

Empowering Crime Victims & Victim-Offender Mediation

by **Marc Levin, Esq.**
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The state's Victim Offender Mediation/Dialogue program created in 1994 allows victims and victims' families to correspond with and meet the violent incarcerated offender, provided both consent. Most of the over 200 mediations have been between victim's families and murderers.¹ Some 97 percent of participants were satisfied with the process and 80 percent reported major life changes as a result.

Bridges to Life, a privately run, ecumenical program that operates in some Texas prisons, features facilitated sessions involving offenders within six months of release and volunteer crime victims. Unlike the Victim Offender Mediation/Dialogue program, the victims and offenders were not parties to the same crime. The current recidivism rate for released offenders who have participated is 14.9 percent, compared to Texas' average recidivism rate of 30.7 percent.²

Texas does not have a statewide pretrial victim-offender mediation program (VOMP), although several Texas counties offer VOMPs for juvenile crime victims. Victims must choose a VOMP over the traditional court system and offender participation is also voluntary, since the offender is required to take responsibility for his conduct and waive his right to trial and appeal.

A written agreement is reached that typically requires restitution, community service, and counseling. The agreement is then ratified by the prosecutor or judge. Failure to comply leads to traditional prosecution and, if necessary, incarceration. There are over 300

VOMPs in North America. Some 95 percent of cases mediated result in a written agreement and 90 percent of these restitution agreements are completed within one year, far exceeding the national collection rate of 20 to 30 percent.³

We recommend that the following reforms be considered:

- *Create state framework and funding mechanism for pretrial VOMPs for property crimes.* A multi-site study found that 79 percent of victims who participated in VOMPs were satisfied, compared with 57 percent of victims who went through the traditional court system.⁴ A national study of juvenile pretrial victim-offender mediation found a 32 percent recidivism reduction.⁵ VOMPs save taxpayers' money, as they reduce utilization of courts and prosecutors—a California VOMP costs only \$250 per case.⁶ One funding option is creating a fee paid by property offenders.
- *Improve access to in-prison victim conferencing.* Wardens should be instructed to welcome Bridges to Life and any similar program provided appropriate security measures are taken.
- *Allow victims to present an oral impact statement prior to sentencing.* The 79th Legislature failed to hold a hearing on House Bills 338 and 442, which would have permitted this.
- *Enact legislation giving victims a seat at the table in plea bargaining.* Most crimi-

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nal cases in Texas are resolved through plea bargaining, but Texas is not among the 22 states that require prosecutors to obtain the victim's views concerning the proposed plea.⁷ Texas' current law only says a judge must "inquire as to whether a victim impact statement has been returned." Arizona is a national model, requiring not only that prosecutors consult with victims, but also guaranteeing victims the right to be present and heard

during any settlement discussions attended by the defendant. Arizona further requires that judges consider the victim's viewpoint in deciding whether to accept the plea. Texas should require prosecutors to certify to the court that they have consulted with the victim and inform the court as to the victim's position on the proposed plea. ★

¹ See <http://www.tdcj.state.tx.us/victim/victim-vomd.htm>.

² See <http://www.bridgestolife.org>.

³ See <http://www.vorp.com/articles/crime.html>.

⁴ Umbreit, M., with R. Coates and B. Kalanj (1994) "Victim Meets Offender," *THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (Monsey, NY: Criminal Justice Press).

⁵ See <http://www.voma.org/docs/connect3.pdf>.

⁶ Niemeyer, M. and D. Shichor (1996) "A Preliminary Study of a Large Victim/Offender Reconciliation Program," *FEDERAL PROBATION* 60(3): 30-34.

⁷ See <http://www.texaspolicy.com/pdf/2006-04-PP-VOM-ml.pdf>.

Does Texas Need More Prisons?

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The facts demonstrate that Texas has plenty of prisons to protect public safety, but failed policies are filling them up with nonviolent offenders who do not endanger the public. Texas has the second highest incarceration rate in the nation and the state's prison system has grown 278 percent from 1978 to 2004 while population has only increased 35 percent during this time. From 1985 to 2006, the state's incarceration rate has grown 205 percent. Texas' non-violent prison population is larger than the total prison population of all other U.S. states except California and of the United Kingdom. Texas has added 13,083 prison beds since 1997 and 3,559 beds since March 2003. If current policies are not changed, the Legislative Budget Board (LBB) has estimated that Texas will need another 8,658 beds by 2009 and some 17,332 new beds by 2012.

Building two new prisons with 4,000 beds as proposed by the Texas Department of Criminal Justice (TDCJ) would saddle taxpayers with \$377 million in construction costs and another \$600 million in operations costs over ten years, not including additional costs associated with increasing salaries for prison guards to staff these facilities given that the state already is 3,000 prison guards short. Fortunately, by taking targeted measures involving only nonviolent offenders, we can protect public safety while completely eliminating the need for new prisons and even beginning to draw down the current prison population.

It is important to note that passing "Jessica's Law" would not create the need for building

additional prison beds in the near term. By requiring 25 years without parole for violent sex offenses against children, this proposed legislation will only increase capacity pressures a decade from now because LBB projections account for the fact that such offenders serve double-digit prison terms already.

The Council on State Governments Justice Center (CSG), under the direction of Dr. Tony Fabelo, presented two scenarios on January 29, 2007 that represent alternatives to TDCJ's plan to build one new medium and one new high-security prison.¹ In the course of the last six months, we have been privileged to work with Dr. Fabelo and these scenarios include many of the changes we have suggested in our reports. They reflect the extensive expertise of Dr. Fabelo and the reform-minded leadership of House Corrections Chairman Jerry Madden and Senate Criminal Justice Chairman John Whitmire, as well as the commendable efforts of the Sunset Advisory Commission.

The first CSG scenario relies entirely on parole to keep the prison population at current levels. This scenario envisions the Board of Pardons & Paroles (BPP) following its guidelines by increasing its cumulative parole release rate from 26 percent to 29 percent (actually below the 31 percent recommended by their own guidelines) and increasing discretionary mandatory release (DMS) rate from 52 percent to 57 percent. This scenario includes making a 1,000 combination SAFFP/DUI unit available by September 1, 2008, an item that was also requested by TDCJ in addition to the 4,000 hard beds. This would address

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the backlog of up to 1,900 inmates who have been paroled but are waiting to complete a six-month treatment program that is a condition of release set by BPP. This scenario also includes creating 150 new halfway house beds. This scenario would result in savings of \$99.8 million for the 2008-09 biennium and \$543 million by 2012.

The second CSG scenario proposes, in addition to the 1,000 bed SAFFP/DUI treatment unit and 150 halfway house beds, the following:

- 2,400 Intermediate Sanction Facility Beds (1,200 by Sept. 2008 and another 1,200 by Sept. 2009),
- 1,600 beds in probation residential treatment facilities,
- 200 existing beds converted to an In-Prison Therapeutic Community (IPTC), and
- Transfer to TDCJ of Texas Youth Commission San Saba and Marlin units, resulting in 1,200 new beds available by Sept. 2008.

This second scenario could cost an additional \$142.7 million in the 2008-09 biennium, but is projected to net a total savings of \$65.1 million by 2012. The savings for each of these scenarios does not include the avoided cost of new prisons.

The options highlighted on the following chart include these proposals, but also present additional alternatives and demonstrate how the parole capacity savings can be achieved through highly targeted changes affecting only the most low-risk nonviolent offenders. There is insufficient information at this time concerning the cost of converting the Youth Commission facilities, although it would likely be minimal since they were formerly adult facilities, and, more importantly, of the cost of redirecting some Youth Commission residents to other facilities, the latter of which is not reflected in the CSG scenario. Although we believe the capacity pressures in the adult system can be responsibly addressed without this conversion, we also think that the Youth Commission, which houses 64 percent nonviolent offenders and has a recidivism rate of 55 percent, could benefit from this opportunity to move some of their least serious offenders to therapeutic, community-based group homes.

In addition to the policy changes highlighted below that would all result in diversions from prison for nonviolent offenders, we also recommend that the Legislature lift arbitrary caps on capacity at privately operated prisons. Currently, Texas Government Code 495.001(b) arbitrarily limits the number of beds a state may lease in any one private

prison to 1,000. Private providers have offered additional beds at existing facilities if this cap was lifted, which would be far more cost effective than new construction. Government Code 495.007, which caps the total number of private prison beds at 4,580, should also be repealed. While the first priority during this session must be to bring an end to the excessive rate of incarcerating nonviolent offenders that created the current crowding crisis, competition among providers can minimize the new costs of any new capacity that is created.

Although Texas has the nation's second-highest incarceration rate, we have the 10th highest crime rate of any state. One factor is lack of police manpower. Among all states, Texas has the greatest percentage of law enforcement personnel working in corrections as opposed to in policing. New York City, the safest large city in the nation, has twice the police strength per capita as Dallas, which is the nation's most unsafe large city. Texas lawmakers must consider whether we can get more crime prevention bang for our next criminal justice dollar by spending that dollar on grants to support short, intensive treatment and community-oriented policing in high crime areas, as opposed to additional prisons.

With the surplus of space that could be created in existing lockups by enacting a full menu of reforms in parole, probation, and drug sentencing, lawmakers can select from among a number of options including:

- Reduce the criminal justice budget
- Strengthen the Crime Victims' Compensation Fund which is projected to be insolvent within several years
- Create additional treatment and diversion options such as drug courts and victim-offender mediation
- Provide grants to put more police on the street to do community-oriented policing in high-risk areas
- Accommodate any proposals enacted that lengthen sentences for violent offenders, including violent sex offenders.
- Convert a state jail to a medical parole facility for paraplegic and other infirm inmates using GPS for security, thereby allowing millions in health care costs to be shifted to the federal government
- Convert a state jail to a work restitution center for property offenders where such offenders would be paid for producing goods, and the money used to pay restitution to crime victims and child support. Texas prisoners owe \$2.5 billion in child support. ★

| Policy Change | Cost of Change | Diversions from Prison | Operational Costs Saved* | Net Savings** |
|---|---|--|---|----------------------|
| Redirect probation revocations for technical violations from prison to 90-day placements at 1) expanded transitional treatment centers (TTC) and intermediate sanctions facilities (ISF), 2) privately operated residential drug treatment community corrections centers, 3) county jails with cost paid by state | - \$40.8 million for new 1,400 bed transitional treatment center - \$32 million for new 1,200 bed intermediate sanctions facility - \$4.7 million for leasing county jail beds for 90 day placements | 6,244 | \$112.6 million | \$35.1 million |
| Above scenario but with parole reforms, allowing for conversion of 2,600 state jail beds to TTC and ISF beds | - \$7.6 million for treatment of 6,244 offenders (based on IPTC \$8 additional per day) in addition to current state jail costs | 6,244 | \$112.6 million | \$75.9 million |
| Add additional 1,600 probation residential treatment beds | \$71.7 million | 1,445 | \$78.2 million (assumes 3 year average prison sentence avoided based primarily on technical revocations averaging 2.5 years and some new drug offense revocations averaging 4.5 years) | \$6.5 million |
| Restore mandatory supervision for offenders convicted of nonviolent felony drug possession | - \$1.72 million in additional parole costs - \$5.8 million for 14.3 percent of new parolees who will be revoked to prison for average of 1.5 years ² | 1,500 | \$27.0 million | \$19.5 million |
| Institute mandatory supervision for remaining time of sentence after one year served for state jail felons convicted of drug possession | - \$696,749 additional parole costs for 606 drug possession offenders who would've served another year - \$732,082 in additional parole costs for 1,519 drug possession offenders who would've served average of another five months - \$781,265 for 14.3 percent of new parolees revoked to jail for an average additional six months - \$815,836 for 14.3 percent of new parolees revoked to jail for an average of an additional 2.5 months | 1,238 | - \$11.0 million for 606 drug possession offenders who would have served another year - \$11.4 million for 1,519 drug possession offenders who would have served an average of another five months | \$19.4 million |
| Institute mandatory supervision for remaining time of sentence after one year served for a state jail property offense, if that was the first property offense conviction and offender had no previous violent convictions. ³ | - \$225,000 in additional parole costs for 196 first-time property offenders who would have served another year - \$237,119 in additional parole costs for 492 first-time property offenders who would have served an average of another five months - \$252,686 for 14.3 percent of new parolees who will be revoked to jail for an average of an additional six months - \$264,289 for 14.3 percent of new parolees who will be revoked to jail for an average of an additional 2.5 months | 688 | - \$3.5 million for 196 first-time property offenders who would have served another year - \$3.7 million for 492 first-time property offenders who would have served an average of another five months | \$6.2 million |
| Change sentencing laws to require probation and treatment instead of incarceration for nonviolent drug possession, not including drug delivery offenders | - Assumes on average most offenders will need 90 days of inpatient and outpatient treatment while some will need more or less of each - \$80.4 million for inpatient treatment of 12,943 offenders for average of 90 days at \$69 per day Department of State Health Services reimbursement rate - \$14.0 million for outpatient treatment of 12,943 offenders at average cost of \$1,080 - \$5.7 million in state share of felony and misdemeanor probation costs - \$25.1 million in incarceration costs for the 761 probationers who will be revoked | 12,943 (assumes 80 percent of 16,179 new drug possession receives would be eligible for diversion) | \$466.8 million (assumes diversion from 2 year average time served based on 5.8 year sentence average for drug prisoners and .8 year sentence average for drug state jail felons). | \$341.6 million |
| Require parole board to meet its own guidelines for parole of offenders in levels 6 and 7, which are all nonviolent | - \$2.6 million in additional parole supervision costs - \$8.7 million for 14.3 percent of new parolees who will be revoked to prison for average of 1.5 years | 2,252 | \$39.0 million | \$27.7 million |
| Probation reform to shorten terms and encourage early termination of rehabilitated offenders who have met terms | None | 190 | \$3.28 million | \$3.3 million |

| <i>Policy Change</i> | <i>Cost of Change</i> | <i>Diversions from Prison</i> | <i>Operational Costs Saved*</i> | <i>Net Savings**</i> |
|---|--|-------------------------------|---|---|
| Subsidize placement in existing halfway houses for 180 days to clear out backlog of 600 paroled inmates who remain in prison due to lack of an address | \$3.4 million based on \$31.89 per day ⁴ halfway house cost | 600 | \$2.7 million based on eliminating assumed average of 90 extra days spent in prison after being paroled waiting for halfway house | \$3.4 million, because halfway house costs would have occurred later regardless |
| Contract for the construction of 600 new halfway house beds | \$13.14 million | 600 | \$2.7 million based on eliminating assumed average of 90 extra days spent in prison after being paroled waiting for halfway house | -\$10.4 million |
| Create 1,300-bed combined substance abuse felony punishment facility (SAFP) and DUI pre-parole facility that would provide six month treatment program for chemically dependent DUI inmates upon completion of which they would be immediately released | \$46 million | 1,310 | \$23.62 million | -\$22.38 million |
| Add 3,000 treatment slots for outpatient substance abuse counseling by licensed providers | \$3.24 million | 480 | \$8.7 million | \$5.46 million |
| Add In-Prison Therapeutic Community (IPTC) to 1,500 existing prison beds. | \$7.66 million | 330 | \$3.0 million | -\$4.66 million |

*Excludes savings in annualized construction costs from not building new prisons. It is estimated that each new prison bed costs \$94,000.

**The savings estimates for each change are calculated independently of the other proposed changes. Savings will be lower for some items if enacted in conjunction with other items. For example, increasing the parole rate of nonviolent drug offenders will result in fewer drug offenders still in prison who would then be placed on mandatory supervision, a date that occurs after the parole eligibility date.

¹ See <http://justicecenter.csg.org/downloads/TX1+JR+Scenarios.pdf>.

² Average parole revocation length is 2.5 years, but low-level offenders have shorter total sentences so we believe 1.5 years is a more accurate number of the amount of time they would be imprisoned for if their parole was revoked. It can be argued that these figures should also be lower because many of the offenders who would be paroled and revoked would have gotten out a year later on discretionary mandatory supervision and been revoked then anyway, resulting in the same revocation cost.

³ A study by the Criminal Justice Policy Council found that all but 14 percent of state jail offenders had a previous arrest. http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/statejail.pdf. This includes arrests for traffic and drug offenses, and not all arrests result in convictions. For these purposes, it is estimated that all but 25 percent had a previous conviction for a property or violent offense. This emphasizes the fact that incarceration for such offenders simply adds to the long-term costs because there is no evidence, except with the rare very old offender, that prison ages individuals out of their criminal proclivities.

⁴ http://www.caction.org/IssueAreas/faqs/PublicSafety_Aug2004.pdf.

Business Overcriminalization

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Texas lawmakers have created over 1,700 criminal offenses. This excludes criminal offenses created by state agencies through rulemaking and city ordinances. The traditional criminal offenses like murder, rape, and theft are found in the Penal Code, but the proliferation of criminal offenses now extends to nearly every other body of state law. Many of these statutes concern relatively innocuous individual and business activities that would be better addressed through incentives created by competitive markets or civil penalties. We recommend that the following reforms be considered:

- **Avoid creating new crimes.** Texas businesses should not be saddled with additional criminal offenses, such as a proposal last session to create a Texas version of the Sarbanes-Oxley federal accounting labyrinth that would have gone even further and applied to privately held companies. This federal scheme has cost the U.S. economy \$1.4 trillion. Competition-reducing proposals to license additional occupations such as laser hair removal, which often include criminal penalties, should be viewed with skepticism.
- **No jail time upon payment of fine for many regulatory misdemeanors.** Require deferred disposition for certain regulatory Class A and Class B misdemeanors involving ordinary business activities when there is no individual victim and no threat to public safety, such as professional licensing violations. Accordingly, jail time would only be an option if the fine is not paid.
- **Abolish or reduce the penalty for excessive criminal offenses, such as:**
 - Agriculture Code, Chapter 76: Class A misdemeanor (up to a year in jail) to use, handle, store, or dispose of a pesticide in a manner that injures vegetation, crops, wildlife, or pollinating insects and a third degree felony (up to 10 years in prison) for repeat offenses.
 - Water Code, Chapter 26: Second degree felony (up to 20 years in prison) for a person who “fails to remit any fees collected by any person required to hold a permit under this section,” even though the fees range from \$25 to \$50.
 - Government Code, Chapter 3101: Misdemeanor for thrashing a pecan without written permission from the property owner.
- Ensure that culpable mental state is required for conviction for regulatory crimes. State law should also prevent localities from creating strict criminal liability regulatory offenses.
- Amend the Code of Criminal Procedure to allow for citation without arrest for regulatory Class B misdemeanors and prohibit arrest for regulatory Class C misdemeanors. Section 14.06 of the Code of Criminal Procedure prohibits police from issuing citations for Class B misdemeanors. Arrest is permitted for all Class C misdemeanors except speeding and open container. Ordinary busi-

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ness people should not be arrested for minor infractions, such as not posting a required sign, that may be honest mistakes and pose no danger to the public. Law enforcement resources can be saved by simply issuing citations either requiring a court appearance or offering payment by mail or online. Arrests clog county jails and undermine workforce participation, since many applications ask whether the applicant has been arrested.

- Narrow blanket statutes such as animal identification law that allow agencies to engage in limitless, ad hoc criminal lawmaking by creating rules that are criminal offenses.
- Occupations Code, § 165.151: Class A misdemeanor (up to one year in jail) for violating “any

rule” of any professional licensing board. Civil penalties and revocation are usually sufficient.

- Agriculture Code, Chapter 1611: Class C misdemeanor for violation of any animal identification rule promulgated by the Animal Health Commission. Class B misdemeanor (up to 180 days in jail) for multiple convictions and each day a violation occurs (such as an animal not being tagged) is a separate offense. ★

¹ See <http://www.texaspolicy.com/pdf/2006-08-TXpenalcodecrimes.pdf>.

² See http://www.economist.com/business/displayStory.cfm?story_id=3984019.

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Probation Reform

Some 455,000 Texans, which amounts to one out of every twenty Texans, are on probation. Approximately 12,000 probationers are revoked to prison for technical violations, costing the state \$757 million in incarceration costs. Although three times as many Texans are on probation as in prison, ten state dollars are spent on prison for every dollar spent on probation.¹

The 79th Legislature offered the 121 local probation departments additional funds to hire new probation officers in return for implementing progressive sanctions, which reduce revocations by responding to each probation infraction with measured punishments, such as increased reporting requirements, a curfew, electronic monitoring, or a shock night in jail. There has been a 12 percent decrease in felony probation revocations attributable to the departments that accepted the new money and implemented progressive sanctions.² The following reforms should be considered:

- *Shorten probation terms.* Texas has the longest probation terms in the nation at up to 10 years. The maximum for less serious offenses should be reduced to five years and judges should review files on an annual basis to determine which probationers should be discharged early.
- *Revise probation funding formulas.* Currently, most state probation funding is not tied to the risk level of the department's caseload or the department's performance. Consequently, counties that rely on probation for offenders that need a high level of supervision are penalized

relative to counties that simply send these offenders to prison or jail. Other than the new money approved last session that was reserved for departments that utilize progressive sanctions, funding is also not tied to performance. Accountability can be enhanced by moving to funding formulas based on caseload risk level and performance measures such as recidivism and restitution collection.

- *Reroute probationers revoked for technical revocations to day treatment centers and short-term treatment facilities.* Some 40 percent of new prison intakes are revoked probationers and half of these did not commit a new crime, but rather a technical violation, which can be missing a meeting, failing to pay probation fees, or testing positive for drugs. Technical revocations result in prison sentences averaging 2.5 years. Probationers revoked for technical violations should be redirected from prisons to day treatment centers and intermediate sanction facilities for 90-day stays that, when necessary, include intensive treatment for substance abuse. This would save tens of millions and result in 6,244 diversions from prison, eliminating the need for new prisons.
- *Consolidate 2,000 offenders on both probation and parole.* End this duplication of caseworkers and resources by releasing the offender from whichever term is shorter.
- *Reduce paperwork and utilize neighborhood assignments.* The time probation

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officers spend on paperwork should be reduced by having offenders fill out forms electronically using a computer or kiosk. Probation officers should be assigned to neighborhoods with high concentrations of probationers and work with neighborhood associations, religious congregations, and other stakeholders to monitor their caseloads and connect probationers with resources that can assist them with personal transformation.

- *Initiate probation assessment earlier.* It takes months or even a year from arrest to sentencing—time that can be used by probation departments to assess individuals

likely to receive probation. This assessment can then be furnished to the judge, the prosecution, the defense, and the victim to determine the length and conditions of probation that would be most beneficial. Additionally, probation resources, such as drug treatment, can be deployed prior to sentencing so that probationers can immediately begin to confront and correct their problems. ★

¹ See <http://www.texaspolicy.com/pdf/2006-06-PP-probationreform-ml.pdf>.

² See <http://www.tdcj.state.tx.us/publications/cjad/publications-cjad-monitoring-diversion-pgms.htm>.

Reentry and Employment of Ex-Offenders

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Each year over 50,000 former prisoners re-enter Texas neighborhoods. Ex-offenders face substantial barriers in obtaining housing and employment, some of which are imposed by law or through the effects of the civil justice system. There are over 50 state statutes that restrict ex-offenders from entering various occupations. Many employers will not hire ex-offenders due to fear of a negligent hiring lawsuit should something go wrong. However, research shows that employment is highly correlated with reduced recidivism. We recommend that the following reforms be considered:

- *Revise the 168 state statutes and regulations that bar ex-offenders from numerous occupations from plumber to electrician to manicurist.* Statutes that should be amended to exclude at least nonviolent offenders include:
 - Section 76.108 of the Agriculture Code that disqualifies ex-offenders from obtaining a commercial license to apply pesticides.
 - Section 43.01 of the Human Resources Code that excludes ex-offenders from being an employee at a facility for the elderly or disabled.
 - Section 53.021 of the Occupations Code that requires revocation of licenses for all licensed occupations upon conviction of selected offenses.
 - Section 451.251 of the Occupations Code that authorizes revocation of athletic trainer license upon conviction of a certain misdemeanors and all felonies
- Section 548.507 of the Transportation Code that authorizes TXDOT to revoke certification of a vehicle inspector due to a criminal conviction.
- *Limit negligent hiring lawsuits based on the fact that employer hired an ex-offender.* Employers lose 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million. “The high probability of losing coupled with the magnitude of settlement awards suggest that fear or litigation may substantially deter employers from hiring applicants with criminal history records.” Employers should be immune from liability simply based on hiring nonviolent ex-offenders except for the following circumstances:
 - Sex offenders who will work in positions involving children or home visits, and
 - Employees who manage funds as a fiduciary with convictions for offenses related to misappropriation of funds.
- *Expand access to transitional treatment centers (TTCs) and aftercare programs.* Research suggests that without aftercare, in-prison treatment may have minimal effect. There is insufficient capacity at 90-day TTCs for felons released from

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Substance Abuse Felony Punishment (SAFP) lockups. Currently, state jail inmates do not receive drug treatment and are then released to the street without any aftercare. Addicts in state jail for drug possession should be eligible for early release to TTCs and other aftercare programs.

- *Restrict authority of cities to pass ordinances that ban parolees from housing and prevent churches and other*

non-profits from assisting ex-offenders. The Houston City Council is considering an ordinance to prohibit parolees from certain areas. The City of Sinton banned parolees from living within 1,000 feet of a church, which caused the church to close its rehabilitation program—this case is now before the Texas Supreme Court. ★

¹ Mary Connerley, Richard Avery, and Charles Bernardy, "Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies," *Public Personnel Management* Vol. 20, No. 2.

² Harry Holzer, "Employment Barriers Facing Ex-Offenders," Urban Institute (19 May 2003) http://www.urban.org/UploadedPDF/410855_holzer.pdf.

³ James D. Griffith, Matther L. Hiller, Kevin Knight, and D. Dwayne Simpson, "A Cost-Effectiveness Analysis of In-Prison Therapeutic Community Treatment and Risk Classification," *The Prison Journal* (September 1999) 352.

⁴ See http://www.boston.com/news/nation/articles/2006/12/26/texas_city_tests_religion_law.

Disciplinary Alternative Education Programs & Student Discipline

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In 2004-05, Texas public schools made 132,158 assignments to Disciplinary Alternative Education Programs (DAEPs). DAEPs are alternative settings for students who commit any violation of the district's code of conduct. Most are self-contained campuses while others are part of a regular school.

School districts operate DAEPs with only minimal oversight by the Texas Education Agency (TEA). For example, state law requires that DAEPs provide only two hours of instruction everyday and many DAEPs run half-day shifts, even though the average DAEP student is two to three grade levels behind.¹ Yet, districts pull down full state per pupil funding for DAEP students. Some 569 pre-kindergarten and at least 3,118 first-grade students have been referred to DAEPs. According to TEA, DAEPs have a drop-out rate that is more than five times higher than regular campuses. Some 80 percent of Texas prisoners are drop-outs. The following reforms should be considered:

- *Require that parent and student have the opportunity to enter into a behavior modification agreement prior to discretionary DAEP referral.* Such agreements should set forth clear expectations for improving the students' conduct, including specifying what steps the parent can take at home to improve the student's behavior at school.
- *Increase state standards for DAEPs.* DAEPs should be required to offer the

full seven hours of instruction that all other public schools provide. The state should also require that districts with DAEPs serving more than 1,000 students offer at their DAEPs the courses needed for high school graduation. Districts with more than 500 DAEP students should be required to use class assignments based on grade or academic ability. Additionally, the TEA should issue guidelines on DAEP course offering to ensure that the courses mirror the state-mandated curriculum.

- *Improve accountability and transparency of DAEPs.* The Kaufman Test of Educational Analysis (KTEA) is administered to students in long-term placements at Juvenile Justice Alternative Education Programs (JJAEPs) and should be required for long-term placements at DAEPs so that there is an intake and outtake measurement to determine if students are learning while at DAEPs. The Texas Education Agency (TEA) should be required to keep track of the results. Districts should also be required to report to the TEA, and the TEA compile data, regarding whether students' behavior and attendance improve after leaving a DAEP, and how many DAEP students end up at JJAEPs, juvenile detention, the Texas Youth Commission, and prison.
- *Redirect students who commit violent crimes off-campus to JJAEPs.* While most DAEP students have simply been disruptive in class, these students often sit

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next to DAEP students who have committed serious violent crimes, but are not at JJAEPs, which are more highly structured environments suitable for violent offenders. This is because the crime committed was off-campus and thus does not trigger expulsion under Education Code Chapter 37. In the 33 most populous counties with JJAEPs, students guilty of violent offenses off-campus should be sent there.

- *Require districts to provide transportation to DAEPs when necessary.* Parents face criminal truancy charges for not getting their child to a DAEP,

but state law does not require districts to provide transportation regardless of how far away the DAEP is from the parent's home, likely contributing to the high drop-out rate. For parents who do not have a car, live more than 10 miles from the DAEP, or have another hardship, districts should be required to offer transportation.²

- *Limit out-of-school suspensions.* State law should be changed so students may not be placed in out-of-school suspension for more than 10 cumulative school days. ★

¹ Marc Levin, "Schooling a New Class of Criminals," Texas Public Policy Foundation (March 2006) <http://www.texaspolicy.com/pdf/2006-03-PP-DAEP-ml.pdf>.

² In the 79th legislative session, Rep. Dora Olivo (D-Rosenberg) filed HB2127, which would have required transportation to DAEPs be provided for all students. The Legislative Budget Board determined that this would result in no additional cost to the state. See <http://www.capitol.state.tx.us/tlodocs/79R/fiscalnotes/html/HB02127I.htm>.

Overcriminalization of Students & Zero Tolerance

by **Marc Levin, Esq.**
Director, Center for Effective
Justice

State Rep. Harold Dutton recently defended an eight-year girl in Municipal Court who was issued a Class C misdemeanor citation for chewing gum in class. Students are being increasingly criminalized. From September 2004 through August 2005, there were 10,149 Education Code cases referred to Texas municipal courts. During the same period from 1998 to 1999, there were 6,888 such cases.

Over 10,000 Texas students are expelled from school every year. Currently, 33 Texas counties have Juvenile Justice Alternative Education Programs (JJAEPs), but in the remaining 221 counties, thousands of students are simply expelled to the street, endangering the public, halting their educational progress, and making it more likely that they will eventually end up incarcerated.

Under zero tolerance policies, students have been expelled for pocket knives in their car parked on school property, accidentally bumping into an alarm, and possessing prescription drugs and asthma inhalers that they were legitimately using but failed to register with school authorities. The Houston Press reported about a model student, Pavlos Karnezis, who was expelled and sent to a JJAEP boot camp for a small knife he used for a school-sponsored internship at Texas Instruments that was volunteered to a physics teacher when she asked for something to cut with. We recommend that the following reforms be considered:

- *Require that relevant factors be reviewed in expulsion decisions.* The 79th Legislature enacted HB 603, which allows schools to consider whether a student had a culpable mental state and a prior disciplinary history in issuing a mandatory expulsion. However, some districts, such as Fort Bend ISD in the Karnezis case, are still not considering these factors.
- *Make expulsion discretionary instead of mandatory for students caught with prescription drugs, asthma inhalers, and other substances.* Under Education Code Section 37.007 (a)(3), it is a mandatory expulsion offense if a student is caught with Xanax or other legitimately prescribed medications that they have not registered with school authorities, because this provision requires expulsion for any drug offense that is punishable as a felony, but such offenses that would otherwise be misdemeanors are punishable as felonies under Health & Safety Code Section 481.134 if they occur within 1,000 feet of a school. Schools should be given discretion in whether to expel such students, as they may achieve better outcomes through in-school discipline, suspension, and/or treatment.
- *End issuance of criminal citations in school for disciplinary infractions that do not involve conduct that is an element of a crime under state or local law.* HB 786 by Rep. Dutton would amend Section 37.102 of the Education Code to accomplish this.

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- *Reduce expulsions to the street.* Lower the population threshold for counties that must provide JJAEPs from 125,000 to 75,000. JJAEPs are overseen by the Juvenile Probation Commission and results show that students at JJAEPs make substantial progress in both academics and behavior modification. In communities where the population does not justify a JJAEP facility, evening classes at the school featuring a probation officer and teacher should be established.
- *Create restorative programs on campus that divert students from the courts.* Through teen court, victim-offender mediation, and peer conferencing, students who commit an infraction, but do not threaten teachers or other students, can, as a condition of not being issued a citation, removed to an alternative school, or expelled, agree to perform service projects, apologize to and compensate the victim such as by returning stolen items, and correct misbehavior in the future.
- *Allow parents to select binding arbitration in lieu of their right to appeal JJAEP placement in district court.* Most parents lack the funds to hire attorneys to battle school district lawyers. Arbitration would be quicker and consume fewer school and court resources. ★

¹ Marc Levin, "Schooling a New Class of Criminals," (March 2006) <http://www.texaspolicy.com/pdf/2006-03-PP-DAEP-ml.pdf>.

² See <http://www.houstonpress.com/Issues/2006-06-29/news/feature.html>.

³ Texas Juvenile Probation Commission 2004 Report, <http://www.tjpc.state.tx.us/publications/reports/RPTOTH200405.pdf>.

Parole Reform

by **Marc Levin, Esq.**
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Approximately 76,000 Texans are on parole or mandatory supervision. The statewide parole revocation rate is only 11 percent, which includes both new offenses and technical revocations.

In 2005, the Board of Pardons & Paroles (BPP) released 24 percent fewer Level 7 (lowest risk, non-violent) offenders and 10 percent fewer Level 6 (also low-risk, non-violent) offenders than the minimum levels dictated by its own guidelines. Following those guidelines would have resulted in a net gain of 2,252 available prison beds.¹ Parole costs \$3.15 a day compared with \$40.06 for prison.

We recommend that the following reforms be considered:

- *Prioritize release of lowest risk, nonviolent offenders.* This can be accomplished through strategies such as restoring mandatory supervision (automatic release after good time plus time served equals sentence) for nonviolent offenders in Levels 6 and 7, and granting parole to such offenders if the first board member reviewing the file votes yes. Such a very limited restoration of mandatory supervision would reduce prison capacity needs by 1,500 and save \$19.5 million.
- *Make state jail felons eligible for release after serving one year of their sentence.* Currently, state jail felons are ineligible for early release and must serve every day of their maximum two-year sentence, even though they are the lowest level state inmates, who committed either drug possession or a lower level property offense, such as writing a hot check. State jail felons serving time for drug possession and first-time property offenders should be placed on mandatory supervision after one year, freeing up 1,926 state jail beds and saving \$25.6 million.
- *Revise offense classifications used by the BPP, which are used along with individual characteristics in determining an offender's risk level.* Homicide and kidnapping are appropriately rated high severity, but so are some types of riot participation, carrying a concealed weapon in a prohibited place, and delivering less than 5 pounds of marijuana in a drug free zone.
- *Parole terminally ill and infirm inmates to nursing facility.* The medical parole program is so strict that less than six percent of eligible offenders are actually released. There are 200 crippled prisoners, mostly paraplegics and multiple-limb amputees. Moving them to parole nursing facilities with electronic monitoring would shift their enormous health care costs to the federal government. In one year, two elderly infirm prisoners cost the state \$1 million in health care.
- *Eliminate past drug or alcohol use as a reason for denying parole.* A substance abuse problem many years ago may not correlate with an offender's risk of recidivism today, particularly if appropriate treatment programs are available in prison or on parole.

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- *Expand capacity of treatment programs that are conditions of parole and halfway houses.* There are an average of 1,000 inmates who have been granted parole but, due to a long backlog, are waiting for a slot in a six month state residential treatment program that is a condition of their release. Another 600 inmates who have been paroled remain in prison because they have no address to which they can be released and a shortage of state-subsidized halfway house beds.
- *Modernize management of Driving Under the Influence (DUI) inmates.* There are 5,500 DUI prison inmates (only 700 of whom injured someone), but only 500 are receiving treatment for

their alcoholism. New technology allows many of these offenders to be safely supervised on parole at a much lower cost. The Secure Continuous Remote Alcohol Monitor (SCRAM) is a device worn by DUI offenders that detects alcohol in their sweat and immediately alerts their parole officer if they have violated the terms of their parole by consuming alcohol. By expanding in-prison treatment for alcoholism, outpatient alcoholism treatment for parolees, and utilizing SCRAM and other monitoring technologies, more DUI offenders who have been sufficiently punished can be paroled while protecting public safety. ★

¹ Marc Levin, "The Role of Parole in Solving the Texas Prison Crowding Crisis," Texas Public Policy Foundation (November 2006) <http://www.texaspolicy.com/pdf/2006-10-PP-parole-ml.pdf>.

Restitution for Crime Victims

by **Marc Levin, Esq.**
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Under common law, Texas courts have always had the power to order restitution to the victim as part of criminal sentencing and as a condition of probation. In 1989, Texas adopted a constitutional amendment now in Article I, Section 30 that included the right to restitution. In 2005, House Bill 1751 became law, strengthening Texas' restitution statutes by requiring that trial courts that decline to order restitution to provide a written explanation. Although the Texas restitution collection rate is not known, the national rate is between 20 and 30 percent, leaving most victims uncompensated.

The Crime Victims' Compensation Fund (CVCF) operated by the Attorney General offers violent crime victims reimbursement of up to \$50,000 in medical and other costs.¹ The CVCF is primarily filled with court costs along with restitution and fees paid by offenders, but also receives 14 percent of its budget in federal grants. The CVCF pays out \$40 million per year, but is projected to become insolvent between 2008 and 2011.²

Texas has 14 restitution centers with a total capacity of 737 beds. Judges may sentence offenders, who might otherwise go to prison, to probation and confinement in a restitution center. Residents work full time, perform community service restitution, and participate in educational and rehabilitative programs.

We recommend that the following reforms be considered:

- *Enact constitutional amendment to allow for garnishment of wages for restitution.* Currently, the Texas Constitution allows garnishment of wages only for child support. House Corrections Chairman Jerry Madden has agreed to sponsor this amendment.
- *Lower property exemption thresholds for restitution converted to civil judgments.* Victims can convert unpaid restitution into a civil judgment, but Texans can exempt up to \$30,000 in personal property if single and \$60,000 if married from civil judgments. These thresholds should be substantially lowered in cases involving restitution and state or local agencies should assist victims with obtaining liens against offenders' personal property.
- *Improve collection of restitution by probation departments.* Not all of the 121 local probation districts report to the state their rate of collection restitution. A portion of probation funding should be based on the performance of departments in collecting restitution, which would promote better reporting and more aggressive collection efforts.
- *Expand capacity of work restitution centers.* Victims can be better compensated and the state can save money by sentencing more nonviolent property offenders to work restitution centers as an alternative to prison. Restitution center residents paid more than \$4.5 million toward victim restitution, fines and fees and contributed another \$600,000 in

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community service restitution. Only 21 percent of residents discharged from restitution centers are subsequently rearrested, a recidivism rate substantially below that of prison discharges.

- *Prioritize restitution expenditures by the CVCF.* Part of the CVCF budget funds grants for victim-related non-profit organizations. While these grants may support worthwhile programs, if a shortfall requires prioritization, the Fund should focus on direct restitution payments.
- *Audit courts and local governments to ensure court fees are remitted to the CVCF.* Insolvency can be averted if court fee collection rates can be increased. Currently, it is estimated that only 50 percent of the allowable court fees are collected and forwarded to the CVCF. The Attorney General should initiate enforcement activity as authorized by Article 56.59 of the Code of Criminal Procedure. ★

¹ See http://www.oag.state.tx.us/AG_Publications/pdfs/2004cvc_annual.pdf.

² "Avoiding Insolvency of the Crime Victim Compensation Fund," Legislative Brief, Crime Victims' Institute at Sam Houston State University, 2005.