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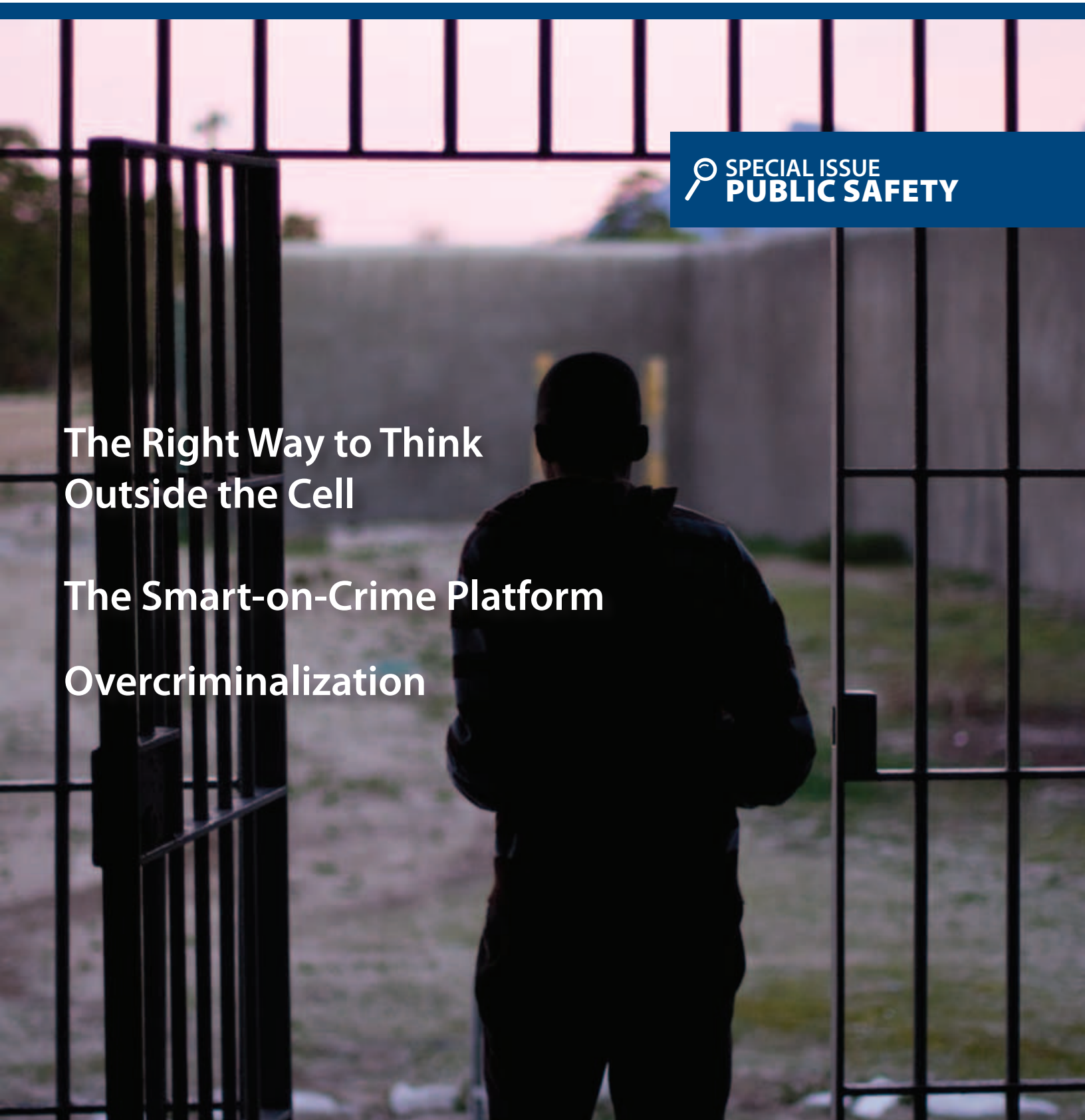

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The Texas Solution to the Prison Problem

Q&A with Rep. Jerry Madden, TX

BY COURTNEY O'BRIEN, ALEC

Rep. Jerry Madden, graduate of West Point with an engineering degree, and state legislator in Texas since 1993, is no amateur when it comes to applying the practical knowledge of systems and structures to political and policy discourse. His background and experience led him to introduce sweeping criminal justice reform in Texas that now stands as a model to emulate in other states. *Governing Magazine* named him one of their 2010 Public Officials of the Year for these reforms and his bipartisan strategy. Rep. Madden gladly welcomed an interview to discuss these efforts in the hope of providing other legislators an insider view of how Texas achieved its goals.

Q: Governing Magazine named you one of their 2010 Public Officials of the Year largely due to the criminal justice reforms you helped pass in Texas. What led to the reforms you introduced?

The Speaker of the House came to me and said, "Don't build new prisons, they cost too much." So we started looking at our current corrections costs, the number of prisoners, and where they were coming from. The first thing we discovered was that many of our prisoners were *not* coming from direct sentencing by our judges and juries, but from technical violations of probation/parole. For example, not showing up to meet with their officers at designated times, drug violations, etc. Approximately 13,000 people a year were returning to prison due to these technical violations. I had only so much space in our prisons and could not build new ones—I had to either slow down the number of people coming back into the prison system, or I had to open the doors to let them out. We weren't going to just open the doors, so we looked at our probation system.

Q: Which solutions did you propose?

In 2007, we increased funding for specialized courts, introduced progressive sanctions for probation/parole officers, and modified the caseloads of probation officers (see ALEC's model legislation, *Swift and Certain Sanctions Act*). After probation, we looked at parole and how we could identify high-risk offenders earlier (see ALEC's model legislation, *Recidivism Reduction Act*). We found out quickly that it costs less to intervene early when dealing with offenders who have mental health or drug addiction problems. To treat drug and alcohol addiction you have to go to the root of the problem. We diverted some of our funding to community mental health groups, and drug treatment and substance abuse programs in the prison and probation communities—programs that already existed but were not being utilized. We did not want to slow down the number of dangerous offenders coming back into the system, but did want to slow down those who were low-risk and could be treated. We tipped the scales and prevented rapid prison growth by allocating resources to the right programs.

Rep. Madden

Q: Who did you partner with to achieve reform?

I went to Texas State Senator John Whitmire, the Chairman of the Criminal Justice Committee. We formed a bipartisan partnership. We also got the support of the Speaker, and the Appropriations Committee.

We also worked with our state think tanks that do research and develop reports in Texas on the Criminal Justice system. These reports helped convince the public and our legislature that solutions did exist to address the problem.

To achieve this reform in other states, it is important to know how many prison beds/resources you would need and what the cost would be to continue accepting the number of offenders you are projected to have. Compare this cost with the costs of bulking up mental health and substance abuse programs that will help to produce the reduced recidivism rates. The winning argument for Texas was that the cost of reducing our low-risk prison populations by investing in community programs was much less expensive than building new prisons. We were not decreasing public safety, but were diverting offenders that the public would generally agree should be treated to programs, rather than wasting their taxpayer dollars. We are called the Department of Corrections—we should be correcting behavior.

Q: You are also the Public Sector Chair of ALEC's Corrections and Reentry Working Group. Is the Working Group working on similar policy?

ALEC is a leader on producing policy that works to effectively reduce prison populations while maintaining public safety. Our Working Group began by asking, "what can we do to make a difference and reduce costs for states?" Part of our solution has been to produce policy that performs a risk analysis of each offender, provides for progressive sanctions in parole programs, and rewards various departments that produce results. I recommend looking at ALEC's "Cutting Crime and Budgets" initiative on their web site.

For more information on the Texas Reform, or to learn about the ALEC solutions, please contact Courtney O'Brien at cobrien@alec.org.


"The coal industry and the electric power industry have a vision of the ability to use coal with near-zero emissions. And we're on a path to get there."
Dan should know. He's part of an international effort working toward the successful capture and storage of CO_2 on a large commercial scale. The technology, called carbon capture and storage (CCS), will allow us to continue using coal, one of our most abundant and affordable fuels, in an even more environmentally responsible way. And power plants using natural gas will also need to employ CCS to meet stringent CO_2-reduction goals.
As Dan is quick to point out, we are making progress toward that goal.
"We have technologies today that can capture CO_2, and we have coal-fired power plants that already capture and store CO_2 emissions. We can store carbon dioxide underground and do it in a safe way.
"I am confident, based on the number of scientists and engineers around the world working on this solution, that we can get there. That is what my job is all about."
Dan agrees that driving down the cost of capturing and storing CO_2 on a widespread basis is the next task. And with people like Dan leading the way, we will succeed.
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Engineer/Project Manager
CONSOL Energy – Pittsburgh, Pennsylvania

Georgia Ends Get Out of Jail Free Program

BY MICHAEL HOUGH, ALEC

Last year, lawmakers in Georgia worked to solve a major problem in their criminal justice system. Georgia's state-run pretrial release program, which is tasked with releasing defendants from jail pending trial, was allowing dangerous criminals to leave their jail cells on simply the mere promise to return for their court date. Fulton County, which is home to the City of Atlanta, had a long track record of allowing defendants, who were charged with committing violent crimes, to bypass taking out a commercial bail bond and instead releasing them for free. Fortunately, the State of Georgia enacted ALEC's *Crimes with Bail Restrictions* legislation, which will help end the revolving door of justice in Georgia by forcing criminals to take out a secured bond to gain release from jail.

How bad were things in Georgia? Here are some of the examples of crimes committed by individuals who were let out of jail for free: armed robbery, aggravated assault, identity fraud, kidnapping, possession of dangerous drugs, hijacking a motor vehicle, sexual battery, child molestation, and false imprisonment. Georgia's pretrial release was allowing criminals to sign their own bonds to gain release from jail, which meant these individuals were being released without paying any money and only giving the state their word to return. This system resulted in the state facing a crime and fugitive problem.

Unlike commercial bail where criminals have to pay a portion of their total bond and are held accountable by bounty hunters who will track them down if they fail to appear for court, when the government runs bail no one tracks down absconders. Despite the high number of fugitives in Atlanta, the Fulton County Department of Pretrial Releases actually turned in zero dollars in forfeited bonds in 2009, which means they apprehended no fugitives and/or they did not collect any money owed to them. Clearly taxpayers were being ill-served by this system. This system was making a mockery out of the criminal justice system in Georgia by allowing dangerous criminals to walk out of jail and then having no one track them down in the event they fled.

Having these defendants instead post a bond with a commercial bail agent helps ensure that these dangerous criminals are brought in for their court date so that justice can be served. In fact, a study comparing secured vs. unsecured release conducted by Dr. Thomas H. Cohen of the Department of Justice found that, "defendants released through surety bond were less likely to miss their court appearances and become fugitives than defendants released through other means."

Having these defendants instead post a bond with a commercial bail agent helps ensure that these dangerous criminals are brought in for their court date so that justice can be served.

According to the Department of Justice, defendants released on their own recognizance (ROR) had a thirty percent failure to appear rate in court compared to nineteen percent of defendants released on a surety bond. This makes sense because those released on ROR versus a surety bond have less of an incentive to return for court. In fact, in some cities if fugitives disappear for long enough, the charges against them will eventually be dropped.

If a defendant released by a pretrial agency fails to appear in court, a penalty is rarely, if ever, paid—as we have seen in Fulton County. With state revenues falling it's important to note that commercial bail actually generates revenue for state government because bail bondsmen pay taxes, and in the event that a criminal absconds, they forfeit the entire amount of the bond to the state.

In addition, commercial bail does a better job of protecting your communities by making sure that criminals return to court and are held accountable for the crimes they committed. Commercial bail has proven to be more successful at holding criminals accountable, all at no cost to the taxpayer. In this economy, taxpayers should not have to subsidize the release of dangerous criminals.

ALEC's *Crimes with Bail Restrictions Act* simply says that individuals who commit serious crimes like murder, sexual assault, carjacking, and burglary have to pay for their own release from jail and have to use a secured bond. This commonsense approach takes taxpayers off the hook for bailing out criminals and will improve public safety by bringing accountability to a state's criminal justice system.

This legislation by Georgia lawmakers will help ensure that criminals who commit serious crimes will have to use a secured bond, which is a proven and accountable system. ALEC's *Crimes with Bail Restrictions Act* was first enacted in New Jersey and has been popular there as legislators continually add new crimes to list from which criminals have to use secured bail. During a time when state legislators are looking to cut the size of government—the use of get out of jail free cards by criminals should be the first item to be cut.

Michael Hough,
ALEC Public Safety
Resident Fellow

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The Smart-on-Crime Platform

A Legislator's Guide to Criminal Justice Policy

BY COURTNEY O'BRIEN, ALEC

In 1848, a famous American clown by the name of Dan Rice coined the popular cliché: "jumping on the bandwagon." It originated as Rice used his bandwagon of performers and music to garner attention for political campaign appearances. Although a popular phrase in American politics, this cliché is less ideal in actual practice. Most people appreciate a good performance, but the change of hands that occurred on November 2, 2010 implies a call among the electorate for research-backed policy change that is fiscally responsible and results-oriented. The results of the 2010 elections have presented an opportunity for legislators—to jump *off* the bandwagon to help pave a new, more effective, road to reform.

One area in desperate need of leaders to introduce research-backed policy change is criminal justice. In the four decades since 1972, the number of prisoners in the United States has grown by 705 percent.[1] The overall incarcerated population reached an all-time high in 2008 with 1 in 100 adults behind bars,[2] and when you add in offenders on probation and parole, the criminal justice system now supervises 1 in 31 American adults.

As population numbers rose, so did state spending. From 1985 to 2010, states' corrections spending went up by 674 percent.[3] Consequently, state corrections systems comprise the fourth-largest category of states' collective spending behind education, Medicaid, and transportation. Corrections spending has also been the second fastest growing category, trailing only Medicaid. In addition, 9 out of 10 state correction dollars is allocated to prisons.[4] Unfortunately, positive returns have not been as deep as the investment.

In the past few years, even before the economic crisis, policymakers began to tackle these numbers and have been implementing reforms with strong bipartisan support. Solutions exist that provide community safety and cost less to the state and taxpayer. ALEC recommends the following policy solutions:

Evidence-Based Practices

Implementing research-backed programs and procedures

Problem: Over 7 million offenders are under some sort of correctional supervision, and about 4 in 10 probationers don't successfully complete their period of supervision. Research and practice over the past 25 years have identified new policies that can reduce recidivism rates.[5]

Policy Solutions:

- Using "risk assessment tools" to determine appropriate levels and types of supervision
- Requiring a percentage of state funds for offender programming be spent on programs that are evidence-based

(See ALEC's model legislation: "Recidivism Reduction Act")[6]

Earned Compliance Credits

Reducing the time low-risk, non-violent offenders are on active supervision for each month they are in full compliance with their conditions of supervision

Problem: Community corrections agencies have to allocate limited resources across large populations of offenders. These agencies need better tools to supervise offenders and motivate them to successfully reenter society.[7]

Policy Solutions:

- Focusing staff, services and sanctions on higher-risk offenders
- Providing ability to agencies to move lower-risk probationers and parolees to less-intensive level of supervision if fulfilling conditions and obligations
- Enhancing motivation and promoting behavior change among offenders

(See ALEC's model legislation: "Earned Compliance Credit Act")[8]

Administrative Sanctions

Institutional and community-based sanctions that provide swift, certain and proportionate responses to violations of probation and parole and the authority to states to assign-and reassign-offenders to those sanctions

Problem: Probationers and parolees that violate their conditions of supervision can overcrowd prisons and drive up the costs of corrections. In some states violators can account for two-thirds of prison admissions.[9]

Policy Solutions:

- Developing a continuum of sanctions from community service programs to day reporting centers, to more restrictive responses such as secure residential facilities
- Establishing authority for agencies to impose graduated sanctions and rewards through an administrative process

(*See ALEC's model legislation: "Swift and Certain Sanctions Act"*)[10]

Performance Incentive Funding

Realigning states and localities fiscal relationships in ways that reward performance

Problem: If community corrections agencies help to reduce costs for the state by keeping minor violators of probation/parole on community supervision rather than revocation to prison they receive more cases but no additional money to manage them.[11]

Policy Solutions:

- Appropriating to community corrections agencies a percentage of the imprisonment costs averted when they reduce the rate of new felony convictions and the rate of revocations for technical violations
- Appropriating to community corrections agencies a percentage of savings if agencies show improvement in three other key outcome areas: employment, drug test failures, and victim restitution collection

(*See ALEC's model legislation: "Community Performance Incentive Act"*)[12]

Performance Measurement

Systematic performance measurement model for community corrections agencies which provides regular, objective and quantitative feedback on how well agencies are achieving their goals

Problem: Many community corrections agencies lack a systemic approach to performance measurement, making it difficult for policymakers to determine if they are accomplishing their goals.[13]

Policy Solutions:

- Requiring offender supervision agencies to set up a system to track and report regularly on key performance measures as defined by the American Correctional Association
- Measuring: recidivism, employment, substance abuse, payment of victim restitution, compliance with "no contract" orders, and the overall performance of supervised individuals as measured by the type of discharge from supervision

(*See ALEC's model legislation: "Community Performance Measurement Act"*)[14]

These policy recommendations may provide a powerful opportunity to legislators to reduce victimization and control corrections costs.[15] California, notorious for its overcrowded conditions, recently enacted provisions very similar to the *Swift and Certain Sanctions Act*, which cuts the number of low-risk probationers returning to prisons for technical violations by expanding the use of intermediate sanctions.[16]

In 2007, ALEC member Texas Representative Jerry Madden led the state in avoiding new prison construction by reinvesting a portion of corrections funds into community-based treatment and diversion programs. This saved Texas $2 billion and the crime rate is now lower than it has been since 1973. ALEC member Pennsylvania Senator Stewart Greenleaf recently championed a bill that provides for a risk assessment tool and a graduated sanctioning system for parole violators.

These efforts have helped to provide reduced prison populations and corrections costs. For the first time since 1972, there was a year-to-year drop in the state prison population.[17] The combined corrections appropriations are also lower in 44 states for the first time since 1985.[18] From 2000 to 2009 the country's violent crime rate fell by 39 percent.[19]

The smart-on-crime strategies have helped to fuel some of these positive changes. Evidence-based approaches can help pave the road to cut costs for states while providing for public safety, victim restitution and offender rehabilitation.

Courtney O'Brien is the ALEC Director of the Commerce, Insurance, and Economic Development & the Public Safety and Elections Task Forces

1. Public Safety Performance Project, *Prison Count 2010:State Population Declines for the First Time in 38 Years,* Pew Center on the States, The Pew Charitable Trusts (2010).http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf
2. Ibid.
3. National Association of State Budget Officers, State Expenditure Reports: 1987-2008.
4. Center on Sentencing and Corrections, *The Continuing Fiscal Crisis in Corrections: Setting a New Course,* VERA Institute of Justice, (2010).). http://www.vera.org/download?file=3072/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf
5. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008). http://www.pewcenteronthestates.org/uploadedFiles/Policy%20Framework.pdf
6. http://www.alec.org/AM/Template.cfm?Section=Cutting_Crime_and_Budgets1&Template=/CM/HTMLDisplay.cfm&ContentID=13928
7. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008).
8. http://www.alec.org/AM/Template.cfm?Section=Cutting_Crime_and_Budgets1&Template=/CM/HTMLDisplay.cfm&ContentID=13928
9. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008).
10. http://www.alec.org/AM/Template.cfm?Section=Cutting_Crime_and_Budgets1&Template=/CM/HTMLDisplay.cfm&ContentID=13928
11. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008).
12. http://www.alec.org/AM/Template.cfm?Section=Cutting_Crime_and_Budgets1&Template=/CM/HTMLDisplay.cfm&ContentID=13928
13. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008).
14. http://www.alec.org/AM/Template.cfm?Section=Cutting_Crime_and_Budgets1&Template=/CM/HTMLDisplay.cfm&ContentID=13928
15. Public Safety Performance Project, *Policy Framework to Strengthen Community Corrections*, Pew Center on the States, The Pew Charitable Trusts (2008).
16. Public Safety Performance Project, *Prison Count 2010:State Population Declines for the First Time in 38 Years,* Pew Center on the States, The Pew Charitable Trusts (2010).
17. Public Safety Performance Project, *Prison Count 2010:State Population Declines for the First Time in 38 Years,* Pew Center on the States, The Pew Charitable Trusts (2010).
18. Center on Sentencing and Corrections, *The Continuing Fiscal Crisis in Corrections: Setting a New Course,* VERA Institute of Justice, (2010).
19. Ibid.

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The Specialty of Specialty Courts

Solving Problems, Not Passing Them Along

BY MARC LEVIN, ESQ., DIRECTOR OF CENTER FOR EFFECTIVE JUSTICE

It is axiomatic that courts serve a vital function in the criminal justice system. However, the limited role of traditional criminal courts makes it difficult for judges to hold defendants accountable on an ongoing basis and for policymakers to hold these courts accountable for their performance in correcting offenders and thereby enhancing public safety. Traditional criminal courts typically refer an offender to another system—whether that is prison or probation—and place an emphasis on the single act of issuing punishment.

Handing down a sentence based on a determination of what constitutes a just punishment is an important function of our legal system, but there may be cases where outcomes can be improved if that a court does something more. For most low-risk offenders, basic probation is sufficient and, conversely, with many dangerous violent and career criminals, the best thing a court can do is impose a long prison term. Specialty or problem-solving courts, however, can provide a level of structure and intervention to achieve success with a defendant who needs more than basic probation but, with the right supervision, does not need to be incarcerated to protect the public. In a problem-solving court, incarceration is an option, but only if the participant fails to comply with all requirements or re-offends.

To be certain, problem-solving courts impose punishment, but they are more than simply way stations in the assembly line of justice. Problem-solving courts are distinct in part because they don't just pass along the offender to another system, but exercise ongoing oversight of that defendant to hold them accountable for changing their own life and meeting their obligations. While traditional courts often do more than punish, the routing of a defendant to a problem-solving court signifies that the goal of rehabilitation will be prioritized in the case. Types of problem-solving courts include drug courts, mental health courts, veterans' courts, DWI courts, and family violence courts. While this piece focuses on pretrial diversion problem-solving courts, there are also reentry courts that seek to reduce recidivism among those reentering society from prison.

Finally, problem-solving courts also represent an important departure from the adversarial nature of the traditional justice system, because the judge, prosecutor, and defense lawyer typically work collaboratively. The focus is on how to address the defendant's problem—whether that is addiction, mental illness, or Post-Traumatic Stress Syndrome (PTSD)—and thereby enhance public safety. While many cases in problem-solving courts, such as drug possession and a non-accident DWI do not involve an individual victim, in those cases where there is a victim, problem-solving courts typically (and appropriately) hear from the victim concerning what restitution is needed to make them whole.

The Texas Public Policy Foundation's Right on Crime initiative has highlighted problem-solving courts because evidence indicates that they can cost-effectively reduce re-offending, particularly when structured and operated with fidelity to the original model that has been evaluated in numerous empirical studies. Accordingly, as policymakers seek to deliver more public safety with every precious taxpayer dollar, problem-solving courts can be a valuable tool in their arsenal.

Types of Problem-Solving Courts

Drug Courts

The first type of problem-solving or specialty court in the United States to proliferate, and still by far the most common, is a drug court. First developed in Miami in 1989, a drug court is a special court assigned to dispose of cases involving substance-abusing offenders through comprehensive supervision, drug testing, treatment services and immediate sanctions and incentives. Drug courts feature extensive interaction between the judge and the offender and often involve the offender's family and community. Successful completion of the drug court program typically

results in dismissal of the charges (pretrial diversion) or satisfaction or reduction of the sentence (reentry or intensive probation). The U.S. Department of Justice has outlined ten key components of drug court programs.[1]

Traditionally, only individuals charged with non-violent drug offenses may be diverted from trial in a regular criminal court to a drug court, although some drug courts have begun including offenders who committed property crimes to obtain funds to support a drug habit.

The evidence that drug courts reduce crime and produce positive outcomes continues to build. In May 2010, the Organization of American States' Inter-American Drug Abuse Control Commission released a study of outcomes from drug courts in 12 countries, including the United States, which found that the courts reduce local crime and recidivism while lowering incarceration costs.[2] Texas offenders completing drug court programs have a 28.5 percent re-arrest rate compared to 58.5 percent in the control group.[3]

Nationally, the average recidivism rate for drug court graduates is between 4 percent and 29 percent as compared to 48 percent for the control group.[4] A survey of 17,000 annual drug court graduates nationwide found that recidivism rates for drug court participants one year after graduation is only 16.5 percent and 27.5 percent after two years.[5] Some 71 percent of all offenders entering drug courts since 1989 have either successfully completed their drug court program or are currently participating.[6]

In addition to reducing recidivism, drug courts can keep families together and relieve burdens on the social service system because offenders diverted from the prison are often primary breadwinners. For example, research shows drug courts reduce the utilization, and therefore costs, associated with the foster care system.[7] Also, many drug courts enable successful participants to avoid a permanent criminal record. This promotes employment, since the participant can truthfully state they have not been criminally convicted.

A comprehensive drug court program typically costs between $2,500 and $4,000 annually per offender.[8] By comparison, the annual cost per U.S. prison inmate exceeds $27,000 per year.[9] A study of a drug court in Portland, Ore., found $5,071 in savings, including victimization costs, due to reduced rates of drug use and recidivism.[10] The Maricopa County, Ariz., drug court saves more than $600,000 annually in pretrial expenses because the drug court procedure combines arraignment, change of plea, and sentencing in one hearing held within 14 days of arrest, eliminating multiple court hearings, court-appointed counsel, police interviews, trials, and presentence reports.[11]

An informative resource for policymakers interested in drug courts is the National Drug Court Institute's "Model Drug Offender Accountability and Treatment Act."[12]

Hawaii HOPE Court

Like many states, Hawaii faced a problem of probationers not keeping their appointments and declining mandatory drug tests. Probationers could commit numerous infractions before action was taken, leading to revocations to prison that might have been avoided had swift and sure sanctions been used to send a message upon initial violations.

The state addressed this challenge in 2004 by creating Hawaii's Opportunity Probation with Enforcement (HOPE) Drug Court where offenders are ordered to treatment and must call in every morning to determine if they must report to the court to take a drug test. If they fail, they are jailed for several days, usually on weekends in order to preserve employment. Although participants can ultimately be imprisoned for multiple failures, it is rare because the immediate accountability of a short jail stay deters future drug use.

The HOPE Court differs from a drug court in part because not every offender is ordered to treatment. Treatment and referrals are made as needed based on the Court's determinations concerning which participants have a diagnosed substance abuse disorder, and which simply need structure and daily accountability. Thus, the emphasis is on swift, sure, and commensurate sanctions and incentives. Partly for this reason, the HOPE Court is considerably less expensive than a drug court, costing only $1,000 per participant.[13]

Some 71 percent of all offenders entering drug courts since 1989 have either successfully completed their drug court program or are currently participating.

This court has proven in a randomized controlled trial to reduce positive drug screens by 91 percent and cut both revocations and new arrests by two-thirds.[14] According to UCLA researchers, for a group of methamphetamine-using probationers, positive drug tests declined 80 percent after entering the HOPE program.[15] Similarly, for the 685 probationers who were in the program for at least three months, the missed appointment rate fell from 13.3 percent to 2.6 percent and positive drug tests declined from 49.3 percent to 6.5 percent.[16] Research has also found that HOPE reduces new crimes by more than 50 percent.[17] While 37 percent of Hawaii probationers are revoked, the rate for HOPE participants is less than 5 percent, resulting in significant savings from avoided incarceration costs.[18]

A pilot court modeled on the HOPE Court was launched in Clark County (Las Vegas), Nev., in November 2009. In 2010, ALEC approved a resolution endorsing the HOPE Court model.[19]

Mental Health Courts

A mental health court diverts certain mentally ill offenders from traditional sentencing, redirecting them into appropriate mental health treatment. A clinical case manager screens offenders for participation in the court using an instrument designed to identify individuals with serious mental disorders. Defendants with conditions that are on Axis I of the *Diagnostic and Statistical Manual of Mental Disorders*, such as major depression and schizophrenia, are typically eligible.

Rather than simply issuing a sentence and going to the next case, the judge coordinates mental health services for the offender and monitors compliance. Smaller probation caseloads are typically

Orange County, CA Veterans' Court

used, allowing case managers to effectively monitor participants' compliance with the treatment plan.

A RAND Institute study of mental health courts found that "the leveling off of mental health treatment costs and the dramatic drop in jail costs yielded a large cost savings at the end of [its] period of observation."[20] For example, in the Washoe County Mental Health Court in Reno, Nev., the 2007 class of 106 graduates went from 5,011 jail days one year prior to mental health court to 230 jail days one year after, a 95 percent reduction.[21] Strikingly, the cost to the system was reduced from $566,243 one year prior to mental health court to $25,290 one year after.[22]

Evidence suggests that mental health courts also reduce re-offending. The *American Journal of Psychiatry* reported that mental health courts were "associated with longer time without any new criminal charges or new charges for violent crimes."[23] Similar results have been achieved in the Delaware Mental Health Court. Of the 64 offenders who participated in the first three years of the program, 57 completed the program, of which 53 did not recidivate within six months of completion.

Veterans' Courts

The rationale for veterans' courts is based on the combat-related stress, financial instability and other difficulties adjusting to life that confront many soldiers returning home. A 2008 RAND Corporation study found that about one-fifth of all Iraq and Afghanistan veterans—or about 300,000 of the more than 1.6 million U.S. troops in the two wars—reported symptoms of PTSD or major depression.[24] While most of these veterans are law-abiding, these problems contribute to criminal behavior among a substantial number of veterans.

The Bureau of Justice Statistics found in a 2000 survey—the most recent information available—that 12 percent of prison and jail inmates reported military service.[25] All told, more than 200,000 veterans are behind bars. Veterans were more likely to be first-time offenders, employed, and have a history of mental illness and/or alcohol dependence.[26]

The nation's first veterans' court was founded in 2008 in Buffalo, New York and at least ten communities across the nation have also set up such courts. In the Buffalo court, where none of the 100 participants have been re-arrested, offenders must complete "rigorous and individually tailored treatment programs."[27] The Buffalo judge, Robert Russell, points out that veteran's courts are distinguished from other specialty courts in that they also include mentoring sessions with other veterans, which leverage the camaraderie that the military builds. Struck by the impressive results of the Buffalo court, Congressman Steve Buyer (R-Indiana) told Judge Russell at a hearing examining the success of that court: "You win my 'wow' award."[28]

Following the success of the Buffalo model, Illinois, Nevada, and Texas are among the states that have enacted legislation authorizing the creation of veteran's courts. The Texas legislation may be particularly useful as a model for other states, because it authorizes counties to create such courts, provides guidelines that are flexible enough to allow for local innovation, and had no fiscal note. [29]

Veterans' courts share many attributes with drug and mental health courts. Though they recognize that veterans deserve our gratitude for their service, these courts don't let them off the hook because of that, but rather appropriately hold them accountable through a strict schedule of court appearances and treatment appointments, and, if necessary, sanctions imposed by the judge that can include jail time. Some courts also utilize probation officers to ensure the offender is properly monitored. Serious violent and sex offenders are generally not eligible for a veteran's court. Some veterans' courts require that participants have a service-related disability such as primary diagnosis of post-traumatic stress disorder (PTSD), traumatic brain injury, or severe depression.[30] Veterans' courts typically have the authority to require participants to attend rehabilitation, educational, vocational, medical, psychiatric or substance-abuse programs.

Like other problem-solving courts, rather than issue a sentence and move to the next case, a judge holds regular hearings to monitor the offender's progress through treatment and compliance with the terms of probation. The El Paso, Texas court is actually a docket of an existing court so there is no expense of creating a new court and the county expects to save money on jail costs. Just as with drug and mental health courts, successful completion of the court may result in a dismissal or reduction of the charges, a feature which helps participants obtain or retain employment.

Policy Implications

Criteria for Admission

A key policy question is which offenders should be eligible for problem-solving courts. For example, should a court accept felony or misdemeanor offenders, or both? In nearly every state, only felony offenders are eligible for state prisons, so a misdemeanor problem-solving court will not directly save the state money on incarceration costs, although it can indirectly do so if it accepts felony probationers who commit a misdemeanor or if it prevents misdemeanants from re-offending who otherwise would have moved on to a felony. More broadly, if a problem-solving court primarily accepts the "low-hanging fruit" who could succeed on basic probation rather than successfully diverting offenders from

incarceration, this widening of the net may offset some or all of the anticipated savings.

In light of this, policies and practices should incorporate the use of modern risk-needs assessment instruments that can match the right defendant with the right sanction, ensuring that offenders are not either over-supervised or under-supervised. Recommendations on this are offered in the Texas Public Policy Foundation's July 2010 publication *The Role of Risk Assessment in Enhancing Public Safety and Efficiency in Texas*.[31]

Funding Problem-Solving Courts

Processing a defendant through a problem-solving court costs a fraction of incarceration, but there are still costs associated with setting up and operating a problem-solving court. These include not only the court itself, but any additional probation department and treatment resources if such existing resources are insufficient or cannot be reallocated. While imposing court fees on defendants is an option, many states already have high fees and such fees can trade-off with important obligations such as restitution and child support, particularly given that many defendants have few resources.

Perhaps the most promising strategy for creating and maintaining problem-solving courts is offering local jurisdictions funding for such courts based on their commitment to reducing the number of nonviolent offenders they send to state lockups. Under this approach, the state could, for example, reallocate half of its savings from needing fewer prisons to problem-solving courts and related community corrections strategies.

This is a similar concept to Arizona's Senate Bill 1476 enacted in December 2008, which created a performance-based probation funding component.[32] Under this incentive-based approach, probation departments are promised a share of the state's savings from lowered incarceration when they reduce both their revocations to prison and probationers' convictions for new offenses. In 2009, the first year of its incentive funding plan, Arizona achieved a 12.9 percent reduction in the number of probationers who had to be returned to prison for a new offense.[33]

The Role of the Victim

It is vital that, in cases involving an individual victim, problem-solving courts ensure the victim's voice is heard and that adequate restitution is ordered and provided. The Council of State Governments Justice Center has issued *A Guide to the Role of Crime Victims in Mental Health Courts* that is equally applicable to other problem-solving courts that deal with cases where there is an individual victim.[34] It explains how such courts can effectuate the right to attend, the right to be heard, the right to be informed of proceedings, the right to reasonable protection, and the right to full and timely restitution. Successful completion of a specialty court is typically dependent on paying all restitution.

Conclusion

Problem-solving courts can hold offenders accountable for their performance and, because they foster sustained interaction between the court and the offender, enable policymakers and the public to better hold the courts accountable for their performance. While there are offenders with addictions, mental illness, or PTSD who must nonetheless be incarcerated in order to protect the public, prisons are often used for many such offenders because more cost-effective alternatives like problem-solving courts are unavailable.

Whereas prison offers an escape from everyday obligations such as restitution and child support and may introduce low-risk offenders to more hardened criminals, problem-solving courts can in some sense be tougher on crime because they force addicts to confront their addictions and address at their root the factors of mental illness and PTSD that often contribute to criminal activity and may only worsen behind bars. In light of the compelling research indicating the efficacy of problem-solving courts and need to achieve greater public safety with increasingly limited budgets, problem-solving courts can offer the right prescription for many states and communities.

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1. http://www.nadcp.org/docs/dkeypdf.pdf.
2. http://www.oas.org/documents/eng/press/Publication_drug_courts_volumen_I.pdf.
3. http://www.texaspolicy.com/pdf/2006-02-PP-drugcourts-ml.pdf.
4. http://www.drugpolicy.org/docUploads/2001drugcourts.pdf.
5. http://www.ncjrs.gov/pdffiles1/201229.pdf.
6. http://spa.american.edu/justice/resources/decade1.pdf.
7. Superior Court, San Diego County, The Dependency Court Recovery Project, by James R. Milliken (San Diego, California, May 2000), pp. 1-2.
8. *See* note 4.
9. http://www.window.state.tx.us/tpr/tpr4/vol1/v12rec4.html.
10. http://www.ncjrs.org/pdffiles1/nij/grants/203558.pdf
11. Letter from Leslie Miller, superior court judge, Pima County, Arizona, July 12, 2000.
12. http://www.ndcrc.org/sites/default/files/PDF/Monogram5.pdf.
13. http://www.ibhinc.org/pdfs/HOPEPROBATION.pdf (November 14, 2010).
14. http://www.pewcenteronthestates.org/uploadedFiles/HOPE_Research_Brief.pdf.
15. *Ibid.*
16. *Ibid.*
17. http://www.ibhinc.org/pdfs/HOPEPROBATION.pdf (November 14, 2010).
18. *Ibid.*
19. http://www.alec.org/AM/Template.cfm?Section=Home&Template=/MembersOnly.cfm&ContentID=14162&FusePreview=False.
20. Christine DeMartini *et al.*, *Justice, Treatment, and Cost: An Evaluation of the Fiscal Impact of Allegheny County Mental Health Court*, (Santa Monica, CA: RAND Corporation, 2007), p. xi.
21. Personal Interview, Julie Clements, Pretrial Services Officer, Washoe County Mental Health Court, January 13, 2009.
22. *Ibid.*
23. http://ajp.psychiatryonline.org/cgi/content/abstract/164/9/1395.
24. http://www.rand.org/pubs/monographs/MG720/.
25. http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf.
26. *Ibid.*
27. http://www.statebillnews.com/?p=550.
28. http://www.buffalonews.com/cityregion/story/798194.html.
29. http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01940F.htm
30. http://www.allbusiness.com/government/government-bodies-offices-regional/12793391-1.html.
31. http://www.texaspolicy.com/pdf/2010-07-PP15-RiskAssessment-ml.pdf.
32. http://www.azleg.gov/legtext/48leg/2r/bills/sb1476p.pdf (November 14, 2010).
33. http://www.paindependent.com/research/detail/probation-changes-could-solve-prison-dilemma (November 14, 2010).
34. http://consensusproject.org/downloads/guidetocvinmhc.pdf.

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Misapplication of Independent Contractor Laws

Would an entrepreneur actually pay to be someone's employee?

BY JASON STRACZEWSKI, INTERNATIONAL FRANCHISE ASSOCIATION

In order to combat employers who have been alleged to misclassify employees as "independent contractors," some states have amended their wage, workers compensation and/or unemployment insurance laws to broaden the definition of who is an "employee" under such laws. One typical amendment makes anyone who performs services under the "direction and control" of another person that person's "employee," unless the alleged employer can show that the person providing services is completely "free" from such direction and control. Other amendments have focused on the concept of an employer's "place of business."

These amendments have unintended consequences for those who provide services as franchisees in a bona fide business format franchise relationship. Franchisees are entrepreneurs who choose to start an independent business in their local community by affiliating themselves with a known brand and proven business system. Business format franchises—as opposed to distribution franchise systems such as automobiles, beer and soft drinks—are created to give entrepreneurs the ability to use the intellectual property and business plan of a franchisor. The franchisor develops and maintains the brand, while owners of franchise outlets deliver a product or service for the customer.

Under federal law, a franchisor must maintain certain minimum controls over the use of its brand, marks and system—the very things that make a franchise valuable to the person who buys one. An entrepreneur who buys a franchise usually must agree to protect the trademarked features of the franchised system. In certain states, this agreement has caused some franchisees to find themselves being classified as the franchisor's "employee" under state law, even though the franchisee intended to be their own boss, run their own business, and be responsible for their own employees.

In half of all U.S. states a service provider is presumed to be an "employee," and not an "independent contractor," unless the employer can pass three tests. The tests are commonly known as the "ABC test," although the specific terms of the test often vary from state to state. The ABC test stems from late 19th/early 20th century notions of when someone "employs" another. That test predates the development of business format franchises by several decades.

The prong that most often causes confusion and has been misapplied by state regulators, is the "A" prong, which examines whether the service provider (here, the franchisee) is "free from control and direction" of the putative employer (here, the franchisor) "in connection with the performance of the services" furnished by the service provider. The difficulty is that, on the one hand, the franchisee (as the owner and operator of his own business) is free to perform services at the time, in the place and in the manner as he or she sees fit. On the other hand, if the franchisee has deliberately purchased a franchise that prescribes valuable, trademarked methods for providing services, it has been inappropriately argued that the franchisee is not completely "free" from the control of the franchisor in connection with the performance or delivery of services. But in order to retain ownership of its intellectual property—as laid out in the Federal Lanham Trademark Act of 1946—a franchisor must maintain certain minimum controls over its brand.

Franchising is an important engine of economic growth. According to a 2008 PriceWaterhouseCoopers economic survey, there are more than 900,000 franchised businesses in the United States that employ 21 million workers. Franchising contributes $2.3 trillion in economic output to the American economy through more than 200 industries that use the franchise business model.

Franchising provides entrepreneurs the ability to start a business while not having to create a business concept from scratch. Individuals choose to buy franchises for the advantages it gives them in the competitive marketplace. In a typical franchise relationship, the franchisee (like any other law-abiding entrepreneur) agrees to pay all taxes and insurance premiums, and in exchange enjoys the profits of their business. The franchisee makes the decision to accept the responsibility to pay taxes and insurance only after the end of a federally mandated period during which the prospective franchisee is free to decline the franchise.

Franchising contributes $2.3 trillion in economic output to the American economy through more than 200 industries that use the franchise business model.

Becoming a franchisee is an entrepreneurial choice. It is a decision to be one's own boss, grow the business and hire employees. Extending employment regulations to the franchisor/franchisee relationship unfairly punishes those who want to be entrepreneurs and disrupts the model they chose to operate their business. Franchisees are small business owners and are the engines of the American economy. Regulations that are misapplied and cause franchisees to be treated as employees will deprive the economy of the very entrepreneurs we need to recover from recession.

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The Right Way to Think Outside the Cell

BY MARC LEVIN AND VIKRANT REDDY, TEXAS PUBLIC POLICY FOUNDATION

Conservatism takes pride in its "brand" as a movement concerned with cutting needless costs in government programs, removing bureaucratic inefficiencies, and encouraging accountability. Conservatives have consistently pushed for such measures in virtually every policy arena except for one—Criminal Justice. However, now this scrutiny is being brought to public safety policies with the Texas Public Policy Foundation's new Right on Crime initiative and its Statement of Principles endorsed by scores of conservative leaders such as Newt Gingrich, William Bennett, Grover Norquist, and Ed Meese.

Right on Crime recognizes that, when it comes to criminal justice, many conservatives have become too wedded to an expensive, inefficient, and unaccountable system. It is the approach captured by the phrase, "lock 'em up and throw away the key." While this is often the right answer for violent criminals and sex offenders, using this as the one-size-fits-all solution is a mistake. Just as conservatives know that throwing money at education or health care does not make people smarter or healthier, conservatives also understand that writing a blank check to the criminal justice system does not necessarily ensure public safety.

Conservatives are tough on crime but should also be tough on spending, prioritizing costly prison space for the dangerous and utilizing cost-effective community-based corrections approaches.

The Birth of "Tough on Crime" Politics

Along with rock music, a destructive drug culture, and social upheaval, the 1960s ushered in radical academic theories about criminal justice. Misguided liberal theorists of the era argued that criminals were inevitable products of oppressive societies—but that virtually all of them were capable of rehabilitation. These progressive theories led to a renewed emphasis on treatment and rehabilitation, but this was followed by a significant rise in the crime rate in the early 1970s. Possible contributing factors include family breakdown, demographic changes, increased urbanization, accelerated losses in manufacturing jobs, an irresponsible "if it feels good, do it" mentality, growing drug abuse, and veterans returning home from Vietnam with untreated mental disorders that contributed to criminal behavior.

In response to rising crime conservatives swung the pendulum in the opposite direction, embracing the "tough on crime" attitude that touted more incarceration as the only effective solution to crime.

Treatment came to be regarded as ineffective, and supporters of alternative community sanctions (such as parole and probation) were pegged as "soft on crime." Fortunately, in the ensuing decades, a large body of research has been developed that better indicates what works for different types of offenders, and there have been significant advances in areas such as electronic monitoring and validated risk/needs assessments for matching offenders with supervision and treatment strategies.

The emergence of crime as a hot button political issue overshadowed the need for research on which offenders could benefit from treatment programs and which offenders truly belonged in prison. Incarceration rates throughout the United States began to rise dramatically during the early 1970s, and in most states, they still have not stopped rising. The rate of incarceration rose from 96 per 100,000 in 1970 to 452 per 100,000 in 1998 to 952 per 100,000 in 2008.[1]

Distinguishing Between the People We're Scared of and the People We're Just Mad At

Today, half of incarcerated offenders have committed non-violent offenses. Many such offenders can be reformed into productive citizens. As Virginia Department of Corrections director Gene Johnson has explained, "[a]t some point in time we need to stop locking up people we're mad at and lock up people we're afraid of."[2] Fortunately, since the left-right debate of the 1960s and 1970s, research has enhanced both the effectiveness of community supervision and treatment and the ability to distinguish those offenders that can be safely supervised in the community.

For a first-time, low-risk nonviolent offender, incarceration does not necessarily improve public safety since these offenders often serve only a year or two in prison where they become a greater danger after meeting violent, hardened career criminals and being recruited by prison gangs. In fact, one study that compared low-level drug possession offenders who went into an evidence-based probation program that involved intensive supervision, drug testing, and treatment with similar offenders who went to prison found that the former group was 22 percent less likely to recidivate.[3]

South Carolina exemplifies a state taking a conservative approach to prioritizing correctional resources. In 2010, South Carolina policymakers faced a prison budget that had risen six-fold in 25 years.[4] Over the next five years, the state's prison population was projected to grow by another 3,200, costing $141 million.[5] To address this, the legislature enacted reforms supported by more than 90 percent of its members and signed by Governor Mark Sanford that prioritized expensive prison beds for violent criminals and sex offenders.[6]

The overhaul reduced the sentences of certain low-risk, nonviolent offenders, ended mandatory minimum prison sentences for first-time drug offenders, and allowed suitable nonviolent offenders to join work-release programs, while also increasing penalties for some violent offenses. As a result of such reforms, the state expects to save $175 million on prison construction in the coming year and $60 million on operating costs over the next five years.[7]

Prisons are Bursting at the Seams

From 1925 to 1972, the national prison population grew by 105 percent, nearly the same rate as the country's population.[8] However, since 1973, the number of prisoners increased dramatically, growing by 705 percent.[9]

Many federal and state nonviolent offenders serve increasingly long sentences due to such trends as sentencing enhancements and the abolition of parole in numerous states. Moreover, the number of crimes has grown exponentially, resulting in a small but alarming number of individuals being locked up for activities that traditionally were not criminal.

State Budgets Drained by Prisons

Prison systems are continuously outgrowing themselves, causing governments to pour more resources into corrections. In fact, of every $14 that taxpayers send to state general funds, one dollar is dedicated to corrections.[10] In California, for example, it costs the state $47,102 to house one inmate per year, a number that has increased by $19,500 since 2000-01.[11]

In Texas, the state's Legislative Budget Board projected in 2007 that 17,332 new prison beds would be needed by 2012, costing approximately $1.3 billion to construct and $1.5 billion to operate over five years.[12] Fortunately, Texas policymakers, led by conservative Republican Rep. Jerry Madden, who chaired the House Corrections Committee in 2007 and now heads the ALEC Public Safety and Elections Task Force Corrections and Reentry Working Group, instead adopted a $241 million balanced plan that strengthened probation, increased the capacity of treatment programs for nonviolent offenders addicted to drugs and/or suffering from mental illness, and created several short-term intermediate sanctions and drug treatment facilities that divert nonviolent offenders. Texas's crime rate has declined sharply since this package was enacted in 2007, reaching its lowest level since 1973.[13]

> Just as conservatives know that throwing money at education or health care does not make people smarter, conservatives also understand that writing a blank check to the criminal justice system does not necessarily ensure public safety.

Greater Public Safety Doesn't Require More Spending

Too often, conservatives are simply afraid to put pressure on the criminal justice budget, fearing that they will be viewed as "soft on crime." However, experience tells a different story.

Consider Florida and New York. Between 2000 and 2007, Florida increased its incarceration rate by 16 percent, while New York decreased its rate by 16 percent.[14]

While one might intuit that Florida's crime rate would have dipped and New York's risen, in reality, New York's crime rate dropped by 25 percent, while Florida's fell by just 11 percent.[15] Furthermore, violent crime in New York City plummeted by 64 percent, even though the city had 42 percent fewer inmates.[16]

The Hawaii Opportunity Probation with Enforcement (HOPE) Court is an example of the value of a community-based offender accountability program that produces a dramatic public safety return for each dollar spent. The program requires participating drug possession offenders to call into a recorded line every morning to determine if their color group must report that day for a drug test. There are swift and certain sanctions if they test positive or don't appear, including a few days in jail, which are often on the weekend (so the offender may retain employment).

The results of the HOPE Court demonstrate how swift and certain punishment often deters a criminal action more than the smaller chance of a long prison stay. HOPE has cut drug use by more than 70 percent and arrests for new crimes have fallen by more than 50 percent, as measured by a controlled study that compared participants and non-participants.[17] All of this has been achieved while also reducing costs—HOPE costs only $1,000 per participant—and the number of prison beds necessary to incarcerate re-offending drug users.[18]

Reducing Crime and Recidivism through Improved Probation and Parole

In 2005, Texas dedicated an additional $55 million in funding for stronger probation supervision. Participating local probation departments utilized the funds to improve supervision strategies and reduce caseload sizes, meaning that in a large urban area a probation officer might supervise 100 offenders instead of 140 and there would be more specialized caseloads for probationers who need special supervision, such as the mentally ill. To receive funding, departments were required to implement graduated sanctions, providing swift and sure consequences such as increased reporting and electronic monitoring for violations such as missing appointments,

an approach that has been proven to prevent violations from escalating to the point that a probationer is revoked to prison for such technical violations, even though they are not suspected of having committed a new offense. Participating departments reduced the number of probationers who were sent to prison for technical revocations by 16 percent.[19]

Meanwhile, those departments that did not participate in the program increased their technical revocations by 8 percent.[20] Had every department in Texas increased its technical revocations by 8 percent, Texas would have needed to put an additional 2,640 offenders into prison for an average of 2.5 years, costing the state $119 million (not including the cost of prison construction).[21] Thus, this performance-oriented funding approach paid for itself at least two times over.

Incentivizing Results

Some 68 percent of criminals who leave U.S. prisons are rearrested within three years.[22] While a criminal must always be held accountable and never excused for re-offending, the criminal justice system must also be held to account for the fact that prison inmates are rarely taught how to function outside the cell, how to reintegrate into their communities, how to hold down a job, how to become a contributing member of society, and how to overcome the errors in thinking and negative associations that originally led them to crime.

However, the criminal justice system typically does not reward better outcomes for offenders, (or victims or taxpayers), but instead is funded simply based on how many offenders are under correctional control. As such, the more prisoners a facility has, the more money it receives. While there is an obvious need to partly base corrections funding on volume, the current approach of basing all funding solely on this basis means that many of the results taxpayers seek, such as reduced recidivism and increased restitution to victims, are not being incentivized.

The problem is captured well by Right on Crime signatory Newt Gingrich, who wrote in a recent *Atlanta Journal Constitution* op-ed: "Just as…a bridge's value isn't measured by its completion but by its long-term reliability, celebrating taking criminals off the street with little thought to their imminent return to society is foolhardy."[23] In fact, while conservatives have rightfully pushed for merit pay for classroom teachers and accountability systems that measure school performance and drop-out rates, in most states there are no performance measures that indicate whether prisons or probation agencies are reducing recidivism, ensuring victims receive restitution, and achieving positive outcomes such as reduced rates of drug use and increased rates of offender employment.

Arizona partly addressed this concern by enacting performance-based probation funding in 2008. Under SB1476, probation departments receive 40 percent of the state's savings from less incarceration when they reduce both their revocations to prison and probationers' convictions for new offenses. Departments also receive an additional 10 percent of the savings if these increase victim restitution collections from probationers. In 2009, the first year with this new measure in effect, the state experienced a 12.8 percent decrease in revocations of probationers to prison.[24] Additionally, there was a 1.9 percent reduction in probationers who were convicted of a new crime.[25] Arizona reduced the number of probationers committing a new felony and therefore being revoked by 76 percent, saving the state $1.7 million on incarceration costs. [26]

Prioritizing Victims

In many respects, victims are key "consumers" of the criminal justice system. The current system, however, is not fully responsive to these consumers, as victims often have little or no input on the sentence and collect about a third of court-ordered restitution.

One alternative is victim-offender mediation, of which there are 300 programs in North America, most commonly dealing with low-level juvenile property offenders. Mediation typically results in an apology and a binding agreement for restitution and community service, which an offender must perform in order to avoid a traditional prosecution and trial. A nationwide study revealed that 95 percent of cases resolved through victim-offender mediation (where participation is voluntary both for the victim and offenders) result in a written agreement and allows an offender to avoid a conviction on their record.[27] Approximately 89 percent of those agreements are fully completed within a year, meaning that restitution has been fully paid.[28] In contrast, restitution arranged through the traditional court system has an average collection rate of no more than 45 percent.[29]

> Violent crime in New York City plummeted by 64 percent, even though the city had 42 percent fewer inmates.

In addition to increasing victim satisfaction, mediation may also reduce recidivism, as many offenders come to appreciate that they did not simply a statute, but harmed a real person.[30] Mediation is also far more expeditious than months of pretrial procedures, a trial, and appeals, and greatly reduces costs since mediators are typically attorneys, ministers, and community leaders who either volunteer or receive nominal compensation.

Reexamining "The System"

"What … has the 'system' produced?" asks George L. Kelling, Right On Crime signatory and scholar at the Manhattan Institute. "An endless temptation to spend money."[31] Kelling, the architect of Rudolph Giuliani's policing policies that contributed to a 64 percent reduction in violent crime and 42 percent reduction in incarceration from 2000 to 2007 in New York City, argues that we need the type of policing that does not simply feed a "system," but that will mobilize communities to take back their neighborhood by working with law enforcement to identify, report, and purge the criminal element. Kelling contends that, unlike mechanical systems where there is equilibrium between inputs and outputs, the criminal justice "system"

is not really a system because it grows when it fails, as opposed to striking a natural balance and rewarding results.

Indeed, at the back end of the "system," we find that corrections spending is out of control. The "system" is failing to maximize the public safety return on each taxpayer dollar spent. For example, even as the number of nonviolent offenders behind bars and the associated costs have exploded, little attention has been focused on post-release supervision and reentry strategies that will keep that offender from recidivating. In fact, government barriers, such as laws that prohibit nonviolent offenders from entering occupations ranging from hair styling to roofing as well as laws that subject employers to negligent hiring lawsuits for hiring an ex-offender, obstruct successful reentry and contribute to recidivism.

In contrast, when low-risk, nonviolent offenders are kept out of prison, ties to their family, communities and support systems remain intact and they can often avoid being surrounded by individuals who have been convicted of more severe, violent crimes. Also, an offender who is reformed in the community and maintains employment is more likely to pay restitution. For instance, crime victims in Texas receive 98 times more restitution from probationers than prisoners.[32]

The Time is Right for Right on Crime

On Dec. 15, conservative leaders came together through the Right on Crime initiative to support tough and smart approaches. Joining Gingrich, Bennett, Meese, and Norquist in endorsing the Right on Crime Statement of Principles were conservative leaders such as American Conservative Union Chairman David Keene, Prison Fellowship executives Chuck Colson and Pat Nolan, and Family Research Council President Tony Perkins.

The Texas Public Policy Foundation's Right on Crime campaign aims to raise awareness of the truly conservative position on criminal justice policy by demonstrating the growing support for effective criminal justice reforms within the conservative movement. Right on Crime's supporters have rallied behind six fundamental principles[33]:

1. As with any government program, the criminal justice system must be transparent and include performance measures that hold it accountable for its results in protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution and conserving taxpayers' money.
2. Crime victims, along with the public and taxpayers, are among the key "consumers" of the criminal justice system; the victim's conception of justice, public safety, and the offender's risk for future criminal conduct should be prioritized when determining an appropriate punishment.
3. The corrections system should emphasize public safety, personal responsibility, work, restitution, community service, and treatment—both in probation and parole, which supervise most offenders, and in prisons.
4. An ideal criminal justice system works to reform amenable offenders who will return to society through harnessing the power of families, charities, faith-based groups, and communities.
5. Because incentives affect human behavior, policies for both offenders and the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results.
6. Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.

By returning to such fundamental conservative principles, policymakers can enhance public safety, control costs, ensure victims receive justice, and redirect offenders into being productive, law-abiding taxpayers.

It is time to think outside the cell and place the criminal justice system under the same microscope that conservatives use to hold every other government program accountable.

For more information regarding Right on Crime, visit www.rightoncrime.com.

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1. Ibid.
2. http://www2.newsvirginian.com/news/2010/jul/28/va_doc_head_stop_locking_up_those_were_mad_at-ar-412445.
3. http://sentencing.nj.gov/downloads/pdf/articles/alternative1.pdf
4. http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/PSPP_South_Carolina_brief.pdf
5. Ibid.
6. http://www.thesunnews.com/2010/06/03/1509912/sentencing-reform-now-law-in-sc.html.
7. Ibid.
8. http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880.
9. Ibid.
10. Ibid.
11. http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3.
12. http://www.texaspolicy.com/pdf/2010-01-PP04-justicereinvestment-ml.pdf.
13. http://www.texaspolicy.com/pdf/2010-01-PP04-justicereinvestment-ml.pdf.
14. http://www.gppf.org/pub/crime/ThinkingOutsideTheCell.pdf.
15. Ibid.
16. Ibid.
17. http://www.pewcenteronthestates.org/uploadedFiles/HOPE_Research_Brief.pdf.
18. http://www.washingtonmonthly.com/features/2009/0907.kleiman.html.
19. http://www.texaspolicy.com/pdf/2010-01-PP04-justicereinvestment-ml.pdf.
20. Ibid.
21. Ibid.
22. http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134.
23. http://www.aei.org/article/101827.
24. http://www.paindependent.com/research/detail/probation-changes-could-solve-prison-dilemma.
25. Ibid.
26 http://tinyurl.com/2g2nhnc..
27. http://www.texaspolicy.com/pdf/2010-03-PP03-victimsconsumers-ml.pdf.
28. Ibid.
29. http://www.crimevictimsinstitute.org/documents/Restitution%20Report.pdf.
30. http://www.texaspolicy.com/pdf/2010-03-PP03-victimsconsumers-ml.pdf.
31. http://www.city-journal.org/article01.php?aid=1577.
32. http://www.texaspolicy.com/pdf/2010-03-PP03-victimsconsumers-ml.pdf
33. http://www.rightoncrime.com/the-conservative-case-for-reform/conservative-allies/statement-of-principles.

Delivering Justice for Sexual Assault Victims

BY DR. JEFF BOSCHWITZ, ORCHID CELLMARK

For victims of sexual assault, going through the difficult process of having a rape kit collected from their body just a few hours after being attacked can be traumatizing. How do you face a victim after they go through that process and tell them their kit is not important enough to be tested? And what do you say to later victims of serial offenders who could have been apprehended earlier if previous victims' rape kits had been tested in a timely fashion?

Since the ability to use forensic DNA analysis to identify rapists (or exonerate the innocent) is probably the single most important tool in fighting this crime, there is an assumption by the public that all rape kits collected are ultimately tested for DNA. Unfortunately, as exposed by the CBS evening news in a series of investigative reports over the last year, law enforcement is leaving many rape kits untested. Victims' groups estimate there are as many as 400,000 untested rape kits sitting in police storage in the United States. The reality is that in nearly all states, the majority of rape kits are not submitted for testing.

There is an important distinction to make between rape kits which were submitted to a crime lab for testing and are in backlog there, and rape kits that, once taken into police custody, were never submitted for testing. Many legislators assume that if their crime lab has a minimal reported backlog then their state does not have a rape kit backlog. In fact, the majority of rape kits are never submitted to the crime lab for testing by local law enforcement, and sit in police storage facilities. The crime lab, having no way of knowing the number of kits they have not received, only reports on the number of rape kits backlogged in the lab, not what is in police storage.

Why Testing 100% of Rape Kits Makes Sense

There are four primary reasons why law enforcement does not send all rape kits to the lab for DNA testing.

1. The state does not intend to either investigate or prosecute the case.
2. The defendant does not dispute the fact he or she had sexual relations with the victim.
3. Testing old cases does not necessarily result in a significant number of hits to the national DNA database.
4. Law enforcement is concerned the crime lab's resources are already stretched thin.

On the first point, the determination whether or not to investigate or prosecute a rape case should take into account all the evidence available, including the results from a rape kit test. This is true even in non-stranger rape cases. How can an investigator or a prosecutor make a decision on how to proceed without collecting and verifying all the available facts in the case?

Not sending a rape kit to the crime lab because the accused is only arguing whether or not the sex was consensual is perhaps the most common reason for not submitting a rape kit for DNA testing. However, when the accused denies sexual contact with the victim, rape kit testing can confirm a victim's account of the events and discredit a suspect. Even when the accused will admit they had sex with the victim and argue that the victim gave consent, rape kit DNA testing can still confirm the nature of the sex act performed and determine whose depiction of the events is more accurate.

Also, putting these cases in the FBI database is a way to identify serial rapists, including serial non-stranger rapists. It is well documented that rapists are usually serial offenders so a "her word against his" case may become a case of five women's words against his when all rape kit data is tracked. That kind of information can drastically change the approach to a case and lead to more arrests. In fact in New York City, the arrest rate for rape jumped from 40 percent to 70 percent after implementing a policy to test all rape kits. This compares with a national average for rape arrest, which is only 20 percent.

Building a database of suspected rapists by putting old cases in the database drives arrest rate increases for new cases because old data can be used to establish a pattern of behavior. This can in turn support convictions where that pattern exists, and remove perpetrators from the streets before they prey on another victim.

Finally, there is no question that if demand for DNA testing increases without a proportional increase in public lab resources, delays of cases could result. However, many legislators are unaware that there are public-private partnership options for DNA testing that can be used to stretch existing spending significantly further and reduce or altogether bypass this problem. This option is discussed in detail below.

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Which States Have Taken Action?

Illinois is the first state to enact comprehensive reform. Their new law requires all rape kits to be submitted to the crime lab within 10 days of collection and to be tested for DNA within six months by the crime

lab receipt assuming there are available resources and staffing.[1] Several local jurisdictions have also implemented new policies to test all rape kits for DNA, including Cleveland, Memphis, Los Angeles, and San Francisco. In all other jurisdictions, to the best of our knowledge, it is at law enforcement's discretion whether or not a rape kit is submitted for DNA testing.

Given Current Budget Constraints, How Can States Afford to Increase Rape Kits Testing?

Public-private partnerships are a proven way of minimizing the incremental cost of testing all rape kits. Private labs have the same accreditation as public labs, analyze tens of thousands of cases for DNA every year, and perform DNA testing at a fraction of the cost of the public sector. Private labs are an alternative to building bigger public labs that can save the taxpayer money.

The average cost for a private lab to process a rape kit usually ranges from $900 to $1,400 with the average being approximately $1,200 per kit, this *includes* the cost to upload data to the national database and testimony costs. Estimates using comprehensive, publicly-available data indicate that public lab variable costs (i.e., labor and materials) are 50 percent to 100 percent higher than private labs costs. Based on these estimates, shifting the labor and supply costs associated with one public lab employee to a public-private partnership can result in completion of an additional 40 cases per year for the same spending.

The cost savings of using a public-private partnership are even more compelling when factoring in space, equipment, and other overhead. The incremental fixed costs required to increase public lab capacity are several times the cost of working with a private lab. In addition, if overhead could be reduced even slightly by shifting some existing work to the private sector, this savings combined with the variable cost savings described above could cover the incremental cost of testing all new rape kits.

The potential to stretch existing resources further is even greater if money being directed to overtime is redirected to the public-private partnership. For example, for every case analyzed by a public lab through the use of federal grant money for overtime or equipment, two and a half cases could be analyzed by a private lab. Despite this difference, the majority of federal grant money targeted for DNA backlog reduction is used for overtime or equipment, rather than to work with the private sector. Based on the above ratio, the average-sized state could test 600 more cases with their federal grant money if it was targeted to the private sector versus being used by the public sector on overtime and equipment.

> It is important to note that the scope of this problem is very small in relation to state budgets, particularly if public-private partnerships are leveraged.

Finally, it is important to note that the scope of this problem is very small in relation to state budgets, particularly if public-private partnerships are leveraged. In the average-sized state, it will cost about $1.2 million a year to keep up with testing of all new rape cases using public-private partnerships. The one-time cost to catch up with old cases could be as high as $8 to 10 million for the average-sized state using public-private partnerships, but that cost can be spread out over a few years as has been done in other jurisdictions that have implemented change.

Public Opinion Strongly Supports Legislative Action

A recently conducted public opinion survey showed that 74 percent of U.S. adults believe it is important (20 percent) or very important (54 percent) that all rape kits are tested for DNA, including acquaintance rapes, even though there are limited financial resources to do so.[2] In addition, 85 percent of adults would somewhat favor (27 percent) or strongly favor (58 percent) their elected officials supporting legislation to require all rape kits to be tested for DNA. This kind of public support is evidenced by the fact that Illinois, a strongly divided state politically speaking, passed its legislation without a single no vote in either the Illinois House or Senate.

What Can State Lawmakers Do?

This is one area where bi-partisan action can be taken rapidly. As a start, legislators can validate the current criteria by which local law enforcement sends a case for DNA testing and request a count of how many untested cases are in police storage. Once the problem is well defined, legislators can work with state sexual assault victim's groups to educate lawmakers on the problem and draft legislation to address it using the Illinois legislation as a starting framework. While allocating financial resources to implement new legislation is always a challenge, the total costs are relatively small, the use of public-private partnerships will minimize it, and you will be surprised at how victims' groups, private donors and other sources step up to help out.

The time to act is now. Every day we delay is another day that a rape that could have been prevented.

1. http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-1011&print=true&write

2. Survey conducted by Harris Interactive on behalf of Orchid Cellmark

Dr. Jeff Boschwitz is the Vice President of Orchid Cellmark, a member of ALEC's Public Safety and Elections Task Force.

Overcriminalization

An Ounce of Prevention is Worth a Pound of Cure

BY SHANA-TARA REGON, KYLE O'DOWD, ROBERT ALT, AND BENJAMIN P. KEANE

For centuries, "guilty mind," or *mens rea*, requirements restricted criminal punishment to those who were truly blameworthy. No person should be convicted of a crime without the government having proven that he intended to violate a law or knew that his conduct was unlawful. In a sharp break with this tradition, the recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.

Recently, the National Association of Criminal Defense Lawyers and The Heritage Foundation jointly examined the federal legislative process for all non-violent and non-drug criminal offenses introduced during the 109th Congress in 2005 and 2006.[1] This study revealed that offenses with inadequate *mens rea* requirements were everywhere at all stages of the legislative process: over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate *mens rea* requirements, putting the innocent at risk of criminal punishment. This study also found consistently poor legislative drafting. Many of the new laws are so vague and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they seek to prohibit and punish.

These failings appear to be related to the reckless pace of criminalization. Congress is awash with criminal legislation, and the House and Senate Judiciary Committees lack the time to review each criminal offense and correct weak *mens rea* requirements. Over half of the offenses in the study were never referred to either judiciary committee. This is despite these committees' special expertise in crafting criminal offenses, knowledge of the priorities and resources of federal law enforcement, and express jurisdiction over federal criminal law.[2]

The study also revealed that Congress frequently delegates its criminal lawmaking authority to other bodies, typically executive branch agencies. Delegation empowers unelected regulators to decide what conduct will be punished criminally, rather than requiring Congress to make that determination itself. This "regulatory criminalization" significantly increases the scope and complexity of federal criminal law, prevents systematic congressional oversight of criminalization, and lacks the public accountability provided by the normal legislative process.

To begin to solve the problems identified in this study, which are also prevalent at the state level, one should consider the following specific recommendations for reform. Legislative bodies should:

1. Enact default rules of interpretation to ensure that mens rea requirements are adequate to protect against unjust conviction.

Lawmakers should enact statutory laws that direct courts to grant a criminal defendant the benefit of the doubt when legislators have failed to adequately and clearly define the *mens rea* requirements for criminal offenses and penalties. First, this reform would direct courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one. Second, this reform would direct courts to apply any introductory or blanket *mens rea* terms in a criminal offense to each and every element of the offense. It would improve the *mens rea* protections throughout criminal law, provide clarity, and help ensure that fewer individuals are unjustly prosecuted and punished.

2. Codify the common-law rule of lenity.

The rule of lenity directs a court, when interpreting an ambiguous criminal law, to resolve the ambiguity in favor of the defendant. Giving the benefit of the doubt to the defendant is consistent with the traditional rules that all defendants are presumed innocent and that the government bears the burden of proving every element of a crime beyond a reasonable doubt. This reform would also protect the legislature's lawmaking authority because it would restrict the ability of courts to legislate from the bench and reduce the frequency courts are forced to speak to the ambiguous legislative prerogatives of lawmakers.

3. Require detailed written justification for and analysis of all new criminalization.

This reform would require legislators to produce a standard public report assessing the justification, costs, and benefits of all new criminalization. This report should include:

- A description of the problem that the criminal offense is intended to redress, including an account of the perceived gaps in existing law, the wrongful conduct that is currently unpunished or under-punished, and any specific concerns motivating the legislation;
- A direct statement of the express constitutional authority under which the federal, state, or local government purports to act, and an analysis of whether the criminal offenses or penalties are consistent with constitutional considerations of federalism;
- A discussion of any overlap between the conduct to be criminalized and conduct already criminalized by existing federal, state, and local law;
- A comparison of the new law's penalties with the penalties under existing federal, state, and local laws;
- A summary of how enforcing the new offense or penalty to the degree required to solve the identified problem will impact the federal, state, or local budget and other resources, including judiciary and public-defender resources; and
- An explanation of how the *mens rea*

requirement of each criminal offense should be interpreted and applied to each element of the offense.

This reform proposal would require legislators to collect information on regulatory criminalization, including an account of all new criminal offenses that executive agencies have added to existing regulations, as well as the specific statutory authority supporting such regulations.

Mandatory reporting would increase accountability by requiring legislators to perform basic analysis of the grounds and justification for all new and modified criminal offenses and penalties. At both the state and federal level, a well-structured, tailored reporting requirement could significantly help stem the tide of overcriminalization.

4. Draft every criminal offense with clarity and precision.

A final reform recommendation calls for a more focused and deliberative approach to the creation and modification of criminal offenses. When drafting criminal offenses, lawmakers should always:

- Include an adequate *mens rea* requirement;
- Define both the *actus reus* (guilty act) and the *mens rea* (guilty mind) of the offense clearly, and in definite terms;
- Provide a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; and
- Avoid delegating criminal lawmaking authority to regulators.

The importance of sound legislative drafting cannot be overstated, for it is the drafting of a criminal offense that frequently determines whether a person acting without intent to violate the law or lacking knowledge that his conduct was unlawful will endure a life-altering prosecution and conviction—and in the process, lose his personal freedom.

In combination, these reforms will help ensure that every bill proposing a criminal offense receives the attention it is rightly due by lawmakers. Likewise, these reforms will strengthen existing protections against unjust conviction and rein in the unnecessary proliferation of criminal punishment—the greatest power government routinely uses against its own citizens. Americans are entitled to nothing less given the fundamental guarantees of liberty granted under our constitutional framework of criminal justice.

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1. Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law, Brian W. Walsh and Tiffany M. Joslyn (2010).

2. One encouraging finding in the *Without Intent* report is that oversight by the House Judiciary Committee does improve the quality of *mens rea* requirements. Oversight includes marking up a bill or reporting it out of committee for consideration by the full House of Representatives. Based upon this analysis, and upon the specific criminal law jurisdiction and expertise of the Judiciary Committee, automatic referral of all bills adding or modifying criminal offenses to the committee is likely to reduce the erosion of adequate *mens rea* requirements.

Jail Population Decreases as the Use of Commercial Bail Increases

BY COURTNEY O'BRIEN, ALEC Director of the Commerce, Insurance, and Economic Development & the Public Safety and Elections Task Forces

A new study by the U.S Department of Justice (DOJ) found the number of individuals who were held in jail decreased even through the use of commercial bail bonds has gone up (http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=121). The overall jail population has decreased from 773,341 in 2007 to 760,400 in 2009.

Michael Hough, public safety resident fellow at the American Legislative Exchange Council, (ALEC) said, "This latest study disproves the myth that the use of bail bonds increases the number of people in jail. We now know that this connection cannot be made. The increased use of commercial bail can actually help to alleviate overcrowding in jails."

This recent study coincides with an earlier DOJ study that found the percentage of individuals who were released from jail on commercial bail increased by 100 percent since 1992. Today over 40 percent of individuals released from jail have done so on commercial bond.

The National Association of Pretrial Services Agencies, which lobbies for the abolition of commercial bail, released a report in 2009 claiming the pretrial jail population was rapidly increasing (http://www.napsa.org/publications/napsafandp1.pdf) due to commercial bail. National Public Radio also made a similar argument in a three-piece report entitled, "Bail Burden Keeps U.S. Jails Stuffed with Inmates."

While the number of individuals in jail decreased from 2007 to 2009 the number of individuals in prison continued to grow.

Hough said, "Commercial bail is more widely used by local governments and judges because bondsmen are able to quickly free individuals from jail while holding them accountable to return to court to face justice. It is important to note that other factors like a declining crime rate also factored in to the lower jail population, but clearly the anti-private sector bail lobby will have to find something other than jail overcrowding to howl about."

Michael Hough, ALEC Public Safety Resident Fellow

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