

**CRIMINAL JUSTICE REFORM SUBCOMMITTEE OF THE
COURTS CORRECTIONS AND JUSTICE INTERIM COMMITTEE
JUNE 25, 2015**

**EXHIBITS FOR PRESENTATIONS RELATING TO MANDATORY
MINIMUM SENTENCING REFORM**

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**EXHIBIT 1: VERA INSTITUTE FOR JUSTICE: CENTER ON
SENTENCING AND CORRECTIONS REPORT: "PLAYBOOK FOR
CHANGE? STATES RECONSIDER MANDATORY SENTENCING."**

**EXHIBIT 2: THE SENTENCING PROJECT, RESEARCH AND
ADVOCACY FOR REFORM: THE STATE OF SENTENCING IN 2013:
DEVELOPMENTS IN POLICY AND PRACTICE.**

**EXHIBIT 3: VALERIE WRIGHT, Ph.D. (NOVEMBER 2010) THE
SENTENCING PROJECT: DETERRENCE IN CRIMINAL JUSTICE:
EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT**

**EXHIBIT 4: NATIONAL RESEARCH COUNSEL (APRIL 2014): THE
GROWTH OF INCARCERATION IN THE UNITED STATES:
EXPLORING CAUSES AND CONSEQUENCES; CHAPTER 5: THE
CRIME PREVENTION EFFECTS OF INCARCERATION**

**EXHIBIT 5: PEW CENTER ON THE STATES PUBLIC SAFETY
PERFORMANCE PROJECT: 2011 KENTUCKY REFORMS CUT
RECIDIVISM, COSTS.**

EXHIBIT 6: NEW MEXICO CONTROLLED SUBSTANCE STATUTES

EXHIBIT 7: NM STAT. ANN. § 31-18-17; House Bill 26 (2002 Reg. Session); excerpts from vetoed HB 225 (1999 Reg. Session). [Mandatory sentencing reforms.]

EXHIBIT 8: HB 296 (2007 Reg. Session) [fiscal impact bill]

EXHIBIT 9: NM STAT. ANN. § 30-9-11 – CSP statute; proposed amendments to § 30-9-11.

EXHIBIT 10: NM STAT. ANN. §12-2A-16; NM CONST. ART. IV, § 33

Exhibit 1

Playbook for Change?

States Reconsider Mandatory Sentences

POLICY REPORT / FEBRUARY 2014 (UPDATED 4/4/14)

Ram Subramanian • Ruth Delaney

CENTER ON SENTENCING AND CORRECTIONS

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.



Peggy McGarry
Director, Center on Sentencing and Corrections

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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.

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

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

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

New York's Rockefeller drug laws come into effect, establishing mandatory minimum sentences for drug offenses.

Minnesota and Pennsylvania become first states to establish sentencing commissions.

- Comprehensive Criminal Control Act establishes a federal sentencing commission.
- Washington state enacts the first truth-in-sentencing law that requires violent offenders to serve most of their sentences in prison.

Congress formally adopts federal sentencing guidelines; five states now have sentencing guidelines.

- California passes Proposition 184 (three strikes law) enhancing mandatory penalties for third-time felony convictions.
- Violent Crime Control and Law Enforcement Act introduces a federal three strikes law and restricts federal funding for prison construction to states that enact truth-in-sentencing laws. Five states already have truth-in-sentencing laws in place.
- Violent Crime Control and Law Enforcement Act creates the first safety valve provisions that allow judges to sentence certain nonviolent offenders below mandatory minimums in limited circumstances.

\$ 19.5 billion 🧑 881,871

Sixteen states now have abolished parole.

Michigan eliminates mandatory sentences for most drug offenses.

\$ 34.3 billion 🧑 1,237,476

New York eliminates mandatory minimums in low-level drug cases and reduces minimum mandatory penalties in other drug cases.

At least thirteen states now have narrowed sentence enhancements.

1973

1978

1980

1984

1986

1987

1994

1995

1999

2000

2002

2009

2012

2013



State general fund correctional spending*



State prison population sentenced to at least one year**

Minnesota becomes first state to adopt sentencing guidelines.

Anti-Drug Abuse Act establishes mandatory minimums for federal drug offenses and institutes the 100:1 powder-to-crack cocaine sentencing ratio. (100:1)



7.7 billion



469,934

Eleven additional states pass truth-in-sentencing laws.

- Twenty-four states now have three strikes laws.
- Seventeen states now have sentencing guidelines.
- Twenty-nine states now have truth-in-sentencing laws.

- California revises its three strike law, limiting the imposition of a life sentence to cases in which the third felony conviction is for a serious or violent crime.
- At least seventeen states and the federal government have partially repealed or lessened the severity of mandatory sentences.



46 billion



1,315,817

* 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, Year and 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

Mandatory minimum laws paint with a broad brush, ignoring salient differences between cases or offenders.

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 statutes, 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. The law creates a new “violent” habitual offender category attached to more than 40 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 resentencing 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.

- **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:

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

- 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) SB 318 (2003) HB 1352 (2010) SB 96 (2011) SB 250 (2013)					1
COLORADO	HB 1338 (2010)							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 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								1
MICHIGAN		PA 665 (2002) PA 670 (2002)		PA 666 (2002)				3
MINNESOTA	SF 802 (2009)							1
MISSOURI		SB 628 (2012)						1

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...".
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- 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*

- 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.uscc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (accessed on December 9, 2013).
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- 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 For information regarding the effect of H 3818 (2012), see the Prisoners' Legal Services of Massachusetts' memorandum on "Three Strikes" Legislation at <http://www.plsma.org/wp-content/uploads/2012/07/1001-3-Strikes-Protocol.pdf> (accessed April 1, 2014).
- 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).

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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.

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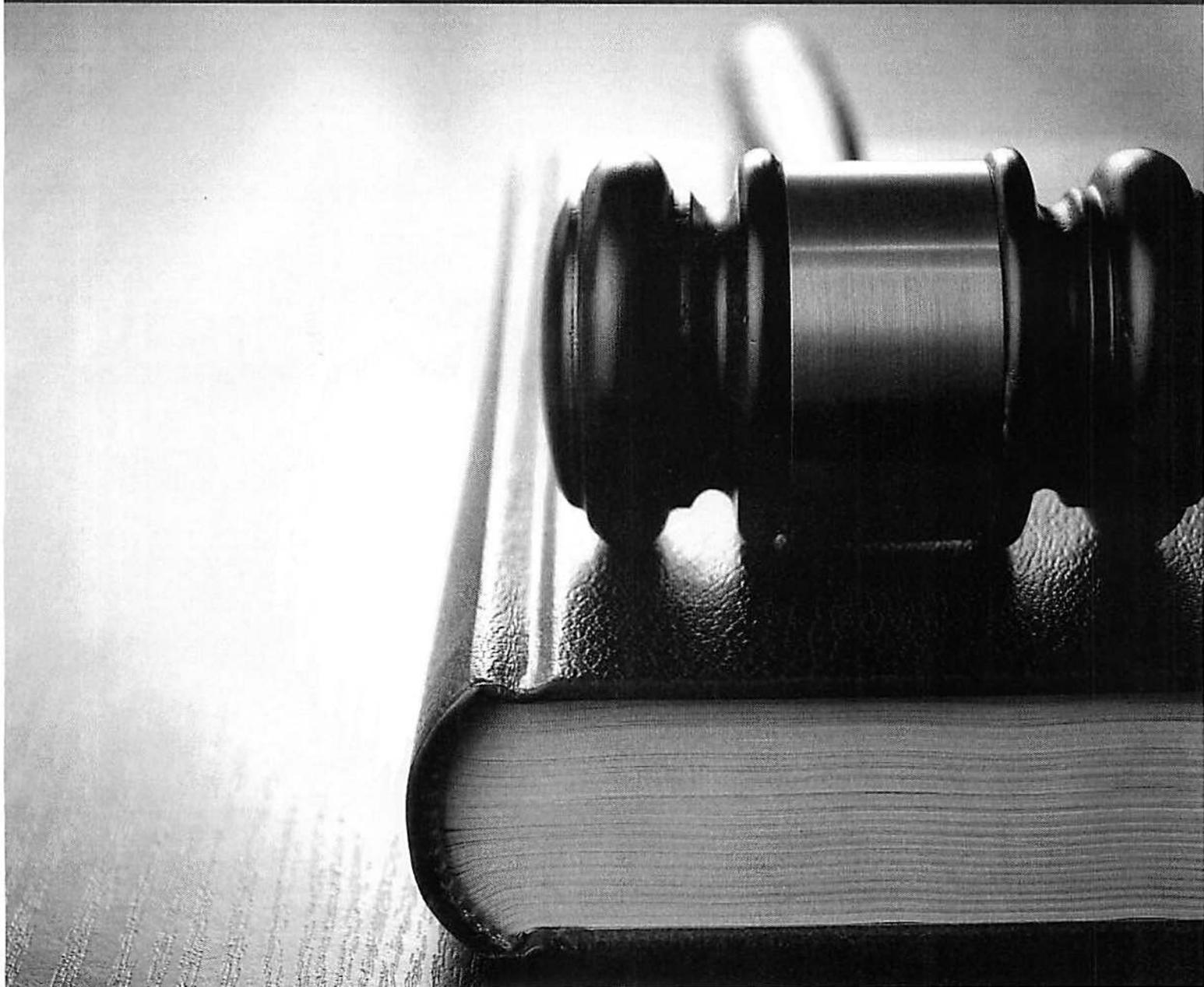
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Exhibit 2

THE STATE OF SENTENCING 2013: DEVELOPMENTS IN POLICY AND PRACTICE



THE
SENTENCING
PROJECT
RESEARCH AND
ADVOCACY FOR REFORM



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INTRODUCTION

The United States has the highest rate of incarceration in the world and keeps 7.2 million men and women under correctional supervision. More than 2.2 million are in prison or jail while nearly five million are monitored in the community on probation or parole.

The scale of the nation's correctional population results from a mix of crime rates and legislative and administrative policies that vary by state. Today, there is general agreement that the high rate of incarceration resulted from deliberate policy choices that impose punitive sentences which have increased both the numbers of people entering the system and how long they remain under correctional control. These policies include an expansion of life without parole as a sentencing option and lengthy terms under community supervision.

Despite the nation's four-decade era of mass incarceration, the Bureau of Justice Statistics reported that the prison population dropped in 2012 for the third consecutive year. About half of the 2012 decline – 15,035 prisoners – occurred in California, which decreased its prison population in response to a 2011 Supreme Court order to relieve prison overcrowding. But eight other states – Arkansas, Colorado, Florida, Maryland, New York, North Carolina, Texas, and Virginia – showed substantial decreases of more than 1,000 inmates, and more than half the states reported some drop in the number of prisoners.

Previous changes in policy and practice may have contributed to the modest decline. Lawmakers have cited the growth in state corrections spending at the expense of other priorities as a reason to change sentencing policies and practices. During 2013, legislators in at least 31 states adopted 47 criminal justice policies that may help to reduce the prison population, improve juvenile justice outcomes, and eliminate the barriers that marginalize persons with prior convictions. The policy reforms outlined in this report document changes in sentencing, probation and parole, collateral consequences and juvenile justice.

Highlights include:

- Six states – Colorado, Hawaii, New Hampshire, Oregon, South Dakota, and Vermont – expanded alternatives to incarceration for certain drug offenses.
- Three states – Kansas, Oregon, and South Dakota – authorized earned discharge from community supervision.
- Maryland abolished the death penalty as a sentencing option. Today, 18 states and the District of Columbia no longer authorize the death penalty.
- Oregon became the third state to authorize racial impact statements for any change to criminal laws or sentencing codes.
- Five states – California, Illinois, Maryland, Minnesota, and Rhode Island – adopted or expanded policies to address employment barriers for persons with a prior criminal history.
- Georgia and Nebraska enacted comprehensive juvenile justice measures that included provisions to expand alternatives to incarceration for certain youth.
- At least eight states – Arkansas, Delaware, Louisiana, Nebraska, South Dakota, Texas, Wyoming, and Utah – modified juvenile life without parole policies.

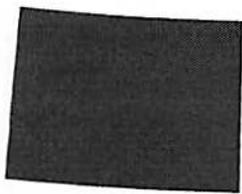
State sentencing reforms in 2013 continue trends that The Sentencing Project has documented for several legislative cycles. But despite the changes, there continues to be a great need to address the nation's high rate of incarceration. The challenge now is to build on these gains to downscale state prison systems. Most states continue to authorize life without parole as a sentencing option, implement a range of mandatory sentencing laws, and enact practices that extend the length of time persons spend in prison. Stakeholders interested in reducing their state's reliance on incarceration must continue to push for dialogue and reforms that use balanced approaches to reduce crime and improve public safety.

Key Criminal Justice Policy Reforms and Legislation Passed in 2013

State	Reform(s)
Arkansas	Modified parole review process for youth previously sentenced to life without parole.
California	Reduced barriers to employment for persons with prior criminal history. Authorized parole hearings for long-term incarcerated youth.
Colorado	Established alternative sentencing scheme for certain drug offenses. Created diversion program. Authorized sealing of certain convictions. Reduced juvenile detention bed cap. Expanded eligibility to seal certain juvenile records.
Delaware	Eliminated voter registration waiting period for certain felony convictions. Authorized parole review for certain youth sentenced to life terms.
Georgia	Authorized judges to depart from certain mandatory minimums. Modernized provisions related to juvenile proceedings.
Hawaii	Expanded judicial discretion for certain drug offenses.
Idaho	Authorized sentence reduction for certain offenses
Illinois	Authorized medical marijuana. Established second chance probation. Raised the age of jurisdiction for juvenile defendants.
Indiana	Expanded expungement provisions. Authorized sentencing alternatives for certain youth.
Kansas	Authorized early discharge from probation.
Louisiana	Expanded parole eligibility for certain youth convicted of homicide- offenses.
Maryland	Eliminated the death penalty. Reduced barriers to employment for persons with prior criminal history. Required reporting on use of graduated sanctions for juveniles. Reduced out of home placement for certain youth.
Massachusetts	Raised the age of jurisdiction for juvenile defendants.
Minnesota	Expanded state "ban the box" policy to address employment barriers for persons with prior criminal history.
Mississippi	Created truth-in-sentencing task force. Authorized expungement for persons with certain juvenile convictions.
Missouri	Modified provisions related to certain juveniles certified as adults.
Nebraska	Enacted comprehensive measure to modify juvenile sentencing provisions.
New Hampshire	Authorized medical marijuana.
Nevada	Eliminated deportation as a collateral Consequence for Certain Offenses. Limited Jail Stays for Certain Youth.
North Dakota	Increased monetary thresholds for certain property offenses.
Oregon	Authorized racial impact statements. Modified criminal penalties for certain offenses under justice reinvestment initiative. Provided for earned discharge for probation and post-prison supervision.
Rhode Island	Adopted "ban the box" provision to reduce barriers to employment for persons with prior criminal history.
South Carolina	Required time served under home confinement to factored in at sentencing.
South Dakota	Modified certain sentences under justice reinvestment initiative. Modified probation and parole policies. Authorized judicial discretion at sentencing for youth convicted certain homicide offenses.
Texas	Expanded parole eligible life terms to include juvenile defendants eighteen years of age.
Vermont	Eliminated criminal penalties for certain marijuana offenses.
Virginia	Adjusted parole review process.
Washington	Established mental health diversion option for certain juveniles.
West Virginia	Adjusted certain sentencing options through justice reinvestment initiative.
Wyoming	Required parole review for youth convicted of certain homicide offenses.
Utah	Expanded expungement policy to include certain drug offenses. Authorized parole eligibility for youth convicted of certain homicide offenses.

SENTENCING

Lawmakers in at least sixteen states enacted changes to sentencing policy in 2013. Since the 1980s, officials at the state level have frequently enhanced criminal penalties, contributing to the nation's high rate of incarceration. Changing policy and practice to impact prison admissions and length of stay may help lawmakers and practitioners reduce state prison populations. Reform initiatives adopted in various states included abolishing the death penalty, authorizing racial impact statements, and establishing alternative sentences for certain drug offenses.



COLORADO

ESTABLISHED ALTERNATIVE SENTENCING SCHEME FOR CERTAIN DRUG OFFENSES AND CREATED DIVERSION PROGRAM

SB 250 established a separate sentencing scheme for persons convicted of certain drug offenses. The bill authorized probation and community-based sentencing alternatives for persons convicted of certain felony drug offenses and allowed the felony charge to be lowered to a misdemeanor conviction after the completion of probation. **SB 250** also required the court to "exhaust alternative sentencing options" for certain drug defendants; the provision required defendants to have already participated in several forms of treatment and alternative sentencing prior to being sentenced to prison. The Colorado Legislative Council estimated that approximately 550 prison-bound defendants will be reclassified to a lower level felony classification and given the opportunity to successfully complete probation or a diversion community corrections program in lieu of being incarcerated in a Department of Corrections facility.

Lawmakers also established a diversion program with the passage of **HB 1156**. The measure eliminated adult deferred prosecution as a sentencing option and replaced it with the option of an adult diversion program. Under the new statute, a defendant and district attorney may

enter into a diversion agreement for up to two years prior to proceeding with the criminal case against the defendant. During the two-year diversion period, defendants are subject to supervision conditions.



GEORGIA

AUTHORIZED JUDGES TO DEPART FROM MANDATORY MINIMUM SENTENCES

HB 349 authorized judges, in some circumstances, to depart from mandatory minimum sentences for certain drug offenses. Specifically, the legislation seeks to allow judges to consider the role of defendants in drug cases, for example sentencing low-level players to an appropriate sentence when warranted. The measure also codified statutory authority for the Georgia Council on Criminal Justice Reform.



HAWAII

EXPANDED JUDICIAL DISCRETION FOR CERTAIN DRUG OFFENSES

Lawmakers cemented their commitment to judicial discretion for certain drug offenses with the passage of **SB 68**. The measure provides judges discretion in setting prison terms for persons convicted of certain class B and class C felony drug offenses and provides for sentences proportionate to the offense and related conduct. Prior to the change in law, a class B felony offense carried a maximum prison term of 10 years and a class C felony offense carried a maximum prison term of 5 years or a possible term of 5 years probation with up to 12 months in prison.



AUTHORIZED SENTENCE REDUCTION FOR CERTAIN OFFENSES

IDAHO

S 1151 expands provisions relating to relief from certain felony convictions by authorizing a court to reduce certain felony convictions to misdemeanors. The court is authorized to reduce the conviction if fewer than five years have elapsed with the approval of the prosecuting attorney. The measure lists various criminal offenses eligible for a sentence reduction, including certain assault and property offenses.



AUTHORIZED MEDICAL MARIJUANA

ILLINOIS

HB 1 authorized use of medical marijuana for patients living with 42 designated illnesses including cancer, AIDS, and multiple sclerosis. Under the new law, a person can be prescribed up to 2.5 ounces of marijuana over a two-week period and must have an established relationship with their doctor. Patients would have to buy marijuana from one of 60 dispensing centers throughout the state and would not be allowed to legally grow their own. New Hampshire also authorized medical marijuana in 2013, expanding the number of states that authorize possession of medical marijuana to 20.



MARYLAND ELIMINATED THE DEATH PENALTY

Maryland became the 18th state to repeal the death penalty with the passage of **SB 276**. Governor Martin O'Malley stated following the bill's passage,

"I've felt compelled to do everything I could to change our law, repeal the death penalty, so that we could focus on doing the things that actually work to reduce violent crime."

Prior to repeal, five men had been sentenced to death in the state; their sentences were not impacted by the change in law. Since 2007, five other states – New Jersey, New York, New Mexico, Illinois and Connecticut – have eliminated the death penalty as a sentencing option.



CREATED TRUTH-IN- SENTENCING TASK FORCE

MISSISSIPPI

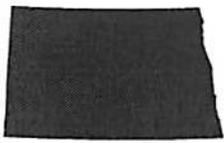
Lawmakers established a Truth-in-Sentencing Task Force with the passage of **HB 1231**. The task force's statutory mission is to study and make recommendations for improving the relationship between the corrections system and other components of the criminal justice system in Mississippi. Specifically, the task force is responsible for reviewing any sentencing disparities among persons incarcerated in state prisons for the same offense and documenting the number of persons sentenced according to mandatory minimum penalties. Additionally, the task force is charged with identifying critical problems in the criminal justice system, assessing its cost-effectiveness, and publishing a report detailing findings and recommendations.



AUTHORIZED MEDICAL MARIJUANA

NEW HAMPSHIRE

The passage of **HB 573** authorized possession of marijuana for medical purposes. The measure qualified patients with "chronic or terminal diseases" or "debilitating medical conditions" to obtain marijuana from four non-profit, state-licensed alternative treatment centers. This change in law expands the policy to all New England states, comprising six of the 20 states – and the District of Columbia – that have enacted such reforms.



INCREASED MONETARY THRESHOLDS FOR CERTAIN PROPERTY OFFENSES

NORTH DAKOTA

Lawmakers increased monetary threshold amounts for certain property offenses with the enactment of **SB 2251**. The change in policy reflects that monetary triggers for specified criminal offenses have become reduced in value over time as a result of inflation. Modernizing property offense thresholds may reduce incarceration. In recent years, other states including California, Delaware, Maryland, Montana, Oregon, and Washington, have enacted similar provisions.

and authorized judges to impose a downward departure from mandatory minimum sentences for certain drug trafficking offenses. These changes were to the presumptive sentence; judges continue to have the authority to provide an individualized sentence that increases or decreases the presumptive sentence.

- Increased early release from 30 days to 90 days for eligible prisoners whose transitional release plan is approved by the Department of Corrections. The transitional leave program provides resources and support to incarcerated individuals as they prepare to re-enter the community. Persons sentenced prior to 1989 and those convicted of Measure 11 offenses are not eligible for this program.



AUTHORIZED RACIAL IMPACT STATEMENTS AND MODIFIED CRIMINAL PENALTIES FOR CERTAIN OFFENSES UNDER JUSTICE REINVESTMENT INITIATIVE

OREGON

SB 463 requires the Oregon Criminal Justice Commission, at the written request of one legislative member from each political party, to prepare a statement on proposed legislation or a potential measure's impact on persons of color impacted by proposed criminal justice policies. The measure was patterned after legislation in Iowa, which is among several states, including Connecticut and Minnesota, that have similar policies. In recent years other states, including Arkansas, Texas, and Maryland, have introduced similar measures.

HB 3194 contained other provisions that established the Task Force on Public Safety that was charged with monitoring the implementation of the legislation. The measure also established the Justice Reinvestment Grant Program, to be administered by the state's Criminal Justice Commission. The program will allocate grants to provide a continuum of community based programs to reduce recidivism and decrease the county's use of incarceration.

Lawmakers also enacted several sentencing changes with the passage of **HB 3194**, the state's Justice Reinvestment Initiative (JRI). The bill included various provisions targeted to address prison growth and incentives for local communities to change criminal justice policies and practices. Provisions included:

- Realigned sentencing options for several Measure 57 offenses. Criminal penalties for certain drug and property offenses were enhanced in 2008 via ballot measure. The new provision shortened the presumptive sentence for identity theft and third degree robbery, allowed probation instead of prison for certain drug trafficking offenses,



REQUIRES TIME SERVED BE USED TO CALCULATE SENTENCING

SOUTH CAROLINA

H 3193 required that time served under monitored house arrest on a pretrial basis must be included when calculating the amount of time served for purposes of sentencing.



MODIFIED CERTAIN SENTENCES UNDER JUSTICE REINVESTMENT INITIATIVE

SOUTH DAKOTA

Under **SB 70**, lawmakers reclassified certain drug offenses and property offenses as well as other provisions. The measure created a tiered controlled-substance statute to distinguish between drug users and drug dealers. Additionally, **SB 70** reduced the punishment for drug possession to a Class 5 felony triggering a five-year

maximum sentence while increasing sentences to a 15-year maximum for serious drug manufacturing and drug distribution offenses. Previously, dealers and drug users were subject to a Class 4 felony offense punishable by up to 10 years in prison. The bill included a provision creating an additional criminal offense of drug possession based on a positive drug test. Prior to SB 70, the practice of charging persons with drug possession was ruled constitutional by the South Dakota Supreme Court. However, SB 70 codified the practice into statute.

The bill also modified threshold amounts and reclassified penalties for certain property offenses. SB 70 reduced sentences for grand theft of less than \$5,000 in value and for certain low-level burglary offenses. However, the bill increased penalties for serious grand theft offenses of more than half a million dollars in value, enhancing the maximum penalty to 25 years.

SB 70 included additional provisions such as establishing a structure for specialty courts, created an oversight council to monitor implementation of the legislation, enhanced prison terms for certain persons with repeat offenses, and developed a funding structure to address anticipated demand of incarceration at the local level in county jails.



ELIMINATED CRIMINAL PENALTIES FOR MARIJUANA POSSESSION OFFENSES

VERMONT Legislators removed criminal penalties for up to one ounce of marijuana with the passage of SB 200. The bill imposes a \$200 fine for possession for a first-time offense. Fines increase for subsequent offenses. Under the law, marijuana possession will no longer result in the creation of a criminal record.

WEST VIRGINIA



EXPANDED CERTAIN SENTENCING OPTIONS THROUGH JUSTICE REINVESTMENT INITIATIVE

SB 371 included several provisions with the intent of addressing prison overcrowding in the state's correctional facilities. The measure authorized judges to sentence certain non-violent defendants to prison with an option of early release that requires community supervision; the provision was not retroactive. The bill also requires all counties in the state to establish drug courts and provides authority for courts to use a pretrial risk assessment instrument. Prior to the policy change, at least 30 of West Virginia's 55 counties had established a specialty court.

"This legislation will usher in a new era of how we handle substance abuse in our state. No longer will we simply lock people up and pretend the problem will go away. We will combine treatment with effective supervision to hold offenders accountable and break the cycle of crime and addiction," stated Jeffrey Kessler, West Virginia Senate President.

PROBATION AND PAROLE

Reducing probation or parole revocations to prison is a key strategy for addressing the scale of prison admissions that lawmakers and practitioners are increasingly employing. During 2013, several states adopted changes to supervision policies to avert potential growth in the prison population or to reduce overcrowding. Diverting prison-bound defendants as in South Dakota, by expanding the range of offenses which are eligible for community supervision, may help reduce admissions to correctional facilities. Additionally, extending earned release policies for persons serving probation or parole terms can reduce the number of people under supervision and subject to revocation. At the state level, most legislatures have the authority under state statute to address length of stay and supervision practices through policy change.

ILLINOIS

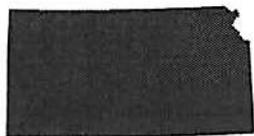


ESTABLISHED SECOND CHANCE PROBATION

HB 3014 created a “second chance probation” option for persons convicted of non-violent offenses. The measure allowed a conviction to be cleared

from a defendant’s record after following successful completion of at least a two-year period of probation. This sentencing option gives prosecutors and judges more flexibility when charging and sentencing certain defendants.

KANSAS



AUTHORIZED EARLY DISCHARGE FROM PROBATION

Under **HB 2170**, lawmakers authorized early discharge from probation for persons meeting certain requirements, including a low risk score, payment of all restitution, and compliance with probation supervision for twelve months. Eligibility includes persons sentenced to

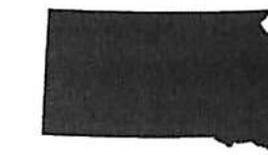
community corrections facilities and those who have a non-prison sanction including a suspended sentence. The measure authorized earned credits to be subtracted from an individual’s sentence but not added to the post-release supervision term except for those sentenced for certain sex offenses. Persons convicted of certain sex offenses have their post-release supervision term extended by the amount of good time earned while incarcerated.



OREGON

EARNED DISCHARGE FOR PROBATION AND POST-PRISON SUPERVISION

SB 463, the state’s Justice Reinvestment Initiative measure, also authorized earned time credits for persons on probation or post-prison supervision. Under the legislation, individuals who successfully complete the terms of probation or parole may have their supervision term reduced by 50 percent, but not less than six months. The legislation is anticipated to result in fewer people on supervision.



SOUTH DAKOTA

MODIFIED PROBATION AND PAROLE POLICIES

SB 70, the state’s Justice Reinvestment Initiative, contained several provisions relating to probation, reducing recidivism for persons on probation and parole, and earned discharge from supervision. Lawmakers authorized presumptive probation for certain non-violent felonies – Class 5 and 6 offenses – limiting punishment to community supervision unless a court determines aggravating circumstances pose a risk to public safety.

The measure also included a provision requiring the use of evidence-based practices that codified the practice of imposing graduated sanctions for certain probation and parole violations into statute. The intent behind the

provision is to reduce revocations to prison for certain technical supervision populations.

Lawmakers also authorized earned discharge from supervision for individuals who follow the conditions of probation and parole, providing an incentive for compliance and allowing probation and parole officers to focus on higher-risk offenders.



VIRGINIA

ADJUSTED PAROLE REVIEW PROCESS

HB 2103 required the Parole Board to ensure that each person eligible for parole review receives a timely and thorough review of his or her suitability for release including any post-sentencing factors. If the Board denies the person parole, the Board is required to deliver a written, fact-specific, and individualized statement of the reasons for the denial.



WEST VIRGINIA

REQUIRES POST-RELEASE SUPERVISION FOR CERTAIN OFFENSES

Lawmakers made several changes to probation and parole policies under the state's justice reinvestment package. **SB 371** mandated post-release supervision for one year following the completion of a prison term for persons convicted of certain offenses. The measure also requires probationers deemed moderate- to high-risk to report to day-report centers and outlines a process for services for which those persons may be eligible. SB 371 also codifies into statute jail stay lengths for first and second violations of probation conditions and requires a revocation of supervision for probationers who violate conditions for a third time.

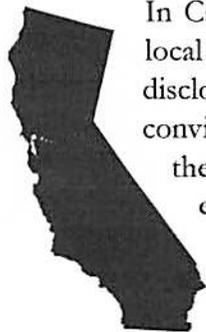
COLLATERAL CONSEQUENCES

The collateral consequences associated with a criminal conviction can exclude individuals from certain job opportunities, limit civic participation, and restrict access to certain public benefits. The policies that marginalize persons with prior convictions vary widely from state to state. During 2013, lawmakers in at least ten states enacted policies to limit employment barriers and restore civil rights.

CALIFORNIA, ILLINOIS, MARYLAND, MINNESOTA, AND RHODE ISLAND:

REDUCED BARRIERS TO EMPLOYMENT THROUGH "BAN THE BOX" POLICIES

Persons with felony convictions may find seeking employment a significant barrier to participating fully in the community. The difficulty in obtaining or maintaining employment has been identified as a major factor in recidivism. Efforts to change policies that inquire into a job applicant's criminal justice involvement are known as "Ban the Box" and have been growing since Hawaii first took the step 15 years ago. At least ten states – California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Mexico and Rhode Island – have enacted these policy reforms. During 2013, at least five states – California, Illinois, Maryland, Minnesota, and Rhode Island – changed or modified these policies.



CALIFORNIA

In California, **AB 218** restricted a state or local agency from asking an applicant to disclose information regarding a criminal conviction until the agency has determined the applicant meets the minimum employment qualification for the position. California eliminated the box asking about convictions on state job applications in 2010, under an executive order by former Governor Arnold Schwarzenegger.



ILLINOIS

During 2013, Illinois Governor Pat Quinn issued an administrative order that prohibits state agencies from asking job applicants about their criminal history before beginning to evaluate the individual's knowledge, skills and abilities.

"A law-abiding citizen's past mistakes should not serve as a lifetime barrier to employment," Governor Quinn said. "Creating opportunities for ex-offenders to obtain gainful employment and reach their full potential as a member of society is one of the most effective tools for reducing recidivism. As we know, the best tool to reduce poverty, drive down crime and strengthen the economy is a job."

MARYLAND



Under **SB 4**, Maryland lawmakers prohibited any state appointing authority in the Executive, Legislative, or Judicial Branch from inquiring into the criminal record or history of an applicant for employment until the applicant has been given an opportunity for an interview. Similar to "ban the box" provisions enacted in other states, the bill includes exemptions for several agencies including the Department of Public Safety and Correctional Services. An appointing authority may still notify an applicant that prior criminal convictions could prohibit employment for some positions. The bill also includes an annual related reporting requirement for the Department of Budget and Management (DBM) that terminates in 2018.



MINNESOTA

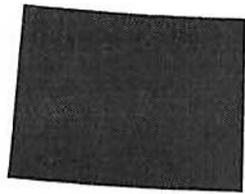
During 2013, Minnesota lawmakers expanded their “ban the box” law to include private employers with the enactment of **SF 523**. The new law requires public and private employers to wait until a job applicant has been selected for an interview before asking about criminal records or conducting a criminal record check.

It makes it illegal for employers to disqualify a person from employment or to deny them a license because of their criminal background unless it is directly related to the position. The measure authorizes Minnesota’s Commissioner of Human Rights to investigate violations, issue written warnings, and impose financial penalties.

RHODE ISLAND



Lawmakers in Rhode Island authorized **H 5507**, legislation that restricts employers from including questions on job applications regarding charges, arrests, and criminal convictions. Under this measure, prospective employers will only be able to ask about an applicant’s criminal background at the first interview and any time after, but not during the application process.



COLORADO

AUTHORIZED SEALING OF CERTAIN CONVICTIONS

SB 123 contained several provisions relating to collateral consequences, including allowing for the sealing of records and specifying notification provisions for persons seeking to have their record sealed. This bill allowed an individual to petition the court to seal certain conviction records involving petty offenses or municipal violations. The petitioner is subjected to a three-year waiting period and is ineligible if he or she has been charged or convicted of a new criminal offense during that time.

The measure clarifies other provisions relating to court orders of collateral relief. Previously, courts could grant an order of collateral relief to defendants who entered into alternative sentence agreements such as probation or community corrections. An order of collateral relief is

meant to improve the defendant’s likelihood of success in the alternative sentencing program by addressing barriers to employment and housing, among other collateral consequences. The bill states that an order may relieve a defendant of any of the collateral consequences of a criminal conviction that the judge believes will assist the defendant in completing probation or a community corrections sentence, but it cannot apply to collateral consequences imposed by potential employment with certain state law enforcement agencies.



DELAWARE

ELIMINATED VOTER REGISTRATION WAITING PERIOD FOR CERTAIN FELONY CONVICTIONS

Lawmakers enacted the second leg of a constitutional amendment with the passage of **HB 10**. This change eliminates the five-year waiting period after an individual has completed a prison sentence and all other obligations to the state before having their voting rights restored. Prior to reform, the state disenfranchised 46,600 individuals, including over 28,000 who had completed their sentence. African Americans comprised 45% of disenfranchised voters in Delaware. Delaware was one of 12 states in which a felony conviction could result in the loss of voting rights post-sentence. House Bill 10 moved Delaware in line with a majority of states, including neighboring Pennsylvania, Maryland, and West Virginia, with less restrictive disenfranchisement policies.



ILLINOIS

STREAMLINED SEALING/EXPUNGEMENT PROCESS

Lawmakers passed **HB 3061**, a measure that expanded the list of offenses for which sealing a defendant’s criminal record history may be sought, including a Class 3 felony offense for possession with intent to manufacture or deliver a controlled substance, and limits the sealing of Class 2 offenses under Section 401 of the Illinois Controlled Substances Act to possession with intent to manufacture or deliver a controlled substance (excluding manufacture and delivery offenses). The bill provides

factors for the court to consider in granting or denying a petition to expunge or seal a criminal history record.

Lawmakers also streamlined the criminal record expungement and sealing process with the passage of **HB 2470**. The measure imposes time limits on certain expungement proceedings to ensure they are heard in a timely manner and requires that if a judge rules in the defendant's favor, that ruling must be delivered promptly to the proper authorities.



EXPANDED EXPUNGEMENT PROVISIONS

INDIANA

HB 1482 expands the list of offenses that petitioners may request a court to seal or expunge from arrest or conviction records. The bill authorizes the sealing on non-conviction arrests after one year and expungement of misdemeanor records after five years for various offenses including Class D felonies that have been reduced to misdemeanors.

"Making a mistake doesn't mean that you're necessarily a bad person," stated bill sponsor State Rep. Jud McMillin (R). "Making a mistake means you're a human being."



NEVADA

ELIMINATED DEPORTATION AS COLLATERAL CONSEQUENCE FOR CERTAIN OFFENSES

SB 169 altered the landscape of misdemeanor sentencing by reducing the maximum possible sentence for gross misdemeanor offenses from 365 days to 364 days. This modest change alters the collateral consequence of deportation that noncitizen defendants face by ensuring that no misdemeanor conviction can any longer be classified as an "aggravated felony" under immigration law (a classification that results in virtual automatic deportation). Lawmakers in Washington state enacted a similar measure in 2011.



UTAH

EXPANDED EXPUNGEMENT POLICY TO INCLUDE CERTAIN DRUG OFFENSES

HB 33 expands Utah's expungement provisions relating to certain drug possession and paraphernalia offenses. The bill amends the process to expunge drug offenses by adding another felony and misdemeanor to the list that can be expunged. The measure requires the petitioner to be free of illegal substance abuse and to successfully manage their substance addiction.

JUVENILE JUSTICE

Lawmakers continue to reform sentencing policies for juvenile defendants by prioritizing alternatives to incarceration and expanding parole review processes. The framework for addressing juvenile crime has shifted in recent years to emphasize prevention and diversion programs. During 2013, officials enacted policy changes that reduced out-of-home placement for youth, expanded sentencing options, and limited incarceration under certain circumstances. Policymakers in several states also modified life without parole policies for certain youth.



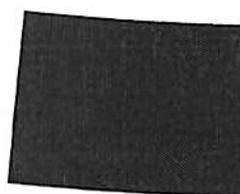
AUTHORIZED PAROLE HEARINGS FOR LONG-TERM INCARCERATED YOUTH

CALIFORNIA

SB 260 requires the Board of Parole Hearings to conduct a parole release hearing for certain incarcerated youth convicted of specified crimes prior to being 18 years of age. The bill would make a person eligible for parole release during the 15th year of incarceration if they meet specified criteria and had received a determinate sentence, during the 20th year if the person had received a sentence that was less than 25 years to life, and during the 25th year of incarceration if the person had received a sentence of 25 years to life. The measure requires the board, in reviewing a prisoner's suitability for parole, to give weight to the diminished culpability of juveniles as compared to adults. Persons sentenced pursuant to the Three Strikes law, Jessica's Law, or sentenced to life in prison without the possibility of parole are ineligible for review authorized by SB 260.

Prior to the enactment of SB 260, the board was required to meet with each incarcerated person during his or her third year of incarceration to make recommendations relevant to granting post-conviction credit. The measure delayed the board's meeting with eligible persons, including those eligible to be considered for a youth offender parole hearing, to the sixth year prior to the individual's minimum eligible

parole release date. The bill required the board to provide an inmate additional, specified information during this consultation, including individualized recommendations regarding work assignments, rehabilitative programs, and institutional behavior, and to provide those findings and recommendations, in writing, to the inmate within 30 days following the consultation.



COLORADO

REDUCED JUVENILE BED CAP AND EXPANDED ELIGIBILITY TO SEAL CERTAIN JUVENILE RECORDS

State lawmakers enacted several measures to reduce incarceration of incarcerated youth and address collateral consequences. **SB 177** reduced the bed cap for the Division of Youth Corrections (DYC) in the Department of Human Services (DHS) from 422 to 382. The DYC oversees youths between the ages of 10 and 21 who have been detained, committed, or paroled in Colorado's juvenile justice system. In recent years, the number of youth held in DYC facilities has decreased markedly. The lower incarceration population allowed the bed cap to be reduced.

HB 1082 expanded the categories of juvenile offenses that can be sealed under Colorado law. Prior to the policy change, certain juvenile offenders, including persons convicted of certain violent offenses and unlawful sexual behavior, were excluded from expungement provisions. However, HB 1082 renders youth who have failed to pay court-ordered restitution ineligible.



MODERNIZED PROVISIONS RELATED TO JUVENILE PROCEEDINGS

GEORGIA

HB 242, a comprehensive juvenile justice reform measure, revised several provisions relating to the state's juvenile justice system. The revisions contain significant juvenile justice reforms, including alternatives to incarceration for youth who have committed status offenses or who are classified as low-to-medium risk, increased emphasis on risk assessment, increased attorney presence throughout the entire sequence of juvenile proceedings, and a reclassification of designated felonies to include a separate "Class A" and "Class B," so that less serious offenses carry shorter maximum sentences. The measure's provisions are estimated to save \$85 million over five years and reduce recidivism by focusing out-of-home facilities on youth convicted of serious offenses and investing in evidence-based programs.

"We acted because Georgia could not afford its own numbers," stated Governor Nathan Deal. "Not when we have more than half of all youth offenders ending up back in a detention center or prison within three years. Not when we have each youth in a detention center costing Georgia's taxpayers \$90,000 or more every year and not when 40 percent of juveniles in detention facilities are considered a low risk to reoffend. We worked hard and we found ways to keep low-risk offenders out of detention centers and save taxpayer dollars, nearly \$85 million over five years, while also eliminating the need for two new facilities. We did all this while not only maintaining but improving public safety."

ILLINOIS AND MASSACHUSETTS: RAISED THE AGE OF JURISDICTION FOR JUVENILE DEFENDANTS



ILLINOIS

HB 2404 in Illinois raised the age of juvenile court jurisdiction from 17 to 18 for youth charged with non-violent felonies. When signed into law, the bill would put 17-year-olds under the jurisdiction of juvenile, not adult court. The bill expands on legislation passed in 2009 that made the same change for youth charged with misdemeanors.



MASSACHUSETTS

In Massachusetts, HB 1432, "An Act Expanding Juvenile Jurisdiction," required juvenile courts to retain jurisdiction over persons who commit crimes when they are younger than 18. The new law also provides for 17-year-olds to be ordered into the custody of the Department of Youth Services rather than into an adult prison or jail. In the case of violent criminal activity, though, the juvenile court will retain the discretion to impose an adult sentence. The law also provides that 17-year-olds will no longer receive an adult criminal record and that they will benefit from other safeguards provided to juveniles.

"I am proud to sign legislation that creates a better balance of holding our most violent offenders accountable, while giving our young people the opportunity for rehabilitation and reform that they deserve," said Governor Deval Patrick. "We are working hard to make the investments in education and job training to close achievement gaps and give every child the opportunity to succeed. But whether we like it or not, some children still fall through the cracks and we must not give up on them."



AUTHORIZED SENTENCING ALTERNATIVES FOR CERTAIN YOUTH

INDIANA

HB 1108 provided judges with new sentencing alternatives for youth under age 18 in Indiana's criminal courts. The measure authorized more discretion for judges when sentencing juveniles convicted of certain felonies. The court can now order those defendants to be placed in a juvenile facility instead of an adult facility, where age appropriate rehabilitative services are available. The "dual sentencing" provision allows a judge to send a youth convicted as an adult into a juvenile facility until he or she turns 18. When the juvenile reaches the age of 18, the judge can reassess the sentence and send the youth to adult prison to serve the criminal sentence, or sentence him or her into a community-based corrections program or in-home incarceration.

MARYLAND



REQUIRED REPORTING ON USE OF GRADUATED SANCTIONS AND REDUCED OUT OF HOME PLACEMENT FOR CERTAIN YOUTH

Legislators enacted two measures that may reduce commitments to juvenile incarceration facilities. **SB 536** required the Department of Juvenile Services to report on its creation and implementation of graduated responses across Maryland. Graduated responses include sanctions and incentives that give youth timely consequences to their behavior, whether good or bad. The intent behind the measure is to create an array of options that do not rely on incarceration because of the lack of other sanctions.

Lawmakers also limited the juvenile offenses that can trigger out-of-home placement with the enactment of **HB 916**. The measure restricts out-of-home placement for several offenses including possession of marijuana, disturbing the peace, and trespassing unless certain factors arise.



AUTHORIZED EXPUNGEMENT FOR PERSONS WITH CERTAIN JUVENILE CONVICTIONS

MISSISSIPPI

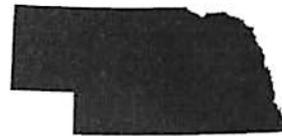
HB 1043 authorized any person who was under the age of eighteen years when he or she was convicted of a felony to petition the sentencing court to expunge one conviction from all public records. Individuals are eligible to file a petition five years after successful completion of all terms and conditions of their sentence. Statutory exceptions include specified violent offenses.



MODIFIED PROVISIONS RELATED TO CERTAIN JUVENILES CERTIFIED AS ADULTS

MISSOURI

SB 36 made changes in the state's practices for youth subject to the dual jurisdiction of adult and juvenile courts. The measure allowed eligible youth who have been convicted or pled guilty in adult court to remain in the custody of Missouri's Department of Youth Services. That means they can be housed in a youth-oriented facility and receive a range of education and counseling services unavailable to persons in adult correctional facilities.



ENACTED COMPREHENSIVE MEASURE TO MODIFY JUVENILE JUSTICE PROVISIONS

NEBRASKA

Lawmakers passed **LB 561** with the intent of overhauling the state's juvenile justice system. The measure establishes the Office of Juvenile Assistance (OJA) under the Supreme Court.

"I just hope every day we can make improvement, that we can help more kids, that we can keep them out of the prison system," Governor Dave Heineman told reporters.

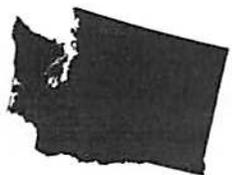
The OJA coordinates diversion programming, violence prevention programming, the distribution of juvenile grants and the collaboration between juvenile justice entities and the Juvenile Justice Institute, the University of Nebraska Medical Center and national experts. LB 561 shifts the supervision of youth in the system to the probation department and prioritizes the strategy of juvenile defendants to receive treatment in their homes and communities whenever possible utilizing evidence-based practices. The measure provides additional resources to the County Juvenile Services Aid program to help counties develop community-based service options.

NEVADA



LIMITED JAIL STAYS FOR CERTAIN YOUTH

AB 207 limits to thirty days the period that a juvenile court can sentence certain youth to county jail. Under current law, if a person who is at least 18 years of age but less than 21 years of age is under juvenile probation or parole supervision, the juvenile court may order the person to be placed in county jail for the violation of probation or parole.



WASHINGTON

HB 1524 authorizes a police officer to take a youth who has committed a non-serious misdemeanor and whom the officer believes has a mental health disorder to a location other than juvenile incarceration, such as a treatment program. The measure also increases the number of times the youth can be diverted from court—from two to three times—and the number of counseling hours she or he can access—from 20 to 30—making it more likely that the youth will receive needed services.

ESTABLISHED MENTAL HEALTH DIVERSION OPTION FOR CERTAIN JUVENILES

ARKANSAS, DELAWARE, LOUISIANA, NEBRASKA, SOUTH DAKOTA, TEXAS, WYOMING AND UTAH:

MODIFIED PAROLE REVIEW PROCESSES FOR CERTAIN YOUTH

At least eight states enacted policy change to respond to the Supreme Court's *Miller v. Alabama* decision that determined mandatory life without parole sentences for juveniles convicted of homicide violate the Eighth Amendment. Lawmakers restructured sentencing practices in several states – Arkansas, Delaware, Louisiana, Nebraska, and South Dakota – that previously imposed mandatory life without parole for youth convicted of certain crimes. Three other states – Texas, Wyoming, and Utah – also modified their parole processes for certain youth.

- Arkansas lawmakers enacted **HB 1993**, a measure that allows youth convicted of homicide offenses to become eligible for parole after serving a minimum of 28 years.
- **SB 9** in Delaware allows individuals serving 20 years or more for a conviction before their 18th birthday to have their case reviewed by a judge for resentencing.
- **HB 152** in Louisiana modified that state's sentencing structure for certain youth. The measure permits youth convicted of homicide offenses to become eligible for parole after serving a minimum of 35 years.
- Legislators in Nebraska authorized **LB 44**, a bill that requires judges to consider mitigating factors at sentencing in addition to a comprehensive mental health evaluation. The bill requires persons sentenced under the statute to serve a minimum of 40 years.
- South Dakota lawmakers enacted **SB 39**, a measure that provides judges with discretion when sentencing youth convicted of first or second-degree murder. The bill allows for a sentence of any term-of-years sentence up to life in prison without parole.
- Texas lawmakers amended the state's sentencing structure, during the second special session with **SB 2**. The measure relates to the punishment of a capital felony committed by an individual younger than 18 years of age. Prior to the ruling

in *Miller v. Alabama*, Texas policymakers imposed a life with the possibility of parole in 40 years for juvenile defendants aged 17 or younger. SB 2 expanded that sentencing option to include defendants aged 18.

- Wyoming lawmakers authorized **HB 23**, a measure that requires youth convicted of first degree murder to receive parole review after serving a minimum of 25 years.
- **SB 228** in Utah authorizes parole eligibility for youth convicted of aggravated first-degree murder. Youth sentenced under this provision must serve a minimum of 25 years.

POLICY RECOMMENDATIONS

During 2013, lawmakers enacted a number of legislative changes to address the high rate of incarceration at the state level. Documented changes in sentencing policy and practice over a number of years demonstrate that officials can adopt initiatives targeted to reduce state prison populations without compromising public safety. In 2012, 28 states achieved modest declines in their prison populations; some have downscaled prison capacity by closing correctional facilities. Stakeholders building momentum for policy reforms to address the scale of incarceration should consider the following options during the 2014 legislative session:

LIMIT THE USE OF INCARCERATION AS A SENTENCING OPTION

There is general agreement today that the increase in the rate of incarceration was largely the result of deliberate changes in policy and practice that imposed punitive sentences. The nation's sentencing framework has increased both the numbers of people entering the system and how long they remain under correctional control. During 2013, several states adopted changes to their sentencing practices. Oregon required racial impact statements for any change to criminal laws or sentencing codes. Hawaii and Idaho authorized judicial discretion in setting prison terms for certain felony offenses. Despite these changes, mass incarceration will continue to plague the criminal justice system due to mandatory minimums and an increasing number of prisoners serving life sentences. To address the nation's prison problem, policymakers must both enhance diversion options for less serious offenders and reconsider the value of excessively long sentences.

EXPAND ALTERNATIVES TO INCARCERATION FOR JUVENILES

In recent years, a new approach to juvenile justice has emerged. After more than a decade of policies that relied heavily on the incarceration and imprisonment of youth, the number of youth incarcerated in state and county facilities totaled more than 100,000 juveniles in 2000. Since then, changes in approach and practice have decreased the number of youth in such facilities by nearly 40%. Policies that have been identified to reduce reliance on juvenile incarceration include the expansion of evidence-based alternatives to incarceration, intake procedures that minimize use of secure-detention, and limits on the use of incarceration for minor offenses. During 2013, Georgia and Nebraska took steps to adopt this framework. Additional state reforms hold the promise of further reductions in juvenile incarceration.

SCALE BACK COLLATERAL CONSEQUENCES

More than 19 million persons have felony convictions, most of whom have either completed their sentences or are under supervision in the community. They are often adversely affected by barriers to employment, excluded from social safety net programs, and may be barred from public or private housing. These collateral penalties impose substantial obstacles to social and economic participation and undermine fairness. In 2013, states such as Colorado and Indiana enacted policies to limit the scope of collateral consequences. State legislators should consider expanding voting rights for persons under correctional supervision and eliminating restrictions on access to welfare and food stamp benefits for persons with felony drug convictions. Lastly, lawmakers can address barriers to employment through "ban the box" provisions that delay inquiry into a prospective job applicant's criminal history until the applicant receives an interview.



The State of Sentencing 2013: Developments in Policy and Practice

JANUARY 2014

Further reading available on our website:

- On the Chopping Block 2013: State Prison Closings (2014)
- The State of Sentencing 2012: Developments in Policy and Practice (2013)
- Ending Mass Incarceration: Social Interventions That Work (2013)

The Sentencing Project works for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.

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Exhibit 3



Deterrence in Criminal Justice

Evaluating Certainty vs. Severity of Punishment

Valerie Wright, Ph.D.

November 2010



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The Sentencing Project is a national non-profit organization engaged in research and advocacy on criminal justice policy issues.

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Over the past several decades state and federal incarceration rates have increased dramatically. As a consequence of more punitive laws and harsher sentencing policies 2.3 million people are incarcerated in the nation's prisons and jails, and the U.S. leads the world in its rate of incarceration.

Sentencing systems and incarceration traditionally have a variety of goals, which include incapacitation, punishment, deterrence and rehabilitation. In recent decades, sentencing policy initiatives have often been enacted with the goal of enhancing the deterrent effect of the criminal justice system. Under the rubric of "getting tough on crime," policies such as mandatory minimums, truth in sentencing, and "three strikes and you're out" have been designed to deter with the threat of imposing substantial terms of imprisonment for felony convictions.

While the criminal justice system as a whole provides some deterrent effect, a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits. Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits. This briefing paper provides an overview of criminological research on these relative impacts as a guide to inform future policy consideration.

CONCEPTUALIZING DETERRENCE

In broad terms punishment may be expected to affect deterrence in one of two ways. First, by increasing the certainty of punishment, potential offenders may be deterred by the risk of apprehension. For example, if there is an increase in the number of state troopers patrolling highways on a holiday weekend, some drivers may reduce their speed in order to avoid receiving a ticket. Second, the severity of punishment may influence behavior if potential offenders weigh the consequences of their actions and conclude that the risks of punishment are too severe. This is part of the logic behind “three strikes,” and “truth in sentencing” policies, to utilize the threat of very severe sentences in order to deter some persons from engaging in criminal behavior.

One problem with deterrence theory is that it assumes that human beings are rational actors who consider the consequences of their behavior before deciding to commit a crime; however, this is often not the case. For example, half of all state prisoners were under the influence of drugs or alcohol at the time of their offense.¹ Therefore, it is unlikely that such persons are deterred by either the certainty or severity of punishment because of their temporarily impaired capacity to consider the pros and cons of their actions.

Another means of understanding why deterrence is more limited than often assumed can be seen by considering the dynamics of the criminal justice system. If there was 100% certainty of being apprehended for committing a crime, few people would do so. But since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially reduced. Clearly, enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions.

¹ Christopher Mumola. “Substance Abuse and Treatment, State and Federal Prisoners, 1997.” Bureau of Justice Statistics Special Report, 1999.

Economists often come to different conclusions than criminologists on the value of harsher sentences in reducing crime. While criminologists tend to regard various legal threats as the result of a complex and unpredictable process, economists approach the issue along the lines of a rational choice perspective that considers the risk and benefits of engaging in crime; sanctions merely represent the expected price of engaging in criminal behavior. In critiquing this perspective, Michael Tonry, a leading scholar on crime and punishment, contends that “Such research is incapable of taking into account whether and to what extent purported policy changes are implemented, whether and to what extent their adoption or implementation is perceived by would-be offenders, and whether and to what extent offenders are susceptible to influence by perceived changes in legal threats. At the very least, macro-level research on deterrent effects should test the null hypothesis of no effect rather than the price theory assumption that offenders’ behavior will change in response to changes in legal threats.”²

Another problem in assessing deterrence is that in order for sanctions to deter, potential offenders must be aware of sanction risks and consequences before they commit an offense. In this regard, research illustrates that the general public tends to underestimate the severity of sanctions generally imposed.^{3,4} This is not surprising given that members of the public are often unaware of the specifics of sentencing policies. Potential offenders are also unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect. The absence of such data on awareness of punishment risks makes it difficult to draw conclusions regarding the deterrent effects of sanction levels and prospects. Below we explore these outcomes in greater detail.

² Michael Tonry. “Learning from the Limitations of Deterrence Research” in *Crime and Justice: A Review of Research* edited by Michael Tonry. The University of Chicago Press, 2008.

³ Kirk R. Williams, Jack P. Gibbs, and Maynard L. Erickson, “Public Knowledge of Statutory Penalties: The Extent and Basis of Accurate Perception,” *Pacific Sociological Review*, 23(1), 1980.

⁴ Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, and P-O. Wikstrom, “Criminal Deterrence and Sentence Severity: An Analysis of Recent Research,” Oxford: Hart Publishing, 1999.

CERTAINTY VS. SEVERITY OF PUNISHMENT

Criminological research over several decades and in various nations generally concludes that enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment. Key findings in this regard include the following:

- The Institute of Criminology at Cambridge University was commissioned by the British Home Office to conduct a review of research on major studies of deterrence. Their 1999 report concluded that "...the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."⁵ In addition, in reviewing macro-level studies that examine offense rates of a specific population, the researchers found that an increased likelihood (certainty) of apprehension and punishment was associated with declining crime rates.⁶
- Daniel Nagin and Greg Pogarsky, leading scholars on deterrence, conclude that "punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences."⁷

Similar findings are observed in micro-level studies on deterrence that assess the likelihood of individuals engaging in crime. People who perceive that sanctions are more certain tend to be less likely to engage in criminal activity. Scenario-based research using self-reports that examine the effect of certainty of punishment on individual behavior has shown that as the perceptions of the risk of arrest for petty

⁵ Ibid.

⁶ Ibid.

⁷ Daniel Nagin and Greg Pogarsky. "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology*, 39(4), 2001.

theft, drunk driving, and tax evasion increases, individuals report they would be less likely to offend.

Researchers have also compared the relative importance of both certainty and severity as dimensions of punishment. In a 2001 study published in the journal *Criminology*, researchers utilized a sample of college students to assess the likelihood of drinking and driving. The authors found that the certainty of punishment was a more robust predictor of deterrence than severity. Increasing the probability of apprehension by 10% was predicted to reduce the likelihood of drunk driving by 3.5%, while the effect of severity eroded when the effects of certainty and severity were combined.⁸

In another study, researchers compared crime and punishment trends in the U.S., England, and Sweden, and failed to find an effect for severity.⁹ The statistical associations were weak and even when there was a negative relationship between severity of punishment and crime rates, the findings were not strong enough to achieve statistical significance. This finding is noteworthy because it reflected varying degrees of punitiveness in the sentencing policies of the three nations.

While most studies suggest that certainty of punishment is related to reductions in crime rates, some researchers speculate that increasing the likelihood of arrest and/or incarceration for both serious and minor offenses could cause sanctions, particularly imprisonment, to be viewed as less stigmatizing.¹⁰ Nagin also emphasizes that sanctions have the potential to erode the deterrent effects of a policy because as he states, “[f]or an event to be stigmatizing it must be relatively uncommon.”¹¹

⁸ Ibid.

⁹ David Farrington, Paul Langan, Per-Olof H. Wikstrom. “Changes in Crime and Punishment in America, England and Sweden between the 1980s and the 1990s,” *Studies in Crime Prevention*, 3:104-131, 1994.

¹⁰ Paul J. Hirschfield, “The Declining Significance of Delinquent Labels in Disadvantaged Urban Communities,” *Sociological Forum*, 23(3), 2008.

¹¹ Daniel S. Nagin, “Criminal Deterrence Research at the Outset of the Twenty-First Century,” In *Crime and Justice: A Review of Research*, edited by Michael Tonry. Chicago: University of Chicago Press, 1998.

MORE SEVERE SENTENCES FAIL TO ENHANCE PUBLIC SAFETY

The logic behind supporting harsher sentences is simple: locking up people for longer periods of time should enhance public safety. From this view, putting people in prison for years or even decades should prevent offenders from re-offending by incapacitating them and/or deterring would-be-offenders from committing crimes. However, contrary to deterrence ideology and “get tough” rhetoric, the bulk of research on the deterrent effects of harsher sentences fails to support these assertions.¹²

A series of studies have examined the public safety effects of imposing longer periods of imprisonment.^{13, 14, 15} Ideally, from a deterrence perspective, the more severe the imposed sentence, the less likely offenders should be to re-offend. A 1999 study tested this assumption in a meta-analysis reviewing 50 studies dating back to 1958 involving a total of 336,052 offenders with various offenses and criminal histories. Controlling for risk factors such as criminal history and substance abuse, the authors assessed the relationship between length of time in prison and recidivism, and found that longer prison sentences were associated with a three percent increase in recidivism. Offenders who spent an average of 30 months in prison had a recidivism rate of 29%, compared to a 26% rate among prisoners serving an average sentence of 12.9 months. The authors also assessed the impact of serving a prison sentence versus receiving a community-based sanction. Similarly, being incarcerated versus

¹² Anthony Doob and Cheryl Webster, “Sentence Severity and Crime: Accepting the Null Hypotheses,” *Crime and Justice*, 30:143-195, 2003.

¹³ Paul Gendreau, T. Little, and Claire Goggin, “A Meta-Analysis of Adult Offender Recidivism: What Works!” *Criminology*, 34(3):575-607, 1996.

¹⁴ Martin A. Levin, “Policy Evaluation and Recidivism,” *Law and Society Review*, 6(1):17-46, 1971.

¹⁵ Lin Song and Roxanne Lieb, “Recidivism: The Effect of Incarceration and Length of Time Served,” Olympia, WA: Washington State Institute of Public Policy, 1993

remaining in the community was associated with a seven percent increase in recidivism.¹⁶

Researchers also find an increased likelihood that lower-risk offenders will be more negatively affected by incarceration.¹⁷ Among low-risk offenders, those who spent less time in prison were 4% less likely to recidivate than low-risk offenders who served longer sentences.¹⁸ Thus, when prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry into society. Conversely, when prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.¹⁹

The Bureau of Justice Statistics has reported on a nationally representative sample of prisoners assessing the impact of time served in prison on recidivism rates. Researchers found that recidivism rates did not vary substantially whether prisoners were released anywhere in the range of six months to five years. While recidivism rates were high in general, they fluctuated in the range of 62-68%, and did not decline significantly for those spending more time in prison.²⁰ Furthermore, findings from a natural experiment investigating how prisoners respond to the manipulation of prison sentences show that reduced sentences may reduce recidivism rates. The Collective Clemency Bill passed by the Italian Parliament in July 2006 allowed for a three-year sentence reduction for persons who committed their offense prior to May

¹⁶ Paul Gendreau, Claire Goggin, and Francis T. Cullen, "The Effects of Prison Sentences on Recidivism," Ottawa, Ontario, Canada: Public Works and Government Services Canada, 1999.

¹⁷ Ibid.

¹⁸ *Supra*, note 15.

¹⁹ Thomas Orsagh and Jong-Rong Chen, "The Effect of Time Served on Recidivism: An Interdisciplinary Theory," *Journal of Quantitative Criminology*, 4(2):155-171, 1988.

²⁰ Patrick Langan and David Levin. "Recidivism of Prisoners Released in 1994," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2002.

2, 2006.²¹ The authors of the study concluded that the sentence commutations significantly reduced the likelihood of recidivating.²²

ECONOMIC COSTS OF MORE SEVERE SENTENCES

Fiscal crises and a growing emphasis on using evidence-based practices has caused many policymakers to call into question the practicality of current sentencing policies and the overreliance on incarceration. Incarceration is an expensive sanction and sentencing people to longer prison terms has resulted in valuable resources being devoured. It is estimated that federal, state, and local governments are spending \$68 billion annually.²³ A recent economic analysis estimates that reducing the number of incarcerated non-violent offenders by half could save taxpayers \$16.9 billion annually without putting public safety at risk.²⁴

Non-violent drug offenders comprise a substantial percentage of the prison population and many studies have suggested that this number could be reduced if more treatment alternatives were available. While there are costs associated with treatment, research indicates that they tend to be far lower than the costs associated with lengthy terms of incarceration that show little evidence of deterring future offenses. For example, a recent study showed that spending on drug treatment in community-based programs versus incarceration yields a higher return on the investment while at the same time improving the life outcomes of drug users. The study concluded that a dollar spent on treatment in prison yields about six dollars of

²¹ The Collective Clemency Bill (2006) states that if a former inmate commits a crime within five years following his release from prison, he or she will be required to serve the remaining sentence suspended by the pardon in addition to the sentence given for the new crime.

²² Fancesco Drago, Roberto Galbiati, and Pietro Vertova, "The Deterrent Effects of Prison: Evidence from a Natural Experiment," *Journal of Political Economy*, 117(2):257-280 2009.

²³ John Schmitt, Kris Warner, and Sarika Gupta. "The High Budgetary Cost of Incarceration," Center for Economic and Policy Research, 2010.

²⁴ Ibid.

savings, but a dollar investment in community-based treatment yields nearly \$20 in costs savings.²⁵

CONCLUSION

Existing evidence does not support any significant public safety benefit of the practice of increasing the severity of sentences by imposing longer prison terms. In fact, research findings imply that increasingly lengthy prison terms are counterproductive. Overall, the evidence indicates that the deterrent effect of lengthy prison sentences would not be substantially diminished if punishments were reduced from their current levels. Thus, policies such as California's Three Strikes law or mandatory minimums that increase imprisonment not only burden state budgets, but also fail to enhance public safety. As a result, such policies are not justifiable based on their ability to deter.

Based upon the existing evidence, both crime and imprisonment can be simultaneously reduced if policy-makers reconsider their overreliance on severity-based policies such as long prison sentences. Instead, an evidence-based approach would entail increasing the certainty of punishment by improving the likelihood that criminal behavior would be detected. Such an approach would also free up resources devoted to incarceration and allow for increased initiatives of prevention and treatment.

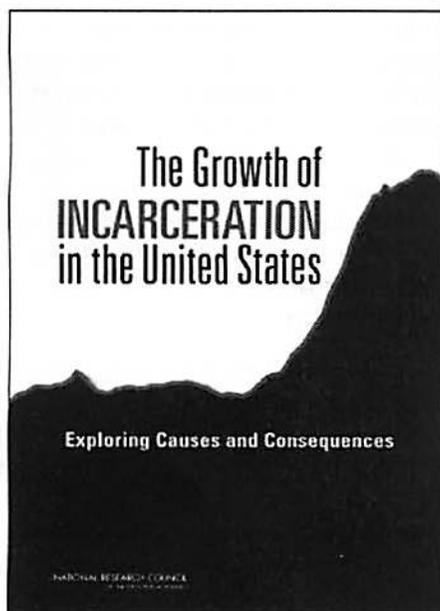
²⁵ Steve Aos, Marna Miller, and Elizabeth Drake, "Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates," Olympia: Washington State Institute for Public Policy, 2006.

Exhibit 4

REPORT BRIEF • APRIL 2014
COMMITTEE ON LAW AND JUSTICE

THE GROWTH OF INCARCERATION IN THE UNITED STATES

EXPLORING CAUSES AND CONSEQUENCES



After decades of stability, the United States saw its incarceration rate more than quadruple in the past 40 years. Currently, nearly 1 out of 100 American adults is in prison or jail. What drove this increase in the use of imprisonment, and how has it affected individuals, families, communities, and society at large? Has this shift in policy produced significant benefits, or is a change in course needed?

Asked to answer these questions, the National Research Council appointed a committee of experts in criminal justice, the social sciences, and history to examine the evidence. The committee released its findings and recommendations in the report *The Growth of Incarceration in the United States: Exploring Causes and Consequences*.

The dramatic increase in incarceration has failed to clearly yield large crime-reduction benefits for the nation, the report concludes. In addition, the growth in incarceration may have had a wide range

of unwanted consequences for individuals, families, communities, and society. The effects of harsh penal policies have fallen most heavily on blacks and Hispanics, especially the poorest. The report recommends that policymakers take steps to reduce the nation's reliance on incarceration.

THE RISE OF INCARCERATION

State and federal prison populations in the U.S. rose steadily between 1973 to 2009, from about 200,000 to 1.5 million, declining slightly in 2009 to 2012. This growth in incarceration levels was historically unprecedented and internationally unique.

When incarceration rates began to grow in the early 1970s, American society had passed through a period of intense change – including rising crime rates, social unrest, intense political conflict, and a profound transformation in race relations. In this context, state and federal policymakers

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U.S. State and Federal Imprisonment Rate, 1972-2012

made policy choices that increasingly relied on longer sentences and wider use of imprisonment.

Between 1975 and 1995, all 50 states and the federal government reduced judges' discretion in sentencing by mandating imprisonment for a wide variety of offenses. Congress and most state legislatures enacted laws that mandated lengthy prison sentences – often of 5, 10, and 20 years or longer – for drug offenses, violent crimes, and repeat offenders. Congress and more than half of the states enacted “three strikes” laws that mandated minimum sentences of 25 years or longer for some offenders. “Truth-in-sentencing” laws, which require those affected to serve at least 85 percent of their prison sentences, were enacted by Congress and a majority of states.

THE CONSEQUENCES OF HIGH INCARCERATION RATES

Effects on crime. The shift toward more incarceration and longer sentences reflected a widespread view that incarceration was a key way to control crime. This has not proven to be the case. During the four decades when incarceration rates steadily rose, crime rates showed no clear trend. The crime reduction effect of incarceration is highly uncertain and is unlikely to have been large. In addition, the crime-reduction benefits of very long sentences are likely to be small; one reason is that rates of re-offending drop significantly as people age, and so very long sentences incarcerate people whose likelihood of committing further crimes is low even if they were not imprisoned.

Consequences for those imprisoned. As incarceration rates have grown, there have been fewer opportunities for prisoners to participate in pro-

grams that might promote success after release. Higher incarceration rates have also led to overcrowding: Many state and federal prisons operate at or above 100 percent of capacity, and cells designed for a single inmate often house two or sometimes three inmates. While overcrowding did not drive up violence in prisons as some feared, persistent overcrowding is associated with a range of poor consequences for health and behavior, as well as increased risk of suicide.

Prison's effects do not end with an inmate's release, and they extend beyond the former prisoner to affect families, communities, and society. The vast expansion of the criminal justice system has created a large population whose access to public benefits, occupations, and the ability to vote are limited by a criminal conviction. Those with a criminal record often face lower earnings and lower employment rates, as they are disproportionately denied jobs. Many states deny those with a criminal record licenses to work in many professions, such as plumbing, food catering, and hair cutting. Individuals with felony convictions sometimes must forfeit all or some of their pension, disability, or veteran's benefits. Many are ineligible for public housing, student loans, food stamps, and other forms of assistance.

Consequences for families. From 1980 to 2000, the number of children with incarcerated fathers grew from about 350,000 to 2.1 million – about 3 percent of all U.S. children. Research shows that incarceration is strongly correlated with negative social and economic consequences for former prisoners and their families. Fathers' incarceration is also strongly linked to family hardship, including higher rates of homelessness and poor developmental outcomes in children.

Consequences for communities. Few studies have attempted to quantify the effects of incarceration on communities, and causal evidence on incarceration's specific effects on communities is lacking. However, it is clear that consequences of the decades-long build-up of the U.S. prison population have been most acute in poor minority neighborhoods that already suffer from an array of other social, economic, and public health disadvantages. Incarceration is concentrated in the communities that are least capable of absorbing its effects.

Consequences for society. The increase in incarceration rates has also had broader effects on U.S. society, the committee found. The widespread practice of denying the right to vote to those with a criminal record, as well as the way prisoners are counted in the U.S. census, combine to weaken the power of low-income and minority communities. Nearly one-third of African American men are estimated to be permanently ineligible to serve as jurors, compounding the problem of gross underrepresentation of African Americans on juries. In addition, the penal system has consumed larger portions of many government budgets, leaving less to spend on education, health care, economic development, state and local police, and other public purposes.

CONCLUSIONS AND RECOMMENDATION

The United States has gone past the point where the numbers of people in prison can be justified by social benefits, the report concludes. Because the dramatic growth in incarceration in recent decades has not clearly yielded large crime-prevention benefits and may have imposed a wide range of unwanted social, financial, and human costs, federal and state policymakers should revise current criminal justice policies to significantly reduce the use of incarceration and to explore alternatives. They should take steps to improve the experience of incarcerated men and women

and to avoid unnecessary harm to their families and communities.

Three sets of policies should be reconsidered, according to the committee:

Sentencing policy. While detailed strategies for reducing incarceration must be decided by policymakers and the public, evidence points to some sentencing practices that yield uncertain benefits and impose large social, financial, and human costs. For example, unless lengthy sentences can be specifically targeted to very high-rate or extremely dangerous offenders, they are an inefficient approach to preventing crime. Long sentences, along with mandatory minimum sentences and policies on enforcement of drug laws, should be reexamined. Some states and the federal government have already begun to reconsider and alter these practices.

Prison policy. Given how damaging incarceration can be for some prisoners, families, and communities, steps should be taken to improve prison conditions and programs in ways that will reduce incarceration's harmful effects and foster the successful reintegration of former prisoners when they are released. Greater outside scrutiny of prison conditions would aid efforts to improve them. In addition, a broad review is needed of the penalties and restrictions faced by the formerly

GUIDING PRINCIPLES

Good justice policy rests not only on empirical research but also on a society's principles and values about the appropriate role of punishment. The committee elaborated four guiding principles with deep roots in jurisprudence and social policy:

- **Proportionality:** Criminal sentences should be proportionate to the seriousness of the crime.
- **Parsimony:** Punishment should not exceed the minimum needed to achieve its legitimate purpose.
- **Citizenship:** The conditions and consequences of imprisonment should not be so severe or lasting as to violate one's fundamental status as a member of society.
- **Social justice:** As public institutions in a democracy, prisons should promote the general well-being of all members of society.

The principles help to determine if the current system is aligned or in conflict with core values. As policymakers and the public consider the implications of the findings presented in the report, they should see these principles as complementing the recent emphasis on crime control and accountability. Together, they help define a balanced role for the use of incarceration in U.S. society.

incarcerated in their access to the social benefits, rights, and opportunities that might otherwise promote their successful reintegration.

Social policy. Reducing the severity of sentences will not, by itself, relieve the underlying problems of economic insecurity, low education, and poor health that are associated with incarceration in America's poorest communities. Solutions to these problems are outside the criminal justice system, and they will include policies that address school dropouts, drug addiction, mental illness, and neighborhood poverty – all of which are intimately connected with incarceration and necessitate a reassessment of the available social services.

As society reduces its heavy reliance on imprisonment, public officials will need effective alternative ways to respond to crime. To guide policymakers in the future, comprehensive research is needed to evaluate the effects of various sentencing policies that do not involve incarceration and programs designed to serve as alternatives to incarceration, including their effects on crime. Evaluations should also be conducted of in-prison programs designed to facilitate successful reentry and community based programs to support reintegration of formerly incarcerated men and women. Society as a whole will benefit from having more practical and efficient approaches to our criminal justice system.

COMMITTEE ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION

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5

The Crime Prevention Effects of Incarceration¹

As discussed in previous chapters, the growth in U.S. incarceration rates over the past 40 years was propelled by changes in sentencing and penal policies that were intended, in part, to improve public safety and reduce crime. A key task for this committee was to review the evidence and determine whether and by how much the high rates of incarceration documented in Chapter 2 have reduced crime rates. In assessing the research on the impact of prison on crime, we paid particular attention to policy changes that fueled the growth of the U.S. prison population—longer prison sentences, mandatory minimum sentences, and the expanded use of prison in the nation’s drug law enforcement strategies.

We are mindful of the public interest in questions regarding the relationship between incarceration and crime. Indeed, as discussed in Chapters 3 and 4, the assertion that putting more people in prison would reduce crime was crucial to the political dynamic that fueled the growth in incarceration rates in the United States. In recent years, policy initiatives to reduce state prison populations often have met objections that public safety would be reduced. There is of course a plausibility to the belief that putting many more convicted felons behind bars would reduce crime. Yet even a cursory examination of the data on crime and imprisonment rates makes clear the complexity of measuring the crime prevention effect of incarceration. Violent crime rates have been declining steadily over the past two decades, which suggests a crime prevention effect of rising incarceration rates. For

¹This chapter draws substantially on Durlauf and Nagin (2011a, 2011b) and Nagin (2013a, 2013b).

the first two decades of rising incarceration rates, however, there was no clear trend in the violent crime rate—it rose, then fell, and then rose again.

There are many explanations for the lack of correspondence between rates of incarceration and rates of violent crime and crime rates more generally. However, one explanation deserves special emphasis: the rate of incarceration, properly understood, is not a policy variable *per se*; rather, it is the outcome of policies affecting who is sent to prison and for how long (Durlauf and Nagin, 2011a, 2011b). The effect of these policies on crime rates is not uniform—some policies may have very large effects if, for example, they are directed at high-rate offenders, while others may be ineffective. Thus, the committee's charge was to dig below the surface and review the research evidence on the impact of the specific drivers of the rise in U.S. incarceration rates on crime in the hope that this evidence would inform the larger policy discourse. In this regard, one of our most important conclusions is that the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless the longer sentences are specifically targeted at very high-rate or extremely dangerous offenders.

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the *threat* of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the *experience* of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses.² A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.

This chapter presents the results of the committee's examination of the crime prevention effects of imprisonment through deterrence or incapacitation. The first section provides an overview of deterrence and reviews

²Drug sales, use, and possession are, of course, widely criminalized. While there are some long-standing national data collections on drug use and a few national surveys have asked about drug sales, there are no national time series on overall levels of drug crime. Thus, analyses of the relationship of imprisonment rates to crime rates provide no insight into impacts on drug crimes.

evidence on the deterrent effect of incarceration. The second section describes the theory of incapacitation and summarizes empirical research on incapacitation's effects. We then review panel studies examining the association between rates of incarceration and crime rates across states and over time. These studies do not distinguish between deterrence and incapacitation and might be viewed as estimating a total effect of incarceration on crime. The fourth section summarizes research on specific deterrence and recidivism. This is followed by a review of research on the effects of incarceration for drug crimes on drug prices and drug use. We then offer observations regarding gaps in knowledge about the crime prevention effects of incarceration.

DETERRENCE: THEORY AND EMPIRICAL FINDINGS

In the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy.

Theory

Most modern theories of deterrence can be traced to the Enlightenment-era legal philosophers Cesare Beccaria (2007) and Jeremy Bentham (1988). Their work was motivated by a mutual abhorrence of the administration of punishment without constructive purpose. For them that constructive purpose was crime prevention. As Beccaria observed, "It is better to prevent crimes than punish them" (1986, p. 93). Beccaria and Bentham argued that the deterrence process has three key ingredients—the severity, certainty, and celerity of punishment. These concepts, particularly the severity and certainty of punishment, form the foundation of nearly all contemporary theories of deterrence. The idea is that if state-imposed sanctions are sufficiently severe, criminal activity will be discouraged, at least for some. Severity alone, however, cannot deter; there must also be some probability that the sanction will be incurred if the crime is committed. Indeed, Beccaria believed that the probability of punishment, not its severity, is the more potent component of the deterrence process: "One of the greatest curbs on crime is not the cruelty of punishments, but their infallibility. . . . The certainty of punishment even if moderate will always make a stronger impression . . ." (1986, p. 58).

In contemporary society, the certainty of punishment depends on the probability of arrest given a criminal offense and the probability of punishment given an arrest. For a formal sanction to be imposed, the crime must be brought to official attention, typically by victim report, and the offender

must then be apprehended, usually by the police.³ The offender must next be charged, successfully prosecuted, and finally sentenced by the courts. Successful passage through all of these stages is far from certain. The first step in the process—reporting of the crime—is critical, yet national surveys of victims have consistently demonstrated that only half of all crimes are brought to the attention of the police. Once the crime has been reported, the police are the most important factors affecting certainty—absent detection and apprehension, there is no possibility of conviction or punishment. Yet arrests ensue for only a small fraction of all reported crimes. Blumstein and Beck (1999) find that robberies reported to police outnumber robbery arrests by about four to one and that the offense-to-arrest ratio is about five to one for burglaries. These ratios have remained stable since 1980. The next step in the process is criminal prosecution, following which the court must decide whether to impose a prison sentence. In light of the obstacles to successful apprehension and prosecution, the probability of conviction is quite low, even for felony offenses (although it has increased since 1980). Moreover, because the majority of felony convictions already result in imprisonment, policies designed to increase the certainty of incarceration for those convicted—through mandatory prison sentences, for example—will have only a limited effect on the overall certainty of punishment.

The third component of the theory of deterrence advanced by Bentham and Beccaria, and the least studied, is the swiftness, or “celerity,” of punishment. The theoretical basis for its impact on deterrence is ambiguous, as is the empirical evidence on its effectiveness. Even Beccaria appears to have based his case for celerity more on normative considerations of just punishment than on its role in the effectiveness of deterrence. He observed: “the more promptly and the more closely punishment follows upon the commission of a crime, the more just and useful will it be. I say more just, because the criminal is thereby spared the useless and cruel torments of uncertainty, which increase with the vigor of imagination and with the sense of personal weakness . . .” (Beccaria, 1986, p. 36).

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not. Furthermore, suddenly induced rages, feelings of threat and paranoia, a desire for revenge and retaliation, and self-perceptions of

³Crime may also be sanctioned entirely outside of the criminal justice system through retaliation by the victim or by others on the victim's behalf.

brilliance in the grandiose phase of manic-depressive illness all can limit a potential offender's ability to exercise self-control. Also playing a role are personality traits and the pervasive influence of drugs and alcohol: in one study, 32 percent of state prison inmates reported being high on drugs at the time of their crime, and 17 percent committed their crime to get money to buy drugs (Mumola and Karberg, 2006). The influence of crime-involved peers who downplay the long-term consequences of punishment is relevant as well.

Taken together, these factors mean that, even if they knew the penalties that could be imposed under the law, a significant fraction of offenders still might not be able to make the calculation to avoid crime. Because many crimes may not be rationally motivated with a view to the expected costs of punishment, and because offenders may respond differently to the severity, certainty, and swiftness of punishment, the magnitude of deterrent effects is fundamentally an empirical question. Furthermore, deterrent effects may depend on the type of sanction and its severity. Sanctions may be effective in some circumstances for some people but ineffective in other circumstances or for others.

Empirical Findings

Empirical studies of deterrence have focused primarily on sentence enhancements that introduce additional prison time for aggravating circumstances related to the crime or the defendant's criminal history. The earliest attempts after the 1970s to measure the effects of severity examined the deterrent effects of sentence enhancements for gun crimes. A series of studies (Loftin and McDowell, 1981, 1984; Loftin et al., 1983) considered whether sentence enhancements for use of a gun when engaged in another type of crime (such as robbery) deter gun use in the commission of a crime. While this research yielded mixed findings, it generally failed to uncover clear evidence of a deterrent effect (but see McDowell et al. [1992] for evidence of reductions in homicides).⁴

There is, however, an important caveat to keep in mind when extrapolating from these studies to understand the link between severity and deterrence: studies that failed to find a deterrent effect for sentence enhancements for use of a gun in committing a crime also found that the sentences ultimately imposed in these cases were in fact not increased.

⁴Pooling city-specific results to obtain a combined estimate of the impact of mandatory sentence enhancements for gun crimes, McDowell and colleagues (1992, p. 379) suggest that "the mandatory sentencing laws substantially reduced the number of homicides; however, any effects on assault and robbery are not conclusive because they cannot be separated from imprecision and random error in the data."

Thus, criminals may not have been deterred from using a gun because the real incentives were not changed. This observation is a reminder of Tonry's (2009b) commentary on the inconsistent administration of mandatory minimum sentencing.

Kessler and Levitt (1999) examine the deterrent impact of California's Proposition 8, passed in 1982. Proposition 8 anticipated the three strikes laws passed by many states, including California, in the 1990s, which substantially increased sentences for repeat commission of specified felonies. Kessler and Levitt estimate a 4 percent decline in crime attributable to deterrence in the first year after the proposition's enactment. Within 5 to 7 years, the effect grew to a 20 percent reduction, although the authors acknowledge that this longer-term estimate includes incapacitation effects.

The findings of Kessler and Levitt (1999) are challenged by Webster and colleagues (2006). They point out that Kessler and Levitt's findings are based on data from alternate years. Using data from all years, Webster and colleagues find that crime rates in the relevant categories started to fall before Proposition 8 was enacted and that the slope of this trend remained constant during the proposition's implementation.⁵ (See Levitt [2006]⁶ for a response and Raphael [2006] for analysis that supports Webster and colleagues [2006].)

One exception to the paucity of studies on the crime prevention effects of sentence enhancements concerns analyses of the deterrent effect of California's "Three Strikes and You're Out" law, which mandated a minimum sentence of 25 years upon conviction for a third strikeable offense.⁷ Zimring and colleagues (2001) conclude that the law reduced the felony crime rate by at most 2 percent and that this reduction was limited to those individuals with two strikeable offenses. Other authors (Stolzenberg and D'Alessio, 1997; Greenwood and Hawken, 2002), who, like Zimring and colleagues (2001), examine before-and-after trends, conclude that the law's crime prevention effects were negligible. The most persuasive study of California's three strikes law is that of Helland and Tabarrok (2007). As discussed below, this study finds an effect but concludes that it is small.

⁵In other words, the drop in crime after the passage of Proposition 8 "may simply be the result of a preexisting decline over time," consistent with the possibility that "by the time that legislative change is enacted, levels of crime have often already begun to drop for reasons not tied to variations in threatened punishment" (Webster et al., 2006, p. 441).

⁶According to Levitt (2006, p. 451), the arguments made by Kessler and Levitt (1999) "were based on the fact that after Proposition 8, eligible crimes fell more in California than noneligible crimes, and most importantly, the relative movements of eligible and noneligible crimes in California systematically differed from those in the rest of the United States after Proposition 8, but not before."

⁷Strikeable offenses include murder, robbery, drug sales to minors, and a variety of sexual offenses, felony assaults, other crimes against persons, property crimes, and weapons offenses (Clark et al., 1997).

One challenge for research on sentence enhancements is that because entire jurisdictions are affected by a sentencing reform, the “treated” defendants are necessarily compared with those in other times or places who are likely to differ in unmeasured ways. Six recent studies present particularly convincing evidence on the deterrent effect of incarceration by constructing credible comparisons of treatment and control groups, and they also nicely illustrate heterogeneity in the deterrence response to the threat of imprisonment. Weisburd and colleagues (2008) and Hawken and Kleiman (2009) studied the use of imprisonment to enforce payment of fines and conditions of probation, respectively, and found substantial deterrent effects. Helland and Tabarrok (2007) analyzed the deterrent effect of California’s third-strike provision and found only a modest deterrent effect. Ludwig and Raphael (2003) examined the deterrent effect of prison sentence enhancements for gun crimes and found no effect. Finally, Lee and McCrary (2009) and Hjalmarsson (2009) examined the heightened threat of imprisonment that attends coming under the jurisdiction of the adult courts at the age of majority and found no deterrent effect. These studies are described further below.

Weisburd and colleagues (2008) present findings of a randomized field trial of different approaches to encouraging payment of court-ordered fines. Their most salient finding involves the “miracle of the cells”—that the imminent threat of incarceration provides a powerful incentive to pay delinquent fines, even when the incarceration is only for a short period. This finding supports the notion, discussed earlier, that the certainty rather than the severity of punishment is the more powerful deterrent. It is true that in this study, there was a high certainty of imprisonment for failing to pay the fine among the treatment group. Nonetheless, the term used by Weisburd and colleagues—the “miracle of the cells” and not the “miracle of certainty”—emphasizes that certainty is a deterrent only if the punishment is perceived as costly enough.

This point is further illustrated by Project HOPE (Hawaii’s Opportunity Probation with Enforcement). In this randomized experiment, the treatment group of probationers underwent regular drug testing (including random testing). The punishment for a positive test or other violation of conditions of probation was certain but brief (1-2 days) confinement. The intervention group had far fewer positive tests and missed appointments and significantly lower rates of arrest and imprisonment (Kleinman, 2009; Hawken and Kleiman, 2009; Hawken, 2010).⁸

⁸The success of Project HOPE has brought it considerable attention in the media and in policy circles. Its strong evaluation design—a randomized experiment—puts its findings on a sound scientific footing and is among the reasons why its results are highlighted in this report. Still, there are several reasons for caution in assessing the significance of the results.

Helland and Tabarrok (2007) examine the deterrent effect of California's "Three Strikes and You're Out" law among those convicted of strikeable offenses. They compare the future offending of those convicted of two previous strikeable offenses and those convicted of one strikeable offense who also had been tried for a second strikeable offense but were convicted of a nonstrikeable offense. The two groups had a number of common characteristics, such as age, race, and time spent in prison. The authors find an approximately 20 percent lower arrest rate among those convicted of two strikeable offenses and attribute this to the much more severe sentence that would have been imposed for a third strikeable offense.

Ludwig and Raphael (2003) examine the deterrent effect of sentence enhancements for gun crimes that formed the basis for a much-publicized federal intervention called Project Exile in Richmond, Virginia. Perpetrators of gun crimes, especially those with a felony record, were the targets of federal prosecution, which provided for far more severe sanctions for weapon use than those imposed by Virginia state law. The authors conducted a careful and thorough analysis involving comparison of adult and juvenile homicide arrest rates in Richmond and comparison of the gun homicide rates of Richmond and other cities with comparable preintervention homicide rates. They conclude that the threat of enhanced sentences had no apparent deterrent effect.

The shift in jurisdiction from juvenile to adult court that occurs when individuals reach the age of majority is accompanied by increased certainty and severity of punishment for most crimes. Lee and McCrary (2009) conducted a meticulous analysis of individual-level crime histories in Florida to see whether felony offending declined sharply at age 18—the age of majority in that state. They report an immediate decline in crime, as predicted, but it was very small and not statistically significant.⁹

As of this writing, the results have yet to be replicated outside of rural Hawaii. This is also a complex intervention, and the mechanisms by which compliance with conditions of probation is achieved are not certain. Specifically, a competing interpretation to deterrence for the observed effects is that probationers were responding to an authoritative figure. Nevertheless, the interpretation that certain but nondraconian punishment can be an effective deterrent is consistent with decades of research on deterrence (Nagin, 1998, 2013b). That such an effect appears to have been found in a population in which deterrence has previously been ineffective in averting crime makes the finding potentially very important. Thus, as discussed later in this chapter, research on the deterrent effectiveness of short sentences with high celerity and certainty should be a priority, particularly among crime-prone populations.

⁹The finding that the young fail to respond to changes in penalties associated with the age of majority is not uniform across studies. An earlier analysis by Levitt (1998) finds a large drop in the offending of young adults when they reach the age of jurisdiction for adult courts. For several reasons, Durlauf and Nagin (2011a, 2011b) judge the null effect finding of Lee and McCrary to be more persuasive in terms of understanding deterrence. First, Levitt (1998) focuses on differences in age measured at annual frequencies, whereas Lee and McCrary mea-

In another analysis of the effect, if any, of moving from the jurisdiction of juvenile to adult courts, Hjalmarsson (2009) uses the 1997 National Longitudinal Survey of Youth to examine whether young males' perception of incarceration risk changed at the age of criminal majority. Youth were asked, "Suppose you were arrested for stealing a car, what is the percentage chance that you would serve time in jail?" The author found that subjective probabilities of being sent to jail increased discontinuously on average by 5.2 percentage points when youth reached the age of majority in their state of residence. While youth perceived an increase in incarceration risk, Hjalmarsson found no convincing evidence of an effect on their self-reported criminal behavior.

In combination, the above six studies demonstrate that debates about the deterrent effect of legal sanctions can be framed in terms argued by Beccaria and Bentham more than two centuries ago: Does the specific sanction deter or not, and if it does, are the crime reduction benefits sufficient to justify the costs of imposing the sanction? The Helland and Tabarrok (2007) study is an exemplar of this type of analysis. It concludes that California's third-strike provision does indeed have a deterrent effect, a point conceded even by Zimring and colleagues (2001). However, Helland and Tabarrok (2007) also conclude, based on a cost-benefit analysis, that the crime-saving benefits are so small relative to the increased costs of incarceration that the lengthy prison sentences mandated by the third-strike provision cannot be justified on the basis of their effectiveness in preventing crime.

The above six studies suggest several important sources of the heterogeneity of the deterrent effect of imprisonment. One source relates to the length of the sentence. Figure 5-1 shows two different forms of the response function that relates crime rate and sentence length. A downward slope is seen for both, reflecting the deterrence effect of increased severity. Both curves have the same crime rate, C_1 , at the status quo sentence length, S_1 . Because the two curves are drawn to predict the same crime rate for a zero sanction level, the absolute deterrent effect of the status quo sanction level is the same for both. But because the two curves have different shapes, they also imply different responses to an incremental increase in sentence length to S_2 . The linear curve (A) is meant to depict a response function in which there is a sizable deterrent effect accompanying the increase to S_2 , whereas the nonlinear curve (B) is

sure age in days or weeks. At annual frequencies, the estimated effect is more likely to reflect both deterrence and incapacitation; hence Levitt's results may be driven by incapacitation effects rather than deterrence per se. Second, the analysis by Lee and McCrary is based on individual-level data and therefore avoids the problems that can arise because of aggregation (Durlauf et al., 2008, 2010). The individual-level data studied by Lee and McCrary also are unusually informative on their own terms because they contain information on the exact age of arrestees, which allows for the calculation of very short-run effects of the discontinuity in sentence severity (e.g., effects within 30 days of turning 18).

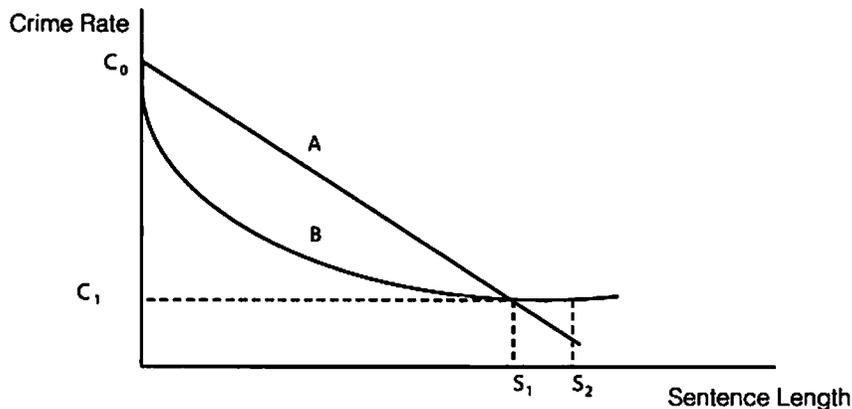


FIGURE 5-1 Marginal versus absolute deterrent effects.
SOURCE: Nagin (2013a).

meant to depict a small crime reduction response due to diminishing deterrent returns to increasing sentence length. In curve B in Figure 5-1, the largest reductions in crime will be obtained with small increases in short sentences.

The evidence on the deterrent effect of sentence length suggests that the relationship between crime rate and sentence length more closely resembles curve B in Figure 5-1 than curve A. Ludwig and Raphael (2003) find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary (2009) and Hjalmarsson (2009) find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok (2007) find only a small deterrent effect of the third strike of California's three strikes law. As a consequence, the deterrent return to increasing already long sentences is modest at best.

The fine payment (Weisburd et al., 2008) and Project HOPE (Kleiman, 2009; Hawken and Kleiman, 2009; Hawken, 2010) experiments also suggest that that curve B, not curve A, more closely resembles the dose-response relationship between crime and sentence length. Although these programs were designed to achieve behavioral changes other than simple crime prevention (payment of criminal fines and cessation of drug use, respectively), in both cases the subjects of the program demonstrated increased compliance with court orders, an important justice system goal. In the case of Project HOPE, subjects also showed substantially reduced levels of criminal offending. The results of these studies suggest that, unlike increments to long sentences, short sentences do have a material deterrent effect on a crime-prone population.

The conclusion that increasing already long sentences has no material deterrent effect also has implications for mandatory minimum sentencing. Mandatory minimum sentence statutes have two distinct properties. One is that they typically increase already long sentences, which we have concluded is not an effective deterrent. Second, by mandating incarceration, they also increase the certainty of imprisonment *given conviction*. Because, as discussed earlier, the certainty of conviction even following commission of a felony is typically small, the effect of mandatory minimum sentencing on certainty of punishment is greatly diminished. Furthermore, as discussed at length by Nagin (2013a, 2013b), all of the evidence on the deterrent effect of certainty of punishment pertains to the deterrent effect of the certainty of apprehension, not to the certainty of postarrest outcomes (including certainty of imprisonment given conviction). Thus, there is no evidence one way or the other on the deterrent effect of the second distinguishing characteristic of mandatory minimum sentencing (Nagin, 2013a, 2013b).

INCAPACITATION

Crime prevention by incapacitation has an appealing directness—the incarceration of criminally active individuals will prevent crime through their physical separation from the rest of society. In contrast with crime prevention based on deterrence or rehabilitation, no assumptions about human behavior appear to be required to avert the social cost of crime.

Despite the apparent directness and simplicity of incapacitation, estimates of the size of its effects vary substantially. Most estimates are reported in terms of an elasticity—the percentage change in the crime rate in response to a 1 percent increase in the imprisonment rate. Spelman (1994) distinguishes between two types of incapacitation studies—simulation and econometric studies. Simulation studies are based on the model of Avi-Itzhak and Schinnar (1973), described below. The earliest simulation-based estimates are reported by Cohen (1978). Her elasticity estimates range from -0.05 to -0.70 , meaning each 1 percent increase in imprisonment rates would result in a crime reduction of 0.05 to 0.7 percent. Later estimates by Dilulio and Piehl (1991), Piehl and Dilulio (1995), and Spelman (1994) fall within a narrower but still large range of about -0.10 to -0.30 —a 0.1 to 0.3 percent crime reduction for a 1 percent increase in imprisonment.

Econometric studies also examine the overall relationship between the crime rate and the imprisonment rate. These studies are discussed in greater detail in the next section. The range of elasticity estimates from these studies is similarly large—from no reduction in crime (Marvell and Moody, 1994; Useem and Piehl, 2008; Besci, 1999) to a reduction of about -0.4 or more (Levitt, 1996). These divergent findings are one of the key reasons the

committee concludes that we cannot arrive at a precise estimate, or even a modest range of estimates, of the magnitude of the effect of incarceration on crime rates.

Many factors contribute to the large differences in estimates of the crimes averted by incapacitation. These factors include whether the data used to estimate crimes averted pertain to people in prison, people in jail, or nonincarcerated individuals with criminal histories; the geographic region from which the data are derived; the types of crimes included in the accounting of crimes averted; and a host of technical issues related to the measurement and modeling of key dimensions of the criminal career (National Research Council, 1986; Cohen, 1986; Visher, 1986; Piquero and Blumstein, 2007). Here we focus on two issues that are particularly important to estimating and interpreting incapacitation effects: the estimate of the rate of offending of active offenders and the constancy of that rate over the course of the criminal career.

Research on incapacitation effects derives from what has come to be called the “criminal career” model first laid out in a seminal paper by Avi-Itzhak and Schinnar (1973). These authors assume that active offenders commit crimes at a mean annual rate (denoted by λ) over their criminal career (averaging τ years in length).¹⁰ The extent of punishment is described by the probability of arrest, conviction, and incarceration for a given crime and the length of time spent in prison.

At the level of the population, this framework yields an accounting model that calculates the hypothetical level of crime in society in the absence of incarceration and the fraction of that level prevented by incarceration as a function of the probability of incarceration and the average length of the sentence served. The theory, as already noted, is appealingly simple. The model has no behavioral component. It views the prevention of crime not as a behavioral response to punishment, as in deterrence, but as the result of the simple physical isolation of offenders. We return to the implications of these behavioral assumptions below, but first consider two other key assumptions of the Azi-Itzhak and Shinnar framework that has been so influential in research on incapacitation. The first concerns the assumption that λ is constant across offenders, and the second is that it remains unchanged over the duration of the criminal career.

Constancy of λ Across the Population

The most influential source of data for calculating λ —or the average rate at which active offenders commit crimes—has been the RAND Second

¹⁰It is further assumed that, while the offenders were active, they committed crimes according to a Poisson process and that career length was exponentially distributed.

Inmate Survey, for which a sample of 2,190 incarcerated respondents in California, Michigan, and Texas was interviewed in the 1970s. The survey recorded respondents' criminal involvement in the 3 years before their current incarceration (Petersilia et al., 1978). The most important finding of this survey was that λ is far from being constant across inmates; to the contrary, it is highly skewed. Table 5-1 is taken from Visher's (1986) reanalysis of the RAND data. For robbery, the mean to median ratio is 8.3, 12.6, and 5.2 for California, Michigan, and Texas, respectively. For burglary, these respective ratios are 15.9, 17.2, and 11.0. The difference between the median and the 90th percentile is even more dramatic. With the exception of robbery in Texas, that ratio always exceeds 20 to 1. The skewness of the offending rate distribution has crucial implications for the calculation of incapacitation effects: as a matter of accounting, the estimated size of incapacitation effects will be highly sensitive to whether the mean, median, or some other statistic is used to summarize the offending rate distribution.

Skewness in the offending rate distribution also has important implications for projecting the marginal incapacitation effect of changes in the size of the prison population. This is due to the important concept of "stochastic selectivity" (Canela-Cacho et al., 1997). Stochastic selectivity formalizes the observation that unless high-rate offenders are extremely skillful in avoiding apprehension, they will be represented in prison disproportionately relative to their representation in the population of nonincarcerated

TABLE 5-1 Differences in Distributions of λ for Inmates Who Reported Committing Robbery or Burglary, by State

Statistic	California	Michigan	Texas
Robbery			
25th pct.	2.1	1.4	0.9
50th pct.	5.1	3.6	2.5
75th pct.	19.8	13.1	6.2
90th pct.	107.1	86.1	15.2
Mean	42.4	45.4	13.1
Burglary			
25th pct.	2.3	1.9	1.2
50th pct.	6.2	4.8	3.1
75th pct.	49.1	24.0	9.9
90th pct.	199.9	258.0	76.1
Mean	98.8	82.7	34.1

NOTE: Data were computed as part of the reanalysis.
SOURCE: Visher (1986).

offenders. This is the case because they put themselves at risk of apprehension so much more frequently than lower-rate offenders.

Thus, surveys of offending among the incarcerated will overstate the crime prevention benefits of further increases in the imprisonment rate. The basis for this conclusion is straightforward: because most of the high-rate offenders will already have been apprehended and incarcerated, there will be relatively few of them at large to be incapacitated by further expansion of the prison population. The implication is that the crime control benefits of incapacitation will decrease with the scale of imprisonment. Canela-Cacho and colleagues (1997) use the RAND Second Inmate Survey to estimate the actual magnitude of the model's prediction. Their findings are dramatic—they conclude that offending rates of the incarcerated are on average 10 to 50 times larger than those of the nonincarcerated. Figure 5-2 compares projections of the distribution of robbery offense rates for offenders who are and are not incarcerated. The distributions are starkly different—few high-rate robbers are at large because most have already been apprehended and represent a large share of the prison population.

Direct evidence of stochastic selectivity is reported by Vollaard (2012), who studied the introduction of repeat-offender sentence enhancements in the Netherlands. These enhancements increased sentences from 2 months to 2 years for offenders with 10 or more prior convictions—mainly older men with histories of substance abuse who were involved in shoplifting and other property crimes. The sentence enhancements initially had a large crime-reducing effect, but the effect declined as they were administered to less serious offenders with fewer prior convictions. Recent work by Johnson and Raphael (2012) on the crime prevention effect of imprisonment also suggests that the size of the effect diminishes with the scale of imprisonment. They estimate substantial declines in the number of crimes averted per prisoner over the period 1991 to 2004 compared with 1978 to 1990. This finding also is consistent with the results of an earlier analysis by Useem and Piehl (2008), who conclude that crime reduction benefits decline with the scale of imprisonment, and with Owens' (2009) finding of modest incapacitation effects based on her analysis of 2003 data from Maryland.

Constancy of λ Over the Criminal Career

The criminal career model assumes that the offending rate is constant over the course of the criminal career. However, large percentages of crimes are committed by young people, with rates peaking in the midteenage years for property offenses and the late teenage years for violent offenses, followed by rapid declines (e.g., Farrington, 1986; Sweeten et al., 2013); in an application of group-based trajectory modeling (Nagin, 2005), Laub and Sampson (2003) show that the offending trajectories of all identified groups

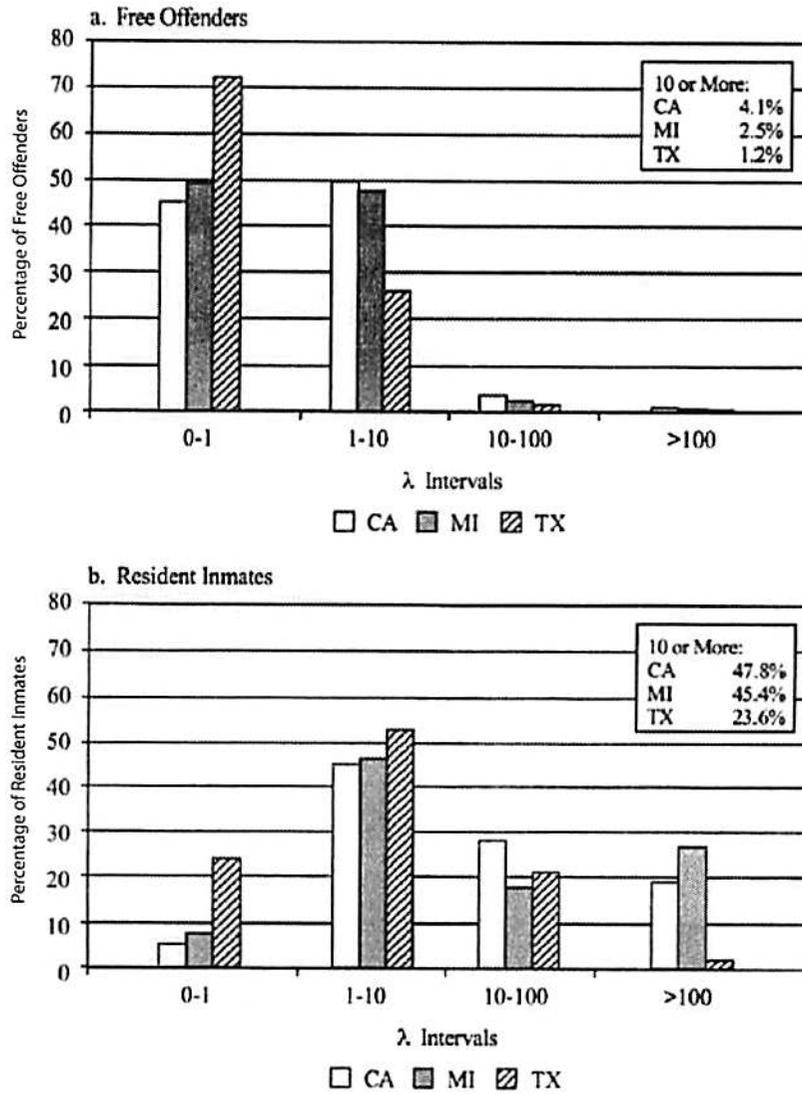


FIGURE 5-2 Distribution of offense rates (λ) among free offenders and resident inmates.
SOURCE: Canela-Cacho et al. (1997).

decline sharply with age. The implication is that estimates of offending rates of prison inmates based on self-reports or arrest data for the period immediately prior to their incarceration will tend to substantially overstate what their future offending rate will be, especially in their middle age and beyond. This conclusion is reinforced by the criminal desistance research of Blumstein and Nakamura (2009), Bushway and colleagues (2011), and Kurlychek and colleagues (2006). Blumstein and Nakamura (2009), for example, find that offending rates among the formerly arrested are statistically indistinguishable from those of the general population after 7 to 10 years of remaining crime free.¹¹

Other Considerations

Beyond the constancy of the offending rate across offenders and over the criminal career, several other assumptions relate to the effectiveness of imprisonment as a public safety strategy. Three assumptions are particularly relevant here.

The first has to do with the phenomenon of replacement, as discussed in Box 5-1. From the inception of research on incapacitation, it has been recognized that incarceration of drug dealers is ineffective in preventing drug distribution through incapacitation because dealers are easily replaced. Miles and Ludwig (2007) argue that analogous market mechanisms may result in replacement for other types of crime.

Second, the criminal career model assumes that the experience of incarceration has no impact, positive or negative, on the intensity and duration of postrelease offending. As discussed later in this chapter, evidence of this effect is generally poor, but there is reason to suspect that the experiences of imprisonment may exacerbate postrelease offending.

Third, the criminal career model assumes away co-offending, a phenomenon that is particularly common among juveniles and young adults. In so doing, the model implicitly assumes that incapacitation of one of the co-offenders will avert the offense in its entirety—a dubious assumption. Indeed, Marvell and Moody (1994) conclude that failure to account for co-offending may inflate incapacitation estimates by more than a third.¹²

¹¹Most active career offenders also desist from crime at relatively early ages—typically in their 30s (Farrington, 2003). The “age-crime curve” and the short residual lengths of criminal careers are among the principal reasons why it can be difficult to implement ideas about “selective incapacitation” of high-rate offenders—it is easy to identify high-rate serious offenders retrospectively but not prospectively.

¹²We also note that in their reanalysis of the RAND data, Marvell and Moody make further adjustments for many of the other factors already discussed. The adjustments result in a 77 percent reduction in their estimate of the incapacitation effect compared with the RAND estimate.

BOX 5-1
Replacement Effects and Drug Arrests

For several categories of offenders, an incapacitation strategy of crime prevention can misfire because most or all of those sent to prison are rapidly replaced in the criminal networks in which they participate. Street-level drug trafficking is the paradigm case. Drug dealing is part of a complex illegal market with low barriers to entry. Net earnings are low, and probabilities of eventual arrest and imprisonment are high (Levitt and Venkatesh, 2000; Caulkins and Reuter, 2010; Reuter, 2013). Drug policy research has nonetheless shown consistently that arrested dealers are quickly replaced by new recruits (Dills et al., 2008; MacCoun and Martin, 2009). At the corner of Ninth and Concordia in Milwaukee in the mid-1990s, for example, 94 drug arrests were made within a 3-month period. "These arrests, [the police officer] pointed out, were easy to prosecute to conviction. But . . . the drug market continued to thrive at the intersection" (Smith and Dickey, 1999, p. 8).

Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances choose to sell drugs on street corners because it appears to present opportunities not otherwise available. However, such people tend to overestimate the benefits of that activity and underestimate the risks (Reuter et al., 1990; Kleiman, 1997). This perception is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live affluent lives and manage to avoid arrest. Similar analyses apply to many members of deviant youth groups and gangs: as members and even leaders are arrested and removed from circulation, others take their place. Arrests and imprisonments of easily replaceable offenders create illicit "opportunities" for others.

**ESTIMATING THE TOTAL EFFECT OF
INCARCERATION ON CRIME**

Instead of studying policy changes in specific jurisdictions or asking offenders about their levels of criminal involvement, another commonly used design analyzes the relationship between imprisonment rates and crime rates across states and over time. The usual specification regresses the logarithm of the crime rate on the logarithm of the incarceration rate, yielding an elasticity of the crime rate with respect to incarceration. This elasticity measures the expected percentage change in the crime rate for a 1 percent increase in the incarceration rate. Because the estimated elasticity does not distinguish between the effects of incapacitation and the effects of deterrence, researchers in this domain interpret it as estimating a "total effect" of incarceration on crime.

A key challenge for studies in this research tradition is the problem of endogeneity—crime rates may affect incarceration rates even as

incarceration rates affect crime rates because an increase in crime may increase the numbers of arrests and prison admissions. Under these conditions, a coefficient from a regression of crime rates on imprisonment rates will reflect both the reductions in crime due to incapacitation and deterrence and the increase in incarceration due to increased crime. Estimates of the negative incarceration effect that do not adjust for this endogeneity will thus be biased toward zero, underestimating the degree to which imprisonment reduces crime.

Adjustment for endogeneity of this kind usually involves instrumental variables. In this problem context, an instrumental variable is a variable that (1) is not affected by the crime rate but (2) does affect the incarceration rate, and (3) has no effect on the crime rate separate from its effect on the incarceration rate. Although instrumental variables generally are difficult to find, researchers have argued that some policy changes meet these three conditions. Such policy changes may thus be useful instruments for identifying the causal effect of incarceration on crime, purged of the influence of crime on incarceration. We discuss these studies below.

A review by Donohue (2007) identifies eight studies of the relationship of crime rates to incarceration rates. Six of the eight studies use data from all or nearly all of the 50 states for varying time periods from the 1970s to 2000, and the remaining two use the RAND inmate surveys and county-level data from Texas. All find statistically significant negative associations between crime rates and incarceration rates, implying a crime prevention effect of imprisonment. However, the magnitudes of the estimates of this effect vary widely, from nil for a study allowing for the possibility that prevention effects decline as the scale of incarceration increases (Liedka et al., 2006) to -0.4 percent for each 1 percent increase in the incarceration rate (Spelman, 2000). Apel and Nagin (2011), Durlauf and Nagin (2011a, 2011b), and Donohue (2007) discuss the main limitations of these studies.

Western (2006) performed a Bayesian sensitivity analysis that adjusted regressions not accounting for endogeneity according to different beliefs about the effect of crime on incarceration. In an analysis of 48 states for the period 1971 to 2001, the assumption that crime had no effect on incarceration yielded an elasticity of the index crime rate to state incarceration rates of -0.07 . Assuming strong endogeneity—that a 1 percent increase in crime produced a 0.15 percent increase in incarceration—yielded an elasticity of -0.18 that was more than twice as large, although this estimate was statistically insignificant. In short, the estimated elasticity of crime with respect to incarceration is acutely sensitive to beliefs about the dependence of incarceration on crime. The highest estimates of crime-incarceration elasticity imply that crime has a large effect on incarceration rates.

Explicit adjustment for endogeneity with instrumental variables is provided by Levitt (1996), Spelman (2000), and Johnson and Raphael (2012).

Levitt (1996) uses court-ordered prison releases and indicators for overcrowding litigation to form a set of instrumental variables. (Spelman [2000] uses the same instruments applied to a slightly longer time series.) Levitt argues that such court orders meet the test for providing a valid estimate of the effect of the incarceration rate on the crime rate. The orders are not affected by and have no direct effect on the crime rate, affecting it only insofar as they affect the imprisonment rate. Levitt's instrumental variables-based point elasticity estimates vary by specification and crime type, but some are as large as -0.4 .

Even if one accepts Levitt's arguments about the validity of the prison overcrowding instrument, the estimated effects have only limited policy value. The instrument, by its construction, likely is measuring the effect on crime of the early release of selected prisoners, probably those nearing the end of their sentenced terms. It may also reflect the effect of diverting individuals convicted of less serious crimes to either local jails or community supervision. In either case, the estimates are not informative about the crime prevention effects, whether by deterrence or incapacitation, of sentence enhancements related to the manner in which a crime is committed (e.g., weapon use), to the characteristics of the perpetrator (e.g., prior record), or to policies affecting the likelihood of incarceration. More generally, the uncertainty about what is actually being measured inherently limits the value of the estimated effects for both policy and social science purposes.

A more recent instrumental variables-based study by Johnson and Raphael (2012) specifies a particular functional dependence of prison admissions on crime and uses this information to identify the incarceration effect. Identification is based on the assumption that prison populations do not change instantaneously in response to changes in the size of the criminal population. As in the non-instrumental variables-based analysis of Liedka and colleagues (2006), Johnson and Raphael conclude that the crime prevention effect of imprisonment has diminished with the scale of imprisonment, which was rising steadily over the period of their analysis (1978 to 2004). Their conclusion also is consistent with previously discussed findings of Canala-Cacho and colleagues (1997), Vollaard (2012), and Owens (2009).

In light of the incapacitation studies, evidence reported by Johnson and Raphael (2012) that the crime-incarceration elasticity is smaller at higher incarceration rates suggests that relatively low-rate offenders are detained by additional incarceration when the incarceration rate is high. However, even the incapacitation interpretation is cast in doubt by the aging of the U.S. prison population. Between 1991 and 2010, the percentage of prisoners in state and federal prisons over age 45 nearly tripled, from 10.6 percent to 27.4 percent (Beck and Mumola, 1999; Guerino et al., 2011). Thus, the apparent decline in the incapacitative effectiveness of incarceration with

scale may simply be reflecting the aging of the prison population (regardless of whether this is attributable to longer sentences), which coincided with rising imprisonment rates. Further complicating the decreasing returns interpretation is the changing composition of the prison population with respect to the types of offenses for which prisoners have been convicted. For more than four decades, the percentage of prisoners incarcerated for non-Part I Federal Bureau of Investigation (FBI) index crimes¹³ has increased substantially (Blumstein and Beck, 1999, 2005). Thus, the reduction in crime prevention effectiveness may be due to the types of prisoners incarcerated rather than the high rate of incarceration itself.

All of these studies, whether instrumental variables-based or not, also suffer from an important conceptual flaw that limits their usefulness in understanding deterrence and devising crime control policy. Prison population is not a policy variable per se; rather, it is an outcome of sanction policies dictating who goes to prison and for how long—the certainty and severity of punishment. In all incentive-based theories of criminal behavior in the tradition of Bentham and Beccaria, the deterrence response to sanction threats is posed in terms of the certainty and severity of punishment, not the incarceration rate. Therefore, to predict how changes in certainty and severity might affect the crime rate requires knowledge of the relationship of the crime rate to certainty and severity as separate entities. This knowledge is not provided by the literature that analyzes the relationship of the crime rate to the incarceration rate.

These studies also were conducted at an overly global level. Nagin (1998) discusses two dimensions of sanction policies that affect incarceration rates. The first—“type”—encompasses three categories of policies: those that determine the certainty of punishment, such as by requiring mandatory imprisonment; those that affect sentence length, such as determinate sentencing laws; and those that regulate parole powers. The second dimension—“scope”—distinguishes policies with a broad scope, such as increased penalties for a wide range of crimes, from policies focused on particular crimes (e.g., drug offenses) or criminals (e.g., repeat offenders).

The 5-fold growth in incarceration rates over the past four decades is attributable to a combination of policies belonging to all cells of this matrix. As described in Chapter 3, parole powers have been greatly curtailed and sentence lengths increased, both in general and for particular crimes (e.g., drug dealing), and judicial discretion to impose nonincarcerative sanctions has been reduced (Tonry, 1996; Blumstein and Beck, 1999, 2005; Raphael and Stoll, 2009). Consequently, any impact of the increase in prison population

¹³Part I index crimes are homicide, rape, robbery, aggravated assault, burglary, larceny/theft, motor vehicle theft, and arson.

on the crime rate reflects the effect of an amalgam of potentially interacting factors.

There are good reasons for predicting differences in the crime reduction effects of different types of sanctions (e.g., mandatory minimum sentences for repeat offenders versus prison diversion programs for first-time offenders). Obvious sources of heterogeneity in offender response include such factors as prior contact with the criminal justice system, demographic characteristics, and the mechanism by which sanction threats are communicated to their intended audience.

THE CRIMINAL INVOLVEMENT OF THE FORMERLY INCARCERATED

Research on incapacitation and deterrence focuses largely on the contemporaneous effect of incarceration—the crime prevented now by today's incarceration.¹⁴ However, today's incarceration may also affect the level of crime in the future. In studying the lagged effects of incarceration on crime, researchers generally have focused on the criminal involvement of people who have been incarcerated. Two competing hypotheses appear plausible. On the one hand, people who have served time in prison may be less likely to be involved in crime because the experience of incarceration has deterred them or because they have been involved in rehabilitative programs. On the other hand, the formerly incarcerated may be more involved in crime after prison because incarceration has damaged them psychologically in ways that make them more rather than less crime prone, has brought them into contact with criminally involved peers, has exposed them to violent or other risky contexts, or has placed them at risk of crime because of imprisonment's negative social effects on earnings and family life (discussed in Chapters 8 and 9, respectively). A recent review of the literature on imprisonment and reoffending by Nagin and colleagues (2009) concludes that there is little evidence of a specific deterrent or rehabilitative effect of incarceration, and that all evidence on the effect of imprisonment on reoffending points to either no effect or a criminogenic effect.¹⁵

¹⁴The committee is not aware of any research estimating the lagged effects of incapacitation on crime.

¹⁵It is important to distinguish the effect of imprisonment on recidivism from the effect of aging on recidivism. Studies of the effect of aging on recidivism examine how rates of recidivism change with age, whereas studies of the effect of imprisonment on recidivism examine how imprisonment affects recidivism compared with a noncustodial sanction such as probation. Thus, the conclusion that rates of recidivism tend to decline with age does not contradict the conclusion that imprisonment, compared with a noncustodial sanction, may be associated with higher rates of recidivism.

Whatever the effects of incarceration on those who have served time, research on recidivism offers a clear picture of crime among the formerly incarcerated. The Bureau of Justice Statistics has published two multistate studies estimating recidivism among state prisoners. Both take an annual cohort of prison releases and use state and federal criminal record databases to estimate rates of rearrest, reconviction, and resentencing to prison. Beck and Shipley (1989) examine criminal records for a 1983 cohort of released prisoners in 11 states, while Langan and Levin (2002) analyze a 1994 cohort in the 11 original states plus 4 others. Although the incarceration rate had roughly doubled between 1983 and 1994, the results of the two studies are strikingly similar: the 3-year rearrest rate for state prisoners was around two-thirds in both cohorts (67.5 percent in 1994 and 62.5 percent in 1983).

Research on recidivism recently has been augmented by studies of “redemption”—the chances of criminal involvement among offenders who have remained crime free (Blumstein and Nakamura, 2009; Kurlychek et al., 2006, 2007; Soothill and Francis, 2009). Although none of these studies examines desistance among the formerly incarcerated, their findings are suggestive and point to the need for research on long-term patterns of desistance among those who have served prison time. Using a variety of cohorts in the United States and the United Kingdom, this research finds that the offending rate of the formerly arrested or those with prior criminal convictions converges toward the (age-specific) offending rate of the general population, conditional on having been crime free for the previous 7 to 10 years. The redemption studies also show that the rate of convergence of the formerly incarcerated tends to be slower if ex-offenders are younger or if they have a long criminal history.

Rehabilitative programming has been the main method for reducing crime among the incarcerated. Such programming dates back to Progressive-era reforms in criminal justice that also produced a separate juvenile justice system for children involved in crime, indeterminate sentencing laws with discretionary parole release, and agencies for parole and probation supervision. For much of the twentieth century, rehabilitation occupied a central place in the official philosophy—if not the practice—of U.S. corrections. This philosophy was significantly challenged in the 1970s when a variety of reviews found that many rehabilitative programs yielded few reductions in crime (Martinson, 1974; National Research Council, 1978a). By the late 1990s, consensus had begun to swing back in favor of rehabilitative programs. Gaes and colleagues (1999) report, with little controversy, that well-designed programs can achieve significant reductions in recidivism, and that community-based programs and programs for juveniles tend to be more successful than programs applied in custody and with adult clients. Gaes and colleagues also point to the special value

of cognitive-behavioral therapies that help offenders manage conflict and aggressive and impulsive behaviors.

Since the review of Gaes and colleagues, there have been several important evaluations of transitional employment and community supervision programs (Hawken and Kleiman, 2009; Redcross et al., 2012). Results for transitional employment among parole populations have been mixed. Over a 3-year follow-up period, prison and jail incarceration was significantly reduced by a 6-week period of transitional employment, but arrests and convictions were unaffected. Parole and probation reforms involving both sanctions that are swift and certain but mild and sanctions that are graduated have been shown to reduce violations and revocations. Because evaluation of such programs is ongoing, information about other postprogram effects is not yet available.

Researchers and policy makers often have claimed that prison is a “school for criminals,” immersing those with little criminal history with others who are heavily involved in serious crime. Indeed, this view motivated a variety of policies intended to minimize social interaction among the incarcerated in the early nineteenth-century penitentiary. Much of the research reported in Chapters 6 through 9 on the individual-level effects of incarceration suggests plausible pathways by which prison time may adversely affect criminal desistance. Research suggests the importance of steady employment and stable family relationships for desisting from crime (Sampson and Laub, 1993; Laub and Sampson, 2003). To the extent that incarceration diminishes job stability and disrupts family relationships, it may also be associated with continuing involvement in crime. As previously indicated, Nagin and colleagues (2009) found that a substantial number of studies report evidence of a criminogenic effect of imprisonment, although they also conclude that most of these studies were based on weak research designs.

EFFECTS OF INCARCERATION FOR DRUG OFFENSES ON DRUG PRICES AND DRUG USE

As discussed in Chapter 2, a large portion of the growth in state and federal imprisonment is due to the increased number of arrests for drug offenses and the increased number of prison commitments per drug arrest. Law enforcement efforts targeting drug offenses expanded greatly after the 1970s, with the arrest rate for drugs increasing from about 200 per 100,000 adults in 1980 to more than 400 per 100,000 in 2009 (Snyder, 2011). Sentencing for drug offenses also became more punitive, as mandatory prison time for these offenses was widely adopted by the states through the 1980s and incorporated in the Federal Sentencing Guidelines in 1986. Expanded enforcement and the growing use of custodial sentences for drug

offenses also produced a large increase in the incarceration rate for these offenses. From 1980 to 2010, the state incarceration rate for drug offenses grew from 15 per 100,000 to more than 140 per 100,000, a faster rate of increase than for any other offense category. State prison admissions for drug offenses grew most rapidly in the 1980s, increasing from about 10,000 in 1980 to about 116,000 by 1990 and peaking at 157,000 in 2006 (Beck and Blumstein, 2012, Figures 12 and 13).

As discussed in Chapter 4, successive iterations of the war on drugs, announced by the Nixon, Reagan, and Bush administrations, focused drug control policy on both the supply side and the demand side of the illegal drug market. The intensified law enforcement efforts not only were aimed chiefly at reducing the supply of drugs, but also were intended to reduce the demand for drugs. On the supply side, the specific expectation of policy makers has been that, by taking dealers off the streets and raising the risks associated with selling drugs, these enforcement strategies and more severe punishments would reduce the supply of illegal drugs and raise prices, thereby reducing drug consumption. On the demand side, penalties for possession became harsher as well, and criminal justice agencies became actively involved in reducing demand through the arrest and prosecution of drug users. As a result of this twin focus on supply and demand, incarceration rates for drug possession increased in roughly similar proportion to incarceration rates for drug trafficking (Caulkins and Chandler, 2006).

Much of the research on drug control policy—and specifically, on the effectiveness of law enforcement and criminal justice strategies in carrying out those policies—is summarized in two reports of the National Research Council (2001, 2011). On the supply side of the drug market, the 2001 report finds that “there appears to be nearly unanimous support for the idea that the current policy enforcing prohibition of drug use substantially raises the prices of illegal drugs relative to what they would be otherwise” (p. 153). However, the combined effect of both supply- and demand-side enforcement on price is uncertain (Kleiman, 1997; Kleiman et al., 2011; Reuter, 2013) because effective demand-suppression policies will tend to decrease rather than increase price. Thus, the well-documented reduction in the price of most drugs since the early 1980s (Reuter, 2013) may, in principle, be partly a reflection of success in demand suppression.¹⁶ Nevertheless,

¹⁶National data on drug price trends come from the System to Retrieve Information from Drug Evidence (STRIDE), which combines information on acquisitions of illegal drugs by the Drug Enforcement Administration (DEA) and the Metropolitan Police of the District of Columbia (MPDC). The underlying reporting base from DEA field offices is very sparse, and earlier National Research Council reports warn of the acute limitations of the STRIDE data. The data show large declines in the prices of cocaine and heroin since the early 1980s, and prices have largely been fluctuating around a historically low level over the past two decades. A typical estimate records a decline in the price of a pure gram of powder cocaine from \$400

the ultimate objective of both supply- and demand-side enforcement efforts is to reduce the consumption of illicit drugs, and there is little evidence that enforcement efforts have been successful in this regard. The National Research Council (2001, p. 193) concludes: “In summary, existing research seems to indicate that there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use.” Although data often are incomplete and of poor quality, the best empirical evidence suggests that the successive iterations of the war on drugs—through a substantial public policy effort—are unlikely to have markedly or clearly reduced drug crime over the past three decades.

KNOWLEDGE GAPS

We offer the following observations regarding gaps in knowledge of the crime prevention effects of incarceration and research to address those gaps.

Deterrence and Sentence Length

The deterrent effect of lengthy sentences is modest at best. We have pointed to evidence from the Project HOPE experiment (Kleiman, 2009; Hawken and Kleiman, 2009; Hawken, 2010) and a fine enforcement experiment (Weisburd et al., 2008) suggesting that the deterrent effect of sentence length may be subject to decreasing returns. Research on the relationship between sentence length and the magnitude of the deterrent effect is therefore a high priority. Related research is needed to establish whether other components of the certainty of punishment beyond the certainty of apprehension, such as the probability of imprisonment given conviction, are effective deterrents.

Sentencing Data by State

A National Research Council report on the deterrent effect of the death penalty (National Research Council, 2012a) describes large gaps in state-level data on the types of noncapital sanctions legally available for the punishment of murder and on their actual utilization. Comparable gaps exist for other serious crimes that are not subject to capital punishment. As a consequence, it is not possible to compare postconviction sentencing practices across the 50 states. Development of a comprehensive database

in 1981 to under \$100 in 2007 (Fries et al., 2008). Similar price declines are found for heroin and crack cocaine.

that would allow for such cross-state comparisons over time is therefore a high priority.

CONCLUSION

Many studies have attempted to estimate the combined incapacitation and deterrence effects of incarceration on crime using panel data at the state level from the 1970s to the 1990s and 2000s. Most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration. Where adjustments are made for the direct dependence of incarceration rates on crime rates, the crime-reducing effects of incarceration are found to be larger. Thus, the degree of dependence of the incarceration rate on the crime rate is crucial to the interpretation of these studies. Several studies influential for the committee's conclusions in Chapters 3 and 4 find that the direct dependence of the incarceration rate on the crime rate is modest, lending credence to a small crime-reduction effect on incarceration. However, research in this area is not unanimous and the historical and legal analysis is hard to quantify. If the trend in the incarceration rate depended strongly on the trend in crime, then a larger effect of incarceration on crime would be more credible. On balance, panel data studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.

Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.

Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they

are specifically targeted at very high-rate or extremely dangerous offenders. For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.

Finally, although the body of credible evidence on the effect of the experience of imprisonment on recidivism is small, that evidence consistently points either to no effect or to an increase rather than a decrease in recidivism. Thus, there is no credible evidence of a specific deterrent effect of the experience of incarceration.

Our review of the evidence in this chapter reaffirms the theories of deterrence first articulated by the Enlightenment philosophers Beccaria and Bentham. In their view, the overarching purpose of punishment is to deter crime. For state-imposed sanctions to deter crime, they theorized, requires three ingredients—severity, certainty, and celerity of punishment. But they also posited that severity alone would not deter crime. Our review of the evidence has confirmed both the enduring power of their theories and the modern relevance of their cautionary observation about overreliance on the severity of punishment as a crime prevention policy.

Exhibit 5



2011 Kentucky Reforms Cut Recidivism, Costs

Broad Bill Enacts Evidence-Based Strategies

Problem: Kentucky had one of the fastest growing prison populations in the nation over the decade ending in 2009, rising by 45 percent, compared to 13 percent growth for all states.

Consequences: Corrections spending jumped 214 percent over the two decades ending in FY 2010, to \$440 million. Meanwhile, recidivism rates remained above levels seen in the 1990s, despite slight improvement in recent years.

Drivers: Data showed an increase in overall arrests and court cases, as well as rising incarceration rates for technical parole violators. Analysis also showed offenders in Kentucky were far more likely to be sentenced to prison than the national average and an increase in the percentage of all admissions who were drug offenders.

Reforms: With technical assistance from the Pew Center on the States, the Task Force on the Penal Code and Controlled Substances Act produced a set of reforms leading to the Public Safety and Offender Accountability Act of 2011. Passed unanimously in the Senate and with just one dissenting vote in the House, the law concentrates expensive prison beds on serious offenders, reduces recidivism by

The Impact of Public Safety Reform

The Public Safety and Offender Accountability Act will reduce Kentucky's prison population by more than 3,000 inmates over the next 10 years and save taxpayers an estimated \$422 million.



SOURCE: Kentucky Office of State Budget Director

strengthening probation and parole, and establishes mechanisms for measuring government progress over time.

Impact: The legislation is expected to enhance public safety and improve the performance of Kentucky's correctional system on multiple levels. The state estimates the reforms will save \$422 million over 10 years, allowing increased investment in programs to reduce recidivism with residual funds available for state budget relief.

Background

Between 1999 and 2009, Kentucky had one of the fastest growing prison populations in the nation. Although it has declined modestly during the past three years, the Commonwealth's inmate population was 45 percent larger in 2009 than it was a decade earlier.¹

This is one of the best days in the 26 years I've been up here."

Senate President David Williams (R),
upon passage of the bill, February 28, 2011

Looking back over a longer period, the prison population had jumped more than 260 percent since 1985, from about 5,700 inmates to more than 20,700 in 2010, according to the Kentucky Department of Corrections.² At year-end 2007, 1 of every 92 adults in Kentucky was incarcerated, compared with 1 of every 100 adults nationally.³

This high rate of prison expansion was not the result of an increase in crime. Kentucky's serious crime rate has been well below that of the nation and other southern states since the 1960s, and the crime rate in 2009 was about what it was in 1974.⁴ Nevertheless, the Commonwealth's imprisonment rate has increased. It jumped from well below the national average in 1985 to slightly above the national average in 2009.⁵ That high imprisonment rate applies to both men and women. In 2008, Kentucky had the sixth highest incarceration rate for females.⁶

Kentucky taxpayers paid handsomely for the Commonwealth's heavy reliance on prison. In FY 1990, general fund corrections spending in Kentucky totaled \$140 million. By FY 2010, that amount was \$440 million, an increase of 214 percent.⁷ Focusing the lens tighter, average state spending per prisoner rose about 10 percent between FY 2005 and FY 2009, jumping to approximately \$19,000 per year to house each inmate.⁸ Meanwhile, funds to reduce recidivism and hold offenders accountable in the community became more scarce. Spending on probation and parole between FY 2005 and FY 2009 dropped from \$1,191 per offender per year to \$961 per offender per year.⁹

Greater spending on prisons did not translate into more positive public safety outcomes. While the state's recidivism rate—the number of offenders who return to prison within three years of release—fluctuated over the previous decade and improved slightly in recent years, it remained above the levels from the late 1990s. The recidivism rate for those leaving prison in 1997 was 37 percent. The Kentucky Department of Corrections reported that the rate peaked at 44 percent for those leaving prison in 2003, and stood at 40 percent for those who left prison in 2007.¹⁰

Charting a New Path

With the prisons filled to capacity and the state economy in significant distress, Kentucky in 2010 was at a critical crossroads. Although the inmate population had dipped somewhat, the significant growth of prison spending over the previous decade and disappointing public safety return concerned many Kentucky policy makers, and they began looking for new solutions to contain prison growth and corrections spending while protecting public safety.

To help chart a course forward, the General Assembly in 2010 established the bipartisan, inter-branch Task Force on the Penal Code and Controlled Substances Act.¹¹ The task force members included the chairs of the Senate and House Judiciary Committees, the Chief Justice, the governor's Justice and Public Safety Cabinet secretary, a former prosecutor, a former public defender, and a county judge/executive. The task force was given authority to request technical assistance from outside organizations, and it made this request of the Pew Center on the States.

Beginning in the summer of 2010, the task force began a detailed analysis of Kentucky's sentencing and corrections data, combing through prison admissions data and auditing state policies. Pew and its partners, the Crime and Justice Institute and the JFA Institute, assisted the task force with this work.

The analysis revealed that correctional policies and practices were principally responsible for Kentucky's prison growth, rather than an increase in crime or any demographic shifts. Among the findings:

- **Increase in Arrests and Court Cases.** While reported crime remained basically flat between 2001 and 2009, adult arrests increased 32 percent during that time.¹² The increase was driven by a 70 percent jump in arrests for drug offenses, a 22 percent increase in arrests for Part 1 offenses and an increase of 33 percent for Part 2 offenses.¹³ Meanwhile, the Administrative

Members of the Task Force on the Penal Code and Controlled Substances Act:

- Senator Tom Jensen, task force co-chair and chair of the Senate Judiciary Committee
- Representative John Tilley, task force co-chair and chair of the House Judiciary Committee
- Secretary J. Michael Brown, Justice and Public Safety Cabinet
- Chief Justice John D. Minton, Jr., Kentucky Supreme Court
- Tom Handy, former Commonwealth's Attorney
- J. Guthrie True, former public advocate
- Judge/Executive Tommy Turner, Larue County

Office of the Courts reported that the number of criminal cases filed in Kentucky's circuit courts rose from 25,591 in 2002 to 32,026 in 2009.¹⁴

■ **High Percentage of Offenders Being Sentenced to Prison.**

Kentucky sentenced offenders to prison as opposed to probation or other alternative sanctions at a much higher rate than most other states. In 2009, Kentucky circuit and district courts sentenced 57 percent of all convicted felony offenders to prison, a considerably higher proportion than other jurisdictions.¹⁵ The federal Bureau of Justice Statistics reports that in 2006, 41 percent of all felony convictions nationwide resulted in a sentence to state prison.¹⁶

■ **Technical Parole Violators.**

Parolees sent back to prison for a violation of the terms of their release who did not have a new felony conviction nearly doubled as a percentage of prison admissions over the past 12 years. The Kentucky Department of Corrections reported that such parole violators accounted for 10.2 percent of total prison admissions in FY 1998, but made up 19.5 percent of all admissions in FY 2010. Admissions by parole violators who had a new felony conviction accounted for just 2.2 percent of total admissions in FY 2010, up from 1.8 percent of total admissions in FY 1998.¹⁷

■ **Drug Offenders.** The Kentucky Department of Corrections reported that between 2000 and 2009, the proportion of incoming inmates who were drug offenders rose from 30 percent to 38 percent. More broadly, 25 percent of the total inmate population was serving time for drug offenses. In addition, about 75 percent of these incarcerated drug offenders are in prison for possession offenses or first-time drug trafficking offenses that are often met with alternative sanctions in other states.¹⁸

Building Consensus

The extensive analysis of factors fueling growth in the prison system was the first step in a year-long effort to develop common-sense policy changes to contain corrections costs and reinvest a portion of the savings in evidence-based practices and programs that have been shown in other states to reduce recidivism and improve public safety.

In addition, the task force reviewed existing community supervision policies and practices; considered best practices from other states; and solicited input from a wide range of stakeholders within the criminal justice system and beyond. These included law enforcement officials, county representatives, prosecutors, the defense bar, crime victims, judges, probation and parole officers, business leaders, and treatment providers.

[Sen. Jensen and Rep. Tilley] were from two different parties, from two separate parts of the state, but their perseverance caused all of us to lay down our differences for the greater good."

Chief Justice John D. Minton, Jr.
April 20, 2011

Through a series of public hearings and meetings, the task force members used this research and input to build consensus for a package of tailored legislative and administrative reforms. The package of reforms, released as part of a final task force report in January 2011, will hold offenders accountable while reducing recidivism, leading to stable costs and improved public safety.

To enact these recommendations, the task force co-chairs, Sen. Tom Jensen, a Republican from London, and Rep. John Tilley, a Democrat from Hopkinsville, drafted the Public Safety and Offender Accountability Act with input from key stakeholders.¹⁹

The 150-page bill was introduced in February 2011 and sailed through both chambers—unanimously in the Senate and 96-1 in the House—and was signed into law by Governor Steve Beshear on March 3, 2011. Despite a short legislative session and a gubernatorial campaign pitting the Senate President against the sitting governor, both Republicans and Democrats were able to coalesce around this important issue.

Projections are that the changes will reduce the prison population by more than 3,000 inmates over the next 10 years, saving the state an estimated \$422 million.²⁰ The legislation directs that a significant portion of those savings be reinvested in evidence-based correctional programs.

The Public Safety and Offender Accountability Act

The Public Safety and Offender Accountability Act combines data-driven reforms to help Kentucky use its expensive prison space for the most serious offenders, strengthen parole and probation to reduce recidivism, and track progress under the law so the legislature can effectively evaluate results. The Office of State Budget Director estimates the reforms will produce savings of \$422 million over 10 years.²¹ A portion of these savings will be reinvested in substance abuse programs, mental health treatment, and other efforts designed to reduce reoffending.



It is critical to find sensible ways to be smart on crime while remaining tough on criminals, and Kentucky will surely be held as an example for other states to follow."

Governor Steve Beshear (D)
February 28, 2011

Focus Expensive Prison Beds on Serious Offenders

The Kentucky Department of Corrections reported that between 2000 and 2009, the proportion of incoming inmates who were drug offenders rose from 30 percent to 38 percent. In addition, 25 percent of the total inmate population was serving time for drug offenses, and about 75 percent of them were incarcerated for possession offenses or a first-time drug trafficking offense.²²

The law reflects a consensus that many of these low-risk, nonviolent offenders can be effectively supervised in the community at a lower cost, ensuring prison beds are available for more dangerous offenders. Savings from that tiered approach can then be invested to create a stronger system of community punishments that will reduce recidivism. Specifically, the Act:

- Distinguishes between serious drug trafficking and peddling by maintaining severe penalties for serious drug traffickers, while establishing a proportionate scale of penalties that ensures those who traffic in larger quantities of drugs are punished more harshly than those who sell small amounts for personal use.
- Revises penalties for simple possession of drugs by making the penalty for possession of controlled substances in the first degree a Class D felony with a three-year maximum sentence rather than five years. In addition, it also allows courts to divert minor offenders by permitting deferred prosecution or a presumptive probation sentence for first and second time possession offenders.
- Eliminates sentence enhancements for second and subsequent drug possession offenses.
- Requires prosecutors to choose to enhance a person's sentence using either the Persistent Felony Offender (PFO) statute or the enhancement in the applicable criminal offense statute, but not both, and restricts possession in the first degree from triggering the application of the PFO statute, but allows it to count as a prior offense if another subsequent felony offense triggers the PFO statute.
- Revises the "drug-free school zone" by changing the required distance between a trafficking offense and a school building from 1,000 yards to 1,000 feet in accordance with the Uniform Controlled Substances Act.²³
- Expands community-based transitional housing options and GPS monitoring for those leaving prison.

Reduce Recidivism by Strengthening Probation and Parole

Kentucky's corrections system has faced several persistent challenges, such as stubbornly high recidivism rates, a high rate of imprisonment and a lack of sufficient community intervention resources. The new law codifies and expands upon efforts that will allow the system to address these challenges. Specifically, the Act:

- Requires that the courts and corrections authorities incorporate risk and needs assessment information into the decision-making process, including for pre-trial supervision, at sentencing, in evaluating parole suitability and setting terms of parole, and throughout the period of probation and parole supervision.
- Requires that by 2016, 75 percent of state expenditures on supervision and intervention programs for pre-trial defendants, inmates and those on parole and probation are spent on programs that are evidence-based.
- Requires that offenders are supervised using practices proven to reduce recidivism.
- Allows parole and probation officers to focus on those most likely to reoffend by requiring the use of administrative caseloads for low-risk offenders.
- Authorizes compliance credits for parolees and early termination for probationers who successfully comply with supervision conditions.
- Requires six months of supervision for offenders who would otherwise be discharged without supervision at the end of their sentences, except for serious offenders such as Class A felons or those convicted of a capital offense; prospectively those offenders will now be supervised for one year after the end of their sentence.
- Authorizes the Department of Corrections to allow offenders to complete required programming in the community and be monitored by GPS.
- Permits placement of offenders closer to their community in local jails for the last part of their sentences and allows eligibility for work release.
- Increases accountability for probation and parole violations by authorizing imposition of administrative, graduated sanctions for parole and probation violators.
- Creates two pilot projects based on the successful HOPE probation (Hawaii's Opportunity Probation with Enforcement) model, which requires frequent drug testing with immediate sanctions for positive drug tests or other violations and referral to treatment if necessary.

Improve Government Performance

Kentucky faces a tough economic situation, and the state continues to weather significant budget shortfalls. In fiscal years 2009 and 2010, general fund receipts declined for two consecutive years for the first time since World War II. Revenue levels experienced by the state in FY 2008 are not expected to return until FY 2012.²⁴ Such economic woes make efficiency in government all the more important. The new law will improve the performance of Kentucky's correctional system to ensure taxpayers receive a better return on their public safety investment. Specifically, the Act:

- Identifies the primary objective for both the Department of Corrections and sentencing policy as maintaining public safety, holding offenders accountable and reducing recidivism.
- Establishes mechanisms to measure and report the results achieved under the law.
- Improves the efficiency of the parole process by limiting the deferment period and requiring the parole board to hear cases at least 60 days prior to the offender's parole eligibility date. This change eliminates administrative delays that result in offenders staying in prison beyond the date they are granted parole.
- Requires a Corrections Impact Statement to determine the fiscal impact for any bill that proposes to increase, decrease or otherwise impact incarceration, and requires the sponsor of such a bill to identify the funds to pay for any additional costs.
- Establishes performance incentive funding pilot projects to reduce the number of offenders sent to prison at sentencing or based on a revocation.
- Requires that the Department of Corrections develop an online system that provides courts, attorneys, probation and parole officers, and victims with information about sentencing.
- Improves bail and pretrial release systems by using risk assessment and GPS monitoring, ensuring that bail amounts for misdemeanors do not exceed the fines and fees of the offenses charged, setting a \$100 per day credit toward bail and release for offenders in jail, and requiring the Supreme Court to set guidelines for judges to use when ordering pretrial release for moderate or high risk offenders.
- Allows a peace officer to issue a citation instead of making an arrest for many misdemeanor offenses with certain exceptions, such as when the offender poses a risk of danger to himself or others.

- Requires a certificate of need before the construction of new jails.
- Reauthorizes the Task Force on the Penal Code and Controlled Substances Act to monitor the implementation of the provisions of this Act and recommend further changes to Kentucky's criminal justice system.

Reinvest Savings to Strengthen Probation and Parole

The Office of State Budget Director estimates that the Act's reforms will bring gross savings of \$422 million over 10 years.²⁵ A portion of these savings will be reinvested in efforts to reduce recidivism, including strengthening probation and parole and programs for substance abusing offenders. Specifically, the Act:

- Requires that the savings achieved by the changes to the drug provisions in the Commonwealth's Controlled Substances Act be measured and reinvested to expand interventions in the community and in prison that reduce the likelihood of criminal behavior. Such measures include evidence-based substance abuse and mental health programs.

- Requires the General Assembly to appropriate funds necessary to expand treatment programs, expand probation and parole services, and provide for additional pretrial services and drug court case specialists necessary as a result of the provisions in the new law.
- Of the remaining savings from the Act, after accounting for needed parole and probation services, 25 percent will be distributed to a new local corrections assistance fund to aid local corrections facilities and programs.
- Designates \$1.2 million of the savings to expand the functionality and data in the Kentucky Offender Management System to ensure the Department of Corrections can effectively track the data necessary to carry out the new law.

Endnotes

1 U.S. Dept. of Justice, Bureau of Justice Statistics, "Prisoners in Year End 2009."

2 Kentucky Department of Corrections.

3 *One in 100: Behind Bars in America 2008*, Public Safety Performance Project, The Pew Charitable Trusts (Washington, D.C.: Feb. 2008). These figures include adult offenders in jail as well as those in prison.

4 The Disaster Center. United States: Uniform Crime Report—State Statistics from 1960-2009. United States Crime Rates 1960-2009. < <http://disastercenter.com/crime/>> (accessed Feb. 10, 2011).

5 According to the *Sourcebook of Criminal Justice Statistics Online*, the Kentucky state imprisonment rate in 1985 was 133 per 100,000 residents, compared with a U.S. rate of 187 per 100,000 residents. The state imprisonment rate in 2009 was 478 per 100,000 residents, compared with a U.S. rate of 442 per 100,000 residents. The 2009 number is found in Appendix Table 9 of the BJS report "Prisoners in 2009."

6 U.S. Dept. of Justice, Bureau of Justice Statistics, "Prisoners in 2008."

7 Data from Kentucky Legislative Research Commission. In 2010, general fund spending for corrections was reduced by \$75 million and replaced with \$75 million in federal stimulus funding. The \$440 million figure for FY 2010 includes the \$75 million in federal stimulus funding. For FY 2012, there will be no federal stimulus funding for Kentucky corrections and the \$75 million in state general fund spending was restored.

8 Average per-prisoner spending was calculated using the data from the Department of Corrections' "Cost to Incarcerate by Type of Institution" and includes an average of maximum security, medium security state and private, and minimum security state and private facilities.

9 Data from the Department of Corrections' "Cost to Incarcerate by Type of Institution."

10 Data from the Kentucky Department of Corrections.

11 House Concurrent Resolution 250 (2010).

12 Data from Kentucky State Police. Per Kentucky State Police accounting practices, these figures refer to charges, not individual arrests.

13 Data from Kentucky State Police. Part I offenses include murder and non negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft and arson. Part II offenses include the additional 21 crimes tracked by the FBI's Uniform Crime Reports, including drug offense violations.

14 Data and analysis from the Administrative Office of the Courts, Department of Court Services Research and Statistics.

15 Ibid.

16 Bureau of Justice Statistics, "Felony Sentences in State Courts, 2006," December 30, 2009, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152>.

17 Data from Kentucky Department of Corrections.

18 Ibid.

19 House Bill 463 (2011).

20 Fiscal Analysis on House Bill 463 conducted by the Kentucky Office of State Budget Director.

21 Ibid.

22 Data from Kentucky Department of Corrections.

23 The Uniform Controlled Substances Act was drafted by the U.S. Department of Justice in 1969 and promulgated by the National Conference of Commissioners on Uniform State Laws while the federal Controlled Substances Act was being drafted.

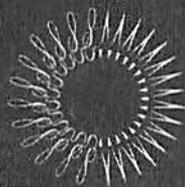
24 FY 2010 Year End Financial Report, Presented to the Interim Joint Committee on Appropriations and Revenue on July 22, 2010, by Mary Lassiter, State Budget Director.

25 Fiscal Analysis on House Bill 463 conducted by the Kentucky Office of State Budget Director.

Launched in 2006, the Public Safety Performance Project seeks to help states advance fiscally sound, data-driven policies and practices in sentencing and corrections that protect public safety, hold offenders accountable and control corrections costs.

The Pew Center on the States is a division of The Pew Charitable Trusts that identifies and advances effective solutions to critical issues facing states. Pew is a nonprofit organization that applies a rigorous, analytical approach to improve public policy, inform the public and stimulate civic life.

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Exhibit 6

N.M. Stat. Ann. § 30-22-14.1

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 22 Interference with Law Enforcement

30-22-14.1. Bringing contraband into a juvenile detention facility or juvenile correctional facility; penalty.

A. Bringing contraband into a juvenile detention facility or juvenile correctional facility consists of carrying, transporting or depositing contraband onto the grounds of any facility designated by the children, youth and families department for the detention or commitment of children. Whoever commits bringing contraband into a juvenile correctional facility is guilty of a third degree felony. Whoever commits bringing contraband into a juvenile detention facility is guilty of a fourth degree felony.

B. As used in this section, "contraband" means:

- (1) any deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of his duties;
- (2) currency brought onto the grounds of a juvenile detention facility or juvenile correctional facility and not declared upon entry to the facility for the purpose of transfer to a child detained in or committed to the facility, but does not include currency carried into areas designated by the facility administrator as areas for the deposit and receipt of currency for credit to a child's account before contact is made with any child;
- (3) any alcoholic beverage brought within the physical confines of the juvenile detention or juvenile correctional facility; or
- (4) any controlled substance, as defined in the Controlled Substances Act [30-31-1 NMSA 1978], but does not include a controlled substance carried into a juvenile detention facility or juvenile correctional facility through regular facility channels and pursuant to the direction or prescription of a regularly licensed physician.

N.M. Stat. Ann. § 30-22-14

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 22 Interference with Law Enforcement

30-22-14. Bringing contraband into places of imprisonment; penalties; definitions.

A. Bringing contraband into a prison consists of knowingly and voluntarily carrying, transporting or depositing contraband onto the grounds of the penitentiary of New Mexico or any other institution designated by the corrections department for the confinement of adult prisoners. Whoever commits bringing contraband into a prison is guilty of a third degree felony.

B. Bringing contraband into a jail consists of knowingly and voluntarily carrying contraband into the confines of a county or municipal jail. Whoever commits bringing contraband into a jail is guilty of a fourth degree felony.

C. As used in this section, "contraband" means:

(1) a deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of duties;

(2) currency brought onto the grounds of the institution for the purpose of transfer to a prisoner, but does not include currency carried into areas designated by the warden as areas for the deposit and receipt of currency for credit to a prisoner's account before contact is made with the prisoner;

(3) an alcoholic beverage;

(4) a controlled substance, as defined in the Controlled Substances Act [30-31-1 NMSA 1978], but does not include a controlled substance carried into a prison through regular prison channels and pursuant to the direction or prescription of a regularly licensed physician; or

(5) an electronic communication or recording device brought onto the grounds of the institution for the purpose of transfer to or use by a prisoner.

D. As used in this section, "electronic communication or recording device" means any type of instrument, device, machine or equipment that is designed to transmit or receive telephonic, electronic, digital, cellular, satellite or radio signals or communications or that is designed to have sound or image recording abilities or any part or component of such instrument, device, machine or equipment. "Electronic communication or recording device" does not include a device that is or will be used by prison or jail personnel in the regular course of business or that is otherwise authorized by the warden.

E. Nothing in this section shall prohibit the use of hearing aids, voice amplifiers or other equipment necessary to aid prisoners who have documented hearing or speech deficiencies or their visitors. Rules for such devices shall be established by the warden or director of each jail, detention center and prison.

N.M. Stat. Ann. § 30-31-20

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-20. Trafficking controlled substances; violation.

A. As used in the Controlled Substances Act [30-31-1 NMSA 1978], “traffic” means the:

(1) manufacture of a controlled substance enumerated in Schedules I through V [30-31-6 through 30-31-10 NMSA 1978] or a controlled substance analog as defined in Subsection W of Section 30-31-2 NMSA 1978;

(2) distribution, sale, barter or giving away of:

(a) a controlled substance enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978] that is a narcotic drug;

(b) a controlled substance analog of a controlled substance enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978] that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers; or

(3) possession with intent to distribute:

(a) a controlled substance enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978] that is a narcotic drug;

(b) controlled substance analog of a controlled substance enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978] that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers.

B. Except as authorized by the Controlled Substances Act [30-31-1 NMSA 1978], it is unlawful for a person to intentionally traffic. A person who violates this subsection is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A person who knowingly violates Subsection B of this section within a drug-free school zone excluding private property residentially zoned or used primarily as a residence is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31-22

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-22. Controlled or counterfeit substances; distribution prohibited.

A. Except as authorized by the Controlled Substances Act [30-31-1 NMSA 1978], it is unlawful for a person to intentionally distribute or possess with intent to distribute a controlled substance or a controlled substance analog except a substance enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978] that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers. A person who violates this subsection with respect to:

(1) marijuana or synthetic cannabinoids is:

(a) for the first offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) a controlled substance enumerated in Schedule V [30-31-10 NMSA 1978] or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than five hundred dollars (\$500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

B. It is unlawful for a person to distribute gamma hydroxybutyric acid or flunitrazepam to another person without that person's knowledge and with intent to commit a crime against that person, including criminal sexual penetration. For the purposes of this subsection, "without that person's knowledge" means the person is unaware that a substance with the ability to alter that person's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is being distributed to that person. Any person who violates this subsection is:

(1) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the Controlled Substances Act [30-31-1 NMSA 1978], it is unlawful for a person to intentionally create or deliver, or possess with intent to deliver, a counterfeit substance. A person who violates this subsection with respect to:

(1) a counterfeit substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) a counterfeit substance enumerated in Schedule V [30-31-10 NMSA 1978] is guilty of a petty misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for a definite term not to exceed six months, or both.

D. A person who knowingly violates Subsection A or C of this section while within a drug-free school zone with respect to:

(1) marijuana or synthetic cannabinoids is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) a controlled substance enumerated in Schedule V [30-31-10 NMSA 1978] or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(4) the intentional creation, delivery or possession with the intent to deliver:

(a) a counterfeit substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) a counterfeit substance enumerated in Schedule V [30-31-10 NMSA 1978] is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

E. Notwithstanding the provisions of Subsection A of this section, distribution of a small amount of marijuana or synthetic cannabinoids for no remuneration shall be treated as provided in Paragraph (1) of Subsection B of Section 30-31-23 NMSA 1978.

N.M. Stat. Ann. § 30-31-23

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-23. Controlled substances; possession prohibited.

A. It is unlawful for a person intentionally to possess a controlled substance unless the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of professional practice or except as otherwise authorized by the Controlled Substances Act [30-31-1 NMSA 1978]. It is unlawful for a person intentionally to possess a controlled substance analog.

B. A person who violates this section with respect to:

(1) one ounce or less of marijuana or synthetic cannabinoids is, for the first offense, guilty of a petty misdemeanor and shall be punished by a fine of not less than fifty dollars (\$50.00) or more than one hundred dollars (\$100) and by imprisonment for not more than fifteen days, and, for the second and subsequent offenses, guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both;

(2) more than one ounce and less than eight ounces of marijuana or synthetic cannabinoids is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both; or

(3) eight ounces or more of marijuana or synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A minor who violates this section with respect to the substances listed in this subsection is guilty of a petty misdemeanor and, notwithstanding the provisions of Sections 32A-1-5 and 32A-2-19 NMSA 1978, shall be punished by a fine not to exceed one hundred dollars (\$100) or forty-eight hours of community service. For the third or subsequent violation by a minor of this section with respect to those substances, the provisions of Section 32A-2-19 NMSA 1978 shall govern punishment of the minor. As used in this subsection, "minor" means a person who is less than eighteen years of age. The provisions of this subsection apply to the following substances:

(1) synthetic cannabinoids;

(2) any of the substances listed in Paragraphs (20) through (25) of Subsection C of Section 30-31-6 NMSA 1978; or

(3) a substance added to Schedule I [30-31-6 NMSA 1978] by a rule of the board adopted on or after the effective date of this 2011 act [March 31, 2011] if the board determines that the pharmacological effect of the substance, the risk to the public health by abuse of the substance and the potential of the substance to produce psychic or physiological dependence liability is similar to the substances described in Paragraph (1) or (2) of this subsection.

D. Except for those substances listed in Subsection E of this section, a person who violates this section with respect to any amount of any controlled substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV is guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars (\$500) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both.

E. A person who violates this section with respect to phencyclidine as enumerated in Schedule III [30-31-8 NMSA 1978] or a controlled substance analog of phencyclidine; methamphetamine, its salts, isomers or salts of isomers as enumerated in Schedule II [30-31-7 NMSA 1978] or a controlled substance analog of methamphetamine, its salts, isomers or salts of isomers; flunitrazepam, its salts, isomers or salts of isomers as enumerated in Schedule I [30-31-6 NMSA 1978] or a controlled substance analog of flunitrazepam, including naturally occurring metabolites, its salts, isomers or salts of isomers; gamma hydroxybutyric acid and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma hydroxybutyric acid,

its salts, isomers or salts of isomers; gamma butyrolactone and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma butyrolactone, its salts, isomers or salts of isomers; 1-4 butane diol and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of 1-4 butane diol, its salts, isomers or salts of isomers; or a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Except for a minor as defined in Subsection C of this section, a person who violates Subsection A of this section while within a posted drug-free school zone, excluding private property residentially zoned or used primarily as a residence and excluding a person in or on a motor vehicle in transit through the posted drug-free school zone, with respect to:

(1) one ounce or less of marijuana or synthetic cannabinoids is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both, and for the second or subsequent offense, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) more than one ounce and less than eight ounces of marijuana or synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) eight ounces or more of marijuana or synthetic cannabinoids is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(4) any amount of any other controlled substance enumerated in Schedule I, II, III or IV [30-31-6, 30-31-7, 30-31-8 or 30-31-9 NMSA 1978] or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV, except phencyclidine as enumerated in Schedule III, a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) phencyclidine as enumerated in Schedule III [30-31-8 NMSA 1978], a narcotic drug enumerated in Schedule I or II [30-31-6 or 30-31-7 NMSA 1978], a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31-24

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-24. Controlled substances; violations of administrative provisions.

A. It is unlawful for any person:

(1) who is subject to Sections 30-31-11 through 30-31-19 NMSA 1978 to intentionally distribute or dispense a controlled substance in violation of Section 30-31-18 NMSA 1978;

(2) who is a registrant, to intentionally manufacture a controlled substance not authorized by his registration, or to intentionally distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Controlled Substances Act [30-31-1 NMSA 1978]; or

(4) to intentionally refuse an entry into any premises for any inspection authorized by the Controlled Substances Act [30-31-1 NMSA 1978].

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31-25

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-25. Controlled substances; prohibited acts.

A. It is unlawful for any person:

- (1)** who is a registrant to distribute a controlled substance classified in Schedules [Schedule] I or II, except pursuant to an order form as required by Section 30-31-17 NMSA 1978;
- (2)** to intentionally use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended or issued to another person;
- (3)** to intentionally acquire or obtain, or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;
- (4)** to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Controlled Substances Act [30-31-1 NMSA 1978], or any record required to be kept by that act; or
- (5)** to intentionally make, distribute or possess any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint or device of another or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render the drug a counterfeit substance.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31-41

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-41. Anabolic steroids; possession; distribution; penalties; notice.

- A.** Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person to intentionally possess anabolic steroids. Any person who violates this subsection is guilty of a misdemeanor.
- B.** Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person to intentionally distribute or possess with intent to distribute anabolic steroids. Any person who violates this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.
- C.** Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person eighteen years of age or older to intentionally distribute anabolic steroids to a person under eighteen years of age. Any person who violates this subsection is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.
- D.** A copy of this act shall be distributed to each licensed athletic trainer by the athletic trainers advisory board and displayed prominently in the athletic locker rooms of all state post-secondary and public schools.

N.M. Stat. Ann. § 30-31A-4

This section is current through the First Session of the Fifty-First Legislature

*Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31A Imitation
Controlled Substances*

30-31A-4. Manufacture, distribution [or possession] of imitation controlled substance.

It is unlawful for any person to manufacture, distribute or possess with intent to distribute an imitation controlled substance. Any person who violates the provisions of this section is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31A-6

This section is current through the First Session of the Fifty-First Legislature

*Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31A Imitation
Controlled Substances*

30-31A-6. Possession with intent to distribute an imitation controlled substance.

It is unlawful for any person intentionally to possess an imitation controlled substance with the intent to distribute.
Any person who violates this section is guilty of a fourth degree felony.

N.M. Stat. Ann. § 30-51-4

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 51 Money Laundering

30-51-4. Prohibited activity; criminal penalties; civil penalties.

A. It is unlawful for a person who knows that the property involved in a financial transaction is, or was represented to be, the proceeds of a specified unlawful activity to:

- (1) conduct, structure, engage in or participate in a financial transaction that involves the property, knowing that the financial transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property or to avoid a transaction reporting requirement under state or federal law;
- (2) conduct, structure, engage in or participate in a financial transaction that involves the property for the purpose of committing or furthering the commission of any other specified unlawful activity;
- (3) transport the property with the intent to further a specified unlawful activity, knowing that the transport is designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the monetary instrument or to avoid a transaction reporting requirement under state or federal law; or
- (4) make the property available to another person by means of a financial transaction or by transporting the property, when he knows that the property is intended for use by the other person to commit or further the commission of a specified unlawful activity.

B. A person who violates any provision of Subsection A of this section is guilty of a:

- (1) second degree felony if the illegal financial transaction involves more than one hundred thousand dollars (\$100,000);
- (2) third degree felony if the illegal financial transaction involves over fifty thousand dollars (\$50,000) but not more than one hundred thousand dollars (\$100,000);
- (3) fourth degree felony if the illegal financial transaction involves over ten thousand dollars (\$10,000) but not more than fifty thousand dollars (\$50,000); or
- (4) misdemeanor if the illegal financial transaction involves ten thousand dollars (\$10,000) or less.

C. In addition to any criminal penalty, a person who violates any provision of Subsection A of this section is subject to a civil penalty of three times the value of the property involved in the transaction.

D. Nothing contained in the Money Laundering Act [30-51-1 NMSA 1978] precludes civil or criminal remedies provided by the Racketeering Act [30-42-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or by any other New Mexico law. Those remedies are in addition to and not in lieu of remedies provided in the Money Laundering Act.

N.M. Stat. Ann. § 30-31-25.1

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-25.1. Possession, delivery or manufacture of drug paraphernalia prohibited; exceptions.

A. It is unlawful for a person to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act [30-31-1 NMSA 1978]. The provisions of this subsection do not apply to a person who is in possession of hypodermic syringes or needles at the time he is directly and immediately engaged in a harm reduction program, as provided in the Harm Reduction Act [24-2C-1 NMSA 1978].

B. It is unlawful for a person to deliver, possess with intent to deliver or manufacture with the intent to deliver drug paraphernalia with knowledge, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act [30-31-1 NMSA 1978]. The provisions of this subsection do not apply to:

(1) department of health employees or their designees while they are directly and immediately engaged in activities related to the harm reduction program authorized by the Harm Reduction Act [24-2C-1 NMSA 1978]; or

(2) the sale or distribution of hypodermic syringes and needles by pharmacists licensed pursuant to the Pharmacy Act [Chapter 61, Article 11 NMSA 1978]

C. A person who violates this section with respect to Subsection A of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) or by imprisonment for a definite term less than one year, or both. A person who violates this section with respect to Subsection B of this section is guilty of a misdemeanor.

D. A person eighteen years of age or over who violates the provisions of Subsection B of this section by delivering drug paraphernalia to a person under eighteen years of age and who is at least three years his junior is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 30-31-18

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31 Controlled Substances

30-31-18. Prescriptions.

A. No controlled substance listed in Schedule II [30-31-7 NMSA 1978], which is a prescription drug as determined by the federal food and drug administration, may be dispensed without a written prescription of a practitioner, unless administered directly to an ultimate user. No prescription for a Schedule II substance may be refilled. No person other than a practitioner shall prescribe or write a prescription.

B. Prescriptions for Schedules II through IV [30-31-7 to 30-31-9 NMSA 1978] shall contain the following information:

- (1) the name and address of the patient for whom the drug is prescribed;
- (2) the name, address and registry number of the person prescribing the drug; and
- (3) the identity of the pharmacist of record.

C. A controlled substance included in Schedules III or IV [30-31-8 or 30-31-9 NMSA 1978], which is a prescription drug as determined under the New Mexico Drug and Cosmetic Act [26-1-1 NMSA 1978], shall not be dispensed without a written or oral prescription of a practitioner, except when administered directly by a practitioner to an ultimate user. The prescription shall not be filled or refilled more than six months after the date of issue or be refilled more than five times, unless renewed by the practitioner and a new prescription is placed in the file. Prescriptions shall be retained in conformity with the regulations of the board.

D. The label affixed to the dispensing container of a drug listed in Schedules II, III or IV [30-31-7, 30-31-8 or 30-31-9 NMSA 1978], when dispensed to or for a patient, shall contain the following information:

- (1) date of dispensing and prescription number;
- (2) name and address of the pharmacy;
- (3) name of the patient;
- (4) name of the practitioner; and
- (5) directions for use and cautionary statements, if any.

E. The label affixed to the dispensing container of a drug listed in Schedule II, III or IV [30-31-7, 30-31-8 or 30-31-9 NMSA 1978], when dispensed to or for a patient, shall contain a clear concise warning that it is a crime to transfer the drug to any person other than the patient.

F. No controlled substance included in Schedule V [30-31-10 NMSA 1978], which is a proprietary nonprescription drug, shall be distributed, offered for sale or dispensed other than for a medical purpose and a record of the sale shall be made in accordance with the regulations of the board.

G. In emergency situations, as defined by regulation, Schedule II [30-31-7 NMSA 1978] drugs may be dispensed upon oral prescription of a practitioner, if reduced promptly to writing and filed by the pharmacy in accordance with regulations of the board.

N.M. Stat. Ann. § 30-31A-5

This section is current through the First Session of the Fifty-First Legislature

**Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 31A Imitation
Controlled Substances**

30-31A-5. Sale to a minor.

No person who is eighteen years of age or older shall intentionally sell an imitation controlled substance to a person under the age of eighteen years. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

N.M. Stat. Ann. § 31-18-15

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 31 Criminal Procedure > Article 18 Sentencing of Offenders

31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:

- (1)** for a first degree felony resulting in the death of a child, life imprisonment;
- (2)** for a first degree felony for aggravated criminal sexual penetration, life imprisonment;
- (3)** for a first degree felony, eighteen years imprisonment;
- (4)** for a second degree felony resulting in the death of a human being, fifteen years imprisonment;
- (5)** for a second degree felony for a sexual offense against a child, fifteen years imprisonment;
- (6)** for a second degree felony, nine years imprisonment;
- (7)** for a third degree felony resulting in the death of a human being, six years imprisonment;
- (8)** for a third degree felony for a sexual offense against a child, six years imprisonment;
- (9)** for a third degree felony, three years imprisonment; or
- (10)** for a fourth degree felony, eighteen months imprisonment.

B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of the Criminal Sentencing Act [31-18-12 NMSA 1978].

C. The court shall include in the judgment and sentence of each person convicted and sentenced to imprisonment in a corrections facility designated by the corrections department authority for a period of parole to be served in accordance with the provisions of Section 31-21-10 NMSA 1978 after the completion of any actual time of imprisonment and authority to require, as a condition of parole, the payment of the costs of parole services and reimbursement to a law enforcement agency or local crime stopper program in accordance with the provisions of that section. The period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed pursuant to Subsection A of this section together with alterations, if any, pursuant to the provisions of the Criminal Sentencing Act [31-18-12 NMSA 1978].

D. When a court imposes a sentence of imprisonment pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-18-16.1 [repealed] or 31-18-17 NMSA 1978 and suspends or defers the basic sentence of imprisonment provided pursuant to the provisions of Subsection A of this section, the period of parole shall be served in accordance with the provisions of Section 31-21-10 NMSA 1978 for the degree of felony for the basic sentence for which the inmate was convicted. For the purpose of designating a period of parole, a court shall not consider that the basic sentence of imprisonment was suspended or deferred and that the inmate served a period of imprisonment pursuant to the provisions of the Criminal Sentencing Act [31-18-12 NMSA 1978].

E. The court may, in addition to the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

- (1)** for a first degree felony resulting in the death of a child, seventeen thousand five hundred dollars (\$17,500);
- (2)** for a first degree felony for aggravated criminal sexual penetration, seventeen thousand five hundred dollars (\$17,500);
- (3)** for a first degree felony, fifteen thousand dollars (\$15,000);
- (4)** for a second degree felony resulting in the death of a human being, twelve thousand five hundred dollars (\$12,500);
- (5)** for a second degree felony for a sexual offense against a child, twelve thousand five hundred dollars (\$12,500);

- (6) for a second degree felony, ten thousand dollars (\$10,000);
- (7) for a third degree felony resulting in the death of a human being, five thousand dollars (\$5,000);
- (8) for a third degree felony for a sexual offense against a child, five thousand dollars (\$5,000); or
- (9) for a third or fourth degree felony, five thousand dollars (\$5,000).

F. When the court imposes a sentence of imprisonment for a felony offense, the court shall indicate whether or not the offense is a serious violent offense, as defined in Section 33-2-34 NMSA 1978. The court shall inform an offender that the offender's sentence of imprisonment is subject to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. If the court fails to inform an offender that the offender's sentence is subject to those provisions or if the court provides the offender with erroneous information regarding those provisions, the failure to inform or the error shall not provide a basis for a writ of habeas corpus.

G. No later than October 31 of each year, the New Mexico sentencing commission shall provide a written report to the secretary of corrections, all New Mexico criminal court judges, the administrative office of the district attorneys and the chief public defender. The report shall specify the average reduction in the sentence of imprisonment for serious violent offenses and nonviolent offenses, as defined in Section 33-2-34 NMSA 1978, due to meritorious deductions earned by prisoners during the previous fiscal year pursuant to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. The corrections department shall allow the commission access to documents used by the department to determine earned meritorious deductions for prisoners.

N.M. Stat. Ann. § 30-28-1

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 30 Criminal Offenses > Article 28 Initiatory Crimes

30-28-1. Attempt to commit a felony.

Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.

Whoever commits attempt to commit a felony upon conviction thereof, shall be punished as follows:

- A. if the crime attempted is a capital or first degree felony, the person committing such attempt is guilty of a second degree felony;
- B. if the crime attempted is a second degree felony, the person committing such attempt is guilty of a third degree felony;
- C. if the crime attempted is a third degree felony, the person committing such attempt is guilty of a fourth degree felony; and
- D. if the crime attempted is a fourth degree felony, the person committing such attempt is guilty of a misdemeanor.

No person shall be sentenced for an attempt to commit a misdemeanor.

Exhibit 7

N.M. Stat. Ann. § 31-18-17

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 31 Criminal Procedure > Article 18 Sentencing of Offenders

31-18-17. Habitual offenders; alteration of basic sentence.

- A. A person convicted of a noncapital felony in this state whether within the Criminal Code [30-1-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or not who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by one year. The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.
- B. A person convicted of a noncapital felony in this state whether within the Criminal Code [30-1-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or not who has incurred two prior felony convictions that were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by four years. The sentence imposed by this subsection shall not be suspended or deferred.
- C. A person convicted of a noncapital felony in this state whether within the Criminal Code [30-1-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or not who has incurred three or more prior felony convictions that were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by eight years. The sentence imposed by this subsection shall not be suspended or deferred.
- D. As used in this section, "prior felony conviction" means:
- (1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a prior felony committed within New Mexico whether within the Criminal Code [30-1-1 NMSA 1978] or not, but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978; or
 - (2) a prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:
 - (a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;
 - (b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or
 - (c) the offense would have been classified as a felony in this state at the time of conviction.
- E. As used in this section, "nonviolent felony offense" means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.

History

1953 Comp., § 40A-29-30, enacted by Laws 1977, ch. 216, § 6; 1979, ch. 158, § 1; 1983, ch. 127, § 1; 1993, ch. 77, § 9; 1993, ch. 283, § 1; 2002, ch. 7, § 1; 2003, ch. 90, § 1.

Annotations

Notes to Decisions

Constitutionality.

Generally.

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HOUSE BILL 26

45TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2002

INTRODUCED BY
W. Ken Martinez

FOR THE CORRECTIONS OVERSIGHT AND JUSTICE COMMITTEE

AN ACT

RELATING TO CRIMINAL SENTENCING; PROVIDING A COURT WITH
AUTHORITY TO DEPART FROM THE IMPOSITION OF A MANDATORY
SENTENCE OF IMPRISONMENT FOR A HABITUAL OFFENDER; AMENDING A
SECTION OF THE CRIMINAL SENTENCING ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 31-18-17 NMSA 1978 (being Laws 1977,
Chapter 216, Section 6, as amended by Laws 1993, Chapter 77,
Section 9 and also by Laws 1993, Chapter 283, Section 1) is
amended to read:

"31-18-17. HABITUAL OFFENDERS--ALTERATION OF BASIC
SENTENCE.--

A. For the purposes of this section, "prior felony
conviction" means:

- (1) a conviction for a prior felony committed
within New Mexico whether within the Criminal Code or not; or
- (2) any prior felony for which the person was
convicted other than an offense triable by court martial if:
 - (a) the conviction was rendered by a

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1 court of another state, the United States, a territory of the
2 United States or the commonwealth of Puerto Rico;

3 (b) the offense was punishable, at the
4 time of conviction, by death or a maximum term of imprisonment
5 of more than one year; or

6 (c) the offense would have been
7 classified as a felony in this state at the time of
8 conviction.

9 B. Any person convicted of a noncapital felony in
10 this state whether within the Criminal Code or the Controlled
11 Substances Act or not who has incurred one prior felony
12 conviction which was part of a separate transaction or
13 occurrence or conditional discharge under Section [~~31-20-7~~]
14 31-20-13 NMSA 1978 is a habitual offender and his basic
15 sentence shall be increased by one year [~~and the sentence~~
16 ~~imposed by this subsection shall not be suspended or~~
17 ~~deferred~~]. The sentence imposed pursuant to this subsection
18 shall not be suspended or deferred, unless the court makes a
19 specific finding that justice will not be served by imposing a
20 mandatory sentence of imprisonment and that there are
21 substantial and compelling reasons, stated on the record, for
22 departing from the sentence imposed pursuant to this
23 subsection.

24 C. Any person convicted of a noncapital felony in
25 this state whether within the Criminal Code or the Controlled
Substances Act or not who has incurred two prior felony
convictions which were parts of separate transactions or
occurrences or conditional discharge under Section [~~31-20-7~~]
31-20-13 NMSA 1978 is a habitual offender and his basic

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1 sentence shall be increased by four years [~~and the sentence~~
2 ~~imposed by this subsection shall not be suspended or~~
3 ~~deferred~~]. The sentence imposed pursuant to this subsection
4 shall not be suspended or deferred, unless the court makes a
5 specific finding that justice will not be served by imposing a
6 mandatory sentence of imprisonment and that there are
7 substantial and compelling reasons, stated on the record, for
8 departing from the sentence imposed pursuant to this
9 subsection.

10 D. Any person convicted of a noncapital felony in
11 this state whether within the Criminal Code or the Controlled
12 Substances Act or not who has incurred three or more prior
13 felony convictions which were parts of separate transactions
14 or occurrences or conditional discharge under Section
15 [~~31-20-7~~] 31-20-13 NMSA 1978 is a habitual offender and his
16 basic sentence shall be increased by eight years [~~and the~~
17 ~~sentence imposed by this subsection shall not be suspended or~~
18 ~~deferred~~]. The sentence imposed pursuant to this subsection
19 shall not be suspended or deferred, unless the court makes a
20 specific finding that justice will not be served by imposing a
21 mandatory sentence of imprisonment and that there are
22 substantial and compelling reasons, stated on the record, for
23 departing from the sentence imposed pursuant to this
24 subsection."

24 Section 2. EFFECTIVE DATE.--The effective date of the
25 provisions of this act is July 1, 2002.

HOUSE BILL 225

44TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1999

INTRODUCED BY

R. David Pederson

FOR THE COURTS, CORRECTIONS AND CRIMINAL JUSTICE COMMITTEE

AN ACT

RELATING TO CRIMINAL SENTENCING; ENACTING THE SENTENCING STANDARDS ACT; PROVIDING STANDARDS FOR THE IMPOSITION OF CRIMINAL SANCTIONS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE.--Sections 1 through 4 of this act may be cited as the "Sentencing Standards Act".

Section 2. [NEW MATERIAL] PURPOSE OF ACT.--The purpose of the Sentencing Standards Act is to:

A. establish rational and consistent sentencing standards that reduce disparity in the imposition of sanctions by providing principles for judges to use in determining appropriate criminal sanctions;

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1 or who is handicapped was intentionally injured, the court
2 shall submit the issue to the jury by special interrogatory.
3 If the case is tried by the court and if a prima facie case
4 has been established showing that in the commission of the
5 offense a person sixty years of age or older or who is
6 handicapped was intentionally injured, the court shall decide
7 the issue and shall make a separate finding of fact thereon.

8 ~~[G. Any alteration of the basic sentence of~~
9 ~~imprisonment pursuant to the provisions of this section shall~~
10 ~~be served concurrently with any other enhancement alteration~~
11 ~~of basic sentence pursuant to the provisions of the Criminal~~
12 ~~Sentencing Act.~~

13 D.] C. As used in this section, "handicapped"
14 means that the person has a physical or mental impairment that
15 substantially limits one or more of that person's functions,
16 such as caring for himself, performing manual tasks, walking,
17 seeing, hearing, speaking, breathing, learning and working."

18 Section 7. Section 31-18-17 NMSA 1978 (being Laws 1977,
19 Chapter 216, Section 6, as amended by Laws 1993, Chapter 77,
20 Section 9 and also by Laws 1993, Chapter 283, Section 1) is
21 amended to read:

22 "31-18-17. HABITUAL OFFENDERS--ALTERATION OF BASIC
23 SENTENCE.--

24 A. For the purposes of this section, "prior felony
25 conviction" means:

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1 (1) a conviction for a prior felony committed
2 within New Mexico whether within the Criminal Code or not; or

3 (2) any prior felony for which the person was
4 convicted other than an offense triable by court martial if:

5 (a) the conviction was rendered by a
6 court of another state, the United States, a territory of the
7 United States or the commonwealth of Puerto Rico;

8 (b) the offense was punishable, at the
9 time of conviction, by death or a maximum term of imprisonment
10 of more than one year; or

11 (c) the offense would have been
12 classified as a felony in this state at the time of
13 conviction.

14 B. Any person convicted of a noncapital felony in
15 this state whether within the Criminal Code or the Controlled
16 Substances Act or not who has incurred one prior felony
17 conviction which was part of a separate transaction or
18 occurrence or conditional discharge under Section [~~31-20-7~~
19 31-20-13 NMSA 1978 is a habitual offender and his basic
20 sentence shall be increased by one year [~~and the sentence~~
21 ~~imposed by this subsection shall not be suspended or~~
22 ~~deferred~~].

23 C. Any person convicted of a noncapital felony in
24 this state whether within the Criminal Code or the Controlled
25 Substances Act or not who has incurred two prior felony

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1 convictions which were parts of separate transactions or
2 occurrences or conditional discharge under Section [~~31-20-7~~]
3 31-20-13 NMSA 1978 is a habitual offender and his basic
4 sentence shall be increased by four years [~~and the sentence~~
5 ~~imposed by this subsection shall not be suspended or~~
6 ~~deferred~~].

7 D. Any person convicted of a noncapital felony in
8 this state whether within the Criminal Code or the Controlled
9 Substances Act or not who has incurred three or more prior
10 felony convictions which were parts of separate transactions
11 or occurrences or conditional discharge under Section
12 [~~31-20-7~~] 31-20-13 NMSA 1978 is a habitual offender and his
13 basic sentence shall be increased by eight years [~~and the~~
14 ~~sentence imposed by this subsection shall not be suspended or~~
15 ~~deferred~~].

16 E. If a person is convicted of a noncapital felony
17 offense listed in Subsection A of Section 4 of the Sentencing
18 Standards Act, which has a presumptive sentence of presumptive
19 prison, the habitual offender sentence enhancement set forth
20 in Subsection B, C or D of this section shall not be suspended
21 or deferred, unless the sentencing court makes a specific
22 finding that justice will not be served by imposing a
23 mandatory sentence of imprisonment and that there are
24 substantial and compelling reasons, stated on the record, for
25 departing from the sentence imposed pursuant to Subsection B.

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1 C or D of this section.

2 F. If a person is convicted of a noncapital felony
3 offense listed in Subsection A of Section 4 of the Sentencing
4 Standards Act, which has a presumptive sentence of no
5 presumption, the habitual offender sentence enhancement set
6 forth in Subsection C or D of this section shall not be
7 suspended or deferred, unless the sentencing court makes a
8 specific finding that justice will not be served by imposing a
9 mandatory sentence of imprisonment and that there are
10 substantial and compelling reasons, stated on the record, for
11 departing from the sentence imposed pursuant to Subsection C
12 or D of this section.

13 G. If a person is convicted of a noncapital felony
14 offense listed in Subsection A of Section 4 of the Sentencing
15 Standards Act, which has a presumptive sentence of presumptive
16 non-prison or presumptive penalties and fines, the habitual
17 offender sentence enhancement set forth in Subsection D of
18 this section shall not be suspended or deferred, unless the
19 sentencing court makes a specific finding that justice will
20 not be served by imposing a mandatory sentence of imprisonment
21 and that there are substantial and compelling reasons, stated
22 on the record, for departing from the sentence imposed
23 pursuant to Subsection D of this section. "

24 Section 8. APPLICABILITY.--The provisions of this act
25 apply to persons convicted of a criminal offense committed on

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1 or after July 1, 1999. As to persons convicted of a criminal
2 offense committed prior to July 1, 1999, the laws with respect
3 to sentencing of criminal offenders in effect at the time the
4 criminal offense was committed shall apply.

5 Section 9. EFFECTIVE DATE.--The effective date of the
6 provisions of this act is July 1, 1999.

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Exhibit 8

AN ACT

RELATING TO CRIMINAL SENTENCING; CREATING PROCEDURES FOR CERTAIN LEGISLATION THAT WOULD INCREASE, DECREASE OR CREATE CRIMINAL PENALTIES; REQUIRING THAT AN APPROPRIATION ACCOMPANY ANY SUCH LEGISLATION; REQUIRING FISCAL IMPACT STATEMENTS; CREATING A FUND.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. LEGISLATION TO INCREASE, DECREASE OR CREATE PERIODS OF IMPRISONMENT--FISCAL IMPACT STATEMENTS--PROCEDURE.--

A. The New Mexico sentencing commission shall prepare a fiscal impact statement as provided in this section for a bill that:

(1) creates a new crime or repeals an existing crime for which imprisonment is authorized;

(2) increases or decreases the period of imprisonment authorized for an existing crime;

(3) imposes or removes mandatory minimum terms of imprisonment; or

(4) modifies the law governing release of inmates in such a way that the time served in prison will increase or decrease.

B. A fiscal impact statement shall reflect the estimated increase in annual operating costs for the

corrections department attributable to the bill if it becomes law. The estimated increase in annual operating costs shall reflect the highest annual increase from the projected increase for the six fiscal years following the effective date of the law and shall be calculated in current dollars. The fiscal impact statement shall include details concerning any increase or decrease in the inmate population.

C. The amount estimated in a fiscal impact statement shall be printed in the title of the bill and shall be included in the bill as a one-year appropriation from the general fund to the criminal justice special fund. If the New Mexico sentencing commission does not have sufficient information to project the fiscal impact, the fiscal impact statement shall state that there is insufficient information to estimate the fiscal impact and the words "costs cannot be determined" shall be printed in the title of the bill.

D. For each law enacted that results in a net increase in periods of imprisonment in adult correctional facilities and for which a fiscal impact statement has been prepared, an appropriation shall be made from the general fund to the criminal justice special fund in an amount equal to the amount estimated in the fiscal impact statement.

E. The New Mexico sentencing commission shall prepare fiscal impact statements for bills described in Subsection A of this section only if they are presented no

later than December 1 to the commission, to the interim legislative committee that oversees criminal justice or to the legislative finance committee. The New Mexico sentencing commission shall complete the fiscal impact statements no later than January 15 of the following calendar year and shall forward copies of the statements to the legislative council service and the legislative finance committee and to the chief clerk of the house of representatives and the chief clerk of the senate for transmittal to the primary sponsors of the legislation and to the chair of each committee assigned to consider the legislation.

F. The corrections department shall annually provide the New Mexico sentencing commission with the average operating costs per inmate and the number of inmates in adult correctional facilities.

G. As used in this section, "operating costs" means all costs other than capital outlay costs for state-operated adult correctional facilities and privately operated adult correctional facilities.

Section 2. CRIMINAL JUSTICE SPECIAL FUND--CREATED.--

A. The "criminal justice special fund" is created in the state treasury. The fund consists of appropriations, gifts, grants, donations and bequests made to the fund. Income from the fund shall be credited to the fund. Money in the criminal justice special fund shall not revert to the

general fund.

B. Money in the criminal justice special fund shall be subject to appropriation by the legislature for criminal justice purposes, including operational costs of the corrections department, courts, district attorneys and the public defender department.

Section 3. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2007. _____

Exhibit 9

N.M. Stat. Ann. § 30-9-11

This section is current through the First Session of the Fifty-First Legislature
Michie's™ Annotated Statutes of New Mexico > *Chapter 30 Criminal Offenses* > *Article 9 Sexual Offenses*

30-9-11. Criminal sexual penetration.

- A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.
- B. Criminal sexual penetration does not include medically indicated procedures.
- C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.
- D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:
 - (1) on a child under thirteen years of age; or
 - (2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

- E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:
 - (1) by the use of force or coercion on a child thirteen to eighteen years of age;
 - (2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
 - (3) by the use of force or coercion that results in personal injury to the victim;
 - (4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
 - (5) in the commission of any other felony; or
 - (6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act [31-18-12 NMSA 1978].

- F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

- G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:
 - (1) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or
 - (2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

History

N.M. Stat. Ann. § 31-18-23

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > *Chapter 31 Criminal Procedure* > *Article 18 Sentencing of Offenders*

31-18-23. Three violentfelony convictions; mandatory life imprisonment; exception.

- A. When a defendant is convicted of a third violentfelony, and each violentfelony conviction is part of a separate transaction or occurrence, and at least the third violentfelony conviction is in New Mexico, the defendant shall, in addition to the sentence imposed for the third violent conviction, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of Section 31-21-10 NMSA 1978.
- B. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violentfelony conviction, pursuant to the provisions of Section 31-18-24 NMSA 1978.
- C. For the purpose of this section, a violentfelony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violentfelony conviction.
- D. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violentfelony for the purposes of the Criminal Sentencing Act [31-18-12 NMSA 1978] if that crime would be considered a violentfelony in New Mexico.
- E. As used in the Criminal Sentencing Act [31-18-12 NMSA 1978]:
- (1) "great bodily harm" means an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body; and
 - (2) "violentfelony" means:
 - (a) murder in the first or second degree, as provided in Section 30-2-1 NMSA 1978;
 - (b) shooting at or from a motor vehicle resulting in great bodily harm, as provided in Subsection B of Section 30-3-8 NMSA 1978;
 - (c) kidnapping resulting in great bodily harm inflicted upon the victim by the victim's captor, as provided in Subsection B of Section 30-4-1 NMSA 1978;
 - (d) criminal sexual penetration, as provided in Subsection C or D or Paragraph (5) or (6) of Subsection E of Section 30-9-11 NMSA 1978; and
 - (e) robbery while armed with a deadly weapon resulting in great bodily harm as provided in Section 30-16-2 NMSA 1978 and Subsection A of Section 30-1-12 NMSA 1978.

History

1978 Comp., § 31-18-23, enacted by Laws 1994, ch. 24, § 2; 1996, ch. 79, § 3; 2009, ch. 11, § 2.

Annotations

Notes

Effect of amendments.

The 2009 amendment, effective July 1, 2009, deleted "when that sentence does not result in death" following "violent conviction" in the first sentence of (A); substituted "the defendant" for "he" in (C); in (E), substituted "the victim's" for "his" and deleted "and" in the last part of (2)(c), and substituted "Subsection C or D or Paragraph (5) or (6) of Subsection E" for "Subsection C or Paragraph (5) or (6) of Subsection D" in (E)(2)(d).

Applicability.

Laws 2009, ch. 11, § 6, makes the provisions of this act apply to crimes committed on or after July 1, 2009.

Michie's™ Annotated Statutes of New Mexico

CHAPTER 30. CRIMINAL OFFENSES

ARTICLE 9. SEXUAL OFFENSES

N.M. Stat. Ann. § 30-9-11 (2009)

§ 30-9-11. Criminal sexual penetration

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.

D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

- (1) on a child under thirteen years of age; or
- (2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

- (1) by the use of force or coercion on a child thirteen to eighteen years of age;
- (2) by the use of coercion on a child thirteen to eighteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of the child;
- (3) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
- (4) by the use of force or coercion that results in personal injury to the victim;
- (5) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
- (6) in the commission of any other felony; or
- (7) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of *Section 31-18-15 NMSA 1978*, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act [*31-18-12 NMSA 1978*].

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force ~~or coercion~~ not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

(1) ~~perpetrated through the use of coercion not otherwise specified in this section;~~

(2) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(3) ~~perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.~~

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

Exhibit 10

N.M. Stat. Ann. § 12-2A-16

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Chapter 12 Miscellaneous Public Affairs Matters > Article 2A Uniform Statute and Rule Construction Act

12-2A-16. Effect of amendment or repeal.

- A. An amendment or repeal of a civil statute or rule does not affect a pending action or proceeding or a right accrued before the amendment or repeal takes effect.
- B. A pending civil action or proceeding may be completed and a right accrued may be enforced as if the statute or rule had not been amended or repealed.
- C. If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed under the statute or rule as amended.

History

Laws 1997, ch. 173, § 16.

Annotations

Notes to Decisions

Applicability.

Application of amendments.

Applicability.

Applying Subsection C of this section to the 2002 amendment of 31-18-17 NMSA 1978, mindful that an enhanced sentence was part of the punishment for the crime to which the enhanced sentence attaches, the amendment effectively reduced the potential enhanced penalties for violating felony statutes by narrowing the definition of "prior felony conviction." Under the 2002 amendment to 31-18-17D NMSA 1978, a prior felony conviction does not include felony convictions when the sentence was completed 10 years or more before the current conviction. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, 2004 N.M. App. LEXIS 49 (N.M. Ct. App. 2004), cert. quashed, 110 P.3d 74, 2005 N.M. LEXIS 43 (N.M. 2005).

To the extent that this section and 30-1-2 NMSA 1978 conflicted, this section supersedes 30-1-2. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, 2004 N.M. App. LEXIS 49 (N.M. Ct. App. 2004), cert. quashed, 110 P.3d 74, 2005 N.M. LEXIS 43 (N.M. 2005).

Application of amendments.

When the legislature amended the statute under which those with multiple driving under the influence convictions were sentenced, 6-8-102 NMSA 1978, twice in the same legislative session, first increasing the applicable penalties, and then restating the statute's pre-amendment language, the later amendment applied to defendants who had not been sentenced as of that amendment's effective date, under 12-2A-16C NMSA 1978. State v. Smith, 2004-NMCA-026, 135 N.M. 162, 85 P.3d 804, 2004 N.M. App. LEXIS 3 (N.M. Ct. App. 2004), rev'd, 2004 -NMSC- 032, 136 N.M. 372, 98 P.3d 1022, 2004 N.M. LEXIS 421 (N.M. 2004).

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N.M. Const. Art. IV, § 33

This section is current through the First Session of the Fifty-First Legislature

Michie's™ Annotated Statutes of New Mexico > Constitution of the State of New Mexico ADOPTED JANUARY 21, 1911 > Article IV Legislative Department

Sec. 33 [Prosecutions under repealed laws.]

No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law.

Annotations

Notes to Decisions

Applicability.

Sentence.

—Generally.

Applicability.

Defendant was not immune from prosecution on the ground that the statute under which he was charged was subsequently repealed; pursuant to N.M. Const., art. IV, § 33, a person was not exempt from prosecution and punishment for any crime or offense by reason of the subsequent repeal of a law. State v. McAdams, 1972-NMCA-029, 83 N.M. 544, 494 P.2d 622, 1972 N.M. App. LEXIS 749 (N.M. Ct. App. 1972).

Sentence.

—Generally.

Inmate's sentence as a habitual offender under former 41-16-1, 1953 Comp. (31-18-17 NMSA 1978) was proper and did not violate his constitutional rights because the sentence imposed under former 41-16-1, 1953 Comp., was the law that was in effect at the time the inmate raped his victim. State v. Tipton, 1967-NMSC-270, 78 N.M. 600, 435 P.2d 430, 1967 N.M. LEXIS 2868 (N.M. 1967).

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