

## The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime & Costs

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### Key Findings

- The federal government should better utilize probation, accountability courts, and other community-based sanctions that the states have used to control criminal justice costs and improve public safety.
- The federal prison system should expand good time credits.
- The federal government should implement better strategies to improve ex-offender reentry and limit the “collateral consequences” of incarceration.
- Congress should reverse decades of overcriminalization and limit the use of criminal law to regulate behavior that is not traditionally considered criminal in nature.

“There is an urgent need to address the astronomical growth in the prison population, with its huge cost in dollars and lost human potential....The criminal justice system is broken, and conservatives must lead the way in fixing it.” ~Newt Gingrich and Pat Nolan<sup>2</sup>

### Challenges Facing the Federal Criminal Justice System

The federal prison population, which currently exceeds 218,000 prisoners, has increased at an alarming rate for about three decades.<sup>3</sup> Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.<sup>4</sup>

It is generally true that both state and federal prison populations rapidly outpaced population growth throughout the 1980s and 1990s, but in recent years, many state prison populations have declined, while the federal prison population keeps growing.<sup>5</sup> In 2012, the Bureau of Justice Statistics reported that the total population of incarcerated persons in the United States had decreased for four consecutive years from 2008 to 2011, but the decline came entirely at the state level.<sup>6</sup> The federal system continued to gain prisoners.

When the first federal prison, in Fort Leavenworth, Kansas, was partially opened in 1903, it contained a total of 418 federal prisoners.<sup>7</sup> In 1930, President Herbert Hoover signed legislation formally establishing the Federal Bureau of Prisons (BOP) to “provide more ... humane care for federal inmates, to professionalize the prison service, and to ensure consistent and centralized administration.”<sup>8</sup> The BOP, in 1931, managed 13,035 prisoners in 14 facilities. In 1940, the number of prisoners increased to

24,797. From 1940 until 1980, the federal prison population hovered just above or just below 20,000.<sup>9</sup>

The population exploded, however, after the passage of the Comprehensive Crime Control Act of 1984, a major criminal justice overhaul which largely eliminated federal parole, reduced good time credits, and transferred many sentencing decisions from the judiciary to Congress.<sup>10</sup>

Table 1: Federal Prison Population Growth 1940-2012<sup>11</sup>

Year	Federal Prison Population
1930	12,185
1940	19,921
1950	17,632
1960	23,469
1970	20,038
1980	24,252
1990	54,913
2000	145,416
2010	209,771
2012	218,700

The federal prison budget grew as the federal prison population grew. The BOP budget increased by an average of \$197 million per year from Fiscal Year (FY) 1980 to FY 2010, a total increase of approximately 1,700 percent.<sup>12</sup> The current BOP budget is 25 percent of the entire Department of Justice (DOJ) budget, and a 2012 Urban Institute study concluded that “if present trends continue, the share of the DOJ budget consumed by BOP will [approach] 30 percent in 2020.”<sup>13</sup> The FY 2013 budget request for BOP, \$6.9 billion, was 4.2 percent higher than the budget enacted in FY 2012.<sup>14</sup> The in-

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creasing cost of prisons is not only a fiscal concern. It has public safety consequences because the swelling BOP budget crowds out other important DOJ functions, such as crime prevention and investigation.<sup>15</sup>

Furthermore, federal prisons are overcrowded, which may lead to increases in prisoner misconduct.<sup>16</sup> As of September 2012, the prison system operated at 39 percent above capacity.<sup>17</sup> High-security and medium security facilities for male inmates are especially overburdened, operating at 47 percent and 51 percent over capacity in 2012, respectively.<sup>18</sup> Temporary solutions, such as double and triple-bunking and housing prisoners in non-residential areas, are commonplace, but these practices create public safety concerns by undermining the ability of the corrections system to provide effective recidivism-reduction programming.<sup>19</sup>

Expansions of the federal prison system have been proposed to deal with these problems.<sup>20</sup> Such proposals, however, do not solve the fundamental spending problem. They merely ignore perpetual prison population growth.

**Drivers of Growing Federal Prison Population: Overfederalization, Inflexible Sentencing Designs, & Ineffective Community Supervision**

The expansion of federal prosecution into areas traditionally governed by the police function of the states—the “overfederalization” of crime—has played a significant role in the increase of the federal prison population.<sup>21</sup> For example, in 1980, 4,749 drug offenders accounted for 25 percent of the federal prison population, but in 2009, a total of 95,205 drug offenders accounted for 51 percent of the federal prison population.<sup>22</sup> For some in this category, such as drug king-

pins or white collar criminals like Bernie Madoff, justice may require lengthy sentences. These criminals, however, represent only a portion of the prison population. Many in federal prisons are drug offenders who traditionally would have been dealt with in state criminal justice systems.<sup>23</sup> Moreover, these offenders, many of whom are low-level and low-risk, often serve lengthy federal sentences with limited avenues for earning early release.<sup>24</sup> Justice Antonin Scalia, in testimony before the Senate Judiciary Committee, has observed that “it was a great mistake to put routine drug offenses into the federal courts.”<sup>25</sup>

Another driver of the growing federal prison population is the manner in which sentence lengths dramatically increase due to a variety of sentencing enhancements that are stacked upon an underlying charge. Many states have moved to more flexible sentencing approaches in the last several years that recognize judges and juries—not legislatures—are best able to tailor an appropriate sentence to the unique facts of a case. Texas, for example, generally follows an effective and well-regarded model of indeterminate sentencing. The federal prison system, however, eschews the Texas model, and adheres ever-more closely to California’s counterproductive model of determinate sentencing.<sup>26</sup> From 1991 to 2011, the number of mandatory federal penalties almost doubled, and it has been argued that because these penalties are listed in the U.S. Sentencing Guidelines, they have a collateral effect on other penalties which must increase “in order to keep a sense of proportionality.”<sup>27</sup>

Indeed, these inflexible penalties are arguably superfluous in light of the federal sentencing guidelines.<sup>28</sup> Moreover, they may lead to unjust outcomes and effectively substitute prosecutorial discretion for judicial discretion because the prosecutor, by selecting the charge, is also selecting the sentence.<sup>29</sup> Former Chief Justice of the United States William Rehnquist criticized these sentencing schemes by saying that they have “led to an inordinate increase in the ... prison population and will require huge expenditures to build new prison space.”<sup>30</sup> Supreme Court Justice Anthony Kennedy has been equally critical.<sup>31</sup>

Still another driver of the increasing federal prison population is ineffective community supervision. In FY 2010, about one in seven BOP admissions were supervision violators.<sup>32</sup> In 2012, a report on recidivism among offenders on federal community supervision that was prepared for the

Bureau of Justice Statistics and the Office of Probation and Pretrial Services concluded that substance abuse, mental health issues, and difficulty in obtaining employment are all risk factors for recidivism.<sup>33</sup> DOJ resources could be directed towards addressing these risk factors, but as mentioned above, spending on incarceration crowds out spending for these operations.

In short, after years of well-intentioned but imprudent policy decisions, the federal prison system is riddled with costly problems. Punishment is often disproportionate, judicial discretion has been curtailed, expensive incarceration is sometimes used on offenders regardless of whether public safety benefits from it, good behavior and recidivism reduction are not effectively incentivized, and the scope of the federal criminal law has exceeded its appropriate reach. Federal prosecution and incarceration should be reserved for appropriate criminals, notably those guilty of crimes which fall outside of the scope of the states' police powers or high-level offenders which the federal system is particularly well-suited to prosecute and punish.

### **Taking Cues from the States— Especially Texas**

The challenges described above are not historically unique to the federal system. Several states faced comparable overcrowding crises in recent years, but they responded by cutting prison populations and costs without reducing public safety. Between 2000 and 2010, 17 states managed to reduce both their crime rates and their incarceration rates.<sup>34</sup> This suggests that increases in incarceration are not necessarily responsible for decreases in crime.<sup>35</sup>

This is not as counter-intuitive as it might seem at first blush. According to social scientists Bert Useem and Anne Morrisson Piehl, incarceration reduces crime but yields diminishing returns. In fact, Useem and Piehl go yet one step further when describing the results of their research:

[T]hese results go beyond the more typical claim of declining marginal returns. Rather, they document accelerating declining marginal returns, that is, a percent reduction in crime that gets smaller with ever-larger prison populations. The findings imply several conclusions about the usual constant-elasticity, statistical analyses of incarceration's effect on crime: (1) at low levels

of incarceration, these analyses underestimate the negative relationship between incarceration and crime; (2) at higher levels of incarceration, the analyses overstate the negative effect; and (3) analyses from one time period cannot be extrapolated to other points in time with vastly different incarceration experience.<sup>36</sup>

Commenting in part on Piehl and Useem's research, criminologist John DiIulio observed that "[t]he justice system is becoming less capable of distributing sanctions and supervision rationally, especially where drug offenders are concerned."<sup>37</sup> The upshot is that, at a certain point, incarceration is not the optimal method for ensuring public safety. Public safety may also improve, at least in part, through stronger community corrections and improved reentry.

Texas, for example, offers an excellent model that federal reform could reasonably emulate. In 2007, in lieu of constructing approximately 17,000 more prison beds and a spending increase of approximately \$2.63 billion through 2012,<sup>38</sup> the Texas Legislature opted to implement proven supervision and treatment programs for \$241 million, with recidivism reduction as the primary goal.<sup>39</sup> Since 2007, Texas legislators have focused on expanding community-based options like accountability courts and halfway houses,<sup>40</sup> and the years in which these changes were implemented have coincided with declining crime rates in Texas that have reached their lowest level since 1973.<sup>41</sup> In the process, Texas avoided spending nearly \$2 billion dollars which would have otherwise been spent on prison beds. It is notable that the decline in crime is occurring as the state relies less, not more, on incarceration. In 2011, for the first time in modern history, Texas actually closed a prison, the Central Unit in the city of Sugarland.<sup>42</sup> (By contrast, in April of 2013, U.S. Rep. Hal Rogers indicated that Congress may soon allocate funds for a new federal prison in Letcher County, Kentucky.<sup>43</sup>)

Texas policymakers accomplished this by focusing on recidivism reduction and incentivizing good conduct. For appropriate offenders, alternatives to incarceration such as evidence-based intervention and treatment programs, problem-solving (accountability) courts, and community supervision with electronic monitoring have been used. These alternatives have been shown for many offenders to produce a greater reduction in crime with each dollar spent.<sup>44</sup>

## Genuine Reform of the Federal Criminal Justice System Should Be Guided by Six Principles<sup>45</sup>

The national Right On Crime campaign presents six principles to guide state-level criminal justice reform. All six of the principles are equally applicable to federal criminal justice reform:

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

### Four Broad Policy Recommendations

To maximize the public safety return on taxpayer investment, the federal prison system needs to be reformed. Al-

ternatives to incarceration, such as treatment and community-based corrections, are generally less costly and more effective, and they should be better utilized. Costly incarceration should be reserved for those who truly warrant it, due to public safety, deterrence, or retribution considerations. Good behavior and recidivism reduction should be incentivized by tying time served to earned time credits. The federal government should implement better strategies to improve ex-offender reentry and limit the "collateral consequences" of incarceration. Above all, federal crimes should be limited to those outside the scope of state police powers and which federal agencies are uniquely suited to prosecute.

### A Greater Focus on Community Corrections

Fundamentally, the federal prison system needs a greater focus on community corrections. For example, after serving a portion of his sentence in prison, a suitable federal inmate could be stepped down to a community-based option (with appropriately graduated sanctions) such as work release, a day reporting center, or a halfway house. By contracting with state or non-profit operators, substantial cost-savings could be realized, as time spent at community corrections facilities is generally less costly (\$70.79/day) than incarceration in federal prisons (\$77.49/day).<sup>46</sup> The annual cost of community supervision is approximately \$3,433 per offender; by contrast, the average cost of incarcerating a minimum security inmate is \$21,006 annually.<sup>47</sup> This would facilitate reentry in close proximity to the community from which the offender came, where positive supports such as families, churches, and social service organizations can be better leveraged to promote successful reintegration.

Congress might also consider policy changes that allow courts, using appropriate risk assessment instruments, to place more federal inmates on probation, an idea considered in a 2013 Congressional Research Service report.<sup>48</sup> The report noted that a federal judge's ability to sentence an offender to probation is somewhat limited under the federal sentencing guidelines.<sup>49</sup> Nevertheless, the report also concluded that because the U.S. Supreme Court has determined the guidelines to be advisory, judges are not entirely without flexibility.<sup>50</sup>

Of course, genuine reform means not just more community supervision, but better supervision—what some state-level reformers refer to as "supervision with teeth."

At the state level, electronic monitoring has been especially instrumental in improving the supervision of offenders. The tool enables a supervising agency to determine whether an offender is at work, attending treatment, in a prohibited zone, or violating a curfew. One study found offenders being electronically monitored were 89-95 percent less likely to be revoked for a new offense, perhaps because they better appreciate the likelihood of being caught if they abscond.<sup>51</sup> Although electronic monitoring is not a panacea (it will not replace the human relationship necessary in community corrections), federal policymakers should consider whether home confinement with electronic monitoring could be expanded among inmates in low-security and medium-security facilities.

### ***Expansion of Good Time Credits***

In the federal system, good time credits are given to inmates who have “displayed exemplary compliance with institutional disciplinary regulations.” These credits, which are the primary means of sentence reduction, are effectively capped at 47 days per year sentenced.<sup>52</sup> Thus, the vast majority of federal inmates serve more than 87 percent of their sentences, and the average time served is a relatively long 9.5 years.<sup>53</sup>

No offender is entitled to time off his or her prison term, but states like Texas with a strong tradition of law and order have enacted earned time policies that apply to prisoners who are not among the most serious offenders, recognizing the basic truth that incentives affect behavior and, therefore, earned time can enhance compliance and the motivation to complete vocational, educational, and rehabilitative programs. In 2011, Texas took the additional step of expanding the good time credits for some offenders in state jails in addition to those in prison.<sup>54</sup>

The states that have adopted more robust earned time programs than the federal system, such as Texas, Kansas, and Colorado, have appropriately limited the programs to low-level offenders.<sup>55</sup> Federal legislation should do the same. Furthermore, the BOP should consider granting earned time to inmates who complete rehabilitative programs that are not related to substance abuse, such as those programs related to anger management and other mental health problems.<sup>56</sup>

In many states, including Georgia, Ohio, and Pennsylvania, expansions of good time credits and a broad philosophical

## **Kentucky’s Public Safety and Offender Accountability Act of 2011 also focused, in part, on improving the incentives for ex-offenders to find and keep jobs, and it is expected to reduce the state prison population by 3,000 and save \$422 million.**

shift away from determinate sentencing polices have been coupled with improvements to community supervision for drug offenders. A RAND Institute study argues in favor of this approach, having determined that with the important exception of drug dealing by major kingpins, determinate sentences for drug offenders are not cost-effective.<sup>57</sup> Furthermore, there appears to be no correlation between such sentences and recidivism rates.<sup>58</sup>

### ***Facilitating Reentry and Limiting Collateral Consequences***

Many states have begun to target recidivism-reduction as the key to reducing incarceration costs. In 2008, Arizona passed the Safe Communities Act, legislation which—among other things—established stronger incentives for probationers to get jobs. Kentucky’s Public Safety and Offender Accountability Act of 2011 also focused, in part, on improving the incentives for ex-offenders to find and keep jobs, and it is expected to reduce the state prison population by 3,000 and save \$422 million.<sup>59</sup>

Often, the key to helping ex-offenders find and keep jobs is removing the “collateral consequences” of a conviction. As Dr. Mitch Pearlstein has explained:

Collateral sanctions [or consequences] include any legal penalty, disability, or disadvantage imposed automatically upon conviction: for example, ineligibility for various jobs, such as school-bus driver or property manager for an apartment building. Collateral consequences encompass the full range of bad things and debilitating restrictions—official or unofficial, codified or not—that regularly confront people after they’ve served their sentences.<sup>60</sup>

## Abner Schoenwetter, a lobster fisherman, served over six years in a federal prison for fishing-related violations, such as the importation of lobster tails in plastic bags rather than cardboard boxes.

Some state governments have addressed this issue through legislation seeking to remove arrests from criminal records if an arrest did not result in the filing of charges. Another option is to allow a judge to limit the access or visibility of parts of a criminal record after a sufficient amount of time has passed. The most sweeping solution, expungement of a crime, is appropriate only in limited circumstances—primarily exoneration. Nondisclosure, however, would still allow the offense to be visible to judges, prosecutors, and law enforcement and to be reasonably used for sentencing enhancement purposes. Measures like this—which fall short of expungement—are appropriate in a wider array of cases based on such factors as the nature of the underlying offense and the length of time an ex-offender has been law-abiding in the community and in compliance with all terms of supervision.

The American Legislative Exchange Council has even passed model legislation that extends greater tort liability protections for employers who hire ex-offenders. (The ALEC legislation includes some obvious and appropriate safeguards—such as not extending liability protection to employers who hire sex offenders to work in child care.)

Congress has already considered some similar policies. One proposal, for example, would enhance an ex-offender's ability to limit the disclosure of nonviolent offenses on his or her record. The federal government could do more, however. For instance, the Federal Bureau of Investigation (FBI) conducts many criminal background checks for prospective federal employees, and according to a report issued by the Department of Justice in 2006, around half of these records are incomplete or inaccurate because of arrest updates that have not been submitted to the FBI.<sup>61</sup> New legislation from Congress could require the FBI to track down

any incomplete information before releasing a rap sheet on an offender.

### *Reversing Overcriminalization*

Finally, the federal prison system would benefit by paying more attention to a trend that state lawmakers increasingly try to avoid: overcriminalization, the tendency of governments to use the criminal law to regulate behavior that is not traditionally considered criminal.

Lobster fisherman Abner Schoenwetter, for example, served over six years in a federal prison for fishing-related violations, such as the importation of lobster tails in plastic bags rather than cardboard boxes.<sup>62</sup> Federal prosecutors concluded that his actions violated Honduran law, which, under the Lacey Act, they are empowered to interpret and enforce.<sup>63</sup> There was a dispute within the Honduran government over whether Schoenwetter's actions in fact violated the law of Honduras, but this did not prevent federal prosecutors from pressing charges and earning a conviction.<sup>64</sup> For over six years, taxpayer dollars that could have been applied to far more important DOJ investigative and crime prevention functions were instead used to incarcerate Schoenwetter. As Justice Scalia noted in a different case:

It should be no surprise that as the volume [of criminal laws] increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nittygritty. In the field of criminal law, at least, it is time to call a halt.<sup>65</sup>

Overcriminalization is increasingly a part of discussions about state corrections reform. The American Legislative Exchange Council's Public Safety Performance Project (PSP), for example, promotes model legislation for states that is aimed at reducing overcriminalization in state codes. Among other things, the PSP insists that criminal statutes contain strong mens rea protections so that limited carceral resources are not spent on people who did not have the requisite state of mind to render their actions criminal. According to one analysis, "over 57 percent of the offenses

considered by the 109th Congress contained inadequate mens rea requirements.”<sup>66</sup>

Another problem that occurs at the state level, but which is also noticeable at the federal level, is the delegation of authority for criminal law creation and enforcement to federal agencies. As Professor Erik Luna has commented:

The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.<sup>67</sup>

Former Attorney General Dick Thornburgh has called for the creation of a commission to study overcriminalization, and he has recommended that the commission be linked to a larger federal criminal justice reform effort.<sup>68</sup> In May 2013, the U.S. House of Representatives announced the creation of a bipartisan, 10-member task force to investigate the problem.<sup>69</sup> The U.S. Senate should consider taking a similar step.

## Conclusion

It is sometimes said—citing a famous opinion by Justice Louis Brandeis—that the 50 states serve as ‘laboratories of democracy,’ and that states should learn from one another’s successful policy experiments.<sup>70</sup> But the federal system can also learn from their experiments. In a sensible political environment, the national government’s public policy decisions would emulate state policy successes. In current criminal justice policy, states like Texas are leading the way, and the federal government would be wise to follow. ★

## Endnotes

- <sup>1</sup> The authors would like to thank Cody Smith and April Philley for valuable research assistance.
- <sup>2</sup> Newt Gingrich & Pat Nolan, "Prison Reform: A Smart Way for States to Save Money and Lives," *Washington Post* (7 Jan. 2011).
- <sup>3</sup> United States Department of Justice, "Quick Facts about the Bureau of Prisons," (Bureau of Prisons, June 28, 2012). As of July 18, 2013, the Bureau of Prisons was supervising a total of 219,218 individuals in all public facilities, private facilities, and community correctional management field offices. Federal Bureau of Prisons Weekly Population Report (accessed 18 July 2013).
- <sup>4</sup> The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted. *See also* "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.
- <sup>5</sup> Paul Guerino, Paige Harrison, & William J. Sabol, Prisoners in 2010, U.S. Department of Justice, Bureau of Justice Statistics (Dec. 2011) Table 1. From 2008 to 2010, the Federal prison population increased by 4.2%, while state prison populations decreased by 0.4%.
- <sup>6</sup> Lauren E. Glaze & Erika Parks, Correctional Populations in the United States, 2011, U.S. Department of Justice, Bureau of Justice Statistics (Nov. 2012) 1.
- <sup>7</sup> Dean J. Champion, *Sentencing: A Reference Handbook* 22 (2007). Federal incarceration is relatively recent innovation, but even state and local incarceration was once a rare punishment. In colonial America, "[f]logging, public humiliation, and banishment were common penalties, and execution was imposed for a wide range of offenses." Suzanne M. Kirchhoff, *Economic Impacts of Prison Growth*, Congressional Research Service (Apr. 2010) 6.
- <sup>8</sup> United States Department of Justice, "About the Federal Bureau of Prisons," (Federal Bureau of Prisons, Jan. 2011).
- <sup>9</sup> Margaret Werner Cahalan, Historical Corrections Statistics in the United States, 1850-1984, United States Department of Justice, Bureau of Justice Statistics (Dec. 1986); United States Department of Justice, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (Spring 1989).
- <sup>10</sup> *See* 18 U.S.C. §§ 3551-3586 (1985).
- <sup>11</sup> Population figures are taken from sources provided by the Bureau of Justice Statistics. Figures for 1940-1960 are taken from Cahalan at 146. The figure for 1970 is taken from Cahalan at 32. Figures for 1980-2000 are taken from Nathan James, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, Congressional Research Service (Jan. 2013) 53-54. Because some available records reflect prison population figures as calculated at the beginning of the year, some reflect them as calculated at the end of the year, and some are averages, the methodology for the counting the totals is not entirely consistent. The general trend, however, holds firm. Populations hovered around 20,000 from 1940-1980, and then began to increase sharply.
- <sup>12</sup> *The Federal Prison Population Buildup*, 11; William T. Robinson & Janet Levine, "Time is right for criminal justice reform," *The Hill*, (25 Oct. 2011).
- <sup>13</sup> Nancy La Vigne & Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, Urban Institute Justice Policy Center (Nov. 2012) 2.
- <sup>14</sup> *The Federal Prison Population Buildup*, 12. It is worth noting that not only is a larger prison population leading to higher incarceration costs, but the per capita cost of incarceration itself has been rising. *The Federal Prison Population Buildup*, 15-16. "Annual costs per inmate are \$21,006 for minimum security, \$25,378 for low security, \$26,247 for medium security, and \$33,930 for high security." Lavigne & Samuels, *Growth and Increasing Cost*, 2. The average cost per federal prisoner is \$28,284 per year (\$77.49/day). "Annual Determination of Average Cost of Incarceration," Bureau of Prisons, 76 Fed. Reg. 57081 (15 Sept. 2011).
- <sup>15</sup> "Annual Letter to the United States Sentencing Commission," Office of the Assistant Attorney General (23 July 2012) 4.
- <sup>16</sup> *The Federal Prison Population Buildup*, 24. The Congressional Research Service report explains that although different reports have reached different conclusions about whether overcrowding causes prisoner misconduct, the BOP's own study (conducted across 73 all-male facilities between July 1996 and December 2004) determined that "there is a significant positive relationship between overcrowding and misconduct." *Ibid*.
- <sup>17</sup> United States Government Accountability Office, "Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure" (Sept. 2012) 2.
- <sup>18</sup> *The Federal Prison Population Buildup*, 22.
- <sup>19</sup> *See ibid*, 25 (noting temporary housing solutions, including spaces normally reserved for programming); "Annual Letter to the United States Sentencing Commission," Office of the Assistant Attorney General (23 July 2012) 6.
- <sup>20</sup> United States Department of Justice, "FY 2013 Budget and Performance Summary" (2012) 8. The President's FY 2013 budget request of \$8.6 billion for federal prisons and detention is a 4.5 percent increase over the enacted budget of FY 2012, despite a 2.2 percent decrease in the DOJ discretionary budget. This includes plans to open two new prisons, and contract for an additional 1000 beds. *Ibid*.
- <sup>21</sup> Alexander Hamilton, "The Federalist No. 17" (5 Dec. 1787) ("There is one transcendent advantage belonging to the province of the State governments ... I mean the ordinary administration of criminal and civil justice."); *see also* Vikrant P. Reddy, "10th Amendment applies to criminal justice, too," *The National Law Journal* (15 Feb. 2012).
- <sup>22</sup> *The Expanding Federal Prison Population* 2 (internal citations omitted).
- <sup>23</sup> "Report to Congress: Cocaine and Federal Sentencing Policy," United States Sentencing Commission (May 2007) 85. "Among federal powder

cocaine offenders the largest proportion are couriers and mules, consistent with the need for a large number of low-level, unskilled laborers required to transport the drug into the United States. Among federal crack cocaine offenders, the largest proportion of offenders also are classified in a low-level function—that of street-level dealer. . . .”; Testimony of Bret Tolman, Hearing on Rising Prison Costs: Restricting Budgets and Crime Prevention Options Before the Senate Judiciary Committee (1 Aug. 2012) 3-4. “In the drug arena, DOJ is expected to use the hammer of heavy mandatory minimum sentences to dismantle drug trafficking—but the reality is that most prosecutions, while resulting in significant prison sentences, are only netting insignificant ‘mules’ or small-time traffickers rather than those of any importance in a given drug organization.”

<sup>24</sup> See generally “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” United States Sentencing Commission (Oct. 2011).

<sup>25</sup> Testimony of Antonin Scalia, Hearing on Considering the Role of Judges Under the Constitution of the United States Before the Senate Judiciary Committee, 111th Cong. 8 (5 Oct. 2011).

<sup>26</sup> Ashley Stebbins, “A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position,” 62 BAYLOR L. REV. 873, 880 (2010). “California can draw important lessons from Texas sentencing. Texas has preserved an indeterminate system with unique features that have allowed it to remain flexible in its own recent reforms and to address prison overcrowding.”

<sup>27</sup> *Federal Prison Population Buildup*, 8, citing Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, United States Sentencing Commission (Oct. 2011) 63.

<sup>28</sup> See Cassell, Paul G., “Too Severe? A Defense of the Federal Sentencing Guidelines” (and a Critique of the Federal Mandatory Minimums), 56 STAN. L. REV. 1017, 1044-48 (2004).

<sup>29</sup> “[I]n the absence of any judicial check on this legislative trend, the result is a wholesale transfer of power from elected legislative officials to prosecutors who, in many instances, are unelected and not responsible to the public. Where once the law had strict limits on the capacity of the government to criminalize conduct. . . those limits have now evaporated.” Paul Rosenzweig, *The Overcriminalization of Social and Economic Conduct*, Heritage Foundation Legal Memorandum (17 Apr. 2003). Indeed, in a forthcoming law review article, John F. Pfaff argues that “at least since 1994, [state and federal] prison growth has been driven primarily by prosecutors increasing the rate at which they file charges against arrestees.” See John F. Pfaff, “The Micro and Macro Causes of Prison Growth,” 28 GA. ST. U. L. REV. \_\_\_\_, \_\_\_\_ (2013).

<sup>30</sup> William H. Rehnquist, Luncheon Address, in U.S. SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA 286 (1993).

<sup>31</sup> Anthony Kennedy, Speech by Justice Kennedy at the American Bar Association Annual Meeting (9 Aug. 2003) (“I can accept neither the wisdom nor the necessity of federal mandatory minimum sentences.”).

<sup>32</sup> La Vinge & Samuels, *Growth and Increasing Cost*, 5.

<sup>33</sup> William Rhodes, Christina Dyou, Ryan Kling, Dana Hunt, and Jeremy Luallen, *Recidivism of Offenders on Federal Community Supervision*, Abt Associates (Jan. 2013).

<sup>34</sup> Calculated by the Pew Public Safety Performance Project based on data from The Bureau of Justice Statistics (Paul Guerino, Paige Harrison, & William J. Sabol, *Prisoners in 2010*, U.S. Department of Justice, Bureau of Justice Statistics (Dec. 2011)) and The Federal Bureau of Investigation (*Crime in the United States 2010*).

<sup>35</sup> Criminologists generally believe that recent increases in incarceration in the United States were responsible only for 25-33% of the national crime decrease that contemporaneously occurred. William Spelman, “The Limited Importance of Prison Expansion,” in *The Crime Drop in America*, eds. Alfred Blumstein and Joel Wallman (Cambridge University Press, 2000) 97-129 and Steven D. Levitt, “Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not,” J. ECON. PERSPECT. 18, no 1 (Winter 2004): 163-190.

<sup>36</sup> Anne Morrison Piehl & Bert Useem, “Prisons,” in *Crime and Public Policy* (eds. James Q. Wilson and Joan Petersilia) (Oxford University Press 2011), at 542.

<sup>37</sup> John J. Dilulio, Jr., “Two million prisoners are enough,” *The Wall Street Journal* (12 Mar. 1999).

<sup>38</sup> Legislative Budget Board, “Adult and Juvenile Correctional Population Projections Fiscal Years 2007-2012” (Jan. 2007) table 3 (projected population exceeding state operating capacity of 17,332). See also Pew Charitable Trust Public Safety Performance Project, “Public Safety, Public Spending: Forecasting America’s Prison Population 2007-2011” (20 Jun. 2007) 22 (estimated per bed construction cost of \$65,000); Legislative Budget Board, “Criminal Justice Uniform Cost Report Fiscal Years 2006-2008” (29 Jan. 2009).

<sup>39</sup> Council of State Governments Justice Center, “Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative” (Apr. 2009).

<sup>40</sup> Texas Department of Criminal Justice, Report to the Governor and Legislative Budget Board on the Monitoring of Community Supervision Diversion Funds (1 Dec. 2007) 10-11.

<sup>41</sup> “Uniform Crime Reporting Statistics,” Federal Bureau of Investigation, accessed 14 June 2013.

<sup>42</sup> Zen T.C. Zheng, “Lawmakers agree to shut 102-year-old Sugar Land prison,” *Houston Chronicle* (18 May 2011).

<sup>43</sup> Katie Roach, “Plans still underway to bring federal prison to Letcher Co.,” WYMT TV (16 Apr. 2013).

<sup>44</sup> Steve Aos, Polly Phipps, Robert Barnoski and Roxanne Lieb, “The Comparative Costs and Benefits of Programs to Reduce Crime, Version 4.0,” Washington State Institute for Public Policy (May 2001). Marc A. Levin, “Five Technological Solutions for Texas’ Correctional and Law Enforcement Challenges,” Texas Public Policy Foundation (Jun. 2008) 1-4.

<sup>45</sup> Right On Crime Statement of Principles.

- <sup>46</sup> “Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates’ Time in Prison,” United States Government Accountability Office Report to Congressional Requestors (Feb. 2012) 18.
- <sup>47</sup> See *supra* note 14.
- <sup>48</sup> *Federal Prison Population Buildup*, 38-41.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> *Ibid.* (citing *United States v. Booker*, 543 U.S. 220, 245 (2005)).
- <sup>51</sup> Kathy G. Padgett, William D. Bales & Thomas G. Blomberg, “Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring,” *Criminology and Public Policy*, 5.1 (2006) 61-69.
- <sup>52</sup> *Barber v. Thomas*, 130 S.Ct. 2499, 2503 (2010). The relevant sentencing statute provides that “a prisoner who is serving a term of imprisonment of more than one year . . . may receive credit toward the service of the prisoner’s sentence, beyond the time served, of up to 54 days. . . .” See 18 U.S.C. § 3624(b)(1). In *Barber*, however, the Supreme Court explains how the BOP’s calculation procures effectively limit this to only 47 days. See *Barber*, 130 S.Ct. at 2503; see also “Frequently Asked Questions about Federal Good Time Credit,” Families Against Mandatory Minimums (7 June 2010).
- <sup>53</sup> “Federal Bureau of Prisons FY 2013 Budget Request,” before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (6 Mar. 2012) statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. In comparison, the average time served by state prisoners nationwide is 2.9 years. “Time Served: The High Cost, Low Return of Longer Prison Terms,” The Pew Center on the States (Jun. 2012) table 1.
- <sup>54</sup> TEX. CODE CRIM. PRO. ANN. art. 42.12 § 15(h) (Vernon 2012).
- <sup>55</sup> Alison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislatures, (July 2009), 4.
- <sup>56</sup> “Compassionate release,” like good time, is another early release policy that, if properly reformed, may reduce the federal prison population and alleviate the burden of growing costs. A full evaluation of compassionate release policies is beyond the scope of this paper, but interested readers may access a Department of Justice report concluding that the program is badly mismanaged at The Federal Bureau of Prisons’ Compassionate Release Program, U.S. Department of Justice Office of the Inspector General (Apr. 2013). Unlike good time, compassionate release is granted for medical or humanitarian reasons. Among other recommendations, the Department of Justice report suggested that the standards for granting and denying compassionate release should be clarified.
- <sup>57</sup> Rand Corporation, *Are Mandatory Minimum Drug Sentences Cost-Effective?*, 1997.
- <sup>58</sup> Cynthia A. Kempinen, “A Multi-Method Study of Mandatory Minimum Sentences in Pennsylvania” (Pennsylvania Commission on Sentencing Research Bulletin: April 2010) 8.
- <sup>59</sup> See Robinson and Levine.
- <sup>60</sup> Mitch Pearlstein, “Crime, Punishment, and Rehabilitation,” *National Review* (3 Oct. 2011).
- <sup>61</sup> “The Federal Bureau of Investigation (FBI) maintains a criminal history record repository, known as the Interstate Identification Index (III or ‘Triple I’) system, that contains records from all states and territories, as well as from federal and international criminal justice agencies. The state records in the III are submitted to the FBI by central criminal record repositories that aggregate criminal records submitted by most or all of the local criminal justice agencies in their jurisdictions. The records in the III are all based on 10 rolled fingerprints, which provide a positive, biometric match between the individual and his or her record. Although it is quite comprehensive in its coverage of nationwide arrest records for serious offenses, the III is still missing final disposition information for approximately 50 percent of its records.” U.S. Dept. of Justice Office of the Attorney General, *The Attorney General’s Report on Criminal History Background Checks* (June 2006) 3.
- <sup>62</sup> Testimony of Abbie Schoenwetter, Hearing on Reining In Overcriminalization: Assessing the Problem, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 23 (4 Sept. 2010).
- <sup>63</sup> See 16 U.S.C. §§ 3371-78.
- <sup>64</sup> *U.S. v. McNab*, 324 F.3d 1266, 1266-67 (2003) (“Our task is complicated by conflicting representations from Honduran officials regarding the validity of the Honduran laws.”).
- <sup>65</sup> *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).
- <sup>66</sup> Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, May 2010) 3-4.
- <sup>67</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 AM U. L. REV. 703, 708 (2005) (citations omitted).
- <sup>68</sup> Testimony of Dick Thornburgh, Hearing on Overcriminalization and the Need for Legislative Reform Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 8 (22 July 2009) (“A Commission should be constituted, perhaps in connection with Senator Webb’s National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated mens rea requirements, and consider overcriminalization issues.”).
- <sup>69</sup> Resolution Establishing the House Committee on the Judiciary Over-criminalization Task Force, 113th Cong., (2013).
- <sup>70</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).



## About the Authors

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