

Mandatory Minimum Sentencing

Testimony of Mark A.R. Kleiman before the Pennsylvania Senate Judiciary Committee
May 22, 2017

Mr. Chairman, members of the committee:

It is an honor to have been invited to present my views to this committee, and a particular honor to be in the company of a scholar as distinguished as Alfred Blumstein and a researcher/practitioner as eminent as Bret Bucklen. I will try to be brief, offering a series of bullet-points rather than an extended discourse. I welcome the committee's questions now, and would be happy to provide additional material in writing.

Mandatory minimum sentencing presents four distinct questions:

- How many people do we want in prison at any one time?
- What mix of long and short sentences do we want?
- How should incarceration be divided between drug offenders and property and violent offenders?
- Who decides what to do in each individual case?

1. The sentiment behind mandatories is that we want more people in prison. But that's not always their effect. If something else caps the prison headcount, then more long sentences means fewer shorter sentences.
2. Prisons are expensive. A program to expand incarceration ought to come with a statement of where offsetting spending cuts will come from, or which taxes should be increased, to pay the additional cost.
3. It's not at all clear that Pennsylvania would benefit from having more prisoners. Even putting the budget problem to one side, it's entirely possible that the current number is above the level that would minimize crime. New York City, which has had spectacular success in reducing crime over the past twenty-five years, has also reduced its incarceration rate by more than 50% over that period. Smart policing can allow both crime control and reduced prison headcounts.
4. Nationally, our current incarceration rate is, beyond comparison, the highest in the world. It's five times the American historical level, seven times the level of other advanced democracies. Now that we're back to roughly 1965 crime rates, there's no clear need to have 500% of 1965 incarceration rates.
5. Prisons can reduce crime by deterrence, by incapacitation, and by rehabilitation. But putting too many people away can also increase crime: by turning out ex-prisoners who are more dangerous and less capable of fitting in to normal society than they were when

they went away, and by normalizing incarceration in high-crime communities, thus reducing the deterrent effect of the shame of incarceration.

6. Swiftness and certainty are more important than severity in determining the deterrent value of a punishment. Thus, long sentences produce less deterrence per cell-year than shorter sentences. Long sentences also tend to increase the time lag between arrest and disposition. That's why James Q. Wilson identified severity as the enemy of swiftness and certainty.

7. Prisoners are most dangerous when they're young and when they have recently offended. Every year someone serves behind bars he gets one year older and one year further from his most recent (non-prison) crime. Most serious crime careers end before the age of 40. Long sentences tend to fill the prisons with people who would otherwise be retired criminals. So, mandatories reduce the incapacitation benefit of incarceration.

8. Of course there are exceptionally and persistently dangerous people for whom long-term incarceration pays off. But mandatory sentences aren't an especially good way of picking them out.

9. To justify long mandatories, you'd have to believe not only that long sentences are good, but that prosecutors are better than judges in deciding who should serve such sentences. After all, a "mandatory sentence" isn't mandatory for the prosecutor, who can always bargain it away or file a lesser-included charge that doesn't have a mandatory. There isn't evidence that prosecutors are better at sentencing than judges.

10. Mandatories are an excellent tool for compelling guilty pleas and testimony, whether the defendant is guilty or not and whether the testimony is truthful or not. Obviously, that improves prosecutors' conviction rates, but it's not nearly as obvious that it serves the cause of justice or crime control.

11. The current epidemic of opiate and opioid addiction and overdose death certainly calls for a vigorous policy response. But there is no reason to think that lengthening sentences for drug dealing across the board would have any beneficial effect.

12. When we lock up an active burglar or a robber, we can be confident that doing so will prevent some crime through simple incapacitation. That robber or burglar can't commit more such crimes from behind bars, and locking one such person up does nothing to make those crimes more attractive to other potential offenders. The scarce factor in burglary is burglars, not homes subject to break-in. If we lock up a burglar, no one else is going to do his burglaries for him while he's away.

13. The opposite is true of locking up a drug dealer. The scarce factor in drug dealing is customers. The number of drug dealers even in an active market area tends to be relatively small and relatively constant over time. Many work part-time in the illicit drug trade, because the demand isn't sufficient to support full-time work for all the people willing to engage in dealing. When one dealer leaves the trade – because he gets locked up or for some other reason – that creates a market niche for another dealer. Thus,

incarcerating drug dealers is systematically less valuable than incarcerating predatory criminals.

14. Mandatory sentences for drug sales near schools have been exhaustively evaluated. No study finds an effect on drug use by people of school age. Many studies find large amounts of futile incarceration, with an especially heavy burden of racial and socioeconomic disparity due to differences in population density. That idea, having been tried and failed, should be abandoned rather than being revived.

15. Empirically, between 1980 and today, the number of drug dealers behind bars has risen more than tenfold, from fewer than 40,000 to more than 400,000 nationwide, in part as a result of the massive use of mandatory sentencing at the federal level. And yet the prices of opiates and cocaine – adjusting for inflation and potency/purity – are down at least 80%. There simply is no reason to think that longer sentences for opiate dealers will save any lives.

16. Some drug dealers are armed and violent; many aren't. Systematically longer sentences for armed dealing might have a useful incentive effect. But longer sentences for dealing generically reduce the effects of add-on sentences for being armed. A three-year add-on for being armed transforms the nature of a one-year sentence for dealing; that same add-on is a footnote to a ten-year sentence.

17. The penetration of the opiate/opioid markets by drugs of the fentanyl class – all of them more potent than heroin, and some of them massively so – represents a twofold threat. Not only do the fentanyls expand the total opiate supply, in part because they are more compact and thus easier to smuggle than heroin and in part because they can be produced virtually anywhere, but their potency and variety greatly increase the risk of overdose compared to heroin itself. The body count is further increased by the fact that some of the fentanyls are longer-acting pharmacologically than heroin; unlike a heroin user brought out of overdose by naloxone, a revived fentanyl user may well go back into respiratory arrest because the fentanyl outlasts the naloxone.

18. That creates a strong case for differential sentencing, with longer sentences for fentanyl sellers than for heroin sellers. (This would be even more effective if qualitative testing kits were made available so that dealers and users could know what's in the material being bought and sold.) Differential sentencing could either be created within a discretionary or guideline framework by making fentanyl dealing a separate and more serious offense than heroin dealing or by the sort of sentence enhancements used for dealing while armed, dealing to a minor, or dealing within a school zone. It could also be imposed on a mandatory basis, but I for one wouldn't be inclined to do that unless and until it became evident that judges were unwilling to impose enhanced sentences for such a deadly drug. As in the case of sentencing to deter gun-carrying, mandating long sentences for heroin dealing would frustrate the differential-sentencing approach to discouraging fentanyl dealing.

19. Enforcement (including prosecution and sentencing) has only a limited contribution to make to the current epidemic, as mandatory sentencing has only a limited

contribution to make to increasing the potency of enforcement. The more promising approaches include:

- Regulatory and educational steps to reduce over-prescribing of opiates.
- Identifying the customers of “pill mills,” “script doctors,” and ordinary drug dealers at the time cases are made against them, and working to get those customers into treatment at what is a moment of maximum opportunity and maximum overdose risk.
- Ensuring that criminal justice agencies offer scientifically sound treatment approaches. For the opiates, that means mostly medically assisted treatment, whether with agonists such as buprenorphine and methadone or antagonists such as Vivitrol.
- Using community supervision – including probation, parole, and pretrial supervision – to mandate desistance from drug use, with frequent testing and swift-certain-fair sanctioning.

20. Faced with an urgent problem, the impulse to “do something” can be overwhelmingly strong. But it is more important to do something useful, and to avoid superficially attractive but counterproductive responses. Mandatory sentencing is a solution in search of a problem. Wise legislators will resist its siren call.