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The Political Attractiveness of Mandatory Minimum Sentences

Anthony N. Doob

Carla Cesaroni

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The Political Attractiveness of Mandatory Minimum Sentences

Abstract

This article addresses the question of why Canada still has mandatory minimum sentences despite inquiries by a number of commissions that suggest abolition. It suggests that politicians and judges alike not only promote mandatory minimum policies, but also speak about them in much the same way - as a way of fighting crime. Though the evidence is clear that mandatory minimum sentences are not an effective crime-control strategy, and actually disrupt the sensible operation of the justice system, it is apparent that the deterrence message they deliver is still functional for politicians and is rarely challenged by judges.

Keywords

Mandatory sentences; Mandatory sentences--Political aspects; Canada

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THE POLITICAL ATTRACTIVENESS OF MANDATORY MINIMUM SENTENCES[©]

BY ANTHONY N. DOOB* & CARLA CESARONI**

This article addresses the question of why Canada still has mandatory minimum sentences despite inquiries by a number of commissions that suggest abolition. It suggests that politicians and judges alike not only promote mandatory minimum policies, but also speak about them in much the same way—as a way of fighting crime. Though the evidence is clear that mandatory minimum sentences are not an effective crime-control strategy, and actually disrupt the sensible operation of the justice system, it is apparent that the deterrence message they deliver is still functional for politicians and is rarely challenged by judges.

Cet article aborde la question à savoir pourquoi le Canada tient à conserver les peines minimales obligatoires malgré que de nombreuses commissions d'enquête ont suggéré leur abolition. Cela suggère qu'une telle politique est favorisée par les politiciens et les juges et qu'ils les considèrent comme étant un outil opportun pour lutter contre le crime. Malgré qu'il existe des indices manifestes que les peines minimales obligatoires ne constituent pas une stratégie efficace pour contrôler le crime et qu'elles peuvent même perturber l'opération raisonnable du système judiciaire, il est évident que la perception de leur effet dissuasif a encore de la valeur aux yeux des politiciens et que cette impression est rarement remise en question par les juges.

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* Professor of Criminology at the Centre of Criminology, University of Toronto.

** Doctoral student at the Centre of Criminology, University of Toronto

I. MANDATORY MINIMA: IS THERE ANYTHING TO SAY?

Despite the results of a number of commission reports suggesting that mandatory minimum policies have a negligible impact on crime control, politicians and judges continue to promote mandatory minima as an effective means of fighting crime. Why, then, are we still discussing whether Canada should have any mandatory minimum sentences? To explore this question, we will first contrast the recommendations from various commissions with the views and policies promoted by political leaders. We then point out that judges often speak about mandatory minima using much the same language as that used by politicians: mandatory minima are seen as a way of fighting crime. Recent evidence that demonstrates mandatory minimum sentences are not effective crime control strategies and that they disrupt the sensible operation of the justice system is then reviewed.

In 1987, the Canadian Sentencing Commission (CSC) noted that since 1952 “all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished.”¹ The CSC further pointed out that the 1952 Royal Commission on the Revision of the Criminal Code (RCRCC)² also concluded that all mandatory minimum sentences should be abolished. The RCRCC quoted, with approval, an article by Chief Justice McRuer in which he noted that the presence of a mandatory minimum sentence “tends to corrupt the administration of justice by creating a will to circumvent it.”³ Presumably, most of the corrupting effects of mandatory minimum sentences were well known fifty years ago. Recent summaries of the evidence against mandatory minima are discussed later in the article. However, when the CSC reviewed this evidence for the criminal justice community, it reminded us that:

[W]hether mandatory minima serve a valid purpose in the current sentencing scheme has been answered with notable unanimity given the variety of sources. Calls for the abolition of mandatory minima within the current framework of the criminal justice system have been made by commissions, academics, and criminal justice professionals alike.⁴

¹ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services, Canada, 1987) (Chair: J.R. Omer Archambault) at 178 [hereinafter *CSC Report*].

² Canada, *Royal Commission on the Revision of the Criminal Code* (1952) as cited in the *CSC*, *ibid.* at 178.

³ *Ibid.* at 179.

⁴ *Ibid.* at 188.

The CSC focused on sentencing policy rather than the politics of mandatory minimum sentences. Hence, it answered the question of whether we should have mandatory minimum sentences in the same manner as its predecessors: "This Commission is of the view that existing mandatory minimum penalties, with the exception of those prescribed for murder and high treason, serve no purpose that can compensate for the disadvantages resulting from their continued existence."⁵

Despite the conclusions of various commissions, Canada, like the United States, has not completely lost its attraction to mandatory minimum sentences. Looking back at Canadian Senate hearings in 1952, the political taste for mandatory minima was just as strong then as it is now. While appearing before the Senate in 1952, the Minister of Justice said something that could have been said in 1996 when the government imposed a new set of mandatory minima:

While there may be some merit in the recommendation of the Commission [which was reviewing the Criminal Code], we think that because of their deterrent effect, minimum penalties should not be entirely abolished, and it is for this reason that we propose they should be retained in respect of the offences I have just mentioned.⁶

Those offences included driving while intoxicated or while ability-impaired, thefts of certain matters from the post office, robbery of the mails, and theft of a motor car.

Forty-two years later, Justice Minister Allan Rock, introduced his gun control legislation with the following words:

The areas in which we will act follow the three broad categories: First, criminal sanctions for the use of firearms in crime... . Let me turn first to the question of criminal penalties. There is a disturbing trend particularly in urban areas toward violence with firearms. Five Canadians each week are victims of homicide by gun... . To strengthen the law and to provide real deterrents in sentencing we will introduce new strong penalties for 10 specific serious crimes... . Those who choose to use a firearm in such a way must know that they will surely incur severe consequences.⁷

Recent decisions from the Supreme Court of Canada suggest that judges, like politicians, believe in the power of mandatory minimum sentences to deter crime. In upholding the mandatory minimum sentence in *R. v. Morrisey*, the Supreme Court stated that "[i]t cannot be disputed

⁵ *Ibid.*

⁶ Senate, *Official Report of Debates* (13 May 1952) at 210.

⁷ *House of Commons Debates*, (30 November 1994) at 3434.

that there is a need for general deterrence. This legislation dictates that those who pick up a gun must exercise care when handling it.”⁸ Later, the perceived ability of mandatory minimum sentences to shape behaviour is made even more explicit:

Perhaps the most egregious hypotheticals reviewed are the individuals playing with guns. Firearms are not toys. There is no room for error when a trigger is pulled. If the gun is loaded, there is sufficient probability that any person in the line of fire could be killed. The need for general deterrence is as great (if not greater) for the hypothetical offenders playing with guns as it is for people such as the appellant ... In such circumstances, there can be no question that the four-year minimum is as appropriate as it is for the appellant.

The four-year minimum sentence equally sends a message to people who are in a position to harm people to take care when handling their weapon. Hunting accidents occur all too easily. When individuals with weapons are hunting in such a degree of proximity, extra steps are necessary to ensure that other hunters are not harmed ... Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence ... serves a general deterrent function to prevent others from acting so recklessly in the future.⁹

This perspective is reminiscent of Mr. Justice McIntyre’s dissent in *R. v. Smith* in which he stated that:

There can be no doubt that Parliament, in enacting the *Narcotic Control Act*, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognized that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provision of a prison sentence cannot by itself be attacked as going beyond what is necessary to achieve the valid social aim.¹⁰

After reviewing the arguments for not second-guessing Parliament, and the history of the law being challenged, Mr. Justice McIntyre concluded that:

In view of the careful and extensive consideration given to this matter by Parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence exists which would realize the valid social aim of deterring the importation of drugs, I cannot find that the minimum sentence of seven years goes beyond what is necessary for

⁸ [2000] 2 S.C.R. 90 at 117.

⁹ *Ibid.* at 120-21.

¹⁰ (1987), 34 C.C.C. (3d) 97 at 117. See Mr. Justice McIntyre’s dissent.

the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives.¹¹

Mandatory minimum sentences apparently are seen as powerful forces that can be used to keep Canadians safe. The purpose of this paper is not to review, yet again, the evidence of the past fifty years. That evidence is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences.¹² However, quite independent of the social science evidence, it is useful to examine how judges characterize human behaviour. The Supreme Court of Canada appears to be arguing that a careless hunter or careless gun owner would shrug off a gun accident that would take the life of a friend or fellow hunter unless there was a mandatory minimum sentence.

Denunciation and deterrence are often invoked as justification for harsh treatment of offenders. In *R. v. Latimer*, for example, the Supreme Court of Canada noted that:

Furthermore, denunciation becomes much more important in the consideration of sentencing in cases where there is a "high degree of planning and premeditation, and where the offence and its consequences are highly publicized, [so that] like minded individuals may be deterred by severe sentences." ... This is particularly so where the victim is a vulnerable person with respect to age, disability, or other similar factors.¹³

Again, the implication of this statement seems to be that without minimum sentences, the weak would be vulnerable to murder just as hunters would be vulnerable to careless shooting.

Mandatory minimum sentences are seen by some judges and politicians as powerful tools to improve society. We should point out, however, that some trial judges are less enamored with mandatory minima than some judges at the appellate level. In a survey carried out by the CSC, 57 per cent of trial judges surveyed stated that mandatory minima restricted their ability to carry out a just sentence. Only 9 per cent of trial judges indicated that mandatory minimum sentences "never restricted their ability

¹¹ *Ibid.* at 119.

¹² Various summaries exist. A useful one is M. Tonry, "Mandatory Penalties" in M. Tonry, ed., *Crime and Justice: A Review of Research*, vol. 16 (Chicago: University of Chicago Press, 1992) 243 [hereinafter *Crime*]. See also D.S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-first Century" in M. Tonry, ed., *Crime and Justice: A Review of Research* vol. 23 (Chicago: University of Chicago Press, 1998) 1.

¹³ [2001] 1 S.C.R. 3 at 41-42.

to impose a just sentence.”¹⁴ Trial judges in the mid-late 1980s also indicated that mandatory minimum sentences contributed to inappropriate agreements between Crown and defence counsel.¹⁵ Most defence counsel and about one-third of the Crown counsel surveyed by the CSC indicated that mandatory minimum sentences “caused Crown and defense to enter into agreements [that] they would otherwise avoid.”¹⁶

This is not to say that there is a clear split between trial judges and appeals judges on their view of deterrence. In the case of *R. v. Cerasuolo*¹⁷, Mr. Justice Hogg found it necessary to protect the harm being done to the integrity of chat lines. He rejected a joint submission for a sentence of one year and noted that:

The facts surrounding this case are absolutely atrocious. Chat lines are put into place for people to get together on a proper basis. I may not agree with the type of chat lines that are on the air, of which there are hundreds of them on the Internet, however, people put faith in these things and you, sir, have taken advantage of them.

...

As far as I am concerned, the message that must go out to people who are going to take advantage of those who put their faith in the chat line that [this behaviour] will not be allowed by this Bench or any other Bench. You are going to go to the penitentiary for three years.¹⁸

The Court of Appeal, on the other hand, was less optimistic (and, we would suggest, much more realistic) about its ability to control this form of crime:

The trial judge seemed overly concerned with the harm being done to the integrity of chat lines. In my view, the message of the sentencing judge that the bench will protect those who “put their faith in chat lines” is unrealistic and imprudent.¹⁹

The argument is, obviously, more general than this very sensible statement by the Ontario Court of Appeal. Generally, judges are not well placed to control the level of crime in society. As the CSC pointed out years ago in the context of a judge’s role in protecting the public, “[i]ntuitively,

¹⁴ *CSC Report*, *supra* note 1 at 180.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ (2001), 140 O.A.C. 114.

¹⁸ *Ibid.* at 115-16.

¹⁹ *Ibid.* at 117.

at least, one would rather resort to a security guard than to a sentencing judge to protect one's home."²⁰

II. MANDATORY MINIMA: RECENT EVIDENCE

Although the CSC reviewed the experience with mandatory minimum sentences up until 1986, we should also look at more recent experience. Notwithstanding the fact that it is possible that "new evidence" has convinced governments and judges that mandatory minima now are different, the recent evidence looks remarkably similar to the older evidence.²¹

A December 1994 report commissioned by the Firearms Control Task Force and the Research Section of the Department of Justice reviewed the evidence available on the impact of mandatory minimum sentences.²² The report concluded that:

Taken together, the empirical literature reviewed for this report suggests the following conclusions about mandatory minimum sentencing provisions:

- Charges for offences, which are the subject of mandatory minimum sentences, are frequently the subject of plea negotiations.
- The public is largely unaware of which offences are covered by mandatory minimum penalties.
- Police, lawyers, and judges may alter their behaviour in a variety of ways, aimed at mitigating the impact of mandatory minimum penalties on accused for whom the mandatory penalty is perceived to be unduly harsh.
- Mandatory minimum penalties are seen as shifting discretion from the impartial judiciary to the adversarial prosecution.
- Mandatory minimum penalties are associated with lower overall probabilities of conviction for the target offence, but longer sentences when convictions are obtained.
- As a means of incapacitation, mandatory minimum penalties are estimated to have no more than a modest impact on crime rates for the target offence.
- Implementation of mandatory minimum penalties can increase prison populations.
- Juries may be less willing to convict if they know that the charge being tried is covered by a mandatory minimum penalty.
- Mandatory penalties may increase trial rates.
- Judges may impose less severe sentences than the statute provides for.²³

²⁰ CSC Report, *supra* note 1 at 148.

²¹ *Crime*, *supra* note 12.

²² Department of Justice, *Research on the Application of Section 85 of the Criminal Code of Canada* (Working Document) by C. Meredith, B. Steinke & S.A. Palmer (Ottawa: Department of Justice, 1994)

²³ *Ibid.*

This list of impacts would not appear to have given much comfort to those who advocate or implement mandatory minimum penalties. However, this evidence has not been very influential.

In the United States, mandatory minimum sentences have made inroads on two separate fronts. In the first place, the United States Sentencing Commission has made its "guidelines" into virtual mandatory sentences creating what are, in effect, hundreds of mandatory minimum sentences. At the same time, the United States Sentencing Commission criticized the United States Congress for legislating mandatory minima.²⁴ The second, more recent, mandatory minimum sentences are even more striking. In 1994, California became the first state to create a "three-strikes law."²⁵ Three-strikes sentencing has since become the new criminal justice fad.

The original three-strikes legislation in California came as a result of a highly publicized kidnap-killing during an election year. The form of this law, where even the third strike could be a relatively minor offence, is unusual, even for three-strikes laws. The first three-strikes laws came into effect in 1994. By 1997 over twenty states had joined the game. What constitutes the first and second strike varies across jurisdictions, as does the definition of the third strike.²⁶

If any mandatory minimum penalty is going to deter crime, it should be three-strikes legislation. These models of sentencing have received an inordinate amount of publicity since they first came into law. In particular, those cases where the sentence is clearly disproportionate have received worldwide attention. For example, one individual was sentenced to twenty-seven years to life (to be served in prison) for attempting to sell stolen batteries worth approximately ninety dollars. A minimum sentence of five years was given to a defendant for selling five dollars worth of marijuana.

²⁴ For a discussion of the United States Sentencing Commission's "guidelines," see A.N. Doob, "The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You May Not Get There" in C. Clarkson and R. Morgan, eds., *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) 199. It should be pointed out that in 1991, the United States Sentencing Commission issued its own report on legislated mandatory minimum sentences: United States of America, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington: U.S. Sentencing Commission, 1991). As Tonry points out, "[w]ere federal officials more interested in rational policy-making than in political posturing, the U.S. Sentencing Commission report...would result in withdrawal of all mandatory sentencing proposals and repeal of those now in effect." See *Crime, supra* note 12 at 254. This did not happen.

²⁵ Cal. Penal Code § 1170.12.

²⁶ M. Vitiello, "Three-strikes: Can We Return to Rationality?" (1997) 87 J. Crim. L. & Criminology 395.

Some Australian states have introduced three-strikes-type legislation and some obviously disproportionate sentences have resulted. Examples include mandatory imprisonment for a yo-yo thief, a year in prison for an Aboriginal man who stole a towel from a washing line to use as a blanket, and a prison sentence for a one-legged pensioner who damaged a hotel fence.²⁷

Nevertheless, even though three-strikes laws should be nearly ideal cases for deterrence, the available research provides little comfort to those who still cling to the belief that mandatory minimum penalties are an effective means of accomplishing crime control. For example, in one study data obtained on a monthly basis were examined in California's ten largest cities or counties. The results "generally indicate that three-strikes law did not decrease the California Crime Index [a crime rate based on the rate of reported 'index' crimes] below that expected on the basis of preexisting trends."²⁸ Another study pointed out that the counties that used three-strikes laws the most (proportionately seven times as much as those that, like San Francisco, used it the least) were "not associated with bigger crime decline than [those areas that used it the least]."²⁹

The Australian results are just as easy to describe. There is "compelling evidence" that the laws did not achieve a deterrent effect.³⁰ What is more interesting, however, is the fact that the Australian governments responsible for these mandatory minima have effectively conceded that mandatory sentences have no deterrent effect. They recognize that there is a need for judicial discretion and for more vigorous use of diversionary schemes and alternative strategies.³¹

Furthermore, there are, as Justice McRuer suggested more than fifty years ago, corrupting influences of mandatory minimum sentences on the operation of the criminal justice system. Interestingly, it appears that

²⁷ N. Morgan, "Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?" (2000) 24 *Crim. L. J.* 164.

²⁸ L. Stolzenberg & S.J. D'Alessio, "Three-strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates" (1997) 43 *Crime and Delinquency* 457 at 464. In one of the ten California locations the decrease in index crime coincided with the implementation of the three-strikes law. There seems to be no reasonable explanation for the difference between this county (Anaheim) and the other ten. There was no suggestion that it was related to the fact that Disneyland is located in Anaheim.

²⁹ M. Males, D. Macallair & K. Taqi-Eddin, *Striking Out: The Failure of California's "Three-strikes and You're Out" Law* (San Francisco: Justice Policy Institute, 1999) at 6.

³⁰ Morgan, *supra* note 27 at 172.

³¹ *Ibid.* at 182.

the two competing hypotheses—that the law will be slavishly followed, or that the system will find a way of reverting to established norms—are both supported and contradicted by the evidence. The difficulty is that it is unpredictable which pattern will emerge. For example, when three-strikes legislation was enacted in California, there was an initial increase in the number of preliminary hearings, although this effect was not long lasting. Trial rates, of course, did increase for both the second and third strike. In general, counties in California varied on how strictly they enforced the laws. In four years, prison populations increased by about 27 per cent (thirty thousand more prisoners were added). This number was lower than had been expected because the justice system implemented the law in a less than uniform manner.³² The fact that there has been some circumvention of the law, however, does not mean that things are as they always were. One study of three-strikes legislation, consisting of interviews and surveys of judges, prosecutors, and public defenders, in five large California counties found that there were important impacts on the manner in which cases were handled: “Three strikes has significantly disrupted the efficiency of the courtroom and has made prediction of case outcomes difficult.”³³

It is easy to understand one reason for this outcome: plea bargaining became difficult because it became nearly impossible to predict when prosecutors would be willing to dismiss prior “strike” allegations.

The greatest effect of Three-strikes...has been an increase in trials... . Three-strikes prohibits such deals [where a guilty plea is accepted in return for a lesser punishment]. Defendants who face extended prison terms are unlikely to agree to plead guilty... . Overall the felony trial rate is higher than before Three-strikes... .³⁴

Recognizing [the possibility of jury nullification], public defenders attempt to inform the jury that the current offence is a third strike.³⁵

Similar findings have been noted in the State of Washington where presumptive sentences for certain drug offences have increased dramatically since 1990. According to Rodney Engen and Sara Steen, the severity of charges at conviction changed significantly following each change in the law. This evidence suggests that there is manipulation of

³² J. Austin *et al.*, “The Impact of ‘Three-strikes’ and You’re Out” (1999) 1 *Punishment & Society* 131.

³³ J.C. Harris & P. Jesilow, “It’s Not the Old Ball Game: Three-strikes and the Courtroom Workgroup” (2000) 17 *Justice Q.* 185 at 192.

³⁴ *Ibid.* at 198.

³⁵ *Ibid.* at 199.

charges (and subsequent sentences) rather than a strict application of charges to crimes committed.³⁶ They argue that the overall impact of the changes in the law is substantially greater for offenders convicted at trial than for those who pled guilty. The results of this study support an “efficiency” model: charging practices will change as options for inducing guilty pleas change, but those changes are entirely contingent upon offenders pleading guilty.³⁷

Manipulations of the system are not confined to prosecutors and defence counsel. Over the years, judges in many western countries, including Canada, have found numerous ways of circumventing mandatory penalties.³⁸ For example, when judges view legislation as requiring sentences that are not proportionate to the crime or in keeping with fundamental justice, they will interpret the language of the statute in a manner that gives it the narrowest interpretation consistent with the intention of the statute.³⁹ Attacking the meaning of “prior convictions” is one of the most common means of restricting mandatory minimum legislation.⁴⁰

Notwithstanding the known negative impacts of three-strikes legislation in the United States, in October 2000, the then leader of the Canadian Alliance, Stockwell Day, announced that a Canadian Alliance government would bring in three-strikes legislation for violent and sexual offenders.⁴¹

III. WHY DO WE STILL HAVE MANDATORY MINIMUM SENTENCES?

Numerous commentators have noted that mandatory minimum penalties are still popular with politicians. As Michael Tonry has pointed out in response to his own rhetorical question:

³⁶ R. L. Engen & S. Steen, “The Power to Punish: Discretion and Sentencing Reform in the War on Drugs” (2000) 105 *Am. J. of Soc.* 1357 at 1384.

³⁷ *Ibid.* at 1385.

³⁸ A. Freiberg “Guerrillas in our Midst? Judicial Responses to Governing the Dangerous” in M. Brown & J. Pratt, eds., *Dangerous Offenders: Punishment and Social Order* (New York: Routledge, 2000) 51.

³⁹ *Ibid.* at 61.

⁴⁰ *Ibid.* at 62.

⁴¹ A. Dawson, “Day Vows to Get Tough with Cons” *The Ottawa Sun* (6 October 2000) 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.⁴²

It is easy to suggest that politicians should give us the best laws possible, or that they should provide evidence for their assertions especially when centuries of experience tell us the opposite. The problem is that Tonry's analysis of politicians' motivations is almost certainly correct: they do not care. Working on the assumption that it is a waste of time to urge politicians to be honest with their constituents, Tonry made a number of suggestions on how to minimize the harm that comes from mandatory minimum sentences. These suggestions include making the penalties presumptive rather than mandatory and adding "sunset" provisions to mandatory penalty laws so that they would automatically be repealed unless re-enacted by the legislature. Tonry also advocates limiting mandatory minima to very serious crimes as well as modifying the time when correctional or parole authorities can release offenders.⁴³

The difficulty with these suggestions is that they have not been successful. Perhaps the issue is somewhat more complex than these suggestions would imply. One explanation is obvious: politics, in recent years, has become a question of whose sound-bite attracts the most votes. The difficulty is simple: locking up an offender for "at least" some minimum time sounds like good crime control, especially since people seem to overestimate the likelihood that an offender will re-offend.⁴⁴ Incapacitation, selective or not, has a ring of reasonableness to it, especially if one does not know the relevant data.⁴⁵ Politicians and judges frequently

⁴² *Crime*, *supra* note 12 at 244.

⁴³ *Ibid.* at 245, 267-69.

⁴⁴ A.N. Doob & J. V. Roberts, "Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys" in N. Walker & M. Hough, eds., *Public Attitudes to Sentencing: Surveys from Five Countries* (Aldershot: Goer, 1988) 111 [hereinafter *Public Attitudes*].

⁴⁵ As pointed out in a recent paper by Kathleen Auerhahn, "Proposals for selective incapacitation are predicated on the idea that we can prospectively identify high-rate offenders sufficiently early in their careers to reap the incapacitative benefit of crime reduction. The major obstacle to the specific implementation of such proposals is that no convincing evidence exists that this is possible." See K.

tell people that locking up offenders is an effective and efficient way of controlling crime. But the primary attraction of mandatory minimum sentences is simple: a politician can state that he or she will “make us safe” from bad people by passing mandatory minimum sentencing laws. Whether a member of the public thinks that this might be accomplished by way of incapacitation or deterrence does not matter: in about eight seconds, the message can be communicated.

What does it take to explain that mandatory minima are ineffective as crime-control measures, especially when contrasted with crime-control measures that consume the same amount of public resources? What does it take to explain that there are effective approaches to crime control that do not involve such blunt ineffective measures? It will take more than the eight seconds that a prime time television news broadcast will give anyone who opposes mandatory minima. In fact, the most likely “balanced” news broadcast would probably include eight seconds of one politician advocating mandatory minima and eight seconds of someone else saying nothing more than “it won’t work.” There is no question of who will win that sixteen second political battle. The challenge to get beyond the sound bite is serious.

This battle continues in the realm of what the public purportedly “thinks” about crime. The public’s desire for harsh punishment is often expressed in public opinion polls. Research suggests, however, that severity may not be the issue—the public is upset with sentencing generally, which gets expressed in terms of sentencing severity.⁴⁶

Criminological theorist, David Garland suggests that, over the past forty years, crime control strategies have changed. This is a result of the perceived inability of penal-welfare policies to deliver adequate levels of security. He suggests that this perception has resulted in a shift to two types of government action: enhanced control and expressive punishment

Auerhahn, “Selective Incapacitation and the Problem of Prediction” (1999) 37 *Criminology* 703 at 726. According to Auerhahn, there is a “tremendous appeal of selective incapacitation as an idea. Given that we have every reason to believe a small subset of criminal offenders contribute disproportionately to the total volume of crime in a society, a strategy that promises to locate and incapacitate this group is almost irresistible in its elegance. The seductive simplicity of selective incapacitation leads otherwise conscientious researchers to conclude that it works, despite the total lack of evidence to support such a conclusion The obstacle to realizing this seemingly perfect solution to crime prevention lies in the prospective identification of this offender pool. We simply cannot do it with any reliable accuracy.” (*Ibid.* at 727.) As another writer noted, “the criminal justice system has been burdened with unrealistic expectations of solving social problems that have [proven to be] insoluble elsewhere” (*Ibid.* at 723.)

⁴⁶ A.N. Doob, “Transforming the Punishment Environment: Understanding Public Views of What Should Be Accomplished at Sentencing” (2000) 42 *Can. J. Crim.* 323 [hereinafter “Transforming”]

("punitive segregation"). "The new penal ideal is that the public be protected and its sentiments expressed."⁴⁷ Garland was referring, for the most part, to the United States and the United Kingdom. Nevertheless, in many ways the arguments apply to Canada, though perhaps in a softer, gentler fashion.

Through the mass media, crime became a prominent fact of life for a middle class that was, until the latter half of the twentieth century, reasonably insulated from it. Additionally, fear of crime became an everyday consideration for anyone who owned a car, took the subway, or walked home alone at night. The social distance between the middle class and crime was diminished and support for "understanding" the offender within the liberal elite declined. This tolerance was replaced with new strategies: expressivity, punitiveness, victim-centredness, public protection, etcetera.⁴⁸ Crime is no longer something that happens to other people. The "get tough" message now resonates with the middle class. Increasingly, criminal justice "experts" whose policies and ideologies were associated with decades of rising crime and institutional failure, no longer enjoy the same amount of political influence.⁴⁹

Where might one expect such "punitiveness" from the (formerly liberal) elite to show most dramatically? If its members are looking for punitive segregation this attitude should be most salient with respect to repeat and violent offenders. These offenders are precisely the kind of individuals targeted by most of the three-strikes legislation and by many of Canada's mandatory minimum sentence laws. People overestimate the amount of crime that involves violence, and they overestimate the likelihood that offenders will re-offend. Concern about crime is disproportionately a concern about violence. As such, politicians who advocate mandatory minimum sentences for violent and/or repeat offenders know that they are preaching to the converted. The challenge to convince politicians not to use mandatory minimum penalties is almost certain to be impossible. This result is particularly true when failures of less punitive policies are likely to be seen as failures of political will rather than approaches that were doomed to fail.⁵⁰

⁴⁷ D. Garland, "The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies" (2000) 40 *British J. of Crim.* 347 at 350.

⁴⁸ *Ibid.* at 368.

⁴⁹ *Ibid.* at 358.

⁵⁰ K.F. Ryan, "Clinging to Failure: The Rise and Continued Life of U.S. Drug Policy" (1998) 32 *L. & Soc. Rev.* 232.

Even with youth crime, this focus on “repeat violent” offending is part of current political rhetoric. In her “Strategy for the Renewal of Youth Justice”⁵¹ and in the *Youth Criminal Justice Act*⁵² the Minister of Justice, Anne McLellan, has provided harsh sentencing provisions for a symbolically important group statement. The legislation provides for a presumptive adult sentence for those young offenders who have been “found” to be repeat violent offenders. We suspect that the Minister of Justice was responding to widespread concern about this very small group of offenders.

IV. WHAT CAN BE DONE TO HELP POLITICIANS BREAK THE HABIT OF LEGISLATING MANDATORY MINIMA?

There are not going to be any simple solutions to a complex problem. Our argument is that mandatory minimum sentences “work” in a political sense. They are easy to legislate and difficult to evaluate. They do not have to have a budget associated with them since the financial impact (through increased prison populations) will not show for a number of years.

There is, however, some public support for non-punitive approaches. But when a member of the public is asked to support a policy of reduced crime through mandatory minimum sentences it is hard to resist. One of the advantages of an incapacitation strategy accomplished through mandatory minimum sentences is that it has natural intuitive appeal.⁵³

As others have suggested, there is a need to find a replacement for “getting tough.” One suggestion is that a “social support” approach to crime prevention, might be appropriate.⁵⁴ As sensible as this might be, it fails the “sound bite” test. The difficulty with the social support or causes of crime approach is that the benefits are too remote. It requires individuals to trade the apparent immediate and definite promise of safety from mandatory minima for a remote and probabilistic benefit. Furthermore, as

⁵¹ Department of Justice, *A Strategy for the Renewal of Youth Justice* (Ottawa: Department of Justice, 1998).

⁵² Bill C-7, *Youth Criminal Justice Act*, 1st Sess., 37th Parl., 2001 (1st reading 5 February 2001).

⁵³ A.N. Doob, “Criminal Justice Reform in a Hostile Climate” (CIAJ conference) Banff, Alberta, October 1995, *Canadian Institute for the Administration of Justice, Public Perceptions of the Administration of Justice* (Montreal: Les Editions Themis, 1996) 253. See also, “Transforming”, *supra* note 46

⁵⁴ F.T. Cullen, J. P. Wright & M. B. Chamlin, “Social Support and Social Reform: A Progressive Crime Control Agenda” (1999) 45 *Crime and Delinquency* 183.

Arie Freiberg has suggested, "crime prevention strategies are more likely to be successful if they recognize and deal with the roles of emotions, symbols, irrationalism, expressionism, non-utilitarianism, faith, belief, and religion in the criminal justice system."⁵⁵ He goes on to suggest that we "must deal with the *affective* as well as the *effective*, with both the instrumental and sentimental aspects of penal policy."⁵⁶

Perhaps a more successful approach is to discuss the financial costs of a strategy based on mandatory sentences. But such talk is always vulnerable to the suggestion that "if one life were saved it would be worth the millions it might cost." The obvious problem with the "one life" approach to crime control is that it avoids the most obvious question: what if two lives could be saved with the same amount of money spent in some other way? Then the "one life saved" sounds like a pretty bad bargain and bad politics.

The data on the "cost effectiveness" of punitive policies, including mandatory minima, is clear. The "human cost" is high. The steady accumulation of prisoners serving mandatory terms in the United States has meant a constant increase in prison populations and budgets.⁵⁷ The "War on Drugs" has witnessed the explosion of the population of inmates in state and federal prisons from 196 000 in 1972 to 1 159 000 by 1998—an increase of 500 per cent over a twenty-six year period, one that exceeds the United States population increase of 28 per cent.⁵⁸ California, home of three-strikes legislation, has a higher rate of people in prison for drug offences than Canada does for all offences combined.⁵⁹

These social costs are unevenly distributed. For example, despite the fact that most American drug users are white, and African-Americans and Latinos make up only approximately 25 per cent of New York's population, African-Americans and Latinos constitute 83 per cent of those in New York's prisons. In 1998 over 90 per cent of New York's 22,670

⁵⁵ A. Freiberg, "Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice" (2001) 3 *Punishment & Soc.* 265 at 266 [hereinafter "Affective"].

⁵⁶ *Ibid.*

⁵⁷ *Crime, supra* note 12 at 269.

⁵⁸ D. Macallair *et al.*, *Drug Use and Justice: An Examination of California Drug Policy Enforcement*, (Washington: Justice Policy Institute, 2000) online: <<http://www.cjci.org/cadrag/cadrag.html>> (date accessed: 14 October 2001).

⁵⁹ *Ibid.*

inmates in prison for drug offences were there because of two laws requiring minima.⁶⁰

The effects of these policies are evident:

Whereas New York spent more than twice as much on universities than on prisons in 1988, the state now spends \$275 million more on prisons than on state and city colleges. The 1997–8 figures represent only the corrections operating cost, and do not include the \$300 million approved for the construction of 3100 new prison spaces approved in the state budget for that year.⁶¹

These figures—and, in fact, most “cost” estimates related to crime—do not even include one of the largest costs: the cost to society and to the offender of having an otherwise potentially productive member of the community rendered a burden rather than a contributor to society.

What about the financial costs of a punitive sentencing regime in Canada? Imprisonment is certainly expensive. It costs approximately \$62 000 per year to keep a person in a federal penitentiary. Money spent keeping an inmate unnecessarily in prison means money that cannot be spent on programs in the community that help reduce crime. One way to make people think about whether they really want to imprison an offender is to make financial costs of imprisonment obvious.⁶² Research shows that support for imprisonment tends to decline when people are reminded either that offenders are eventually released or that imprisonment is expensive.⁶³ It is noteworthy that in 2000, California voters voted by a 61 to 39 per cent margin to require drug treatment instead of jail for those arrested for drug possession or use. It would appear that they have learned that they are not getting “value for money” from the billions of dollars being spent to imprison small-time drug users.⁶⁴

Finally, as Freiberg suggests, “[s]uccessful penal reform must take account of the emotions people feel in the face of wrongdoing.”⁶⁵ Citing

⁶⁰ R. Gangi, V. Schiraldi & J. Ziedenberg, *New York: State of Mind? Higher Education vs. Prison Funding in the Empire State, 1988-1998* (Washington: Justice Policy Institute, 1998) at 5, online: <<http://www.jjic.org/pdf/nysom.pdf>> (date accessed: 14 October 2001).

⁶¹ *Ibid.* at 3.

⁶² “Transforming,” *supra* note 46 at 334.

⁶³ *Ibid.* at 335.

⁶⁴ S. Muwakkil, “Just Vote NO - The War on Drugs Loses at the Polls” *In These Times* 25:1-2 (25 December 2000) 25, online: <<http://www.inthesetimes.com/web2501/muwakkil2501a.html>> (date accessed: 14 October 2001).

⁶⁵ “Affective,” *supra* note 55 at 275

Gaubatz,⁶⁶ he suggests that the public's punitive attitude to crime may be based on four motivations: security, desert, compassion, and a desire for major social changes to improve society.⁶⁷ If this description is accurate, it means that moving from mandatory minimum sentences to just sentences may require a careful crafting of crime policy. A policy that focuses on fair sentences, compassion, and understanding of victims as well as offenders, along with policies that focus on providing real rather than apparent security and change in social policy would appear to meet these requirements.

V. CONCLUSION

Politicians are successful in disseminating the message that mandatory minimum sentences make good policy. This success is not necessarily because the public actually believes that these messages are true, but because on some level the public is hoping that a quick fix to the crime problem exists. To the extent that the public does not care very much about the impact of a policy on people who have been found by a court to have committed a serious offence, the attitude may well be: "it can't hurt" to impose disproportionately severe sentences. Social scientists need to demonstrate that effective and palatable alternatives exist or resign themselves to a world where policies are driven more by what sounds good than by what is the most effective way to address a complex problem. In promoting these policies, it is clear that the policy process must take into account the various functions served by punishment in our society.

⁶⁶ K.T. Gaubatz, *Crime in the Public Mind*. (Ann Arbor: University of Michigan Press, 1995).

⁶⁷ "Affective," *supra* note 55 at 271.