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Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates

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EXECUTIVE SUMMARY

The United States has been experiencing increasingly high levels of incarceration, particularly over the last three decades. Several states have realized such levels are not sustainable and have been examining potential solutions to lower incarceration rates. One proposed solution is to allow greater flexibility for judges when sentencing nonviolent, low-risk offenders. By allowing judges to depart from mandatory minimums for nonviolent, low-risk offenders, incarceration rates drop without compromising public safety.

The American Legislative Exchange Council (ALEC) model *Justice Safety Valve Act* allows for discretion during sentencing of certain individuals. Such a sentencing structure would help to reduce the cost of incarceration without compromising public safety.

THE PROBLEM

After remaining steady for most of the twentieth century, the number of people incarcerated in state prisons¹ has increased considerably over the last three decades. By the end of 2014, the state prison population totaled 1,350,958 inmates.²

Many states sought to accommodate the growth in the prison population by building new prisons; however, some simply could not keep pace. In 2014, 18 states had exceeded the maximum measure of their prison facilities' capacity.³ Among them was Illinois, whose year-end 2014 prison population of 48,300 inmates was 150 percent of its rated capacity and 171 percent of the design capacity.⁴ Other states including Ohio (132 percent), Massachusetts (130 percent) and Nebraska (128 percent)

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also had more prisoners “than the maximum number of beds for which their facilities were designed, rated, or intended.”⁵

Maintenance costs for these overcrowded prisons coupled with growing inmate populations led to skyrocketing state corrections budgets. According to the National Association of State Budget Officers (NASBO), state spending for corrections totaled \$53.3 billion in fiscal year (FY) 2013, which represented 6.9 percent of state general revenue spending.⁶ NASBO estimated that state corrections spending would continue to rise.⁷ State dollars accounted for 97.7 percent of total state corrections spending.⁸

This additional spending has still proven insufficient.

Despite the recent swelling of states’ corrections budgets, the rate of growth of state corrections spending related to convicted populations has slowed in the last couple of years. This is largely because “states have begun controlling costs through reducing recidivism rates, implementing changes to parole and probation systems, enhancing community supervision of convicted persons and drug treatment programs, and enacting sentencing reforms.”⁹ Nevertheless, many states continue spending too much on corrections, yet still face overcrowded, understaffed facilities designed to house convicted persons, with stubbornly high recidivism rates.

THE SOLUTION: SENTENCING REFORM

After crime rates rose steadily throughout the 1970’s, many states (and the federal government) responded by passing harsh mandatory minimum sentencing laws. These laws require automatic, fixed-length prison sentences – not only for violent crimes, but for nonviolent and drug crimes as well. These new sentencing laws sent more people to prison, imposed longer prison sentences, and are generally considered a main driver of exploding state prison populations.

If mandatory sentences for nonviolent and drug offenders were necessary for public safety, their cost would be justified. However, as corrections spending has climbed, most experts have come to believe incarcerating huge numbers of low-level, nonviolent and drug offenders post-conviction is an inefficient and ineffective method of controlling crime. While public safety benefits of incapacitating dangerous criminals justifies the costs, according to the Pew Center on the States, “most criminologists now consider the increased use of prison for nonviolent offenders a questionable public expenditure, producing little additional crime control benefit for each dollar spent.”¹⁰

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Even the most ardent and influential supporters of incarceration as a means to control crime have expressed skepticism toward mandatory minimum drug laws. Dr. John J. Dilulio Jr., a criminologist, Harvard Ph.D. and former Professor of Politics and Public Policy at Princeton, is among the leading advocates of incarceration in the United States. Dilulio rejects what he calls “the soft-in-the-head anti-incarceration left,” and has written, “No one – at least no one in elite policy-wonk circles – is a bigger fan of incarcerating known, adjudicated adult and juvenile criminals than me.”¹¹ Yet Dr. Dilulio opposes mandatory minimum sentences for drug offenders.¹² In a *New York Times* op-ed Dilulio wrote:

*Prison definitely pays, but there's one class of criminal that is an arguable exception: low-level, first-time drug offenders . . . It makes no sense to lock away even one drug offender whose case could be adjudicated in special drug courts and handled less expensively through intensively supervised probation featuring no-nonsense drug treatment and community service.*¹³

Dilulio continued that theme in a *National Review* article:

*There is a conservative crime-control case to be made for repealing mandatory minimum drug laws now. That's a conservative crime-control case, as in a case for promoting public safety, respecting community mores, and reinstating the traditional sentencing prerogatives of criminal-court judges. It is a conservative case, and I . . . one of the few academic analysts with a kind word for imprisonment, have come to embrace it.*¹⁴

Independent research organizations have come to similar conclusions. The RAND Corporation looked at the cost effectiveness of mandatory minimum drug laws and asserted: “[I]f reducing consumption or violence is the goal, more can be achieved by spending additional money arresting, prosecuting, and sentencing dealers to standard prison terms than by spending it on sentencing (fewer) dealers to longer, mandatory terms.”¹⁵

Other influential proponents of the “lock ‘em up and throw away the key” model of crime control also believe the strategy has gone too far and now recommend reducing the prison population to more efficiently fight crime. For instance:

*University of Chicago economist and author Steven D. Levitt wrote several influential papers in which he concluded that pro-prison policies were a major factor in reducing crime during the 1990s. He later found, however, that as the crime rate continued to drop and the prison population continued to grow, the return on public safety diminished... “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration.” And today? Dr. Levitt says, “I think we should be shrinking the prison population by at least one-third.”*¹⁶

In recognition of the rising costs and shrinking benefits of harsh sentencing laws, many states have begun to reconsider their reliance on mandatory minimums for nonviolent and drug offenders. For example, the Pennsylvania Sentencing Commission found “neither length of sentence nor the imposition of a mandatory minimum sentence alone was related to recidivism.”¹⁷ A legislative analysis in Washington state found that while incarcerating violent offenders provides a net public benefit, imprisonment of property and drug offenders leads to negative returns.¹⁸

Many states have gone further than simply studying the problem and have adopted evidence-based, cost-effective sentencing reforms. For instance, prosecutors in Michigan suggested to legislators that the state was “warehousing too many low-level nonviolent offenders with a minimal role in the drug trade for too long in costly prison beds.”¹⁹ As a result, Michigan repealed most of its drug-related mandatory minimums. Prison admittances fell and Michigan saved billions in tax dollars. More importantly, the crime rate fell 27 percent in the decade after the repeal.

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“Legislators have a wide range of policy options available to combat inefficient prison spending and to protect public safety. “Back-end” post-conviction reforms, including vocational training and reentry programs, are valuable tools to help reduce recidivism.”

Other states have moved in a similar direction. Texas, a state not burdened with lengthy mandatory minimums laws, was able to save nearly \$2 billion by investing in diversion and community corrections programs rather than building new prisons. The incarceration rate in Texas fell from 710 per 100,000 residents in 2003 to 584 in 2014. Meanwhile, the crime rate fell faster than the national average.²⁰ The Texas experiment is not unique. In fact, the Pew Center on the States found all 17 states that cut their imprisonment rates over the past decade also experienced a decline in crime rates.²¹

Legislators have a wide range of policy options available to combat inefficient prison spending and to protect public safety. “Back-end” post-conviction reforms, including vocational training and reentry programs, are valuable tools to help reduce recidivism. Changes to occupational licensure laws to allow ex-offenders to find employment more easily are also ben-

eficial. But just as one would first turn off a spigot to stop an overflowing bathtub, states must first stop filling their prisons with low-level offenders. They can best achieve this objective by reforming their mandatory minimum laws.

Toward that end, American Legislative Exchange Council (ALEC) members developed the *Justice Safety Valve Act*, which provides sentencing courts with discretion to depart from mandatory sentences for nonviolent offenders who meet specified criteria.

HOW IT WORKS

Generally, a “safety valve” is an exception to a mandatory minimum sentencing law authorizing the court to give an offender less time in prison than the required minimum.²² Some safety valves give sentencing judges broad discretion to waive mandatory minimums, while others restrict eligibility to offenders who meet certain criteria. For instance, Florida’s safety valve for certain hit-and-run offenses allows sentencing judges to depart from a four-year mandatory minimum if they find that “imposing a mandatory minimum term of imprisonment would constitute or result in an injustice.”²³ On the other end of the spectrum, the federal drug safety valve requires defendants to meet a strict five-part test.²⁴

The ALEC Justice Safety Valve Act is a narrowly tailored reform that applies only to nonviolent, non-sex crime offenders. Additionally, the safety valve does not apply to any offender 1) who has a previous conviction for the same offense within the last ten years; 2) uses a firearm in a manner that causes physical in-



jury during the commission of the offense; or 3) was the leader, manager, or supervisor of others in a continuing criminal enterprise. For all other offenders, the model policy allows sentencing courts to depart from mandatory minimums in any instance where the minimum sentence would result in substantial injustice, and the minimum sentence is not necessary for the protection of the public. The model policy provides for transparency and accountability in sentencing by requiring judges to report any departures from mandatory minimums. State agencies would then be required to make those reports available online.

WHY IT WORKS

The *Justice Safety Valve Act* is a specific solution designed to help with the specific problem of mandatory minimum sentences being imposed in cases where they are not necessary to protect public safety. The model policy does not repeal any mandatory minimum sentences, and it does not require judges to impose non-prison sanctions when prison is appropriate. Rather, the policy allows judges to impose appropriate sentences in certain cases where mandatory minimums clearly should not apply.

The *Justice Safety Valve Act* strikes a balance between the repeal of mandatory minimum sentencing laws and the inflexible application of mandatory minimums irrespective of mitigating circumstances. This “third way” has several immediate benefits.

First, the safety valve provides sentencing courts the authority to make common sense distinctions between dangerous, repeat offenders and low-level, nonviolent offenders. As a result, the model policy would reserve scarce prison space for violent offenders, habitual criminals, and offenders who pose a threat to public safety. This reduces overcrowding, eases problems related to prison facility understaffing, and allows states to reverse the growth in corrections spending.

Second, the safety valve allows courts to avoid unreasonable outcomes the imposition of a mandatory minimum would require. For example, a safety valve would allow a sentencing court to avoid giving a first-time drug courier and a major kingpin the same sentence, an outcome often required where a safety valve is unavailable.

“...the safety valve provides sentencing courts the authority to make common sense distinctions between dangerous, repeat offenders and low-level, nonviolent offenders.”



Third, the safety valve allows states to more efficiently allocate scarce resources. Every dollar spent on unnecessary incarceration cannot be spent putting more police on the street or more prosecutors into courtrooms. Money wasted on inefficient incarceration is unavailable for other state needs such as more teachers, better infrastructure, or tax relief.





CASE STUDY

CASE STUDIES IN SENTENCING REFORM

In 2010 South Carolina's prison population was projected to grow more than 10 percent by 2014, after having tripled during the previous 25 years.²⁵ Corrections spending had already increased 500 percent since 1983, and the Pew Center on the States estimated that new growth in the prison population would cost more than half a billion dollars over five years. Meanwhile, about half of South Carolina's prisoners were being held for nonviolent offenses.²⁶

In response to this crisis, South Carolina passed the "Omnibus Crime Reduction and Sentencing Reform Act of 2010." Among other "smart justice" reforms, the legislation removed the 10-year mandatory minimum sentence for school zone violations, allowed the possibility of probation for certain second and third drug possession convictions, and eliminated mandatory minimum sentences for first convictions of simple drug possession. Four years later South Carolina has closed two minimum-security prisons,²⁷ saved millions of dollars,²⁸ and the state's crime rate has fallen.²⁹

Georgia's recent experience with sentencing reform mirrors South Carolina's. For years, Georgia passed "tough on crime" legislation, including a two-strike law that put thousands of

Georgians in prison for life.³⁰ According to one report, in 2010 "One in 13 Georgian adults was under correctional control of some sort, and the state's inmate population had more than doubled since 1990 . . . Corrections were the state's second-highest state expenditure, after the Department of Education."³¹ By 2012 Georgia was spending more than \$1 billion on corrections. Meanwhile, drug and property offenders represented nearly 60 percent of prison admissions.³²

Georgia Governor Nathan Deal created a special council to develop recommendations for reforming his state's criminal justice system. One of the recommendations endorsed by the council was a safety valve modeled on the federal drug safety valve. In 2013, the Georgia legislature adopted the safety valve and it became law.

Georgia's reforms are working. Sentencing reform has already saved Georgia \$20 million,³³ and according to a 2014 report, "Georgia is increasingly focusing expensive prison space on dangerous offenders while using more cost-effective, community-based sanctions for less serious lawbreakers."³⁴

Other states have had safety valves on the books for years, with consistent success. For instance, Minnesota's safety valve allows courts to depart from mandatory minimum sentences for certain gun crimes.³⁵ According to ALEC member organization Families Against Mandatory Minimums (FAMM):

*In 2010, 48 percent of Minnesota offenders subject to these mandatory minimums received the safety valve. On average, their sentences were 38 months shorter than those of people who received the mandatory minimum, saving Minnesota almost 1,200 prison beds and \$37.5 million in prison costs. At the same time, violent crime in Minnesota has steadily declined since 2006, falling another 2.9 percent in 2010.*³⁶

Additionally, Connecticut, Florida, Maine, Montana, New York, Oregon and Virginia already have similar safety valve provisions in their statutes.





“Protecting public safety is an essential function of government. But governments have an obligation to taxpayers to avoid unnecessary spending by providing public services as efficiently as possible.”

In 2015, Oklahoma and Maryland each passed versions of the ALEC *Justice Safety Valve Act*. Oklahoma State Representative Pam Peterson introduced the safety valve bill because Oklahoma’s “prison-bed space [was] being taken up with people who don’t need to be there.”³⁷ Oklahoma Governor Mary Fallin, who signed the safety valve bill into law, said personal and community safety were her top priorities, but for many offenders “long sentences in state penitentiaries increase their likelihood of escalated criminal behavior.”³⁸

Maryland recently enacted a broad safety valve authored by ALEC member, Senator Michael Hough. Hough said the bill “strikes a balance by maintaining tough penalties for drug dealers, who must be behind bars to protect our communities, providing judicial discretion to depart from overly harsh mandatory penalties in egregious circumstances and increasing drug treatment.”³⁹

Finally, in 2015 North Dakota passed its own version of the Justice Safety Valve Act. This law allows judges to depart from mandatory minimum drug sentences upon a finding that the imposition of the mandatory minimum would result in manifest injustice to the defendant and that the mandatory minimum sentence is not necessary for the protection of the public.⁴⁰

CONCLUSION

Protecting public safety is an essential function of government. But governments have an obligation to taxpayers to avoid unnecessary spending by providing public services as efficiently as possible. Imposing mandatory minimum sentences on low-level, nonviolent and drug offenders who pose little threat to public safety is wasteful, ineffective and counterproductive. On the other hand, reserving prison space for violent and repeat offenders maximizes the efficiency of the criminal justice system, thus giving taxpayers the most public safety benefit for their dollar.

Many states have used safety valves to avoid unnecessary incarceration that would otherwise result from the inflexible imposition of mandatory minimum sentences. Those states have seen reductions in their crime rates and many have kept their prison populations and corrections budgets in check. The *Justice Safety Valve Act* gives legislators a model for common sense reform to prioritize scarce prison space, reduce corrections costs, and efficiently protect public safety.





MODEL POLICY

Justice Safety Valve Act:**Summary**

This act would provide sentencing judges with discretion to depart from mandatory minimum sentences for nonviolent offenders who meet specified criteria.

Model Policy

{Title, enacting clause, etc.}

{Section 1.} **Title.** This Act shall be known as the Justice Safety Valve Act.

{Section 2.} **Sentencing.**

(A) Notwithstanding any other provision of law, when sentencing a person convicted of a violation for which there is a mandatory minimum sentence, but which did not:

(1) Include the use, attempted use or threatened use of serious physical force by the defendant against another person or result in the serious physical injury of another person by the defendant; or

(2) Involve any sexual contact offense by the defendant against a minor (other than an offense involving sexual conduct where the victim was at least 13 years old and the offender was not more than four years older than the victim and the sexual conduct was consensual);

(B) The court may depart from the applicable mandatory minimum sentence if the court finds substantial and compelling reasons on the record that, in giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation that:

(1) Imposition of the mandatory minimum would result in substantial injustice to the defendant;

(2) The mandatory minimum sentence is not necessary for the protection of the public.

{Section 3.} Exceptions

(A) Section (2)(B) shall not apply if the court finds that:

- (1) The individual has a conviction for the same offense during the ten-year period prior to the commission of the offense;
- (2) The individual intentionally uses a firearm in a manner that causes physical injury during the commission of the offense;
- (3) The individual was the leader, manager, or supervisor of others in a continuing criminal enterprise.

{Section 4.} Reporting

(A) Upon departing from mandatory minimum sentences, judges shall report to [the Sentencing Commission or other appropriate agency] which shall, one year following the enactment of this statute and annually thereafter, make available in electronic form and on the World Wide Web, a report as to the number of departures from mandatory minimum sentences made by each judge in the state.

{Section 5.} Reinvestment

(A) Twenty-five percent of the savings realized as a result of this act shall revert to the general fund to advance evidence-based practices shown to reduce recidivism.

{Section 6.} Effective Date.**{Section 7.} Repealer Clause****{Section 8.} Severability Clause**

Approved by the ALEC Board of Directors on August 3, 2013.

End Notes

1. State prisons are facilities with a purpose of housing individuals who have been sentenced following trial or a guilty plea, which is different than a county jail which has a purpose of housing individuals awaiting trial. This paper is intended to discuss a solution to overcrowding in state prisons of sentenced populations.
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22. Families Against Mandatory Minimums. "Turning off the Spigot."
23. Florida § 316.027(2)g. Available: http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0316/Sections/0316.027.html

24. To qualify for the federal safety valve, the court must find that (1) no one was harmed during the offense; (2) the offender has little or no history of criminal convictions; (3) the offender did not use violence or a gun; (4) the individual was not a leader or organizer of the offense; and (5) the offender told the prosecutor all that he knows about the offense. 18 U.S.C. § 3553(f) (2012).
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