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Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges

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SENTENCING GUIDELINES AND MANDATORY MINIMUMS: MIXING APPLES AND ORANGES

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Evaluation of the federal sentencing guidelines1 and their operation to date is currently the focus of much study and discussion. The U.S. Sentencing Commission recently issued a four-year report on the topic,2 the General Accounting Office has also recently completed a study, and academics and practitioners nationwide are devoting considerable attention to the subject. Because of the profound impact sentencing guidelines have on the administration of the criminal justice system, careful study and clear analysis are essential to producing a useful evaluation.

From the outset, however, two factors muddy such analysis. First, mandatory minimum sentencing statutes operate concurrently with the guidelines and, indeed, formed the basis for the Commission's guidelines for drug-related offenses.3 Thus, it is impossible to disentangle the effects of mandatory minimum statutes from those of the sentencing guidelines. Second, the databases available to researchers in the sentencing area were not designed for this evaluation, and, as a result, they have their limitations. Quantitative assessments must therefore be viewed with caution, conclusions must be tempered with some skepticism, and final judgments must be reserved. Nevertheless, research has produced significant data that deserve attention and warrant consideration in policy-making.

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3. U.S.S.G., supra note 1, § 2D1.1 cmt. n.10; id. § 5G1.1.
Recent research by the Federal Judicial Center has focused on the sentencing of drug offenders over a seven-year period, during which both the mandatory minimum statutes and the sentencing guidelines went into effect. The Center's primary interest was the impact of the mandatory minimum sentencing laws. Regrettably, no database exists that separates out sentences imposed under mandatory minimum laws. The Center was, therefore, unable to identify, collect, or analyze cases disposed of under those laws. But by using information from presentence reports, the Center was able to study drug convictions and determine which drug amounts warranted a sentence under the mandatory minimum laws and which did not. This Comment looks at what that research discloses about sentencing disparity under the mandatory minimum laws and the implications of those findings for the administration of criminal justice under existing sentencing laws.

I. THE CONTINUED EXERCISE OF DISCRETION

A study conducted primarily by Dr. Barbara Meierhoefer for the Federal Judicial Center demonstrates how certain sentencing factors have influenced the length of sentences imposed on drug offenders. The study lists the following influential factors for offenders with mandatory minimum behaviors and for other drug offenders: the drug type and amount, and the defendant's prior record, role in the offense, gender, and race.

Putting aside drug type, quantity, and prior offenses—which are the operative sentencing factors under the mandatory minimum statutes—it is curious that the other identified factors should influence the sentencing of offenders with mandatory minimum behavior, given that the statute

4. Although such a time-series analysis does not allow unequivocal attribution of changes to particular circumstances, noticeable changes in sentencing that occurred in 1987, following enactment of mandatory minimum statutes but before the guidelines went into effect, are taken to suggest an effect of these laws.

5. This deficiency should be remedied in future studies. The Sentencing Commission has been collecting data since early 1989 on whether the charge for which a defendant was convicted carried a mandatory minimum term. The Commission's Monitoring Unit, however, considers these data to be of questionable reliability, based on samples it has drawn to study the effect of minimums.


itself bars their consideration, at least for sentencing below the mandatory minimum. If mandatory minimum laws were applied automatically to the statutory offense behaviors, letting the chips fall where they may, one would expect that after the mandatory minimum drug laws became effective in 1986, the sentences would differ little based on the defendant’s role in the offense, gender, or race. Instead, since 1986 the sentences for the more culpable drug offenders have remained more than double those for similarly situated, less culpable drug offenders; males continue to receive sentences about forty percent higher than those of females. Moreover, of all cases in which the offense behavior warranted a mandatory minimum sentence, defendants received a sentence at or above that minimum level only sixty percent of the time.

The irony that emerges is that discretion seems to intrude into even the most rigid sentencing scheme. That being so, the issue becomes, why give all this discretion to advocate prosecutors and none to neutral judges? The purpose of Congress—to send a message to drug dealers that if they sell, for instance, five grams of crack, they’ll go to prison for five years—is not being accomplished. Congressional and administration supporters of mandatory minimum sentencing should have doubts about the validity of their underlying assumptions in light of this startling evidence of discretionary application of the laws. It is not that the sentencing scheme is not tough or rigid enough, but rather that the tougher and more rigid it is, the more determined the effort (and the greater the need) to circumvent it.

II. RACIAL DISPARITY

The most disturbing data to come out of the study are those suggesting racial disparity in the application of mandatory minimum laws. The difference between the average sentence imposed on black offenders versus that imposed on white offenders has increased (from twenty-eight percent in 1984 to forty-nine percent in 1990). The racially disparate

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8. The statutes do, of course, allow courts to impose sentences above the minimum, in conformity with the sentencing guidelines, but the minimum is generally so high that the exercise of upward discretion is not a significant factor in the operation of mandatory minimum statutes.
10. Id.
11. Id.
12. In addition, the efficacy of using severe sentences as a potential deterrent for groups of offenders who do not believe they will be caught has always been questionable.
impact of mandatory minimum sentences is further supported by the fact that, among defendants whose behavior warranted a mandatory minimum sentence, nonwhite defendants received the mandatory prison term twenty percent more often than white defendants.\textsuperscript{14}

Presumably, racial animus is not a factor in the exercise of prosecutorial discretion. But it is quite likely that mandatory minimums have a disproportionate racial impact because of the higher penalties for the sale and distribution of crack compared with those for powder cocaine.\textsuperscript{15} The penalties for crack are 100 times as severe as those for cocaine: For example, five grams of so-called cocaine base, known commonly as crack, is treated the same as 500 grams of cocaine; fifty grams of crack is treated the same as five kilos of cocaine; and, incidentally, crack is treated twenty times more severely than heroin.\textsuperscript{16} As a result, even small, street-level crack dealers become subject to severe mandatory minimum sentences and are caught up in the net of federal prosecutions. This means not only that crack defendants are disproportionately black because of the more frequent use of crack in the inner city, but also that most of them are small-time dealers who have little information to offer the prosecutor in exchange for a reduced charge or a downward departure in their sentence for providing "substantial assistance," authorized under the statute on the motion of the government. In comparison, dealers in large quantities of cocaine are more likely to have information about chains of distribution that the government would consider worth bargaining for.

This situation results from the 1986 Anti-Drug Abuse Act,\textsuperscript{17} which prescribed these increased penalties for crack. The law's legislative history reveals great concern in Congress over a national crack epidemic stimulated by the then-recent deaths of star athletes Len Bias, a basketball player, and Don Rogers, a football player.\textsuperscript{18} Crack, which can be smoked, was also regarded as much more addictive than cocaine. And because crack is effective in smaller quantities, it was thought to be more affordable for young people. For those reasons, the existing drug laws were considered inadequate to deal with the perceived dangers.

\textsuperscript{14} Id.
\textsuperscript{15} The supposition cannot be tested directly because the available databases do not differentiate between crack and powder cocaine. The Sentencing Commission is now in the process of implementing a data module that will include this distinction.
\textsuperscript{16} U.S.S.G., supra note 1, § 2D1.1 cmt. n.10(c).
\textsuperscript{18} "Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 13 (1986).
The extreme disparity between crack penalties and those for cocaine, and the accompanying racially disparate impact, have raised questions concerning a potential violation of the Equal Protection Clause. Federal courts of appeals have so far rejected constitutional attacks on the treatment of crack offenders.\textsuperscript{19} However, in \textit{State v. Russell},\textsuperscript{20} the Minnesota Supreme Court declared unconstitutional as applied a state statute under which possession of three grams of crack carried the same punishment as possession of ten grams of cocaine.\textsuperscript{21} The court found inadequate evidence to support the statute's underlying premise that possession of the required amount signified that the defendant was a dealer.\textsuperscript{22} It also found insufficient evidence to support a distinction between crack and cocaine based on their relative dangers and addictive qualities.\textsuperscript{23} Most significantly, the court found that of those charged with crack possession, ninety-seven percent were black; of those charged with cocaine possession, eighty percent were white.\textsuperscript{24}

\textbf{III. INCENTIVES TO PLEAD GUILTY}

Aside from the problem of disparate racial impact, the Center's study also shows the significant effect the mandatory minimum statutes have on the prosecutor's power to make charging decisions and to secure downward departures for substantial cooperation.\textsuperscript{25} Notwithstanding the total absence of judicial discretion to sentence below the minimums, some defendants appear able to negotiate out of mandatory minimum sentences. Although specific data linking sentences to the statutes are unavailable, it is undisputed that charging decisions, bargains, and motions for downward departures result in below-minimum sentences for behavior within the statutes.

A failure to gain a favorable charging decision or departure motion from the prosecutor—whether as part of a plea bargain or otherwise—

\begin{itemize}
\item \textsuperscript{20} 477 N.W.2d 886 (Minn. 1991).
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 889-90.
\item \textsuperscript{23} \textit{Id.} at 890.
\item \textsuperscript{24} \textit{Id.} at 887 n.1.
\item \textsuperscript{25} MEIERHOEFER, \textit{GENERAL EFFECT}, supra note 6, at 24-25.
\end{itemize}
has devastating consequences for a defendant subject to mandatory minimums. To illustrate, simple possession of one gram of crack carries a five-year mandatory minimum sentence if it is a third offense;\textsuperscript{26} distribution of ten grams of crack carries a five-year minimum sentence or ten years if it is a second drug felony conviction;\textsuperscript{27} distribution of fifty grams of crack carries a ten-year minimum sentence or a twenty-year minimum sentence if the defendant has a prior drug felony conviction—federal, state, or foreign—and mandatory life in prison without parole after two prior felony convictions.\textsuperscript{28}

Faced with such penalties, and no possibility that judicial sentencing discretion can intervene to mitigate their harshness, defendants often conclude that little is lost by going to trial, unless the evidence would disclose such egregious offense conduct that a judge might impose a sentence above the minimum. It is safe to say, therefore, that the risk of a mandatory minimum sentence provides a powerful impetus to go to trial rather than plead guilty.

The incentives under mandatory minimum sentencing statutes are profoundly different from those under the sentencing guidelines. While substantially restricting judicial discretion, the guidelines nevertheless offer several incentives to plead guilty: The sentence adjustments for acceptance of responsibility and for obstruction of justice both operate to serve that end.\textsuperscript{29} At the middle levels of the guidelines table, for example, the two-level adjustment for acceptance of responsibility can produce a spread between the high and low of the guidelines range of well over one year, and in the higher criminal history categories of three years or more.\textsuperscript{30} Further, the guidelines afford opportunities to negotiate about other factors affecting the sentence, such as relevant conduct and role in the offense.\textsuperscript{31}

\textbf{IV. IMPLICATIONS FOR EVALUATION}

These distinctions between sentencing under the mandatory minimum laws and under the sentencing guidelines must be kept in mind when assessing sentencing data. In particular, any evaluation of the impact of the sentencing guidelines on guilty-plea and trial rates will

\textsuperscript{26} 21 U.S.C. § 844(a) (1988).
\textsuperscript{27} Id. § 841(b)(1)(B) (1988).
\textsuperscript{28} Id. § 841(b)(1)(A) (1988).
\textsuperscript{29} See U.S.S.G., supra note 1, § 3E1.1 cmt. nn.3-4.
\textsuperscript{30} See id. ch. 5, pt. A.
\textsuperscript{31} See, e.g., id. § 1B1.8; id. ch. 1, pt. A., at 7 (1991).
require careful analysis. Already there is evidence tending to show that plea rates in drug and weapons cases are declining, whereas such rates for other types of offenses are increasing.\textsuperscript{32} The decline in plea rates in drug and weapons cases, many of which are subject to mandatory minimums, may reflect the lack of incentives for a defendant to plead guilty under the mandatory minimum statutes, rather than the impact of the sentencing guidelines per se. While it is generally undisputed that sentencing guidelines have made sentencing more time-consuming and burdensome for district court judges—not to mention appellate judges who must hear appeals from sentencing decisions—it is far from clear that the guidelines have affected the rate of pleas and trials. Therefore, assessing the impact of the guidelines on plea and trial rates in drug and weapons cases subject to mandatory minimum sentences, which the sentencing guidelines incorporate, is highly problematic.

A fair evaluation of the operation of the guidelines will require developing and segregating mandatory minimum data. This evaluation would be aided considerably if the Sentencing Commission would develop guidelines for drug cases independent of the mandatory minimums. Although mandatory minimums trump the guidelines in any case in which both apply, separating guidelines convictions from those driven by mandatory minimums would make it possible to fairly and accurately evaluate the operation and impact of each system.
