



Getting Criminal Justice Right

***Presented
October 23, 2015***



***Conopus Club
San Antonio, Texas***

Marc A. Levin, Esq.

Policy Director, Right on Crime ♦ Center for Effective Justice



Texas Public Policy Foundation (TPPF)
(512) 472-2700, mlevin@texaspolicy.com
www.texaspolicy.com ♦ www.rightoncrime.com

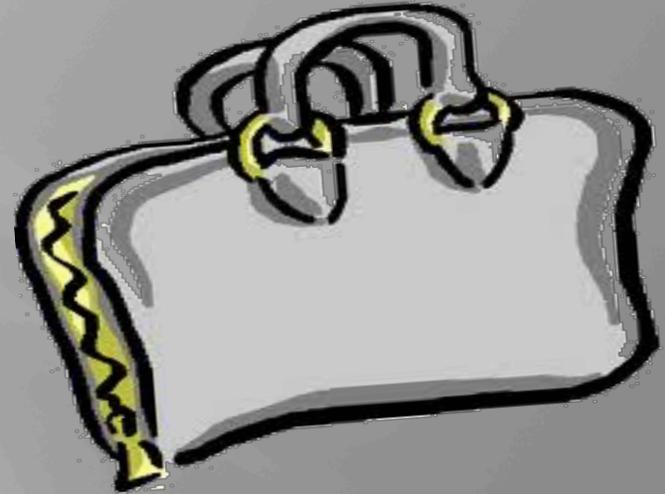
Introduction to the Texas Public Policy Foundation

- **TPPF Mission:** Individual Responsibility, Free Enterprise, Limited Government, Private Property Rights
- We apply these foundational principles to criminal justice, bringing together stakeholders and working with policymakers and allies across the spectrum.



The TPPF Portfolio

- Fiscal and tax restraint
- Civil justice reform
- Center for Tenth Amendment Studies
- Deregulation of (over)regulated industries like insurance and utilities.
- Center for Effective Justice launched in March 2005, Right on Crime in Dec. 2010



Right on Crime Enters the Field

- Former AG Ed Meese, Speaker Newt Gingrich, Gov. Jeb Bush, Former Drug Czar Bill Bennett, Grover Norquist, and Other Conservative Leaders Endorse Right on Crime Statement of Principles
- Statement Supports Reining in Growth of Non-Traditional Criminal Laws, Cost-Effective Alternatives for Nonviolent Offenders, Emphasis on Restitution and Treatment, and Performance Measures.





Favorably covered
in numerous outlets
such as:



Getting Criminal Justice Right

- **Gov. Reagan in 1971:**

“Our rehabilitation policies and improved parole system are attracting nationwide attention. Fewer parolees are being returned to prison than at any time in our history, and our prison population is lower than at any time since 1963.”



Regulatory Offenses on the Rise

- These offenses typically involve ordinary business and recreational activities and no individual victim.
- States where criminal laws have been counted reveal about 2,000 each in Texas and Arizona.
- Texas has 11 felonies relating to harvesting oysters.
- Nearly 20 states have default mens rea provision, including Ohio enacted in 2014.



The Withering Intent Requirement

- Many of these laws dispense with the traditional requirement of a culpable mental state. For example, of the 83 environmental criminal offenses in Florida, 52 are strict criminal liability offenses.
- Under federal law, corporate defendants been held strictly criminally liable for deaths of migratory birds.



Penalties Can Be Extreme

- In Alabama, “disposing of scrap tires in a way not approved by the Environmental Management Act” is a felony punishable by up to 10 years in prison, even if no harm.
- Under the Texas Water Code, “transporting or causing or allowing to be transported for storage, processing, or disposal, any hazardous waste to any location that does not have all required permits” is punishable by up to 10 years behind bars, even if the waste is not actually stored at the location that lacks permits and there is no harm.



The Dangers of Delegation

- Federal and state laws often confer virtually unlimited authority on agencies to effectively create new criminal offenses through their rulemaking.
- Louisiana RS 30:2421A creates an offense with a one year prison term for “disposing of white goods (appliances) except in a collection or recycling facility in accordance with the rules and regulations of the department.”



Solutions to Rein in Overcriminalization at the State Level



Enact ALEC Model Legislation on Default Mens Rea & Rule of Lenity

- Model default mens rea provision requires that the defendant have a conscious object to engage in conduct of the nature constituting each element of the offense and with either specific intent to violate the law or with knowledge that the person's conduct is unlawful.
- Rule of lenity provision states that if there are two or more objectively reasonable interpretations of a criminal statute and, under one of them the defendant's conduct is not criminal, the benefit of the doubt goes to the defendant.

Reduce and Revise Criminal Laws

- Stop creating new criminal offenses as a method of regulating non-fraudulent business activities. Regulation is better handled through non-criminal administrative mechanisms and market forces, not the heavy stigma of criminal sanctions.
- Most new crimes not requested by prosecutors, but often rent seeking to stick a free government lawyer on a competitor.



Narrow What's Criminal and Jailable

- Convert many regulatory misdemeanors into civil violations or, at the least, remove jail time as an option for such offenses, provided that the non-jail penalty is satisfied.
- Economic conduct should be criminal only when it results in actual harm or danger, except if there is intentional fraud such as Madoff.



Turning to Traditional Crimes: Strengthening Alternatives to Incarceration



Incarceration & Crime

State	Incarceration Rate Change 2000-2007	Crime Rate Change 2000-2007
California	0%	-16%
Florida	+16%	-11%
New York	-16%	-25%
Texas	-8%	-6%

Violent crime in New York City down 64% from 2000 to 2007 while 42% fewer inmates.

Texas' Successful Budgetary Reforms in 2005 and 2007

- Capacity in programs that offer less costly alternatives to incarceration was expanded and then maintained in subsequent sessions, despite overall budget shortfalls in 2009 and 2011.
- Parole rate has increased, as Board finds that as more inmates are receiving treatment, more are safe to be released with supervision and fewer parolees committing new crimes.



Texas Probation Reform Proves the Right Incentives Work

- In 2005, additional \$55 million in funding for stronger probation supervision to probation departments that adopted progressive sanctions.
- Participating probation departments reduced their technical revocations by 16% while those that didn't increased technical revocations 8%.
- Had all departments increased their revocations by 8%, another 2,640 revocations for an average of 2.5 years at a cost to taxpayers of \$119 million, not including prison construction.
- Texas probation revocation rate declined from 16.4% in 2005 to 14.7% in 2010.



Bolstering Texas Parole Supervision: Less Crime, Less Total Spending

- From 2007 to 2010, 1,306 fewer parolees allegedly committed an offense and 825 fewer were revoked for rule violations, saving \$30.1 million.
- Parole supervision has added instant drug testing, more substance abuse treatment, more job placement resources, enhanced use of graduated sanctions; restored parole chaplains, and increased officers' emphasis on helping parolees succeed instead of "trail'em, nail'em, and jail'em."

Texas Trend: Lower Incarceration and Crime Rates

Year	FBI Index Crime Rate	Incarceration Rate Per 100k
2005	4,857.1	681
2013	3,658.0	601
Percent Change	-24.7%	-11.7%

Texas' crime rate has reached its lowest level since 1968.

*Sources: Bureau of Justice Statistics and
Texas Law Enforcement Agency Uniform Crime Reports*

Achieving Better Results in Pretrial Justice Decisions

- By reducing unnecessary jailing of low-risk pretrial detainees, space can be freed up in county jails for other offenders and use of short jail stays as probation/parole sanction.
- Strengthen pretrial supervision and ensure public safety, notability to pay, is prioritized.



Drug Sentencing Reform

- Require probation, treatment, and drug court in low-level possession cases in lieu of prison unless the offender has a prior substantial record and judge finds danger to public safety.
- SC, KY, OH, GA, and AZ have reduced low-level drug possession penalties, and AZ has been diverting drug offenders since the 1990s.



Problem-Solving Courts

- **Drug courts:** 34% lower recidivism: should focus on high-risk offenders who would have gone to prison.
- Hawaii HOPE Court with regular testing, treatment as needed, and weekend jail in few cases of non-compliance: 2/3 less re-offending, costs a third of drug court.
- **Mental health courts:**
Amer. Journal of Psychiatry: less total & violent re-offending



The Incentive Funding Model: Aligning Goals & Funding

- Gives counties the option to receive some state funds now spent incarcerating non-violent offenders in exchange for setting a prison commitment target and reducing recidivism.
- Funds could be used for treatment, stronger probation, electronic monitoring, prevention, problem-solving policing, and victim mediation and services.



Strengthen Probation: Demand Results

- 2008-09: CA, IL & AZ pass performance-based probation funding measures providing departments with incentive funding for fewer commitments, fewer new crimes, and more restitution. AZ measure led to 31% decline in new crimes and 28% drop in revocations.
- IL bill requires system-wide use of assessment instruments that match risk and needs to supervision strategies, tracking an offender from entry to reentry.



The Earned Time Revolution

- States such as Georgia, Texas, and Ohio have recently adopted or expanded earned time for lower –level offenders.
- ALEC model legislation and pending bill by Senators Cornyn & Whitehouse.
- Studies of policies in New York, Wisconsin, and Washington find reduced recidivism as offenders have incentive to complete rehabilitative programs.



Expand Post-Release Supervision

- 2014 Pew study: 11,280 Texas inmates released without supervision each year.
- Pew 2013 New Jersey study found similar inmates put on parole had 36% fewer new offenses than max-outs. Promotes continuity of care for mentally ill.
- Use some savings from reduced time served to expand post-release supervision.



Strengthening Supervision

- Bolster graduated sanctions and incentives
- Enhance use of risk/needs assessments to match offenders with programs
- FL. Study: GPS monitored probationers were 89% less likely to be revoked
- Address waiting list for substance abuse and mental health treatment, consider non-narcotic pharmaceuticals for heroin and alcoholism.



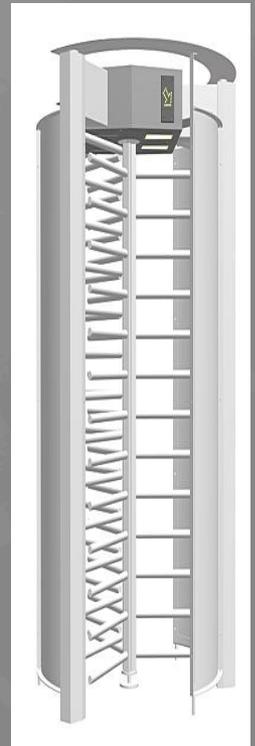
Athens, GA Day Reporting Center



Rick Thomas installs hardwood floors in an Athens apartment complex as part of his construction job. Thomas graduated from the Day Reporting Center opened in 2008 by the Department of Corrections. Newly released offenders with a history of a substance abuse and cognitive challenges receive counseling and supervision. To graduate, participants must hold and maintain a job for 90 days. Georgia has 11 day reporting centers.

Stop the Revolving Door

- Employed offenders on supervision twice as successful
- In-prison vocational training = 9% less re-offending
- Grant occupational licenses when offense is unrelated to the job. In some states, drug possession disqualifies a prospective barber. 2009 TX law and ALEC model bill allow many ex-offenders to obtain a provisional license for most trades, which becomes permanent if they comply with law and rules.



Remove Barriers to Reentry

- Recent Texas laws provide immunity to employers who hire ex-offenders and to landlords who rent to them.
- Enable nonviolent, non-chronic ex-offenders after time of compliance to obtain non-disclosure of record by expanding law passed in 2015.



Prioritizing Victims



- Nationally, restitution ordered in only 26% of property cases – a third collected.

Making Victims Whole

- Probationers pay \$391 million in restitution (at least 34 times more per offender than inmates) and do 135 million service hours.
- Victim mediation: 14 states with statutes. Must be chosen by victim and offender. Proven to increase victim satisfaction as a result of apology and completion of restitution in 89% of cases. Most studies find less re-offending as well.



The Victims' Perspective

Survey of Iowa Burglary Victims

Sanction	Percent Requesting
Restitution	81.4%
Community Service	75.7%
Pay Fine	74.3%
Regular Probation	68.6%
Treatment/Rehabilitation	53.5%
Intensive Probation	43.7%
Short Jail Term	41.4%
Boot Camp	40.0%
Work Release Facility	34.3%
Prison Sentence \geq Year	7.1%

Other Issues to Weigh

- Civil asset forfeiture reform
- Solitary confinement (stop direct release)
- Wrongful convictions and indigent representation (TX voucher pilot)
- Pushing back on overfederalization (SORNA and driver's licenses)
- Protecting policing advances, e.g. bkwindows
- Sentencing – uniformity vs. discretion to tailor
- Heroin in the heartland
- Juvenile justice (status offenses/zero tolerance)



Key Resources

- Heritage Foundation
- www.overcriminalized.com
- ALEC (including model legislation)
- www.alec.org
- Pew Public Safety
- Performance Project
- www.pewcenteronthestates.org
- Council of State Governments
- www.csgjusticecenter.org
- Justice Fellowship
- www.justicefellowship.org
- TPPF & Right on Crime
- www.texaspolicy.com / www.rightoncrime.com

