Exemptions from Mandatory Minimum Penalties

Yvon Dandurand*
University of the Fraser Valley

A report prepared for the
Uniform Law Conference of Canada
Working Group on Exemptions from Mandatory Minimum Penalties

August 2012

(*) With the assistance of Jessica Babineau. The author wishes to thank Anouk Desaulniers, Earl Fruchtman, Eric Gottardi, Josh Hawkes, Colleen McDuff, Kelly Morton-Bourgon, Kevin Reitz, Kusham Sharma, Susan Kennedy, John H. Siebert, Matthias Villetorte, and Lane Wiegers for the guidance and assistance they provided during this review.

Contents

Introduction

The question of mandatory minimum sentences and their impact on recidivism, the criminal justice process and prisons is a hotly debated one. In some instances, the minimum sentences imposed by law are completely mandatory and do not suffer any exceptions. However, in the majority of countries where they are part of the sentencing law, some exceptions to their imposition have been provided by law. These exceptions or exemptions allow courts to impose sentences below a mandatory minimum penalty in some circumstances or whenever their strict application may result in unjust outcomes.

At present, with only one small exception, such a "safety valve" or "exceptional relief" provision does not exist in Canadian sentencing laws. That exception was recently introduced into the *Controlled Drugs and Substances Act* by Bill C-10 in order to allow the court, under certain circumstances where the accused person is addicted to an illegal substance, to delay imposing a sentence while the addicted person takes an approved treatment program.[1] Such programs encourage the accused person to deal with the addiction that motivates the criminal behaviour.[2] If the person successfully completes the program, the court is not required to impose the minimum punishment for the offence for which the person was convicted.

This paper examines the application of mandatory minimum penalties and reviews the experience of several jurisdictions where exceptions to, or other forms of relief from, the application of such mandatory minimum penalties have been provided by law. In particular, the paper offers a comparative analysis of legal provisions permitting a court in appropriate circumstances to provide relief from the imposition of certain mandatory minimum penalties where the imposition of such custodial sentence would result in an unjust sentence.

---

1 Bill C-10, s. 43. The amendment will come into force on November 6, 2012. http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-10/C-10_4/C-10_4.PDF

2 These include drug treatment programs under subsection 720(2) of the *Criminal Code*.

Mandatory Minimum Penalties

Mandatory sentencing laws take many forms. Some require that a minimum prison sentence be imposed for designated offences. An automatic life sentence for certain crimes is also a form of mandatory minimum sentence. Mandatory sentences generally prescribe both the type of sanction and the minimum level of the sanction. The mandatory minimum penalty sometimes apply only to recidivists, as they provide for more severe sanctions for repeat offenders or for someone previously convicted of a felony, such as the 'three strikes and you're out' law in many American jurisdictions. Mandatory sentencing may also require that an incremental penalty be imposed on convicted offenders meeting certain criteria (e.g., anyone committing an offence involving a firearm). In some instances, the mandatory minimum sentence scheme is presumptive, when it specifically stipulates grounds upon which the court may find the presumption to be rebutted and proceed to exercise its sentencing discretion. Finally, there are mandatory sentencing provisions that function indirectly by specifying a minimum non-parole period to apply in the case of certain serious offences. Some of these schemes allow for exceptions or exceptional relief, others do not, or do so only in some limited situations.

Most jurisdictions restrict the use of mandatory minimum penalties to a very few types of offences. The mandatory penalties are typically imposed either for a few very serious crimes like murder or violent sexual crimes or are imposed for comparatively minor but wide-spread offences like property offences, in particular for repeat offenders. Generally speaking, the mandatory penalties are most commonly used for drug and firearms related offences as well as for serious violent and sexual offences.

There is a considerable amount of research and commentary on the advantages and disadvantages of mandatory minimum sentences and the problems associated with them (American Law Institute, 2011; Crutcher, 2001; Gabor and Crutcher, 2002; Hugues, 2001; Law Council of Australia, 2001; Law Institute of Victoria, 2011; Luna and Gassel, 2010; O'Donovan and Redpath, 2006; Roberts, 2001; 2005; Tonry, 2006; 2009; Trevor and Newburn, 2006). However, our purpose here is not to review the impact of these mandatory sentencing schemes, but to consider the different ways in which exceptions or possible relief from their application have been included in such schemes.

In some cases, no doubt, the exceptions were established to address some of the most obvious drawbacks, and potential injustices, of the automatic application of minimum sentences. In other cases relating particularly to drug offences, one may suspect that the exceptions were specifically created with a view to facilitate plea bargaining and obtain the collaboration of offenders with the state.

Before reviewing the various types of exemptions from mandatory minimum penalties that have been created in different jurisdictions, it may be useful here to briefly review the mandatory minimum penalties schemes to which these exemptions may apply.

a) United States

In the USA, at the federal level, mandatory minimum penalties have been prescribed over the years for a core set of serious offences, such as murder and treason, and also have been enacted to address immediate problems and exigencies. Since the mid-1950s, Congress enacted more mandatory minimum penalties and expanded their application to offences not traditionally covered by such penalties. Mandatory minimum penalties generally relate to controlled substances, firearms, identity theft, and child sex offences (USSC, 2011). Over the years, most American States have also adopted mandatory minimum penalties law. Tonry notes that between 1975 and 1996, mandatory minimums were America's most frequently enacted sentencing law changes (2009:82). Some States have since been moving away from that approach.

b) England and Wales

In England and Wales, a mandatory life sentence for a second serious violent or sexual offence was once required – it was repealed in 2003. The *Powers of the Criminal Court (Sentencing) Act 2000* includes mandatory minimum sentences for second serious offences (s. 109), as well for a third drug trafficking offence (s. 110), or a third domestic burglary (s. 111). The *Criminal Justice Act 2003* introduced some mandatory sentences for violent and sexual offenders. It also established a mandatory minimum sentence for unauthorized possession or distribution of a prohibited firearm.[3] Section 29 of the

[3] *The Criminal Justice Act 2003*, sections 287 and 293.

Violent Crime Reduction Act 2006 introduced a minimum penalty for new firearms related offences.[4]

c) South Africa

In South Africa, prior to 1980, mandatory minimum sentences were in place for corrective training and the prevention of crime. These mandatory minimum penalties were removed from South African law after the Viljoen Commission[5] found that their mandatory nature did not permit individual circumstances to be taken into account and resulted in unfair sentences (O'Donovan and Redpath, 2006). Very strict mandatory minimum penalties were enacted in 1997 for serious offences and minimum 10, 20, and 30 year sentences were required for first, second and third rapes.[6] These sentencing dispositions which were initially enacted for a period of two years were successively renewed and remained in effect until 2009.

d) Australia

In Australia, mandatory minimum penalties are imposed for certain immigration offences. In 2010, the law was amended to extend the mandatory minimum penalty provisions in the *Immigration Act 1958* to apply the higher minimum sentence and non-parole period for a new aggravated offence of people smuggling involving exploitation or danger of death or serious harm and where a person is convicted of multiple people smuggling offences.[7] There currently is a proposal to remove existing mandatory minimum penalties for people smuggling.[8]

In that country, even if there are some examples of Commonwealth offences for which a mandatory minimum penalty has been set, the guide[9] for officers in Australian Government departments working on framing criminal offences that are intended to become part of

---

4 *Violent Crime Reduction Act 2006,* s. 29(6)(b).

5 Report of the Commission of Enquiry into the Penal System of the Republic of South Africa ('Viljoen Report'), 1976.

6 The *Criminal Law Amendment Act* (No. 105 of 1997).

7 *Anti-People Smuggling and Other Measures Act 2010.*

8 *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*.

9 The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* was developed by the Criminal Justice Division of the Attorney General's Department to assist officers in Australian Government departments working on framing criminal offences that are intended to become part of Commonwealth law.

Commonwealth law states that "(o)ther than in rare cases, Commonwealth offences should carry a maximum penalty rather than a fixed penalty and should not carry a minimum penalty" (Australian Government, 2011: 37).[10]

A few Australian states have also enacted mandatory minimum penalties. In the Northern Territory a mandatory minimum penalties scheme came into force in 1997, through amendments to the *Juvenile Justice Act 1983* (NT) and the *Sentencing Act 1995* (NT).[11] The scheme introduced mandatory minimum penalties for a broad range of property offences, including theft (but not shoplifting), criminal damage, unlawful entry into buildings, unlawful use of a vehicle, possession of goods suspected of being stolen, and receiving stolen property. For juveniles, 15 and 16 year-olds found guilty of a second or subsequent property offence, a 28-day period of detention was made mandatory. For offenders aged 17 and over a minimum term of 14 days applied to a first offender and escalating minimum terms for repeat offenders: 90 days for second time offenders and 12 months for third time offenders.

Two years later, following some controversial cases, the *Sentencing Amendment Act 1999* introduced some 'exceptional circumstances' provisions which provided that defendants before the court for a single property offence that was trivial in nature could have a non-custodial penalty imposed on them if they could prove that they cooperated in the investigation of the offence; that there were mitigating circumstances (other than intoxication); that the offence was an

---

[10] The Guide states several reasons why mandatory minimum penalties should be avoided: fixed and minimum penalties can interfere with the discretion of a court to impose a penalty appropriate in the circumstances of a particular case; defendants may be less likely to cooperate with authorities if such cooperation cannot be reflected in sentencing; fixed and minimum penalties create an incentive for a defendant to fight charges, even where there is little merit in doing so; fixed and minimum penalties preclude the use of alternative sanctions; industry confidence in an enforcement system directed at industry regulation is undermined where less serious cases do not result in lesser penalties; and, the judiciary may look for technical grounds to escape restrictions on sentencing discretion when faced with minimum penalties, leading to anomalous decisions (Australian Government, 2011: 38).

[11] *Sentencing Amendment Act (No. 2) 1996* (Act No. 65, 1996).

aberration from their usual behaviour and that they were otherwise of good character and had made efforts towards restitution.[12]

The mandatory penalties for property offences remained in effect until 2001.[13] In 2001, a newly elected government repealed the mandatory sentencing regime for juvenile property offences and replaced it in with a more flexible scheme for adult offenders convicted of robbery. In June 1999, the *Sentencing Act* was amended to impose a mandatory minimum sentence for second offences of assault and first offences of sexual assault. This applies to adults. A jail term is mandatory, but no minimum sentence is prescribed. The mandatory penalties for violent and sexual offences were repealed in 2007.

Between 1992 and 1994, Western Australia's criminal law mandated the imposition of a minimum sentence for automobile theft.[14] In 1996, amendments to the *Criminal Code* introduced three-strikes penalties for people convicted of a third and consecutive household burglary offences.[15] Section 401(4) states, in effect, that a person convicted for a third time of entering a home without permission and who commits an offence in "circumstances of aggravation", or who intends to commit such an offence, must be sentenced to imprisonment for at least 12 months. Section 400(1) defines "circumstances of aggravation" as including: being armed with a dangerous weapon; being in company with other armed persons; causing bodily harm; and, threatening to kill or injure. The section is specifically extended to juveniles. If the offender is a young person (as defined in the *Young Offenders Act 1994*), the offender may be sentenced either to imprisonment for at least 12 months or to a term of detention of at least 12 months(as defined in the *Young Offenders Act*). That law remained in effect until 2007. A "three-strikes" burglary law was introduced in 1996 which provided that an adult or juvenile offender convicted for the third time for a home burglary must receive a 12 month minimum term of imprisonment or

---

12 *Sentencing Act 1995* (NT) s. 78A(6B)-(6C), (6E), enacted by the *Sentencing Amendment Act 1999*. A sentence imposed under the exceptional circumstances provisions did not amount to a 'strike' for the purposes of the mandatory imprisonment provisions (Aboriginal and Torres Strait Islander Social Justice Commissioner, 2002).

13 *Sentencing Act* (NT) s. 78B, s. 78BA and s. 78BB.

14 *Crime (Serious and Repeat Offenders) Sentencing Act 1992.*

15 *Criminal Code Amendment Act (No.2) 1996*.

detention; the power to suspend sentence was also expressly prohibited.[16]

New South Wales also imposes some mandatory minimum penalties from which a court may deviate for "good reasons." The law sets standard non-parole periods for a number of serious offences. Standard non-parole periods, are arguably mandatory sentences, but in this case courts may set longer or shorter sentences if there are particular reasons for doing so.

e) New Zealand

In New Zealand, life imprisonment was the mandatory minimum penalty for murder[17], until amendments were adopted in 2010.[18] With these amendments, life imprisonment became the maximum penalty for murder rather than the mandatory penalty but a strong presumption remained in favour of its use.[19] The *Sentencing and Parole Act 2010* also introduced a "three strike" sentencing regime (or a sentence escalation regime) for certain qualifying offences. In that regime, courts are required to warn qualifying offenders and then increase penalties for subsequent offences. Most importantly, on a "third strike", the courts are to impose the maximum term of imprisonment prescribed for that offence unless that would be "manifestly unjust." The courts are also to order that the offender be ineligible to apply for parole unless that order would be "manifestly unjust."[20]

Exceptional Relief Provisions

Many observers believe that mandatory minimum penalties risk producing widespread injustices because they are not applied only to those they were intended to dissuade and because they always produce circumvention:

> "Even if the mandated punishment is appropriate for some of the people it affects, some other people wind up being sentenced in a way that the practitioners involved believe to be unjust. For still

---

16 *Criminal Code of Western Australia*, s. 401(4).

17 *Sentencing Act 2002.*

18 *Sentencing and Parole Act 2010*.

19 *Sentencing Act 2002*, s. 102.

20 See: Ekins and Brookbanks (2010) and Chhana et al. (2004).

> others, practitioners figure out ways, usually surreptitiously and behind closed doors, to avoid imposing the unjust sentences. The resulting hypocrisy and lack of transparency compound the problems of unjust sentences and stark disparities." (Tonry, 2006: 46).

Reducing this kind of "circumvention" and the problems it creates is perhaps the best argument in favour of officially providing some special statutory reliefs in all cases where a mandatory penalty is required by the law.

In the United States, the American Law Institute, currently developing a revised version of the *Model Penal Code: Sentencing*, has repeatedly disapproved of mandatory-minimum prison sentences. It explains that:

> "During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and the society" (American Law Institute, 2011: 7).

Recognizing that, even in the best of scenarios, it could be many years before mandatory penalties are eradicated from the nation's criminal laws, the draft *Model Penal Code* includes an array of new provisions, dispersed throughout the sentencing articles, that are intended to mitigate the effects of mandatory-minimum sentences in particular settings.

The *Model Penal Code*, for example, would grant sentencing judges an "extraordinary departure power" to deviate from the terms of mandatory-penalty provisions: "Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a)" (American Law Institute, 2011: 23).

The *Model Penal Code* would also create, among other things, an overarching statutory power for appellate courts to overturn any sentence authorized or mandated in the criminal code on grounds of disproportionality. It would also include new "sentence-modification powers" (or a second look provision) which would engage after a prisoner has served 15 years (American Law Institute, 2011).

In the State of Victoria (Australia), the Sentencing Advisory Council responded to a request for advice from the Attorney General on the introduction of statutory minimum sentences for the offences of intentionally causing serious injury and recklessly causing serious injury, when those offences are committed in circumstances of gross violence. The Council recommended that the phrase 'special reasons' be used to avoid confusion with other tests in Victorian law that use the phrase 'exceptional circumstances'. The Council argued that exceptions to the imposition of a statutory minimum sentence should be based on circumstances that significantly diminish an offender's culpability or that can be justified for public policy reasons. The Council also suggested that the mere existence of a special reason in a case should not automatically warrant exemption from the statutory minimum sentences; instead, a court should consider whether it is also in the interests of justice to do so (Sentencing Advisory Council, 2011).

The Council considered that tightly defining the statutory exemptions from the statutory minimum sentences would be preferable to a general statement test susceptible to broad interpretation. The Council recommended that a non-exhaustive list of special reasons should be established to provide guidance to a court as to the kinds of circumstances that ought to warrant exemption from the statutory minimum sentence and the rationale behind such exemptions. The Council specified that "the list of special reasons should comprise those circumstances that are foreseeable and commonly regarded as appropriate exemptions on the basis of the rationales of diminished culpability and public policy" (Sentencing Advisory Council, 2011: 12).

The Council suggested that the following special reasons be included: intellectual disability or cognitive impairment (including acquired brain injury); mental illness; particular psychosocial immaturity and/or particular vulnerability in custody; or assistance by the accused to police or an undertaking by the accused to assist the Crown (Sentencing Advisory Council, 2011: 12)

Types of Relief Available

Different types of relief from or exceptions to the application of mandatory minimum penalties have been adopted in the laws reviewed here. For ease of presentation, these different approaches have been grouped into nine distinct categories. The types of relief that are found in various laws include relief from minimum penalties:

1. for juveniles (or exclusion from application of minimum penalties);
2. to encourage early guilty pleas;
3. to encourage defendants to offer substantial assistance to the prosecution;
4. in view of mitigating circumstances (safety valve);
5. in "exceptional or compelling circumstances";
6. in the interest of justice or to avoid an "unjust" sentence;
7. to allow for the treatment of the offender;
8. as a way of making the "mandatory" penalty presumptive; and,
9. after the fact as part of a sentence review process.

Each of these approaches will be reviewed below, but it should be noted at the outset that these categories are far from being mutually exclusive. For example, in many of these categories, the relief is only available where the offender offers some degree of cooperation with the state, or pleads guilty. Offenders who offer "substantial assistance" will almost automatically enter into a plea agreement and plead guilty. Similarly, the difference between "mitigating circumstances" and "exceptional circumstances" is not always perfectly clear and, needless to say, the main reason for allowing the court to consider "exceptional and compelling circumstances" is to avoid an "unjust sentence." Finally, depending on how broadly the exception or the relief is formulated it may in effect amount to converting the "mandatory" penalty into a presumptive sentence.

The following discussion is organized along those categories, but the distinctions that they respectively rest upon should not be interpreted too literally.

1. Relief or exclusion from the application of mandatory minimum penalties to those under 18 (juveniles)

In the United States, some of the States that have adopted mandatory minimum penalties for certain specified offences have also created some exceptions to the application of these minimum penalties in the case of juvenile offenders. This is the case, for example, in the State of Montana where the *Code* creates an exception to mandatory minimum

sentences for offenders who were less than 18 years of age at the time of the commission of the offence.[21]

In the States of Washington and Oregon, the exception to the application of mandatory minimum penalties applies explicitly to sentences imposed upon any person waived from the juvenile court (tried and sentenced as an adult).[22] In Oregon, however, there are also exceptions to the exception: mandatory minimum penalties can still be imposed in the case of a juvenile sentenced as an adult for aggravated murders[23], and as an enhanced penalty for use of a firearm during the commission of a felony.[24] Other States have elected to make the mandatory minimum penalties presumptive instead of compulsory in the case of offenders under the age of 18.[25]

In England and Wales, most mandatory minimum sentences only apply to offenders who, at the time when that offence was committed, were 18 or over[26], but there are instances where minimum penalties may apply also to offenders between the ages of 16 and 18.[27] Note that s. 291 of the *Criminal Justice Act 2003* also provides the Secretary of State with the power by order to exclude application of a minimum sentence for certain firearm offences to those under 18.

In South Africa, under the *Criminal Law Amendment Act 1997*, mandatory minimum sentences are not applicable to a child who was under the age of 16 when he or she committed the offence. Should a court decide to impose a minimum sentence upon a child who, at the time of the commission of the offence, was 16 years or older, but under the age of 18 years, the court has, in terms of s. 51(3)(b), to enter its reasons for its decision on the record of the proceedings. However, in

---

21 *Montana Code* §46-18-22. The exception for juveniles applies not only to "mandatory minimum sentences", but also to "restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility."

22 *Revised Code of Washington* (RCW) §9.94A.540(3), and *Oregon Revised Statutes* (ORS), §161.620.

23 ORS §161.620(1) (Sentences imposed upon waiver from juvenile court), and ORS §163.105 (Sentencing options for aggravated murder).

24 ORS §161.620(2) (Sentences imposed upon waiver from juvenile court), and ORS §161.610 (Enhanced penalty for use of firearm during commission of felony).

25 For example, the State of Connecticut: *Connecticut General Statutes* – 21a-278(a) & (b).

26 E.g., *Powers of the Court (Sentencing) Act 2000*, sections 109(1)(b), 110(1)(b), 111(1)(b).

27 E.g., *Powers of Criminal Courts (Sentencing) Act 2000*, sections 109, 110, 111.

Jan Hendrik Brandt v The State the Supreme Court of Appeal held that the legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court which is more free to depart from the prescribed minimum sentence.[28] As a result, the sentencing court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence and offenders under 18 though over 16 do not have to establish the existence of substantial and compelling circumstances because s. 51(3)(a) does not apply to them.

2. Reduction of minimum penalty for early guilty pleas

The links between mandatory minimum penalties, plea negotiation practices, the charging process and sentencing patterns are complex. It is often alleged and there is some evidence to support that the establishment of mandatory minimum penalties lead to some "adjustments" in practice to the plea negotiation and charging processes (Cano and Spohn, 2012; Merritt et al., 2006; Tonry, 2006; 2009; Ulmer et al., 2007; United States Sentencing Commission, 2011). From a justice system efficiency point of view, it may be advantageous to find ways to increase the likelihood of an early guilty plea. Guilty pleas, particularly when they are entered early in the criminal justice process, can significantly speed it up, eliminate the need for many adjournments and a trial, reduce the need for costly and complicated disclosure processes, and reduce the overall costs of the system. Many jurisdictions have explored ways of increasing the likelihood that accused individuals will not only plead guilty, but also do so at an early stage in the process (Dandurand, 2009).

Legal provisions establishing mandatory minimum penalties for certain offences typically remove any incentive an offender may have to plead guilty or to cooperate with the prosecution in such cases. Mandatory penalties can increase trial rates and thereby increase workloads and case processing time. In the United States' federal system, for example, there is clear evidence that accused individuals choose to go to trial because of charges carrying mandatory minimum penalties (United States Sentencing Commission, 2011: 116). Prosecutors facing these situations have often found ways to use their discretionary authority to frame the charges in such a way as to circumvent the application of these provisions.

---

[28] *Jan Hendrik Brandt v The State,* SCA (SA), 513/03.

It is possible for the legislator to specifically create an exception to the strict application of mandatory minimum penalties for offenders who plead guilty at an early stage of the process, thus creating an explicit incentive for early guilty pleas. It is also possible for the legislator to provide offenders with an incentive for pleading guilty and collaborating with the prosecution by specifically creating an exception to the application of the mandatory minimum penalties for offenders offering assistance to the prosecution. This kind of exception (or "departure" from the mandatory minimum penalties) is found in the United States federal criminal law relating to certain drug offences. This second approach is discussed separately below.

a) England and Wales – Reduction of sentences for early guilty pleas

In England and Wales, s. 152 of the *Powers of the Criminal Court (Sentencing) Act 2000*) foresees the possibility for the court to reduce a sentence)[29]. This possibility only exists for the court to do so in relation to the minimum penalties established for drug related offences by s. 110 and by s. 111 for domestic burglary.[30] In such cases, the court may impose a sentence that is no less than 80 percent of the mandatory minimum sentence specified in the law and must state in open court that it has done so:

> 152. (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and
>
> (b) the circumstances in which this indication was given.
>
> (2) If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.
>
> (3) In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 above, nothing in that subsection shall prevent the court, after taking into account any matter referred to in subsection (1) above, from

---

[29] *Powers of the Court (Sentencing) Act 2000*, s. 152 (Reduction of sentences for guilty pleas)

[30] *Powers of the Court (Sentencing) Act 2000*, sections 110, 111.

> imposing any sentence which is not less than 80 per cent of that specified in that subsection.

A similar possibility for exceptions was not created for the minimum sentences provisions of s. 109 of the same Act[31] relating to offenders convicted of a third or subsequent serious offence.[32]

3. Relief for defendants who offer substantial assistance to the state

Many of the reliefs available in different jurisdictions are tied to the offender's cooperation with the state, or at the very least an agreement to plead guilty. However, some jurisdictions have adopted sentence reduction schemes that apply specifically in cases where a mandatory minimum penalty is required under the law. Such sentence reduction is usually activated at the discretion of the prosecutors who can initiate a motion.

The discretion inherent in the substantial assistance departure provisions allows prosecutors and judges to openly circumvent mandatory minimum sentences. In the United States, it is frequently observed that the existence of mandatory minimum penalties constrains judges' discretion, but that the possibility of departures from the minimum penalties to recognize "substantial assistance" to the government provides prosecutors and judges with an important tool for avoiding mandatory penalties. These substantial assistance provisions clearly serve the operational interests of the prosecution by providing offenders with a clear inducement to plead guilty and to cooperate as informants when they can (Martin, 2001).

a) Federal criminal law USA – 18 USC §3553 (E)

In the United States, the mandatory penalties can be avoided in certain instances if offenders receive "substantial assistance departures." The federal criminal law establishes a limited authority to impose a sentence below a statutory minimum penalty: 18 USC 3553(e):

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of

---

[31] *Powers of the Court (Sentencing) Act 2000*, s. 109.

[32] See also the similar dispositions retained in: *Criminal Justice Act 2003,* s. 144(2).

> another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, *United States Code*.[33]

This is a motion made by the prosecution when the defendant has entered a plea of guilty. Upon a motion of the U.S. Attorney's Office, a defendant who renders "substantial assistance" to law enforcement (however defined by the U.S. Attorney's Office) may be sentenced below the sentencing guidelines' recommended minimum. If the court grants the motion, the sentencing judge is free to depart anywhere below the minimum recommended by the guidelines.[34] The judge's decision regarding the appropriate reduction may rest on such things as the significance and usefulness of the defendant's assistance; the truthfulness, completeness, and reliability of the information provided; the nature, extent, and timeliness of the defendant's assistance; and, any danger or risk that resulted from the defendant's assistance.

It is clear that different charging and plea negotiation practices have developed in various federal districts that resulted in the disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length (USSC, 2011: 345). In 2010, almost half (46.7%) of offenders convicted of an offence carrying a mandatory minimum penalty were relieved from the application of such a penalty at sentencing because they provided substantial assistance to the government or qualified for the "safety valve" relief (USSC, 2011: xxviii). Concerns have also been raised about the impact of these exceptions on offenders who do not benefit from them and, for example, refuse to plead guilty and collaborate with the government. There is evidence that federal defendants who exercise their rights to trial and are convicted receive more severe sentences, a consequence known as a "trial penalty." Trial penalties vary among types of offences and the characteristics of the offender. However, they were shown to proportionately increase as sentencing guidelines' minimum sentencing recommendations increase (Ulmer, Eisenstein and Johnson, 2010).

Mario Cano and Cassia Spohn, summarizing the research on "substantial assistance departures" from mandatory minimum

---

[33] 18 USC 3553(e).

[34] These are known as 5K1 departures (after the federal rule describing them: USSG §5K.1.1; USSC, 2001).

sentences, note that legally irrelevant factors affect the likelihood of receiving substantial assistance departures and the magnitude of the sentence discount from which the offenders benefit (Cano and Spohn, 2012). These departures, they argue, may be the primary source of unwarranted sentencing disparity found in research on federal sentence outcomes.

There is clear evidence that substantial assistance departures are used to mitigate the sentences of "sympathetic" and "salvageable" offenders. A study by Nagel and Schulhofer, focusing on guideline circumvention in three U.S. district courts in 1989 and 1990, found that downward departures for substantial assistance were used to mitigate the sentences of "salvageable" or "sympathetic" defendants and that prosecutorial decisions to file motions for substantial assistance departures were based on an assessment of the value of the case and the sentence that was deserved (Nagel and Schulhofer, 1992). Other studies of the impact of offender and case characteristics on sentence outcomes and substantial assistance departures in cases where offenders were facing mandatory minimum penalties have reached similar conclusions (Farrell, 2004; Hartley, 2008; Hartley et al., 2007; Kautt and Delone, 2006; Spohn and Fornango, 2009).

A study of federal sentencing of narcotic offenders in five federal districts near the American southwest border confirmed that departures are significant predictors of sentence-length decisions for both citizens and noncitizens, and in some districts, citizenship status indirectly influences sentences through departure decisions (Hartley and Armendariz, 2011).[35] A recent study by Cano and Spohn showed that substantial assistance departures are used to reduce the sentences of certain types of offenders facing mandatory minimum penalties: females, U.S. citizens, employed persons, those with some college, those with dependent children, and those who played a minor or minimal role in the offence (Cano and Spohn, 2012).[36] A previous study of prosecutorial decisions to file a motion of substantial assistance departure, using data from three U.S. district courts, had produced similar findings and revealed that significant inter-prosecutor disparity

[35] See also: Johnson, Ulmer and Kramer, 2008).

[36] The United States Sentencing Commission's data show that female offenders obtain relief from a mandatory minimum penalty at sentencing more often than male offenders (65.5% compared to 44.7%). Female offenders qualify for the safety valve at a higher rate than male offenders (46.4% compared to 26.3%). Female offenders also received relief by providing substantial assistance to the government at a higher rate (36.0%) than male offenders (24.7%) (USSC, 2011).

exists in the likelihood of substantial assistance departures and in the criteria that prosecutors use in deciding whether to file a motion for a substantial assistance departure (Spohn and Fornango, 2009).

b) State laws

Many American states make cooperation or assistance with the state a legitimate reason for a departure from a mandatory minimum sentence. In Florida, for example, the state attorney can request the court to reduce or suspend a sentence of any person who is convicted of drug trafficking when the person provides substantial assistance in the identification, arrest, or conviction of any other person engaged in trafficking in controlled substances (pursuant sometimes to a "Substantial Assistance Contract"). A downward departure from the lowest permissible sentence (as calculated according to the total sentence points pursuant to a sentence calculation formula[37]) is prohibited unless there are circumstances or factors that reasonably justify the downward departure. These factors are quite numerous, but they ostensibly include having entered into a legitimate and non-coerced plea agreement or cooperation with the state to resolve the current offence or any other offence.[38]

In Pennsylvania, the decision to pursue most mandatory minimum penalties belongs solely to the prosecutors. In that context, the mandatory minimum penalties effectively substitute prosecutorial discretion to judicial discretion. After deciding to charge an offence that is eligible for a mandatory minimum penalty, the prosecutors decide whether to move for the application of the mandatory penalty. If the prosecutors decide not to pursue the mandatory minimum sentence, the offenders are sentenced pursuant to State's sentencing guidelines which normally call for penalties that are lower than the mandatory minimum sentences. If the prosecutors move for the application of the mandatory minimum sentence, the court must sentence accordingly.[39] A study of prosecutors' decisions to apply a mandatory minimum among eligible offenders sentenced for drug crimes or as repeat, "three-strike" offenders in that State found that these decisions were significantly affected by the type and characteristics of the offences and

---

[37] *Florida Statutes, Criminal Procedure and Corrections,* 921.0024. See also: 921.00265 (recommended sentences; departure sentences; mandatory minimum).

[38] *Florida Statutes, Criminal Procedure and Corrections*, 921.0026.

[39] *Pennsylvania Consolidated Statutes*, Title 42, s. 9714(d).

guidelines sentencing recommendations, prior record, mode of conviction, and gender (Ulmer et al., 2007).

4. Relief in view of mitigating factors (safety valve)

The legislator is sometimes prepared to consider exceptions to the automatic application of a mandatory sentence when "good reasons" exist to do so, or there are some important mitigating circumstances requiring consideration. In some cases, the specific "mitigating circumstances" that can be considered by the courts are actually spelled out. The following are four similar examples of such an approach: South Australia, the so-called "safety valve" provisions of the American federal criminal law, the State of Montana, and Sweden.

a) South Australia – Good reason for reducing the minimum penalty

In South Australia, under s. 17 of the *Criminal Law Sentencing Act 1988,* the courts have the power to reduce a penalty below the minimum stated by the relevant Act where good reason exists to do so:[40]

> "17—Reduction of minimum penalty
>
> Where a special Act fixes a minimum penalty in respect of an offence and the court, having regard to—
>
> (a) the character, antecedents, age or physical or mental condition of the defendant; or
>
> (b) the fact that the offence was trifling; or
>
> (c) any other extenuating circumstances,
>
> is of the opinion that good reason exists for reducing the penalty below the minimum, the court may so reduce the penalty." [41]

Section 21 of the *Criminal Law Sentencing Act 1988* further specifies that in cases where an offender is liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.

Section 21 provides that:

---

[40] This section, however, does not allow the court to impose less than the mandatory minimum disqualification of licence, for example, in drinking and driving matters.

[41] *Criminal Law (Sentencing Act)* (SA) *1988*, s. 17

> "(1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.
>
> (2) If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term.
>
> (3) If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.
>
> (4) The power conferred on a court by this section is not limited by any other provision of this Part.
>
> (5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties."

It may be argued that these particular provisions of the sentencing law are in effect transforming mandatory minimum penalties into presumptive penalties.

b) Federal criminal law USA – 18 USC §3553(f)

The federal criminal law in the United States foresees some limitations on the applicability of statutory minimum sentences in certain cases involving offences under sections 401, 404, or 406 of the *Controlled Substances Act*[42] or sections 1010 or 1013 of the *Controlled Substances Import and Export Act.*[43] These are often referred to as "safety valve" provisions. In such instances, the court is to impose a sentence pursuant to the guidelines promulgated by the United States Sentencing Commission without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that:

> "(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

---

[42] 21 USC 841, 844, 846

[43] 21 USC 960, 963

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."[44]

The judge must still consult and consider the guidelines in deciding the sentence to impose, as well as provide a statement of reasons.[45] As was the case for 18 USC 3553(e) referred to above, collaboration with the government is a requirement.

The "safety valve" provisions are used quite extensively in drug offence cases. Their impact is not yet fully understood, but it is quite clear that mandatory minimum sentences together with these provisions do not affect sentence outcomes in a uniform manner across federal districts. Hartley, studying decision making practices of judges for narcotic violations in four districts in the southwestern United States, found that "safety valve" provisions do not decrease defendants' sentence significantly in all districts (Hartley, 2008: 449).

In a survey of prosecutors and defence attorneys conducted for the United States Sentencing Commission, most defence attorneys reported that the safety valve provisions worked well for qualifying offenders (USSC, 2011: 118).[46] The Commission recommended that Congress consider establishing a statutory "safety valve" mechanism similar to the one available for certain drug trafficking offenders for low-level,

---

[44] 18 USC §3553(f) – see: 18 USC 3553(c) Statement of Reasons for Imposing a Sentence.

[45] See 18 USC 3553(c)- Statement of Reasons for Imposing a Sentence.

[46] Some of the prosecutors surveyed complained that the "safety valve" took away the incentive for offenders to cooperate with the prosecution (USSC, 2011: 118).

non-violent offenders convicted of other offences carrying mandatory minimum penalties (USSC, 2011: 346).

c) Montana

The *Montana Code* (Title 46 – Criminal Procedure) creates several potential reliefs from the application of various mandatory minimum sentences (and mandatory life sentences) based on a number of mitigating factors. In addition to being 18 at the time of committing the offence, the mitigating factors recognized by the law are:

- **Mental capacity**: "the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution. However, a voluntarily induced intoxicated or drugged condition may not be considered an impairment for the purposes of this subsection."
- **Offence committed under duress**: "the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution."
- **Minor role in the crime:** "the offender was an accomplice, the conduct constituting the offense was principally the conduct of another, and the offender's participation was relatively minor."
- **No serious bodily injury**: "in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense."[47]

d) Sweden – Special circumstances

The *Swedish Penal Code* provides the penalty for specified crimes, sometimes expressed also as a minimum sentence. For example, the penalty for rape is imprisonment for at least two and at most six years and, if the crime is gross, the penalty is imprisonment for at least four and at most ten years.[48] For arson, the penalty is imprisonment for at

[47] *Montana Code* §46-18-222 (2) to (5).

[48] *Swedish Penal Code*, Ch. 6, s. 1.

least two and at most eight years, but in the case of gross arson, it is imprisonment for a term of at least six and at most ten years.[49]

Notwithstanding the specified minimum penalties stipulated in the Code, the court is required to give reasonable consideration to a number of factors and circumstances and impose a lesser sentence than that prescribed for the crime:

> "In determining the appropriate punishment, the court shall, besides the penal value of the crime, give reasonable consideration to:
>
> 1. whether the accused has suffered severe bodily harm as a result of the crime,
> 2. whether the accused to the best of his ability has attempted to prevent, remedy or limit the harmful consequences of the crime,
> 3. whether the accused gave himself up,
> 4. whether the accused would suffer harm through expulsion by reason of the crime from the Realm,
> 5. whether the accused, as a result of the crime, has suffered, or there is good reason to suppose that he will suffer, dismissal from, or termination of, employment, or will encounter any other obstacle or special difficulty in the pursuit of his occupation or business,
> 6. whether the accused, in consequence of advanced age or ill health, would suffer unreasonable hardship by a punishment imposed in accordance with the penal value of the crime,
> 7. whether, having regard to the nature of the crime, an unusually long time has elapsed since its commission or
> 8. whether there exists any other circumstance that calls for a lesser punishment than that warranted by the penal value of the crime.
>
> If any circumstance covered by the first paragraph exists, the court may, if there are special grounds for so doing, impose a less severe punishment than that prescribed for the crime." [50]

---

[49] *Swedish Penal Code*, Ch. 13, sections 1 and 2.

[50] *Swedish Penal Code*, Ch. 29, s. 5.

5. Relief available in exceptional or substantial and compelling circumstances

A much stricter concept of "exceptional circumstances" or the concept of "substantial and compelling circumstances" as potential bases to justify a deviation from a prescribed minimum sentence are sometimes preferred by the legislator. These concepts are meant to indicate that the courts should apply the mandatory penalties in the vast majority of cases and to deviate from them only in exceptional cases. Over the years, the courts have had to provide further guidance on how these concepts were to be interpreted. The following briefly describes the experience in that regard of the Northern Territories (Australia), the United Kingdom, and South Africa. In the latter, after the exceptions were found to have been used quite extensively in rape cases, the legislator eventually amended the legislation to specifically exclude certain factors from being considered as "substantial and compelling circumstances" in rape cases.

a) Northern Territories – Exceptional circumstances

In the Northern Territories, Australia, some reliefs from mandatory sentencing provisions have been created to apply in "exceptional circumstances." The "exceptional circumstances" exception was introduced in June 1999[51] but it only applies to a single first adult property offence and is limited in its applicability because four criteria have to be fulfilled, namely:

- the offence must have been of a trivial nature;
- the offender must have made reasonable efforts to make full restitution;
- the offender must be of otherwise good character with mitigating circumstances (which do not include intoxication) which reduce the extent to which the offender is to blame;
- the offender must have cooperated with law enforcement agencies.

b) United Kingdom – Exceptional Circumstances

In England and Wales, the concept of "exceptional circumstances" as the basis of an exception to the application of mandatory minimum sentences was introduced as s. 51A of the *Firearms Act 1968* by s. 287 of the *Criminal Justice Act 2003*. The Act provided for a five year

[51] *Sentencing Amendment Act 1999*.

minimum custodial sentence for illegal possession and distribution of prohibited firearms, but also provided that a court could impose a lesser sentence if the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so (s. 287(2)). The same exception was included in relation to the minimum penalty applicable to the new firearms offence created in 2006, by s. 28 (using someone to mind a dangerous weapon) of the *Violent Crime Reduction Act 2006.*[52]

The meaning of "exceptional circumstances" was considered in *R v Rehman and Wood*.[53] The Court of Appeal offered the following guidance:

- Parliament has signalled that it was important that deterrent sentences be imposed. The latter are sentences that "pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider" (para. 4).
- The policy was to treat the specified offences as requiring a minimum term of imprisonment unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out a deterrent message (para. 12)
- In determining whether the case involved 'exceptional circumstances', it is necessary to look at the case as a whole. "It is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance" (para. 11).
- Sometimes there may be "one single striking, which relates to either the offence or the offender' which causes the case to fall within the requirements of exceptional circumstances", but in other cases it would be the collective impact of all the relevant circumstances (para. 11).

---

52 *Violent Crime Reduction Act 2006,* s. 29: "the court must impose (with or without a fine) a term of imprisonment of not less than 5 years, unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so."

53 *R v Rehman and Wood* [2005] EWCA Crim. 2056, [2005] Criminal Law Review 878.

- The mandatory minimum penalty is capable of being arbitrary and causing considerable injustice, especially bearing in mind that possession of a prohibited firearm is an absolute offence and that "an offender may commit the offence without even realizing that he has done so" (para. 12). It is to be noted, that "if an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect upon him" (para. 14).
- Reading the section in light of the provisions of the *Human Rights Act 1998*, the circumstances will be 'exceptional' if it would mean that to impose the minimum sentence would result in an arbitrary and disproportionate sentence (para. 14).
- It is clear that it is the opinion of the court that is critical as to what exceptional circumstances are. Unless the judge is clearly wrong in identifying exceptional circumstances when they did not exist, or clearly wrong in not identifying them when they do exist, the Court of Appeal will not readily interfere (para. 14).

In other cases, the Court of Appeal further specified that s. 51A(2) does not allow for a reduction of the minimum term on account of a guilty plea.[54] Also, where exceptional circumstances are found, the minimum term should be kept as a starting point.[55]

The following are a few examples of cases where the court have recognized the existence of "exceptional circumstances": a situation where the consequence of a long imprisonment would be particularly severe because of the offender's serious physical disabilities;[56] a situation where the sole prohibited firearm involved in the possession offence had been acquired before the possession of such a firearm became unlawful;[57] or, a situation where the offender, someone without a criminal record, kept some prohibited firearms 'dumped' on his premises, locked in a secure cabinet, intending to hand them to the police if there was a gun amnesty.[58] However, leaving a firearm in insecure bedsit after deciding not to use it to commit suicide was held not to be "exceptional."[59]

---

54 *R v Jordan*; *R v Alleyne*; *R v Redfern* [2005] 2Cr.App.R.(S) 44.

55 *R v Beard* [2008] 2.Cr.App. R.(S) 70.

56 *R v Blackall* [2006] 1 Cr App R (S) 131.

57 *R v Mehmet* [2006] 1 Cr App R (S) 397.

58 *R v Bowler* [2007] EWCA Crim 2068.

59 *R v Robinson* [2010] 2 Cr.App. R(S) 20 CA.

c) South Africa – Substantial and compelling circumstances

In South Africa, the *Criminal Law Amendment Act, 1997* introduced mandatory minimum penalties for certain serious offences, as well as escalating minimum penalties when an offender is found guilty of certain offences for a second or a third time. The law recognizes that a deviation from a mandatory minimum sentence is possible when the court is satisfied that *substantial and compelling circumstances* exist which justify the imposition of a lesser sentence than the sentence prescribed. Ten years later, the *Criminal Law (Sentencing) Amendment Act, 2007* amended the law to specify that, in the case of a rape, the complainant's previous sexual history, an accused person's cultural or religious beliefs about rape, or any relationship between the accused person and the complainant prior to the offence being committed, do not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.

Sections 51 and 53 of the *Criminal Law Amendment Act,* 1997 (as amended[60]) provide:

> **"51. Minimum sentences for certain serious offences.**
>
> (…)
>
> (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
>
> (aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
>
> (i) The complainant's previous sexual history;
> (ii) an accused person's cultural or religious beliefs about rape; or
> (iii) any relationship between the accused person and the complainant prior to the offence being committed.
>
> (…)

[60] Most recently by the *Criminal Law (Sentencing) Amendment Act, 2007.*

> (5) *(a)* Subject to paragraph *(b)*, the operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
>
> *(b)* If a sentence is imposed in terms of subsection (2)*(c)*, not more than half of that sentence may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
>
> (6) This section does not apply in respect of a person who was under the age of—
> *(a)* 16 years at the time of the commission of an offence contemplated in subsection (1) or (2)*(a)* or *(b)*; or
> *(b)* 18 years at the time of the commission of an offence contemplated in subsection (2)*(c)*.
>
> (7) If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of the person beyond reasonable doubt.
>
> (…)"

The concept of "substantial and compelling circumstances" has been the object of judicial interpretation. In *S v Mofokeng and Another*, the judge held that for substantial and compelling circumstances to be found, "the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of statutorily prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified."[61]

Most notably, in *S v Malgas*, the court held, at the outset, that the mandatory sentences should ordinarily be imposed and that, when considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.[62] The Court held that the imposition of the prescribed sentence need not amount to a "shocking injustice" before a departure is justified.[63] With respect to what may constitute "substantial and compelling circumstances", the Court emphasized the following:

> "Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those

---

61 *S v Mofokeng and Another* 1999 (1) SACR (W) 502, at 523

62 *S v Malgas* [2001] 3 All SA 220(A), para. 8.

63 *S v Malgas* [2001] 3 All SA 220 (A), para, 23.

> words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them."[64]

The Court unanimously decided that the "ultimate cumulative impact" of all the factors usually considered in sentencing (the traditional mitigating and aggravating factors) must be weighed up to decide whether a departure from the prescribed period is justified. "Substantial and compelling circumstances" may arise from a number of factors considered together even if, taken one by one, these factors may not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be "disproportionate to the crime, the criminal and the needs of society", the court may impose a lesser sentence (O'Donovan and Redpath, 2006: 14).

The court added:

> "The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."[65]

The Court also offered the following guidance for applying mandatory minimum sentences:

---

64 *S v Malgas* [2001] 3 All SA 220 (A), para. 9.

65 *Malgas* [2001] 3 All SA 220(A), para. 22.

"(a) Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

(b) Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

(c) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

(d) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

(e) The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

(f) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

(g) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

(h) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

(i) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

(j) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."[66]

We may note also that the Constitutional Court of South Africa rejected a challenge to the constitutional validity of these provisions in *Buzani Dodo v The State*.[67]

In practice, the "substantial and compelling circumstances" argument has been invoked regularly to justify a departure from the prescribed minimum sentences (Rudmand, 2006). Some have argued that the exception clauses were used too frequently and may have defeated the purpose of the mandatory minimum sentences.[68]

Because of the possibility of invoking "substantial and compelling circumstances", it was argued that the limiting of judicial discretion in respect of certain rape cases by the Act did not rid such sentencing of outdated myths and stereotypical assumptions about rape. The provisions may have led courts to conduct a grading exercise in rape cases (O'Sullivan, 2006). The Supreme Court of Appeal may have added some ambiguity in defining the circumstances that can justify a departure from the mandatory minimum sentence for rape. In *S v Abrahams*, it stated that "some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a

---

66 *S v Malgas* [2001] 3 All SA 220(A), para. 25.

67 *Buzani Dodo v The State* (case CCT1/01, 5 April 2001).

68 Deon Rudman, Deputy Director-General: Legislation and Constitutional Development, Department of Justice and Constitutional Development reported *that s*uggestions have been made, especially by women's rights groups on behalf of rape victims, that the legislature should stipulate circumstances which would not qualify as 'substantial and compelling' to ensure that judicial officers do not invoke factors which are irrelevant and which should not warrant a sentence less than the minimum prescribed (Rudman, 2006: 28)

sentence is inappropriate and unjust."[69] In *S v Mahomotsa*, the Court referring to rape cases noted that "they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment."[70]

In *S v Mvamvu* the Supreme Court of Appeal considered an appeal by the State of a five year prison sentence imposed on the accused for the abduction and repeated rape and assault of his estranged customary law wife, who had obtained a domestic violence protection order against him.[71] The Court found the existence of the customary law marriage, Mvamvu's honest belief that he had a right to conjugal benefits and the fact that he grew up and lived in a world of his own shaped by customary norms and practices, to be mitigating factors.[72]

These and other events eventually led to the inclusion through the *Criminal Law (Sentencing) Amendment Act, 2007* of the new s. 3(aA) stipulating what shall not constitute substantial and compelling circumstances when the offender is convicted for the offence of rape.

There is some evidence that the mandatory minimum penalties have exacerbated the problem of prison overcrowding in South Africa and have increased court costs and delays, but their full impact has not been evaluated (O'Donovan and Redpath, 2006; Sloth-Nielsen and Ehlers, 2005). There does not appear to be any data available on the impact of the use of the "exceptional circumstances" provisions of the law.

6. Relief in the "interest of justice" or to avoid an "unjust" sentence

It can obviously be argued that, when the law specifies the kind of mitigating or exceptional circumstances that may justify a departure from mandatory minimum penalties, it essentially does so in order to

---

69 *S v Abrahams* 2002 (1) SACR 116 (SCA), para. 29.

70 *S v Mahomotsa* 2002 (2) SACR 85 (SCA), para. 18.

71 *S v Mvamvu* 2005 (1) SACR 54.

72 See also: *Nkomo v The State* 2006 SCA 167 RSA, and *S v Mahomotsa* 2002 (2) SACR 435 (SCA), in which the Supreme Court of Appeal pointed out that even in the case of a serious and multiple rapes a sentence of life imprisonment need not necessarily be imposed. If there are compelling and substantial circumstances the appropriate sentence is within the court's discretion. See also *Rammoko v DPP* 2003 (1) SACR 200 (SCA).

avoid some unjust sentencing outcomes. Nevertheless, in some jurisdictions, the legislator has relied on the concept of "unjust sentences" to create specific exceptions to the application on mandatory penalties. This approach was used in New Zealand, England and Wales, and Scotland.

a) New Zealand – Exception when a sentence would be "manifestly unjust"

New Zealand offers some interesting examples of exceptions to the application of mandatory minimum sentences.[73] The *Sentencing Act 2002* had introduced minimum finite sentences for murder and minimum non-parole periods which applied unless they were considered by the court to be "manifestly unfair". The Act had also imposed minimum penalties in cases of serious offending where the culpability of the offender has been high and aggravating factors have been present. However, as mentioned before, New Zealand later adopted a sentence escalation regime that amounts to a form of mandatory minimum sentencing regime. The *Sentencing and Parole Act 2010* also replaced the previous mandatory life imprisonment penalty for murder with more flexible sentencing provisions.[74] With these amendments, life imprisonment became the maximum penalty for murder rather than the mandatory penalty but with a strong presumption in favour of its use.[75] A finite sentence of imprisonment, however, is only available for murder if a life sentence would be "manifestly unjust". The intent was ostensibly to ensure that finite penalties would only apply in exceptional cases such as mercy killings, failed suicide pacts and situations involving battered defendants, where life imprisonment would be "manifestly unjust" on the facts (Chhana et al., 2004: 13). The new section 102 of the *Sentencing Act 2002* reads as follows:

> "*102 Presumption in favour of life imprisonment for murder*
>
> (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be *manifestly unjust*.

---

73 *Sentencing Act 2002,* as amended.

74 *Sentencing and Parole Act 2010*.

75 *Sentencing Act 2002*, s. 102.

> (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so. (…)"[76]

When the courts impose a life sentence for murder, they must also specify a minimum period of imprisonment or imprisonment without parole of no less than ten (10) years and must be the minimum that the court considers necessary to satisfy the purposes of the sentence:

> "*103 Imposition of minimum period of imprisonment or imprisonment without parole*
> (…)
> (2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
> (b) denouncing the conduct in which the offender was involved:
> (c) deterring the offender or other persons from committing the same or a similar offence:
> (d) protecting the community from the offender.
>
> (2A) If the court that sentences an offender convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment would be sufficient to satisfy 1 or more of the purposes stated in subsection (2), the court may order that the offender serve the sentence without parole.
>
> (2B) The court may not make an order under subsection (2A) unless the offender was 18 years of age."[77]

When some aggravating circumstances accompany the murder, the court is required to impose a minimum period of imprisonment or imprisonment without parole of no less than seventeen (17) years, unless it is satisfied that it would be *manifestly unjust* to do so:

> *"104 Imposition of minimum period of imprisonment of 17 years or more*
>
> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:

---

[76] *Sentencing Act 2002*, s. 102.

[77] *Sentencing Act 2002,* s. 103

(a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or

(b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or

(c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or

(d) if the murder was committed in the course of another serious offence; or

(e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or

(ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or

(f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or

(g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or

(h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or

(i) in any other exceptional circumstances."

Finally, when the murder is a "stage 2 or stage 3 offence" (second or third "strike" – see below), the court must sentence the offender to a life sentence without parole, or a minimum period of imprisonment of not less than 20 years unless, again, it would be *manifestly unjust* to do so.[78]

The *Sentencing and Parole Act 2010* also introduced a "three strikes" sentencing regime (or, more exactly, a sentence escalation regime) for certain qualifying offences. There are 40 qualifying offences comprising all major violent and sexual offences with a maximum penalty of seven years imprisonment or more, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery. In

[78] *Sentencing Act 2002*, s. 86E.

that three-stage regime, courts are required to warn qualifying offenders and then increase penalties for subsequent offences. Most importantly, on a "third strike", the courts are to impose the maximum term of imprisonment prescribed for that offence unless that would be "manifestly unjust".

When one of the qualifying offences is committed, a first warning is to be issued to any offender aged 18 or over at the time of the offence and who does not have any previous warnings. The first "strike" warning stays on the offender's record (unless his or her conviction is quashed by an appellate court). Should this offender be subsequently convicted of committing another qualifying offence, he or she is to receive a final warning and, if sentenced to imprisonment, will serve that sentence in full without the possibility of parole. On conviction of a third qualifying offence the court must impose the maximum penalty for the offence. The court must also order that the sentence be served without parole, unless the court considers that would be *manifestly unjust*. If there are some exceptional circumstances associated with the offence or the offender, the judge can decide that it would be "manifestly unjust" or extremely unfair to order that the sentence be served without parole.

> *"86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment*
>
> (1) Despite any other enactment,—
>
> (a) a defendant who is committed for trial for a stage-3 offence must be committed to the High Court for that trial;
>
> and
>
> (b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.
>
> (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
>
> (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be *manifestly unjust* to make the order.
>
> (4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum period of imprisonment of not less than 20 years

> unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be *manifestly unjust*, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.
>
> (5) If the court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the court must give written reasons for not doing so.
>
> (6) If the court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.
>
> (7) Despite subsection (2), this section does not preclude the court from imposing, under section 87, a sentence of preventive detention on the offender, and if the court imposes such a sentence on the offender,—
>
> (a) subsections (2) to (5) do not apply; and
>
> (b) the minimum period of imprisonment that the court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the court would have imposed under subsection (2), unless the court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be *manifestly unjust*.
>
> (8) If, in reliance on subsection (7)(b), the court imposes a minimum period of imprisonment that is less than the term of imprisonment that the court would have imposed under subsection (2), the court must give written reasons for doing so."

The exception can also apply in cases where the court is sentencing an offender to preventive detention. Under s. 89 of the *Sentencing Act 2002*, when a court sentences an offender to preventive detention, it must also order that the offender serve a minimum period of imprisonment, which in no case may be less than 5 years. The minimum period of imprisonment must be the longer of: (a) the minimum period of imprisonment required to reflect the gravity of the offence; or, (b) the minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing.

Section 86D (7) and (8) of the *Sentencing and Parole Reform Act 2010* specifies that the minimum period of preventive imprisonment that the Court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the Court would have imposed under subsection (2), unless the Court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be *manifestly unjust*.

In all of the relevant instances, the courts must give written reasons for deviating from the expected minimum penalty. The threshold for deviating from the prescribed minimum penalties, as set by the "manifestly unjust" criterion, is quite high so as to apply only to very unusual circumstances. Yet, the threshold is not very specific, so as to allow the courts to deal with unforeseen circumstances.

Since the new regime was adopted, the courts have had several opportunities to explain how the "manifestly unjust" concept should be interpreted. The courts have held that it is a high threshold. What amounts to "manifestly unjust" depends on the particular facts of the case. In *R v O'Brien* the court commented that: "'Unjust' can only mean that in the context of a particular murder and a particular offender, the normal sentence of life imprisonment runs counter to both a Judge's perception of a lawfully just result and also offends against the community's innate sense of justice. 'Manifestly' means that injustice must be patently clear or obvious." [79]

With respect to the court's discretion to deviate from the "strong presumption" that a sentence of life imprisonment must be imposed (s. 102), the courts have clarified that the assessment of manifest injustice is a conclusion likely to be reached in exceptional cases only and the scope to account for the young age of the offender is greatly limited.[80]

In *R v O'Brien* the Court of Appeal noted that: "There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of further risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment."[81] However, it agreed with the court of first instance and held that in the context of a criminally motivated and

---

79 *R v O'Brien*, HC, New Plymouth, 21/2/2003, T06/02.

80 *R v Rawiri & ors* [2003] 3 NZLR 794.

81 *R v O'Brien* 2003, NZ CA107/ 03, para. 36.

brutal attack on a vulnerable victim, a mild intellectual impairment, even when coupled with youth, was not sufficient to displace the presumption.[82]

b) England and Wales – Exception when a minimum penalty would be unjust

The relief was introduced in the United Kingdom in a proposed new law at the last minute, by the House of Lords to allow judges to have regard to specific circumstances relating to either the offender or the offence when considering the appropriateness of imposing the minimum sentence. Judges were also directed to take into account any specific circumstances that would render the prescribed minimum penalty "unjust in all the circumstances".[83]

Section 109 of the *Power of Criminal Courts (Sentencing) Act 2000* imposed a mandatory life sentence in the cases of offenders, aged 18 or over, convicted of a second serious offence, "unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so" (s. 109 (2)). In such cases, the court must state in open court that it is of that opinion and what the exceptional circumstances are (s. 109(3)). The list of serious offences qualifying under these dispositions is a long one (culpable homicide, conspiracy to commit murder, rape, aggravated assaults, possession of firearms, use of firearms to resist arrest, etc.).

Section 110 of the same Act also established a seven year minimum imprisonment penalty for a third "class A drug offence" and s. 111 provided a minimum penalty of three years of imprisonment for a third conviction for burglary. In both cases, the law also left the door open and provided an exception allowing the courts to deviate from these penalties "where the court is of the opinion that there are particular circumstances which: (a) relate to any of the offences or to the offender; and, (b) would make it unjust to do so in all the circumstances" (s. 110 (2) and s. 111(2)). As was the case for s. 109, where the courts do not impose the minimum sentence, they must state in open court that they are of that opinion and what the particular circumstances are.

---

[82] Several other court decisions are also reviewed in Chhana et al., 2004.

[83] For a short discussion of the political context in which these provisions were added to the legislation, see Jones and Newburn, 2006.

In *McInerney,* the Court of Appeal expressed the view that the exemption created in s. 111(2) in respect of domestic burglary gives the sentencing judge a fairly substantial degree of discretion as to the categories of situations where the presumption can be rebutted.[84] The Court gave two examples of situations where a mandatory sentence of imprisonment for three years may be unjust: when two offences were committed before the offender became 16, when two of the offences were committed many years earlier than the third offence, or when an offender has made real efforts to reform or conquer his drug addiction, but some personal tragedy triggers the third offence.

With respect to s. 110 (minimum sentences for drug offences), there are similar examples of cases where the courts have determined that imposing the minimum penalty would be unjust: for example, when an offender's previous convictions had occurred a number of years before the current offence;[85] or when the previous offences only involved supplying small amounts of drugs to a group of friends.[86]

c) Scotland – Exceptions in the interest of justice

A prospective amendment to the *Crime and Punishment (Scotland) Act 1997,* added new sections 205A and 205B which would introduce a mandatory minimum sentence for a third conviction of certain offences related to drug trafficking (Class A drug trafficking offences), s. 205B. Interestingly, 205B (3) also provided that the court is not to impose the minimum sentence "where it is of the opinion that there are specific circumstances which: (a) relate to any of the offences or to the offender; and, (b) would make that sentence *unjust"*.

Section 205A would also provide "automatic" life imprisonment sentences for certain qualifying offences (e.g., culpable homicide, attempted murder, incitement to commit murder or conspiracy to commit murder, rape or attempted rape, aggravated assault, robbery involving a firearm, etc.). However, a potential relief would be created in the "*interest of justice*." Section 205A (3) provides that, "if the High Court is of the opinion that it would be in the interests of justice for it to pass a sentence other than the sentence which that subsection would

---

84 *R v McInerney R v Keating* [2003] All ER (D) 28 (Jan). Given the identity of language between the relevant paragraphs creating an exception to mandatory penalties in sections 110 and 111, it is likely that this would also for s. 110 in relation to the mandatory minimum sentence for Class A drugs.

85 *R v McDonagh* [2006] 1 Cr. App. R. (S.) 111.

86 *R v Turner* [2006] 1 Cr App R (S) 95.

require it to pass, it may decline to pass that sentence and may instead pass any sentence which it otherwise has power to pass in respect of a conviction for that offence."[87]

7. Relief to allow for the treatment of the offender

In the State of Montana, Section 46-18-222 of the *Montana Code (Title 46 – Criminal Procedure)* creates a possible relief from the application of very severe mandatory minimum penalties in a number of specified sexual offences, such as sexual assault when the victim is less than sixteen years of age and the offender is more than 3 years older than the victim (§45-5-502(3)), or sexual assault without consent (§45-5-503(4)) and incest (§ 45-5-507(5)), when the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence, or for offences such as prostitution (§45-5-601(3)), promoting prostitution (§45-5-602(3)), aggravated promotion of prostitution (§45-5-603(2)) when the "prostitute" was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence, or sexual abuse of children (§45-5-625(4)), when the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offence.[88]

The relief which is provided by §46-18-222(6) is unusual and justified on the basis of the prospect for the rehabilitation of the offender. It requires the judge to determine, "based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of §46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society." In those cases, the judge must include in his or her judgment a statement of the reasons for the determination.

---

87 *Crime and Punishment (Scotland) Act 1997,* s. 205A (3).

88 In the case of these last four offences, the mandatory minimum is effectively 25 years. The Code states that the offender shall be punished by imprisonment in a state prison for a term of 100 years and the court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222. During the first 25 years of imprisonment, the offender is not eligible for parole.

8. Presumptive minimum penalties

A presumptive minimum sentencing regime is one in which prescribed legislative minimum sentences dictate the sentence that must be imposed by a court in sentencing offenders, but where the law also stipulates grounds upon which the court may find the presumption to be rebutted and proceed to exercise its full sentencing discretion (See: Sentencing Advisory Council, 2008: 6).

It has been argued that much of what mandatory minimum penalties are meant to achieve can be achieved by making such laws *presumptive*, not unlike what is already the de facto situation in many jurisdictions where sentencing guidelines were adopted and are enforced.[89] Michael Tonry argues that: "Converting all mandatory penalties to presumptive penalties would sacrifice few of the values sought to be achieved by such laws but would avoid many of the undesirable side effects" (Tonry, 2009: 103).[90] The following are examples of jurisdictions where mandatory minimum penalties have been established (or have evolved) as *presumptive penalties,* allowing deviations from the presumptive sentence in exceptional circumstances. In at least one of these jurisdictions, New South Wales, an attempt has been made to evaluate the impact of the presumptive scheme.

Three examples are presented here. These are the cases of Connecticut which has both strict and presumptive minimum sentences, Minnesota

---

[89] In the United States, decisions of the Supreme Court have effectively made federal sentencing guidelines presumptive. See: *United States v. Booker*, 543 U.S. 220 (2005). In Booker, the Supreme Court held that the SRA's mandatory guidelines scheme violates the Sixth Amendment. To salvage the guidelines in a constitutionally permissible manner, the Court severed the SRA provision "that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." However, the Court held that district judges must take the guidelines into account in accordance with 18 USC § 3553(a)(4)(a).12. - Booker, 543 US at 259-260. See also: The detailed report of the United States Sentencing Commission (2011), *Report to Congress: Mandatory Minimum penalties in the Federal Criminal Justice System*.

[90] Having argued that one of the unintended consequences of mandatory minimum sentences laws requiring the imposition of penalties sometimes perceived to be too severe is that prosecutors may sidestep the laws by not bringing charges subject to such penalties or by agreeing to dismiss them in plea negotiations (or that judges and prosecutors can find other "disingenuous" ways to evade their applications), Tonry adds that: "If official circumvention of mandatory penalties in cases where they seem unduly harsh is foreseeable, and it is, conversion to mandatory (presumptive) penalties is likely to result in no less systematic enforcement but to lessen hypocritical efforts at avoidance" (Tonry, 2009: 103).

which has both presumptive sentencing guidelines and minimum penalties, and New South Wales which has a presumptive standard non-parole period sentencing scheme.

a) Connecticut - Mandatory minimum penalty as a "presumptive minimum sentence"

The State of Connecticut has adopted two forms on mandatory minimum penalties: *strict* mandatory minimum sentences requiring a judge to impose a statutorily fixed minimum sentence regardless of mitigating factors (no opportunity for discretion), and *presumptive* minimum sentences. Under the presumptive sentencing dispositions, a judge may exercise his or her discretion to depart from a mandatory minimum prison term with a statement explaining the reasons for the departure. In 2001, for example, the legislature provided judges with the discretion to deviate from the mandatory minimum penalty for certain drug manufacture or sale offences (involving small quantities) based on "good cause" (to be shown by defendant) when "the crime was non-violent as determined by the judge."[91] In that case, the mandatory minimum sentence is also immediately presumptive when the offender is under the age of 18 or his or her mental capacity was significantly impaired.

The *Connecticut General Statutes* contain several other drug or firearms related offences which specifically stipulate exceptions to the application of the mandatory minimum penalty, thus making the mandatory penalty presumptive.[92] In some instances, the "presumptive nature" of the mandatory minimum sentence only applies to the first conviction for that offence (e.g., a first conviction for driving during license suspension for DWI and DWI related offences).

b) Minnesota – Presumptive sentencing guidelines and mandatory minimum penalties

In Minnesota, sentencing guidelines were developed several decades ago in order to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offence of

---

[91] *Connecticut General Statutes* – 21a-278(a) & (b)

[92] Example of such offences include: driving during licence suspension for DWI, operating a motor vehicle under the influence of alcohol or drugs, carrying handgun without permit.

conviction and the extent of the offender's criminal history.[93] The guidelines are to be used to determine the presumptive sentence, but the Minnesota Sentencing Guidelines Commission makes it clear that "while the sentencing guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist" (Minnesota Sentencing Guidelines Commission, 2011: 1).

When such factors are present, the judge may depart from the presumptive disposition or duration provided in the guidelines, and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence. When a sentence departs from the sentencing guidelines, it is an exercise of judicial discretion constrained by case law and appellate review. In such instances, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence. Furthermore, when a plea agreement is made that involves a departure from the presumptive sentence, the court must cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted. The Minnesota Sentencing Guidelines Commission, explained:

> "The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if judges depart from the guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high" (Minnesota Sentencing Guidelines Commission, 2011: 30).

There are also several serious crimes for which Minnesota statutes prescribe a mandatory minimum sentence (e.g., where a firearm was used during the commission of the offence). However, in most of these cases, judges now have the authority to impose a different sentence if reasons are given. In that sense, some of the mandatory minimum penalties, operating in conjunction with the sentencing guidelines, have become presumptive. According to the State's Sentencing Guidelines Commission, "when a motion to sentence apart from the mandatory minimum is made by the prosecutor or the judge, it becomes legal to stay imposition or execution of sentence or to impose a lesser sentence than the mandatory minimum" (2011: 38). In such instances, written

[93] See: Minnesota Sentencing Guidelines Commission, 2011.

reasons are required to specify the substantial and compelling nature of the circumstances which led to that decision and to "demonstrate why the sentence selected is more appropriate, reasonable or equitable than the presumptive sentence" (Minnesota Sentencing Guidelines Commission, 2011: 38).

c) New South Wales: Standard non-parole period sentencing scheme

In New South Wales, a new standard non-parole period statutory scheme for specified indictable offences was added to the *Crimes (Sentencing Procedure) Act 1999* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. It introduced standard non-parole periods for a broad range of serious indictable offences (e.g., murder, wounding or grievous bodily harm with intent, sexual intercourse without consent, sexual intercourse with a child under the age of 10 years, or robbery with arms and wounding). A standard non-parole period for each offence is set out in a table included in the law and "represents the non-parole period for an offence in the middle of the range of objective seriousness for offences."[94]

There were further amendments to the statutory scheme by the *Crimes (Sentencing Procedure) Amendment Act 2007* and the *Crimes Amendment (Sexual Offences) Act 2008*, adding to the list of offences to which standard non-parole periods applied and excluding from the application of the scheme offenders who were under 18 years of age at the time of the offence.[95]

The purpose of the statutory scheme was to make sentencing more consistent and transparent, and not to introduce mandatory sentencing. The scheme was meant to "provide further guidance and structure to judicial discretion."[96] Section 54B(2) of the Act provided at the time that "the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter (…)." Legitimate departures from the standard non-parole

---

[94] *Crimes (Sentencing Procedure) Act*, s. 54A(1) & (2).

[95] See: *Crimes (Sentencing Procedure) Act*, s. 54D(3), inserted by the *Crimes Amendment (Sexual Offences) Act 2008*, Sch 2.4[4].

[96] Then Attorney General (NSW), the Hon RJ Debus, NSW, Legislative Assembly, Debates, 23 October 2002, p 5813.

period set by law are quite possible: the use of the word "may" in s. 54B(3) of the *Crimes (Sentencing Procedure) Act* confers a discretion on the court to depart from a standard non-parole period.[97]

The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are described in s. 21A of the *Crimes (Sentencing Procedure) Act*. Ss. 21A(2) and 21A(3) respectively list various aggravating and mitigating factors, while s. 21A(1) also permits consideration of "any other objective or subjective factor that affects the relative seriousness of the offence" and adds that the matters specifically listed in the section are to be considered "in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law."

The court in *R v Way* (2004) said that "statutory and common law factors may still properly be taken into account in determining a sentence even though they are not listed in s. 21A(2) or (3)", including the fundamental principle of individualised justice.[98] Therefore, the matters that may justify a departure from the standard non-parole period may include those recognised by the common law but not mentioned in s. 21A (e.g., offender's ill health, hardship to the offender as a result of protective custody, hardship to third parties, and the principles of parity and totality). In that sense, the standard non-parole periods set by law, act more as reference point, along with the other factors such as authorities, guideline judgments, or the specified maximum penalty for an offence.

The dispositions concerning the application of the standard non-parole periods should not be understood in mandatory terms. This was made clear in *Muldrock v The Queen* (2011), where all Justices of the High Court in a single judgment held that the Court of Criminal Appeal had erred "by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant."[99] The High Court also held that "… it was an error [of the court in R v Way] to characterise s. 54B(2) as framed in mandatory terms."[100]

---

[97] See: s. 54B(3) of the *Crimes (Sentencing Procedure) Act*.

[98] *R v Way* (2004) 60 NSWLR 168 at [104].

[99] *Muldrock v The Queen* (2011) 244 CLR 120 at [32]. The High Court also held that *R v Way* was wrongly decided.

[100] *Muldrock v The Queen* (2011) 244 CLR 120 at [25]. In effect, the High Court held that in sentencing for an offence to which standard non-parole periods applied a court is not required or permitted to engage in a two-stage approach and that the

According to s. 44 (1)(3), "(…) when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence)." The full range of subjective considerations is capable of warranting a finding of special circumstances. In *R v Simpson*, Chief Justice Spigelman said:

> "The words 'special circumstances' appear in numerous statutory provisions. They are words of indeterminate reference and will always take their colour from their surroundings … the non-parole period is to be determined by what the sentencing judge concludes that all of the circumstances of the case, including the need for rehabilitation, indicate ought [to] be the minimum period of actual incarceration."[101]

The Judicial Commission of New South Wales noted that a finding of special circumstances under ss. 44(2) or 44(2B) authorises a reduction in the otherwise appropriate non-parole period, but it does not authorise an increase in the term of the sentence.[102] The reform of the offender will often be the purpose in finding special circumstances, but this is not the sole purpose.[103] The risk of institutionalisation, even in the face of entrenched and serious recidivism, may be regarded as a sufficiently special circumstance to warrant adjusting the statutory ratio.[104]

A study of the impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales, concluded the statutory scheme had generally resulted in a greater uniformity of, and consistency in, sentencing outcomes (Poletti and Donelli, 2010).

---

standard non-parole period should not have been determinative in sentencing Mr. Muldrock. This decision has the potential to affect the sentencing of offenders convicted of an offence with a standard non-parole period.

[101] *R v Simpson* (2001) 53 NSWLR 704, at 59.

[102] *R v Tobar* (2004) 150 A Crim R 104, at 36–37; *R v Huynh* [2005] NSWCCA 220, at 35–39; *Markham v R* [2007] NSWCCA 295, at 29.

[103] *R v El-Hayek* (2004) 144 A Crim R 90, at 105.

[104] *R v Lemene* (2001) 118 A Crim R 131, at 66–67; *R v Hooper* [2004] NSWCCA 10, at 62–64; *Jackson v R* [2010] NSWCCA 162, at 24–25.

9. Relief available after sentencing

A more indirect way to create exceptions to mandatory minimum sentences is to make them subject to review after they have been pronounced. This process exists in Maryland where the code contains mandatory minimum sentences for certain handgun and drug distribution offences. The state's mandatory sentencing requirements largely target repeat offenders, and judges can impose a lesser sentence provided the prosecution agrees. The Court of Appeals has also stated that plea agreements that stipulate a sentence below a mandatory minimum for repeat offences are acceptable and that prosecutors are free to decide whether or not to seek the mandatory minimum for a repeat offender.

Since 1999, Maryland's criminal procedure code makes it possible for offenders sentenced to prison for more than two years, including offenders sentenced to a mandatory minimum sentence, to apply for reconsideration of their sentence by a three-judge panel (excluding the sentencing judge) from the same circuit in which they were sentenced.[105] In the case of a prisoner serving a mandatory sentence, the sentence cannot be decreased unless the vote of the panel is unanimous. The likelihood of obtaining relief from a sentence review is apparently quite small (Justice Policy Institute, 2006).

The draft *Model Penal Code Sentencing* of the American Law Institute also includes provisions for a sentence modification judicial review panel to review the sentences of offenders who have served at least 15 years of their sentence (American Law Institute, 2011: 76).

Discussion

1. Impact of exemptions from mandatory minimum penalties

There is some consistent evidence about the impact of mandatory minimum penalties, but very few jurisdictions have compiled and published data on cases where exceptions were made to the application of these mandatory sentencing provisions. It is obvious that the impact in question can be expected to vary depending on the type of crime or

[105] *Maryland Code*, *Criminal Procedure* §8-105.

type of offenders to which or to whom they apply, but that kind of systematic analysis does not seem to have been conducted yet.

However, having made this general observation, it should also be noted that there is a fair amount of data and research already available relating to the impact of certain departures from mandatory minimum sentences (either for substantial assistance or as a result of "safety valve" provisions) now possible in the United States (at the federal level and in some states). These departures, because they require the agreement of the prosecution, are essentially used to encourage or compel offenders to plead guilty and cooperate with the state. The research, as was mentioned before, shows that these exceptions have introduced an alarming level of unjustifiable sentencing disparity and too have affected different groups of offenders differently. They may also have allowed the courts to more efficiently expedite a significant number of cases.

As for the impact of exceptions to mandatory minimum penalties based on stricter or more substantial criteria, systematic data do not seem to be available anywhere.

There appears to be only one situation where the resulting deviations from mandatory minimum penalties for serious crimes may have compromised the stated policy objectives for the adoption of these sentencing schemes. That is the case of South Africa where sentencing decisions based on considering "substantial and compelling circumstances" in rape cases appear to have defeated the stated purpose of the sentencing scheme. As was seen earlier, that situation was corrected by amending the law to specify which factors did not constitute "substantial and compelling circumstances" in rape cases. That situation also appears to be the only case where serious public concerns were expressed about the application of reliefs from mandatory minimum sentences.

2. Exemptions and the prohibition of unjust, arbitrary or inhuman punishment

The possibility for the courts to recognize special circumstances and depart from mandatory minimum penalties to prevent the imposition of unjust sentences tends to be regarded as a necessary way to ensure that mandatory sentencing schemes do not contravene some fundamental human rights principles regarding criminal punishment.

The countries reviewed in this paper are bound by the *International Covenant on Civil and Political Rights* (ICCPR), in particular articles 7 (Prohibition of inhuman and degrading treatment) and 9 (Prohibition of arbitrary detention). Some, like the United Kingdom, are also bound by the *European Convention on Human Rights*, in particular Article 3 which prohibits "inhuman or degrading treatment" and Article 5 prohibiting arbitrary detention. Several of them have their own human rights law which invariably prohibit arbitrary, inhuman or unjust punishments. In several instances, the question arose of whether mandatory minimum sentences are essentially in contravention of these human rights principles. In such instances, the fact that there was a possibility for the courts to depart from mandatory minimum penalties in some limited circumstance was deemed directly relevant to the discussion.

The United Nations Human Rights Committee has consistently held that, with respect to Article 9 of the ICCPR, the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. In that sense, as some scholars have argued, "a penalty which might be justified for a serious crime could constitute inhuman treatment or punishment if imposed for a petty offence. To this extent at least inhuman treatment is a relative notion" (Jacobs and White, 1996: 51).

That whole discussion is certainly relevant to Canada in the context of the guarantees offered by the *Canadian Charter of Rights and Freedom* Article 9 (the right not to be arbitrarily detained or imprisoned) and Article 7 (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice).

a) United Kingdom

In the UK, the *Human Rights Act 1998* integrating the European Convention also prohibits "inhuman or degrading treatment" and "arbitrary detention."[106] The question of whether mandatory penalties may contravene the Convention has been raised in at least two cases: *R v Offen and Others*[107] and *R v Rehman and Wood*[108]. In the first case, the court considered the requirement to impose a life sentence under

[106] See: http://www.legislation.gov.uk/ukpga/1998/42/contents.

[107] *R v Offen and Others* [2001] 1 Cr App R 372.

[108] *R v Rehman and Wood* [2005] EWCA Crim 2056.

section 2 of the *Crime (Sentences) Act 1997* when a person is convicted for a second time of a serious offence (unless there are exceptional circumstances). In the second case, the Court of Appeal was dealing with the mandatory minimum penalty required under Section 51A of the *Firearms Act 1968* (inserted in the Act by section 287 of the *Criminal Justice Act 2003*. One of the appellants had submitted that section 51A required the court to impose sentences that constituted inhuman and degrading treatment and punishment in contravention of Article 3 of the *European Convention on Human Rights*, and that such sentences could result in arbitrary and disproportionate deprivation of liberty in violation of Article 5 or articles 5 and 3 when read together. The Court did not regard that as "being a situation where it is necessary to read the section down (i.e., 51A), relying on section 3 of the *Human Rights Act 1998* so as to comply with the Convention."

The Court's reasoning was the mandatory minimum penalty could result in an arbitrary and disproportionate sentence if there was no possibility for the court to consider "exceptional circumstances", most particularly if the circumstances involved were such that it "would mean that to impose five years' imprisonment would result in an arbitrary and disproportionate sentence."[109]

b) United States

In the United States, the *Bill of Rights* (specifically, the 8th Amendment to the Constitution) prohibits the infliction of "cruel and unusual punishment." The United States Supreme Court, in deciding whether or not a particular punishment is cruel and unusual, has relied on principles articulated in *Furman v Georgia*.[110] The punishment must not be: by its severity, degrading to human dignity; a severe punishment that is obviously inflicted in wholly arbitrary fashion; a severe punishment that is clearly and totally rejected throughout society; a severe punishment that is patently unnecessary.

The latter principle is frequently quoted with respect to mandatory minimum penalties. The argument often revolves around whether the mandatory severe punishment may be necessary to deter offenders or to protect society and are therefore justified.

---

[109] *R v Offen and Others* [2001] 1 Cr App R 372, para. 16.

[110] *Furman v Georgia,* 408 U.S. 238 (1972).

c) New Zealand

In New Zealand, section 9 of the New Zealand *Human Rights Act 1990* establishes the "right not to be subjected to torture or cruel treatment" as follows: "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment." Section 22 affirms that "(e)veryone has the right not to be arbitrarily arrested or detained," and section 27 affirms that "(e)very person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognized by law." These rights are not absolute. Section 5 expressly provides that the rights conferred by the Act may be limited by law to the extent that this can be "demonstrably justified in a free and democratic society."

The terms "disproportionately severe" (in Section 9) create a requirement for the courts to balance mandatory penalties required for the protection of the public through the imprisonment of dangerous offenders, are the human rights provisions which limit arbitrary and excessive punishment and detention.

d) South Africa

In South Africa, the *Constitution of South Africa 1996* (Chapter 2 – *Bill of Rights*) refers to the right "not to be deprived of freedom arbitrarily or without just cause" (12(1)(a)), and the right "not to be treated or punished in a cruel, inhuman or degrading way" (12(1)(e))(a non-derogable right).

"Article 36 (limitation of rights) of the Bill of Rights, stipulates that:

> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> a. the nature of the right;
> b. the importance of the purpose of the limitation;
> c. the nature and extent of the limitation;
> d. the relation between the limitation and its purpose; and
> e. less restrictive means to achieve the purpose."

The Constitutional Court has found that "proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading."[111] In *Dodo v S*, the court explained that a sentence would be "cruel, inhuman or degrading" if it's length was grossly disproportionate, but also that the court can impose a lesser sentence well before gross disproportionality is reached when "substantial and compelling circumstances" exist, based on the interpretation of that test specified by the Supreme Court of Appeal in *S v Malgas*.[112] In other words, the fact that a departure from the mandatory minimum sentence is possible in certain circumstances is what makes it possible to avoid gross disproportionate penalties.

3. Policy options

The main argument in favour of providing potential exceptions to the application of mandatory minimum penalties is obviously the need to avoid unjust and arbitrary punishment. As was frequently articulated by various courts, the principle of proportionality in sentencing is also at the centre of that concern. Strict mandatory sentences, whether or not they can in fact deliver on the policy objectives that motivated their adoption in the first place, necessarily hold the inherent risk that they may be applied in cases for which they were never intended or in circumstances where they will amount to an unjust sentence. When mandatory minimum penalties can lead to gross disproportionate sentences, they are most surely not compatible with fundamental human rights.

Such arguments usually lead to a call for the reintroduction of some sentencing discretion, at least in a limited way, wherever mandatory minimum penalties have eliminated that discretionary authority or displaced it from the judiciary to the prosecution. Several jurisdictions have shown that it is possible and useful to introduce exceptions to mandatory minimum sentences that are based on criteria that set a high threshold for any departure from the legislated mandatory minimum penalty. Where necessary, it is even possible to set limits on the interpretation of these criteria.

It is certainly possible and most likely desirable, without denying the policy objectives pursued through the adoption of mandatory minimum penalties, to adopt a sentencing scheme where the mandatory

---

[111] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, para. 94.

[112] *Buzani Dodo v The State* (CCT1/01, [2001]), para. 37.

minimum penalties are affirmed as an essentially presumptive rather than strict framework. There are already some very viable examples of such schemes.

Finally, if an essentially presumptive and minimum penalties regime applicable to a very small number of serious offences is not adopted, it remains possible to create some specific reliefs which can prevent mandatory minimum penalties from leading to gross injustice, manifestly unjust sentencing outcomes or the denial of offenders' human rights.

.-.-.-.-.

References

Aboriginal and Torres Strait Islander Social Justice Commissioner (2002). *Social Justice Report 2001 - Chapter 4: Laws mandating minimum terms of imprisonment ('mandatory sentencing') and Indigenous people*. Sydney: HREOC. http://www.hreoc.gov.au/social_justice/sj_report/sjreport01/sjreport.pdf

American Law Institute (2011). *Model Penal Code Sentencing – Tentative Draft No. 2.* Philadelphia: ALI.

Australian Government (2011). *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* Attorney General`s Department. *http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesCivilPenaltiesandEnforcementPowers.aspx*

Cano, M. and C. Spohn (2012) "Circumventing the Penalty for Offenders Facing Mandatory Minimums: Revisiting the Dynamics of "Sympathetic" and "Salvageable" Offenders", *Criminal Justice and Behavior*, 39 (3): 308-332.

Chhana, R., Spier, P., Roberts, S., and C. Hurd (2004). *The Sentencing Act 2002: Monitoring the First Year*. Wellington: Ministry of Justice, March 2004. *http://www.justice.govt.nz/publications/publications-archived/2002/the-sentencing-act-2002-monitoring-the-first-year/sentencing-for-murder-and-high-risk-offenders*

Crutcher, N. (2001). "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis", *Criminal Law Quarterly,* 44(3): 279-309.

Dandurand, Y. (2009). *Addressing Inefficiencies in the Criminal Justice Process*. Vancouver: ICCLR. http://www.criminaljusticereform.gov.bc.ca/en/reports/pdf/InefficienciesPreliminaryReport.pdf

Ekism R. and W. Brookbanks (2010). "The Case against the 'Three Strikes' Sentencing Regime", *New Zealand Law Review,* 689-724

Farrell, A. (2004). "Measuring Judicial and Prosecutorial Discretion: Sex and race disparities in departures from the federal sentencing guidelines", *Justice Research and Policy*, 6 (1): 45-78.

Gabor, T. and N. Crutcher (2002). *Mandatory Minimum Penalties: Their Effects in Crime, Sentencing Disparities, and Justice System Expenditures.* Ottawa: Department of Justice Canada, Research and Statistics Division.

Hartley, R. (2008)."Sentencing Reforms and the War on Drugs: An analysis of sentence outcomes for narcotics offenders adjudicated in U.S. district

courts on the southwest border", *Journal of Contemporary Criminal Justice*, 24 (4), 437-461.

Hartley, R., Maddan, S., and C. Spohn, C. (2007). "Prosecutorial Discretion: An examination of substantial assistance departures in federal crack-cocaine and powder-cocaine cases", *Justice Quarterly*, (24): 382-407.

Hartley, R. D. and L. F. Armendariz (2011). "Border Justice? Sentencing Federal Narcotics Offenders in Southwest Border Districts: A focus on citizenship status", *Journal of Contemporary Criminal Justice*, 27(1): 43–62.

Hughes, G. (2001). *The Mandatory Sentencing Debate*. Melbourne: *Law Council of Australia.* http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91B75434-1E4F-17FA-D2BA-B6D5A60592A7&siteName=lca

Jacobs F. and R. White (1996) *The European Convention on Human Rights.* Oxford: Clarendon Press.

Johnson, B. D., Ulmer, J. T. and J. H. Kramer (2008). "The Social Context of Guidelines Circumvention: The case of Federal District Courts", *Criminology*, 46 (3):737-783.

Johnson, P. (2003). *Reforms to NSW Sentencing Law - The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002.* A Paper for a Seminar conducted by the Judicial Commission of New South Wales. http://www.judcom.nsw.gov.au/publications/selected_papers/reforms-to-nsw-sentencing-law

Jones, T. and T. Newburn (2006). "Three Strikes and You're Out: Exploring symbol and substance of American and British crime control policies", *British Journal of Criminology,* 46(5): 781-802*.*

Justice Policy Institute (2007*). Maryland's Mandatory Minimum Drug Sentencing Laws - Their Impact on Incarceration, State Resources and Communities of Color*. Washington (D.C.): JPI.

Kautt, P. M., and M. A. Delone (2006). "Sentencing Outcomes under Competing but Coexisting Sentencing Interventions: Untying the Gordian knot", *Criminal Justice Review*, 31(2): 105-131.

Law Council of Australia (2001). *The Mandatory Sentencing Debate.* Canberra: Law Council of Australia.

Law Institute of Victoria (2011). *Mandatory Minimum Sentencing*. Melbourne: Law Institute of Victoria.

http://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/Mandatory-Minimum-Sentencing.aspx

Luna, E. and P. G. Gassel (2010). "Mandatory Minimalism", *Cardozo Law Review,* 32 (1): 1-83.

Martin, D. (2001). "Distorting the Prosecution Process: Informers, mandatory minimum sentences, and wrongful convictions", *Osgoode Hall Law Journal* (39): 153-165.

McCoy, C. and P. McManimon (2004). *New Jersey's "No Early Release Act": Its Impact on Prosecution, Sentencing, Corrections, and Victim Satisfaction*. Washington, D.C.: Office of Justice Programs, National Institute of Justice.

Merritt, N., Fain, T., and S. Turner (2006). "Oregon's Get Tough sentencing Reform: A lesson in justice system adaptation", *Criminology and Public Policy*, 5(1): 5-36.

Minnesota Sentencing Guidelines Commission (2011). *Minnesota Sentencing Guidelines and Commentary*, Revised August 1, 2011. St.-Paul (MN): MSGC. http://www.msgc.state.mn.us/guidelines/Corrections%20Sex%20Offender%20Grids%20and%20Guidelines/Corrected%20Sentencing%20Guidelines%20August%201%202011.pdf

Nagel, I. H. and S. J. Schulhofer (1992). "A Tale of Three Cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines", *Southern California Law Review*, 66, 501-566.

O'Donovan, M. and J. Redpath (2006). *The Impact of Mandatory Sentencing in South Africa. Report 2. Capetown: Open Society Foundation. http://www.osf.org.za/File_Uploads/docs/SENTENCINGREPORT2MinimumSentencing.pdf*

O'Sullivan, M. (2006) "Gender and sentencing proceedings in South Africa", in *Sentencing in South Africa – Report 1.* Newlands (S.A.): Open Society Foundation for South Africa, pp. 59-65.

Poletti, P. and H. Donelly (2010). *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*. Sydney: Judicial Commission of New South Wales. http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-33/monograph33.pdf

Roberts, J. V. (2001). "Mandatory Minimum Sentences of Imprisonment: Exploring the consequences for the sentencing process", *Osgoode Hall Law Journal*, 39 (2&3): 305-327.

Roberts, J. V. (2005). *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*. Ottawa: Department of Justice Canada, Research and Statistics Division. http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/index.html

Rudman, D. (2006). "Sentencing Policy Developments in South Africa, 1994–2006", in *Sentencing in South Africa – Report 1.* Newlands (S.A.): Open Society Foundation for South Africa, pp. 26-39.

Sloth-Nielsen, J. and L. Ehlers (2005). "Assessing the Impact – Mandatory and minimum sentences in South Africa", *SA Crime Quarterly*, 14 (Dec.): 15-22.

Sloth-Nielsen J. and L. Ehlers (2005). *A Pyrrhic Victory? – Mandatory and minimum sentences in South Africa.* Pretoria: Institute for Security Studies.

Spohn, C. and R. Fornango (2009). "U.S. Attorneys and Substantial Assistance Departures: Testing for interprosecutor disparity", *Criminology*, 47 (3) 813-845.

Tonry, M. (2006). "Criminology, Mandatory Minimums, and Public Policy", *Criminology and Public Policy*, 5(1): 45-66.

Tonry, M. (2009). "The Mostly Unintended Effects of Mandatory Penalties: Two centuries of consistent findings", *Crime and Justice*, 38(1): 65-114.

Ulmer, J. T., Kurlychek, M. C., and J. H. Kramer (2007). "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences", *Journal of Research in Crime and Delinquency*, 44 (4): 427-458.

Ulmer, J. T., Eisenstein, J., and B. D. Johnson (2010). "Trial Penalties in Federal Sentencing: Extra-guidelines factors and district variation", *Justice Quarterly*, 27(4): 560-592.

United States Sentencing Commission (2011). *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington (D.C.): USSC. http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm

.-.-.-.