James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money*, RAND Drug Research Policy Center, at 77 (1997) (noting that federal law enforcement is better at targeting high-level drug dealers, while local law enforcement is better able to respond to problems caused by street-level dealers).

<sup>476</sup> Sporkin & Hutchinson, *supra* note 460, at 1282 (Statement of Rep. Hutchinson) (“It is fundamentally appropriate for the people, through their elected representatives, to express outrage toward certain conduct that is harmful to the public generally.”); *see also* Mueller, *supra* note 469, at 230 (“[Mandatory minimum penalties] are important as expressions of Congressional concerns and, ultimately, as benchmarks for the base offense levels specified by the Commission in the guidelines.”). Mr. Hutchinson recently testified before the Commission that he has “no problem with the concept of mandatory minimums. [F]or the Congress of the United States . . . to express outrage at a particular societal problem through a mandatory minimum, I think can be appropriate.” *Testimony of Asa Hutchinson to the Commission*, at 170 (June 1, 2011).

<sup>477</sup> Mulhausen, *supra* note 460, at 9 (noting also that “mandatory minimum sentences that establish long incarceration or death sentences for very serious and violent crimes can be justified based solely on the doctrine of

#### 4. *Effective Law Enforcement Tool that Induces Pleas and Cooperation*

Many in the law enforcement community view mandatory minimum penalties as an important investigative tool. The threat of a mandatory minimum penalty gives law enforcement leverage over defendants, who may be encouraged to cooperate in exchange for lesser charges or safety valve and substantial-assistance benefits.<sup>478</sup> Commissioner Raymond Kelly of the New York Police Department testified that the potential application of more severe penalties in federal court “has convinced a number of suspects to give up information.”<sup>479</sup> Similarly, the Department of Justice views mandatory minimum penalties as an “essential” and “critical tool” in obtaining “cooperation from members of violent street gangs and drug distribution networks.”<sup>480</sup>

#### 5. *Assistance to State and Local Law Enforcement*

Another justification for federal mandatory minimum penalties relates to the relationship between state and federal law enforcement. Then-Assistant Attorney General Mueller stated that because of the substantial concurrent state and federal jurisdiction in many drug and firearm cases, if “a state sentence for one of these crimes is inappropriately low, the existence of a substantially higher, federal mandatory minimum ensures a sentence that protects the public.”<sup>481</sup> In their testimony to the Commission, Commissioner Kelly and Chief Jackson made the related

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just deserts”); *see also* The Constitution Project, *Principles for Design and Reform of Sentencing Systems: A Background Report* 26 (May 13, 2010) (“[T]here are indisputably some offenses, such as forcible rape or premeditated murder, for which, by any standard, the minimum legally allowable punishment should include a term of imprisonment.”), *available at* <http://www.constitutionproject.org/pdf/34.pdf>.

<sup>478</sup> *See* Stephanos Bibas, *Plea-Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2485 (2004) (“In exchange for substantially assisting the investigation or prosecution of others, defendants may earn sentences far lower than the [Sentencing] Guidelines and even mandatory minima would otherwise provide.”); Fitzgerald, *supra* note 464, at 248 (“Mandatory minimum sentences have been a very effective tool in prosecuting particularly violent offenders. The threat of a mandatory minimum sentence has caused many persons charged with these offenses to become cooperative witnesses, often testifying against persons with greater responsibility in the drug or gang organization.”); John C. Jeffries, Jr., & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1119-21 (1995) (concluding that “onerous mandatory minimum sentences,” along with the sentencing guidelines, “has produced far more cooperation and accomplice testimony in organized crime cases than occurred in the pre-Guidelines era . . . especially when [the cases] involve murder or large amounts of narcotics.”); *see also Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of Christopher A. Wray, Assistant Attorney General) (“Cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court.”).

<sup>479</sup> Prepared Statement of Raymond W. Kelly, Commissioner, New York Police Department, to the Commission, at 4 (July 10, 2009).

<sup>480</sup> Yates, *supra* note 459, at 9; *See also* Fitzgerald, *supra* note 464, at 248.

<sup>481</sup> Mueller, *supra* note 469, at 230.

point that the prospect of being convicted of a federal statute carrying a mandatory minimum penalty induces defendants to plead to state charges.<sup>482</sup>

### C. POLICY VIEWS AGAINST MANDATORY MINIMUM PENALTIES

#### 1. *Contribution to Excessive Uniformity and Unwarranted Disparity*

One of the policy views advanced against mandatory minimum penalties is that they result in excessive uniformity by requiring similar sentences for dissimilar offenders. For example, “one of the [principal] flaws of mandatory minimums is that they apply one-size-fits-all sentences to defendants who are not equally culpable.”<sup>483</sup> As one scholar explained:

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*.<sup>484</sup>

In the American Bar Association’s view, “[t]reating unlike offenders identically is as much a blow to rational sentencing policy as is treating similar offenders differently.”<sup>485</sup>

Many believe that mandatory minimum penalties result in arbitrary and disparate sentences because they rely on certain specified triggering facts to the exclusion of all others.<sup>486</sup>

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<sup>482</sup> Kelly, *supra* note 479, at 4; Jackson, *supra* note 473, at 2; *see also Armed Career Criminal Act of 1983, supra* note 468, at 26 (statement of William Cahalan, Prosecuting Attorney, Wayne County, Michigan.) (“[B]ut if there was the thought that they were going over to the Federal system and face a mandatory 15 years, that would be an inducement to plead guilty in our [state] system.”).

<sup>483</sup> Prepared Statement of Jay Rorty, American Civil Liberties Union, to the Commission at 5 (May 27, 2010); *see* 149 Cong. Rec. H 3072 (daily ed. Apr. 10, 2003) (statement of Rep. Kilpatrick) (“I am not a proponent of mandatory minimums . . . [t]here should not be a one-size-fits-all sentencing structure when judges are determining incarceration of a human being.”).

<sup>484</sup> Prepared Statement of Steven J. Schulhofer, NYU School of Law, to the Commission at 10 (May 27, 2010); Rorty, *supra* note 483, at 5.

<sup>485</sup> Prepared Statement of James E. Felman, American Bar Association, to the Commission, at 10 (May 27, 2010); *see also* Bureau of Justice Assistance, U.S. Department of Justice, *National Assessment of Structured Sentencing* 127 (1996) (“It is clear from the experiences of many States that the increased use of mandatory minimum penalties is interfering with achievement of the dual goals of reducing disparity and controlling correctional population growth.”).

<sup>486</sup> Testimony of Chief Judge Robert J. Conrad, Jr., U.S. District Court for the Western District of North Carolina, to the Commission, at 129 (Feb. 11, 2009) (“Statutory mandatory minimum punishments and the guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, and use of special skill.”). *See also* Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANT. CRIMINOLOGY 155 (2009) (finding that

“[W]henever 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.”<sup>487</sup> For example, so-called “sentencing cliffs” occur when an offender’s “conduct just barely brings him within the terms of the mandatory minimum.”<sup>488</sup> In such a case, the offender is subject to a significantly higher sentence than an offender whose conduct fell just outside the scope of the mandatory minimum penalty, even though his or her conduct was only marginally different.<sup>489</sup> For example, a defendant convicted of trafficking 100 grams of heroin would be subject to the five-year mandatory minimum penalty while one who sold only 99 grams of the drug would not, meaning that these defendants are subject to substantially different sentences despite nearly identical conduct.<sup>490</sup>

A majority of judges believe that mandatory minimum penalties contribute to sentencing disparity. In a 2010 Commission survey of United States District Judges on a range of sentencing issues, 52 percent of judges ranked mandatory minimum penalties among the top three factors contributing to sentencing disparity.<sup>491</sup> In contrast, 78 percent believed that the sentencing guidelines have reduced unwarranted sentencing disparities among similarly situated defendants.<sup>492</sup>

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overreliance on drug quantity, without adequate adjustments for offender culpability, results in excessive uniformity where major, mid-level, and minor offenders receive similar sentences).

<sup>487</sup> Prepared Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, to the Commission, at 25 (May 27, 2010).

<sup>488</sup> Schulhofer, *supra* note 484, at 9-10; See Steven A. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

<sup>489</sup> See Prepared Statement of Erik Luna, Cato Institute, to the Commission at 2 (May 27, 2010) (describing sentencing cliffs as the by-product of “seemingly trivial lines that carry huge consequences” in statutes with mandatory minimum penalties); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194-95 (1993) (noting that mandatory minimum penalties create “cliff effects” because they do not “provide for graduated increases in sentence severity” and instead provide for “sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record”).

<sup>490</sup> Schulhofer, *supra* note 484, at 9-10; Prepared Statement of Steven Saltzburg, George Washington University School of Law, to the Commission, at 6 (May 27, 2010). A person convicted of a drug trafficking offense that involved 100 grams or more of a mixture containing heroin is subject to a penalty of not less than five years and not more than 40 years imprisonment. See 21 U.S.C. § 841(b)(1)(B). If the offense involved 99 grams or less of the same heroin mixture, the person is subject to a penalty of not more than 20 years imprisonment. See 21 U.S.C. § 841(b)(1)(C).

<sup>491</sup> U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 tbl. 16 (June 2010) [hereinafter 2010 Survey Results].

<sup>492</sup> *Id.* at tbl. 17.

## 2. *Excessive Severity and Disproportionality*

Many view current federal mandatory minimum penalties as producing sentences that are excessively harsh relative to the gravity of the offense committed, in part because “all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime.”<sup>493</sup> According to the Judicial Conference of the United States, mandatory minimum penalties end up sweeping broadly because

a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator . . . . The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct.<sup>494</sup>

One scholar explains that many sentences seem disproportionate to the offense because “Congress did not link the minimum [sentence] to its picture of the least serious version of an offense,” but rather to “an especially serious offender, and chooses as the ‘minimum’ [a] sentence that it considers appropriate for him. As a result, Congress sets ‘minimum’ sentences that are far too severe.”<sup>495</sup>

Some critics, including the late Chief Justice William H. Rehnquist, cite Congress’s political concerns as a reason why mandatory minimum statutes are excessively severe.<sup>496</sup>

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<sup>493</sup> Saltzburg, *supra* note 490, at 5; *See Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 42 (2009) (statement of Chief Judge Julie E. Carnes, U.S. District Court for the Northern District of Georgia, on behalf of the Judicial Conference of the United States) (although there may be some offenses “that are so unambiguous or heinous in nature that no examination of any fact other than the commission of the crime itself” is required to determine the appropriate sentence, “[m]ost criminal conduct . . . does not lend itself to such narrow scrutiny”); Felman, *supra* note 485, at 8.

<sup>494</sup> Carnes, *supra* note 493, at 38 (arguing that mandatory minimum penalties also produce unfair and irrational sentences that undermine public confidence in the judicial system and waste public resources by incarcerating offenders for longer than necessary); *see* Bibas, *supra* note 478, at 2487 (“All too often . . . sentencing guidelines and statutes act as sledgehammers rather than scalpels. This is particularly true of statutory minima and maxima, which are packaged in large, discrete chunks.”); *see also* The Constitution Project, *supra* note 477, at 36 (“[O]nce a mandatory minimum sentence has been enacted for a crime type, repeated increases in the minimum sentence for the same crime are even more problematic than increases in statutory maximum sentences since mandatory sentences necessarily affect all defendants convicted of an offense, while increases in statutory maximum sentences need have no impact on any particular defendant.”).

<sup>495</sup> Schulhofer, *supra* note 484, at 11. *See also* Prepared Statement of Julie Stewart, President, Families Against Mandatory Minimums, to the Commission, at 1-2 (May 27, 2010); Nachmanoff, *supra* note 487, at 2 (concluding that mandatory minimum statutes require excessive sentences for “tens of thousands of less serious offenders who are not dangerous”); Testimony of C. Warren Maxwell, Deputy Chief U.S. Probation Officer, District of Connecticut, to the Commission, at 187 (July 9, 2009) (“Sentencing length in mandatory minimums seems to have been chosen arbitrarily without much regard to research in what is most effective in deterring crime and reducing recidivism.”).

<sup>496</sup> *See* William H. Rehnquist, Chief Justice of the United States, *Luncheon Address* (June 18, 1993), in Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 287 (1993)



Some scholars argue that mandatory minimum penalties produce disproportionately high sentences even for offenders not subject to such penalties “because all [federal offenders] are subject to guidelines that have been set to incorporate the mandatory minimums.”<sup>497</sup> These observers believe increasingly severe mandatory minimum penalties have “impelled the [Commission] to increase many sentences to maintain some consistency in the Guidelines” and have caused higher sentences “virtually across the board.”<sup>498</sup> For example, some believe that the linkage between the drug guidelines and mandatory minimum penalties “maintains proportionality only with mandatory punishment levels that are overly severe—in effect spreading the disproportionality inherent in mandatory minimums to every offender at every quantity level.”<sup>499</sup> In the Commission’s 2010 survey of judges, 58 percent of the respondents were in favor of de-linking the guidelines from the mandatory minimum penalties, 22 percent were against doing so, and 19 percent had no opinion.<sup>500</sup>

The Department of Justice has stated that “there are real and significant excesses in terms of the imprisonment meted out for some offenders under existing mandatory sentencing laws, especially for some non-violent offenders.”<sup>501</sup> The Department of Justice explained that “[m]andatory minimum sentencing statutes in the federal system now apply to a significant array of serious crimes; and they also, by and large, mandate very severe imprisonment terms.”<sup>502</sup>

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(“Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”). See also Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 24 (2010) (“[F]ederal lawmakers have explicitly used phrases like ‘tough on crime’ in their support for mandatory minimums, with some of the most notorious sentencing laws originating from symbolic politics.”); Testimony of Chief Judge Vaughn R. Walker, U.S. District Court for the Northern District of California, to the Commission, at 43 (May 28, 2009) (“The minimum mandatories in drug cases, child pornography cases, and so forth were enacted in reaction to a perceived political need at the time. Over time . . . the political need diminishes.”); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) (“Mandatory minimum sentencing was clearly an effort to be tough on crime. Congress was frustrated. They wanted to get rid of the drug scourge and Congress thought that putting violators of the drug laws in jail for long terms would cure the problem.”).

<sup>497</sup> Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 3 (1994).

<sup>498</sup> Felman, *supra* note 485, at 9.

<sup>499</sup> Rorty, *supra* note 483, at 5-6.

<sup>500</sup> See 2010 SURVEY RESULTS, *supra* note 491, at tbl. 3.

<sup>501</sup> Yates, *supra* note 459, at 6-7. In the Sentencing Project’s *Downscaling Prisons: Lessons from Four States* (2010), Judith Greene and Marc Mauer recount the rise in the prison populations of New York, Michigan, and New Jersey resulting in part from the institution of mandatory minimum penalties for drug offenses, including low-level offenders. For example, in 1973, New York Governor Nelson Rockefeller supported legislation imposing a fifteen-year mandatory minimum penalty for the sale of two ounces or possession of four ounces of a narcotic drug. Enactment of the “Rockefeller Drug Laws” increased the proportion of drug offenders in the state’s prison population from 11% to 34%. *Id.* at 6. The report also recounts recent sentencing reforms, including the reduction or elimination of mandatory minimum penalties, in New York, Michigan, New Jersey, and Kansas, that reduced those states’ prison expenditures. *Id.* at 60.

<sup>502</sup> Yates, *supra* note 459, at 6.

This, in turn, has produced exponential growth in the federal prison population since the 1980s, and the federal Bureau of Prison's overcapacity "has real and detrimental consequences for the safety of prisoners and guards, effective prisoner reentry, and ultimately, public safety."<sup>503</sup> For this reason, the Department of Justice suggests "some reforms of existing mandatory minimum sentencing statutes are needed . . . to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population."<sup>504</sup>

Many judges also believe mandatory minimum penalties are too severe overall, with about 62 percent of judges responding to the 2010 Commission survey stating that such penalties across all offenses were "too high."<sup>505</sup> The judges' opinions were more nuanced, however, with regard to specific offenses. More than 50 percent of judges surveyed believed that the mandatory minimum penalties were appropriate in drug trafficking offenses involving heroin (55%), powder cocaine (52%), and methamphetamine (53%), while most of the surveyed judges described the penalties for crack cocaine (76%) and marijuana (54%) offenses as "too high."<sup>506</sup> In firearms cases, approximately 60 percent of judges who responded in the 2010 Commission survey believed that the mandatory minimum sentences were appropriate for firearm offenders convicted of 18 U.S.C. § 924(c) and (e). Two percent stated that those sentences were too low, while approximately 40 percent responded that they were too high.<sup>507</sup> With regard to child pornography offenses, most judges felt that the applicable mandatory minimum penalties were appropriate for production and distribution offenses (67% and 57%, respectively), with far fewer responding that these penalties were too high (37% and 23%, respectively). In contrast, 71 percent of respondents stated that the mandatory minimum penalty for *receipt* of child pornography was too high, with only 26 percent believing it to be appropriate. For all other child exploitation offenses, 68 percent of respondents believed the sentences were appropriate, 26 percent believed they were too high, and 6 percent believed they were too low.<sup>508</sup>

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<sup>503</sup> *Id.* at 7; see Pew Center on the States, *One in 100: Behind Bars in America* 5, 11 (Feb. 2008) ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258. With the number of adults [in the United States] just shy of 230 million, the actual incarceration rate is 1 in every 99.1 adults."); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) ("[I]t's a terrible thing that we're doing with mandatory minimums. . . . [W]e're putting more people in prisons, we're building more prisons, it's costing us tremendous amounts of money.").

<sup>504</sup> Yates, *supra* note 459, at 8, 9-10.

<sup>505</sup> See 2010 SURVEY RESULTS, *supra* note 491, at tbl. 1.

<sup>506</sup> *Id.* Note that this survey was conducted prior to enactment of the Fair Sentencing Act of 2010, Pub. L. 111-220, which among other things increased the quantity of crack cocaine required to trigger the 5-year and 10-year mandatory minimum penalties from 5 and 50 to 28 and 280 grams, respectively. Chapter 8 of this Report reviews current sentencing data about offenders convicted of drug offense statutes carrying mandatory minimum penalties.

<sup>507</sup> *Id.* Chapter 9 of this Report reviews current sentencing data about offenders convicted of firearms offense statutes carrying mandatory minimum penalties.

<sup>508</sup> *Id.* Chapter 10 of this Report reviews current sentencing data about offenders convicted of sex offense statutes carrying mandatory minimum penalties.

### 3. Lack of Individualized Sentencing

Critics often argue that mandatory minimum penalties conflict with the goal of individualized sentencing.<sup>509</sup> For instance, the Judicial Conference has long urged Congress “to reconsider the wisdom”<sup>510</sup> of mandatory minimum penalties because they “block judges from considering the individual circumstances of particular cases.”<sup>511</sup> Because mandatory minimum penalties may prevent a judge from considering all (or even most) of the pertinent facts and circumstances of the case (such as offender characteristics<sup>512</sup>), the resulting sentence may be unfair or irrational.<sup>513</sup> Likewise, the American Bar Association has also called for the repeal of federal mandatory minimum penalties after concluding that they are “inconsistent with the notion of individualized sentencing within a guided discretion regime.”<sup>514</sup> Moreover, there is significant agreement with the Judicial Conference and the ABA among judges, lawmakers, practitioners, scholars, and advocacy groups.<sup>515</sup>

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<sup>509</sup> See Justice Kennedy Commission, American Bar Association, *Reports with Recommendations to the ABA House of Delegates 27* (August 2004) available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_kennedy\\_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf); See also Chief Judge Walker, *supra* note 495, at 42 (“[T]he minimum mandatory sentences of course are troubling for all of us in many cases because they don’t necessarily adequately reflect the tremendous variations in the particular facts and circumstances of the case.”).

<sup>510</sup> See Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States 16* (1990), available at <http://www.uscourts.gov/judconf/90-Mar.pdf>.

<sup>511</sup> *Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007) (statement of Judge Paul G. Cassell on behalf of the Judicial Conference of the United States).

<sup>512</sup> Saltzburg, *supra* note 490, at 5.

<sup>513</sup> Judge Carnes, *supra* note 493, at 38 (arguing that mandatory penalties also produce unfair and irrational sentences that undermine public confidence in the judicial system and waste public resources by incarcerating offenders for longer than necessary).

<sup>514</sup> Justice Kennedy Commission, *supra* note 509, at 26-27.

<sup>515</sup> See, e.g., Letter from Sen. Patrick J. Leahy, Chairman, Senate Judiciary Committee, to Judge William K. Sessions, Chair, U.S. Sentencing Commission (Aug. 30, 2010), available at [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20100825/SenLeahy\\_2011PolicyPriorities.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100825/SenLeahy_2011PolicyPriorities.pdf) (“I am concerned that the creation of mandatory minimum penalties too often ties the hands of judges and prosecutors and can result in unjust sentences. I also worry that mandatory minimum penalties undermine the integrity and consistency of the sentencing guidelines system.”); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38 (2009) (statement of Grover G. Norquist, President, Americans for Tax Reform) (“The benefits, if any, of mandatory minimum sentences do not justify the burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become sort of a poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself.”); 150 CONG. REC. H4809 (daily ed. June 23, 2004) (statement of Rep. Scott) (speaking in opposition to the mandatory minimums penalties created in the Identity Theft Penalty Enhancement Act in 2004, on grounds that that “[b]y adding mandatory minimum sentences and denying probation and concurrent sentences, the bill imposes unnecessary and unproductive restrictions on the ability of the

#### 4. *Transfer of Sentencing Discretion from Judges to Prosecutors*

Mandatory minimum penalties are often viewed as effectively transferring discretion from judges to prosecutors.<sup>516</sup> This transfer of discretion is of concern to some because it both constrains judges' discretion and "shift[s] that discretion to prosecutors, who do not have the incentive, training, or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case."<sup>517</sup>

According to a report of the Constitution Project Sentencing Initiative, co-chaired by former Attorney General Edwin Meese III and Professor Philip B. Heymann, this transfer of sentencing discretion through prosecutorial charging and plea bargaining effectively undercuts the objective of reducing disparity.<sup>518</sup> Others have strongly concurred with this view: "Mandatory minimums effectively transfer sentencing authority from trial judges to federal

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Sentencing Commission and judges, in individual cases, to assure a rational and just system of sentencing as a whole and for individuals").

<sup>516</sup> See, e.g., Justice Kennedy Commission, *supra* note 509 (recommending repeal of mandatory minimum sentences because "they tend to shift sentencing discretion away from courts to prosecutors"). See also Jeffrey T. Ulmer, Megan C. Kurlychek, & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIM. & DELINQ. 427, 451 (2007) ("Our findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion."); Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power. . . . In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence."); see also David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. LAW & ECON. 591, 622 (Oct. 2005) ("[P]rosecutors generally have the discretion to prosecute a defendant for a lesser charge than the initial arrest charge, and the use of such discretion can have dramatic effects on sentencing with respect to mandatory sentencing laws.").

<sup>517</sup> Felman, *supra* note 485, at 12-13; see also Testimony of Judge Gerald Bard Tjoflat, U.S. Court of Appeals for the Eleventh Circuit, to the Commission, at 29 (Feb. 10, 2009) ("One of the problems with mandatory minimums is the prosecutor becomes the sentencer in many cases."); Testimony of Judge Jay C. Zainey, U.S. District Court for the Eastern District of Louisiana, to the Commission, at 29-30 (Nov. 19, 2009) ("[I]t should not be the ultimate responsibility or power of the government to let, to allow us or to enable us to go below the statutory minimum."); Sporkin & Hutchinson, *supra* note 460, at 1286 (statement of Judge Sporkin) ("And yet we're giving that twenty-five or thirty-year-old [Assistant United States Attorney] more discretion than you're giving a fifty-five-year-old judge who's had a lot of jobs and has been through the system and thoroughly vetted."); *Mandatory Minimum Sentences – Are They Being Imposed and Who is Receiving Them?: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 4 (1993) (statement of Henry R. Wray, Director of Administration of Justice Issues, U.S. Government Accounting Office) ("[The General Accounting Office identified] several [Department of Justice] district charging policies and practices that influenced decisions whether to pursue mandatory minimum convictions against certain categories of defendants."); Paul Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 58 (2000) ("It seems likely that use of [firearm sentencing enhancements] as bargaining chips is a major reason for circumvention [of the specified mandatory minimum penalty]."); Judge Cassell, *supra* note 510, at 152; Nachmanoff, *supra* note 487, at 12.

<sup>518</sup> The Constitution Project, *supra* note 477, at 27 ("[T]he existence of mandatory minimum sentences tied to conviction of particular offenses permits manipulation of sentences through differential prosecutorial charging and plea bargaining policies . . . [that] undercuts the objective of reducing disparity.").

prosecutors, who may pre-set punishment through creative investigative and charging practices, producing troubling punishment differentials among offenders with similar culpability.”<sup>519</sup> This shift in discretion is especially problematic, according to some, because prosecutorial decisions are made outside of public view and in an “uncertain and inconsistent” manner.”<sup>520</sup> Justice Anthony Kennedy has observed that even though a prosecutor may act in good faith, the “trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.”<sup>521</sup> In the Commission’s 2010 survey of judges, 66 percent of respondents ranked charging decisions among the top three factors contributing to sentencing disparities.<sup>522</sup>

Moreover, some argue that mandatory minimum penalties can also be used to coerce defendants to plead guilty and waive constitutional rights: “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.”<sup>523</sup> Finally, some believe that the threat of mandatory minimum penalties might cause offenders to give false information,<sup>524</sup> to plead guilty to charges of which they may actually be innocent,<sup>525</sup> or to forfeit a strong defense.<sup>526</sup>

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<sup>519</sup> Luna, *supra* note 489, at 4; *see also id.* at 4-5 (noting that “Prosecutors are influenced by ordinary human motivations that may at times cause a loss of perspective . . . [potentially] leading to the misapplication of mandatory minimums. . . . A sentencing judge is the one neutral actor in the courtroom who benefits from neither harsh punishment nor lenient treatment.”).

<sup>520</sup> Felman, *supra* note 485, at 11-12; *see also Mandatory Minimum Sentences – Are They Being Imposed and Who is Receiving Them?*, *supra* note 517 (“Prosecutors consider many factors in making charging decisions. On the basis of the information in the case files, [the General Accounting Office was] unable to determine for individual cases why a mandatory minimum charge was dropped, reduced, or never brought.”); *National Assessment of Structured Sentencing*, *supra* note 485, at 100 (“By radically constricting judicial discretion, mandatory minimum penalties severely constrain the sentencing process and move the locus of disparity to the charging stage, where it is less visible.”).

<sup>521</sup> Justice Anthony M. Kennedy, U.S. Supreme Court, 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](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html).

<sup>522</sup> *See* 2010 SURVEY RESULTS, *supra* note 491, at tbl. 16.

<sup>523</sup> Nachmanoff, *supra* note 487, at 12; *see Rorty*, *supra* note 483, at 2 (“Then prosecutors used that threat [of mandatory minimum penalties] to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury – all as the price for not being exposed to the higher minimum.”); Luna, *supra* note 489, at 2 (suggesting such practices impose a “trial tax” on defendants who exercise their constitutional right to a jury trial).

<sup>524</sup> *See* Nachmanoff, *supra* note 487, at 13 (“The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.”); Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 931 (1999) (“[F]ormer [Assistant United States Attorneys] . . . readily admit that, in some instances, they simply could not determine if the cooperator had told the truth.”); Prepared Statement of Thomas W. Hillier, II, Constitution Project, to the Commission, at 6-7 (May 27, 2010) (explaining that mandatory minimum penalties “create a powerful incentive for informants and cooperators to provide exaggerated or false information [to prosecutors] . . . [that] is not subjected to the crucible of trial”).

<sup>525</sup> Nachmanoff, *supra* note 487, at 13.

## 5. *Ineffectiveness as a Deterrent or as a Law Enforcement Tool to Induce Pleas and Cooperation*

Some scholars counter the claims made by proponents of mandatory minimum penalties that these penalties serve as an effective deterrent to crime.<sup>527</sup> They note that the research conducted by social scientists and public policy analysts has found little evidence to support the argument that mandatory minimums prevent crime.<sup>528</sup> In fact, many assert it is an increase in the *certainty* of punishment through the prosecution of more offenders that is the more cost-effective deterrent compared to the *severity* of punishment that mandatory minimum penalties or longer sentences provide.<sup>529</sup>

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<sup>526</sup> Prepared Statement of Cynthia Hujar Orr, National Association of Criminal Defense Lawyers, to the Commission, at 8 (May 27, 2010) (“The risk of being sentenced under mandatory minimums effectively precludes defendants from exercising their Sixth Amendment right to a trial. . . . [E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten years or more, a defendant will almost always forego his right to a trial.”).

<sup>527</sup> Some research, in fact, questions the effectiveness of deterrence on crime prevention. See e.g., Dieter Dolling, Horst Entorf, Dieter Hermann, & Thomas Rupp, *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL’Y RES. 201, 216 (2009) (finding a only a slight relationship between punishment and crime deterrence); Gary Kleck, Brion Sever, Spencer Li, & Marc Gertz, *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 653-655 (2005) (implying that a weak relationship exists between general deterrence and the certainty, severity or swiftness of punishment); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (surveying extensively the history and scholarly literature on criminal deterrence and concluding that the perceived severity and certainty of punishment do not appear to be an effective deterrent to crime); National Institute of Justice, U.S. Department of Justice, *Relations between Increases in Certainty, Severity, and Celerity of Punishment for Drug Crimes and Reduction of Crime, Drug Crime, and the Effects of Drug Abuse* 46 (1993) (“Research on the effects of increased certainty, severity, and/or celerity of punishment upon levels of crime is inconclusive.”).

<sup>528</sup> Durlauf & Nagin, *supra* note 471, at 37-38 (finding relatively little reliable evidence that severity of punishment results in a substantial deterrent effect, while strong evidence indicates that certainty of punishment has a large deterrent effect and concluding that lengthy prison sentences, particularly mandatory minimum sentences, are difficult to justify on a deterrence-based, crime-prevention basis); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST 143, 187 (2003) (“We could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence.”).

<sup>529</sup> Valerie Wright, The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (2010) (“Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.”); *Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 2 (July 1999) (statement of Peter Reuter & Susan Everingham, RAND Drug Policy Research Center) (“[Our] principal finding is that spending [a fixed sum of] money on bringing more dealers to justice is superior in terms of the consequent reduction in cocaine consumption . . . [than sentencing fewer dealers to mandatory minimum sentences.]”); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, & P.O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* 45-48, 51-52 (1999) (finding that certainty of punishment has a greater deterrent effect than did severity of punishment and noting little evidence exists suggesting mandatory penalties exert a deterrent effect). Some researchers, however, argue that a balanced approach of both certainty and severity may achieve the best overall result of crime deterrence. Silvia M. Mendes, *Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role in Criminal Deterrence Policy*, 32 POL. STUD. J. 59, 70 (2004) (concluding that neither certainty nor severity should be more important than the other and the best overall result for deterrence policy is produced by a balancing of both components). See also Harold G. Grasmick & George J. Bryjak, *The*

Some also dispute the claims that mandatory minimum penalties are a useful law enforcement tool for the investigation and prosecution of criminals by inducing pleas and cooperation. The American Bar Association has raised a threshold question of whether inducing cooperation is a legitimate sentencing goal.<sup>530</sup> Beyond that threshold question, many observe that the exchange of reduced sentences for information results in “inverted sentencing,” in which offenders with valuable information – kingpins, organizers, and other highly culpable defendants – can avoid mandatory minimum penalties through charge-bargaining and substantial assistance motions while low-level offenders cannot because they lack such valuable information.<sup>531</sup> Others have also argued that mandatory minimum penalties are inefficient investigative tools.<sup>532</sup>

Some further believe that mandatory minimum penalties cause a “cooperation backlash” that occurs “when sentencing practices are viewed as overly severe” and “many citizens become reluctant to assist the law enforcement effort.”<sup>533</sup> Thus, while mandatory minimum penalties can increase cooperation by offenders who face those punishments, they “can chill the willingness of citizens to cooperate with law enforcement at the early stages of investigation and arrest.”<sup>534</sup> One witness viewed mandatory minimum penalties as superfluous because many defendants will assist authorities in exchange for a less severe sentence, regardless of whether a mandatory minimum penalty applies.<sup>535</sup>

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*Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471, 486 (finding that severity of punishment has a deterrent effect when coupled with the certainty of punishment).

<sup>530</sup> Felman, *supra* note 485, at 13 (“[T]he ABA rejects the very premise that the inducement of cooperation is a legitimate aim of sentencing policy.”).

<sup>531</sup> Orr, *supra* note 526, at 3; Schulhofer, *supra* note 484, at 16; Felman, *supra* note 485, at 10; Schulhofer, *supra* note 488, at 211-12; *See also* Bibas, *supra* note 478, at 2491 (“Many offenders, however, have no information to trade. They may have committed their crimes alone, may be too low-level to know much of value, or may be innocent. Moreover, even if defendants have information, their codefendants may preempt them by trading information first. The race to cooperate leaves some behind, and this effect may correlate poorly with offenders’ culpability”).

<sup>532</sup> Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 129-30 (2003) (“Unfortunately, of all the ways prosecutors can control sentences, the mandatory minimum statutes force them to use the least efficient mechanism. Cooperation requires many prosecutorial and investigative resources. Unlike a dropping a count in the indictment, cooperation requires meetings with both prosecutors and agents. If cooperation is successful, the information gained often gives rise to a new investigation. While it is desirable to prosecute new cases, it is not at all clear that the best way to allocate investigative resources is to order them according to how sentences should be imposed in already-prosecuted cases.”).

<sup>533</sup> Schulhofer, *supra* note 484, at 16; *See* Nachmanoff, *supra* note 487, at 6-7 (“Extreme federal punishments are not necessary to deter, and create destructive community backlash . . .”).

<sup>534</sup> Schulhofer, *supra* note 484, at 17.

<sup>535</sup> *See* Testimony of Julia L. O’Connell, Federal Public Defender, Northern & Eastern Oklahoma, to the Commission, at 182 (Nov. 19, 2009) (“[A] defendant who is facing a term of imprisonment, if that person wants to reduce their term of imprisonment and feels comfortable cooperating, they are going to do so, no matter how small the potential sentence is.”).

## 6. Interference with State Law Enforcement

Some view federal mandatory minimum penalties as indicative of the “over-federalization” of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government.<sup>536</sup> The late Chief Justice Rehnquist noted that mandatory minimum penalties “fueled the trend toward federalizing crimes” because law enforcement elects to pursue charges in federal rather than state courts because of the severe mandatory minimum penalties available under federal law.<sup>537</sup> Professor Erik Luna testified that

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<sup>536</sup> See Chapter Four of this Report for a discussion about the increase in the number of federal criminal laws since the 1980s. See also Task Force on Federalization of Criminal Law, American Bar Association, *The Federalization of Criminal Law* 5 (1998) (“Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often lacking a principled basis.”); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523-24 (2011) (“Over the last several decades, federal criminal law has mushroomed beyond recognition. . . . Many of these laws are written in sweepingly broad terms, overlap with one another, and cover ground already addressed by state law, including violent crimes.”); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000) (“Without doubt, criminal conduct ought to be prosecuted, but, while this increasing federalization of crime might bring votes to politicians at election time, the rush to make federal every social affront is at the expense of our constitutional division of governmental authority and of the justice system.”).

A related phenomena sometimes used interchangeably with “over-federalization” is “over-criminalization,” which generally means the expansion of federal and state criminal law to punish types of conduct not traditionally criminalized. A wide-range of observers has expressed concern over those related trends. See, e.g., Brian W. Walsh & Tiffany M. Joslyn, The Heritage Foundation and the National Association of Criminal Defense Lawyers, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in the Federal Law* 6-10 (2010) (discussing the erosion of the *mens rea* requirement under federal law); John Hasnas, Washington Legal Foundation, *Mens Rea Requirement: A Critical Casualty of Overcriminalization* 1 (2008) (“Traditionally, the criminal law required a showing of *mens rea* (which is Latin for a guilty mind) . . . [which] renders the criminal law a very poor mechanism for economic regulation. . . . Unfortunately, at an ever-accelerating rate over the course of the 20th and 21st centuries, federal and state governments have elected to employ the criminal law as a means of achieving regulatory ends.”); William R. Maurer & David Malmstrom, Federalist Society, *The Explosion of the Criminal Law and Its Cost to Individuals, Economic Opportunity, and Society* 4 (2010) (“Today’s legislatures use the criminal code not just to prevent or punish wrongdoing, but to regulate a wide range of personal, economic, and social conduct.”); and Kimberly Humphrey, American Civil Liberties Union, *Criminal Codes Gone Wild* (Oct. 20, 2010) (“Overcriminalization describes the trend in our justice system of attaching criminal penalties to conduct that should not be categorized as criminal.”), available at <http://www.aclu.org/blog/drug-law-reform-racial-justice/criminal-codes-gone-wild>.

<sup>537</sup> Rehnquist, *supra* note 496, at 286; cf. 149 CONG. REC. H. 3067 (daily ed. Apr. 10, 2003) (statement of Rep. Scott) (“The [proposed] bill [the PROTECT Act] adds a 5-year mandatory minimum for first offense crimes that are Federal crimes only because a person crosses State lines, such as when an 18-year-old and a 17-year-old conspire to cross state lines from Washington, D.C., to Virginia to have consensual sex . . . [but if they] cross from Virginia to Washington, D.C., to have sex, it would not be a child sex offense, and that is because consensual sex outside of marriage is not a crime in Washington, D.C., while it is in Virginia.”). See also Testimony of Jacqueline Johnson, First Assistant Federal Public Defender, Northern District of Ohio, to the Commission, at 328-29 (Sept. 10, 2009) (“In Ohio, the average time served for possessing a weapon in the state system under disability is 1.15 months. . . . [My] client . . . has a Criminal History Category of IV. . . . He has two misdemeanors for which he received two points, one conviction for public gambling, three convictions for driving while under suspension . . . and then he has one conviction for drug trafficking, which he received no time in prison at the state level. . . . If he were to proceed to trial and be convicted of [§ 924(c)], he’s looking at a guideline range of 51 to 63 months [with a mandatory minimum sentence of 60 months].”).



federal mandatory minimum penalties can “overwhelm” state and local choice on criminal justice issues, thereby “effectively and powerfully nullifying state and local judgments.”<sup>538</sup> He further testified that he was concerned “that law enforcement considers vast sentencing differentials between state and federal systems as some type of unmitigated good, essentially treating the states as the junior varsity.”<sup>539</sup>

### 7. *Impact Across Demographic Groups*

Some express concerns that mandatory minimum penalties unfairly impact racial minorities and the economically disadvantaged.<sup>540</sup> This may be attributed in part to the fact that the most frequently applied mandatory minimum penalties are for drug offenses, which according to some disproportionately impacts certain racial or ethnic groups.<sup>541</sup> While acknowledging that this disproportionate impact may be more a function of law enforcement priorities rather than sentencing policy, some assert that mandatory minimum penalties nevertheless are being applied most frequently to a population that is not necessarily representative of all persons violating such laws.<sup>542</sup> They argue that this perceived uneven

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<sup>538</sup> Luna, *supra* note 489, at 7.

<sup>539</sup> Testimony of Erik Luna, Cato Institute, to the Commission, at 271 (May 27, 2010); *See also* Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 730 (2002) (“Ironically, federal reforms that were intended to combat sentencing disparities likely exacerbated disparities between state and federal sentences. . . . Thus, federal mandatory minimum penalties exceed state maximum penalties for some offenses in some states.”).

<sup>540</sup> *See* 1991 COMMISSION REPORT, at 51. Justice Kennedy Commission, *supra* note 509, at 27 (finding that that mandatory minimum penalties disproportionately affect racial minorities); Brennan Center For Justice, *Racial Disparities in Federal Prosecutions* (2010) (recounting instances of racial disparities in federal prosecutions and making recommendations to eliminate the same), *available at* [http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion\\_report.pdf?nocdn=1](http://www.brennancenter.org/page/-/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 311 (2001) (concluding that in spite of explicit statements in the federal sentencing guidelines, “large differences in the length of sentence exist on the basis of race, gender, education, income, and citizenship.”).

<sup>541</sup> Prepared Statement of Marc Mauer, Executive Director, Sentencing Project, to the Commission, at 7 (May 27, 2010). *See also* Bureau of Justice Assistance, *supra* note 485, at 89 (“Collectively, results of all the studies in this chapter suggest that the USSC guidelines have reduced disparity but that more research is needed to better understand the overall impact on sentencing disparity reduction. The extent of racial disparity in the use of incarceration has worsened under the mandatory minimum-driven drug guidelines, with dramatically increased penalties for which African-Americans are disproportionately arrested and convicted.”); Prepared Statement of Laurie L. Levenson, Professor, Loyola Law School, to the Commission, at 5 (May 27, 2010) (“[M]andatory minimum sentences have created two systems of justice --- one for white defendants and another for inmates of color. . . . More than 71% of the inmates in federal prison are inmates of color . . . [and sentenced for federal drug offenses] which, not coincidentally, are the crimes most affected by mandatory minimum sentences.”); Orr, *supra* note 526, at 5 (“Mandatory minimums are primarily imposed for drug offenses and statistics demonstrate that people of color are disproportionately prosecuted for drug offenses. These two facts create an environment ripe for racial disparity in mandatory minimum sentencing.”).

<sup>542</sup> Mauer, *supra* note 541, at 7. *See also* Ngozi Caleb Kamalu, Margery Coulson-Clark, & Nkechi Margaret Kamalu, *Racial Disparities in Sentencing: Implications for the Criminal Justice System and the African American Community*, 4 AFR. J. OF CRIMINOLOGY & JUST. STUD. 1 (2010) (reviewing literature on racial disparities in sentencing and noting the impact of the penal system on the African American community); Johnson, *supra* note

application creates perceptions of unfairness that undermine the public's acceptance of the criminal justice system.<sup>543</sup>

Some also view legally relevant factors, such as criminal history and prosecutorial discretion in charging decisions or plea agreements, as contributors to the demographically disparate impact of mandatory minimum penalties. Studies show that racial minorities are more likely than whites to have a prior record, which may result from disproportionate processing by the criminal justice system.<sup>544</sup> Research likewise indicates that offenders in certain racial groups may be less likely to get the benefit of prosecutorial discretion in charging decisions or plea agreements.<sup>545</sup>

Some have also expressed the view that disparate results may occur based on an individual's socio-economic status. For example, one public policy group that has conducted several studies on the impact of the criminal justice system on discrete communities observed a disproportionate impact of the justice system on economically-disadvantaged defendants.<sup>546</sup>

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535, at 328 (“I have a case now where ATF agents and local police were conducting surveillance at a gun show in a semi-rural community [in Ohio] where few African-Americans live. They observed a black woman and a black man buy two guns and simply assumed that one or both of them were straw purchasers or convicted felons.”).

<sup>543</sup> Justice Kennedy Commission, *supra* note 509, at 52 (“It is nonetheless true that there is a perception among substantial numbers of minorities that the criminal justice system is discriminatory, and the perception frequently is based upon reality. That perception itself may lead to crime, disrespect for the law, and even a willingness to nullify or subvert the law. Accordingly, we must recognize how racial disparities may undermine confidence in our criminal justice system and its ability to prevent crime.”).

<sup>544</sup> See Mauer, *supra* note 541, at 8; MARC MAUER, RACE TO INCARCERATE 126–40 (2006) (describing disparities in incarceration rates, explaining that those disparities are the product of myriad criminal justice policies, and concluding that the “sentencing policies of recent years, whether motivated by a desire to ‘get tough’ or to reduce disparities, have in fact unfairly affected low-income people and minorities.”). See also Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians In the Criminal Justice System* 28 (2010) (“[D]ata from Hawai‘i’s Attorney General show that Native Hawaiians are arrested at a greater frequency than Hawai‘i’s other ethnic groups, often second only to Whites in specific offense categories.”); Vincent Schiraldi & Jason Ziedenberg, Justice Policy Institute, *Race and Incarceration in Maryland* (2003) (finding that racial and ethnic minorities in Maryland are overrepresented in the states incarcerated population).

<sup>545</sup> Nachmanoff, *supra* note 487, at 10 (“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. [In FY2008], about 35% of black defendants [received a § 924(c) enhancement] but only 26% of white defendants received the § 924(c) [enhancement].”); Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 417 (2010) (finding that black and Hispanic offenders are less likely to have their initial charges reduced in weapons offenses); Cassia Spohn, John Gruhl, & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 183 (1987) (finding evidence that black and Hispanic offenders are less likely to have felony charges against them dropped compared to white or female offenders in Los Angeles, CA).

<sup>546</sup> Justice Policy Institute, *A Capitol Concern: The Disproportionate Impact of the Justice System on Low-Income Communities in D.C.*, at 4-5 (July 2010) (finding that communities of color and low-income are disproportionately represented in D.C.’s criminal justice system), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/10-07\\_exs\\_capitolconcern\\_ac-ps-rd-dc.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/10-07_exs_capitolconcern_ac-ps-rd-dc.pdf). See also Tracy Nobile, Cassia Spohn, and Miriam DeLone, *A Tale of Two Counties: Unemployment and Sentence Severity*, 15 JUST. Q. 459, 479-484 (1998) (finding

## D. CONCLUSION

Mandatory minimum penalties have long drawn the attention of various stakeholders in federal criminal justice policy, and these stakeholders have taken a range of policy positions supporting and opposing mandatory minimum sentencing provisions. In particular, disagreements concerning mandatory minimum penalties center on their ability to establish appropriate sentences, their ability to reduce unwarranted sentencing disparities, and their efficacy as investigative and resource-preserving tools.

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evidence that a defendant's employment status has an effect on sentence severity and/or the decision to incarcerate); Justice Policy Institute, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties*, at 16 (2007) ("Prisons in the U.S. are disproportionately populated by individuals who were living in poverty prior to their imprisonment."), available at [http://www.justicepolicy.org/images/upload/07-12\\_REP\\_Vortex\\_AC-DP.pdf](http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf).

