

## Look Askance Before You Enhance A Checklist for Legislators

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Each session of the Texas Legislature brings dozens of new sentencing enhancements. In the 2009 legislative session, of 100 bills passed out of the House Criminal Jurisprudence Committee, 40 percent increased penalties.<sup>1</sup> Here are some questions policymakers should ponder before adopting new sentencing enhancements.

### ✓ Have Sentences Already Gotten Tougher?

- While there are inevitably individual cases where an offender in retrospect should have been subject to additional punishment, policymakers must examine the aggregate data for the offense in question before determining that existing sentences are insufficient. Nationally, prisoners released in 2009 served an average of nine additional months in custody, or 36 percent longer, than those released in 1990.<sup>2</sup> In Texas, violent offenders are serving an average of 85 percent of their sentence behind bars, up from 75 percent six years ago.<sup>3</sup>

### ✓ Is There Evidence That Current Penalties Are Ineffective?

- Legislation proposing to enhance a criminal penalty is often based on a single incident. However, is there data indicating that the incident is emblematic of a broader problem?
- Are law enforcement, prosecutors, and judges utilizing existing penalties to the full extent?

### ✓ Will An Enhancement Deter the Conduct?

- Extending prison terms undoubtedly incapacitates those specific offenders for a longer period, which can produce a public safety benefit if that offender would have been a danger to the public during that time. However, it is not clear that enhancements have a broader deterrent effect. A review of empirical research concluded, “the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects.”<sup>4</sup> However, researchers have found that an increased likelihood (certainty) of apprehension and punishment was correlated with declining crime rates. Similarly, scholars Daniel Nagin and Greg Pogarsky concluded that “punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences.”<sup>5</sup>
- If the enhancement results in a certain offender being incarcerated for a year or two longer than otherwise, is there any greater likelihood that the offender will receive effective programming and that the behavior will change? Research shows that the average prison terms of many nonviolent offenders already extend beyond the point where there is any additional reduction in recidivism.<sup>6</sup>

### ✓ Does the Enhancement Reduce the Discretion of Judges, Juries, and Corrections Officials?

- Many proposed enhancements mandate a minimum term of incarceration. These policies take away traditional authority from judges and juries that are useful in crafting a just sentence to fit the facts of the case, including the wishes of the victim, the offender’s prior record, if any, the offender’s risk level, and the extent to which effective correctional interventions are available in the community. To the extent policymakers are dissatisfied with the ways in which judges and juries are exercising this discretion, they can provide guidance by specifying aggravating factors for offenses that judges and juries must consider without mandating a certain result in every case.

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- Other proposed enhancements make certain offenders ineligible for parole supervision. As a result, these offenders, having discharged every day of their sentence behind bars, must be discharged from incarceration without any supervision. For all but the most serious offenses, this is problematic given that research shows recidivism can be reduced by requiring at least six months of post-incarceration supervision during which the offender can be tracked and held accountable.<sup>7</sup>

✓ **Will the Enhancement Make the Penalty for the Offense More or Less Commensurate with Other Penalties?**

- Many enhancements of theft, for example, apply far more serious penalties to theft of a particular type of item than would apply through the standard matrix based on the dollar value of what was stolen. These boutique penalties are often not sought by prosecutors, but by special interest groups. Indeed, the Texas Association of District and County Attorneys estimates only three percent of all proposed enhancements were suggested by prosecutors.<sup>8</sup> Many prosecutors argue they undermine uniformity, produce disparate sentences, and complicate their jobs by cluttering the criminal code.<sup>9</sup>

✓ **Are There Other Solutions?**

- For example, if there is a spike in a certain type of street crime in an area, data-driven policing can better target law enforcement resources to those hotspots, which has proven to prevent crime in New York City and other jurisdictions.<sup>10</sup>
- If recidivism rates are high for certain offenders, rather than simply extending the sentence, consider what can be done to make the existing sentence more impactful. For example, ensure evidence-based practices are being utilized in both community supervision and prison and that there are outcome-oriented performance measures to ensure the rehabilitation programs being funded are those that get results. Building on the research that the swiftness and certainty of punishments is often more important than the severity, probation and parole supervision should employ graduated sanctions to address technical violations. Courts that have succeeded with this approach, such as the Hawaii HOPE Court, should be replicated.<sup>11</sup> ★

<sup>1</sup> Emily Ramshaw, "Texas legislature cranking out a variety of stiffer penalties for obscure crimes," *Dallas Morning News* (1 May 2009).

<sup>2</sup> Pew Center on the States Public Safety Performance Project, "The High Cost, Low Return of Long Prison Terms" (June 2012).

<sup>3</sup> Texas Department of Criminal Justice, "Agency Strategic Plan: Fiscal Years 2013-2017" (6 July 2012); Texas Department of Criminal Justice, "Agency Strategic Plan: Fiscal Years 2007-2011" (28 June 2006).

<sup>4</sup> Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, and P.O. Wikstrom, "Criminal Deterrence and Sentence Severity: An Analysis of Recent Research" (Oxford: Hart Publishing, 1999).

<sup>5</sup> Daniel Nagin and Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology*, 39:4 (2001).

<sup>6</sup> Pew Center on the States Public Safety Performance Project, "The High Cost, Low Return of Long Prison Terms" (June 2012).

<sup>7</sup> Melinda Schlager and Kelly Robbins, "Does Parole Work? Revisited: Reframing the Discussion of the Impact of Postprison Supervision on Offender Outcome," *The Prison Journal* 88:2 (June 2008) 245-247.

<sup>8</sup> Emily Ramshaw, "Texas legislature cranking out a variety of stiffer penalties for obscure crimes," *Dallas Morning News* (1 May 2009).

<sup>9</sup> Remarks by Texas District and County Attorneys Association Legislative Director Shannon Edmonds, Audio of panel "Criminal Law v. Free Enterprise: What's the Verdict?" at 10th Annual Policy Orientation for the Texas Legislature (Jan. 2012).

<sup>10</sup> George Kelling, "How New York Became Safe: The Full Story," Manhattan Institute, *City Journal* (2009).

<sup>11</sup> "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program.

