

Moreover, statutes providing harsh mandatory terms do not work because judges, juries, and even prosecuting attorneys find ways of getting around them. Prof. Paul Tappan, in an article, "Court Treatment of General Recidivist Statutes" (48 Col. L. Rev. 238 (1948)), has documented just how prosecutors, courts, and defense attorneys evade the mandatory provisions of such statutes. He cited one appellate court which frankly declared its hostility to the application of the law. In granting a writ of habeas corpus to a prisoner the court said: "If the sentence under review stands, the relator, who is 25 years of age, because he had previously stolen chickens, certain automobile parts, and a motorcycle, must spend the remainder of his days in a State's prison." He cited another case in which a district attorney had to apply to the Supreme Court for a writ of mandamus to a lower court judge who had issued an order forbidding supplementary proceedings under the habitual criminal act. The article gives other instances, some legal and some of doubtful illegality, in which judges have found ways to avoid imposing mandatory penalties.

Similar examples of circumventing such mandatory penalties may be found in the Federal jurisdiction. The Congress in 1935 passed a law providing a mandatory 25-year term for armed postal robbery. It was passed in a gangster-ridden era and undoubtedly the Congress had in mind the desperadoes of those days who held up post offices at the point of a machinegun, shotgun, or revolver. But in the years since then the Dillingers have gone, and their places have been taken by social misfits, alcoholics, emotionally disturbed youngsters, and others who may enter a smalltown grocery store doubling as a post office and brandish some kind of weapon to force the proprietor to hand over the contents of the cash register, including whatever stamps it may contain.

The judges get around this statute in two ways. First, they found that the statute did not prohibit the imposition of probation for such offenders. In many instances, although a prison term may have been indicated, the judges placed the defendants on probation rather than impose a 25-year term. This is perhaps an outstanding example of the manner in which a statute has completely frustrated its own purpose. Other judges have completely ignored the statutory requirement for a 25-year term and imposed a lesser term of years. These sentences were illegal, but they have not been challenged by the defendants, who benefited from them, or by the U.S. attorneys, who were aware as well as the judge that a 25-year term would be contrary to the interests of justice.

The Narcotics Control Act of 1956 provides other illustrations, both of the injustices of mandatory penalties and the means that have had to be found to mitigate or correct these injustices. That statute, as you know, provides mandatory minimum terms of 5 years or more for certain types of narcotics and marihuana offenses. It does not provide any means of distinguishing between major racketeers such as Vito Genovese and the victim of the drug traffic, the addict. In fact, we have received smalltime drug addicts and pushers with much more severe sentences than the 15 years that was imposed on Genovese. Just last week I interviewed one such person at Leavenworth who received 40 years for possession and sale of demerol and other synthetic drugs stolen apparently from a doctor's supply. This sentence was partially the result of the requirement that a long prescribed sentence had to be imposed on some of the counts. Some of it, of course, was due to the savagery of the judge.

Despite the fact the Narcotics Control Act has been tightly written there are other judges who find ways of avoiding the imposition of such grossly excessive penalties. In the typical case several counts are involved, some of which call for a mandatory minimum penalty and a few of which (26 U.S. 7273(a)) permit the judge to use his discretion in imposing probation or a term of 2 years or more with eligibility for parole. Some judges, in cases in which the 5-year minimum term would be too severe under the circumstances, have dismissed the counts of the indictment carrying mandatory minimum terms and allowed the defendant to plead to a count permitting the judge to use his discretion in sentencing. This is typical of the way these mandatory sentencing provisions are circumvented and is the basis for my belief they are self-defeating.

The American Law Institute's model penal code, in tentative draft No. 2 (p. 41) states that: "Experience has shown that \* \* \* highly afflictive, mandatory punishment provisions become nullified in practice." I predict that if H.R. 7525 is enacted with its present provisions for mandatory minimum terms of 20 years for first-degree burglary and 5 years for second-degree burglary, as well as the similar mandatory minimum terms for robbery, when armed, the following trends will result: