

The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings

**Barbara S. Vincent
Paul J. Hofer**

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I. Introduction

In recent years, evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system. Chief Justice William Rehnquist has stated that these statutes are “perhaps a good example of the law of unintended consequences.”¹ There is substantial evidence that the mandatory minimums result every year in the lengthy incarceration of thousands of low-level offenders who could be effectively sentenced to shorter periods of time at an annual savings of several hundred million dollars, and that the mandatory minimums do not narrowly target violent criminals or major drug traffickers. The statutes

have unintended consequences that compromise the basic fairness and integrity of the federal criminal justice system. Moreover, the benefits of mandatory minimums could be achieved at a lower cost and with fewer negative side effects through application of the federal Sentencing Guidelines.

To be sure, others assert that mandatory minimums are worth the price. They believe that negative side effects are overstated, and that mandatory minimums serve important symbolic functions and have a broad deterrent effect—or will have a deterrent effect as public knowledge of congressional resolve to punish crime severely increases.

To prepare this paper, we reviewed the evidence on federal mandatory minimums, including a new report by the Department of Justice on low-level drug offenders,² studies by the General Accounting Office³ and the United States Sentencing Commission,⁴ and a previous Federal Judicial Center report,⁵ as well as the best of other scholarly research on mandatory minimums in the federal and state systems. We analyzed data from the United States Sentencing Commission on offenders who were convicted under the mandatory minimum statutes in 1992. We combined information from other studies to estimate the numbers of low-level offenders who were directly or indirectly affected by the mandatory minimum statutes in the most recent available statistical year. These findings are presented in Figure 1.

We have supplemented these research findings with actual cases from the U.S. district courts. The cases show that the theoretical flaws of the minimums have human consequences. These cases were found through a search of computer records, and the reported facts were then verified through consultation with probation officers in the district where each case was decided.⁶

Mandatory minimum sentencing statutes have been tried in the federal system before,

1. William H. Rehnquist, Luncheon Address (June 18, 1993), *in* United States Sentencing Commission, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States 286 (1993).

2. U.S. Department of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories 3 (December 1993) [hereinafter DOJ Report].

3. U.S. General Accounting Office, Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them? (November 1993) [hereinafter GAO Report]. *See also* Henry R. Wray, Mandatory Minimum Sentences: Are They Being Imposed and Who Is Receiving Them?, Report to the Chairman, Subcommittee on Crime and Criminal Justice, House of Representatives GAO/GGD-94-13 (November 1993).

4. *See* U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991) [hereinafter Special Report to the Congress].

5. Barbara S. Meierhoefer, The General Effect of Mandatory Minimum Prison Terms (Federal Judicial Center 1992).

6. Since some of the facts presented come from confidential presentence reports, we have used only offenders’ initials to protect the identity of the offenders and their families.

Congress should not be distracted by off-the-mark suggestions that [mandatory minimum sentencing] is a soft vs. tough on crime issue. I am a former prosecutor and I chair an agency that views *crime control* as the most important goal of sentencing. . . . So the real issue is how to most effectively, efficiently, and fairly achieve this important goal.¹⁴
—*The Honorable William W. Wilkins, Jr., U.S. Court of Appeals for the Fourth Circuit*

notably in the Narcotic Control Act of 1956.⁷ In 1970, Congress repealed most of the mandatory minimum terms, in part because the increases in sentence length required by the statutes had not shown the expected reduction in drug law violations.⁸ But in 1984, as part of the same comprehensive legislation that created the Sentencing Guidelines, Congress began what has become biannual enactments of new manda-

tory minimum penalty statutes. Over sixty federal criminal provisions now contain mandatory minimum penalties. The idea behind them is simple: If you commit a crime involving a certain amount of drugs, or possess a weapon during a crime, or have certain types of prior convictions, then the judge must impose a prison term of five years, ten years, thirty years, or even life imprisonment, without the possibility of parole for any of these

terms. Congress sets the minimum punishment, and every judge must impose it on every offender who meets the statutory criteria, regardless of any other facts in the case.

Without the statutory minimums, the coexisting federal guidelines would control sentences. The guidelines are also a form of mandatory sentencing—judicial discretion is sharply limited and there is no parole. But the guidelines take into account many more factors than do the mandatory minimums; they maintain “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”⁹ Judges may in extraordinary circumstances depart either upward or downward from the guideline range.¹⁰ In 1992, judges departed above the range in 1.5%

of the cases and below the range in 6% of the cases based on mitigating circumstances.¹¹ Under the guidelines, judges can choose the precise sentence from a narrow range of months or years of imprisonment,¹² and in some cases they can impose alternatives to imprisonment, such as home confinement.¹³

With the guideline structure in place, eliminating mandatory minimum statutes would not be a return to the days of unfettered judicial discretion. The question for Congress is how best to determine the punishment for different types of crimes and offenders—through the Sentencing Guidelines or through mandatory minimum statutes.

7. Narcotic Control Act of 1956, Pub. L. No. 84-728, tit. I, § 103, 70 Stat. 651, 653–55 (1956).

8. Special Report to the Congress, *supra* note 4, at 6 (discussing S. Rep. No. 613, 91st Cong., 1st Sess. 2 (1969)).

9. 28 U.S.C. § 991(b)(1)(B) (1988).

10. 18 U.S.C. § 3553(b) (1988). Departures must be accompanied by a statement of reasons justifying the sentence as appropriate. Both the defendant and the government have the right to appeal departure sentences. 18 U.S.C. § 3742 sets forth the standards for appellate review of sentencing.

11. U.S. Sentencing Commission, Annual Report—1992, at 121 (1993) [hereinafter Annual Report—1992]. Judges departed an additional 15% based on substantial assistance motions by the government, to be discussed later in this report.

12. The guideline range can be no greater than 25% of the minimum months of imprisonment or six months, whichever is greater. 28 U.S.C. § 994(a)(2) (1988).

13. Prison can be avoided entirely only if the minimum of the guideline range is six months or less, which is far below the range for any offenses covered by mandatory minimum sentences. U.S.S.G. § 5C1.1(d) (1993).

14. Judge William W. Wilkins, Jr., Chairman of the U.S. Sentencing Commission, Testimony Before the Subcommittee on Crime and Criminal Justice of the House of Representatives Committee on the Judiciary (July 28, 1993), *reprinted in* 6 Fed. Sentencing Rep. 2, at 67 (September/October 1993) (emphasis in original).

II. Profile and Estimates of the Number of Low-Level Offenders Affected by Mandatory Minimums

Critics of the mandatory minimum statutes contend that because the statutes are written so broadly, many minor offenders are affected—including many who present no threat to society and who could be adequately punished with shorter sentences. Determining how many of these offenders are sentenced every year, or how many are already in prison, has been difficult. Computer databases do not record whether a defendant warrants mercy. People disagree over who is truly a “low-level” drug trafficker or a “less culpable” conspirator. In addition, mandatory minimums have both direct and indirect effects, and the num-

ber of offenders counted depends on which effects one includes.

New data from the Department of Justice and studies by the Sentencing Commission allow us to estimate more closely than before the numbers of offenders who are affected by the mandatory minimums and are considered “low-level” offenders. We know, for example, that the minimums have had their greatest impact on drug offenders. Ninety-one percent of the defendants sentenced under statutes with mandatory minimum provisions during a recent six-year period were convicted of drug offenses.¹⁵

Low-level offenders affected indirectly through the Sentencing Guidelines

The greatest effect of the mandatory minimums is through their incorporation into the Sentencing Guidelines, although this effect is indirect. Disentangling the effects of the mandatory minimums from those of the guidelines

is highly problematic,¹⁶ but the mandatory minimums have influenced, and some would say distorted, the guidelines and thus the entire federal sentencing structure.¹⁷ All federal crimes committed since November 1987 (the effective date of the Sentencing Guidelines) are now sentenced under the guidelines. The guideline levels were set by the Sentencing Commission so that the length of imprisonment for all but the least culpable offenders is longer than the length required by the mandatory minimums.¹⁸ This prevents extreme disparities between those convicted under the mandatory minimum statutes and those subject only to the guidelines, and it also permits some room for downward adjustments in the guideline range for offenders who plead guilty, accept responsibility for their offenses, or engage in other mitigating conduct. Every federal offender—even those not convicted under a mandatory minimum statute—has been indirectly affected by the statutes because all are subject to guidelines that have been set to incorporate the mandatory minimums.

15. Special Report to the Congress, *supra* note 4, at 10. The statutes responsible were 21 U.S.C. § 841 (38,214 offenders), 21 U.S.C. § 844 (10,218 offenders), and 21 U.S.C. § 960 (6,135 offenders). The total number of offenders in the period from 1984 to August 1990 was 59,780.

16. William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. Cal. L. Rev. 405 (1992).

17. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 Fed. B. News & J. 158 (1993).

18. See U.S. Sentencing Commission, Federal Sentencing Guidelines Manual, at § 2D1.1 cmt. n.10 (1994) [hereinafter Guidelines Manual]; see also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 927–32 (1990).

In fiscal 1992, 38,081 offenders were sentenced under the guidelines. Of these, 16,834 (44%) were convicted primarily of a drug offense.¹⁹ The top bar in Figure 1 shows these drug offenders; lower bars show the number falling under various definitions of low-level offenders, including those who are indirectly and directly affected by the statutes. About half of the drug offenders (8,459 people) were in the lowest criminal history category (they received one or fewer points under the guidelines' criminal history scoring scheme²⁰), there was no dangerous weapon involved in their offense, and they were not organizers, leaders, managers, or supervisors (i.e., they had no "aggravating role" under the guidelines) in the drug trafficking operation.²¹ If we exclude offenders who receive even one criminal history point under the guidelines, the number drops to 6,897. These are the low-level drug offenders who were both directly and indirectly affected by the mandatory minimums in just one year.

The Department of Justice counted low-level drug offenders sentenced in *all* years who are currently in the custody of the Bureau of Prisons. The DOJ used a slightly different definition of "low-level": offenders who had no record of violence, no evidence of sophisticated criminal activity, and no prior prison confinement. They found that of the 90,000 offenders currently in custody, over 45,000 were drug offenders, and over 16,000 of these were low-level.²² The majority of these offenders had never been arrested before their present offense. They are serving an average sentence of 81.5 months and constitute more than one-third of all of the drug violators incarcerated in federal prisons.²³ If the prosecutorial and sentencing practices of recent years continue, low-level offenders like these 16,000 will be joined by thousands more every year and will occupy an increasing proportion of federal prison space.²⁴

The DOJ obtained additional information on a representative sample of 767 low-level drug offenders who were sentenced in 1992 and were in prison in June 1993. This

population's profile is roughly comparable to that of the offenders displayed in the third bar from the top in Figure 1: drug offenders with no criminal history points, no indication of a weapon involved in the offense, and no aggravating role in the crime. The DOJ data can be used to estimate how many of these lowest level offenders sentenced in one recent year played various types of minor roles.²⁵ Figure 1 illustrates the approximate number who performed four of the least cul-

19. Annual Report–1992, *supra* note 11, Figure B, Table 11, at 44–45 (15,643 for drug trafficking; 290 for use of a communication facility in the commission of a drug offense; 901 for simple drug possession).

20. Criminal history scoring is explained in *Guidelines Manual*, *supra* note 18, at ch. 4. Generally, offenders earn at least one point if within the past ten years they have received a sentence of less than sixty days for any offense except certain foreign, juvenile, or tribal offenses, or other specified petty offenses, such as reckless driving.

21. DOJ Report, *supra* note 2, at 19 (reporting data provided by the U.S. Sentencing Commission from FY 1992).

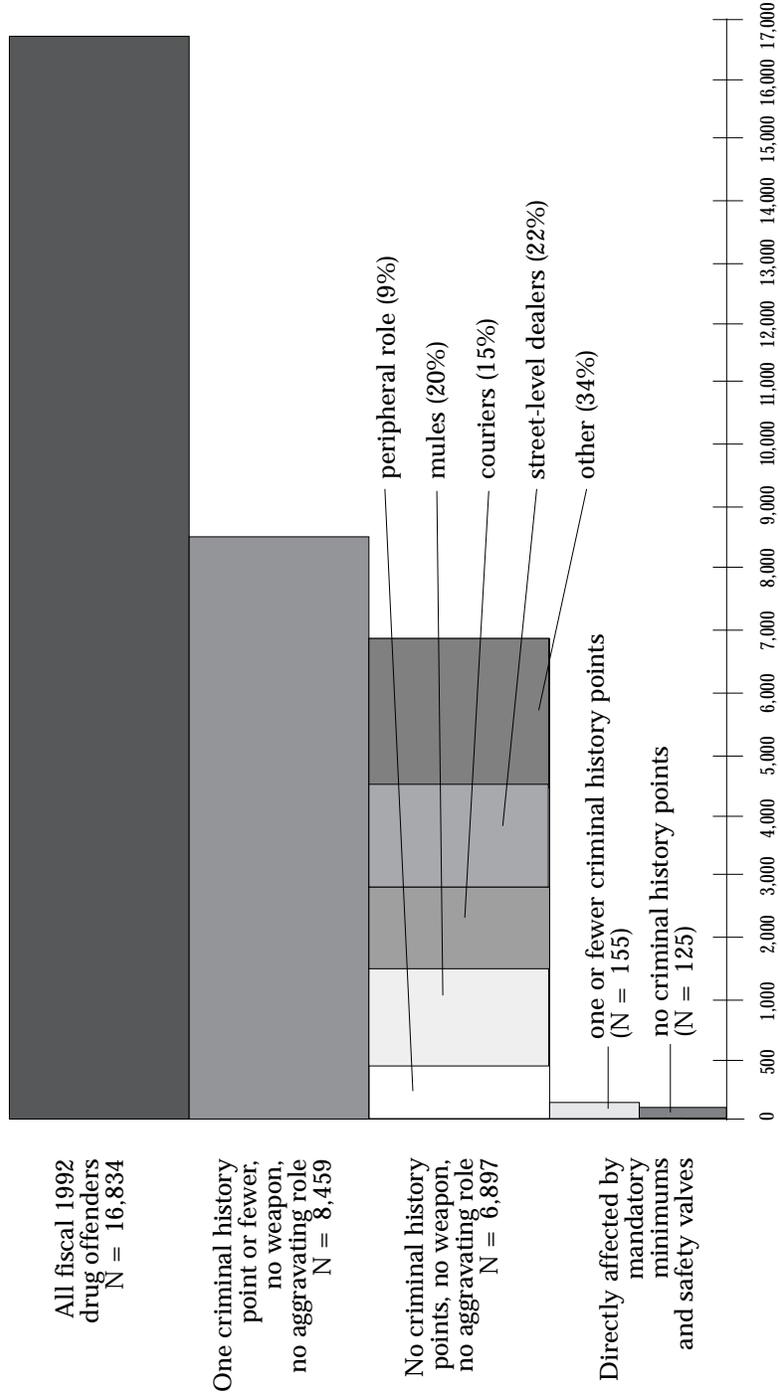
22. *Id.* at 2.

23. Annual Report–1992, *supra* note 11, at 2–3.

24. Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sentencing Rep. 29 (July/August 1993).

25. The populations used in the DOJ study and the Sentencing Commission data reported in Figure 1 vary slightly. *Cf.* DOJ Report, *supra* note 2, at Appendix A and n.8. Both include only drug offenders with no indication of use of a weapon in the present offense, and no indication of an aggravating role. The DOJ excluded offenders who had previously been committed to a prison, including juvenile convictions, or had any record of violence, including institutional violence. The 6,897 included in the Sentencing Commission count include offenders with a criminal history score of zero, which would include some offenders with old or juvenile commitments. The total population identified by the DOJ was 5,099, after cases were excluded because of incomplete matches and missing data.

Figure 1: Breakdown of Fiscal 1992 Drug Offenders Affected by Mandatory Minimums



pable roles. Of the DOJ sample, 15% were “couriers” and 20% were “mules,” whose sole role in the offense was to transport the drugs.²⁶ Twenty-two percent were street-level dealers who distributed small quantities of drugs directly to users. About 9% had an even more

peripheral role, including those who ran errands, acted as lookouts, off-loaded boats, or performed other similar functions. Only 1% of the sample had a purely “passive” role, such as a girlfriend who allowed her drug-dealing boyfriend to use her apartment to store drugs.

Offenders convicted under mandatory minimum statutes

The offenders described above are indirectly affected by the mandatory minimums, but not all were convicted under a statute carrying a minimum penalty. Offenders convicted under the statutes bear additional consequences: For these offenders, the statute sets the prison term, even if the guideline range is lower. If the guidelines for their crimes are later amended and applied retroactively, these offenders will still be required to serve the statutory term unless Congress changes the mandatory minimum and makes that change retroactive.²⁷ Further, a judge can never depart from a statutory minimum (as can be done with guideline sentences) to take account of mitigating circumstances. The only basis for departure from a mandatory minimum is a motion by the government that the defendant has provided substantial assistance in the prosecution of another person. This exception, while providing an out for some defendants, creates many problems of its own, which we discuss later in this report.

The Statistical Appendix contains complete tables describing the characteristics of persons convicted directly under the mandatory minimum statutes in fiscal 1992. Over one-quarter of offenders sentenced under the guidelines in fiscal 1992 were convicted under a statute that carried a mandatory minimum prison term. Eighty-eight percent of these offenders committed drug trafficking offenses. Half of the drug offenses involved cocaine powder; cocaine base (“crack”), marijuana/hashish, and heroin accounted, respectively, for 19%, 15%, and 8% of the total. Eighty-five percent of the offenders convicted under mandatory minimum statutes did not play an

aggravating role in the offense. Forty-nine percent received no criminal history points under the Sentencing Guidelines, and 61% received one or zero points. Weapons were *not* involved in 77% of the offenses. The offenders also appear to have amassed no great wealth from their crimes: 81% were judged unable to pay a fine. Clearly, the mandatory minimum statutes are not being applied only to “kingpins” or armed drug dealers.

26. DOJ Report, *supra* note 2, at Table 16. Couriers transport drugs with the assistance of a vehicle, mules carry drugs on their person or in their baggage. See DOJ Report, *supra* note 2, at 31 and Appendix B for complete definitions of these role categories.

27. This is the situation today for offenders sentenced to mandatory minimums for trafficking LSD. The Sentencing Commission recognized that including the weight of paper or sugar in which the LSD is sold in the calculation of drug weight led to sentences that were disproportionate and excessive. (See discussion in text *infra*, Chapter 8.) A recent amendment of the guidelines (Guidelines Manual, *supra* note 18, at Amendment 488) enables offenders whose sentences were controlled by the guidelines to petition for corrective resentencing. But whether the commission or the courts can resentence offenders who received the statutory minimum based on the weight of the carrier medium is doubtful. See Administrative Office of the U.S. Courts, Memorandum from Catharine M. Goodwin, Office of the General Counsel, to the Committee on Criminal Law (November 15, 1993) (on file at the Federal Judicial Center).

Offenders whose sentences are directly controlled by the mandatory minimums: the impact of “safety valves”

The sentences received by most drug offenders under the Sentencing Guidelines are well above the mandatory minimum levels, since the guidelines are anchored by the mandatory minimums and go up from there. Minor participants, however, can benefit from reductions because of their mitigating role or from judicial departures from the guidelines and, depending on the amount of drugs involved, the guideline sentence can be lower than the mandatory minimum. Currently, when a person is convicted under a mandatory minimum statute, neither the guidelines nor the judge can go below the statutory “floor.” The mandatory minimum directly controls the sentence. Recent proposals for a “safety valve”—legislation that would make the mandatory minimums inapplicable for certain categories of low-level drug offenders²⁸—could benefit offenders whose guideline range is now controlled by a mandatory minimum term.

Determining how many low-level cases have been directly controlled by a mandatory minimum in this way, and how many in the future might benefit from safety-valve legislation, is difficult for several reasons. First, when a mandatory minimum is known to apply, probation officers and judges do not always make findings concerning facts—such as the

offender’s minor role in the offense or other mitigating personal characteristics—that could be the basis for a downward adjustment or a departure. We don’t know how many already-sentenced offenders might have received a different sentence if there had not been the mandatory minimum.

Second, the potential impact of a safety valve depends on future actions by the Sentencing Commission and the Department of Justice. If the commission were to amend the guidelines for drug trafficking, a mandatory minimum safety valve could potentially impact a larger number of offenders, depending on the particulars of the guideline amendment. The number of offenders benefiting from a sentencing safety valve could also be smaller than in years past because a safety valve of sorts at the prosecution stage has recently been established through a revision in the Department of Justice’s Principles of Prosecution. Previous policies required the government to charge the most serious readily provable offense, whereas new policies allow prosecutors to consider whether the resulting sentence is disproportionate to the crime.²⁹ The guidelines provide a standard for proportionality, and some prosecutors may decline to pursue charges carrying a mandatory minimum if the resulting sentence is greater than the otherwise applicable guideline sentence.

Studies by both the General Accounting Office and the Sentencing Commission have counted the number of cases where the mandatory minimum “trumped” the apparently applicable sentence. The GAO found in its study of 900 cases—selected in eight judicial districts from cases in which an offender was arrested for a crime involving an amount of drugs that should trigger a mandatory minimum, the presence of a firearm, or both³⁰—that 25% of the time the mandatory minimum was within the guideline range. In 5% of the cases the mandatory term was greater than even the top of the otherwise applicable guide-

28. See Flexibility in Application of Mandatory Minimum Sentence Provisions in Certain Circumstances, H.R. Rep. No. 3355, 103d Cong., 1st Sess., at § 2404 (as passed by the Senate, November 1993).

29. Compare U.S. Department of Justice, Memorandum from Richard Thornburgh to U.S. Attorneys (March 13, 1989) with U.S. Department of Justice, Memorandum from Janet Reno (October 12, 1993) (on file at the Federal Judicial Center). (The new guidelines allow prosecutors to consider “whether the penalty yielded by [the guideline] sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct. . .”).

30. GAO Report, *supra* note 3, at 4.

line range.³¹ However, since the GAO sample was not randomly selected exclusively from the population of low-level, nonviolent, first-time drug offenders, it cannot tell us how many of this population are directly affected by the minimums.

The best data concerning low-level offenders come from the Sentencing Commission, which has recently attempted to estimate the impact of various safety-valve proposals. If we begin by eliminating those offenders who were not convicted under a mandatory minimum statute from the 6,897 offenders with no criminal history and low-level drug offenses in Figure 1, we are left with 3,198 cases. From these we can eliminate 1,029 who were excepted from the mandatory minimums based on a motion by the government that they provided substantial assistance, leaving 2,169.³² From this group, 601 offenders were possibly affected by the mandatory minimums—the minimums were within the otherwise applicable guideline ranges. Only 125 offenders were definitely affected by the mandatory minimums; their guideline ranges were entirely below the statutory terms to which they had to be sentenced.³³

The number of offenders who would be affected by various safety-valve provisions depends, of course, on how the safety valve is defined. Some proposals, such as the one included in the crime bill passed by the Senate on November 19, 1993, have more restrictive definitions of low-level than the definition used in the paragraph above. Precise estimates of the impact of proposals are impossible if data on the criteria used to define “low-level” are unavailable. For example, we can’t determine whether defendants have prior foreign, domestic, or juvenile convictions, whether they owned, financed, or sold any drugs, or whether they cooperated with authorities. Consequently, numbers based on the less restrictive criteria above are likely to be overestimates of the number of defendants who would be affected by safety valves with additional restrictive conditions. The Sentencing Commission found that if we eliminate

offenders with any known prior contact with the criminal justice system, the number of defendants who would definitely benefit from a safety valve falls to seventy-two.³⁴

Conversely, if the qualifying criteria are broadened, a safety valve’s potential impact would be greater. If we apply the same criteria—no dangerous weapon, no aggravating role in the offense, no death or bodily injury arising from the crime—but increase the extent of prior record permitted, larger numbers of defendants would be affected. A safety valve for those with one criminal history point or less would definitely lower sentences for 155 offenders; for two points or less, 167 offenders; for three points or less, 200 offenders.³⁵

Thus, policy makers considering enacting additional mandatory minimums, repealing some or all of the existing ones, or enacting safety valves or other modifying legislation should be mindful of the numbers and types of offenders who would be affected by changes in the mandatory penalty statutes. Many of the effects of the mandatory minimums are indirect through the sentencing guidelines. When the guidelines are made to incorporate the mandatory minimums, the guidelines magnify the statutes’ effects. Changing statutes without changing the guidelines minimizes the effects of legislative changes.

31. *Id.* at 12.

32. Also eliminated in the Sentencing Commission’s analysis are the small number whose offense led to death or serious bodily injury.

33. See U.S. Sentencing Commission, Analysis of the Violent Crime Control and Law Enforcement Act of 1993—H.R. Rep. No. 3355 (as passed by the Senate November 19, 1993), at Table 10, 49 (February 22, 1994) [hereinafter Analysis of Crime Bill].

34. See U.S. Sentencing Commission, Impact Analysis of Drug Mandatory Minimum Carve-Out for Defendants with No Known Prior Contact with the Criminal Justice System (undated) (on file at the Federal Judicial Center).

35. Analysis of Crime Bill, *supra* note 33.

III. What Do the Mandatory Minimums Cost?

Using the above estimates of the numbers of defendants directly and indirectly affected by the mandatory minimums, we can approximate what the minimums cost and what might be saved by (1) adding a safety valve, (2) eliminating mandatory minimums for drug offenses and allowing the present guideline system to operate, and (3) eliminating all mandatory minimums and amending the guidelines.

We know from previous work by the Bureau of Prisons that 70% of the prison growth related to sentencing since 1985 is attributed to increases in drug sentence length. “[D]rug law offenders alone are consuming three times more resources than all other federal crimes combined . . . unless Congress and the Sentencing Commission change drug sentences, relief will be nowhere in sight. The prison population could reach 110,000 by 1997, two-and-a-half times what it was in 1987, at a yearly operating cost of well over \$2 billion.”³⁶ The average annual cost of incarceration is \$20,747 per prisoner.³⁷ Construction of new prison space is, of course, an additional expense.

36. Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sentencing Rep. 29 (July/August 1993).

37. Based on the Federal Bureau of Prisons’ fiscal year 92 per-bed cost of \$56.84 per day.

38. DOJ Report, *supra* note 2, at Table 5.

39. The following calculations do not take into account good-time credits, which may reduce sentences by up to 15%.

40. Seventy-eight percent of all drug trafficking offenders in fiscal 1992 received this adjustment. See Annual Report–1992, *supra* note 11, at Table 34, 92.

41. DOJ Report, *supra* note 2, at Table 23.

42. Assuming no departure and a sentence at the mid-point of the guideline range.

43. Special Report to Congress, *supra* note 4, at 117. Figures were updated using the more current estimated costs of imprisonment.

If Congress were to enact a safety valve for offenders with no criminal history points, about 125 offenders a year would definitely receive lower sentences. Exact data on what sentence these offenders currently receive is not readily available, but we know that among low-level offenders in the Department of Justice study who received a mandatory minimum, half were sentenced to five years and half to ten.³⁸ The resulting 935 bed-years cost about \$19,400,000.³⁹ What sentences would these offenders receive under the guidelines without the statutory floor? If we assume guideline calculations for these offenders begin at the offense level corresponding to the amount of drugs specified in the mandatory minimum, we can calculate what the average sentence would be under the guidelines. About three-quarters would receive a two- or three-level reduction for acceptance of responsibility.⁴⁰ About one-quarter would receive a mitigating role reduction of two to four points.⁴¹ An average three-level reduction for every offender results in sentences of fifty-one or ninety-seven months for each half of the population,⁴² leaving 769 bed-years at a cost of \$15,954,000. This represents a savings of roughly \$3.5 million in future expenditures for low-level offenders sentenced in one year.

If the mandatory minimums were completely repealed, more savings would be realized. The Sentencing Commission estimated the additional cost of the statutes above the otherwise applicable guideline range for offenders sentenced in 1990. The mandatory minimums directly affected 981 offenders. If these offenders had received the applicable guideline sentence instead, over \$91 million in future expenses would have been saved.⁴³ Under a “high-impact” model, which assumes that judges would sentence lower in the guideline ranges in cases where the mandatory minimum now falls within the range, the savings climb to \$145 million.

To achieve greater savings, a safety valve or repeal must be combined with amendment of the Sentencing Guidelines. If the guideline ranges were reduced by two offense levels for low-level drug offenders of the type identified by the Department of Justice, those offenders who now receive an average sentence of 81.5 months⁴⁴ would receive sentences about 20% shorter⁴⁵—for an average of about 65 months.⁴⁶ This 16.5-month savings, applied to the 6,897 offenders with no criminal history points sentenced each year, would save

9,483 bed-years, or almost \$200 million a year. If we multiply this by every year that the current sentencing regime stays in place, then add the cost of the new prison construction needed to house the burgeoning population, we can estimate the cost of incarcerating low-level drug offenders for the lengthy sentences mandated by the statutes. To save the billions of dollars currently being spent on the lengthy incarceration of low-level drug offenders will require both statutory change and guideline amendment.

44. DOJ Report, *supra* note 2, at 3.

45. The Sentencing Table in the *Guidelines Manual* is constructed so that a two-level reduction results in a sentence about 20% shorter. See *Guidelines Manual*, *supra* note 18, at 270.

46. The suggestion of a two-level reduction is based on recent proposed amendments to the Sentencing Guidelines. See U.S. Sentencing Commission, Proposed Guideline Amendments for Public Comment, 58 Fed. Reg. 67,522 (December 21, 1993), proposed amendment 8. All guideline amendments are subject to the approval of Congress. Data from the pre-guidelines era show that a defendant convicted of trafficking in 500 grams of cocaine, who had a lesser role, and who plead guilty would have served time of between ten to sixteen months. See U.S. Sentencing Commission, Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, Table 1(a), at 27 (June 18, 1987). The minimum guideline range for this defendant today is thirty to thirty-seven months. The statutory mandatory minimum is five years.

IV. Do the Mandatory Minimums Serve Sentencing Goals?

Whatever the cost of the mandatory minimums, they could be worth their expense if they achieved important sentencing goals, such as reducing crime or drug availability.⁴⁷ A growing body of research, however, indicates that mandatory minimums in general,

and the federal statutes in particular, have not proved effective. When they are effective (e.g., incapacitating dangerous offenders), they are less precise than the guidelines system and thus waste resources that could be conserved by more precise tools.

General deterrence of potential offenders

In a recent review of the results of decades of research evaluating the effectiveness of mandatory minimum drug and firearm laws, Prof. Michael Tonry concluded that “the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.”⁴⁸ The reasons for this are several. When mandatory minimums call for short prison terms, they are often irrelevant because longer terms would have been imposed anyway. When they call for longer terms, they are often circumvented and thus do not increase the certainty and predictability of punishment. Prof. Stephen Schulhofer, reporting on the results of an evaluation of the New York mandatory minimum drug laws, notes that although the statutes increased both the probability of incarceration upon conviction and the severity of the sentences imposed, there were declines in the volume of arrests, the rate of indictment upon arrest, and the rate of conviction

upon indictment. The result was that the overall probability of imprisonment after the law’s enactment was lower than before the law.⁴⁹

(See the additional discussion *infra* showing that the federal mandatory penalties are not applied uniformly, Chapter 5.)

In addition, conventional assumptions of deterrence theory may not apply to drug traffickers. To be deterred, offenders must stop to weigh the costs and benefits, be aware of the penalties, find those penalties intolerable, and have other more attractive options. Even if some potential offenders are deterred, drug trafficking will not be curtailed if there are other persons willing to take the place of convicted offenders. This appears to be true in the profitable drug business.⁵⁰ Only 5% of the offenders convicted under the mandatory minimum statutes in fiscal year 92 were organizers or leaders of an extensive drug operation. Over 85% did not manage or supervise traf-

Congress decided to hit the problem of drugs, as they saw it, with a sledgehammer, making no allowance for the circumstances of any particular case. . . . Under the statutory minimum, it can make no difference whether he is a lifetime criminal or a first-time offender. Indeed, under this sledgehammer approach, it could make no difference if the day before making this one slip in an otherwise unblemished life, defendant had rescued fifteen children from a burning building, or had won the Congressional Medal of Honor while defending his country.
—Judge J. Spencer Letts, *Central District of California, on having to impose a ten-year sentence on a situational offender (United States v. Patillo, 93 Daily Journal D.A.R. 5399, March 23, 1993).*

47. The purposes of sentencing are codified in federal sentencing law at 18 U.S.C. § 3553(a)(2).

48. Michael Tonry, *Mandatory Penalties*, in 16 *Crime & Justice: A Review of Research*, at 243–44 (Michael Tonry ed., 1990).

49. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 *Wake Forest L. Rev.* 207 (1993).

50. See generally Ralph D. Ellis & Carol S. Ellis, *Theories of Criminal Justice: A Critical Reappraisal* (1989); Mark A. R. Kleiman, *Against Excess: Drug Policy for Results* 161–63 (1992).

ficking activity. These low-level offenders are the type who are easily replaced in a drug

ring and whose removal cannot realistically be expected to disrupt drug distribution.

Specific deterrence and rehabilitation of known offenders

Research has consistently found that longer prison terms do not reduce recidivism. A recent review of the literature by the Department of Justice confirmed that “[t]he great majority of recidivism studies of State and all studies of Federal prison releasees report that the amount of time inmates serve in prison

does not increase or decrease the likelihood of recidivism, whether recidivism is measured as a parole revocation, rearrest, reconviction, or return to prison.”⁵¹ Neither deterrence as a result of fear of reimprisonment nor rehabilitation achieved in prison appears to be affected by the amount of time served.

Case History:

VC is a 19-year-old man with no prior criminal record. He dropped out of school after the seventh grade, but then attended Keystone Job Corps Center for five months. He was terminated from the program before graduation, however, because of an altercation with another student. He was enrolled in the Street Academy at the time of his arrest. He has no other employment history and remains financially dependent on his mother. He denies use of drugs or alcohol, and his urine specimens were negative for drug use.

While police were conducting “buy-bust” operations, an undercover officer approached VC and asked for a “twenty.” The officer then continued to walk down the street as VC met with a male juvenile. Through the use of a surveillance team, the police saw VC hand a plastic bag to the juvenile, who then came up to the undercover officer and handed him the bag in exchange for \$20 in marked money. The money was then delivered to VC. Upon arresting VC, the police recovered forty-eight plastic bags of cocaine base, totaling 6.854 grams.

Based on the Sentencing Guidelines, VC’s time of imprisonment ranged from fifty-one to sixty-three months. However, the statutory provisions required a minimum term of five years.

Incapacitation

The leading argument for lengthy incarceration has been that it keeps dangerous offenders off the street so that they cannot continue to commit offenses against the community.⁵² Incapacitation of persons likely to commit new crimes can pay off—the cost of incarceration may be lower than the cost of the crimes that the person was likely to commit. The key, however, is to target offenders who are likely to commit new crimes, and the federal mandatory minimums do a poor job of this.

Research has clearly established that prior criminal activity is the best indicator of future dangerousness.⁵³ The majority of mandatory minimum statutes, however, base punishment not on prior criminal activity but primarily on the amount of drugs or a few other features of the present crime, such as the presence of a firearm. The drug-trafficking mandatory minimums increase penalties for repeat offenses, but they do so crudely, and they often similarly treat persons with significantly different risks of recidivism. Further, based on the data in Table 3 of the Sta-

51. DOJ Report, *supra* note 2, at 41.

52. See U.S. Department of Justice, Office of Policy Development, *The Case for More Incarceration* (October 28, 1992).

53. Alfred Blumstein et al., *Criminal Careers and “Career Criminals”* 12 (1986).

tistical Appendix, we find that half of the offenders convicted under mandatory minimum sentencing statutes in fiscal 1992 had zero criminal history points. They were the offenders least in need of incapacitation.

The Department of Justice study demonstrates that the guidelines' criminal history points are highly correlated with recidivism: 18% of releasees with zero points recidivate

Punishment

Retribution—punishment imposed to express society's abhorrence of the crime—can also be a valid reason for imprisonment. However, the sentencing philosophy of “just deserts,” which bases punishment partly on the amount of harm done by a criminal, has always recognized that individual culpability is also a crucial factor in determining degree of punishment.⁵⁶ Mandatory minimums, by focusing only on the amount of drugs without considering the defendant's role, motivation, state of mind, or other individual characteristics, are not a true implementation of any coherent punishment philosophy. They ignore the question of how much imprisonment is deserved by each particular defendant.

Mandatory minimum statutes fail to differentiate among offenders who are quite different from one another, such as the leaders of a conspiracy who plan and organize the importation of a planeload of drugs and reap the profits, and the underlings who are paid a fixed price to unload the plane, watch for police, or carry out other menial tasks. Because mandatory minimums ignore many relevant sentencing factors, they give disproportionate weight to the factors they do consider—amount of drugs, particular types of prior convictions, and especially the government's power to move for a reduction of sentence

within three years, and rates increase to over 75% at the highest point levels.⁵⁴ First-time drug offenders were found to be especially low risks for serious and violent recidivism.⁵⁵ The guidelines are more precise tools for targeting high-risk offenders and could do an even better job if the penalties for first offenders were not based on the mandatory minimums.

based on a defendant's substantial assistance in the prosecution of another person, as discussed below.

Case History:

SC and JG are both 20-year-old women with no prior criminal records who lived in an apartment with SC's boyfriend. SC's boyfriend had apparently allowed a friend to use the apartment to store a large amount of cocaine, but as the boyfriend was not indicted, his exact role is unclear. However, neither SC nor JG knew or were known by any of the other codefendants in this case, and there is no evidence that they profited in any way or bought, sold, or used drugs themselves. They were aware that there were drugs in the apartment, and both were sentenced to ten years in prison.

SC had moved to the United States from Mexico with her boyfriend about one year before because she wanted their child (now ten months old) to be born in the United States. JG had moved into the apartment only weeks before the arrest at the request of SC, her foster sister, who needed help caring for her infant son. At sentencing, the judge departed downward from the sentencing guideline range to the ten-year minimum, stating that SC was a “minimally involved offender if I ever saw one,” and that JG's case was clearly one of “being at the wrong place at the wrong time.”

54. DOJ Report, *supra* note 2, at Table 27.

55. *Id.* at 38.

56. Andrew von Hirsch, *Past or Future Crimes* (1985).

Mandatory minimums have had no observable effect on crime

Trends in criminal victimization rates and drug availability for the periods before and after the mandatory minimums took effect fail to demonstrate any reduction in crime that can be attributed to the mandatory minimums. As

shown in Figures 2a and 2b, victimization surveys—the best available data on both reported and unreported crimes—show a relatively stable rate for crimes of violence since 1975 and a fairly steady decrease in property offenses that began well before the mandatory minimum era. This is perhaps not surprising, since only a small proportion of crime is prosecuted in the federal courts. Federal sentencing policy cannot be expected to have a significant effect on the crimes of most concern to the public when most crime is prosecuted by the states. Moreover, mandatory minimums have not until recently had the public visibility that may be necessary to give them a deterrent effect.

However, the prosecution of drug traffickers is one area in which the federal role is substantial and where visible deterrent messages (e.g., zero tolerance) have been sent. But here as well, survey data on the availability of drugs to high school students—arguably the best standard measure of long-term nationwide trends in drug availability—show that there has been no overall drop since the mandatory minimums were implemented (see Figure 3).

It is always problematic to attribute changes in crime rates to any particular policy, or to prove that a policy has had any or no effect. But at the least, these data show that the mandatory minimums have not proven effective at reducing crime or reducing drug availability.

Case History:

PR is a 49-year-old woman with no previous arrests or convictions who is described by family members and her therapist as unassertive and an extreme introvert. Her two sons were the leaders of a city-wide crack cocaine operation and distributed drugs from PR's home. PR neither bought nor sold drugs, nor profited in any way from the drug sales. She did know that her home was being used to distribute drugs by her two sons and did nothing about it. She was found guilty by a jury and sentenced to ten years in prison, the mandatory minimum required by the total amount of crack involved in the conspiracy. The sons received life sentences.

PR's ten-year sentence was more than double that of MJ, one of her codefendants, who was an active street dealer in the conspiracy. He had a prior record, four pending charges, and was serving a sentence for manslaughter, the result of beating someone to death with a baseball bat. MJ pled guilty and the government noted in the plea bargain that this defendant was linked to a lesser amount of crack than was involved in the whole conspiracy. His mandatory minimum was therefore five rather than ten years, and he was sentenced below the minimum to fifty-seven months because of his cooperation with the authorities.

Figures 2a and 2b: Victimization Rates, 1973–1992

Figure 2a: Rate of Personal Victimization (per 1,000)

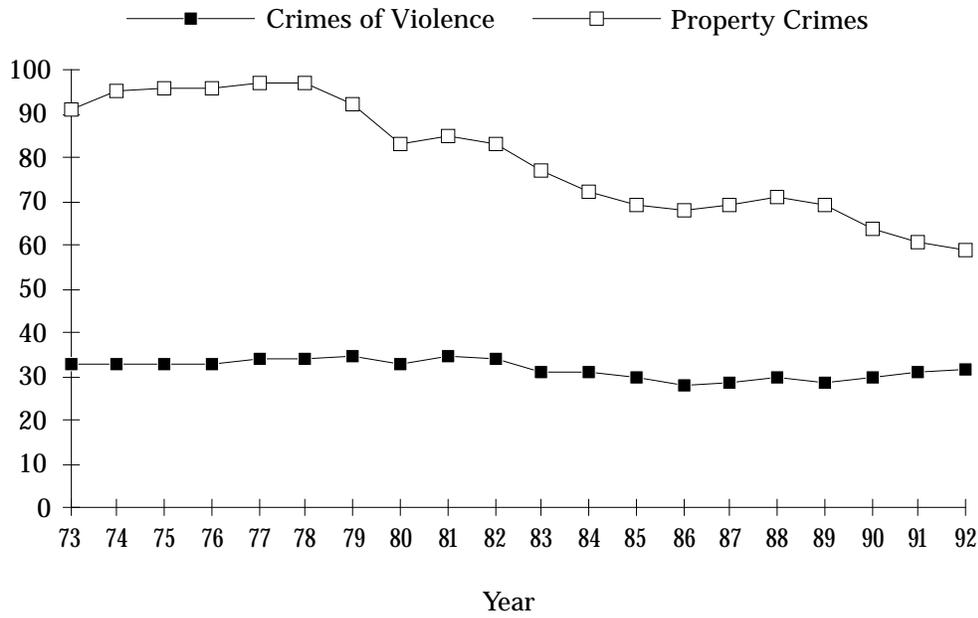
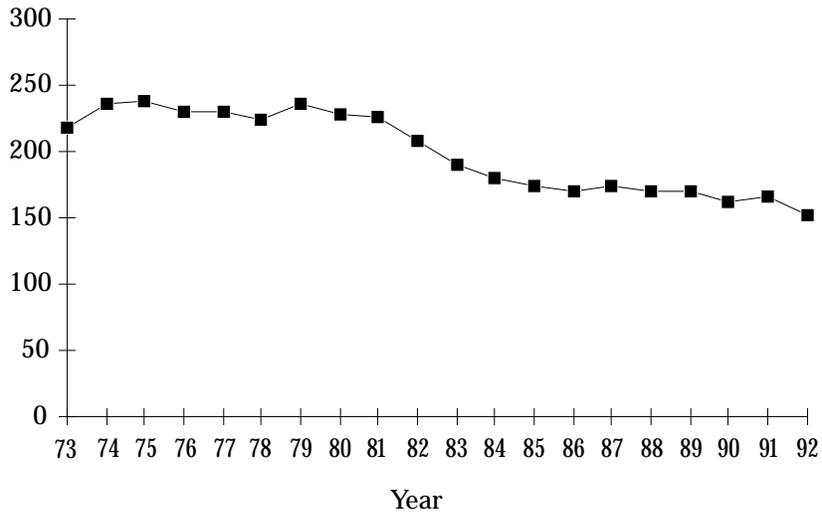
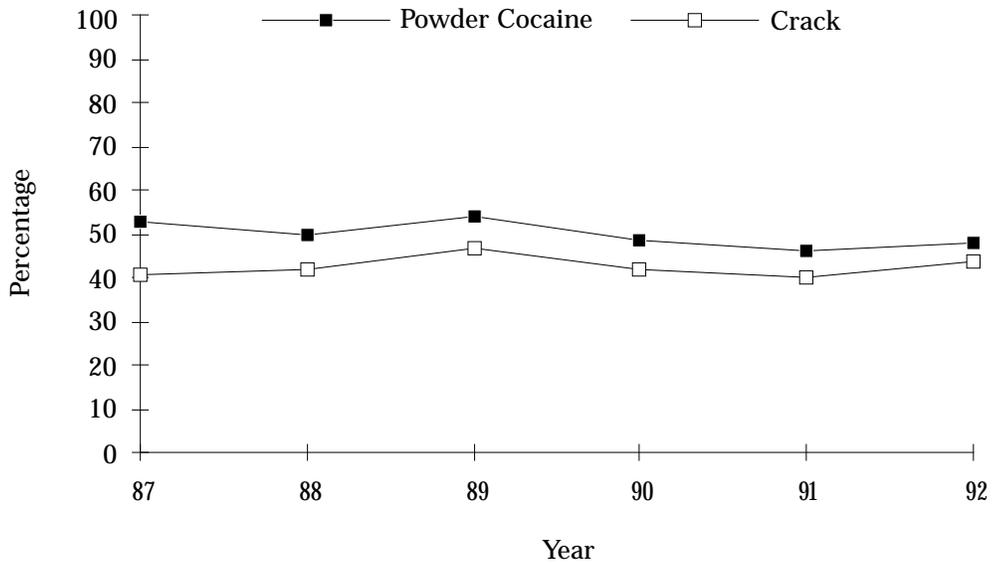
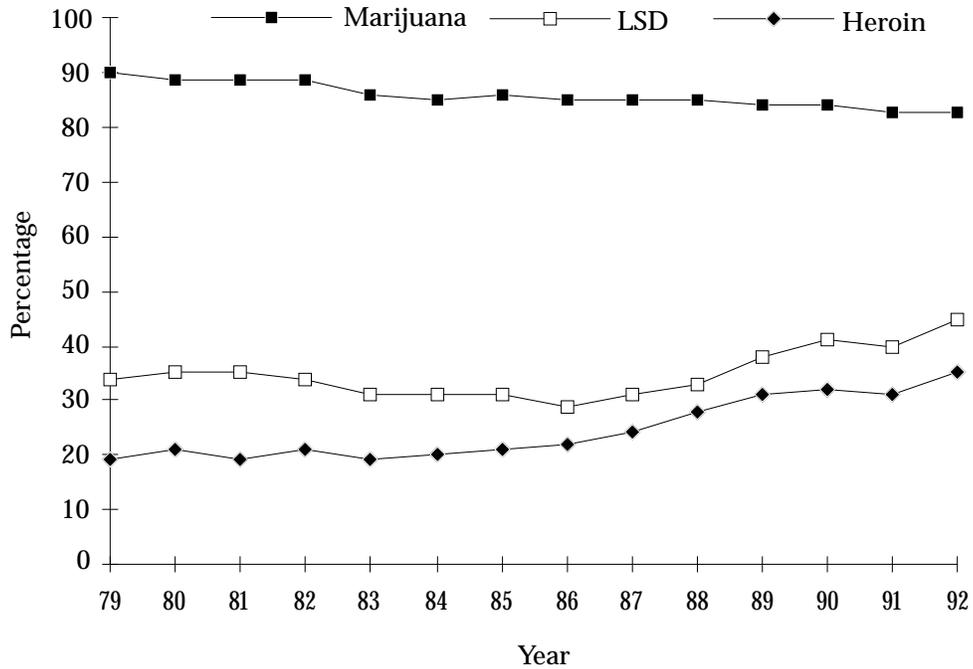


Figure 2b: Rate of Household Victimization (per 1,000)



Source: Bureau of Justice Statistics, Criminal Victimization 1992 (1993), Table 3, at 4.

Figure 3: Percentage of High School Seniors Responding That Drugs Would Be Fairly Easy or Very Easy for Them to Get



Source: Results of series of surveys by the Survey Research Center of the Institute for Social Research as reported in the Sourcebook of Criminal Justice Statistics (1992), Table 2.76, at 224.

V. Mandatory Minimums Are Not Applied Uniformly

A major goal of federal sentencing reform is reducing disparity, but the federal mandatory minimums are applied inconsistently. Charges carrying mandatory minimum sentences are often not pursued in cases where the facts appear to warrant them. Charges may be dropped after indictment, usually through a process of plea bargaining in which the defendant agrees to plead guilty to lesser charges or agrees to cooperate with the government and assist in the prosecution of another person. The sentence that results when the mandatory minimums are not applied may be a fair sentence—the prosecutor’s discretion not to pursue charges carrying a mandatory minimum can be exercised to avoid some of the worst consequences of the broadly worded statutes. But the data show that prosecutorial discretion alone is an imperfect tool for tailoring the mandatory minimums to appropriate cases.

The mandatory minimums “create an environment in which guideline circumvention becomes more common and acceptable, even in situations not directly affected by the statutory minimum.”⁵⁷ Circumvention of the mandatory minimums through plea bargaining is, unlike the exercise of sentencing discretion, hidden and unsystematic. “So long as the mandatory minimum sentences and guidelines anchored by mandatory minimums are tied to the charges for which the defendant is convicted and prosecutors exercise unfettered discretion in charging decisions, the goals of certainty, uniformity, and the reduction of unwarranted disparity are at risk.”⁵⁸

The data confirming uneven application are consistent and conclusive. At the request of Congress, the Sentencing Commission conducted a study based on a national sample of 1,136 defendants in fiscal 1990. The commis-

Case History:

TB, WC, and FC were codefendants in a conspiracy to import marijuana that involved numerous transactions.

TB is a 50-year-old man with one prior conviction for possession of marijuana, for which he was sentenced to four years in prison. In the current offense, he was involved in three different transactions, performing various jobs, such as locating a landing site for an airplane, having the plane repaired, supplying motorcycles to transport the marijuana, and assisting in the unloading of shipments. He pled guilty and was of substantial assistance to the authorities, which resulted in a sentence of fifty-eight months.

WC is a 38-year-old first offender who owned a farm where one planeload of marijuana was unloaded and kept overnight; he stood guard during the unloading. Despite his lesser culpability and clean record, he received a ten-year sentence.

FC, who cooperated with the government, also received a ten-year sentence. FC piloted or copiloted four shipments, admitted to grossing in excess of \$1 million, had two prior convictions for drug trafficking, and was under both parole supervision and state probation at the time of the current offense.

57. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 560 (1992).

58. *Id.* at 561.

sion found that 26% of the defendants identified from file review as involved in behaviors that appeared to warrant a mandatory minimum term pled guilty to a charge that carried either a reduced mandatory minimum or no minimum at all. An additional 16% were convicted of lesser counts, in most cases because of plea agreements. Overall, only 60% were sentenced to a term at least as long as the applicable mandatory minimum.⁵⁹ The resulting report noted that “[s]ince the charging and plea negotiation 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.”⁶⁰

Discretion is sometimes used to avoid applying the minimums to some low-level offenders

Figure 4a shows that offenders who have prior records and those whose convictions involve larger amounts of drugs are more likely to receive a sentence at least as long as the prescribed minimum.⁶³ Peripherally involved offenders are much less likely to receive the minimum than were those who are more culpable.⁶⁴ A sentence lower than the applicable minimum represents a shared view among the prosecutor, defender, and the sentencing judge that the minimum is not necessary to accomplish the purposes of sentencing. Such agreement exists for the vast majority of the minimally involved offenders and for over half of those with minor roles—a message from those who deal with offenders every day that the mandatory minimum statutes are over-broad. “Covert departures” such as these are of less value than explicit guideline departures, which must be accompanied by statements of reasons on the record, because explicit departures can be used by the Sentencing Commission and Congress to monitor the workings of the statutes and inform decisions about guideline revisions. Furthermore, while discretion is being used to ameliorate some of the effects of mandatory minimums, it can-

Similarly, the study by the Federal Judicial Center found that 46% of offenders identified from computer records as likely to have been involved in behavior that should trigger a mandatory minimum received a sentence below the apparently applicable minimum.⁶¹ The study by the General Accounting Office found that 34% of the offenders in their sample were not convicted under the mandatory minimum statute that appeared to be warranted.⁶² The study reports specific district policies that were intended to avoid applying the mandatory minimums to low-level offenders.

not be relied on to work in every case: Some of the least culpable offenders still receive substantial terms of imprisonment of equal or even greater severity than more culpable offenders.⁶⁵

59. Special Report to the Congress, *supra* note 4, Figure 5, at 56.

60. *Id.* at ii.

61. Meierhoefer, *supra* note 5, at 9.

62. GAO Report, *supra* note 3, at 6.

63. *See also* Meierhoefer, *supra* note 5, at 13 (drug amounts), 15 (prior record).

64. Prosecutorial discretion is controlled through the policies of the Department of Justice and each U.S. Attorney. Revisions to the Department of Justice’s *Principles of Prosecution I*, section 9-27.000, may further increase the discretion of prosecutors to avoid mandatory minimums in cases of low-level offenders. *See* Memorandum of Attorney General Janet Reno, *supra* note 29.

65. DOJ Report, *supra* note 2, at 45.

Figures 4a and 4b: Percentage Sentenced to at Least the Mandatory Minimum

Figure 4a: By Drug Amount and Prior Record

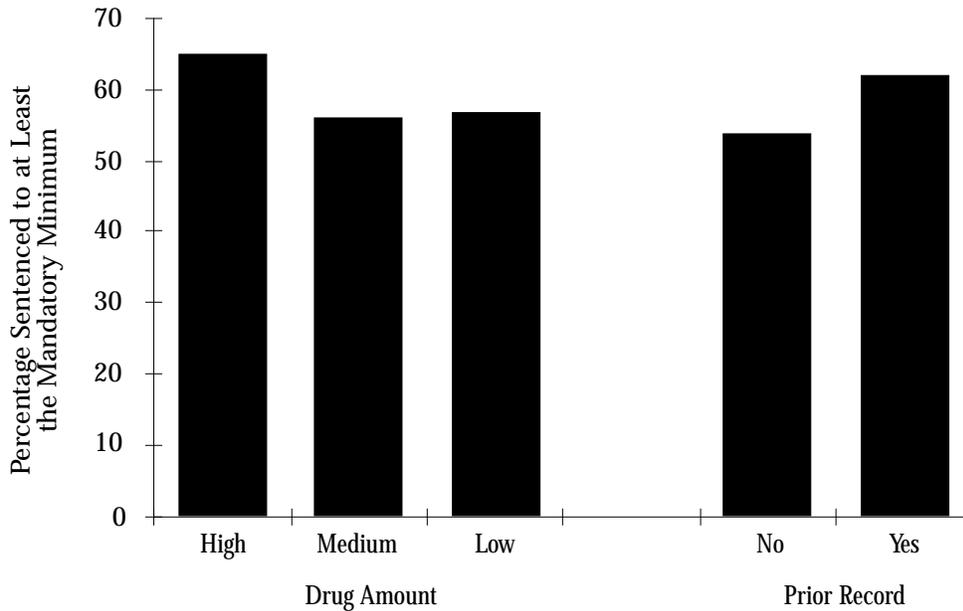


Figure 4b: By Role in the Offense



Source: U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 66, 67, 75 (August 1991).

Not all serious offenders receive the mandatory minimum term

Figures 4a and 4b also show that although repeat offenders and those whose convictions involve large drug amounts are more likely to receive the minimum term than others, over one-third of each of these groups of offenders are sentenced beneath the apparently applicable minimum. Furthermore, the relationship between whether the minimum term was applied and the role the offender played in

the offense is curved: street-level offenders are more likely to receive the minimum than are those who are *either* more or less culpable. Although this latter finding is surprising at first glance, it is a consequence of the structure of the current minimums and the accompanying shift in discretion from judges to prosecutors.

I do not know what efforts, if any, the government has made to bring to justice James, or any of the drug kingpins who are ultimately responsible for Ms. Jackson's possession of drugs. Too often . . . this Court and other district courts find themselves sentencing underlings to substantial sentences while the drug overlords remain at large. In this case, and unfortunately too many others, the government seeks to justify a severe and disproportionate sentence by pointing to the need to fight the drug war. I will not treat the Renee Jacksons of the nation as stand-ins for drug kingpins simply because those genuinely deserving of harsh sentences are not before me. The drug war simply cannot be won on the backs of Renee Jackson and others like her.

—Judge Stanley Sporkin, *District of the District of Columbia, upon sentencing a single homeless mother whose sole remuneration was to be leftover drugs* (*United States v. Renee Jackson*, 756 F. Supp. 23, Feb. 12, 1991).

VI. Mandatory Minimums Transfer Discretion from Neutral Judges to Adversarial Prosecutors

The mandatory minimums base sentences primarily on the particular charges that are pressed, on the amount of drugs or number of prior convictions that are found, and on whether the defendant benefits from a motion for reduction of sentence based on substantial assistance—factors that are largely controlled by the prosecutor. While prosecutors have always had charging discretion, what is new under the mandatory minimums is that there is little judicial discretion left to check and balance the prosecutor’s decisions.

The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward prosecution priorities, sometimes at the expense of other sentencing goals. For example, the government relies on

assistance and cooperation from some defendants—perhaps as confidential informants or witnesses at trial—to make cases against others. Sentencing incentives for those who cooperate are viewed as an important component of law enforcement. The problem is that offenders who are more involved in the drug network and have more valuable information to provide are in a better position to receive a reduced sentence than are less culpable offenders who are less informed. Consequently, more culpable offenders may get *shorter* sentences than the low-level offenders who participated in the same conspiracy. Prof. Stephen Schulhofer called this the “Cooperation Paradox.”⁶⁶

Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious the defendant’s crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor. Discounts for the top dogs have the virtue of necessity, because what makes the post-discount sentencing structure topsy-turvy is the mandatory minimum, binding only for the hangers on. What is to be said for such terms, which can visit draconian penalties on the small fry without increasing prosecutors’ ability to wring information from their bosses? Our case illustrates a sentencing inversion. Such an outcome is neither illegal nor unconstitutional, because offenders have no right to be sentenced in proportion to their wrongs. . . . Still, meting out the harshest penalties to those least culpable is troubling because it accords with no one’s theory of appropriate punishments.

—Judge Frank H. Easterbrook, *U.S. Court of Appeals for the Seventh Circuit (United States v. Anthony Brigham, 977 F.2d 317 (7th Cir. 1992))*

66. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 207 (1993).

Case History:

MR and AM were codefendants who conspired to distribute five kilograms of cocaine.

MR is a 41-year-old male first offender who sold two small quantities of cocaine to an undercover agent and made arrangements for the sale of an additional five kilograms. He is married and, until being fired because of his involvement in the current offense, had been a comptroller for fifteen years. After his arrest, he sought treatment for his cocaine abuse and was reportedly doing well. He pled guilty, provided the authorities with substantial assistance, and as a result received a sentence (below his five-year minimum) of one year in prison.

AM is a 37-year-old man who accompanied MR to the arranged sale and served as courier for a portion of the drugs. He has no prior convictions and had a stable employment history as a messenger with the same company for fifteen years; he was described by his boss as a trusted employee. Like MR, he had a history of drug abuse. AM pled guilty, but was not of "substantial assistance," as was his more culpable codefendant. He therefore received a sentence of sixty-three months, which was the bottom of his guideline range and just above his five-year mandatory minimum term.

VII. Mandatory Minimums Have a Disparate Impact on Non-White Offenders

As shown in Figures 5a and 5b, studies by both the Sentencing Commission and the Federal Judicial Center have found that among offenders who engaged in conduct warranting a mandatory minimum, white offenders were less likely than blacks or Hispanics to receive the mandatory minimum term. In addition, since the mandatory minimums have been enacted, the gap between the average sentences of blacks and those of other groups has grown wider.⁶⁷ These racial and ethnic differences indicate that one or more features of the current system have a proportionally greater impact on blacks and Hispanics than on whites.

Statutes having a disparate impact on blacks include those that make offenses involving five or more grams of crack cocaine (a weekend's supply to a serious abuser) subject to the same mandatory minimum term of five years in prison as offenses involving 100 times that

amount of powder cocaine. Because blacks are more likely to be prosecuted for crack offenses and whites for powder cocaine offenses,⁶⁸ the long sentence lengths for smaller amounts of crack lead to longer sentences for blacks.

Two other factors have the unintended consequence of reducing sentences for whites more than those for blacks: (1) the discount afforded defendants who plead guilty, and (2) the discount for defendants who cooperate and provide substantial assistance to authorities. Whites tend to plead guilty and receive motions for reductions of sentence for cooperation more frequently than blacks do.⁶⁹ However, the Department of Justice found that there are no significant differences in sentence lengths for black defendants and white defendants who plead guilty and cooperate with authorities.⁷⁰

It is conceivable that plea opportunities are equal for the races and are simply rejected more often by minority offenders, or that whites have a greater willingness or ability than minority defendants to provide substantial assistance. If so, then the disparate impact is simply an unintended consequence of policies that are neutral on their face and in their application. Even if true, questions would remain about whether the purposes advanced by these policies outweigh their disparate impact, or whether policies with less disparate impact could be found that would be equally effective. Is crack cocaine sufficiently more dangerous than powder cocaine to justify the harsher treatment? Should defendants who exercise their right to trial get longer sentences than those who plead guilty? Could ways be found to minimize the adverse impact of current policies on cooperation—for example, by taking into account the willingness of peripheral defendants to cooperate, even if they are too low-level to have any useful information to provide?

67. Meierhoefer, *supra* note 5, Graph 16a, at 21.

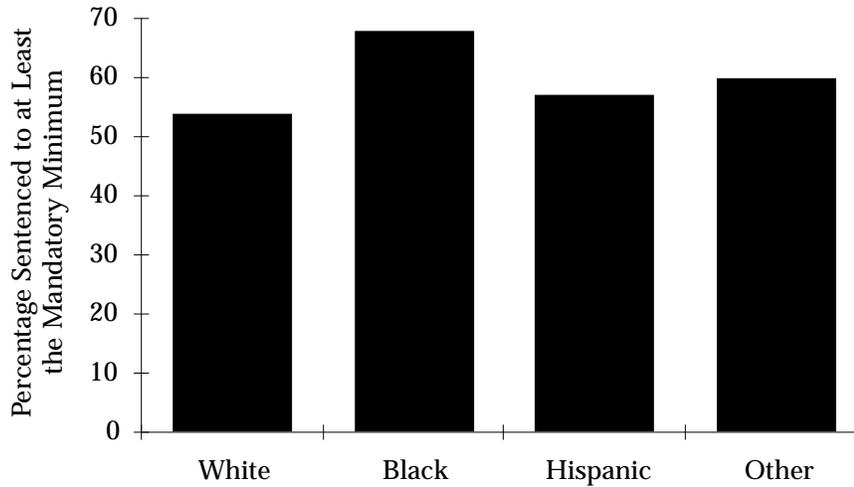
68. Whether this arises only from blacks' disproportionate use of crack as compared with their use of powder cocaine, or whether it reflects selective prosecution practices, is the subject of current research and debate. Compare Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993) with Joseph E. Finley, *Crack Charging in Los Angeles: Do Statistics Tell the Whole Truth About "Selective Prosecution"?*, 6 Fed. Sentencing Rep. 113 (1993).

69. Special Report to the Congress, *supra* note 4, at 81.

70. The study did not control for ethnicity, but it did find a significant relationship between sentence length and citizenship—a factor not considered by either of the other studies. It is not known whether the association between sentence length and ethnicity found in other studies might, in fact, be the result of the association of ethnicity and citizenship. DOJ Report, *supra* note 2, Appendix C, at 35.

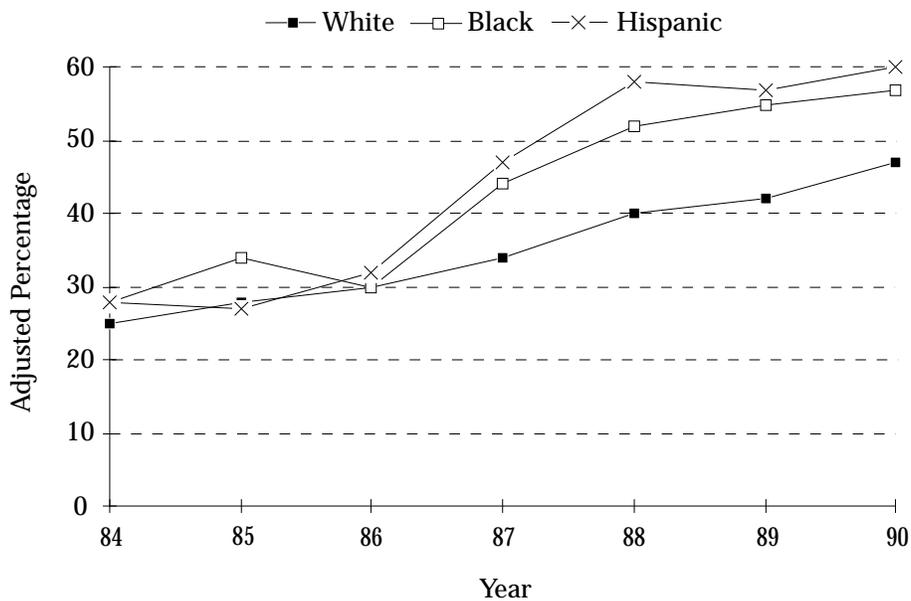
Figures 5a and 5b: Percentage Sentenced to at Least the Mandatory Minimum by Race of the Offender

Figure 5a: U.S. Sentencing Commission Study



Source: U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 80 (August 1991).

Figure 5b: Federal Judicial Center Study



Source: Barbara Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms 21* (Federal Judicial Center 1992).

VIII. Mandatory Minimums Create Anomalies in the Law of Sentencing

An offender who sells ten grams of heroin mixed with eighty-nine grams of sugar has no required mandatory minimum term; the minimum for an offender who sells ten grams of heroin mixed with ninety grams of sugar is five years. These examples illustrate two anomalies of the present mandatory minimum statutory scheme. The first arises from statutory language that includes, when one figures the weight of drugs triggering the mandatory minimums, the weight of any “mixture or substance containing a detectable amount” of the drug.⁷¹ The courts have been left to struggle with cases in which the weight of suitcases bonded to the drugs, or of wash water used to clean drug laboratory equipment, or paper that weighs hundreds of times as much as the drugs themselves is used to set the length of imprisonment.⁷² Using the weight of mixtures penalizes persons lower in the distribution chain who typically dilute the drug. Factors such as the atmospheric humidity and the type of paper used to carry the drug can dramatically affect the sentence. One judge concluded that “[t]o base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.”⁷³

The second anomaly is known as “sentencing cliffs.” Sentencing cliffs arise when small differences in facts mean large differences in sentences (e.g., where one extra gram triggers a mandatory minimum term of five years). In addition to the exaggerated effect this gives to small amounts of drugs, some mandatory

minimum provisions double the applicable minimum for offenders who have a prior conviction for a drug felony. For the prior-conviction enhancement to apply, the government must specify the particular conviction it is using to invoke the “second offender” penalty.⁷⁴

Case History:

AM and JG were codefendants who were arrested by authorities after the unloading of a shipment of cocaine. Both are characterized in official documents as “acting under the direction of an unindicted coconspirator.”

AM is a 56-year-old man who was a watchman at the house where the drugs were unloaded and served as the “look-out” in this offense. He has three prior convictions: a five-year sentence for importation of marijuana in 1976; a sentence of probation for carrying a concealed weapon; and a two-year term for counterfeiting, from which he was released in 1988. He pled guilty to one count and provided authorities with substantial assistance.

JG is a 44-year-old man who helped to unload the drugs. He has one 12-year-old prior conviction for possession with intent to distribute marijuana, for which he received a nine-month sentence, and a *nolo contendere* plea to a DUI charge. He was found guilty after trial of one count.

Because both of these rather similar offenders had a prior conviction for a drug felony, the prosecutor filed a “second offender” notice for each. However, while the notice stood for JG, it was withdrawn for the cooperating defendant, AM. The result? AM was sentenced to ten years and JG was sentenced as a second offender to twenty years.

71. See, e.g., 21 U.S.C. § 841(b) (1988).

72. See *Chapman v. United States*, 500 U.S. 453 (1991).

73. *United States v. Chapman*, 908 F.2d 1312 (7th Cir. 1990) (Posner, J., dissenting).

74. 21 U.S.C. § 851 (1988).

IX. Mandatory Minimums Have Hampered Sentencing Reform

The Sentencing Reform Act of 1984, which created the guidelines system, culminated a legislative process that began in 1970. Its emphasis on fairness, predictability, and openness in sentencing garnered broad bipartisan

Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to “get tough on crime.” Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines, as a whole.

Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.

—Chief Justice William H. Rehnquist, at the *National Symposium on Drugs and Violence in America*, June 18, 1993.

support, and the Act was accompanied by a lengthy and thoughtful legislative history. By creating the United States Sentencing Commission, Congress recognized that an independent, expert commission was better equipped than itself for the esoteric, yet politically sensitive task of setting criminal penalties. Congress then enacted mandatory minimum statutes for some of the most common federal offenses before the first set of Sentencing Guidelines was issued.⁷⁵ This action seriously hampered guideline development.

The Sentencing Commission incorporated the mandatory minimums instead of relying on independent study of past practices and the purposes of sentencing to

scale the offenses and determine appropriate sanctions.⁷⁶ The commission therefore adopted many features of the minimums:

- The guidelines require a government motion before the court can depart below the guideline range based on an offender’s substantial assistance to authorities.

- The guidelines set sentences based largely on the amount of any mixture of substance containing a detectable amount of drugs, rather than the actual amount of the illegal substance.

- The guidelines anchor punishment for drug offenses in accordance with the trigger amounts in the statutes and scale punishment up from there.

The commission’s approach generally leads to sentences well above the mandatory minimum, but as noted earlier, some defendants receive downward adjustments for their roles in the offense and acceptance of responsibility, and hit the mandatory minimum “floor.” To avoid this—to make the mandatory minimums truly *minimums* for the least culpable offenders who plead guilty, while preserving the proportionality of the guidelines—would require that sentences *for all offenders* be ratcheted up at least five more levels.⁷⁷ This would result in approximately a 75% increase in every federal sentence. Proportionality cannot be achieved under the current mandatory minimums without greatly increasing all sen-

75. The mandatory minimums for drug offenses became effective for offenses committed on or after October 27, 1986; the first guidelines were effective for offenses committed on or after November 1, 1987.

76. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 927–32 (1990).

77. Offenders who play a minimal role are granted a four-point reduction under the guidelines; those who accept responsibility in a timely manner can receive a three-point reduction. See Guidelines Manual, *supra* note 18, at ch. 3. Current guideline levels are set two points higher than is necessary to ensure that the guideline range includes the mandatory minimum term corresponding to various amounts of drugs.

tence lengths and prison populations.

The Sentencing Commission could address some of these problems by setting the guidelines where they think appropriate, regardless of the statutes. But this would increase prosecutorial power and create further potential for disparity and abuse, since the

prosecutor's decision to charge the mandatory minimum would then have even greater consequence than it does today. The best way for real sentencing reform to proceed is for the mandatory minimum statutes to be repealed or made secondary to the Sentencing Guidelines.

X. Guidelines Offer a Better Way

Mandatory minimums have contaminated assessment of the Sentencing Guidelines. Judges and other close observers believe that many of the worst flaws of the guideline system can be traced to the mandatory minimums. In contrast to the simplistic categorization scheme and inflexibility of the mandatory minimums, the Sentencing Guidelines

offer a richer and more rationally structured approach to sentencing and one that is much better suited to the tasks of reducing unwarranted disparity, reducing unwarranted uniformity, and allocating expensive prison space for the most dangerous and deserving offenders.

The guidelines consider more of the salient offense and offender characteristics and avoid sentencing cliffs

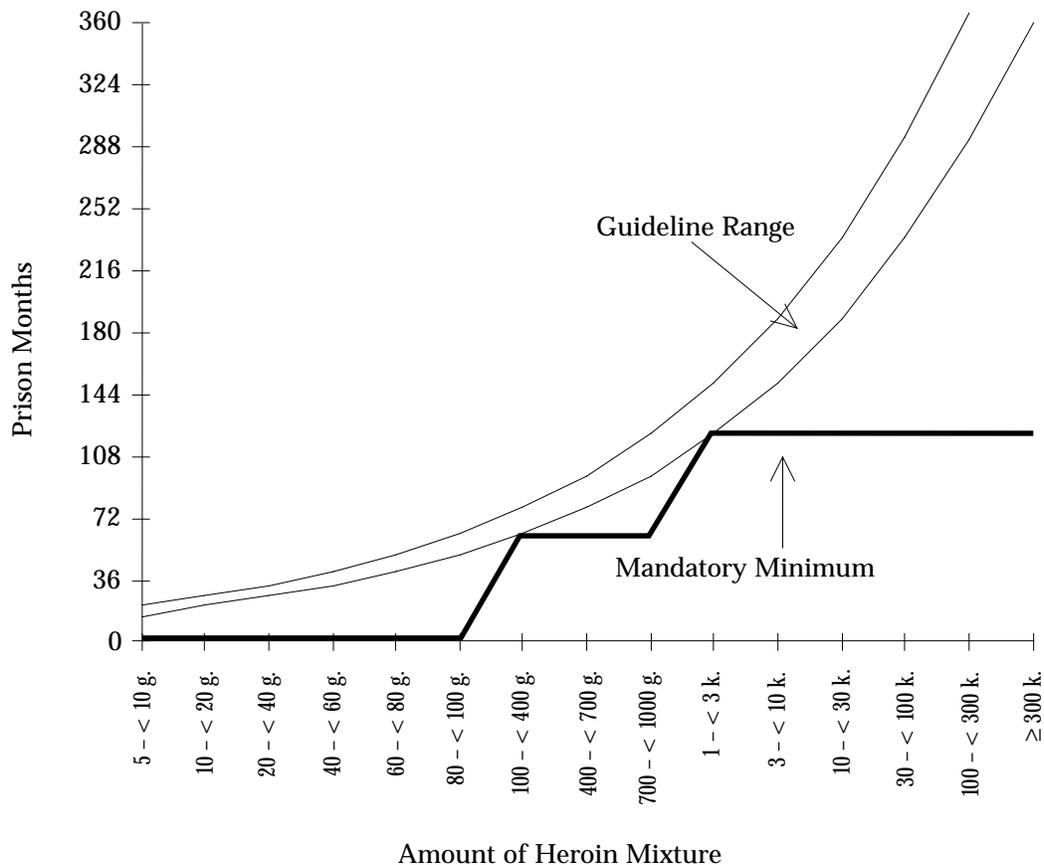
As long as the guidelines mimic the statutes and base punishment primarily on drug amounts, the importance of role in the offense, offender characteristics, and other relevant factors will be undervalued. But the current guidelines still take into account more factors—including some adjustment for role, acceptance of responsibility, and attributes of any victims of the crime—than do the mandatory minimum statutes. As Figure 6 shows, the guidelines avoid the sentencing cliffs inherent in the minimums by calibrating drug

amounts and prior record more finely, and providing for overlapping guideline ranges. In the hypothetical “heroin and sugar” example presented on page 25, one gram of sugar makes a five-year difference in the applicable mandatory minimum term. Under the guidelines, the sentencing ranges would overlap: For a first offender, 99 grams of heroin and sugar equate to a guideline range of fifty-one to sixty-three months, whereas 100 grams of heroin and sugar equate to sixty-three to seventy-eight months.

I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality. In our view, the Sentencing Commission is the appropriate institution to carry out this important task.

—Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Judicial Conference Committee on Criminal Law in testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993.

Figure 6: Guideline Range vs. Mandatory Minimum for Various Amounts of a Mixture Containing Heroin

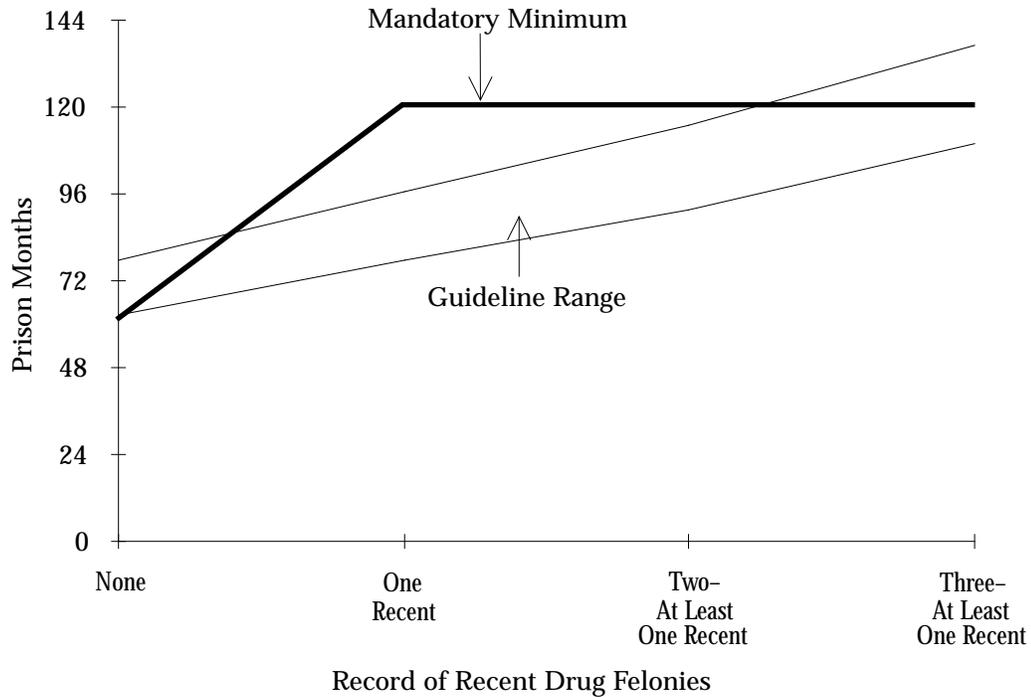


As Figure 7 shows, the provisions of the guidelines concerning prior record are also more proportional than mandatory minimums. If the defendant with 100 grams of heroin and sugar had one prior conviction for a drug felony, the mandatory minimum would jump from five to ten years.⁷⁸ The guidelines for this offense can reach ten years for offenders with serious prior records (e.g., three prior felonies), but they get there more gradually. The range moves from sixty-three to seventy-

eight months to seventy to eighty-seven months for one prior drug felony that was not very recent, and to seventy-eight to ninety-seven months if less than two years elapsed since the offender's release from the prior sentence. Furthermore, if the prior conviction was for a non-drug felony such as robbery, the increase under the guidelines because of prior record would be the same as for a drug felony, whereas there would be no increase under the mandatory minimum statutes at all.

78. 21 U.S.C. § 841(B) (1988).

Figure 7: Guideline Range vs. Mandatory Minimum for Number of Drug Felony Convictions (When the Current Offense Is Within Two Years of Release from Imprisonment on the Last Conviction)



Case History:

RP is a first-time offender and a citizen of Colombia, where his wife and five children reside. He received approximately \$176 to crew a yacht from Colombia to Haiti. He was apparently unaware that the yacht was carrying a load of marijuana until he broke into a locked front cabin containing the drugs to investigate a water leak. (The boat eventually sank.) The captain had left the yacht to buy tickets for the crew's flight back to Colombia and was not there when the ship began to take on water or when it was boarded by the U.S. Coast Guard. RP's calculated guideline range was seventy-eight to ninety-seven months, reflecting the following facts: (1) the amount of marijuana was 1,000–3,000 kilograms; (2) there was no enhancement for a weapon; (3) he was a first offender; (4) he played a minor role; and (5) he accepted responsibility for his actions. RP was sentenced to the mandatory minimum ten-year sentence—almost two years more than would otherwise have been called for under the guidelines.

Case History:

FQ is a 47-year-old illegal alien who was the stash house maintenance man in a marijuana conspiracy. At the request of one of his codefendants, he unlocked the door to the house and readied the house for his codefendants, who then unloaded a shipment of marijuana. FQ was aware that drugs were involved and pled guilty. His calculated guidelines range was forty-one to fifty-one months, reflecting the following facts: (1) the amount of marijuana was 100–400 kilograms; (2) there was no enhancement for a weapon because none of the weapons involved in the offense were “reasonably foreseeable” by the defendant; (3) he was a first offender; (4) he played a minor role; and (5) he accepted responsibility for his actions. However, since the amount of marijuana triggered a mandatory minimum term—and he had no helpful information to offer to authorities—FQ was sentenced to the required five years.

This was the same sentence given to JD, a supplier who received a sentence reduction under Federal Rule of Criminal Procedure 35(b) for his testimony in a related case, and to AG, a distributor, and EE, a collector/broker in the conspiracy.

XI. Conclusion

In an extensive review of research on the effects of mandatory minimum sentences, Prof. Michael Tonry concluded that “[b]asic new insights concerning application of mandatory penalties are unlikely to emerge. . . . We now know what we are likely to know, and what our predecessors knew, about mandatory penalties. As instruments of public policy, they do little good and much harm.”⁷⁹

There are better alternatives that can more effectively express our values and accomplish our goals. Formal and informal ways for Congress to convey its policy recommendations to the Sentencing Commission, other than through mandatory minimum sentences, are catalogued in the commission’s *Special Report to the Congress*.⁸⁰ These include changes in the statutory maximums, along with directives to the Sentencing Commission to reevaluate guideline levels or to study, report to Congress, and amend the penalties for particular crimes. Congress reviews all guideline amendments before they become effective.

In a recent special issue of the *Federal Sentencing Reporter*, the editors listed five principles to help accommodate the needs of Congress and the judiciary to find fair and effective sentencing statutes:

- (1) The narrower the definition of the offense and offender to which a mandatory penalty applies, the fewer the inappropriate cases will be swept within it.
- (2) The more flexible a mandate, the more likely it will accommodate proportionate sentences in dissimilar cases.

(3) The higher the severity of a mandatory minimum, the more likely that uniform sentences will exceed reasonable *and intended* punishment.

(4) There is an inherent conflict between the structural principles which accommodate fine tuning by the Commission and courts under the Sentencing Reform Act of 1984 and the blunt instrument of mandatory penalties.

(5) Just as no judge is permitted by law to sentence an offender without a carefully developed factual record, Congress ought not formulate mandatory sentences without the relevant facts about affected defendants. . . . Before considering any mandatory sentencing legislation, Congress should require a formal Sentencing Commission report and then hold hearings on (i) the nature and range of crimes covered by the proposal, (ii) the characteristics of offenders falling within the terms of the proposal, and (iii) the sentencing patterns under existing law for crimes and offenders falling within the terms of the proposal. . . .⁸¹

These principles should be applied to a review of the mandatory penalties already in place, as well as to new legislation.

The extensive body of research summarized here and the procedures outlined by the Sentencing Commission, along with the five principles outlined above, can help Congress as it continues to work toward a more fair and effective criminal justice system.

79. Michael Tonry, *Mandatory Penalties*, in 16 *Crime & Justice: A Review of Research*, at 243–44 (Michael Tonry ed., 1990).

80. Special Report to the Congress, *supra* note 4, at 118.

81. Marc Miller & Daniel J. Freed, *The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 *Fed. Sentencing Rep.* 59 (1993) (emphasis in original).

Statistical Appendix

Profile of Offenders Convicted Under Mandatory Minimum Sentencing Statutes in Fiscal 1992

Table 1: Number of Offenders and Type of Offense to Which Mandatory Minimums Applied

Number sentenced under a statute with a mandatory minimum prison term: 10,670 (28%)

Drugs:	9,401 (88%)
Drugs only	8,238 (77%)
Drugs + firearms	1,163 (11%)
Firearms (non-drug)	989 (9%)
Other	280 (3%)

Table 2: Type of Drug Offenses to Which Minimums Applied

	Cocaine Powder	Cocaine Base	Heroin	Marijuana/Hashish	Other	Not Known	Total
Trafficking	4,673	1,805	773	1,404	676	28	9,359 (99%)
Distribution/ manufacture	4,163	1,671	584	1,228	635	24	8,305 (88%)
Import/export	371	9	172	140	11	0	703 (7%)
Other trafficking	139	125	17	36	30	4	351 (4%)
Use of a communication facility	3	1	0	1	2	0	7 (< 1%)
Simple possession	6	17	4	5	3	0	35 (< 1%)
Total	4,682 (50%)	1,823 (19%)	777 (8%)	1,410 (15%)	681 (7%)	28 (< 1%)	9,401

Source: U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences, 1992 (computer file; Washington, D.C: United States Sentencing Commission, producer, 1993; Ann Arbor, Mich.: Inter-university Consortium for Political and Social Research, distributor, 1993).

Table 3: Description of Drug Trafficking Offenders (N = 9,359)**A. Role in Offense**

Minimal	Minor	None	Manager/Leader (Small)	Manager (Large)	Leader (Large)	Unknown
340	881	6,755	587	334	442	20
4%	9%	72%	6%	4%	5%	< 1%

Notes: The classifications are based on guideline adjustments for role as described in detail at section 3B1.1 and section 3B1.2 of the *United States Sentencing Commission Guidelines Manual*. “Manager” is a manager or supervisor; “leader” is an organizer or leader; “small” refers to criminal activity involving fewer than five participants and not otherwise extensive. “Unknown” includes missing, conflicting, and inapplicable data.

B. Criminal History Points

Points	Number of Offenders	Percentage
0	4,602	49%
1	1,157	12%
2	426	5%
3	832	9%
4	437	5%
5	395	4%
6	426	5%
7-9	558	6%
10+	520	6%
Unknown	6	< 1%

Notes: Under Chapter 4 of the *Guidelines Manual*, offenders are assigned criminal history points for prior convictions. Generally, three points are given for each conviction in which the resulting sentence was over thirteen months imprisonment, two points for sentences between sixty days and thirteen months, and one point for other convictions. Points are also assigned if the offender was under criminal jurisdiction for another offense when the current crime was committed, or if a two- or three-point conviction was sustained within two years of the current offense. Refer to the manual for detailed instructions on when convictions are not counted and when additional points can be added for prior violent offenses.

C. Weapon Possession During Crime

	Number of Offenders	Percentage
Weapon	2,149	23%
No weapon	7,197	77%
Missing	13	< 1%

Notes: A weapon for which the offender was held responsible was assumed to have been present if either the offender (1) was also convicted under 18 U.S.C. § 924 or (2) received a two-level enhancement for possession of a weapon under section 2D1.1 of the Sentencing Guidelines. “Missing” denotes missing data.

Table 4: Mandatory Minimum Drug Trafficking Offenses by Role in the Offense, Criminal History, and Weapon Possession

Criminal History Points/Weapon Possession	Role in Offense			Manager/ Leader (Small)	Manager (Large)	Leader (Large)
	Minimal	Minor	None			
0						
All offenders	234 (3%)	518 (6%)	3,216 (34%)	271 (3%)	155 (2%)	199 (2%)
No weapon	213 (2%)	455 (5%)	2,593 (28%)	205 (2%)	122 (1%)	131 (1%)
Weapon	21	63 (1%)	623 (7%)	66 (1%)	33	68 (1%)
1						
All offenders	27	104 (1%)	873 (9%)	67 (1%)	35	47
No weapon	25	89 (1%)	666 (7%)	50 (1%)	26	30
Weapon	2	15	207 (2%)	17	9	17
2						
All offenders	9	22	328 (4%)	32	15	20
No weapon	9	20	251 (3%)	20	12	11
Weapon	0	2	77 (1%)	12	3	9
3						
All offenders	19	77 (1%)	609 (7%)	49 (1%)	32	45
No weapon	19	71 (1%)	441 (5%)	39	23	20
Weapon	0	6	168 (2%)	10	9	25
4						
All offenders	17	35	310 (3%)	26	20	29
No weapon	17	31	238 (3%)	16	11	14
Weapon	0	4	72 (1%)	10	9	15
5						
All offenders	4	27	290 (3%)	38	13	21
No weapon	4	24	200 (2%)	30	8	11
Weapon	0	3	90 (1%)	8	5	10
6						
All offenders	12	24	319 (3%)	23	22	25
No weapon	10	21	224 (2%)	18	16	14
Weapon	2	3	95 (1%)	5	6	11
7-9						
All offenders	5	39	426 (5%)	34	24	29
No weapon	5	35	302 (3%)	23	19	16
Weapon	0	4	124 (1%)	11	5	13
10+						
All offenders	12	35	380 (4%)	47	18	27
No weapon	10	29	250 (3%)	27	8	16
Weapon	2	6	130 (1%)	20	10	11

Note: Table uses number and percentage of trafficking offenses where data were available on role in the offense, criminal history, and weapon possession (Total = 9,334).