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# FEDERAL FIREARMS POLICY AND MANDATORY SENTENCING\*

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## I. INTRODUCTION

The Attorney General's Task Force on Violent Crime clearly considered federal firearms policy a central concern. In all, the Task Force made six recommendations in this area. The one which has attracted the most legislative attention, however, calls on the Attorney General to support or propose legislation requiring a mandatory sentence for the use of a firearm in the commission of a federal felony.<sup>1</sup> This policy, as the commentary on the recommendation points out, is widely supported by the public and the police, and clearly meets the Task Force's three criteria for sensible policy in this area.<sup>2</sup>

There are at least five reasons why a mandatory sentencing policy is especially attractive. First, since it applies only when a firearm is used in the commission of a felony, it does not impose any restrictions on law-

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<sup>1</sup> U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 29 (Recommendation 17) (1981) [hereinafter cited as TASK FORCE REPORT]. Recommendation 5 in Phase I and Recommendations 17 through 22 in Phase II address firearm policy.

<sup>2</sup> The criteria are (1) that any recommendations be politically feasible; (2) that they balance the costs associated with gun ownership with the legitimate reasons for owning guns; and (3) ("most importantly") that a prima facie case can be made that they will reduce violent crime. *Id.* at 30 (Commentary).

abiding citizens who own guns for legitimate purposes. Second, the direct financial costs of the policy are minimal compared to more general mandatory sentencing schemes which would produce large increases in the costs of litigation and incarceration. Because this policy targets a relatively small group of offenders, it constitutes a strategic allocation of scarce crime control resources.<sup>3</sup> Third, the policy is "just" in the sense that the public generally agrees that gun crimes are more serious than others and that those who commit them deserve special punishment.<sup>4</sup> Also, since the constraints on judicial discretion apply to everyone who is accused, the mandatory sentence should contribute to equity and reduce disparities in sentencing. Fourth, the law promises to reduce violent crime by deterring potential offenders from committing a crime, or by channeling them away from guns toward weapons which are less lethal. Fifth, it is a politically feasible policy. Largely because of these reasons, the proposed mandatory sentencing policy is difficult to oppose.

In a previous paper we suggested that a mandatory sentence for firearms crimes promises something like a criminological wonder drug — a plan to reduce violent crime at minimal cost with no serious side effects.<sup>5</sup> Yet in medicine many promising therapies — from snake oil to laetrile — have proven, on the basis of experience, to be ineffective or to have damaging side effects. There is similarly some significant experience with mandatory sentencing for gun offenses which suggests that there may be unanticipated problems. During the last five years we have studied effects of a Michigan statute similar to the one recommended by the Task Force. Our research, which is based on the experience of Detroit's Records Court and on violent crime data in the city, suggests that the expected benefits of the law did not occur and that there have been serious unexpected costs associated with the policy.

## II. BACKGROUND

The Michigan Felony Firearm Law, which went into effect in January of 1977, mandates a "flat" two-year sentence for possessing a firearm while committing or attempting to commit a felony. The sentence is to be served preceding and in addition to the sentence imposed for the

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<sup>3</sup> For a discussion, see C. COOK & D. NAGIN, *DOES THE WEAPON MATTER?* (1979).

<sup>4</sup> In the spring of 1979 we asked a probability sample of residents of the Detroit metropolitan area whether they favored a mandatory two-year sentence for felonies committed with a gun and whether they would favor such a law even if it did not reduce crime and it cost money to keep more people in prison. Ninety percent of respondents favored the law and 65% favored it even if it had no deterrent effect.

<sup>5</sup> Loftin, Heumann & McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 14 *LAW & SOC'Y R.* (forthcoming).

underlying felony. In addition, the law prohibits parole, probation, or suspended sentences.<sup>6</sup>

We began our research in 1977 just after the law went into effect. We selected Detroit as a site for the research because of the concentration of violent crime in the city, and because of the role that the Wayne County (Detroit) Prosecutor chose to play in the implementation of the law. He was instrumental in mounting a publicity campaign which included billboards and bumper stickers proclaiming, "One with a Gun Gets You Two." He also announced, as a matter of departmental policy, that the gun law would be charged in all eligible cases and that there would be no plea bargaining on this charge.

In order to estimate the impact of the law on the processing of cases in Detroit's Recorders Court, we collected information on all of the cases disposed of by the court during 1976, 1977, and 1978 where the original charge was one of eleven violent felonies (armed robbery, assault with intent to commit murder, etc.) and conducted a series of interviews with judges, prosecutors, and defense attorneys. For use in making our estimates of the impact on patterns of crime in the city, we assembled monthly data on the number of violent crimes reported to the police by type of weapon for a period of about twelve years (1968-1979).

### III. THE EFFECT OF THE LAW ON VIOLENT CRIMES

The year before the gun law went into effect, 1976, was an especially bad year for law enforcement in Detroit. There was a series of highly publicized events which emphasized the problems the city was experiencing with violent crime. While cities of comparable size were experiencing a five percent decline in violent crime, Detroit suffered through a five percent increase. Then, in early 1977, a few months after the gun law went into effect, the police and the media began to celebrate a decline in crime which was led by a thirty percent decline in homicides. By the end of 1977 it was evident that the city had exper-

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<sup>6</sup> MICH. COMP. LAWS ANN. § 750.227b (1978)(MICHIGAN STAT. ANN. § 28.424(2)(Callaghan 1981)):

(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

enced declines of approximately twenty percent in both property and violent crime.

Understandably, many observers suggested that the gun law was, to some degree, responsible for this decline. Although the timing of events made this a natural inference, an extensive statistical analysis of the data has led us to the conclusion that the ebb in crime enjoyed by Detroit was unrelated to the gun law and that, in fact, as of 1980 there were no discernible changes in the level of violent crime, or in the type of weapons used in crimes, which could be attributed to the law.<sup>7</sup> There are three features of the data that are especially important in reaching this conclusion. First, the decline in robberies and homicides began at least five months before the law went into effect and four months before the publicity campaign for the law began. Second, only for homicides was the decline significantly greater for gun offenses than for offenses committed without a gun. For example, the level of armed robberies fell, but so did that of unarmed robberies. Third, there was no apparent change in the number of assaults. Initially, we thought the decline in the number of homicides might reflect a similar decline in gun assaults which could, in turn, be linked to changes in assault sentences in Records Court. Having examined all of the data, however, we conclude that this interpretation no longer fits the facts. Since there was no significant change in gun assaults which might explain the decline in homicides, we believe that the decline in gun homicides occurred because of other factors and was not directly related to the gun law.

It is possible that unique features of the Detroit situation prevented an effect which would have been enjoyed in other settings. Another possibility is that benefits which were realized in Detroit were masked by events which occurred along with the intervention of the gun law. As a matter of scientific inference, the likelihood that the Detroit results are misleading can be reduced considerably by replicating them in another setting. Therefore, we are currently investigating crime patterns in several cities in the state of Florida, which in October 1975 implemented a three-year mandatory sentence similar to the Michigan law.<sup>8</sup> Our analysis of the Florida data is not complete, but after examining monthly data on robberies and assaults in Miami, Jacksonville, and Tampa occurring between January 1968 and December 1979, we have found no evidence of a change in these crimes which could reasonably be attributed to the mandatory sentence.

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<sup>7</sup> Some of the analysis is reported in Loftin & McDowall, "One With A Gun Gets You Two": *Mandatory Sentencing and Firearms Violence in Detroit*, 455 ANNALS 150 (1981); Loftin, Heumann & McDowall, *supra* note 5. These patterns are quite different from what one would expect if the gun law had any deterrent or incapacitative effect on violent crime.

<sup>8</sup> FLA. STAT. ANN. § 775.087(2) (West 1976).

There are two possible general explanations of why the mandatory sentence did not produce the expected preventive effects. The first is that the courts found ways of circumventing the mandatory provisions of the law and therefore there was no objective change in sanctions. The second is that potential offenders are not responsive to a mandatory two or three year sentence enhancement.

Although we cannot rule out the first explanation, we think it is the less likely of the two. Although, as we describe below, there was no step-like increase in the certainty and severity of sentences in Detroit, nevertheless this was a tough law. There were no major loopholes in its formulation and the Wayne County Prosecutor was aggressive in his policy of charging the law and resisting attempts to circumvent it. Our interviews indicate that, in spite of some cynicism about the impact of the law, many defendants were concerned that they might get caught in its rigid flat time provisions. A strong message was sent to the community that gun offenders would be dealt with sternly. Over a period of time it is possible that experience with the behavior of the courts demonstrated to the criminal community that the sentences had not changed very much. If this were the case, however, we could expect to find an initial reduction in crimes with a gun followed by a gradual return to the previous levels. There is no indication of this type of pattern in the data. Thus, this interpretation would fit the data only if we are willing to assume that potential offenders, who would have been responsive to an actual change in sanctions, were from the outset insensitive to the publicity campaign and the aggressive charging policy of the prosecutor. While we cannot rule it out completely, we think this is unlikely.

The second explanation, that potential offenders are not sensitive to a two- or three-year mandatory sentence enhancement, is more persuasive. The scope of this type of law is very narrow. In fact, the number of people who could possibly be influenced by its provisions may be negligible. Legally it applies only to felonies committed while in possession of a gun and not to the "included" offense of carrying a gun illegally. This means that it cannot influence the carrying of a gun unless a person is planning to commit a felony. For those who are planning a serious crime, the possibility that they may meet armed resistance provides a powerful inducement to carry a gun which, in all but the most unusual circumstances, would completely overwhelm the deterrent effect of a two-year mandatory enhancement for a felony which already carries the risk of a substantial sentence. The law can therefore be expected to reach the behavior of only those offenders who are planning to commit a felony in circumstances where there is little likelihood of meeting armed resistance, and who, prior to the gun law, would have used a gun. Clearly this is a very small group.

One may feel that the mandatory sentence for gun felonies is a desirable policy even if it does not prevent violent crime. It is a just policy which clearly expresses the community's sentiments that gun crimes are serious crimes and should be punished accordingly. In this sense there is no harm and perhaps some community benefit from the policy. On the other hand, the fact that many people believe that it will reduce crime is not only a significant source of support for the policy, it is also a drain on public support for other gun policies which would reduce the availability of guns and thus may have more of an influence on gun crimes. In this sense the mandatory sentencing policy may impose a significant opportunity cost on the community. It preempts support for other, perhaps more effective, gun control policies.

#### IV. THE RESPONSE OF TRIAL COURTS

Thus far we have limited our evaluation to a consideration of the effect of the proposed mandatory gun law on crime rates. Although we suppose the law could be defended as one which simply advertises a mandatory sentence, and which does not speak to the issues of how and even whether the law is actually applied in the courts, we think it a fair conclusion that the Attorney General's Task Force intended that the proposed law in fact be imposed, that it not merely be a symbolic statement without any alterations in trial court practice.

Indeed, the Task Force evidences a considerable degree of concern and sophistication in its commentary on the law. It recognizes the traditional weakness associated with a mandatory sentence, namely, that it can be used as a tool in the plea bargaining process, a chip for the prosecutor to trade off in return for a plea. Specifically, the Task Force warns that "the power to impose this sentence should not be vitiated by any opportunities on the part of prosecutors to circumvent it through the use of plea bargaining, charge reduction, or other methods."<sup>9</sup>

This is, we believe, an important component of the Task Force position. All too often sentence reforms designed to limit judicial discretion ignore the complementary discretion exercised by prosecutors. Thus, efforts to limit the judge frequently have the consequence of enhancing the discretion of the prosecutor. The Task Force was aware of the problem, and it wisely counseled against this outcome.

Nevertheless, problems remain. First, there is a problem of omission. The comments of the Task Force suggest that *once charged* the mandatory sentence ought not be manipulated. It does not address the traditional prerogative of the prosecutor to decide whether a particular charge should be levelled in the first instance. Prosecutors — and U.S.

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<sup>9</sup> TASK FORCE REPORT, *supra* note 1, at 30 (Commentary).

Attorneys — are under no obligation to charge each and every count that may apply to a particular defendant. Indeed, central to most conceptions of the fair and wise exercise of prosecutorial discretion is the notion of selectivity in charging. In the area of mandatory sentencing, many believe it especially important that such discretion be exercised. In issuing his “Principles of Federal Prosecution,” then Attorney General Benjamin Civiletti wrote:

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instance [sic], however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant’s conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.<sup>10</sup>

It is not clear if Civiletti’s views comport with those of the Task Force. Does the Task Force expect selectivity in charging, with the concomitant decrease in “mandatory” application of the penalty, or does it instead desire that prosecutors eschew discretion in these cases and charge the law whenever the facts warrant it? If the Task Force is “comfortable” with the former, then pre-indictment plea bargaining, or the re-drawing of indictments after plea negotiations, are likely to remain as possible techniques of circumvention. Even without these machinations, the exercise of traditional prosecutorial discretion will, as suggested above, make the mandatory sentences something less than mandatory.

We cannot be sure what the Task Force intended, although the tone of the commentary certainly suggests that it anticipated fairly rigid charging practices coupled with stringent prohibitions on plea bargaining. For our discussion, then, it is useful to assume that the U.S. Attorneys would employ the proposed gun law when warranted, and adhere to strictures against subsequent manipulations of the provision. Accepting this assumption, however, raises two additional questions regarding the consequences of the proposed mandatory sentencing plan. First, can a U.S. Attorney or a prosecutor’s office sufficiently control and monitor subordinate behavior to insure compliance with a law banning the exercise of discretion in a subset of cases? Second, if the office can

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<sup>10</sup> U.S. Dept. of Justice, *Principles of Federal Prosecution*, 27 CRIM. L. REP. (BNA) 3282 (Aug. 6, 1980).

successfully limit discretion, is the law likely to achieve its desired purposes, namely, insuring the mandatory application of a penalty to all gun offenders?

Again, the findings from our research into the mandatory firearms penalty in Detroit are instructive in addressing these issues. With respect to the first issue — and admittedly to our surprise — a prohibition on prosecutorial plea bargaining imposed by the Wayne County Prosecutor seemed, in large measure, to work. By closely monitoring compliance and by visibly sanctioning a few assistant prosecutors who deviated from the policy, the Prosecutor made his position, and his commitment to the gun law, well know throughout his office. Subordinates, although not infrequently in disagreement with the mandatory provisions in particular cases, were forced in plea discussions to take a “my hands are tied” position. Thus, the Detroit implementation, rather than representing the typical response to mandatory sentencing (i.e., an increase in prosecutorial plea bargaining), in large measure adhered to the very posture the Task Force Report seems to advance. The question that remains is, given this forceful implementation, what were the consequences for defendants sentenced in Detroit’s Recorders Court?

By and large, the consequences were very few. In comparing defendants charged with similar offenses before and after the implementation of the mandatory sentence, we found that the percentage of defendants falling within a particular dispositional category (e.g., no prison sentence) remained fairly constant. Although there were some changes at the margins, and although these were usually in the direction of some increase in sentence length, overall the two-year mandatory sentence in Detroit did not lead to a two-year increase in sentence length for defendants convicted of serious offenses, nor did it lead to a two-year sentence for defendants who, prior to the law, would not have received a prison sentence.<sup>11</sup>

Notwithstanding the prohibition on plea bargaining and the restrictions imposed on judicial discretion by the mandatory sentence, the system managed in large measure (but not completely) to “absorb” the mandatory sentence without substantially upsetting the norms that had guided its practices in the earlier period. This was largely accomplished through two mechanisms. First, in the serious cases where defendants had previously received substantial periods of incarceration, judges were increasingly drawn into sentence negotiations with defense attorneys. The result of these negotiations was often a decrease in the sentence on the primary felony to offset the additional sentence required by the gun

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<sup>11</sup> For a detailed discussion of these findings see Loftin, Heumann & McDowall, *supra* note 5.

law count. Thus, for the "bad" defendants, not much changed. They did essentially the same time both before and after the law went into effect.

The less serious offenses and offenders raised more difficult problems. Prior to the gun law, defendants in such cases received a short period of incarceration, or more typically, probation. The gun law, however, like the Task Force proposal, requires a substantial period of incarceration. This major change in the court's norm made many judges, prosecutors, and defense attorneys quite uncomfortable. Within the ambit of the mandatory provision were many so-called "equity cases," cases in which the mandatory two-year sentence provision applied but in which, in some sense, no one felt sure that such a term was deserved. These were the same sort of cases to which the Civiletti guidelines referred in discussing prosecutorial discretion,<sup>12</sup> the cases that are inevitably swept up when one passes a general statute which necessarily applies to the almost infinite variety of offenses a court processes. In Detroit these equity cases placed an enormous strain on the system. Judges confronted the predicament of having to sentence a defendant to two years in state prison when they felt the sentence was inconsistent with their prior sentencing norms, and perhaps more importantly, with a sense of proportionality in punishment. Defendants not swept up by the gun law but guilty of more serious offenses were faring better than these "equity" defendants.

The response of the court was to process many of these cases in bench or waiver trials. As is the case with the Task Force recommendation, the mandatory sentencing provision of the Michigan law attaches only to *felonies*. Thus, if judges found defendants guilty of a misdemeanor in a bench trial, by definition the mandatory provision fell by the wayside, an outcome which, of course, resurrected judicial discretion. These trials took two forms. Sometimes they were in fact "wired"—arranged in advance (sometimes with the acquiescence of the assistant prosecutor) by the defense attorney and the judge; other times defense attorneys were forced to gamble on the judge's sense of the inappropriateness of the penalty, and hope that he or she "would take care of it" during a bench trial. In the "wired" trial the outcome was assured; in the others the gamble was generally, but not always, successful.

To summarize, the simultaneous restriction of prosecutorial discretion and the introduction of a mandatory sentence increased judicial participation in sentence bargaining and the use of *sub rosa* techniques to avoid the gun law in less serious cases. Detroit, like the federal system, did not have a long tradition of extensive judicial participation in sen-

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<sup>12</sup> See *supra* note 10 and accompanying text.

tence negotiations; as a result of the gun law, judicial participation increased. Moreover, like most jurisdictions, Detroit had been moving toward a process of opening up plea negotiations by putting these negotiations and agreements on the record; wired trials thwarted this process, at least in part, as *sub rosa* deals replaced open agreements. Finally, it is worth repeating that although most defendants benefited by these arrangements, some did not. In large measure the gun law was "absorbed" by the court; to the extent it was not, it worked selectively, and often seemingly whimsically, in terms of the particular defendants who experienced the sentencing increment.

## V. CONCLUSIONS

These findings should be viewed as illustrative and not necessarily predictive of what might happen in the federal system should the Task Force recommendations succeed. The federal system is in some important respects different from state court systems, particularly in terms of a tradition of rules limiting the role of the federal judiciary in plea and sentence negotiation. Nonetheless, we think it is plausible to argue that if the mandatory sentencing provision is charged across the board, and that if prohibitions on plea negotiations are rigorously adhered to, similar tensions are likely to arise in the federal system.<sup>13</sup> Perhaps the participants in the federal system will simply accept these tensions, and concede inequalities as a cost of achieving some level of certainty of punishment. Although we think this is a less likely result than the contrary posture adopted in Detroit, both approaches raise obvious policy concerns.

Whether the benefits reaped from the mandatory sentence are worth the price under either set of responses is a matter that turns on one's values and on one's judgment of the efficacy — whether symbolic or real — of this sort of policy toward gun control. Because we are uncomfortable with either set of judicial responses and unable to discern any deterrent effect of the law (at least as applied in Detroit), and because these sorts of statutes may prevent more systematic assaults on gun violence, we remain quite unconvinced of the desirability of mandatory sentences. Alternate policies, more systematic in addressing the question of violent firearm offenses, and affording an opportunity for the structured exercise of discretion by prosecutors and judges, strike us as more promising avenues for policy consideration.

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<sup>13</sup> Cases in the federal courts, of course, differ from those in state courts. Nonetheless, it is still likely that the distribution of federal gun cases — assuming no selectivity in charging — will include its share of "equity" cases.