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A VIEW FROM THE STATES: EVIDENCE-BASED PUBLIC SAFETY LEGISLATION

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I. INTRODUCTION

Over the last three decades, incarceration became the primary weapon to combat crime. A wave of “tough-on-crime” policies expanded offenses punishable by incarceration and lengthened custodial sentences. These policies included the introduction of mandatory minimum sentencing regimes, penalty enhancements such as three-strikes provisions, and truth-in-sentencing policies requiring offenders to serve 85% of their sentences behind bars. All were designed to keep more criminal offenders in prison and off the street for longer periods of time. The unsurprising result was the exponential growth of the prison population nationwide: between 1972 and 2010, the state prison population increased 705%, from 174,379 state inmates in 1972 to 1,404,053 inmates as of January 1, 2010.¹ By 2009, it was calculated that more than one in every 100 Americans were behind bars.²

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¹ PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (Apr. 2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf.

² PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 3 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

The fiscal crisis of the last several years, however, has placed America's reliance on prisons under intense scrutiny: the rapid growth of prison populations has been accompanied by a corresponding explosion in state spending on corrections. More prisoners under state jurisdiction, serving longer sentences, has meant higher costs for basic necessities, such as food, inmate healthcare, and prison programming. It has led to the costly construction of more prisons nationwide and, in turn, to expanded expenditures on staffing, maintenance, and operations. Between 1985 and 2009, annual correctional expenditures from state general funds increased 700%, from \$6.7 billion to more than \$47 billion. Currently, state correctional agency costs nationwide are estimated at \$52 billion annually.³ A recent Vera Institute of Justice study found that the true cost of prisons is much higher, and includes costs outside of corrections budgets such as employee benefits and taxes, pensions and health care contributions, capital costs, and inmate services such as hospital care, education, and training.⁴ The full price of prisons was 13.9% higher than correctional agency expenditures alone.⁵

Spurred by ongoing budget deficits, states are seeking ways to manage correctional costs better. In the last few years, states have implemented short-term measures that have centered on operational efficiencies, including staff reductions, wage or hiring freezes, program cuts, consolidation of facilities and operations, or halting planned facility construction or program expansion.⁶ These cuts only go so far. In order to reduce costs significantly, states have begun to reexamine and reevaluate their sentencing and correctional policies as a way to decrease prison costs *over the long term*.⁷ With fewer dollars available, states are challenged to maintain public safety while coping with smaller budgets.

³ PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 1 (2011), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf.

⁴ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS 4 (Jan. 2012), available at <http://www.vera.org/download?file=3495/the-price-of-prisons-updated.pdf>.

⁵ *Id.* at 6.

⁶ CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 4-6 (July 2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/Vera_state_budgets.pdf; VERA INST. OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING A NEW COURSE 10-14 (Oct. 2010), available at <http://www.vera.org/download?file=3072/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf>.

⁷ ADRIENNE AUSTIN, VERA INST. OF JUSTICE, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001-2010, at 4 (Sept. 2010), available at <http://www.vera.org/download?file=3060/Sentencing-policy-trends-v1alt-v4.pdf>; LAUREN-BROOKE EISEN & JULIENE JAMES, VERA INST. OF JUSTICE, REALLOCATING JUSTICE

In this context, overcriminalization can be understood as the incarceration of more people than (1) public safety requires or (2) states can afford. In times of fiscal emergency, legislators must grapple with overcriminalization by reexamining the criminal justice system as a whole.⁸ The states profiled in this Article have acted to reduce their prison populations and costs, while at the same time investing in cost-effective strategies to enhance public safety. Seen in this light, overcriminalization ought to be a subject of great concern to policymakers and the people they represent.

This Article examines the challenges that states have faced and the solutions that many have adopted to trim budgets without endangering public safety. Part II describes the research and data analysis that informs policy and practice reforms. Next, Part III discusses conditions necessary for comprehensive reform. Part IV then presents recent legislative efforts that focus on the use of incarceration while investing in community-based strategies to reduce recidivism and victimization. Part V lays out principles for effective implementation. Finally, Part VI examines whether states have succeeded in reducing prison populations and costs and expanding community corrections; it summarizes a recent study by the Vera Institute of Justice, observing that the potential gains of increasing reliance on community corrections may be threatened by the decreased budgets in the wake of the fiscal crisis.

II. BACKGROUND: DATA- AND RESEARCH-DRIVEN POLICIES

The sustained economic downturn of the past four years has forced many state and local governments to examine their budgets to identify and quantify the cost effectiveness of specific expenditures. Corrections agencies have not been spared this scrutiny. Seeking better outcomes for their communities—less crime, lower rates of recidivism, and fewer victims—states have accelerated efforts at broad-scale sentencing and corrections reforms aimed at overhauling expensive, ineffective sanctioning

RESOURCES: A REVIEW OF 2011 STATE SENTENCING TRENDS 5 (Mar. 2012), *available at* <http://www.vera.org/download?file=3509/reallocating-justice-resources.pdf>; RAM SUBRAMANIAN & REBECCA TUBLITZ, VERA INST. OF JUSTICE, REALIGNING JUSTICE RESOURCES: A REVIEW OF POPULATION AND SPENDING SHIFTS IN PRISON AND COMMUNITY CORRECTIONS 4 (Sept. 2012), *available at* <http://www.vera.org/files/Full%20Report.pdf>.

⁸ Cf. Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1312 (2010) (urging state legislators to “reexamine the purpose and value of the capital punishment system” in light of its massive cost). Illinois has since abolished its death penalty.

policies and incorporating data-driven policies and programs into agency operations. This Part explains the principles that underlie these efforts.

Using research to guide criminal justice decisionmaking is not a new development in correctional practice. In the 1960s, New York City instituted an early version of an actuarial risk-assessment process to make pretrial release decisions.⁹ A decade later, parole boards across the country began to use simple risk assessments to aid their release decisions.¹⁰ Similarly, the Wisconsin risk-assessment system was widely adopted in the 1980s for probation and parole supervision,¹¹ while evaluations of the boot-camp programs prevalent in the late 1980s and early 1990s demonstrated their ineffectiveness, leading many states to abandon the model.¹² In the decades since, many criminal justice agencies and administrators have used well-structured research and evidence to make decisions that improve community safety. What has changed is that states are now using research to drive comprehensive legislative change.

Decades of criminal justice research have identified policies and programs that are effective at reducing recidivism.¹³ Collectively, this research has led to the use of what are widely known as evidence-based practices. Some of the most important findings are summarized as the principles of risk, need, and responsivity, used to determine, respectively, who should be treated, what should be treated, and how to intervene. These principles helped shape specific practices such as actuarial risk assessment,

⁹ CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 18 (Mar. 2011), available at [http://www.pretrial.org/Featured%20Resources%20Documents/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20\(2011\).pdf](http://www.pretrial.org/Featured%20Resources%20Documents/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20(2011).pdf).

¹⁰ Joshua Stengel, *Parole's Function, Purpose, and Role in the Criminal Justice System*, U.S. DEPARTMENT OF JUST. (Aug. 30, 2010, 4:38 PM), <http://community.nicic.gov/blogs/parole/archive/2010/08/30/parole-s-function-purpose-and-role-in-the-criminal-justice-system.aspx>.

¹¹ Howard Henderson & Holly Miller, *The (Twice) Failure of the Wisconsin Risk Need Assessment in a Sample of Probationers*, CRIM. JUST. POL'Y REV., Sept. 22, 2011, at 1–2, available at <http://cjp.sagepub.com/content/early/2011/09/09/0887403411422410>; Patricia Van Voorhis & Kelly Brown, *Risk Classification in the 1990s*, at 10 (1996) (unpublished draft manuscript), available at <http://static.nicic.gov/Library/013243.pdf>.

¹² JAMES AUSTIN ET AL., MULTI-SITE EVALUATION OF BOOT CAMP PROGRAMS, FINAL REPORT 2 (Jan. 2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/192011.pdf>; David B. Wilson, Doris L. MacKenzie & Fawn Ngo Mitchell, *Effects of Correctional Boot Camps on Offending*, CAMPBELL SYSTEMATIC REV., 2003:1 (last updated Feb. 12, 2008) at 18–20, available at <http://www.campbellcollaboration.org/lib/download/3/>.

¹³ ROGER PRZYBYLSKI, RKC GROUP, WHAT WORKS: EFFECTIVE RECIDIVISM REDUCTION AND RISK-FOCUSED PREVENTION PROGRAMS 11–12 (Feb. 2008), available at http://dcj.state.co.us/ors/pdf/docs/ww08_022808.pdf.

intrinsic motivation enhancement, and the application of targeted interventions.

The risk principle states that, for the greatest impact on recidivism, the majority of services and interventions should be directed toward higher risk individuals. “High-risk” refers to those people with a higher probability of reoffending; “low-risk” people are those with prosocial attributes and a low chance of reoffending. Research demonstrates that placing low-risk people in more intensive programs can often increase their failure rates, resulting in recidivism. This is because placing those who are low-risk in intensive programming or supervision can interrupt prosocial networks (school, employment, or family) and may increase exposure to and influence of higher risk individuals.¹⁴

The need principle holds that correctional treatment should focus on criminogenic factors—those needs that are directly linked to crime-producing behavior.¹⁵ Extensive research on recidivism among the general criminal population has identified a set of factors that are most associated with criminal behavior.¹⁶ These “central eight” factors are antisocial attitudes, antisocial associates, antisocial personalities, criminal history, substance abuse and alcohol problems, family characteristics, education and employment, and a lack of prosocial leisure or recreation.¹⁷

The responsivity principle directs that treatment programs should be delivered in a manner consistent with the ability and learning style of the client. Treatment should be tailored to each offender’s abilities, and

¹⁴ CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, UNDERSTANDING THE RISK PRINCIPLE: HOW AND WHY CORRECTIONAL INTERVENTIONS CAN HARM LOW-RISK OFFENDERS 7 (2004), available at <http://www.yourhonor.com/dwi/sentencing/RiskPrinciple.pdf>.

¹⁵ D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL’Y & L. 39, 44–45 (2010).

¹⁶ Although correctional agencies have been using this knowledge to guide their supervision strategies, it has not been as common for sentencing decisions to take these factors into account. PAMELA M. CASEY, ROGER K. WARREN & JENNIFER K. ELEK, NAT’L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 1–3 (2011), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx>. To be sure, sentencing has purposes other than risk reduction, including incapacitation and restitution, to name two. *Id.* at 1. However, this means that a sentence may not necessarily correspond with a person’s risk and need level.

¹⁷ See generally Andrews & Bonta, *supra* note 15 (summarizing research on criminogenic need factors). The first four factors listed are the “top four” factors most associated with criminal activity. *Id.* at 46. Criminal history is a static factor, but the remaining seven needs listed are dynamic, meaning they can be changed through appropriate interventions like cognitive behavioral programming. *Id.*

interventions should be based on behavioral strategies, including cognitive behavioral techniques, skill building, or social learning.

Efforts in recent years to develop policy based on data and research have inspired the concept of “justice reinvestment”—using data analysis to safely reduce prison populations and redirecting the dollars saved to strategies proven to decrease crime. Justice reinvestment has gained widespread acceptance as a promising approach to promoting public safety while conserving public dollars.¹⁸ Since its introduction in Connecticut in 2003, the promise of justice reinvestment has motivated many states to undertake expansive reforms.¹⁹ In 2011, Arkansas, Kentucky, Ohio, Oklahoma, North Carolina, and Vermont passed sweeping legislation aimed at rebalancing the use of incarceration—reserving prison for serious offenders—and making community corrections more effective by mandating the use of evidence-based practices. They joined other states that have gone through similar processes, including Connecticut in 2003; Colorado, Kansas, Rhode Island, and Texas in 2007; Oregon in 2009; and South Carolina in 2010.²⁰ Delaware, Florida, Idaho, Illinois, Louisiana, Maryland, Nebraska, and North Dakota have also passed bills in recent years that modify sentencing laws or support evidence-based practices in the criminal justice system.²¹

Early in the current recession, many states focused only on achieving quick cost savings, but state lawmakers are now considering multiple, related policy changes that will have long-term fiscal impacts while directing the use of savings toward specific crime-reduction strategies. These states are aiming to overhaul expensive, ineffective sentencing policies and incorporate evidence-based policies and programs into their criminal justice systems to reach their goals of decreasing prison populations, achieving better outcomes for communities, and spending less money on corrections.²² The result is legislation that aims to make more targeted use of incarceration and to reinvest the cost savings into

¹⁸ For a historical background on justice reinvestment, see Todd R. Clear, *A Private-Sector, Incentives-Based Model for Justice Reinvestment*, 10 *CRIMINOLOGY & PUB. POL'Y* 585, 585–91 (2011). Clear writes that justice reinvestment is not easily defined. This report focuses on justice reinvestment policies at the state level, although it should be noted that local jurisdictions are also using similar strategies.

¹⁹ See *Work in the States*, COUNCIL OF STATE GOV'TS JUSTICE CTR., <http://www.justicereinvestment.org/states> (last visited Feb. 27, 2012) for a summary of state reform.

²⁰ *Id.*

²¹ See AUSTIN, *supra* note 7, at 5, 6, 9, 10, 12, 13, 16; see also H.R. 225, 61st Leg., 1st Reg. Sess. (Idaho 2011); S. 801, 2011 Leg., 428th Sess. (Md. 2011); Leg. 191, 102nd Leg., 1st Sess. (Neb. 2011); S. 2141, 62nd Leg. Assemb., Reg. Sess. (N.D. 2011).

²² See *discussion* Parts III & IV.

community programs geared toward reducing recidivism and victimization. In general, the efforts share the goals of reducing the prison population while increasing the use of community corrections.

III. LAYING THE GROUNDWORK

Comprehensive efforts to change a state's approach to public safety rely on legislation that tackles a broad range of issues that impact prison and community supervision populations. This Part discusses conditions necessary for successful legislative change.

A. STAKEHOLDER INVOLVEMENT

Vera staff, who provide technical assistance to states, have found that an important step in moving toward comprehensive legislative and policy reform is to create a high-level policy body whose members represent the opinions and concerns of major stakeholders. Without participation of key stakeholders, the effort risks an analysis that is not interpreted accurately, policy options that are not comprehensive enough to make a difference or that may fail because they do not account for relevant information, and opposition late in the game from those who were not included in the process.

This group should be empowered to review data analysis and vet policy proposals. To ensure that proposed reforms account for diverse and relevant perspectives, the group should include bipartisan representation from all branches of government. The key participants will vary based on the jurisdiction, but to illustrate, such policy groups usually include legislators, executive staff from relevant agencies, judges, defense attorneys, prosecutors, and law enforcement. Legislators can share their constituents' concerns and sponsor bills, facilitating passage of legislation that is responsive to the electorate. Key executive agency staff, who know what the system's needs and challenges are, can bring a real-world perspective to implementing and measuring the effects of reforms, which helps to craft smart policies from the outset. Judges, defense attorneys, prosecutors, and law enforcement make front-end decisions that could support or undermine the impact of the new laws and policies.

In addition to a strong policy group, the reform effort needs multiple champions who are influential in different communities. Unsuccessful and successful efforts alike prove the importance of multiple advocates, rather than the voice of a visionary or vanguard. Both governmental and nongovernmental stakeholders should be included to inform and interpret

data analysis and subsequent policy development.²³ During the process, it is advisable to reach out to secure the views and suggestions of groups with a stake in these issues. Even after taking these steps, however, legislation can still fail because of disagreements among stakeholders.

As one of several examples, in 2011, Kentucky's legislature passed sweeping reform legislation: the Public Safety and Offender Accountability Act (House Bill 463).²⁴ The vote on the bill demonstrated its strong bipartisan support, passing the Senate unanimously and the House by a vote of ninety-six to one. The legislation, which aimed to ensure adequate prison space for violent and career criminals and to stop the revolving door for lower risk, nonviolent offenders, was drafted by the Task Force on the Penal Code and Controlled Substances Act. The task force had only seven members, allowing for an intimate exchange of ideas. The group consisted of two legislators (one Democrat and one Republican), a former prosecutor, a former defense lawyer, the secretary of the Justice and Public Safety Cabinet (JPSC), a retired judge, and the state chief justice. Particularly remarkable is that Kentucky legislators were able to pass the bill in a short thirty-day session.²⁵

As JPSC Secretary J. Michael Brown explained:

But just as noteworthy as the bill itself is the manner in which it became law. House Bill 463 is the product of recommendations from an unprecedented bipartisan, inter-branch task force that included legislators, the Chief Justice, officials from the Justice Cabinet, prosecutors and local officials. Anytime you can bring together that diverse of a group and reach near unanimous support from the legislature, you know you've created something significant.²⁶

²³ Offenders have a broad range of needs, and corrections agencies cannot by themselves provide for all of them. Collaborating with community organizations and agencies from other government sectors—housing, health, mental health, education, and labor—can help make the best use of available resources. Ideally, consulting with community organizations to formulate policy should be the beginning of coordination efforts. As states are implementing legislation, corrections officials should convene treatment and service providers, health and housing agencies, and others who can partner with corrections agencies. Such collaborations can help corrections agencies to meet their legislative mandates and deliver better outcomes for the people they supervise. To implement new policies, government and community-based providers may need support and training on data collection, performance measurement, and evidence-based practices.

²⁴ H.R. 463, 2011 Leg., Reg. Sess. (Ky. 2011).

²⁵ The Kentucky General Assembly convenes its regular session on the first Tuesday after the first Monday in January. The session lasts for sixty days in even-numbered years and for thirty days in odd-numbered years. KENTUCKY LEGISLATURE, <http://www.lrc.ky.gov/> (last visited Mar. 28, 2012).

²⁶ Email from Secretary Brown's office to Lauren-Brooke Eisen (Sept. 21, 2011, 10:53 AM).

Kentucky's inclusive process resulted in a consensus report with data analysis endorsed by the working group, policy options that were comprehensive and forward-looking, and near-unanimous support from the legislature.

B. POLITICAL LEADERSHIP

Other recent examples, such as reforms in Vermont and North Carolina, reflect the forces driving lawmakers to take up systemic policy change. These forces include the ongoing fiscal crisis; changes in political leadership; recent success in smaller, similar criminal justice reforms; and specific corrections or criminal justice issues such as overcrowding or a lapse of time since the last systematic review.

In Vermont, the most recent wave of changes builds on reforms put in place in previous years. After a near doubling of the state's prison population between 1996 and 2006, Vermont's 2008 justice reinvestment legislation slowed growth, and, over the past year, the population declined.²⁷ The policies established in response to the 2008 legislation allowed the state to close and reorganize several prisons, to pilot screening and assessment processes to identify appropriate candidates for treatment and diversion programs, to expand drug treatment programs, and to increase the capacity of transitional housing and job training programs to reduce barriers to reentry. This reorganization set the stage for more ambitious reform in 2011's War on Recidivism Act.²⁸ The law continues efforts to reform the state's correctional policies and provides the Vermont Department of Corrections with some flexibility in how it deals with nonviolent offenders, especially people convicted of low-level drug-related crimes. Projections estimate that the new legislation will save the state \$1.6 million annually.²⁹

Although stability and continuity of political leadership can support broad-scale reform, in some cases changes in the political landscape can spur the overhaul of a criminal justice system. Despite a historic change in North Carolina's legislative leadership—with Republicans taking hold of the House and Senate in 2010 after continuous Democratic control since the late 1800s—the state was able to reach bipartisan interbranch support for new legislation. Governor Bev Perdue signed the Justice Reinvestment Act in June of 2011.³⁰

²⁷ S. 108, 2011–2012 Leg., Reg. Sess. (Vt. 2011).

²⁸ *Id.*

²⁹ Ken Picard, *Is It Cheaper to House Vermont Prisoners in or out of State? It Depends*, SEVEN DAYS (April 20, 2011), <http://7dvt.com/2011vermont-prisons>.

³⁰ H.R. 642, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

State Representative David Guice, a retired probation officer and sponsor of the bill, described the law as “a significant departure from business as usual,” and explained:

In the last 10 years North Carolina’s corrections spending increased 68 percent to \$1.51 billion. Our prisons are over capacity and the prison population is projected to continue growing by at least 10 percent in the next decade. Such growth could cost upwards of \$267 million in construction and operating expenses, all of which are avoided under this legislation.³¹

Growth in prison spending and projected population increases united leaders from both parties to make significant changes to the community supervision and treatment provision. This new way of doing business is grounded in research showing what is effective, but was largely driven by a recognition that the cost of doing nothing was too great to bear.

Whether inspired by past successes or energized by political change, the legislation passed recently shares a data-intensive approach, described in more detail below.

C. OUTSIDE ASSISTANCE

Although states may have the will and internal expertise to reform policy and legislation, an infusion of outside resources, perspectives, and experience can provide new energy and stimulate interest among policymakers and move the process of change more quickly. Few states have the capacity to perform the expedited and intensive data analysis needed to inform timely policy debates and decisions. An external research organization can dive into that work without ignoring other demands. Similarly, outside facilitators can manage focused, reasoned discussions of values, data interpretation, and the use of resources among stakeholders—debates that might be challenging for someone who has established relationships with the participants.

Because the advancement of justice reinvestment has been a policy goal of both the federal government and private funders, several states’ efforts have benefited from outside assistance and expertise. The U.S. Department of Justice’s Bureau of Justice Assistance (BJA) and the Pew Center on the States’ Public Safety Performance Project (Pew) have offered support jointly and separately to many states in recent years. In 2011, for example, BJA and Pew funded justice reinvestment efforts in Alabama, Arkansas, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Ohio, South Carolina, and Vermont. Funding for such work is often directed at research and technical assistance

³¹ Email from State Representative David Guice to Lauren-Brooke Eisen (Sept. 21, 2011, 11:46 PM).

organizations as well as direct grants to states to support justice reinvestment strategies. External researchers and consultants bring their experience to bear on an examination of statewide criminal justice structures, equipping stakeholders with the information they need to make informed policy decisions.

D. COMPREHENSIVE ANALYSIS

State leaders who want to spend fewer corrections dollars to improve public safety should begin with a thorough review of existing policies and their impact on corrections populations. The policy group needs access to solid, reliable data and analysis that can identify the laws and policies driving the prison population. The analysis should examine the state's prison population, the kinds of charges on which people are being held, their average length of stay by charge, and demographics. These should be compared to similar data over the past several years to indicate trends over time, if any. These trends vary according to the state, but some states have found that revocations from probation or parole for technical violations of supervision conditions drive their prison populations.³² Others find that low-level property or drug offenders constitute a large portion of admissions to prison.³³ These state-specific findings guide what policies will help address the prison-population drivers.³⁴

It is also useful to forecast the population and future cost impacts of maintaining the status quo, and to project how different policy options will affect the future population and costs. Such estimates are difficult to make, but are essential to the policy discussion. The foundation of such calculations is a series of assumptions about factors such as the state's crime rate, population, the proportion of prison sentences as compared with probation sentences over time, and the proportion of the population that will be in the high-crime age group (i.e., the age group most likely to engage in

³² E.g., *Kansas: Implementing the Strategy*, JUST. REINVESTMENT, <http://www.justicereinvestment.org/states/kansas/how-ks/> (last visited Feb. 16, 2012); *North Carolina: Implementing the Strategy*, JUST. REINVESTMENT, http://www.justicereinvestment.org/states/north_carolina/how-nc/ (last visited Feb. 16, 2012).

³³ E.g., *Ohio: Implementing the Strategy*, JUST. REINVESTMENT, <http://www.justicereinvestment.org/states/ohio/how-oh/> (last visited Feb. 16, 2012).

³⁴ For supervision revocations, examples of alternative policy options include implementing swift and certain sanctions and increasing the availability and use of responses to violations—sometimes through implementation of a matrix or grid to guide probation and parole officer decisionmaking—among other supervision strategies. When states find that low-level drug or property offenders are populating their prisons, one response is to amend sentencing laws to permit judges to sentence individuals convicted of these crimes to alternatives to incarceration, such as probation or a drug-court program.

criminal behavior) going forward.³⁵ These assumptions are subject to change for a variety of unforeseen reasons. As policies are reworked or other factors change, states must adjust the estimates and projections accordingly.

Projections, however, have risks: they can provide fodder for critics of these policies when future variances from the projections are used to call the legislation ineffective. Dr. James Austin, president of the JFA Institute, who has provided expert assistance to help state governments analyze their criminal justice data, cautions those who may be tempted to rely too heavily on the projected effects of proposed policy changes on costs and jail, prison, parole, or probation populations: “A projection simply reflects what would likely happen if a particular policy or law is implemented,” he explains.³⁶ “But state governments need to keep in mind that altering one policy, even if minor, may alter significant aspects of the projections.”³⁷ Austin says that projections are quite valuable, if taken in the correct context and used appropriately: “[A] projection should accurately show what the impact would be if no additional laws or policies are later implemented. But because the policy and legislative environment is constantly in flux, projections must constantly be updated.”³⁸ Austin points out that “inherent in this dynamic and ever-changing political process is the potential for misinformed critics to use any difference in projections a few years later to proclaim either the projection was inaccurate or the legislation was not effective.”³⁹ Nevertheless, states frequently rely on these projections to determine their best courses of action. If projections show that a new prison facility will be necessary, a state can make planning and policy changes to avoid building prisons.

Starting in 2009, Arkansas undertook a thorough analysis of its system, reviewing sentencing data and auditing corrections and community supervision policies for the purpose of making comprehensive reforms. The analysis showed that while its prison population had more than doubled, the state was underutilizing probation, increasing sentence lengths for nonviolent offenses, departing substantially from its voluntary

³⁵ N.M. SENTENCING COMM’N, NEW MEXICO PRISON POPULATION FORECAST: FY 2011–FY 2020, at 2 (June 2010), *available at* http://nmssc.unm.edu/nmssc_reports/; Email from Dr. James Austin to Lauren-Brooke Eisen (Sept. 12, 2011, 6:59 PM).

³⁶ Email from Dr. James Austin to Lauren-Brooke Eisen (Sept. 12, 2011, 6:59 PM).

³⁷ Email from Dr. James Austin to Lauren-Brooke Eisen (Oct. 3, 2011, 1:10 PM).

³⁸ Email from Dr. James Austin to Lauren-Brooke Eisen (Sept. 12, 2011, 6:59 PM).

³⁹ Email from Dr. James Austin to Lauren-Brooke Eisen (Oct. 3, 2011, 1:10 PM).

sentencing guidelines, and delaying transfer of inmates to parole.⁴⁰ The data analysis also revealed that sentencing and corrections policies and practices—and not increased crime—were the substantial contributing factors to Arkansas’s prison population growth. These observations led policymakers to pass legislation in 2011 creating a stronger community supervision system and making greater use of alternatives to incarceration.

North Carolina also took a comprehensive approach to examining its systemwide criminal justice data. Researchers analyzed the state’s prison, community corrections, crime, and recidivism data, including an examination of the prison population and factors driving prison growth. A bipartisan, interbranch working group subsequently determined that more than half of all admissions to prison were for probation revocations: In 2009, probation revocations accounted for 53% of prison admissions.⁴¹ Responding to the data and to evidence about what would improve outcomes, policymakers expanded probation officers’ authority to impose a broader range of sanctions for violations, allowed probation officers to impose house arrest with electronic monitoring without judicial approval in most cases, and limited the length of incarceration for those whose probation is revoked for technical violations rather than new crimes.

In addition, after finding that more than 85% of those released from prison receive no supervision upon release, policymakers sought to improve public safety by increasing such supervision. Research has demonstrated that individuals pose the greatest risk of reoffending in the days and weeks immediately following release.⁴² State legislatures increasingly are turning to mandatory post-incarceration supervision to provide support in the community during this critical period, ultimately in the hope that it will reduce recidivism. Accordingly, North Carolina’s legislation now requires everyone convicted of a felony to receive at least nine months of post-release supervision.

The examples above, from Kentucky, Vermont, North Carolina, and Arkansas, illustrate common elements of successful comprehensive sentencing and corrections legislation. These elements include involvement

⁴⁰ PEW CTR. ON THE STATES, ARKANSAS’S 2011 PUBLIC SAFETY REFORM LEGISLATION TO REDUCE RECIDIVISM AND CURTAIL PRISON GROWTH 3–5 (July 2011), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_Arkansas_brief.pdf.

⁴¹ COUNCIL OF STATE GOV’TS JUSTICE CTR., JUSTICE REINVESTMENT IN NORTH CAROLINA: ANALYSIS AND POLICY FRAMEWORK TO REDUCE SPENDING ON CORRECTIONS AND REINVEST IN STRATEGIES TO INCREASE PUBLIC SAFETY 6 (Apr. 2011), *available at* http://justicereinvestment.org/files/JR_North_Carolina_policy_framework_v8mg_mc.pdf (citing data and reports from the North Carolina Department of Correction).

⁴² AMY L. SOLOMON ET AL., URBAN INST., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES 14 (Dec. 2008), *available at* http://www.urban.org/uploadedpdf/411791_public_safety_first.pdf.

of stakeholders from across the political, ideological, and systemic spectrum; political leadership that pushes past partisanship; outside assistance from criminal justice consultants that can help energize and inform policymakers' discussions; and comprehensive data analysis that determines population drivers.

IV. 2011 LEGISLATION

To illustrate comprehensive, statewide reforms addressing prison-population drivers, this Part summarizes policies enacted through legislation in 2011. The policies fall broadly into four categories: (1) reducing the prison population safely; (2) requiring the use of evidence-based practices; (3) reinvesting cost savings in evidence-based practices or other criminal justice resources; and (4) evaluating the policies' impact on the prison population, costs, and public safety.

A. POPULATION REDUCTION

In efforts to address the immediate pressure of overcrowding and avoid looming construction costs, a number of new laws aim to reduce the prison population directly and immediately. One common way to achieve this is to expand opportunities for individuals in the state's custody or control to accrue good-time or earned-compliance credits. When applied to incarcerated populations, these measures focus on releasing offenders believed to pose the lowest risk of committing new crimes and returning them to the community more quickly. In the case of those under community supervision, states are looking to reward compliance with supervision conditions and program requirements by reducing either the length or the level of supervision, a step that can reduce an individual's exposure to possible revocation.

1. Good-Time Credits for Inmates

Corrections administrators have long used good time as a way to encourage inmates' compliance with disciplinary rules. Traditional good-time credits apply automatically, shaving off time from people's sentences for good behavior, that is, for complying with a prison's disciplinary rules.⁴³

⁴³ TODD EDWARDS, COUNCIL OF STATE GOV'TS, CORRECTIONAL GOOD TIME CREDITS IN SOUTHERN STATES (May 2001), available at <http://www.slcatlanta.org/Publications/HSPS/GoodTime.pdf>; ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS (July 2009), available at http://www.ncsl.org/documents/cj/Earned_time_report.pdf. States use different names for the reduction in sentences based on compliance with certain conditions. Here the term "earned time" refers to credits prison inmates can receive for participating in certain

Studies examining this method of population reduction show that inmates released early do not have a significantly different rate of recidivism than those who serve full terms, and in some cases, they show reduced rates of reoffending.⁴⁴ Other policies that shorten the length of incarceration reward inmates for participating in certain educational or treatment programs.

Recent legislation indicates that states are increasing the availability of good-time credits and expanding credits for participation in programs that can help inmates succeed once they return to the community. A new law in Nebraska increases good-time credits for people in state prisons.⁴⁵ After a year of incarceration, inmates' sentences will be reduced by three days (instead of only one day) for each month in which they do not commit certain disciplinary infractions. The law also extends good time to parolees, outlining how those on supervision can reduce those terms for good behavior.

A 2011 law in North Dakota gives prison and county jail administrators more flexibility to award "performance-based" sentence reductions to inmates serving shorter sentences. The inmates can earn reductions of one day for every six days served for participating in treatment and educational programs and for good work performance.⁴⁶

Also in 2011, the governor of Oklahoma signed legislation adding associate's and bachelor's degrees to the list of educational programs eligible for "inmate conduct credits."⁴⁷ Previously, inmates received credits only for completing a general educational development certification.

2. *Earned-Compliance Laws*

Similar to how good-time credits shorten incarceration lengths, earned-compliance credits reduce the length of time that parolees or probationers serve on supervision when they comply with the conditions of their supervision. Some of these policies also provide credits to probationers and parolees who participate in vocational or educational programs, similar to the way these policies work for inmates. Reducing supervision terms in this manner is grounded in the idea that offenders will be incentivized to comply with the conditions of their case plans if they can terminate supervision earlier. While it may be too soon to comment on the

programs and classes. Earned-compliance credit typically refers to reductions in probation or parole terms.

⁴⁴ CAROLINA GUZMAN, BARRY KRISBERG & CHRIS TSUKIDA, NAT'L COUNCIL ON CRIME & DELINQUENCY, *ACCELERATED RELEASE: A LITERATURE REVIEW* (Jan. 2008), available at http://www.nccd-crc.org/nccd/pubs/2008_focus_acceleratedRelease.pdf.

⁴⁵ Leg. 191, 102nd Leg., 1st Reg. Sess. (Neb. 2011).

⁴⁶ S. 2141, 62nd Leg. Assemb., Reg. Sess. (N.D. 2011).

⁴⁷ S. 137, 53rd Leg., 1st Reg. Sess. (Okla. 2011).

impact of earned-compliance credits, it is consistent with the risk principle—that resources should be targeted toward moderate- to high-risk offenders. Earned-compliance credits allow supervision officers to focus supervision and programming on those who are most likely to benefit.⁴⁸

Kentucky expanded early termination of supervision to individuals under community supervision. Parolees can earn credits for complying with requirements, having no new arrests, and staying up-to-date on restitution payments. The Kentucky Department of Corrections calculates earned-compliance credits for parolees in a similar manner to the way in which they are calculated for inmates. Similarly, probationers can earn early termination of their supervision if they fulfill the terms of their case plan, have no new arrests, and comply with restitution payments, among other requirements.⁴⁹

3. Medical Parole

In an effort to save money and, at times, as a gesture of compassion, some states are expanding the eligibility of their sickest inmates—including elderly men and women—for early release. Medical release for this population promises cost savings to corrections departments at relatively low risk to public safety. One of the chief purposes of incarceration is incapacitation, that is, preventing people from committing additional crimes in the community. If inmates are so sick that they reasonably are considered incapable of new crimes, incapacitation no longer justifies incarceration (although other purposes may remain). Some states are changing legislation and policies to allow early release of inmates who pose little risk to public safety.

In 2011, Colorado expanded eligibility for special needs parole, requiring the Department of Corrections to be proactive in identifying who is eligible for such parole.⁵⁰ Montana, Kentucky, Rhode Island, and Arkansas also expanded or streamlined medical parole eligibility, with Arkansas allowing the parole board to revoke parole if a released person's condition improves.⁵¹

Not all states are following suit, however. Some policymakers are reluctant to support medical parole laws because taxpayers want to know

⁴⁸ See, e.g., PEW CTR. ON THE STATES, POLICY FRAMEWORK TO STRENGTHEN COMMUNITY CORRECTIONS: EARNED COMPLIANCE CREDITS 4–5 (Dec. 15, 2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/Policy%20Framework.pdf.

⁴⁹ H.R. 463, 2011 Leg., Reg. Sess. (Ky. 2011).

⁵⁰ S. 241, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

⁵¹ H.R. 141, 62nd Leg., Reg. Sess. (Mont. 2011); H.R. 463, 2011 Leg., Reg. Sess. (Ky. 2011); H.R. 5757, 2011 Leg., Jan. Sess. (R.I. 2011); S. 750, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

whether costs are simply being shifted to other state agencies, such as social service or health departments, or to the federal government through Medicare or Medicaid.⁵² In addition, a physical disability, even a severe one, may not keep an individual from committing a new offense.⁵³

Despite research showing that older inmates are less likely to engage in criminal behavior, medical release is generally underutilized.⁵⁴ If states make use of their expanded medical parole laws, the field will benefit from a better understanding of the magnitude and nature of the risk posed by medical release.

B. MANDATING THE USE OF EVIDENCE-BASED PRACTICES TO REDUCE RECIDIVISM

Continuing a trend of the past several years, more states are investing in programs that result in lower crime and recidivism rates, regardless of whether they are engaged in justice reinvestment efforts or just trying to cut costs.⁵⁵ To make the shift to evidence-based practice, screening tools are required to ensure that the appropriate population is being targeted for interventions. Some legislation passed in 2011 explicitly requires the use or development of such tools. Evidence-based practice also requires programming that can produce results. Accordingly, legislation may prescribe specific interventions in prison or in the community (such as drug treatment programs, cognitive behavioral treatment programs, and intensive community supervision combined with treatment-oriented programs) or, more generally, may require the use of evidence-based practices. In 2011, many states mandated the use of a risk-assessment tool, requiring assessments at different stages of the criminal justice process from pretrial to parole release decisions.

⁵² TINA CHIU, VERA INST. OF JUSTICE, *IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE* 8 (April 2010), available at <http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>.

⁵³ See, e.g., J. Harry Jones, *Medical Parole Rejected for Rapist*, SAN DIEGO UNION-TRIB. (May 24, 2011, 9:02 PM), <http://www.utsandiego.com/news/2011/may/24/medical-parole-rejected-for-incapacitated-san/> (describing a district attorney's opposition to a medical parole request based on the inmate's past threatening behavior and a fear that inmate could ask others to do harm on his behalf).

⁵⁴ See CORR. ASS'N OF N.Y., *HEALTHCARE IN NEW YORK PRISONS: 2004-2007*, at 74 (Feb. 2009), available at http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Healthcare_Report_2004-07.pdf; CHIU, *supra* note 52, at 2; Emily Ramshaw, *Few Texas Inmates Get Released on Medical Parole*, TEXAS TRIB. (June 3, 2010), <http://www.texastribune.org/texas-dept-criminal-justice/texas-department-of-criminal-justice/few-texas-inmates-get-released-on-medical-parole/>.

⁵⁵ AUSTIN, *supra* note 7.

For example, Ohio's sweeping criminal justice reform package requires the use of evidence-based practices and the adoption of a common set of risk-assessment instruments.⁵⁶ The risk-assessment tools will help target community supervision and treatment resources for use with offenders who need them most.⁵⁷

Kentucky's legislation focuses on increasing the use of evidence-based practices throughout its criminal justice system.⁵⁸ The law requires Kentucky's Department of Corrections to rely on evidence-based practices, including: allocating caseload and workload based on offender risk level, using evidence-based programs and measuring their effectiveness, and providing appropriate training on evidence-based supervision to employees. To ensure that these practices are targeting the right offenders, the law mandates the use of a validated risk-assessment instrument during the pretrial process, before sentencing, during prison intake, and again upon release to parole. Kentucky's approach recognizes that risk assessment is "the engine that drives effective interventions with offenders."⁵⁹ As important to practitioners as it is to lawmakers, assessment helps to identify those who are most at risk of reoffending, separate those who need intervention from those who do not, and identify needs that can be targeted with appropriate programs.⁶⁰ All of this information can help guide resource-allocation decisions and improve public safety outcomes.

Likewise, North Carolina's legislation focuses on an increased use of evidence-based practices. Section 6 of the Treatment for Effective Community Supervision Act of 2011 states that the bill is intended to "support the use of evidence-based practices to reduce recidivism and to promote coordination between State and community-based corrections programs."⁶¹ The bill requires, among other things, the Department of Corrections to develop minimum program standards, policies, and rules for community-based corrections programs; consult with the Department of Health and Human Services regarding the oversight and evaluation of substance abuse service providers; and develop and publish a recidivism-reduction plan for the state. The legislation also recognizes the need to

⁵⁶ H.R. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

⁵⁷ COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN OHIO: HOW OHIO IS REDUCING CORRECTIONS COSTS AND RECIDIVISM (Dec. 2011), available at http://www.justicereinvestment.org/files/JR_OH_Summary_12_1_2011.pdf.

⁵⁸ H.R. 463, 2011 Leg., Reg. Sess. § 1(4) (Ky. 2011).

⁵⁹ Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203, 204 (2010).

⁶⁰ *Id.*

⁶¹ H.R. 642, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

prioritize the delivery of services to people convicted of felonies who are high-risk and moderate- to high-need.

Although evidence-based practices cost money, investing in them allows agencies to realize cost savings by reducing recidivism. Even if legislation does not mandate the use of such practices, it is important that jurisdictions dedicate sufficient resources to improving supervision practices and building agencies' capacity to use treatment and other programs shown to decrease crime.

If a state's legislation does not make funds available by mandating reinvestment, policymakers and other stakeholders should take steps to ensure that reforms are funded. Agencies may need to hire additional personnel, purchase equipment, train employees, or acquire software to implement reforms. Without these resources, an agency may not be able to achieve fidelity to the evidence-based practice model.

C. SUPERVISION OF HIGH-RISK PROBATIONERS

When states have analyzed their prison populations, many have found that large numbers of people admitted to their institutions are there for violating the conditions of their probation or parole. In searching for ways to reduce those revocations and improve the outcomes of supervision, states have implemented systems of graduated sanctions and interventions to respond to such behavior. These systems offer probation and parole officers a guide for responding swiftly and appropriately to each technical violation. Responses vary by the individual's risk level and the seriousness of the behavior and can include increased reporting by people under supervision, additional drug or alcohol testing, and "shock nights" in jail. Research indicates that swift, certain, and proportionate sanctions for these technical violations can improve compliance and reduce the number of violators sent to jail or prison.⁶²

One program that uses swift and certain sanctions is Hawaii's Opportunity Probation with Enforcement (HOPE). Established in 2004, HOPE has made a significant dent in the high failure rate of people on probation in Hawaii. One of the challenges facing policymakers nationwide is how to help more people finish probation successfully given that almost 40% fail to complete their terms, with many ending up in prison at greater

⁶² Faye S. Taxman, David Soule & Adam Gelb, *Graduated Sanctions: Stepping into Accountable Systems and Offenders*, 79 PRISON J. 182 (1999) (arguing that certainty deters future deviance); Angela Hawken & Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE*, NAT'L CRIM. JUST. REFERENCE SERVICE 17-26 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (reporting that Hawaii's HOPE program reduced violations and revocations to prison for participating offenders).

costs to taxpayers.⁶³ HOPE targets high-risk probationers by applying swift, certain, and consistent sanctions, appropriate to the severity of the behavior, in response to behavior that violates the terms of the individual's supervision. After three months in the program, participants' rate of missed appointments and failed drug tests decreased by 75%, with the reduction peaking at 95%.⁶⁴ As a result, many states are looking to replicate the program and its outcomes. While not yet considered "evidence-based,"⁶⁵ HOPE is a promising model that exemplifies the data-driven decisionmaking process: isolating a prison-population driver (in this case, probation failures) and tailoring interventions to address that driver.

Without adopting the HOPE model in every respect, some states have passed legislation that incorporates many of the same elements—including swift, certain, and consistent sanctions—into their laws. Illinois passed legislation requiring the chief judge of each circuit to adopt a system of structured intermediate sanctions for violations of the terms and conditions of probation.⁶⁶ Likewise, Maryland, Kentucky, and Arkansas passed legislation creating pilot programs based on the HOPE model.⁶⁷ Alabama also attempted to codify standards for the creation of programs modeled on HOPE,⁶⁸ but the legislation was not passed. The Alabama bill's failure demonstrates the potentially polarizing nature of public safety reforms. One news account explained that the reforms failed because of officials' concerns about reelection, as well as faulty public perceptions that the legislation would result in release of prisoners without appropriate treatment or support.⁶⁹

⁶³ VERA INST. OF JUSTICE, MORE THAN THE SUM OF ITS PARTS: WHY HAWAII'S OPPORTUNITY PROBATION WITH ENFORCEMENT (HOPE) PROGRAM WORKS 1 (2010), available at <http://www.vera.org/files/HOPE%20Policy%20Brief.pdf>.

⁶⁴ RICHARD KIYABU, JOACHIM STEINBERG & MINAKO YOSHIDA, VERA INST. OF JUSTICE, HAWAII'S OPPORTUNITY PROBATION WITH ENFORCEMENT (HOPE): AN IMPLEMENTATION ANALYSIS 6 (May 2010), available at <http://www.hopeprobation.org/wp-content/uploads/2010/10/HOPE-Probation-final.pdf>.

⁶⁵ See *Program Profile: Hawaii Opportunity Probation with Enforcement*, OFFICE OF JUST. PROGRAMS, <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=49> (last visited Feb. 8, 2012).

⁶⁶ H.R. 2853, 97th Gen. Assemb., 1st Reg. Sess. (Ill. 2011).

⁶⁷ S. 801, 2011 Leg., 428th Sess. (Md. 2011); H.R. 463, 2011 Leg., Reg. Sess. (Ky. 2011); S. 750, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

⁶⁸ H.B. 216, 2011 Leg., Reg. Sess. (Ala. 2011).

⁶⁹ Bob Lowry, *State Prison Takeover Possible Failure to Pass Sentencing Bills May Be Trigger*, HUNTSVILLE TIMES, June 19, 2011, at 15-A.

D. EXPANDED SUPERVISION PROGRAMS

The community corrections system is charged with supervising individuals who are under the authority of the criminal justice system but are not incarcerated. Community corrections staff oversee individuals who are on pretrial release, sentenced to probation, released on parole, or under post-incarceration supervision. In addition to routine supervision, community corrections agencies may address criminogenic factors by providing treatment, educational programming, or vocational training to support rehabilitation. Some common community corrections programs include drug and alcohol treatment programs, electronic monitoring, home detention, community service programs, educational programs, day reporting centers, and sex offender and domestic violence treatment.

States passing comprehensive legislation in 2011 expanded community corrections programs with the goals of both fiscal austerity and lowering recidivism rates. In Oklahoma, the state expanded eligibility for GPS monitoring and community sentencing.⁷⁰ The North Carolina Department of Corrections may now require an offender sentenced to community punishment to comply with a range of conditions, including performing up to twenty hours of community service, undergoing drug treatment, submitting to house arrest with electronic monitoring, abiding by a curfew, wearing a GPS tracking device, and participating in educational or vocational programs.⁷¹

Using community corrections, rather than institutional sentences, has the potential to improve communities. Defendants and offenders who are not incarcerated have the opportunity to remain with their families, hold on to employment, and participate in treatment or other programming within the natural context of their lives, as opposed to the “unnatural” setting of a prison or jail. Drug or mental health treatment, job skills training, and behavioral interventions delivered in the community have long been demonstrated to be more effective than those offered behind bars.⁷²

⁷⁰ H.R. 2131, 53rd Leg., 1st Reg. Sess. (Okla. 2011).

⁷¹ H.R. 642, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

⁷² See STEVE AOS ET AL., WASH. ST. INST. FOR PUB. POLICY, *THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME* (May 2001), available at <http://www.wsipp.wa.gov/rptfiles/costbenefit.pdf>; see also Gary Zarkin et al., *Benefits and Costs of Substance Abuse Treatment Programs for State Prison Inmates: Results from a Lifetime Simulation Model*, HEALTH ECONOMICS 1 (Apr. 19, 2011), <http://onlinelibrary.wiley.com/doi/10.1002/hec.1735/pdf>; Gary Zarkin et al., *A Benefit-Cost Analysis of the Kings County District Attorney's Office Drug Treatment Alternative to Prison (DTAP) Program*, JUST. RES. POL'Y, Spring 2005, at 1. However, the effectiveness of electronic monitoring (EM) and global positioning technology (GPS) remains in question. Scholars in this field continue to debate the interplay between these technologies and program elements such as curfews, the characteristics of the offenders selected, and work or

Another benefit to increased use of community corrections is its cost. In 2008, a survey of thirty-three states indicated an average cost of about \$79 per inmate per day, or almost \$29,000 per inmate per year.⁷³ The average daily costs for managing an offender in the community in the surveyed states ranged from \$3.42 for probationers to \$7.47 for parolees, equivalent to about \$1,250 to \$2,750 per year, respectively.⁷⁴

However, expanding the use of community supervision will improve public safety only if responsible agencies are prepared and equipped to manage greater numbers of offenders. In some cases, the changes mandated by these legislative packages will require major shifts in the policies and practices of the state's criminal justice agencies. Moving toward or expanding evidence-based practices will require resources for planning, staff training, offender and program assessments, and more effective interventions. There is a risk inherent in shifting people from prison or jail into the community: if supervision agencies do not have adequate resources and time for planning and training staff, the policies may fail.⁷⁵ The offenders may be at a greater risk of committing new offenses and may end up incarcerated anyway. Community corrections agencies that incorporate evidence-based practices, secure adequate resources for staff and services, and have the support of courts and other policymakers can potentially achieve impressive results. They can successfully manage offenders at lower costs and staff may better prepare those they supervise by providing support and guidance in their communities. But they cannot succeed without appropriate capacity.

E. REINVESTMENT

Legislation developed under the rubric of justice reinvestment may identify the sources and funds to be reinvested as well as where the money will go. This is to ensure that any savings realized from the legislation return to the agency that made the changes, rather than improving the state's general fund balance. These mechanisms commit a state to providing incentives and rewards for successful policy implementation, described in more detail below. State legislation from 2011 provides

education requirements. In short, it is unclear whether EM and GPS can be effective without other program elements. *See generally* MIKE NELLIS, THE INTEGRATION OF PROBATION AND ELECTRONIC MONITORING—A CONTINUING CHALLENGE 5–7 (May 2011), *available at* http://www.cepprobation.org/uploaded_files/EM Literature Research.pdf.

⁷³ PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12 (Mar. 2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

⁷⁴ *Id.*

⁷⁵ *Id.* at 14.

examples of some mechanisms for reinvesting funds: requiring or permitting future averted costs to be reinvested into evidence-based programs and creating performance-based incentive funding programs.

Some states' legislation requires that cost savings be calculated for each substantive policy change and that reinvestment be tied to those specific savings. Kentucky's legislation requires the state department of corrections to calculate the cost savings from portions of the new law. The legislation directs these savings toward the "community corrections" fund, established to finance improvements to community corrections practices.⁷⁶ It also calls for reinvestment in expanded treatment programs and probation and parole services as well as additional pretrial services and drug court specialists through the administrative office of the courts.⁷⁷

Another type of reinvestment provides funding to local jurisdictions or agencies that can demonstrate they have used evidence-based practices to achieve positive outcomes in reducing returns to prison. The goal of performance-based incentive programs is to invest funds into community corrections programs and treatment efforts to stop the cycle of reoffending and avoid future prison costs.⁷⁸ Arkansas's legislation, for example, establishes a performance-incentive funding program that provides onetime grants to five pilot jurisdictions with the goal of reducing their net burden on the corrections department.⁷⁹ The grantees will use award funds to enhance community-based supervision using evidence-based practices, sanctions, and programs such as day-reporting centers and mental health or drug treatment. Every year, grant recipients will receive additional funds equal to one-half of the costs averted by reducing the number of people sent to the Arkansas Department of Correction.⁸⁰

Although technically not reinvestment, another method of securing funds for recidivism-reduction efforts is to institute or increase existing fees for treatment or community supervision. For example, Arkansas's legislation directs the revenue from new and increased fees to fund "best practices."⁸¹

States that have not designated funds for reinvestment, such as Ohio, have concentrated on redesigning their criminal justice systems' programs and resources. With many states facing large budget shortfalls, reallocating

⁷⁶ H.R. 463, 2011 Leg., Reg. Sess. § 72 (Ky. 2011).

⁷⁷ § 68(5)(a).

⁷⁸ See generally VERA INST. OF JUST., PERFORMANCE INCENTIVE FUNDING: ALIGNING FISCAL AND OPERATIONAL RESPONSIBILITY TO PRODUCE MORE SAFETY AT LESS COST (Nov. 2012), available at <http://www.vera.org/files/performance-incentive-funding-report.pdf>.

⁷⁹ S. 750, 88th Gen. Assemb., Reg. Sess. § 117 (Ark. 2011).

⁸⁰ *Id.*

⁸¹ §§ 85, 124.

existing resources to streamline processes can achieve better criminal justice outcomes without new expenditures. Ohio's legislation, though not strictly reinvestment, reflects this approach.⁸² After analyzing the state's criminal justice population drivers, state officials determined that property and drug offenders in Ohio served repeated short prison sentences followed by releases to the community with no supervision.⁸³ To address the fact that Ohio's probation system is extremely fragmented, with more than 190 agencies supervising individuals statewide, the new laws set minimum standards for any entity that oversees probationers.⁸⁴ The legislation also requires the Ohio Department of Rehabilitation and Correction (ODRC) to adopt standards specifying which categories of offenders are appropriate for community-based corrections facilities and programs. Because many of these facilities and programs are operated by independent organizations, the new measures give the ODRC the ability to set eligibility criteria to maximize effectiveness. ODRC can, for example, prevent the placement of low-risk offenders in expensive programs developed for high-risk offenders.⁸⁵

Reinvestment mechanisms are designed to fund much-needed reforms in lean budget years. Legislation that requires reinvestment dollars be spent by the agency or program that avoided expenditures based upon evidence-based practices sends a clear message about how the legislature expects the business of corrections to be conducted. It also provides support for budget requests intended to further the legislation's goals. It does not, however, provide an absolute buffer against future economic downturns or changing political priorities. As budgets continue to decline, the legislature can always reconsider reinvestments, threatening their sustainability over time. Texas provides a recent example. Despite demonstrated success, Texas's proposed 2012 budget threatened to cut the funding for its 2007 reinvestment in probation and treatment programming.⁸⁶ Treatment Alternatives to Incarceration would have been cut by a striking 90%.⁸⁷ Ultimately, the cuts did not pass; however, this demonstrates the precarious

⁸² H.R. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

⁸³ COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 57.

⁸⁴ The state budget included \$10 million for probation incentive funding, which will offer competitive grants for which county probation offices can compete. ST. OF OHIO CONTROLLING BD., OPERATING TRANSFER, CONTROLLING BOARD NO. DRC0100527 (Dec. 12, 2011), available at <https://ecb.ohio.gov/Public/ShowAgenda.aspx>.

⁸⁵ COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 57, at 1.

⁸⁶ See Scott Henson, *Texas Corrections Budget at Second Glance*, GRITS FOR BREAKFAST (Jan. 19, 2011), <http://gritsforbreakfast.blogspot.com/2011/01/texas-corrections-budget-at-second.html>.

⁸⁷ *Id.*

nature of reinvestment funding that supports community supervision and treatment.⁸⁸ In addition, reinvestment mechanisms alone do not ensure that community corrections or programming has adequate funding to protect public safety.

F. EVALUATION

Evaluation is necessary to determine whether policy changes are working as intended and to provide information allowing policymakers to determine how to allocate and invest additional funds in evidence-based, recidivism-reducing programs. Many states have already recognized this need and established mechanisms for evaluating their policies' impact on crime or recidivism outcomes and associated cost savings.

For example, Vermont's legislature appropriated funding to the Vermont Center for Justice Research to conduct an outcome assessment of the state's two work camps.⁸⁹ In addition, the legislation directs the Center to conduct a meta-analysis to evaluate the ways in which innovative programs and initiatives, best practices, and research on program assessment can inform Vermont's approach to swift and sure sanctions and effective interventions. This portion of the legislation differs from other states' legislation because it directs a literature and practice review prior to adoption of a particular set of policies.

Similarly, a new law in North Carolina requires the Department of Correction's Division of Community Corrections to develop and publish a recidivism-reduction plan.⁹⁰ The plan must describe steps the Department will take to meet the goal of reducing community supervision revocations by 20% from the baseline rate in the 2009–2010 fiscal year. One component of the plan is to identify programs shown by research to reduce recidivism for individuals identified as high-risk and high needs. The plan must also examine the programs' cost-effectiveness and explain how the department will fund the most cost-effective programs statewide. Subsequent annual reports must describe the state's progress implementing its plan.⁹¹

The steps taken by these states are important—they recognize that data allows policymakers to base their decisions on evidence and not on

⁸⁸ Compare CONF. COMM. REP. ON S. 1 (Tex. 81st Leg., Reg. Sess.) at V-12, available at http://www.lbb.state.tx.us/GAA/General_Appropriations_Act_2010-11.pdf, with CONF. COMM. REP. ON H. 1 (Tex. 82d Leg., Reg. Sess.) at V-11, available at http://www.lbb.state.tx.us/GAA/General_Appropriations_Act.pdf.

⁸⁹ S. 108, 2011–2012 Leg., Reg. Sess. (Vt. 2011).

⁹⁰ H.R. 642, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

⁹¹ *Id.*

anecdotal information or by reacting to critical incidents. To make sound data-driven decisions, policymakers must be able to rely on the information and analysis provided to them. Too often, however, the information systems available in corrections agencies, the courts, and other key organizations were designed only for day-to-day operational use. They capture information needed to manage cases on a docket or the population of a prison; to generate required reports; and to meet federal, state, and local requirements. The agencies created their systems to serve their own needs, and rarely to gather data for use in cross-system analysis. Policymakers in the past rarely asked analytic questions of the data stored in these systems, so the quality of the data and the ease with which it could be analyzed were not always prioritized.

For the process described here, complete and accurate data that can be linked across agencies for analysis is vitally important. Facing the difficulties described above, states have created data workgroups with staff from multiple agencies to identify data sources and solve problems with their quality and use. Kentucky legislators recognized the limitations of the state's corrections data infrastructure and made a onetime appropriation to update the Kentucky Offender Management System. The enhanced system can track offender program participation and program effectiveness, among other information.⁹²

States wishing to use a data-driven approach to decisionmaking must develop the means and capacity within their relevant agencies to gather quality data, to link it across agencies, and to use it to answer key policy questions quickly and reliably. Even when budgets are tight, it is necessary to invest resources in the skilled staff and technology required to have this capacity going forward. This data-gathering and analysis capacity is vital for policy development, but it is just as valuable to individual agencies for internal use. Quality data and trustworthy analysis can put agencies in a better position to spot problems and look for their causes, examine trends, perform population projections, assess the capacity of programs to meet client needs, target services to offenders, and evaluate programs and policies. A sustained focus on quality data collection and analysis is critical when implementing evidence-based practices.

V. TRENDS IN PRISON AND COMMUNITY CORRECTIONS POPULATIONS AND EXPENDITURES: 2006–2010

The Vera Institute of Justice recently published a study examining trends in prison and community corrections populations and actual

⁹² H.R. 463, 2011 Leg., Reg. Sess. § 109 (Ky. 2011).

expenditures.⁹³ Vera, in partnership with the Pew Center on the States' Public Safety Performance Project, sought to answer two questions. First, given legislative efforts to reduce spending on prisons and expand community corrections, are prison populations—and therefore, prison expenditures—decreasing accordingly? Just as importantly, are states investing more resources in community corrections systems to match expected population growth?

The goal of the legislation passed in recent years is to drive down prison population and costs and reallocate a portion of the actual savings or averted costs to community corrections, where policymakers hope a larger proportion of the offenders will be placed. Data from the five-year period of 2006 to 2010 show mixed results: Although a majority of states continued to experience increases in both prison population and expenditures, the community corrections numbers appeared to be moving in the desired direction and agencies saw more people on supervision and received increased resources.

The data from 2009 to 2010 tell a slightly different story and may be a better indication of years to come. While prison population and spending have begun to move downward, so, too, has spending on community corrections. Complicating the picture is that the criminal justice system is not a machine; pushing down the prison population may not decrease the costs. Indeed, costs are impacted by a confluence of interests, and cost-saving measures may or may not achieve their intended results. Variables that have played a significant role in shaping fiscal outcomes in corrections over the last five years include the expansion or construction of facilities, pressure from labor unions, and unexpected growth in the correctional population because of a public response to crime or otherwise.⁹⁴

Moreover, with revenues plummeting, state policymakers are wrestling with the seemingly intractable dilemma of how to balance state budgets and maintain or improve services that people need and want. With crime dropping and the public's interest in tough-on-crime policies waning, policymakers may be more willing to make wholesale, absolute cuts to correctional budgets rather than reinvest actual savings or averted prison costs in community corrections. Diverting funds to other areas deemed more urgent—such as health care and education—may be the reason why the Vera Institute of Justice's recent study found that “two-thirds of the responding states have decreased their prison expenditures between 2009

⁹³ SUBRAMANIAN & TUBLITZ, *supra* note 7.

⁹⁴ *Id.* at 12–13.

and 2010, and more than half also decreased their community corrections spending.”⁹⁵

Despite these external forces, policy decisions that deliberately attack the drivers of the prison system can be successful. The outcomes in Michigan,⁹⁶ for example, demonstrate that that systemic cost savings can be realized through the implementation of sentencing reform that either decreases the number of people entering prison or increases the number of individuals placed on community supervision, when resources are provided at an appropriate level.

The continued fiscal crisis raises the concern that further cuts to community corrections are in store for states. While recognizing that this is a period of fiscal emergency, responses to budget shortfalls must not downgrade community corrections systems so as to imperil public safety. Curtailing services for offenders and reducing staff as caseloads rise can undermine an agency’s ability to properly conduct assessments, supervise offenders, and target service delivery based on offenders’ risks and needs.

The next several years are critical for criminal justice systems in this country. More and more states are embarking on reform efforts that will aim to reduce their prison populations and expenditures and strengthen their community corrections systems. Whether the resources will follow the population remains an open question.

VI. CONCLUSION

Throughout the United States, the use of research to drive systemic criminal justice change is gaining momentum. Legislatures are crafting bold, comprehensive reform packages that seemed out of the question just a few years ago. There are common threads across the states that have achieved change: multidisciplinary input, bipartisan cooperation, the availability of data analysis and information, and the political leadership on all fronts to make it happen. The substantive policies share common elements as well: states are changing sentencing and release policies to reduce prison populations, expanding community corrections, mandating and providing funding for evidence-based practices (such as targeting high-risk individuals for intensive supervision), and requiring evaluations of outcomes to determine which approaches are most effective in reducing crime.

For policymakers to realize the promise of evidence-based reforms, however, new laws must account for the challenges of implementation, including the need for adequate resources. States that tie new policies to

⁹⁵ *Id.* at 22.

⁹⁶ *Id.* at 11.

funding sources and build systematic policy or program evaluation into their legislation will likely see the greatest fiscal savings and improvements in public safety. However, the recent trend of decreased spending on community corrections threatens the success of these reforms.

This Article provides an introduction to the research supporting comprehensive public safety legislation, observations about conditions that can contribute to a successful reform effort, a review of recent legislation, and an indication of how states are using incarceration and community corrections. It is the authors' hope that the Article will support and provide guidance to those who would engage in similar, future efforts.

