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Michael Tonry

The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings

ABSTRACT

Policy and knowledge concerning mandatory minimum sentences have long marched in different directions in the United States. There is no credible evidence that the enactment or implementation of such sentences has significant deterrent effects, but there is massive evidence, which has accumulated for two centuries, that mandatory minimums foster circumvention by judges, juries, and prosecutors; reduce accountability and transparency; produce injustices in many cases; and result in wide unwarranted disparities in the handling of similar cases. No country besides the United States has adopted many mandatory penalty laws, and none has adopted laws as severe as those in the United States. If policy makers took account of research evidence (and informed practitioners' views), existing laws would be repealed and no new ones would be enacted.

The greatest gap between knowledge and policy in American sentencing concerns mandatory penalties. Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms—from 1-year add-ons for gun use in violent crimes in the 1950s and 1960s, through 10-, 20-, and 30-year federal minimums for drug offenses in the 1980s, to three-strikes laws in the 1990s—are a bad idea. That is why the U.S. Congress in 1970, at the urging of Texas Congressman George H. Bush, repealed most of

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the mandatory minimum sentence provisions then contained in federal law (U.S. Sentencing Commission 1991). It is why nearly every authoritative nonpartisan law reform organization that has considered the subject, including the American Law Institute in the *Model Penal Code* (1962), the American Bar Association in each edition of its *Criminal Justice Standards* (e.g., 1968, standard 2.3; 1994, standard 18–3.21[b]), the Federal Courts Study Committee (1990), and the U.S. Sentencing Commission (1991) have opposed enactment, and favored repeal, of mandatory penalties. In 2007, the American Law Institute approved a partial second edition of the *Model Penal Code* that repudiated mandatory penalties. In 2004, an American Bar Association commission headed by conservative Justice Anthony Kennedy of the U.S. Supreme Court called upon states, territories, and the federal government to repeal mandatory minimum sentence statutes (Kennedy 2004). The recommendations were overwhelmingly approved by the ABA House of Delegates.

Mandatory sentencing laws for felonies take a number of forms. Typical laws specify minimum prison sentences for designated violent and drug crimes (e.g., minimum 5 years' imprisonment for selling 10 grams of crack cocaine). Others require that incremental penalties be imposed on convicted offenders meeting specified criteria (e.g., anyone convicted of an offense involving a firearm must receive 2 years' imprisonment in addition to that imposed for the offense). Sometimes they specify minimum sentences to be imposed on people convicted of a particular offense who have prior felony convictions. Three-strikes laws, for example, are mandatory sentencing laws. Typically they provide that anyone convicted of a designated (usually violent or drug) crime, who has previously twice been convicted of similar crimes, be sentenced to a prison sentence of 25 years or more.

Several other kinds of "mandatory" sentencing laws are not addressed in this essay. I do not discuss mandatory sentences for misdemeanors; a common example is laws that mandate short jail terms for some drunk-driving offenses. I do not discuss laws that use the word "mandatory" but do not mean it. "Mandatory life" sentences for murder are legally required in England and in some Australian states. The terminology, however, is misleading. In most cases, the judge also indicates how long the offender should be held before release on parole. Utterance of the words "mandatory life imprisonment" is obligatory; a life spent behind bars is not. Finally, I do not discuss mandatory confinement under civil

law authority. This primarily affects people being held for immigration law violations pending hearings or deportation.

Policy makers promoting mandatory penalties usually offer three justifications. Mandatory penalties are said to assure evenhandedness: every offender who does the crime will do the time. They are said to be transparent: mandatory penalty laws assure everyone, offenders, practitioners, and the general public alike, that justice will be done and be seen to be done. They are said to prevent crime: the certainty of punishment will deter would-be offenders. The insuperable difficulty with all these claims is that centuries of evidence show them to be untrue.¹

There is a fourth justification, but it is one that has no place in a society that takes human rights seriously. Enactment of mandatory penalties is sometimes justified in expressive terms, irrespective of their effects. Their enactment is said to acknowledge public anxiety and assuage victims' anger.² They are a sign that policy makers are listening, and care, and are prepared to take action. This assumes, however, that offenders' interests in being treated justly and fairly do not warrant consideration. People may sometimes feel that way, but that cannot be a legitimate basis for making policy in a free society. In no other setting would the claim be allowed that harm may properly be done to individuals solely because doing so might give pleasure to other people.

Objections to mandatory penalties are well documented and of long standing. They are not mandatory, whatever the law may say, and they are not transparent. When mandatory penalty laws require imposition of sentences that practitioners believe are too severe, three things happen. Sometimes prosecutors sidestep the laws by not bringing charges subject to them or by agreeing to dismiss them in plea negotiations. Sometimes sentences are imposed that everyone involved believes are unjustly severe. Sometimes judges and prosecutors disingenuously evade their application. Because these things happen, mandatory pen-

¹ Another possible argument for mandatory penalties is that they encourage defendants to plead guilty (Boerner 1995). This is a non sequitur. Were there no mandatories, defendants now affected by them would remain subject to all the pressures that face every criminal defendant. They would simply no longer face out-of-the-ordinary—and therefore unfair—pressures resulting from the rigidity and excessive severity of many mandatory minimum sentence laws. In any case, as studies discussed in Secs. I–III demonstrate, prosecutors are often complicit in circumvention of mandatory penalties.

² A substantial public opinion literature shows that support for mandatory minimums is typically high when people are asked about them in the abstract but falls to low levels when people are asked about particular cases (Roberts 2003).

alties produce wide disparities between cases that are comparable in every way except how they were handled. And because practitioners often feel they must devise ways to circumvent their application, critical decisions are not made in court openly, transparently, and accountably. Laws ostensibly meant to produce consistent penalties on center stage produce inconsistent ones behind the scenes.

Nor does the evidence show that mandatory penalties provide effective deterrents to crime. From the accounts of pockets being picked at the hangings of pickpockets in eighteenth-century England (Teeters and Hedblom 1967; Hay et al. 1975) to the systematic empirical evaluations of the past 30 years, similar conclusions emerge. Mandatory penalty laws have not been credibly shown to have measurable deterrent effects for any save minor crimes such as speeding or illegal parking or for short-term effects that quickly waste away.³

Two separate claims are sometimes conflated. One is that mandatory penalty laws prevent crimes by means of their putative certainty of application. Relatively little research has been done on that question. When probabilities of suspicion, arrest, prosecution, and conviction are compounded and the time required to dispose of cases is taken into account, certainty is an unrealistic aim in any case. The second claim, sometimes referred to as the marginal deterrence hypothesis, is that increases to previously applicable penalties will prevent crimes by raising their prospective punitive cost. A few studies by economists have found marginal deterrent effects (e.g., Shepherd 2002; Levitt and Miles 2007),⁴ but they have been refuted by other economists.⁵ Most other social scientists conclude that the hypothesis cannot be confirmed (e.g., Doob and Webster

³ Laurence Ross (1982) showed that apparent effects even of drunk-driving crackdowns soon waste away. Lawrence Sherman (1990) demonstrated the wasting effect of police crackdowns and proposed that police harness that effect by repeatedly shifting their geographical focus after brief periods of "residual deterrence" can be expected to end.

⁴ Economists generally assume that increased penalties will reduce crime rates and attempt in their research to determine by how much. Ronald Coase, the Nobel Prize-winning pioneer of the law-and-economics movement, observed: "Punishment, for example, can be regarded as the price of crime. *An economist will not debate whether increased punishment will reduce crime; he will merely try to answer the question, by how much?*" (1978, p. 210; emphasis added). Other social scientists attempt to determine *whether* punishment increases affect behavior. This disciplinary difference may be why economists generally conclude that increased punishments deter and other social scientists generally conclude that the hypothesis cannot be confirmed.

⁵ John Donohue (2006, p. 4), observing that "[Nobel Prize winner Gary] Becker suggests that price theory can fill in where empirical evidence is lacking: capital punishment is akin to a rise in the price of murder and hence might be expected to lessen the number of murders," rhetorically asks whether many economists' vigorous defense of traditional economic models in relation to crime is in effect a defense of price theory itself.

2003; Webster, Doob, and Zimring 2006; Tonry 2008) or that occasional findings of deterrent effects in studies of particular policies in particular places have no generalizable policy implications (e.g., Cook 1980; Nagin 1998; Pratt et al. 2006, p. 379). The clear weight of the evidence is that the marginal deterrence hypothesis cannot be confirmed. In any case, the hypothesis has only limited relevance to understanding the effects of mandatory penalties and provides no basis for making policy decisions. Even in theory, it is germane only to the period immediately after enactment of a new or harsher law.

No one who has lived in the United States, however, can be unaware that conservative politicians for 3 decades consistently promoted passage of more and harsher mandatory sentence laws. Moderate and liberal politicians, most famously former President Bill Clinton, from the mid-1980s onward more often than not followed suit. Between the mid-1970s and the mid-1980s, every American state but one enacted at least one new mandatory penalty law (Shane-DuBow, Brown, and Olsen 1985). Most adopted many such laws for violent, sexual, and drug offenses and for “career criminals.” The U.S. Congress repeatedly, between 1984 and 1996, enacted new mandatory sentencing laws and increased penalties under existing ones (Austin et al. 1994). The first “three strikes and you’re out” law was enacted by referendum in Washington State in 1993 and was followed most famously in California in 1994 but also by more than 23 other states and the federal government (Dickey and Hollenhorst 1999; Chen 2008, table 1).

The pace of new enactments has slowed. Except in Alaska in 2006, no new three-strikes laws were enacted in American states after 1996 (Chen 2008, table 1). In some states, the scope of mandatory penalty laws has been narrowed, though only slightly, and in a few states judges were given new discretion to impose some other sentence in narrowly defined categories of cases (Butterfield 2003; Steinhauer 2009). As these words were written in March 2009, New York’s governor and legislature were reported to have agreed on repeal of most of the Rockefeller Drug Laws (Peters 2009). In 2007, the U.S. Sentencing Commission changed its guidelines to narrow the ramifications of mandatory penalties for drug crimes.⁶ Taken as a whole, and with the

⁶ It is a long story. The initial commissioners in the 1980s set sentences for many offenses not subject to mandatory penalties longer than they needed to be on the logic that if the mandatory penalty statutes had applied, those offenses would have been covered as the commission prescribed.

exception of repeal of the New York laws, if that happens, as Adam Liptak (2007, p. A21) noted of the U.S. Sentencing Commission changes, these changes only nibble at the edges: "The sentencing commission's striking move . . . will have only a minor impact. Unless Congress acts, many thousands of defendants will continue to face vastly different sentences for selling different types of the same thing." No major laws have been repealed, no major laws have been enacted retroactively to shorten the sentences of the hundreds of thousands of prisoners serving time under mandatory minimum laws, and most new laws narrowing their scope have been restrictively drafted to cover only minor offenses and offenders.

The decent thing to do would be to repeal all existing mandatory penalties and to enact no new ones. If that is politically impracticable, there are ways to avoid or ameliorate the foreseeable dysfunctional effects of mandatory penalties. First, make penalties presumptive rather than mandatory. Second, add "sunset provisions" providing that the laws lapse and become presumptive after 3–5 years, and include such provisions in any new mandatory minimum sentencing laws. Third, limit lengthy prison terms—whether or not subject to mandatory penalties—to serious crimes such as grievous assaults causing serious injury, aggravated rape, murder, and flagrant financial crimes. Fourth, authorize correctional officials to reconsider release dates of all offenders receiving prison sentences exceeding a designated length (say 5 or 10 years).

This essay summarizes research on the implementation, operation, and deterrent effects of mandatory sentencing laws. Sections I, II, and III are chronological and survey knowledge concerning the implementation of mandatory penalties since the eighteenth century.⁷ I discuss the handful of most ambitious studies in some detail—some might think belaboredly—to show that centuries-old knowledge continues well founded in our world. Section I examines research before 1970. Section II examines the major empirical evaluations of mandatory penalties in the 1970s and 1980s, including the 1978 evaluation of New York's "Rockefeller Drug Laws." Section III discusses the U.S. Sentencing Commission's 1991 study of federal mandatory minimum sentence laws and the small body of research that has accumulated since then. Section IV summarizes the small literature on mandatory minimums in other countries, primarily Australia, England and Wales, and

⁷ Sections I and II draw heavily on an earlier essay that summarized research on mandatory penalties through the early 1990s (Tonry 1996, chap. 5).

South Africa. Although the mandatory penalties are much less harsh in those countries and the research is less extensive, the findings are indistinguishable from those in the United States. Section V examines research on deterrent effects. Section VI tries to make sense of these findings and to outline their policy implications.

I. Mandatory Penalties before 1970

The foreseeable problems in implementing mandatory penalties have been well known for 200 years. A U.S. House of Representatives report, explaining why the Congress in 1970 repealed almost all federal mandatory penalties for drug offenses, accurately summarized what was then known: "The severity of existing penalties, involving in many instances minimum mandatory sentences, has led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offenses. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make conviction . . . more difficult to obtain" (quoted in U.S. Sentencing Commission 1991, pp. 6-7).

The least subtle way to avoid imposition of harsh penalties is to nullify them. "Nullification," a term in common usage for more than two centuries, encapsulates the process by which judges and juries refuse to enforce laws or apply penalties that they consider unjust. Oliver Wendell Holmes Jr. described the jury's capacity to nullify harsh laws as among its principal virtues (Holmes 1889). Harvard Law School Dean Roscoe Pound claimed that "jury lawlessness is the great corrective of law in its actual administration" (1910, p. 18). John Baldwin and Michael McConville, in a review of jury research, observed: "The refusal of juries to convict in cases of criminal libel, the 'pious perjury' they welcomed in order to avoid conviction on a capital offense, the indulgence shown toward 'mercy killings' and the nullification of the Prohibition laws during the 1920s are simply the most famous examples of this exercise of discretion" (1980, p. 272). The leading criminal law casebook in use in American law schools for 30 years, Jerome Michael and Herbert Wechsler's *Criminal Law and Its Administration* (1940), gave lengthy and respectful consideration to nullification.

A. The Death Penalty in Eighteenth-Century England

The death penalty debate in eighteenth- and nineteenth-century England is strikingly similar to contemporary American debates about mandatory penalties. In July 1991, in the face of claims that newly proposed mandatory penalty laws would overburden the courts and have little practical effect, one congressman told the *New York Times*: “Congressmen and Senators are afraid to vote no” on crime and punishment bills, “even if they don’t think it will accomplish anything.” A Senate aide suggested that “it’s tough to vote against tough sentences for criminals” (Ifill 1991, p. A6). At the end of the eighteenth century, Edmund Burke declared “that he could obtain the consent of the House of Commons to any Bill imposing the punishment of death” (Select Committee on Capital Punishment 1930, paras. 10, 11). Samuel Romilly, England’s most celebrated nineteenth-century death penalty opponent, repeatedly called for repeal of capital punishment laws because they were applied erratically and unfairly and because the erratic application inevitably undermined whatever deterrent effects they might possibly have had (Romilly 1820).

During the reigns of the four Kings George, between 1714 and 1830, the British Parliament created 156 new capital offenses. By 1819, British law recognized 220 capital offenses, most of them property crimes. During the same period, however, the number of executions steadily declined. Douglas Hay (1975), in a famous essay “Property, Authority, and the Criminal Law,” explained the anomaly. The propertied classes in the early years of the Industrial Revolution, he argued, attempted to protect their financial interests through promotion and passage of laws that emphasized the importance of private property (by making numerous property crimes punishable by death). At the same time, the same people, often serving as magistrates and judges, operated a legal system that provided exemplary punishments and, by making frequent merciful exceptions and observing procedural rules that made death sentences difficult to obtain, protected the system’s legitimacy in the eyes of the general public.

Judges and juries went to extreme lengths to avoid imposing death sentences. Juries often refused to convict. A variant, with twentieth-century echoes, was to convict of a lesser offense. According to a 1930 report of the British Select Committee on Capital Punishment, describing eighteenth-century practices,

In vast numbers of cases, the sentence of death was not passed, or if passed was not carried into effect. For one thing, juries in increasing numbers refused to convict. A jury would assess the amount taken from a shop at 4s. [shillings] 10d. [pence] so as to avoid the capital penalty which fell on a theft of 5s. In the case of a dwelling, where the theft of 40s. was a capital offense, even when a woman confessed that she had stolen £5, the jury notwithstanding found that the amount was only 39s. And when later, in 1827, the legislature raised the capital indictment to £5, the juries at the same time raised their verdicts to £4 19s. (Select Committee on Capital Punishment 1930, para. 17)

As more capital offenses were created, the courts adopted increasingly narrow interpretations of procedural, pleading, and evidentiary rules. Seemingly well-founded prosecutions would fall because a name or a date was incorrect or a defendant was wrongly described as a “farmer” rather than as a “yeoman” (Radzinowicz 1948–68, vol. 1, pp. 25–28, 89–91, 97–103; Hay 1980, pp. 32–34).

Even among those sentenced to death, the proportion executed declined steadily. According to the Select Committee on Capital Punishment, “The Prerogative of the crown [pardon] was increasingly exercised. Down to 1756 about two-thirds of those condemned were actually brought to the scaffold; from 1756 to 1772 the proportion sank to one-half. Between 1802 and 1808 it was no more than one-eighth” (1930, para. 21). Most of those pardoned received substituted punishments of a term of imprisonment or transportation (Stephen 1883, vol. 1, chap. 13).

B. Mandatory Penalties in the 1950s

The American Bar Foundation’s Survey of the Administration of Criminal Justice in the United States in the 1950s confirmed the lessons from eighteenth-century England. Frank Remington, director of the 18-year project, noted: “Legislative prescription of a high mandatory sentence for certain offenders is likely to result in a reduction in charges at the prosecution stage, or if this is not done, by a refusal of the judge to convict at the adjudication stage. The issue . . . thus is not solely whether certain offenders should be dealt with severely, but also how the criminal justice system will accommodate to the legislative charge” (1969, p. xvii).

The survey’s findings are exemplified by three processes the reports described. First, Donald Newman described how Michigan judges dealt with a lengthy mandatory minimum for drug sales:

Mandatory minimums are almost universally disliked by trial judges. . . . The clearest illustration of routine reductions is provided by reduction of sale of narcotics to possession or addiction. . . . Judges . . . actively participated in the charge reduction process to the extent of refusing to accept guilty pleas to sale and liberally assigning counsel to work out reduced charges. . . . To demonstrate its infrequent application, from the effective date of the revised law (May 8, 1952) to the date of tabulation four years later (June 30, 1956), only twelve sale-of-narcotics convictions were recorded in Detroit out of 476 defendants originally charged with sale. The remainder (except a handful acquitted altogether) pleaded guilty to reduced charges. (Newman 1966, p. 179)

Second, Newman described efforts to avoid 15-year mandatory maximum sentences for breaking-and-entering and armed robbery:

In Michigan conviction of armed robbery or breaking and entering in the nighttime (fifteen-year maximum compared to five years for daytime breaking) is rare. The pattern of downgrading is such that it becomes virtually routine, and the bargaining session becomes a ritual. The real issue in such negotiations is not whether the charge will be reduced but how far, that is, to what lesser offense. . . . [A]rmed robbery is so often downgraded that the Michigan parole board tends to treat a conviction for unarmed robbery as prima facie proof that the defendant had a weapon. And the frequency of altering nighttime burglary to breaking and entering in the daytime led one prosecutor to remark: "You'd think all our burglaries occur at high noon." (1966, p. 182)

Third, Robert O. Dawson described "very strong" judicial resistance to a 20-year mandatory minimum for sale of narcotics: "All of the judges of Recorder's Court, in registering their dislike for the provision, cited the hypothetical case of a young man having no criminal record being given a twenty-year minimum sentence for selling a single marijuana cigarette. Charge reductions to possession or use are routine. Indeed, in some cases, judges have refused to accept guilty pleas to sale of narcotics, but have continued the case and appointed counsel with instructions to negotiate a charge reduction" (1969, p. 201).

These findings from the American Bar Foundation Survey differ in detail from those of eighteenth-century England, but only in detail. When the U.S. Congress repealed most mandatory penalties for drug offenses in 1970, it was merely acknowledging enforcement problems that had long been recognized.

II. Mandatory Penalties in the 1970s and 1980s

Between 1975 and 1996, mandatory minimums were America's most frequently enacted sentencing law changes. By 1983, 49 of the 50 states (Wisconsin was the holdout) had adopted mandatory sentencing laws for offenses other than murder or drunk driving (Shane-DuBow, Brown, and Olsen 1985, table 30). By 1994, every state had adopted mandatory penalties; most had several (Austin et al. 1994). Most mandatory penalties apply to drug offenses, murder or aggravated rape, felonies involving firearms, or felonies committed by people who have previous felony convictions. Between 1985 and mid-1991, the U.S. Congress enacted at least 20 new mandatory penalty provisions; by 1991, more than 60 federal statutes subjected more than 100 crimes to mandatory penalties (U.S. Sentencing Commission 1991, pp. 8–10). More followed, including the federal three-strikes law, in the next few years. Few if any new mandatory penalty laws were enacted after 1996.⁸

The experience in most states in the late 1980s and early 1990s was similar. In Florida, for example, seven new mandatory sentencing laws were enacted between 1988 and 1990 (Austin 1991, p. 4). In Arizona, mandatory sentencing laws were so common that 57 percent of felony offenders in fiscal year 1990 were potentially subject to mandatory sentencing provisions, although in the vast majority of cases defendants were allowed to plead guilty to offenses not subject to minimums (Knapp 1991, p. 10).

The empirical evidence for this period comes primarily from four major studies. One is an evaluation of the "Rockefeller Drug Laws" (Joint Committee on New York Drug Law Evaluation 1978). One concerns the Michigan law requiring imposition of a 2-year mandatory prison sentence on persons convicted of possession of a gun during commission of a felony (Loftin and McDowall 1981; Loftin, Heumann, and McDowall 1983). Two concern a Massachusetts law requiring a 1-year prison sentence for persons convicted of carrying a firearm unlawfully (Beha 1977; Rossman et al. 1979). These studies differ from those in the 1950s in that they examined court processes but also used quantitative data to look for effects on overall system operations, especially guilty plea and trial rates, and overall sentencing patterns.

⁸ I have not checked the statutes of every U.S. jurisdiction. The National Conference of State Legislatures publishes annual reports entitled "State Crime Legislation in [e.g.] 2006"; these describe minor changes in state mandatory penalty laws since the mid-1990s but no major new ones (<http://www.ncsl.org>).

TABLE 1
Drug Felony Processing in New York State

	1972	1973*	1974	1975	1976 (January-June)
Arrests	19,269	15,594	17,670	15,941	8,166
Indictments:					
<i>N</i>	7,528	5,969	5,791	4,283	2,073
Percent of arrests	39.1	38.3	32.8	26.9	25.4
Indictments disposed	6,911	5,580	3,939	3,989	2,173
Convictions:					
<i>N</i>	6,033	4,739	3,085	3,147	1,724
Percent of dispositions	87.3	84.9	78.3	78.9	79.3
Prison and jail sentences:					
<i>N</i>	2,039	1,555	1,074	1,369	945
Percent of convictions	33.8	32.8	34.8	43.5	54.8
Percent of arrests	10.6	10.0	6.1	8.6	11.6

SOURCE.—Joint Committee (1978), tables 19, 24, 27, 29.

* The drug law went into effect on September 1, 1973.

A. *The Rockefeller Drug Laws in New York*

The most exhaustive evaluation concerned the "Rockefeller Drug Laws" (Joint Committee on New York Drug Law Evaluation 1978). They took effect on September 1, 1973. They mandated lengthy prison sentences for narcotics offenses and included statutory limits on plea bargaining. The key findings were these: drug felony arrests, indictment rates, and conviction rates all declined; for those who were convicted, however, the likelihood of being imprisoned and the average length of prison term increased; the two preceding patterns canceled each other out, and the likelihood that a person arrested for a drug felony was imprisoned was about the same after the law took effect as before—around 11 percent; the proportion of drug felony dispositions resulting from trials tripled between 1973 and 1976, and the average time for processing of a single case doubled.

Table 1 shows case processing patterns for drug felony cases in New York during the period 1972–76. The percentage of drug felony arrests resulting in indictments declined steadily from 39.1 percent in 1972, before the law took effect, to 25.4 percent in the first half of 1976. Similarly, the likelihood of conviction, given indictment, declined from 87.3 percent in 1972 to 79.3 percent in the first half of 1976.

Practitioners made vigorous efforts to avoid application of the mandatory sentences in cases in which they viewed those sentences as being

too harsh; the remaining cases were dealt with as the law dictated (Blumstein et al. 1983, pp. 188–89). Thus, the percentage of drug felonies in New York City disposed of by means of a trial rather than a guilty plea rose from 6 percent in 1972 to 17 percent in the first 6 months of 1976. Many fewer defendants pled guilty, and the trial rate tripled. It took between 10 and 15 times as much court time to dispose of a case by trial as by plea, and the average case processing time for disposed cases increased from 172 days in the last 4 months of 1973 to 351 days in the first 6 months of 1976. Backlogs rose commensurately (Joint Committee on New York Drug Law Evaluation 1978).⁹

Sentencing severity increased substantially for defendants who were convicted. Only 3 percent of sentenced drug felons between 1972 and 1974 under prior law received minimum sentences longer than 3 years. Under the new law, 22 percent did. The likelihood that a person convicted of a drug felony in New York State received a prison sentence grew from 33.8 percent in 1972 to 54.8 percent in the first 6 months of 1976 (Joint Committee on New York Drug Law Evaluation 1978, pp. 99–103).

B. Massachusetts's Bartley-Fox Amendment

Massachusetts's Bartley-Fox Amendment required imposition of a 1-year mandatory minimum prison sentence, without suspension, furlough, or parole, for anyone convicted of unlawful carrying of an unlicensed firearm. An offender need not have committed any other crime.

Two major evaluations were conducted (Beha 1977; Rossman et al. 1979). Some background on the Boston courts may make the following discussion of their findings more intelligible. The Boston Municipal Court is both a trial court and a preliminary hearing court. If a defendant is dissatisfied with his or her conviction or sentence, an appeal may be made to the Suffolk County Superior Court for a new trial.

James Beha's (1977) analysis was based primarily on comparisons of police and court records for the 6-month periods before and after the law's effective date. David Rossman and his colleagues (1979) dealt with official records from 1974, 1975, and 1976 supplemented by interviews with police, lawyers, and court personnel.

⁹ However, anticipating a finding from later studies, later analyses by Feeley and Kamin (1996) showed that, within a few years, a new "going-rate" equilibrium was established and trial rates and case processing times returned to former levels.

The primary findings were these:

1. Police altered their behavior in ways aimed at limiting the law's reach. They became more selective about whom to frisk; the absolute number of reports of gun incidents taking place out of doors decreased, which meant a concomitant decrease in arrests, and the number of weapons seized without arrest increased by 120 percent from 1974 to 1976 (Carlson [1982, p. 6], relying on Rossman et al. [1979]).
2. The number of persons "absconding" increased substantially between the period before the law took effect and the period after (both studies).
3. Outcomes favorable to defendants, including both dismissals and acquittals, increased significantly between the before and after periods (both studies).
4. Of persons convicted of firearms carrying charges in Boston Municipal Court, appeal rates increased radically (Beha 1977, table 2). In 1974, 21 percent of municipal court convictions were appealed to the Superior Court. The appeal rate in 1976 was 94 percent (Rossman et al. 1979).
5. The percentage of defendants who entirely avoided a conviction rose from 53.5 percent in 1974 to 80 percent in 1976 (Carlson [1982, p. 10], relying on Rossman et al. [1979]).
6. Of that residuum of offenders who were finally convicted, the probability of receiving an incarcerative sentence increased from 23 percent to 100 percent (Carlson [1982, p. 8], relying on Rossman et al. [1979]).

C. The Michigan Felony Firearms Statute

The Michigan Felony Firearms Statute created a new offense of possessing a firearm while engaging in a felony and specified a 2-year mandatory prison sentence that could not be suspended or shortened by release on parole and that had to be served consecutively to a sentence imposed for the underlying felony. The law took effect on January 1, 1977. The Wayne County prosecutor banned charge bargaining in firearms cases and took measures to enforce the ban, suggesting that the likelihood of circumvention should have been less than was experienced in New York and Massachusetts.

Heumann and Loftin (1979) observed a strong tendency in Wayne

County toward early dismissal of charges other than on the merits. They interpreted this as evidence of efforts to avoid applying the mandatory penalties. They focused on three offenses: armed robbery, "other assaults," and felonious assault. "Felonious assaults" tend to arise from "disputes among acquaintances or relatives and are less predatory than armed robbery." "Other assaults" is an intermediate category.

Case processing patterns for felonious assault, the low-severity offense, did not change after the mandatory penalty provision took effect. There was some increase in early dismissal of armed robbery charges and a substantial increase in dismissals of "other assaults." These findings are consistent with the hypothesis that efforts were made to avoid application of the mandatory penalty to defendants for whom lawyers and judges believed it inappropriately severe.

The probabilities of conviction differed after implementation depending on the offense. Consistent with the Massachusetts findings that mandatory sentences reduce the probability of convictions, conviction probabilities declined for "other assaults" and armed robbery (Loftin, Heumann, and McDowall 1983, p. 295).

The effects of the Felony Firearm Statute on sentencing severity were assessed in two ways. Using quantitative methods, Loftin, Heumann, and McDowall (1983) concluded that the statute did not generally increase the probability that prison sentences would be imposed, but for those receiving prison sentences, it increased the expected lengths of sentences for some offenses (pp. 297-98). Using simpler tabular analyses, they concluded that, overall, the percentage of defendants vulnerable to the firearms law who were incarcerated did not change markedly (Heumann and Loftin 1979).

As table 2 indicates, the probability of a prison sentence, given filing of the charge, increased slightly for felonious assault and other assault and decreased slightly for armed robbery. The probability of incarceration given conviction also did not change markedly for felonious assault or armed robbery. It did change for other assault, increasing from 57 percent of convictions prior to implementation of the firearm law to 82 percent afterward. This resulted in part from the substantial shift toward early dismissal of other assault charges, reducing the residuum of cases to be sentenced from 65 percent of cases to 50 percent.

Finally, trial rates remained roughly comparable before and after implementation, except for the least serious category of offenses, fe-

TABLE 2
Disposition of Original Charges in Wayne County, Michigan, by
Offense Type and Time Period

	<i>N</i>	Dismissed at/before Pretrial (%)	Dismissed or Acquitted after Pretrial (%)	Convicted/ No Prison (%)	Some Prison (%)	Total (%)
Felonious assault:						
Before*	145	24	31	31	14	100
After†	39	26	26	31	18	101
Other assault:						
Before	240	12	24	28	37	101
After	53	26	24	9	41	100
Armed robbery:						
Before	471	13	19	4	64	100
After	136	22	17	2	60	101

SOURCE.—Cohen and Tonry (1983), tables 7–10; adapted from Heumann and Loftin (1979), table 3.

NOTE.—The totals do not always sum to 100 percent because of rounding.

* Offense committed before January 1, 1977, and case disposed between July 1, 1976, and June 30, 1977.

† Offense committed and case disposed between January 1, 1977, and June 30, 1977.

lonious assaults, for which the percentage of cases resolved at trial increased from 16 percent of cases to 41 percent (Heumann and Loftin 1979, table 4). This is explained by Heumann and Loftin in terms of an innovative adaptive response, the “waiver trial.” By agreement or by expectation, the judge would convict the defendant of a misdemeanor rather than the charged felony (the firearms law applied only to felonies) or would simply, with the prosecutor’s acquiescence, acquit the defendant on the firearms charge. Either approach eliminated the threat of a mandatory sentence. A third mechanism for nullifying the mandatory sentencing law was to decrease the sentence that otherwise would have been imposed by 2 years and then add the 2 years back on the basis of the firearms law (Heumann and Loftin 1979, pp. 416–24).

D. The New York, Massachusetts, and Michigan Studies

The Massachusetts, Michigan, and New York laws are especially good illustrations of the operation of mandatory sentencing laws. For differing reasons, vigorous and highly publicized efforts were made to make them effective. The New York law was the first piece of high-visibility law-and-order legislation enacted in the 1970s in the United

States; it attracted enormous attention both because it happened in New York and because its proponent, Governor Nelson Rockefeller, long known as a liberal Republican, used it in part to attempt to establish more conservative credentials.¹⁰ Amid enormous publicity and massive media attention, the legislature authorized and funded 31 new courts, including creation of additional judges, construction of new courtrooms, and provision of support personnel and resources, and expressly forbade some kinds of plea bargaining to assure the mandatory sentences were imposed. In Massachusetts, while the statute did not address plea bargaining, it expressly forbade “diversion in the form of continuance without a finding or filing of cases,” both devices used in the Boston Municipal Court for disposition of cases other than on the merits.¹¹ In Michigan, the Wayne County prosecutor established and enforced a ban on plea bargaining. He also launched a major publicity campaign, promising on billboards and bumper stickers that “One with a Gun Gets You Two.”

Nothing in these findings would surprise the authors of the American Bar Foundation Surveys or observers of eighteenth-century English courts.

III. Mandatory Minimums since 1990

The evaluators of the Rockefeller Drug Laws and the Michigan Felony Firearms law investigated deterrent effects of mandatory penalties, but most research before 1990 paid primary attention to sentencing patterns and case processing. Since 1990, only two major published studies looked primarily at those subjects. Most studies, discussed in Section V, investigated deterrent (and sometimes incapacitative) effects.

A. U.S. Sentencing Commission Report

The U.S. Sentencing Commission report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, demonstrates that mandatory minimum sentencing laws shift discretion from judges to prosecutors, result in higher trial rates and lengthened case processing times, fail to acknowledge salient differences between cases, and often punish

¹⁰ It seems to have worked. President Gerald Ford, himself initially an unelected successor to Vice President Spiro Agnew, later appointed Rockefeller as his vice president.

¹¹ Filing is a practice in which cases are left open with no expectation that they will ever be closed; continuance without finding leaves the case open in anticipation of eventual dismissal if the defendant avoids further trouble.

minor offenders more harshly than anyone involved believes is warranted. Heavy majorities of judges, defense counsel, and probation officers disliked mandatory penalties; prosecutors were about evenly divided. Judges and lawyers often circumvented mandatory sentence laws.¹²

The commission analyzed three data sets describing federal sentencing and two sources of data concerning the opinions of judges, assistant U.S. attorneys, and others. The three data sets were FPSSIS, U.S. Sentencing Commission monitoring data for fiscal year 1990, and a 12.5 percent random sample of defendants sentenced in fiscal year 1990. Data for the random sample were augmented by examining computerized and paper case files to identify cases (there were 1,165 defendants) that met statutory criteria for receipt of a mandatory minimum drug or weapon sentence.

The sources of data on practitioners' views were structured interviews of 234 practitioners in 12 sites (48 judges, 72 assistant U.S. attorneys, 48 defense attorneys, and 66 probation officers) and a May 1991 mail survey of 2,998 practitioners (the same groups as were interviewed; 1,261 had responded by the time the report was written).

1. *Sentencing Analyses.* The sentencing data revealed a number of not unexpected patterns. First, prosecutors often did not file charges that carried mandatory minimums when the evidence would have supported such charges. Prosecutors failed to file charges for mandatory weapons enhancements against 45 percent of drug defendants for whom they would have been appropriate. Prosecutors failed to seek mandatory sentencing enhancements for prior felony convictions in 63 percent of cases in which they could have done so. Only in 74 percent of cases were defendants charged with the offense carrying the highest applicable mandatory minimum.

Second, prosecutors used mandatory provisions tactically to induce guilty pleas. Among defendants fully charged with applicable mandatory sentence charges and convicted at trial, 96 percent received the full mandatory minimum sentence. Of those pleading guilty, by contrast, 27 percent pled to charges bearing no mandatory minimum or a lower one. Of all defendants who pled guilty (whether or not initially charged with applicable mandatory-bearing charges), 32 percent had no mandatory minimum at conviction; 53 percent were sentenced be-

¹² The U.S. General Accounting Office (1993) reached similar conclusions.

low the minimum the evidence would have justified. Among defendants against whom mandatory weapons enhancements were filed, the weapons charges were later dismissed in 26 percent of cases.

Third, mandatory penalties increased trial rates and thereby increased work loads and case processing times. Nearly 30 percent of those convicted of offenses bearing mandatory minimums were convicted at trial, a rate two-and-one-half times the overall trial rate for federal criminal defendants.

Fourth, judges were often willing to work around, and under, the mandatory penalties. Forty percent of defendants whose cases the commission believed warranted mandatory minimums received shorter sentences than applicable statutes specified. Mandatory minimum defendants received downward departures 22 percent of the time. The commission observed that “the increased departure rate may reflect a greater tendency to exercise prosecutorial or judicial discretion as the severity of the penalties increases” (U.S. Sentencing Commission 1991, p. 53). To like effect, “the prosecutors’ reasons for reducing or dismissing mandatory charges . . . may be attributable to . . . satisfaction with the punishment received [after the reduction or dismissal]” (U.S. Sentencing Commission 1991, p. 58).¹³

Other studies confirmed the commission’s principal findings.¹⁴ A series of analyses of plea bargaining under the federal guidelines conducted by Stephen Schulhofer showed that prosecutors and defense counsel, in nearly a third of cases examined, manipulated the guidelines, often with tacit judicial approval, to achieve sentence reductions (Schulhofer and Nagel 1989; Nagel and Schulhofer 1992). This finding is not on its face surprising; plea negotiation is common everywhere in the United States, and sentence reductions are what defendants want (Schulhofer 1997).

Schulhofer’s conclusion that sentences in a third of cases were reduced by prosecutorial manipulation was probably an underestimate. The manipulations were in violation of commission (and often De-

¹³ Judicial and prosecutorial avoidance of mandatory penalties is probably much greater in 2009 than it was at the time of the commission’s 1991 study; analyses by Bowman and Heise (2001, 2002) showed that overall circumvention of guidelines increased steadily during the 1990s and average sentence lengths decreased.

¹⁴ In the text I mention studies only of federal mandatory minimums. There is a large general literature on how and why prosecutors, often in consort with judges and defense lawyers, circumvent sentencing laws and guidelines. There are studies on three-strikes in California (e.g., Harris and Jesilow 2000) and federal (e.g., Johnson, Ulmer, and Kramer 2008) and state (e.g., Ulmer, Kurlychek, and Kramer 2008) guidelines.

partment of Justice) policies and sometimes involved judicial acquiescence.¹⁵ Neither assistant U.S. attorneys nor judges have an interest in publicly acknowledging their willful evasion of sentencing guidelines and mandatory penalties. A Federal Judicial Center survey of all federal district court judges and probation officers in 1996 showed that 73.2 percent of judges and 93.2 percent of probation officers “strongly” or “somewhat agree” that “plea bargains are a source of hidden unwarranted disparity in the guidelines system” (Johnson and Gilbert 1997, table 7).¹⁶

2. *Opinion Surveys.* No category of federal court practitioners, including prosecutors, much liked mandatory minimum sentencing laws (U.S. Sentencing Commission 1991, chap. 6). In 1-hour structured interviews, 38 of 48 federal district court judges offered unfavorable comments. Among 48 defense counsel, only one had anything positive to say, and he also had negative comments. Probation officers were also overwhelmingly hostile. The most common complaints for all three groups were that the mandatory penalties were too harsh, resulted in too many trials, and eliminated judicial discretion. Only among prosecutors was sentiment more favorable; even among them, however, 34 of 61 were wholly (23) or partly (11) negative.

The mail survey showed that 62 percent of judges, 52 percent of private counsel, and 89 percent of federal defenders wanted mandatory penalties for drug crimes eliminated. A 1993 Gallup Poll survey of judges who were members of the American Bar Association found that 82 percent of state judges and 94 percent of federal judges disapproved of mandatory minimums (*ABA Journal* 1994). A 1994 Federal Judicial Center survey reported that 72 percent of circuit court judges and 86 percent of district court judges moderately or strongly supported changes in “current sentencing rules to increase the discretion of the judge” (Federal Judicial Center 1994). Although the 1996 Federal Judicial Center survey did not ask what respondents thought about mandatory penalties, 78.7 percent of district court judges “strongly” or

¹⁵ The tension between local prosecutors wanting to do justice in individual cases and political officials in the Department of Justice in Washington wanting to enforce standardized policies continues (e.g., Stith 2008).

¹⁶ A U.S. General Accounting Office study covering 1999–2001 found that, even among cases in which mandatory minimums were not circumvented by prosecutors, judges sentenced below the minimum in 52 percent of cases (U.S. General Accounting Office 2003, p. 14).

“somewhat agreed” that their influence on the federal guidelines should be reduced (Johnson and Gilbert 1997, table 10).

B. Oregon's Measure 11

Oregon's Measure 11, adopted by voters in a referendum in 1994, required imposition of mandatory minimum prison sentences from 70 to 300 months on anyone (including children as young as 15) convicted of any of 16 designated crimes. The law's coverage was later extended to five additional crimes. A person who knew nothing about how courts operate might expect that anyone who committed those 21 crimes would receive the mandated sentences.

RAND Corporation evaluators understood how courts operate (Merritt, Fain, and Turner 2006). They supposed that judges and lawyers would alter previous ways of doing business, especially in filing charges and negotiating plea bargains, to achieve results that seemed to them sensible and just. To find out whether they were right, they interviewed a considerable number of practitioners, analyzed data on sentences for offenses subject to Measure 11 and lesser related offenses for periods before and after Measure 11 took effect, and conducted another round of interviews to test their readings of the statistical analyses.

On the basis of the research summarized in Section II, they expected that, compared with sentencing patterns before Measure 11, relatively fewer people would be convicted of Measure 11 offenses and more of non-Measure 11 offenses, those convicted of Measure 11 offenses would receive harsher sentences, and jury trial rates would rise for a while and then return to prior levels. The rationales were that practitioners would divert some cases that would once have been Measure 11 offenses into less serious offense categories, that the remaining Measure 11 cases would be of greater average seriousness than before the law changed, and that the threat of harsher sentences would for a while cause more defendants to take their chances on a trial rather than plead guilty (but new going rates would in due course be established and guilty plea rates would return to normal).

The research confirmed the hypotheses and in addition showed that sentences for non-Measure 11 offenses also became harsher, that the mandatory minimums increased prosecutors' power, and that the changed sentencing patterns resulted primarily from changes in charging (fewer Measure 11 crimes, more lesser crimes) and plea bargaining

(fewer pleas to initially charged offenses, more to lesser included offenses).

The only other major related evaluation was carried out in New Jersey by Candace McCoy and Patrick McManimon (2004), who examined sentencing patterns and case processing in New Jersey after enactment of a “truth-in-sentencing” law requiring people convicted of designated offenses to serve 85 percent of the announced sentence. This was not a mandatory minimum sentence law, but similar hypotheses apply: that power would be shifted to prosecutors, that charging and bargaining patterns would change to shelter some defendants from the new law, that sentences would be harsher for those not sheltered, and that new plea negotiation “going rates” would be established. Each of the hypotheses was substantiated.

Nothing found in any of these studies contradicts findings from earlier periods.

IV. Mandatory Penalties in Other Countries

No Western country besides the United States has adopted a large number of broad-based mandatory penalties. The small literature concerns Australia, Canada, England and Wales, and South Africa. No ambitious evaluations comparable to those discussed in Sections I–III have been undertaken. There have been efforts, however, to take stock of their effects. The most recent and comprehensive is a report by the Sentencing Advisory Council of the Australian State of Victoria. Its conclusions are in line with every other major analysis: “Ultimately, current research in this area indicates that there is a very low likelihood that a mandatory sentencing regime will deliver on its [deterrent] aims. . . . There is, in any case, ample evidence that mandatory sentencing can and will be circumvented by lawyers, judges, and juries both by accepted measures (such as plea bargaining) and by less visible means. The outcome of this avoidance is to jeopardize seriously another aim of mandatory sentencing; that is, to ensure that proportionate and consistent sentences are imposed” (Sentencing Advisory Council 2008, p. 21).

A. England and Wales

By American standards, some other countries’ mandatory penalty laws are not mandatory at all. Three mandatory sentence laws were

enacted in England and Wales as part of the Crime (Sentences) Act 1997. The first provided for an automatic life sentence (though affected offenders remained eligible for parole release) for a second serious violent or sexual offense unless there were “exceptional” circumstances. The other two specified a minimum 7-year sentence for third-time trafficking in class A drugs and a minimum 3-year sentence for third-time domestic burglary. These laws, however, provided that judges could impose a lesser sentence if they concluded that imposition of the mandatory sentence would be unjust “in all the circumstances.” Andrew Ashworth (2001), the preeminent British sentencing scholar, has argued that that provision emasculated the law. The Court of Appeal, in an opinion by Lord Chief Justice Wolfe, in a case involving mandatory life sentences for second serious violent or sexual crimes, ruled that a finding that the offender “was not felt to present a significant risk to the public” would satisfy the “exceptional circumstances” test (Jones and Newburn 2006, p. 787). Cavadino and Dignan observed that the decision would “presumably allow sentencers to avoid passing life sentences in many—perhaps most—of these ‘two-strikes’” cases (2002, p. 106). The mandatory life sentence for a second violent or sexual offense was repealed as part of the Criminal Justice Act 2003.¹⁷

B. South Africa

The South African laws were enacted in 1997 at a time of rapidly rising crime rates, with a 2-year sunset clause and ostensibly as an interim measure. They provided for mandatory minimums for certain serious offenses and minimum 10-, 20-, and 30-year sentences for first, second, and third rapes, respectively, and for specific types of murder. Similar to the English law, the initial proposed law provided that courts could impose less severe sentences if there were “circumstances” that would justify them. Before the departure criterion was enacted, it was redefined to require a finding of “substantial and compelling circumstances.”¹⁸ The mandatory penalties remained in effect in mid-2009 after a series of 2-year extensions.

Constitutional challenges were raised. In *S. v. Malgas*, 2 SA 1222 (2001), the South African Supreme Court of Appeal, not unlike the

¹⁷ The story of the enactment and experience with the English laws is told most fully by Jones and Newburn (2006). Convictions for murder trigger an automatic (but parolable) life sentence.

¹⁸ Van zyl Smit (2000) tells the tale in considerable detail.

English Court of Appeal before it, broadened the departure test: “‘Substantial and compelling circumstances’ may arise from a number of factors considered together—taken one by one, these factors need not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be ‘disproportionate to the crime, the criminal, and the needs of society,’ the court may impose a shorter sentence” (pp. 1234–35).

In the aftermath of *Malgas*, South Africa is repeating an old American story. Stephan Terblanche (2003) has argued that minimum sentence legislation has worsened disparities and inconsistencies in South African sentencing. Evaluations have shown that judges depart from the mandatory minimums in a majority of cases (O’Donovan and Redpath 2006). There is evidence that circumvention of the law is widespread (Roth 2008, pp. 169–70) and that sentences for those not benefiting from departures became harsher after the 1997 law was enacted (Sloth-Nielsen and Ehlers 2005).

The most comprehensive examination of the effects of South Africa’s mandatory penalties concluded that, because of *Malgas*, the laws did not substantially increase constraints on judicial discretion. The study documented increased inconsistency in sentencing and increases in court costs and delays (O’Donovan and Redpath 2006, pp. 81–84).

C. *Australia*

Three-strikes laws in Western Australia and the Northern Territory attracted considerable attention in Australia even though, by American, English, and South African standards, they were mild (Hogg 1999; Law Council of Australia 2001). The Northern Territory, which traditionally has much the highest imprisonment rates in Australia, enacted a mandatory penalty law in 1997 for a broad range of low-level offenses, including theft, receiving stolen property, criminal damage, and unlawful use of a vehicle. First-time adult offenders faced a mandatory minimum 14-day prison sentence, second-timers a minimum 90 days, and third-timers a minimum of a year. A 28-day detention term was mandated for 15- and 16-year-olds convicted of a second or subsequent offense. In 1999, sexual and violent offenses were made subject to mandatory penalties. As in the English and South African laws, an “exceptional circumstances” provision in all these laws allowed judges to avoid imposing the minimum sentences on adults when they made appropriate findings (Brown 2001). Johnson and Zdenkowski (2000), in an assessment of the

effects, concluded that discretion had been shifted from judges to prosecutors and that more case dispositions moved out of the spotlight and into the shadows as defense lawyers negotiated charge dismissals and agreements to permit informal dispositions (e.g., restitution). The mandatories for property offenses were repealed in 2001. The mandatories for violent and sexual offenses remained in effect in 2007 (Warner 2007).

Western Australia had two such laws. The first, enacted in 1992, was precipitated by a rash of automobile thefts by juveniles that produced police chases and 16 related traffic deaths in 18 months. It mandated indeterminate (parolable) detention in addition to at least 18 months' imprisonment. Only two juveniles were sentenced to indeterminate detention under the law. An evaluation by the Western Australian Crime Research Centre concluded that the law's enactment had no effect on rates of automobile theft (Broadhurst and Loh 1993). The law was repealed in 1994 (Brown 2001; Warner 2007).

A 1996 three-strikes law subjected people convicted for the third and subsequent times of household burglary to a 12-month minimum sentence to confinement. An Australian judge observed that such adult offenders already typically received 18- to 36-month sentences, making the mandatory penalty "less than the term of an imprisonment that an adult might have expected before the law was changed" and therefore largely symbolic (Yeats 1997, p. 375). The burglary three-strikes law remained in effect in 2007. Kate Warner observed: "The heat seems to have gone out of the debate, perhaps because in practice it has little effect on adults and the courts have circumvented mandatory detention for juveniles by imposing Conditional Release Orders" (2007, p. 337).

Neil Morgan's evaluation concluded that "there is compelling evidence from WA that neither the 1992 nor the 1996 laws achieved a deterrent effect. . . . There was a leap in residential burglaries immediately after the introduction of the new [1996] laws at precisely the time when the greatest reduction would have been expected" (2000, p. 172).

D. Canada

Canada is a federal country in which the criminal code and its sentencing laws are federal but prosecutions are handled in provincial courts. There have been three major sets of mandatory penalties.¹⁹ A

¹⁹ Crutcher (2001) provides a detailed account of the history of mandatory penalties in Canada.

minimum sentence of 7 years was mandated for importation of narcotics, but this was declared unconstitutional by the Canadian Supreme Court because it was “grossly disproportionate to what the offender deserves” (*R v. Smith*, 34 C.C.C. 3d 97 [1987], at p. 139). New mandatory drug importation laws were not enacted. A 1996 law mandated minimum 4-year prison sentences for offenders committing any of 10 violent crimes with a firearm. Cheryl Webster and Anthony Doob, after analyzing data on Canadian prison populations, concluded: “While the mandatory minimum sentences for violent crimes did in fact increase the sentences that *some* offenders received, it is likely that the ‘new’ sanction would not significantly differ from one that would have been handed down under the prior legislation for most offenders. . . . It is probable they would already have been dealt with in a harsh manner by Canadian judges” (2007, p. 317; emphasis in original). Legislation introduced in 2006 (Bill C-10, 39th Parliament, 1st session) requires a 5-year mandatory minimum for gang-related gun crimes or gun use in relation to designated serious crimes and a longer minimum for second convictions. It applies only to handguns and involves only marginally more severe punishments than the 1996 legislation. It took effect a few months before the time of writing. Doob and Webster (2009) describe it, like its 1996 predecessor, as a primarily symbolic tough-on-crime initiative of a conservative government.

None of the laws in Canada, England, South Africa, and Australia are as severe as the harsher American laws and few are as rigid. To a considerable extent these countries have recognized the foreseeable nullification problems that face all rigid or severe sentencing laws by creating “exceptional circumstance” authority for judges to depart openly and accountably. The South Africans, however, have replicated the pattern of stark and unjust disparities that result when some like-situated offenders benefit from low-visibility circumvention of severe laws and others go to prison for many years.

V. Deterrent Effects

One claim often made for mandatory minimum sentence laws is that their enactment and enforcement deter would-be offenders and thereby reduce crime rates and spare victims’ suffering. This claim, if true, makes a powerful case. Unfortunately, the accumulated evidence shows that it is not true.

There are three kinds of sources of relevant evidence. First, governments in many countries have asked advisory committees or national commissions to survey knowledge of the deterrent effects of criminal penalties in general. Second, a sizable number of comprehensive reviews of the literature on deterrence have been published. Third, evaluations have been conducted of the deterrent effects of newly enacted mandatory penalty laws.

A. National Advisory Bodies

No one doubts that society is safer having some criminal penalties rather than none at all, but that choice is not in issue. On the real-world question of whether increases in penalties significantly reduce the incidence of serious crimes, the consensus conclusion of governmental advisory bodies in many countries is possibly, a little, at most, but probably not.

After the most exhaustive examination of the question ever undertaken, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded: "In summary . . . we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence" (Blumstein, Cohen, and Nagin 1978, p. 7). Daniel Nagin of Carnegie Mellon University, a principal draftsman of the report, was less qualified in his assessment: "The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist. . . . Policymakers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence . . . strongly supports the deterrence hypothesis" (1978, pp. 135–36).

The National Academy of Sciences Panel on Understanding and Controlling Violence reached a similar conclusion in 1993. After documenting that the average prison sentence per violent crime tripled between 1975 and 1989, the panel asked, "What effect has increasing the prison population had on violent crime?" and answered, "Apparently very little" (Reiss and Roth 1993, p. 6). That answer took account of both deterrent and incapacitative effects.

Similar bodies in other Western countries have reached similar conclusions. British Prime Minister Margaret Thatcher's government created a Home Office advisory committee on criminal penalties. The resulting white paper, which led to an overhaul of English sentencing laws in 1991, expressed skepticism about the deterrent effects of pen-

alties: "Deterrence is a principle with much immediate appeal. . . . But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation" (Home Office 1990, p. 6).

The same conclusions were earlier reached by the Canadian Sentencing Commission: "Evidence does not support the notion that variations in sanctions (within a range that reasonably could be contemplated) affect the deterrent value of sentences. In other words, deterrence cannot be used with empirical justification, to guide the imposition of sentences" (1987, p. xxvii). The Committee on Justice of the Canadian Parliament, chaired by a member of the then-governing Conservative Party, a few years later observed: "If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses have on crime. . . . [The] evidence from the US is that costly repressive measures alone fail to deter crime. The Committee unanimously agrees that crime prevention is the best policy choice" (Canada 1993, p. 2).

Negative findings concerning the deterrent effects of penalties are not unique to English-speaking countries. The Finnish government made a conscious policy decision in the mid-1970s to reduce the prison population from what was widely seen as unacceptably high levels, and it succeeded. The incarceration rate per 100,000 population fell by 60 percent between 1970 and 1992. The policy decision was based in large part on an examination of evidence on deterrence. A report issued by the Finnish Ministry of Justice's National Research Institute of Legal Policy explained: "Can our long prison sentences be defended on the basis of a cost/benefit assessment of their general preventative effect? The answer of the criminological expertise was no" (Törnudd 1993).

Alfred Blumstein, chairman of the National Academy of Sciences panels on deterrence and incapacitation (Blumstein, Cohen, and Nagin 1978), sentencing research (Blumstein et al. 1983), and criminal careers (Blumstein et al. 1986) and long America's leading authority on crime-control research, explained why, on empirical grounds, three-strikes laws (and by implication all mandatory penalties) are misconceived:

“However hard it is for rational folks to conceive of it, there are some people who simply do not respond to whatever threat is presented to them. The problem is that any serious three-strikes candidate probably falls into that category. For people who see no attractive options in the legitimate economy, and who are doubtful that they will live another ten years in any event, the threat of an extended prison stay is likely to be far less threatening than it would be to a well-employed person with a family” (Blumstein 1994, p. 415).

The government committees and commissions agree that insufficient evidence exists for basing detailed sanctioning policies on the deterrence hypothesis. The American National Academy of Sciences panel reports concur.

B. Surveys of the Literature

The critical question is whether marginal changes in sanctions have measurable deterrent effects. The heavy majority of broad-based reviews reach similar conclusions that no credible evidence demonstrates that increasing penalties reliably achieves marginal deterrent effects. A few reviews by economists, relying solely on work by economists, come out the other way. They have been convincingly refuted. The surveys by noneconomists discuss social science work generally, including that of economists.

Philip Cook, one of a handful of senior economists who have specialized on crime topics, surveyed the literature in 1980. He concluded that existing studies showed that “there exist feasible actions on the part of the criminal justice system that may be effective in deterring [certain] crimes . . . [but the studies] do *not* demonstrate that all types of crimes are potentially deterrable, and certainly they provide little help in predicting the effects of any specific governmental action” (1980, p. 215; emphasis in original).

Daniel Nagin, in 1998, revisiting the work of the 1978 National Academy of Sciences panel 20 years later, observed that he “was convinced that a number of studies have credibly demonstrated marginal deterrent effects,” but he concluded that it was “difficult to generalize from the findings of a specific study because knowledge about the factors that affect the efficacy of policy is so limited” (1998, p. 4). He highlighted four major factors: the relation between short- and long-term effects, the relation between risk perceptions and sanctions pol-

icies, the methods of implementation, and the extent of implementation.

Andrew von Hirsch and his colleagues (1999), in a survey of the literature commissioned by the Home Office of England and Wales, concluded that “there is as yet no firm evidence regarding the extent to which raising the severity of punishment would enhance deterrence of crime” (p. 52). Anthony Doob and Cheryl Webster, in 2003, in yet another major review of the literature, noted some inconclusive or weak evidence of marginal deterrence, but they concluded: “There is no plausible body of evidence that supports policies based on this premise [that increased penalties reduce crime]. On the contrary, standard social scientific norms governing the acceptance of the null hypothesis justify the present (always rebuttable) conclusion that sentence severity does not affect levels of crime” (2003, p. 146).²⁰ A meta-analysis by Travis Pratt and his colleagues (2006) produced a main finding on deterrence, one “noted by previous narrative reviews of the deterrence literature,” that “the effects of severity estimates and deterrence/sanctions composites, even when statistically significant, are too weak to be of substantive significance (consistently below $-.1$)” (p. 379).

Three literature surveys by economists, summarizing work principally by themselves and other economists, conclude that increases in punishment achieve marginal deterrent effects. The insularity of work by economists creates a serious problem: although other social scientists regularly explain data problems and unwarranted assumptions that bedevil many economic analyses of punishment, economists seldom acknowledge the criticisms, the problems, or the existence of deterrence research by noneconomists.²¹ Donald Lewis describes “a substantial body of evidence which is largely consistent with the existence of a deterrent effect from longer sentences” (1986, p. 60). Steve Levitt, relying principally on data from two of his own analyses, describes them as evidence “for a deterrent effect of increases in expected punishment” (2002, p. 445). Levitt and George Miles (2007) conclude:

²⁰ I reached the same conclusion in a 2008 *Crime and Justice* essay (Tonry 2008).

²¹ In a classic instance, Joanna Shepherd, e.g., author of several economic studies finding a deterrent effect of capital punishment, in 2004 testified before the U.S. Congress that there was a “strong consensus among economists that capital punishment deters crime” and that “the studies are unanimous” (2004, pp. 10–11), without mentioning the equally strong consensus among noneconomists (with agreement of many economists [Donohue and Wolfers 2005; Donohue 2006] that capital punishment cannot be shown to deter homicide).

“The new empirical evidence [produced exclusively by economists] generally supports the deterrence model. . . . Evidence of the crime-reducing effects of the scale of policing and incarceration is consistent across different methodological approaches” (p. 456). Much of their discussion focuses on whether capital punishment, recent increases in the scale of imprisonment, and changes in use of police manpower have reduced crime rates; the marginal deterrence hypothesis receives little attention except concerning a study by Kessler and Levitt (1999) of the effects of a change in California law.²²

C. Evaluations and Impact Assessments

Two literatures are germane. Evaluations of mandatory minimum laws in the 1970s and 1980s focused on effects on sentencing outcomes and court processes. These generally conclude that deterrent effects cannot be shown to be associated with passage and implementation of mandatory penalty laws. A second literature, all focused on California in the 1990s, examines the effects on crime rates of changes in California sentencing laws. Most of it concerns the three-strikes law. None of the major California studies focused primarily on implementation and case processing or was as ambitious as the federal mandatory minimum study or the New York drug law evaluation. The divide in California between some economists and other social scientists is stunning. Work by non-economists and some economists concludes that no crime-preventive effects can be shown. Work by other economists concludes that the new laws have had substantial deterrent effects.

1. *Mandatory Minimum Evaluations.* No individual evaluation has demonstrated crime reduction effects attributable to enactment or implementation of a mandatory minimum sentence law. One analysis combined data from four studies that had not found deterrent effects and concluded that a small deterrent effect could be shown. For reasons given below, the finding is not credible.

The evaluators of the Rockefeller Drug Laws expended most of their efforts trying to identify effects on drug use or drug-related crime. They found none (Joint Committee on New York Drug Law Evaluation 1978).

²² Kessler and Levitt (1999) sought to identify deterrent effects from passage in 1982 of a California referendum that increased penalties for certain crimes. They examined crime data at 2-year intervals and thereby missed a downward trend that began in 1980 and continued after passage of the referendum. This made the post-1982 decline as likely to be the extension of a preexisting trend as a deterrent effect (Webster, Doob, and Zimring 2006).

A number of studies were made of the crime-preventive effects of the Massachusetts law requiring a 1-year minimum sentence for people convicted of possession of an unregistered firearm. The studies concluded that it had either no deterrent effect on the use of firearms in violent crimes (Beha 1977; Rossman et al. 1979; Carlson 1982) or a small short-term effect that quickly disappeared (Pierce and Bowers 1981).

Studies in other states reached similar results. An evaluation of the mandatory sentencing law for firearms offenses in Detroit, Michigan, concluded that "the mandatory sentencing law did not have a preventive effect on crime" (Loftin, Heumann, and McDowall 1983). Assessments of the deterrent effects of mandatory penalty laws in Tampa, Jacksonville, and Miami, Florida, "concluded that the results did not support a preventive effect model" (Loftin and McDowall 1984, p. 259). The results of evaluations of the crime-preventive effects of mandatory penalty laws in operation in Pittsburgh and Philadelphia, Pennsylvania, "do not strongly challenge the conclusion that the statutes have no preventive effect" (McDowall, Loftin, and Wiersema 1992, p. 382).

One analysis based on evaluation data concluded that mandatory penalties had deterrent effects. McDowall, Loftin, and Wiersema (1992), the team of researchers who conducted the Michigan, Florida, and Pennsylvania deterrence analyses mentioned in the preceding paragraph, combined the data from all six sites in three states and concluded that mandatory penalties for gun crimes reduced gun homicides but not assaults or robberies involving guns. This is counterintuitive. Homicides by definition are lethal assaults, and the ratios of assaults and robberies that involve guns and result in deaths should be relatively stable, assuming there have been no substantial changes in the lethality of available weapons. If the proportions of assaults and robberies involving guns decline, gun homicides should decline commensurately, and vice versa. If a deterrent effect can be shown for relatively small numbers of homicides, it should be much easier to demonstrate for vastly larger numbers of assaults and robberies.

2. California Studies. The gap between politics and knowledge concerning the effects of California's three-strikes law has been enormous. Most credible empirical assessments of the law's effects on crime rates and patterns have concluded that none can be shown. From the law's initial passage in 1994 during the administration of Republican Governor Pete Wilson, California politicians have claimed to believe its

passage and implementation were major causes of California's substantial crime-rate decline during the 1990s.

a. California Government Views. Although it took a dozen years, some agencies of California government eventually expressed views consistent with those of (most) researchers. It was a long time coming. In 1999, California Secretary of State Bill Jones claimed: "After five years, we now have strong statistical data to show the law is working as intended. California's murder and robbery rates are down by 50% [and] the overall crime rate in California has declined 38%. . . . It is clear that the implementation of the Three Strikes and You're Out Law has made a considerable positive impact on the incidence of crime and California" (Secretary of State 1999, pp. 1, 3).

Governor Wilson, in vetoing legislation creating a commission to study the law's effects, said its aim was to "disprove the obvious positive impact of the Three Strikes law. . . . There are many mysteries in life, but the efficiency of 'Three Strikes' . . . is not one of them" (quoted in California District Attorneys Association 2004, p. 32). Wilson's successor, Democrat Grey Davis, vetoing a similar bill calling for a study commission, observed that "the savings associated with the law, in terms of lives not destroyed, injuries not sustained, and property not stolen . . . is ultimately incalculable, but very serious" (quoted in California District Attorneys Association 2004, p. 32).

By 2004, when the accumulation of studies suggesting otherwise had become huge, even the California District Attorneys Association expressed more cautious views: the "dramatic drop in California's crime rate might be properly attributable to several substantial factors. It is counter-intuitive, however, to think that incarcerating violent recidivist felons for longer periods (whether under the two- or three-strikes provisions of this law) was not one of them" (2004, p. 21).

In 2005, the Legislative Analyst's Office, after presenting an analysis showing that the declines in overall and violent crime rates in the four counties in which the law was most often applied and the four in which it was least often applied were indistinguishable, concluded: "For now, it remains an open question as to how much safer California's citizens are as a result of Three Strikes" (p. 33).

b. California Impact Assessments. Many three-strikes laws are not, strictly speaking, mandatory minimum sentence laws. Under California's, for example, both prosecutors and judges can "strike" the prior convictions that trigger the law's mandatory minimum sentences; if

TABLE 3
California Three Strikes: Effects on Reduced Crime Rates

Authors	Method	Deterrent Effect
Schiraldi and Ambrosio (1997)	Yes/no three-strike state comparisons	None
Stolzenberg and D'Alessio (1997)	Time series: 10 largest California cities	None
Males and Macallair (1999)	California age group comparisons	None
Chen (2000, 2008)	California county comparisons	None
	Time series: 50 states	None
	Time series: California	Not significant
Austin et al. (2000)	California county comparisons	None
	Yes/no three-strike state comparisons	None
Caulkins (2001)	National econometric model	None
Marvell and Moody (2001)	Time series: 50 states	None: increased murder rates
Moody, Marvell, and Kaminski (2003)	Time series: 50 states	None: increased murder rates
Zimring et al. (2001)	California county comparisons	None
	California age group comparisons	None
Shepherd (2002)	California econometric model	Yes
Ehlers et al. (2004)	California county comparisons	None
	Yes/no three-strike state comparisons	None
Kovandzic et al. (2004)	Model: U.S. cities	None: increased murder rates
Justice Policy Institute (2004)	Yes/no three-strike state comparisons	None
Tonry (2004)	Time series: 10 most populous states	None
Legislative Analyst's Office, California (2005)	California county comparisons	None

they do so, the law and its penalties do not apply. I discuss the literature briefly. It is well known and with only rare exceptions reaches the same conclusion—that the law's passage and implementation had no demonstrable effects on crime rates (or, perversely, increased homicide rates).

Table 3 summarizes the findings of 15 empirical efforts to assess the crime-preventive effects of California's three-strikes law. They involve four principal research designs: econometric time-series designs (e.g., Chen 2000, 2008; Caulkins 2001; Marvell and Moody 2001; Shepherd 2002); noneconometric time-series comparisons of California crime-rate trends with those of other states (e.g., Schiraldi and Ambrosio

1997; Austin et al. 2000; Ehlers et al. 2004; Tonry 2004); time-series comparisons within California of crime-rate trends in counties in which three-strikes charges were filed often and seldom (e.g., Males and Macallair 1999; Zimring, Hawkins, and Kamin 2001; Ehlers et al. 2004; Legislative Analyst's Office 2005); and comparisons within California of crime-rate trends for people of different ages (e.g., Males and Macallair 1999; Zimring, Hawkins, and Kamin 2001).

Only two of the studies shown in table 3 conclude that the three-strikes law reduced California crime rates (Chen 2000; Shepherd 2002). Three studies (Marvell and Moody 2001; Kovandzic, Sloan, and Vieraitis 2002; Moody, Marvell, and Kaminski 2003) concluded that enactment of three-strikes laws produced *increases* in homicide rates. Chen's findings were weak, and her conclusions were hedged.²³ Joanna Shepherd (2002) produced the only assessment finding significant effects: "During the first two years after the legislation's enactment, approximately eight murders, 3,952 aggravated assaults, 10,672 robberies, and 384,488 burglaries were deterred in California by the two- and three-strikes legislation" (p. 174).

Shepherd's findings on this subject correspond to findings of herself and other economists on the deterrent effects of capital punishment (e.g., Dezhbakhsh, Rubin, and Shepherd 2003) and enactment of "shall issue" laws that authorize private citizens to carry concealed firearms in public (e.g., Lott and Mustard 1997; Lott [1998] 2000). In all three cases, the economic analyses reach conclusions about strong deterrent effects that are different from almost all studies by noneconomists. In the latter two cases, other economists have demonstrated why the findings are not credible (capital punishment: e.g., Donohue and Wolfers 2005; Donohue 2006; concealed weapons: Ayres and Donohue 2003*a*, 2003*b*). Problems recurrently identified are the reliance solely on official data analyzed at county or state levels, lack of awareness of case processing differences at local levels, and poorly specified models. It is common for other economists, when reanalyzing data in published works, to show that minor changes in assumptions in economic models produce enormous changes in results (often changing the sign; e.g., showing that the change appears to have increased rather than de-

²³ "The approach taken in California has not been dramatically more effective at controlling crime than other states' efforts. . . . [California's law] is not considerably more effective at crime reduction than alternative methods that are narrower in scope" (Chen 2008, pp. 362, 365). Doob and Webster (2003) have demonstrated fundamental problems with her analysis.

creased crimes rates). The fundamental problem, however, is that economists assume what other social scientists investigate—that increased penalties reduce crime rates. Shepherd, for example, observes that her “model predicts that offenses covered by two- and three-strikes legislation will be deterred” (2002, p. 173). That economists’ models are often devised to confirm their assumptions (“predictions”) may be why they so often do and why others can pick the models apart. In the case of California’s three-strikes law, however, Shepherd is an outlier; other economists’ analyses concur with the no-deterrent-effect conclusions of noneconomists (Marvell and Moody 2001; Kovandzic, Sloan, and Vieraitis 2002; Moody, Marvell, and Kaminski 2003).

No matter which body of evidence is consulted—the general literature on the deterrent effects of criminal sanctions, work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties—the conclusion is the same. There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime.

VI. Undoing the Harm

The policy and human rights implications of this two-century-old body of knowledge are clear. Mandatory penalties are a bad idea. They often result in injustice to individual offenders. They undermine the legitimacy of the courts and the prosecution system by fostering circumventions that are willful and subterranean. They undermine achievement of equality before the law when they cause comparably culpable offenders to be treated radically differently when one benefits from practitioners’ circumventions and another receives a mandated penalty that everyone immediately involved considers too severe. And the clear weight of the evidence is, and for nearly 40 years has been, that there is insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects.

Supporters of mandatory penalties in anxious times are concerned with political and symbolic goals. Put positively, elected officials want to reassure the public generally that their fears have been noted and that the causes of their fears have been acted on. Officials who support mandatory penalties often do not much care about problems of implementation, foreseeable patterns of circumvention, or the certainty of excessively and unjustly severe penalties for some offenders. Their in-

terests are different. Put negatively, officials want to curry public favor and electoral support by pandering, by making promises that the law can at best imperfectly and incompletely deliver.

The most famous and most far-reaching mandatory sentencing law, California's three-strikes law, resulted from politicians' competing attempts to use punishment policies to pursue purely political goals. It was enacted not because thoughtful policy makers really believed that people who stole pizza slices in schoolyards or handfuls of compact discs from Wal-Mart deserved decades-long prison sentences but because Republican Governor Pete Wilson and California Assembly Leader Willie Brown played a game of chicken from which, in the end, neither backed down. Democratic legislators agreed among themselves to pass any proposal Governor Wilson offered, in hopes "that he would back down from an unqualified 'get tough' stand or be politically neutralized if he persisted." Wilson did not blink. Nor did the Democrats. The law was passed as proposed because both sides were "unwilling to concede the ground on 'getting tough' to the other side in the political campaign to come." As a result California adopted the most far-reaching and rigid three-strikes law in the country (Zimring, Hawkins, and Kamin 2001, p. 6).

However their motives are portrayed, for many legislators, their primary purpose has been achieved when their vote is cast. They have been seen to be tough on crime. Calls for enactment of mandatory penalties, or introductions of bills, or castings of votes are symbolic statements. Instrumental arguments about effectiveness or normative arguments about injustice to offenders fall on deaf ears.

The dilemma is that the public officials who enact mandatory sentencing laws support them for symbolic and political reasons while the public officials who administer mandatory sentencing laws oppose them for instrumental and normative reasons. The instrumental arguments against mandatory penalties are clear. First, they increase public expense by increasing trial rates and case processing times. Second, in every published evaluation, judges and prosecutors were shown to have devised ways to circumvent application of the mandatory penalties.

The normative arguments against mandatory penalties are also straightforward. First, simple justice: because of their inflexibility, such laws sometimes result in imposition of penalties in individual cases that everyone involved believes to be unjustly severe. Second, perhaps more

importantly, mandatory penalties encourage hypocrisy on the part of prosecutors and judges.

The hypocrisies that mandatory penalties engender are what most troubles prosecutors and judges. Plea bargaining may be a necessary evil, an essential lubricant without which the machinery of justice would break down, but it is typically routinized. Armed robbery is pled down to robbery, aggravated assault to assault, theft 1 to theft 2. Prosecutors, defense counsel, judges, probation officers—all who are involved—know what is happening, understand why, and acknowledge the legitimacy of the reasons.

Legislators, whatever their purposes for supporting mandatory sentencing laws, once the vote is cast, move on to other issues. For judges, prosecutors, and defense counsel, it is another story. They must live with their own consciences and with their shared views of the bounds of fair treatment of offenders. They must also keep the courts functioning. That they sometimes devise ways to avoid application of laws they believe to be undeservedly harsh should come as no surprise.

Ironically, most mandatory penalty provisions enacted during the 1980s and 1990s concerned drug crimes, behaviors that both practitioners and researchers believe to be uniquely insensitive to the deterrent effects of sanctions. Despite risks of arrest, imprisonment, injury, and death, drug trafficking offers economic and other rewards to disadvantaged people that appear to far outweigh any available in the legitimate economy. Market niches created by the arrest of dealers are as a result often filled within hours, as many studies of drug marketing by ethnographers have shown, (e.g., Johnson et al. 1990; Padilla 1992; Fagan 1993). As a result, according to Alfred Blumstein, there is no evidence that harsh drug law enforcement policies have been at all successful: “Of course, that result is not at all surprising. Anyone who is removed from the street is likely to be replaced by someone drawn from the inevitable queue of replacement dealers ready to join the industry. It may take some time for recruitment and training but experience shows that replacement is easy and rapid” (1994, p. 400).

Both police officials and conservative scholars agree. James Q. Wilson (1990, p. 534) has observed that “significant reductions in drug abuse will come only from reducing demand for those drugs . . . the marginal product of further investment in supply reduction [law enforcement] is likely to be small.” He reports: “I know of no serious law-enforcement official who disagrees with this conclusion. Typically,

police officials tell interviewers that they are fighting a losing war or, at best, a holding action” (p. 534). Similarly, U.S. Senator Daniel Patrick Moynihan of New York, a sometime supporter of the drug wars, has acknowledged: “Drug busts are probably necessary symbolic acts, but nothing more” (1997, p. 208).

In a sensible world of rational policy making, no mandatory penalty laws would be enacted. Those that exist would be repealed. That would be the simplest way to address the problems revealed by the literature and canvassed in this essay. That is not the world we live in. There are other ways the problems could be addressed or at least diminished.

A. Make Mandatory Penalties Presumptive

Much of what legislators hope to accomplish with mandatory sentencing laws could be achieved by making such laws presumptive. In a few states—Minnesota is an example—judges are given authority to disregard most mandatory penalties and impose some other sentence if reasons are given. Prosecutors who wish to can appeal the adequacy of the reasons given. Converting all mandatory penalties to presumptive penalties would sacrifice few of the values sought to be achieved by such laws but would avoid many of the undesirable side effects.

Prosecutors and judges both have powerful voices in sentencing. Disregard of the presumption would usually require that both agree that the penalty would be too severe in a particular case or that the political climate has altered and public sensibilities no longer demand especially harsh penalties. The final word, however, should be the judge’s. Prosecutors too often are motivated by the notoriety of a case, their personal ideology, or their political self-interest to insist on severity when a more detached view would suggest otherwise.

By enacting a mandatory (presumptive) penalty law, the legislature would be expressing its policy judgment that, say, people who commit robberies with firearms deserve at least a 3-year minimum prison term. Most prosecutors and judges would accept that such policy decisions are the legislature’s to make and that that one is not patently unreasonable. The law’s facial legitimacy would cause many prosecutors and judges to deal with it in good faith. The law’s presumptive character, however, would let judges take account of mitigating circumstances (the defendant was an underage, bullied, unarmed participant who remained in the car) without resort to subterfuge.

If official circumvention of mandatory penalties in cases where they

seem unduly harsh is foreseeable, and it is, conversion to mandatory (presumptive) penalties is likely to result in no less systematic enforcement but to lessen hypocritical efforts at avoidance.

B. Enact "Sunset" Clauses

Our understandings of the politics and empirical experience of mandatory penalties could be married by including sunset clauses in all future mandatory penalty laws and adding them to existing ones. Sunset clauses provide for automatic repeal of a statute at a fixed time unless a new vote is taken to extend its life. This proposal, first made, to my knowledge, by Alfred Blumstein of Carnegie Mellon University at a "presidential crime summit" in 1991, would both acknowledge felt political imperatives and limit the damage mandatory penalties do.

Any honest politician will concede two points—that it is often difficult to resist political pressures to vote for tough penalties and that it is always difficult to vote to make penalties more "lenient." Blumstein's proposal addresses both propositions. If a charged political climate or campaign or a series of notorious crimes makes it difficult to resist "tough-on-crime" proposals, such laws will continue to be enacted. Statute books are cluttered with provisions passed on the passions of moments. Often, however, passions subside with time, and competing values and calmer consideration make the wisdom of such laws less clear.

Sunset clauses would assure that laws passed in the passion of a moment do not endure for decades, long after many people think them good policies—as the Rockefeller Drug Laws and the federal crack/powder 100-to-1 laws have done for more than 35 and 20 years, respectively. Few people support either of those laws on the merits. Proposals to repeal them have been being made for decades, but risk-averse elected officials have been unwilling to vote for repeal. With sunset clauses in place, legislators unwilling to take responsibility for voting for repeal of a punitive law may feel able more comfortably acceding to its lapse.

C. Narrow Mandatory Penalties' Scope

If the bases for passing sentencing laws were concerns for justice and institutional effectiveness, most mandatory penalties would be repealed and few others would be enacted to take their places. That is unlikely. Horrible, senseless crimes do occur, public fears and anxieties are heightened, and elected officials want to respond. There being in practice little that officials can do about crime, the attractions of mandatory

penalties as a rhetorical demonstration of concern are great. A *New York Times* article about mandatory proposals offered by U.S. Senator Alfonse D'Amato of New York, for example, reports: "Mr. D'Amato conceded that his two successful amendments, which Justice Department officials say would have little practical effect on prosecution of crimes, might not solve the problem. 'But,' he said, 'it does bring about a sense that we are serious'" (Ifill 1991, p. A6).

The most extreme versions of nullification and circumvention involve laws that mandate severe penalties for minor crimes. In eighteenth-century England, juries often refused to convict of capital offenses those who were charged with property crimes. In Michigan in the fifties, judges refused to impose mandatory minimum 20-year sentences for drug sales. Modern federal prosecutors and judges often work to avoid imposition of lengthy minimum sentences on minor offenders.

One way, therefore, to bring the symbolic goals of legislators and the instrumental and normative concerns of criminal justice practitioners into better balance would be to confine the scope of mandatory penalties to patently serious crimes such as homicide and aggravated rape and to maintain an empirically realistic balance between the gravity of crimes and the severity of punishments.

D. Authorize Correctional Reconsideration of Lengthy Sentences

Little public harm would accrue, and considerable private benefit obtain, if correctional or parole authorities were authorized periodically to reconsider lengthy sentences (say 5 or 10 years) and to release prisoners. Increasing numbers of prisoners are now being held under 10-, 20-, and 30-year mandatory minimum terms or under sentences of life without the possibility of parole. In many states, the steady accumulation of such prisoners promises sizable long-term increases in prison populations and budgets. Many such long-term prisoners continue to be held long after they present any threat to anyone and long after any clamor for their continuing incarceration has subsided. Under the laws of most states, such prisoners can be released only by pardon or commutation. In our era, these powers are seldom exercised. Giving correctional authorities power to reconsider the need or desirability of long sentences would allow eventual release of people receiving unusually long sentences without requiring extraordinary political decisions such as gubernatorial pardons or commutations.

The argument for administrative reconsideration of lengthy man-

andatory sentences parallels the argument for sunset clauses in mandatory penalty statutes—some decisions present such difficult political problems for elected officials that it is better to eliminate the need to make them. Almost despite the desirability of repealing a mandatory penalty or releasing old and harmless people from prison, feelings of political vulnerability prevent decisions that on their merits ought to be made. Permitting corrections or parole officials to decide when a prisoner under lengthy sentence has served long enough would remove those decisions from the public eye.

Mandatory penalties is not a subject on which research has counted for much in the United States for the past 30 years. Policy debates neither waited for nor paid much attention to research results. We now know what we are ever likely to know, and what our predecessors knew, about mandatory penalties. They do little good and much harm. If New York does repeal its Rockefeller Drug Laws and if that proves a harbinger of change generally, the time may be coming when policy and knowledge will point in the same direction. There will be little need for mandatory penalties, and academics will have no need to propose “reforms” premised on the inability of elected officials to make sensible decisions. If that does not happen, proposals such as those offered here provide mechanisms for reconciling the perceived symbolic and rhetorical needs of elected officials with the legal system’s needs for integrity in process and justice in punishment.

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