

The impact of mandatory minimum penalties in federal sentencing

Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.

The U. S. Sentencing Commission's examination of the effects of mandatory sentencing is very timely and will be of great benefit to both policymakers and practitioners. While the Commission's 1991 report on these issues was quite valuable, much has changed in the interim and there is now more than two decades of experience with these penalties. In addition, congressional action regarding cocaine sentencing issues and Senator Webb's proposed commission to study the criminal justice system indicate that sentencing issues are now in a period of reexamination, and so the field will benefit from a comprehensive assessment of current policies.

There are a variety of issues to be addressed in examining mandatory sentencing, but I will focus on two in particular. First, what effect have federal mandatory minimum penalties had on public safety? And second, to what extent have these penalties exacerbated existing racial disparities within the criminal justice system?

Public safety

Mandatory minimum penalties have been enacted over time for a variety of reasons. Foremost among these are legislators' professed belief that such penalties will bring greater cer-

tainty to the sentencing process and that they will "send a message" to potential offenders that specified behaviors will be met with harsh and certain punishment.

Looking at the experience of the past several decades, some observers have contended that mandatory minimums, including such federal penalties, have produced significant benefits in reducing crime. At a 2009 congressional hearing, for example, former U.S. Attorney Michael J. Sullivan asked, "Has the role that Congress played in sentencing, including the passage of mandatory minimum sentences, had an impact on public safety and crime?" He concluded that "The answer to that question can easily be found in crime statistics and is buttressed by anecdotal story after story from across our nation. Crime rates over the past 30 years certainly paint a picture of continuing success of reducing crime and victimization through sound public policy."¹

What, then, do we know about the extent to which federal mandatory penalties have been responsible for declines in crime? To date, there is virtually no data that is capable of demonstrating a direct link between federal mandatory penalties in particular and any declines in crime. Further, a broad range of research

suggests that it is quite unlikely that these penalties would have such an impact.

In examining the effect of federal mandatory penalties, the key data problem is that the federal court system handles only a small fraction, less than 10 percent, of all criminal cases. Therefore, attempting to draw any conclusions about the specific impact of *federal mandatory penalties* on crime rates is fraught with imprecision. To state that the adoption of such penalties by Congress in the 1980s was directly responsible for reductions in a wide variety of crimes that are generally prosecuted in state courts requires a great leap of faith that is not supported by the evidence.

We can see this most clearly in the realm of drug offenses, the category in which federal mandatory penalties most often apply. Since drug offenses are widely prosecuted in both state and federal courts, a potential offender has no means of knowing in which court system he or she would be likely to be prosecuted (assuming, of course, that the offender is even thinking about the prospects of apprehension). Therefore, it is virtually impossible to break out any uniquely *federal* impact of mandatory sentencing.

Even aside from this problem, measuring the impact of harsh sentencing policies on crime rates is a complex undertaking. While it is the

This article is adapted from testimony before the United States Sentencing Commission on May 27, 2010.

1. Statement of Michael J. Sullivan before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, July 14, 2009.

case that crime rates have generally been declining since the early 1990s and that this has taken place at a time when the prison population was rising, this does not necessarily suggest that there is a clear and unambiguous relationship between these two factors. Just prior to the beginnings of the crime decline, in the period 1984-91, incarceration rates increased substantially and yet crime rates increased as well.

Looking a bit more expansively, a comparison of trends in the U.S. and Canada in recent decades is instructive. While there has been a great deal of attention focused on the U.S. crime decline of the 1990s, similar declines were achieved in Canada as well, yet these occurred while the prison population was actually declining. Thus, we should be exceedingly cautious in attributing any substantial causal effect between rising incarceration and declining crime rates.

While incarceration has some impact on crime, this effect is generally more modest than many believe. The most optimistic research to date on the crime decline of the 1990s finds that 25 percent of the decline in violent crime can be attributed to rising imprisonment,² but other scholarly work concludes that this effect may be as small as 10 percent.³ And in either case, such studies do not tell us whether using resources to support expanded incarceration is more effective than targeted social interventions, such as expanded pre-school programming, substance abuse treatment, or improving high school graduation rates, all of which have been demonstrated to improve public safety outcomes. Further, the rise in incarceration over the past two decades is a function of a range of factors, including increased drug

arrests, harsher sentencing policies, reduced parole releases, and increased parole revocations. Federal mandatory sentencing penalties play a relatively small role in this overall scheme.

While there is little relevant data on the overall impact of federal mandatory penalties, there is nonetheless a broad range of evidence that suggests that it is unlikely that mandatory penalties for drug offenses have a significant impact on enhancing public safety. This is the case for several reasons:

Deterrence is primarily a function of the certainty, not severity, of punishment. To the extent that sentencing policies may deter individuals from engaging in crime, the research literature generally shows that increases in the certainty of punishment are much more likely to produce an effect than enhancements to the severity of punishment. That is, if we can increase the prospects that a given offender is apprehended, some persons will be deterred by that knowledge. But merely extending the amount of punishment that will be imposed, when most offenders don't believe they will be apprehended, does little to add to any deterrent effect. In this regard, mandatory penalties increase severity, but have no direct impact on increasing certainty, and are therefore not likely to provide any significant additional deterrent effects.

Mandatory penalties are particularly ineffective in addressing drug crimes. While there is an ongoing debate about the effect of imprisonment on reducing crime, drug offenses are particularly immune to being affected by more and longer prison terms. This is largely due to the "replacement" nature of these offenses, the fact that there is a virtually endless supply of potential offenders in the drug trade. Since the vast majority of incarcerated drug offenders are from the lower and middle ranks of the drug trade, their imprisonment in effect creates a "job opportunity" for someone else seeking to earn some quick money. As long as there is a demand for ille-

gal drugs, there will be a large pool of potential sellers, as evidenced by the fact that the number of persons incarcerated for a drug offense has increased by more than 1000 percent since 1980. Since federal mandatory penalties are disproportionately employed for drug offenses, this suggests that their overall impact is similarly limited.

Mandatory penalties may adversely affect recidivism. Whatever one may think about the wisdom of mandatory sentencing, it is undeniable that such penalties serve to increase the length of time that offenders serve in prison by restricting the discretion of judges and corrections/parole officials. By doing so, these policies may have a criminogenic effect. A 2002 review conducted by leading Canadian criminologists involved a meta-analysis of 117 studies measuring various aspects of recidivism. The researchers concluded that longer periods in prison were "associated with a small increase in recidivism" and that "the results appear to give some credence to the prison as 'schools of crime' perspective."⁴

Federal mandatory penalties increase the challenges for successful reentry. While not a problem exclusive to mandatory sentencing, the combination of expanded federal prosecution of drug offenses along with lengthier prison terms produced by mandatory penalties exacerbates the challenges of reentry. This is due to the fact that since federal prisoners can be housed anywhere in the country, many are in prisons far from their homes and are also serving long prison terms. This combination of circumstances contributes to eroding ties to family and community, the critical ingredients of successful reentry.

Exacerbating racial disparity

In addition to the counterproductive effects of mandatory sentencing on public safety, mandatory minimum penalties also serve to exacerbate racial disparities within the criminal justice system. A combination of circumstances virtually ensures that this will be an inevitable outcome of such

2. William Spelman. *The Limited Importance of Prison Expansion*, in Alfred Blumstein and Joel Wallman, *THE CRIME DROP IN AMERICA* (Cambridge University Press, 2000).

3. Bruce Western, *PUNISHMENT AND INEQUALITY IN AMERICA* (Russell Sage Foundation, 2006).

4. Paula Smith, Claire Goggin, and Paul Gendreau, "The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences," (Solicitor General of Canada, 2002).

penalties.

We have seen for some time that racial disparities are produced in federal case processing. As the Commission documented in its 1991 analysis of mandatory penalties, "The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be

sentenced below the applicable mandatory minimum."⁵ That review found that 54 percent of white defendants were sentenced at the mandatory minimum, compared to 67.7 percent of Black defendants and 57.1 percent of Hispanic defendants.

More recently, in regard to federal mandatory penalties for crack cocaine, the Commission's 15-year assessment of the federal sentencing guidelines concluded that "This one sentencing rule contributes more to

the differences in average sentencing between African-Americans and White offenders than any possible effect of discrimination."⁶

These effects are not limited to the federal system. Mandatory penalties such as "three strikes" laws produce similar racial disparities. In California, for example, the state with the most far-reaching such law, African Americans constitute 29 percent of persons serving a felony sentence in prison, but 45 percent of persons serving time for a three strikes offense.

Why, though, would mandatory penalties uniquely produce such disproportionate racial and ethnic effects? Several factors are key in understanding these dynamics.

First, and most critical, is the fact that mandatory penalties in the federal system have most often been applied to the prosecution of drug offenses. As a wealth of documentation has shown, the drug war has had extremely disproportionate effects on African-American communities. This is not initially a function of sentencing policy, but rather law enforcement priorities; ultimately, this results in the application of harsh penalties to a population that is not necessarily representative of all persons who have violated the applicable laws. Clearly, there is no more obvious example of this than the figure of African Americans constituting at least 80 percent of those being charged with crack cocaine offenses over a 20-year period.

A second, and somewhat more subtle, effect of mandatory penalties is that many such policies provide increasingly harsh punishments to offenders based on prior convictions. Perhaps the most extreme recent case in this regard was the

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5. United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, August 1991.

6. United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, November 2004.

7. Testimony of Ricardo H. Hinojosa before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, May 21, 2009.

8. Michael Tonry, *SENTENCING MATTERS* (Oxford University Press, 1996).

sentencing of Weldon Angelos, a 24-year-old Latino music producer in Utah who was also a mid-level marijuana seller. On three separate occasions, Angelos sold marijuana to an undercover agent. During these transactions, Angelos possessed a weapon, which he did not use or threaten to use. Although all three convictions were related, following the first conviction Angelos was treated for sentencing purposes as a recidivist. Therefore, he was sentenced to a total of 55 years in federal prison—5 years for the first conviction, and then 25 years each for the subsequent convictions based on the prior conviction and the weapons possession.

The reason that mandatory penalties in such cases have a disproportionate racial impact is that defendants of color are more likely to have a prior record than are white defendants. Some people would argue that this is due to greater involvement in crime, others would contend that this results from disproportionate processing by the criminal justice system. But regardless of one's perspective, it is undeniable that this will be the case. Therefore, it is virtually inevitable that minority defendants will experience these penalties disproportionately.

To be clear, most observers would suggest that it is not necessarily inappropriate for judges or for sentencing structures to consider prior criminal record as a factor in sentencing. But with the new generation of habitual offender and mandatory sentencing policies imposing such extreme penalties, the significance of this factor is dramatically escalated, as we can see in the case of Weldon Angelos or many of the three strikes cases in California.

In addition, in the federal system a more significant prior record also limits the possibility that a defendant can be considered for a "safety valve" reduction in a mandatory sentence case, which in turn adversely affects defendants of color. As Judge Hinojosa noted in his May 21, 2009 testi-

Federal judges surveyed on criminal sentencing

The U.S. Sentencing Commission has published the results of the first-ever survey of federal trial judges to elicit their views about federal sentencing under the advisory guidelines system in effect since 2005. The survey, among many other findings, indicates that 62 percent of the responding judges believe that mandatory minimum sentences for various federal crimes are too high. The survey, conducted from January through March 2010, drew responses from 639 of the 942 judges to whom it was sent, a 67.8 percent response rate. Based on an analysis, the 639 judges who responded sentenced 116,183 of the 146,511 individual federal criminal offenders sentenced in fiscal years 2008 and 2009 – 79 percent of the offenders sentenced in that two-year span.

The Commission has made a 36-page report of the survey results available on its website, at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf

mony to the House Judiciary Committee, 77.8 percent of crack cocaine defendants in 2008 did not qualify for safety valve consideration, compared to 40 percent of powder cocaine defendants.⁷ So while both the mandatory penalties and the safety valve provision are "race neutral" in theory, in practice they inevitably contribute to exacerbating existing racial disparities.

Conclusion

In examining the effects of mandatory sentencing since the 1950s, sentencing scholar Michael Tonry concludes that "Evaluated in terms of their stated substantive objectives, mandatory penalties do not work. The record is clear... that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh."⁸ There is no reason to believe that Tonry's 1996 conclusion in this regard has changed substantially since that time.

The growing bipartisan consensus on the need for reform of policies such as the cocaine sentencing disparity is an encouraging recognition that there is now a receptivity toward examining the effectiveness of sentencing policies adopted in recent decades. In regard to mandatory sentencing, there is a broad consensus among legal organizations, scholars, and many practitioners that such policies are counterproductive to a fair and effective system of justice. Thus, the congressional mandate to assess these policies and the Commission's thorough examination of the relevant issues is very welcome. Eliminating mandatory sentencing from the federal court system would represent a significant step toward developing a more rational and fair system of sentencing. ❧

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