



## International Center for Ethics, Justice, and Public Life

### Ethical Inquiry: October 2011

#### Exploring the Ethics of Mandatory Minimum Sentencing

Throughout the United States, those convicted of certain crimes must be sentenced to at least the number of years in prison dictated by federal guidelines and/or state laws. Referred to as mandatory minimum sentences, they apply to a wide range of crimes, ranging from murder and drug possession to child pornography and insider trading.

These sentencing requirements have led to controversies, such as the case of Genarlow Wilson, sentenced under mandatory sentencing rules to 10 years in prison without probation or parole for engaging in a consensual sexual act with a 15 year old when he was 17. (The conviction was later overturned and the sentence declared “cruel and unusual.”)



The issue of mandatory minimum sentencing in Massachusetts as it applies to drug possession and sales was explored by students in the Brandeis University Legal Studies course "Advocacy for Policy Change" (LGLS 161b), in the spring of 2011. The course is the centerpiece of an initiative launched by the Ethics Center designed to encourage citizens to bring moral and ethical insights to the process of making and revising laws. Read excerpts from the work of those students in Advocacy for Policy Change: Brandeis students work to reform Massachusetts law [PDF].

In this “Ethical Inquiry” we look at the history of mandatory minimum sentencing, as well as the perspectives of supporters and opponents

#### History of Mandatory Minimum Sentencing

Mandatory minimum sentences for federal crimes such as murder and piracy date back to 1790, but only became commonly applicable to entire classes of offenses, and to non-federal crimes, in the last few decades. The current state of sentencing for federal crimes began with the passage of the Sentencing Reform Act of 1984. (See “Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences,” *Florida State University Law Review* [PDF])

The Sentencing Reform Act of 1984 is a chapter of the Comprehensive Crime Control Act of 1984, which overhauled federal statutes dealing with crime. Provisions within the comprehensive Sentencing Reform Act, dealt with a wide variety of issues, including duties of probation officers, post-sentence administration, and victims’ rights. (See “The Sentencing Reform Act of 1984: A Practical Appraisal” *UCLA Law Review* (1988). Note: subscription may be required.)

The Act also called for the development of guidelines for federal sentences and mandated the formation of the United States Sentencing Commission (USSC). With such guidelines, Congress sought to minimize the disparity in sentences for similar crimes, and to create proportionality between sentences and severity of offenses.

In October 1987, the USSC produced the United States Sentencing Guidelines ([http://www.usc.gov/Guidelines/2010\\_guidelines/index.cfm](http://www.usc.gov/Guidelines/2010_guidelines/index.cfm)). These guidelines, in summary, created base-level sentences for each federal offense. Prior, trial courts had discretion in determining appropriate sentences; the Guidelines created a complex process for calculating sentences based on aggravating and mitigating factors. (See “The Sentencing Reform Act of 1984: A Practical Appraisal” *UCLA Law Review* (1988). Note: subscription may be required.)

Also in 1987, the United States Supreme Court eliminated mandatory death sentences.

In 2005, the Supreme Court ruled in United States v. Booker that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment to the United States Constitution. In other words, federal sentencing guidelines could be constitutional only if “advisory” rather than mandatory. Appeals courts were to review sentences for “reasonableness.”

Although this ruling arguably confused the system, an extensive 2006 USSC report on the impact of Booker found that the majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. Since 2005, the battle over both federal (<http://www.nytimes.com/2005/05/11/politics/11gang.html>) and state mandatory minimum sentences, as they apply to various crimes, has continued.

### **Federal vs. State Mandatory Minimum Sentencing**

Criminal cases can fall either under federal or state jurisdiction. The biggest difference between federal and state cases is sentencing after a conviction. Even though many state crimes carry mandatory minimum sentences, state laws can allow a judge the right to exercise discretion, particularly with plea bargains. In federal courts, the Federal Sentencing Guidelines control sentencing according to a more rigid formula.

### **Perspectives of Supporters and Opponents**

The basic rationale for federal sentencing guidelines, as explained by the USSC in describing its mission, is to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. In accordance with these theories of punishment, the objectives of the Sentencing Reform Act and mandatory minimums are: 1. honesty in sentencing, 2. uniformity in sentencing, and 3. proportionality in sentencing.

The main arguments against mandatory minimums are that they generate harsh sentences, limit judicial discretion in considering individual circumstances, create racial disparities in sentences, and allow prosecutors to force defendants to bargain away their constitutional rights.

Opponents include many grassroots coalitions and legal organizations: Families Against Mandatory Minimums (FAMM), the American Civil Liberties Union (ACLU), National Association for the Advancement of Colored People (NAACP), and The Sentencing Project.

#### **Uniformity**

A 1991 Boston Bar Association and Crime and Justice Foundation report found that sentencing in Massachusetts is “haphazard, confusing, and archaic.” As a result of judge’s not receiving guidance in sentencing, “there is substantial disproportionality in sentences for various offenses and a lack of uniformity among sentences imposed for the same offense.” (Although this report recommended repealing mandatory sentencing laws, but the Massachusetts Court System website cites it in support of state sentencing guidelines.)

In testimony before the United States sentencing Commission David Muhlhausen, a Senior Policy Analyst at The Heritage Foundation cited a study published in 1977 that was influential in demonstrating sentencing disparities across the nation. In 1977 in Virginia, 47 judges were given identical descriptions of five legal cases. Whereas they tended to agree on the verdicts, they administered widely varying sentences. The researchers concluded “when legal cases are equalized within offence categories, judges show significant disparity.”

Before mandatory minimums, judges had the discretion to impose whatever sentence they deemed appropriate. Proponents of mandatory minimums felt that the wide disparity in sentencing was unfair, especially to those who received long sentences for crimes for which others were punished lightly. (See “Inter-Judge Sentencing Disparity After Booker: A First Look” (*Stanford Law Review*, 2010) for more on this issue.)

Opponents to mandatory minimum sentencing point out that these disparities exist even with mandatory minimum sentencing, often citing, for example, differences in the punishments associated with crack cocaine and powder cocaine. Variations in state laws also contribute to ongoing discrepancies.

#### **Judicial Outcomes**

In an overview of mandatory minimum sentences for Drug Watch International, former Assistant U.S. Attorney David Risley wrote that mandatory minimum sentences “prevent the judicial trivialization of serious drug crimes.” He explained that “when serious crimes become routine, there is a human tendency to treat it routinely, and sentences drop accordingly.”

In support of this argument, David Muhlhausen explains that indeterminate sentencing began to loose favor during the 1970s because it allowed judges and parole boards to become too lenient in their handling of convicted criminals at the expense of public safety.

In opposition to this argument, Harvard Law School professor Charles Ogletree argues that rigid laws often overestimate the severity of crimes. He refers to it as “...putting people who have committed low-level offenses, who are perfectly capable of being rehabilitated, away for lengthy sentences and turning them into hardened criminals....”

## Public Safety

Aside from serious and violent offenders being treated leniently, proponents feel that mandatory minimum sentences deter crime and incarcerate dangerous offenders for long periods of time, thereby increasing public safety. This argument, as it pertains to the “War on Drugs”, has been used by Michael J. Sullivan, former Acting Director of the Bureau of Alcohol, Tobacco, and Firearms (BATF); Richard B. Roper II, former U.S. Attorney for the Northern District of Texas; and the Drug Enforcement Administration.

Opponents disagree with the utility of this argument, and maintain that mandatory minimums largely target low-level offenders who redirect attention from more serious criminals.

It is important to note that the seeming majority of sources that support their position with quantitative data oppose mandatory minimum sentencing. However, many of these sources focus on mandatory minimum sentencing only as it applies to drug possession and sales. (Indeed, David Muhlhausen notes that drug trafficking mandatory minimum statutes tend to receive the most attention, though most mandatory minimums statutes are for violent or other types of offenses.) In contrast, proponents of mandatory minimum sentencing tend to focus on crime and sentencing in general.

## The Case of New York State’s 1973 Rockefeller Drug Laws

The debate over and history of New York's Rockefeller Drug Laws illustrates many of these arguments.

The main arguments against mandatory minimum sentencing – limited judicial discretion, economic inefficiency, and unintended consequences such as growth in prison populations as well as growth in racial disparities behind bars – particularly plagued New York State between the years of 1973 and 2008 due to some of the most severe anti-drug mandatory minimum sentencing laws in the nation.

As supporters of mandatory minimum sentencing note, these laws were a response to a growing drug problem among United States, and in particular largely urban New York City and State, citizens in the late 1960s and early 1970s. See the “Illegal Drugs” section of the New York State Police website’s history section for a law enforcement perspective on the issue and the impact of the Rockefeller Drug Laws.

Referred to as the Rockefeller Drug Laws after then-New York Governor Nelson Rockefeller, their purpose was to deter citizens from using and selling drugs but their effect was to harshly punish low-level, nonviolent offenders through mandatory minimum sentencing (See “Petty criminals in prison longer” Associated Press, 1994). During these years, prison populations increased, without a decrease in the underlying drug addiction problem. Additionally, the Rockefeller policies placed the burden of retribution on taxpayers [PDF]. (See also Times Topics: Rockefeller Drug Laws)

As the prison population grew, so did racial disparities behind bars. 90-92% of inmates were black and Hispanic, even though they were only 32-34% of the general population. Interestingly, studies showed that the rates of illicit drug use, sales, and addiction were equal between racial groups. This 90:30 ratio was one of the highest racial disparities in the nation, and widely considered a “human rights disgrace” [PDF].

Reforms to these laws enacted in 2009 with support from then-New York Governor David Paterson, have been initially effective in reframing drug use as a public health issue, and providing treatment alternatives to incarceration. Since 2009, other states have made, or are in the process of making, steps to undertake similar reforms when it comes to mandatory minimum sentencing.

## Final Thoughts

Mandatory minimum sentencing seeks to create fairness in punishment and increase public safety. Can good intentions ever justify negative consequences? Is indeterminate sentencing fairer than the alternative? On a practical level, does mandatory minimum sentencing meet its goals?

We invite you to continue exploring the ethical issues that arise in this context, and to share your thoughts with us on our Facebook page.

*Have suggestions for additional content that looks at the ethical issues surrounding mandatory minimum sentencing? Let us know:*

- *Comment on this "Ethical Inquiry" on the International Center for Ethics, Justice and Public Life's Facebook page.*
- *Send an email.*
- *And follow the Ethics Center on Twitter: @EthicsBrandeis.*

*This installment of "Ethical Inquiry" was researched and written by **Anna Khandros '11**, a member of the Spring 2011 Ethics Center Leadership Council (ECLC). Read more from Anna on the ECLC's blog, "Exploring Ethics."*