Twitter Thread by Carissa Byrne Hessick



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Let’s talk about this story. It discusses a NJ bill that is designed to make sentencing less harsh. The bill is being held up because a lawmaker introduced an amendment that would eliminate the mandatory minimum for one type of corruption.

First, let's talk about the framing of the story. The lede is about how the lawmaker who introduced the amendment has a girlfriend whose son is facing corruption charges. The story minces no words: It says the amendment was added specifically to help that man.

> But after the Assembly passed the bill in July, a powerful Democratic state senator, Nicholas Sacco, inserted an amendment that would also eliminate certain mandatory sentences for another criminal category: corrupt public officials.
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> The tweak is already the stuff of Jersey lore: It was added at least in part to help Mr. Sacco’s girlfriend’s son, who was accused of falsifying a timecard at a no-show job and charged with official misconduct. If convicted, he faces a mandatory five-year prison term.

The idea of powerful people helping each other escape punishment is a powerful one. It is the stuff of headlines and outrage, and so I'm not surprised that this is how the story is being framed.

But there is also another way to frame this story--that most people only appreciate the harshness and injustice of the criminal justice system once they or someone they love have been swept up in it.
We've seen the story before, and it sends us a different message.

The "powerful people get off" framing tells us to be suspicious of leniency & not to trust criminal justice reform.

The "I only realized when" framing tells us that we aren't paying enough attention to harshness & more reform is probably needed.

Second, let's talk about the crime itself which carries a 5 year mandatory minimum.
As someone who researches the statutory language of criminal laws, this law makes me very uncomfortable. The conduct is not well defined--look at that "clearly inherent" language. Yikes!

2C:30-2. Official misconduct
A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $200.00 or less, the offense of official misconduct is a crime of the third degree.

L.1978, c. 95, s. 2C:30-2, eff. Sept. 1, 1979. Amended by L.1979, c. 178, s. 61, eff. Sept. 1, 1979.

So it is unclear what, precisely, is illegal under this law. In addition, the law appears to be a kind of catch all -- other classic corruption crimes, like bribery, are handled by other statutes (which also carry mandatory minimums).

Only Illinois has similar mandatory penalties for official misconduct, which became a second-degree crime in New Jersey in 1978 in the midst of a decade-long reckoning with a system riddled with Mafia-linked public corruption.

The five-year sentence for second-degree official misconduct was set in 2007. Other corruption charges, including bribery, perjury and witness tampering, would still be subject to mandatory penalties.

All of this raises an important question--Is this relatively vague law even necessary? Couldn't the girlfriend's son have been charged with some other crime, like theft?

And if we are going to have a relatively vague law, do we want it to carry a 5 year mandatory sentence?

That leads to my third point--all of the statements in the NYT story about why this mandatory minimum law is necessary. Those statements boil down to two arguments--neither of which stands up to scrutiny. The first argument is that officials "need" this law to "build cases"

> If adopted, it could fundamentally weaken the ability of prosecutors to build criminal cases against corrupt politicians, public officials and police officers in New Jersey, a state with a well-earned reputation for wrongdoing.

In case it's not clear from these quotes, the argument about "building cases" is an argument that prosecutors need to be able to threaten suspects with a mandatory minimum sentence so that the suspect will plead guilty.

It's a common argument, usually framed in terms of "cooperation" rather than guilty pleas. (I guess prosecutors know that the public would balk at the idea that prosecutors shouldn't even have to bring a case to trial.)

The thing that is so galling about the "build the case" argument is that it is often paired with an argument about it being important that these defendants serve a particular sentence--even though the whole idea of cooperation is premised on the idea of a much lower sentence.

In this article, the argument is framed as a need for protection against politically appointed judges possibly being too lenient. If the implication is supposed to be that judges as appointees can't be trusted, I wish it had mentioned that NJ prosecutors are selected the same way

> Jim Walden, a former federal prosecutor in New York who was tapped as special counsel to investigate an $11 billion tax incentive scandal in New Jersey, called the minimum sentences for official misconduct “incredibly effective.”
>
> In addition to creating an incentive for wrongdoers to cooperate with the government, the strict sentencing rules ensure that judges — who, in New Jersey, are appointed by the governor and Legislature — do not apply separate standards to powerful politicians.

By supplementing the "build the case" argument with "judges might be too lenient," the article may mislead readers.
The article never mentions that mandatory minimums are about shifting power over punishment decisions from judges to prosecutors.
But that's exactly what they do.

The second argument in favor of mandatory minimums is straightforward--both in terms of the argument and also why it is wrong.
The argument is deterrence. If you know crime X carries Y mandatory minimum, then you are less likely to commit crime X.

> "Public officials make rational decisions: whether to engage in corruption," he added. "They consider the risk. They consider the consequences. You want to make those consequences very, very significant to make it a deterrent."

The deterrence argument seems intuitive. The problem is that it doesn't actually happen.
The truth is that human beings don't really think like this. And the idea that people will be less likely to commit crimes because of higher punishments has been debunked lots of times.

The irony of this story is that this whole bill is about reducing mandatory minimum sentences. The amendment just added one more crime to the list. All of this bad arguments about keeping mandatory minimums apply to drug and property crimes as well.

> The bill stems from an 18-month effort by a bipartisan commission, which scrutinized penalties for various criminal charges and recommended the elimination of lengthy, mandatory sentences for nonviolent drug and property crimes — rigid terms that have left New Jersey with one of the most racially imbalanced prison systems in the country.

It is precisely because of this that some people interviewed for the story were just like "OK. Feel free to another crime to the bill if you want."
Those people get it--mandatory minimums are not a good idea, even if you really don't like a particular type of crime.

> “Whether the official misconduct is included or not is of no moment to me,” said Joseph E. Krakora, New Jersey’s public defender who was a member of the sentencing commission. “It just needs to be passed.”

But not everyone feels this way. Aside from prosecutors (and plenty of former prosecutors) who are always willing to recycle the same tired arguments in favor of mandatory minimums, there are other people opposed to this amendment: Progressives

> But a coalition of progressive organizations is staunchly opposed to the amendment.
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> “This amendment, if enacted into law, would surely send a message that corruption is tolerated in New Jersey — or at least implicitly sanctioned by state legislators,” a group of 41 organizations wrote to legislative leaders in a letter released Tuesday.
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> “And it is yet another instance of our elected representatives putting the needs of themselves and their friends over the needs of their most vulnerable constituents.”

Progressive groups are worried about money in government, corruption, and income inequality. I get it. I also worry about those things.
But the idea that removing a mandatory minimum sentence sends the message that a crime is "tolerated" is just silly.

That "sends a message" argument is just as bad as the "build a case" argument and "deterrence" argument---and it has been used for decades to put more people in prison and to fuel mass incarceration.
These groups should know better.

Unfortunately, corruption specifically and white collar crime more generally is something where some progressives are happy to see higher penalties and a coercive justice system.

This desire for harshness is so prevalent, that some have coined the term "carceral progressivism"

Don't get me wrong. There are reasonable arguments to be made about the underenforcement of white collar crimes and how particular underenforcement patterns appear designed to benefit the wealthy and the powerful. https://t.co/v12qh0mlTj

> One of the most consequential enforcement decisions is where to look for law breaking.
>
> And a policy of prioritizing low level enforcement over high level enforcement is impossible to defend on the merits. https://t.co/ZBNZoUudZF
>
> — Carissa Byrne Hessick (@CBHessick) September 28, 2020

But let's please not pretend that mandatory minimums are necessary to cure those enforcement problems. They exist in large part so that prosecutors do not actually have to prove their case in court. And they also just don't work.

And can we also agree that the Supreme Court's recent cases about how to interpret federal corruption statutes are just irrelevant to the conversation about whether states should have mandatory minimum penalties at their disposal to enforce poorly drafter state laws. Sheesh!!

> The legislative maneuver comes at a time when public confidence in government is low and proving official misconduct under federal law has become far harder after a 2016 Supreme Court decision that narrowed the legal definition for corruption.
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> Over the last several years, the high-court ruling has led appellate panels to overturn the convictions of at least two powerful New York politicians, Sheldon Silver and Dean Skelos, and unraveled the federal bribery case against U.S. Senator Robert Menendez of New Jersey.