

Rewarding Results: Measuring and Incentivizing Performance in Corrections

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Rewarding Results: Measuring and Incentivizing Performance in Corrections

by Marc A. Levin, Esq.
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Executive Summary

In corrections, there is a strong public interest in producing the greatest reduction in crime—particularly the most serious crimes—for every dollar spent. Conversely, the criminal justice system should cost-effectively maximize positive outcomes such as victim restitution, victim satisfaction, and the employment of offenders as productive citizens.

It is often said that, if you don't measure something, you won't affect it. Similarly, if one incentivizes certain results, it may increase the odds of achieving those outcomes. Indeed, the two principles are linked—measuring performance is a prerequisite for developing a system of incentives, since there must be an ongoing, reliable means of determining whether the desired outcomes are being achieved.

Just like retirees monitoring their investment portfolio, taxpayers deserve to know whether the system they are funding is achieving the intended results to the greatest degree possible with each dollar spent. Unfortunately, corrections systems have historically lacked clear, outcome-oriented performance measures.

Instead, they have tended to insufficiently measure performance or employ measures based on volume, such as how many offenders are convicted or incarcerated. This conflicts with the overriding public policy objective, which is not more criminals and a larger criminal justice system, but

lower crime and lower costs. Longer sentences and more prisons may yield a smaller gain in public safety for each dollar spent when compared with a greater emphasis on strategies that prevent crime, reduce recidivism, and use the least restrictive and least costly sanction for an offender that is necessary to protect public safety.

As budgets tighten, it is particularly important to strengthen performance measures and reward results, ensuring taxpayers are kept safe and receive the greatest return on their investment. Means of accomplishing this in Texas include the following recommendations:

- Revise performance measures for adult and juvenile corrections agencies to deemphasize the current measures that focus on volume, such as the number of offenders incarcerated or in a program, and add measures that assess cost-benefit based on outcomes such as recidivism (re-offending), restitution, and the employment rate of ex-offenders.
- Change the adult probation funding formula so that it is based not solely on the number of individuals supervised, but also on outcomes such as recidivism, revocations to prison, and restitution collections, adjusted for the risk level of the caseload.
- Reduce current incentives for local communities to send nonviolent adult offenders into state lockups by implementing a version of the Commitment Reduction Program that was

enacted in 2009 for Texas' juvenile justice system.

- Develop a new approach to outsourcing and private correctional facilities that focuses not simply on funding the provider or program with the lowest cost, but on indicators of quality and benchmarks for outcomes such as recidivism.

Through these and other reforms that reward results, Texas can build on its recent progress in lowering crime and controlling costs.

Introduction

In corrections policy, more isn't always better. George Kelling, Harvard professor and 1990s architect of New York City public safety policies that achieved historic reductions in both crime and incarceration, explained why.¹

Kelling declared in a landmark 1991 essay that over the last 30 years the criminal justice system has exhibited "an endless temptation to spend money" because of a lack of "fiscal balance between the parts" that an ideal "system" would incorporate.²

Instead, he noted: "more police mean more criminals arrested, more arrestees mean more prosecutors and judges to convict, more convicts mean more prisons and more parole and probation offices."

Conversely, there is little or no incentive to prevent the crime that feeds the system, whether through more effective policing, better probation supervision, substance abuse and mental health treatment, or even policies that reduce barriers to offenders obtaining employment and housing. All these factors may lead to less of the criminal behavior that results in more offenders cycling in and out of an ever-growing corrections system. We first examined the long-standing challenge of creating the right incentives in

this government sector that grows when it fails in a 2005 publication.³ Fortunately, since that time, reforms have been made in Texas, as well as in other U.S. states and Great Britain, which have partially addressed this issue.

Nonetheless, some policy approaches still incentivize incarceration even for nonviolent offenders, which is the most costly alternative. In San Bernardino County, Calif., one of two performance measures for the district attorney's office is the percentage of felony cases resulting in a prison sentence.⁴ Of course, if a murderer or rapist is being incarcerated, the public safety benefit may be well worth the cost, but what about a non-violent, first time drug possession felony offender or a felony shoplifting offender whose victim is more interested in restitution than incarceration?

The broader problem is that funding of corrections programs is typically based on volume. More prisoners or more probationers results in more funding for the government entity involved. Funding by volume means that the results taxpayers seek—such as the greatest decrease in the most damaging crimes for every dollar spent, restitution for crime victims, and the integration of more ex-offenders into the productive, tax-paying segment of society—are not being incentivized. Through tying funding to performance in both government-operated corrections programs and in contracting with private providers, policymakers can better align corrections funding with desired outcomes.

Measuring Performance

Best Practices

A prerequisite for basing a portion of funding on results is the development of a reasonably accurate method of measuring performance. While performance measures do not themselves reduce recidivism or control correctional costs, they can indirectly do so by assisting policy-

makers in identifying effective programs and creating an incentive for corrections agencies to improve outcomes. Clear and instructive performance measures also foster greater transparency in government, allowing the public to better ascertain whether programs are working.

Both the American Correctional Association and the Pew Center on the States Public Safety Performance Project recommend probation and parole system performance measures for recidivism, substance use, restitution collected, offender employment, and compliance with “no contact” orders (as when a probationer or parolee is prohibited from going near a victim, children in general, or other designated individuals).⁵

Another key benchmark for probation and parole programs is revocations to prison. It is particularly important to focus within this category on the number of revocations for rules violations. These are revocations where the offender has not been charged with a new offense. They may involve missing an appointment or failing a drug test. Such “technical revocations” where a new crime is not alleged typically account for half of the probationers revoked to prison each year.

A recent report by the Pew Center Public Safety Performance Project noted:

Other states—including Washington, Nebraska, Ohio, Alaska, Wyoming and Iowa—are producing their own corrections-specific measurement systems. One of the most sophisticated is Oregon Accountability Model, a System currently being developed by Oregon. The strategic plan has a multi-step process for evaluating and improving every aspect of the department through performance measures, including some mandated by the legislature and others developed by the department. The department’s

measures are among the most sophisticated of any state at tracking the factors that are most likely to lead an offender to recidivate. For example, rather than just tracking the recidivism rate, the agency tracks the percentage of offenders employed 180 days after release. Rather than just tracking the percentage of inmates completing programs, it tracks the percentage who enter and complete the programs recommended for them in an intake assessment.⁶

Challenges

Measuring performance is simply a matter of identifying the key data points to be quantified and collecting the data, but for that data to be useful it must be assimilated and put into context. Such analysis involves evaluating the cost-effectiveness of different programs which may vary even within the program depending on the type of offender, the disparate performance of more than 120 adult probation departments,* and the impact of sentencing decisions that vary widely across jurisdictions. Here, many complexities arise, partly because no offender is exactly like others in terms of factors such as prior record, risk factors, and facts surrounding the offense.

For example, the composition of a probation or parole caseload may vary from one officer and jurisdiction to the next. Similarly, one prison may house more difficult offenders than another. If one county sentences to probation offenders who would have gone to prison in a second county, the first county may have a more challenging probation caseload. So, in comparing the degree to which different jurisdictions utilize the state prison system and the public safety benefits they obtain for every dollar spent, it may be necessary to examine longitudinal data over extended timeframes such as three, five, and ten years that reflects sentencing decisions and the outcomes and costs of both probation and incarceration.

* Texas probation departments are statutorily referred to as Community Supervision Corrections Departments (CSCDs). While populous counties have their own department, smaller rural counties often share a department.

In comparing the rates at which probationers or prisoners re-offend, it is important to note that risk level and the seriousness of the offense frequently do not correspond. For example, a first-time offender who commits a violent act in the heat of passion may be low-risk as determined by a standardized assessment instrument because he has no prior offenses, is employed, is not mentally ill or chemically dependent, has normal family and social connections, and exhibits other positive indicators that correlate with a low chance of recidivism.

Conversely, a low-level drug offender may be high risk because of factors such as homelessness, mental illness, and the lack of family or social supports, although importantly the primary risk for many such offenders may be another drug possession case rather than a violent or sex offense, which is the type of risk that should be more heavily considered in making evidence-based decisions since it is these crimes that have the greatest negative impact on the public. A three-factor Violence Risk Screening Instrument has been developed by researchers and validated on probationers in Multnomah County, Oregon (Portland) that would enable practitioners to better determine which nonviolent offenders may pose a substantial risk of committing a more serious offense in the future in the absence of the proper intervention.⁷ In Texas, all probation departments as well as the parole division administer a risk assessment instrument so it is possible to adjust for the risk level of their caseload in evaluating performance, though it is not specific to the risk of violent crime.

Similarly, Texas prisons are challenging to compare with one another because they vary widely by security level, type of offenders, and available programming. Moreover, inmates are frequently transferred among units for reasons such as evening out capacity across the system, responding to disciplinary violations requiring a higher level of custody, and providing access to a specialized education, treatment, or vocational program.

However, inmates assigned to a privately operated unit are rarely moved. This occurs only in the few instances when repeated and/or severe disciplinary violations require a higher level of custody or solitary confinement which the Texas Department of Criminal Justice (TDCJ) terms administrative segregation. Under TDCJ policy, all maximum security units are state-run and private units do not house high security or administratively segregated (solitary confinement) offenders.

Perhaps the outcome of greatest interest to policymakers and the public is recidivism, though there is no single standard across states and correctional programs. The many ways to measure recidivism include self-reporting, re-arrest rate, re-conviction rate, and re-incarceration rate. A range of methodological concerns arise, such as distinguishing between re-incarceration for a new offense versus violating a term of supervision and between severe and relatively minor new offenses.

For example, if a probationer or parolee commits a new violent offense, it is of greater significance than if he commits misdemeanor shoplifting or possesses marijuana. Yet, typically, recidivism is measured without regard to the severity of the new offense or rules violation. Jurisdictions also use varying timeframes for measuring recidivism, though a three-year rate is most commonly used.

To the extent a share of funding is tied to outcomes, the policy can be made more workable by using measures in addition to recidivism that can be calculated in a shorter period. Some of these measures may in fact be, to some degree, proxies for recidivism.

For instance, inmates who obtain a vocational certificate while in prison are significantly less likely to recidivate.⁸ If part of the funding for a prison, whether public or private, was linked to this and other outcomes measurable upon

or shortly after release, these aspects of the performance-based funding system could be measured and analyzed much sooner than recidivism for a given cohort of released inmates. Typical recidivism measurements would occur one to three years after a given cohort of inmates is released. Also, the prison could have total control over how programming is delivered within the unit, whereas other entities, such as the parole system, would have a significant influence over recidivism following an inmate's release.

Future Directions

While measuring, evaluating, and rewarding performance is challenging, the difficulty of the task does not diminish its importance or desirability. In addition to the aforementioned examples of best practices in this country, England is charting a particularly innovative course in this regard.

A British proposal for incentive funding seeks to better align longitudinal responsibility for an offender with accountability for their conduct and reformation. The idea is to create a system in which each warden or contractor has a portfolio of inmates—as if they were investments. The goal is to achieve a positive return by reducing recidivism through the efficient allocation of resources and implementation of effective practices both during the incarceration and parole phases of the offender's progression through the system.⁹

In effect, the plan would fund prisons partly based on their results. A basic tier of funding would keep the lights on at prisons and parole offices; a second tier would be based on performance, primarily measured by recidivism within several years of release. Existing contracts with private prisons would be restructured on this basis, and public prisons would be decentralized under appointed “governors” with the responsibility and accompanying accountabil-

While measuring, evaluating, and rewarding performance is challenging, the difficulty of the task does not diminish its importance or desirability.

ity for their “portfolios” of inmates as they advance from prison to parole.

The United Kingdom (U.K.) already utilizes a competitive commissioning system with outcome-based goals. Regional corrections commissioners are evaluated using benchmarks such as recidivism reduction. If public corrections programs under their supervision fail to meet well-defined performance targets, commissioners are required to outsource services through contracts that provide clear incentives for improved performance.¹⁰

In April 2008, the governing boards of six probation areas were redesignated as Probation Trusts. The change affords them greater autonomy but also subjects them to greater competition and loss of “business” if their performance on offender outcomes falls short.¹¹ Two additional trusts were added in April 2009.¹²

Most recently, in March 2010, the U.K. announced a highly innovative approach to incentivizing positive correctional outcomes. Through social impact bonds, private investors are being invited to pay for a project to rehabilitate British offenders and receive a return on their money if reoffending rates decline.

The *Guardian* newspaper reported, “Investors will pay £5 million towards intensive education and support for short-term prisoners leaving Peterborough prison in Cambridgeshire. A total of 3,000 will be helped over six years by the St. Giles Trust, a non-profit organization which specializes in working with ex-offenders.”¹³

In this pilot program, investors reap a profit if reoffending rates fall by 7.5 percent or more, with profits increasing based on the amount of government savings from reduced recidivism, up to a maximum return of 13 percent. The pilot program focuses primarily on non-violent, low-level prisoners released after serving short jail sentences, as 75 percent typically commit another crime within two years of release.

An evaluation of the St. Giles Trust reentry program found that a 40 percent reduction in re-offending results in savings of £10 for every pound invested. The great promise of this pilot program is that private capital will now fuel an engine for lower crime and reduced costs to taxpayers.

Linking Funding to the Performance of Government Corrections Programs

Traditionally, Texas and other states have funded adult prison, probation, and parole based on the number of offenders in each system. With this model, a prison or probation department successful in reducing re-offending receives the same level of funding as its less successful counterpart.

In 2005, Texas took a first step in shifting this paradigm through grants to adult probation departments that were linked to performance. Local probation departments could obtain the new share of funding from the state for caseload reduction and enhanced supervision and treatment only if they agreed to a goal of 10 percent fewer revocations to prison and adopted a progressive sanctions model.

Progressive sanctions involve responding to rule violations—missing an appointment or failing a drug test, etc.—with a swift, sure, and commensurate sanction, such as requiring increased reporting or a few nights in the county

jail. Progressive sanctions, along with positive incentives for exemplary conduct by probationers, have been proven to reduce re-offending and provide an alternative to a costly revocation to prison that still holds probationers accountable for rules violations.¹⁴ The increasing number of probationers revoked to prison for rules violations other than a new offense was one of the key trends that led to the January 2007 projection that Texas would need another 17,332 prison beds by 2012.

With a few exceptions, probation departments participating in the new funding stream have succeeded in reducing the number of probationers revoked to prison for rules violations or new offenses. It is not a strict performance incentive program, because there is no specific provision for reducing the funding if the goals of 10 percent fewer revocations and uniform use of progressive sanctions are not achieved.

Adult probation revocations since fiscal year 2006 have declined 4.14 percent in probation departments receiving diversionary grant funds while increasing 9.79 percent in non-participating departments.¹⁵ Nearly all of the largest probation departments in the state were among those that began receiving the diversion funding in fiscal year 2006. In the first two years alone, participating departments have reduced their technical revocations by 16 percent, while non-participating departments have increased technical revocations by 8 percent.¹⁶ Had all departments increased revocations by 8 percent, another 2,640 probationers would have been returned to prison at a cost of \$119 million, not including the cost of constructing additional prisons. This cost would have far exceeded the cost of creating this new probation funding stream. Departments receiving the funding used most of it to reduce caseloads of probationers per supervising officer from 150 to about 110.

The Texas Department of Criminal Justice Community Justice Assistance Division (TDCJ-CJAD), which distributes probation funding and conducts oversight of departments, is following up with action plans for a handful of diversion-funded departments that have not delivered.

For example, while technical revocations in funded departments have declined overall by about 2,000, they increased in Bexar and Collin counties where in both cases the probation department director has been replaced since the new funding began. When these counties are excluded, revocations declined from 18,130 to 14,477 from the 2004-05 to 2008-09 biennia among the departments that began receiving diversion funding in 2006.¹⁷

Evidence points to no increase in crimes due to keeping on probation more technical violators who might have previously gone to prison, which may be due partly to the fact that departments receiving the funding used much of it to reduce caseload size to enhance supervision and were required to adopt and implement guidelines for progressive sanctions. Indeed, the trend in revocations for new offenses among these departments over this time is slightly superior to those departments that did not receive diversion funding.¹⁸

Further, probation placements have increased substantially among departments participating in the supplemental funding stream.¹⁹ This suggests that the additional resources available for supervision and treatment may be increasing prosecutors' and judges' confidence in probation, encouraging them to utilize it more often in lieu of prison. This effect, like the decline in revocations, results in less incarceration and overall savings for taxpayers.²⁰ Since the additional diversion funding for participating probation departments began in fiscal year 2006, the crime rate in Texas has continued to decline.²¹

While some might have assumed that more people entering probation instead of prison would result in more crime, Texas' experience is consistent with results from Maryland's correctional options program, showing that low-risk, non-violent offenders sentenced to probation with graduated sanctions and services were 22 percent less likely to recidivate than comparable offenders sentenced to prison.²² Clearly, a critical factor is the quality of the probation supervision and programming, and given that probation costs Texas taxpayers about 35 times less than prison, even the most intensive probation programs with highly capable staff can be implemented for many more offenders at the same cost as one prison bed.

Overhauling Outsourcing: Seeking Innovation to Enhance Correctional Outcomes in Addition to Cost Control

Privately Operated Corrections in Texas

Although the merits of private prisons are much-debated, this discussion can obscure the fact that for-profit and non-profit entities in Texas and many other states operate numerous residential and non-residential community corrections programs for adults and juveniles. In fact, of the 20,362 privately operated beds under contract with TDCJ, only 4,118 are in actual prisons. The remainder are in other types of correctional facilities, such as state jails, pre-parole transfer facilities, and intermediate sanctions facilities. While the jails and pre-parole transfer facilities operated by for-profit companies are very similar to prisons, other types of facilities such as community corrections centers, halfway houses, and residential drug treatment centers that in many cases are operated by non-profit companies that contract with the state and local probation departments are substantially different than prisons. Also, prisons operated by TDCJ routinely outsource various functions,

including the operation of in-prison drug treatment, to vendors such as the non-profit Gateway Foundation.

Interestingly, state jails and pre-parole transfer facilities were intended to be significantly different from prisons, as the initial contracts in the early 1990s for these facilities focused more on treatment and preparation for reentry. However, they have evolved into being very similar as programming was scaled back as a rapidly growing inmate population pressured the overall corrections budget, creating an impetus to drive down per inmate costs up until the 2007 session, even when it meant eliminating educational, treatment, and vocational programs that may be correlated with lower recidivism. In fact, for capacity reasons, about half of all inmates at state jails are third degree or higher felons.

Support and Criticism of For-Profit Correctional Facilities

Some evidence suggests that private prisons cost less to operate than government-run prisons, producing savings of 5 to 20 percent.²³ Of 28 studies reviewed by the Reason Foundation, 22 found that savings averaged about 15 percent; the other six studies found the costs to be about the same.²⁴

Savings may be attributable to 1) the pressures of competitive bidding that incentivize efficiencies, 2) innovations in the design of units that improve sight lines and other elements, therefore reducing the number of staff needed for security, and 3) the fact that the state is not liable for the retirement costs of private prison staff.²⁵

On average, in 2008 it cost Texas taxpayers \$47.50 a day to keep an offender in a state prison.²⁶ The state paid county jails \$41.48 a day for each bed it rented prior to August 2009 when these leases were terminated. In 2008, privately operated prisons cost the state \$36.10 per day.²⁷ Interestingly, the gap between the cost of incar-

ceration in Texas and California is far greater than the gap between public and private prisons in Texas, as California spends more than \$128 per day per inmate.²⁸

Also, privatization may create a positive incentive for greater efficiency in state-run prisons. A study by Vanderbilt University professors found that states utilizing private prisons had considerably more success in controlling public corrections spending than did states with no private prisons. From 1999 to 2004, the average cost of housing prisoners in a public facility grew by about 5 percent in states without a private prison. States with some prisoners in privately run lockups saw their average costs increase by less than 2 percent.²⁹ During this same period, the number of states with private prisons went from 13 to 34.³⁰

In Virginia, private prisons broke new ground by not adhering to the public prisons' policy of storing 30 days of food—an anachronism, said three scholars, dating from “the days of mule trains, when there was a need to keep a large supply of food in storage in case of bad weather.”³¹ When the state-run prisons saw that the private operators were saving money by storing less food, they, too, changed the policy. The scholars—James Blumenstein, Mark Cohen, and Suman Seth—argue that such “cross-fertilization” is one of the main benefits of privatization.

Nonetheless, critics of private prisons question cost savings, charge that private facilities are not sufficiently accountable for the quality of services, cite alleged violations of inmates' rights, and argue there is a lack of transparency, since private firms are often not covered by public information statutes.³² Interestingly, since private prisons do not enjoy sovereign immunity, they are more vulnerable to being sued for damages by inmates for abuses, creating more accountability at least through the avenue of litigation.

The quality of private and public prisons is indeed difficult to measure. Even where objective measurements such as recidivism are used, it may be difficult or impossible to adjust for other factors such as the varying risk levels of inmates in different facilities. In reviewing existing research, the Reason Foundation found that many studies determined private prisons outperformed their counterparts on measures such as assaults and unit disruptions, while some other studies found the opposite.³³ Still another group of studies found no significant differences.³⁴ Just as with government-run prisons, private prisons can be expected to vary widely across operators and units based on factors such as program availability, program design, contractual provisions, limitations of the physical plant, staff quality, and internal accountability mechanisms to prevent and respond to crises and allegations of abuse.

One of the most thorough studies, by sociologist Charles Logan, surveyed staff and inmates at a New Mexico private prison and a public prison in West Virginia, both of which house women.³⁵ The survey compared the units along eight dimensions (security, safety, order, care, activity, justice, conditions, and management) using some 333 variables.³⁶ Logan found the private prison outperformed its public counterpart in all dimensions except care.

However, another study by corrections researcher Judith Greene comparing quality indicators in Minnesota public prisons versus private prisons in the state through a survey of inmates found the state-run prisons fared better in a majority of qualitative measures such as the qualifications and performance of staff and the implementation of treatment programs, though the private units were rated superior in some areas as well.^{37*} The report recommended re-

stricting private prisons to low security inmates and that the current emphasis on controlling costs be complemented with greater attention to quality and accountability in contracts with private operators. The potential benefits of focusing on factors other than simply cost per inmate are significant since a private contractor, whether a non-profit or for-profit, can be terminated whereas a government monopoly operator cannot. However, if the lowest cost per inmate is the only consideration in contracting and there is no accountability for results, competition can only be expected to produce the same product bereft of innovations that continually drive quality in the non-correctional marketplace where firms compete on value, consisting of both cost and quality.

Another criticism of private prisons is that they may create a private interest group with a financial incentive to lobby lawmakers for policies that increase incarceration, such as by enacting penalty enhancements. While this may be a theoretical concern, research shows that public prison guard unions have lobbied and waged ballot campaigns for harsher sentences and higher rates of incarceration.³⁸ While the most notorious exemplar of this strategy is the California Correctional Peace Officers Association (CCPOA), that union's counterpart in Michigan unsuccessfully fought to derail recent reforms focusing on alternatives to incarceration.³⁹

CCPOA sees privatization as undermining its power by resulting in jobs for typically non-unionized private prison guards. In fact, the California union is the fifth largest source of campaign contributions in the state. It gave more than \$3 million to elect Gov. Gray Davis, who (before voters recalled him) presided over ballooning incarceration rates.⁴⁰ With pressure from the union, prison guard salaries rose from

* Notably, Minnesota's prisons offer a wider array of programming than most other states in both their public and privately-operated units, and the extent to which program delivery retains fidelity to the design may impact the results.

\$14,400 in 1980 to \$54,000 in 2002, along with additional costs for benefits and pensions.⁴¹ Taking overtime into account, many guards make more than \$100,000 per year.⁴²

As California resources have been drained towards more prisons and higher salaries for guards, little money has been left over for diversion, probation, and parole. This contributed to the nation's most notorious "revolving door" of re-incarceration, deepened the state's budget morass, and led to a federal court order requiring the state to alleviate prison overcrowding. A federal court recently warned that California was returning to an era when union leaders were allowed to "overrule the most critical decisions" of prison administrators.⁴³

Two measures currently pending in Congress (H.R. 413 and S. 1611) would require state and local governments to provide collective bargaining for all public safety employees, a category that includes prison guards and jailers.⁴⁴ Texas state law currently prohibits collective bargaining for public employees. If enacted, these proposals, which together have approximately 200 congressional sponsors, could greatly increase Texas prison operating costs by driving up salaries. This could cause prisons, which already account for 88 percent of the state's corrections budget, to crowd out funding for probation and parole supervision and programming, making it more difficult to sustain and build on the recent investments in the front end of the system that have been credited with helping the state decrease both its crime and incarceration rates.

Outsourcing and Trends in Incarceration Rates and Costs

During periods when states had budget surpluses, critics of private prisons may have had another concern. What if lowering prison costs might pave the way for ever-increasing rates of incarceration by making it relatively more affordable? While virtually all observers agree

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that a minimum incarceration rate that is high enough to encompass the most dangerous offenders is correlated with public safety, research suggests that once the incarceration rate exceeds a certain level, it may actually increase crime as more and more low-risk, nonviolent offenders are swept into prisons for brief terms, particularly prisons that do little more than warehouse, when they may be less likely to recidivate if they had been subjected to a community-based sanction and supervision.⁴⁵ Thus, up until the last few years when both state budgets and incarceration rates grew substantially, the question posed was whether slightly lowering the cost of prison operations would simply lead to more incarceration, rather than savings being returned to taxpayers or used for other purposes. Although it may seem counter-intuitive to object to any means of reducing per inmate costs, this criticism is based on the view that lowering incarceration costs merely facilitates an incarceration rate above what produces a net positive return in lower crime for the same level of total corrections spending.

Whatever the merits of this concern, Texas and many other states are no longer in the age of the 1990s and early part of this century that brought ever-increasing state budgets and incarceration rates. Instead, we are in a time of shrinking budgets and, in 2009, the first decline in total state prison populations in 38 years.⁴⁶ In the current budget environment, with Texas and nearly every other state facing large shortfalls, identifying operational efficiencies that do not reduce prison programming could actually contribute savings to the corrections budget, thus avoid-

ing the need to reduce diversion, probation, parole, and in-prison educational, treatment, and vocational programs. Accordingly, the role of private providers—whether for-profit or non-profit—must be examined as policymakers seek to identify strategies to control overall corrections spending without either reducing diversion, probation, and treatment programs or arbitrarily and haphazardly releasing inmates who still pose a danger to the public.

Even as Texas' prison population declines, the state continues to incarcerate many low-security inmates in more costly, high-security state-run lockups. Clearly, Texas does not need more prisons or other remotely located lockups of any type. Instead, policymakers should evaluate whether, for example, some state jail inmates—e.g., drug possession offenders convicted for less than a gram and low-level property offenders such as hot check writers—would be less likely to re-offend if sentenced to a less costly community corrections facility or day treatment program. Secondly, it is an opportune time to examine whether private providers could help the state transition its correctional capacity to rely more on lighter, less costly community-based facilities that are in closer proximity to qualified treatment staff, can provide work release programs during the day for suitable offenders, are more accessible for visitation, and can better facilitate successful reentry as offenders are discharged to the communities from where they came.

State jail felons serve on average less than a year and are flat discharged without any supervision, being ineligible for parole or good time. Thus the current approach provides little benefit in terms of incapacitation of these nonviolent offenders while, unlike a community-based model, fraying any positive ties these offenders might have in their communities, such as family support, employment, and connections to faith-based institutions. Not surprisingly, state jail felons have the highest recidivism rate of any type of state inmates.⁴⁷

One factor influencing policy decisions may be that there may be less resistance to reducing the inmate population and therefore the jobs at a private facility. While decisions on which units to downsize should ideally be made based on objective factors rather than parochial considerations, to the degree that dynamic contributes to greater practical flexibility in managing capacity, it is advantageous. This is particularly relevant in the current climate of shrinking tax revenues, lower crime rates, declining prison populations, and increasing interest in alternatives approaches to incarceration that may deliver more public safety at a lower cost.

TDCJ has used short-term contracts for a small number of beds leased at county jails, some of which are privately operated. However, recent drops in Texas' incarceration rate and inmate population enabled TDCJ, in August 2009, to terminate the contracts for 1,899 beds at county jails, some of which were privately operated. While typical state contracts with private prison operators run at least five years and require the same programming as in comparable state-run facilities, these were very short-term contracts, and programming was largely absent. It made sense to close these beds first as the prison population began declining.

When the Legislature downsized Texas Youth Commission lockups in 2007, some legislators sought to block the closure of their “hometown” facilities, even though employees in good standing were reassigned to other units and staffing was reduced through attrition. Another point in favor of those private facilities that are privately financed: taxpayers are not stuck with the sunken capital costs if a facility is no longer needed.

By the same token, decisions to close prisons that are not temporary contract beds should not be based on whether the facility is public or privately operated, but rather on a combination of objective factors—operating costs, pro-

jected capital expenditures, value of the land if sold, track record in staffing the facility (a problematic matter in some remote areas), offender outcomes, verified complaints concerning staff, and other quantifiable performance indicators.

Options for Updating Texas' Traditional Approach to Outsourcing

Often overlooked in the debate over whether to outsource and utilize private corrections facilities is how to best structure the contracts to the extent such facilities continue to play a role in the corrections system. In Texas, whether the contract is for a private prison or a treatment program within a state-run prison, the primary focus has been identifying the lowest bidder to perform the function in the exact same manner as the state would have done. This approach, of course, can yield operational cost savings, but it gives short shrift to the potential benefits of fostering innovation in the private sector—whether for-profit or non-profit—through more effective programmatic approaches that achieve goals such as recidivism reduction.

To put it simply, if a private provider could achieve a 15 percent reduction in recidivism through innovative programming that would cost 5 percent more, the benefits to taxpayers from avoiding re-incarceration costs and, more importantly, the benefits in terms of fewer victims of crime, could more than offset the initial outlay.

The contracts that TDCJ enters into with private prison operators are hundreds of pages long and require that every aspect of incarceration match that in state-run institutions. For example, TDCJ mandates that private prisons use the same key systems as state prisons. Similarly, private prison operators are required to tailor their educational services to those offered by the state's Windham School District. This means not simply making sure private operators offer the same curriculum, but also man-

dating such details as the school calendar and the days off schedule for teachers. Thus, there is little room for innovation and no reason to believe that the quality or results in Texas private prisons would be superior to those in their state-run counterparts. TDCJ's contracts with private providers, whether for private prisons or a treatment program, typically base compensation solely on a per diem, without regard to the correctional outcomes achieved.

Recommendations

Strengthen Performance Measures

During the legislative interim, each state agency works with the Legislative Budget Board and the Governor's Office of Budget, Planning, and Policy to determine what changes, if any, should be made to the performance measures that are incorporated into the agency's budget. Through this process, juvenile and adult corrections performance measures should be strengthened to emphasize results rather than process and so-called "output" measures, such as the total number of referrals and residential placements.

A 2008 Texas Public Policy Foundation publication makes recommendations for such changes, suggesting that volume measures be replaced with results-oriented measures such as three year re-referral rate for juvenile probation, technical revocation rate, and victim satisfaction and restitution.⁴⁸ Additionally, the publication recommends that the Texas Juvenile Probation Commission (TJPC) begin tracking the performance of each juvenile probation department to supplement aggregate data for all departments. Similarly, TJPC should aggressively use the performance data submitted by departments to evaluate the effectiveness of the local initiatives funded through the Commitment Reduction Program (CRP) and then work with those departments whose programs are not fully achieving their goals to redesign

the programs based on more effective programs in other jurisdictions and national research.

Performance measures for adult corrections also tend to focus too much on volume and not enough on outcomes. These should be similarly revised to focus on reducing recidivism and lowering both the rate at which offenders under community supervision commit new offenses and the rate at which they are revoked to prison for rules violations.

Making victims whole is one criminal justice goal for which there is not an outcome-oriented performance measure for TDCJ. However, unpublished data provided by the agency to the Foundation shows that in 2008, Texas probationers who owed victim restitution paid an average of \$109, for a total of \$46.8 million.⁴⁹ This is more than 34 times the restitution paid by each prison inmate.⁵⁰ In 2008, Texas prison inmates paid a mere \$501,000 in total victim restitution, fines, fees, and court costs, an average of only \$3.21 per inmate.⁵¹ Texas probationers also performed 9.7 million community service hours in 2008—\$63.3 million worth, based on an hourly rate of \$6.55.⁵² However, statewide data is not maintained on the percent of probationers who are current on their restitution and community service obligations. That figure, along with the average amount of restitution collected by offenders who owe it, would be a useful measure for evaluating the performance of various probation departments and TDCJ's parole division.

Utilize Results of Strengthened Performance Measures to Guide Policy and Funding Decisions

In addition to stronger, more outcome-oriented performance measures for agencies, data indicating the results of individual programs would benefit policymakers as well as judges, corrections administrators, and parole board members. Of course, policymakers need to know which programs are most cost-effective

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as they make decisions regarding the allocation of funding. Moreover, Texas judges make decisions every day regarding the sentence of a defendant or revocation of a probationer; corrections administrators decide whether to place an inmate in a particular educational, treatment, or vocational program; and parole board members decide whether an inmate should be approved for release, and if so, whether completion of one of many treatment programs should be required as a condition of parole.

Ideally, each of these decision makers would have access to a dashboard that indicated the effectiveness of the various options for each offender based on the outcomes of offenders of a similar profile. Moreover, given that most cases are resolved through plea bargains, and that prosecutors' duty is to obtain justice, which does not always mean the longest sentence, why not provide prosecutors with information to foster evidence-based plea bargaining? A May 2009 Pew Center on the States Public Safety Performance Project report "Arming the Courts with Research: 10 Evidence-Based Sentencing Initiatives to Control Crime and Reduce Costs," provides a blueprint for how to incorporate objective findings into sentencing practices.⁵³

The Legislative Budget Board does not have the same resources that the state's Criminal Justice Policy Council, which was abolished in 2003, had to conduct evaluations of specific correctional programs. It does, however, publish an annual report on recidivism and revocations

and is expected to release a report later this year that will provide recidivism information concerning certain treatment programs that were expanded as part of the 2007 package of alternatives to building new prisons.⁵⁴ While much presently unavailable data is needed to fully implement evidence-based decision making at sentencing, as well as in prison management and community supervision, that approach is clearly superior to relying on tradition or intuition to determine which offenders require incarceration and which program would be most effective for each type of offender.

Even before sufficient outcome data on programs is available, a dashboard for Texas courts simply showing the available slots and beds in various treatment programs would be invaluable.

Prior to the 2007 expansion of these programs, many had waiting lists, very often with no place but behind bars to wait. The Legislative Budget Board had told lawmakers it would cost more than \$2 billion to build 17,332 prison beds by 2012. Instead, key components of the \$241 million alternative corrections funding plan that was enacted expanded the capacity of sanctions and treatment programs that are either in lieu of prison or must be completed within prison in order to be released on parole.

Today, there is excess capacity in programs such as the Substance Abuse Felony Punishment Facilities (SAFPFs), which are six-month therapeutic communities intended to divert non-violent offenders with severe substance abuse problems from prison. If the approximately 1,000 empty SAFPF beds were more fully utilized this year for diversion, the state could potentially close at least one prison by early 2011. Yet, some judges and prosecutors may not be aware that these beds are available, since prior to 2007 offenders would wait for many months in county jail for SAFPF bed to open up. Accordingly, many jurisdictions short-circuit-

ed the lengthy process and the jail costs they would bear by simply sending those offenders to prison for several years. Indeed, it was difficult to determine the true demand for SAFPF beds since some jurisdictions stopped adding offenders to the waiting list.

The studies on overall SAFPF outcomes were performed by the Criminal Justice Policy Council more than a decade ago. They found that, when coupled with the transitional treatment center reentry phase, SAFPFs did reduce recidivism.⁵⁵ A more recent study from Dallas demonstrates that large recidivism reductions have been achieved through the reentry drug court where supervision and treatment are coordinated for offenders returning to Dallas County from the SAFPF program.⁵⁶

It is difficult to determine the degree to which the empty SAFPF beds result from a lack of awareness or the inclination of some jurisdictions to send eligible offenders to prison instead. TDCJ has sought to notify local authorities about the empty SAFPF beds and additional efforts in this regard are warranted. In 2011, lawmakers should consider an incentive measure that would provide jurisdictions a share of the savings to the state from downsizing prisons if they increase the share of low-level, non-violent drug offenders diverted to probation, treatment, and SAFPF in lieu of prison.

Create Probation Funding Formula Linking a Share of Funding to Outcomes

Arizona's Performance-Based Probation Funding Model

In 2008, Arizona enacted legislation that authorized performance-based probation funding.⁵⁷ This approach gives probation departments a share of the state's savings when they reduce revocations to prison and new convictions, and increase restitution collections. County probation departments receiving these funds are re-

quired to use these monies to: 1) increase the availability of substance abuse treatment programs for probationers, 2) increase the availability of risk reduction programs and interventions for probationers, and 3) make grants to nonprofit victim services organizations to partner with the probation department and the court to assist victims and increase the amount of restitution collected from probationers.

The Pew Center on the States Public Safety Performance Project recommends that a performance-based probation funding system should appropriate 30 percent of savings for new conviction and revocation rates to probation departments and an additional 5 percent each if the probation department demonstrates improvement in employment, drug test results, and victim restitution collection.⁵⁸

In 2009, the first year of its incentive funding plan, Arizona saw a 12.8 percent decrease in revocations of probationers to prison, including decreases in all but three of the state's 15 counties.⁵⁹ There was also a 1.9 percent reduction in the number of probationers convicted of a new felony.⁶⁰ In Mohave County, the probation department in 2009 reduced total revocations by 101. The percentage of probation caseload revocations for new felonies dropped from 4.6 to 1.1.⁶¹ This saved the state \$1.7 million in incarceration costs. Mohave County officials are expecting the state to fulfill its end of the bargain by appropriating 40 percent of the savings to the county in the next budget.

How did Mohave County achieve these results? In short, by implementing evidence-based practices—those techniques that research has shown to reduce the risk of criminal behavior. Assistant Probation Chief Alan Palomino noted: “First we looked at our revocation pro-

cess and at who we were revoking. There were a lot of technical violators who missed appointments or were just not doing exactly what was required of them on their probation. We looked at ways to motivate them toward cooperation and buying into their own probation process.”

The enhancements in Mohave County's approach to probation included:

- Training probation officers to utilize motivational interviewing—a method of therapy that identifies and mobilizes the client's intrinsic values and goals to stimulate behavior change. Motivation to change is elicited from the client, and not imposed from without. It is assumed that ambivalence or lack of resolve is the principal obstacle to be overcome in triggering change.* Motivational interviewing has been designated by the National Institute of Corrections as one of eight evidence-based practices that contribute to reduced recidivism.⁶²
- Separating the minimum-risk offenders from the medium- and high-risk populations and varying supervision and caseload levels for each group, with one officer handling minimum-risk offenders in each city within the county.
- Better identifying the needs of each offender, such as substance abuse programs, educational programs, and anger management.
- Implementing Moral Recognition Therapy, a cognitive educational program that helps probationers understand that their own choices have put them into their situations and makes them accountable for their actions.

* In an example of motivational interviewing, an officer may ask a probationer questions designed to elicit self-motivational statements such as, “What are you afraid might happen if things continue as they are?” and “What might be some advantages of changing your behavior?”

- Producing immediate consequences for violations and positive accolades for accomplishments.

Extending Texas' New Juvenile Probation Funding Model to the Adult System

In some ways, the Arizona measure is similar to the budgetary provision that the Texas Legislature adopted in 2009 that created the Commitment Reduction Program (CRP) within the juvenile justice system. In 2009, the Legislature cut funding for the Texas Youth Commission from \$314 million in 2008 to \$210 million in 2010 and \$205 million in 2011, primarily due to a decline in population.⁶³ Effectively, part of the savings—\$45.7 million—was allocated for the CRP, through which county juvenile boards that choose to participate may obtain additional funds for community-based programs in exchange for agreeing to target fewer commitments to TYC. Rider 21 to the General Appropriations Act requires that TJPC pay TYC \$51,100 for each youth committed to TYC in excess of 1,783 youths per year.⁶⁴

However, it appears this provision will not be invoked. TYC commitments have fallen approximately 40 percent this year, with juvenile probation departments on pace to meet and, in many cases, come in far under their targets.⁶⁵ This is particularly notable given that commitments were already at historically low levels, having declined by half from 2006 to 2009 as the abuse scandal led to Senate Bill 103 in 2007 that downsized TYC.⁶⁶

Through the CRP, departments submit to TJPC funding plans linked to the number of youths they pledge to divert from TYC. For example, if a department's three-year average of commitments to TYC is 25, they can obtain their full

share of new funding by pledging to divert five youths from TYC, a figure based on the state-wide goal of 1,783 or fewer commitments. The department can also obtain partial funding by pledging to divert fewer than five youths.*

Plans for new or expanded programs must include supporting evidence or documentation that the new program or service has had positive outcomes in other jurisdictions. Similarly, plans for enhanced supervision or specialized caseloads must include evidence of success. Evidence of positive outcomes must also be provided for proposed residential services as well as a description of how the family of a supervised youth will be incorporated into the rehabilitative efforts.

Departments will be evaluated according to the following performance measures:⁶⁷

- Number of juveniles served;
- Percentage of juveniles completing the program(s);
- Percentage of juveniles with improved outcomes (e.g., reduction in substance use or increase in school attendance);
- Number of juveniles committed to TYC;
- Number of juveniles certified to stand trial as adults;
- Re-offending (recidivism) as measured by one-, two-, and three- year re-referral/re-arrest and incarceration rates for all juveniles participating in the program; and
- Cost per youth diverted.

* The Commitment Reduction Program does not place a legal cap on the number of youths committed to TYC. Judges may still commit youths for any felony offense or violations of probation. The county Juvenile Board, which includes the judges in the county who hear juvenile cases, decides whether to participate in the Program.

The guidelines specify that maximum diversion funding shall not exceed the rate of \$140 per juvenile diverted per day or \$51,100 annually. The majority of the funds will support non-residential programs that cost much less than this maximum amount, though this figure still compares favorably to the \$99,000 annual cost of TYC commitment in 2009.⁶⁸ Under the guidelines, any department that exceeds the target for TYC commitments for 2010 to which they agreed will have their share of this new funding reduced or eliminated in 2011.

Factoring in the Risk Level of Departments' Caseloads

In 2007, the Texas Legislature passed House Bill 3200, which incorporated some aspects of performance-based probation funding.⁶⁹ It was vetoed by the Governor because it did not define a technical revocation. The bill instructed the TDCJ Community Justice Assistance Division, which distributes funding to probation departments, to replace the current funding formula, which is simply based on the number of probationers under supervision with a formula that includes:

- Higher per capita rates for felony probationers who are serving the early years of their probation terms than for those serving the end of their terms;
- Penalties in per capita funding for each felony probationer whose probation was revoked due to a technical violation of probation; and

- Awards in per capita funding for each felony defendant discharged due to an early termination of probation.

Among the goals of the bill were to provide a fiscal incentive to probation departments to use approaches such as increased reporting, imposition of a curfew, referral to treatment, and electronic monitoring to respond to rules violations by probationers as an alternative to prison revocations.

Though these intermediate sanctions cost probation departments money, they are far less costly than revocation to prison. A revocation shifts the full cost of that offender to the state. Also, the legislation was based on testimony, including that of some probation directors, to the effect that individuals were being kept on probation for many years after they had met all their obligations and posed no threat to public safety.⁷⁰ After all, said witnesses, the probationer who routinely pays his fees—that cover half of the departments' budgets—and needs little or no supervision, is the most attractive client. This testimony at the Sunset Commission hearings on TDCJ in 2006 combined with the Sunset staff's research led the Commission to draw this conclusion in its staff report.^{71*} Given that the research shows most violations and revocations occur within the first few years of a probation term, the frontloading of resources was intended to create an incentive to focus supervision on these offenders.

The concern regarding definition of a technical revocation can easily be addressed by provid-

* The report notes: "Because CSCDs receive both state funding and fees based on the number of offenders under supervision, neither CSCDs nor the judges have incentive to terminate supervision early, which would deprive those departments of both sources of funding. In addition, low-risk offenders who have served several years of successful probation and may be eligible for early termination, are typically less likely to recidivate, require less supervision, and are more likely to comply with conditions and pay fees. Keeping these offenders on probation permits a CSCD to continue to collect fees and state funds, but requires the CSCD to expend fewer resources to supervise the offenders."

ing that, if the probationer is not alleged to have committed a new offense within six months of the filing of a motion to revoke, the revocation is a technical one. Policymakers should also consider directing CJAD to incorporate into a new funding formula the factors in the Arizona legislation and the Pew model statute, as well as the risk level of a department's caseload.

An advantage of the CRP model over the Arizona model is its upfront funding to probation departments, permitting them to implement the supervision and treatment strategies at the beginning of the year or biennium. This would allow them to divert more appropriate offenders from prison, instead of forcing them to spend local funds while awaiting their share of the savings. This may be one reason why TYC commitments in participating Texas juvenile probation departments have declined at a much faster rate than adult probation revocations to prison in Arizona. The clawback provision in the CRP as well as the annual TJPC review to determine whether funding continues and, if so, in what amount still gives the state leverage to make sure the agreed upon targets are met.

Focus State Oversight of Private Correctional Facilities on Results Rather Than Process

The goal of state oversight of private correctional facilities should not be to make every aspect of these facilities identical to those of their state counterparts. Currently, details such as the lock and key system are specified in contracts hundreds of pages long. While these facilities should be at least as humane and offer comparable services as the state's facilities, there should be considerable flexibility so that private operators can experiment with innovative methods of meeting their contracts with the state and accomplishing the goals of securing and reforming inmates. Benchmarks should be focused on performance rather than process.

For example, if a private prison can develop an educational program that enables more inmates to obtain G.E.D.s, the program should be permitted, even if the curriculum, type of instructor, length of courses, and other details differ from those of the Windham School District, which serves state prisons.

Change Private Contracts to Include a Performance Bonus and Select Private Operators and Providers Based on Performance Track Record in Addition to Cost

The British Conservative Party has published a policy paper recommending that private facility operators be paid a basic amount needed to maintain operations plus a bonus tier of funding for recidivism reductions.⁷² The authors note:

Private prisons are already docked money if they fail to meet certain operational standards. Rewarding them for good performance is a sensible extension of that principle. The companies that currently run private prisons have told us they would be willing to compete for business where they were paid according to their ability to cut recidivism.

Such an approach would make sense in Texas only if the contracts with private operators were overhauled to provide more flexibility to customize programming. But Texas' current prison contracts specify every aspect of operations, essentially making these facilities cookie-cutter replicas of state-run prisons. The contracted rate is a flat per diem with no ties to inmate outcome measures. Instead, these contracts should give private operators freedom to innovate, offering bonuses based on outcomes such as reduced recidivism and the percentage of inmates who earn a GED or occupational certificate. Educational and vocational progress correlates strongly with reduced recidivism.⁷³

Finally, when state agencies select private providers—whether to operate a private institution or a particular treatment program—indicators of quality and correctional outcomes in that provider’s track record should be examined along with the size of the bid. Clearly, the public has an interest in avoiding security breaches and violations of inmates’ rights, as well as in the effectiveness of programs at these facilities that will influence the conduct of released inmates. Bonding, insurance, and/or financial stability criteria may be justified to avoid fly-by-night operators. The goal should be the best value, which is not always the lowest price.

Texas can look east to find an example of a state that has systematically used performance measures and accountability in its contracting procedures to drive resources from failing corrections programs into more effective ones. In Florida, former Governor Jeb Bush instituted an accountability system for measuring and rating the performance of private entities that operate residential programs for juveniles based on the quality and outcomes of these programs. Perpetually low-performing operators and programs are terminated by the Florida Department of Juvenile Justice, with resources and youths shifted to better performing counterparts. Through the Redirection program, which enhances juvenile probation funding for evidence-based non-residential options in jurisdictions that reduce residential commitments, Florida has dramatically lowered the total number of youths in residential settings even while recidivism has declined.⁷⁴

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Conclusion

At a time of strain on public resources, there is an urgent need to better align correctional funding and goals through creating positive incentives. Whether in publicly or privately operated programs, policymakers and agency leaders must implement clear, outcome-oriented performance measures, coupled with funding that is tied at least in part to results, rather than the traditional approach of simply basing funding on the volume of offenders served. This new performance-oriented paradigm will lay the groundwork for a corrections system that does not grow larger, but instead becomes more effective in delivering a greater degree of public safety, restitution for victims, and rehabilitation of offenders for every dollar spent. ★

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