Mandatory Penalties

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ABSTRACT

To many public officials, promotion and enactment of mandatory penalty laws are important symbols of their concern for public safety and citizens' fear of crime. In practice, mandatory minimum-penalty laws accomplish few of their stated objectives and produce unwanted consequences. Their deterrent effects range from nonexistent to short-lived. When they call for short mandatory prison terms for serious crimes, they are often irrelevant because longer sentences are generally imposed. When they mandate longer terms (five, ten, twenty years), they are often circumvented by lawyers and judges. They reduce defendants' incentives to plead guilty, reduce guilty plea rates, and lengthen case processing time. They sometimes result in imposition of penalties more severe than anyone immediately involved believes appropriate. A number of devices exist, ranging from repeal to reconfiguration, for avoiding the unwanted effects of mandatory penalties. Whether such devices can adequately reconcile public officials' needs to take symbolic actions with court officials' needs to be both just and efficient remains to be seen.

Mandatory penalties do not work. The record is clear from research in the 1950s, the 1970s, the 1980s, and, thanks to the U.S. Sentencing Commission, the 1990s that mandatory penalty laws shift power from judges to prosecutors, meet with widespread circumvention, produce dislocations in case processing, and too often result in imposition of penalties that everyone involved believes to be unduly harsh. From research in the 1970s and 1980s, the weight of the evidence clearly
shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.\(^1\) Why, then, did legislatures in all fifty states enact mandatory penalty laws in the 1970s and 1980s, and why do legislatures continue to enact them?

The reason is that most elected officials who support such laws are only secondarily interested in their effects; officials' primary interests are rhetorical and symbolic. Calling and voting for mandatory penalties, as many state and federal officials repeatedly have done in recent years, is demonstration that officials are "tough on crime." If the laws "work," all the better, but that is hardly crucial. In a time of heightened public anxiety about crime and social unrest, being on the right side of the crime issue is much more important politically than making sound and sensible public policy choices.

This essay retells a story, at least three centuries old, of the political appeal and practical limits of mandatory sentencing laws. The retelling is occasioned by the publication of a U.S. Sentencing Commission report on mandatory penalties in the federal courts and by the possibility that prison crowding, budgetary crises, and a changing professional climate may make more public officials willing to be reminded of what we have long known about mandatory penalties. Officials in some states (there seems little hope at the federal level) may in coming years be more inclined than in the recent past to make policy choices based on knowledge of how mandatory penalties operate in practice. Surprisingly, few published works offer overviews of research on mandatory penalties. This essay is one effort to fill that void.

That mandatory penalties have more costs than benefits does not mean that rational social policies might not incorporate serious penalties for serious crimes. There are more effective, less costly ways than creation of mandatory penalties to achieve that end. In every era, some

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\(^1\) Because few studies attempt to examine the mandatory penalty laws' deterrent effects, and because the clear weight of the evidence on the deterrent effects of marginal manipulation of penalties demonstrates few or no effects (e.g., Blumstein, Cohen, and Nagin 1978), except in this note I do not explore that subject. Several studies of the Massachusetts firearms law concluded that it had a short-term deterrent effect on the use of firearms in violent crimes (e.g., Pierce and Bowers 1981). However, studies of mandatory sentencing laws for firearms offenses in Michigan (Loftin, Heumann, and McDowall 1983) and Florida (Loftin and McDowall 1984) concluded that no discernible effect on the level of crime could be attributed to the mandatory sentencing laws. The Rockefeller Drug Law evaluation also found no demonstrable impact of that law on drug use or crime in New York (Joint Committee on New York Drug Law Evaluation 1978). The proliferation of mandatory penalties for drug crimes in the 1980s did not demonstrably reduce drug trafficking or affect its most common measure, the street prices of illicit substances (Reuter and Kleiman 1986, table 5; Moore 1990, fig. 1).
kinds of crime are regarded as so serious that harsh penalties appear called for. Examples in our time include aggravated forms of stranger violence, nonfamilial sexual abuse of young children, and flagrant fraudulence in the financial markets. Assuming that legislators will want to provide for severe penalties for especially serious crime, there are ways to avoid or ameliorate the foreseeable dysfunctional effects of mandatory penalties. Here are four examples. First, in order to establish policies calling for severe penalties for serious crimes, while allowing sufficient flexibility to avoid foreseeable unintended consequences, penalties for especially serious crimes might be made presumptive rather than mandatory. Prosecutors and judges both have powerful voices in sentencing; disregard of the presumption would require that one or both decide either that the penalty would be too severe in a particular case or that the political climate has altered and public sensibilities no longer demand such harsh penalties. Second, as a matter of course, legislators might add "sunset provisions" to mandatory penalty laws. This would assure that laws passed in the passion of the moment will not endure for decades. Legislators can much more comfortably accede to the lapse of a punitive law than vote for its repeal. Third, mandatory (or presumptive) penalties might be limited to serious crimes like armed robbery, aggravated rape, and murder. The most widespread and cynical circumventions of mandatory penalty laws, and the most extreme injustices in individual cases, arise under laws requiring severe penalties for minor crimes like possession or trafficking of small amounts of controlled substances. Fourth, correctional officials might be authorized to reconsider release dates of all offenders receiving prison sentences exceeding a designated length (say three or five years). This would allow eventual release of people receiving unusually long sentences, life sentences without eligibility for parole, and sentences under "habitual offender" fixed-term laws, without requiring extraordinary political decisions like gubernatorial pardons or commutations.

This essay summarizes the available research on the implementation and operation of mandatory sentencing laws. Section I provides a brief summary of the state of knowledge concerning mandatory penalties before 1970. Section II examines the major empirical evaluations of mandatory penalties, beginning with the most ambitious, the U.S. Sentencing Commission's 1991 study of federal mandatories and the 1978 evaluation of New York's "Rockefeller Drug Laws." Section III tries to make sense of those findings and to outline their implications for elected officials who want simultaneously to respond to public anxi-
ety about serious crime and yet to enact laws that waste as few public resources, foster as few hypocrisies, and do as little injustice as possible.

I. Mandatory Penalties before 1970

The foreseeable problems in implementing mandatory penalties have been well known for 200 years. Most systematic empirical research postdates 1970. This section summarizes knowledge to that date. Perhaps the best way to summarize past knowledge concerning mandatory penalties is to quote from a U.S. House of Representatives report that explained why the Congress in 1970 repealed almost all federal mandatory penalties for drug offenses. “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” (House of Representatives 1970, quoted in U.S. Sentencing Commission 1991, pp. 6–7). Our knowledge in the 1990s concerning mandatory penalties is little different. More to the point, knowledge in the 1790s was much the same.

The least subtle way to avoid imposition of harsh penalties is to nullify them by refusing to convict offenders subject to them. “Nullification,” a term in common usage for more than two centuries, encapsulates the process by which judges and juries, but particularly juries, willfully refuse to enforce laws or apply penalties that seem to them unjust. Oliver Wendell Holmes, Jr., described the jury’s capacity to nullify harsh laws as its central virtue (Holmes 1889). 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 research on juries, 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 twenty-five years, Michael and Wechsler's *Criminal Law and Its Administration* (1940), dedicated lengthy consideration to nullification. Although the term is no longer in vogue, a sum-
ary of the evidence concerning nullification and similar processes may be useful.

A. The Death Penalty in Eighteenth-Century England

The death penalty in eighteenth- and nineteenth-century England was the subject of policy debates strikingly like late twentieth-century 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). 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 contemporary prison reformer, by contrast, repeatedly called for repeal of capital punishment provisions because the laws were applied erratically and unfairly and because the erratic application inevitably undermined the laws’ deterrent effects (Romilly 1820). During the reigns of the four British King Georges, 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 carried out not only failed to increase commensurately with the passage of new laws but declined. Executions were four times more common in the early 1600s than in the mid-1700s (Hay 1975, p. 22). According to Sir Leon Radzinowicz, executions in the late eighteenth century varied between a low of twenty-one per year during the 1780s and a high of fifty-three in the 1790s (Radzinowicz 1948–68, 1:141, 147).

Douglas Hay (1975), in a famous essay, “Property, Authority, and the Criminal Law,” tries to explain the contrast between continuous extension of the reach of the death penalty and steady decline in the incidence of its use. He argues that the explanation can be found in the efforts of propertied classes in the early years of the Industrial Revolution to protect their class interests through passage of laws that

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2 To like effect, the U.S. Sentencing Commission’s report on mandatory penalties argued that their inconsistent application is likely to undermine their deterrent effects (1991, p. ii, iii).
symbolically emphasized the importance of private property (by making numerous property crimes punishable by death) while operating a legal system that provided both exemplary punishments and, by frequent merciful exceptions and observing procedural rules, supported its own public legitimacy. In this period before creation of professional police departments and widespread use of prisons for punishment, the civil peace depended on general acceptance of the legitimacy of the existing social order.

More important for purposes of this essay, however, are the methods used in practice to avoid carrying out death sentences. First, and most important, juries often refused to convict offenders; an acquittal is a simple but effective way to avoid a mandatory penalty (Baldwin and McConville 1980, p. 272). A variant, which has twentieth-century echoes, was for the jury 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. 10d. 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 . . . the legislature raised the capital indictment to £5, the juries at the same time raised their verdicts £4 19s. [1930, para. 17]

Second, as more capital offenses were created, the courts adopted increasingly narrow interpretations of procedural, pleading, and evidentiary rules. Prosecutions seemingly well-founded as a factual matter would fall because a name or a date was incorrect or a defendant's occupation was wrongly described as "farmer" rather than "yeoman" (Radzinowicz 1948–68, vol. 1:25–28, 83–91, 97–103; Hay 1980, pp. 32–34).

Third, increasing numbers of offenders were accorded protection from death under the doctrine of "benefit of clergy." A doctrine that initially protected clergymen from execution following convictions at civil (as opposed to religious) courts, benefit of clergy was extended to literate laymen in the medieval period and to all accused in 1706. Its
effect was to exempt first offenders convicted of lesser felonies from execution (Baker 1977, p. 41).

Fourth, even among those who were not acquitted, convicted of lesser charges, discharged on procedural technicalities, or protected by benefit of clergy, the proportion sentenced to death declined steadily throughout the late eighteenth century.

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).

Briefly to summarize, experience with "mandatory" capital punishment in eighteenth-century England instructed all who would pay attention that mandatory penalties, especially for crimes other than homicide, elicited a variety of adaptive responses from those charged to enforce the law, including juries' refusals to convict "guilty" offenders and decisions to bring in convictions for less serious charges not subject to the penalty, development of technical procedural devices used by judges to discharge cases, and extensive use of pardons and other post-conviction devices to avoid carrying out executions.

B. American Mandatory Penalties in the 1950s

Our best source of information on criminal court processes in the 1950s, the various reports emanating from the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States, confirms the lessons from eighteenth-century England. Frank Remington, director of the eighteen-year project, in the foreword to the sentencing volume, 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" (Dawson 1969, p. xvii).

The American Bar Association survey was conceived as an empirical investigation and description of the administration of criminal justice
in the United States. “Pilot studies” were undertaken in several states in the mid-1950s. As the enormity of the project became apparent, the pilot studies became the survey and led to the publication of five volumes based on extensive reviews of files, interviews, and participant observation (including *Conviction* [Newman 1966], *Prosecution* [Miller 1969], and *Sentencing* [Dawson 1969]). Several volumes deal with charging, case processing, and sentencing aspects of mandatory penalties. The survey’s findings on mandatories are exemplified by three processes the reports describe. First, Newman describes 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. [1966, p. 179]

Second, on a related subject (avoidance of long statutory maximum sentences), Newman (1966, p. 182) describes efforts to avoid fifteen-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. As has been pointed out, armed 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."

Third, Dawson (1969, p. 201) describes “very strong” judicial resistance to a twenty-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.” These findings from the American Bar Foundation 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 been recognized for centuries.

II. Mandatory Penalties in the 1970s, 1980s, and 1990s
Despite earlier generations’ understanding of why mandatory penalties are unsound as a matter of policy, mandatory sentencing laws since 1975 have been America’s most popular sentencing innovation. By 1983, forty-nine of the fifty states had adopted mandatory sentencing laws for offenses other than murder or drunk driving (Shane-DuBow, Brown, and Olsen 1985, table 30). Most mandatories apply to murder or aggravated rape, drug offenses, felonies involving firearms, or felonies committed by persons who have previous felony convictions. Between 1985 and mid-1991, the U.S. Congress enacted at least twenty new mandatory penalty provisions; by 1991, more than sixty federal statutes defined more than one hundred crimes subject to mandatories (U.S. Sentencing Commission 1991, pp. 8–10). The experience in most states in the late 1980s was similar. In Florida, for example, seven new mandatory sentencing bills were enacted between 1988 and 1990 (Austin 1991, p. 4). In Arizona, for another example, mandatory sentencing laws are so common that 57 percent of felony offenders in fiscal year 1990 were subject to mandatory sentencing enhancements (Knapp 1991, p. 10).

3 Legislation in the 1980s in many states established forty-eight-hour and other brief mandatory minimum terms for many drunk driving offenses (Jacobs 1988).
The political attractiveness of mandatory sentencing laws is not difficult to understand. During the 1980s many political figures of both parties campaigned on “tough on crime” platforms and few elected officials dared risk being seen as “soft.” A recent New York Times story captures the climate in its title: “Senate’s Rule for Its Anti-crime Bill: The Tougher the Provision, the Better” (Ifill 1991). Mandatories are often targeted on especially disturbing behaviors, such as large-scale drug sales, murder, or rape, or especially unattractive characters, such as repeat violent offenders or people who use guns in violent crimes.

In the case of firearms offenses, mandatory laws allow the state, like Janus, to frown on law-defying villains who use firearms for criminal purposes and to smile on law-abiding citizens who use firearms for legitimate purposes. In a nation in which most approaches to control of gun use are politically impracticable, mandatory sentencing laws are a mechanism for attempting to deter illegal gun use and encourage offenders to use less lethal weapons.

Although the uninitiated citizen might reasonably believe that, under a mandatory sentencing law, anyone who commits the target offense will receive the mandated sentence, the reality is more complicated. Sentencing policy is only as mandatory as police, prosecutors, and judges choose to make it. The people who operate the criminal justice system generally find mandatory sentencing laws too inflexible for their taste and take steps to avoid what they consider unduly harsh, and therefore unjust, sentences in individual cases. And, frequently, the mandatory sentencing law is simply ignored. For example, in Minnesota in 1981, of persons convicted of weapons offenses to which a mandatory minimum applied, only 76.5 percent actually received prison sentences (Knapp 1984, p. 28).

Research on mandatory sentencing laws during the 1970s and 1980s reveals a number of avoidance strategies. Boston police avoided application of a 1975 Massachusetts law calling for mandatory one-year sentences for persons convicted of carrying a gun by decreasing the number of arrests made for that offense and increasing (by 120 percent between 1974 and 1976) the number of weapons seizures without arrest (Carlson 1982). Prosecutors often avoid application of mandatory sen-

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4 One striking form of plea bargaining around mandatory penalties occurs in Arizona, where Knapp (1991, pp. 10–11) found that 3,739 (24 percent) of 15,720 felony convictions in 1990 were for the inchoate offenses of attempt and conspiracy. Inchoate offenses are not subject to mandatory penalties. Defendants charged with completed felonies subject to mandates are routinely allowed to bargain down to inchoate offenses.
tencing laws simply by filing charges for different, but roughly comparable, offenses that are not subject to mandatory sentences. Judges too can circumvent such laws. Detroit judges sidestepped a 1977 law requiring a two-year sentence for persons convicted of possession of a firearm in the commission of a felony by acquitting defendants of the gun charge (even though the evidence would support a conviction) or by decreasing the sentence they would otherwise impose by two years to offset the mandatory two-year term (Heumann and Loftin 1979).

There has been considerable recent research and, taken together, like the work of earlier generations, it supports the following generalizations:

1. lawyers and judges will take steps to avoid application of laws they consider unduly harsh;
2. dismissal rates typically increase at early stages of the criminal justice process after effectuation of a mandatory penalty as practitioners attempt to shield some defendants from the law’s reach;
3. defendants whose cases are not dismissed or diverted make more vigorous efforts to avoid conviction and to delay sentencing with the results that trial rates and case processing times increase;
4. defendants who are convicted of the target offense are often sentenced more severely than they would have been in the absence of the mandatory penalty provision; and
5. because declines in conviction rates for those arrested tend to offset increases in imprisonment rates for those convicted, the overall probability that defendants will be incarcerated remains about the same after enactment of a mandatory sentencing law.  

The empirical evidence concerning the operation of mandatory sentencing laws comes primarily from five major studies. One is the U.S. Sentencing Commission’s recent study of mandatory penalties in the U.S. federal courts (U.S. Sentencing Commission 1991). The second concerns the “Rockefeller Drug Laws,” which required mandatory prison sentences for persons convicted of a variety of drug felonies (Joint Committee on New York Drug Law Evaluation 1978). One concerns the operation of a 1977 Michigan law requiring imposition of a two-year mandatory prison sentence on persons convicted of possession of a gun during commission of a felony (Loftin and McDowall 1978). This finding recurs in research on mandatories in the 1970s. Whether it will be found in the 1990s is unknown. The U.S. Sentencing Commission study of mandatory penalties, like earlier research, revealed longer case processing times and lower guilty plea rates than for non-mandatory-penalty crimes but does not consider whether incarceration probabilities, given an arrest, have changed.
1981; Loftin, Heumann, and McDowall 1983). Two concern a Massa-
achusetts law requiring a one-year prison sentence for persons convicted
of carrying a firearm unlawfully (Beha 1977; Rossman et al. 1979).

A. U.S. Sentencing Commission Report

Were federal officials more interested in rational policy-making than
in political posturing, the U.S. Sentencing Commission report, "Man-
datory Minimum Penalties in the Federal Criminal Justice System,"
would result in withdrawal of all mandatory sentencing proposals and
repeal of those now in effect.

The commission's report demonstrates that mandatory minimum
sentencing laws unwarrantedly shift discretion from judges to prosecu-
tors, result in higher trial rates and lengthened case processing times,
arbitrarily fail to acknowledge salient differences between cases, and
often punish minor offenders much more harshly than anyone involved
believes is warranted. Interviews with judges, lawyers, and probation
officers at twelve sites showed that heavy majorities of judges, defense
counsel, and probation officers dislike mandatory penalties; prosecu-
tors are about evenly divided. Finally, and perhaps not surprisingly
given the other findings, the report shows that judges and lawyers not
uncommonly circumvent mandatories.

The commission's study was prompted by a congressional mandate.6
The congressional charge had eight parts, including an assessment of
the effects of mandatories on sentencing disparities, a description of the
interaction between mandatories and plea bargaining, and "a detailed
empirical research study of the effect of mandatory minimum penalties
in the Federal system."

The commission's research design effectively combined methods and
data sources for investigating charging, bargaining, and sentencing pat-
terns. The combination of quantitative analyses of 1984–90 sentencing
patterns, a detailed quantitative analysis of case processing in 1990,
and various interviews and surveys aimed at capturing officials' opin-
ions provide complementary sources of information. In presenting and
discussing findings, the report carefully notes the limits of the claims
it can make and describes alternative interpretations of findings.

The commission analyzed three data sets describing federal sentenc-
ing and two sources of data concerning the opinions of judges, assistant
U.S. attorneys, and others. The three sentencing data sets were

FPSSIS,\textsuperscript{7} sentencing commission monitoring data for fiscal year 1990, and a 12.5 percent random sample from the sentencing commission's file of defendants sentenced in fiscal year 1990.\textsuperscript{8} Data for the random sample were augmented by examining computerized and paper case files to identify cases (there proved to be 1,165 defendants) that met statutory criteria for receipt of a mandatory minimum drug or weapon sentence.

The two sources of data on practitioners' opinions were structured interviews in twelve sites of 234 practitioners (forty-eight judges, seventy-two assistant U.S. attorneys, forty-eight defense attorneys, sixty-six 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. Results of the Sentencing Analyses. The sentencing data revealed a number of patterns that the commission found disturbing. First, there were clear indications that prosecutors often do not file charges that carry mandatory minimums when the evidence would have supported such charges. For one example, prosecutors failed to file charges for mandatory weapons enhancements against 45 percent of drug defendants for whom they would have been appropriate. For another, prosecutors failed to seek mandatory sentencing enhancements for prior felony convictions in 63 percent of cases in which they could have been sought. For a third, defendants were charged with the offense carrying the highest applicable mandatory minimum in only 74 percent of cases.

Second, there were clear indications that prosecutors used mandatory provisions tactically to induce guilty pleas. For one example, among defendants who were fully charged with applicable mandatory sentence charges and who were convicted at trial, 96 percent received the full mandatory minimum sentence; by contrast, 27 percent of those who pled guilty pled to charges bearing no mandatory minimum or a lower one. For another example, of all defendants who pled guilty (whether or not initially charged with all the applicable mandatory-bearing charges), 32 percent had no mandatory minimum at conviction.

\textsuperscript{7} FPSSIS, pronounced "Fipsiss," is an acronym for "Federal Probation Sentencing and Supervision Information System," the Administrative Office of the U.S. Courts' automated information system for federal sentencing.

\textsuperscript{8} The FPSSIS and monitoring data are insufficiently detailed to permit the fine-grained factual analyses of actual offense behavior that are required to determine whether facts alleged in specific cases might warrant filing of mandatory-bearing charges. As a result, those data sources are used to provide more general portraits of sentencing patterns over time and in 1990.
and 53 percent were sentenced below the minimum that the evidence would have justified. For a third example, among those defendants against whom mandatory weapons enhancements were filed, the weapons charges were later dismissed in 26 percent of cases.

Third, mandatories increased trial rates and presumably also increased workloads 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, there were indications that judges (often presumably with the assent of prosecutors) imposed sentences less severe than applicable mandatory provisions would appear to require. Before examples are given, it bears mention that the sentencing commission’s “modified real offense” policies direct judges, especially in drug cases, to sentence on the basis of actual offense behavior and not simply the offense of conviction.

Here are a couple of the commission’s findings that suggest judicial willingness to work around, and under, the mandatories. Forty percent of all defendants whose cases the commission believed warranted specific mandatory minimums received shorter sentences than the applicable statutes would have specified. Another example: mandatory minimum defendants received downward departures 22 percent of the time. The commission observes 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” (U.S. Sentencing Commission 1991, p. 58).

Taken together, these findings suggested to the commission that mandatory minimums are not working. They were shifting too much discretion to the prosecutor. They were provoking judges and prosecutors willfully to circumvent their application (U.S. Sentencing Commission 1991, pp. ii, 76). They were producing high trial rates and unacceptable sentencing disparities.

2. Results of the Opinion Surveys. No category of federal court practitioners, including prosecutors, much likes mandatory minimum sentencing laws (U.S. Sentencing Commission 1991, chap. 6). In one-hour structured interviews, thirty-eight of forty-eight federal district court judges offered unfavorable comments. The most common were that the mandatory sentences are too harsh and that they eliminate judicial
discretion. Among forty-eight defense counsel, only one had anything positive to say about guidelines, and he also had negative comments. The most common complaints were that the mandatories are too harsh, that they result in too many trials, and that they eliminate judicial discretion. Probation officers were also overwhelmingly hostile to the mandatories; their most common complaints were that the mandatories are too harsh, result in prison overcrowding, and eliminate judicial discretion. Only among prosecutors was sentiment more favorable to mandatories, and even then thirty-four of sixty-one interviewed who expressed a view were wholly (twenty-three) or partly (eleven) negative.

Consistent with the interview data, the mail survey showed that 62 percent of judges, 52 percent of private counsel, and 89 percent of federal defenders want mandatories for drug crimes eliminated, compared to only 10 percent of prosecutors and 22 percent of probation officers.

B. The Rockefeller Drug Laws in New York

Perhaps the most exhaustive examination of mandatory sentencing laws before the commission's work was an evaluation of the later repealed Rockefeller Drug Laws in New York. The “Rockefeller Drug Laws” took effect in New York on September 1, 1973. They prescribed severe mandatory prison sentences for narcotics offenses and included selective statutory limits on plea bargaining. A major evaluation (Joint Committee on New York Drug Law Evaluation 1978) focused primarily on the effects of the drug laws on drug use and drug related crime and only to a lesser extent on case processing. The study was based primarily on analyses of official record data routinely collected by public agencies. The key findings were these:

1. drug felony arrests, indictment rates, and conviction rates all declined after the law took effect;
2. for those who were convicted, however, the likelihood of being imprisoned and the average length of prison term increased;
3. the two preceding patterns cancelled each other out and the likelihood that a person arrested for a drug felony would be imprisoned was the same—11 percent—after the law took effect as before;
4. because defendants struggled to avoid the mandatory sentences, the proportion of drug felony dispositions resulting from trials tripled between 1973 and 1976 and the average time required for processing of a single case doubled.

Table 1 shows case processing patterns for drug felony cases in New
TABLE 1
Drug Felony Processing in New York State

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<td>5,969</td>
<td>5,791</td>
<td>4,283</td>
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<td>Percent of arrests</td>
<td>39.1</td>
<td>38.3</td>
<td>32.8</td>
<td>26.9</td>
<td>25.4</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>6,033</td>
<td>4,739</td>
<td>3,085</td>
<td>3,147</td>
<td>1,724</td>
</tr>
<tr>
<td>Percent of disposi-</td>
<td>87.3</td>
<td>84.9</td>
<td>78.3</td>
<td>78.3</td>
<td>79.3</td>
</tr>
<tr>
<td>Prison and jail sentences:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>2,039</td>
<td>1,555</td>
<td>1,074</td>
<td>1,369</td>
<td>945</td>
</tr>
<tr>
<td>Percent of convictions</td>
<td>33.8</td>
<td>32.8</td>
<td>34.8</td>
<td>43.5</td>
<td>54.8</td>
</tr>
<tr>
<td>Percent of arrests</td>
<td>10.6</td>
<td>10.0</td>
<td>6.1</td>
<td>8.6</td>
<td>11.6</td>
</tr>
</tbody>
</table>

Source.—Joint Committee (1978), tables 19, 24, 27, 29.
* The drug law went into effect September 1, 1973.

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. Of those defendants, however, who were not winnowed out earlier, the likelihood that a person convicted of a drug felony would be incarcerated increased from 33.8 percent in 1972 to 54.8 percent in 1976.

The interpretation conventionally put on the preceding findings is that defense lawyers, prosecutors, and judges made vigorous efforts to avoid application of the mandatory sentences in cases in which they viewed those sentences as being too harsh and that the remaining cases were dealt with harshly as the law dictated (Blumstein et al. 1983, pp. 188–89). Thus, the percentage of drug felonies in New York City disposed of after a trial rose from 6 percent in 1972 to 17 percent in the first six months of 1976 (Joint Committee on New York Drug Law Evaluation 1978, p. 104). In other words, many fewer defendants pled guilty, and the trial rate tripled. No doubt as a consequence of the increased trial rates, it “took between ten and fifteen 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 four months of 1973 to 351 days in the first six months of 1976. Backlogs rose commensurately notwithstanding the creation of thirty-one additional criminal courts in New York City for handling of drug prosecutions (Joint Committee on New York Drug Law Evaluation 1978, tables 33-35 and p. 105).

Sentencing severity increased substantially for defendants who were eventually convicted. Only 3 percent of sentenced drug felons received minimum sentences of more than three years between 1972 and 1974 under the old law. Under the new law, the percentage of convicted drug felons receiving sentences of three years or longer increased to 22 percent. The likelihood that a person convicted of a drug felony would receive an incarcerative sentence increased in New York State from 33.8 percent in 1972, before the new law took effect, to 54.8 percent in the first six months of 1976 (Joint Committee on New York Drug Law Evaluation 1978, pp. 99-103).

The broad pattern of findings in the New York study, while more stark in New York than in other mandatory sentencing jurisdictions that have been evaluated, recurs throughout the impact evaluations. The combination of the Rockefeller Drug Laws' effects was more than the system could absorb, and many key features were repealed in mid-1976.

C. Massachusetts's Bartley-Fox Amendment

Massachusetts's Bartley-Fox Amendment required imposition of a one-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; the Massachusetts law thus was different from many mandatory sentencing firearms laws that require imposition of a minimum prison sentence for the use or possession of a firearm in the commission of a felony.

Two major evaluations of the Massachusetts gun law 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 either his conviction or his sentence, he may appeal to the Suffolk County Superior Court where he is entitled to a trial de novo.

The Beha (1977) analysis is based primarily on comparisons of police
and court records for the periods six months before and six months after the effective date of the mandatory sentencing law. The Rossman et al. (1979) study dealt with official records from 1974, 1975, and 1976 supplemented by interviews with police, lawyers, and court personnel. The primary findings:

1. police altered their behavior in a variety of 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, and by 1976 that rate had increased to 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).

Thus the broad patterns of findings for the U.S. Sentencing Commission and Rockefeller Drug Law evaluations carries over to Massachusetts—more early dismissals, more protracted proceedings, increased sentencing severity for those finally convicted.

D. 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 two-year mandatory prison sentence that could not be suspended or shortened by release on parole and that must 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.

There has been one major evaluation of the Michigan law that gave rise to a number of related publications (Heumann and Loftin 1979; Loftin and McDowall 1981; Loftin, Heumann, and McDowall 1983). Several other articles concerning the Michigan gun law have been published, and one of these (Bynum 1982) also discusses empirical data.

The Bynum study (1982) demonstrates how prosecutors control the use of mandatory sentencing laws. Drawing on a sample of cases from a statewide data set collected during the course of a sentencing guidelines project, Bynum identified 426 cases that, from records, involved robberies with firearms that were committed after January 1, 1977, and were therefore eligible for prosecution under the felony firearms statute. In only 65 percent of the eligible cases was the firearms charge filed. More indicative, however, of prosecutorial manipulation of mandatory sentencing laws was the finding that in some courts firearms charges were filed in 100 percent of the eligible cases and in other courts firearms charges were filed in none of the eligible cases (Bynum 1982, table 4.1).

Heumann and Loftin observed a strong tendency in Wayne County toward early dismissal of charges other than on the merits, which they interpret as evidence of efforts to avoid applying the mandatory penalties. Their inquiry focused on three offenses that were relatively common—felonious assault, "other assault," and armed robbery. Armed robbery means in Wayne County what it means most places. "Felonious assaults" tend to arise from "disputes among acquaintances or relatives and are, by conventional standards, less predatory than armed robbery." "Other assaults" is an intermediate category of "assault with intent to ..." offenses. These three categories offered a severity continuum. Most armed robberies would generally be perceived as serious crimes. Many felonious assaults would commonly be regarded as impulsive and expressive and less serious then armed robbery. Other assaults are more heterogeneous.

Felonious assault disposition patterns did not change after the mandatory penalty provision took effect. There was some increase in early

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9 Heumann and Loftin in their examination of case records to determine the existence and extent of undercharging found that the gun law charge had been made in 96 percent of the eligible cases in Wayne County (1979, p. 407).
dismissal of armed robbery charges and a substantial increase in the rate of early dismissals of "other assault" charges. These findings are consistent with the hypothesis that efforts will be made to avoid application of harsh sentencing laws to defendants for whom lawyers and judges feel that they are inappropriately severe: "other assault" was the offense category in which the greatest ambiguities about culpability were likely to exist.

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

Loftin and his colleagues assessed the impacts of the Felony Firearm Statute on sentencing severity in two ways. Using quantitative methods, they concluded that the statute did not generally increase the probability that prison sentences would be imposed but that, for those receiving prison sentences, it did increase the expected lengths of sentences for some offenses (Loftin, Heumann, and McDowall 1983, pp. 297-98). Using simpler tabular analyses in an earlier article, they concluded that, overall, the percentage of defendants vulnerable to the firearms law who were incarcerated did not change markedly in Wayne County after implementation of the new law (Heumann and Loftin 1979). As table 2 indicates, the probability of receiving 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 but did change for "other assault" and increased 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 all cases to 50 percent.

Finally, trial rates remained roughly comparable before and after implementation except for the least serious category of offenses, "felonious assaults," for which the percentage of cases resolved at trial increased from 16 percent of cases to 41 percent of cases (Heumann and Loftin 1979, table 4). This is explained by Heumann and Loftin in terms of an innovative adaptive response, the "waiver trial." Either by agreement or by expectation, the judge would convict the defendant
### TABLE 2
Disposition of Original Charges in Wayne County, Michigan, by Offense Type and Time Period

<table>
<thead>
<tr>
<th>Offense Type</th>
<th>Dismissed at/before Pretrial (Percent)</th>
<th>Dismissed or Acquitted after Pretrial (Percent)</th>
<th>Convicted/No Prison (Percent)</th>
<th>Some Prison (Percent)</th>
<th>Total (Percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonious assault:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before*</td>
<td>145</td>
<td>24</td>
<td>31</td>
<td>14</td>
<td>100</td>
</tr>
<tr>
<td>After†</td>
<td>39</td>
<td>26</td>
<td>26</td>
<td>31</td>
<td>101</td>
</tr>
<tr>
<td><strong>Other assault:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before</td>
<td>240</td>
<td>12</td>
<td>24</td>
<td>28</td>
<td>37</td>
</tr>
<tr>
<td>After</td>
<td>53</td>
<td>26</td>
<td>24</td>
<td>9</td>
<td>41</td>
</tr>
<tr>
<td><strong>Armed robbery:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before</td>
<td>471</td>
<td>13</td>
<td>19</td>
<td>4</td>
<td>64</td>
</tr>
<tr>
<td>After</td>
<td>136</td>
<td>22</td>
<td>17</td>
<td>2</td>
<td>60</td>
</tr>
</tbody>
</table>

**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 and case disposed between January 1, 1977, and June 30, 1977.

of a misdemeanor rather than the charged felony (which made the firearm law inapplicable because it specified a two-year add-on following conviction of a felony) or would simply, with the prosecutor’s acquiescence, acquit the defendant on the firearms charge. Either approach eliminated the mandatory sentence threat and both are consistent with processes described in the American Bar Foundation Survey twenty years earlier to avoid imposition of twenty-year minimum sentences for drug sales (Dawson 1969, p. 201). A third mechanism for nullifying the mandatory sentencing law in cases in which imprisonment would be ordered in any case was to decrease the sentence that otherwise would have been imposed in respect of the underlying felony by two years and then add the two years back on the basis of the firearms law (Heumann and Loftin 1979, pp. 416–24).

### E. Observations on New York, Massachusetts, and Michigan Studies

For a variety of reasons, the Massachusetts, Michigan, and New York laws ought to be especially good illustrations of the operation of mandatory sentencing laws. Many such laws are on the books but exist simply as part of a larger statutory backdrop before which the drama
of crime and punishment takes place.\textsuperscript{10} In these three instances, however, for differing reasons, vigorous and highly publicized efforts were made to make the mandatory sentencing laws stick. In New York, amidst enormous publicity and massive media attention, the legislature established thirty-one new courts, including creation of additional judges, construction of new courtrooms, and provision of supporting personnel and resources, and expressly forbade some kinds of plea bargaining in an effort to assure that 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. (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.) In Michigan, while the statute did not address plea bargaining, the Wayne County prosecutor established and enforced a ban on plea bargaining in cases coming within the operation of the mandatory sentencing law. He also launched a major publicity campaign, promising on billboards and bumper stickers that "One with a Gun Gets You Two."

Thus, in all three states, the new laws were accompanied by evidence of seriousness of purpose. If mandatory sentencing laws are to operate as their supporters hope they will, the experience in these three states should provide a good test of the realism of those hopes.

Those hopes are unrealistic. Findings from all three states suggest that mandatory sentencing laws are not an especially effective way to achieve certainty and predictability in sentencing. To the extent that they prescribe sanctions more severe than lawyers and judges believe appropriate, they can be, and are, circumvented. For serious criminal charges, the mandatory sentencing laws are often redundant in that offenders are, in any case, likely to receive prison sentences longer than those mandated by statute. For less serious cases, mandatory sentencing laws tend to be arbitrary; they result in either increased rates of dismissal or diversion of some defendants to avoid application of the statute or occasionally result in sentencing of "marginal" offenders in ways that most parties involved consider unduly harsh.

\textsuperscript{10} For example, the U.S. Sentencing Commission (1991, p. 10) concluded that four of the approximately one hundred federal mandatory penalty provisions then in effect accounted for 94 percent of mandatory penalties imposed.
III. Mandatory Penalties as Instruments and Symbols

George Santayana's admonition that "those who do not remember the past are condemned to relive it" does not capture the policy dilemma posed by mandatory penalties. Officials who support such laws 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 interests are different, as recent policy debates demonstrate. According to a recent New York Times article about mandatory proposals offered by New York Senator Alfonse D'Amato: "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).

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. 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.

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, whether by Sir Samuel Romilly in eighteenth-century England or by Senator Edward Kennedy in our own place and time, fall on deaf ears.11

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 argument against mandatory penalties is clear. First, they increase public expense by increasing trial rates and case processing times. The U.S. Sentencing Commission study found that

11 Nearly every major modern American organization that has considered the merits of mandatory penalties has opposed them, including the American Bar Association (1968, standard 2.3, pp. 63–66), the American Law Institute (1962), and, most recently, the Federal Courts Study Committee (1991).
trial rates were two and one half times greater (30 percent of dispositions) for offenses bearing mandatory penalties than for other offenses (12 percent of dispositions); disposition by trial tripled under the Rockefeller Drug Laws (17 percent of dispositions after taking effect vs. 6 percent before); in Michigan, dispositions by trial for felonious assaults involving firearms increased from 16 percent to 41 percent after mandatory penalties became applicable.

Second, in every published evaluation, judges and prosecutors were shown to have devised ways to circumvent application of the mandates. Sometimes prosecutors simply refused to file mandatory-bearing charges; sometimes plea bargaining was used; sometimes judges refused to convict; sometimes judges ignored the statute and imposed sentences inconsistent with it.

The normative arguments against mandatories 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 important, mandatory penalties encourage hypocrisy on the part of prosecutors and judges. To avoid injustices in individual cases, officials engage in the adaptive responses and circumventions described throughout this essay.

The hypocrisies that mandatory penalties engender are what most troubles prosecutors and judges with whom I speak. 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 involved—know what is happening, understand why, and acknowledge the legitimacy of the reasons.

Mandatory penalties elicit more devious forms of adaptation. When Michigan judges in the 1950s or the 1970s acquit factually guilty defendants, or when Arizona prosecutors in the 1980s permit people who have committed serious crimes to plead guilty to attempt or conspiracy, or when prosecutors and judges fashion new patterns of plea bargaining solely to sidestep mandatories, important values are being sacrificed. Many practitioners find these processes dishonest and tawdry.

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 uncommonly harsh should come as no surprise.

If the findings of empirical evaluations of mandatory sentencing laws were heeded, there would be no mandatory penalties. Given the American political climate of the early 1990s, wholesale repeals are unlikely. A more modest hope is that elected officials will become slightly more responsible about crime control policy and balance their felt need to make symbolic and rhetorical statements through passage of legislation with our well-established knowledge of how mandatories operate in practice. Four suggestions for how that might be done follow.

A. Making 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 mandatory penalties and impose some other sentence if reasons are 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.

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 three-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 presumably cause many prosecutors and judges to deal in good faith with it. 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. That the judge possessed authority to decide that special circumstances rebutted the presumption would signal that prosecutors also could legitimately take special circumstances into account in plea bargaining.

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 avoid hypocritical efforts at avoidance.
B. Mandatory Penalties and “Sunset” Clauses

Our understandings of the politics and empirical experience of mandatories 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 permit laws to lapse without the need for legislators to vote for repeal and thereby expose themselves to “soft-on-crime” attacks.

C. Narrowing Mandatories’ Scope

From this point my suggestions for reform of mandatory penalties became less politically realistic. If the bases for passing sentencing laws were concerns for justice and institutional effectiveness, most mandatories 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.

If a call for repeal of all mandatories is likely to pass unheard, conceivably a call for a narrowing of their scope might be credible. 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 that were property crimes. In Michigan in the fifties, judges refused to impose mandatory minimum twenty-year sentences for drug sales.
Similar instances of imbalance between the gravities of crimes and the severity of penalties occur in our time. In Alabama, for example, any sale of narcotics within three miles of a school provokes a mandatory minimum. While the goal of protecting children from drugs has obvious appeal, the three-mile radius encompasses all of the area of most cities and towns.

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 like homicide and aggravated rape and to maintain an empirically realistic balance between gravity of crimes and severity of punishments.

D. Reconsideration of Mandatory Penalties

Little public harm would accrue, and considerable private benefit obtain, if correctional or parole authorities were accorded routine discretion to release prisoners serving mandatory terms after some decent interval. Increasing numbers of prisoners are now being held under ten- or twenty-year mandatory minimum terms or under sentences of life without parole. In many states, the steady accumulation of such prisoners promises sizeable long-term increases in prison populations and budgets. More important, 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 present laws of most states, such prisoners can be released only by pardon or commutation. In our era, these powers are seldom exercised, in part because they make public officials vulnerable to “soft-on-crime” attacks.

The argument for administrative reconsideration of lengthy mandatory sentences parallels the argument for sunset clauses in mandatory penalty statutes—some decisions present such excruciating 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 from prison an old and harmless prisoner, political vulnerability prevents decisions that on their merits ought to be made. Permitting corrections or parole officials to decide when a prisoner under mandatory sentence has served long enough would remove those decisions from the public eye.
IV. Conclusion
Perhaps unusually for an essay that mostly reviews research, this one
does not end with a research agenda. The issues are primarily political
and prudential. Basic new insights concerning application of manda-
tory penalties are unlikely to emerge. Research designs can however
be devised that would provide narrower instruction about mandatories.
For example, the effects of my proposal for replacing mandatories now
in effect might be measured by substituting “mandatory/presumptive”
laws for a representative half (or other fraction) of existing mandatory
penalties. Thus there would be one-year, two-year, five-year, and ten-
year mandatory (presumptive) crimes and one-year, two-year, five-
year, and ten-year conventional mandatory-penalty crimes. By use of
quantitative time-series analyses of cases disposed before and after the
law change and through use of qualitative and quantitative methods to
examine case disposition before and afterward, we would learn both
how processing of cases changed after mandatories became presump-
tive and, by comparing case dispositions of mandatories and presumpt-
tives afterward, we could learn what differences in case processing the
change to presumptive sentences produces.
This is not a realm, however, where research counts for much.
Policy debates are likely neither to wait for nor much depend on re-
search results. We now know what we are likely to know, and what
our predecessors knew, about mandatory penalties. As instruments of
public policy, they do little good and much harm. If America does
sometime become a “kinder, gentler place,” 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 deci-
sions that take account of existing knowledge. As yet, however,
America is neither completely kind nor universally gentle, and propos-
als such as those offered here might provide mechanisms for reconciling
the symbolic and rhetorical needs of elected officials with the legal
system’s needs for integrity in process and justice in punishment.

REFERENCES
American Bar Association Project on Standards for Criminal Justice. 1968.


Mandatory Penalties


