
FROM THE PRACTITIONERS' PERCH:
HOW MANDATORY MINIMUM SENTENCES AND THE
PROSECUTION'S UNFETTERED CONTROL OVER SENTENCE
REDUCTIONS FOR COOPERATION SUBVERT JUSTICE
AND EXACERBATE RACIAL DISPARITY

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It has been nearly a decade since Justice Anthony Kennedy lent his important voice to the growing concern over the injustice of mandatory minimum sentences.¹ It was a watershed moment to hear a Supreme Court Justice who joined the opinion upholding California's "three strikes law" criticize the precise practice that he had previously concluded was constitutional.² In the years since, commentators, legal scholars, and even politicians from across the political spectrum have increasingly expressed dismay at the pervasive injustice inflicted by decades of increasingly draconian sentencing policies. The raw num-

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¹ Justice Anthony M. Kennedy, Associate Justice, Supreme Court of the U.S., Address at the American Bar Association Annual Meeting 4 (Aug. 9, 2003), (*available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf) ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.").

² See *Ewing v. California*, 538 U.S. 11, 30-31 (2003).

bers of incarcerated persons in America are universally startling.³ For some, they are nothing less than a national embarrassment, particularly in light of the undeniably disparate impact on minorities.⁴

Since mandatory minimum sentences first came into vogue, criminal defense practitioners have observed firsthand the heartbreak and misery that they foster. Any discussion of mandatory minimum sentences in the United States must focus on the role of drug sentences.⁵ Seldom is there a true correlation between a client's criminality and the punishment when a difference of years, and sometimes decades, of a person's life is determined by arbitrary thresholds.⁶ Mandatory minimums are merely accelerants that exaggerate the types of law enforcement practices that foster as much crime as they prevent and convert low-level offenders into career criminals. They squander precious resources and undermine public confidence in our justice system, especially in poor and disadvantaged communities.

At every stage of the criminal justice process, mandatory minimums contribute to disparate impact among racial groups.⁷ They en-

³ Over 1.5 million people are incarcerated in state and federal prisons. Heather C. West et al., *Prisoners in 2009*, BUREAU OF JUST. STAT. BULL., Dec. 2010, at 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>. This number does not include those held by local or municipal authorities. See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 7 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (stating that there are 1,596,127 adults in prison in the United States and an additional 723,131 in jail).

⁴ Black and Hispanic men and women are incarcerated at much higher rates than whites. See West, *supra* note 3, app. tbls.13-15.

⁵ See U.S. SENTENCING COMM'N, REPORT TO CONGRESS REGARDING FEDERAL MANDATORY MINIMUM SENTENCING PENALTIES 1 (2009), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20090710_StC_Mandatory_Minimum.pdf (finding that, in fiscal year 2008, there were 31,239 counts of conviction that carried a mandatory minimum term of imprisonment, and of which 24,789, or 79.4 percent, were for drug offenses).

⁶ See, e.g., 21 U.S.C. § 841(b)(1)(A)-(B) (2006) (setting mandatory minimums of five and ten years for manufacture, possession, or sale of narcotics). Most states also have harsh mandatory minimums and determinate sentences. The authors have extensive experience with the mandatory minimums in Colorado and New York. New York led the way four decades ago with the infamous "Rockefeller drug law," which punished the sale of as little as two ounces with a prison term of fifteen years to life, with no possibility of parole prior to service of the minimum. See N.Y. PENAL LAW § 220.43 (McKinney 2011); see also *id.* § 70.00 (3)(a)(i) ("For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years . . ."); *id.* § 70.00(1)-(2) (providing for the mandatory life maximum).

⁷ See SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1 (2008), available at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf ("One fundamental aspect of this marginalization is the disparate treatment of per-

courage policing practices, investigative techniques, and prosecutorial strategies that are illogical, counterintuitive, and sometimes arbitrary and abusive. The ultimate example of how mandatory minimums have fostered prosecutorial excess is the unfettered prosecutorial discretion to disregard those minimums for so-called cooperators.

This essay provides a practitioner's view of how mandatory minimum sentences diminish fairness and contribute to arbitrary justice. Most importantly, prosecutors' unlimited power to procure information and testimony by bargaining away those minimums has created a bizarre, alternate universe in which the worst behavior, by both law enforcement and the accused, often garners the greatest reward. Finally, this essay suggests that significant reform may be accomplished if we simply restore judicial authority to assess independently whether, in light of all the circumstances, a person's post-arrest conduct merits a departure from a mandatory sentence.

I. MANDATORY MINIMUMS ARE PERVASIVE, AND MINORITY POPULATIONS ARE DISPROPORTIONATELY SUBJECTED TO THEM

The U.S. criminal code has exploded in recent decades. There are now well over 4400 federal criminal penalties and many more that arise from agency regulations.⁸ Along with the overall expansion of federal criminal penalties, there has been a surge in mandatory minimum sentences.⁹ Most states have followed suit, enacting mandatory guidelines, specific mandatory minimums, and determinate sentences without the possibility of early release.¹⁰

The most prevalent mandatory penalties are in the areas that most affect low-income, disadvantaged populations: controlled substance of-

sons of color which occurs incrementally across the entire spectrum of America's criminal justice system.").

⁸ BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 5 (2010), available at <http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent>.

⁹ For a chart of federal mandatory minimums for drug trafficking offenses, see *Federal Trafficking Penalties*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/agency/penalties.htm> (last visited Nov. 15, 2011).

¹⁰ Cf. Violent Crime Control and Law Enforcement Act of 1994, Pub. Law No. 103-322, § 20102(a), 108 Stat. 1796, 1816 (codified as amended at 42 U.S.C. § 13702) (providing financial incentives for states to increase prison sentences under the original Truth in Sentencing grant program).

fenses, weapons offenses, and illegal reentry.¹¹ Far and away, the biggest drivers of this trend have been the so-called war on drugs and the nation's infatuation with lengthy incarceration as the perceived antidote to drug abuse, without any constitutional limitation on those sentences.¹²

While there is considerable debate about whether controlled substance offenses are in fact more prevalent in minority communities, or whether the societal decision to concentrate policing resources in those areas distorts crime statistics—creating an illusion of greater abuse by minorities—the irrefutable fact is that our prisons are disproportionately filled with minority drug offenders.¹³ Many commentators have argued that in America's largest city, the last two New York mayors—whose tenure spans nearly a generation—have implemented policing policies that target minority populations.¹⁴

¹¹ See 8 U.S.C. § 1326(b) (setting criminal penalties for reentry of certain removed aliens); 18 U.S.C. § 924 (setting penalties for federal firearms offenses); 21 U.S.C. § 841(b) (setting penalties for federal narcotics offenses).

¹² See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991) (upholding a mandatory sentence of life without the possibility of parole for the possession of 650 grams of cocaine).

¹³ See David Rudovsky, *A Closing Keynote: A Comment on Mass Incarceration in the United States*, 11 U. PA. J. CONST. L. 207, 210-11 (2008) (noting the disproportionate number of African-Americans in prison and questioning whether our country over-incarcerates minorities); see also *Hearing on the Impact of Mandatory Minimum Penalties in Federal Sentencing before the U.S. Sentencing Comm'n* 6-7 (May 27, 2010) (statement of Marc Mauer, Executive Director, The Sentencing Project), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Mauer_Sentencing_Project.pdf (“As a wealth of documentation has shown, the drug war has had extremely disproportionate effects on African American communities.”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

¹⁴ See HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007*, at 6 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (noting that the “marijuana arrest campaign” is especially harmful to “Black and Latino young people and their families”); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462 (2000) (“[T]he implementation of Broken Windows policies was disproportionately concentrated in minority neighborhoods and conflated with poverty and other signs of socio-economic disadvantage.”); Memorandum from Harry G. Levine, Professor of Sociology, Queens Coll. & City Univ. of N.Y., to the New York Senate 2 (June 15, 2010), available at <http://dragon.soc.qc.cuny.edu/Staff/levine/Testimony-Memo-NYS-Senate-Marijuana-Arrests-June-2011.pdf> (“The arrests unjustly target young African Americans and Latinos and their neighborhoods.”).

II. LAW ENFORCEMENT TACTICS EXPLOIT MANDATORY MINIMUMS TO INDUCE AND EXAGGERATE CRIMINALITY

Law enforcement tactics have changed dramatically over the past several decades. Gone are the days when the police emphasized solving crimes and catching the perpetrators. Today the emphasis is on undercover police work, premised upon deception and dependent upon a network of informants. The widespread use of undercover and sting operations to foment the actual commission of crime is a relatively new phenomenon, and the inclusion of “CI” or “CS” (confidential informants or confidential sources) is ubiquitous in modern-day indictments.

The use of undercover operations—with law enforcement officers posing as criminals, and cooperating criminal defendants participating as active facilitators—is now a staple of law enforcement on both the state and federal levels.¹⁵ This activity is not limited to surveillance and prevention; officers actively engage in the facilitation of criminal activity.¹⁶ Undercover agents and informants encourage others to commit offenses, either by providing resources or markets,¹⁷ acting as decoys or potential victims, or otherwise providing opportunities for criminal activity that may never have occurred but for the law enforcement operation.¹⁸ The entrapment defense is an ineffective check on these practices because the legal hurdle for establishing the defense is so high.¹⁹ And the areas that law enforcement often targets

¹⁵ See Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 161 (2009) (“Investigative deception is a firmly entrenched aspect of contemporary American policing.”).

¹⁶ *Id.* at 164-65.

¹⁷ We have seen these kinds of tactics on high visibility cases from ABSCAM to Operation Fast and Furious. ABSCAM was a 1970s FBI-initiated sting operation in which federal agents posing as foreign officials met and bribed U.S. congressmen in a confabulated public corruption scandal. *FBI Presses on Corruption*, PITTSBURGH POST-GAZETTE, Nov. 6, 2006, at A6. “Fast & Furious” refers to the Bureau of Alcohol, Tobacco, Firearms, and Explosives’ (ATF) sting operation in which ATF agents posing as illegal gun-runners sold high-powered weapons to Mexican drug cartels, thousands of which were lost. Some of these weapons were later linked to the shooting deaths of American law enforcement agents. *ATF’s Fast and Furious Scandal*, L.A. TIMES, <http://www.latimes.com/news/nationworld/nation/atf-fast-furious-sg.0,3828090.storygallery> (last visited Nov. 15, 2011) (compiling articles about the scandal).

¹⁸ See Joh, *supra* note 15, at 165 (“Facilitative operations also raise the serious issue of crime amplification: the possibility that the very undercover investigation meant to catch criminals in the act may actually produce more crime.”).

¹⁹ To establish entrapment under federal law and in a majority of states, the defendant must demonstrate that she was not personally disposed to commit the offense. “It is only when the Government’s deception actually implants the criminal design in

tend to be poor and disadvantaged. Thus, cooperating defendants are turned loose in those communities to troll for new cases.

A. *Sentencing Entrapment*

Practitioners routinely encounter several phenomena as a result of these practices. Armed with the knowledge that mandatory minimums exert great pressure upon accused suspects, law enforcement employs practices that amplify criminal activity. One practice, known as “sentencing entrapment” or “sentencing manipulation,” has become common practice, especially as a sequela to the war on drugs,²⁰ and there are many reported cases in which these practices have been upheld.²¹

Here is a typical example, based on the authors’ experience with a real case. Anthony C., a young working man in New York, became a cocaine abuser. To support his habit, he sold minimal quantities to a friend. Unknown to him, his friend was arrested and faced prosecution under New York’s harsh Rockefeller drug law.²² Law enforcement agents told Anthony’s friend that if he wanted to avoid a mandatory penalty, then he would have to help make a case involving a more serious offense. After agreeing to cooperate, the friend—operating under the aegis of law enforcement—again sought to purchase cocaine from Anthony. Only this time, he said he had a cousin who wanted more than Anthony had ever sold. Anthony repeatedly refused. The friend was not dissuaded. He declined to buy the small amount and kept imploring Anthony to sell him at least two ounces. Eventually Anthony agreed. The cousin was an undercover officer, and Anthony now faced a minimum of fifteen years to life.

This scenario is commonplace. With mandatory minimums triggered by arbitrary thresholds, there is an irresistible temptation not to simply catch a person committing a crime, but also to make every effort to ratchet the offense up so that law enforcement will have the

the mind of the defendant that the defense of entrapment comes into play.” *United States v. Russell*, 411 U.S. 423, 436 (1973). A prior criminal conviction, especially for the same or similar offense, will be admissible in evidence and will almost certainly make it impossible for the accused to prevail. The Supreme Court has held that entrapment hinges on a defendant’s state of mind, thereby opening the door to prior criminal conduct. *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). See generally Daniel E. Feld, Annotation, *Modern Status of the Law Concerning Entrapment to Commit Narcotics Offenses*, 22 A.L.R. FED. 731 (2011).

²⁰ Derrick Augustus Carter, *To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation*, 42 AKRON L. REV. 135, 151 (2009).

²¹ See *id.* at 137-38 nn.9-13 (listing cases).

²² See *supra* note 6.

power to crush the accused with the possibility of decades in prison. And mandatory penalties for repeat offenders provide a similar inducement to target those with a criminal history. Because these techniques are largely beyond regulation or judicial oversight,²³ the extent to which it can be definitively established that they promote racial disparity requires further inquiry by scholars,²⁴ but for anyone who spends a day in a metropolitan courtroom, the disparate impact is apparent.

B. Aggregation of Charges

Another favored tactic among prosecutors is the aggregation of charges against multiple defendants alleging a massive conspiracy with criminal conduct far greater than anything engaged in by many of the individuals. Typically the government will indict many individuals who are aligned very loosely, if at all. Often the unifying commonality in the massive conspiracy will simply be that they are from the same neighborhood, or even a single block. The many defendants, sometimes numbering in dozens, will often include a compilation of bit players. By aggregating the criminality, higher mandatory minimums apply, vastly increasing the stakes for the individual accused.

For example, there is currently pending in the Southern District of New York a sixty-defendant drug conspiracy case, originally alleging a conspiracy to distribute fifty grams or more of crack cocaine.²⁵ Some of the defendants are alleged gang members, charged with acts of violence, but most are not.²⁶ Some allegedly sold significant quantities of drugs, but most only minimal amounts.²⁷ The case illustrates how wantonly the government uses mandatory minimums to extract guilty pleas. The government forced most defendants to either plead guilty to the ten-year count or face additional charges, including the filing of prior felony information that will double the mandatory minimum and increase the penalty to life for others.²⁸ Some defendants took the plea immediately, some agreed to plead but encountered delays in

²³ See Joh, *supra* note 15, at 168-80 (summarizing applicable state and federal constraints that ostensibly serve as a check on law enforcement).

²⁴ *Id.* at 197.

²⁵ See *United States v. Boykin*, No. 10-0391, 2011 WL 2419877 (S.D.N.Y. June 7, 2011) (ruling on the defendants' various pretrial motions).

²⁶ *Id.* at *1-2.

²⁷ *Id.* at *3.

²⁸ This information originated from the authors' personal communication with defense attorneys involved.

setting plea hearings based on court congestion, scheduling conflicts, etc., and some refused the plea outright.

While this colossal case was pending, Congress passed the Fair Sentencing Act, reducing the penalties for crack cocaine by substituting an 18:1 ratio between crack and cocaine for the prior 100:1 ratio.²⁹ In July 2011, Attorney General Eric Holder issued a memorandum directing that the new provisions should be applied retroactively to defendants sentenced after August 3, 2010.³⁰ Those who pled guilty to the fifty-plus gram conspiracy but who, for myriad reasons, had not yet been sentenced get the benefit of the reduced penalty, will face five years instead of ten. One such defendant, Naquan Gayle, was enmeshed in the conspiracy because of a low-level drug sale. Because he was sentenced just ten days before Attorney General Holder announced the new retroactive policy, he was sentenced to ten years. Another defendant in the case, who was originally scheduled to be sentenced before Mr. Gayle, benefited from the reduction because his attorney had other commitments necessitating the adjournment of the sentence until after August 3.³¹ He, unlike Mr. Gayle, stands to receive the five-year sentence.³²

But what really underscores how tyrannically mandatory minimum sentences are employed is the way in which the government acted toward those defendants who had not yet pled when the reduced penalties were enacted and the Holder memo was published. In a flash, the government procured a superseding indictment of the remaining defendants, raising the amount of drugs charged to satisfy the ten-year mandatory minimum—this time alleging a 280-gram conspiracy—and securing a renewed deadline to either plead guilty to that charge or face the prior felony information.

²⁹ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 and 28 U.S.C.).

³⁰ Memorandum from Eric H. Holder Jr., Attorney Gen. of the U.S. to all Federal Prosecutors (July 15, 2011), available at http://www.fd.org/pdf_lib/Holder%20FSA%20memo%207.15.11.pdf.

³¹ See Motion to Vacate Sentence and Resentence Pursuant to Fair Sentencing Act of 2010 at 18-19, *Boykin*, No. 10-0391 (S.D.N.Y. Oct. 5, 2011). As of the date of this writing, the government has declined to afford him the benefit of the reduced penalty, and his attorney has moved to vacate the sentence on due process and equal protection grounds.

³² *Id.*; see also 21 U.S.C. § 841(b)(1)(B) (2006) (setting the mandatory minimum sentence for cocaine convictions).

C. The "Look Back" Conspiracy Cycle

Another way in which mandatory minimums are abused federally is through the use of "look back" conspiracies. In this scenario, the government uses information from cooperating defendants to bring charges against individuals who at some point are alleged to have participated with those defendants in their criminal activities.

For example, Reynaldo C. was charged as a co-conspirator in a multi-defendant case.³³ He faced a ten-year minimum and the possibility of twenty years if the government filed a prior-felony information. And there was not much doubt that he would be convicted, because one of the acts specified in the conspiracy was a drug crime to which he had already pled guilty in state court more than a year before the pending action. In fact, not only had he pled guilty, but he had also served time, and was in a treatment program well before the federal "look back" indictment. Reynaldo not only thrived in that program, but he was also using his own experience to help others overcome drug abuse. Though Reynaldo had already been punished and was back on his feet—and notwithstanding the fact that he had indisputably not committed any criminal act since he was arrested by the state—the government used the mandatory minimum to coerce a guilty plea.³⁴

All of these tactics exaggerate criminality and turn the criminal justice system into a powerful engine of conviction, sweeping up masses of low-level offenders and filling our prisons with long-term inmates.³⁵ This use of mandatory minimum sentences is a strange way to dispense justice. But there is yet another aspect of the system that imbues prosecutors with unfettered authority to use mandatory minimums as an instrument of coercion that fuels mass incarceration: the power to dispense with them for "cooperators."

³³ Information originated from author's personal experiences in criminal defense.

³⁴ The authors do not use the word "coerce" lightly. When the prosecution tells a defendant to plead guilty or face a geometrically greater term of imprisonment, one that may result in decades of imprisonment, if convicted after trial, it is coercion—although law enforcement and the law may not recognize it as such. Ordinary people do not view it any other way.

³⁵ As the prison census confirms, the inmates are disproportionately minority populations. See *supra* text accompanying notes 4 and 7.

III. "SUBSTANTIAL ASSISTANCE" BREEDS SUBSTANTIAL INJUSTICE:
COOPERATION BEFORE AND AFTER ENACTMENT OF THE SENTENCING
REFORM ACT OF 1984 AND THE ANTI-DRUG ABUSE ACT OF 1986

Prior to the enactment of the federal sentencing guidelines and anti-drug laws in the mid-1980s, the determination as to whether and to what extent a federal defendant deserved a reduction in sentence was entrusted to the sentencing judge. The vehicle for such a reduction was Rule 35 of the Federal Rules of Criminal Procedure, which provided that a court could reduce a sentence within 120 days after the imposition of the sentence or within 120 days of the completion of the appellate process.³⁶ This rule provided a vehicle for those defendants who sought to cooperate with the government to have the court consider the nature and extent of the cooperation and adjust the sentence accordingly. Typically, the defendant made the motion within the 120-day period following sentencing, and the court held the motion under advisement for an indeterminate period until the cooperation was concluded.

Under this procedure, the court reviewed all of the facts and circumstances surrounding the defendant's cooperation. The procedure afforded the defense an opportunity to show the court that the client had made every effort to assist the government, had fully severed her ties with criminal associates, and had complied with every request made by the government. Even where the cooperation did not bear fruit, a court could ameliorate the sentence in recognition of the defendant's good faith efforts.³⁷

Federal sentencing reductions, including those that vitiate mandatory minimums, are now governed by United States Sentencing Guideline § 5K1.1 and 18 U.S.C. § 3553(e). These provisions stripped the courts of their authority to recognize a defendant's good faith efforts to cooperate. Instead, the power to unlock the steel door of a mandatory minimum was vested with the prosecution, and the standard for the exercise of that power became the prosecutors' subjective determination that the defendant's assistance was "substantial."³⁸ This

³⁶ FED. R. CRIM. P. 35 (1976).

³⁷ *See, e.g.,* United States v. Unterman, 433 F. Supp. 647, 648 (S.D.N.Y. 1977) (reducing a defendant's prison sentence by more than one-half even though the value of the cooperation was not known, because the Court "believe[d] credit should be given for the sincerity of defendant's attempts at cooperation").

³⁸ For a narrow category of controlled substance offenses, Congress enacted a provision commonly referred to as the "safety valve." *See* 18 U.S.C. § 3553(f) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2011). It authorizes a sentence below a

represents one of the most profound changes in federal sentencing law, amplified immeasurably by the interplay with mandatory minimums. It has radically altered the nation's criminal justice system, causing arbitrary, irrational, and unreliable justice.

Under these provisions, the defendant has no power to seek a reduction in sentence for cooperation. A reduction below a mandatory minimum may be granted only if the government moves for it, and only if the government asserts that the defendant provided substantial assistance.³⁹ Exceptions to this extraordinary prosecutorial discretion have been recognized only in rare circumstances.⁴⁰ The consequences of this new regime cannot be overstated.

In the era before harsh mandatory sentencing provisions, stemming either from the pre-*Booker*⁴¹ guidelines or statutory mandatory minimum sentences, cooperation was relatively rare. Today it has become as common as sunrise and sunset.⁴² It is not surprising. Extra-

statutory minimum for nonviolent drug offenders with a minimal criminal history if they did not play a leading role in the offense. 18 U.S.C. § 3553(f). The defendant must also truthfully disclose to the government all information pertinent to the offense. *Id.* It does not require substantial assistance, nor a motion by the government. *Id.* The provision requires that the imposed sentence be consistent with the authorized guideline, which is highly problematic because the guideline is often pegged to the mandatory minimum. For example, the base offense level for controlled substance offenses that carry a mandatory minimum of five years imprisonment is 26, which provides for a range of 63 to 78 months, and the level for those that carry a mandatory minimum of ten years is 32, which provides for a range of 121–151 months. See 21 U.S.C. 841(b)(1)(A)–(B) (2006) (providing the drug quantity levels for five- and ten-year minimums); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c), drug quantity tbl. (listing the base offense levels for various drug quantities); see also U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (setting the ranges for base offense levels 26 and 32).

³⁹ See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (stating that this provision applies “[u]pon motion of the government”); see also 18 U.S.C. § 3553(e) (same).

⁴⁰ *Wade v. United States*, 504 U.S. 181, 185–86 (1992) (holding that “federal district courts have authority to review a prosecutor’s refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive”; that is, “if the prosecutor’s refusal to move was not rationally related to any legitimate Government end.”); see also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 112 n.20, 130–49 (1994) (discussing attempts to eliminate or circumvent the government motion requirement).

⁴¹ *United States v. Booker*, 543 U.S. 220 (2005).

⁴² For example, in fiscal year 2010, 18.5 percent of offenders convicted of an offense carrying a mandatory minimum were relieved of the penalty for substantial assistance. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 133 figs.7-8 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_

ordinarily harsh mandatory penalties leave the accused with little choice but to consider cooperation. Twenty-five years ago, after a lawyer came into a case, completed an initial review, and perhaps had some discussions with the prosecutor about the available plea offer, he would outline two options: the client's prospects at trial and the probable sentencing range if convicted, or the probable sentencing range if the client accepted a prosecutor's plea offer. Rarely was cooperation a consideration, except in those few cases where the government needed assistance to identify a major accomplice or to solve a particularly heinous crime.

Today, a lawyer must explain three options: the first two, plus cooperation. While cooperation was always an option to ameliorate the prospect of a harsh sentence, the risks now are so dramatic that it is essentially malpractice not to explore that option with a client. And while in the past a lawyer knew that a client's good faith efforts to cooperate could lead to a lesser sentence, now the lawyer knows that earnest and sincere efforts alone are worthless.

IV. REAL WORLD DISTORTIONS CAUSED BY THE PROSECUTOR'S CONTROL OF THE COOPERATION OPTION

The combustible mix of draconian sentences and unbridled prosecutorial discretion has led to bizarre consequences. This is the real world of cooperation from the defense perspective.

A. *The Race to the Prosecutor's Door*

One of the first phenomena evident under the cooperation regime is the "race to the prosecutor's office."⁴³ The fear that a co-defendant may provide the same information first creates a strong incentive for the accused to rush to offer cooperation. In what other context would any rational person make a life-altering decision without sober deliberation? How can an attorney assess a case and identify litigable issues when delay may cost the client the one opportunity to avoid years in prison? But that is precisely what happens. There may be sixty defendants at the initial presentment; by the next appearance, only fifty-five, and at the next fifty-two, and so on. Where are they disappearing to? They have lined up to seek the cooperation departure.

Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm. There is no data on how many tried to cooperate but did not qualify.

⁴³ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 15 (2010).

This process reeks of arbitrariness. The lawyer who cautions patience, believing that she does not know enough to accurately assess the case and effectively advise the client, may irrevocably lose the cooperation opportunity for her client. Another, who is engaged in a separate case, may suffer the same outcome merely because of the prior commitment. Because the test is “substantial assistance,” it is likely, if not certain, that if the prosecutor has already received the information from another source, then a tardy offer to cooperate will not meet that criterion. That is what happened in the case of Reynaldo C. By the time of the federal charges, he was on a new path, and any offer of assistance was too late. While haste may make waste in most situations, when it comes to cooperation, delay may lead to disaster.⁴⁴

B. *Too Low to Know*

What happens when an accused is at such a low level in the enterprise that he has no useful information, and the only individual he can implicate either is already convicted or has such a solid case against him that the government does not need assistance? This is one of the most common and heartbreaking scenarios.⁴⁵ One of the early cases upholding the constitutionality of the substantial assistance criterion involved just such a person.⁴⁶ Victoria Severich faced a mandatory minimum after her arrest for possession of cocaine secreted on her body at an airport.⁴⁷ Despite her best efforts to cooperate, she was denied a departure motion because she could not provide information sufficient to lead to the arrest of another.⁴⁸

⁴⁴ This system also contributes to serious ethical dilemmas for practicing attorneys. Various professional standards require that an attorney conduct sufficient inquiry and investigation before counseling a client to enter a guilty plea. *See, e.g.*, AM. BAR ASS'N, CRIMINAL JUSTICE SECTION STANDARDS: DEFENSE FUNCTION STANDARDS § 4-6.1 (2011), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#4.1.

⁴⁵ *See* Luna & Cassell, *supra* note 43, at 15 (“Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.”)

⁴⁶ *United States v. Severich*, 676 F. Supp. 1209, 1213-14 (S.D. Fla. 1988).

⁴⁷ *Id.* at 1210.

⁴⁸ *Id.* at 1214.

C. *To the Most Culpable Go the Greatest Benefits*

Consider the case of Demetric Savoy, in which racial profiling almost certainly played a pivotal role in his initial stop.⁴⁹ Mr. Savoy and two companions, one male and one female, were arrested in a New York train station.⁵⁰ The female was found in possession of crack cocaine. She immediately implicated the other male. Within days, the other male offered to cooperate with the government. He told the government that Demetric Savoy had transported drugs on several occasions, enabling the government to aggregate the weight to trigger the ten-year mandatory minimum. Mr. Savoy, who had one prior misdemeanor charge, maintained his innocence and went to trial. He lost. The cooperating co-defendant, who had two prior narcotics felony convictions, received time served, spending less than one year in jail. Mr. Savoy received a sentence of sixteen years.⁵¹

Whether or not the cooperating defendant was truthful, is there any justice or rationality in a system that permits the prosecution to wield its enormous power to allow a three-time felon to bargain for his freedom while a first-time felon is condemned to prison for sixteen times as long? Yet this has become routine. For example, one of the authors handled a case in which the admitted shooter in a homicide cooperated, served only six years, and then agreed to testify against an alleged accomplice—ten years after the shooting. This wanton use of cooperation is a prime engine for the incarceration of the disadvantaged. Since the most culpable have the most to gain, and the best chance of gaining it, this irrational system of manipulating mandatory minimum sentences undermines the American system of justice.

D. *The Proffer Process and the Incentive to Lie*

It is impossible to discuss the potential abuse resulting from the prosecution's control over the cooperation process without looking at the government's mechanism for auditioning a cooperator. The prelude to the cooperation agreement is the proffer session or, more like-

⁴⁹ Mr. Reimer served as counsel for Mr. Savoy in this case.

⁵⁰ Their arrest was itself a manifestation of the disparity in the criminal justice system. All three were casually dressed African-Americans who were stopped in Penn Station at rush hour when, according to the arresting officer, his suspicions were aroused because they looked nervous and appeared to be running to catch a train. *See United States v. Savoy*, No. 98-1733, 1999 WL 980967, at *1 (2d Cir. Sept. 30, 1999).

⁵¹ Mr. Savoy was recently released after serving more than twelve years, the beneficiary of the reduced cocaine/crack sentencing disparity.

ly, repeated sessions. It is during those meetings that the prospective beneficiary of the government's largesse must demonstrate the ability to deliver substantial assistance. As noted above, for the most deeply enmeshed in criminality, this may not pose a serious problem. But for others, there is a real danger that the government will find the information inadequate.

These sessions are not conducted at arm's length, with each side on a level playing field. The government holds all the power, while the defendant is in a desperate situation, facing decades or even life in prison. It is not long before a prospective cooperator may "improve" his recollection after he goes through a few hours of debriefings and after being told that the information is not enough, or that it is not what the government hoped or expected to hear. Unfortunately, these procedures are shrouded in secrecy. Once the defendant satisfies the government, there is no check on the process, unless that defendant is later cross-examined by another defendant's attorney. If the defendant does not satisfy the government, then there is no recourse. There is no independent assessment of whether the information substantially assisted the government. And there is no opportunity to avoid the mandatory minimum simply by trying to help. Thus, the proffer meetings can become an invitation to falsify.⁵²

Occasionally, a little sunlight illuminates the cooperation process. It took a white-collar case to shed light on the inherent abuse. In *United States v. Ruehle*, a Broadcom stock option case, Judge Cormac C. Carney of the Central District of California became sufficiently alarmed to conduct an evidentiary hearing in the middle of trial.⁵³ At the conclusion of the hearing, he found that the government had intimidated and improperly influenced three witnesses critical to the defense.⁵⁴ Judge Carney dismissed the charges.⁵⁵ He found that the effect of the misconduct with respect to the witnesses distorted the truth-finding process and compromised the integrity of the trial, and that to submit the case to the jury would have made a mockery of the defendant's constitutional right to compulsory process and a fair trial.⁵⁶ One aspect of his findings is particularly relevant to this essay.

⁵² Lee, *supra* note 40, at 177 ("The incentive to tell the prosecutor whatever she wants to hear in order to reap the benefits of the substantial assistance provision is enormous.")

⁵³ Transcript of Record at 5192, *United States v. Ruehle*, No. 08-0139 (C.D. Cal. Dec. 15, 2009), available at <http://www.nacdl.org/criminaldefense.aspx?id=19574>.

⁵⁴ *Id.* at 5201.

⁵⁵ *Id.* at 5199-200.

⁵⁶ *Id.* at 5195.

Nancy Tullos, the vice president of human resources, was one of the witnesses who could have exonerated the defendant, William J. Ruehle. The court found that the prosecution put enormous pressure on Ms. Tullos after she refused to cooperate with the government. But she eventually testified against Mr. Ruehle. The court concluded, “I have absolutely no confidence that any portion of Ms. Tullos’s testimony was based on her own independent recollection of events as opposed to what the government thought her recollection should be on those events.”⁵⁷ The court highlighted the process that led to its finding:

Most troubling, the government met with Ms. Tullos on 26 separate occasions and subjected her to grueling interrogation during which the government interjected its views of the evidence and, at least on one occasion, told her that she would not receive the benefits of cooperation unless she testified differently than she had initially in an earlier session.⁵⁸

This case exposes the process by which thousands of people every year qualify for government motions for leniency by providing “substantial assistance.”

E. Cultivating Substantial Assistance

Perhaps the most troubling permutation, and the one that has the most pervasive impact on minority communities, occurs when the prospective cooperator does not have the information necessary to qualify for substantial assistance, but is willing to work to provide it. It is at this point that the cooperating witness becomes a confidential informant, or “CI.” This completes the circle, bringing things back to the law enforcement tactics discussed above. Now the cooperator, whose last hope for freedom depends upon his providing new cases for the government, is turned back in the community with the specific goal of luring others into committing crimes. Practitioners know that there will be no limits on whom the desperate cooperator will attempt to ensnare. The authors have handled cases in which the government has asked brother to turn against brother, husband against wife, and even son against mother. When it comes to the government’s unquenchable thirst for new cases, the recruitment of cooperators is seldom limited by universal values.

For years, commentators have decried the inherent injustice spawned by the interplay of mandatory minimum sentences and the

⁵⁷ *Id.* at 5197.

⁵⁸ *Id.* at 5196.

unchecked power of the prosecution to bargain them away.⁵⁹ The process is inherently abusive. It is time to fix it.

V. THE SOLUTION: A RETURN TO JUDICIAL OVERSIGHT

When it enacted the “safety valve” provision, Congress took a small step toward ameliorating some of the most egregious injustices in the application of the mandatory minimums in federal drug laws.⁶⁰ It removed the government’s unilateral power to invoke the provision, and it conditioned qualification for the relief upon a judicial determination of truthful disclosure, rather than a prosecutorial assessment of actual value. This approach restores fairness and rationality to sentencing. It focuses on the defendant’s post-arrest conduct, rather than upon external factors over which she has no control.

Practitioners immediately recognized the value of the safety valve. But its value is far too limited, and its availability is subject to government manipulation.

First, by definition the safety valve applies only to controlled substance offenses. Second, the qualifying factors vastly restrict its use. By limiting it to persons with no more than one criminal history point, it bars access to many, irrespective of the relatively minor nature of prior conduct—potentially pushing a person into a higher criminal history—or whether the prior conduct is remote in time. This factor also contributes to increased racial disparity.⁶¹ The other limiting factors may also result in arbitrary disqualification. Third, as noted above, the authorized departure is limited by the statutory obligation to sentence in accordance with the applicable guideline. Even in the post-*Booker* sentencing environment, this is likely to severely limit the extent of the departure below the statutory minimum. Fourth, although the court must ultimately determine whether the defendant provided all relevant information, the government’s subjective view of this will usually carry great weight with the court. Finally and perhaps most disturbingly, the prosecution’s unbridled charging

⁵⁹ See e.g., Lee, *supra* note 40, at 122-30 (discussing the various ways in which the filing or nonfiling of substantial assistance motions are arbitrary and irrational, and providing examples of stark disparity between similarly situated defendants).

⁶⁰ *Id.*

⁶¹ U.S. SENTENCING COMM’N, *supra* note 42, at 132-33 (noting the “demographic differences . . . in fiscal year 2010 between the rates of relief for offenders convicted of an offense carrying a mandatory minimum”).

discretion enables the government to include charges that will disqualify otherwise eligible offenders.⁶²

The system needs a general safety valve approach, but without the present limitations. The system needs a return to judicial discretion to determine whether a person's truthful and comprehensive post-arrest efforts to cooperate and purge themselves of criminality warrant relief from a mandatory minimum sentence—and the system needs to give judges full authority to determine how much relief to grant.

A reasonableness requirement could limit judicial discretion, and courts should certainly afford the government ample opportunity to present its recommendation. But the discretion should not be limited to any class of offenses, nor should it automatically bar classes of offenders. Under the present construct, when the government chooses to move for a departure based upon substantial assistance, there are no limitations whatsoever. No crime or crimes are barred. No classes of offenders are barred. In a reformed system, the court likewise should have no such restrictions.

The authors recognize that this may be overly ambitious. Other proposals seek reform in more modest ways. Several years ago, Professor Cynthia Kwei Yung Lee advanced a proposal to restore the judicial authority to determine whether a defendant deserved leniency for cooperation, but it would have limited the departure to three to five levels.⁶³ The problem with this approach is that it clearly does not provide adequate relief. In some cases, significant limitations would discourage many from the risks of cooperation, and in many other cases, it would perpetuate the same arbitrariness from which the present system suffers.

Recently, Professors Erik Luna and Paul Cassell advanced an intriguing proposal that would create a new safety valve, increasing judicial authority and widening the availability of a departure from mandatory minimums.⁶⁴ Their proposal would limit such departures to the applicable guideline range, which is a highly problematic outcome.⁶⁵ In most cases the guideline sentence is at or higher than the mandatory minimum sentence.⁶⁶ A quarter century of disappointment in the willingness of the Sentencing Commission to ameliorate harshness in the guidelines makes it difficult for criminal defense practitioners to pin

⁶² Luna & Cassell, *supra* note 43, at 54.

⁶³ Lee, *supra* note 40, at 177-79.

⁶⁴ Luna & Cassell, *supra* note 43, at 60-77.

⁶⁵ *Id.*

⁶⁶ *Id.* at 73-74.

hopes for reform on the issuance of more humane guidelines. Professors Luna and Cassell acknowledge that the efficacy of their minimalist proposal hinges upon congressional action to invite the Sentencing Commission to decouple the guidelines from mandatory minimum penalties.⁶⁷ Still, the minimalist proposal is laudable. It addresses the core problem with how things currently operate by reinserting judicial discretion into a system that has become rigid, harsh, and arbitrary.

Those who have stood beside individual defendants and have observed up close and personally the tyranny of mandatory sentencing welcome any relief—however incremental or marginal. It took nearly two decades of concerted effort to address the cruel 100:1 cocaine/crack ratio. And despite broad bipartisan support for the elimination of the disparity and calls for reform from all three branches of government, reformers hailed the Fair Sentencing Act revision as a great triumph, though it merely reduced the ratio to 18:1.

So yes, however the progress comes, however small the steps, the defense bar will welcome it. But inevitably, a sentencing regime that couples mandatory minimums with unfettered prosecutorial control must be dismantled if there is to be meaningful reform and if racial disparity is to be purged from the criminal justice system. That one reform will ripple through the system. It will fundamentally alter the means, the methods, and the tactics that drive prosecutorial and policing practices, and steer them toward a more humane and fair place.

Preferred Citation: Norman L. Reimer & Lisa M. Wayne, Essay, *From the Practioner's Perch: How Mandatory Minimum Sentences and the Prosecution's Unfettered Control Over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity*, 160 U. PA. L. REV. PENNUMBRA 159 (2011), <http://www.pennumbra.com/essays/12-2011/ReimerWayne.pdf>.

⁶⁷ *Id.* at 75-77.