

1991

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Recommended Citation

Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines"*, 4 FED. SENTENCING R. 129 (1991), available at https://scholarship.law.umn.edu/faculty_articles/517.

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MANDATORY MINIMUM PENALTIES
AND THE U.S. SENTENCING COMMISSION'S
"MANDATORY GUIDELINES"

Michael Tonry*

Were elected public officials more interested in rational policymaking than in political posturing, the U.S. Sentencing Commission report, "Mandatory Minimum Penalties in the Federal Criminal Justice System," would lead the Bush Administration to withdraw all mandatory sentencing proposals and the Congress to repeal mandatorics now in effect.

The Commission's report convincingly demonstrates that mandatory minimum sentencing laws shift discretion from judges to prosecutors, result in higher trial rates and case processing times, arbitrarily fail to acknowledge salient differences between cases, and often punish minor offenders much more harshly than anyone involved believes warranted. Interviews with judges, lawyers, and probation officers at twelve sites showed that heavy majorities of judges, defense counsel, and probation officers dislike mandatory penalties; prosecutors were about evenly divided. Finally, and perhaps not surprisingly given the other findings, the report shows that judges and lawyers not uncommonly circumvent mandatorics.

Three striking features of the report stand out. First, the Commission's is the most ambitious and sophisticated study of mandatory sentencing ever undertaken. Second, its core findings are entirely consistent with the findings of earlier empirical research. Third, nearly all the criticisms of mandatory penalties that the Commission offers apply with equal force to the Commission's own guidelines.

The Commission's arguments for abandonment of Federal mandatory penalties, if applied to the Federal sentencing guidelines, suggest that the guidelines themselves should be abandoned or overhauled. The fundamental defect of mandatory penalties, the cause of all the operational problems the Commission documents, is that they are mandatory. The Federal sentencing guidelines by contrast were intended to be presumptive, not mandatory. In practice, as the Commission works ever harder to limit judges' departures from the guidelines,¹ they become more and more like mandatory sentencing laws. Indeed, in what is either a Freudian slip, or a deliberate effort by an unknown Commission staffer to emphasize the similarity between mandatory penalties and the Federal guidelines, the report's executive summary refers to "the mandatory guidelines that the Sentencing Commission would promulgate" (emphasis added).

This article offers a brief overview of the Commission's mandatory sentencing report. Part I describes the research on which the report is based and summarizes key findings. Part II compares the Commission's findings to the findings of previous research on mandatory minimums. Part III considers whether the credibility of the guidelines the Commission itself developed and promulgated is fatally undermined by the Commission's analyses of the shortcomings of mandatory minimum penalties.

I. What the Commission Did and
What It Learned

The Commission's study was prompted by a congressional mandate.² The congressional charge had eight parts, including an assessment of the effects of mandatorics on sentencing disparities, a description of the interaction between mandatorics and plea bargaining, a compilation of all mandatory minimum sentencing provisions in Federal law, and "a detailed empirical research study of the effect of mandatory minimum penalties in the Federal system." The Commission was also directed to consider the interactions between mandatorics and sentencing guidelines, the effects of mandatorics on Federal prison populations, and various ways that Congress "can express itself with respect to sentencing policy."

To address these subjects, the Commission examined pending legislation and existing mandatory sentencing laws and their legislative histories, examined the rationales for such laws and for the legislation creating the U.S. Sentencing Commission, and undertook five major projects analyzing, or collecting and analyzing, empirical data.

The empirical analyses are the heart of the Commission's report, so I do not devote much space here to the statutory and conceptual analyses. Concerning existing statutes, the Commission determined that there are approximately 100 separate Federal mandatory minimum penalty provisions in 60 different criminal statutes. More than half of those statutes were not used between 1984 and 1990. Four statutes accounted for 94 percent of the 59,780 cases sentenced under mandatory provisions during those years. Concerning conceptual analyses, the Commission argued that the existing Federal guidelines were a better vehicle than mandatory penalties for setting Federal sentencing policies and that Congress has other, better ways to influence Federal sentencing practice than by passing mandatory sentencing laws.

Before I describe the Commission's empirical findings, a few prefatory words should be said about the study. The Commission's research staff deserve high marks for a first-rate piece of research. The research design is among the best imaginable for investigating charging, bargaining, and sentencing patterns. The combination of quantitative analyses of 1984-1990 sentencing patterns, a detailed quantitative analysis of case processing in 1990, and various interviews and surveys provide complementary sources of information. In presenting and discussing

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findings, the report carefully notes the limits of the claims it can make and describes alternative interpretations of findings. For years to come, this study will likely be the standard against which other analyses of mandatory sentencing are judged.

The Commission analyzed three data sets describing Federal sentencing and two sources of data concerning the opinions of judges, assistant U.S. attorneys, and others. The three sentencing data sets were FPSSIS,³ Sentencing Commission monitoring data for fiscal year 1990, and a 12.5 percent random sample from the Sentencing Commission's file of defendants sentenced in fiscal year 1990.⁴ Data for the random sample were augmented by examining computerized and case files to identify cases (there proved to be 1165 defendants) in which "actual offense behavior" met statutory criteria for receipt of a mandatory minimum drug or weapon sentence.

The two sources of data on practitioners' opinions were structured interviews in 12 judicial districts of 234 practitioners (48 judges, 72 assistant U.S. attorneys, 48 defense attorneys, 66 probation officers), and a May 1991 mail survey of 2998 practitioners (the same groups as were interviewed; 1261 had responded by the time the report was written).

A. Results of the Sentencing Analyses

The sentencing data revealed a number of patterns that the Commission found disturbing. First, there were clear indications that prosecutors often do not file charges that carry mandatory minimums when the evidence would have supported such charges. For one example, prosecutors failed to file charges for mandatory weapons enhancements against 45 percent of drug defendants for whom they would have been appropriate. For another, prosecutors failed to seek mandatory sentencing enhancements for prior felony convictions in 63 percent of cases in which they could have been filed. For a third, defendants were charged with the highest applicable mandatory-minimum offense in only 74 percent of cases.

Second, there were clear indications that prosecutors used the mandatory provisions tactically to induce guilty pleas. For one example, among defendants who were fully charged with applicable mandatory sentence charges who were convicted at trial, 96 percent received the full mandatory minimum sentence; by contrast, 27 percent of those who pled guilty pled to charges bearing no mandatory minimum or a lower one. For another example, of all defendants who pled guilty (whether or not initially charged with all the applicable mandatory-bearing charges), 32 percent had no mandatory minimum at conviction, and 53 percent were sentenced below the minimum that the evidence would have justified.⁵ For a third example, among those defendants against whom mandatory weapons enhancements were filed, the weapons charges were later dismissed in 26 percent of cases.

Third, mandatory increased trial rates, and presumably also increased workloads and case

processing times. Nearly 30 percent of those convicted of offenses bearing mandatory minimums were convicted at trial, a rate two and one half times the overall trial rate for federal criminal defendants.

Fourth, there were indications that judges (presumably with the assent of prosecutors) often imposed sentences less severe than applicable mandatory provisions would appear to require. Before examples are given, it bears mention that the Sentencing Commission's "modified real offense" policies direct judges, especially in drug cases, to sentence on the basis of actual offense behavior, and not simply the offense of conviction.

Here are a couple of the Commission's findings that suggest judicial willingness to work around, and under, the mandatories. Forty percent of all defendants whose cases the Commission believed warranted specific mandatory minimums received shorter sentences than the applicable statutes specified. Another example: mandatory minimum defendants received downward departures 22 percent of the time. The Commission observes that this could result from an unusually high prevalence of substantial assistance motions or "alternatively, the increased departure rate may reflect a greater tendency to exercise prosecutorial or judicial discretion as the severity of the penalties increases."⁶

Fifth, perhaps in part because of the patterns revealed in the four preceding points, the Commission concluded that substantial unwarranted disparities existed in sentencing of defendants to whom mandatory minimums applied. There appeared to be substantial differences among circuits: in the District of Columbia, First, Eighth, and Eleventh Circuits, more than 70 percent of mandatory minimum defendants received sentences at or above the levels the Commission believed appropriate. By contrast, fewer than half of defendants received such sentences in the Second and Tenth Circuits and only a bit more than half (50.8 percent) in the Ninth.

There were other indications of disparity. The Commission notes that "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 [46 percent] are more likely than non-whites [blacks, 32 percent; Hispanics, 43 percent] to be sentenced below the applicable mandatory minimum."⁷ The Commission also observed that, by its definition, disparities exist among like situated defendants when 40 percent of offenders to whom particular mandatories should apply receive less severe sentences.

Taken together, these empirical findings suggested to the Commission that mandatory minimums are not working. They are shifting too much discretion to the prosecutor. They are apparently (the Commission never comes right out and says this, though it several times implies it⁸) provoking judges and prosecutors willfully to circumvent their application. They are producing high trial rates and unacceptable sentencing disparities. Finally, on the basis of

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sheerest speculation, the Commission suggests that less than uniform application of the mandatories "is likely to thwart the deterrent value of mandatory minimums."⁹

B. Results of the Opinion Surveys

The results of the interviews of federal court practitioners about the impact of mandatory minimum sentencing laws are easy to report. In one-hour structured interviews, 38 of 48 Federal district court judges offered unfavorable comments. The most common were that the mandatory sentences are too harsh and that they eliminate judicial discretion. Among 48 defense counsel, only one had anything positive to say about mandatories and he also had negative comments. The most common complaints were that the mandatories are too harsh, that they result in too many trials, and that they eliminate judicial discretion. Probation officers were also overwhelmingly hostile to the mandatories; their most common complaints were that the mandatories are too harsh, result in prison overcrowding, and eliminate judicial discretion. Only among prosecutors was sentiment more favorable to mandatories and even then 34 of 61 interviewed who expressed a judgment were wholly (23) or partially (11) negative.

Consistently with the interview data, the mail survey showed that 62 percent of judges, 52 percent of private counsel, and 89 percent of Federal Defenders want mandatories for drug crimes eliminated, compared to only 10 percent of prosecutors and 22 percent of probation officers.

II. How the Commission's Findings Compare with Earlier Research

The Commission's findings gain credibility from their remarkable consistency with the findings of prior research on mandatory sentencing and plea bargaining "bans." Evaluations of plea bargaining bans show that lawyers and judges who think them unreasonable often find ways to circumvent them. Major evaluations of the operation of mandatory sentencing laws for drug or firearms offenses or both have been carried out in Florida, Massachusetts, Michigan, and New York. Perhaps the most exhaustive examination of mandatory sentencing laws before the Commission's work was an evaluation of the later-repealed Rockefeller Drug Laws in New York. All of these studies, and a few others, were examined and synthesized by the National Academy of Sciences Panel on Sentencing Research.¹⁰

Earlier research on mandatory sentencing laws showed that such laws often led to increased rates of early dismissal of cases. Such laws often led to prosecutorial and judicial circumvention of the mandatory sentencing laws, especially when the mandated sentences were harsher than judges and lawyers believed to be just. Prosecutors often used the mandatories as plea bargaining chits and permitted defendants to plead guilty to other offenses not subject to mandatory penalties. Sometimes judges simply failed to find, as a matter of fact, that the

necessary elements of the mandatory offense had been proved.

Mandatory sentencing laws often led, especially dramatically in the case of the Rockefeller Drug Laws, to increased trial rates and increased average case processing times. And, in some cases that did not benefit from early dismissals, opportune plea bargains, or judges' failures to find seemingly unchallenged facts, some defendants were sentenced to punishments more severe than judges and lawyers believe to be just.

Now consider the Commission's findings. Like the earlier research, the Commission detected prosecutorial and judicial behavior that appeared to be inconsistent with unflinching application of the mandatories. Like the earlier research, the Commission observed increased trial rates for cases subject to mandatories. And, in the interviews and mail survey, as in earlier research, the Commission learned that many practitioners strongly dislike mandatory sentencing laws.

It all fits together. If the vast majority of trial judges and defense counsel, and many prosecutors, believe mandatory penalties to be too rigid and too harsh, it should be no surprise that prosecutors often do not file the most serious possible charge, that counsel negotiate pleas that escape some or all of the mandatories' force, and that judges find grounds for reducing sentences.

For legislators, much of their purpose in supporting mandatory sentencing laws is achieved when the vote is cast. They have been seen to be tough on crime. For judges, prosecutors, and defense counsel, it is another story. They must live with their own consciences and with their shared views of the bounds of fair treatment of offenders. They must also keep the courts functioning. That they sometimes devise ways to avoid application of laws that they believe to be unreasonably harsh should come as no surprise. This is what earlier research on mandatory sentencing laws has shown, and the Commission's findings demonstrate that history is being repeated.

III. What Does the Mandatory Sentencing Report Imply About the Federal Sentencing Guidelines?

The Commission draws substantially different conclusions from its mandatory sentencing study than I do, or than I suspect most independent analysts will. The Commission documents the defects of harsh mandatory sentencing laws and explains that the Federal sentencing guidelines can achieve all the aims of mandatory penalties better than mandatory penalties do, while avoiding their foreseeable defects. Independent analysts will, I suspect, conclude that most of the critical allegations in the Commission's indictment of mandatory sentencing laws apply with equal force to the Federal sentencing guidelines, and that the Commission would be well-advised to reconsider key features of the guidelines.

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As was revealed, purposely or inadvertently, when the Commission's report referred to its own sentencing guidelines as "mandatory," most of the Commission's critique of mandatory penalties applies with equal force to its own guidelines. A court could probably appropriately take judicial notice of the widespread hostility of Federal district court judges to the Federal sentencing guidelines. The grounds of that hostility are the same as the grounds the Commission reports for judicial opposition to mandatories—that they are too harsh and too rigid and unduly constrain judicial discretion.

Except for a preliminary evaluation of plea bargaining under the guidelines before *Mistretta* was decided,¹¹ no published evaluations of case processing under the Federal sentencing guidelines are now available. One might reasonably predict, however, that such an evaluation will show charging, plea bargaining, charge dismissal, and sentencing patterns not greatly different from those the Commission describes for mandatory sentencing.

The Commission's findings concerning mandatory penalties, based on research, closely parallel the Federal Courts Study Committee's observations concerning the Federal guidelines, based on testimony. The Study Committee questioned the "impersonal and mechanistic character of the guidelines approach." Ninety percent of district judges surveyed said that guidelines make sentencing more time consuming. The Committee received testimony "again and again" that guidelines were unduly rigid and made it difficult for judges to impose just sentences. The Committee was told of "hidden bargaining" and "that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor."¹²

The Sentencing Commission itself, in its criticism of mandatory penalties makes five basic points:

1. "mandatory minimums transfer sentencing power from the court to the prosecutor" (p. iii);
2. "under mandatory minimums, offenders seemingly not similar nonetheless receive similar sentences" (p. ii);
3. "since the charging and plea bargaining processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised" (p. ii);
4. "the disparate application of mandatory minimum sentences . . . 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" (p. ii);
5. "lack of uniform application [of mandatories] creates unwarranted disparity in sentencing, and compromises the potential of the guidelines sentencing system to reduce disparity." (p. ii).

Under the existing Federal sentencing guidelines, the first four of those points are likely to apply to the guidelines nearly as much as they do to the mandatory penalties.

The fifth point is the crux of the problem.

Although the Commission objects to "disparities" resulting from judicial and prosecutorial circumventions of the rigidity of mandatories, many trial judges object equally vigorously to the rigidity of the Commission's guidelines.

Everything we know from the Commission's mandatory penalty study, from other research on mandatories, and from research on sentencing guidelines tells us that judges and prosecutors will, much of the time, find ways to circumvent sentencing laws they regard as unjust or unduly harsh. The disparities the Commission decries under mandatories are a foreseeable and inevitable by-product of the Commission's harsh and mechanical guidelines.

A Commission-sponsored assessment of plea bargaining under the guidelines, conducted by University of Chicago Law Professor Stephen Schulhofer and U.S. Sentencing Commission member Ilene Nagel, contains numerous illustrations of assistant U.S. attorneys making charging or bargaining decisions in order to avoid imposition of guideline sentences that the prosecutor believed to be unjustly severe. This is curious because it shows that the Commission fully understands that its own guidelines raise problems similar to those it disapproves concerning mandatory sentencing laws. For example: "charge bargain[ing's] . . . potential for introducing disparity is likewise substantial"; "prosecutors viewed some guidelines sentences as too severe. They granted sentencing concessions not because they were obligated to do so in this bargaining situation, but because of their own sense of the equities."¹³

For reasons best known to the members of the U.S. Sentencing Commission, the Commission has tried to make the Federal sentencing guidelines nearly as mandatory as Federal mandatory sentencing laws. Every other sentencing commission has adhered to its statutory charge to develop presumptive sentencing guidelines that allow judges and counsel openly and honestly to adjust sentences to accommodate meaningful differences among cases.

There is no reason to predict that the U.S. Sentencing Commission will have a change of heart about the purposes and wisdom of its self-styled "mandatory guidelines." If it does not, however, as its analysis of mandatory minimums shows, the sentencing guidelines are likely to continue to meet with judicial hostility, prosecutorial ambivalence, and wholesale circumvention.

FOOTNOTES

¹ Statement of Hon. Vincent L. Broderick and Hon. Mark Wolf, March 5, 1991, 3 *Fed. Sent. R.* 1991, pp. 276, 278.

² Public Law 101-647, Sect. 1703 [104 Stat. 4846].

³ FPSSIS, pronounced 'FIPSISS,' is an acronym for "Federal Probation Sentencing and Supervision Information System," the Administrative Office of the U.S. Courts' automated information system for Federal sentencing.

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⁴ The FPSSIS and monitoring data are insufficiently detailed to permit the fine-grained factual analyses of actual offense behavior that are required to determine whether facts alleged in specific cases might warrant filing of mandatory-bearing charges. As a result, those data sources are used to provide more general portraits of sentencing patterns over time and in 1990. Among other things, they show that the proportion of federal defendants sentenced for mandatory-sentence offenses has been increasing steadily, that nominal sentence lengths imposed are increasing substantially, and that time-to-be-served is increasing even more rapidly. On the last point: "A defendant receiving the median 36 month term for drug distribution in 1984 would likely serve only one-third of the sentence or 12 months. In 1990, a defendant receiving the median 66 months for drug distribution would likely serve 85 percent of the sentence or 56 months. Thus a sentence increase of 83 percent actually results in an increase of 367 percent in likely time served from 1984 to 1990." (P. 44)

⁵ The report acknowledges that "prosecutors' reasons for reducing or dismissing mandatory minimum provisions at this stage cannot be assessed through this study" (p. 58) and accordingly that some of these apparently "lenient" disposi-

tions may result from evidentiary or workload considerations.

⁶ P. 53.

⁷ Pp. ii, 76.

⁸ P. 53: ("The increased departure rate may reflect a greater tendency to exercise prosecutorial or judicial discretion as the severity of the penalties increases."). P. 58: ("The prosecutors' reasons for reducing or dismissing mandatory [charges] . . . may be attributable to . . . satisfaction with the punishment received.").

⁹ Pp. ii-iii.

¹⁰ Blumstein, Alfred, Jacqueline Cohen, Susan Martin, and Michael Tonry. 1983. *Research on Sentencing: The Search for Reform*. Washington, D.C.: National Academy Press.

¹¹ Schulhofer, Stephen J. and Ilene H. Nagel, "Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months," *27 American Criminal Law Review* 231 (1989).

¹² Federal Courts Study Committee. 1990. *Report of the Federal Courts Study Committee*. Washington, D.C., pp. 23, 37-38.

¹³ Schulhofer, Stephen J. and Ilene H. Nagel, "Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months," *27 American Criminal Law Review* 231, 278, 293 (1989).