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Pennsylvania's Mandatory Sentencing Act Five Years With a Gun: Unconstitutional Delegation of Legislative Power or Proper Exercise of Prosecutorial Discretion?

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Pennsylvania's Mandatory Sentencing Act — Five Years With a Gun: Unconstitutional Delegation of Legislative Power or Proper Exercise of Prosecutorial Discretion?

"Where the law ends, tyranny begins."[1]

I. Introduction

The Pennsylvania mandatory sentencing statutes grew out of the reaction of elected officials to the perceived public outcry against an increase in crimes, the use of firearms in the commission of crimes, and a growing apprehension that sentences imposed were not commensurate with the seriousness of corresponding offenses.[2] Since his election, Governor Thornburgh actively pursued and promoted an extensive program designed to "get tough on crime."[3] One aspect of

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1. The quote is attributed to William Pitt and is cited in DAVIS, DISCRETIONARY JUSTICE 3 (1969).

2. Prior to the enactment of 42 PA. CONS. STAT. § 9712 (1982), sentences for the crimes enumerated in that section (*see infra* note 22) were to be within a maximum and minimum range set by statute. (*Cf.* 18 PA. CONS. STAT. § 1103 (1973), aggravated assault as a felony, maximum of 10 years, a minimum of *no more* than 5 years). The court determines the actual sentence pursuant to standards mandated by 42 PA. CONS. STAT. § 9721 (1980).

Section 9721(b) requires that the court impose a sentence of confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community, and the rehabilitative needs of the defendant. Further, the court must consider the sentencing guides adopted and promulgated by the Pennsylvania Commission on Sentencing.

In essence, these guidelines provide for three possible sentencing ranges, a minimum (or standard), an aggravated and a mitigated, with the proper range to be determined by computing the offense gravity score and the prior record score according to factors and tables provided. These two scores are then utilized to enter and apply the "sentence range chart."

Detailed procedures to accomplish this objective are set forth in the SENTENCING GUIDELINES, 204 PA. ADMIN. CODE §§ 303.1-303.9 (Shepard's 1982).

In imposing sentence, the court must make as part of the record a statement of the reasons for the sentence imposed, setting forth the guideline factors the court considered and the weight attached to them, and the facts concerning the circumstances of the offense and character of the defendant, including his potential for rehabilitation. *See, e.g.*, Commonwealth v. Phillips, 342 Pa. Super. 45, 492 A.2d 55 (1985).

Importantly, section 9721(b) mandates that, if the court imposes a sentence outside the sentencing guidelines, the court provide a contemporaneous written statement of the reason for the deviation from the guidelines. Section 9721(b) provides that failure to comply constitutes grounds for vacating the sentence. *See, e.g.*, Commonwealth v. Hutchinson, 343 Pa. Super. 596, 495 A.2d 956 (1985).

3. Governor Thornburgh's press release dated October 2, 1985, updated his administration's ongoing "crime fighting campaign." Though the press release was not directed at the Mandatory Minimum Sentencing Act, the administration did claim that "[i]n 1982, at Thorn-

this program has involved legislation establishing mandatory minimum sentences for crimes considered to be especially offensive.[4] Pennsylvania's present Drunk Driving Law,[5] enacted in 1982, is one highly visible example of this growing trend.

A less notorious but nonetheless important example of the movement is Pennsylvania's Mandatory Sentencing Act ("Act"), which provides for the imposition of a mandatory sentence of five years for certain offenses committed with firearms.[6] There is no extensive legislative history concerning the Act.[7] Its purpose, according to Justice Larsen of the Pennsylvania Supreme Court, is to assure "lengthened incarceration for felons who make visible use of firearms in the execution of their criminal deeds . . . [which has] the effect of maintaining in the citizenry much needed confidence in our criminal system."[8]

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burgh's suggestion, the General Assembly approved legislation imposing mandatory sentences for . . . offenders using firearms." The Governor's release announced the proposal of legislation that would permit lengthened minimum sentences. The current sentencing code set the minimum at "no more than half of the maximum." 42 PA. CONS. STAT. §§ 9755(b) and 9756(b) (1980). The legislation proposed would allow a minimum sentence to be imposed up to "the maximum allowed by law."

It is interesting to note the way in which the Governor justified the need for this legislation. "I am proposing today that the *judge, who has heard all of the evidence, and is in the best position to determine the appropriate sentence, have the authority to issue sentences that fit the crime and the criminal* . . . ." (emphasis added)

4. *See, e.g.*, 42 PA. CONS. STAT. § 9713 (1982) (sentences for offenses committed on public transportation); 42 PA. CONS. STAT. § 9714 (1982) (providing for life imprisonment for homicide); 42 PA. CONS. STAT. § 9717 (1982) (sentences for offenses against elderly persons); 42 PA. CONS. STAT. § 9718 (1982) (sentences for offenses against infant persons).

5. 75 PA. CONS. STAT. § 3731(e) (1982) provides as follows:

> (e) Penalty —
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> (1) Any person violating any of the provisions of this section is guilty of a misdemeanor of the second degree and the sentencing court shall order the person to pay a fine of not less than $300 and serve a minimum term of imprisonment of:
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> (i) not less than 48 consecutive hours.
>
> (ii) not less than 30 days if the person has previously been convicted of an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.
>
> (iii) not less than 90 days if the person has twice previously been convicted of an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.
>
> (iv) not less than one year if the person has three times previously been convicted of an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.
>
> (2) Acceptance of Accelerated Rehabilitative Disposition or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.

6. 42 PA. CONS. STAT. § 9712 (1982) [hereinafter "Act"]. *See infra* note 22 for the full text of the Act.

7. *See infra* notes 27-36 and accompanying text.

8. Commonwealth v. Wright, 508 Pa. 25, 43, 494 A.2d 354, 363 (1985) (Larsen, J.,

Certainly any attempt to foster public confidence in the criminal justice system is worthwhile. It is, however, at least debatable whether mandatory sentencing schemes further this goal.[9] It is also questionable whether a statute that raises serious constitutional questions should be used to achieve such a result. While a court will not and should not pass on the former question,[10] a court is uniquely qualified, and duty-bound, to provide an answer to the latter.[11]

After a brief overview of the provisions[12] and legislative history[13] of the Act, this comment will examine *Commonwealth v. Wright*,[14] a recent Pennsylvania Supreme Court case declaring the Act constitutional.[15] This comment will then raise a serious constitutional issue not adequately addressed in *Wright*. Specifically, it will consider whether the Act, because it allows a prosecutor standardless discretion in deciding to pursue a mandatory sentence, is an unconstitutional delegation of legislative power,[16] or whether the discretion exercised by the prosecutor at this sentencing stage is no greater than that exercised at any other stage of the prosecution. Both the nature of the non-delegation doctrine[17] under the Pennsylvania Constitution[18] and the scope of the prosecutor's discretion[19] will be examined in order to determine the constitutionality of the statute in this context.

II. Background

A. The Mandatory Minimum Sentencing Act and its Legislative

concurring), *aff'd*, McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986).

9. AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES, Standard 18-2.1(c) (1980), provides: "[T]he legislature should not specify a mandatory sentence for any sentencing category or for a particular offense."

10. Marbury v. Madison, 5 U.S. (1 Cranch 137) (1803).

11. *See* Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 164 (1853). ("An act should be declared unconstitutional (by a court) if and only if it violates the Constitution, clearly, palpably, and plainly.")

12. *See infra* notes 20-26 and accompanying text.

13. *See infra* notes 27-36 and accompanying text.

14. 508 Pa. 25, 494 A.2d 354 (1985), *aff'd*, McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986).

15. *See infra* notes 37-82 and accompanying text.

16. This issue was first raised in Commonwealth v. Dennison, 10 Phila. Rep. 531. In a well-reasoned opinion written by Judge Avellino, the court *en banc* ruled that the delegation was unconstitutional. For further discussion of this point, see *infra* notes 85-126 and accompanying text.

17. *See infra* notes 83-117 and accompanying text.

18. See PA. CONST. art. II, § 1, which provides, "The legislative power of this Commonwealth shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."

19. *See infra* notes 118-47 and accompanying text.

History

What was to become the Mandatory Minimum Sentencing Act was first proposed in the Pennsylvania State Senate in September of 1981[20] as an amendment[21] to Title Forty-Two of the Pennsylvania Consolidated Statutes (Judiciary and Judicial Proceedings). The Act[22] provides for the imposition of a mandatory minimum sentence of five years imprisonment upon conviction for having committed one of the enumerated offenses while visibly possessing a firearm.[23] These enumerated offenses are robbery, voluntary manslaughter, murder in the third degree, rape, involuntary deviate sexual intercourse, and aggravated assault.

Before the court imposes the mandatory minimum sentence, two conditions must be satisfied. First, the prosecutor must give reasonable notice following conviction of the Commonwealth's intention to

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20. Pa. S. 1081, 1981 Session, printed in HISTORY OF SENATE BILLS, SESSIONS OF 1981-82 at A-141 (1982).

21. The Act replaced 18 PA. CONS. STAT. § 1312, which provided in pertinent part: "In all cases except where the defendant has been convicted of first degree murder, the sentence shall be determined by the court as authorized by law." *See* 42 PA. CONS. STAT. § 9721 et seq. (1980).

22. The Act reads as follows:

> (a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C.S. § 2702(a)(1), (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.
>
> (b) Proof of sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.
>
> (c) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

42 PA. CONS. STAT. § 9712 (1982).

23. For an interesting discussion concerning what is a firearm for purposes of the Act, see Commonwealth v. Williams, Dauphin County Court of Common Pleas, Docket No. 1737 C.A. (1984) (holding a pellet gun was not a firearm for purposes of the Act). 42 PA. CONS. STAT. § 9712(a) (1982).

proceed under the sentencing scheme.[24] Second, after receiving this notice, the sentencing court must find by a preponderance of the evidence that the accused visibly possessed a firearm while committing the enumerated offense.[25] Upon such a finding the sentencing court must impose a minimum sentence of at least five years imprisonment. The sentencing court's only discretionary choice is whether to impose a sentence greater than five years.[26]

As noted, the legislative history of the Act is virtually non-existent.[27] The three printings of the legislation during its consideration by the Senate[28] show that the Act underwent an extensive re-drafting.[29] In its original form,[30] the Act did not provide for a notice requirement on the part of the prosecutor. The Act was therefore self-executing; the prosecutor had no discretion whatsoever.[31] In the final printing of the Act, prior to the Senate's final consideration, the Senate added the notice requirement.[32] This gives the prosecutor considerable latitude. There is, however, no recorded debate to explain the inclusion of this notice provision and the resulting prosecutorial discretion. The only mention of the bill in recorded debate consisted of a brief speech by Senator O'Pake.[33] His remarks focused exclusively on the problem of prison overcrowding that would result in light of this legislation.[34]

The Act, as amended, passed the Senate in December 1981. It was then sent to the House of Representatives, where final passage occurred in late February 1982. Again, there was no recorded debate.[35] In the absence of any pertinent debate, the courts have been forced to consider the plain language of the Act, as well as other factors, in determining the legislative intent.[36]

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24. 42 PA. CONS. STAT. § 9721(b).

25. *Id.* The court makes this finding of fact at a sentencing hearing. The only factor to be considered by the court at sentencing is whether the accused visibly possessed a firearm.

26. 42 PA. CONS. STAT. § 9712(a) (1982).

27. *See infra* notes 29-36 and accompanying text.

28. Pa. S. 1081, SENATE BILLS, printer's number 1270 (1981).

29. Pa. S. 1081, SENATE BILLS, printer's number 1515 (1981).

30. Pa. S. 1081, SENATE BILLS, printer's number 1270 (1981).

31. *Id.*

32. Pa. S. 1081, SENATE BILLS, printer's number 1515 (1981).

33. SENATE JOURNAL 1981 Session, 1208 (Pennsylvania 1981).

34. *Id.*

35. HISTORY OF SENATE BILLS, Sessions 1981-82, at A-141 (Pennsylvania 1982).

36. The trial court in *Dennison* used an interesting approach to this problem. The court examined the other mandatory minimum sentencing schemes for crimes committed on public transportation, *see* 42 PA. CONS. STAT. § 9714 (1982), against the elderly, *see* 42 PA. CONS. STAT. § 9717 (1982), and against infants, *see* 42 PA. CONS. STAT. § 9718 (1982). The court then noted that two of these subsequent mandatory sentencing acts had no notice requirement and were thus self-executing. *See Dennison*, 10 Phila. Rep. at 539. The importance of this was

B. *The Wright Decision*

In *Commonwealth v. Wright*,[37] the Supreme Court of Pennsylvania upheld the constitutionality of the Mandatory Minimum Sentencing Act. For purposes of appeal, the Court consolidated five trial court decisions. In each case, the trial court convicted the defendant of one of the Section's enumerated offenses,[38] and the prosecutor gave notice of the Commonwealth's intention to proceed under the statute. In four of the cases,[39] the trial court held the Act unconstitutional and refused to apply the mandatory minimum sentence. The courts then sentenced the defendants according to the guidelines[40] set forth in Pennsylvania's indeterminant sentencing statute. In the fifth case,[41] the trial court rejected the defendant's arguments and sentenced her in accordance with the Act.

The constitutional challenge posed by the five defendants centered on the intent and proof subsection of the Act.[42] That subsection provides that possession of a firearm is not an element of the crime itself. While notice to the defendant of the intent to seek sentencing under the mandatory provisions is not required prior to con-

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to discount the argument that the legislative policy of all the minimum mandatory sentencing schemes allowed the prosecutor this measure of discretion. *See Dennison*, 10 Phila. at 538. *But see*, *Wright*, 508 Pa. at 40 n.4, 494 A.2d at 361 n.4 (court states that the legislative judgment was to afford the prosecutor this discretion).

37. 508 Pa. 25, 494 A.2d 354 (1985).

38. *See supra* note 22 and accompanying text.

39. (1) In Commonwealth v. McMillan, No. 28 E.D., Appeal Docket 1984, appellee McMillan was convicted by a jury of aggravated assault, 18 PA. CONS. STAT. § 2702(a)(1) (1973), and possession of instruments of crime generally, 18 PA. CONS. STAT. § 907(a) (1973). He was sentenced to concurrent terms of three to ten and two and one-half to five years, respectively.

(2) In Commonwealth v. Peterson, No. 62 E.D. Appeal Docket 1984, appellee Peterson was convicted after a bench trial of voluntary manslaughter, 18 PA. CONS. STAT. § 2503, (1973) and possession of instruments of crime generally. She received a sentence of one to six years on the manslaughter charge and a concurrent six to eighteen month sentence on the weapons count.

(3) In Commonwealth v. Dennison, No. 101 E.D. Appeal Docket 1984, appellee Dennison was convicted by a judge of aggravated assault and possession of instruments of crime generally. Concurrent sentences of eleven and one-half to twenty-three months were imposed.

(4) In Commonwealth v. Smalls, No. 106 E.D. Appeal Docket 1984, appellee Smalls was convicted after a bench trial of robbery, 19 PA. CONS. STAT. § 3701(a)(1) (1976), and criminal conspiracy, 18 PA. CONS. STAT. § 903 (1978), for which he was sentenced to concurrent four to eight year terms. He also was convicted of violation of the Uniform Firearms Act, 18 PA. CONS. STAT. § 2705 (1973), for which he was sentenced to concurrent terms of two and one-half to five and one to two years respectively. Sentence was suspended on his conviction of possession of instruments of crime.

40. *See supra* note 2 and accompanying text.

41. In Commonwealth v. Wright, No. 4 E.D. Appeal Docket 1984, appellee Wright pleaded guilty to the charge of robbery and was sentenced to five years imprisonment pursuant to 42 PA. CONS. STAT. § 9712 (1982).

42. *Wright* at 30, 494 A.2d at 356.

viction, reasonable notice must be given to the defendant of the Commonwealth's intention to proceed under this section after conviction. The subsection also provides that the applicability of the Act depends on visible possession of a firearm demonstrated by a preponderance of the evidence, and this shall be determined by the court at sentencing.[43] The question raised in four of the cases at the trial level was whether the preponderance standard was violative of due process.[44] In the fifth case, *Commonwealth v. Dennison*,[45] the trial court held that the act was constitutionally infirm because it constituted an impermissible delegation of legislative power to the executive.

Most of the *Wright* opinion addressed the due process[46] question raised by the preponderance standard.[47] The defendants put forth two different but related arguments. First, the statute improperly allowed for the imposition of an enhanced mandatory penalty on the lowest burden of proof[48] recognized in the law,[49] the preponderance standard.[50] Second, the Act allowed imposition of a mandatory sentence based upon the establishment of a discrete critical fact relating to the circumstances of the offense, without requiring proof of the fact beyond a reasonable doubt.[51] The defendants claimed that this critical fact, visible possession of a firearm, was an element of the crime for which the court was sentencing the defendant. As such, they argued, the United States Supreme Court mandated in *In re Winship*[52] and *Mullaney v. Wilbur*[53]that visible possession must be

43. *See supra* note 22 subsection (b).

44. *Wright* at 31, 494 A.2d at 357.

45. 10 Phila. Rep. 531.

46. U.S. CONST. amend. XIV, § 1, provides that "[N]o state shall . . . deprive any person of life, liberty, or property without due process of law."

47. The Pennsylvania Supreme Court relegated discussion of the delegation question to a brief footnote. *See Wright* at 40, n.4, 494 A.2d at 361, n.4. *See infra* notes 78-82 and accompanying text.

48. The Supreme Court of the United States stated the reasoning behind the different burdens of proof as follows: "[The burden] instructs the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Santosky v. Kramer, 455 U.S. 745, 755 (1982) (*quoting* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

49. There are three standards of proof to which the prosecutor may be held: (1) *Preponderance of the Evidence* — "a finding that [a fact] is more probable than not." BLACK'S LAW DICTIONARY 1064 (5th Ed. 1979); (2) *Clear and Convincing* — "The measure of degree of proof which will produce in the mind of the fact finder, a firm belief as to the correctness of the allegations sought to be established. *Id.* at 227; (3) *Beyond a Reasonable Doubt* — "the fact finder must be entirely convinced [of the existence of fact], satisfied to a moral certainty." *Id.* at 147.

50. *Wright* at 31, 494 A.2d at 356.

51. *Id.*

52. 397 U.S. 358 (1970). In *Winship*, the Supreme Court mandated that the prosecution must prove all elements of a crime beyond a reasonable doubt.

proven beyond a reasonable doubt.

The Pennsylvania Supreme Court rejected both arguments.[54] The court began by noting that the legislature has expressly provided that the provisions of the Act shall not be an element of the crime[55] and that it is the province of the legislature[56] to define these elements.[57] The court then discussed the definition of an element,[58] and concluded that under Pennsylvania law, even in the absence of an explicit statement by the legislature, visible possession of a firearm could not be considered an element of the crime of which a defendant subject to the Act has been convicted.[59]

The court then discussed the argument that *In re Winship*[60] and *Mullaney*[61] compelled a contrary conclusion. The court acknowledged that *Mullaney* appeared to indicate that the holding in *Winship* was not limited to the elements of a crime as defined by the state legislature.[62] The Pennsylvania Supreme Court, however, relying on *Patterson v. New York*,[63] and the reluctance of the United

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53. 421 U.S. 684 (1975). In *Mullaney* the Court held that a Maine statute which attempted to define a single homicide offense (with degrees of sentencing) was unconstitutional. The burden was shifted to the defense to prove the presence of "heat of passion" or "sudden provocation" in order to lower the degree for sentencing purposes. The Court stated that the State was required to prove the absence of these elements, for they were criminal facts which went to the degree of the defendant's culpability.

54. *Wright* at 32, 494 A.2d at 357.

55. *See supra* note 22 subsection (b) and accompanying text.

56. Commonwealth v. Graves, 461 Pa. 118, 334 A.2d 661 (1975).

57. *But see Mullaney*, 421 U.S. at 698. (The Court extended the rationale of *Winship*, requiring proof beyond a reasonable doubt, to discrete critical facts that establish the required culpability. This burden of proof was therefore not limited to those elements as explicitly defined by the legislature.)

58. The Pennsylvania Crimes Code defines an element of an offense as follows:

> [S]uch conduct or such attendant circumstances or such a result of conduct as:
> (1) is included in the discipline of the offense;
> (2) establishes the required degree of culpability;
> (3) negatives an excuse or justification for such conduct;
> (4) negatives a defense under the statute of limitations; or
> (5) establishes jurisdiction or venue.

18 PA. CONS. STAT. § 103 (1982).

59.

> Visible possession of a firearm is neither included in the definitions of the felonies enumerated in section 9712(a) nor does it establish the culpability required under those definitions. See 18 Pa. C.S. §§ 2502(c), 2503, 2702(a)(1), 2901, 3121, 3123, 3701(a)(1)(i)-(iii). Subsections (3), (4), and (5) of the statutory definition of "element of an offense" are clearly inapplicable. Thus, under Pennsylvania law, even in the absence of an explicit statement by the legislature, visible possession of a firearm could not be considered an element of the crime of which defendant subject to section 9712 has been convicted.

Wright at 32, 494 A.2d at 357 (1985).

60. *See supra* note 52.

61. *See supra* notes 53 and 57.

62. *Wright* at 33, 494 A.2d at 358.

63. 432 U.S. 197 (1977). The United States Supreme Court refused to extend *Mullaney*

States Supreme Court to extend *Winship*, gave *Mullaney* a much narrower reading.[64] The court applied the reasonable doubt standard to those facts which go to the guilt or innocence of the defendant, not those relating to the severity of the punishment.[65] The court went on to say that visible possession of a firearm was a sentencing factor to be considered only after conviction of one of the enumerated offenses;[66] it in no way relieved the prosecution of its burden of proving guilt.[67] Thus, the court reasoned that under *Winship*, *Mullaney* and *Patterson*, the Due Process Clause did not require that visible possession of a firearm be treated as an element of the underlying offense that must be proven beyond a reasonable doubt.[68]

The court also rejected the defendant's argument that the mandatory minimum sentence's dependence on the determination of a fact by only a preponderance standard violated due process. The court noted[69] that while the sentencing procedure must comport with the basic requirements of the Due Process Clause,[70] the defendant need not be accorded the entire panoply of criminal trial procedural rights.[71] The court then said that the reasonable doubt standard during a sentencing hearing was not one of those basic rights which are essential.[72] To determine the minimum burden of proof tolerated by due process in a given proceeding, the court balanced the public and private interests involved, and it also made a policy judgment as to how the risk of error should be allocated among the parties.[73] The court found the liberty interests of the defendants to be similar to the interest of any convicted felon; the prior determination of guilt had extinguished his right to remain free.[74] The court further found

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and *Winship* so as to require New York to prove beyond a reasonable doubt the absence of extreme emotional disturbance. It found that the existence of extreme emotional disturbance as a mitigating factor was a separate issue which did not negate any elements which the State was required to prove.

64. *Wright* at 35-36, 494 A.2d at 359.

65. *Id.*

66. *Id. See supra* notes 22-23 and accompanying text.

67. *Wright* at 35, 494 A.2d at 359.

68. *Id.*

69. *Id.*

70. *Cf.* Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing is a critical stage for right to counsel purposes); Witherspoon v. Illinois, 391 U.S. 510 (1968), *reh'g denied*, 398 U.S. 898 (1968) (defendant has a legitimate interest in the character of the sentencing procedure).

71. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977).

72. *Wright* at 37-38, 494 A.2d at 360.

73. *Id.* (*citing* Addington v. Texas, 441 U.S. 428 (1979)).

74. *But see Santosky*, 455 U.S. 745 (1982). The Supreme Court mandated an intermediate standard of proof, clear and convincing evidence, when the individual interest at stake was more substantial than the mere loss of money. Viewed in the light of an aggravated assault conviction, the Pennsylvania Supreme Court's argument loses a bit of its luster. If the convicted felon were sentenced under 42 PA. CONS. STAT. § 3921 (1982), other factors, such as

a countervailing, "unquestionably important" interest on behalf of the Commonwealth to protect the public from armed felons and to deter the use of firearms.[75] The court concluded that, having weighed the interests involved together with the fact that the risk of error was slight,[76] it was not unreasonable for the defendant to share equally with the Commonwealth any risk of error in the fact finding process. The preponderance standard, therefore, satisfied the minimum requirements of due process.[77]

The court gave only a cursory review to the delegation argument raised by the *Dennison* case.[78] It merited but one line of text,[79] accompanied by a footnote.[80] The court flatly rejected the argument that the Act violated the separation of powers principle by depriving the sentencing court of discretion in the sentencing procedure.[81] This issue, however, was not raised in the *Dennison* opinion. The court similarly dismissed the illegal delegation argument, which had led a Philadelphia Common Pleas court sitting en banc to rule the Act unconstitutional.[82] The Pennsylvania Supreme Court held that the delegation of the power to decide whether to pursue the mandatory sentence was constitutional because there was no significant distinction between the discretion afforded in the Act and the discretion exercised by the prosecutor at any other stage of the criminal prosecution.

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the defendant's background, possibility of rehabilitation and any mitigating circumstances would be used to determine the sentence. *See supra* note 2 and accompanying text. While it is true he could receive the maximum of five to ten years, it is likely he would receive a lesser sentence. In that sense, the increased duration of the loss of one's own liberty would seem to amount to more than the "*mere loss of money.*"

75. *Wright* at 40, 494 A.2d at 361-62.

76. *Id.* (The Court stated that visible possession of a firearm was a straightforward determination with scant potential that suspicion and conjecture will enter into the fact finder's decision. The decision was also open to appellate review, which further served to decrease the risk to the defendant).

77. *Wright* at 41, 494 A.2d at 362.

78. Commonwealth v. Dennison, 10 Phila. Rep. 531.

79. *Wright* at 40, 494 A.2d at 361.

80. *Id.* n.4, as follows:

> 4. For this reason the argument that section 9712 violates the separation of powers principle by depriving the sentencing court of discretion may be rejected out of hand. We must also decline the invitation to hold that section 9712 improperly delegates this legislative power to the executive by giving the prosecution discretion whether to invoke the mandatory sentencing procedure. We perceive no distinction between such an exercise of discretion and the prosecutorial discretion exercised at any other stage of the criminal prosecution. The decision to accord the Commonwealth a measure of discretion as to whether to employ section 9712 in a given case was a proper exercise of legislative judgment.

81. *Id.*

82. *Id.*

III. The Non-Delegation Doctrine

A. Non-Delegation in Pennsylvania

The Pennsylvania Constitution mandates that legislative power, which is the power to make, alter, and repeal laws, shall vest in the General Assembly, consisting of the Senate and House of Representatives.[83] This explicit grant of power to legislate,[84] in combination with the doctrine of separation of powers[85] among the three co-equal branches of government, gives rise to the non-delegation doctrine. The non-delegation doctrine prohibits the delegation of legislative power to the executive, judiciary, or the people of the Commonwealth.[86]

The Pennsylvania Supreme Court laid the foundation for the determination of what is and what is not a delegation of legislative power in *Locke's Appeal*[87] in 1871. In overruling *Parker v. Commonwealth*,[88] the court held constitutional a legislative act[89] granting counties the right of local option in the granting of liquor licenses.[90] Justice Agnew wrote that "[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine *some fact or state of things* upon which the law makes, or intends to make its own action depend."[91] Thus, the court held that the determination by the electorate that the populace was for or against the granting of liquor licenses in their own ward was not an unconstitutional delegation by the legislature. Despite powerful precedent and strong dissents by Chief Justice Read[92] and Justice Shar-

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83. O'Neill v. American Fire Insurance Co., 166 Pa. 72, 30 A. 943 (1895).

84. PA. CONST art. II, § 1.

85. A recent Commonwealth Court opinion pointed out:

> The principal of separation of powers is the cornerstone of our democratic form of Government. From the historical perspective persuaded by Hamilton, Jay and Madison, to the present time, it has been and remains, a valid doctrine determining the structure of both our State and Federal systems, and is the statement of the parameters with which each of the branches of Government operates.

Heller v. Frankston, 83 Pa. Commw. 294, 302, 464 A.2d 581, 585 (1983).

86. *See* Locke's Appeal, 72 Pa. 491 (1871), discussed *infra* notes 87-93 and accompanying text.

87. 72 Pa. 491 (1871).

88. 6 Pa. 507 (1847). In *Parker*, the supreme court ruled that this granting of a local option to determine whether a liquor license should issue was an illegal delegation of legislative power.

89. Act of May 3, 1871 (P.L. 523).

90. The facts in Locke involved a vote by a ward in Philadelphia about a particular liquor license. If the majority of voters cast ballots against the licenses, then the act made it illegal to issue such a license.

91. Locke's Appeal, 72 Pa. at 498 (emphasis added).

92. Chief Justice Read argued as follows:

> By whom is this law enacted? Clearly not by the legislature, but by the voters,

swood,[93] the court opined that this determination of fact or state of things was not an exercise of the legislative power by the electorate. This rationale, although axiomatic today, is not, in and of itself, sufficient to hold constitutional a law which permits an administrative board to determine policy. The legislature must further provide appropriate and adequate standards and guidelines in order to guide these determinations.[94]

The legislature may confer authority and discretion in connection with the execution of the law.[95] It may not, however, delegate this authority without providing standards that limit and define these discretionary powers with reasonable clarity.[96] Although administrative details need not be specifically outlined in the statute,[97] vague or nonexistent standards that fail to delineate with some clarity the bounds of the administrator's power are not adequate.[98]

In determining the adequacy of standards accompanying a legislative delegation,[99] the court is not bound by the mere letter of the

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> without discussion, and in secret, no man knowing how his next door neighbor voted, nor his reason for casting his ballot as he has chosen to do. The question therefore, of license or no license is decided by whom the Constitution has stripped of all legislative power or authority. This is a legislative question purely and must be decided . . . openly and publicly.

Locke's Appeal, 72 Pa. at 503 (Read, C.J., dissenting).

93. Justice Sharswood argued:

> Now I think no one would doubt, if the legislature were to submit to the people of the county or township, or ward, the question whether murder should be punished by imprisonment only, and let the people vote "capital punishment" or "no capital punishment," that would be a law and the legislature could not delegate it to the people. Does the law such as the one before us differ from this?

Locke's Appeal, 72 Pa. at 508 (Sharswood, J., dissenting).

94. In *Holgate Bros. v. Bashore*, 331 Pa. 255, 200 A. 672 (1938), the Pennsylvania Supreme Court held that "where necessary hardship would be incurred" was an inadequate standard to accompany the legislative delegation to Department of Labor and Industry of the power to "alter, amend or repeal the basic rules and regulations of the General 44-Hour Week Law of 1937 (P.L. 2766)."

95. *In re* Issuance of Restaurant Liquor License to Tate, 196 Pa. Super. 193, 173 A.2d 657 (1961).

96. *See Holgate, supra* note 94, at 260, 200 A. at 675 (1938).

97. Chartiers Valley Joint School District v. County Bd. of School Directors, 418 Pa. 520, 529, 211 A.2d 487, 493 (1965).

98. *But see* WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW, 257 (1985). Judge Woodside indicates that *Holgate* represents the high-water mark of the standard requirement of the non-delegation doctrine. "Although the rules have not changed, the Supreme Court [of Pennsylvania] is more likely to find adequate standards to guide and restrain agencies in the statutes today than it did in the days of *Holgate*."

99. Pennsylvania courts have found these standards to be adequate to accompany the corresponding delegation of legislative power. *See, e.g.*, Belovsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277 (1947) (valid to authorize administrators to designate as blighted areas those "areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein"); Commonwealth of Pennsylvania Water & Power Resources Bd. v. Green Spring Co., 394 Pa. 1, 145 A.2d 178 (1958) (valid to authorize the Board to issue permits for construction of dams considering (1) whether the obstruction

law, but it will look also at the underlying purpose and reasonable effect of the statute. If the purpose and effect establish a general standard according to which the power must be exercised, the delegation will not be invalidated.[100] The standards must, however, be specific enough to guard against the uncontrolled exercise of discretion by the administrator.[101] The court also will examine the purpose of the statute to determine the breadth of the administrator's discretion.[102] Where the act envinces a clear legislative policy to vest a commission with broad supervisory powers, the discretionary powers of the commission also will be broad.[103]

The existence and adequacy of standards[104] accompanying a legislative delegation is not the only constitutional hurdle a delegating act must clear. As *Locke* points out, the act must be complete in and of itself, needing no further action on the part of the legislature to make it effective.[105] It cannot be an invitation to the administrator to make law,[106] but only to apply it. Thus, before the act is "complete," the basic policy choices must have been made by the legislature.[107] They alone are vested with this power by the Constitution,[108] and they alone are responsible to the electorate.[109] In a general sense

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would potentially endanger life or property, (2) whether the obstruction would divert the natural course of the stream or river); Dauphin Deposit Trust Co. v. Meyers, 388 Pa. 444, 130 A.2d 686 (1957) ("adequacy or inadequacy of banking facilities" a reasonable standard); In re Weaverland Indep. School Dist., 378 Pa. 449, 106 A.2d 812 (1954) (valid to allow the Superintendent to approve a petition for the establishment of a new school district if he viewed the merits of the petition from an "educational standpoint"); In re Fisher, 344 Pa. 96, 23 A.2d 878 (1942) (administrative body given the power to fix "fair" wages, considering such factors as "the cost of living" and "the reasonable value of services"); Rohrer v. Milk Control Bd., 322 Pa. 257, 186 A. 336 (1936) (valid to fix milk prices based on the same standards).

100. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 216, 346 A.2d 269, 293 (1975).

101. Dussia v. Barger, 466 Pa. 152, 160, 351 A.2d 667, 671 (1975). After discussing the principles of the non-delegation doctrine, the court determined that the power being challenged did not emanate from the legislature. The State Police Commissioner's power to terminate an officer for cause had existed at common law. The legislature's codification of this did not make it legislative power. This obviated the need to inquire whether the legislature had set forth adequate standards to check the Commissioner's discretion. *William Penn Parking*, 464 Pa. 168, 456 A.2d 269 (1975).

102. Gilligan v. Pennsylvania Horse Racing Comm'n, 492 Pa. 92, 422 A.2d 487 (1980). The court noted that the function of the Commission was the regulation of a previously illegal activity. This being the purpose, the court denied the challenge to the broad powers delegated to the Commission concerning all aspects of the racing industry. This included the setting of fee schedules for jockeys.

103. *Id.* at 96, 422 A.2d at 489.

104. *See supra* notes 95-103 and accompanying text.

105. *Locke*, 72 Pa. at 496.

106. *Id.*

107. *William Penn Parking*, 464 Pa. 168, 346 A.2d 269 (1975).

108. PA. CONST. Art. II, § 1. *See supra* note 84 and accompanying text.

109. Though the public prosecutor is also responsible to the electorate, he is accountable only for his enforcement of these basic policy decisions, and not for his setting of policy or law-

these basic policy decisions, like adequate standards, would serve as a check on the discretionary powers of an administrator.[110] Any use of those delegated powers must conform with the stated purpose of the act, the general factual situations within the contemplation of the act, and those remedies and sanctions afforded under the statute. The reasonable effect of any administrative action must comport with these basic policy decisions of the legislature.

The non-delegation doctrine is alive[111] in Pennsylvania, though it may be argued that it is not well.[112] What can be gleaned from this analysis is that the supreme court will go to virtually any length to hold a legislative delegation valid.[113] In summary, the two principal limitations on the legislature's power to delegate are: the basic policy choices must be made by the legislature; and the legislation must provide adequate standards that guide the administrative function.[114] In determining whether the basic policy choices have been made, a court will look to the general purpose of the act.[115] In certain instances, the court must determine if the legislature has done whatever possible to delineate the bounds of the power delegated to an administrative board which, because of its function, necessarily applies an expertise not typically within the common experience of

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making.

110. *Gilligan*, 492 Pa. at 96, 422 A.2d at 489.

111. *Cf.* Chambers Development Co., Inc. v. Commonwealth, ex rel Allegheny County Health Dep't, 81 Pa. Commw. 622, 474 A.2d 728 (1984).

112. *See supra* note 101. *See also* DAVIS, ADMINISTRATIVE LAW TREATISE, § 3:14. In this section, Professor Davis discussed the typical state opinion regarding the non-delegation doctrine and the lengths to which a court will go in order to uphold a legislative delegation to an administrative body. For example, while a state may require "adequate standards" for a delegation to be valid, it will settle simply for a statement that the administrator must act reasonably, or in the best interests of the state. *Cf. In re* Weaverland Indep. School Dist., 378 Pa. 449, 106 A.2d 812 (1954).

113. This, however, does not obviate the need for the non-delegation doctrine. The purposes served by it are laudatory and legally sound. Professor Davis does not dispute this. *See* ADMINISTRATIVE LAW TREATISE § 315 at 207. It also does not change the law in this Commonwealth. Any delegation of legislative power that is challenged will be scrutinized in light of the principles laid out in this section. *See supra* notes 83-110. If it is found to be deficient as to either of the two concerns put forth, it will not pass constitutional muster. Davis takes issue with this result. A court's inquiry should be directed not at the statute itself, but at the totality of protections that exist to structure and check the discretionary powers afforded to administrative agencies. Instead of preventing delegations by the legislature, courts should encourage delegations provided there exists a check on the unbridled exercise of this power. Some examples of these safeguards include, internal regulations and standards promulgated by the administrator, the existence of legislative supervision of his actions, and the possibility of open hearings and judicial review. As to the last, Davis stated: "[O]penness is the natural enemy of arbitrariness and the natural ally in the fight against injustice." DAVIS, DISCRETIONARY JUSTICE at 98 (1969).

114. *William Penn Parking*, 464 Pa. 168, 346 A.2d 269 (1975).

115. *Id.*

the lawmakers.[116] In determining the adequacy of the standards, the court is not limited to the statutory language,[117] but will look to the purpose of the legislation and its reasonable effect. In that sense, the court will fashion standards, if it can, where none are explicitly stated.

IV. The Scope of the Prosecutor's Discretion[118]

The United States legal system vests in the prosecutor broad discretionary powers,[119] ranging from the power to decide whom to charge with which crime, to, in certain cases, deciding the minimum penalty which a convicted person will receive.[120] The reasons for vesting such broad powers in the hands of the prosecutor are threefold. First, since penal codes tend to be general, the prosecutor must have discretion to decide whether and to what degree these codes apply.[121] This promotes the equitable objective of individualized justice.[122] Second, penal codes are examples of "over criminalization," in that they define as criminal every act that the public is against, regardless of enforcement problems or changing societal values.[123] Thus, to permit necessary distinctions to be made requires the vesting of broad discretionary powers. The third and arguably the principal rationale for prosecutorial discretion stems from the limited resources available for law enforcement.[124] It would be both physically and economically impossible for a prosecutor to process every case that was presented. Therefore, he must be able to use his own discretion in allocating available resources, so as to prosecute criminals

116. *Cf. Gilligan*, 492 Pa. 92, 422 A.2d 487 (1980); Appeal of Weinstein, 159 Pa. Super. 437, 441, 48 A.2d 1, 3 (1946); *Water & Power Resources Bd.*, 394 Pa. 1, 145 A.2d 178 (1958).

117. *William Penn Parking*, 464 Pa. 168, 346 A.2d 269 (1975).

118. A complete discussion of the broad discretionary powers possessed by a prosecutor exceeds the scope of this comment. Therefore, this section discusses generally the powers of the prosecutor pursuant to the charging function in order to draw the distinction between these powers and those exercised in the post-trial setting.

119. *See* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV 1521 (1981).

120. As is evidenced by the Act, an interesting trend has emerged. As legislatures have taken discretion away from sentencing courts the level of prosecutorial discretion has increased proportionally. This can be either given explicitly, as in the case of § 9712 and certain recidivist statutory schemes, *see, e.g*, 42 PA. CONS. STAT. § 9713 (1982), or it may be exercised more discretely, as in the prosecutor's decision to charge a defendant with an offense that will trigger these acts. For a discussion of recidivist statutes and the constitutional problem posed by them, see Note, *Constitutional Infirmities of Indiana's Habitual Offender Statute*, 13 IND. L. REV. 606 (1980).

121. *See* Cox, *Prosecutorial Discretion an Overview*, 13 AM. CRIM. L. REV. 383 (1976).

122. *See* Gershan, PROSECUTORIAL MISCONDUCT, § 4.2 (1982).

123. *Id.*

124. *See, e.g.*, H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT (1982).

most effectively.

The apex of the prosecutor's power lies in the charging functions.[125] It is well established that the Constitution permits the prosecutor, an actor in the executive branch, to make the decision whether or not to bring criminal charges[126] against an individual, and what charges to file among several possibly applicable statutes.[127] There are both constitutional[128] and ethical[129] restrictions on this power. A prosecutor may not be discriminatory in enforcing[130] a law if that discrimination is based on some arbitrary or invidious classification.[131] In addition, he may not bring a prosecution against a given defendant based on personal or political motivations.[132] In attempting to prove an improperly motivated prosecution, however, the challenging defendant has a difficult burden to overcome. Courts create a rebuttable presumption that the prosecutor has acted in good faith.[133]

Another aspect of the charging function is selecting which charges are to be brought from various provisions which proscribe the same criminal act. In *United States v. Batchelder*,[134] the United States Supreme Court ruled that, absent a finding that a prosecutor lacked probable cause, the decision as to what charge to file rested in the prosecutor's discretion.[135] This power may have a profound impact on a defendant. In *Batchelder*, the United States Attorney had a choice of proceeding under one of two overlapping provisions of the

125. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION (approved draft 1971) § 3.4. *See also* Vorenberg, *supra* note 119, at 1524.

126. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Commonwealth v. Malloy, 304 Pa. Super. 297, 450 A.2d 689 (1982); Petition of Piscanio, 235 Pa. Super. 490, 344 A.2d 658 (1975).

127. U.S. v. Batchelder, 442 U.S. 114, 123-24 (1979).

128. In *Oyler v. Boles*, 368 U.S. 448 (1962), the Court held that selective enforcement in and of itself was not unconstitutional. However, if it is established that the stated selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, a constitutional defense may arise. *Id.* at 456.

129. ABA STANDARDS, *supra* note 9, at § 3.9(c).

130. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that such enforcement is a violation of equal protection).

131. In order to make out a constitutional defense, the following elements must be proven: (1) that others similarly situated to the defendant were not prosecuted; (2) that the defendant was singled out as a result of some conscious, deliberate, and purposeful decision; (3) that the discriminatory selection was based upon an arbitrary, invidious or impermissible consideration. United States v. Verrios, 501 F.2d 1207 (2d Cir. 1974). *But see* People v. Tillman, 4 Ill. App.3d 910, 282 N.E.2d 231 (1972) (refusing to recognize this defense on the ground that there is no deprivation of a right since there is no right to commit a crime).

132. *See supra* note 131.

133. Oyler v. Boles, 308 U.S. 448 (1962); United States v. Saade, 652 F.2d 1126 (1st Cir. 1981).

134. 442 U.S. 114 (1979).

135. *Id.* at 123-24.

Omnibus Crime Control and Safe Streets Act of 1968.[136] Although the two provisions made identical conduct illegal, one provision carried a maximum of five years,[137] the other a maximum of two years.[138] The Court upheld the prosecutor's choice to proceed under the harsher statute.[139]

The court of appeals in *Batchelder* expressed doubt about the constitutionality of this legislative redundancy.[140] In its view, because the two provisions prohibited identical conduct, the prosecutor's discretion as to which of the two penalties would apply would be unfettered,[141] leading to unequal justice. The United States Supreme Court summarily rejected this argument.[142] The prosecutor's discretion to choose between the two provisions was not unfettered[143] because it was subject to the constitutional restraints outlined in *Oyler v. Boles*[144] and *Yick Wo v. Hopkins*.[145] This decision, like any other within the prosecutor's charging function, was given a presumption of good faith. The Court also rejected the argument that

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136. 18 U.S.C. §§ 922 and 1202 (1968).
137. In pertinent part,
18 U.S.C. § 922(h) provides:
It shall be unlawful for any person —
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug . . . or narcotic drug . . .; or
(4) who has been adjudicated as a mental defective or has been committed to any mental institution;
to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
18 U.S.C. § 924(a) provides in relevant part: "Whoever violates any provision of this chapter . . . shall be fined $5,000, or imprisoned five years, or both . . . ."
138. 18 U.S.C. § 1202(a) provides:
Any person who —
(1) has been convicted in a court of the United States or of a state or any political subdivision thereof of a felony, or
(2) has been discharged from the Armed Forces under dishonorable conditions, or
(3) has been adjudged by a court of the United States or of a state or any political subdivision thereof of being mentally incompetent, or
(4) having been a citizen of the United States has renounced his citizenship, or
(5) being an alien who is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for more than two years, or both.
139. *Batchelder*, 442 U.S. at 124.
140. 581 F.2d 626 (7th Cir. 1978).
141. *Id.* at 633 n.11.
142. *Batchelder*, 442 U.S. 124-25.
143. *Id.*
144. *See supra* note 128 and accompanying text.
145. *See supra* note 130 and accompanying text.

the prosecutor was empowered to determine the ultimate criminal sanction. This was still the province of the court. Prosecutorial discretion merely enabled the sentencing judge to impose a greater sentence and fine under one provision rather than under the other.[146]

It is important to note that the Court examined the issue of prosecutorial discretion in the context of the charging function. The Court has not, as of yet, examined the question of whether it is within the prosecutor's discretion to decide which sentencing scheme will apply if that decision is not made in the context of the charging function, but instead is made in the post-conviction phase of the prosecution.[147]

V. The Act is Unconstitutional Because it Gives the Prosecutor Standardless Discretion in Deciding Whether to Pursue the Mandatory Minimum Sentence.

Any analysis of the Act under the non-delegation doctrine must begin with the standards set forth in *Locke's Appeal*.[148] The Act must be complete. It cannot be an invitation to the administrator to make law. The administrator, however, may determine matters of fact. The Act in question does not become operable unless two conditions are met.[149] The prosecutor must give timely notice of his intention to proceed under the Act, and the sentencing court must determine by a preponderance of the evidence that the accused visibly possessed a firearm.[150] Because the second condition involves a purely factual determination, it comports with *Locke*. Arguably, the first condition does not.

The notice provision involves a purely subjective determination by the prosecutor that the Act should apply. It is not self-executing, but instead turns upon a discretionary decision by the District Attorney. The Act's application is wholly dependent upon his decision to proceed under the sentencing scheme. The importance of this decision for a given defendant cannot be underestimated.

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146. *Batchelder*, 442 U.S. at 125.

147. As has been noted, the Pennsylvania Supreme Court failed to see this distinction (*see supra* notes 78-82 and accompanying text). The United States Supreme Court apparently will address this issue in the *McMillan* case.

148. *See supra* notes 87-95 and accompanying text.

149. *See supra* notes 96-111 and accompanying text.

150. "Visibly possessed" has been defined for purposes of the Act as: "[p]ossession that manifests itself in the process of the crime. Thus where the victim never saw the gun, but heard the shot, saw smoke and sustained a gun shot wound, that evidence was sufficient to prove that [the defendant] visibly possessed a firearm." Commonwealth v. Woodlyn, 345 Pa. Super. 200, 497 A.2d 1374 (1985).

> Thus, Dennison, at age 73, is faced with the prospect of spending the rest of his natural life incarcerated not because the Mandatory Sentencing Act rests quietly upon the pages of a book of statutes, but rather because the District Attorney has chosen to lift that book and throw it not too gently in Dennison's direction.[151]

Prosecutors must make subjective determinations as to the applicability of criminal statutes daily.[152] These decisions are not only made but are encouraged. The decision not to charge a given individual is not open to judicial review. The decision to charge rests within the sound discretion of the prosecutor,[153] and it will not be disturbed absent a showing of selective or discriminatory enforcement. Although the Pennsylvania Supreme Court saw no difference[154] between the post-trial decision afforded the prosecutor under the Act and the daily pre-trial decisions he must make pursuant to his charging function, it is arguable that a qualitative difference does exist.

The pre-trial, post-trial distinction is not merely one of timing or semantics. First, the reasons underlying the great latitude afforded under the charging power do not exist in the post-trial setting. There are no limited resources to be saved by not filing under the Act. Second, while the decision to charge is given a presumption of validity, it is either proven or disproven in the openness of the courtroom. The decision to provide the requisite notice is made in the confines of the District Attorney's office, and there is no degree of certainty as to what, if any, criteria are applied to formulate this decision.[155] Furthermore, the District Attorney need not justify this decision at the sentencing hearing. The judicial inquiry is statutorily limited to whether the defendant visibly possessed a firearm.[156]

The third qualitative distinction involves the differing degrees by which the two decisions will ultimately affect the sentence received by the defendant. The charging power allows the prosecutor, as a practical matter, to affect the sentence. The *Batchelder*[157] and *Lutz*[158] decisions have recognized this. The effect, however, is indi-

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151. *Dennison*, 10 Phila. at 538.

152. *See supra* notes 118-47 and accompanying text.

153. *See supra* notes 125-33 and accompanying text. *See also* Commonwealth v. Lutz, 508 Pa. 297, 306, 495 A.2d 928, 932 (1985).

154. *Wright* at 40 n.4, 494 A.2d at 363 n.4. (*See supra* note 80 for full text of n.4.)

155. *Dennison*, 10 Phila. 540-41.

156. *See supra* note 22 subsection (c).

157. *See supra* notes 134-46 and accompanying text.

158. *Lutz* at 306, 495 A.2d at 932-33. In *Lutz*, the defendant raised the issue whether the district attorney's discretion was limited by the Mandatory Sentencing provisions of the motor vehicle code. *See supra* note 5. The court said it was not, stressing that "Accelerated

rect at best. It is tempered by the sentencing court's consideration of all other factors[159] attendant in a given case. Also, while the prosecutor, pursuant to the charging power, may decide between one sentencing scheme or another, the ultimate sentence is still up to the sound discretion of the trial judge and may fall anywhere within the statutory limits. The discretion given the prosecutor under the Act allows him, in the post-trial setting, to preclude one of the sentencing schemes. In *Batchelder*,[160] the prosecutor was merely providing for *the possibility* of a greater sentence, while under the Act, the prosecutor is mandating that a minimum sentence of five years be imposed.

These three differences show that the two decisions do not derive from the same prosecutorial power. If, as the *Wright* opinion indicates, these two decisions derive from the same power, there arises no need to discuss the delegation question. The prosecutor is acting qua prosecutor, and this power does not derive from any legislative pronouncement. If the decision to proceed under the Act is qualitatively different than those normally possessed by the prosecutor, then the power to make this decision must come from the legislature.

Because the Act is not self-executing, the legislature has chosen to delegate the power to determine whether the Act should be applied in a given case. It may confer discretion, however, it must provide adequate standards to guide the prosecutor and check his discretion. The legislature must also make the basic policy decisions concerning the Act and its applicability. Simply because the legislature has chosen to delegate this power will not necessarily invalidate the legislation. As to the subject delegation, the Pennsylvania Supreme Court has deemed it a proper exercise of legislative judgment.[161] The legislature's power to make this judgment is not in question here. What is in question is the way in which the legislature has exercised this power.

A stated purpose of the non-delegation doctrine is to insure that the basic policy decisions are made by the politically responsible parties. One basic choice has been made. Crimes committed with firearms should be punished more severely than those committed with-

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Rehabilitative Disposition ("ARD") is a *pretrial disposition*. His failure to submit the case for ARD did not in itself set the sentence. If the defendant is acquitted, no sentence will issue. If he is not, the legislation provides the sentence, not the prosecutor." (emphasis added)

159. *See supra* note 2 and accompanying text.

160. *See Batchelder*, 442 U.S. at 125.

161. *Wright* at 40 n.4, 494 A.2d at 363 n.4.

out firearms. A question left unanswered, however, is in which instances this Act should not apply? The legislature, by providing the notice requirement, has decided implicitly it should not apply in all instances. When should it be inapplicable? What if the defendant was initially a victim, who used legally unjustifiable force[162] in repelling his attacker? Will the Act apply? These are basic policy choices to which the Act does not speak. Instead, the legislature has abdicated its duty, inviting the prosecutor to make these choices for it.

If, however, the basic policy decision was to allow the prosecutor to decide, a second infirmity becomes evident. By what standards is this decision to be made? Again, the statute is silent. There is neither explicit language to guide the prosecutor nor parameters to check his discretion. Moreover, no standards are evident from an examination of the basic purpose of the Act. If the General Assembly truly intended to impose mandatory sentences, then any manner and degree of prosecutorial discretion exercised in this post-trial setting would be inconsistent with the Act's stated purpose.

It has been suggested that the prosecutor is not in a position to exercise unfettered discretion.[163] He is still bound by constitutional constraints. Such constraints are conditioned on judicial review of his action. Under the Act, however, the sentencing hearing is limited to a factual determination and constitutes a mere ratification of his decision. The constraints are also inadequate because in the post-trial setting the prosecutor has a greater effect on the sentence. He is improperly placed in a position where inappropriate motivations, such as vindictiveness or political advantage, can lead him to advocate a sentence of at least five years imprisonment. These ramifications are serious, and warrant additional protection in the nature of adequate standards promulgated by the legislature to check this discretion. The legislature must provide such standards to cure the constitutional infirmity of the Act.

VI. Epilogue

In the year since this comment was written, defendants have continued to challenge the constitutional validity of the Act, basing their challenges on the notice requirement and its concomitant prosecutorial discretion. Two significant superior court opinions have since been handed down which have attempted to deal with the issue presented by this comment.

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162. *Dennison*, 10 Phila. at 540.
163. *See supra* notes 141-47 and accompanying text.

In *Commonwealth v. Anderson*,[164] the issue presented to the court was whether the vesting of unbridled discretion in the prosecutor to determine whether the mandatory sentence of five years would be applied, violated the separation of powers doctrine. The court held that it did not. It began by noting that this argument "misapprehended"[165] the nature of the Act. It was true, the court noted, that the "language at first blush would seem to empower the prosecutor to decide when and to whom the [A]ct should apply."[166] However, it reasoned that "the obligatory language of § 9712 . . . makes clear that the mandatory minimum shall be imposed in all cases where the sentencing court has determined that the conditions are met."[167]

This interpretation would seem to beg the question. If the notice provision is not met, the Act is not applicable. If the prosecutor does not file notice to proceed under this section, there is no inquiry made by the sentencing court as to its applicability. Instead the sentencing hearing will focus on factors relevant under the indeterminant sentencing scheme.[168] Without the required notice the sentencing court's "inquiry" becomes a mere ratification of the District Attorney's decision that the five year mandatory sentence should not apply.

In *Commonwealth v. Cofoni*,[169] Judge Cercone delivered the opinion for the court which may have the effect of rendering this comment moot. Judge Cercone held that the notice provision provided "*no* discretion to the prosecutor in the proper case."[170] "[T]hus as we read the statute . . . where some quantum of evidence exists that an enumerated crime was committed by a defendant who visibly possessed a firearm, the district attorney must invoke section 9712 . . . ."[171] This interpretation is clearly at odds with the *Wright*[172] opinion, which referred to the prosecutor's "measure of discretion"[173] under the Act. Perhaps anticipating this, Judge Cercone noted that this comment in the *Wright* decision was merely dicta and not a holding in fact case.[174]

164. 345 Pa. Spuer. 407, 498 A.2d 857 (1985).
165. *Id.* at 412, 498 A.2d at 889.
166. *Id.*
167. *Id.* (emphasis added).
168. *See supra* note 2 for an explanation of this scheme.
169. 349 Pa. Super. 407, 503 A.2d 430 (1986).
170. *Id.* at 413, 503 A.2d at 434.
171. *Cofoni*, at 413-14, 503 A.2d at 434.
172. Commonwealth v. Wright, 508 Pa. 25, 494 A.2d 354 (1985).
173. *Id.* at 40, n.4, 494 A.2d at 361 n.4 (*see supra* note 80 for full text of the footnote).
174. *Cofoni*, at 414 n.2, 503 A.2d at 434 n.2.

The interpretation given the Act in *Cofoni* is certainly an improvement over the "measure of discretion" language used in *Wright*. It removes many of the inherent dangers that stem from unbridled prosecutorial discretion. However, a question remains. What quantum of evidence must exist before the mandatory provisions of the Act must apply? What facts are necessary to warrant its application? This author wonders whether the prosecutor's inquiry into the existence of "some quantum" of evidence of the use of a firearm, will differ as a practical matter from the determination made prior to *Cofoni*.

Mark B. Sheppard