



## Texas' Mandatory Sentencing Enhancements

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### Key Points

- Sentencing enhancements have been part of American jurisprudence for decades.
- However, no studies have routinely shown benefit to public safety attributable to these enhancements.
- Further, these enhancements have the chance of ensnaring low-level nonviolent felons for sentences that far outweigh the crime.

A policy product of the general “get tough on crime” era, sentencing enhancements enjoyed a great deal of bipartisan political support during the early 1980s through the late 1990s. Sentencing enhancements are statutory provisions that raise the minimum threshold of criminal sentence based on a certain characteristic of the offense or offender. For example, habitual-offender laws raise the minimum sentence of a guilty conviction should the offender have preexisting felony convictions. Laws relating to “hate crimes” increase the punishment when the offender is found to be motivated to commit the crime by certain types of hate. Relatively minor theft offenses are commonly enhanced when the type of material stolen has a constituency that pushes for the enhancement.

Sentencing enhancements are often promoted as responses to failures—real or perceived—of the criminal justice system. For instance, media reports in the 1990s of crimes committed by repeat offenders served as much of the impetus for the habitual offender laws during that period. While they certainly achieve one result desired by proponents—keeping a certain kind of offender locked up for a longer period of time—their benefit as a deterrent effect on others is mixed and often dependent on the type of crime involved.

Texas law currently offers a wide range of the punishments for each of the various tiers of offenses. Further, crimes may substantively qualify under more than one tier of the offense. For example, “theft of service” under Chapter 31.04 of the Penal Code can be charged as a Class C misdemeanor to a First Degree Felony, depending on the alleged monetary value of the service. Based on the fact pattern of the case, prosecutors have broad

discretion in choosing what charge best fits the nuances of the crime. The ranges are illustrated in the table below.

### Texas Sentencing Ranges by Offense Tier

Offense Tier	Imprisonment	Fine
Capital Felony	Life without parole to death	N/A
First Degree Felony	5 years to life	≤ \$10,000
Second Degree Felony	2 years to 20 years	≤ \$10,000
Third Degree Felony	2 years to 10 years	≤ \$10,000
State Jail Felony	180 days to 2 years	≤ \$10,000
Class A Misdemeanor	≤ 1 year	≤ \$4,000
Class B Misdemeanor	≤ 180 days	≤ \$2,000
Class C Misdemeanor	N/A	≤ \$500

This report analyzes the extent to which sentencing enhancements create a deterrent effect that can enhance public safety.

### Sentencing Enhancements in Other States *Record-Based Sentencing Enhancements*

Perhaps the most common type of sentence enhancement is habitual-offender laws. These laws specify that after an individual has been found guilty of a certain number of offenses, a finding of guilt can (and oftentimes must) carry a harsher punishment than had an individual with no record committed the offense.

Texas was the first state to establish a “three strikes”-style habitual-offender statute in 1974. Borrowing from the baseball idiom, the statute states that an offender who has been found guilty of a third felony must be sentenced to no less than 25 years imprisonment.

Stolzenberg and D'Alessio tested 10 years of monthly data for the 10 largest California cities (including 21 months after the sentencing law went into effect), designating the activation of “three strikes” as the independent variable. Further, that study added petty theft (the theft of property valued less than \$500) as a control variable to disentangle the effect of any preexisting drop in the overall crime rate. The authors detected no appreciable drop in crime.

Another study did uncover a deterrent effect of the law. Seeking to isolate the deterrent effect from the incapacitation effect, that is, the effect attributable to individuals being persuaded against reoffending versus that of individuals unable to do so because they were incarcerated, Kessler and Levitt found a small reduction in eligible offenses.

In what is perhaps the most rigorous and exhaustive analysis of a habitual-offender law, Tomislav Kovandzic examined 18 years of Florida crime rates in 58 of the state's 67 counties. Using a multiple time-series design, the research model included relevant control variables such as prison population rates (to control for incapacitation effects) and demography (to control for the criminogenic effects of areas with a young male population). Kovandzic was unable to identify a pronounced positive effect.

#### *Weapon-Specific Sentence Enhancements and Mandatory Minimums*

The use and control of guns is a matter of substantial debate in the United States. Some want to regulate or even ban the ownership and use of handguns. But, as seen in Texas during the recent legislative session, others support both concealed and open carry of such weapons. When it comes to enhancing sentencing based on the use or presence of a handgun, however, there is much more agreement. Loftin and McDowall make the point that such enhancements are popular because “the costs are borne completely by criminals and the criminal justice system, rather than by law abiding citizens that also own firearms.”

In addition to the deterrent effect of an offender being behind bars for a longer period when a compulsory length of time is added to the sentences of those found guilty of using a firearm

in, or having one associated with, a crime, sentencing enhancement for the use of guns is thought to deter other people from committing such offenses. These enhancements are sometimes applied by restricting or prohibiting certain discretionary practices within the criminal justice system, such as plea bargaining or the possibility of nonsecure correctional control (such as probation). These additional riders to criminal sentences are referred to as firearm specifications.

As a point of distinction, it is important to note that a weapons-based sentence enhancement increases the potential punishment for an already-illegal act based on the weapon's presence or use. This is different from a higher-tier offense, where the presence or use of a weapon is an essential part of the illegal behavior itself (e.g., aggravated robbery versus robbery). Texas law does not have firearm sentence enhancements *per se*; rather, it has a provision for a standalone Class B misdemeanor charge if a firearm

is brandished or discharged.

Methodologically, research into firearm-related sentencing enhancements measures the effect on a narrowly specified behavior represented in many larger datasets. Researchers who are interested in identifying any deterrent effect have less “noise” to strip from the data and the effect of key independent variables (if any) will be more readily apparent than in analyzing a law that applies to any and all crimes above a certain threshold. Therefore, the true general and specific deterrent effect (if any) will more likely be observed evaluating these specific subtypes of sentence enhancements.

One of the most widely publicized application of state firearm specifications came in form of Massachusetts' Bartley-Fox Act. This statute compelled the judiciary to add an additional, immutable one-year prison term beyond the base sentence to those found in possession of an illegal firearm and an additional two years to those who are found guilty of a separate crime in which they possessed a firearm. While not an enhancement *per se*—more a manifestation of mandatory sentencing provisions designed to deter “casual carrying”—the 1974 Bartley-Fox Act resulted in several notable examples of otherwise-law-abiding citizens sentenced with the mandatory penalty while attempting to provide only for their self-defense.

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Deutch and Alt were able to isolate a significant outcome in the rates of armed and gun assault. Using a single interrupted time-series design, researchers found statistically significant differences in a longitudinal model that extended six months beyond the enactment date of the law. The single-series design is criticized by other firearm policy research methodologists, however, as it does not take into account ambient trends affecting the same phenomena (such as weapon saturation) and uses a short-run, highly-variable series after the law took effect.

In the most rigorous study conducted on the Bartley-Fox Act, Pierce and Bowers used FBI data to conduct an interrupted time-series analysis on the incidence of assault, robbery, and homicide. The models estimated marked decreases in firearm-related assaults and robberies; however, this effect was offset by increases in nonfirearm crimes of the same category. The rise in nonfirearm assaults outstripped the beneficial decrease in firearm-related assaults, while the increase in nonfirearm robberies was less than the decrease in the firearm-related robberies. Most interestingly, the authors identified a significant decrease in firearm-related homicides with no countervailing increase in nonfirearm homicides.

Another early adopter of firearm enhancement penalties was Florida, whose law went into effect in 1975. This statute mandated an additional 3-year imprisonment term be applied to those found guilty of 11 specific felonies should the crime be committed during the possession of or with the assistance of a firearm. Loftin and McDowall, applied an autoregressive integrated moving average model (ARIMA) to screen the data to highlight only meaningful effects amid external trends. As

such, what little reduction was observed in these cities' crime rates cannot be deemed significant.

Though less publicized, Arizona also passed one of the earliest iterations of mandatory firearm sentences. Taking effect in August 1974, this law established a graduated series of minimum sentences a defendant would be eligible for based on the number of previous armed robbery offenses committed. This precluded, save for following the first instance, the offender from having any reduction in the sentence at a subsequent stage of the criminal justice system. Also using an ARIMA model, McPheters, Mann, and Schlagenhauf evaluate the effects of the law in Maricopa (Phoenix) and Pima (Tucson) Counties. The authors conclude that, within a month of the law taking effect, offenders responded as expected under the principle of general deterrence, i.e., offenders in Arizona metropolitan areas rapidly reduced the number of robberies with a firearm supplied as penalties for firearm use became more severe. Further, this finding is counter to regional crime trends, which did not see a similar drop in armed robberies, nor a diffusion of benefits.

Despite the relative dearth of research on state-level mandatory firearm specifications, two composite studies have been conducted seeking to mete out the effect size in crime reduction attributable to these laws. However, it does bear mention that these composite studies incorporate datasets aggregated from the few studies mentioned herein and consist of no more than seven "cases" internally.

McDowall, Loftin, and Wiersema conducted the first pooled analysis on the effects of the firearm specifications. Compiling the data from their Michigan and Florida studies, the authors add in Pittsburgh and Philadelphia. This case set was chosen due to the similar firearms specification in the parent states. The data was tested against two explanatory hypotheses: that the firearm specifications have no effect on aggregate crime rates or that the laws led to a significant decrease in individual categories of violent crime (armed robbery, homicide, and assault with firearm, the offense categories most proximate to firearm legislation). The authors conclude that while some cities appeared to experience an insignificant reduction effect, these





specifications did not reduce related crime, and some cities experienced a statistically significant increase.

Finally, the most empirically rigorous composite study on these specifications was conducted by Marvell and Moody. While aggregating the data in a similar fashion, and using the same studies from McDowall, Loftin, and Wiersema, the authors thought to include control variables that often drive variation in case details (such as demographics and ambient crime rates). Further, their study targeted additional outcomes, such as prison commitments and Uniform Crime Report–recorded crime. This analysis was unable to isolate effects in any of the three domains provided.

In sum, the effects of these enhancements have proved beneficial in some instances and ineffective in others. It is unclear if these differences are due to differences in the design or implementation of the laws or to methodological concerns surrounding researchers' ability to account for the existence of aggravating factors in cases ending in a plea arrangement. For instance, due to plea bargaining what in fact is an armed robbery may be recorded as an aggravated assault, just as what is in fact an aggravated assault may be recorded as an attempted homicide based solely on the charging decision. The judicial discretion and fact finding divorced from the plea negotiations present the possibility of caprice and arbitrariness regarding both public safety and punishment, all of which complicates statistical analysis.

### Sentence Enhancements in Texas

The first of its kind, Texas' three-offense habitual-offender statute was passed in 1974 alongside sweeping criminal justice reforms. While they have been in effect longer than any others in the nation, no research has been conducted on the effectiveness of the sentencing provisions. As such, this section simply discusses two types of sentencing enhancements in Texas.

Texas also enhances the penalties for the possession of drugs in the immediate vicinity of a school. This well-intended enhancement is meant to deter drug dealers or the possession of controlled substances in or around school grounds. However, this enhancement opens the door to harsh, counterproductive penalties, e.g., third-degree felonies for four ounces of marijuana. This law has the potential to include individuals in possession of the drug simply passing by a school on foot or in a vehicle or by simply being in a nearby park. While selling or the intent to sell narcotics to children is an offense indeed worthy of moral opprobrium, possession cases (such as the one substantiated against one Henry Wooten of Tyler)

have the propensity of being charged out of proportion to the actual offense.

Allowing nonviolent felonies to trigger the “third strike” poses problems when one considers the lengthy sentence that can be triggered. Further, the addition of certain regulatory and licensing offenses means that an individual facing three counts of the triggering charge may receive the enhancement with no previously substantiated crimes. Offenses that could trigger the attachment of the habitual offender 25-year enhancement include:

Offense	Level
Practicing acupuncture without a license	Third Degree Felony
Aggravated perjury	Third Degree Felony
Depositing grain without title	Second Degree Felony
Bigamy	Third Degree Felony
Violating bingo regulations	Third Degree Felony
Altering a scale weight ticket	Second Degree Felony
Practicing chiropractic medicine while intoxicated	State Jail Felony
Failing to register an aircraft	Third Degree Felony
Tampering with a consumer product	Second Degree Felony

### Policy Recommendations

While some studies into sentence enhancements have shown a benefit to public safety, others have not. The following are recommendations for how best to deal with current and potential future enhancements:

#### *Eliminate Superfluous Sentencing Enhancements in Texas Law*

One such enhancement that could be easily removed is Texas' statute seeking to combat the theft of copper wiring and copper-laden electrical components. Under current statute, the theft of any aluminum, bronze, copper, or brass (all common, recyclable metals) is a state jail felony. This provision was written so broadly, it could be applied via charging decisions to the theft of pennies and empty beer cans. This statute can be altered to reflect the sum damage of the act rather than the elements of the theft itself, thereby still punishing copper thieves who do a great deal of damage and avoiding overcriminalizing the theft of one pre-1982 cent.

#### *Establish a Nonbinding, Gradient System of Guidelines for Sentence Enhancements*

Without codified enhancements, judges and juries would be able to issue sentences anywhere within the statutorily established range of acceptable penalties. This may lead one to worry that hundreds of fact finders left to their own devices may issue radically disparate sentences based on jurisdiction, offense, or extralegal characteristics of the defendant. While the literature roundly shows that extralegal disparity actually increases in the presence of mandatory sentencing schemes, it would nonetheless be prudent to provide “advisory guidelines” for fact finders. Several states, such as Ohio and Kansas, have implemented simple sentencing guidelines to suggest an appropriate sentencing range to the judge given the facts of a case and the offender’s background, adding a degree of offense and offender-level specificity to Texas’ broad ranges for various classes of crimes.

#### *Dial Back Current Habitual-Offender Statutes*

Under current law, an individual with two previous nonviolent felonies could find herself facing no fewer than 25 years if she is caught in possession of just over four ounces of marijuana. While this is not an insubstantial amount, it is certainly far from the seasoned trafficker the habitual-offender statute would ideally target. To remedy this, the legislature can amend the habitual-offender statute to require at least one violent felony before triggering the habitual-offender provisions.

#### *Avoid Enacting New Sentence Enhancements*

Finally, the legislature can resist the practice of enacting new sentencing enhancements, except where absolutely necessary. Crime-control policy matters pose difficult questions to elected officials, and the reliance on retributive platitudes provides an easy, though wholly ineffective and costly, solu-

tion. Recent legislatures have considered habitual-sentencing enhancements for misdemeanor offenses, such as House Bill 734 during the 83rd legislative session. Of the 76 passed bills in the 83rd legislative session that amended the Texas Code of Criminal Procedure, over one-quarter increased the sentences on preexisting laws. If this rapid growth in criminal law continues unabated and without connection to proven public safety results, Texas could quickly find itself facing unexpected increases in criminal justice costs.

Legislators pondering the addition of new sentencing enhancements to extant criminal law should ask themselves the following:

- Are current sentences already greater than the original intent of the law when the behavior was criminalized?
- Is there evidence that current penalties are ineffective?
- Is there evidence that an enhancement will deter the conduct?
- Does the enhancement inappropriately reduce the discretion of judges, juries, and correctional officials?
- Will the enhancement skew the penalty relative to similar penalties?
- Are there alternatives to sentence enhancement?

In the absence of a viable, sound alternative, perhaps a sentence enhancement is the only recourse available to counter an increase in crime through deterrence and adequately punish offenders. However, the alternatives should be closely considered before moving forward with any enhancements. ★

## Endnotes

- <sup>1</sup> Samuel Walker. *Sense and Nonsense about Crime, Drugs, and Communities: A Policy Guide*, Monterey, Cal.: Cengage Learning, 2010.
- <sup>2</sup> Rhys Hester, "The Three Strikes Law," in *The Social History of Crime and Punishment in America: An Encyclopedia*, Wilbur R. Miller, ed., Sage (2012).
- <sup>3</sup> Felony sentence ranges can be found in §12.31 through §12.35 of the Texas Penal Code; misdemeanor sentence ranges can be found in §12.21 through §12.23 of the same code.
- <sup>4</sup> Charles P. Bubany, "Texas Penal Code of 1974," *Southwest Law Journal* 28 (1974): 292.
- <sup>5</sup> Texas Penal Code § 12.42
- <sup>6</sup> Lisa Stolzenberg and Stewart J. D'Alessio. "Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates," *Crime & Delinquency* 43, No. 4 (1997): 457-469.
- <sup>7</sup> Daniel Kessler and Steven D. Levitt, "Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation," *National Bureau of Economic Research*, No. w6484, 1998.
- <sup>8</sup> Tomislav Kovandzic, "The Impact of Florida's Habitual Offender Law on Crime," *Criminology*, 39, no. 1 (2001).
- <sup>9</sup> Colin Lofton and David McDowall, "One with a Gun Gets You Two: Mandatory Sentencing and Firearms Violence in Detroit," 17, *Law and Society Review*, 287, 303 (1983).
- <sup>10</sup> Texas Penal Code § 42.01
- <sup>11</sup> Glenn Pierce and William Bowers, "The Bartley-Fox Gun Law's Short-Term Impact on Crime in Boston," *Annals of the American Academy of Political and Social Science* 455, no. 1 (1981): 120-137.
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- <sup>15</sup> Gary Kleck, Chester Britt, and David Bordua. "The Emperor Has No Clothes: Using Interrupted Time Series Designs to Evaluate Social Policy Impact." *Journal on Firearms & Public Policy* 12 (2000): 197.
- <sup>16</sup> Pierce and Bowers, "The Bartley-Fox Gun Law's Short-Term Impact on Crime in Boston."
- <sup>17</sup> Fla. Stat. Ann. 775.087(2)
- <sup>18</sup> Colin Loftin and David McDowall, "The Deterrent Effects of the Florida Felony Firearm Law," *Journal of Criminal Law and Criminology* 75, no. 1 (1984): 250-259.
- <sup>19</sup> ARS 13-641.
- <sup>20</sup> Lee McPheters, Robert Mann, and Don Schlagenhauf. "Economic Response to a Crime Deterrence Program: Mandatory Sentencing for Robbery with a Firearm," *Economic Inquiry* 22, no. 4 (1984): 550-570.
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- <sup>22</sup> Bubany, Texas Penal Code of 1974.

<sup>23</sup>Texas Health and Safety Code § 481.

<sup>24</sup>Dallas Morning News Editorial Board, "Editorial: Unreasonable Drug Sentence," *Dallas Morning News*, Nov. 26, 2010.

<sup>25</sup>Texas Penal Code 31.03.

<sup>26</sup>Eugene Volokh, "[Felony to Steal an Aluminum Can—or a Penny—in Texas](#)," Volokh Conspiracy, Oct. 6, 2011.

<sup>27</sup>Jill Farrell, "Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?" *Justice Research and Policy* 5, no. 1 (2003): 95-116.

<sup>28</sup>Texas District and County Attorneys Association, "[TDCAA Legislative Re-Cap—83rd Regular Session](#)," June 4, 2013.

<sup>29</sup>Marc Levin, "[Look Askance before You Enhance](#)," Texas Public Policy Foundation, April 19, 2013.

## About the Author



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