THINKING MANDATORY MINIMUMS

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The benefits of mandatories are almost entirely achievable.
ONE OF THE MOST important developments in crime control policy during the past decade has been the proliferation of mandatory minimum sentencing statutes. Despite persistent criticism of mandatories, repealing them has seemed unthinkable, because of strong public support for long sentences and the assumption that flaws in the

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concept of mandatories are too complex to be explained to voters. But there are new signs of doubt, most prominently expressed this past summer by Senator Orrin Hatch, the ranking Republican on the Senate Judiciary Committee. At long last, it may be possible to reexamine the subject without whistling in the dark.

Long prison sentences are very expensive (in human and budgetary terms), and their deterrence benefits are speculative. For those reasons, many criminal justice experts consider mandatories fundamentally misguided, the more so when they really “work” by boosting prison terms substantially.

I will not emphasize that perspective here. Mandatories retain strong bipartisan support in Congress, and during the last Presidential campaign they were endorsed by the Presidential and Vice-Presidential candidates of both major parties. I take these endorsements seriously and assess mandatories primarily from the perspective of those who subscribe to their basic goals.

Although some element of symbolic politics no doubt plays a role in Congressional support for long mandatory sentences, this policy tool also reflects real and important objectives. Frustrated with the persistence of violent crime and a spreading drug problem during the 1970's and 1980's, Congress saw inadequate penalties as partly to blame. It concluded that long mandatory sentences could insure a more just penalty and a more effective deterrent. But severe sentences cannot be effective when their application is too unpredictable, and they cannot be viewed as just punishment when they are disparately applied. If mandatories are failing to achieve their intended purposes, then continued reliance upon them is a poor crime control strategy and, ultimately, poor politics as well.

Unfortunately (for opponents of mandatory minimums), the available evidence does not entirely bear out their objections. Some of the benefits claimed for mandatories (especially increased severity and greater willingness by defendants to provide information on others) are almost certainly being realized. Nonetheless, the benefits of mandatories are both smaller than expected and almost entirely achievable by other means. There is now good reason to believe that mandatories are not only unfair but counterproductive. Committed crime control advocates should now favor their repeal.

There is a lesson here too about Congress's broader role in establishing policy for the criminal justice system. Congress can identify basic values and provide a sense of direction. Congress and only Congress can respond to the system's perennial top-priority request: "Send money." But Congress cannot micromanage. The attempt to do so is undesirable in principle, unattainable and destructive in practice.

**Federal Mandatories and Their Goals**

Mandatory minimum penalties have been a feature of federal criminal law since 1790. Mandatories remained rare, however, until the passage of the Narcotic Control Act of 1956, which imposed stiff mandatory sentences for drug importation and distribution. In 1970, Congress concluded that this effort had been a failure, and it repealed virtually all the drug mandatories. Among those who supported the 1970 repeal was Congressman George Bush, who urged that the drug mandatories were ineffective and unjust.

Fourteen years later the pendulum swung again. In 1984 Congress enacted mandatory penalties for several drug offenses and imposed a mandatory five-year sentence enhancement for any offender who carried a gun during a crime of violence. Every two years thereafter, from 1986 through 1990, Congress enacted additional mandatories and stiffened some of those already on the books. Its objective was to insure effective deterrence, guarantee severe punishment for those perceived as egregious offenders and eliminate disparate sentencing of defendants convicted of like offenses.

The federal code now contains over 100 mandatory minimum sentence provisions, but most of them are seldom or never used. Just four of these statutes (covering drug offenses and the enhancement for carrying a gun during another offense) account for 94% of all mandatory cases.

**How the Federal Mandatories Are Structured**

The best way to understand mandatory minimum sentencing is to distinguish two forms that these statutes can take. I call these two models discretionary mandatories and mandatory mandatories. The nomenclature seems oxymoronic in the first case and redundant in the second, but the clumsy terminology is necessary to underscore the central fact of life under "mandatories": Most of these statutes are essentially discretionary.

A. Discretionary mandatories.

Mandatories require the judge to impose a minimum sentence upon conviction under a specified
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charge, but they do not usually obligate prosecutors to bring such a charge every time the facts would support it. Legislatures in effect delegate to prosecutors the power to decide whether the statute really mandates a minimum sentence or instead is only another charging option. And prosecutors typically assume that a “mandatory” statute imposes no mandate on them. Mandatories then become little more than a bargaining chip, a “hammer” which the prosecutor can invoke, as needed, to obtain more guilty pleas under more favorable terms.

Bargaining-chip mandatories provide an escape from the additional trials that real mandatories can generate, and they may even reduce process costs, because their severe penalties can induce pleas that would not otherwise be forthcoming. Bargaining-chip mandatories also have important crime-control benefits. Though they do not constrain prosecutors, they do constrain judges, who are sometimes perceived as “soft” on crime. And even when bargained away, mandatories have crime-control value because they tend to increase the severity of sentences that guilty plea defendants will accept. But these deterrence benefits are undercut by uncertainty about whether the mandatory will be applied and by the perception among offenders that the mandatory can be manipulated. Also, bargaining-chip mandatories tend to increase rather than reduce disparity, because low-visibility prosecutorial choices control their application. And their most severe effects fall not on flagrantly guilty repeat offenders (who avoid the mandatory by their plea), but rather on first offenders in borderline situations (who are more likely to insist upon trial).

B. Efforts to constrain discretion in mandatories.

Fairness concerns and the desire for stronger crime-control benefits prompt efforts to make mandatories more than mere bargaining chips. Two approaches are possible. In the mandatory-prosecution approach, prosecutors are required to charge and are prohibited from bargaining. In mandatories that are fact-based rather than charge-based, judges ignore the formal charge and base the sentence on actual conduct.

The federal gun enhancement, 18 U.S.C. §924(c), illustrates the possibilities. The statute provides that whoever uses a firearm in committing a federal crime of violence or drug offense shall, in addition to the penalty for the underlying crime, serve a further term of five years without parole. Courts have assumed that the extra five-year term can be imposed only if the defendant is indicted under §924(c) and found guilty beyond a reasonable doubt. As a result, §924(c) creates a charge-based mandatory which becomes inapplicable at the prosecutor’s discretion.

The penalty effect of this bargaining chip is enormous. Under the federal Sentencing Guidelines, a first offender convicted of selling 50 grams of cocaine faces a sentence of 21-27 months, and if the offender carries a firearm, the Guidelines provide for an additional six-month penalty. But if the drug dealer is charged and convicted under §924(c), the 60-month add-on for carrying the weapon is ten times the enhancement otherwise applicable.

Because §924(c) depends on the prosecutor’s charg-
ing decision, there is obviously no “mandatory” five-year enhancement for carrying a weapon. The Department of Justice has sought to fill this gap by adopting something close to a regime of mandatory prosecution for “readily provable” violations. But the Department’s policy has wavered and its effectiveness is incomplete.

The drug mandatories have a similar verbal structure but a different history. The principal statute, 21 U.S.C. §841(a), declares it to be unlawful for any person to manufacture or distribute a controlled substance. The penalty provisions, set forth in §841(b), provide that “in the case of a violation of subsection (a) of this section involving [various drug quantities], such person shall be sentenced to a term of imprisonment which may not be less than [various terms of years].” Unlike §924(c), §841(b) has not been treated as a charge-based mandatory; to date the courts have uniformly held that the drug quantities specified in §841(b) are not elements of the offense but solely sentencing factors to be considered by the judge.

So interpreted, the drug statute becomes a fact-based rather than a charge-based mandatory. If, at sentencing, the judge finds by a preponderance of the evidence that the violation was one “involving” more than the specified drug quantity, the mandatory applies and the minimum sentence must be imposed. In this regime, the quantity that a prosecutor chooses to charge is irrelevant. The quantity applicable for sentencing purposes may be either higher or lower than the amount stated in the count of conviction.

This approach seems to eliminate the bargaining-chip quality of drug amounts. But the appearance is deceptive. The prosecutor who wants a deal can simply “hide” some of the drug quantities. She can also avoid §841 altogether; if she charges under a different statute, the quantity-based regime of §841(b) becomes unavailable to the judge.

After 1984, the alternative of choice for prosecutors seeking to avoid §841 was the charge of conspiracy to distribute drugs, in violation of 21 U.S.C. §846. Congress responded by plugging this loophole in 1988, when it made sentencing under §846 subject to the §841 penalties. But Congress’s effort did not, and obviously could not, stop a prosecutor determined to use §841 as a bargaining chip. The fact-based mandatories of §841 and §846 can still be avoided as long as there is any other charging option. When Congress eliminated conspiracy as a negotiating alternative to §841, two other options emerged - - the “phone count” (use of a communications facility to further a drug offense), a violation that carries a four-year maximum, and simple possession of a controlled substance, a violation that carries a one-year maximum. To judge solely by the statistics, the country has suffered an epidemic of telephone use and simple possession since 1988; in some districts, these charges have become the most serious count in up to 30% of all drug convictions.

Congress could plug these loopholes by extending maximum sentences for these alternate charges and by making their penalties fact-based rather than charge-based. Plea negotiators then would have to be more imaginative, but they would no doubt be equal to the task. Guilty pleas to misprision of a felony, filing false tax returns, and similar violations could be expected to proliferate. Unless Congress converts all misdemeanors into felonies carrying sentences of life in prison, the fact-based approach can never prevent mandatories from becoming bargaining chips.

The other way to constrain bargaining is to make prosecution mandatory. Though Congress has yet to take this approach, a few states have done so. Their experience is not encouraging. After enactment of New York’s Rockefeller drug laws in 1973, the volume of arrests declined sharply, and the overall probability of imprisonment actually dropped as a result. Yet trial rates rose and case processing times roughly doubled, despite the addition of 31 new criminal courts in New York City. “Mandatory” sentencing had not eliminated discretion but had simply displaced it to less visible stages of the criminal process. After less than three years, the experiment was abandoned and plea bargaining restrictions were repealed.

At the federal level, there are no statutory restrictions on charging or bargaining, but in 1987, the Department of Justice began to address the loophole by internal guidelines. The Department sought to enhance the bite of §841 by making prosecution mandatory for all “readily provable” violations. Though not uniformly followed, the policy has had impact; in some districts a degree of real mandatoriness has been attained. But success in this endeavor brings problems of its own.

C. Mandatory mandatories.

When mandatories are actually applied to all fact situations falling within their scope, predictable and severe sentences are achieved. The result is longer prison terms, increased correctional costs, and (perhaps) enhanced deterrence. Because judges cannot award a discount for a guilty plea, the percentage of defendants going to trial rises. Finally, mandatory-pros-
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crime of violence or a drug offense is subject to a minimum consecutive sentence of five years, and for a "second or subsequent conviction," the minimum consecutive sentence is 20 years. The Supreme Court decided, this past Term, that because of the "second or subsequent" wording, the 20 year minimum is applicable to a first offender, if he is convicted of committing two offenses with weapons during the same month or even the same day.

One might think that obvious bloopers of these sorts are not relevant to assessing the mandatory idea in principle. But Congress can never foresee the full range of circumstances to which a mandatory might apply. Mistakes are inevitable. Anomalies and injustices will arise in any system that attempts to base severe sentences on just one or two circumstances of a case.

3. Misplaced equality will occur even if all outright mistakes can be eliminated. Equal treatment of like offenders prevents one form of disparity, but equal treatment of unlike offenders creates another form of disparity — excessive uniformity. And excessive uniformity is inevitable under mandatories because they single out just one or two factors to determine the sentence. Offenders who differ in a host of crucial respects receive inappropriately equal treatment.

One example is equal treatment of offenders who play different roles in the offense. The ringleader faces the same sentence as a young messenger with no real control over the events. Parties who were pressured to participate face the same sentence as the most violent and abusive leaders. Mandatories could allow room for
such factors by permitting them to aggravate the sentence. But that approach would require setting the minimum penalty at the level appropriate for the least culpable offender, and such a statute would hardly "send a message." Instead mandatories are invariably pegged at a level that the legislature considers appropriate for a highly culpable participant; in some of the federal mandatories, the "minimum" sentence is life imprisonment without parole. Just punishment for lesser roles is inevitably precluded.

Because mandatories are excessively uniform, pressure to evade them constantly occurs. Mandatory-prosecution mandatories can be grossly unfair if faithfully applied, but (perhaps fortunately) they become difficult to sustain in practice because misplaced equality produces powerful resistance to their enforcement.

4. The cooperation paradox provides a final example of the distortions that result from inattention to context. One universally recognized exception to a mandatory minimum is the situation in which a defendant testifies against confederates or provides leads in other investigations. Sentence concessions are essential to guarantee that mandatories do not choke off the flow of such cooperation. Indeed mandates coupled with an exception for cooperation provide powerful inducements for assistance that might not otherwise be forthcoming.

But the escape hatch for cooperation creates a paradox. Defendants who are most in the know, and thus have the most to offer, are almost always the more important members of the conspiratorial group. The highly culpable offender is the best placed to negotiate a big sentencing break. Minor players, with little knowledge or responsibility, have little to offer and can wind up with far more severe sentences than the boss.

Of course, sentence concessions for helping the government have always been part of American sentencing and always will be. The vice of an escape hatch for cooperation stems from its interaction with the rigidity that mandatories otherwise impose. Low-level dealers, middlemen and more important distributors are normally held accountable for the same quantity of drugs flowing through the conspiratorial network. All participants therefore face the same high mandatory sentence, regardless of their limited role on the offense or mitigating personal circumstances. The "big fish" and the "minnows" wind up in the same sentencing boat. Enter the escape hatch, with sentence concessions that tend to increase with the knowledge and responsibility of the offender. The big fish get the big breaks, while the minnows are left to face severe and sometimes draconian penalties.

This result makes nonsense of the intuitively plausible scale of penalties that Congress and the ordinary person envisage when they think of sentences linked to drug quantity. Instead of a pyramid of liability, with long sentences for leaders at the top of the organizational ladder, the mandatory system can become an inverted pyramid, with stiff sentences for minor players and modest punishments for insiders who can cut favorable deals. Judge Frank Easterbrook calls this the phenomenon of "inverted sentencing. The more serious the defendant's crimes the lower the sentence. . . ."

The Effect of Mandatories: The Empirical Evidence

Sentencing Commission data show evidence of dramatic increases in sentence length in the period since mandatories were adopted. From 1984 to 1990, median sentences for one typical kind of drug case increased from 36 months with parole eligibility to 66 months without parole, an increase in likely time served of 367%. Although such increases cannot be attributed solely to mandatories, those statutes no doubt contribute to the trend, both directly and through their impact on the Sentencing Commission's choice of guideline ranges.

The mandatories did not, however, have much effect on the rate of cases going to trial. Guilty plea rates in drug cases (79%) remain roughly what they were before the mandatories took effect. Even in large quantity cases that appear eligible for the ten-year minimum, the plea rate (73%) is only slightly lower than the 79% rate observed in drug cases generally.

One explanation for the persistence of high guilty plea rates emerges from the Sentencing Commission's analysis of prosecutorial charging practices. In a sample of defendants apparently eligible for a mandatory drug or weapons sentence, the Commission found that only 74% of the defendants were charged with the highest mandatory indicated by their conduct. Among drug defendants who appeared eligible for the §924(c) weapons enhancement, only 55% were so charged. Further attrition occurred after indictment. Only 59% of the defendants were eventually convicted at the mandatory level for which they appeared eligible, and

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Many in this group still managed to avoid the mandatory level through a reward for cooperation. Among defendants who entered into plea agreements, more than half were sentenced below the mandatory level for which they appeared eligible.

Even more troubling, the attrition of cases did not appear to be random. Whites were less likely to be charged at the highest possible level, and once charged were less likely to be convicted than similarly situated blacks and Hispanics. Moreover, of defendants who faced a mandatory minimum at sentencing, 25% of the whites benefited from a prosecutor's "substantial assistance" motion, but only 18% of the blacks did. The Commission's data thus suggest not only a large element of discretion in the federal "mandator­ies," but also uncertainty, disparity, and possibly even invidious discrimination.

Methodology may be part of the problem here. Evidentiary gaps might explain some of what looks like unjustifiable manipulation. Because the Commission relied primarily on case files and written presentence reports, its evaluation may miss the significance of certain intangibles.

My own research, conducted with Sentencing Commissioner Ilene H. Nagel, attempted to provide a contrast to the Commission's statistical approach by using case files as background for extensive interviews with case prosecutors and probation officers. This "softer" but more comprehensive information base can help separate unjustified manipulation from legitimate evidentiary problems. We found that prosecutors evaded the applicable legal sentence (including both the requirements of mandatories and Sentencing Guidelines) in 20-35% of all cases resolved by guilty plea. Evasion seemed especially common in drug cases; on the other hand, §924(c) cases were treated scrupulously in many districts.

Some confirmation of our qualitative impressions can be gleaned from data concerning the tool most likely to be used to evade mandates - the lesser drug offenses that can serve as vehicles for count bargaining. In fiscal 1990, only 2% of all guilty pleas in drug cases resulted from pleas to a telephone count (21 U.S.C. §843) and only 7% resulted from pleas to a charge of simple possession (21 U.S.C. §844). But §843 convictions represent a major share of all drug convictions in New Hampshire (18%), Northern Texas (14%), Southern Indiana (13%) and Colorado (25%). Convictions under §844 were frequent in Maryland (25%), Eastern Virginia (24%), and Middle Alabama (34%), among others. In many districts §843 and §844 counts combined represented over 30% of all drug convictions. It is possible, of course, that simple possession and telephone use happened to be especially pervasive in these districts, or that weak evidence was a more common problem there than elsewhere. But one is entitled to be skeptical of such explanations for the data. The inference of commonplace evasion of drug mandatories in these districts seems compelling.

Motions for reduction of sentence on grounds of substantial assistance provide another window into the phenomenon. In fiscal 1991, such motions were made...
in 12% of all cases nationally, but substantial assistance motions were almost routine in Eastern Pennsylvania (41%), Western North Carolina (37%), Colorado (24%), and Northern Florida (36%). Some of the districts that rarely use §843 and §844 seem to rely on the substantial assistance motion as a substitute. Others (e.g. Colorado) seem to use both devices, with a cumulative effect that may touch more than half of all drug cases. The raw data cannot by themselves preclude legitimate explanations; cases of genuine cooperation may happen to be distributed very unevenly by districts. But again, one is entitled to be skeptical. The influence of pervasive discretion, with sharp disparities in its application, is strong.

**Conclusion**

The federal mandatories have almost certainly raised the severity of punishment in drug and weapons cases and made defendants more willing to assist in other investigations. Yet because the federal mandatories preserve discretionary features, trial rates have not soared. The process costs of true mandatories have been largely avoided.

These gains aside, the federal mandatories, precisely because they retain large measures of both discretion and mandatoriness, produce many of the worst effects of both models. Severity gains are undercut by uncertainty, since mandatories appear to be evaded in 30-50% of the cases to which they apply. At the same time, mandatoriness remains real, especially when defendants choose to go to trial. In such cases severity becomes a mixed virtue; sentences that seem fair when judged in the abstract from Washington often appear draconian as applied in context. Uniformity backfires because true mandatoriness produces inequity: cliffs, mistakes, misplaced equality and the cooperation paradox. Meanwhile discretion remains, and this discretion, largely unguided, is exercised at the lowest levels of visibility. Indeed the very illegitimacy of discretion in an ostensibly mandatory system drives discretionary judgments further underground, obscures accountability and invites disparity and abuse.

Is there another way? Mandatories, even if they bring some benefits, simply may not be worth their high budgetary and moral costs. But there is no need for Congress to face up to this hard choice, because virtually all the benefits of mandatories can be achieved without their unwanted side effects.

The alternative that can achieve Congressional goals is one that is already in place – the guidelines system enacted in 1984. Guidelines create greater uniformity than the previous regime of discretionary judicial sentencing and can guard against what some perceive as undue judicial leniency. At the same time, guidelines can avoid excessive uniformity by basing the sentence range on structured adjustments for an offender's role in the offense, lesser culpability, and mitigating personal circumstances. And when a sentence range is provided by guidelines rather than mandatories, the judge can depart if circumstances are unusual.

Guidelines can achieve a substantial degree of uniformity and even severity. At the same time, guidelines can preserve discretion, channel it into a structured framework, and allow sufficient flexibility to avoid the inequities of mandatory sentencing. By taking advantage of the guidelines system, Congress can achieve all the goals it seeks through mandatory minimums, without the adverse effects.

But guidelines can provide an effective alternative to mandatories only on one condition, only if they are flexible in ways that mandatories are not. Guidelines that permit artificial factors to drive the computation of offense levels, that prevent adjustments for variations in culpability, and that deny scope for judicial departure in exceptional circumstances are "guidelines" in name only. Just as mandatories can be discretionary, guidelines can become mandatory, with all the costs that excess rigidity brings. The existing federal Sentencing Guidelines too often seem to slide in this direction. To develop a just and effective sentencing system, Congress and the Commission must work together to remove excessive rigidity not only from the mandatory minimums, but also from the Guidelines themselves.

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Mr. Schulhofer's teaching and research interests lie primarily in the area of criminal justice. This article is adapted with permission from an article entitled "Rethinking Mandatory Minimums," by Stephen J. Schulhofer © 1993, Wake Forest Law Review.