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**Issues related to Harsh Sentences and
Mandatory Minimum Sentences:
General Deterrence and Incapacitation**

Research Summaries Compiled from *Criminological Highlights*
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Criminological Highlights is produced by a group of faculty (at the University of Toronto and at nearby universities), criminology doctoral students, and librarians. To find items appropriate for *Criminological Highlights*, we scan everything that comes into the Centre of Criminology library and over 100 journals that are available electronically. From time to time, we also consider papers published in journals in related fields. A short list (typically about 20-30 articles per issue) is chosen and the group reads and discusses each of these papers. For a paper to be included in *Criminological Highlights* it must be methodologically rigorous and it must have some (general) policy relevance.

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This overview of research findings is designed to be read along with the actual research summaries from *Criminological Highlights* which are contained in Part B of this report.

The effect of harsh penalties on crime

There has been a substantial amount written on the issue of the general deterrent impact of sentencing. Essentially the traditional view of general deterrence was that by making sentences harsher, crime would decrease. The underlying theory is that if the ‘costs’ of offending are greater (where costs might be estimated as being the product of the likelihood of apprehension by the expected sentence) crime would decrease.

Looking carefully at the underlying theory makes it evident, first of all, that what might be called the “Deterrence Through Sentencing” hypothesis is a *perceptual* theory. The theory implies that for an increase in the severity of sentences to have an effect on crime, people would have to *perceive* that severity had increased. The actual penalty is not directly important; it is the perception of the penalty that is likely to be imposed that is important.

One way in which governments have attempted to increase the actual – and the perceived – severity of sentences is by legislating mandatory minimum sentences. The deterrence justification for mandatory minimum sentences is that the presence of mandatory minimum sentences will be well known to the public who will see the sentences as harsh. In addition, of course, it is assumed that potential offenders will believe that if they offend there is a reasonable likelihood that this mandatory minimum sentence will be imposed.

The “Deterrence Through Sentencing” hypothesis is, of course, broader than the issue of mandatory minimum sentences or ‘three strikes’ models of sentencing. The research literature on general deterrence through harsh sentences is huge. A number of comprehensive summaries have been written, two of them by two of the authors of this compendium.¹ The chapter summarized on page² B-1 is typical of these summaries.

The issue of general deterrence – the typical justification for mandatory minimum penalties – has been reviewed many times in the past 30 years or so. Some of the earlier work on this topic related to capital punishment. Although many observers concluded long ago that capital punishment does have an added deterrent impact (above whatever its alternative

¹ Doob, Anthony N. and Cheryl Marie Webster (2003). Sentence Severity and Crime: Accepting the Null Hypothesis. Tonry, Michael (ed.) *Crime and Justice: A Review of Research*. Volume 30. Chicago: University of Chicago Press (pages 143-195). Webster, Cheryl Marie and Anthony N. Doob (2012) Searching for Sasquatch: Deterrence of Crime Through Sentence Severity. *Oxford Handbook on Sentencing and Corrections*. Edited by Joan Petersilia and Kevin Reitz. New York: Oxford University Press (pages 173-195).

² Page numbers for the *Criminological Highlights* summaries (Part B of this compendium) are to be found at the bottom right. (Other numbers that might be found on some pages relate to the original source of the summary).

might be, see page B-2), research on this topic has continued (see, for example, page B-3). At this point, we think it is fair to say that we know of no reputable criminologist who has looked carefully at the overall body of research literature on “deterrence through sentencing” who believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts.

The evidence supporting this conclusion has been accumulating for decades. In the 1970s, thoughtful reviewers were cautious in their conclusions, suggesting only that the deterrent impact of harsh sentences had not been adequately demonstrated. More recently, we, and others, have been more definitive in our conclusions: crime is not deterred, generally, by harsher sentences. This is not, of course, a new conclusion.

John A. Macdonald, Canada’s first Prime Minister, is quoted as saying that “Certainty of punishment, and more especially certainty that the sentence imposed by the judge will be carried out, is of more consequence in the prevention of crime than the severity of the sentence” (Richard J. Gwyn: *John A: The Man Who Made Us* (Random House Canada) p. 160). We suspect that what Macdonald meant by “the certainty that the sentence imposed by the judge will be carried out” is simply the certainty that there will be a criminal punishment. But whatever John A. Macdonald meant by that phrase, clearly he did not think that ‘severity’ of sentences was very important. He was almost certainly correct in this.

We will be focusing largely on the ‘severity’ component of general deterrence, and will refer to it, as in Webster and Doob (2012: 174; note 1) as the ‘Deterrence Through Sentencing’ or DTS hypothesis. It is important to understand at least two restrictions on what we are referring to when we talk about DTS. In the first place, we are *not* concerning ourselves with that aspect of the general deterrence hypothesis related to *certainty* of apprehension and punishment. (Nor are we addressing another issue: the speed at which the penalty is imposed.) Few would deny that people are less likely to commit crimes if they think there is a high likelihood they will be apprehended and receive a punishment with sufficiently undesirable consequences.

Second, and equally important, when we refer to increases of punishment (or variation in punishment levels) we are referring *only* to punishments that are plausible in a western democracy. We do this for two reasons. First it is silly to talk about questions such as whether the death penalty would have more of a deterrent impact on shoplifting than a fine, or whether a fine of one dollar for an armed robbery would have the same impact as a long prison sentence. These extremes are not plausible penalties for these offences. The only plausible reason even to discuss them (at least that we can think of) is to examine the untested – and almost certainly incorrect – notion that the impact of penalties on behaviour is linear. A linear relationship, if it were to exist, would suggest that increases of equal size – e.g, a month – would have identical impacts on crime. Thus, a simple linear model would suggest that an increase from one month of imprisonment to two months of imprisonment would have the same ‘deterrent’ impact as an increase from 100 months to 101 months.

Even if DTS were effective, it seems unlikely that the impact would be linear. Second, interest in variation in sentence severity is focused on penalties that are harsh enough that people have an interest in avoiding receiving them, and not so harsh that they would never be imposed.

We will not be talking about these kinds of examples for yet another important reason: no evidence exists on their effects for the simple reason that there are no settings in which they take place. In summary, when we talk about DTS (deterrence through sentencing) we will be talking about variation in sentencing severity within ranges that are plausible within contemporary (western) society.

Included in Webster and Doob (2012: p. 175) is a table containing a list of reviews that have failed to conclude that DTS is a plausible way to reduce crime.³ What is interesting, in this context, is that even an economist who appears to believe in DTS has noted that the evidence has been elusive:

Our results suggest that criminals respond to the severity and not just the certainty of sentences, a result that is predicted by the economic model of crime but has proven elusive empirically.⁴

Part of the reason we believe the safest overall conclusion on DTS is that harsher sentences do not deter more than less harsh sentences (when both are restricted to plausible ranges) is that Kessler and Levitt (the authors of the above-cited quotation) are correct: findings that are favourable to the DTS hypothesis are very elusive.

Research on the DTS question has used a number of different methods. In our view, the most persuasive studies are those carried out after about 1990. Typically these are ‘policy experiments’ in which the effects on crime of large changes in sentencing laws or practices can be evaluated. In general, the most comprehensive studies tend to show no overall effects supportive of the DTS hypothesis.

The difficulty with many studies in this area is that problematic measures are used (see discussion in Doob and Webster 2003: 159-161 hereafter referred to as DW2003, see reference in note 1). For example, the description of a policy that increases the ‘risk of imprisonment’ seems to imply that it is examining a simple increase in the severity of punishment. However, it is equally possible that this increase could be driven, instead, by increases in risk of apprehension (DW2003: 185-7). Another problem is that the findings are inconsistent (DW2003: 161-2). Inconsistent results (e.g., across jurisdictions) are important,

³ This list also includes two reviews that focus solely on the few studies purporting to show an effect of DTS. As noted, neither of those two authors claims to be providing a comprehensive summary of research.

⁴ Kessler and Levitt (1999) *Journal of Law and Economics*, 1999, 42, 343-363.

but can be cited selectively. We cite an example of this methodological error in a study purporting to examine the impact of executions on crime (See Webster and Doob, 2012, note 1, p. 186-187 hereafter referred to as WD2012). In this study, inconsistent results are described, in effect, as saying that the effect does not occur ‘everywhere.’ This ignores the possibility that inconsistent results - taken as a whole - could demonstrate no impact of DTS. What accounts for inconsistency in findings is a separate question of no relevance here. The point is that an exclusive focus on ‘positive’ effects and a dismissal of other effects capitalizes on the unpredictability of crime rates.

The variation in results is a critical problem. In one study (see page B-4), the impact of the implementation of 3-strikes laws was examined across 7 offences and 21 states in which these laws were implemented.

Three strikes laws can be considered a special case of harsh sentencing practices whereby second and third time offenders are subject to increasingly harsh mandatory minimum sentences. The exact nature of these laws varies across US states. For example, what constitutes previous ‘strikes’ varies. In some states, for the purposes of determining whether a person is eligible for an enhanced (harsher) mandatory minimum sentence, a second or third strike might be restricted to being a relatively serious felony. In other states, it is any felony in the offender’s past. Similarly, the offence that makes an offender eligible for harsh sentencing on the ‘third strike’ varies across states. Some states require only that it be any felony (and, therefore, it could be a relatively minor offence) and other states require that it be a more serious offence.

What 3-strikes sentencing laws have in common is that repeat offenders are subject to dramatically increased mandatory minimum sentences. Furthermore, these laws typically come into effect with a fair amount of publicity. However, they have not always been crafted carefully enough to avoid problems (see page B-5), nor have they always had coherent objectives (see page B-7).

Publicity is critical for general deterrence because it is the *belief* or the *perception* that an offender will receive a very harsh sentence that, presumably (according to the DTS hypothesis), would inform the offender about the consequences. Hence, abrupt, well-publicized changes in penalty structures would be expected to be ‘easy’ tests for the DTS hypothesis.

In a rather comprehensive study (page B-4), data from 188 US cities were examined. Three-strikes legislation was brought into effect in 21 states. Hence, the non-3-strikes cities were used as controls and, importantly, various other controls (e.g., economic factors) were also included in the model. The data were examined separately for 7 offences (homicide, rape, robbery, aggravated assault, burglary, larceny, auto-theft). Though one could imagine there might be different effects for different crimes, it is harder to imagine why some states would show a deterrent effect and others would not.

Results – change in crime in the 5-year period following the change in sentencing laws – were calculated for each of the 7 crimes and for each state separately, resulting in 147 (7x21=147) different findings. These findings could show that crime decreased or increased, and the effects could be ‘statistically significant’ (unlikely to be due to simple chance variation) or ‘not significant’ (likely to be due to simple variation, from year to year, in crime rates occurring for no discernible reason). The results were remarkable and are shown in the following table.

Number of States showing an increase and decrease in crime following implementation of 3-strokes sentencing laws (5-year impact)

Offence	Crime decreased significantly	Crime decreased, not significantly	Crime increased significantly	Crime increased, not significantly	Total states showing decrease	Total states showing increase
Homicide	1	6	8	6	7	14
Rape	8	3	6	4	11	10
Robbery	7	4	7	3	11	10
Aggravated Assault	6	5	9	1	11	10
Burglary	6	4	4	7	10	11
Larceny	6	5	4	6	11	10
Auto Theft	9	2	6	4	11	10
Total (across all 7 offences)	43	29	44	31	72	75

Adapted from Table 4, page 233, of the Kovandzic, Sloan and Vieraitis (2004)

This table is, in fact, easy to read. As already mentioned, there were 147 separate ‘tests’ of the DTS hypothesis. Looking at the bottom right, we see that in 72 of these tests, crime decreased (consistent with the DTS hypothesis). But in 75 of these tests, crime *increased*, not only not supporting the DTS hypothesis, but going directly against it.

In the final two columns of each row, we see that (with one exception) for each of the seven offences, almost exactly the same number of states showed a decrease in crime (consistent with the DTS hypothesis) as an *increase* in crime (directly counter to the DTS hypothesis).

Indeed, the only offence where there appears to be a substantial difference is homicide; it appears to *increase* following the implementation of sentences of increased severity (See page B-8).

The fact that so many of these findings are ‘statistically significant’ (i.e., not likely to be due to random variation) in both directions suggests that the variables that are examined – most notably the implementation of 3-strikes legislation – do not adequately account for changes in crime rates.

These findings are important for another reason. Isolated effects can easily be pointed to as suggesting that DTS ‘works’. In this study, for example, one could accurately state the following: “In Arkansas, after the implementation of 3-strikes legislation, there was a significant reduction in the crime rates for all 7 offences.” Though this might be true, it ignores the fact that the following statement also describes the findings accurately: “In Nevada, after the implementation of 3-strikes legislation, there was a significant increase in the crime rates for all 7 offences.” As there is no obvious reason for 3-strikes laws to have a deterrent effect in one state but the opposite effect in another state, it is much more likely that variation in crime in both states is due to factors other than 3-strikes laws. In other words, if one is going to “cherry pick” findings, one really needs to pick from both sides of the tree. The overall findings as shown in the table above tell the whole story: taken as a whole, there is no consistent evidence supporting the DTS hypothesis. (See also page B9).

When one looks carefully at some examples purporting to be ‘successful’ findings of DTS, one sometimes also sees problems of data selection (DW2003: 164-7) or inconsistent results (DW2003: 167-70). Occasionally, the data do not even appear to fit the description that is offered of them (DW2003: 170-173). One of the most highly cited studies purportedly showing a deterrent impact⁵ was later shown to have demonstrated this impact only because of a peculiar decision to use only half of the available data. When complete data were examined, it was clear that the crime drop did not correspond with the change in the law.⁶

Most importantly, for there to be plausible evidence of DTS, there needs to be an elimination of other simple explanations. In WD2012 (183-187), we discuss two sets of data (one of which is also summarized on page B-10) that have been used in recent years in Canada as evidence to suggest that DTS ‘works’. Both have serious problems, as described in WD2012. Statements that DTS has been “supported” are not sufficient. One needs to examine the evidence that is presented. Hence, we believe it is important for those interested in the DTS hypothesis to consider the large body of research, not individual studies taken out of this larger context.

One reason that the DTS hypothesis has survived this long without being completely rejected is that it appears intuitive – that is, until one considers, carefully, the steps that are necessary for it to be effective.

⁵ Kessler and Levitt (1999) *Journal of Law and Economics*, 1999, 42, 343-363

⁶ Webster, Cheryl Marie, Anthony N. Doob and Franklin E. Zimring (2006) Proposition 8 and Crime Rates in California: The Case of the Disappearing Deterrent. *Criminology and Public Policy*, 5(3), 417-447

First, as already pointed out, the DTS hypothesis is inherently a ‘perceptual’ hypothesis. If people do not know there has been a change in the penalty structure, or if they are unaware that they will, if convicted, receive a harsh penalty, then the penalty cannot deter them. This is discussed in detail in DW2003, p. 181-184.

For a penalty to deter, people also have to think about the consequences of offending (rather than committing the offence in the heat of the moment, or thoughtlessly). In addition, they have to believe there is a reasonable likelihood that they will be apprehended. If they don’t think they will be caught, penalties are, by definition, irrelevant (no matter how harsh they are).

An additional problem is that people really don’t have much of an idea about what the sentences are likely to be for ordinary crimes (see page B-11). This can be demonstrated by asking ordinary people (who don’t work in the criminal justice system) what the penalty is for a serious, but all-too-common, offence: impaired driving (or driving with blood alcohol level of over 80 mg of alcohol in 100 ml of blood). Few people know the penalties described in S. 255 of the Canadian *Criminal Code*, even though the penalties were changed relatively recently, presumably for deterrence purposes. If the penalties are not known, they can’t deter.

Another study (page B12) illustrates these problems quite well. Most offenders do not meet the relevant ‘thought’ requirements – that is, believing they might be caught and knowing the relevant penalty.

But most obviously, in the world in which we live, the DTS hypothesis *must* assume there is a group of people in society who would commit the crime if they thought they would get the lower penalty, but would not do it for the higher penalty. Let’s consider one of the earliest changes in the penalty structure introduced by the Conservative Government of Canada after it formed the government in 2006: penalties for robbery (and various other offences) carried out with a firearm.

Beginning in 1996, the penalty for robbery with any firearm was a maximum of life in prison and a minimum of 4 years in penitentiary. The current government introduced legislation in its first session of Parliament in the spring of 2006 (Bill C-10, 39th Parliament, 1st session) raising the penalty for a first firearm robbery using a handgun or prohibited weapon, but *not* a rifle or shotgun, to 5 years. This amendment was eventually made law in the next session of Parliament as part of Bill C-2 (39th Parliament, 2nd session).

The government’s theory is obvious, and interesting. In effect, they are suggesting one of two possible deterrent mechanisms: 1) potential first time robbers will switch from a handgun to a shotgun or rifle (because the penalty is lower) or 2) potential first time robbers will desist from carrying out a robbery with a handgun, because of the possibility that they

will be caught and convicted of armed robbery and sentenced to at least 5 years. The logic of *increasing* the penalty for robbery with a handgun or prohibited weapon (from 4 years to 5 years in prison) would appear to be that there are people who would commit the offence expecting to receive a 4 year prison sentence but would not commit the offence if it were increased to five years in prison. This is the only way in which this change in penalty could reduce robberies with a handgun or prohibited weapon.

Some unintended consequences of mandatory minimum penalties

In his review of these issues, Tonry (page B-13) notes there are a number of ways in which ordinary criminal justice processes are impaired by mandatory minimum penalties. These include attempts to circumvent unduly harsh penalties (in effect, making discretion invisible—see page B-14) as well as the inappropriate use of prosecutorial discretion to extract a guilty plea (by agreeing to circumvent an unduly harsh penalty if a person pleads guilty). It appears that it is predictable when ‘mandatory’ minimums will be imposed (see page B-15). Among other factors that appear to be important in determining whether a person receives the ‘mandatory’ penalty is whether the defendant appears to be a ‘good’ person (see page B-16).

The effects, as summarized, are varied. Rigid penalty structures can impact negatively on the efficiency of courts (e.g., page B-17) and make sentencing less transparent (e.g., page B-18). They can also affect important matters such as trial rates (e.g. page B-19).

Another negative impact of rigid mandatory minimum sentences is that they can lead to dissimilar cases receiving similar sentences (see page B-20). To the extent that mandatory minimum sentences focus attention on simple matters (e.g., quantity of marijuana plants being cultivated, as is the case in the recent changes to the Canadian *Controlled Drugs and Substances Act*), other relevant factors (e.g., the role of the offender in the overall drug cultivation system) get lost.

Mandatory minimum sentences, which are typically set in a rather unsystematic way for single offences, often interfere with proportional sentences and, as a result, disrupt the processing of cases as well as the sentencing of offenders (See page B-21). Alternatively, when done broadly (as in the case of ‘3-strikes’ sentencing models), they can catch the wrong people and fail to have the promised impact (Page B-22).

Finally, since crime prevention resources in most jurisdictions are limited, it is useful to look at the relative effectiveness of a million dollars invested in increased punishment in comparison to the same amount invested elsewhere. At least one study (page B-23) found that investments in imprisonment do not pay off well compared to investments in drug treatment.

Certainty of Punishment

We wouldn't want to leave the discussion of the empirical work on deterrence without noting an obvious exception to the generalization that 'deterrence' is not an effective approach to crime prevention. That exception is the impact of *certainty* of apprehension and punishment. There are effective things that can be done by way of increasing the perceived likelihood of apprehension for offending. However, some of these effects are neither large nor long-lasting.

From a policy perspective, however, *certainty* of apprehension – or more importantly *perceived* certainty of apprehension – is difficult to accomplish. Something has to be done in addition to simply changing the law.

The studies summarized on pages B24 and B25 demonstrate that intensive police patrols can have an impact, though the impact may not remain after the intensity is reduced to 'normal' rates of patrols. Similarly, intensive crackdowns on guns can have at least temporary impacts (page B-26). Other forms of enforcement can also have an impact (page B-27). These kinds of findings are one reason one of the world's experts on deterrence suggested that criminal justice resources targeted at 'deterrence' should focus on certainty, not severity (page B-28). However, it needs to be remembered that "certainty" and "perceived certainty" are both difficult to accomplish.

Punitive policies and direct crime prevention: Incapacitation

One seemingly incontrovertible fact about harsh penalties involving imprisonment is that when people are in prison, they are not committing offences in the community. By this argument, high imprisonment rates might be seen as almost automatically leading to crime reduction.

This simple hypothesis is, however, challenged by the findings (not covered in this report) demonstrating that imprisonment can make people *more* likely to reoffend once the sentence is complete. Said differently, people may not commit offences while incarcerated, but this 'savings' in public safety could be nullified (if not outweighed) if they are more likely to commit offences when released.

Another concern is that in some areas – drug production and distribution, for example – incapacitation-based policies seem to be based on the false assumption that there will be no replacement of producers or distributors of drugs. This is almost certainly not the case. The closing down of a marijuana 'grow op' will almost certainly not have any impact on the likelihood that drugs will be available on the street. And the evidence suggests that drug enforcement (which presumably is supposed to reduce availability of drugs) will not have an appreciable impact on drug prices (page B-29). Similarly, it has been argued (page B-30) that

attempts at controlling international drug trafficking may have even expanded the number of sources for drugs. More generally, however, people may go to prison as a result of increased enforcement, but there seems to be little impact on drug prices or drug availability.

The empirical findings on the impact of incapacitation are not encouraging. For example, there are serious problems in determining who is likely, in the future, to be a 'high rate' offender. Different definitions of 'persistent young offenders', for example, result in the identification of very different youths. And when a group is identified, members of that group may not be responsible for many very serious offences (see page B-31). Yet these are the offenders whom it would make most sense to incapacitate.

The problem is simple: Most of those predicted to be high rate offenders turn out not to be (B-32). More generally, it has been suggested that *any* crime control strategy based on intervening in the lives of those who are predicted to be 'at risk' for serious offending is likely to be ineffective (Page B-33 and B-34). There is an understandable criminological reason for this: as people get older they are increasingly less likely to offend. Thus, precisely at the time when people are identified – from past behaviour – to have been high rate offenders, their offending rate declines (see B-35).

More generally, however, criminal justice attempts to identify and incapacitate large numbers of apparently high rate serious offenders *because* of what they might do in the future are unlikely to have much impact precisely because these offenders would likely be given long prison sentences in any case (i.e., because of the seriousness of their offences and their long criminal records) (see page B-36). Jurisdictions that have attempted to deal with crime by increasing the size of their prison populations have not been successful (see page B-37).

The imposition of harsher sentences does not deter crime.

Background. Over the past 25 years, many reviews have been carried out of the research literature on deterrence. Those reviews which examined a substantial number of studies on the deterrent effect of sentence severity have concluded that no convincing evidence exists to suggest that harsher sentences deter. The reviews which have claimed that severe sanctions do reduce crime are based on a highly selected group of papers of questionable value (see below). Despite these findings, most scholars have been reluctant to claim definitively that variation in the severity of sentences (within ranges that are plausible in western democratic countries) does *not* have an impact on crime rates. Instead, the majority have suggested that more evidence is needed before a firm conclusion can be drawn.

This paper concludes that “[i]t is time to accept the null hypothesis” that “variation in the severity of sanctions is unrelated to levels of crime” (p.143). Although the existence of the criminal justice system as a whole and the perception of an increased likelihood of apprehension appear to deter crime, no consistent and convincing evidence has emerged over the last quarter century to justify the claim that increases in sentence severity have a deterrent effect on criminal activity. In addition to those studies examined in earlier comprehensive reviews, this paper assesses the most recent research on the topic. Consistent with prior findings, this literature did not support the conclusion that harsh sentences deter. In particular, the following studies were reviewed:

- Simple descriptive comparisons of crime rates between harsh “3-strikes” sentencing states and those without these severe sentencing laws.
- Studies examining the effects of variation in the implementation of 3-strikes legislation (See *Criminological Highlights*, 1(3) Item 4)
- Research on the impact of changes in sentencing policy, more generally.
- Studies on the effect of mandatory minimum penalties (See *Criminological Highlights*, 3(4) Item 6).
- Research on the impact of habitual offender laws in deterring crime.
- Studies of offenders’ thought processes.
- Research that attempts to disentangle the independent effects of apprehension, conviction and punishment.

Further, studies that purport to demonstrate deterrent impacts of harsh sentences are shown in this paper to have a range of serious problems. More specifically, the following problematic areas are identified:

- Selective use of data.
- Confusion between “certainty” and “severity” effects, and/or the use of measures that combine conceptually different constructs.
- Effects which “do not show a consistent, replicated pattern” (p.167).
- Stated conclusions which are at odds with the data (*e.g.*, effects that are neither consistent nor statistically significant).

Conclusion. The conclusion of this review paper is based on recent evidence including the inability of “3-strikes” sentencing regimes to reduce crime. Consistent with the findings of other comprehensive summaries, no convincing evidence was found to suggest that crime can be reduced by harsh sentences. It is true that one can never prove the absence of a phenomenon. However, the enormous efforts which have been expended over the past 30 years to find the opposite – that is, consistent deterrent effects (of harsher punishment) - have proven unsuccessful. From a policy perspective, it would seem that the time has come to accept the conclusion that harsh sentences do not deter.

Reference: Doob, Anthony N. and Cheryl Marie Webster (2003). Sentence Severity and Crime: Accepting the Null Hypothesis. In Michael Tonry (ed.). *Crime and Justice: A Review of Research*, Volume 30. Chicago: University of Chicago Press, pp. 143-195.

Leading American criminologists and American police chiefs agree: The death penalty does not significantly reduce the number of homicides. Debates about the death penalty distract politicians from focusing on real solutions to crime problems, and politicians support the death penalty to show that they are “tough on crime”.

Background. Public opinion polls in the United States and in Canada typically show a fair amount of support for the death penalty. In the U.S., according to a Gallup Poll in 1994, 80% supported the death penalty. Questions about support of the death penalty require an alternative choice in order to be meaningful. In 1991 it was found that support for capital punishment dropped from 76% to 53% when people were given a choice between capital punishment and life in prison without parole (p. 3). Obviously support for capital punishment exists for a number of reasons. The two reasons most often expressed are that it is appropriate for murder, given the nature of the crime, and that it will deter other potential murderers. Belief in deterrence turns out to be important for many people: a 1991 U.S. Gallup poll found that support for capital punishment dropped from 76% to 52% when people were asked “if they would support the death penalty if new evidence proved that the death penalty does not act as a deterrent to murder” (p. 4).

This study. Since there is some disagreement about how experts view the death penalty, the authors of this paper decided to compare two groups: eminent American criminologists and police chiefs and country sheriffs from all parts of the U.S. The police and sheriff study comes from 386 randomly selected chiefs and sheriffs conducted in 1995 by other researchers as part of another study. The criminologists consists of all of the living presidents and past-presidents of three professional and academic criminological organizations (the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association). Ninety-six percent returned the completed questionnaire.

Findings. The police chiefs and criminology presidents were presented with three statements and asked whether each was accurate:

- “Politicians support the death penalty as a symbolic way to how they are tough on crime.” Accurate statement: Criminology presidents: 100%. Police chiefs: 85%.
- “Debates about the death penalty distract Congress and the state legislatures from focusing on real solutions to crime problems.” Accurate statement: Criminology presidents: 87%. Police chiefs: 57%.
- “The death penalty significantly reduces the number of homicides.” Accurate statement: Criminology presidents: 0%. Police chiefs: 26%.

Obviously police chiefs are not quite as certain as criminology presidents that the death penalty is ineffective as a deterrent and supported largely for political purposes. Nevertheless, the vast majority do take this position.

Conclusion. If expert views of capital punishment are important, then it is useful to know that there is consensus about the ineffectiveness of the death penalty among elite criminologists. And it is interesting that the majority of U.S. police chiefs agree with the academics. One suspects that many other criminologists, not just the presidents of organizations would support the view that there are more important crime and criminal justice issues to spend one’s time on than capital punishment.

Reference. Radelet, Michael L. and Ronald L Akers. (1996) Deterrence and the death penalty: the views of experts. *The Journal of Criminal Law & Criminology*, 87 (1), 1-16.

Capital punishment – an issue for Canadians that doesn’t ever seem to disappear from the public agenda – simply does not act as a deterrent to murder. Though the rate of executions in the U.S. appears high, and, relatively speaking, the homicide rate in many locations in the U.S. is lower than it has been for decades, a careful analysis demonstrates unequivocally that capital punishment does not deter.

A few years ago, leader of Canada’s Reform Party, Preston Manning, suggested that if most Canadians “after reasoned debate, were to declare their conviction that the death penalty is or could be made... a deterrent, presumably this penalty has some deterrent effect, at least among those who so believe” (*Globe and Mail*, 4 July 1995, A13). Such views are easy to dismiss, if one can escape, momentarily, the circularity of his logic. However, they do raise the question of whether capital punishment “works” in any way other than reducing the population of people who, for the most part, have murdered other humans.

This analysis of the evidence demonstrates, using multiple sources of data, that capital punishment does not deter murder. Various methodological approaches have been used. Among other findings, this paper points out that:

- States in the U.S. that have capital punishment do not have lower homicide rates than those without capital punishment.
- States that have abolished and/or reinstated capital punishment do not show consistently different homicide rates before vs. after the change in the law.
- A comparison of states that have capital punishment to neighbouring states that do not fails to show a consistent advantage to having capital punishment.
- The certainty that a murderer will be executed (“execution risk”) is not related to homicide rates when adequate statistical analyses are performed. (The exception to this conclusion is the mid-1970s work of Ehrlich which, among other problems, is completely dependent on using a particular time period for analysis – 1933-1969).
- Highly publicized executions – which are, presumably, most likely to create the perception that murderers are executed – show no effect. In both a carefully controlled study over the period 1950-1980, as well as a study of the period 1940-1986, there was no significant association “between execution newspaper publicity and homicide rates” (p. 235).
- Similarly, there was no consistent evidence of a deterrent effect due to television coverage of executions.
- It has occasionally been suggested that capital punishment “works” only for certain types of murders (e.g., killings of police, first degree murder, felony murder). This “modified” deterrence hypothesis is not supported by the evidence. For example, for police killings, there was “no evidence that overall and specific types of police killings are responsive to changes in the provision of capital punishment, the certainty of execution, or the amount and type of television news coverage devoted to executions” (p. 239).

Conclusion. No matter what data one looks at, no matter what method one uses, no matter what type of murder one tries to deter, capital punishment does not deter. Thus if we are really interested in reducing homicide rates, we have to move our attention elsewhere.

Reference: Bailey, William C. and Ruth D. Peterson. Capital punishment, homicide and deterrence: An assessment of the evidence. In *Studying and preventing homicide: Issues and Challenges*. Smith, M. Dwayne and Margaret A. Zahn (editors). Thousand Oaks: Sage, 1999.

A comprehensive study of crime in 188 U.S. cities demonstrates that three strikes laws did not lower crime rates.

Between 1993 and 1996, 25 U.S. states plus the U.S. federal government passed some form of “three strikes” laws – laws in which a person convicted for the third time typically gets a dramatically longer sentence than they would have received if they had no criminal record. In some states, the second conviction also results in a sentence harsher than the offence itself would warrant. What counts as a “strike” varies across jurisdictions. The proponents of this form of sentencing law suggest that through general deterrence and/or incapacitation, these laws will reduce crime.

The application of “three strikes” laws, however, has been dramatically uneven. “Strikes” in some locations are not brought to the attention of the court (perhaps as part of plea bargains) and, as a result, offenders often do not receive the enhanced sentence prescribed by the law. Much of the research has focused on California where three strikes provisions were aggressively administered. But even in California the evidence does not support the hypothesis that these laws reduce crime (See *Criminological Highlights*, 13)#4, 26)#3, 52)#2, 62)#1). Furthermore, there is evidence that they create other problems (See *Criminological Highlights*, 12)#5, 33)#5) for the administration of justice.

This study examines the impact of the state level sentencing laws on crime in 188 U.S. cities with populations of 100,000 or more. Crime rates for homicide, robbery, assault, rape, burglary, larceny, and motor vehicle theft were examined. A long list of variables known to relate to local crime rates – e.g., percent of households headed by females, percent living

below the poverty line, percent Black or Hispanic – were controlled statistically.

In general, crime in these cities began decreasing *before* the passing of three strikes laws in 1994 or 1995. But, before controlling for *any* other variables, it appeared that crime decreased “slightly faster” (p. 221) in three strikes states. However, when the various control factors are included in the analysis, there was no evidence of a decrease in crime rates attributable to the 3-strikes laws. There was, however some evidence that “states adopting three strikes laws were the same ones relying more heavily on incarceration as a crime control strategy during... the 1980s and 1990s” (p. 225). Only one reliable effect was identified: homicide rates *increased* by about 10.4% after the passage of three strikes legislation. The passing of three strikes laws did not appear to be consistently related to other crime rates.

Conclusion. When the data are examined on a state-by-state basis, one can find jurisdictions where crime reductions appeared to be associated

with the passage of three strikes laws. However, given that there are increases in the same crimes associated with the passage of similar laws in other states, it would appear to be most likely that the laws are not the cause of either the decrease in crime rate in some locations or the increases in others. “One cannot cherry-pick those states that appear to benefit from the passage of a three strikes law and ignore states where the laws appear to have a deleterious impact on crime” (p. 232).

Reference: Kovandzic, Thomislav V., John J. Sloan, III, and Lynne M. Vieraitis. 2004). “Striking Out” as Crime Reduction Policy: The Impact of “Three Strikes” Laws on Crime Rates in U.S. Cities. *Justice Quarterly*, 21 2), 207-239.

The three strikes law in California was passed even though it was known by legislative committees to be seriously flawed, and even though it was known to imply heavy financial costs, and even though other “tougher” but more rational approaches were available. The political and criminological lessons from California’s experience should be learned by all.

Background. The “three strikes” legislation in California is not unique. And few jurisdictions (in North America, at least) are likely to be immune to the pressures which led to its passage. This paper chronicles the political history of California’s legislation, the changes in penal theory that enabled it to become law, and the claims that were made. Rather than try to summarize the paper, a list of points with page references are provided.

- Those favouring three strikes legislation point to statistics of reduced reported crime to show it is working (similar to statistics in most parts of the U.S.). However, the “time served” for non-three strikes offenders is being reduced dramatically to make room for three strikes offenders: a one year sentence now translates into 71 days, on average, in custody. Belief in deterrence made this all right according to California’s Attorney General: “[I]f more [offenders] are being pushed out in the street and the crime rate is going down, it’s difficult not to say that some are being deterred from committing other crime” (p. 396, ft 7). On the other side, there are an increasing number of stories of wildly disproportionate sentences (e.g., stealing a drill from a garage led to a 25 year to life sentence for a man with two prior household burglaries, one of which was in the late 1970s).
- African Americans who make up 7% of the state’s population account for 38% of those sentenced under these provisions (p. 399 and ft 20). The law is particularly harsh on them because it includes drug offences. Though there is evidence (see p. 456, footnote 350) that whites and blacks use cocaine and marijuana at the same rate, arrest rates are much higher for African-Americans.
- Multiple offender statutes have been passed in over 20 states (p. 400), but there is enormous variation in what qualifies as the earlier strikes, how many strikes one gets, what the “trigger” offence can be, and the nature of the impact of the final strike (e.g., whether the trigger offence is relevant) (p. 400-401 and 463-481). California’s law is one of the most extreme on *all* dimensions (p. 402).
- The actual California law seems to have been drafted by an appeal court judge at the request of the father of a murder victim (p. 410 and ft 84) and gathered support after a highly publicized kidnap-killing (p. 411 and ft 89-90). This created public support to put the law on the ballot as a voter initiative. The legislature was told they could pass it, or leave it to the voters to do it for them. It was an election year (1994) (p. 412-413). The problem then was that the citizen sponsor of the initiative would not accept amendments even from law enforcement officials who identified drafting errors (p. 413). Other proposals which would have incarcerated offenders early in their careers were also rejected (p. 419-420).
- Three strikes legislation can be seen as the end point of a move from rehabilitation on the one hand to incapacitation on the other (p. 423). Three strikes legislation abandons a retributivist model (p. 425). Three strikes laws assume that multiple offenders are incorrigible (p. 427), and hence incapacitation is all that is left.
- The evidence in favour of incapacitation as a crime control method is questionable and often simply flawed (p. 432-437). Aside from anything else, it ignores the fact that many crimes are committed in groups and single group members will be replaced (p. 434).
- One of the many difficulties with three strikes legislation is that it creates an elderly prison population who, clearly, are expensive to care for (p. 437).

- In addition, three strikes laws make it more or less impossible to consider what might be called “selective rehabilitation” (p. 448-449) which might be more effective as a crime control method than incapacitation.
- Does the California public really want 3-strikes? It is notable that only four years earlier they rejected a bond issue for prison construction (p. 452). In fact, of course, for the most part the impact of three strikes is a few years away since most 3-strikes offenders would have received some prison time for their offences. Perhaps if the choice had not been “three strikes or ‘nothing’” but rather had been a set of costed alternatives, the voter’s choice would have been different.

Conclusion: The California three strikes legislation provides us with a case history of what can happen when electoral politics -- and to some extent rushed legislation -- takes precedence over rational evaluation of complex questions. Most sentencing systems punish repeat offenders more than first time offenders. The difficulty is that this history illustrates that there are strong forces -- in the case of the three strikes legislation they included the prison guard’s association -- that coalesce in favour of legislation that cannot meet its stated goals but appears, on the surface, to provide quick and effective security.

Reference: Vitiello, Michael (1997). Three strikes: Can we return to rationality? *The Journal of Criminal Law and Criminology*, 87 (2), 395-481.

Mandatory sentences fail again. The various goals associated with mandatory sentences in Australia have not been achieved and governments in Australia may have recognized this fact.

Background. Mandatory sentences in Australia, as elsewhere, are the election-obsessed legislator's best criminal justice friend. The "three strikes" species of mandatory sentence found its way to Australia in the 1990s. Mandatory (prison) sentences did, however, come under fire in early 2000 when the predictable types of cases occurred and were publicized -- mandatory imprisonment for a yo-yo thief, a year in prison for an Aboriginal man who stole a towel from a washing line to use as a blanket, and a prison sentence for a one-legged pensioner who damaged a hotel fence. The laws in Western Australia and the Northern Territory were written broadly enough to ensure that these types of cases would result in a prison sentence.

The rationales that have been given for mandatory sentencing laws in Australia, as elsewhere, have varied over time. In the lineup of justifications, selective incapacitation was first at bat. However, selective incapacitation was shown to be a failure.

Next at bat was general deterrence. General deterrence struck out for the same reason: the evidence was clear that crime rates were unaffected by mandatory minimums. Third at bat, after the first two struck out, was the view that the laws reflected "community concern," the government claiming, not very convincingly, that the first two justifications had never been used (p. 169). The two state governments' approaches appeared to be that if the law doesn't seem to "work", what constitutes "success" should be changed.

Notwithstanding the fact that the laws clearly increased the likelihood of a prison sentence and they received a lot of publicity (good conditions

for deterrence effects), there is "compelling evidence" that the laws did *not* achieve a deterrent effect (p. 172). Not surprisingly, particularly for juveniles, there was judicial motivation to avoid some of the harshest applications of mandatory sentencing laws. Part of the reason for this was the obvious one: proportionality in sentencing was trumped by mandatory sentences. Ironically, the government cited judicial inventiveness in avoiding unduly harsh applications of the law as an argument that the laws were not in breach of U.N. conventions (p.177). In effect, the law was not inappropriate, because it was being successfully avoided! Nevertheless, given that Aboriginal children are over-represented in the courts (they are less likely to be diverted, for example), the laws appeared to affect them more than non-aboriginal children.

Conclusion: Australians have learned that mandatory sentences do not have clear and consistent objectives, and that whatever the objectives might be, they do not seem to be achieved. "We also know that [mandatory sentencing laws] lead to disproportionate sentences, subvert legal processes, and have a profoundly discriminatory impact" (p. 182). However, "there are signs that these lessons have been learned" (p. 182). Governments "have effectively conceded that mandatory sentences have no deterrent effect, and that there is a need for judicial discretion and for the more vigorous use of diversionary schemes and alternative strategies" (p. 182).

Reference: Morgan, Neil. Mandatory sentences in Australia: Where have we been and where are we going? *Criminal Law Journal*, 2000, 24, 164-183.

Can 3-strikes laws promote crime? Evidence has shown that this legislation does not reduce criminal activity through incapacitation or deterrence. This study suggests that these laws can actually promote killings.

Background. Since three strikes laws became a criminal justice fad in the early 1990s, the evidence has convincingly demonstrated that they do not reduce crime. Further, they can be a significant drain on public resources as large numbers of minor offenders are incarcerated (in some states) for long periods of time.

This study, starting from a “rational decision making” perspective, examined the possibility that offenders in 3-strikes states will attempt to avoid apprehension for serious offences by acting in a rational way. More specifically, it is argued that because the penalty for an offence like robbery is, in effect, the same as the penalty for homicide for many serious offenders, the “rational” criminal may attempt to avoid apprehension by killing victims, potential witnesses, or police officers.

Using data from 188 American cities - only some of which had three strikes laws - this study examined the potential homicide promoting effects of this legislation in the period before, during, and after these laws came into effect. Other variables known to relate to homicide rates (*e.g.*, percent African-American, percent young, percent female headed households, percent living below the poverty line, *etc.*) as well as changes in other measures of violence in these cities were controlled for statistically.

The results were clear: “Homicide rates have grown faster (or declined at a slower rate) in three strikes cities compared with cities without the laws” (p.408). “Passage of a three-strikes law has increased homicides, on average, by 13% to 14% over the short term, and 16% to 24% over the long term” (p.409). Finally, “there is no evidence that increases in homicide rates promote state legislatures to enact three strikes laws” (p.412).

Conclusion: “Although policy makers anticipated that [3-strikes] laws would “fix the problem” of serious crime by deterring active criminals and incapacitating repeat offenders... the climate of fear and hysteria in which the statutes were passed actually increased the likelihood of failure or negative unintended consequences” (p.418). It is clear that “policy makers should take more care to weigh, not just the potential benefits of a proposed crime control solution, but the costs as well” (p.419). “Two studies have now found that three-strikes laws increase homicide rates” (p.419). However, what is not known with any certainty is whether this effect occurs because of the hypothesized mechanism of sophisticated offenders killing innocent people in attempts to avoid detection and prosecution. Indeed, several other plausible explanations (*e.g.*, homicide as a defiant reaction against more severe sanctioning practices) would have to be ruled out before a ‘rational model’ explanation can be accepted.

Reference: Kovandzic, Tomislav V., John J. Sloan III, and Lynne M. Vieraitis (2002). Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of “Three Strikes” in U.S. Cities (1980-1999). *Criminology and Public Policy*, 1, 399-424.

California's "3-Strikes" law strikes out again. Strike One: Its effect on crime through incapacitation will be minimal. Strike Two: If fully implemented, the increase in prison costs in the state will be roughly equivalent to the state's current post-secondary education budget. This study throws Strike Three: it will not deter crime.

Context. California's three strikes law created mandatory 25 years to life sentences for those convicted, for the third time, of *any* felony (after two prior convictions for serious crimes). It also increased dramatically the sentence for the second strike. One might expect such well publicized mandatory sentences to deter crime. A previous study by the RAND Corporation looked at incapacitation effects and costs (Strikes One and Two against this law). This study, looks at the other presumed benefit from harsh sentences: general deterrence.

This study. Using month-by-month data from California's ten largest cities, the authors looked at the impact of the new law on felonies (which, presumably, should be given an extra dose of deterrence by the 3-strikes law) before and after the change in the law. And, as a form of comparison, the authors looked at reported misdemeanor larcenies which, presumably would be unaffected by the three strikes law.

Results. The results are easy to describe: "The results generally indicate that the three-strikes law did not decrease the California Crime Index [a crime rate based on the rate of reported "index" crimes] below that expected on the basis of preexisting trends" (p. 464). It is important to look at preexisting trends since crime in California, as elsewhere in North America, was going down *before* the three strikes law came into being. This is important to remember, given that one often hears about simple "before vs. after" comparisons when examining issues such as this one. If crime was already going down before the three strikes law came in, one cannot logically attribute the drop in crime to the law. [In one city -- Anaheim -- there was a significant decrease in the crime index not attributable to preexisting trends. There is no explanation related to the three strikes laws that might explain this one effect in isolation from the other nine cities. The best guess is that something quite different was responsible for the apparent drop in this one city.]

One explanation for the lack of deterrent impact of the law is the obvious one: sentences were already pretty harsh in California. Second, those generally in the position of committing a third strike were getting a little too old to be committing crimes anyway. A law that attempted to deter or incapacitate people when they were at the point of naturally retiring from a life of crime cannot have much impact.

Conclusion. California's three strikes law does not deter. In nine of the ten largest California cities there was no measurable impact on the law beyond what was happening anyway before the law came into being. There seems to be no reasonable explanation related to the three strikes law for the data from the tenth city (Anaheim). There are simple explanations for why the law had no deterrent impact. More important is the implication of these findings for *any* attempt to deter through harsher legislative minimum sentences. The California three strikes law received enormous publicity and was well known to most people since it was voted on in a state-wide initiative. Since it had no discernible deterrent effect, one cannot plausibly expect other legislative minimum sentences in any country to have an impact on crime.

Reference: Stolzenberg, Lisa and Stewart J. D'Alessio. "Three Strikes and You're Out": The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates. (October 1997). *Crime and Delinquency*, 43, 457-469.

The State of Florida was wrong when, in 2004, it announced that a new law that imposed mandatory minimum sentences for certain gun crimes had been directly responsible for a 28% reduction in violent gun crime rates.

During the 1990s, serious crime in most parts of the United States decreased. When crime rates are declining, politicians are often quick to claim that the policies they implemented are responsible for the decrease. Florida, in 1999, brought in a law that required minimum sentences of 10 years, 20 years, or life in prison for certain gun crimes. Speaking about the effects of this law in his testimony before a Canadian House of Commons Committee in November 2005, a prosecutor from the State of Florida asserted that “In the 10-20-Life period, violent crime is down 30%... fewer people were robbed... fewer people were killed... I’m a prosecutor. I’m in the courtroom every day. These laws are good.” Given what is known about the lack of impact of mandatory minimum sentences on crime elsewhere e.g., *Criminological Highlights*, 6 2)#1, 5 2)#2,3 4)#6,7(3)#6), this assertion is surprising. This study examines the hypothesis that the change in penalty structure in Florida was responsible for a reduction in crime.

Crime generally, and violent crime in particular, had been decreasing in Florida since about 1990. Indeed, the *rate* of decrease appeared to be somewhat higher *before* the change in the law as compared to after. Indeed, sophisticated statistical analyses demonstrated, contrary to the prosecutor’s claims, that there was no real evidence of a decrease associated with the timing of the change in the law. These analyses also demonstrated that results are “highly sensitive to when you start calculating the percent change. and this is especially true in Florida’s case because some percent change calculations used by the state of Florida to assess [the] 10-20-Life [minimum sentence law] use data from the years before the passage of the law. Because total crime and homicides were high in these time periods, the use of data from these years as a base for calculating change is likely to inflate the apparent impact of [the law]” (p. 792).

However, there is a more important general point to be made: “Simple before/after comparisons cannot tell the public definitively whether the law was the cause of the change in crime. Many other factors that were occurring at the same time could also have led to changes in crime rates” (p. 793). These issues underscore the problems associated with making sweeping claims about a law’s effects in the absence of rigorous analyses that are sensitive to the possibility that other factors may be responsible for a drop in crime

Conclusion. In this case, it is almost certain that the imposition of harsh sentences for crimes carried out with firearms had no impact on crime rates. Nevertheless, Florida is being held out as another example of how ‘tough’ criminal justice policies can reduce gun crimes. As has been shown in studies of other cities – New York, Boston, and Richmond, Virginia *Criminological Highlights*, 7 5)#2,

7(6)#1) – it is easy to make claims of effectiveness when crime is already decreasing. It is much harder to develop and implement policies that actually have an impact on crime.

Reference: Piquero, Alex R. (2005). Reliable Information and Rational Policy Decisions: Does Gun Research Fit the Bill? *Criminology and Public Policy* 4 4), 779-798.

Harsh sentences don't deter crime in part because there is no relationship between the sentences that are handed down and people's knowledge of those sentences.

"The deterrence doctrine asserts that some people will refrain from some acts because they perceive a risk of punishment" (p. 623). Deterrence-based policies assume that there will be some link between actual punishment and perceptions of punishment. When politicians raise penalties, they assume that people will know about the changes and will act accordingly. The levels of certainty, severity, and swiftness of punishment can only affect behaviour if they are known.

This study took place in 54 of the largest counties in the United States. Two sets of measures were collected: criminal justice processing measures, and estimates from members of the general public of these same measures. Data for four offence types were examined: robbery, homicide, aggravated assault, and burglary. For each of the four offence types, "actual punishment" measures in the respondent's county were obtained on certainty (arrest per 100 offences known to the police and adults convicted per 100 adults arrested), severity (adults sentenced to prison per 100 adults convicted, average maximum sentence imposed), and swiftness of punishment (average days between arrest and sentencing). Survey respondents in each county were asked to estimate each of these. A number of "control variables" were also measured including the actual crime rate in the county, victimization experience, TV news viewing, the respondent's view of the importance of the crime problem, as well as various demographic characteristics.

In general, respondents to the survey underestimated the proportion of offenders who received prison sentences, but were reasonably accurate on the length of the average

sentence. However, the averages tell us nothing about whether individuals living in more punitive locations also perceive their locations to be more punitive. There were *no* consistent findings that could support deterrence notions. There were four offences, and five measures of punishment, leading to 20 tests of the deterrence notion. Two were significant and positive (supporting deterrence) – one on certainty and one on swiftness (none on severity). One relationship was in the opposite direction from that predicted by deterrence theory (on severity of punishment). Since these findings exclude the 15-20% of respondents who were not willing to venture a guess about punishment levels in their area, it would appear that the authors, if anything, biased the findings "in favour of finding a high correspondence between reality and perception, yet [they] still found virtually no association" (p. 651).

Conclusion. In general, it would appear that these findings, derived from a sophisticated survey covering 54 different counties across the United States, support previous findings showing that people are largely ignorant of punishment levels in their communities. Not surprisingly

then, changes in actual penalties being handed down are not accompanied either by changes in the proportion of citizens who think that sentences are too lenient or by changes in offending rates. The deterrent effect sentences may have, then, is largely independent of actual severity of these sentences (See also, *Criminological Highlights*, 62)#1). Said differently people cannot be deterred by severe sentences if they don't know about them. "These findings suggest that conventional efforts to increase general deterrent effects beyond their current level are so unpromising that policy makers should consider more productive alternatives beyond merely increasing punishment levels" (p. 655). Indeed, on the basis of these findings, decreases in punishment levels would be just as effective as increases in deterring people from offending.

Reference: Kleck, Gary, Brion Sever, Spencer Li, and Mac Gertz. (2005). The Missing Link in General Deterrence Research. *Criminology* 43 (3), 623-659.

Most active and violent offenders don't think that they will be caught or have no idea what punishment to expect from their crimes if they were to be caught. More severe sentences would, therefore, have no impact on their likelihood of offending.

Those who suggest that harsher sentences would reduce crime appear to endorse the economic model that, in general, potential offenders make decisions that are informed by evidence of the consequences of what would happen to them if they were apprehended. However, for the consequences (e.g., the severity of the sentence) to make a difference, the offender, at the time of the offence, must both be thinking that there is a plausible chance of being caught and know what the likely punishment would be.

In this study, 278 prison inmates were asked questions about the offence that got them in prison. Specifically, they were asked "When you committed this crime, how likely did you think it was that you would be caught?" This was answered on a 4 point scale ranging from 'very likely' to 'I did not think I would get caught' plus the alternative 'I did not think about it.' They were also asked "When you committed the crime, did you know what the likely punishment would be if you were caught?" Again, a four point scale was used ranging from 'I knew exactly what the punishment would be' to 'I had no idea or thought I knew but was wrong', plus the alternative 'I didn't think about it' (p. 303). By interviewing only those apprehended and punished rather severely, one obviously misses those who were not apprehended or imprisoned. However, the purpose of this study is "to determine to what extent *current* offenders could be dissuaded by more severe sentencing" (p. 301).

Overall, 42% of the 278 offenders indicated that they did not think about whether or not they would be caught

and an additional 34% did not think they would be caught or thought it was not likely. When asked what they thought the punishment would be at the time they were committing the crime, 35% indicated that they didn't think about it, and an additional 18% had no idea or later found out that they were wrong. In total 76% of these prisoners were oblivious to the fact that they might get caught or what the penalty would be (or both). Raising penalties could not be expected to affect their behaviour.

Said differently, 76% of the offenders were "lacking at least one of the necessary conditions for making a rational response to punishments. This group would be unable to make informed, systematic decisions about their crimes. Furthermore, [the survey demonstrates that] 89% of those convicted of crimes involving death of the victim, 91% of sex offenders, and 88% of robbers "may lack the requirements necessary to make informed, rational judgements and to respond as intended to harsher punishment" (p. 305).

Conclusion: "The research suggests that the popular strategy of addressing crime with adjustments in the penal code is unlikely to provide substantial reductions in crime rates and that solutions to the... crime burden must involve a new emphasis on alternative deterrents. The findings speak against more severe sentencing, not for emotional reasons, but because most current criminals do not have the information or mindset required to respond to these incentives for compliance" (p. 308). For example, 89% of the most violent offenders were not thinking about the possibility of apprehension or the likely punishments associated with their crimes.

Reference: Anderson, David A. (2002). The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging. *American Law and Economics Review*, 4 (2), 293-313.

Numerous studies have shown that mandatory penalties do not affect crime rates. The evidence is equally consistent in showing that they interfere with accountability and the efficient operation of the criminal justice system.

“Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms... are a bad idea” (p. 65). That “is why nearly every authoritative nonpartisan law reform organization that has considered the subject... [has] opposed enactment, and favoured repeal of mandatory penalties” (p. 66). Three justifications are offered for mandatory penalties: evenhandedness, transparency, and the prevention of crime. None withstands careful scrutiny.

There is substantial evidence demonstrating that when mandatory penalties are seen as being too severe, prosecutors and judges will often (but not always) circumvent them, in effect moving sentencing decisions from the open courtroom to dark hallways and private offices. This ensures that the penalties handed down are neither consistent across similar cases nor transparent to anyone.

That mandatory sentencing laws are often nullified when their application would be unfairly harsh has been known for at least 3 centuries. The proliferation of mandatory death sentences in 18th century England led to the development of judicial technicalities meant to prevent their application and to widespread refusal by juries to convict offenders of crimes punishable by death. A wide variety of modern techniques (e.g., the prosecution’s “swallowing the gun” or alleging lesser quantities of drugs than were really involved or changing of charges) are today commonly used to circumvent mandatory penalties.

Mandatory penalties have repeatedly been shown to increase the number of trials (since the consequences of

guilty pleas to the original charge are often disproportionately harsh and no benefit can be given for a guilty plea). In many instances, probabilities of conviction decreased when mandatory penalties are implemented and return to normal only when new charge and plea bargaining conventions have evolved. Prosecutors sometimes use the threat of overly harsh mandatory penalties to induce risk-avoidance guilty pleas to lesser charges. For example, Oregon’s dramatic mandatory minimum law (enacted by referendum in 1994) shifted pleas from charges carrying the new mandatories to other lesser included charges (see *Criminological Highlights*, V5N4#5).

A frequently cited justification for enactment of mandatory penalties is their presumed deterrent impact. Repeatedly, however, it has been shown that the imposition of mandatory penalties is not associated with reduced crime (e.g., *Criminological Highlights* V6N2#1, V7N3#6). Of fifteen recent studies summarized in this paper, only one shows any deterrent effects, and it uses a methodology that does not take into account what is known

about crime and the processing of criminal cases.

Conclusion: “Mandatory penalties often result in injustice to individual offenders. They undermine the legitimacy of the courts and the prosecution process by fostering circumventions that are wilful and subterranean. They undermine... equality before the law when they cause comparably culpable offenders to be treated radically differently” (p. 100). And 40 years of increasingly sophisticated research shows they do not have deterrent effects. Getting rid of mandatory penalties however, is not straightforward. One approach is to follow the lead of some jurisdictions: change mandatory penalties into presumptive penalties. Alternatively, “sunset” clauses could be enacted that would abolish the mandatory nature of the law unless the legislature were to re-enact them.

Reference: Tonry, Michael (2009). The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings. In *Crime and Justice: A Review of Research* (Tonry, Michael, ed.), Volume 38. University of Chicago Press.

When given the opportunity to impose sentences that were explicitly longer than would be considered proportionate to the gravity of the offence, judges in Victoria, Australia largely declined to do so, despite the popularity of these provisions with the public and politicians.

Background. Previous research in England on the use of dangerous offender legislation by judges has suggested that “there was a judicial reluctance to apply the full force of provisions such as longer than commensurate sentences and automatic life sentences” (p.82). Generally speaking, “proportionality has been regarded as a fundamental tenet of the common law by the High Court of Australia” (p.82). Nevertheless, the Victoria (state) government introduced legislation in 1993 that required the court “to regard protection of the community as the *principal* purpose for which the sentence is imposed”. In addition, it was stipulated that “in order to achieve this purpose, the court may impose a custodial sentence ‘longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances’”(p.83). It was further permitted that anyone over age 21 and found guilty of one or more of 50 “serious” offences could be sentenced to an indefinite term of imprisonment, notwithstanding the fact that other maximum sentence lengths would normally apply. Clearly, this legislation was a threat to the principle of proportionality in sentencing.

Systematic examination of the effect of legislation such as this one has detected “a juridical tradition... which is generally resistant to such policies” (p.85). For instance, judges will limit the application of these laws to exceptional cases. Similarly, they will interpret the legislation in such a way as to restrict its use. In this study, researchers examined 553 cases appearing before the court between 1994 and 2002 in which the application of these special provisions was considered. These cases largely involved serious sexual offences whose rate of guilty pleas was lower than that for the court as a whole.

The experience in the courts in Victoria suggests that indefinite sentences are not imposed even when they could be. In fact, only 4 of these 553 cases resulted in such a sanction, and in only 11 additional cases were sentences handed down that were longer than proportionate, as allowed by this law. Only 5 of these sentences were upheld after appeal and all were for serious sexual offenses. Further, in those cases in which a disproportionate sentence was not imposed, judges typically indicated that a proportionate sentence would provide sufficient protection to the public. Interestingly, this judicial resistance to indefinite sentences appears to have also influenced prosecutors who have made relatively few applications for this type of sanction.

Conclusions. “Judicial ownership of sentencing and the fierce way in which judicial discretion is defended by the judiciary may go part of the way to explain the reasons for why judges employ avoidance tactics so as not to apply provisions they do not agree with. But such reluctance may also be due to their recognition that the sentences that they are urged to impose will not protect the community, regardless of prevailing popular opinion” (p.98).

Reference: Richardson, Elizabeth and Arie Freiberg (2004). Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria. *Criminal Justice*, 4, 81-102.

Mandatory minimum sentences aren't really mandatory unless prosecutors wish to impose them. The decision to impose a mandatory minimum sentence is affected by factors that normally affect most sentences (e.g., the nature of the offence, the criminal record of the accused) as well as sex and race.

From a prosecutor's perspective, legislation that imposes mandatory minimum sentences on an accused can be a source of direct sentencing power. In some jurisdictions – such as Pennsylvania, the location of this study – prosecutors decide whether or not to charge an accused with an offence that carries a mandatory minimum sentence. In addition, prosecutors can effectively decide whether to apply the law requiring a mandatory minimum sentence. Research by the U.S. Sentencing Commission suggests that only about half of those convicted of offences which made them eligible for mandatory minimum sentences actually received them – a process common enough that it has come to be known as “de-mandatorizing.” From the accused person's perspective, de-mandatorizing a case has the advantage of avoiding the mandatory minimum sentence, whereas from the prosecutor's perspective de-mandatorizing can assure certainty of conviction and some punishment.

This study identified cases in Pennsylvania (between 1998-2000) that were eligible to receive mandatory minimum sentences. Most were drug cases, though some were second and third ‘three strikes’ cases in which mandatory minimums were ‘required.’ Though there were some differences across these two types of cases, the findings were reasonably consistent. The ‘overall’ (full sample) findings are reported here. Only 18% of these cases actually had mandatory minimum sentences imposed. Those who were young, and those who went to trial (as compared to pleading guilty) were more likely to have the mandatory minimum applied, as were those with a prior criminal record, and those charged with more serious or multiple offences.

Americans of Hispanic origins, especially young Hispanic males, were also more likely to receive mandatory minimum sentences. Blacks, overall,

were not significantly more likely to receive a mandatory sentence. However, looking across counties in the state, in those counties in which there was a substantial proportion of Black residents, Blacks were much more likely to receive a mandatory minimum sentence. In contrast, in those counties with few black residents, there were no real differences in the likelihood of ‘mandatorizing’ a case for white and black offenders. It was suggested that “prosecutors might [be] differentially [applying] mandatories in counties with larger minority populations to assuage White fear of minority crime and to be seen as protecting the community from offenders the majority public perceives to be dangerous” (p. 436).

Conclusion: Legislators may believe that when they pass mandatory minimum penalty laws those who are given the responsibility of enforcing these laws will ensure that these

mandatory minimums are imposed. This clearly is not the case. Prosecutors, who in many jurisdictions determine whether a mandatory minimum is imposed, focus in the first instance on the factors that normally determine the sentence: e.g., offence seriousness, criminal record, and whether or not the offender pleaded guilty. But they also use other factors, including race, age, and sex, to determine whether someone is deserving of a mandatory minimum sentence.

Reference: Ulmer, Jeffrey, Megan C. Kurlychek, and John H. Kramer. (2007). Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences. *Journal of Research in Crime and Delinquency*, 44(4), 427-458.

Prosecutors allow departures from “mandatory” sentences for drug offenders who appear to be ‘good’ people.

Mandatory sentencing systems are most likely to be criticized because at times they require the imposition of disproportionate sentences. Many European ‘mandatory’ minimum sentences allow judges to depart if the sentence would otherwise be inappropriate and reasons are given for the departure. When such principled approaches are not available, decision makers may find alternative ways of mitigating the impact of rigid and harsh sentencing systems.

The United States Sentencing Commission guidelines, before 2005, made it almost impossible for judges to depart from the prescribed guideline sentence. The most important way of departing (downwards) was the prosecutor’s request for a departure from the judge for “substantial assistance” given by the convicted person to the prosecutor. The judge would then determine the size of the departure (if any). Drug sentences under these guidelines are determined almost completely by the type and weight of the drug and the offender’s criminal record. As a consequence, substantial assistance departures were important because they constituted almost the only way less-than-normal sentences could be imposed.

This study, carried out in three mid-western US judicial districts, examined which drug offenders (in 1515 cases) received substantial assistance departures. 41% of these cases received such departures. If a case received a departure, the reduction in sentence averaged about 50% (a reduction of over 5 years).

Departures were more likely to be given for three types of offenders: women, those with some post-secondary education, and those who were US citizens. In addition,

the 35% of offenders who had not been held in pretrial custody were more likely than those who were in custody to receive a departure. Those whose most serious offence was a conspiracy charge were more likely to receive a departure than those facing an ordinary drug charge (e.g., trafficking). There were differences across the three districts, with substantial assistance departures more prevalent in Nebraska and Minnesota than in the Southern District of Iowa. In addition, when they were given, departures were larger in Nebraska and Minnesota than they were in Southern Iowa.

Neither drug type nor race was a significant predictor of substantial assistance departures. However, because those convicted of offences related to ‘crack cocaine’ are disproportionately black, it is hardly surprising that race did not have an additional simple effect. The offender’s role in the offence (minor, aggravated or normal) did not have an impact on the likelihood of receiving a ‘substantial assistance’ departure, perhaps because this was one of the factors that had already been taken into account in sentencing.

Conclusion. It seems unlikely that all of the 41% of offenders in this sample who received downward departures offered the prosecutors substantial assistance.

They would all have needed to possess useful information to exchange for a lower sentence. Similarly, it seems unlikely that women, citizens, those with some college or university education, and those not in custody at the time of sentence would have more information to trade than men, non-citizens, less educated defendants, and those in custody at the time of their sentencing. Instead, those who received substantial assistance offers from the prosecutors and less harsh sentences from the judges probably were not seen to be as serious offenders as others. More generally, since the Supreme Court decisions shifting the guidelines from ‘mandatory’ to ‘advisory’ appeared to have little overall impact on sentencing patterns (see *Criminological Highlights* V12N6#6), these findings suggest that those ‘given a break’ from harsh sentencing regimes may simply be those seen by the prosecutor and/or the judge as sympathetic offenders.

Reference: Cano, Mario V. and Cassia Spohn (2012). Circumventing the Penalty for Offenders Facing Mandatory Minimums. *Criminal Justice and Behavior*, 39 (3), 308-322.

Three strikes puts courtroom officials in the hotbox: California's three-strikes legislation has a disruptive impact on the processing of serious cases.

Background: The California 3-strikes law is one of the harshest 3-strikes laws in the U.S. On the second felony conviction, offenders get twice the "normal" sentence that would apply to their offence. The third strike gets 3-times the punishment that would apply to first offenders or 25 years to life, whichever is longer. This third strike sentence is imposed even if the third strike is for a minor felony. Hence an offender can get 25-years-to-life for a minor felony.

An examination of California's 3-strikes laws shows the reality of the administration of overly harsh laws. When the law was brought in, the assumption made by many was that the administration of the law would be undermined by judges, prosecutors, and defence counsel who would not implement the law as written. This is not what universally occurred.

This study interviewed and surveyed judges, prosecutors, and public defenders in five large California counties. "Both methods indicate that Three Strikes has significantly disrupted the efficiency of the courtroom and has made the prediction of case outcomes difficult" (p. 192). For example, in four of the five counties studied, it appears that almost all prior strikes were introduced into evidence. Plea bargaining became difficult because it became difficult to predict when prosecutors would be willing to dismiss prior "strike" allegations. On the other hand, there was some evidence that judges were more willing to ignore prior convictions in counties where prosecutors went by the book.

"The greatest effect of Three Strikes for workgroup (judges, prosecutors, defence) members has been an increase in trials.... Three strikes prohibits such deals [where a guilty plea is substituted for a lesser punishment]. Defendants who face extended prison terms are unlikely to agree to plead guilty.... Overall the felony trial rate is higher than before Three Strikes...." (p. 198)

"Recognizing [the possibility of jury nullification], public defenders attempt to inform the jury that the current offence is a third strike" (p. 199). But even though judges "routinely offered second strike defendants the lowest possible sentence, seemingly to encourage defendants to plead guilty... substantial numbers of [prosecutors, lawyers and judges] believed that they could not predict which cases were likely candidates for leniency" (p. 201).

Conclusion: It is clear that the 3-strikes law in California is having a disruptive impact on the sensible running of the courts. Because the law requires disproportionately severe sentences to large numbers of offenders, there are efforts (some successful) to avoid the harshness of the law. The result is inconsistency in the application of the law and in the outcome of criminal cases in California.

Reference Harris, John C. and Paul Jesilow. It's not the Old Ball game: Three strikes and the courtroom workgroup. *Justice Quarterly*, 2000, 17, 185 –203.

Why do judges not use draconian measures to deal with apparently dangerous offenders? Because these measures are in “conflict with fundamental principles and approaches of the common law... in particular proportionality, discretion, and natural justice” (p. 66).

Background. Many western countries, including Canada, have special, typically draconian, laws to deal with dangerous offenders. These include indefinite sentences, mandatory sentences and special principles of sentencing (e.g., incapacitation) for certain types of offenders. The question asked by this paper is a simple one: why are relatively few offenders sentenced under these laws? In Canada, for example, in the first 20 years of such legislation, only about 150 “dangerous offenders” on indefinite preventive detention out of a potential pool of approximately 14,000 prisoners had accumulated in Canada’s penitentiaries. Hence, the number admitted each year constitute only a tiny proportion of the roughly 4400 prisoners admitted to federal penitentiaries. “Though highly symbolic of the state’s power to act, and of considerable sociological significance, [laws focusing on dangerous and/or recidivist offenders are] in practice irrelevant, offering little effective protection to the public.... [In addition], throughout their histories, [these laws] were often strongly and continuously opposed by those charged with their implementation – the judiciary” (p. 52).

Judicial responses to these laws have typically been less than enthusiastic. Over the years, judges have found numerous ways of circumventing mandatory penalties. Few of those who qualify for special legislative provisions receive these penalties. Australian habitual offender legislation and sex offender provisions, for instance, have been imposed on only a tiny proportion of all those who might qualify (pp. 56-7).

It is probably inappropriate to imply that judges have consciously “resisted” the imposition of these provisions. The judicial actions which result in their non-use “have not been planned or plotted” (p. 59). “The bedrock of resistance to special laws is the principle of proportionality whose origins have been traced back to the Magna Carta, 1215...” (p. 59). In addition, “where the judiciary suspects or believes that legislation represents an attack on fundamental human rights, it will strictly construe the language of the statute in order to give it the narrowest interpretation consistent with the intention of the statute and the preservation of those human rights” (p. 61). Due process requirements and narrow interpretations of the meaning of “prior convictions” have also restricted the use of these laws. “Judicial discretion... is central to the self-concept of the judiciary... Courts... have generally been distrustful of unaccountable administrative authority with the result that attempts to restrict the amount of judicial discretion have been strongly resisted” (pp. 62-3). Finally, at least in Australia, the courts have been “reluctant to make too much of probabilistic data” (p.65). “The liberty of the subject under the common law is not to be set at hazard upon a statistical probability, nor curtailed in the expectation, no matter how well grounded, that an agent of the Executive Government or a Parole Board will choose to set him free before the law’s sentence has run its course” (p. 65).

Conclusion. When special provisions of criminal laws are in conflict with standard criminal law principles, the latter appear to generally win out in jurisdictions with common law traditions. Notwithstanding this fact, “the danger [of special draconian laws is] an emerging philosophy of despair” whereby these laws “are no longer justified on the basis of the gravity of the offence or even on the basis of the offender’s future conduct, but simply on the basis that the offender has forfeited his or her right to participate in society” (p. 67).

Reference: Freiberg, Arie. “Guerrillas in our Midst? Judicial Responses to Governing the Dangerous” in Mark Brown and John Pratt (eds.) *Dangerous Offenders: Punishment and Social Order*. New York and London: Routledge, 2000.

Three strikes laws have had no impact on crime levels. More surprisingly, they have generally had little impact on the criminal justice system largely because they represented, to a great extent, more symbolic than real changes. Even in California, projected impacts were much less than expected. The major impact was predictable: prosecutors have increased their control over the criminal justice process.

Background. Three-strikes legislation has taken America by storm. Even Canada has its own “little-3-strikes” provision in the proposed *Youth Criminal Justice Act* -- three strikes and you’re presumptively an adult (for sentencing purposes). The U.S. laws vary considerably (p. 134-6) on what constitutes the first two strikes, and what offences can be considered a third strike. Finally, the consequences of being “out” vary across states. Critics suggested that the legislation would have an enormous impact on the criminal justice system; supporters suggested that the legislation would reduce crime. Neither occurred.

The general finding in most states was that the law had little impact for a simple predictable reason: “the vast majority of the targeted offender population was already serving long prison terms for these types of crimes... The three strikes law movement is much ado about nothing and is having virtually no impact on current sentencing practices” (p. 142).

California is the exception. California is unique in the baseball justice world because its “third strike” can be any felony. It also created an unusually harsh second strike provision and courts have decided, among other things, that certain juvenile adjudications can count as strikes (p.144). Although the law explicitly prohibits plea bargaining, it allows the prosecutor to “discount a prior conviction...” if the prosecutor believes that a baseball sentence would not be “in the furtherance of justice” (p. 143). Nevertheless, there have been some interesting 3-strikes sentences including:

- 27 years to life (to be served in prison) for attempting to sell stolen batteries (value \$90).
- Minimum of 5 years (to be served) for selling \$5 worth of marijuana.
- 25 years to life (to be served in prison) for, after failing to stop at a stop sign, failing to stop when the police tried to stop the offender. A chase occurred but there was no accident and no injuries except to the car’s tires which were shot out by the police.

The law had an impact initially on the number of preliminary hearings, though this increase did not last long. Trial rates for second and third strike cases are dramatically higher (4% of non-strike felony cases go to trial compared to 9% for second strike and 41% for 3rd. strike cases) but there are few 2nd. and 3rd. strike cases. Counties varied dramatically on how strictly they implemented baseball sentencing. Some (e.g., San Francisco) discounted baseball penalties for those charged with non-violent offences. Generally speaking, crime went down in California as elsewhere in the U.S. and the decrease was uncorrelated with the zeal in implementing baseball justice. The impact on prison populations was much less than initially projected, though there were about 10,000 baseball sentenced offenders admitted to prison each year, and the prison population increased between spring ‘94 (the first inning) and spring ‘98 by almost 30,000 (about 27%). Because of the uneven implementation, however, this was dramatically less than had been projected. Judges, it seemed, also tended to undercut the impact of baseball sentencing (p.152).

Crime, of course, was unaffected by the changes in the law. Those states with and without baseball sentencing and those counties in California which embraced or did not embrace baseball sentencing are indistinguishable when looking at crime rates.

Conclusion: Baseball sentencing rules have symbolic impact but have less impact than originally thought on criminal justice processing. They have no impact on crime. They can, however, “enlarge the discretionary powers -- and hence sentencing powers -- of the prosecutor at the expense of the judge” (p. 158).

Reference: Austin, James, John Clark, Patricia Hardyman, and D. Alan Henry. The impact of ‘three strikes and you’re out’. *Punishment and Society*, 1999, 1, 131-162.

Uniformity of sentences is not an appropriate goal for the sentencing process.

Excessive structuring of sentences can occur in various ways. Legislatures can mandate fixed or mandatory minimum sentences for certain offences. Alternatively, rigid guidelines can be constructed that do not take into account the complexity of the behaviour that needs to be considered in determining a proportional sentence. Sentences, therefore, can be excessively similar. Guidelines are often justified as mechanisms designed to reduce unwarranted variation in sentences. In doing so, they may create unwarranted uniformity.

This paper examines drug sentencing under the U.S. federal guidelines. Those guidelines were made somewhat more restrictive by the fact that the U.S. Congress imposed a number of mandatory minimum sentences on drug offences at the time the guidelines were developed. The guidelines used the mandatory minimum as the starting point. In addition to the criminal record of the accused, the main basis for sentences harsher than the minimum is the quantity of the drug that is the focus of the offence. This means that the role the offender played in the drug process is given no explicit importance in determining the offence. Different drugs are made “equivalent” by conversions into “marijuana-equivalent” amounts of each drug. Furthermore, sentences can not be reduced substantially by mitigating factors, and, often, it is only the more important people in the overall drug-selling process who have the information that allows for a lesser sentence (on the basis that they had relevant information to provide to prosecutors in return for more lenient treatment).

This study examines sentences of 1259 inmates in U.S. federal correctional facilities who were imprisoned for

drug offences (most commonly powder and crack cocaine, marijuana, and methamphetamine). Drug quantity was the strongest predictor of the sentence, as would be expected from the guidelines. Notwithstanding the drug ‘equivalence’ calculations included in the guidelines, offenders serving sentences for marijuana offences received somewhat shorter sentences. Those who went to trial got harsher sentences, especially those found guilty by a jury. In addition, even after controlling for criminal record, drug quantity, drug type, and other legal factors, Black offenders received harsher sentences, as did males, older offenders, and those with lower levels of education.

The most important finding, however, was that the offender’s role in the offence – simple possession, street selling, wholesaling, producing, importing, or laundering money related to drugs, had no impact on sentences. Said differently, an offender who was merely in possession of a certain amount of drugs for his or her own use was treated as equivalent to someone with a more central role in the drug trade who happened to be sentenced for the same amount of drugs. The quantity of drugs that

was the subject of the sentence was, interestingly enough, independent of the person’s role in the drug trade.

Conclusion: The study demonstrates what can happen to sentencing when rules become excessively rigid. In this case “quantity-driven sentencing, coupled with culpability-based adjustments that are too limited in scope, leads to excessively uniform sentences for offenders of widely differing culpability and responsibility for the drug trade” (p. 172). This fact, combined with the finding that other legally irrelevant factors such as race still affect sentence length, suggest that there are serious problems that need addressing in these guidelines and, perhaps, in other rigid guideline systems. Alternatively, of course, it could be that these were the effects desired by those who designed the guidelines.

Reference: Sevigny, Eric L. (2009). Excessive Uniformity in Federal Drug Sentencing. *Journal of Quantitative Criminology*, 25, 155-180.

Oregon's "get tough on crime" law, passed by voters in 1994, had an impact on the courts: trial rates increased for the first two years after the law came into effect. More people went to prison, and they went to prison for longer periods of time.

On 1 April 1995, a sentencing referendum (Measure 11) brought in by the voters in Oregon resulted in long mandatory minimum sentences for 16 violent and sex related crimes. In addition it prohibited 'early' release from prison, and it provided automatic transfer of youths to adult court for these same offences. Five more offences were added to the list shortly thereafter. The theory behind the bill was simple: residents of Oregon were to be safer because offenders would be incapacitated or deterred. However, research on these topics [see, e.g., *Criminological Highlights* 3(1)#1, 6(2)#1, 7(3)#6, 8(1)#2, 8(3)#6] demonstrates that crime is essentially unaffected by legal changes such as those contained in the referendum.

Previous research has found that there is often "hydraulic displacement of discretion" – meaning that a change in the processing of cases has consequential effects in another part of the system – in circumstances such as that which followed the change in the Oregon law. In the case of mandatory minimum sentences, the typical finding is that "prosecutorial authority to determine which offenders are prosecuted [under the new provisions] is enhanced, whereas judges lose much of their authority over the sentencing process" (p. 11). In addition, it is often found that sentence lengths for 'non-targeted' offences increase along side of the 'targeted' offences.

In the case of Oregon, it was found that there was a decrease in the prosecution of Measure-11-eligible cases and an increase in the prosecution of 'alternate' cases (typically lesser degrees of the same offences which did not attract the mandatory penalty). Trial rates for Measure-11-eligible offences also increased in the first two years after implementation, and then reverted to their former levels. But the nature of pleas changed: there was an increase in the number of

cases in which the accused decided to plead to lesser included offences, and a decrease in pleas involving the original charge. The rate of prison sentences, however, increased both for Measure-11 eligible cases and for Measure-11 alternate cases. The group contributing most to the increased use of prison sentences for Measure-11 cases were cases in which the offender had no history of offending. The average prison sentence increased from 77 to 105 months. However, this "success" has to be understood in the context of another effect: sentence lengths for some of the Measure 11-alternate cases decreased. Overall, though, imprisonment rates in Oregon increased during this period.

What seemed to be happening was that after the new law came into effect, rather than being charged with a Measure-11-eligible offence, an offender may be charged with a lesser offence, yet receive approximately the same sentence that the Measure-11-eligible offence would have drawn before Measure 11 came into effect. In other words, "fewer offenders have been sentenced for the [Measure-11] offences, whereas a greater proportion of offenders have been sentenced

for Measure-11-alternate offences. [The] analysis suggests that this shift resulted from the use of prosecutorial discretion and the downgrading of cases, that, although technically Measure-11-eligible, were not deemed appropriate for the associated mandatory minimum penalty" (p. 31). Said differently, prosecutors were sometimes willing to downgrade the offence when the mandatory minimum punishment did not fit the crime.

Conclusion. It is clear that "prosecutorial discretion is the force that drives the implementation and... the impact of mandatory minimum sentencing policy" (p.33). There was, in addition and not surprisingly, evidence of variation in the manner in which the new policies were implemented across locations. Clearly, the implementation of mandatory minimum sentences is not as straightforward as it would appear to be in the legislation.

Reference: Merritt, Nancy, Terry Fain, and Susan Turner (2006). Oregon's Get Tough Sentencing Reform: A Lesson in Justice System Adaptation. *Criminology and Public Policy*, 5 (1), 5-36.

The future impact of laws that ‘toughen’ sentences can be modelled. In California, legislative efforts to toughen sentencing laws have had – and will continue to have - dramatic effects on the size of the prison population. This increase consists largely of drug – not violent - offenders.

In 1976, California shifted from an indeterminate to a determinate sentencing regime. Since that time, the California legislature has enacted over 1,000 new laws related to sentencing policy (more than 400 in the 1990s alone). In addition, there have been numerous ballot initiatives in which citizens, not their legislators, created sentencing provisions. The result of these changes is that California’s imprisonment rate grew by 484% between 1980 and 2006 (from 98 per hundred thousand residents to 475. These figures exclude local jails and those in federal prisons.)

This paper develops a model of California imprisonment during the final two decades of the 20th century, and then uses that model to project what will occur for the next couple of decades based on various political choices. During the period 1980-1998, the number of state prisoners increased from about 20 thousand to about 160 thousand. The proportion of violent prisoners, however, went down from 64% to 44%. In contrast, drug offenders constituted 10% of prisoners in 1980 and 32% in 1998. Given that one of the big changes in policy that took place during this period was to increase sentence length (largely because of the focus of the new sentencing laws on criminal records), it is not surprising that the proportion of prisoners 35 years old and older increased from 23% to 41% and the number of those with two or more prior convictions increased from 11% to 27%. The proportion of female prisoners increased from 5% to 8%.

If the three strikes law of 1994 is fully implemented (e.g., in terms of actual release dates), the proportion of prisoners incarcerated for violent crimes would *decrease* slightly between now and 2030, and the proportion

of drug offenders would continue to increase (to 46%). This scenario also predicts that women, in 2030, would constitute 18% of prisoners. Restricting three strikes eligibility to violent offenders would reduce the increase in prison population to a 65% increase in size by 2030 compared to 79% for the ‘full’ 3-strikes law. The proportion of violent offenders in prison would remain essentially unchanged, but the proportion of blacks and women would grow in a similar fashion to the predictions for the ‘full’ three strikes model. However, “as wide and sweeping as the potential consequences of California’s Three Strikes law appear in the abstract, they pale in comparison to the cumulative effects of the earlier changes made to California sentencing policy” (p. 260).

Conclusion: These cumulative impacts of California’s sentencing laws demonstrate that whatever its stated purposes might be, California’s complex sentencing structure (including the three-strikes laws) is “clearly not defensible on the basis that it makes the public safer by incapacitating dangerous offenders” (p. 261). Though a modified system

of 3-strikes that focuses only on those with a violent criminal history might result in a prison population with slightly higher levels of dangerousness, “it still does not perform terribly well in the context of the existing system” (p. 261). Thus far it is clear that “two decades of sentencing policy reforms conceived and implemented with the goal of making California’s citizens safer have, in fact, resulted in a prison population that is more than four times the size and substantially less dangerous than it was in 1980” (p. 262). “The most prominent promise of criminal sentencing policy reform in California... has been to protect the public from dangerous offenders.... California has faltered miserably on this promise” (p. 262).

Reference: Auerhahn, Kathleen (2008). Using Simulation Modeling to Evaluate Sentencing Reform in California: Choosing the Future. *Journal of Experimental Criminology*, 4, 241-266..

Mandatory minimum sentences for drug crimes are shown to be less effective than treatment in reducing the use of cocaine.

Background. Legislatures love mandatory minimum sentences. The suggestion is that with a flick of a pen, the change in the law will reduce the level of the problem. Mandatory minimum sentences are popular for certain kinds of crimes -- in particular those that frighten the public. Gun crimes constitute one example, drugs another. Of course, there is almost no limit on how high the mandatory minimum might be. If "a few years" is said to reduce the level of the problem somewhat, then "more years" should reduce it more.

But there is another problem. Many criminal justice programs, if implemented with huge amounts of resources, would be shown to be effective. Putting a few more police on the street may not affect street crime, but putting 100 police officers into a small area probably would affect crime in that area. Incapacitating people provides another example: locking up a few more people will not have a measurable impact on crime, but if a substantial portion of the population is in prison, there are, quite simply, fewer people on the street available to commit crime.

The argument that "if one life is saved" the crime control strategy is "worth it" is a dangerous and short-sighted approach. In an era of limited public funds for crime prevention or control, the question is not whether "one life might be saved" but whether "more lives might be saved" using a different approach. A more socially useful approach is to ask "how many lives are saved (or whatever benefit one wants to examine) per million dollars spent" on each of a number of different programs.

This study, carried out and published by the Rand Corporation, examined the impact of mandatory minimum sentences for drug crimes in comparison to treatment. The "outcome measure" that was used was "kilograms of consumption prevented per million dollars spent" on each of a number of different approaches to reducing cocaine use. Note, however, that this is not a "value free" outcome measure: if one's interest was largely the punishing of cocaine dealers, reduction of cocaine use would be less important. The second point that one must consider is that some programs -- like effective treatment programs -- are more likely to show their effects in the long term.

Results. Comparing various criminal justice approaches with the "treatment of heavy cocaine users" leads to findings easy to summarize: Treatment of heavy users results in higher levels of "kilograms of cocaine consumption prevented per million dollars spent" (103.6 kg/\$1 million over a 15 year period) than does longer sentencing (12.6 kg/\$1 million), or conventional enforcement of the drug laws (27.5 kg/\$1 million). Varying the assumptions behind these models does not appear to make much difference: treatment appears to be the most effective approach, using this definition of "effective." It should be pointed out that if long sentences could be directed solely or largely on very high level suppliers of cocaine, and there was little or no replacement for this activity in the market, there would, obviously, be a point at which longer sentences would be cost effective. However, "it is not plausible that these [approaches and results] could pertain to the average federal mandatory minimum defendant, but there may be individuals who do meet the criteria" (p.62).

Conclusion. "Spending additional money on arrest, prosecution, and conventional sentencing is more cost-effective than spending additional money to extend terms served [for those who are already arrested]... *Treatment is more cost-effective than either enforcement approach* [conventional enforcement or mandatory minimum sentences] at reducing cocaine consumption and cocaine spending" (p. 51).

Reference: Caulkins, Jonathan P., C. Peter Rydell, William L. Schwabe, and James Chiesa. *Mandatory minimum drug sentences: Throwing away the key or the taxpayers. money.* Rand Corporation, Drug Policy Research Centre, 1997.

Very intensive foot patrols by police can have an impact on street crime.

Police foot patrols have been seen as a popular way to address crime, though the evidence that they actually deter crime has been weak. The public appears to believe that if there is an officer on foot patrol in their neighbourhood, they will be safe. From a management perspective, foot patrols are expensive. If, however, foot patrols are used selectively to target crime “hotspots” – locations where crime rates (or street crime in particular) are high – it has been suggested that they may be especially effective.

Unlike some studies that looked at relatively large geographic areas, this study examined the impact of intensive police foot patrols on street crime using a large number of small geographic areas. Crime hotspots were identified, in early 2009 in Philadelphia, by looking at the number of homicides, aggravated assaults, and robberies that had occurred outdoors in recent years. In all, 120 hotspots were located, each including at least one of the most violent street corners in the city. These hotspots had an average of 14.7 intersections and 1.3 miles of streets. These 120 hotspots were then divided into 60 pairs of hotspots with similar numbers of violent incidents. One of each pair was then randomly determined to be a ‘control’ hotspot (with no special change in police patrol intensity). The other received intensive patrols for 12 weeks in addition to normal policing. The intensive patrols consisted of 2-person foot patrols for 12 weeks from 10a.m. until 2 a.m., 5 days a week (Tuesday morning to early Sunday morning). In all, then, 57,600 hours of 2-person police patrol (115,200 person-hours) were used during the 12 week period in the 60 intensive patrol hotspot areas. The activities of the police officers varied considerably across areas in terms of the number of

recorded pedestrian and vehicle stops, arrests, and recorded disturbances and drug-related disorder.

Overall, there was a slight reduction in the average number of violent crimes recorded in the experimental areas, compared to the average number before the intensive foot patrols (a reduction of about 0.88 crimes per area during the 12 week period). In the control areas, there was a slight increase in the number of crimes during the ‘treatment’ period, as compared to the earlier period (0.52). However, this apparent relative reduction only occurred in the highest crime areas. These were the areas, not surprisingly, in which the foot patrol officers were most likely to have direct contact with citizens as a result of arrests or responding to various forms of disorder. In the relatively low crime areas (which were, of course, hotspots relative to the city as a whole), the patrols had essentially no impact on crime.

However, it would appear that some of the violent crime reduction in the intensive foot patrol areas was a result of displacement to adjacent areas. It was estimated that 90 violent crimes were averted in the target areas as a result of the intensive foot patrols, but an estimated 37 of these crimes

were displaced to adjacent areas. Thus there were an estimated 53 fewer crimes as a result of the intervention, or one crime for every 1087 hours of 2-person patrols (or 2174 person-hours of patrol).

Conclusion: It would appear that highly intensive policing can modestly reduce the number of violent crimes that take place in an area. In part because the effect is small and is limited to the very highest crime areas, it is difficult to know whether to attribute the drop in crime to the mere presence of a police officer in the area or to the activities of the police in the neighbourhood. The data would suggest that it may be that foot patrols can only deter violent street crime in very violent areas. However, the investment of police time for each crime averted was non-trivial.

Reference: Ratcliffe, Jerry H., Travis Taniguchi, Elizabeth R. Groff, and Jennifer D. Wood (2011). The Philadelphia Foot Patrol Experiment: A Randomized Controlled Trial of Police Patrol Effectiveness in Violent Crime Hotspots. *Criminology*, 49(3), 795-831.

Intensive foot patrols by police can reduce street crime, but the effects don't last after police strength is reduced to normal.

Previous research has demonstrated “that highly intensive policing can modestly reduce the number of violent crimes that take place in an area” (*Criminological Highlights* V12N3#3). This study is a follow-up of an earlier study that examined the impact on crime of intensive 2-person patrols during a 12-week period. The earlier study compared the rate of street crime in areas that received intensive 2-person foot patrols (as well as adjacent areas) to the street crime rates in similar locations that (on a random basis) did not receive intensified foot patrols. The crime reducing effect of the foot patrols was demonstrated, but the amount of crime reduction was not large. It was estimated for every 2174 person-hours of patrol, one crime was averted.

Aside from the cost of implementing high intensity police foot patrols in a neighbourhood, little is known about their long term impact. In particular, it is important to know whether the crime-reducing effects of intensive patrols remain after policing strength (and, therefore, visible presence) returns to ‘normal’ levels. During the ‘intensified foot patrol’ period of the original study, foot patrol officers were responsible for a 64% increase in pedestrian stops, a 7% increase in vehicle stops, and a 13% increase in arrests.

This study focuses on the first 15 month period *after* the intensive foot patrols ceased. From a practical perspective, this period is important because it tests whether the effects of intensive patrols were long-lasting, or whether the effect only lasted while the police officers were present and visible on the street. Previous research (e.g., *Criminological Highlights* V7N6#1) would suggest that one should not expect the effects of the intensive patrol to last after the patrols stop.

In fact, that is what happened. As soon as the extra patrols left, the crime suppressing effect disappeared. “No significant differences were found between the treatment and control areas on levels of violence from the beginning to the end of the post-treatment period” (p. 83). In fact, there was no evidence of a gradual decay: the effects of the intervention ended abruptly when the intensive patrols ended. Crime, in effect, returned to expected levels.

The original study also looked at displacement of crime into adjacent areas. After the intensive patrols stopped, crime in the areas adjacent to where the intensive patrols had taken place went down suggesting that some crime might have moved back to the areas from which it had been displaced during the intensive foot patrols.

Conclusion: It would seem that “the effects of crackdowns [in the form of intensive police foot patrols] are short term and [they] decay rapidly” (p. 87). It has been suggested that intensive foot patrols deter crime

because, in deterrence terms, they act as a “certainty communicating device.” “In Philadelphia, once the ‘certainty communicating device’ was removed, no differences between the treatment [high intensity foot patrols] and control locations were detectable” (p. 87). Since “most police agencies allocate patrol resources disproportionately at high-crime places...., it is questionable whether better funded crackdowns will elicit the aggregate crime reductions predicted. It would appear that “more holistic strategies” (p. 92) are needed to fulfill the goal of effectively reducing the amount of crime in a neighbourhood.

Reference: Sorg, Evan T., Cory P. Haberman, Jerry H. Ratcliffe, and Elizabeth R. Groff (2013). Foot Patrol in Violent Crime Hot Spots: The Longitudinal Impact of Deterrence and Posttreatment Effects of Displacement. *Criminology*, 51 (1), 65-101.

Though not all police crackdowns on gun violence are effective, some seem to be able to suppress gun violence, at least temporarily.

“Project Safe Neighbourhoods” brought over a billion dollars to cities in the United States to reduce crime, especially gun violence. The political debate about guns in the U.S. has focused largely on attempts to restrict access to guns by “high risk” individuals (e.g., youths or those with criminal records). More recently, however, “targeted enforcement” strategies have been used to try to reduce gun violence. It appears that such strategies are sometimes effective, but often are not.

It would seem that there are a few general principles that apply in this area: a) efforts to *reduce gun misuse* are likely to be more cost effective than broad efforts to *reduce availability*, and (b) “for a given level of law enforcement spending, we may achieve a greater deterrent effect by *increasing the certainty rather than the severity* of punishment” (p. 680; See also *Criminological Highlights*, 62)#1). This paper therefore, suggests that “enforcement activities could be made more effective by prioritizing... targeted police patrols that seek to deter high risk people from carrying guns illegally” (p. 681).

A number of strategies that were part of *Project Safe Neighbourhoods* almost certainly were ineffective or have large costs relative to their value. These include providing gun locks (to prevent thefts), school prevention programs, better controls on gun purchases, and better tracing of guns involved in crime. Two programs that are sometimes seen as being effective – those in Richmond, Virginia and in Boston see *Criminological Highlights*, 75)#2) – are shown to be largely ineffective: “Homicide rates in Richmond were trending downward even before the launch of Project Exile” (p. 693-4) just as the decreases in Boston were no larger than decreases in other parts of the state. Simply put, the flaw in simple claims of success with respect to many American “violence prevention” programs in the 1990s is that the programs were started during a period of broad decline in

violence rates in many American cities. Said differently, crime rates went up in the latter part of the 1980s and then began declining *before* programs such as those in Richmond and Boston were implemented. Those cities that showed the largest increases in the 1980s showed the largest decreases in the 1990s. The gun homicide rate in Boston, for example, had decreased by about half prior to the beginning of the program. It then continued to decrease for about three more years.

One potentially promising strategy that appears to have been evaluated carefully was used in Pittsburgh. In response to concerns about guns being illegally carried in public places, concentrations of police on the street were increased dramatically (20%-50%) in high risk areas, during high crime periods (specified days and times). The police officers involved in this show of force did not have to respond to normal calls for service. Their focus, instead, was on traffic stops and “stop-and-talk” activities with pedestrians who appeared to have a high “risk” for carrying guns. The analysis involved comparisons of intensively policed areas with control areas, pre- and post-implementation during the targeted times and the “regular patrol density” times.

Using “assault related gunshot injuries” and reports of “shots fired” as the measures of success, there appeared to be larger decreases in the densely-patrolled areas during the times when there were many

police present. Furthermore, perhaps because of intensive officer training, focused activities, and community involvement, the decrease in gun violence was apparently accomplished without aggravating community-police relationships. The concern, obviously is that if targeted patrols of this sort were employed in a city, they could be seen giving the police a license to target certain racial (or other) groups.

Conclusion. It would appear that targeted increases in police patrols can suppress gun violence at least during the time that the police are present, and that with proper procedures, it is possible to do this without creating strained relationships between the police and the community. To the extent that the focus can be narrow (i.e., on people and locations likely to have a high rate of carrying illegal guns), and to the extent that there is “extensive officer training and... [involvement of the] community in project design and implementation” (p. 682) the overall impact can be positive. Nevertheless, it would appear that the effectiveness of such strategies is likely to be limited to those times and locations in which the concentration of police is high.

Reference: Ludwig, Jens (2005). Better Gun Enforcement, Less Crime. *Criminology and Public Policy* 4 (4), 677-716.

Increasing the certainty of punishment for illegal acts can be effective in reducing offending and may generalize to circumstances in which the objective likelihood of apprehension has not changed.

Governments often look to deterrence as a way to reduce crime. However, they frequently make the mistake of focusing solely on increasing the *amount* of the punishment rather than its certainty even though there is substantial evidence that the size of the expected punishment does not matter in determining levels of crime (e.g., *Criminological Highlights*, V6N2#1, V7N3#6, V8N1#2). In contrast, this study looked at the general deterrent impact of *certainty* of receiving a punishment on law breaking in the Zurich, Switzerland, transit system.

In the transit system in Zurich, train passengers are required to carry valid tickets, but, after 1993, there were no regular checks to see whether passengers had valid tickets. However, infrequent spot checks were carried out throughout the day and evening (which allowed estimates to be made on the proportion of riders who had not purchased tickets). Punishment for not having a valid ticket was, after December 2003, an on-the-spot fine of the equivalent of about €54 (C\$87) escalating to €80 for a third offence.

In the early 2000s, a number of surveys carried out for the transit system revealed that many passengers felt unsafe while riding on evening trains, perhaps because transit staff were not regularly on the trains. In mid-2003, in order to address passengers' sense of insecurity, attendants were brought back onto the trains after 9 p.m. Although they were reintroduced to the trains to provide security to passengers, the attendants were also required to systematically check tickets on the evening trains in the Zurich region. This resulted in about 1 passenger in 3 being checked for valid tickets. No change in the checking

of tickets (and hence the objective probability of apprehension) occurred during daytime hours.

Fare-dodging (estimated by the number of checks leading to an on-the-spot fine) dropped from about 3.5% of all riders in early 2003 to about 1% by the end of 2005. In January 2006, data were made available separately for those subject to 'normal' spot checks (that occurred throughout the day) and for those checked by the train attendant (who worked only in the evening hours). It appears that the increased surveillance during the evening hours generalized to the daytime hours such that fare dodging was equally low during that period, even though there had been no increase in the checking of tickets. The results are corroborated by data from surveys in Zurich schools in 1999 and 2007. The lifetime prevalence of fare-dodging decreased from 62% to 52% during this time period, a finding that is consistent with the transit system's data.

Conclusion: It appears that increasing the objective likelihood of apprehension for offending (transit

fare dodging in this case) can have an impact as long as people *perceive* that the probability of being apprehended has increased. In this case, however, the effect of increased surveillance also generalized to periods of the day when there was no objective change in the probability of apprehension. It may be that in this case – and perhaps others – people know of the general increase in the likelihood of apprehension either from their own experience or from hearing that others have been apprehended. At the same time, they may have insufficient information to realize that the increased surveillance and apprehension was limited to specific times of the day.

Reference: Killias, Martin, David Scheidegger, and Peter Nordenson (2009). The Effects of Increasing the Certainty of Punishment: A Field Experiment on Public Transportation. *European Journal of Criminology*, 6(5), 387-400.

Rather than focusing on severity-based policies that increase already harsh sentences, policy makers should shift their attention to programs that use the police to make the risks and consequences of crime more clear and certain. Such a policy shift holds the promise of reducing both crime and imprisonment.

Imprisonment rates in many countries, most notably the United States, are a concern in part because of the various costs of imprisonment and the fact that high imprisonment rates appear to have little effect in reducing crime. There is a substantial amount of research suggesting that increasing the severity of sentences from current levels will not increase the (general) deterrent impact of the criminal justice system (see *Criminological Highlights*, 6(2)#1) and is not efficient in reducing crime through incapacitation (*Criminological Highlights*, 3(1)#1, 10(2)#5).

This paper points out that deterrence always depends on both certainty and severity. But variation in sentence severity – within levels that are plausible in western societies – does not appear to have much, if any, impact on crime. Given the various costs of imprisonment (financial as well as social), a very attractive criminal justice approach to crime prevention is one that reduces *both* crime *and* imprisonment levels. Incapacitation does not qualify as such a policy since it “necessarily will increase the rate of imprisonment. In contrast, if the policy also prevents crime by deterrence, then it is possible that it will be successful in reducing both imprisonment and crime” (p. 16). In addition, to the extent that the experience of prison is criminogenic (see *Criminological Highlights*, 11(1)#1, 11(1)#2, 11(4)#2), policies that reduce imprisonment have an additional advantage. There are, of course, many other ways to reduce crime. However, given that substantial amounts of public money are spent on the criminal justice system, the question that should be addressed by criminal justice policy makers is a simple one: how can this “criminal justice budget” best be used?

A careful analysis of the data suggests that a fundamental shift should occur – from focusing on

sentence severity to focusing on the certainty of apprehension. A shift of this sort does not mean that by increasing police budgets, crime rates will automatically be lowered. Instead this analysis suggests that *targeted* increases in police activity that increase the likelihood that offenders will be apprehended can prevent crime in the first place and thereby avert the need for punishing an apprehended offender. In other words, averting crime also averts punishment. For example, regular drug testing of probationers to enforce prohibitions against drug use resulted in more certain but shorter imprisonment periods (1-2 days); this, in turn, was quite effective in deterring probationers from drug use and other probation violations. In this way, the certainty of apprehension averted the need for exacting further punishment. What is crucial, of course, is that potential offenders must believe that their likelihood of apprehension *and* punishment is high.

The difficulty is that achieving certainty in delivering punishments is elusive. Not all police programs – or programs that simply increase the number of police in a neighbourhood – achieve high levels of real or perceived certainty of punishment. However, “the key empirical conclusions... are that at prevailing levels of certainty

and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police” (p. 37).

Conclusion: If policy makers are committed to using criminal justice budgets effectively, shifting funds from imprisonment to policing could be effective in reducing both crime and imprisonment. Since people are likely to be deterred by programs that increase the (perceived) likelihood of apprehension, those program will prevent crime and those people who are deterred will not end up in prison. There are, obviously, potential costs to such programs as well. Hence programs that appear to be effective in one location need to be continually evaluated as they are implemented in new locations. And these evaluations need to examine not just the impact on crime, but also other impacts on communities and residents.

Reference: Durlauf, Steven N. and Daniel S. Nagin (2011). Imprisonment and Crime: Can Both Be Reduced? *Criminology and Public Policy*, 11(1), 9-54..

Intensive enforcement of drug laws appears to be an ineffective way of increasing the price of illicit drugs.

Each year in the US hundreds of thousands of people are incarcerated for drug offences. The primary focus of 'drug strategies' in some countries is on enforcement rather than 'demand-side' programs of prevention and treatment. Between 1980 and 2010, incarceration rates in the US for drug offenders increased almost 10-fold, while prices for cocaine and heroin in the US fell substantially.

It appears that simple 'risk-price' models do not fit the data related to drug offences. Control over the supply of drugs – and arrests and incarceration for long periods of time of those in the drug business – should push prices up since the 'cost' of doing business has increased. The theory would then suggest that higher prices of drugs (the result of the high expected cost of doing business) should reduce consumption. The data do not support this simple economic model. In the US, arrests for cocaine and heroin have been fairly stable since the late 1980s, but the number of people in prison has gone up dramatically. Prices (in 2007 dollars) for cocaine dropped dramatically in the 1980s during a period of apparent market expansion, were steady in the 1990s, and dropped again, between 2000 and 2007 by about 25%. But even though the price went down, total consumption did not go up.

One problem in 'modeling' the effect of enforcement efforts on drug use is that the effects on two different types of users – hard core dependent users who are typically a minority in number but who consume the majority of drugs, and non-dependent users – may be very different. One estimate suggests that

a small number of cocaine and heroin users account for 84-93% of total spending on the drugs. It is possible that enforcement efforts can minimize the number of people who become hard core drug users *in the beginning* of a drug 'epidemic' in a community by restricting access to drugs. On the other hand, committing significant resources to drug enforcement may have little impact after drug use is widely established.

The challenge for law enforcement approaches is that the large number of dealers present in a city means that even huge numbers of arrests would be expected to have little impact. It is estimated that in a city of about a million people in the US, there would be approximately 3300 cocaine dealers. The simultaneous arrest of several hundred would therefore hardly touch the selling process.

At the same time, it is clear that drug prohibition (as compared to complete legalization) does increase the price of drugs. However, "for most established markets, expanding enforcement beyond a [simple] base level is a very expensive way to purchase further increments in price. Overall, the US is far into the region of diminishing returns; toughness could be cut

with modest effects on prices and use. Alternatively, toughness could be focused on the forms of dealing that are most violent or otherwise noxious...." (p. 259).

Conclusion: It would appear that a certain level of drug enforcement can keep a market from developing in locations where there is, essentially, no existing market. And if a market is expanding toward a high level of use, some enforcement may help delay that expansion. But in locations with high and stable rates of drug incarceration, reducing the number of prisoners could be carried out without any adverse effects on drug use. "Dramatic reductions in incarceration are possible without entering uncharted waters of permissiveness, and the expansion of today's unprecedented levels of incarceration seems to have made little contribution to the reduction in US drug problems" (p. 261).

Reference: Caulkins, Jonathan P. and Peter Reuter (2010). How Drug Enforcement Affects Drug Prices. In Tonry, Michael (ed.) *Crime and Justice: A Review of Research*, Volume 39. University of Chicago Press.

The warriors against drugs should look at the historical record of trying to suppress opium use. Attempts at suppressing drugs have had the paradoxical effect of increasing supplies and markets.

Background. Over the past 150 years, it appears that opium markets have expanded to meet the supply that is available. The end of the free trade in drugs, brought about in the first part of the 20th century, seems to have resulted in a growth in both production and consumption since that time. For much of the 19th century, drug sales (e.g., British sales of Indian opium to China) were an important part of international trade revenues. Attempts to monopolize this trade led to the opening up of new sources of drugs (e.g., Turkey). European entrepreneurial activity not only created new sources, but also new markets (e.g., in Southeast Asia).

Attempts to restrict the use of drugs after World War I shifted the emphasis to heroin. This was due, in part, to the fact that heroin was more compact, easier to ship, and highly addictive. World War II apparently also had an enormous impact on drug use (and trade). Largely because of global restrictions on shipping drugs, both supplies and markets were almost completely suppressed. However, with the end of global warfare, incomplete attempts to eradicate drug trafficking had paradoxical impacts. For example, the relatively successful eradication of the supply of Turkish opium, “stimulated both opium production and heroin consumption... The illicit world price rose, stimulating opium production elsewhere.... From this predictable, but unrecognized market logic, every short-term victory, every successful eradication or crop substitution, would become a market stimulus that brought another defeat for America’s drug wars” (p. 205). “With global demand constant, a sudden supply reduction in one sector simply raised illicit prices and stimulated increased cultivation elsewhere across the vastness of the Asian opium zone. In essence, the four US drug wars of the past quarter century extended a local law enforcement model into the international arena... that would contribute to an increase in world opium supply....” (p. 206). Undoubtedly, part of the problem is that in many “less controlled” countries, drug production has enormous advantages over conventional crops – “credit access, storability, increasing value over time, permanent marketability, and easy transportability” (p. 211). Thus, the problem is that because suppression is typically bilateral and ephemeral – e.g., the U.S. temporarily suppressing supply from one country –, a rise in drug use typically occurs when supplies increase and costs decline. Though there have been times when perfect coercion has proven effective (e.g., during World War II), “imperfect coercion unleashes a whirlwind of unpredictable consequences” (p. 215).

Conclusion. “Over the past century, each attempt at drug prohibition has produced an unexpected market reaction that has allowed the illicit traffic to adapt, survive, and even expand. After a century of such unintended consequences, it may be time to learn from the past and develop strategies for minimizing the negative impact of both bilateral and multilateral drug control efforts” (p. 218).

Reference: McCoy, Alfred W. Coercion and its Unintended Consequences: A Study of Heroin Trafficking in Southeast and South West Asia. *Crime, Law, and Social Change*, 2000, 33, 191-224.

Persistent young offenders typically commit the same kinds of offences as other young offenders -- only more of them. Who qualifies as “persistent” is arbitrary and those identified by one definition at one point in time would not be the same people identified as “persistent” if the definition or time period were slightly changed.

Context. The idea that a “small number of offenders” is responsible for a disproportionate amount of (youth) crime has become a meaningless truism of criminal justice culture. For example, one can honestly say that in 1995-1996, 2.6% of youth in Canada are responsible for 90% of the cases brought to youth court. Similarly, one can honestly point out that in 1995-6, 46 youths in Canada were responsible for ninety percent of the homicides that took place apparently at the hands of youth. Both of these statements are, essentially, meaningless. There were 111,027 cases brought to court (involving 67,681 persons); these youths are 2.83% of all youths in Canada. There were 51 youths charged with homicide in Canada; 46 youths constitutes 90% of these 51. On the other hand, offending, like many human activities is not evenly distributed across the population. Hence we have the search for the magic sign which identifies “persistent offenders” who could then be incapacitated or treated.

This book reports a study of all of those youths who were arrested three or more times in two parts of England. Starting with this population of youths, three definitions of “persistence” were applied to the pool of 531 youths who had been arrested three times in a year (number of arrests, number of offences attributed to them, number of offences *known* to have been committed by them). An attempt was made to identify the 10% most persistent youthful offenders. The only problem was that 69 different youths were identified by one or more of these criteria, but only 30 of these 69 were identified by all three criteria.

As the authors point out, “These are the juveniles in whom the police, the courts, the press and the public are particularly interested” (p. 101). The offences they were doing were the same as other juveniles: just more of them: “It is not the case that these persistent offenders were committing the more violent or serious offences....” (p. 102)

It was also noted that if one looked at persistence over time, and one used as a measure of persistence “frequency of known and alleged offending over a three month period”, those who would be defined as persistent varied across time: “It was rare for [offenders] who met the criteria in each quarter to be the same individuals” (p. 103). “Offending, particularly persistent offending by juveniles, is a relatively transitory activity” (p. 105). But the overwhelming finding bears repeating: “Persistent offenders... -- whichever of the three definitions was used -- did not seem to be strikingly different from the full sample, with the tautological exception of the frequency of their offending” (p. 119). “Very serious offences -- grievous bodily harm, aggravated burglary, rape and sexual offences -- did not represent in total as much as one percent of all offenses attributed to persistent young offenders -- a pattern that is typical of juvenile offending generally” (p. 120). “Any definition of persistence will inevitably be arbitrary” (p. 122). “In summary, then, not only is the process of attempting to define persistence deeply problematic, but because there is a degree of arbitrariness in the way some offenders rather than others become defined as persistent, creating a custodial sentence for that group raises issues both about equity and about efficient resource use” (p. 123).

Conclusion. We cannot reliably identify who is likely to be a persistent offender. Definitions can be created and applied, but equally reasonably sounding definitions would identify a different group of offenders. Persistent young offenders -- by any definition -- may have committed more offences, but the offences that they commit, on average, are no more serious than the offences committed by others. A special regime for such offenders may look good as long as one does not look carefully at the effects.

Reference: Hagell, Ann and Tim Newburn. *Persistent young offenders*. London: Policy Studies Institute, 1994.

Can crime be reduced effectively by identifying offenders likely to re-offend and incarcerating them? The answer is simple: No.

Background. The “new penology” represents a shift from the treatment of offenders to “the efficient management of dangerous groups. The [penal] task is managerial, not transformative” (p.704). The terms “protection of society” or “protection of the public” now appear to mean “making it impossible for people to offend by placing them in prison.” This is one of the justifications used for “three strikes” legislation. There are, however, serious problems with incapacitation models of sentencing, including the following:

- “the frequency of offending declines with age...
- there is no evidence of a progression of increasing severity of the offences committed over the length of a criminal career,
- there is little evidence of specialization on the part of high rate criminals” (p.707-8).

But the most serious problem is that even the most careful (and optimistic) selective incapacitation model (Greenwood and Abrahamse’s 1982 Rand Corporation report) shows high rates of false positives (around 50%). Furthermore, in the construction of its sentencing model, the Greenwood and Abrahamse study used “items that are unrelated to either the offence or the blameworthiness of the offender” (such as employment history, juvenile and adult drug use, and juvenile criminal history, p.719-720).

The study described in this article replicated the Greenwood (Rand) study. The results of this “new and improved” study are simple to summarize: Using California prison data, only 36% of those who were predicted to be high rate offenders actually turn out to be high rate offenders. Moreover, about one third of the high rate offenders were not identified as such.

Conclusion. “Proposals for selective incapacitation are predicated on the idea that we can prospectively identify high-rate offenders sufficiently early in their careers to reap the incapacitative benefit of crime reduction. The major obstacle to the successful implementation of such proposals is that no convincing evidence exists that this is possible” (p. 726). There is a “tremendous appeal of selective incapacitation as an idea. Given that we have every reason to believe that a small subset of criminal offenders contribute disproportionately to the total volume of crime in a society, a strategy that promises to locate and incapacitate this group is almost irresistible in its elegance. The seductive simplicity of selective incapacitation leads otherwise conscientious researchers to conclude that it works, despite the total lack of evidence to support such a conclusion.... The obstacle to realizing this seemingly perfect solution to crime prevention lies in the prospective identification of this offender pool. We simply cannot do it with any reliable accuracy” (p. 727). [The criminologist Frank Zimring once remarked, “The wonderful thing about incapacitation as a method of crime control is that it has no moving parts.”] As another writer noted, “the criminal justice system has been burdened with unrealistic expectations of solving social problems that have [proven to be] insoluble elsewhere” (p. 728).

Reference. Auerhahn, Kathleen. Selective incapacitation and the problem of prediction. *Criminology*, 1999, 37 (4), 703-734.

Relying on statistical predictions of which individuals will be high rate offenders is not likely to affect the level of crime in a community.

One often hears statements such as “a group as small as 5-6 percent of offenders accounts for up to 50% of offences” (p. 318). Such assertions often are used to justify crime control strategies based on predictions of who these high rate offenders are. There are a number of problems with these assertions. For one thing, they typically refer only to offences resulting in convictions, and often refer only to offences known to have been carried out by those in prison. Most importantly the observations in studies cited in support of these sorts of assertions are made retrospectively. The authors of the present study note: “We have not been able to find a study that could identify a group comprising only a few percent of a cohort at a pre-school age that would then account for half of the cohort’s criminal convictions” (318).

The present study examines the problems inherent in a crime control policy based largely on identifying and intervening with people who are likely to commit criminal offences. For such a policy to be effective, interventions need to reduce dramatically the frequency of future offending for a group of high rate offenders who can be accurately identified. The first problem is that *effective* interventions into the lives of youth, on average, reduce the frequency or likelihood of offending by no more than about 10-20%. In addition, prospective or population studies suggest that crime – even crime leading to convictions – is not highly predictable. One study, for example, showed that the *most* ‘at risk’ youths (about 20% of all youths) in a sample of Swedish males who had been convicted of criminal offences were responsible for only about half of the offences committed by the full sample. Furthermore, only about half of this highly ‘at risk’ group of youths was ever convicted of *any* offence and only 17% of them could be considered ‘high rate offenders.’ In other words,

it does not appear that strategies that might rely on identifying relatively high risk youths and treating them will have an appreciable impact on crime rates.

In addition, from data collected in Sweden in the past 90 years, it does not appear that ‘crime’ as recorded by the police varies in parallel to changes in youths’ social circumstances (e.g., serious intra-family conflict, divorce). In contrast, another factor – societal alcohol consumption – appears to be almost the only variable necessary to understand changes in homicide rates. Similarly, variation in the rate of car thefts for most of the 20th century can be explained by changes in automobile ownership, not individual factors subject to therapeutic intervention.

Conclusion: The suggestion that interventions at the individual level (e.g., efforts to reduce individual drug abuse) will not have a substantial impact on crime rates in a community is not to say that they are unimportant. Rather this paper suggests only that individual interventions are not likely

to turn a high crime society into a low crime society. For example, in one collection of studies it was noted that “the predictors [of lethal violence] based on early life conditions are... strikingly similar [in the United States and in the U.K.]” (p. 331). Nevertheless, homicide rates in these two countries are quite different. “An explanation for crime and trends in crime over time cannot be provided without taking into consideration history and the broader context, including variations in situational factors and in the societal response to undesired behaviours” (p. 332).

Reference: Tham, Henrik and Hanns von Hofer (2009). Individual Prediction and Crime Trends. *European Journal of Criminology*, 6(4), 313-335.

Using “risk” as the basis of criminal justice decisions can be risky: Such decisions may turn out to be less accurate than anticipated and may undermine other important principles.

Risk assessments have been used in criminal justice decision-making for decades. Judges and other criminal justice decision-makers sometimes think that they can predict – using their own intuition or the ostensibly sophisticated prediction instruments developed by others – whether an individual will re-offend. Parole authorities are often, in legislation, required to take into account the likelihood that a prisoner will re-offend. In a similar way, “actuarial risk assessment is now promoted as best practice in child welfare...” (p. 3).

Risk factors have now been divided into two types: static (largely factors relating to an offender’s past) and dynamic (factors subject to change). Furthermore, in part because of the focus on dynamic factors in predictions, “criminological needs” have also become important. The growth of ‘evidence-based practice’ in predictions has encouraged reliance on a simple measure of effectiveness: does a measure predict future offending? If the answer is “yes”, then often the investigation of the validity of an instrument ceases. Similarly, the validity of the measure is seldom described in terms of the proportion of false positives and false negatives that result from using the scale.

Some scales include components that do not on their own predict reoffending. The difficulty is that if individual components of the measures do not predict future offending – as is the case with some components of the LSI-R (Level of Service Inventory – Revised) scale – one runs the very real risk of classifying an individual on the basis of factors that do not have any predictive value even if the overall measure does predict. The result could be that a person’s liberty is restricted as a result of a characteristic that has no relationship to future offending. Furthermore, when risks that are not

demonstrably related to recidivism are included in overall risk measures, it is inevitable that the measures will not be effective in classifying offenders.

Even when the best possible measures are used, there is substantial error. In one study of the LSI-R, 42% of those classified in the highest risk category among Pennsylvania parolees did not reoffend. An ‘improved’ version of this scale reduced the false positive error rate to 31%. However, only 25% of those who did subsequently reoffend were identified as being high risk. Similar findings (with high false positive and false negative rates) are easy to find in other studies. Though the relationship between the ‘risk’ measures and ‘recidivism’ are almost always positive and ‘statistically significant’, there are inevitably high proportions of those who score as ‘high risk’ but do not reoffend. It is rare that a high proportion of recidivists are identified correctly by these scales. In many cases, the problem is that there are large numbers of ‘moderate risk’ offenders whose recidivism is, in effect, unpredictable.

Scale constructors in this area, remarkably, often focus on the internal consistency of the measures. In risk assessment, however, “it is best when all risk items are totally

independent of each other but each has a relatively strong relationship to the outcome measure utilized” (p. 6). These conditions rarely occur in risk scales.

Conclusion: It is inevitable that there will be high proportions of those who are predicted to re-offend by these prediction scales who in fact do not subsequently offend. Conversely, there are high numbers of those who re-offend who were not predicted to do so. Hence it is important to question whether the criminal justice system should base important decisions on perceived risk. If prediction of human behaviour is inherently flawed, perhaps we should revert to other principles – especially in the allocation of punishment. Instead of trying to use the criminal justice system to predict future offending, punishment could be allocated largely on the basis of what an offender has done, rather than what someone thinks he or she might do in the future.

Reference: Baird, Christopher (2009). *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System*. National Council on Crime and Delinquency.

It is impossible to predict at an early age who will turn out to be a ‘high rate’ or serious offender. What can be predicted is that people become less likely to re-offend as they grow older no matter what their early pattern of offending looks like.

There is a good deal of research demonstrating that offenders are typically relatively young and that even relatively high rate offenders eventually slow down or stop offending (see, e.g., *Criminological Highlights* 6(4)#3). However, some policy makers appear to believe that because, in retrospect, it can be shown that a small portion of the population was responsible for a disproportionate amount of past offending, early identification and incapacitation of high rate offenders would be an effective crime control strategy. Such a belief is based on a lack of understanding of the problem of predicting rare events.

This paper focuses on an interesting sample: all of those convicted of criminal offences in the Netherlands in 1977. It then examines their previous offending patterns as well as their offending for the next 25 years. From a practical perspective, then, it allows one to answer two questions: (1) What are the various ‘patterns’ of offending of those who are in contact with the criminal justice system? (2) Can one predict with any useful level of accuracy who, in the future, is likely to be a high rate offender?

Starting with those who were convicted in 1977, and looking back to records of offending from age 12 onwards and forward for decades, there was, not surprisingly, a relatively early peak in the overall offending rate of this group in the late teens and early 20s and a gradual dropoff after that. The rate of violent offending was, as is normally the case, somewhat flatter, but did show a gradual decrease with age. Those offenders whose offending careers began relatively early in life (age 15 or younger, or, in a separate analysis, age 13 or younger) obviously had, overall, higher rates of offending. However, the shape of the curve was the same as that of other offenders:

peaking in early adulthood followed by a decline thereafter. Similar declines were found for those who were early and high rate offenders: rates of offending dropped off after the late teens or early 20s.

When offenders were divided into four groups (according to their patterns of offending) there were some differences across groups. Chronic offenders (the 4% of the group with relatively high rates of offending throughout their 20s and 30s), were more likely to have started offending early in life at a high rate, to have a low IQ, and to have been assessed as unstable psychologically. One might think, therefore, that they could be accurately identified in advance. That turns out *not* to be the case.

In a two stage validation study, a descriptive model identified a small group of ‘low rate offenders’ (14% of the total sample) – those who continue offending at a low rate for relatively long periods of time. However, the best predictive model that would have been available to identify them would have picked out only 3 out of 328 of them. More important was the inability to identify the ‘chronic offenders’ – those with relatively high

rates of offending for long periods of time. Of the 84 who were identified as such on the basis of actual offending patterns over their whole lives, only two could have been identified in advance using the best predictive model that would have been available when they were young.

Conclusion: The results are consistent with previous findings demonstrating the futility of trying to predict in advance which offenders are likely to be high rate or chronic offenders. Although certain factors (e.g., low intelligence and psychological instability) predict early onset and chronic offending to some extent, the ability of factors such as these to identify high rate offenders is extremely limited. Hence policies based on early identification and treatment (or incapacitation) of high rate offenders are doomed to failure.

Reference: Bersani, Bianca E., Paul Nieuwebeerta, and John Laub (2009) Predicting Trajectories of Offending over the Life Course: Findings from a Dutch Conviction Cohort. *Journal of Research in Crime and Delinquency*, 46 (4), 468-494.

Habitual offender laws – those that incarcerate apparently high rate offenders for long periods of time – may have a small impact on crime, but only because of incapacitation (and not deterrent) effects. In any case, even rather draconian laws, like those in the State of Florida, have “not been very effective in reducing crime” (p. 201).

Background. Every U.S. state currently has some form of “habitual offender” laws (e.g., three strikes legislation) that have the effect of incarcerating repeat offenders for longer periods of time than they might ordinarily have served. There are two underlying theories which provide explanations as to how these laws *might* reduce crime. The first is general deterrence and the second is incapacitation. If this legislation were to deter crime in the community, its crime reduction impact would be immediate rather than delayed. If, on the other hand, it were to have incapacitation effects, the impact would only occur several years later since most of those incarcerated under the special “habitual offender” laws would have received a long sentence anyway. Hence, if one is looking for positive impacts, one must look far into the future.

This study looked at the effect of changes that took place in Florida’s laws in 1988. In particular, it examined the impact of an estimate of the “extra prison time” that an offender received because of the longer sentences imposed as a result of modifications in the law. These legislative changes were substantial: an *increase* of approximately 11 years for homicide offences, 12 years for rape, 11 years for robbery, 6.5 years for burglary and 6 years for drug offences.

The immediate effects of the changes in the law are easy to describe: “Florida’s habitual offender law does not reduce crime through [general] deterrence” (p. 190). The impact on reported crime rates of the “extra prison time” which offenders received as a result of the modifications in the law occurred 5-6 years later for some offences. The effects appear to be most stable for robbery, assault, burglary, larceny, and auto theft. There seemed to be no impact on homicide and “the results for rape remain unclear... and subject to debate” (p. 193). Moreover, the effects are small. Not surprisingly, the impact is largest (more than half of the overall impact) on the highest volume, but least serious, crime: theft (p. 193).

Some obvious reasons exist as to why the impacts on crime are so small. Most offenders do not engage in criminal activity with the belief that they will be caught. As a result, deterrent effects of longer sentences are not likely to be large, even if people are aware of the law. Further, sentencing enhancements generally occur when people are beyond their most active crime years. The justice system is not effective at giving long sentences to those particularly likely to re-offend. Finally, in the case of certain offences (e.g., trafficking in drugs), other people take over the roles of those who have been incarcerated.

Conclusion. One of the ironies of the habitual offender legislation is that the majority of the more serious offenders caught by these laws would have received harsh sentences under any traditional sentencing regime. Hence, it is not surprising that the new legislation, itself, has little impact. For the most serious offences, huge increases in prison populations would be necessary to produce any benefits in terms of crime reduction. Further, when one considers that these positive impacts will only appear many years after a law is implemented, it would seem that other long term investments (in families, schools, early development, etc.) would be likely to have at least as much crime reduction impact while also producing other positive effects.

Reference: Kovandzic, Tomislav V. The Impact of Florida’s Habitual Offender Law on Crime. *Criminology*, 2001, 39, 179-203.

Counties in Florida that increased the size of their prison populations received no benefit in terms of a reduction in local crime rates.

Studies which try to estimate the impact of imprisonment on crime rates have used different methods and have arrived at somewhat different findings. A major problem these studies face is estimating the annual number of crimes an offender would commit if he or she remained on the street. Another problem is that imprisonment policies in neighbouring jurisdictions could have an impact on a jurisdiction's crime rate if offenders move around a lot. Data on arrests, however, suggest that few offenders move very far from home when they offend.

This study looks at variation in incarceration rates across counties in Florida. Changes in crime rates and in imprisonment rates in Florida are similar to those in the U.S. as a whole. The 'imprisonment' measure was the number of people sentenced to prison for a year or more in the county (for crimes committed in that county). County crime rates were measured by the seven 'index crimes' (homicide, rape, robbery, assault, burglary, larceny, auto theft) each of which was analyzed separately. Various factors were controlled statistically: the age distribution of the county, % Black, poverty rate, per capita income, % unemployed, % divorced, and % female-headed households with children.

"The basic finding... is that county-level prison population growth seems to have little or no significant relationship with county-level crime rates, at least not in Florida" (p. 227). Although none of the effects of imprisonment rates on crime are

significant, they are all in the predicted direction (more imprisonment, less crime). "Most crime reduction occurs for property crimes" (p. 229), but even then the effect is rather small – "slightly over one index crime per year per additional prisoner" (p. 229) – and as noted not statistically significant.

The study considered the possibility that the effect of imprisonment on crime within counties is not strong in part because it does not take into account imprisonment in nearby counties. An analysis including imprisonment rates in nearby counties suggests that "nearby prison population has no impact on in-county crime" (p. 234).

Conclusion: : "This study finds no support for the 'more prisoners, less crime' thesis" (p. 234). One possible explanation for this could be that "As the prison population [of a community] expands, its potential impact on crime may decrease as lower-rate offenders are included in the

expansion. Thus, incarcerating serious high-rate offenders may reduce crime, but expanding incarceration to include less-serious lower-rate offenders will produce small reductions in crime" (p. 235).

Reference: Kovandzic, Tomislav V. and Lynne M. Vieraitis (2006). The Effect of County-Level Prison Population Growth on Crime Rates. *Criminology and Public Policy*, 5(2), 213-244.