Sentencing in the States: The Good, the Bad, and the Ugly

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Sentencing in the States: The Good, the Bad, and the Ugly

Abstract
Mandatory sentencing laws are responsible for the booming prison population in the United States. They are applied most frequently to crimes involving drugs and mandate harsh penalties of five, ten, twenty years or more behind bars for crimes involving no violence. Julie Stewart, President of the Families Against Mandatory Minimums Foundation (FAMM) and the sister of a marijuana user who spent five years in a federal prison, describes the unfairness of America’s sentencing policies, with a particular emphasis on the application of mandatory minimum sentences to drug-related convictions. These laws have led to a marked increase in the number of Americans in federal prison, including many who do not deserve to be there at all.

BY JULIE STEWART*

Mandatory sentencing laws are responsible for the booming prison population in the United States. They are applied most frequently to crimes involving drugs and mandate harsh penalties of five, ten, twenty years or more behind bars for crimes involving no violence. Julie Stewart, President of the Families Against Mandatory Minimums Foundation (FAMM) and the sister of a marijuana user who spent five years in a federal prison, describes the unfairness of America’s sentencing policies, with a particular emphasis on the application of mandatory minimum sentences to drug-related convictions. These laws have led to a marked increase in the number of Americans in federal prison, including many who do not deserve to be there at all.

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I. INTRODUCTION

Prior to 1990, I knew nothing about the United States of America’s sentencing policies, and I did not know much about the make-up of the country’s prison population either. Nor did I care. If I thought about it at all, I assumed that whoever was in prison belonged there. Then in 1990, my brother Jeff Stewart was arrested for growing marijuana. He pled guilty and received a five-year prison sentence without parole. All of a sudden, I started to care about who was in prison.

Although Jeff’s case is not the worst I have seen, at the time it was the only case I knew. Today it still illustrates, in many ways, what is wrong with the mandatory minimum sentencing laws that I have spent the past decade trying to defeat.

Jeff was thirty-five, living in the state of Washington, leading a relatively unproductive life, and smoking marijuana every day. He and two friends decided that they could grow their own pot, which would provide them with an instant supply and allow them to sell some of it to their friends. They set up a room for growing pot in the garage of some property that Jeff owned and where his two friends lived. They filled the room with as many little pots as would fit (about 365) and started their seedlings.

When the plants were about five or six inches tall, the friends who lived on the property invited a neighbour over to smoke some marijuana. The neighbour, who was also shown the grow room, ended up calling the police and received a one thousand dollar (U.S.) reward for turning in the pot-growers.

When the two men were arrested, they quickly gave up my brother’s name in exchange for a reduction of their sentences. It worked beautifully. Both of the men had prior felony convictions for drug offences and at least one of them had served time in a California prison. However, in exchange for informing on my brother, they both got probation. Had they not provided “substantial assistance” to the prosecutor, they would have received the same sentence (or perhaps longer ones due to their prior convictions) that Jeff did. Instead, Jeff ended up being held responsible for all of their actions and received a federal prison sentence of five years, without parole.

At the time of Jeff’s arrest, I was working in Washington, D.C. at a libertarian think tank called the Cato Institute. I vividly remember being in my office when I received a phone call from Jeff in prison. When he told me that he had been arrested for growing marijuana, my first thought was “how stupid of you,” and my second thought was “well, it’s only marijuana.” Little did I know that there is no such thing as “only” marijuana any more.
Jeff ended up pleading guilty because the prosecutor threatened him with a fifteen-year sentence if his case was brought to trial. This is a common tactic: the government will charge you with every possible offence under the sun, then will offer to drop some of the charges if you agree to save them the trouble of a trial and plead guilty. A quick look at the statistics illustrates that the government wins in an overwhelming majority of cases that go to trial. In Jeff's case, he was as guilty as sin and knew he would lose at trial, so he pled guilty. In exchange, he was given a "mere" five years in prison, instead of the possible fifteen years.

II. MOTIVATING WORDS

At Jeff's sentencing, Judge Robert J. McNichols (now deceased) of the United States District Court for the Eastern District of Washington, made a strong statement opposing the sentence he was forced to give. Judge McNichols mentioned that despite his being a senior district court judge who had been on the bench for twenty-five years, the United States Congress deemed him unfit to determine the appropriate sentence in my brother's case. Instead, a federal prosecutor straight out of law school could tell him what sentence he must deliver.

Those were the comments that motivated me to leave the Cato Institute and start the Families Against Mandatory Minimums Foundation (FAMM). I started FAMM in 1991, a year after my brother's arrest, and am currently its president. FAMM is a non-profit, non-partisan organization concerned with the legal, civil and human rights implications of mandatory sentencing laws. Our members include prisoners and their families, attorneys, judges, criminal justice experts, academics, and private citizens.

FAMM works to end mandatory sentencing laws by educating the public about the injustices of them, lobbying federal and state lawmakers to change the laws, building coalitions, promoting grassroots efforts to increase awareness and advocate for change, and encouraging the media to report on mandatory sentencing laws and their impact. In 2001, there were thirty-five FAMM chapters across the United States run by volunteers who take the organization's message to their communities, legislators, and local media.

FAMM might be considered the silver lining of my brother's case. His conviction galvanized me to take action to try to improve America's sentencing laws. What kind of a justice system did the United States have if judges no longer had sentencing power? And why was Jeff prosecuted federally in the first place? He had not crossed state lines, it was not a Drug Enforcement Agency (DEA) arrest, and there was no prevailing federal nexus. All of this was completely contrary to everything I had learned about
the criminal justice system in school. I was outraged that American voters had allowed this to happen and that nothing was being done to stop it.

III. CRIMES DU JOUR: TWO HUNDRED YEARS OF MANDATORY MINIMUM SENTENCES IN AMERICA

I have learned a lot since my brother's conviction. The first thing I learned is that mandatory minimum sentencing laws are not new—they have been a part of the American justice system for over two hundred years. In 1991, at the request of Congress, the United States Sentencing Commission published a report on mandatory minimum sentences.¹ The report listed all of the mandatory minimum sentencing laws that are on the books, starting in 1790 when piracy on the high seas resulted in a prison sentence of life without parole.²

In 1991, there were over one hundred separate federal mandatory minimum penalty provisions located in sixty different American criminal statutes.³ They constitute a fascinating historical tour of "crimes du jour": in 1857, refusal to testify before Congress resulted in a sentence of one month in prison;⁴ in 1864, refusal to operate railroad or telegraph lines brought about a six-month prison sentence;⁵ in 1888, bribery of a harbour inspector resulted in a six-month prison sentence;⁶ in 1915, the practice of pharmacy and sale of poisons in China generated a one-month prison sentence;⁷ in 1948, treason and sedition was punished by five years in prison;⁸ in 1965, first-degree murder of a president or member of the president's staff brought a sentence of life in prison;⁹ in 1974, sky-jacking resulted in twenty years in prison.¹⁰ One can see how historically (or perhaps, in some cases, hysterically) Congress has responded to what it has

² Act of April 30, 1790, c. 9 1 Stat. 112 at 113.
³ Supra note 1 at 11.
⁵ 45 U.S.C. § 83 [repealed].
perceived to be a national threat by passing a mandatory prison sentence for commission of the crime.

Interestingly, the United States has even had a prior experiment with mandatory sentences for drug offences. In 1956, members of Congress enacted the Narcotic Control Act, better known as the Boggs Act for its sponsor, Louisiana Congressman Hale Boggs. The Boggs Act was designed to catch drug kingpins and put them in prison for many years. It also prohibited parole for the covered offences. Penalties were severe—for example, five to ten years for a first conviction of sale of heroin and ten to thirty years for a second conviction. Many young people received these sentences during the heyday of drug experimentation in the 1960's.

By 1970, members of Congress recognized that the Boggs Act was ensnaring many low-level, non-violent, white drug defendants, so they took the remarkable step of repealing the Narcotic Control Act. On the floor of the House of Representatives, a Congressman from Texas named George Bush announced his support for the repeal of the Boggs Act. He said, “as a result [of the repeal], we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for and fewer disproportionate sentences.” This is the same man who would be elected President of the United States eighteen years later and ardently support the current round of mandatory sentencing laws.

By the mid-1980s, Congress had forgotten the lessons it had learned from the Boggs Act and reintroduced stiff mandatory penalties for drug offences. Between 1984 and 1990, members of Congress enacted four statutes that account for 94 per cent of all federal cases sentenced under mandatory minimum laws, all relating to either drug and gun offences. The laws were enacted in haste, without the benefit of any hearings or analysis of their likely prison or racial impact. What drove the new legislation was another “crime du jour”: the 1986 cocaine overdose of University of Maryland basketball star Len Bias, and the accompanying rise

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12 Ibid. at Stat. 569.
13 Ibid.
17 Supra note 1 at 11.
in the use of crack cocaine. Congress responded by passing laws that said that defendants with a specific quantity of drugs would serve a mandatory prison sentence of a predetermined length — generally five or ten years without parole. No mitigating factors would be considered, and only the prosecutor would have the discretion to reduce the sentence based on a subjective determination that "substantial assistance" had been provided.

IV. THE EFFECT OF MANDATORY MINIMUM SENTENCING LAWS

The impact of these laws has been stunning, not because they led to a reduction in drug use, but because they led to a denial of liberty to thousands of non-violent drug offenders who now fill America's prisons. In 1986, when the majority of the drug-related mandatory minimum regulations were passed, 38 per cent of the federal prison population was comprised of drug offenders. By October 2001, that number was 55 per cent. In 1999, 56 per cent of drug defendants entering federal prison were first offenders, and 88 per cent of them were convicted of crimes in which weapons were not involved.

However, it is not the drug kingpins who are being caught, but the "little guys," girlfriends, and mules. It is they who are being sent to prison for five years, ten years or much longer. But politicians, for the most part, do not seem to care. They do not seem to be bothered by the fact that the lives of the defendants will be destroyed, labelling them forever as felons. Male defendants are removed from their families, and often leave spouses and children without financial support. In the case of female prisoners, America's sentencing policies are, at an astounding rate, separating mothers from children. In 1997, 59 per cent of federal female prisoners and 65 per cent of state female prisoners were mothers of children under the

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20 Ibid.

age of eighteen. And in federal prisons, nearly 72 per cent of incarcerated women are there for drug law violations.

In 2001, there were over one hundred and fifty thousand people in America’s federal prisons and roughly 85,500 (57 per cent) of them were there for drug offences. The average sentence served is seventy-six months—that is almost six and a half years behind bars. They are people like my brother, and like Denese Calixte. She was a fifty-one-year-old mother of seven when she was convicted of possession with intent to distribute crack cocaine and sentenced to ten years in prison. Her offence? After falling from a ladder while picking fruit in Florida to support her family, she injured her neck and could no longer work. A man who sold small quantities of drugs in her neighbourhood asked Denese if he could occasionally leave his drugs with her overnight, for which he would pay her two hundred dollars each night. The drugs were stored in a pill bottle or cigar tube (not exactly a kingpin’s quantity). Somehow the police found out, entered her house, and discovered the drugs. Off to prison for ten years went Denese.

There is also the case of Linda Lee Messer, who was a forty-five-year-old mother of three, working as a housekeeper earning $6.50 an hour, when she was sentenced to five years in prison for manufacturing marijuana. Her offence? The sheriff’s department received a tip that there was marijuana growing on the property owned by Linda and her husband. When they searched the property they found 184 seedlings and one thousand grams of processed marijuana. The case was referred to the United States District Court for the Northern District of Florida. The jury deadlocked in Linda’s first trial and found her guilty in the second one. At sentencing, Judge William Stafford said: “... these local matters, it seems to me, are dealt with better on a local level, or else the federal court becomes

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25 Supra note 21 at 29.

so trivialized that it no longer has room for the real important national cases.”

Further, consider Todd Davidson. He was twenty-one years old when he was arrested in Florida for conspiracy to possess with intent to distribute the drug Lysergic Acid Diethylamide (LSD), while following the band the Grateful Dead on tour. His offence? He and a fellow “Deadhead” were sharing a motel room where his roommate had arranged for several LSD deals with undercover agents. When the roommate was arrested, Todd was charged as well, even though he never participated in any of the deals. Nevertheless, Todd was sent to prison for ten years.

These are the “dangerous drug offenders” filling America’s federal prisons, and they are just a portion of the estimated four hundred thousand drug defendants serving state and federal prison sentences across the country.

This is a shameful period in American history. I look forward to the day that the United States can look back on this period with horror—wondering how so many non-violent offenders could have been incarcerated for so many years.

FAMM does not argue that people should not be sent to prison. We simply want legislators to get out of the sentencing business so that judges can do what they are appointed and confirmed to do: judge. When Congress passes mandatory minimum penalties for certain crimes, judges are bound by law to deliver those sentences to defendants convicted of those crimes. This prevents judges from making distinctions between defendants and sentencing them according to their culpability.

Federal mandatory minimum sentencing laws are particularly egregious in the United States because they are redundant. In 1984, Congress decided to try to reduce sentencing disparity in the federal system by creating sentencing guidelines that would “guide” judges across the country in their sentencing decisions. The United States Sentencing Guidelines became effective on 1 November 1987, and apply to all federal

At sentencing, judges are required to consult the guidelines to determine the starting point for the defendant's sentence, and then they can increase or decrease the sentence within a given range to reflect the defendant's role in the offence.

Layered on top of this carefully calibrated system are the statutory mandatory minimum penalties passed by Congress for certain crimes—mostly drug offences. In contrast to the 1987 guidelines, the mandatory minimum penalties take a sledgehammer approach to sentencing, giving all defendants convicted of the same drug quantity the same sentence, regardless of culpability. While quantity should be one factor considered at sentencing, it should not be the only factor, since it is a wildly inaccurate measure of a person's role in the offence.

It is these mandatory minimum sentences that FAMM opposes. Since there is no longer parole in America's federal system, prisoners serve their full sentence. Examples of those mandatory minimum sentences include:

- five grams of crack cocaine or methamphetamine = five years in prison
- fifty grams of crack cocaine or methamphetamine = ten years in prison
- one hundred marijuana plants = five years in prison
- one thousand marijuana plants = ten years in prison
- five hundred grams of powder cocaine = five years in prison
- five kilograms of powder cocaine = ten years in prison
- one hundred grams of heroin = five years in prison
- one thousand grams of heroin = ten years in prison
- one gram of LSD = five years in prison
- ten grams of LSD = ten years in prison

The manner in which members of Congress arrived at these quantity triggers in 1986 was entirely random and unscientific. Not one hearing was held to determine what an appropriate sentence might be, given a specific amount of drugs. Nor were hearings held to determine what the prison impact might be of such penalties or the racial impact of the proposed sentences. Instead, members of Congress created these sentences on the floor of the House of Representatives in what amounted to a poker game. One member of Congress would suggest a penalty of two years for

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one hundred marijuana plants, and the next member of Congress would say, "No, let's make it three!" And another member would stand up and say, "No, let's go for four years!" And so on.\textsuperscript{33} Many years later, Congressman William Hughes from New Jersey said that the atmosphere was so frenzied that if someone had suggested the death penalty for a given quantity of drugs, another member of Congress would have tried to top it. The racial impact of the laws cannot be overstated. African-Americans comprise 12 to 13 per cent of the general population in the United States, and about 13 per cent of all drug users.\textsuperscript{34} Yet African-Americans make up 38 per cent of those arrested for drug crimes, 59 per cent of drug convictions, and 74 per cent of those sentenced to prison.\textsuperscript{35} Much has been made about the disparity between the sentences for crack cocaine and powder cocaine found in federal mandatory minimum statutes. It takes one one hundredth the amount of crack cocaine to receive the same sentence as that for powder cocaine. From 1992 to 1994, approximately 96.5 per cent of all federal crack prosecutions were of non-whites, yet overall, crack use was higher among whites.\textsuperscript{36} This disparity has drawn the ire of the African-American community in the United States, but has yet to be corrected by Congress.

Other minority groups have also been adversely effected by mandatory sentencing drug laws. Hispanics represent the fastest growing category of prisoners, having grown 219 per cent between 1985 to 1995.\textsuperscript{37} The percentage of Asian-Americans in prison has also grown—their percentage of the federal prison population increased by a factor of four from 1980 to 1999.\textsuperscript{38}

\textsuperscript{33} S. Wallace, "A Bias in the War on Drugs" The Champion (December 1986) 20.
\textsuperscript{34} United States, National Household Survey on Drug Abuse, Preliminary Results from 1997 (Rockville, Md: United States Department of Health and Human Services, 1999) at 13 and 58.
\textsuperscript{36} D. Weikel, "War on Crack Targets Minorities Over Whites" Los Angeles Times (21 May 1995) A1.
\textsuperscript{37} Supra note 35 at 25.
\textsuperscript{38} Ibid.
V. FAMM'S ROLE

There is much work to be done to reform mandatory minimum sentencing laws in the United States. The work of FAMM is doubly hard because we seek reform of both the federal law that applies to all fifty states and the mandatory sentencing laws enacted by individual states. However, in the past decade, FAMM has made progress in reforming sentencing laws and restoring limited judicial discretion in certain areas.

FAMM's most wide-reaching successes occurred in 1994 and 1998. In 1994, FAMM persuaded Congress that some mandatory drug sentences are too severe and judges should be given the power to override the mandatory sentence in certain cases. Congress narrowly defined which defendants would be eligible for the "safety valve" as first-time, non-violent, drug offenders who provided the government with all the information they had about their case. By definition, this largely eliminated defendants who chose to exercise their right to trial. Still, the "safety valve" affects nearly 25 per cent of incoming federal drug prisoners each year, giving 5,041 defendants shorter sentences than they would otherwise have.

In 1998, FAMM succeeded in amending Michigan's heinous drug law, the "650-Lifer" law (so named because it mandated a life sentence without parole for an individual delivering or attempting to deliver 650 grams or more of heroin or cocaine), to allow for parole after fifteen years. It is an incremental change, but it meant immediate freedom for four non-violent drug prisoners serving life sentences without parole, and it provided the possibility of freedom for two hundred others. One of the prisoners released was JeDonna Young, who was arrested at age twenty-four when the police, after stopping the car she and her boyfriend were in, found heroin in the trunk. Although the boyfriend claimed responsibility for the drugs (JeDonna had known him for only three months), JeDonna was tried and convicted of possession with intent to distribute heroin and sentenced to life in prison without parole. After twenty years in prison,
JeDonna was released\textsuperscript{43} as a result of FAMM\textquoteright s successful effort to change the "650-Lifer" law.

FAMM has also had successes in changing some of the technical language of the Sentencing Guidelines to make the sentences more accurately reflect the offender\textquotesingle s role in the crime. In the courts, FAMM has won six of thirteen sentencing cases that have been heard by the United States Supreme Court. Each of these cases involved technical interpretations of the Sentencing Guidelines that affect hundreds, if not thousands, of defendants and prisoners.

In 2001, FAMM worked on sentencing reform in several states: New York, Massachusetts, Ohio, Florida, as well as further reform in Michigan. FAMM recognizes that the outright repeal of mandatory minimum sentencing laws is unlikely, but while urging repeal, we welcome incremental changes that provide greater judicial discretion in sentencing. In that context, at the federal level, FAMM is seeking to make the 1994 "safety valve" retroactive so that it would apply to prisoners who meet the criteria. FAMM is also working to change crack cocaine sentences so that they are more proportional to the rest of the drug sentences.

VI. CONCLUSION

Sentencing reform is always a challenge. It is too easy for politicians to resort to demagoguery about letting criminals out of prison, and too hard for them to look at the facts and admit that current sentencing policies have no impact on drug use. While many people expected the Clinton administration to bring reason to criminal sentencing issues, President Clinton was instead an obstacle to reform. As a Democrat, he felt he had to prove how tough he was on crime and he routinely went to the right of the Republicans on these issues. Ironically, it may be the current Bush administration that will bring about an opportunity for substantive changes in federal sentencing policies.

President George W. Bush has spoken of "penalty reform," and also of the severity of crack cocaine sentences, and the large numbers of low-level drug offenders in prison today. As a Republican, and the former governor of Texas—the state that has executed more individuals than any other since 1976—his tough-on-crime credentials are intact. He may be the very person to convince other Republicans that it is safe to make changes

to sentencing laws that encourage judicial discretion and offer relief to low-level drug offenders. It is too early to tell if President Bush will take action on his words, but we are cautiously optimistic that sentencing reform may take a bold leap forward during his administration.