

# The Mandatory Sentence: Recipe for Retribution

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ADMINISTRATION of justice in the United States is a far more complex matter today than it was in the early part of this century. The story is told in a small hamlet in the foothills of the Berkshires in western Massachusetts, of a man brought before the local justice of the peace—in the days of the first automobiles—charged with exceeding the 15-mile speed limit. He pleaded innocent. The judge placed his hand on his "law book" between the covers of which he had inserted a mail order catalogue to replace the original missing pages, and opening it at random looked up at the culprit: "The court finds you guilty as charged and fines you," his finger ran slowly down the page, "and fines you four dollars and forty-five cents." As the defendant moved to protest, the sheriff pulled him down and whispered: "Shut up you durn fool, you're lucky he was lookin' at pants and not pianos."

The rising volume of crime and the resulting concern for its victims has brought about a climate in which judicial discretion is being replaced by a reliance on statutory regulation of the sentencing process. A recent court case in Tewksbury, Massachusetts, dramatically poses the dilemma confronting our criminal justice system today.

On June 29, 1975, Bessie Stanton, a 70-year-old woman with a seventh grade education, was arrested in a department store. A security guard noticed that she had a .22 caliber pistol, along with some orange peelings and small change, in a bag she was carrying. She had violated the newly passed Fox-Bentley gun control law which mandated a 1-year minimum prison sentence for *anyone* possessing a firearm without a permit or identification card.

The woman reportedly told the police officer: "I didn't mean no harm. I didn't know about no rule or no law." Her brother later told the court, "She don't read no newspaper, watch no television or listen to no radio."

Mandatory sentencing laws, now sweeping our

State legislatures are predetermined, fixed penalties for all violators of particular laws, regardless of individual circumstances. The idea behind these laws is to "make the punishment fit the crime" and to stress the certainty of punishment.

A few months later Bessie Stanton was found innocent. Although she had clearly violated the Massachusetts gun control law and should have received the mandatory prison sentence, the judge ruled that she did not completely understand her constitutional rights when the arresting officer read them to her.

The Bessie Stantons are *not* proving to be the rare exceptions. Six months after the Massachusetts gun law went into effect, 324 violators were arrested, of whom only 78 were found guilty, and of these, only 28 (less than one-tenth) ended up in jail.

More recently in August of 1973, the then Governor of New York, Nelson Rockefeller, experimented with a form of mandatory sentences: the Second Felony Offender Law. This law required all persons convicted as peddlers of heroin, hashish, LSD, amphetamines and barbiturates to serve a minimum prison sentence.

A study of the effect of this law after the first 19 months concluded with the "strong indication that the measure has failed to deter criminals or reduce recidivism . . . ." Moreover, the study showed that inmate population at New York's prisons was up from 12,444 to 16,000. At the current rate of sentencing, these institutions are predicted to reach capacity in the next 2 years. Backlog in the courts has increased by almost 10 percent during the first year of the law, at the same time that the length of prison sentences increased from 31 percent of all felony convictions in 1972 to 40 percent in 1973. It is generally conceded that while some dealers in the streets are now behind bars, the importers and large-scale distributors of narcotics are still at large.

A Florida law passed in 1974 stipulated a 3-year minimum sentence—without parole—for any felony involving the use of a firearm. As a result, the prisons of that state now hold one-third more

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sentenced offenders than they did 2 years ago. Florida prisons are now so overcrowded that tent cities have had to be hastily erected to confine the new influx.

A 1975 survey by the *New York Times* reports Tennessee's penitentiary population up from its normal capacity of 1,600 to 2,100. In Virginia there are 2,000 state prisoners backlogged in city and county jails. Louisiana is considering using a surplus World War II Navy ship as a prison to relieve overcrowding. In North Carolina there are 12,700 inmates in the State Correctional Center for Women, which was designed to hold 10,000. In an Alabama prison, 4,000 inmates are jammed into a capacity designed to house half that number.

Advocates of mandatory sentences are, in essence, proclaiming that a prison sentence is the primary and best method for deterring crime. This reasoning is increasing in public acceptance. At the same time the 1974 *Survey of Inmates of State Correctional Facilities* conducted by the Census Bureau for LEAA found 38 percent of them fully unemployed or only part-time employed. Inmates with less than a high school education comprised 61 percent of the prison population compared with 39 percent in the total U.S. population.

Representative Louis Stokes (D., Ohio) recently announced that unemployment among minority youths has reached 40 percent in his state. While the unemployment rate in 1976 among white teenagers had increased by 17 percent, among black teenagers unemployment was more than double: 39 percent. "It is time for Congress to recognize that deleterious social and economic effects are relegating our unemployed black and white teenagers to city streets and crime." The disproportionate numbers of blacks and other nonwhites in the army of the unemployed is reflected in the finding of the 1974 survey that members of these minorities, who constitute 12.5 percent of the general population, take up 49 percent of state prison cells. The "even-handed justice" ascribed to mandatory sentencing laws operates to bear down hardest on the poor, the unemployed, the ethnic minorities of our cities, and the mentally retarded. An estimated two-thirds of all arrests by police occur in 2 percent of the country. Ramsey Clark, Attorney General under President Johnson, described the areas where these arrests occur: "... where infant mortality is four times higher

than in the city as a whole; where the death rate is 25 percent higher; where life expectancy is ten years shorter; where common communicable diseases with the potential of physical and mental damage are six and eight times more frequent; where alcoholism and drug addiction are prevalent to a degree far transcending that of the rest of the city; where education is poorest . . . where the average formal schooling is four to six years less than for the city as a whole."

Former Boston Police Commissioner, Robert DiGrazia, recently echoed Clark's observation. In an interview with the *Boston Globe* (August 22, 1976), DiGrazia stated, "We are not letting the public in on our era's dirty little secret: that those who commit the crime which worries citizens most—violent street crime—are, for the most part, the products of poverty, unemployment, broken homes, rotten education, drug addiction and alcoholism, and other social and economic ills about which the police can do little, if anything."

It is less than a decade ago that our government was telling us that "the root cause of much criminal conduct is unquestionably poverty, and all that this term connotes: hopelessness, disease, ignorance, and hostility toward established norms of behavior. To break the vicious cycle of criminal recidivism it is necessary to strike at this complex problem."

The reversal of this socially enlightened policy took place with the accession of Mr. Nixon to the presidency: "Americans in the last decade were often told that the criminal was not responsible for his crimes against society; but that society was responsible."

"I totally disagree with this permissive philosophy. Society is guilty of crime only when we fail to bring the criminal to justice. When we fail to make the criminal pay for his crime, we encourage him to think that crime will pay. The only way to attack crime in America is the way criminals attack people—without pity."

Fortunately for Mr. Nixon he was not to be the beneficiary of the policy he preached for less fortunate offenders. But his successor continued the Nixon hard line with the threat: "If juveniles are big enough to commit vicious crimes against society, they are big enough to be punished by society . . . . Detention may not help the juvenile but it will certainly help his potential victims."

The get-tough policy promulgated from on high during the past 8 years is being endorsed and

echoed by academics, many of them former advocates of the very opposite kind of policy.

Foremost among these is James Q. Wilson of Harvard, a government professor-turned-criminology expert. In his widely acclaimed book *Thinking About Crime*, Wilson blames the soaring crime rate on the Johnson Administration's wasteful, humanitarian programs aimed at attacking crime through abolishing poverty. Wilson believes criminals are "wicked," that they commit crime in accordance with Jeremy Bentham's pleasure-pain principle (although he does not credit Bentham), having subjected their criminal intent to a cost-benefit analysis of likely gain versus likely arrest and prison sentence, opting finally for the criminal act.

For such as these, as well as for those who will thereby be deterred from crime, Wilson prescribes swift, sure punishment. No advocate of rehabilitation in prison, Wilson views the correctional system "as having a very different function—namely, to isolate and to punish. It is a measure of our confusion," Wilson continues, "that such a statement will strike many enlightened readers today as cruel, even barbaric. It is not. It is merely a recognition that society . . . must be able to protect itself from dangerous offenders . . . it is also a frank admission that society really does not know how to do much else . . . If prisons cannot rehabilitate at least they can punish and isolate."

The trend draws support from a blue-ribbon Committee for the Study of Incarceration, studied with the names of professors whose recently published report, *Doing Justice* recommends that "The offender should be punished as severely as he deserves, in view of the degree of his offense."

This sure-fire punitive approach finds another strong advocate in Professor Robert Martinson of New York's City College who analyzed 231 experimental studies on the treatment of criminals within a 6-year period and came to the conclusion that, "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism." In other words, rehabilitation simply does not work.

Having demolished the myth of rehabilitation of prisoners as not grounded in results, Martinson has taken a flight of fancy which carries *ad absurdum* his punitive approach, and that of his followers. In an interview in February 1976 *People Magazine*, Martinson suggests that instead

of offenders being assigned a probation or parole officer to work with them before or after a prison term, "one field agent be assigned to each offender for a fixed period. I call it the cop-a-con approach." Instead of probation for a convicted offender, "The court puts him immediately under surveillance, and off he shuffles, followed closely by his shadow."<sup>1</sup>

For the man leaving prison, "Upon his release, the offender would not know who his parole officer is. All he'd know is that someone in his district has been especially assigned to see to it that he is not going to commit another crime without being caught. This agent's job is not to change the man's behavior; it is simply to catch him in the act of committing another crime . . . And surveillance would hang over an offender's head like a 'Damocles' sword'—the threat of certain capture, and of swift, sure punishment."

Desperate for alternatives to what they condemn as the failure of present prison systems, protagonists of the mandatory sentence are ultimately reduced to calling on Orwell's Big Brother to follow secretly and to spy on prospective felons, with no heed paid whatsoever to dealing with the conditions which may have conduced their commitment to criminal pursuits.

John Conrad, who earned a reputation as a progressive penologist in California, Washington, D.C., and Ohio, now tells us that "the hard line is acceptable and can be followed . . . if rational solutions can be formulated and adopted." Included in the "solutions" is the notion that the prison "must be a place in which the altruist can function." As if any prison in America or anywhere else in the world had ever provided the kind of setting in which "altruists" could or would be permitted to operate or that prisoners generally would take other than a jaundiced view of the efforts of "altruists" to improve their prison lot!

Whether these erstwhile liberal correctional experts advocate the sword of Damocles or the mitigating influence of the altruist, they have one characteristic in common, a disregard for the antecedents of their new-found power.

Von Hirsch's recommendation in *Doing Justice*, that the "offender should be punished as severely as he deserves" reads like a translation from Cesare Beccaria, who in his classical treatise "On Crime and Punishment" (1764) specified punishment "in conformity with the value of the crime, uniformly applied to all violators." Kant was saying the same thing at

<sup>1</sup> This idea is also mentioned in Judith Wilks and Robert Martinson, "Is the Treatment of Criminal Offenders Really Necessary?," *FEDERAL PROBATION*, March 1976.

about the same time. Behind these 18th century philosophers rose the shadow of the stele of Hammurabi which advocated the same even-handed dispensation of justice—3,900 years ago.

Backward to Hammurabi, forward to the Mikado's "object all sublime, to make the punishment fit the crime." For the notion of the meting out of punishment according to a fixed schedule has appealed to every generation anxious for even and dependable justice. But even these formulae have made allowances for extenuating circumstances. Since the times of the Romans, the young and the mentally retarded or deranged have been exempt from the full rigors of the law. Once the ladling out of justice in precise proportion to the gravity of the offense has been abrogated in these two respects, the way is then open to the further individualization of justice, which has been the goal of progressive penologists until their recent reversal.

Cesare Beccaria was reacting to the tyranny, aristocratic privilege, corruption, and bureaucratic abuse of his time, which had resulted in judicial favoritism, in torture and imprisonment without formal charges or fair trial. The Bastille was to be levelled, not long after, as a direct consequence of these abuses.

Beccaria's ideas were embodied in France in the radical Penal Code of the Third Brumaire of 1795. One of the first acts of the new regime, this Code left nothing to the discretion of the court, except the question of guilt. There was to be no abatement of sentence for extenuating circumstances, no added penalty for the seriousness with which the crime had been committed—in every respect it was patterned after the "lex talionis" of Babylonian days.

This new Penal Code lasted exactly 15 years. It had proved completely unworkable mainly because judges refused to limit their discretion within a rigidly formulated schedule which aimed to equalize the seriousness of the crime with the prescribed penalty. In the end it was replaced by the Napoleonic Code of 1810, which has endured, with some modifications, down to the present.

Reference to the cost of a stepped-up strict enforcement of mandatory sentences is singularly lacking among those who advocate them. *Corrections Magazine* estimates that a modern, secure prison today requires costs of between \$30,000 and \$50,000 per bed to construct. Just the interest on bonds to be floated to cover the expense of a

single cell would cost the taxpayer between \$2,500 and \$4,000 per year, per prisoner. This figure is exclusive of the costs of retiring the bonds issued to pay for the construction, as well as annual per capita costs of imprisonment of between \$7,000 and \$12,000.

The 522 correction facilities now projected, will cost upwards of \$4 billion to build, according to a recent survey by the National Moratorium on Prison Construction, in Washington, D.C.

If prisons don't work, if rehabilitation is a failure, we are being urged to build more of them, at greater cost, and to sentence more offenders to them than at any other period in our history—and for longer periods of time.

But before we permit our legislators to appropriate these huge sums and before we endorse their punitive approach, let us remind them that we have travelled this road at least once before in our history.

During the period following the American Revolution, the role of the courts was reduced to the application of legal sanctions even-handedly to the guilty, regardless of individual circumstances. During this period, convicted offenders were sentenced to long periods of imprisonment in what came to be called "fortress prisons." The results were overcrowded institutions, professional criminals obtaining pardons through bribery, and the growing prison population—precisely as today—characterized as the poor, the mentally deficient and the powerless in society. Dr. David Fogel, director of the Illinois Law Enforcement Commission, has stated that "by 1808 the Newgate Penitentiary in New York was granting so many pardons as to make discharges equal to commitments while Ohio simply pardoned convicts whenever the population rose about 120 in number, just enough to make room for the newcomers." We face the same situation already today in many of our State prisons, several of which stand condemned by Federal courts as violation of the "cruel and unusual" provision of our Constitution.

Law Professor Alan Dershowitz of Harvard, who served on the Twentieth Century Fund's Task Force on Criminal Sentencing, warns us, in the *New York Times Magazine* (December 28, 1975) concerning mandatory minimum sentencing: "Discretion and disparity will not be eliminated; policemen will still decide whom to arrest; prosecutors will still engage in plea-bargaining and Presidents and Governors will still pardon

and commute." (P. 27) His conclusion represents a pessimistic endorsement of a judicial method of dealing with crime that will neither limit nor reduce it. Moreover, two of the main sources of injustice in the criminal justice system—plea-bargaining and political influence—will not be eliminated.

He, along with other advocates of the hard-line approach to property crime, are generally silent on the subject of how best to deal with predatory acts by persons above the low social-economic level whence most criminals come. Such crimes are known as "white collar," a term coined by Edwin Sutherland, or sometimes—as with the first evidence of the breaking into the Democratic National Committee offices at Watergate—described as "capers." Yet such crimes have been estimated to cost our economy \$90 billion a year.

No proponents of mandatory sentencing have come forward with suggestions that persons who defraud the IRS be given a month for each \$100,000 of evaded taxes, for example, yet lenient sentences are traditional in this type of fraud. Robert Vesco, now a citizen of Italy, today sails his armed yawl in the Caribbean, safe from extradition on charges of swindling, narcotics smuggling and involvement in Watergate. His total take is alleged to be in the vicinity of \$300 million, the equivalent of 1,500,000 street crimes (which have an average take of \$200), which so distress today's penologists.

One of these, Wilson of Harvard, takes even a benign attitude toward criminals in places of public trust: "I am rather tolerant of some forms of civic corruption (if a good mayor can stay in office and govern effectively only by making a few deals with highway contractors and insurance agents, I do not get overly alarmed)." For such as these, Professor Wilson proposes no harsh punishment, certainly no penalty geared to the gravity of the corrupt—and corrupting—criminal behavior.

For while we cannot prove statistically that condoned or tolerated crime in high places results in disregard for the criminal law and contempt for those who administer it, the trickle-down effect of such behavior on all citizens—the law-breaker as well as the noncriminal—has been recognized by at least two Supreme Court Justices: "The law floats in a sea of ethic," Warren once said. "If the government becomes a law-breaker, it breeds contempt for law," Brandeis declared 40 years ago. The Italian

proverb says it in more earthy fashion. "Il pesce puzza dalla testa"—the fish begins to stink from the head.

The acid test of the effectiveness of mandatory sentencing practices lies in the area of capital punishment. Professor Hugo Bedau of Tufts University has recently declared: "The record of a quarter century of criminal justice under a 'mandatory' death penalty indicates that such statutes contribute little or nothing toward uniform, even-handed, non-arbitrary, and predictable justice."

His words are echoed in the July 1976 action of the Supreme Court in striking down laws that make death mandatory for all persons convicted of certain crimes because such laws treat defendants, "... not as uniquely individual human beings but as members of a faceless, undifferentiated mass."

Here lies the crux of the conflict between those who urge the fixed mandatory sentence and those who argue for individualization of treatment at the court and correctional level. Individualization has been the touchstone of modern corrections, whether labelled reformation, rehabilitation or reintegration. These attempts, say today's critics, have failed. Yet none of them cites the lack of meaningful programs in our huge congregate penal stations. If rehabilitation is judged to have failed, we may say of it as has been said of democracy and Christianity—splendid ideas: pity they have never been tried.

Those who urge fixed sentences as a solution to crime fail to point out that we have the highest rate of imprisonment in the world, and that it is still rising. On January 1 of 1976, the United States had an imprisonment rate of 215 per 100,000 population. By comparison, the Netherlands figure is 18 persons per 100,000, an incredible 8 percent of the United States rate.

Denmark incarcerates 28 persons per 100,000; Sweden 32. A "long-term" inmate in Denmark is one who serves more than 3 months. Nine percent of Swedish inmates are sentenced to 1 year or more, while 98 percent of American inmates are sentenced to a year or more.

Texas is reputed to impose the longest and harshest sentences of any state in the Union. Three years ago they had 17,000 men in prison. Massachusetts, with one-half of Texas' population, confined one-sixth that number.

Any proponent of fixed and harsher prison sentences has the responsibility to tell us what

kind of men and women he would deal with in this fashion. Of the 450,000 currently in confinement, two-thirds are unskilled, a highly disproportionate number are Black, many of them are from broken families, most of them have not graduated from high school. By and large they are the poor, the rejected. Today's hard liners have forgotten—or they would have us forget—that no more than 10 to 15 percent of these persons, arrived at prison, are ever provided an opportunity to engage in any meaningful educational, counseling, vocational or treatment program. The great majority spend their days and nights in idleness; many of them are confined to their cells for all but the brief time required to consume their unsavory, low quality rations. The advanced prison systems in this country rarely spend more than 2 percent of their budgets on community-based programs—work or educational release, furloughs, halfway house or prerelease centers—for either the confined or paroled prisoner. Security and a smoothly functioning custodial service is the *summum bonum* of our prison service—reflected in the figure of 85 percent of their budgets devoted to these ends.

The result is that "nothing works," that better than one of every two released from this kind of captivity ultimately returns or—as Ramsey Clark reminds us—that 80 percent of serious crimes are committed by persons who have served time.\* Bernard Shaw has cautioned that to expect to change a prisoner into a law-abiding citizen by imprisonment is as logical as to expect to turn a tiger into a Quaker by placing him in a cage. To which may be added that every time a man is sent to prison, the failure of deterrence has once again been proven.

What it will cost us in interest charges for new

prisons, if spent for services in the areas of unemployment, vocational training, education and health would go far to make up for the manifest deficiencies in our society which are concomitant—if they are not causative—of antisocial behavior.

If we permit a sizeable proportion of our population to live below the poverty line, to suffer unemployment, discrimination and rejection, and then victimize them twice-over when they are subjected to further deprivation and dehumanization in prison, we have only ourselves to thank for the dismal outcome.

If the proponents of mandatory sentences were to plump instead for alleviating the miseries of those who wind up in prison, and were to work to make prisons smaller and their programs effective, we might well see a reduction in crime, a decrease in the number of persons committed to prison, and a lower rate of recidivism for those who are released.

The current popularity of the notion of mandatory sentences is a call for repression of the already oppressed in the name of even-handed justice. Its likely outcome will be a greater show of force by the state, a greater invasion of privacy, a fulfillment well before 1984 of the future which Orwell warned of.

Thus a philosophy which would treat all crimes alike—as if all criminals were alike—descends from de-individualization to de-humanization, carrying with it grave implications not only for the law-breaker but for the law-abiding as well.

"Either we attend to altering the social and economic bases of crime or we grope our way toward a false realism—a garrison state, increasingly controlled by those possessing the force of arms and the keys to the prison." (Jerome Skolnick)

\* EDITOR'S NOTE: We do not stand by this 80 percent figure. It is an arguable position.

NO CRIME can be viewed realistically without a consideration of its circumstances and consequences.—THOMAS J. BERNARD



**END**