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LEGISLATIVE OVERVIEW

Lawmakers must continue criminal justice reforms

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By Marc Levin

There's plenty of good news on criminal justice in Texas, but now is not the time to stop the presses. Instead, Texas lawmakers must build on recent achievements that have enabled Texas to realize its lowest crime rate since 1973 and a double-digit percent drop in both the state's crime and incarceration rates since 2005. By better aligning policies with research, policymakers can continue the progress in driving down the crime rate without being too tough on taxpayers.

Building on recent successes requires understanding the factors that contributed to it. Two key budgetary strategies adopted in 2005 and 2007 enabled Texas to avoid building more than 17,000 new prison beds, which the Legislative Budget Board (LBB) had projected would be needed by 2012. Such beds would have cost \$2 billion to build and operate over five years.

The first strategy involved appropriating \$55 million in 2005 for probation departments that agreed to seek a 10 percent reduction in the number of probationers returned to prison, and that agreed to implement graduated sanctions. Such sanctions involve imposing issuing swift, sure and commensurate measures (more required meetings, extended probation terms, electronic monitoring and weekends in jail, for example) for rules violations such as missed appointments, rather than letting them pile up and then revoking that probationer to prison. Most of the funding went toward reducing caseloads, which facilitated closer supervision and the consistent application of both sanctions and incentives. Participating probation departments have reduced revocations, avoiding \$226 million in incarceration costs.

The second strategy was the 2007 appropriation of \$241 million for prison alternatives. This included more intermediate sanctions and substance abuse treatment beds, drug courts, and substance abuse and mental illness treatment slots. Capacity was also created to clear the backlog of parolees not being released because of waiting lists for in-prison treatment programs that must be completed as a condition of release, and for halfway houses (paroled inmates cannot be released without a valid home plan). The 2008-09 budget added about 7,000 beds, including treatment beds for diverting probationers and parolees from prison, halfway house beds and mental health pretrial diversion beds, as well as 3,000 outpatient drug treatment slots, all of which were maintained in subsequent budgets.

Given that nearly all felonies in Texas can result in either probation or prison, the recent drop in nonviolent offenders directly

sentenced to prison may reflect the confidence that judges, juries and prosecutors have in the effectiveness of probation. Also, probation and parole revocations together account for approximately half of the annual prison intakes, and both have declined over the last several years as supervision has been strengthened. Parole offices have expanded the use of graduated sanctions, implemented instant drug testing, and hired chaplains who connect willing parolees with local religious congregations. Thus, despite there being more parolees, the number of new crimes committed by parolees has declined 11.9 percent since 2007, contributing to a sharp reduction in parole revocations.

The first step in sustaining and continuing these gains is to ensure that the upcoming budget prioritizes proven community corrections approaches that hold offenders accountable and put them on the right track at a fraction of the cost of prison. Consider that in Texas probation costs less than \$3 a day, with half of that paid for by offender fees, while prison is more than \$50 per day. Even if a more intensive community corrections approach like a problem-solving court or GPS is needed to safely supervise certain offenders, the cost is still a fifth of prison. Fortunately, the Texas prison population has declined from its high of nearly 156,000 just a few years ago to 151,191 as of the end of the 2012, some 4,384 fewer beds than the system's operating capacity. Accordingly, legislators should budget for closing additional prisons and reinvest some of the savings in the proven approaches that have contributed to this surplus of beds and simultaneous drop in crime.

Lawmakers can do even more in the next budget by implementing Senate Bill 1055, which was unanimously enacted last session. This measure authorizes counties to voluntarily enter into an agreement with the state to reduce prison commitments of low-level offenders whereby the community receives a share of the state's savings on lower prison costs, partly based on the county's performance in reducing probationers' recidivism rate and increasing the share of probationers who are current on their victim restitution. The next budget should implement SB 1055 by reallocating to participating counties some of the savings from prison closures achieved through the implementation of the local commitment reduction plans described in the legislation. In 2010 — the first fiscal year of Texas' Juvenile Commitment Reduction Program — juvenile commitments to state lockups fell 36 percent, saving taxpayers at least \$114 million, while juvenile crime continued to decline. Senate Bill 1055 provides that counties can use the share of the state's savings that they receive for community-based programs, which include problem-solving courts, specialized probation caseloads, electronic monitoring and short-term use of the county jail to promote compliance.

Legislators should also establish a presumption of probation with mandatory treatment for first-time drug offenders who possessed less than 4 grams — about one-seventh of an ounce — of the outlawed substance. One version of this is Senate Bill 90. Those convicted of drug delivery are excluded, as are drug possession offenders who had a previous conviction for any other offense beyond a traffic violation.

The judge would determine whether the offender would go to a residential facility, which could be the state's six month secure Substance Abuse Felony Punishment Facilities (SAFPFs), or day treatment, or a combination of both. If "three hots and a cot" is tough on crime, is it not tough on crime to force a drug addict to be in a program where he is tested regularly and must attend treatment and cover the cost to the extent possible, hold a job, pay child support and face jail time for repeated failures to comply?

Under this proposal, such an offender could still be initially imprisoned upon a documented judicial finding of danger to the community. Moreover, those who fail to comply face revocation to prison for up to 10 years. The LBB estimated this approach would save \$500 million over five years, even considering the additional probation and drug treatment costs incurred.

Policymakers must also overhaul the state jail system, which houses those with offenses such as possessing less than a gram of drugs, writing hot checks and prostitution. It is plagued by a 60 percent recidivism rate, significantly higher than the recidivism rate of prisons that hold more serious offenders. To achieve better results, the law should be amended to return to the original model where state jail time must be a condition of probation. Accordingly, instead of being discharged without supervision after serving an average of eight months, state jail inmates would go on probation, where they would report to an officer, take drug tests and be required to attend mental health and substance abuse treatment and hold a job, while also being eligible for resources that promote reintegration into society.

Another priority is legislation allowing prosecutors to refer certain cases to victim-offender conferencing. Consider if an 8-year-old in your neighborhood stole something out of your garage. Rather than go through months of a protracted legal process, you as the victim could choose this restorative approach which typically involves the offender taking responsibility for his conduct, making an apology, providing monetary and/or service restitution and performing community service. The defendant must also choose conferencing, as he waives his right to trial and appeal. Some 89 percent agreements are met, but if not, the case is prosecuted. Research shows this approach increases restitution collections, enhances victim satisfaction and reduces recidivism, as offenders come to understand they did not just violate the words of a statute but hurt other individuals. It also conserves judicial, prosecutorial and indigent defense resources.

Furthermore, lawmakers must continue recent progress in driving down both the juvenile crime rate and the number of youths in state lockups. This requires prioritizing funding for the Commitment Reduction Program through which counties have implemented evidence-based approaches that involve juvenile probation officers and treatment personnel coming into the home to strengthen the family's capacity for providing discipline.

Furthermore, it's time to overhaul ineffective zero-tolerance policies that unnecessarily remove students from school and funnel many of them into the juvenile and criminal justice systems. Each year, hundreds of thousands of students are issued criminal citations and sent to municipal courts for such routine misbehavior as making "unreasonable noise," even though such citations don't improve behavior. Further, under zero-tolerance policies, a principal has no choice but to suspend a high school student with an empty beer can in his car within 300 feet of the campus. Policymakers must administer a dose of common sense and local discretion to remedy these flawed policies.

Additionally, let's rein in the number and scope of the state's 1,700 criminal offenses, and avoid adding yet more superfluous crimes. Some 1,500 of these offenses are outside of the Penal Code where the traditional crimes are found. Most of these relate to ordinary business activities. For example, Texas has 11 felonies concerning the harvesting of oysters. In a January report, the LBB recommended that the Legislature create a sentencing commission that would regularly review the voluminous criminal laws to identify those that are unnecessary and ensure that penalties for those that are needed are commensurate with the relative gravity of the conduct. The recommendations of the commission, which would include key stakeholders such as judges, prosecutors, criminal defense lawyers and victims' advocates, would then go to the Legislature. Unfortunately, without such a mechanism to regularly review a body of criminal laws too vast and complex to be comprehensively examined during the fast-moving legislative session, we will be stuck on auto-pilot in the grow-government mode as the Legislature adds an average of 39 new offenses each session and dozens more penalty enhancements without repealing or reining in any laws.

We also recommend adoption of the rule of lenity. This approach to interpreting criminal laws specifies that, if it is unclear whether the conduct at issue is clearly prohibited, the benefit of the doubt goes to the defendant. This concept is consistent with the conservative emphasis on strictly interpreting the law as well as the traditional formulation that a crime consists of a guilty mind combined with a bad act. To have a guilty mind, or mens rea, a person must have had fair warning that their conduct was criminal. If a statute is unclear, it by definition does not provide that fair warning.

These recommendations flow from the fundamental principles of limited government and personal responsibility and the need for policymakers to apply the same scrutiny to criminal laws and spending on corrections as other policy areas. Public safety is one of the few core roles of government, but let's distinguish between those offenders we are afraid of and those we are simply mad at. Texas has made remarkable progress over the last several years in reducing both crime and incarceration, and there is plenty more to be done this session to take a few more bites out of crime and a few less dollars out of taxpayers.

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