

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

INSIDE *ALEC*

SPECIAL ISSUE: PUBLIC SAFETY & ELECTIONS

FEBRUARY 2012

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BY REP. DAVE FRIZZELL

Safer Communities at Less Cost

BY COURTNEY O'BRIEN AND
CARA SULLIVAN

Don't Drop Out of the Electoral College

BY TRENT ENGLAND



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Welcome to the American Legislative Exchange Council's new blog!

We are dedicating this online forum to the more than 2,000 state legislators who call ALEC home. These legislators are committed to the principles of free enterprise, limited government, federalism and individual liberty, and they work every day to promote these ideals in states across the nation.

ALEC is excited to be launching this new effort. With posts from policy experts and members, we hope you'll find this forum informative, enjoyable and resourceful on a daily basis. We will be discussing the most critical issues facing the states – from tax and budgets, to health care and education reform, and everything in between. And, since ALEC's legislators come from different backgrounds with differing opinions, this blog will be a lively channel for debate and edifying discussion.

Exciting things are happening around the country in 2012, and ALEC members are proud to be part of them.

Join the conversation, and enjoy your time on AmericanLegislator.org.

Sincerely,

Representative David Frizzell, Indiana
ALEC National Chairman

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AMERICANLEGISLATOR

A FORUM FOR LEGISLATIVE DEBATE BY ALEC, THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

States Look to Eliminate Personal Income Taxes

Jonathan Williams | February 17, 2012 | 12 Comments

Facing big budget shortfalls, many states are considering fundamentally changing their tax structure. Kansas, Missouri, and Oklahoma are currently attracting the most attention with proposals to eliminate or reduce their income taxes, whichever state eliminates its income tax first will send a strong signal to other states, and more importantly job creators that they are open for business.

Research consistently shows that income taxes have a negative effect on growth, as highlighted in ALEC's Rich States, Poor States annual publication. States without an income tax consistently out-perform states with the highest income taxes. The following table shows how the nine states...

ECONOMY | RICH STATES POOR STATES | TAX

A Threat to Personal Liberty - And How States Can Respond

ALEC Team | February 17, 2012 | 26 Comments

Author Marc Levin, Texas Public Policy Foundation, Private Sector Chair of the ALEC Overcriminalization Subcommittee. There are 1,700 statutory offenses in Texas state law, including 11 felonies relating to harvesting systems. It's now almost status quo for criminal law to be used to regulate ordinary business activities, an example of...

CRIME | EPA | JUVENILE JUSTICE | OVERCRIMINALIZATION | PUBLIC SAFETY

Highway Robbery - Why Power on Transportation Issues Should Be Restored to the States

ALEC Team | February 17, 2012 | 26 Comments

By U.S. Rep. Tom Graves (Division 6-mafia-like scheme. The federal government shows up uninvited and says, "We gotta keep your highway in good shape, but look, we're looking out for ya, we're gonna hold onto your highway money until it's time to spend it, understand?" When the time comes... Read more >

FEDERALISM | TAX | TRANSPORTATION

Juvenile Justice: An Often Overlooked Opportunity for Saving Taxpayer Dollars and Protecting Communities

ALEC Team | February 9, 2012 | 26 Comments

Author Jeanette Kvoll, Texas Public Policy Foundation. The juvenile justice system is the juvenile justice policy analyst in the Center for Effective Justice with the Texas Public Policy Foundation, member of the ALEC Public Safety and Elections Task Force. Corrections policy has long been a topic of hot debate in state...

CONNECTIONS REFORM | JUVENILE JUSTICE | PUBLIC SAFETY | RECIDIVISM

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A Threat to Personal Liberty *and How States Can Respond*

BY REP. B.J. NIKKEL (CO) AND CO-AUTHOR MARC LEVIN

The United States is home to less than 5 percent of the world's population. It is also home to approximately a quarter of the world's prisoners. These numbers speak volumes.

So does the fact that there are more than 4,500 federal statutory offenses and some 1,700 in Texas state law, including 11 felonies relating to harvesting oysters. Indeed, most states have far more criminal offenses outside than inside the Penal Code where traditional crimes are maintained, indicating how criminal law has been increasingly used to regulate ordinary business activities and as another lever for growing government.

The most prominent recent example of this was the raid of Gibson Guitar by the Environmental Protection Agency's own police

force. The actions taken by the EPA could turn iconic American job creators into jailbirds based on federal laws concerning importing wood that should have never been made felonies punishable by prison time.

Beyond the revelation that our justice system severely overcriminalizes certain offenses, we must recognize that a very large price tag is associated with the maintenance and supervision of our states overcrowded prisons.

Public safety is a core function of government that citizens are willing to pay for, but in return they expect the system to be efficient, balanced and just. However, budget shortfalls and the continuous need to find more money for our correctional facilities forces the question, have we gone too far with our "tough on crime" mantra?

Instead of constructing new correctional facilities to deal with overcrowding, lawmakers and officials in the justice system are

beginning to consider alternative strategies to deal with crime. Much research exists which indicates that an overreliance on harsh criminal laws and incarceration for nonviolent, first-time offenders – which has increasingly extends to even non-fraudulent business activities – is not the most cost-effective means of promoting public safety.

Last year, I passed a bill in Colorado that was signed into law which forces state lawmakers to consider the full impact of new criminal legislation they propose. House Bill 11-1239 requires that certain information be included in the fiscal analysis our legislative staff provides to legislators on bills they propose that create new crimes, change the element of a crime, and either increases or decrease the classification of an existing crime.

The bill provides Colorado's lawmakers more information to consider before passing new legislation which may duplicate other existing laws on the books. The legislation may also reduce costs for state and local government.

“...budget shortfalls and the continuous need to find more money for our correctional facilities forces the question, have we gone too far with our “tough on crime” mantra?”

For lawmakers, confronting ourselves with fiscal realities and duplicative statutes pushes us to consider alternative strategies for dealing with crime and public safety.

Now, when a legislator considers new criminal legislation, besides considering fiscal impacts—which Colorado has done for many years, we will also consider the following: whether there are any new elements to the proposed crime and whether or not it can be charged under a pre-existing statute. We will also consider the appropriateness of the new crime's classification, its potential penalty and the current or anticipated prevalence of the proposed legislation.

This expanded discretionary scope better provides lawmakers with an opportunity to reform existing criminal statutes instead of creating new ones. This allows for removal of ambiguities and consolidation of redundancies in our state statutes. We can also narrow down what is actually criminal behavior punishable by imprisonment, and explore more reformative and restorative justice options, like halfway houses, drug, mental health and veterans courts or community-based treatments.

The Public Safety & Elections Task Force unanimously approved a similar resolution offered by Marc Levin, with whom I have co-authored this article and co-chair the ALEC Overcriminalization Subcommittee. Entitled the “Resolution on Transparency and Accountability in Criminal Law,” this measure includes three provisions:

1 *The state shall require that all legislation creating or enhancing a criminal penalty so indicate in its caption. This ensures legislators will be aware that a bill contains one or more criminal provisions before voting on it.* The need for such transparency was illustrated by the convoluted 2,000-page Dodd-Frank legislation that imposed criminal penalties that were largely obscured by the sheer size of the bill.

2 *All legislation creating or enhancing a criminal penalty shall be accompanied by a comprehensive fiscal note that sets forth the estimated costs to both the public and private sectors, including corrections, courts, prosecutorial expenses, public defenders and appointed counsel for indigent defendants, law enforcement, compliance costs for businesses, and other costs.*

Too often, state fiscal notes on criminal justice legislation only include prison costs, often ignoring other costs, particularly those borne by counties for jails, judges, prosecutors, and indigent defense.

3 *The state shall not enact statutes that provide agencies with the power to criminalize violations of their rules unless the conduct involved is expressly prohibited by a legislatively enacted statute and that any existing catch-all statutes that purport to delegate criminal law-making to agencies be repealed or revised accordingly.* This provision is needed because federal and state agencies have created thousands of regulatory crimes based on purported implicit authority provided by catch-all statutory provisions allowing agencies to impose criminal penalties for violations of their rules. This applies to conduct that has never been expressly criminalized by a statute duly enacted by the appropriate legislative body. This makes it difficult if not impossible for individuals and businesses to keep track of the ever-growing body of criminal law. Moreover, the gravity of criminal law demands that those democratically elected policymakers who are directly accountable to the public determine what constitutes criminal conduct and that this power not be delegated to unaccountable bureaucrats.

While this resolution is an important first step, additional ALEC efforts are needed to address overcriminalization, which is a cradle to grave phenomenon. Accordingly, I will introduce a bill this year which has gained phenomenal support in Colorado, which will end the “zero-tolerance” policies in our school. Such policies have over-criminalized many of our youth, who are ticketed and summoned to court for offenses like drawing on their desks (graffiti) or leaving a butter knife in their backpack after a campout (weapons charge). In Texas, students as young as 10 years old had been ticketed for chewing gum in class, until House Corrections Chairman and ALEC leader Jerry Madden recently passed legislation repealing a state law that allowed school districts to create their own criminal offenses by designating violations of their code of conduct as criminal offenses, even though they did not involve activity criminalized by the state or local governments.

These heavy handed, one-size-fits-all approaches to disciplining our youth give kids criminal records and can hamper their ability to have a successful future because employers typically refrain from hiring people with criminal records. Moreover, municipal court judges in Texas have said the hundreds of thousands of tickets issued by schools for misbehavior every year crowds their dockets and they express frustration that their only option is often to fine the parent months after the misbehavior, which has little impact on most youngsters.

Statistics in Colorado tell us nearly 10,000 of our youth have been ticketed annually for the past decade and summoned to court for mostly minor infractions. Through my “Fair School Discipline” bill, I hope to end what many experts label the “school-to-prison-pipeline.” These heavy-handed, one-size-fits-all approaches to disciplining our kids should be the exception, not the norm. Our youth need direction and correction, and even punishment at times, but it should be proportional and commonsensical.

The overcriminalization of our youth and our citizens poses a real and serious threat to people’s personal liberties, as well as our state budgets. It’s time we work together across the aisle and put an end to the overcriminalization of America. 🗣️



REPRESENTATIVE BJ NIKKEL joined the Colorado General Assembly in 2009 and was elected House Majority Whip in 2010. Immediately prior to her Assembly appointment, Nikkel worked for such organizations as the National Guard Association of Colorado and Congresswoman Marilyn Musgrave.



MR. MARC A. LEVIN is the Director of the Center for Effective Justice at the Texas Public Policy Foundation. Levin is an Austin attorney and an accomplished author on legal and public policy issues.



Juvenile Justice: An Often Overlooked Opportunity for Reducing Taxpayer Dollars and Protecting Communities

BY JEANETTE MOLL

Corrections policy has long been a topic of hot debate in state legislatures. Less attention is devoted to juvenile justice. Usually a smaller portion of state budgets, and with issues and principles at play that are not widely appreciated, legislators are often hesitant to delve into the sensitive topic. But surprisingly, those states and legislatures which have taken the time to institute particular reforms in juvenile justice have achieved impressive results.

Juvenile justice presents a uniquely exciting opportunity because some of the reforms that produce the best outcomes for communities and juveniles also happen to cost far less for taxpayers. The result can be extensive budget streamlining, all while strengthening and protecting communities.

The principal way to achieve this result is through a reformation of the traditional juvenile justice system. Traditionally, counties and local governments are responsible for delinquency proceedings and juvenile probation, while the state picked up the responsibility—and the tab—for locking up juvenile offenders. This can produce inefficiencies, as the officials responsible for prosecuting a juvenile may not be sensitive to the costs, potential for abuse, and obstacles to successful reentry into society that result from the placement of that juvenile in state-run secure facilities or residential programs.

By rectifying this fiscal imbalance and empowering communities to keep more youths and dollars closer to home, policymakers can bring juvenile justice policy into alignment with research suggesting that most youths are more effectively rehabilitated closer to their families, churches, and other community resources. This

system is called “Performance Incentive Funding,” and involves a system where juvenile justice expenditures follow the placement of the child.

The state-level agency saves money by reducing the number of juveniles in its secure facilities, and returns a portion of those savings to the counties for them to supervise and treat juveniles in community-based residential and non-residential evidence-based programming. Some versions of performance funding programs are tied not just to reduced commitments of youth, but also to other outcomes such as reduced recidivism of juvenile probationers, increased victim restitution, and an increased number of probationers either attending school or working.

States that have begun implementing some version of incentive funding have enjoyed positive outcomes across the board. For example, as a part of a package of reforms, Texas initiated a sys-

tem connected to his or her community and family while receiving supervision and treatment is more likely to have positive outcomes, all while avoiding expensive confinement in state facilities.⁴ Community-based settings permit juveniles to develop strong bonds with mentors, establish community ties and relationships with community partners, and maintain and strengthen familial relationships.⁵

For example, Missouri moved to a system of community-based treatment decades ago, and has created a model system of community-based juvenile justice. Missouri adopted a system of smaller, less institutional group homes, camps, and treatment facilities located closer to a juvenile’s community. As a result, recidivism rates for Missouri’s youth are less than 9 percent (to adult criminal justice systems) and 6 percent (recommitted to the juvenile justice system) after three years.⁶

“This model policy includes the integral components of a successful performance incentive funding system, and provides policymakers with the tools to make truly transformative changes to their juvenile justice systems.”

tem of performance incentive funding, providing grants to counties who committed fewer juveniles to state care, opting rather to treat the delinquent juvenile closer to home in county facilities. As a result, Texas was able to close three state facilities for juveniles, saving \$110 million dollars in the process. Further, since implementing this model, key indicators of juvenile crime in Texas have declined.¹

In the 1990s, Ohio adopted such a funding policy, giving money to counties that treat juveniles who would otherwise be incarcerated and deducting funds for low-risk juveniles who are sent to state facilities. The result was dramatically reduced recidivism rates—22 percent for moderate risk youth placed through RECLAIM, compared with a 54 percent rate for such offenders in state lockups²—and a savings of between \$11 and \$45 per dollar spent due to the reduced need for more costly state youth lockups.³

Performance incentive funding systems are founded on three major principles. By ensuring fidelity to these principles, states can achieve a more successful and lower cost juvenile justice system, and replicate the successes seen in Texas and Ohio.

COMMUNITY-BASED, LOCAL PROGRAMS FOR JUVENILES ARE MORE EFFECTIVE

Keeping juveniles closer to home produces better outcomes and lower costs. The evidence shows that a juvenile who remains

connected to his or her community and family while receiving supervision and treatment is more likely to have positive outcomes, all while avoiding expensive confinement in state facilities.⁴ Community-based settings permit juveniles to develop strong bonds with mentors, establish community ties and relationships with community partners, and maintain and strengthen familial relationships.⁵

EVIDENCE-BASED PROGRAMMING IS INTEGRAL TO OPTIMAL OUTCOMES FOR JUVENILES AND PUBLIC SAFETY

The last two decades have seen an explosion in the amount of evidence on incapacitation and other treatment alternatives for juvenile offenders. When a program is able to prove its effectiveness in reducing recidivism and the risk of criminal behavior in juveniles through empirical, controlled studies and evaluations, it is deemed an “evidence-based” program.

Evidence-based policymaking integrates the education and information from studies of program outcomes into policy decisions. There are several resources which aggregate evidence-based programs, primarily in three major databases of evidence based programs that provide a full array of information for policymakers.⁷ An evidence-based program provides information on its costs as well as outcomes, which permit policymakers to select the appropriate program with full information of its benefits and limitations.

By ensuring that performance incentive funding involves the use of evidence-based programming, policymakers can ensure that

state dollars are being spent in the most productive way. Positive outcomes for juveniles, in terms of reduced recidivism, result in fewer state costs in criminal corrections for those juveniles later in life, as well as safer communities and a more productive citizenry.

INCAPACITATION IS NOT ALWAYS NECESSARY; A RANGE OF TREATMENT ALTERNATIVES IS MORE EFFECTIVE

While some juvenile offenders do pose a risk to the community, and confinement is necessary for those offenders, nonviolent and low-level juvenile offenders rarely require confinement to adequately redress their wrongdoing. In fact, confinement may be more harmful than helpful, as non-violent and low-level offenders are exposed to criminal peer influences when housed with more dangerous and violent juveniles.⁸

Secure confinement is also exceedingly expensive—totaling hundreds of dollars per day, per juvenile. And those high costs rarely produce the desired results. Re-incarceration and re-arrest rates following secure confinement are high—too high to justify the cost in the case of low-level juvenile offenders.

Through performance incentive funding, counties can consider a wide range of responses to delinquent behavior, from probation to residential treatment. Probation is a low-cost, effective way to supervise juveniles and provide the needed behavioral modification. Additional options beyond basic probation supervision for youths who need more structure include electronic supervision, evening reporting centers, and group homes. But when the responsibility is within local control, with the full range of options, counties and local governments can tailor programming and select the best alternative for each juvenile.


POLICY SOLUTIONS

This year, ALEC unanimously passed model policy for states to implement performance incentive funding. Through that legislation, states can implement a system for tracking the number of juveniles the county avoids sending to the state for secure

confinement, as well as the state expenditures saved as a result. A portion of those savings are then returned to the counties for community-based juvenile justice programs.

Further, the model policy requires the use of evidence-based practices and provides that the funds counties receive can be used for various effective forms of intervention, including restitution to victims, family-based programs, and substance abuse treatment. Also, the model legislation provides that counties must, at the very least, not increase the rate at which juvenile probationers commit new crimes. This assures that there is an incentive not just to divert youths from state lockups, but also to maintain or enhance public safety.

This model policy includes the integral components of a successful performance incentive funding system, and provides policymakers with the tools to make truly transformative changes to their juvenile justice systems. And the benefits—budget streamlining and safer communities—pay dividends for years to come.

Tackling juvenile justice reform can be a daunting task. But armed with this model legislation for performance incentive funding, as well as the research and evidence from states who have successfully implemented this model, policymakers can deliver positive results for communities, juveniles, and state budgets. 



JEANETTE MOLL is the juvenile justice policy analyst in the Center for Effective Justice with the Texas Public Policy Foundation, member of the ALEC Public Safety and Elections Task Force.

¹Marc Levin and Jeanette Moll, "Comprehensive Juvenile Justice Reform: Cutting Costs, Saving Lives," Texas Public Policy Foundation (Sept. 2011).

²Christopher Lowenkamp and Edward J. Latessa, "Evaluation of Ohio's RECLAIM Funded Programs, Community Correctional Facilities, and DYS Facilities: Cost-Benefit Analysis Supplemental Report," University of Cincinnati Division of Criminal Justice Center for Criminal Justice Research (Nov. 2005).

³Ibid.

⁴See Rolf Loeber and David P. Farrington, eds., "Serious & Violent Juvenile Offenders: Risk Factors and Successful Interventions," Thousand Oaks, CA: Sage Publications (1998).

⁵Shelley Zavlek, "Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions," OJJDP Juvenile Justice Bulletin (Aug. 2005).

⁶Richard A. Mendel, "The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders," The Annie E. Casey Foundation (2010).

⁷"OJJDP Model Programs Guide," Office of Juvenile Justice and Delinquency Prevention; "Blueprints for Violence Prevention: Model Programs," Center for the Study and Prevention of Violence, Institute of Behavioral Science; "National Registry of Evidence-based Programs and Practices," Substance Abuse and Mental Health Services Administration.

⁸Uberto Gatti, Richard E. Tremblay, and Frank Vitaro, "Iatrogenic effect of juvenile justice," *Journal of Child Psychology and Psychiatry* 50:8 (2009) 991–998 21 Dec. 2009.



Safer Communities at Less Cost

BY COURTNEY O'BRIEN AND CARA SULLIVAN

OFTEN THE FIRST QUESTION THAT COMES TO MIND WHEN MAKING A DECISION: WHAT IS THE COST?

The costs associated with state corrections systems are more than just the budget of a program—with more than 2.3 million people incarcerated in the U.S., the highest incarceration rate in the world, the broken systems are costing communities, economic development, personal liberties, and society at large. In the four decades since 1972, the number of prisoners in the United States has grown by 705 percent.¹ By 2008, the overall incarcerated population reached a level of 1 out of every 100 adults behind bars.² 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. Over the past two decades, states' corrections spending quadrupled.³ Consequently, state corrections systems represent the second fastest growing area of state budgets, behind only Medicaid. These developments have prompted state officials across the country to reexamine their corrections and criminal justice systems, using a "justice reinvestment" approach. Justice reinvestment is a data-driven strategy for policy-makers to reduce corrections spending and recidivism rates, while improving public safety for citizens. Across state legislatures, "justice reinvestment" working groups are bringing together policymakers and stakeholders on both sides of the aisle to determine where to invest corrections dollars to get the greatest return in public safety. In simple terms: reinvesting funds in the programs and policies that are proven to work.

Programs that are proven to work implies a past success or demonstration of effectiveness. Fortunately, there is data to support policy reforms that provide for community safety and cost less to the state and taxpayer. Examples include utilizing risk assessment tools, focusing resources on high-risk offenders, responding swiftly to violations of probation and parole, rewarding probation or parole programs that reduce the rate of re-offense, and instituting performance measures to determine and track the success of implemented reforms.

THE HISTORY

Safe communities are the end-goal of criminal justice policy. The debate lies in how best to reach that goal. The typical timeline pinpoints the 80's as the "tough on crime" era where legislation, such as California's "three strikes and you're out" law (mandatory sentencing of repeat offenders), locked up offenders that created packed prisons and unsustainable costs. But as long as there are criminals, there will be "tough on crime" policy. Because who does not want to be "tough on crime"? The shift in the debate is attributed to defining what is "tough." A body of research has revealed what works and how to slow the revolving prison door. "Tough on crime" now means holding individuals to a higher standard, holding programs accountable, funding the programs that can produce results, and asking more of offenders. This research has spurred a number of states to take a look at their criminal justice systems, diagnose problems and adopt new strategies.

One of the trailblazers of this reform is Texas. In 2005, under the leadership of Rep. Jerry Madden, the "tough-on-crime" state acted the way the state is known to act: big. After taking a hard look at the numbers, the state built a bipartisan coalition that increased funding for specialized courts, introduced progressive sanctions for probation/parole officers, and modified the caseloads of probation officers. In addition, the state looked at parole and how they could identify high-risk offenders earlier. With a bipartisan coalition that included all stakeholders, they compared costs, and the consequences of failing to act, and enacted policy reform with the end result of state savings of up to \$2 billion and the lowest crime rate since 1973. Texas tipped the scales and prevented rapid prison growth by allocating resources to the right programs.

A FEW EXAMPLES OF SUCCESS

The Texas solution to corrections problems has helped to create a wave of interest across legislatures in the U.S. In 2011 alone, Arkansas, Kentucky, North Carolina and Ohio enacted comprehensive legislation. Arkansas' reform is projected to save the state \$875 million in averted prison construction and operation costs over the next 10 years.⁴ It will also invest savings in community-based supervision and services as well as other practices proven to reduce recidivism. In Kentucky, *The Public Safety and Offender Accountability Act* of 2011 is projected to bring savings of \$422 million over 10 years.⁵ Other states to enact reform included Maryland, Colorado and Louisiana.

THE ALEC POLICIES AND STATE EXAMPLES

In 2009, thanks to the leadership of Rep. Jerry Madden, TX, and Pat Nolan, Prison Fellowship Ministries, ALEC formed a Corrections and Reentry Working Group to develop model policies that provide better public safety outcomes at a lower cost. Many of the ALEC principles align with the successful reforms in the states.

"In Texas, we had only so much space in our prisons and with the number of people coming back into the prison system, we were going to just open the doors, so we looked at our probation and parole officers less to intervene early, especially when dealing with offenders. By allocating resources to the right programs, we were able to reduce and preserve public safety."

REP. JERRY MADDEN (TX)

"The ability of Kentucky's inter-branch task force to forge a consensus and force solicited input from a wide range of stakeholders, including victims, judges, probation and parole officers, and many others, provided perspectives to build consensus for a reform package that would preserve public safety in ways that preserve public safety."

SEN. TOM JENSEN (KY)

"Ohio's comprehensive criminal justice legislation is expected to save inmates, and save the state \$82 million in marginal costs over the next four years. Key to this success was the focus on probation departments and community-based supervision. It pocket the savings without following through on the other reforms they need and will leave Ohio to face the consequences of the current system."

SEN. BILL SEITZ (OH)

"In North Carolina, we faced the prospect of a 10 percent increase in prison costs. We implemented the *Justice Reinvestment Act*, which was designed to reduce those savings in evidence-based practices that have been proven to reduce recidivism. As a result, North Carolina's prison population is expected to decrease, and we will avert \$560 million in spending."

ve could not build new ones—we had to either slow down
or we had to open the doors and let them out. We weren't
n and parole systems. We quickly discovered that it costs
nders who have mental health or drug addiction problems.
e to prevent rapid prison growth, reduce corrections costs

JERRY MADDEN (TEXAS) - SPEARHEADING REFORM

bipartisan consensus was essential to our success. The task
—law enforcement officials, prosecutors, the defense bar,
others. The inter-branch working group used the difference
addressed Kentucky's unique issues and reduced recidivism

KENTUCKY) - BUILDING A BIPARTISAN INTER-BRANCH COALITION

ected to reduce state prison population by nearly 7,000
savings as well as hundreds of millions more in avoided
is that a portion of the savings we realize will be rebated
on programs to provide treatment for offenders. If we just
r end, we will fail to provide offenders with the treatment
high recidivism rates and prison overcrowding.”

IO) - THE IMPORTANCE OF JUSTICE REINVESTMENT

ent increase in prison population by 2020. Instead, we
igned to contain corrections costs and reinvest a portion of
proven to reduce recidivism and maintain public safety. As
o be nearly 5,000 beds lower than projected and the state

REP. DAVID GUICE (NORTH CAROLINA) - RESULTS

The Recidivism Reduction Act

Over the past 25 years, research and practice have produced strategies and policies that have been proven to reduce recidivism. ALEC'S *Recidivism Reduction Act* draws on years of research and implements data-driven programs that utilize risk-needs assessment tools to assign appropriate levels of supervision and corrections programming to offenders. Because these practices have proven successful, they are the best bet for any state looking to reduce corrections spending and maintain public safety.

Prior to legislative reform, Kentucky faced stubbornly high recidivism rates. The *Public Safety and Offender Accountability Act* of 2011 aims to turn this trend around. The policy requires that offenders are supervised using practices proven to reduce recidivism. Corrections agencies must incorporate risk-needs assessment information into the decision-making process for pretrial supervision, sentencing, and the terms of parole. The implementation of evidence-based practices contributes to an estimated savings of \$422 million over ten years which will allow Kentucky to reinvest funds in efforts to reduce recidivism.⁶

The Earned Compliance Credit Act

ALEC's *Earned Compliance Credit Act* reduces the time low-risk, nonviolent offenders are on active supervision for each month they are in full compliance with the terms of their supervision. Earned compliance credit programs promote behavior change by providing low-and moderate-risk offenders with incentives to meet the conditions of their supervision. This allows probation and parole officers to focus staff, services and sanctions on higher-risk offenders who are more likely to commit another crime.

At least 10 states have successfully implemented earned compliance credit programs.⁷ For example, Arizona enacted legislation that enables offenders in community corrections programs to earn up to 20 days a month off of probation in exchange for complying with the terms of their supervision. In just two years, the number of probationers convicted for new felonies declined by 31 percent, and the overall number of probation revocations dropped by 28 percent.⁸

The Swift and Certain Sanctions Act

ALEC's *Swift and Certain Sanctions Act* provides institutional and community-based sanctions as tools for corrections agencies to use as swift, certain and proportionate responses to parole violations. The policy ensures that offenders who violate their terms of parole face immediate and definite consequences. Research indicates that providing offenders with swift, certain and proportionate responses to violations of parole can improve offender compliance and reduce the number of parole violators sent to costly prison cells.

Texas used a policy of administrative sanctions to combat its large number of parolee revocations. In 2005, Texas began awarding grants to probation agencies that implemented graduated sanction programs and agreed to reduce recidivism by 10 percent.

Under these programs, the number of crimes committed by parolees across the state dropped by 8.5 percent.⁹ Additionally, along with major justice reinvestment legislation in 2007, swift and certain sanction programs helped Texas avoid spending up to \$2 billion in new prison construction due to lower incarceration rates.¹⁰

Community Corrections Performance Measurement Act

Community corrections agencies and policymakers need accurate and reliable information on which to base decisions and achieve goals. The ALEC *Community Corrections Performance Measurement Act* helps provide key stakeholders with systematic performance measures that produce regular, objective and quantitative feedback on how well agencies are performing. By measuring outcomes, corrections agencies can most efficiently allocate their staff and resources.

In 2011, Arkansas legislated measurement requirements for the performance of its community corrections programs as part of the state's comprehensive criminal justice reform package, The *Public Safety Improvement Act*. The insight and evidence gained through performance measurements will contribute to a projected reduction of Arkansas' prison population by 3,200 inmates as well as an averted \$875 million in prison costs over the next 10 years.¹¹

Community Corrections Performance Incentive Act

States and local probation departments both have an incentive to protect public safety, maintain corrections costs and increase the effectiveness of community corrections programs. ALEC's *Community Corrections Performance Incentive Act* aligns these incentives by awarding funds to local probation departments that implement evidence-based practices proven to reduce recidivism.

California enacted an incentive funding program for probation in 2009, which awards counties a portion of the state's savings if the counties successfully reduce their rate of probation revocation.¹² It also provided seed money to counties to begin the program. In the first year of implementation, California estimates that 23 percent reduction in revocations in 2010 resulted in state savings of \$179 million, and \$87.5 million of those savings was shared successful county probation departments to reinvest in evidence based programs and practices.¹³ Ohio also implemented a performance incentive funding structure as part of its 2011 justice reinvestment legislation. The combined reforms are projected to avert a 2,871-person increase in Ohio's prison population over five years.¹⁴

Resolution in Support of HOPE

The *Hawaii Opportunity Probation with Enforcement (HOPE)* program was started in 2004 by Judge Steven Alm in an effort to reduce drug use and crime among probationers. Rather than allowing probationers to violate probation until the violations became too egregious to ignore, Judge Alm began immediately punishing probationers when they first violated the terms of their supervision. By providing immediate and definite consequences,

and then following through, Judge Alm discouraged probationers from committing probation violations. The results of the *HOPE* program are astounding. *HOPE* probationers are 55 percent less likely to be arrested for a new crime, 72 percent less likely to use drugs, 53 percent less likely to have their probation revoked, and 61 percent less likely to skip appointments with their probation officers.¹⁵ ALEC's *Resolution in Support of HOPE* aims to replicate these results in other states by encouraging policymakers and criminal justice leaders to take similar steps.

Resolution in Support of Victim-Offender Mediation

The ALEC *Resolution in Support of Victim-Offender Mediation* provides a face-to-face meeting, in the presence of a trained individual, between victims and low-risk, first-time offenders. Victim-offender mediations provide greater closure and restitution for victims, reduce recidivism and save taxpayer dollars by allowing victims and offenders to settle out of court.

Civil Liability Relief for Employers Hiring Ex-Offenders

Employers lose 72 percent of all negligent hiring cases with an average settlement of more than \$1.6 million.¹⁶ The ALEC *Civil Liability Relief for Employers Hiring Ex-Offenders* immunizes employers who hire nonviolent, non-sex ex-offenders from being sued solely on the basis of hiring an ex-offender. According to the Federal Bureau of Prisons, ex-offenders who are employed are three to five times less likely to reoffend.¹⁷ Giving offenders a second chance can promote workforce productivity, lower crime and reduce incarceration costs.

LOOKING FORWARD – STATE PLANS IN 2012

With a multitude of state successes as examples, a few key states are in the process of developing policies to address their own broken criminal justice systems in 2012. Georgia, Missouri and Oklahoma are three states taking the lead on this reform. Over the past two decades, corrections spending in both Georgia and Missouri have skyrocketed. Georgia currently spends more than \$1 billion annually on corrections, up from \$492 million in 1990.¹⁸ Missouri has experienced even more of an increase as corrections spending grew 249 percent between 1990 and 2009.¹⁹

Oklahoma's prison population has increased over the past 10 years—the state has the nation's highest female incarceration rate and fifth highest male incarceration rate.²⁰ Not only has this resulted in prison overcrowding, but also an increase in spending. Yet, the return has not been as deep as the investment. The violent index crime in Oklahoma is higher than the national violent index crime.²¹

Corrections reform is crucial for these states. If current policies remain in place, Georgia's prison population will grow by 8 percent by 2016 and it will have to spend an additional \$264 million to expand capacity.²² Missouri is projected to lose an estimated \$3.7 and \$12.6 million of potential savings if it fails to adopt corrections reforms.²³

CONCLUSION

The states that have introduced corrections reform shared a few things in common: high recidivism rates, high corrections spending, and insufficient outcomes. The states that have enacted corrections reform share a few things in common: coalition building, bipartisan support, and data to support the reforms. The costs of not taking action are high—it will cost taxpayers, communities, safety, families, victims and society at large. Many states have crunched the numbers and determined that continuing with “business as usual” is not fiscally sustainable. With the evidence to support reforms, model policy solutions and state successes as examples, many states are primed for success as they dare to ask their corrections systems: what is the cost and how can we make it better?

For more information regarding the ALEC policy, please contact Courtney O’Brien at cobrien@alec.org. 

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¹Public 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/www.pewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf

²Ibid.

³National Association of State Budget Officers, State Expenditure Reports: 1987-2008.

⁴http://www.pewcenteronthestates.org/uploadedFiles/Pew_Arkansas_brief.pdf

⁵Floor testimony of Senator Tom Jensen, February 28, 2011

⁶Fiscal Analysis of KY House Bill 463, the Public Safety and Offender Accountability Act of 2011, conducted by the Kentucky Office of State Budget Director.

^{7a}The Vera Institute of Justice. (November 2011). Memo to the Maryland Department of Public Safety & Correctional Services. The Vera Institute for Justice, Center on Sentencing and Corrections.

⁸Public Safety Performance Project, The Impact of Arizona's Probation Reforms, Pew Center on the States, The Pew Charitable Trusts (2011). http://www.pewcenteronthestates.org/uploadedFiles/PSPP_Arizona_probation_brief_web.pdf.

⁹Levin, M. (September 2011). Adult Corrections Reform: Lower Crime, Lower Costs. Texas Public Policy Foundation. <http://www.texaspolicy.com/pdf/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>

¹⁰Texas Legislative Budget Board. (January 2007). Adult and Juvenile Correctional Population Projections: Fiscal Years 2007-2012. http://www.lbb.state.tx.us/PubSafety_CrimJustice/3_Reports/Projections_Reports_2007.pdf

¹¹http://www.pewcenteronthestates.org/uploadedFiles/Pew_Arkansas_brief.pdf

¹²Senate Bill 678, Chapter 608 (2008). <http://www.courts.ca.gov/documents/sb678.pdf>.

¹³Public Safety Performance Project, The Impact of California's Probation Performance Incentive Funding Program, Pew Center on the States, The Pew Charitable Trusts.

¹⁴Council of State Governments Justice Center. (February 2011). Policy Framework to Reduce Corrections Spending & Reinvest Savings in Strategies that Can Reduce Crime. <http://justicereinvestment.org/states/ohio/pubmaps-oh>

¹⁵ALEC Resolution in Support of H.O.P.E.

¹⁶Mary Connerley, Richard Avery, and Charles Bernardy: “Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies,” Public Personnel Management Vol. 20, No. 2.

¹⁷Offender Workforce Development Aims to Curb Recidivism,” Third Branch: Newsletter of the Federal Courts (May 2006) <http://www.uscourts.gov/ttb/05-06/offender/index.html>

¹⁸Report of the Special Council on Criminal Justice Reform for Georgians. (November 2011).

¹⁹Missouri Working Group on Sentencing and Corrections Consensus Report (December 2011).

²⁰Oklahoma Department of Correction, “Did You Know” April 2011.

<http://www.doc.state.ok.us/newsroom/publications/didyouknow2011.pdf>.

²¹<http://justicereinvestment.org/states/oklahoma/pubmaps-ok>

²²Report of the Special Council on Criminal Justice Reform for Georgians. (November 2011).

²³Missouri Working Group on Sentencing and Corrections Consensus Report (December 2011).

Child Abuse Scandal Prompts Lawmakers to Weigh In

BY STACIE RUMENAP

You cannot escape it in the news today, it is almost routine to hear media reports about a tragic story of a young child's abduction, abuse and murder—all too often at the hands of an individual who has been entrusted as a guardian of the child.

Predators often seek out kids who are vulnerable to their advances both emotionally and environmentally. It is estimated that the average sexual predator victimizes 117 victims before he is ever caught, and begins preying on victims when the predator is as young as 14 years old. Yet, the predator is not usually caught until he is in his 40's or 50's.

Each and every grisly discovery of unspeakable acts committed against our children fills us with outrage, disbelief and renewed inspiration to do more. That certainly was the case last November when we learned that a prominent football coach, in a position of influence over thousands of youths, was accused of allegedly abusing young boys.

decade, disturbing indicators that Sandusky was breaching boundaries with young boys—or maybe worse. Yet the university's top administrators seemingly swept such suspicions aside, another open question that still demands an answer.

What is clear, however, is that the Sandusky case will raise a renewed consciousness in other communities the way it has been raised in Pennsylvania.

Not surprisingly, Pennsylvania lawmakers were quick to consider legislation just days after news media broke the scandal. Lawmakers in other states such as Maryland and New York were following suit. In fact, approximately 63 bills in 25 states have been introduced in the 2012 legislative session.¹ Forty-eight states currently require at least some professionals to immediately report knowledge or suspicion of child sexual abuse to some authority and eighteen of those states require every adult to be a mandated reporter.

As a state legislative organization, the mass response from legislatures across the nation prompted ALEC lawmakers into action, to provide guidance on how to strengthen existing laws against

“As a state legislative organization, the mass response from legislatures across the nation prompted ALEC lawmakers into action, to provide guidance on how to strengthen existing laws against sexual predators and prevent having such accusations from being swept under the carpet again.”

Penn State's former assistant coach Jerry Sandusky – a legend in the coaching world from 1969 to 1999 – will face trial this fall for more than 50 counts of sexually molesting ten boys over a 15-year period whom he met through The Second Mile, a charity he founded in 1977. Sandusky denies the allegations.

In addition, individuals who allegedly witnessed inappropriate conduct by Sandusky are charged with failing to report suspected child abuse and perjury related to their testimony before the grand jury. Sandusky, 67, allegedly evaded detection by state child services, university administrators, teachers, parents and colleagues.

Ask most people involved in the Penn State football program and they will tell you the warning signs were there for more than a

sexual predators and prevent having such accusations from being swept under the carpet again.

As a result, the Public Safety and Elections Task Force passed the *Child Protection Reporting Requirement Act*. This model policy has been approved by the ALEC Legislative Board.

The Act requires that an individual representing or working for the state, in a position of authority over minors, who witnesses the physical or sexual abuse of a minor (as defined by the state) submits an oral or written report about the incident to local child protective services or the appropriate law enforcement agency.

Had this model legislation been state law in 2002, Penn State assistant coach Mike McQueary would have been required to

ALEC Model Bill – Key Talking Points

- Requires individuals responsible to the state and in positions of authority over minors to file a report if they witness the physical or sexual abuse of a minor.
- Grants an individual who reports abuse or neglect as required by this Act immunity from civil liability unless the report made is knowingly false.
- Encourages law enforcement agencies to share information to ensure the correct agency receives reports of child abuse and can take appropriate actions.
- Requires individuals representing the state and in a position of authority over minors to include in their report of the abuse any information that would aid law enforcement in an investigation.

report what he saw directly to Child Protective Services or law enforcement which would have impelled a police investigation. Instead, McQueary told his bosses—including Penn State's former head coach Joe Paterno, who submitted a report about the alleged assault to his superiors at the university—actions that fulfilled McQueary's and Paterno's legal obligations. University officials failed to act on the report.

Deliberating this bill, some were concerned it did not go far enough, in that Paterno himself should have done more. Some thought the bill was too strong, that potentially a teacher who was shopping in a grocery store on a Saturday afternoon and witnessed a child being abused, would be responsible to report the incident.

We addressed these specific concerns. At best, Paterno's responsibilities were moral and not legal as he did not witness the alleged abuse firsthand. He also reported what he knew to who he believed was the proper authority, including the head of the campus police.

As for the other example about a school teacher witnessing abuse unrelated to his or her authority over minors, we addressed that concern by including language in the model bill specifying that the person who represents or works for the state is required to report abuse only if it occurs within the scope of their work.

What happened at Penn State also serves as a reminder for university presidents that they need a plan in place on how to prevent a similar institutional crisis on their own campuses. Abuse charges on any college campus raise questions about the culture

of college athletics, but they prompt even more about how universities operate.

University presidents across the country are reviewing procedures for handling reports of crimes or unethical behavior and assessing how comfortable faculty, staff and students are in using systems already in place. They are also looking for ways to improve such systems.

Think back to the 2007 shootings at Virginia Tech, where a student gunman killed 32 people and himself. This incident forced universities to revamp emergency notification systems and review how mental-health cases are tracked and treated.

The "Child Protection Reporting Requirement" model is about introducing safeguards, an incentive to remain accountable to protecting our nation's children. The key aspect is that the feedback from a number of different states was incorporated, and the final model now has the approval of the largest individual membership organization of free-market orientated state legislators.

Of course, none of the proposed solutions will bring back Virginia Tech victims, nor will they erase Penn State's scars. But everyone can agree that awareness is crucial to preventing such tragedies from happening again. 🌐



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¹<http://www.ncsl.org/issues-research/human-services/2012-child-abuse-mandatory-reporting-bills.aspx>



ALEC Policy Better Protects Property Rights and Law Enforcement

BY LEE MCGRATH

Civil forfeiture is one of the most serious assaults on property rights in America today. With civil forfeiture—unlike criminal forfeiture—law enforcement in most states can take your property without even so much as charging you with a crime, let alone convicting you of one. Further, nearly all states force you to enter the upside-down legal world where you must prove your property is innocent instead of requiring the government to prove you are guilty of a crime to recover what is rightfully yours.

Worse, civil forfeiture laws give law enforcement a direct profit incentive to abuse this power. In most states, forfeiture laws allow police and sometimes even prosecutors to supplement their office budgets with the proceeds from seizures. This threatens to shift law enforcement's priorities away from the neutral administration of justice and toward the pursuit of property for profit. The honorable men and women of law enforcement should not be burdened with such perverse incentives.

To allow law enforcement officials to punish crime while still respecting property rights, state legislatures must enact new and

comprehensive forfeiture reform. Effective reform requires those who are accused of a crime be convicted before they lose final title to their property and ensures that the proceeds from forfeiture proceedings are deposited in a neutral account controlled by the state legislature rather than given directly in part or in their entirety to fund the budgets of law enforcement agencies that can wield the force of forfeiture.

To that end, ALEC adopted new model forfeiture policy in January. ALEC's *Asset Forfeiture Process and Private Property Protection Act* does the following three important things:

1. It ends civil forfeiture and replaces it with criminal forfeiture;
2. It requires all forfeiture proceeds to be deposited in the state treasury and does not allow them to supplement the budgets of local law enforcement; and
3. It shifts the burden to the state to prove that someone whose property has been seized and claims to be an innocent owner did not have actual knowledge of the crime committed by someone else with their property.

It is important to note the distinction between criminal and civil forfeiture. Criminal forfeiture is when property is taken away after an owner has been found guilty (or has pleaded guilty) in a court of law. But civil forfeiture is a legal fiction that allows law enforcement to charge property with a crime. And under civil forfeiture, owners need not be convicted of any crime to lose homes, cars, businesses, cash or other property.

“The quintessential principle of the American legal system is that you are innocent until proven guilty. ALEC’s model policy is built on that ideal.”

The quintessential principle of the American legal system is that you are innocent until proven guilty. ALEC’s model policy is built on that ideal. By replacing civil forfeiture with criminal forfeiture, it ends the crazed practice of prosecutors filing lawsuits against property, such as the *State of Texas v. One 2004 Chevrolet Silverado*¹ or the even crazier practice in some states of property owners filing civil suits against their own property to try to get it back, such as *Jacobson v. \$55,900 in U.S. Currency*.²

Instead, ALEC’s model policy allows law enforcement to hold seized property for investigatory reasons but requires the state to convict a person before it takes final title to the seized property. If there is no conviction, the person and his property go free.

The ALEC *Asset Forfeiture Process and Private Property Protection Act* also goes directly to the core issue of asset forfeiture abuse—policing for profit. Proceeds to states from forfeiture now exceed \$500 million per year. In only eight states are the proceeds from forfeitures under state law deposited in the state’s general treasury. In the other 42 states, local law enforcement gets at least half of the proceeds including 26 states where 100 percent of the proceeds supplement the budgets of the law enforcement agencies that seized the property.


The potential for abuse is rooted in this potential to make money. Forfeiture laws should not distort the allocation of police

resources or the timing of police actions, yet that is exactly what civil forfeiture inspires. Too often, law enforcement agencies focus their resources not on preventing crime, but rather on cashing in on the cash and valuables surrounding criminal activity. ALEC’s model redirects the proceeds of forfeiture away from law enforcement and returns control over these resources to the legislature—where the constitutional responsibility for raising revenues and making appropriations rightly reside.

Finally, an innocent owner whose property is suspected to be used by others in a crime deserves the presumption of innocence. Just as in a criminal case, the burden should be on the government to prove that the owner had actual knowledge of the crime. If prosecutors cannot meet that burden, the state should return the property quickly to the innocent owner.

Today, the forfeiture process is so convoluted that an innocent owner must calculate the value of his property against the cost of the lawyer and the months for a hearing to get seized property back. ALEC’s model policy protects property owners who are wrongly dragged into the forfeiture process through no fault of their own by establishing the presumption of innocence.

In *Policing for Profit: The Abuse of Civil Asset Forfeiture*,³ three criminal justice researchers and my colleague graded each state on how well it protects property owners—only three states receive a B or better. During the 2012 session, the state legislatures in California, Minnesota, Georgia and New Hampshire are considering legislation to reform their forfeiture laws. More should do so, and we will be happy to help legislators nationwide in that important effort.

ALEC has done a great service. It has put its imprimatur on model forfeiture policy that state legislators across the country can use to end civil forfeiture laws that fall desperately short of protecting property rights and replace civil forfeiture laws with criminal forfeiture laws that avoid giving the wrong incentives to hard-working members of law enforcement whose integrity should never be jeopardized. 



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¹State of Texas v. One Chevrolet Silverado, No. 2009-52869 269th Judicial District, Harris County, Tex. Aug. 19, 2009.

²Jacobson v. \$55,900 in U.S. Currency, 728 N.W.2d 510, (Minn.2007)

³Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic and Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (2010) available at <http://www.ij.org/about/3114>

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Don't Drop Out of the Electoral College

BY TRENT ENGLAND

The founders' intent for the Electoral College was to select the president through a state-by-state process that represents each state's own interests. Legislatures have experimented with that process over time. In every presidential campaign and election, however, the Electoral College has functioned as intended: it has represented states as states in the election of our federal chief executive. While the process has not been exactly as the founders anticipated, it has almost certainly worked even better.

Proposed state legislation around the country seeks to overturn the founders' design. The National Popular Vote (NPV) interstate compact is nothing less than a hijacking of the Electoral College. It would create the effect of a direct national election, turning the entire nation into one giant single-member district in presidential campaigns. This idea was debated and rejected by the American Founders. It has been put forward over and over again as a constitutional amendment, but has always failed. And so NPV seeks to achieve the same ends by other means.

Unsurprisingly, NPV emerged in the aftermath of the 2000 election. One of California's Al Gore electors, John Koza, was also a brilliant computer scientist and major donor to left-wing causes. He had thought about the Electoral College once before, as a graduate student, when he had tried to turn it into a board game. It flopped, but he found success with another invention—the scratch-off lottery ticket. Koza successfully lobbied states to create scratch-ticket lotteries; he invested his royalties in politicians like John Edwards, Al Franken, Bernie Sanders, and Al Gore.

After 2000, Koza began looking for a way to change the Electoral College. Gore had lost because his slim popular vote majority was concentrated in major metropolitan areas. The Electoral College system had rewarded George W. Bush for attracting votes across a much broader and more balanced geography. (Republicans touted the county-level electoral map, which showed Bush's broad support as a sea of red with blue coasts and blue dots for cities and Indian reservations.) Koza decided the Electoral College should go, but recognized that a constitutional amendment requires something close to a national consensus. He looked for an easier way, and found it—arguably, at least—in the power of states to appoint electors.

The framework of the Electoral College was created at the Constitutional Convention. It flowed out of the compromise that

created Congress. Both the House and Senate are based on states—no House district line can cross a state line and every state gets exactly two senators (the latter is the only constitutional provision which cannot be amended). The Electoral College uses the mathematics of Congress—each state has the same number of presidential electors as it has members of the House and Senate. And article two, section one, of the Constitution empowers state legislators to decide how the state will appoint those electors:

“Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

A careful reading of the Constitutional text makes clear that the state itself appoints electors—legislators only determine the process. The Electoral College allows legislators to devise a system to represent their state's own political will in the presidential selection process. Legislatures have directly appointed electors and have allowed for their election individually. Legislatures have instituted elections for electors by district—the process currently used by Nebraska and Maine. And today, the other 48 states (and the District of Columbia) elect a slate of electors for whichever presidential candidate wins the most votes in that state.

NPV advocates claim legislators can also ignore their own voters entirely, neither appointing electors directly nor allowing state voters to choose. The NPV interstate compact requires states that have adopted it to appoint electors based on the nationwide vote. Koza recognized that this would create the effect of abolishing the Electoral College and establishing direct election of the president, but without changing the Constitution. Even the *New York Times*, which has editorialized in support of Koza's plan, described NPV as an “end run” around the Constitution.

Eight states have enacted NPV legislation. The compact only takes effect, however, if enacted by enough states to represent at least a majority of electoral votes (270). States that have adopted NPV are California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, Washington, and Washington, D.C., for a combined 132 electoral votes. It has been voted down or failed to reach the floor in nearly every other state, as legislators come to realize just how radical and possibly unconstitutional is NPV.

Every method of appointing electors, from the founding until today, has respected the states as states. NPV represents a radical move away from that understanding—so radical that it may violate the very constitutional provision it claims to use. The job of a legislator in carrying out article two, section one, is to determine “the manner” by which their “state shall appoint” electors. To give away that appointment to something outside the state is a violation of that trust. Put another way, NPV not only upends the Founders’ intent, but is likely wrong when it claims that the Constitution allows legislators to simply give away a state’s electors.

NPV also claims that the power over the manner for appointing electors trumps the Constitution’s compacts clause. That provision, in Article one, Section ten, requires congressional consent for any agreements among the states. Because NPV makes no allowance for such approval, it could easily be struck down on that ground alone. This guarantees a legal challenge to NPV that would at least put the agreement into doubt until resolved.

The most serious problem with NPV, however, is not its violation of the founders’ intentions or the Constitution. Even if the interstate compact was eventually upheld by the federal courts, NPV would destabilize national politics without providing any of its supposed benefits.

NPV’s slogan is “Every vote equal.” Its advocate’s claim that the fact that presidential campaigns focus their resources in “swing states” is a problem and that NPV is the solution. Both claims are dubious. All campaigns have scarce resources—limited money, time, volunteers, and attention—that they focus on particular groups of voters. Even in a single-member district, campaigns make choices about whom to talk to, what to say to particular groups of voters, and whom to ignore. The Electoral College is not the cause of this political reality.

What the Electoral College does with this reality is good for democracy. By imposing state boundaries on presidential campaigns, the Electoral College pushes national politics downward—closer to the people—and inward toward the most politically balanced states. It creates an incentive for campaigns to work hard to win a few more votes in a state where their candidate is slightly behind. It makes it pointless for campaigns to drive up the totals in states where they enjoy the strongest support. These twin incentives created by the Electoral College are part of why American national politics tends to remain closely divided and relatively moderate.

National Popular Vote would only eliminate swing states because it would eliminate states altogether for the purposes of presidential campaigns. In doing so, it would simply give more

power to pollsters and consultants to segment up the American populace according to characteristics far less benign than state citizenship—wealth, race, religion, and so on.

The other problem NPV claims to solve are those infrequent elections—like 2000—where the Electoral College produces a winner who did not receive the most votes nationwide. This has happened three times in American history (some claim 1824 as a fourth example, but not every state held a popular election that year). Yet a close examination of these elections proves the genius and importance of the state-by-state Electoral College process.

In the presidential election of 1876, Samuel Tilden won nearly 51 percent of the popular vote. Yet the results were disputed in four states: Oregon, Florida, South Carolina, and Louisiana. Election fraud—in particular the violent suppression of black voters—skewed the numbers in favor of Tilden. Because the Electoral College contains the presidential election within each state, Congress was able to sort out the individual election disputes and, in the end, determined that Rutherford Hayes was the rightful victor. Without the Electoral College, vote fraud would have controlled the outcome in 1876. On the other hand, without vote fraud, Hayes might have won a national popular vote majority.

Eight years later, Grover Cleveland finally put the Democrat Party back in the White House for the first time since the Civil War. By adding New York, Connecticut, and Indiana to the Democrats’ strong support across the South, Cleveland won the Electoral College along with a slim popular vote plurality. Running for reelection four years later, this coalition faltered. Cleveland again won a plurality of the national vote, but lost New York and Indiana and thus the Electoral College and the presidency. Cleveland and the Democrats enjoyed strong popularity in one region, but the Electoral College requires something more. Cleveland understood the lesson and won back the White House in 1892 by not just regaining New York and Indiana but winning in Wisconsin and California as well.

The 2000 election was similar to Cleveland’s initial reelection contest. Gore won a narrow popular vote majority from a particular region—call it urban America. The Electoral College required more. And it isolated the election dispute into a single state where it could be dealt with and scrutinized. NPV would manipulate the Electoral College to do the very opposite of what the founders’ intended and in a way that would lead to litigation, uncertainty, and political instability. 🗳️



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