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Playbook for Change?
States Reconsider Mandatory Sentences

POLICY REPORT / FEBRUARY 2014

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FROM THE CENTER DIRECTOR

Mandatory minimum sentences and related policies, like three strikes and truth-in-sentencing laws, are the offspring of an era in which violent crime rates were high, crack cocaine was emerging, gang graffiti covered buildings and public places, and well-publicized random acts of violence (e.g., the infamous 1989 rape of a female jogger in Central Park) contributed to the sense that our society was out of control. In addition, states retained indeterminate sentencing and relied upon paroling authorities who often made decisions behind closed doors and seemed to release prisoners arbitrarily, with little to no input from victims.

Decades of research and innovation, however, have shown us that sentencing laws and corrections practices can do more than simply incapacitate offenders until they "age out" of their most crime-prone years. We now have the ability to create sentences that both punish and rehabilitate and use the occasion to address problems that affect the individual and the community. Unfortunately, 30 years of mandatory minimums and related policies have left a lasting legacy that continues to hamper the efforts of states, counties, judges, and prosecutors who attempt to fashion individualized sentences.

States in particular are also saddled with the enormous costs of policy choices made by previous administrations. Mandatory minimums for drug crimes and the "85 percent rule" (requiring an offender incarcerated for certain crimes to serve 85 percent of his or her sentence) have resulted in overwhelming costs, both in outright expenditures and in opportunities lost. Another, perhaps more important cost is far less visible in the halls of state government: the loss of generations of young men, particularly young men of color, to long prison terms. Not only are they lost to their families, children, and communities for those years, but their own lack of education and skills combined with a range of post-release restrictions and collateral consequences can deeply impair their ability to live productive and healthy lives long after release. The families forever damaged, the talent wasted, and the countless communities left to pick up the pieces demand action against these draconian policies that have already cost us far too much.

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Introduction

In a speech to the American Bar Association in August 2013, Attorney General Eric Holder instructed U.S. Attorneys to refrain from using "draconian mandatory minimum sentences" in response to certain low-level, nonviolent drug offenses.[1] While the instructions are advisory and it is unknown yet whether individual prosecutors will alter their charging practices, Attorney General Holder's directive nonetheless represents an evolving shift in attitude away from mandatory penalties—the centerpiece of federal crime control policy in the United States for the last four decades. Of note, Attorney General Holder's rationale for change relies not only on concerns that emphasize efficiency and effectiveness in the administration of justice, but also on issues of fairness and justice. Indeed, in making his announcement, the Attorney General echoed the conclusions of a 2011 report by the United States Sentencing Commission (USSC) that found that certain mandatory minimum provisions apply too broadly and are set too high; lead to arbitrary, unduly harsh, and disproportionate sentences; can bring about unwarranted sentencing disparities between similarly situated offenders; have a discriminatory impact on racial minorities; and are one of the leading drivers of prison population and costs.[2]

Significantly, this policy shift comes at a time when support for curbing mandatory sentencing has been growing at the federal level. In 2010, Congress passed the Fair Sentencing Act—a historic piece of legislation that reduced the controversial weight ratio of the amount of crack and powder cocaine needed to trigger mandatory sentencing from 100:1 to 18:1 and eliminated the five-year mandatory minimum for first-time possession of crack.[3] Under the previous sentencing structure, for example, defendants with five grams of crack cocaine were subject to the same penalty as those with 500 grams of powder cocaine.

In the current legislative session, Congress is considering two additional reform bills—the Justice Safety Valve Act and the Smarter Sentencing Act—that would permit more judicial discretion at sentencing when certain mandatory minimums apply, expand retroactive application of previously revised sentencing guidelines, and increase the number of offenses eligible for "safety-valve" provisions—provisions that keep a mandatory minimum penalty in place, but allow judges to sentence offenders below that minimum if certain factors apply.[4] President Barack Obama recently signaled his support for these reforms in a statement urging lawmakers to "act on the kinds of bipartisan sentencing reform measures already working their way through Congress."[5]

While Attorney General Holder's announcement focused on federal sentencing reforms, mandatory sentencing policies have been under scrutiny and revision at the state level for some years. Fueled by a concern about the growth in prison populations and associated costs, and supported by advocacy groups, practitioners, researchers, policy analysts, and legal organizations, a growing

number of state legislatures from Texas to New York have successfully passed laws limiting the use of mandatory penalties, mostly in relation to nonviolent offenses, and primarily around drug or drug-related offenses.[6] Notably, these efforts were endorsed by Democratic and Republican governors alike and supported by liberal and conservative advocacy groups, suggesting an emerging consensus that mandatory penalties may not be appropriate for certain types of offenders.

As the federal government and more states follow suit, there is much to be learned from examining current reforms. This policy report summarizes state-level mandatory sentencing reforms since 2000, raises some questions regarding their impact, and offers recommendations to jurisdictions that are considering similar efforts in the future.

Over the last 20 years, a growing body of research has cast doubt on the efficacy of mandatory penalties, particularly for nonviolent drug offenders.

Background

Mandatory penalties—such as mandatory minimum sentences, automatic sentence enhancements, or habitual offender laws—require sentencing courts to impose fixed terms of incarceration for certain federal or state crimes or when certain statutory criteria are satisfied. These criteria may include the type or level of offense, the number of previous felony convictions, the use of a firearm, the proximity to a school, and in the cases of drug offenses, the quantity (as calculated by weight) and type of drug. If a prosecutor charges under such laws and a defendant is found guilty, judges are usually barred from considering a defendant's circumstances or mitigating facts in the case when imposing the sentence, creating rigid, "one size fits all" sentences for certain types of offenses and offenders. In the 1980s and 1990s, policymakers viewed mandatory sentences as one of their most effective weapons in combating crime—particularly in the "war on drugs."[7] These policies encapsulated the then prevailing belief that longer, more severe sentences would maximize the deterrent, retributive, and incapacitative goals of incarceration.

Over the last 20 years, a growing body of research has cast doubt on the efficacy of mandatory penalties, particularly for nonviolent drug offenders.[8] Research indicates that incarceration has had only a limited impact on crime rates and that future crime reduction as a result of additional prison expansion will be smaller and more expensive to achieve.[9] In addition, there is little evidence that longer sentences have more than a marginal effect in reducing recidivism—a key performance indicator of a state's correctional system.[10] More than four out of 10 adult offenders still return to prison within three years of release, and in some states that number is six in 10.[11] Moreover, according to a 2011 USSC study, federal drug offenders released pursuant to the retroactive application of a 2007 change in the sentencing guidelines (though not a change in mandatory minimum penalties) were no more likely to recidivate

MANDATORY SENTENCES: HOW WE GOT HERE

Mandatory penalties have not always been a central feature of the U.S. criminal justice system. Until the 1970s, sentencing in the United States was largely characterized by indeterminate sentencing. Judges (subject only to statutory maximums) had unfettered discretionary authority in fashioning sentences on a case-by-case basis.[12] Informed by the then prevailing belief that sentencing's chief purpose was rehabilitation, judges were free to set the length and type of punishment to best suit an offender's predisposition or ability to rehabilitate.[13]

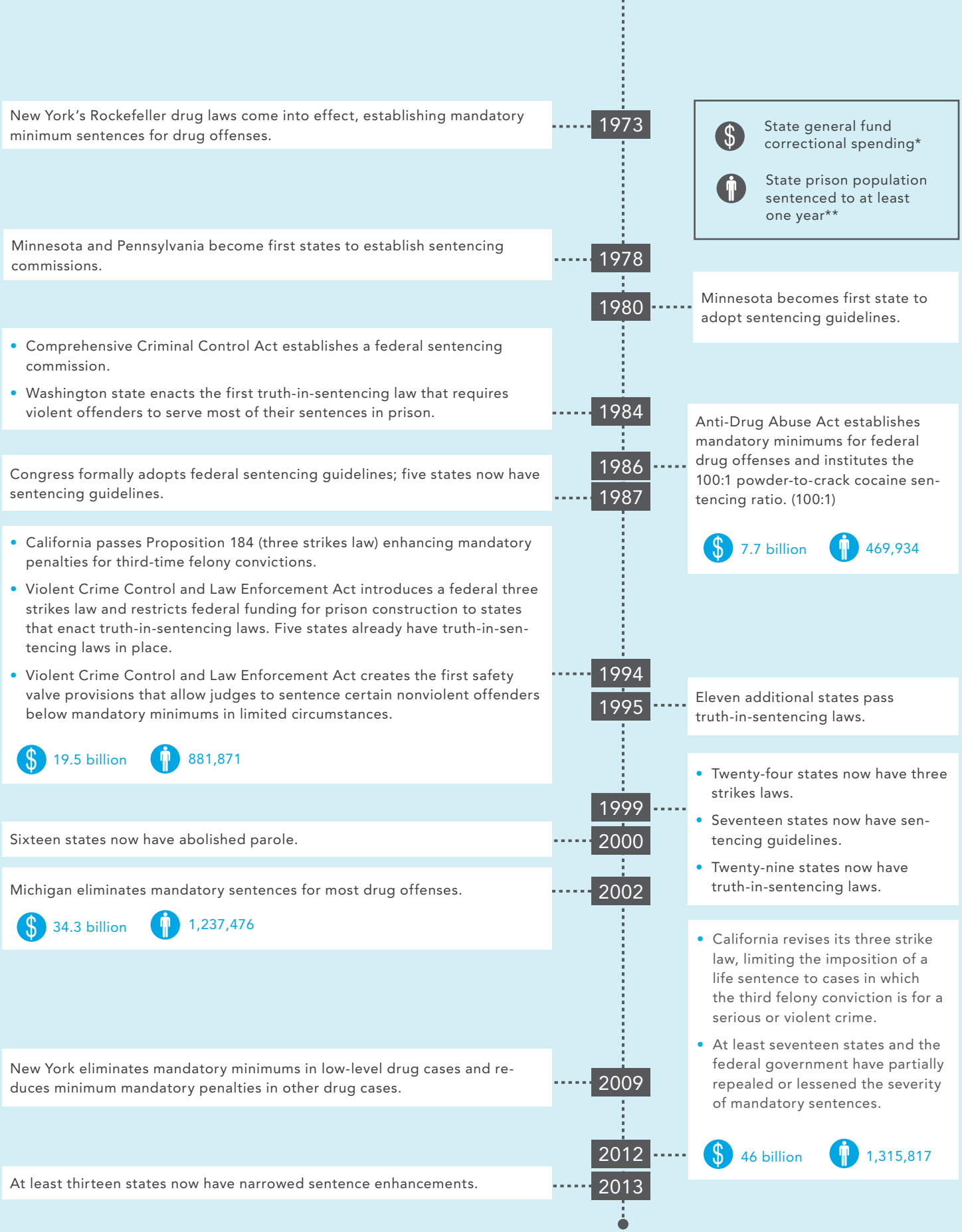
Forecasting sentences under this system was an uncertain and inexact science. Even when a judge ordered a range of permissible punishment, early release mechanisms at the disposal of prison wardens or parole boards could substantially alter judicially imposed sentences.[14] These decisions were rarely subject to appellate or administrative review since there were no rules or guidelines against which to examine them.[15] The result was an opaque sentencing process with little predictability.

As unwarranted sentencing disparities (between imposed sentences and actual time served or between similarly-situated offenders) became apparent, indeterminate sentencing came under attack for being unjustifiably unbounded, unstructured, and arbitrary.[16] Consequently, demands grew for more uniformity and transparency in punishment.[17] Moreover, violent crime rates rose through the 1970s and 1980s, which led to increasing skepticism of the rehabilitative approach and calls for harsher sentences.[18]

As public anxiety grew—particularly in response to the crack epidemic and rising gang violence—sentencing and corrections policy entered the domain of ideology and partisan politics with calls for law and order, "broken windows" policing tactics, the "war against crime" and the "war on drugs."[19] In response, the federal government and many states enacted legislation to curb the apparatus of discretionary indeterminate sentencing.[20] By adopting determinate sentences (e.g., fixed prison terms and the abolition of discretionary parole) or more structured sentencing systems (e.g., the promulgation of sentencing guidelines), they hoped to make the sentencing process more consistent and understandable.[21] These changes also mitigated the risk that judges could rely on improper factors such as race, gender, geography, or personal beliefs when sentencing offenders.

At the same time, galvanized by a growing belief that tougher penalties can reduce crime, mandatory minimum sentences and recidivist statutes, such as California's 1994 three strikes law, became popular as a means of ensuring that offenders deemed dangerous would receive a sufficiently severe custodial sentence.[22] As reforms gathered momentum, a broad consensus emerged that violent and habitual offenders were "dangerous," as were crimes involving a weapon or narcotics, and mandatory penalties proliferated in relation to these offenses.[23] In relation to drug offenses, however, jurisdictions disagreed about the type and quantity of drug needed to trigger severe mandatory sentences.[24]

Although the development of punitive sanctioning policies continued apace during the 1990s—most significantly through the enactment of truth-in-sentencing statutes—concerns arose about the effects of mandatory penalties and whether they serve their intended purposes of just punishment and effective deterrence.[25] As a result, efforts were made to slowly chip away at the growing edifice of mandatory penalties, notably with the creation of judicial safety valves which allow judges to sentence certain offenders below mandatory minimums in limited circumstances.[26]



* National Association of State Budget Officers, *The State Expenditure Report* (Washington, DC: 1986–2012).

** Patrick A. Langan, John V. Fundis, and Lawrence A. Greenfield, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* (Washington, DC: Bureau of Justice Statistics, 1988), 11-13; George Hill and Paige Harrison, *Sentenced Prisoners in Custody of State or Federal Correctional Authorities, 1977–98* (Washington, DC: Bureau of Justice Statistics, 2000); E. Ann Carson and Daniela Golinelli, *Prisoners in 2012—Advance Counts* (Washington, DC: Bureau of Justice Statistics, 2013), 6; and E. Ann Carson and William J. Sabol, *Prisoners in 2011* (Washington, DC: Bureau of Justice Statistics, 2012), 6.

than if they had served their full sentences, suggesting that shorter sentence lengths do not have a significant impact on public safety.[27]

Prompted by the recent economic crisis, informed by decades of research demonstrating that certain offenders can be safely and effectively supervised in the community rather than housed in prison, and encouraged by public opinion polls that show that most Americans support alternatives to incarceration for nonviolent offenses, a number of states have embarked on broad-based sentencing and corrections reform in the last five years.[28] As part of these efforts, states have included reconsideration of the use of mandatory penalties.[29]

New approaches to mandatory sentences

All told, at least 29 states have taken steps to roll back mandatory sentences since 2000.

All told, at least 29 states have taken steps to roll back mandatory sentences since 2000. (A comprehensive list of legislation passed since 2000 can be found in the appendices.) Much of this legislative activity has taken place in the last five years and most changes affect nonviolent offenses, the vast majority of which are drug-related. In the legislation that has been passed, there are three different approaches to reforming mandatory penalties. One method is to enhance judicial discretion by creating so-called "safety valve" provisions that keep the mandatory minimum penalty in place but allow a judge to bypass the sentence if he or she deems it not appropriate and if certain factual criteria are satisfied. A second approach is to narrow the scope of automatic sentence enhancements—laws that trigger sentence increases in specified circumstances, such as an offense occurring within a certain distance from a school or whether an offender has previous felony convictions. A third course is the repeal of mandatory minimum laws or their downward revision for specified offenses, particularly in relation to drug offenses or first- or second-time offenders.

EXPANDING JUDICIAL DISCRETION

Many of the laws enacted in recent years restore discretion to judges at sentencing in cases where a mandatory sentence would normally apply. Through this newfound discretion, judges are now able to depart from statutorily prescribed mandatory penalties if certain conditions are met or certain facts and circumstances warrant such a departure. The facts or circumstances that judges may consider include those related to the nature of the crime or the prior criminal history of the defendant. A condition that some laws require is for the prosecutor to agree to a sentence below a mandatory minimum. Vera's research has found at least 18 states that have passed legislation enhancing

judicial discretion since 2000, including:

- **Connecticut SB 1160 (2001):** This law allows judges to depart from mandatory minimum sentences for certain nonviolent drug offenses in cases where the defendant did not attempt or threaten to use physical force; was unarmed; and did not use, threaten to use, or suggest that he or she had a deadly weapon or other instrument that could cause death or serious injury. Judges must state at sentencing hearings their reasons for imposing the sentence and departing from the mandatory minimum. The act covers 1) manufacture or sale of drugs and related crimes by a person who is not drug-dependent; 2) manufacture or sale of drugs within 1,500 feet of schools, public housing, or day care centers; 3) use, possession, or delivery of drug paraphernalia within 1,500 feet of a school by a non-student; and 4) drug possession within 1,500 feet of a school.
- **New Jersey SB 1866 (2009):** This law permits judges to waive or reduce the minimum term of parole ineligibility when sentencing a person for committing certain drug distribution crimes within 1,000 feet of a school. Judges may also now place a person on probation, so long as the person first serves a term of imprisonment of not more than one year. Judges are still required to consider certain enumerated factors, such as prior criminal record or whether the school was in session or children were in the vicinity when the offense took place, before waiving or reducing a parole ineligibility period or imposing a term of probation.
- **Louisiana HB 1068 (2012):** This law allows for departures from mandatory minimum sentences at two points in the criminal justice process. Judges may depart from a mandatory minimum sentence if the prosecutor and defendant agree to a guilty plea with a sentence below the mandatory minimum term. Judges may also depart from a mandatory minimum sentence post-conviction if the prosecutor and defendant agree to the modified sentence below the mandatory minimum. The law provides for three types of departures. First, judges may reduce a mandatory minimum sentence by lowering the term of imprisonment. Second, judges may lower the dollar amount of a fine that may be imposed. Finally, judges may reduce a sentence by including as part of it a term of parole, probation or sentence suspension. Violent and sex offenses are excluded from consideration.
- **Georgia HB 349 (2013):** This law allows judges to depart from mandatory minimum sentences for some drug offenses if the defendant was not a ringleader, did not possess a weapon during the crime, did not cause a death or serious bodily injury to an innocent bystander, had no prior felony conviction, and if the interests of justice would otherwise be served by a departure. The offenses that are covered by the new law include trafficking and manufacturing of cocaine, ecstasy, marijuana, or methampheta-

mine; and sale or cultivation of large quantities of marijuana. Judges must specify the reasons for the departure. Alternatively, a judge may sentence below a mandatory minimum sentence if the prosecutor and the defendant have both agreed to a modified sentence.

> **Hawaii SB 68 (2013):** This law grants judges the discretion to depart from a mandatory minimum in favor of an indeterminate sentence when the defendant is convicted of a Class B or Class C felony drug offense and the judge finds a departure "appropriate to the defendant's particular offense and underlying circumstances." Previously, Class B and Class C drug felonies had mandatory sentences of 10 and five years respectively. Under the new law, judges may impose a term of between five and ten years for a Class B felony, and between one and five years for a Class C felony. Exceptions apply for some offenses, including promoting use of a dangerous drug, drug offenses involving children, and habitual offenders.

LIMITING AUTOMATIC SENTENCE ENHANCEMENTS

Automatic sentence enhancements typically trigger longer sentences if certain statutory conditions or thresholds are met, such as speeding in a construction zone, selling drugs within a certain distance from a school, committing a crime in the presence of a minor, using a handgun in the commission of a crime, or having a certain number of previous criminal convictions. Since 2000, at least 13 states have passed laws adjusting or limiting sentence enhancements, including:

> **Nevada HB 239 (2009):** HB 239 narrows the definition of habitual criminal status, which carries a five-year mandatory minimum sentence for a third conviction and a 10-year mandatory minimum for a fourth conviction. Previously, petit larceny convictions or misdemeanor convictions involving fraud could serve as a basis for habitual criminal status. Now, only prior felony convictions can trigger these enhancements.

> **Louisiana HB 191 (2010):** Under this law, juvenile delinquency adjudications for a violent crime or high-level drug crime can no longer be used to enhance adult felony convictions. An adult felony conviction can only be enhanced by a prior adult felony conviction.

> **Kentucky HB 463 (2011):** HB 463 reduces the size of the statutory drug-free school zone, within which a drug trafficking offense is a Class D felony that triggers a mandatory sentence of one to five years, from 1,000 yards around the school to 1,000 feet.[30]

> **Colorado S 96 (2011):** This law excludes Class 6 felony drug possession from offenses that trigger the habitual offender sentencing enhancement, which previously would have quadrupled the base sentence for offenders.

> **Indiana HB 1006 (2013):** HB 1006 reduces the size of the school zone for all drug offenses from 1,000 to 500 feet from the school and limits the application of the enhancement to when children are reasonably expected to be present. The new law also removes family housing complexes and youth program centers from the definition of sites protected under the school zone enhancement.

REPEALING OR REVISING MANDATORY MINIMUM SENTENCES

Mandatory minimum laws paint with a broad brush, ignoring salient differences between cases or offenders, often with the effect of rendering low-level, nonviolent offenders indistinguishable from serious, violent offenders in terms of a punishment response. Nowhere is this more evident than in their application to drug offenses, in which drug type and quantity alone typically determine culpability and sentence. An individual's actual role in the crime is irrelevant; drug mule and kingpin can be, and often are, treated the same.[31] Since 2000, at least 17 states and the federal government have passed laws repealing mandatory minimums or revising them downward for certain offenses, mostly in relation to drug offenses. Five of those states are:

> **North Dakota HB 1364 (2001):** This law repeals mandatory minimums for first-time offenders convicted of manufacture, delivery, or possession with intent to manufacture or deliver a Schedule I, II, or III controlled substance, including methamphetamine, heroin, cocaine, and marijuana. Now, first-time offenders are sentenced according to the ranges specified for the class of felony they committed, either a Class A felony (zero to 20 years) or a Class B felony (zero to 10 years) depending on the type and amount of substance at issue.

> **Rhode Island SB 39aa (2009):** This law eliminates mandatory minimums for the manufacture, sale, or possession with intent to manufacture or sell a Schedule I or II controlled substance. For example, offenses involving less than one kilogram of heroin or cocaine, or less than five kilograms of marijuana, previously carried a mandatory minimum sentence of 10 years and a maximum of 50 years. Now, there is no mandatory minimum and the judge may assign a sentence anywhere from zero to 50 years. For offenses involving at least one kilogram of heroin or cocaine or at least five kilograms of marijuana, the previous mandatory minimum of 20 years has been eliminated; the maximum remains life.

> **South Carolina S 1154 (2010):** S 1154 eliminates mandatory minimum sentences for first-time offenders convicted of simple drug possession.

> **Delaware HB 19 (2011):** HB 19 brought about a broad overhaul of Delaware's drug laws by creating three main drug crimes, each with varying

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levels of seriousness: Drug Dealing, Aggravated Possession, and Possession. The law eliminates mandatory minimum sentences for some first-time offenders, including those convicted of trafficking relatively low quantities of drugs if no aggravating circumstances are present.

> **Ohio HB 86 (2011):** HB 86 decreases mandatory minimum sentences for some crack cocaine offenses by eliminating the difference between crack cocaine and powder cocaine. The law also raises the amount of marijuana needed to trigger an eight-year mandatory sentence for trafficking or possession from 20 kilograms to 40 kilograms.

The impact of reforms

There is surprisingly little research on the impact of recent state reforms on incarceration numbers, recidivism rates, or cost.

Though the federal government and at least 29 states have shifted away from mandatory penalties for certain offenses, there is surprisingly little research on the impact of recent state reforms on incarceration numbers, recidivism rates, or cost.[32] It is largely unknown how these reforms are being used by judges and prosecutors on the ground and whether they are achieving their intended outcomes. However, there is some evidence that states that have revised or eliminated mandatory minimums, and applied these changes retroactively to those already serving mandatory minimum sentences, have seen immediate and observable reductions in prison population and costs. (See "Retroactive Reforms" on page 14.) Since most reforms reduce sentence lengths prospectively, it is important to note that impacts may not be seen (and research not possible) for several years, as those convicted prior to the reforms must still serve out their full sentences.

While prospective reductions in sentence length may delay system impacts, the restrictive scope and application of recent reforms—including narrow criteria for eligibility and the discretionary nature of some revised sentencing policies—suggest that the impact of reform may nevertheless be limited. For example, some reforms apply only to first- or second-time, low-level drug offenders. Typically excluded are defendants with lengthy criminal histories or who are concurrently charged with ineligible offenses—often violent and sex offenses. Indeed, if prosecutors were to apply Attorney General Holder's new charging directive to the 15,509 people incarcerated in FY2012 under federal mandatory minimum drug statues, given its exclusionary criteria (i.e., aggravating role, use or threat of violence, ties to or organizer of a criminal enterprise, and significant criminal history), only 530 of these offenders might have received a lower sentence.[33]

In addition to the potentially small pool of eligible defendants, the discretionary nature of many of the new laws may also restrict the number of people they affect. It is unknown how often, where required, prosecutors will

agree with a proposed departure from a mandatory sentence;[34] or with what frequency judges, when permitted, will exercise judicial discretion, even in circumstances where all prerequisites or eligibility requirements are objectively satisfied.[35] Indeed, recent research into the impact of New York's 2009 Rockefeller drug law reforms found that the use of newly acquired judicial discretion to divert drug offenders from prison to treatment programs varied significantly across judicial districts in 2010, suggesting that the local judiciary were divided on when diversion was necessary or appropriate.[36]

Furthermore, some reforms were accompanied by an increase in mandatory penalties for certain offenses—again most often for sex offenses or offenses considered "violent"—suggesting that reform efforts may be undercut by parallel changes that risk increasing the number of offenders serving long sentences in prison. For example, while Massachusetts H 3818 (2012) reduces mandatory minimum sentences for some drug offenses, increases drug amounts that trigger mandatory minimum sentences, and shrinks the size of school zones within which drug offenders receive mandatory sentences, the law also expands the class of offenders who are exposed to an automatic sentence enhancement under its habitual offender statute. In addition, it creates a new "violent" habitual offender category attached to more than 50 qualifying felonies that renders those convicted of them ineligible for parole, sentence reductions for good time, or work release.[37] Though the law mitigates certain mandatory penalties, the widened scope of its revised habitual offender provision may lead to a significant increase in the number of defendants subject to maximum state prison sentences.[38]

Research and policy considerations

Because many recent reforms to mandatory sentences have narrow eligibility requirements or are invoked at the discretion of one or more system actors, the impact that was sought from the changes may ultimately be limited. Policymakers looking to institute similar reforms in order to have a predictable impact on sentence lengths, prison populations, and corrections costs without compromising public safety would do well to ask a number of key questions during the development of new policies. These can serve as an important guide to drafters and implementers in maximizing the desired effect of the policy. In addition, there is a paucity of studies that rigorously examine the effect of recent reforms on the criminal justice system, and thus a need for ongoing data-gathering and analysis to understand the impacts in order to report the results to concerned policymakers. As states increasingly look to each other for sentencing reform strategies, deliberate, data-driven policy development and research into outcomes are ever more critical. Moving forward, there

RETROACTIVE REFORMS

Sentencing reform that is given retroactive effect can yield results in a short time frame, as has been seen in recent years in California, Michigan, and New York.

In 2012, California voters passed Proposition 36, which revised the state's 1994 Three Strikes law (Proposition 184).[39] The law imposed a mandatory life sentence on offenders convicted of their third felony offense, regardless of its seriousness. Proposition 36 revised this by limiting the imposition of a life sentence to when the third felony conviction is serious or violent.[40] It also authorized courts to resentence those serving life sentences under the old law.[41] Since the law took effect in November 2012, judges have granted 95 percent of the petitions for resentencing; 1,011 people have been resentenced and released from prison and more than 2,000 resentencing cases are pending.[42] Thus far, recidivism rates for this group are low; fewer than 2 percent in 4.4 months were reincarcerated compared to California's overall recidivism rate of 16 percent in the first 90 days and 27 percent in the first six months.[43] California also saw an immediate impact in terms of costs; in the first nine months of implementation, the state estimates that Proposition 36 has saved more than $10 million.[44]

Once the home of some of the toughest mandatory drug laws in the country, Michigan enacted Public Acts 665, 666, and 670 in 2002, which eliminated mandatory sentences for most drug offenses and placed these drug offenses within the state's sentencing guidelines. Applied retroactively, nearly 1,200 inmates became eligible for release.[45] Due to these and many other reforms in the areas of reentry and parole, Michigan is a well known success story among states seeking to reduce their reliance on incarceration. Between 2002 and 2010, the state closed 20 prison facilities and lowered spending on corrections by 8.9 percent.[46] Between 2003 and 2012, serious violent and property crimes dropped by 13 and 24 percent, respectively.[47]

After a series of incremental reforms to its Rockefeller drug laws in the early 2000s, New York passed S 56-B in 2009, eliminating mandatory minimums in low-level drug cases and reducing minimum mandatory penalties in other cases. Since 2008, the number of drug offenders under the custody of the Department of Corrections has decreased by more than 5,100, or 43 percent.[48] The law applies retroactively and, as of May 1, 2013, 746 people have been approved for resentencing, 539 have been released, 171 were already in the community when resentenced, and 36 are awaiting release.[49] Citing significant drops in prison populations and crime, New York Governor Andrew Cuomo proposed four more prison closures in July 2013 at a savings of $30 million,[50] bringing the total number of prisons closed since 2009 to 15.[51]

are a number of steps policymakers can take to ensure reform efforts fulfill their promise and are sustainable:

> **Link proposed policies to research.** Balancing the concerns of justice, public safety, and costs in revising sentencing schemes and policies is a challenging undertaking. States need to take a methodical, research-driven approach that includes the analysis of all relevant state and local data to identify key population subgroups and policies driving prison or jail populations and the gaps in service capacity and quality in relation to demonstrated prevention and recidivism reduction needs. This approach should also include the use of evidence-based or best practices when crafting solutions. By tying the development and shape of new policies to the results of these kinds of analyses, policymakers increase their chances of achieving better criminal justice resource allocation and fairer, more consistent sentencing practices.

- In reviewing data, some questions policymakers may want to ask include: Can populations be identified—by offense or status (e.g., habitual drug or property offenders)—that are driving the intake population, causing more people to enter the prison system? Has length of stay changed for any of these subgroups? If so, can policies or practices be identified which cause this increase (e.g., sentence enhancements for second- or third-time offenders)?
- What have been the costs associated with either the increasing intake or length of stay? For example, automatically increasing the time for some offenses or offenders could mean a significant increase in the number of older and sicker inmates and in the costs for inmate care over time. On the other hand, policies that require automatic incarceration for low-level offenses or parole violators may mean an increase in the volume of shorter-term prison stays and the costs of doing more diagnostic assessments.
- Can approaches be identified that have been demonstrated to be safe and effective to handle these cases differently? Are policymakers considering policies and practices that both reduce the intake and the length of stay (e.g., increase eligibility for a community sentence, roll back enhancements for certain offenses, or remove mandatory minimum sentences)?
- Have the cost implications of the proposed changes for counties, taxpayers, and victims been analyzed? Have policymakers factored in the cost of new services and interventions that might be called for either in prison or the community?
- What are the anticipated benefits—as demonstrated by past research—for offenders and the community due to shorter custodial

As states increasingly look to each other for sentencing reform strategies, deliberate, data-driven policy development and research into outcomes are ever more critical.

sentences or community-based interventions?

- **Include stakeholders in policy development.** Have key constituencies and stakeholders been informed of the results of these analyses and invited to provide their ideas, opinions, and concerns? Given the discretionary nature of recent reforms, it is essential to involve the system actors most affected by proposed changes—district attorneys, judges, and defense attorneys—and whose everyday decisions will play an important role in whether new policies have their intended impact. By providing these and other affected stakeholders (e.g., victim advocates, county sheriffs, and commissioners) with opportunities to express their opinions and concerns, vet policy proposals, and make recommendations for implementation, education, and training, they are less likely to feel marginalized by the deliberations and oppose the reforms. In addition, mutual understanding of the goals of an intended reform can increase its potential impact.

- **Match proposed policies with available resources in the community.** If policymakers propose new sentencing options that divert certain offenders away from prison and into community supervision or treatment, receiving systems or programs must have the capacity and resources necessary to manage larger populations. For new policies to succeed in making communities safer, policymakers must ensure that newly available community sentencing options have the necessary staff, training, and program space to handle the influx of new offenders. Without these vital prerequisites, policymakers risk the long-term sustainability and limit the impact of a new effort.

- **Define eligibility requirements clearly and match these to the policy goal.** Safety, justice, and cost reduction should guide policymakers when crafting the specific eligibility criteria or classifications of offenses or offenders in new policies. For example, when aiming to reduce the number of offenders who are incarcerated or their lengths of stay, the criteria should link eligibility to an identified driver of a state's prison population. The objective of a proposed reform may be undermined, for example, if eligibility is unnecessarily limited to the lowest risk offenders, particularly if such offenders do not constitute a significant proportion of the incarcerated population. In addition, eligibility criteria should be defined as clearly as possible in order to minimize the potential for confusion among the system actors responsible for implementing a new sentencing policy. Clearly defined eligibility requirements will eliminate the potential for disparities in application and prevent system actors from subjectively deciding which offenders will benefit from a policy change.

- **Consider whether a proposed reform should apply retroactively.** If prison population reduction is the main goal, retroactive application of reforms is a predictable way to produce immediate results. Especially for prison

systems operating over capacity, applying a new sentencing policy to offenders sentenced prior to the reform can help ease population pressures immediately as well as manage growth over time. This consideration is especially pertinent if the proposed reform will affect a significant proportion of the current incarcerated population. In many cases, reforms are being made to correct overly harsh or ineffective policies. Here too, with goals of justice and fairness, retroactivity may be called for.

If prison population reduction is the main goal, retroactive application of reforms is a predictable way to produce immediate results.

> **Track and analyze the impact on system outcomes.** Despite many reforms to mandatory sentences in the last 13 years, there is a dearth of research examining their impact on a state's criminal justice system. To better understand whether new policies are achieving their intended outcome, policymakers should track and analyze how new policies work in practice. To assist in this effort, policymakers should ensure that systems are in place that can collect the necessary data on sentencing outcomes once reforms are passed into law. While some research requests may be easily answered from existing data sources, some may require updates to agency data systems or other adjustments to enable reporting. Policymakers should collaborate with agency leadership to determine reporting parameters in the early stages of implementation to ensure all data is accurately captured and reported. Depending on the effective date of a given piece of legislation, results may be identified within a few months or may take a year or more to surface.

Some questions policymakers may want to consider asking include:

- How are the changes to the law reflected in sentencing practices?
- How many offenders have been affected by the new law, and how does this compare against the number that was originally projected?
- What are the rates of reoffending under the new law and how does that compare to the previous law?
- Are prison populations trending in the desired direction?

> **Examine the impact on system dynamics.** When a new policy grants enhanced discretion to judges at sentencing or requires the agreement of other system actors, understanding how institutional and system dynamics play out in its implementation will be critical in understanding whether it is effective in achieving the desired goals. If system actors misunderstand a new law or disagree about the offenders to which it should apply, then sentencing reform may not succeed. By identifying these issues throughout a policy's implementation, policymakers can institute solutions early in the process to overcome these potential barriers, such as providing additional training, or improving key stakeholder partnerships.

Some questions policymakers may want to ask include:

- To what extent are judges and prosecutors using their new-found discretion to reduce or avoid mandatory sentences?
- What factors do judges, prosecutors and defense attorneys consider when deciding whether to modify a sentence or utilize a newly created non-prison sanction?
- What are the reasons for declining their new-found discretion?

Future directions

While many of the recent mandatory sentencing reforms have been driven by fiscal concerns, there is a growing discussion that rationalizes change for reasons of fairness and justice.

While many of the recent mandatory sentencing reforms have been driven by fiscal concerns, there is a growing discussion that rationalizes change for reasons of fairness and justice. This is reflected in the attorney general's August 2013 announcement and the statement President Obama made in December 2013 when he commuted the sentences of eight people convicted of drug offenses. Attorney General Holder unambiguously stated that mandatory minimums have an "outsized impact on racial minorities and the economically disadvantaged"—suggesting that the costs of mandatory sentences, whether human, social, or fiscal, may be altogether too high.[52] The federal bench has also invoked moral arguments in this way, most recently in arguing for the retroactive application of the Fair Sentencing Act of 2010.[53] Senators Patrick Leahy (D-VT) and Rand Paul (R-KY)—original sponsors of the Senate Justice Safety Valve Act of 2013—have also weighed in. In his recent testimony to the Senate Judiciary Committee, Senator Paul discussed the disproportionate impact of sentencing on African Americans, asserting that, "Mandatory minimum sentencing has done little to address the very real problem of drug abuse while also doing great damage by destroying so many lives…"[54] Senator Leahy pointed to fiscal and moral reasons in arguing, "We must reevaluate how many people we send to prison and for how long. Fiscal responsibility demands it. Justice demands it."[55] Given that mandatory penalties have long been a central crime control strategy in the United States, this development is significant and represents a substantial departure from past discourse and practice.

Shifts away from mandatory penalties on the state level over the last 13 years suggest that attitudes are evolving about appropriate responses to different types of offenses and offenders. In particular, there appears to be an emerging consensus that treatment or other community-based sentences may be more effective than prison, principally for low-level drug and other specified nonviolent offenses. Although these developments augur significant future change, much remains to be done. Research is urgently required to examine how state reforms to mandatory sentences have played out in practice and is

particularly important as more states and the federal government reassess their use of mandatory sentences. By approaching policymaking in an evidence and data-informed way, states will collectively be able to make smarter, more strategic decisions about how best to revise or roll back their mandatory sentencing schemes going forward.

Appendix A

ALL BILLS, BY STATE AND YEAR

STATE	2000	2001	2002	2003	2004	2005	2007	2009	2010	2011	2012	2013	TOTAL
ARKANSAS										1			1
CALIFORNIA											1		1
COLORADO				1					2	1		1	5
CONNECTICUT		1				1							2
DELAWARE				1					1	1			3
GEORGIA											1	1	2
HAWAII											1	1	2
ILLINOIS												1	1
INDIANA		2								1			3
KENTUCKY										1			1
LOUISIANA		1							1		1		3
MAINE				1									1
MASSACHUSETTS											1		1
MICHIGAN			3										3
MINNESOTA								1					1
MISSOURI											1		1
NEVADA								1					1
NEW JERSEY									1				1
NEW MEXICO			1										1
NEW YORK					1	1		1					3
NORTH DAKOTA		1											1
OHIO										1			1
OREGON		1										1	2
OKLAHOMA											1		1
PENNSYLVANIA										1	1		2
RHODE ISLAND								1					1
SOUTH CAROLINA									1				1
TEXAS							1			1			2
VIRGINIA	1												1
FEDERAL									1				1
TOTAL	1	6	4	3	1	2	1	4	7	7	8	6	50

Appendix B

ALL BILLS, ALPHABETIZED BY STATE

STATE	BILL	YEAR
ARKANSAS	SB 750	2011
CALIFORNIA	PROP 36	2012
COLORADO	SB 318	2003
COLORADO	HB 1338	2010
COLORADO	HB 1352	2010
COLORADO	SB 96	2011
COLORADO	SB 250	2013
CONNECTICUT	SB 1160	2001
CONNECTICUT	HB 6975	2005
DELAWARE	HB 210	2003
DELAWARE	HB 338	2010
DELAWARE	HB 19	2011
GEORGIA	HB 1176	2012
GEORGIA	HB 349	2013
HAWAII	HB 2515	2012
HAWAII	SB 68	2013
ILLINOIS	SB 1872	2013
INDIANA	HB 1892	2001
INDIANA	SB 358	2001
INDIANA	HB 1006	2013
KENTUCKY	HB 463	2011
LOUISIANA	SB 239	2001
LOUISIANA	HB 191	2010
LOUISIANA	HB 1068	2012
MAINE	LD 856	2003

STATE	BILL	YEAR
MASSACHUSETTS	H 3818	2012
MICHIGAN	PA 665	2002
MICHIGAN	PA 666	2002
MICHIGAN	PA 670	2002
MINNESOTA	SF 802	2009
MISSOURI	SB 628	2012
NEVADA	AB 239	2009
NEW JERSEY	SB 1866/ A 2762	2010
NEW MEXICO	HB 26	2002
NEW YORK	AB 11895	2004
NEW YORK	SB 5880	2005
NEW YORK	S 56-B	2009
NORTH DAKOTA	HB 1364	2001
OHIO	HB 86	2011
OKLAHOMA	HB 3052	2012
OREGON	HB 2379	2001
OREGON*	HB 3194	2013
PENNSYLVANIA	HB 396	2011
PENNSYLVANIA	SB 100	2012
RHODE ISLAND	SB 39AA	2009
SOUTH CAROLINA	S 1154	2010
TEXAS	HB 1610	2007
TEXAS	HB 3384	2011
VIRGINIA	SB 153	2000
FEDERAL	S 1789	2010

* HB 3194 repeals a ban introduced by Ballot Measure 57 (2008) on downward departures from sentencing guidelines for certain repeat drug and property offenders. Though the previous ban was not technically considered a mandatory minimum sentence, since defendants could still earn up to a 20 percent sentence reduction for good behavior, it may be considered so in its effect since it barred judges from deviating from the sentencing guideline range in those specified cases.

Appendix C

ALL BILLS, BY STATE AND REFORM TYPE

STATE	Expansion of judicial discretion or safety valve created	Repeal/revision of mandatory minimum sentences	Revision of automatic sentence enhancements	Repeal/revision of mandatory minimum sentences & expansion of judicial discretion	Repeal/revision of mandatory minimum sentences & revision of automatic sentence enhancements	Revision of automatic sentence enhancements & expansion of judicial discretion	Repeal/revision of mandatory minimum sentences, revision of automatic sentence enhancements, & expansion of judicial discretion	TOTAL
ARKANSAS		SB 750 (2011)						1
CALIFORNIA			PROP 36 (2012)					1
COLORADO	HB 1338 (2010)		SB 318 (2003) HB 1352 (2010) SB 96 (2011) SB 250 (2013)					5
CONNECTICUT	SB 1160 (2001)	HB 6975 (2005)						2
DELAWARE	HB 338 (2010)	HB 210 (2003)			HB 19 (2011)			3
GEORGIA	HB 349 (2013)				HB 1176 (2012)			2
HAWAII	HB 2515 (2012) SB 68 (2013)							2
ILLINOIS			SB 1872 (2013)					1
INDIANA						HB 1006 (2013) SB 358 (2001)	HB 1892 (2001)	3
KENTUCKY			HB 463 (2011)					1
LOUISIANA	HB 1068 (2012)		HB 191 (2010)		SB 239 (2001)			3
MAINE				LD 856 (2003)				1
MASSACHUSETTS					H 3818 (2012)			1
MICHIGAN		PA 665 (2002) PA 670 (2002)		PA 666 (2002)				3
MINNESOTA	SF 802 (2009)							1
MISSOURI		SB 628 (2012)						1

NEVADA			AB 239 (2009)					1
NEW JERSEY	SB 1866/ A 2762 (2010)							1
NEW MEXICO	HB 26 (2002)							1
NEW YORK		AB 11895 (2004) SB 5880 (2005)		S 56-B (2009)				3
NORTH DAKOTA		HB 1364 (2001)						1
OHIO					HB 86 (2011)			1
OKLAHOMA		HB 3052 (2012)						1
OREGON	HB 3194 (2013) HB 2379 (2001)							2
PENNSYLVANIA	SB 100 (2012)	HB 396 (2011)						2
RHODE ISLAND		SB 39AA (2009)						1
SOUTH CAROLINA							S 1154 (2010)	1
TEXAS	HB 1610 (2007)		HB 3384 (2011)					2
VIRGINIA	SB 153 (2000)							1
FEDERAL		S 1789 (2010)						1
TOTAL	15	13	10	3	5	2	2	50

ENDNOTES

1 Eric Holder, *Remarks at the Annual Meeting of the American Bar Association's House of Delegates* (speech delivered Monday, August 12, 2013 in San Francisco, CA), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html (accessed October 1, 2013).

2 Ibid. Also *see*, United States Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: United States Sentencing Commission, 2011), 345-347.

3 *Fair Sentencing Act of 2010,* Pub. L. 111-220, 124 Stat. 2372.

4 *Smarter Sentencing Act of 2013,* S. 1410, H.R. 3382, 113th Cong., 1st sess.; *Justice Safety Valve Act of 2013,* S. 619, H.R. 1695, 113th Cong., 1st sess.

5 The White House, "Statement by the President on Clemency," statement (Washington, DC: The White House, Office of the Press Secretary, December 19, 2013) at www.whitehouse.gov/the-press-office/2013/12/19/statement-president-clemency (accessed January 31, 2014).

6 *See* for example, *Adrienne Austin, Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* (New York: Vera Institute of Justice, 2010) and Lauren-Brooke Eisen and Juliene James, *Reallocating Justice Resources: A Review of State 2011 Sentencing Trends* (New York: Vera Institute of Justice, 2012).

7 *United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: United States Sentencing Commission, 2011) 23-28, 85-89; Don Stemen, *Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975-2002* (New York: Vera Institute of Justice, 2005); *See* Stanley Sporkin & Asa Hutchinson, "Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?," 36 *American Criminal Law Review* 36 (1999), 1279, 1282, 1295. Statement of Rep. Hutchinson: "There are very few families that would have escaped the impact of drugs in some capacity. And so, families feel it and they compel their elected representatives to do something about it…..you have to send the right signals, you have to express the public outrage. And so I think the retribution theory is supported. I believe the deterrence theory is supported…[Y]ou have to have a sentencing pattern that has uniformity across it, that sends the right signals, that becomes tough in the area of drugs...".

8 For a review of evaluations on the crime-deterrent effect of mandatory penalties, *see* Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings," *38 Crime & Justice* (2009) 94-96. Also *see*, Marc A. Levin & Vikrant P. Reddy, *The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime & Costs* (Austin, TX: Texas Public Policy Foundation, July 2013); Alison Lawrence and Donna Lyons, *Principles of Effective State Sentencing and Corrections Policy* (Denver: National Conference of State Legislatures Sentencing and Corrections Work Group, 2011); Cheryl Davidson, *Outcomes of Mandatory Minimum Sentences for Drug Traffickers* (Des Moines, IA: Iowa State Advisory Board, Division of Criminal and Juvenile Justice Planning, Iowa Department of Human Rights, 2011); Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing* (Nashville, TN: Judicature, 2010, Volume 94, Number 1); Nicole D. Porter, *The State of Sentencing 2012* (Washington, DC: The Sentencing Project, 2012).

9 The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* (Washington, D.C.: Pew Charitable Trusts, 2011); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (New York: Vera Institute of Justice, 2007).

10 The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons.*

11 Ibid.

12 *See* for example, Michael Tonry, *Sentencing Matters 6* (New York, NY: Oxford University Press, 1996). Minimum penalties existed in a few states and were generally on the lower range of one- or two-year minimums. The exception was mandatory life sentences for particularly egregious crimes, such as murder.

13 Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," in *Sentencing and Sanctions in Western Countries* edited by Michael Tonry and Richard Frase (New York: Oxford University Press, 2001) 223.

14 Michael Tonry, *Sentencing Matters,* 6. Also *see* Marvin E Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review* 41 (1972) 1, 15-16.

15 Ibid.

16 *See* for example, Michael Tonry, *Sentencing Matters,* 9. Also *see* Steven L. Chanenson, "The Next Era of Sentencing Reform" 54 *Emory Law Journal* 44, no.1 (2005) 377, 392-395.

17 *See* for example, *Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment* (New York: McGraw-Hill Publishing Company, 1976) 3-4. Also *see* Marvin E Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review* 41 (1972) 1, 15.

18 *See* for example, Robert Martinson, "What Works? Questions and Answers About Prison Reform" *The Public Interest* 35 (1974) 22, 22-23; Also *see* Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven CT: Yale University Press, 1981); Bureau of Justice Assistance, *National Assessment of Structured Sentencing* (Washington DC: BJA, 1996) 5-18.

19 Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 238-244; Cecelia Klingele, "Changing The Sentence Without Hiding The Truth: Judicial Sentence Modification as a Promising Method of Early Release" *William and Mary Law Review* 52 (2010) 465, 476-7.

20 Although many states retained indeterminate sentencing systems, this did not prevent many of these states from adopting mandatory penalties as means of producing a "zone of hyper determinacy" for specified offenses. *See* Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 229 and 231. Also *see*, Bureau of Justice Assistance, *National Assessment of Structured Sentencing.*

21 For example, Minnesota and Pennsylvania adopted sentencing guidelines in 1980 and 1982, respectively, with many more states following suit. Currently, there are 20 states and the District of Columbia with sentencing guidelines in force. *See* National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (Williamsburg, VA: NSSC, 2008).

22 On the federal level, *see* for example *Comprehensive Crime Control Act of 1984,* Public Law 98-473, 98 Stat. 1976; *Anti-Drug Abuse Act of 1986*, Public Law 99-570, 100 Stat. 3207; *Violent Crime Control and Law Enforcement Act of 1994*, Public Law 103-322, 108 Stat. 1796; On the state level, *see* for example Cal. Penal Code § 667 (West Supp. 1998); *See* also, Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 229.

23 Bureau of Justice Assistance, *National Assessment of Structured Sentencing* 44-5. Also *see*, Urban Institute, "Did Getting Tough on Crime Pay?" *Crime Policy Report* No. 1 (Washington DC; Urban Institute 1997).

24 Michael Tonry, "Mandatory Penalties" in *Crime and Justice: A Review of*

Research edited by Michael Tonry (Chicago, IL: University of Chicago, 1992) 243-274

25 For information on truth-in-sentencing, *see*, Bureau of Justice Statistics, *Truth in Sentencing in State Prisons* (Washington DC: BJS, 1999). For information regarding the abolition of parole, *see* Bureau of Justice Statistics, *Trends in State Parole 1990-2000* (Washington DC: BJS, 2001); For growing concerns about the effects of mandatory penalties, *see* United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington DC: 1991).

26 On the federal level, *see* for example, *Violent Crime Control and Law Enforcement Act of 1994*, Public Law 103-322, 108 Stat. 1796 sec 80001(a). *See* also, Philip Olis, "Mandatory Minimum Sentencing: Discretion, The Safety Valve, And The Sentencing Guidelines," *University of Cincinnati Law Review* 63 (1995).

27 United States Sentencing Commission, *Recidivism among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (Washington, DC: United States Sentencing Commission, 2011) at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (accessed on December 9, 2013).

28 For research about effective correctional strategies in the community, *see* Peggy McGarry et al., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (New York: Vera Institute of Justice, 2013); Also *see* National Institute of Corrections and Crime and Justice Institute, *Implementing Evidence-Based Practice in Community Corrections The Principles of Effective Intervention* (Washington, DC: Department of Justice, National Institute of Corrections, 2004); Christopher T. Lowenkamp and Edward J. Latessa, "Understanding the Risk Principle: How and Why Correctional Interventions Harm Low-Risk Offenders," *Topics in Community Corrections* (Washington, DC: National Institute of Corrections, 2004). For information about the impact of the fiscal crisis on sentencing and corrections, *see* Ram Subramanian and Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections* (New York: Vera Institute of Justice, 2012); For results of recent public opinion polls, *see* Pew Center on the States, *The High Cost of Corrections in America: InfoGraphic* (Washinton, D.C.: The Pew Charitible Trusts, January 2012); For examples of recent broad-based efforts at sentencing and corrections reform, *see* Juliene James, Lauren-Brooke Eisen and Ram Subramanian, "A View from the States: Evidence-Based Public Safety," *Journal of Criminal Law & Criminology* 102, No.3 (2012) 821-849. Also *see*, The Urban Institute, *The Justice Reinvestment Initiative: Experiences from the States* (Washington, DC: The Urban Institute, 2013). Indeed, in several states this has been done under the aegis of the Justice Reinvestment Initiative, a grant program initiated by the U.S. Department of Justice's Bureau of Justice Assistance that aims to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and strengthen neighborhoods.

29 *See* for example, Adrienne Austin, *Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* (New York: Vera Institute of Justice, 2010) and Lauren-Brooke Eisen and Juliene James, *Reallocating Justice Resources: A Review of State 2011 Sentencing Trends* (New York: Vera Institute of Justice, 2012).

30 HB 463, also known as *The Public Safety and Offender Accountability Act*, also made significant revisions to drug statutes, establishing a tiered approach to sentencing that distinguishes between traffickers, peddlers, and users. The bill makes other changes to sentencing, correctional, and community-supervision practices designed to re-center the justice system around evidence-based practices. HB 463 was developed following an analysis of Kentucky's criminal justice population drivers via the Justice Reinvestment Initiative.

31 *See* for example, *United States v. Dossie*, 851 F. Supp. 2d 478 (EDNY March 30, 2012, Gleeson J).

32 A National Institute of Justice-funded study, conducted by the Vera Institute of Justice and researchers from John Jay College and Rutgers University, is investigating the impact of New York's 2009 rockefeller drug law reforms. The findings are expected to be released in 2014. For both pending and passed Federal laws, *see* *Fair Sentencing Act of 2010*, Pub. L. 111-220, 124 Stat. 2372; *Smarter Sentencing Act of 2013*, S. 1410; *Justice Safety Valve Act of 2013*, H.R. 1695.

33 Paul J. Hofer, "Memorandum Regarding Estimate of Sentencing Effects of Holder Memo on Drug Mandatory Minimums," Federal Public and Community Defenders, September 9, 2013, revised September 17, 2013, http://www.fd.org/docs/latest-news/memo-on-holder-memo-impact-final.pdf?sfvrsn=2 (accessed December 17, 2013). (On the study's methodology: "To estimate the number of defendants likely to benefit from these new policies, the U.S. Sentencing Commission's Monitoring Datafile for FY2012 was queried to determine how many of last year's drug defendants appear to fit the memo's major criteria, and how many of these did not already receive relief from any applicable mandatory penalty through the current 'safety valve' or government motions to reduce sentences to reward defendants' substantial assistance. To ensure comparability with analyses of other proposed legislation and policy changes, only cases in which the Commission received full documentation were included. Alternative analysis showed that including cases with missing documentation would increase the estimate of the number of offenders affected by only six defendants.")

34 *See* for example, Georgia HB 349 (2013), Louisiana HB 1068 (2012), and Minnesota SF 802 (2009)

35 *See* for example, Hawaii SB 68 (2013) and Texas HB 1610 (2007).

36 Center for Court Innovation, *Testing the Cost Savings of Judicial Diversion* (New York: Center for Court Innovation, 2013). For instance, the greatest increase in use of diversion occurred in the New York City suburban areas—primarily in Suffolk and Nassau counties. In six upstate counties, however, there was little or no change in sentencing outcomes.

37 Previously, the statute required an offender to have twice served time in state prison for all 688 existing felonies. Offenders were also eligible for parole after having served 50 percent of their maximum sentence on the third felony. Under the new law, an offender now only has to have twice served time in state prison for one day or more and is required to serve two-thirds of the maximum sentence. It also makes such offenders ineligible for parole. The new law also creates a new violent habitual offender class attached to more than 50 qualifying felonies. Violent habitual offenders under the new law are ineligible for parole.

38 Institute for Race & Justice, *Three Strikes: The Wrong Way to Justice —A Report on Massachusetts' Proposed Habitual Offender Legislation* (Cambridge, MA: Harvard Law School, 2013).

39 California Secretary of State, "California General Election, Tuesday, November 6, 2012: Official Voter Information Guide," http://voterguide.sos.ca.gov/propositions/36/title-summary.htm (accessed September 9, 2013).

40 California Proposition 36 (2012) includes two exceptions: 1) When a third felony conviction is non-serious, but prior felony convictions were for rape, murder, or child molestation; and 2) When third felony conviction is for certain non-serious sex, drug, or firearm offenses.

41 Under California Proposition 36 (2012) resentencing is authorized if the third-strike conviction was not serious or violent and the judge determines the sentence does not pose unreasonable risk to public safety.

42 Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, *Progress Report: Three Strikes Reform (Proposition 36) 1,000 Prisoners Released* (Stanford, CA: Stanford Law School and the NAACP Legal Defense and Education Fund, 2013).

43 California defines recidivism as return to prison within a given number of months or years.

44 Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, *Progress Report: Three Strikes Reform (Proposition 36) 1,000 Prisoners Released*; To estimate the savings from Prop. 36, the total number of days the 1,000 released inmates had been out of prison was multiplied by the figure the state uses for per-inmate savings when a prisoner is released ($25K/yr).

45 J. Greene and M. Mauer, *Downscaling prisons: Lessons from four states* (Washington D.C.: The Sentencing Project, 2010).

46 Ram Subramanian and Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections.* (New York, NY: Vera Institute of Justice, 2012).

47 According to FBI Uniform Crime Report data, Michigan police reported 44,922 violent crimes and 250,101 property crimes in 2012 compared to 51,524 violent crimes and 330,356 property crimes in 2002. FBI, "Crime in the United States." (Washington, DC: FBI, 2012), years 2003, 2012.

48 New York State Division of Criminal Justice Services, Office of Justice Research and Performance, *2009 Drug Law Reform Update.* (New York: DCJS, 2013).

49 Ibid. DCJS does not collect or retain information on those not approved for resentencing.

50 The New York Department of Corrections and Community Supervision (DOCCS) reports in a press release a 15 percent decrease in state crime over the last 10 years and a 13 percent reduction in violent crime. New York's prison population has decreased by 24 percent from 71,600 to 54,600 since 1999. (Albany, NY: DOCCS, July 26, 2013).

51 Tiffany Brooks, "Upstate lawmakers question prison closures," *Legislative Gazette,* August 6, 2013.

52 Eric Holder, *see* note 1.

53 *See* for example, *United States v. Blewett,* 719 F.3d 482 (May 17, 2013 Merritt and Martin JJ). Also see, United States v Blewett (December, 3, 2013, see separate dissenting opinions of Merritt, Cole and Clay JJ). Federal judge John Gleeson has also invoked moral arguments to advocate for applying mandatory minimums based on a person's role in a crime rather than drug quantity and also against using prior crimes to escalate mandatory minimums. *See United States v. Dossie,* 851 F. Supp. 2d 478 (EDNY Mar. 30, 2012); *United States v. Kupa,* 11-CR-345 (JG) (EDNY Oct. 9, 2013).

54 *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the Committee on the Judiciary, United States Senate,* 113th Cong. (2013) (statement of Senator Rand Paul, State of Kentucky).

55 *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the Committee on the Judiciary, United States Senate,* 113th Cong. (2013) (statement of Senator Patrick Leahy, State of Vermont).

Acknowledgments

The authors would like to thank Sharyn Broomhead, Rebecka Over, and Sean Addie for their valuable legal research into the bills featured in this report. Thank you to Kaitlin Kall who assisted in designing the charts. We would especially like to thank Patricia Connelly, Mary Crowley, and Chris Munzing for their invaluable assistance in the editing process and Peggy McGarry for her insight and guidance throughout the drafting process.

An electronic version of this report is posted on Vera's website at www.vera.org/mandatory-sentences-policy-report

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THIS YEAR MARKS THE 20TH ANNIVERSARY OF THE 1994 CRIME BILL. To examine the legacy of this landmark legislation, the lessons learned, and the path ahead, Vera is convening a series of conversations with experts and policymakers in Washington, DC, throughout the year, as well as issuing a series of reports on sentencing trends—where the states stand on mandatory minimums and other sentencing practices and the resulting collateral consequences. This report is the first in that series.

Vera will also release a comprehensive study of the impact of the 2009 reforms to the Rockefeller drug laws in New York State, examining whether they have improved offender outcomes, reduced racial disparities, and saved money. Look for updates on our website at www.vera.org.

Suggested Citation

Ram Subramanian and Ruth Delaney. *Playbook for Change? States Reconsider Mandatory Sentences.* New York, NY: Vera Institute of Justice, 2014.

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