



The Impact of Mandatory Sentencing Policies in the United States

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Canada**

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Thank you for the invitation to appear before the Committee to discuss the U.S. experience with mandatory sentencing. I hope that my analysis will be useful in your consideration of proposed changes in Canadian law. I am the Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal justice policy. I am the author of two books and numerous journal articles on sentencing policy, and have testified before the U.S. Congress and many state legislatures.

OVERVIEW

Since the 1970s the federal government and virtually every state legislative body have enacted various types of mandatory sentencing policies. These policies have been targeted most frequently to drug offenses, but have also been imposed for a variety of other crimes, including such initiatives as “three strikes and you’re out” laws in half the states. Thus, we now have three decades of experience with the current generation of mandatory sentencing policies. I believe it is fair to state that there is a growing consensus among leading legal and policy experts that these laws have failed to promote public safety, but have instead produced unintended consequences that frequently result in injustice. The following presents a brief overview of the relevant issues and impacts of these policies.

Mandatory Sentencing has Failed to Enhance Public Safety

While the presumed intent of mandatory sentencing policy is to reduce crime, the experience in the U.S. fails to demonstrate any gains in this respect. This is largely a function of two factors. First, such policies conflict with the criminological insight that the deterrent effect of the criminal justice system is more a function of the certainty of punishment, rather than severity. That is, if we can increase the prospects that an offender will be apprehended and charged, that will deter some potential lawbreakers. But merely increasing the severity of punishment for convicted defendants does little to promote deterrence since most offenders (correctly) believe that they will not be caught for any given offense.

Mandatory penalties as applied to drug offenses are problematic because they focus on the supply side of the drug problem rather than the demand side. As we have seen through the dramatic escalation of the number of drug offenders in prisons and jails – a rise from 41,000 persons in 1980 to 500,000 today – there is a virtually endless supply of persons willing to engage in drug use and selling despite the fact that many are subject to mandatory penalties if apprehended. Thus, mandatory sentencing laws contribute to the over-emphasis on supply-side policies to reduce substance abuse, at the expense of more effective demand-side approaches emphasizing prevention and treatment.

Mandatory Sentencing Results in Excessive Punishment

Mandatory sentencing policies imposed by legislative bodies impose a “one size fits all” sentencing structure that fails to account for the individual circumstances of the offender and the offense. As a result, they too frequently produce sentencing outcomes that are considered excessive by any reasonable measure. In the federal court system, for example, Weldon Angelos, a 24-year-old music producer with no prior convictions, was sentenced in 2004 for three related marijuana sales of about \$350 each. Since he possessed a weapon during the course of these sales, the sentencing judge was obligated to impose harsh consecutive penalties on Angelos, even though he did not use or threaten to use a knife or gun. As a result, Weldon Angelos is now serving a 55-year sentence with no parole in federal prison.

State laws that require mandatory sentencing have produced similar miscarriages of justice. Under the state of California’s “three strikes” law, any felony is counted as a third strike if an offender already has convictions for two “serious or violent” felonies as defined in the statute. In a challenge to the policy that went before the U.S. Supreme Court, two defendants argued that their sentences constituted a form of cruel and unusual punishment. The third strike for one of the defendants involved the theft of three golf clubs from a sporting goods store; the second defendant’s third strike was for the theft of \$153 worth of videotapes from a department store. The Court rejected the arguments, deferring to the discretion of the legislature to

impose such policies. As a result, the golf club thief is now serving a sentence of 25 years to life and the videotape thief has a sentence of 50 years to life.

Clearly, there are many people sentenced under mandatory sentencing laws who have committed far more serious offenses. But judges already have the authority to sentence such offenders to significant prison terms when it is justified. By failing to permit judges to make relevant distinctions among cases such miscarriages of justice are virtually inevitable.

Mandatory Sentences Transfer, But do not Eliminate, Discretion

While the intent of policymakers in legislating mandatory penalties has been to remove discretion in the sentencing process, the actual impact of these laws has been instead to *transfer* discretion. Thus, while judicial discretion is eliminated, the influence of prosecutors in determining the ultimate outcomes of criminal cases is actually enhanced. This is a result of the dynamics of the charging and plea negotiation processes. Since the charge of conviction virtually guarantees a specific sentence under these laws, the prosecutor's exercise of discretion in deciding whether to bring a charge that carries with it a mandatory penalty becomes critical in determining a defendant's sentence.

It is important to note as well that prosecutorial discretion is essentially conducted behind closed doors, whereas that of a sentencing judge is conducted in an open courtroom. Thus, by shifting the locus of the use of discretion, mandatory sentencing not only fails to eliminate the use of discretion, but also subjects it to less public scrutiny.

Mandatory Sentencing Policies Contribute to Racial and Ethnic Disparities

Related to the enhanced discretion of prosecutors resulting from mandatory sentencing laws is the prospect of these policies being implemented in ways that contribute to unwarranted racial and ethnic disparities in sentencing. A 1991 study by the U.S. Sentencing Commission found that in federal criminal cases in which a mandatory charge could be applied, federal prosecutors were more likely to agree to a plea that did not require a mandatory penalty for white defendants than for African Americans or Latinos. While a variety of factors contribute to racial disparities in the justice system, the “hidden” nature of the exercise of prosecutorial discretion makes these dynamics particularly prone to producing such disparities.

U.S. Policy is Shifting away from Mandatory Sentencing

In recent years there has been growing concern about the wisdom of mandatory sentencing laws in the U.S. Influential bodies such as the American Bar Association and the federal judiciary have called for the repeal of such policies based on their restrictions on appropriate judicial discretion.

Policymakers in a variety of jurisdictions are beginning to reassess these laws as well. In 2008, for example, New York State scaled back the infamous “Rockefeller Drug Laws,” mandatory sentencing policies enacted in 1973 that produced excessively punitive drug sentences. Prior to that, Michigan lowered penalties under its mandatory drug-trafficking laws, which in some cases imposed the same sentence on drug sellers as that for first-degree murder. At the federal level, there is now growing momentum to reduce the excessive mandatory penalties imposed for crack cocaine offenses that were adopted in the 1980s.

CONCLUSION

Whether intended or not, mandatory sentencing penalties in the U.S. have produced distorted sentencing outcomes while failing to contribute to public safety. These policies have been a major contributor to the crisis of over-incarceration in the U.S., one which is now causing cutbacks in vital state services as a result of the high cost of prison spending. In addition, they have also contributed to dramatically high rates of incarceration in low-income minority communities in particular, thus affecting the home environment of a generation of children growing up in these communities. It is long past time to restore a better balance of the use of discretion within the criminal justice system as a means of producing more constructive sentencing outcomes. As the government of Canada considers its policy options for sentencing, I hope that the experience in recent decades in the United States will prove instructive.



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