



Aligning Incentives And Goals In The Texas Criminal Justice System

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Introduction

One of the basic rules of economics is that incentives matter. Few people doubt, in the private sector, the greater the financial reward for providing a product or service, the more of that product or service will be supplied. However, incentives are not just financial. For example, whether a victim chooses to report a crime may depend in part on whether the victim believes justice will be done and how time consuming and emotionally draining the process will be.

The criminal justice system creates incentives for both private actors, such as victims and offenders, and government actors, which include judges, prosecutors, and probation departments. Unlike private companies, government entities are not, strictly speaking, seeking profit, but there are both financial and non-financial factors that may influence their decisions. For example, elected judges and district attorneys can be expected to be sensitive to public opinion and public choice theory predicts government agencies will tend to expand their budget and staff over time, often through growing the size of their clientele.

Of course, even those economists with the deepest hue of green eyeshades recognize that human behavior is not dictated entirely by quantifiable incentives. People, and perhaps criminals in particular, are not always rational or fail in their attempt to act rationally because they misperceive reality. However, we can maximize the limited capacity of public policy to influence people's actions by ensuring that the incentives created by the criminal justice system are consistent with its stated goals.

This report assumes that the goals for the Texas criminal justice system should include reducing crime, restoring victims, and minimizing costs to the taxpayer. It focuses on those areas of criminal justice policy where the individual and institutional incentives may not be fully consistent with these goals and offers recommendations for better aligning the system's incentives and goals.

Victim And Offender Incentives

Policies and Procedures that Undermine Incentives for Victim Satisfaction and Crime Reporting

Problem: The criminal justice process often begins with the reporting of a crime by a victim. Approximately 95 percent of all reported crimes involving specific victims are discovered from citizen complaints, usually from the victims themselves.¹ However, studies suggest that victims do not report 67 percent of all crimes.² The U.S. Supreme Court has stated:

[I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.³

Indeed, a survey of victims who did not report the crime found that 36 percent failed to report because the process is confusing or intimidating, while another 24 percent cited a prior bad experience with the system, and an additional 24 percent cited lack of trust.⁴

There are several policies and procedures in the current criminal justice system that lessen the incentive for victims to report crimes.

Many crime victims feel the complex and protracted criminal justice process involving months and often years of hearings and appeals only serves to remind them of their victimization on an ongoing basis. Indeed, victims largely lose control over the process as soon as prosecutors enter the picture. For example, while many prosecutors' offices in Texas have designated victim liaisons, there is no statutory requirement in Texas that prosecutors consider the victims' input with regard to sentencing.

Victims who want to control the process may instead bring civil lawsuits for intentional torts such as battery, civil assault, and intentional infliction of emotional distress.⁵ In fact, the victim may figure that the offender will be more likely to be solvent to pay damages for such torts if he is not imprisoned.

In addition to individual victims, business victims of theft and other crimes often do not report the transgressions. A study conducted in Ireland found many businesses fail to report crimes such as burglary and vandalism because they fear their insurance costs will go up.⁶ The 79th Legislature wisely passed a bill ensuring crimes reported by businesses can no longer be used against them by Dallas and other cities to prove they are creating a nuisance by tolerating crime.⁷

As the Supreme Court observed, providing mechanisms for victims to affect the way in which crime is prosecuted may promote crime reporting. However, there may be a disincentive for prosecutors to support greater victim participation in the criminal justice process. The president of the National District Attorneys Association expressed opposition to victims' rights proposals that would interfere with prosecutorial discretion.⁸ "Prosecutors are particularly likely to resist consideration of the victims' point of view because it is prosecutors' control that would be most eroded."⁹ The current system arguably gives prosecutors an incentive to obtain as many guilty pleas and convictions as rap-

idly as possible, usually through plea bargains, regardless of whether this approach satisfies the victim. A district attorney can defend his record more easily on the basis of such quantifiable numbers rather than victim satisfaction, a more subjective indicator which is not tracked in most Texas jurisdictions.

At trial, Texas law permits victims to present a written impact statement prior to sentencing or an oral impact statement after sentencing.¹⁰ Plea bargains, however, are generally reached through closed-door meetings between prosecutors and defense attorneys with victims playing no role. Indeed, no state gives victims a veto over plea bargains.¹¹ Not surprisingly, the process of plea bargaining and the concomitant lessening of charges has been found to have a significant negative impact on victim satisfaction.¹² A survey of Australian crime victims found 30 percent believe they should be consulted or actively involved in any decision to modify charges through plea bargaining.¹³ Research suggests that victims understand the need for plea bargaining to promote efficiency in the system and that their disappointment primarily lies, not with its existence, but with the fact that they are often not consulted or informed as to the behind-the-scenes deals.¹⁴

In addition to victims' involvement in the process, the extent to which restitution is ordered and actually provided to victims plays a significant role in their satisfaction with the system. A survey of crime victims revealed that 72.5 percent view restitution as a high priority.¹⁵ In Texas, the 79th Legislature strengthened Texas' restitution statutes by specifying that trial courts can decline to order restitution or order only partial restitution if they "state on the record the reasons for not making the order or for the limited order."¹⁶ However, a national study of felony probationers who had completed their sentences found that only 54 percent of the amount of restitution ordered was paid.¹⁷ In addition to obtaining a restitution order against the offender, victims of violent crimes¹⁸ may apply to the Texas Crime Victims Compensation Fund administered by the Attorney General's office.

Recommendations: Victim satisfaction, including feasible reconciliation between the victim and perpetrator, should be a central goal of the criminal justice system both as an end in and of itself and as a means of encouraging victims to report crime, which in turn promotes crime control. The incentives in the current system operate more to achieve the goals of the state

rather than the victim, which are not always the same. The exclusion of victims from the plea bargaining process is perhaps the most obvious example. For less serious crimes, allowing victims to choose alternatives such as mediation and reparative boards to plea bargaining and protracted trials could yield both greater victim satisfaction and improved offender outcomes.

Empower victims to choose victim-offender mediation, reparative boards, and other sentencing alternatives

Victims should be given a greater role in the criminal justice process. First, prosecutors and judges should be required to consider the victim's input in fashioning the offender's sentence. Since many victims find the drawn out nature of pretrial, trial, and appeals proceedings to be a disincentive to reporting crime,¹⁹ informal restorative alternatives such as sentencing circles and offender contracts should be available. For example, offenders who acknowledge responsibility for their actions can sign an agreement with the victim and prosecutor, which is then ratified by the judge.

If victims of certain offenses such as property crimes had the option to proceed with mediation first, the result could be a civil settlement rather than a criminal conviction. It could then be a crime for the offender to break their responsibilities under the civil settlement. Consequently, victims would have a substantial incentive to proceed because of the opportunity for recovery and satisfaction while prosecutorial and judicial resources would be husbanded. Prosecuting non-compliance with the clear terms of a settlement agreement would almost always result in rapid conviction, providing ample leverage for most offenders to comply.

Given that a New Zealand study found 28 percent of victims who failed to report a crime did not do so because they thought that the crime should be solved by the community or by themselves,²⁰ Texas should consider creating another track that victims of minor crimes could choose to elect when reporting crimes. This alternative would guarantee the victim that such a restorative approach would be followed if the offender is willing to take responsibility and forgo his right to trial in exchange for the less punitive approach. Programs such as victim-offender mediation have been shown to substantially increase victim satisfaction with the justice system.²¹

A multi-site study of victim-offender mediation programs with juvenile offenders found:

- Victims who met with offenders in the presence of a trained mediator were more likely to be satisfied with the justice system than were similar victims who went through the standard court process (79 percent versus 57 percent);
- After meeting offenders, victims were significantly less fearful of being revictimized; and
- Recidivism rates were lower among offenders who participated in mediation than among offenders who did not participate (18 percent versus 27 percent); furthermore, participating offenders' subsequent crimes tended to be less serious.²²

Marty Price, founder and director of the Victim-Offender Reconciliation Program (VORP) Information and Resource Center, in Asheville, North Carolina, notes:

Victim-Offender Mediation Programs have been mediating meaningful justice between crime victims and offenders for over 20 years; there are now over 300 such programs in the U.S. and Canada and about 500 in England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand. Remarkably consistent statistics from a cross-section of the North American programs show that about two-thirds of the cases referred resulted in a face-to-face mediation meeting; over 95 percent of the cases mediated resulted in a written restitution agreement; over 90 percent of those restitution agreements are completed within one year. On the other hand, the actual rate of payment of court-ordered restitution (nationally) is typically only from 20-30 percent.

Why is there such a huge difference in restitution compliance? Offenders seldom experience court-ordered restitution as a moral obligation. It seems like just one more fine being levied against them by an impersonal court system. When the restitution obligation is reached voluntarily and face-to-face, offenders experience it in a very different way. Perhaps most important, after facing the victims of their crimes, offenders commit fewer and less serious offenses than similar offenders who are processed by the traditional juvenile or criminal justice system.²³

Allowing Texas victims to choose a victim-offender mediation track could increase victim satisfaction while reducing the caseload for prosecutors and courts. Studies show 51 percent of crime victims would be interested in mediation.²⁴ Victim-offender mediation is particularly appropriate for property crimes where the agreed upon sentence may consist primarily of restitution and community service.

Another option that could be made available to victims is reparative probation boards, which consist of panels of five to seven citizen volunteers who meet with the offender and victim and develop a contract the offender agrees to fulfill as the only condition of probation. The contract is based on five restorative goals: the victim is restored and healed, the community is restored, the offender understands the effects of the crime, the offender learns ways to avoid re-offending, and the community offers reintegration to the offender. In Vermont, such boards process more than a third of the state's criminal docket.²⁵ In the Canadian province of Manitoba where reparative probation boards were pioneered, the recidivism rate of probationers sentenced through this program has been 22 percent lower than the norm.²⁶

Give victims a voice in plea bargaining

Victims must also be given a voice in plea bargaining negotiations. An empirical study examined the satisfaction expressed by victims in a Florida jurisdiction that permitted them to actively participate in the process of plea negotiation.²⁷ The study found increased victims' satisfaction with the disposition of their cases. Moreover, contrary to the fear expressed by some critics that harsher punishments would be imposed, victim participation tended to result in shorter periods of incarceration and greater use of alternative sanctions. While critics may label the idea of giving victims veto power over plea bargaining unworkable, Texas could certainly follow Arizona in passing legislation giving victims the right to actively participate in plea negotiations. Victims of crime surely deserve this modicum of transparency and accountability in the system.

Enhance victims' role at trial

While victims are currently shut out of plea bargaining, Texas does give them some input at trial, but that could be enhanced. In the 79th legislative session, State Reps. Elliott Naishtat and Ruth McClendon introduced legislation to allow victims, or if deceased, their close relatives, to present oral impact statements

prior to sentencing instead of being limited to written statements prior to sentencing, but neither of these bills received a hearing.²⁸ Prosecutors and judges also need to do more to inform victims of their right to submit victim impact statements. A survey conducted by the Attorney General found 57.7 percent of Texas victims who did not submit such statements were unaware of their right to do so.²⁹

Improve restitution system

Texas should also explore strategies to increase the rate at which restitution payments are collected. The U.S. Department of Justice's recommendations for accomplishing this goal include state legislation making restitution payments a priority over other payments due from the offender, including fines, fees, and restitution to entities other than the crime victim; the collection of restitution payments before fines or penalties; and the inclusion of a probation or parole officer's proficiency in managing restitution cases as a component of evaluating their job performance.³⁰ Texas should implement an effective system for monitoring restitution payments. Currently, the Texas Department of Criminal Justice (TDCJ) does not keep track of the amount of restitution owed by each inmate. In contrast, in Alexandria, Virginia, restitution collection data is compiled and circulated throughout the criminal justice system, showing each restitution case, figures for amounts received during the current month, total paid, and total owed.³¹

Restitution collections can also be boosted through programs that increase the rate of employment for probationers and prisoners following their reentry. For example, the Earn-It Program, first created in Quincy, Massachusetts, places offenders who are ordered to pay restitution with local businesses for employment while deducting a share of their earnings to satisfy their restitution orders.³² Texas' work restitution centers for probationers have proven highly effective in reducing recidivism and promoting restitution payments, but probationers must wait as long as six months in jail to enter because there are only 737 spaces due to insufficient funding.

As part of a broad interim charge that was issued to study the Texas Crime Victims Compensation Fund prior to the 80th Legislature, lawmakers should consider whether to expand the crimes for which victims are eligible to collect restitution payments from the Fund to include property crimes. However, it is im-

portant that the Fund remain a last resort because direct payments from the specific offender to the victim are more likely to make the victim feel whole and the offender feel a sense of penitence.

Explore feasibility of victim-initiated prosecutions

Finally, Texas should examine the feasibility of allowing victims to bring their own private criminal prosecutions in some circumstances, an option that was common in colonial America and remains available in Alabama, Montana, and Ohio.³³ To check abuses such as vengeful prosecutions, a judge or the Attorney General could be required to approve a victim-initiated prosecution when the local prosecutor refuses to act.

Incentive for Offenders to Choose Incarceration

Problem: While prison is intended to create a disincentive for criminal conduct, many prisoners turned to crime precisely because their life outside of prison was otherwise unsatisfying from both a financial and emotional standpoint. Whether they want to be incarcerated or not, some offenders, such as serial killers and sex offenders, need to be behind bars if for no other reason than incapacitation. However, for non-violent offenders and others serving relatively short terms, the fact that they prefer prison to a less costly but more rehabilitative sanction creates a perverse incentive, as their decision to decline probation in favor of prison means they will impose exponentially higher costs on taxpayers. The *San Antonio Express-News* recently reported, “Convicted criminals themselves sometimes prefer a short state jail sentence to probation, which can stretch up to 10 years and still comes with the risk of prison if an offender fails to meet often-stringent requirements.”³⁴

Peter Wood, an associate professor of sociology at Mississippi State University, surveyed the sentencing preferences of more than 1,100 prisoners for nonviolent offenses in Kentucky, Indiana, and Oklahoma and found that a third of convicts prefer prison to other sentencing alternatives, including boot camp, work-release, and probation.³⁵ Surveyed male and female convicts rated five other sanctions as more severe than prison. For example, the study (see page 6) found that most inmates would prefer four months of incarceration to spending less time in a boot camp or on day fines, a work release program where non-essential income is confiscated for restitution. Wood explained, “The basic issue is that a lot of inmates

would rather just do the time rather than invest effort and time in doing an alternative sanction.”

Robert Sigler, a criminal justice professor at the University of Alabama, commented on the study, “They would take 12 months in prison over 15 months probation. Probation makes it more difficult for them to pursue a criminal career.”³⁶ John Hamm, director of Alabama’s Montgomery County community corrections added, “That’s because community corrections programs demand a lot more responsibility, including working to pay off family bills, restitution and other expenses. These programs make you change lifestyle. They take up your time, and if they take up their time they won’t have time to do criminal activity.”

Although prison certainly curtails one’s freedoms, prisoners are also the only Americans who enjoy a constitutionally protected right to health care, which increasingly extends beyond the most basic services. Indeed, federal courts have recently ruled that prisoners have a constitutional right to certain sex change treatments based on the 8th Amendment’s prohibition on cruel and unusual punishment.³⁷ In all, Texas spent over \$400 million on inmate health care in 2004, with the average daily cost of care per prison inmate fluctuating between \$7.42 and \$7.92.³⁸

Recommendations: Require eligible offenders to accept intensive probation instead of prison

To remove the perverse incentive for nonviolent convicts to choose prison over more effective alternative sanctions, judges should be empowered to require that certain offenders accept intensive probation, such as participation in a specialized drug court or work restitution center. Offenders who prefer wallowing in prison to enduring the alternative sanctions that force them to confront their problems must be forced to take the medicine that they may later come to realize cured them. This will require increasing funding for these alternative sanctions, which even when properly implemented are much less expensive than incarceration. In 2001, it cost the state an average of \$7,957 to place an offender in a community corrections facility—about half the cost of prison.³⁹

Intensive probation, such as drug courts for offenders for whom residential facilities are not necessary, can save even more money compared with prison. A drug court is a special court given the responsibility to handle cases involving drug-addicted offenders through an ex-

Prisons Are The Most Expensive Sentencing Option: Criminals Perceive Some Alternative Sanctions As More Punitive

Average/Median Amounts of Alternative Sanction Inmates Would Do to Avoid 4/8/12 Months of Medium Security Imprisonment—Comparison of Males and Females (Survey of 415 Criminals)

ALTERNATIVE SANCTION	Months of Actual Medium Security Imprisonment		
	4	8	12
County Jail (months)			
Male:	2.68	3.67	4.74
Female:	3.24	4.27	5.50
Boot Camp (months)			
Male:	2.65	3.45	4.39
Female:	2.79	3.92	4.99
Electronic Monitoring (months)			
Male:	5.29	7.75	10.03
Female:	6.40	8.40	10.95
Regular Probation (years)			
Male:	2.74	3.17	3.59
Female:	2.93	3.67	4.68
Community Service (hours)			
Male:	554	772	1039
Female:	646	904	1286
Day Reporting (months)			
Male:	4.44	6.35	7.93
Female:	4.71	6.56	8.30
Intensive Supervision Probation			
Male:	5.71	8.44	10.73
Female:	5.90	8.41	11.45
Intermittent Incarceration (days)			
Male:	82	122	151
Female:	88	126	161
Halfway House (months)			
Male:	5.00	7.28	9.23
Female:	4.91	6.99	8.55
Day Fine (days)			
Male:	82	114	137
Female:	83	112	141

Source: Peter B. Wood and Harold G. Grasmick, "Inmates Rank the Severity of Ten Alternative Sanctions Compared to Prison," and Harold G. Grasmick, *Oklahoma Criminal Justice Research Consortium Journal*, 1995, available at <http://www.doc.state.ok.us/DOCS/OCJRC/OCJRC95/950725j.htm>.

Boot camp: Boot camp is for a shorter time than you would have been sent to prison. Boot camp is like basic training for the army. There is regular drill instruction like in the military and you are pushed physically and psychologically to perform beyond your capabilities.

Electronic monitoring: On electronic monitoring, you live at home, but your freedom is greatly reduced. You wear an electronic device on your ankle. If you get more than 200 feet from your telephone, this device sends an alarm to a computer alerting the supervising officer.

Regular probation: On probation, you do not spend time in prison, but the amount of time on probation usually lasts much longer than a prison sentence. You must see your probation officer at least once a month, but it can be every week if ordered. You must get permission from the probation office to travel or to move.

Community service: When you are sentenced to community service, you live at home and can have a job. However, you must work some time without pay to make up for the crime for which you were convicted.

Day reporting: If you are sentenced to day reporting, you can stay home at night, but you must check in at a parole office every day. During the day you must have a job or you must go to some center in the community and be involved in activities all day.

Intensive supervision probation (ISP): Intensive supervision is much stricter than regular probation. You do not go to prison and can live at home. However, the probation officer is checking up on you—sometimes everyday—and you are required to be in some kind of treatment program to improve yourself.

Intermittent incarceration: With this punishment, you must spend weekends or evenings in the county jail. But, since you are not in prison, you can have a job and be involved with your family and community when you are not spending your time in jail.

Halfway house: A halfway house is a place where several people convicted of crimes live. Halfway houses have rehabilitative programs, and if your behavior improves you are treated better and given more freedom.

Day fine: A day fine is based on the amount of money you make each day. You are allowed to subtract some money for your rent, transportation, food, utilities, etc., but whatever is left over you have to pay as a day fine.

tensive supervision and treatment program that involves regular interaction between the judge and the offender. A National Institute of Justice study of the Multnomah County Drug Court in Portland, Oregon found that drug courts cost \$5,927 per offender as compared with \$7,369 for traditional probation and that drug courts result in \$5,071 savings, including victimization costs, due to reduced rates of drug use and recidivism.⁴⁰



Use dismissal incentive in minor drug possession cases

Another way to combat the incentive for minor offenders to choose prison over long probation terms is to offer the incentive of dismissal if the accused successfully completes all supervision conditions. This is most appropriate for those charged with possessing a small quantity of drugs because there is not a victim who seeks to obtain the justice of a conviction and there is likely no restitution order that requires long-term monitoring. The Fort Bend County drug court program already offers this incentive. For individuals charged with minor drug possession who stay clean after undergoing a short but intensive treatment program, a dismissal of the original charges makes it easier to obtain employment because the individual can truthfully answer that he was never convicted. Probation departments are currently authorized to supervise offenders in pretrial programs, enabling existing probation resources to be used to supervise individuals completing a pretrial diversion regiment in exchange for dismissal.

Explore use of contracts authorizing harsher but shorter incarceration

Although this is a bold proposal, it is less radical than Texas’ existing program allowing sex offenders to obtain early release if they voluntarily undergo castration.⁴¹ While a long line of court decisions places even

the slightest pain-inducing punishments in jeopardy as violations of the 8th Amendment, programs could simply give offenders the option of enduring extreme manual labor in exchange for a shorter prison term, particularly if they sign a written agreement subjecting themselves to further rigors should they recidivate.

Institutional Incentives

Incentive of Elected Judges to Impose Long Prison Sentences

Problem: One incentive for long prison sentences may be Texas’ system of electing judges. Researchers have found a correlation between impending elections and longer prison sentences. Yale University political scientists concluded:

In Pennsylvania, for the ten years and 22,095 cases we analyze, we can attribute about 2,777 years of additional incarceration to impending election. This may suggest that judges sentence too harshly near elections in an effort to pander to voters, or that they sentence too leniently early in their terms with resultant social costs. In either case, the finding suggests a troubling downside to the electoral control of judges. Because judges’ power to incarcerate is applied to individuals on a case-by-case basis, we can attribute substantial inconsistency in the exercise of this power to this electoral connection.⁴²

Of course, it can be argued that responding to the public’s viewpoint is a proper, not a perverse, incentive. However, the likelihood is that in Texas’ large urban counties with dozens of judicial districts, most voters are entirely unfamiliar with the details of every case. Therefore, judges may well be increasing their sentences prior to elections based not on what they think the public would want if they had heard the case themselves, but on how a sentence could be portrayed by their opponent in a sound bite.

Recommendations: Aside from revisiting Texas’ judicial selection process—an issue beyond the scope of this paper—other changes should be considered.

Review penalties for criminal statutes, particularly non-violent drug offenses

First, the Legislature must conduct a thorough review of all criminal statutes to ensure that for nonviolent crimes, such as possession of a small amount of drugs,

the sentence ranges provide the discretion to impose sentences that do not include prison time. Some 21.7 percent of Texas prisoners, which amounts to approximately 32,550 inmates, are incarcerated for non-violent drug offenses.⁴³ Even for offenses where prison time may be appropriate, excessively high upper ceilings should be lowered, given that some judges may believe that they have a political incentive to choose the maximum.

An example is Chapter 481 of the Health and Safety Code, which creates a third degree felony for possession of between one and four grams of drugs in Penalty Group 1 such as morphine and methadone. Under Section 12.34 of the Penal Code, that means no less than two years and no more than ten years in prison. A more rational approach would involve raising the threshold for the amount of drugs that turns a state jail felony, which a judge can reduce to a Class A misdemeanor, into a third degree felony. Alternatively, drug statutes could be modified to allow or instruct judges to consider factors other than simply the quantity to distinguish between users and dealers.

Given that the use of illegal drugs is often an attempt to escape from reality and the obligations of daily life, it is ironic that prison—the ultimate escape from reality—would be the primary means of punishment for such offenses. In fact, research demonstrates that there is no correlation between incarceration of small-time drug users and rates of drug use and that states with higher rates of incarceration for drug offenses have higher rates of drug use.⁴⁴

Could anyone imagine saying we should get “tough on suicide” by putting people who attempt suicide in prison? We use the police power of the state to stop suicide and force suicidal individuals to confront their demons because we presume that the individual would have desired help and intervention were they sane. That is the societal version of “tough love.” Putting suicidal people in prison would discard those who want to discard themselves, which wouldn’t be tough at all and would hardly provide an incentive to deter suicide. Likewise, we should force drug addicts to undergo treatment and confront the irrational damage they have done to themselves and those around them, not separate them further from reality. For those drug offenders who would benefit more from a residential environment than outpatient treatment, community corrections facilities closer to their families and

away from hardened criminals are preferable to prisons which offer little contact with the outside world.

Expand specialized courts, such as drug courts

Second, Texas should expand the use of specialized courts, such as drug courts, in sentencing nonviolent offenders who have the capacity to take responsibility for their crime and confront their addiction. Major Texas counties that have not established such courts should be required to do so, which would alleviate the unnecessary influx of nonviolent inmates they are offloading on to the overcrowded state prison system. Currently, Section 469.006 of the Health and Safety Code only requires such courts in counties with populations over 550,000 and, even in these counties, the courts must involve only 100 offenders, a threshold far below what would be necessary to make a significant impact. Judges who choose to preside over such courts are, by definition, willing to divert offenders from prison where appropriate, even though it requires intensive engagement and the imposition of progressive sanctions on their part to ensure that the offender is meeting obligations, such as attending drug treatment. According to the TDCJ, offenders completing drug court programs have a 28.5 percent rearrest rate compared to 58.5 percent in the control group.⁴⁵ A study conducted by Dallas County Judge John Creuzot of participants in his drug court program for felony drug offenders between 2001 and 2003 found that the recidivism rate of program participants was 17 percent compared to 61 percent in the control group.⁴⁶

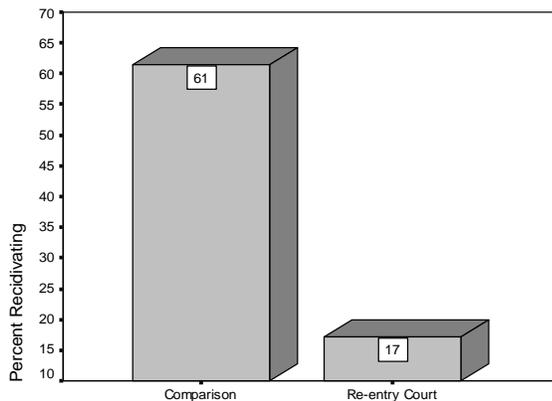
Allow judges to impose conditions of confinement

Finally, by permitting judges to impose rigorous requirements on offenders they sentence, the incentive of judges to focus entirely on the length of the prison term may be reduced because they can point voters to the rigorous conditions they have imposed to make it truly “hard time.” For violent offenders who require incapacitation, Texas should consider revising sentencing procedures to allow judges to set not just the number of years of incarceration, but to also specify the activities the offender will be required to undertake while in prison. These could include the type and amount of work to be performed, community service for inmates on work release, and GED classes in the Windham School District.

Judges should communicate on an ongoing basis with TDCJ to ensure that the conditions they set are

achievable given the current resources and capacities at the various facilities in the system. To the extent judges are authorized and encouraged to dictate the details of an offender's obligations during incarceration, judges can then be held accountable through longitudinal studies that track the rates at which offenders they sentence comply with subsequent probation or parole conditions, pay restitution, and refrain from being rearrested or recidivating.

Recidivism Rates of Dallas County Felony Substance Abuse Offenders Two Years After Re-entry, 2001-2003



Comparison = Control Group Convicted in Traditional Court
 Reentry Court = Participants in Judge Creuzot's Dallas County Drug Court

Source: Judge John Creuzot, October 26, 2005

Incentive For Band-Aid Fixes Rather Than Long-term Solutions For Prison Overcrowding

Problem: As in the early 1990's, Texas is once again facing a prison overcrowding crisis, with prisons now holding 150,500 inmates, which is 97 percent of capacity. The situation has been made worse by Hurricane Rita, which damaged numerous correctional facilities in East Texas. The *Austin-American Statesman* reported:

“It's put a crunch in the system, that's for sure,” said state Sen. John Whitmire, D-Houston and chairman of the Senate Criminal Justice Committee, which oversees prison operations. “We put money in the budget to lease about 6,000 beds over the next two years. This means we'll probably spend that sooner than we counted on. And that doesn't include whatever the cost will be to repair the damaged units.”

Several top prison officials said privately that they expect the damage to be in the millions of

dollars and that repairs could take months. After determining that the prison system could soon run out of bunks, lawmakers allocated \$19.9 million in the spring to lease beds in the current fiscal year and \$43.8 million for 2007. Gov. Rick Perry later vetoed all but \$10 million for leased beds in the current fiscal year.⁴⁷

County jails themselves are overcrowded with some 70,000 inmates. In fact, Texas inmates are now occupying leased beds in Arizona, New Mexico, and Wyoming. Also, some 44 county jails are out of compliance with criteria set by the Jail Standards Commission, partly due to crowding.⁴⁸ Leasing county jail beds costs about the same \$16,000 annual cost of incarcerating inmates in state prisons, but a key difference is that county jails have virtually no educational or rehabilitative programming, which is at least somewhat available in state prisons.

While the new legislative consensus against building more prisons is commendable, the state could actually be getting less correctional bang for its buck by leasing out beds in county jails. The savings of capital construction costs may be offset by higher recidivism rates, due to the dearth of educational, rehabilitative, and reentry services in county jails.

Overcrowding has long played a role in upsetting the intended design of the state prison system. More than a decade ago, 17 state jails were created near urban areas to house offenders guilty of state jail felonies, such as minor drug possession and property crimes, where they would be segregated from more serious offenders and near family that could visit and their point of reentry. Although these facilities were to have extensive reentry services, there are few such services today due to cost pressures and the majority of state jail inmates are now transferees from overcrowded prisons.

Recommendations: Devise long-term plan for prison utilization using dynamic model

Current budgetary pressures are forcing TDCJ to apply short-term band-aids that may increase long-term costs through increased recidivism. The state must devise a long-term plan for reducing incarceration that involves increased reliance on alternatives to incarceration such as specialized courts and intensive probation, revision of criminal offenses and penalties, and adherence to the intended uses of different facilities.

To facilitate such planning, a model should be developed for accurately predicting the effects of various policy alternatives on the crime rate, incarceration and system costs in light of population growth and demographic factors. Such a model can avoid future overcrowding by providing the Legislature with sufficient information to make the policy changes and resource allocations to achieve the requisite diversion of nonviolent offenders and implementation of recidivism-reducing correctional strategies so that the incarcerated population remains steady or decreases. While the Legislative Budget Board utilizes a matrix for assessing the impact of changes in penalties on incarceration, it is not a dynamic model taking into account the effects of criminal justice policies on factors such as deterrence, recidivism, and revocations.

Match design of facilities and programming with actual use

Existing prisons and jails should be rationalized to fulfill the specific intended purposes of each type of facility. Inmates with similar offense records and penological needs should be placed in similar facilities to take advantage of economies of scale in the delivery of services and avoid commingling nonviolent and violent offenders. When possible, nonviolent offenders serving short terms should be housed at facilities close to their homes.

Minimize unnecessary pretrial confinement in county jails

As part of reducing incarceration statewide, Texas counties should be given incentives to reduce their pretrial detentions in county jails. A decade ago, pretrial defendants made up 30.3 percent of the Texas jail population while today they comprise 48.3 percent.⁴⁹ The numbers are significantly higher in most urban counties, including 85.1 percent in Brazoria County. Defendants in drug cases, in particular, wait long periods racking up unnecessary jail costs due to delays in the Department of Public Safety’s testing for controlled substances.⁵⁰ Taxpayers are paying about \$40 a day to put each county jail inmate behind bars.

Incentive Of Counties To Dump Prisoners On The State

Problem: The fractured structure of the state’s criminal justice system creates a perverse incentive for counties to adopt policies and impose sentences that reduce their costs while increasing the total cost of

the system. In public choice terms, counties are free-loading off the state.⁵¹

This problem has come to the forefront in probation revocations. The probation departments are operated by judicial districts known as Community Supervision and Corrections Districts (CSCDs). A total of 121 regional CSCDs oversee probation in the state’s 254 counties.⁵² On average, 64 percent of a CSCDs’ operating budget is state funded and allocated by the Texas Department of Criminal Justice Community Justice Assistance Division (CJAD).⁵³ The remainder of CSCDs’ operating budgets come from probation fees and appropriations by county governments. County governments have the sole responsibility of providing CSCDs with office space and equipment. However, when a probationer is revoked to prison for technical violations or committing a new crime, the state is obliged to bear the full cost of incarceration. Thus, counties have little incentive to augment state funding to support programs such as progressive sanctions, intensive supervision, and drug courts that reduce revocations.

Probation revocations are a significant component of the state’s prison overcrowding problem. Some 37 percent of prison intakes and 41 percent of state jail intakes are revoked probationers, resulting in \$547 million in direct incarceration costs.⁵⁴

Texas Probation & Revocation Statistics: FY 2004

Category	Felons	Misdemeanors	Total	% Change 1995-2004
Probations	235,975	190,971	426,946	+1.4%
Revocations	24,601	25,290	49,891	+31.3%

Source: Texas Department of Criminal Justice

The Wisconsin Policy Research Institute put the value of probation programming that reduces recidivism in perspective, noting: “Even 10 percent less recidivism in Wisconsin by those on probation, parole and pretrial release would mean nearly 20,000 fewer crimes a year, saving citizens \$122 million annually and offsetting about 88 percent of the cost of community corrections.”⁵⁵ One key advantage of community corrections facilities is they keep offenders near their families, giving them a support network to rely upon.

Recommendations: A successful probation system—i.e. one that did not have a 40 percent revocation

rate—would likely have at least a third fewer offenders, a third more officers, and would probably cost slightly more per offender than the current one dollar for every ten dollars spent on prisons, even though prisons have two-thirds fewer offenders. The current system of two polar extremes—virtually no supervision on probation or total supervision in prison—is inefficient. Changing this nonsensical reality requires changing the incentives that have created it.

Merge probation districts into one state department or enhance incentives for counties to reduce probation revocations

The structural solution for this problem would be to make probation a state responsibility and thereby replace the 150 CSCDs with one state agency, or a division of TDCJ. Accordingly, the state would bear both the full costs and benefits of both the prison and probation systems, providing an incentive for policy and funding changes that might increase the cost of probation but save even more in incarceration expenses. Short of shifting probation to the state which would require a significant corresponding shift in tax revenues, CSCDs and the county commissioners courts that support them can be given powerful incentives to reduce their rearrest, revocation, and recidivism rates, thereby allowing them to benefit from part of the savings to the state resulting from reduced incarceration.

The Legislature is moving in this direction. In the 79th Legislature, an additional \$27 million was appropriated for residential facilities providing treatment for mental illness and drug addiction and work restitution centers. Thanks to this new funding, there will be 500 new community corrections facility beds and 4,000 additional probationers will receive outpatient drug rehabilitation services. Yet, this still leaves the state with over 1,400 fewer beds than in 1995 despite a larger population of probationers.⁵⁶

To qualify for the \$27 million in new funds, the Legislature wisely required that Texas probation departments implement a progressive sanctions model and provide specific data to a state tracking system so that probationers can be tracked for recidivism and program evaluation.⁵⁷ However, fund eligibility only requires “a statement that sets a goal for your CSCD reducing revocations to prison and state jail” with “a specific revocation rate reduction goal of 10 percent or more.” Individuals who have attended TDCJ meetings where the requirements have been discussed suggest counties such as

Harris County that are currently far from compliance with various conditions have been assured they will nonetheless get their share of funding.

Reduce probation caseloads and adopt innovative supervision techniques

Policy and funding changes are needed to counteract the incentive for counties to underinvest in probation and instead unload revoked probationers on the state prison system. For example, the current 150 to 1 ratio of probationers to probation officers must be brought closer in line with the 70 to 1 ratio recommended by most experts. The Manhattan Institute’s report “Broken Windows’ Probation: The Next Step in Fighting Crime” observes, “Caseloads averaging 100-500 offenders are absurd.”⁵⁸ The 79th Legislature appropriated new money for hiring probation officers, but not nearly enough to reach their stated goal of a 95-1 ratio. More state funds can be made available for hiring probation officers through savings generated by less reliance on incarceration and by shortening probation terms for nonviolent offenders who have satisfied the terms of their probation agreements.

The report also recommends probation officers shift from a 9-5 weekday schedule to a flexible schedule that includes monitoring of probationers on nights and weekends when they are most likely to step out of line. Also, rather than relying only on office appointments, probation officers should visit the probationer in his neighborhood and engage his family and neighbors.

Incentive For Too Many Probationers With Too Little Supervision

Problem: A related problem is that 40 percent of probation department budgets come from probation fees.⁵⁹ This may create an incentive for unnecessarily long probation terms with little supervision for each probationer. Texas has the longest probation terms in the nation at 67 percent more than the national average.⁶⁰ The Criminal Justice Policy Council noted:

The average probation sentence is 5.6 years and approximately 85 percent of those not revoked served their sentences without an early discharge for good behavior and perhaps a nearly discharge should be considered as a policy option. However, offenders complying with their probation term generate significant revenues by paying probation fees that supplement

probation department budgets. Another option is to consider limiting the length-of-stay in prison for non-violent non-sex offenders revoked from probation for technical reasons as these offenders will serve on average two and half years in prison upon revocation but this option may conflict with discretionary sentencing and parole policies.⁶¹

Research also indicates that probation fees may result in a lower rate of restitution collections, as offenders struggle to meet all of their financial obligations.⁶²

Recommendations: Redirect probation fees to general funds

Probation fees should be redirected into state and county general funds rather than having them flow directly to probation departments. In cases where inmates lack sufficient resources, all funds necessary should be allocated to meet scheduled restitution payments before funds go to pay probation fees.

Shorten probation terms to release offenders who have met obligations

Policy changes to shorten probation terms were part of House Bill 2193, which was passed by the 79th Legislature but vetoed by Governor Rick Perry. These changes would counteract the current incentive for CSCDs to keep probationers on the rolls who have met their obligations, which detracts from their ability to focus human resources on those probationers who have not been reformed. Speaker Tom Craddick has issued an interim charge for the House Corrections Committee to study probation reform. By modifying House Bill 2193 to eliminate its application to several of the violent offenses to which the Governor and prosecutors objected and the requirement that judges grant early termination from probation even if conditions such as restitution are not met, consensus can be achieved in the next legislative session.

Lack of Incentive for Successful Probation Outcomes Due To Diluted Accountability

Problem: Most CSCDs contract out a wide range of probation services, such as job training and drug testing, to private companies. Unfortunately, most CSCDs and the state lack an accountability system for measuring the success of these contractors. At a construction site, this would be the equivalent of having numerous independent contractors working on

many parts of the building with no general contractor accountable for the entire project. Accountability is diluted because whether a probationer succeeds depends on the services provided by many different service providers as well as the probation officers.

The lack of accountability may be one reason why so many Texas probationers are able to abscond. In addition to the 40 percent of probationers who are revoked to prison, the Dallas CSCD lost track of 10,000 probationers, or a quarter of its caseload, in 2004.⁶³

Recommendations: Privatize probation services through use of one general contractor with rigorous selection and monitoring performance criteria

At least seven states have privatized misdemeanor probation programs, including Georgia, Colorado, Connecticut, Florida, Missouri, Tennessee, Utah, and Wyoming.⁶⁴ In these states, either the state or probation departments enter into a contract with a single provider, which may in turn subcontract for services. The American Legislative Exchange Council (ALEC) has developed model legislation for probation privatization.

Georgia has implemented guidelines for drafting contracts, required registration and reporting of private companies, and imposed sanctions for noncompliance. According to a U.S. Justice Department study, privatization of Georgia's probation system increased collection of fines and restitution from \$41 million to more than \$61 million in 2000. There is substantial diversity of and competition among private companies, as more than 30 companies hold contracts with active caseload ranges from 24 to 27,113 probationers.

Such a privatized probation system would allow either TDCJ or probation districts to pick and choose among companies based on their track record in collecting restitution and reducing the rate at which probationers abscond, recidivate, and are revoked to prison. Moreover, by eliminating direct government control, the use of proven faith-based programs can be considered without raising constitutional concerns.

Disincentive For Private Prisons To Innovate

Problem: Although Texas has not tried privatizing probation, Texas boasts a fairly successful program of prison privatization. Indeed, three-fifths of all U.S. states host private prisons; most of them contract with companies to house prisoners. Studies show significant

savings in the range of 5 to 20 percent.⁶⁶ Savings in Texas are estimated at between 10 and 14 percent.⁶⁷ Moreover, research comparing the recidivism rates of public and private prisoners has found a 29 percent lower recidivism rate among inmates released from private prisons, which is likely attributable to more effective programming and reentry services, including the ability to incorporate faith-based programs.⁶⁸ In 2004, more than 1,000 inmates at Corrections Corporation of America (CCA) facilities completed an intensive voluntary faith-based program developed by the Chicago-based Institute in Basic Life Principles (IBLP).⁶⁹

Texas currently incarcerates over 16,000 inmates at private prisons operated by CCA and other companies—more than any other state. While the use of these private facilities has produced significant savings for taxpayers, stringent state regulations imposed by TDCJ continue to interfere with the ability of private prison operators to innovate in ways that could not only save more money, but also improve prisoner outcomes. For example, TDCJ even requires that private prisons use the same key systems that state prisons utilize, even though there was no indication that the private prisons had experienced security difficulties associated with their own, more technologically advanced key systems. Similarly, private prison operators are required to tailor their educational services to exactly match those offered by the state's Windham School District, which involves not only mirroring the same curriculum, but also such arcane details as the school calendar and the days off given to teachers.

Perhaps most significantly, TDCJ refuses to allow private prison operators to implement drug treatment programs that differ from those offered by the state and approved by the Texas Commission on Alcohol and Drug Abuse (TCADA). Instead, private prison operators must use instructors with the same certifications and implement a program that lasts as long as the state's treatment program. According to TCADA, 59 percent of probationers and 63 percent of prison inmates are substance abusers or substance-dependent.⁷⁰ Yet, excluding the state's rudimentary drug education program that all inmates must complete, less than 15 percent of inmates are actually enrolled in any of the state's drug treatment programs due to limited funds and the high per inmate cost of the state's programs. Private prison operators argue that they should be allowed to innovate by implementing less costly drug treatment programs that have proven

effective at their facilities in other states and can reach more inmates with the same amount of funds.

In sum, the incentives are misaligned because TDCJ is both competing with and regulating private prison operators. Although the number of private prisons is at the state cap set by the Legislature, TDCJ has the authority to decide whether to privatize more state jails.

Recommendations: Place private prison oversight under separate entity

The Legislature should consider placing private prison oversight under a separate agency, board, or commission, which could also make a biennial recommendation to the Legislature on whether additional state jails should be privatized. Short of that, the Legislature should pass legislation, which clearly states that the goal of private prison oversight should be to maximize results, both in terms of cost savings and offender outcomes, rather than to force private prisons to replicate public prisons, including their inefficient aspects, in all facets of their design and programming. Instead, private prisons should be given financial incentives to reduce recidivism and rearrest rates through innovative programming just as transportation contractors are rewarded by the Texas Department of Transportation when they finish roads ahead of schedule.

While some public oversight of private prisons that focuses on results rather than methodology remains necessary, the fact is that private prisons are largely holding themselves accountable, often in more exacting ways than their public counterparts. For example, CCA uses 840 criteria to grade its facilities during a three day, on-site audit process.⁷¹ These criteria include the 500 criteria established by the American Correctional Association, which are then augmented with 340 criteria developed by CCA.

Utilize private facilities instead of county jails to stem overcrowding

Finally, with the first priority on ending prison overcrowding via changes discussed in this report, the continued leasing of county jail beds for \$40 a day—with no education, treatment, or job training provided—is inefficient when private corrections facilities can incarcerate offenders in pre-release minimum security facilities with a full array of reentry services for \$30 a day.

Conclusion

The challenges confronting the criminal justice system in Texas result in part from public policies that create incentives which are not fully aligned with the stated goals of the system. These incongruities have little effect on the way in which the most serious crimes, such as murder, are addressed. Cold-blooded killers, who require incapacitation through either life in prison or the death penalty, present the simplest cases that involve the fewest decisions and different entities. It is the less serious offenders who often bounce from probation to county jails to prison and back to probation who should be the focus of criminal justice reforms.

For these less serious offenders, current policies create incentives for prosecution methods and sentencing choices that further the interests of government actors rather than victims. Even within the realm of government, the multitude of criminal justice agencies at the local and state level, particularly the division between probation and prisons, creates a perverse incentive for offenders to be dumped from one system to the other.

Among the effects of these misaligned incentives is excessive reliance on incarceration at the expense of other corrections strategies. With a new consensus against building new prisons and TDCJ slated to go through the sunset process in 2006, there is a unique opportunity to make dramatic policy changes. However, simply scrutinizing one agency will not be enough. In many ways, TDCJ is itself hostage to other actors in the system guided by their own incentives, such as prosecutors, judges, and probation departments.

Much like in public education where Texas has increasingly tied funding to results, we must move from a criminal justice system where funding is based almost entirely on utilization to one where we provide incentives for correctional institutions to successfully graduate offenders from further involvement in the criminal justice system. Such incentives can best be implemented when there is a single entity that can be held accountable for results. Thus, policymakers must rethink the arbitrary and artificial divisions between various criminal justice agencies, the excessive deference to local bureaucracies when state dollars are involved, and the traditional resistance to privatization of criminal justice functions. Ultimately, to bring the system's goals and incentives into alignment, structural changes in policy and funding are needed, not plastic surgery. 

Recommendations:

- Empower victims to choose victim-offender mediation, reparative boards, and other sentencing alternatives
- Give victims a voice in plea bargaining
- Enhance victim's role at trial
- Improve restitution system
- Explore feasibility of victim-initiated prosecutions
- Require eligible offenders to accept intensive probation instead of prison
- Use incentive of dismissal in minor drug possession cases
- Explore use of contracts authorizing harsher but shorter incarceration
- Review penalties for criminal statutes, particularly non-violent drug offenses
- Expand specialized courts, such as drug courts
- Allow judges to impose conditions of confinement
- Devise long-term plan for prison utilization using dynamic model
- Match design of facilities and programming with actual use
- Minimize unnecessary pretrial confinement in county jails
- Merge probation districts into one state department or enhance incentives for counties to reduce probation revocations
- Reduce probation caseloads and adopt innovative supervision techniques
- Redirect probation fees to general funds
- Shorten probation terms to release offenders who have met obligations
- Privatize probation services through use of one general contractor with rigorous selection and monitoring performance criteria
- Place private prison oversight under separate entity
- Utilize private facilities instead of county jails to stem overcrowding

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