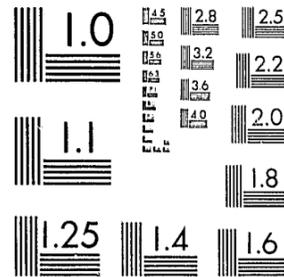


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Mandatory Sentencing: The Experience of Two States

THE ISSUE

Increasing public demands for more effective crime control have created substantial pressures on legislatures to re-examine the scope or structure of criminal penalties. One response has been the enactment of sentencing laws which impose mandatory minimum periods of confinement for specified types of offenses or offenders. Questions have been raised about both the fairness and efficiency of this approach.

CONTENTS OF THIS BRIEF

highly publicized examples of mandatory sentencing are reviewed in this Brief. In 1973, the New York State legislature attempted to deter drug-related crime by increasing the severity of terms for sale and possession of illegal drugs and making their imposition mandatory in cases. Two years later, Massachusetts imposed a mandatory penalty for carrying guns, in the of reducing the seriousness, if not the incidence, of street crime. Although the intent has to reduce crime by increasing the certainty and severity of punishment, the available nce shows a large gap between legislative intent and actual criminal justice practice.

remainder of this Brief:

ection I defines the intent of mandatory sentences;

ections II and III describe the provisions and effects of the New York State Drug Law and the Massachusetts Gun Law;

ection IV highlights the lessons learned from these two laws; and

ection V provides a bibliography of relevant publications and summaries of the egislation.

ocument is the first in a series of Policy Briefs that will examine changes in sentencing law ractice. Future Briefs will focus on other sentencing strategies such as determinate sentenc- entencing guidelines, and community corrections legislation.

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NATIONAL INSTITUTE OF JUSTICE

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I. INTRODUCTION

The Call for Changes in Sentencing Laws

Across the country, sentencing laws and practices have become the center of intensive debate. In the past decade, legislators in a growing number of states have considered or adopted proposals to make sentences more definite in length, more certain, less disparate among offenders, or more severe. Their goal has been to improve sentencing effectiveness by reducing the broad discretion of judges and parole boards commonly permitted under indeterminate sentencing statutes.

The mounting pressure to regulate discretion in sentencing and release decisions reflects a growing controversy over the fundamental purposes of sentencing and imprisonment. Three themes dominate the discussion:

- **Crime Control.** A 1977 public opinion poll reported that 74 percent of those surveyed felt that the courts are too lenient.¹ Rising crime and reports of low rates of prosecution, conviction, and incarceration have contributed to the public demand for more certain punishment and harsher penalties for convicted offenders. Two rationales are advanced for greater severity. Erlich² and others claim that increasing the price of crime (and the certainty that the price will be paid) will deter potential offenders and thereby reduce crime. More recent statistical studies of crime patterns³ have examined instead the effect of incarceration in sequestering putatively high-risk individuals who are thereby incapacitated from most crime at least while they are in prison.
- **Retribution.** Proponents of greater certainty in sentencing point to the punitive rationale for imprisonment and ask that offenders be judged on the severity of their crimes, not the perceived extent of deterrence or rehabilitation.⁴ This view is buttressed by the inability of research findings to substantiate the efficacy of the treatment programs⁵ on which indeterminate sentencing and parole release decisions are predicated.
- **Fairness.** Finally, allegations of unwarranted disparity in sentences received and time served have added issues of fairness and equality to the debate.⁶ According to this view, the wide range of sanctions permitted for most offenses often yields unwarranted variation in the sentences received by similar offenders for similar crimes. Further exercise of discretion by parole boards often results in prisoners with identical sentences serving widely variable prison terms. Parole decisions may reflect many imponderable factors: the severity of the so-called real offense, a parolee's risk prognosis and disciplinary reports, participation in rehabilitation programs, or even prison crowding. The unpredictability of parole discussions often leaves inmates (and sometimes the public) with a sense of capricious or unfair administration of justice.

The Legislative Response

Among the proposals which have been advanced to redress the problems of current sentencing practices, the most narrow and most popular have been various forms of mandatory sentencing laws. Mandatory sentencing has grown quickly from small beginnings. In 1974, Massachusetts enacted a law providing a mandatory one year jail sentence for anyone convicted of carrying a gun. Seven years later, in 1981, the Massachusetts legislature was considering a series of bills providing mandatory sentences for all major offenses. The New York Drug Law, also discussed in this Brief, was enacted in 1973 and provided mandatory sentences for the sale and possession of illegal drugs. It, too, has been followed by additional legislative proposals for mandatory sentencing.

Mandatory sentencing laws are generally similar in their attempt to ensure the incarceration of select classes of offenders, but they differ from one another in the scope and rigidity of their restrictions:

- The Massachusetts gun law allowed no variation: the penalty for a gun-carrying conviction was a one year jail sentence that could not be lengthened and could not be avoided.
- New York's mandatory sentences were indeterminate: the judge was required to send offenders to prison, and the parole board was prohibited from releasing them before the expiration of the minimum term. However, while a prisoner might be paroled after the minimum, he or she also might serve several additional years at the discretion of the parole board.
- Finally, some proposed mandatory laws have permitted probation or suspended sentences, but have required that if an offender were sentenced to prison, it could not be for less than a specific period.

Determinate or presumptive sentencing and sentencing guidelines methods have also received wide consideration as methods of addressing the problems of discretion. Mandatory sentencing may be distinguished from these broader approaches in two respects:

- First, mandatory provisions are generally applied only to specific classes of offenses or offenders. In contrast, proposals for determinate sentencing or sentencing guidelines generally involve full-scale re-structuring of all criminal penalties.
- Second, while mandatory provisions generally prescribe the specific minimum penalty, under determinate sentencing a range is prescribed from which the judge may choose the fixed term. Guideline methods also establish ranges—in the form of suggested rather than inviolable limits—and enumerate conditions under which sentences outside the guidelines may be appropriate.

The National Institute of Justice is sponsoring research on both of these approaches and will issue Policy Briefs as the results become available.⁷

The Response of the Criminal Justice System

In principle, each of these changes in sentencing and release practice shares the goals of reducing—or at least controlling—the discretion available to judges or parole boards in order to reduce disparity and uncertainty or to increase the deterrent value of criminal sanctions. A closer examination, however, often shows that moves to reform sentencing have actually taken the form of a transfer of discretion from one group of actors in the system to another.⁸ At least five major groups have a role in determining the penalty imposed for a crime:

- The *legislature* which defines crimes and establishes the range of penalties;
- *Police officers* who make arrests and preserve and record evidence;
- *Prosecutors* who determine whether to charge, on what crimes, and how far to plea bargain;
- *Judges* who select the nature and length of the penalty within the limits prescribed by the legislature;
- *Parole Boards* whose members control the actual time served in prison for the majority of prisoners.

In most statutory revisions, the total amount of control exercised by the state remains constant, but the balance of influence at each stage shifts, changing the point at which system policy is determined. For example:

- When the Massachusetts gun law took effect, the parole authority lost all release discretion. Most of the control over length of prison terms was transferred to the district attorney's since the charge at conviction now determined the length of the prison sentence if there was one. In some instances an even greater degree of power was granted to arresting officers, who could decide when to look for a gun, and if they found one, whether to report it.
- Similarly, the 1973 version of New York's mandatory drug law, which included restrictions on plea bargaining, increased the importance of the initial description of the offense by police and prosecutors, since subsequent charges could depart from this description only by specified amounts.

The New York Drug Law and the Massachusetts Gun Law

The remainder of this Brief describes initial experience with the New York and Massachusetts laws in greater detail. These laws may be the best documented recent examples of the use of mandatory sentences. As such, they offer guidance on the kinds of changes legislatures can and cannot expect to see as a result of such code revisions. Perhaps the clearest lesson of the experience is that sentencing is only a part of the whole picture of crime and punishment, and that the results of legislation depend not only on the provisions of law, but on the environment in which the law operates.

II. NEW YORK AND MASSACHUSETTS: A COMPARATIVE STUDY IN MANDATORY SENTENCING

The two states described in this Brief adopted the mandatory sentencing approach for two very different kinds of offenses. From 1973 to 1979, New York law prescribed severe penalties for all drug offenders, and required mandatory imprisonment in the most serious felony cases. In Massachusetts, no basic change in statutory penalties was enacted; the legislature merely made the one year jail term for gun carrying mandatory rather than optional, as it had been prior to 1975. Thus, what the two laws had in common was a legislative attempt to reduce the discretion of prosecutors and the courts in imposing sentences of incarceration on convicted offenders.

Mandatory Penalties

In both states, judges were unable to grant probation or suspended sentences for specified convictions. In New York, judges had no alternative to a prison sentence which could — at the discretion of the parole board — extend for the offender's lifetime. The least severe sentence permitted for A-level felonies was "one to life," meaning that the parole board could release the defendant any time after the first year. The most severe sentence allowed was twenty-five to life. The Massachusetts gun law required a sentence of exactly one year in jail for any gun-carrying violation, and specifically precluded any form of parole release, furlough, or time off for good behavior. (A detailed abstract of the statutes is provided in the appendix.)

Restrictions on Pretrial Discretion

Both laws tried to close perceived loopholes in charging and adjudication practice. Massachusetts forbade diversion in the form of continuance without a finding or filing of cases.* It did not restrict the prosecutor's discretion to reduce charges. New York, however, did attack plea bargaining directly. As the law was originally enacted, defendants charged with a class A felony (those bearing an indeterminate maximum sentence of life in prison) could not enter a plea of guilty to any lower class of felony.** Felonies below class A could not be reduced to misdemeanors if the defendant had been convicted of any other felony (drug or non-drug) within the previous ten years. There were no plea restrictions for alleged first offenders or for defendants with misdemeanor charges.

Harsher Penalties

The mandatory sentences New York imposed on drug offenders were structurally indeterminate: the judge chose a minimum and a maximum from ranges prescribed for the class of offenses. The 1972 legislation substantially increased both minima and maxima. For example:

- For possession of two ounces of heroin or sale of one ounce, the new minimum of the sentence was to be 15 to 25 years; the new mandatory maximum was life; plea bargaining for these offenses was severely restricted.

*"Filing" is a practice whereby cases are left open, but with no expectation that they will ever be closed. Continuance without finding leaves the case open in anticipation of eventual dismissal if the defendant avoids further trouble.

**This provision was relaxed in 1976 to allow the least serious A felony charges to be bargained down to a jail sentence not exceeding one year.

- Any repeated conviction of unlawful possession of any stimulant, hallucinogen, hallucinogenic substance, or LSD with intent to sell carried a minimum term of 1 to 8½ years and a mandatory maximum of life.
- Possession of one ounce of marijuana had a non-mandatory prison term with a 1 to 5 year minimum and a 3 to 15 year maximum.

Probation and other alternative sentences were not allowed except under certain circumstances. The minimum times were the earliest point at which prisoners could be released. The latest point could be very late indeed: persons selling any amount of narcotic drug could stay in prison for life, if the parole board chose to keep them. For the most serious class of felonies, released prisoners might remain under the jurisdiction of the parole board for life and theoretically were subject to recommitment at any time.

In contrast to the New York law, Massachusetts left the basic penalty structure unaltered, except for the requirement that the penalty be imposed.

Increased System Resources

While no additional resources accompanied the Massachusetts law, the New York legislature anticipated an increase in criminal court workloads and provided funds for 49 new court parts to help carry the burden. Thirty-one of these were allocated to New York City cases. These court parts (including judges, prosecutors, defense counsel, and support staff) cost the state an estimated \$76 million from September 1973 through June 1976. Because half or more of the time of these courts was devoted to cases which would have been heard under pre-existing law, it is estimated that the ultimate cost of courts to enforce the drug law was approximately \$32 million.

III. RESULTS OF THE LAWS

The announced goals of the New York statute were to "deter the pusher and violent addict and isolate for life those who will not be deterred."⁹ To document the effects of the law on drug abuse, crime, and the criminal justice system, the National Institute of Justice funded an evaluation committee to examine the results of implementation through 1976.¹⁰ The Massachusetts gun law also was the subject of an NIJ study using information for 1975 and 1976.¹¹ These research projects concentrated primarily on the short-term effects of statutory changes. In the course of preparing this Brief, subsequent data from New York were compiled to update the evaluation results. Longer term data from Massachusetts were not available at this writing but are now being analyzed in a continuation of one of the NIJ studies.¹²

Police Behavior

Although neither law was intended to have a direct effect on arrest procedures, enforcement may have been affected by police attitudes. In Massachusetts, police interviewed by the study¹³ said that the gun law had influenced the way in which they conducted field interrogations. Seventy out of 79 respondents said that they were now more selective about whom to frisk because they did not want to risk involving "otherwise innocent" persons. The imposition of mandatory sentences limited the discretionary power of the courts partly by transferring it to the arresting officer, who could simply refrain from reporting a gun if one were found. Police attitudes and knowledge thus came to assume a much greater importance in the implementation of the new law. The number of Boston police reports on gun incidents taking place outside decreased from 144 in 1974 to 108 in 1976. In both years nearly all such incidents resulted in arrests, so that the decrease in incidents resulted in a decrease in arrests. Combining all Boston gun incidents, the number of arrests in gun incidents decreased by 23 percent from 1974 to 1976, while the number of cases of weapons seizure without arrest increased by 120 percent. The increase in non-arrest incidents occurred both in possessors' homes (not covered by the law) and in other indoor locations (which were covered).

When arresting officers bring a complaint against an alleged gun law violator they may charge either "possession" of a weapon or "carrying" the weapon. Only carrying (which implies possession plus movement) is subject to the mandatory penalty. As a practical matter, it is unlikely that the police would discover many cases of mere possession (without carrying). Nevertheless, some charges are filed every year for each offense, and the distribution of carrying vs. possession charges appears to have shifted in response to the change in the law. In 1974, when the distinction between the two offenses did not significantly influence the penalty, 3.4 carrying charges were filed for every possession charge. In the next year, perhaps because of increasing police awareness of the offense of carrying, the ratio rose to seven carrying charges for every possession charge. By 1976, however, this shift had been reversed and there were now 2.5 carrying charges with the mandatory penalty for every one possession charge without it.*

In New York City, the evaluation reported little enthusiasm among police for the drug law. Police Department policy had always discouraged mass street-level arrests for drug offenses because they

*These data come from a 50% sample of cases filed in District Court in the City of Boston (Rossman *et al.*, "The Impact of the Mandatory Gun Law in Massachusetts," p. 272). Police behavior elsewhere in Massachusetts may have been different, but the numbers of incidents are too small to support generalization.

were seen as costly efforts that failed to produce any appreciable effects on the narcotics trade. This policy did not change as a result of the new drug law, partly due to the Department's prior experience and partly due to concern that aggressive street-level enforcement would hopelessly inundate the courts. Indeed, the data on numbers of drug arrests show no clear trend over the seven year period 1972 through 1978. Increases and decreases in the arrest rate appear to be unaffected by any perception of the penalties eventually imposed. Police officials in New York have speculated that the harsher threats did help to encourage informants, but aggregate arrest statistics fail to show evidence of this effect.

Effect on Trial

In both Massachusetts and New York, the most dramatic effects of the statutory changes were to be seen in the courts. Both laws significantly increased the penalties at stake in trial, and the first response of defendants was to redouble their efforts to avoid these penalties. Moreover, both of the statutes explicitly tried to close or restrict some of the informal avenues (plea bargaining in New York, diversion in Massachusetts) by which cases had previously been expedited.

In New York, defendants facing increased penalties redoubled their legal efforts to avoid or postpone sentencing:

- Persons charged with certain felonies could not plead guilty to lesser offenses, and hence had no incentive to plea bargain; this change increased the total proportion of cases proceeding to trial by nearly a factor of three, from 6 percent in 1973 to 17 percent in the first half of 1976. This restriction on plea bargaining was removed in 1976, with an immediate decrease in the demand for trials.
- More motions were filed. By 1974, the number of court appearances under the new law was twice as high as for non-drug cases (21 vs. 11) per disposition.
- Median time to disposition rose from 173 days in 1973 to 340 days in 1976, when the restriction on plea bargaining was relaxed and the backlog of cases began to be disposed. By 1978, the delay had fallen to 245 days—still well above its former level.

The provisions of the 1973 New York law restricted discretion in sentencing and closed some avenues of plea bargaining. As these examples show, however, there were other areas of flexibility which the law could not or did not touch. Defendants were quick to apply every remaining method to avoid or postpone prison sentences. Figure 1 shows the trends in court processing of drug cases which followed the new law.

As in New York, the Massachusetts gun law brought significant change in the strategies followed by defendants. Because the total number of cases was small, however, the total effect on court backlogs was negligible. As Table 1 suggests, defendants facing a year in jail became markedly less cooperative at every step in the process:

- Some defendants simply fled rather than face trial. Defaults rose from 10 percent in 1974 to 18 percent in 1975 and 16 percent in 1976.
- Judicial decisions became more favorable to defendants. Verdicts of not guilty rose from 16 percent of final dispositions the year before the gun law to 40 percent and 33 percent, respectively, in the two years after. Dismissals went from 18 percent in 1974 to 22 percent in 1975 and 38 percent in 1976.

- Convicted defendants were much more likely to appeal their convictions, which, under Massachusetts law, usually resulted in a trial *de novo*.* In 1974, 21 percent of lower court convictions were appealed, in 1975, 86 percent, and in 1976, 94 percent.
- The net result of this process was that while 109 defendants (41 percent of the total Boston sample) were sentenced for gun carrying in 1974, only 50 (25 percent) were sentenced in 1975, and 26 (17 percent) in 1976.

Sanctions Imposed

In both states, the actual numbers of offenders affected by the harsher penalties were much smaller than one might have supposed from a literal reading of the law. We have seen that as the stakes got higher, defendants pursued more dilatory tactics to avoid them. In both states, however, the unlucky fraction who could not escape did receive more severe sentences.

In New York, this fact was masked for a time because delays due to court backlog (and defense maneuvering) were so great that three years passed before the effects of the new law began to appear in the statistics. As Figure 1 shows, the number of prison sentences for drug-related crimes had been falling prior to 1973. The reversal which began after enactment of the drug law produced sustained growth in prison intake, with slightly over two-thirds of the convicted offenders being sentenced to confinement. In the first half of 1977, at what appears to have been the peak period of imprisonment, defendants convicted on drug charges were being incarcerated at a rate that exceeded 2,100 persons per year.

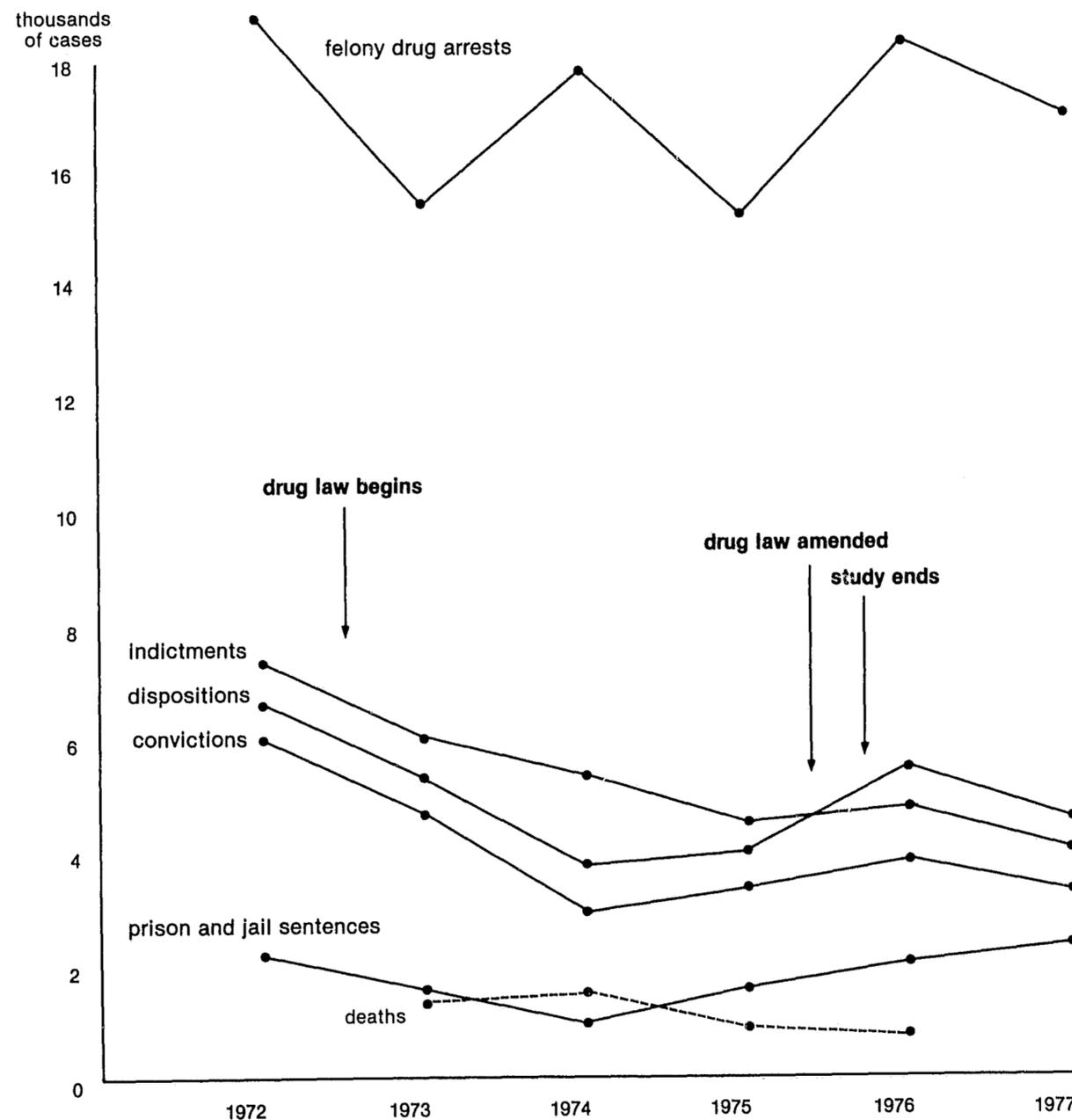
Although this rate of intake was only slightly greater than the previous maximum set in 1972, the application of sanctions was qualitatively different. First, the length of sentences under the new law was potentially much greater than before, since every conviction for a class A offense carried a mandatory life sentence (with parole eligibility after a year or more). In principle, this meant that at best a large cohort of defendants was going to be on parole for the rest of the century; at worst, they could stay in prison for life. Moreover, since incarceration was mandatory for a much broader range of offenses under the new law than under the old, the incoming prisoners included more minor offenders than previously—a change partially reflected in significant increases in the number of women prisoners with life sentences.¹⁴

Massachusetts sentences also were harsher for those defendants who were ultimately convicted of carrying a gun. As Table 1 shows, in 1974 only 23 percent of the sentences involved a jail term. In 1975 and 1976, all sentences for gun carrying were jail sentences. However, since most of these were concurrent with longer sentences for other offenses, in only some of these cases was the mandatory minimum sentence the factor which decided the defendant's fate. Taking these other charges into account, we find that six percent of defendants received jail sentences controlled by gun-carrying convictions in 1974, compared with 14 and 13 percent, respectively, in the two years following enactment of the mandatory sentencing provision.

Case processing for defendants accused of violating the gun law was thus significantly affected by the mandatory sentencing provision, but for most defendants at most stages of the process the effect was to increase the chance of outcomes favorable to the defendant. The number of defen-

*Defendants convicted in lower court bench trials are automatically entitled to retrial before a jury on appeal.

Figure 1
New York State Processing of Drug Offenses: 1972-1977



Sources: "New York State Felony Processing Quarterly Report: Indictment Through Disposition" (1972-1977), New York State Division of Criminal Justice Services, Albany, New York.
"Proceedings: Community Correspondents Groups, Meeting Five, December 6, 7, 8, 1976," Division of Resource Development, National Institute of Drug Abuse, Rockville, Maryland.

Table 1
Disposition of Gun Carrying Cases in Boston: 1974-1976

| | Regular Sentence | | Mandatory Sentence | |
|---|------------------|---------------|--------------------|---------------|
| | 1974 | 1975 | 1975 | 1976 |
| Gun Carrying Cases Filed (sample) | 263 | 198 | 198 | 151 |
| Disposed in Boston Municipal Court | 238 | 173 | 173 | 130 |
| Favorable to defendant | 38% (91/238) | 40% (70/173) | 40% (70/173) | 45% (45/130) |
| Sentenced by District Court | 34% (82/238) | 6% (10/173) | 6% (10/173) | 5% (6/130) |
| Disposed in Suffolk Superior Court** | 33 | 57 | 57 | 34 |
| Favorable to defendant | 18% (6/33) | 30% (17/57) | 30% (17/57) | 41% (14/34) |
| Sentenced by Superior Court | 82% (27/33) | 70% (40/57) | 70% (40/57) | 59% (20/34) |
| Total Defendants Defaulting at Either Stage | 10% (27/263) | 18% (35/198) | 18% (35/198) | 16% (24/151) |
| Total Defendants Sentenced | 110 | 50 | 50 | 26 |
| Jail sentences | 23% (25/110) | 100% (45/45)* | 100% (45/45)* | 100% (23/23)* |
| Jail sentence controlled by gun offense | 6% (16/263) | 14% (28/198) | 14% (28/198) | 13% (20/151) |

*Information is missing on five cases in 1975 and three cases in 1976.

**Under Massachusetts law, defendants convicted in lower courts are entitled to trials *de novo* in Superior Court, so that some cases are disposed in both courts.

Source: Rossman *et al.*, "The Impact of the Mandatory Gun Law in Massachusetts," pp. 352-362.

dants who avoided conviction entirely (including fugitives but excluding pending cases) rose from 53.5 percent in 1974 to 73.5 percent in 1975 and 80 percent in 1976. Offsetting this greater leniency for most defendants was an increase in severity for about seven or eight percent who might have avoided incarceration if the mandatory sentencing provision had not been in effect.

Drug Abuse and Drug-Related Crime in New York

The ultimate goals of the drug law — reduction of drug abuse and associated crimes — proved difficult and perhaps impossible to evaluate. Indirect measures of drug abuse are highly unreliable, and no systematic assessment was attempted in New York directly before or after 1973. It is equally difficult to establish the assumed causal associations between drug abuse and other crimes. Thus, statements about the law's real impact on the problems it addressed are ambiguous:

- **Drug Consumption.** Researchers at the New York State Division of Substance Abuse Services monitor the reported incidence of serum hepatitis and deaths by narcotic drug overdose in New York City. Both have been decreasing recently from peaks established in 1976. Because there is approximately a two year delay between beginning to use drugs and the onset of medical complications, these statistics could indicate that heroin use in New York City began to decrease in 1974, one year after the enactment of the law. However, factors other than the criminal justice system may have contributed to part or all of this decrease.

New York City's Department of Health introduced a more rigorous diagnostic system which may have reduced the number of cases reported as serum hepatitis. Hepatitis is sometimes transmitted as an epidemic disease, and there is some evidence that 1976 may have marked the peak of one such epidemic wave. If so, subsequent decreases were purely coincidental to the altered penalties. Finally, law enforcement officers report that the purity of heroin sold on the street has declined with the rising cost of living, so that pure doses are becoming smaller. One side effect of this trend is that it is becoming more difficult to get enough drugs for an overdose, so that the declining death rate may reflect less use per capita rather than fewer users.

- **Crime.** Most New Yorkers arrested for felonies were not diagnosed as drug addicts either before or after the drug law changed. Even under the best of circumstances, therefore, the law's potential impact on street crime was limited. Indeed, the proportion of arrestees identified as drug users did decrease slightly after 1973 (from 33 percent in 1973 to 28 percent in 1975), but it had already begun to fall two years before enactment of the legislation. The decrease in proportion, moreover, was due to an increase in arrests of non-users, and not to any actual decrease in the number of crimes attributed to drug users or addicts.

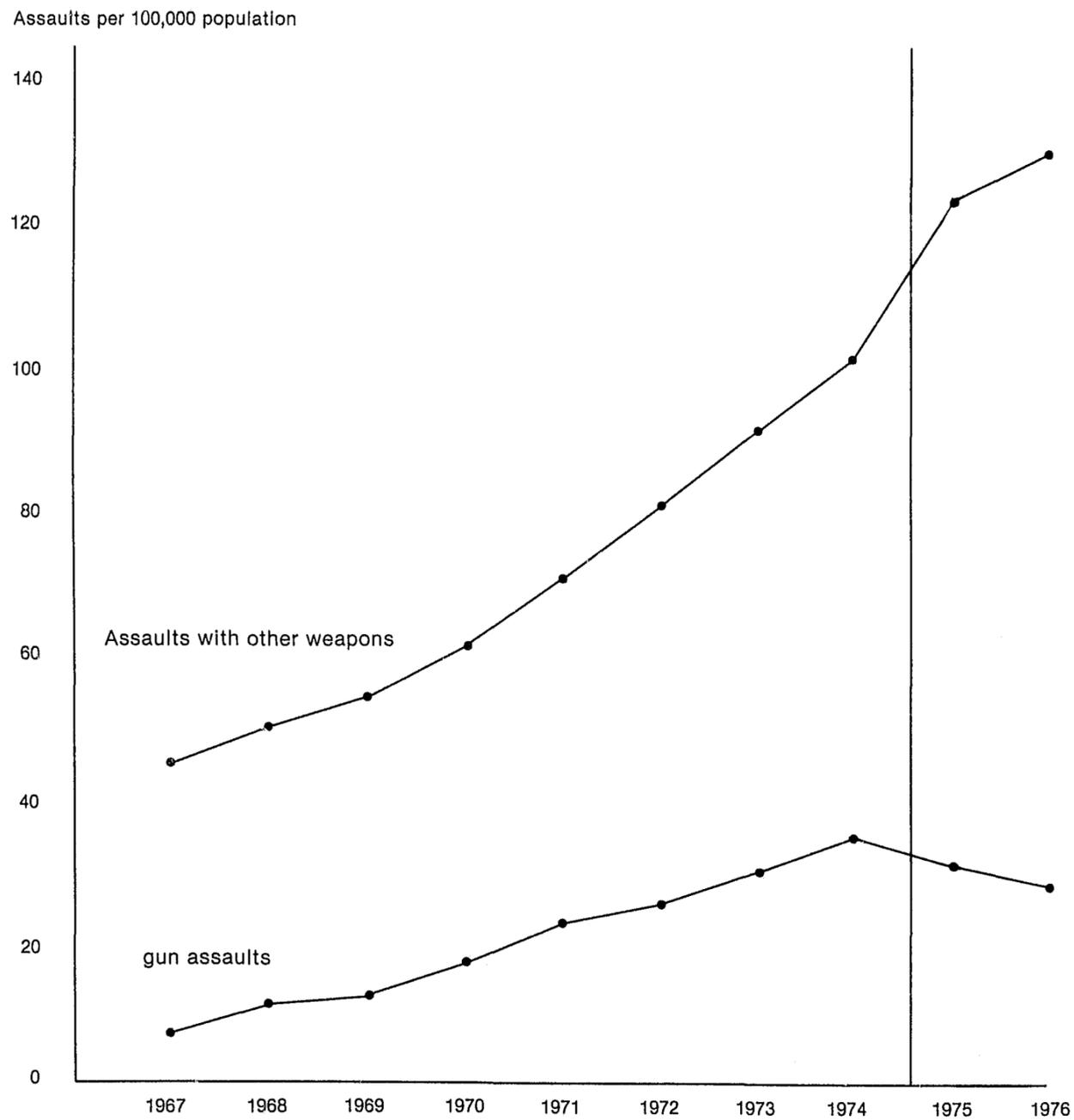
Violent Crime in Massachusetts

Just as New York tried to reduce theft by decreasing the number of people who might steal to support a drug habit, Massachusetts likewise tried to attack serious crimes (homicide, armed assault, and armed robbery) by penalizing an instrumental offense, gun carrying. While the number of people actually serving a mandatory jail sentence for carrying a gun was small, the publicity effort accompanying the new law was large. To the extent that potential offenders believed that harsher penalties were in store, they may have been deterred from carrying guns or showing them in their crimes. The rates of reported armed assault, armed robbery, and homicide all dropped at about the time the law became effective. The rate of assaults using a gun rose from 22.4 reported events per 100,000 population in 1972 to 31.0 per 100,000 in 1974, when the gun law was enacted. In the next two years, the rate fell back to 25.0 reported gun assaults per 100,000 population. This shift at the time of gun law implementation is statistically significant (see Figure 2).

Unfortunately, these data are consistent with several conflicting interpretations. On the basis of a time series analysis of this evidence, the evaluators argue that the state legislature successfully intervened to reverse a trend of increasing numbers of crimes. An alternate hypothesis is that legislative support for gun control is likely to be highest in years which happen to have the most crime, and that passage of the gun law simply coincided with a transient peak in the rate of gun assaults. In this interpretation, the decrease in crime represents no more than a return to "normal" levels following a pair of unusually violent years. Both of these explanations could be partially correct. The data do not permit a definitive attribution of the change in crime rate to deterrence caused by the statute. Monthly data on assaults do, however, suggest that the decrease in gun use which occurred in the spring of 1975 was unusually abrupt, and may have been triggered by the intensive publicity accompanying the new law.

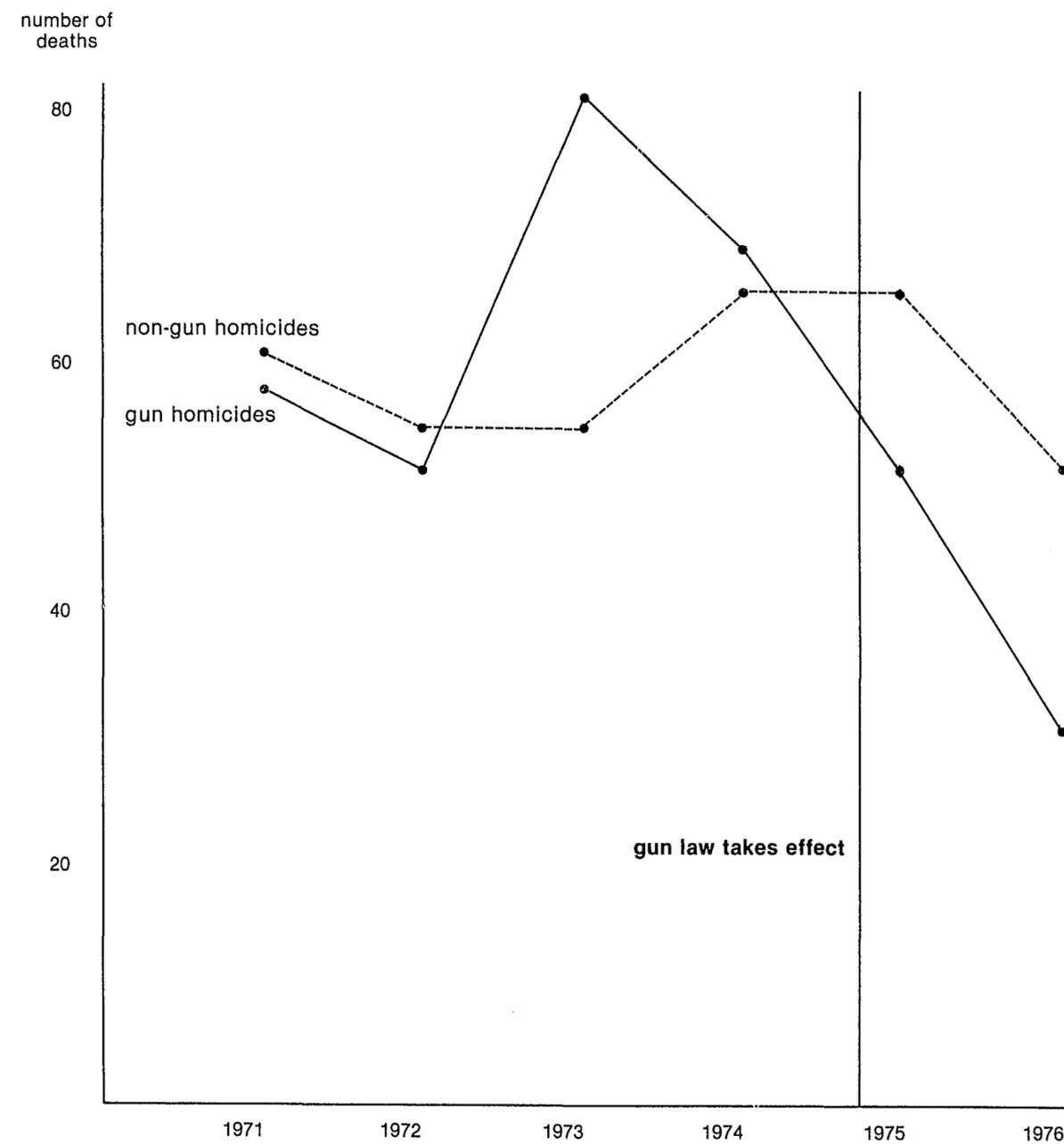
Robberies using a gun show a similar significant decline, from 105.0 per 100,000 in 1974 to 68.2 in 1976, although in this case the actual reduction appears to have occurred a year later than the change in assaults. Homicides similarly decreased from 70 in 1974 (for the City of Boston only) to 31 in 1976. Here, however, attribution to the sole effect of the gun law is even more equivocal, since the decrease in this instance began the year before the law was passed (see Figure 3). Thus,

Figure 2
Rate of Armed Assaults in Massachusetts: 1967-1976



Source: Rossman *et al.*, "The Impact of the Mandatory Gun Law in Massachusetts," p. 53.

Figure 3
Homicides in Boston: 1971-1976



Source: Rossman *et al.*, "The Impact of the Mandatory Gun Law in Massachusetts," p. 155.

while the legislature may be able to take credit for some of the lives saved, it is doubtful that the mandatory sentencing provision was solely responsible for the change.

The fact that all three crimes showed increases followed by decreases, but in three different years, deepens the ambiguity of the data. One might expect robbery and murder, which carry a stiff penalty even without a gun, to be less sensitive to the one year mandatory sentence than assault, where the gun law is more likely to be decisive. Murder, to the extent that it commonly occurs in the home (not affected by the gun law) and is unpremeditated, is even less likely to be influenced by mandatory penalties for gun carrying. If, however, we attribute the significant shifts in these non-target crimes to some cause other than the legislation, that cause becomes at least as plausible an explanation of the change in assault.

IV. CONCLUSIONS

A central theme of both the sentencing revisions described in this Brief has been the profound difference between the stated intentions of legislatures changing sentencing laws and the actual behavior of the justice system in implementing those laws. The massive court delays in New York and the decrease in the Massachusetts conviction rate were hardly what the proponents of the acts would have predicted. In fact, as we have seen, it is even difficult to specify exactly what did happen with much confidence.

At least four major conclusions emerge from the experiences described in this Brief:

(1) **Laws designed to eliminate sentencing discretion may only succeed in displacing that discretion in ways that may be counter to legislative intent.** As the experiences described here showed, effecting meaningful change depends on the concurrence of actors at every stage, from police through courts and corrections to the final releasing authority. Changing one or two parts of this sequence still leaves room for the exercise of considerable discretion elsewhere.

The interplay among criminal justice components was perhaps best shown by the substitution of dismissals and acquittals in Massachusetts courts when postconviction leniency was curtailed. The complexity of the court system afforded numerous alternative ways to avoid imposing the required sentences, and all of them were used. We may regard this either as an attempt by the courts to hold on to discretion which the legislature had tried to remove, or as the result of more vigorous defense under the stimulus of heightened sanctions. In either case, the result was clear. The system changed its processing in ways which largely nullified the impact of the laws on sanctions imposed.

(2) **Attempts to anticipate and remedy these displacement effects may prove difficult.** As New York's experience with the 1973 drug law accumulated, substantial flaws in its design became apparent. Between 1973 and 1980 the state legislature has twice amended the act in order to make it, as Governor Carey said in signing the most recent act of amendments, "more rational."¹⁵

The earliest defect emerged from the desire of the legislature to block plea bargaining as a way of escaping the mandatory penalties. The original act subdivided class A felonies (the most serious) into three subcategories. It also prohibited bargains from class A to class B. The effect of these provisions was to permit plea bargaining for the most serious cases (A-I could be reduced to A-II, and A-II to A-III) but prohibit it for the more numerous, less serious A-III felonies. There was thus no incentive for defendants charged with A-III offenses to plead guilty, and the demand for trials soared. The lesson from this experience was that rigid restrictions on plea bargaining could not feasibly be enforced without much greater disruptions to the criminal justice system than the state was prepared to tolerate. (This problem did not arise in Massachusetts because the gun cases were a negligible fraction of the total workload.)

(3) **To the extent that rigid controls can be imposed, the effect may be to penalize some less serious offenders, while the punishment for more serious cases is postponed, reduced, or avoided altogether.** When enough time had elapsed for defendants to begin to be sentenced under New York's Drug Law, statistics accumulated which indicated that relatively minor offenders were incurring harsh sentences because the mandatory provisions of the act denied judges the flexibility to deal leniently with first offenders involved in small scale transactions.¹⁶ At the same time, court delays allowed some major sellers a year or more on the streets before their sentences began. Moreover, as New York's prisons become more crowded, pressure for earlier release (of both drug and non-drug felons) will increase, and may eventually shorten average time served.

In Massachusetts, it is clear that more defendants are leaving the system early. Offenders who might have been convicted and sentenced under the more lenient law are now fleeing trial rather than face the mandatory sentence. Still others have been more successful in securing case dismissals prior to adjudication. Most of the defendants actually sentenced under the gun law probably would have gone to prison anyway. The first two years of data include a total of only 48 defendants with sentences controlled by the gun law. This sample is too small to support any conclusions about offender characteristics.

(4) It is difficult, perhaps fundamentally impossible, to substantiate the popular claim that mandatory sentencing is an effective tool for reducing crime. The initial logic of the drug law was appealingly simple: sentences would go up, drug use would decline, and crime would go down. There is little statistical support for any of these events. Implementation fell far short of expectations. For a long time, it even seemed as though sentences might have been reduced. Measuring the total volume of drug traffic is at best an inexact art, and any claims of increase or decrease must be viewed with considerable skepticism. Attempting to establish a causal relationship between a gradually implemented law and a doubtful change in drug use is an exercise of limited statistical value. The final step of the argument, linking drug abuse and street crime, is yet more dubious. The number of drug users who are street criminals is far smaller than the law's advocates had implied, and the existence of causal links between the two is largely a matter of speculation.

Massachusetts enacted its mandatory sentencing bill in a year of unusually high gun violence. Any subsequent year which was not also unusually high necessarily looked like a year of reduced gun crime. Gun crimes in most Eastern jurisdictions went up and down during the 1970's. While the decrease in Massachusetts might have been related either to enforcement of the gun law or to public expectations that it would be enforced, it might also have been related to coincident factors which have little to do with the gun law.

These highly ambiguous statistical results should be a source of caution to those who promise that mandatory sentencing will deliver more certain punishment, harsher penalties, and reductions in crime. In view of the uncertain consequences of mandatory sentencing provisions, such promises can only be based on faith, not fact.

V. SOURCES FOR FURTHER INFORMATION

The provisions of the original form of the New York Drug Law and the Massachusetts Gun Law are reproduced in the Appendix. The following documents, referenced in the text of this Brief, can be consulted for more information on general trends in sentencing reform and the specific provisions and results of a variety of statutes, including the New York and Massachusetts laws.

1. Louis Harris, "The Harris Survey," cited in *Sourcebook of Criminal Justice Statistics, 1978*, Bureau of Justice Statistics, U.S. Department of Justice (Washington, D.C.: Government Printing Office, 1979), p. 322.
2. Isaac Erlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *American Economic Review* 65 (1975): 397-417.
3. Mark A. Peterson and Harriet B. Braiker, *Doing Crime: A Survey of California Prison Inmates* (Santa Monica: The Rand Corporation, 1980).
4. A. Von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976).
5. D. Lipton, R. Martinson, and J. Wilks, *The Effectiveness of Correctional Treatment, A Survey of Treatment Evaluation Studies* (New York: Praeger Publishers, 1978).
6. See, for example, Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973).
7. Research in progress on sentencing guideline methods includes an evaluation of the Multi-jurisdictional Sentencing Guidelines Program Test Design by Abt Associates, an evaluation of Massachusetts and Pennsylvania Sentencing Guidelines Experience by Rutgers University, and the internal evaluation of the Minnesota Sentencing Guidelines Commission. The determinate sentencing experiences of California, Maine, and Indiana are also subjects of evaluation.
8. See, for example, Franklin Zimring, "Making Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform," paper presented to the Illinois Academy of Criminology, November 1976.
9. Governor Nelson Rockefeller, as quoted in the *New York Times*, January 26, 1973, p. 1, col. 4, cited by Franklin Zimring. "Deterring Hard Drug Sales: The Rockefeller Drug Law Evaluation," *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rate* (Washington, D.C.: National Academy of Sciences, 1978).
10. Association of the Bar of the City of New York and the Drug Abuse Council, Inc., Joint Committee on New York Drug Law Evaluation, *The Nation's Toughest Drug Law: Evaluating the New York Experience*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice (Washington, D.C.: Government Printing Office, 1978). See also D. Newman *et al.*, "Final Report on Community Alternatives to Maximum Security Institutionalization for Selected Offenders," State University of New York at Albany, 1975. (Mimeographed.) This paper includes a discussion of New York's second-felony offender statute, a related mandatory sentencing provision for the habitual offender.

11. The most current data are reported in G. Pierce and W. Bowers, "The Bartley-Fox Gun Law's Short-term Impact on Crime in Boston," *Annals of the American Academy of Political and Social Science* (May 1981): 120-137. Earlier analyses were conducted by Stuart Jay Deutsch and Francis B. Alt, "The Effect of Massachusetts' Gun Control Law on Gun-related Crimes in the City of Boston," *Evaluation Quarterly 1* (November 1977): 543-567; and James Beha, "And Nobody Can Get You Out: The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Justice in Boston," *Boston University Law Review 57* (January 1977): 96-146.
12. William J. Bowers, Glen L. Pierce, and John F. McDevitt, "Deterrence Processes in Neutralization/Compliance Effects," National Institute of Justice, U.S. Department of Justice, Washington, D.C., 1979.
13. David Rossman, Paul Froyd, Glen L. Pierce, John McDevitt, and William J. Bowers, "The Impact of the Mandatory Gun Law in Massachusetts," National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, Washington, D.C., June 1979.
14. New York State Department of Corrections, Annual Statistical Reports, Albany, New York.
15. Governor Hugh L. Carey, Press Release, State of New York, Executive Chamber, Albany, New York, July 8, 1979.
16. Professor Alfred Blumstein has suggested that the basic intent of mandatory minimum legislation is largely being observed—that serious offenders with long prior records are already more likely to be imprisoned—thus reserving the primary impact of new legislation for relatively minor offenses. See, "Impact of New Sentencing Laws on State Prison Populations in Pennsylvania," School of Urban and Public Affairs, Carnegie Mellon University, 1978. (Mimeographed.) The premise that judges are already significantly influenced by firearms use has also been addressed by Peter H. Rossi, Eleanor Weber-Burdin, and Huey-tsyh Chen, in "Effects of Weapons Use on Felony Case Disposition: An Analysis of Evidence from the Los Angeles *Promis* System," University of Massachusetts at Amherst, undated. This study found that Los Angeles judges add one to two years to the average sentence of defendants using a gun. Similarly, Michigan implemented an alternative form of gun law mandating a minimum two year sentence for any felony committed while in possession of a firearm. Analysis of court cases there (see Colin Loftin and David McDowall, "One With a Gun Gets You Two," *American Academy of Political and Social Science Annals 455* (May 1981): 150-167) shows no statistically detectable change in the average severity of sentences attributable to the new statute, in part because some offenders were already receiving longer sentences, and also because initial charges did not always result in conviction under the statute. Analysis of Michigan crime data does not show significant reductions in gun crime attributable to the law. Finally, preliminary results of Florida's mandatory felony firearm gun law are discussed in Richard Ku, *American Prisons and Jails, Volume IV: Supplemental Report—Case Studies of New Legislation Governing Sentencing and Release*, National Institute of Justice, U.S. Department of Justice (Washington, D.C.: Government Printing Office, October 1980). This analysis suggested that the mandatory imprisonment provisions of the Florida law were already the practice, at least for armed robbers—the main group affected by the felony-firearm law.

Appendix

- Massachusetts' Gun Carrying Statute After the Bartley-Fox Law
- The 1973 New York State Drug Law

Massachusetts' Gun Carrying Statute After the Bartley-Fox Law

§10. Carrying dangerous weapons; possession of machine gun or sawed-off shotgun; confiscation; return of firearm; colleges and universities; punishment

(a) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(3) complying with the provisions of section one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(4) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B of chapter two hundred and sixty-nine; and whoever carries on his person, or carries on his person or under his control in a vehicle a rifle or shotgun, loaded or unloaded, without either:

(1) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(3) having in effect a firearm identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(4) having complied as to carrying, with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns;

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B of chapter two hundred and sixty-nine;

shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection (a) be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subsection or a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric services unavailable at said institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

The provisions of section eighty-seven of chapter two hundred and seventy-six, shall not apply to any person seventeen years of age or over, charged with a violation of this subsection, or to any child between age fourteen and seventeen, so charged, if the court is of the opinion that the interests of the public require that he should be tried for such offense instead of being dealt with as a child.

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic

spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed star-like object intended to injure a person when thrown, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

(c) Whoever, except as provided by law, possesses a shotgun with a barrel less than eighteen inches in length, or possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life or for any term of years provided that any sentence imposed under the provisions of this clause shall be subject to the minimum requirements of clause (a) of this section; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subsection or a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric services unavailable at said institution.

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b), or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the commissioner of public safety, who, upon receipt of the same, shall notify said court of justice thereof. Said commissioner may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or £, a fine of not more than five hundred dollars.

(h) Whoever owns, possesses, or transfers possession of a firearm, rifle, shotgun or ammunition without complying with the requirements relating to the firearm identification card provided for in section one hundred and twenty-nine C of chapter one hundred and forty shall be punished by imprisonment in a jail or house of correction for not more than one year or by a fine of not more than five hundred dollars. A second violation of this paragraph shall be punished by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than one thousand dollars or both.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry firearms issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle or shotgun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

(j) Whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the provisions of chapter one hundred and forty, carries on his person a firearm as hereinafter defined, loaded or unloaded, in any building or on the grounds of any college or university without the written authorization of the board or officer in charge of said college or university shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year or both. For the purpose of this paragraph "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means.

(k) For the purpose of this section "sawed-off shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun, whether by alteration, modification, or otherwise, if such weapon as modified has an overall length of less than twenty-six inches.

(l) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

The 1973 New York State Drug Law

The 1973 drug law was enacted as Chapters 276, 277, 278, 676, and 1051 of the 1973 Laws of New York State. Significant subsequent amendments are contained in Chapters 785 and 832 of the 1975 Laws and Chapter 480 of the 1976 Laws.

The 1973 Drug Law and Its Context

New York State law divides crimes into seven classifications, five felony and two misdemeanor, ranging from class A felony, the most serious, to class B misdemeanor, the least serious. The 1973 law divided the class A felony category into three subclassifications, A-I, A-II, and A-III. Classes A-II and A-III were created especially and exclusively for drug crimes.

TABLE A-1
CRIME CLASSIFICATION AND SELECTED EXAMPLES
UNDER NEW YORK STATE PENAL LAW

| Classification | Drug Crime Example | Non-Drug Crime Example |
|----------------|--|---|
| A-I Felony | Sale of 1 oz. of heroin | Murder 1 ^a and 2 ^a |
| A-II Felony | Sale of between 1/8 oz. and 1 oz. of heroin | None |
| A-III Felony | Sale of less than 1/8 oz. of heroin | None |
| B Felony | Second offender, class C drug crime | Rape 1 ^a , Robbery 1 ^a |
| C Felony | Possession of 1/2 oz. of methamphetamine | Assault 1 ^a , Burglary 2 ^a |
| D Felony | Sale of any amount of any controlled substance | Grand Larceny 2 ^a , Forgery 2 ^a |
| E Felony | None | Perjury 2 ^a , Criminal Contempt 1 ^a |
| A Misdemeanor | Possession of any amount of any controlled substance | Unauthorized use of a Vehicle |
| B Misdemeanor | None | Menacing |

Sentencing possibilities are provided for each classification of crime. Under the 1973 law, indeterminate sentences to State prison were made mandatory for convicted class A and B felons. Certain class C and D crimes also carried mandatory indeterminate sentences. An indeterminate sentence means that the actual length of time the convicted felon will spend incarcerated is not established by the court. Typically, the sentencing judge chooses a maximum term, the longest time the defendant may be incarcerated, from the range of maxima provided by law. The parole board then sets the minimum term, the period during which the convicted felon is not eligible for parole, and subsequently decides the actual term after the minimum term has been served. However, in class A felony cases (and in predicate felony cases discussed below), the sentencing judge must set the minimum as well as the maximum term. In other felony cases, a sentencing judge may set a minimum term of up to one-third of the maximum he has set, provided he specifies his reason for doing so in the court record.

The 1973 law instituted an important difference between the lifetime maximum sentence required for class A drug felonies and the lifetime maximum mandated for other class A felonies. Both drug and non-drug class A felons are eligible for release from prison on parole after serving the minimum sentence set by the court. Non-drug class A felons are then eligible for release from parole supervision after five years of successfully living under this supervision. The 1973 drug law provided, however, that class A drug felons could never be discharged from parole supervision. Class A drug lifetime sentences were thus truly for the life of the convicted felon.

TABLE A-2
FIRST OFFENDER PENALTIES FOR CLASSES OF CRIME UNDER
NEW YORK STATE PENAL LAW
(as of June 1977)

| Classification | INDETERMINATE SENTENCE TO STATE PRISON | | Alternatives to a State Prison Sentence ^a |
|----------------|---|-----------|--|
| | Minimum | Maximum | |
| A-I Felony | 15-25 yrs. | Life | None ^b |
| A-II Felony | 6-8 1/3 yrs. | Life | None |
| A-III Felony | 1-8 1/3 yrs. | Life | None ^c |
| B Felony | 1-8 1/3 yrs. | 3-25 yrs. | None |
| C Felony | 1-5 yrs. | 3-15 yrs. | Probation (5 yrs.), conditional discharge, unconditional discharge ^{d,e,f,g} |
| D Felony | 1-2 1/3 yrs. | 3-7 yrs. | Probation (5 yrs.), local jail (1 yr.), intermittent imprisonment (1 yr.), conditional discharge, unconditional discharge ^{d,e,f,g} |
| E Felony | 1-1 1/3 yrs. | 3-4 yrs. | Probation (5 yrs.), local jail (1 yr.), intermittent imprisonment, conditional discharge, unconditional discharge ^{d,e,f,g} |
| A Misdemeanor | None | None | Local jail (1 yr.), intermittent imprisonment, probation (3 yrs.), conditional discharge, unconditional discharge ^{d,e,h} |
| B Misdemeanor | None | None | Local jail (3 months), intermittent imprisonment, probation (1 yr.), conditional discharge, unconditional discharge ^{d,e} |

^aExcluding fines.

^bMurder in the first degree (of a police officer under particular circumstances) is a class A-I felony that carries a mandatory death sentence.

^cBut informants who aid in the investigation or prosecution of a drug felony may be sentenced to lifetime probation.

^dDefendants indicted for class A-III felonies who plead guilty to a class C felony, as authorized by the 1974 amendment to the law, may receive a local jail sentence of up to one year instead of an indeterminate sentence to State imprisonment.

^eNo alternative is available for defendants convicted of certain specified class C and class D felonies. Conditional discharge and unconditional discharge are not available to defendants convicted of drug felonies.

^fOffenders who are adjudicated Youthful Offenders may not receive a State prison sentence with a maximum of more than four years.

^gOffenders who have been found to be narcotics addicts under the procedures set forth in the New York State Mental Hygiene Law must receive either a probation sentence requiring treatment for their addiction or a sentence to either State prison or local jail.

^hOffenders who are adjudicated Youthful Offenders in a local criminal court and who have not previously been adjudicated or convicted of a crime may not receive a definite sentence of more than six months.

Drug Crime Under the 1973 Law

The 1973 law reclassified most drug crimes as more serious offenses than they had been before. In this reclassification, illustrated in Table A-3, the new law made detailed distinctions among various substances and amounts possessed or sold. A complete list of drug crimes under the 1973 law is presented in Table A-4.

TABLE A-3
RECLASSIFICATION OF SELECTED DRUG CRIMES UNDER
THE 1973 LAW

| Crime | Old Law Classification | New Law Classification |
|-------------------------------------|---------------------------|---------------------------|
| Sale of 1 oz. heroin | C Felony | A-I Felony |
| Sale of 1/8-1 oz. heroin | C Felony | A-II Felony |
| Sale of less than 1/8 oz. heroin | C Felony | A-III Felony |
| Sale of 5 mg. LSD | D Felony | A-II Felony |
| Possession of 5.25 mg. LSD | A Misdemeanor | A-III Felony |
| Possession of 2 oz. methamphetamine | A Misdemeanor | C Felony |

TABLE A-4
CONTROLLED SUBSTANCE (DRUG) CRIMES UNDER 1973 NEW YORK STATE DRUG LAW

| Class | Unlawful sale of | Amount | Unlawful possession of | Amount | INDETERMINATE SENTENCE TO STATE PRISON | |
|----------------------|---|--|--|--|--|--------------------------------------|
| | | | | | Minimum | Maximum |
| A-I Felony | Narcotic drug Methadone ^a | 1 oz. or more 2880 mg. or more | Narcotic drug Methadone ^a | 2 oz. or more 5760 mg. or more | 15-25 years | Life ^b |
| A-II Felony | Narcotic drug Methadone ^a Methamphetamine Stimulant LSD Hallucinogen Hallucinogenic substance | 1/8 oz. up to 1 oz. 360 mg. up to 2880 mg. 1/2 oz. or more 5 gm. or more 5 mg. or more 125 mg. or more 5 gm. or more | Narcotic drug Methadone ^a Methamphetamine Stimulant LSD Hallucinogen Hallucinogenic substance | 1 oz. up to 2 oz. 2880 up to 5760 mg. 2 oz. or more 10 gm. or more 25 mg. or more 625 mg. or more 25 gm. or more | 6-8 1/3 years | Life ^b |
| A-III Felony | Narcotic drug Methamphetamine Stimulant LSD Hallucinogen Hallucinogenic substance Any amount of a stimulant, hallucinogen, hallucinogenic substance, or LSD after a previous conviction for a drug offense | Up to 1/8 oz. 1/8 oz. up to 1/2 oz. 1 gm. up to 5 gm. 1 mg. up to 5 mg. 25 mg. up to 125 mg. 1 gm. up to 5 gm. | Narcotic drug with intent to sell Methamphetamine with intent to sell Stimulant with intent to sell LSD with intent to sell Hallucinogen with intent to sell Hallucinogenic substance Stimulant LSD Hallucinogen Hallucinogenic substance | Any amount 1/8 oz. or more 1 gm. or more 1 mg. or more 25 mg. or more 1 gm. or more 5 gm. up to 10 gm. 5 mg. up to 25 mg. 125 mg. up to 625 mg. 5 gm. up to 25 gm. | 1-8 1/3 years | Life ^c |
| A-III Felony (cont.) | | | Any amount of a stimulant, hallucinogen, hallucinogenic substance or LSD with intent to sell after a previous conviction for a drug offense | | 1-8 1/3 years | Life ^c |
| B Felony | Narcotic preparation to a person under 21 A class C felony sale crime charted below (with the exception of marijuana and methadone ^a) after a prior conviction for a class C felony sale crime charted below (with the exception of marijuana and methadone ^a) | Any amount | A class C felony possession crime charted below (with the exception of marijuana and methadone ^a) after a prior conviction for a class C felony possession crime charted below (with the exception of marijuana and methadone ^a) | | 4 1/2 - 12 1/2 yrs. ^d | 9 - 25 yrs. ^d |
| C Felony | Narcotic preparation Dangerous depressant Depressant Marijuana Methadone ^a | Any amount 10 oz. or more 2 lbs. or more Any amount Up to 360 mg. | Narcotic drug Narcotic preparation Methadone ^a Methamphetamine Stimulant LSD Hallucinogen Hallucinogenic substance Dangerous depressant Depressant Marijuana | 1/8 oz. up to 1 oz. 2 oz. or more 360 mg. up to 2880 mg. 1/2 oz. up to 2 oz. 1 gm. up to 5 gm. 1 mg. up to 5 mg. 25 mg. up to 125 mg. 1 gm. up to 5 gm. 10 oz. or more 2 lbs. or more 1 oz. or more, or 100 or more cigarettes | 1-5 years | 3-15 years ^e |
| D Felony | Any drug | Any amount | Any drug with intent to sell Narcotic preparation Marijuana | Any amount 1/2 oz. or more 1/4 oz. or more, or 25 or more cigarettes | 1-2 1/3 years | 3-7 years ^f |
| E Felony | No drug offenses in this category. | | | | | |
| A misdemeanor | No drug offenses in this category. | | Any drug | Any amount | | Up to 1 year local jail ^g |
| B misdemeanor | No drug offenses in this category. | | | | | |

^aClassification of methadone effective August 9, 1975. Prior to that date methadone was classified as a narcotic drug.
^bAn indeterminate sentence to State prison is mandatory. Defendants indicted for these crimes may not plead guilty to less than a class A-III felony.
^cAn indeterminate sentence to State prison is mandatory with two exceptions: (1) Informants may receive a sentence of lifetime probation, (2) defendants 16 through 18 years of age may be treated as Youthful Offenders effective August 9, 1975). Since July 1, 1976 defendants indicted for these crimes may plead guilty to a class C felony and receive a local jail sentence of up to one year instead of an indeterminate sentence in State prison.
^dAn indeterminate sentence to State prison is mandatory. However, plea bargaining is unrestricted for defendants indicted for class B felonies, unless the defendant has a predicate felony record.
^eAn indeterminate sentence to State prison is mandatory, except for marijuana and methadone crime (see footnote a) and except for defendants who are originally indicted for class A-III felonies and who plead guilty in this class of felony (see footnote c). However, plea bargaining is unrestricted for defendants indicted for class C felonies unless the defendant has a predicate felony record.
^fAn indeterminate sentence to State prison is not mandatory. Plea bargaining is unrestricted for defendants indicted for class D felonies unless the defendant has a predicate felony record.
^gA jail sentence is not mandatory.

Mandatory indeterminate State prison sentences were provided for class A and B drug felonies, and for class C drug felonies except those involving marijuana. To assure that the mandated sentences would be imposed on class A offenders, plea bargaining was limited for defendants indicted for class A crimes. They were not permitted to plead guilty to a crime for which a State prison sentence was not mandated. In 1976, the law was amended to permit defendants indicted for class A-III felonies to plead down to as low a charge as a class C felony. Those defendants who pleaded down from class A-III crime to a class C crime faced mandatory incarceration, but an alternative to an indeterminate State prison sentence was provided by the amendment: up to one year in a local jail.

TABLE A-5
PLEA BARGAINING POSSIBILITIES FOR INDICTED DRUG DEFENDANTS UNDER THE 1973 LAW

| Indictment Charge | Lowest Permissible Guilty Plea For First Offender | Least Restrictive Sentence with Lowest Permissible Plea |
|-------------------|--|---|
| A-I Felony | A-III Felony | State imprisonment, 1 yr. to life |
| A-II Felony | A-III Felony | State imprisonment, 1 yr. to life |
| A-III Felony | A-III Felony, prior to 7/1/77 C Felony, after 6/30/77 | State imprisonment, 1 yr. to life Local jail, 1 day |
| B Felony | Unrestricted | Unconditional discharge |
| C Felony | Unrestricted | Unconditional discharge |
| D Felony | Unrestricted | Unconditional discharge |

Recidivism Under the 1973 Law
 The 1973 law contained two types of provision governing recidivism. Certain drug crimes were reclassified as more serious felonies if they were second or subsequent offenses. For example, possession of one milligram of LSD was made a class C felony, but if the defendant charged with possessing this amount of LSD had previously been convicted of a drug offense, the charge became a class A-III felony.
 The second type of recidivism provision, the second felony offender or predicate felony provision, was much wider in scope. A defendant indicted for any felony crime (drug or non-drug) who had a prior felony conviction was not permitted to plead down to a misdemeanor charge, and if convicted became a second felony offender. (A predicate felony conviction is one for which sentence was passed within ten years of the alleged commission of the new felony. Any period of incarceration served by the defendant for the predicate felony conviction is not counted when calculating this ten year period.)
 A second felony offender faced a mandatory State imprisonment sentence with specified minimum and maximum periods greater than those for first offenders. Since class A felony convictions required the imposition of a lifetime indeterminate sentence, the second felony offender provision of the 1973 law was not made applicable to class A cases.

TABLE A-6
PREDICATE FELONY PLEA BARGAINING AND SENTENCING UNDER THE 1973 LAW

| Indictment Charge | MANDATORY INDETERMINATE SENTENCE | | Lowest Permissible Plea |
|-------------------|----------------------------------|-----------|-------------------------|
| | Minimum | Maximum | |
| B Felony | 4 1/2-12 1/2 yrs. | 9-25 yrs. | E Felony |
| C Felony | 3-7 1/2 yrs. | 6-15 yrs. | E Felony |
| D Felony | 2-3 1/2 yrs. | 4-7 yrs. | E Felony |
| E Felony | 1 1/2-2 yrs. | 3-4 yrs. | E Felony |

About the National Institute of Justice

The National Institute of Justice is a research, development, and evaluation center within the U. S. Department of Justice. Established in 1979 by the Justice System Improvement Act, NIJ builds upon the foundation laid by the former National Institute of Law Enforcement and Criminal Justice, the first major Federal research program on crime and justice.

Carrying out the mandate assigned by Congress, the National Institute of Justice:

- Sponsors research and development to improve and strengthen the criminal justice system and related civil justice aspects, with a balanced program of basic and applied research.
- Evaluates the effectiveness of federally-funded justice improvement programs and identifies programs that promise to be successful if continued or repeated.
- Tests and demonstrates new and improved approaches to strengthen the justice system, and recommends actions that can be taken by Federal, State, and local governments and private organizations and individuals to achieve this goal.
- Disseminates information from research, demonstrations, evaluations, and special programs to Federal, State, and local governments; and serves as an international clearinghouse of justice information.
- Trains criminal justice practitioners in research and evaluation findings, and assists the research community through fellowships and special seminars.

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- Correlates of crime and determinants of criminal behavior
- Violent crime and the violent offender
- Community crime prevention
- Career criminals and habitual offenders
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- Pretrial process: consistency, fairness, and delay reduction
- Sentencing
- Rehabilitation
- Deterrence
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James L. Underwood
Acting Director

END