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## **Protecting Public Safety and Reducing Correctional Costs in Oregon**

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*“Traditionally, the aims of sentencing are fourfold: punishment, deterrence, incapacitation, and rehabilitation. The need for punishment arises from the abstract and objective requirements of justice. As the Athenian stranger puts it in Plato’s Laws: ‘The law like a good archer, should aim at the right measure of punishment, and in all cases at the deserved punishment.’”*

--- Former Attorney General Ed Meese to the American Law Institute, May 22, 1987<sup>1</sup>

*“When I look at Oregon’s proposed corrections spending, I ask the question every conservative should ask of any government program: Will taxpayers get the best result for the lowest cost?”*

--- Grover Norquist in the *Bend Bulletin*, November 21, 2012<sup>2</sup>

### **Oregon’s Corrections Challenges**

Oregon has fourteen state prisons,<sup>3</sup> and state forecasters estimate that it will need more in order to accommodate approximately 2,300 new inmates over the next ten years.<sup>4</sup> The Oregon Department of Corrections has projected that it will cost over \$600 million to accommodate these new inmates.<sup>5</sup>

The forecast comes from an October 2012 report issued semi-annually by Oregon’s Office of Economic Analysis (OEA), the same independent agency responsible for the revenue forecast.<sup>6</sup> OEA’s 10-year forecasts have fallen within six percentage points of actual growth for the last decade.<sup>7</sup> The agency’s 2-year forecasts have come even closer to the mark—within a single percentage point of actual growth for the last decade, on average.<sup>8</sup> Whether policymakers are concerned with the 2013-2015 biennial budget or Oregon’s fiscal health a decade into the future, OEA’s correctional forecasts and associated cost projections suggest real and sobering challenges. Lawmakers must consider whether Oregon is squeezing the most public safety from its corrections spending.

### **Did Oregon’s Increase in Incarceration Cause a Decrease in Oregon’s Crime?**

From 2000 to 2012, the number of incarcerated adults in Oregon increased by 50 percent, a rate of growth three times the national average.<sup>9</sup> The cost of incarceration is certainly more than justified for serious violent offenders, and Oregon likely achieved public safety benefits from

policies that began in the 1990s which put murderers, rapists, and kidnapers behind bars for longer periods of time.<sup>10</sup>

Many states enacted policies like this in the 1990s, and criminologists generally credit the resulting increase in incarceration with 25-33% of the corresponding crime decline experienced across the country over the last two decades.<sup>11</sup> This means incarceration played an important, but limited, role in bringing crime down.

It is also the case that effective law enforcement strategies deter crime, and sensible approaches to community corrections may reduce recidivism. For these and other reasons, simply raising the incarceration rate—an expensive option that diverts funds away from law enforcement, and community corrections—does not guarantee a commensurate drop in the crime rate. Many states—seventeen in the last decade—have been able to reduce both their crime rates and their incarceration rates.<sup>12</sup>

The social scientists Bert Useem and Anne Morrisson Piehl have reached an interesting and subtle conclusion about the relationship between incarceration and crime: incarceration reduces crime, but beyond a certain point, it produces “a percent reduction in crime that gets smaller with ever-larger prison populations.”<sup>13</sup> In economic terms, this means that incarceration has diminishing marginal returns.

[F]indings imply several conclusions about the usual constant-elasticity, statistical analyses of incarceration’s effect on crime: (1) at low levels of incarceration, these analyses underestimate the negative relationship between incarceration and crime; (2) at higher levels of incarceration, the analyses overstate the negative effect; and (3) analyses from one time period cannot be extrapolated to other points in time with vastly different incarceration experience.<sup>14</sup>

The conservative criminologist John Dilulio agrees. Commenting in part on Piehl and Useem’s research, Dilulio wrote in the *Wall Street Journal* that “the value of imprisonment is a portrait in the law of rapidly diminishing returns. The justice system is becoming less capable of distributing sanctions and supervision rationally, especially where drug offenders are concerned.”<sup>15</sup>

### **Moving Forward**

The question for Oregon now is not whether it has relied too heavily on imprisonment, our most costly criminal justice tool, over the past dozen years. Rather, it is what combination of corrections policies, practices and programs will earn state taxpayers the best, most cost-effective public safety results in the future?

For decades, Oregon was highly regarded nationally for its innovative approaches to sentencing, corrections and community supervision.<sup>16</sup> Oregonians have historically welcomed the use of proven alternative strategies that reduce recidivism, thereby preventing offenders from claiming new victims and following the revolving door back into prison.

In recent years, however, as the Oregon prison population has increased, the state’s probation system has come under pressure. Probation can effectively hold many offenders accountable in the community, and costs \$12 per person per day, compared to \$85 per person per day for imprisonment.<sup>17</sup> Funding for probation in Oregon has declined from \$225 million in 2007-09 to \$182 million in 2011-13, which may indicate that Oregon shifted its resources from probation to prison.<sup>18</sup>

It is possible that this shift in resources has actually led to the increase in prison use. If community sanctions that cost more than basic probation supervision are unavailable due to a lack of resources, it is possible that probation departments, prosecutors, and judges will direct more individuals to state prison because it is the most directly available means of ensuring public safety. When probationers miss appointments or test positive for drugs, intermediate sanctions are often unavailable in many counties. Josephine County, for example, lacks a day reporting center, corrections work center, or a single substance-abuse residential treatment program. Another county has a 75-bed waiting list for jail space, meaning short-term or weekend jail sanctions are not an option for officers seeking to quickly punish probationers who violate rules. Electronic monitoring capacity is also diminished. One-third of Oregon counties have no capacity to put probationers on GPS monitoring. Given the strain on the probation system, prison becomes a more common destination for many offenders.

### **The Commission on Public Safety**

Oregon's Commission on Public Safety has charted a course—"Package 1"—that may serve as a useful roadmap for addressing these problems.<sup>19</sup> The bipartisan Commission, which included judges, prosecutors, victims' advocates, lawmakers, corrections experts, and other stakeholders, spent six months studying the system and drafting policy options aimed at containing costs and protecting public safety.<sup>20</sup> If Oregon lawmakers build on the commission's ideas, they may be able to avoid the \$600 million cost of new prison beds, keep streets safe, and ensure that offenders answer for their crimes.

The Commission's proposals in Package 1 include enhancing judicial discretion to impose prison terms that are appropriate for the crime and the offenders' criminal history; strengthening alternative sanctions that are available to non-violent offenders; expanding the use of earned time credits; and more effectively using risk assessments to determine community supervision levels.<sup>21</sup>

The Commission's Package 1 policy options also include the adoption of performance-based incentive funding (PIF) opportunities for counties. PIF, embraced by eight states since 2003, is a fiscal strategy that rewards local jurisdictions with a share of the state's savings when they send fewer offenders to state prison. These funds must then be applied towards evidence-based community programs. Arizona, for example, adopted performance incentive funding in 2008 and experienced a 12.8 percent decrease in probation revocations the following year.<sup>22</sup>

### **Results from Other States**

While tailored for the unique set of challenges facing Oregon, the Commission's proposals in Package 1 reflect the successful experience of other states that have adopted similar reforms. Hawaii, for example, has achieved impressive results with probationers through a high-intensity supervision program known as HOPE (Hawaii's Opportunity Probation With Enforcement), launched by Judge Steven Alm – a former federal prosecutor. In HOPE, drug offenders undergo frequent, random drug tests and, if they fail, are quickly jailed for several days.<sup>23</sup> The number of missed and failed drug tests has dropped by about 80 percent.<sup>24</sup> Earlier this year, the state of Washington adopted the HOPE model in its community corrections system.<sup>25</sup>

In Texas, meanwhile, state legislators have focused on expanding community-based options such as accountability courts and halfway houses,<sup>26</sup> and in 2011, for the first time in modern history, Texas closed a prison.<sup>27</sup> Most importantly, crime in Texas has continued to decline, reaching its lowest level since 1973 and falling far faster in 2011 than crime rates nationally.<sup>28</sup>

Arkansas, Georgia, Kentucky, Ohio, Pennsylvania, and South Carolina also have embraced many of these strategies. Notably, these states have both strengthened community supervision and adjusted their sentencing policies, reducing some penalties for drug, property, and burglary offenses. A RAND Institute study, as well as other research, supports this trend, finding that with the important exception of drug dealing conducted by major kingpins involving large quantities of contraband, mandatory minimums for drug offenders are not cost-effective.<sup>29</sup> Similarly, a study of mandatory minimums in Pennsylvania found that there was no correlation between the imposition of a mandatory minimum sentence and recidivism.<sup>30</sup> In other words, despite the appeal of consistency, mandatory minimums do not necessarily yield a better public safety outcome.

The evidence certainly justifies reexamining the need for mandatory minimums for offenses that capture broad ranges of criminal activity. In the case of these offenses, judicial discretion is critical. Some Oregonians may worry that excessively lenient judges will abuse additional flexibility, but the solution to that problem is greater engagement, particularly by conservatives, in Oregon's nonpartisan judicial elections.

### **Six Principles to Guide Reform**

Prominent Oregon fiscal conservatives such as John Charles and Steve Buckstein favor the Commission's comprehensive approach, which broadly adheres to these six essential principles:<sup>31</sup>

1. As with any government program, the criminal justice system must be transparent and include performance measures that hold it accountable for protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution, and conserving taxpayers' money.
2. Crime victims, along with the public and taxpayers, are among the key "consumers" of the criminal justice system; the victim's conception of justice, public safety, and the offender's risk for future criminal conduct should be prioritized when determining an appropriate punishment.
3. The corrections system should emphasize public safety, personal responsibility, work, restitution, community service, and treatment—both in probation and parole, which supervise most offenders, and in prisons.
4. An ideal criminal justice system works to reform amenable offenders who will return to society through harnessing the power of families, charities, faith-based groups, and communities.
5. Because incentives affect human behavior, policies for both offenders and the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results.
6. Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.

In addition, it is vital that a portion of the funds saved by avoiding construction of new prisons be directed to proven community corrections and law enforcement approaches. Resources also must be available to provide close supervision, which in appropriate cases can be supplemented with electronic monitoring and problem-solving courts. These cost more than basic probation, but far less than prison.

Moreover, as the Commission report notes, some rural Oregon counties no longer have 24-hour law enforcement. All Oregon citizens must be assured that when they call "911," there is a voice

on the other end of the line and the means to provide an immediate response. While other budgetary priorities such as avoiding further tax increases can be furthered by avoiding new prison costs, the overriding objective must be to first allocate the funds needed to ensure public safety through strong community corrections, law enforcement, and victims' services.

Finally, in addition to the sentencing and corrections reforms put forward by the Commission to avert projected prison growth, Oregon policymakers must also examine the state's \$84.81 inmate per diem, which is one-third more than the inmate per diem in Texas.<sup>32</sup> While cost of living differences and variations in the level of programming must be accounted for, Oregon may find substantial savings by changing procurement practices, outsourcing certain functions within correctional institutions, and reforming correctional employee pensions. The Commission rightly called on the legislature to reduce these per-day costs over time. As in other areas of government, conservatives must insist on accountability.

## Conclusion

Many of the Commission's recommendations can be implemented at little to no cost. Others, however, would require funding, and these costs are not to be taken lightly. Ultimately, Oregonians should consider the benefits of shifting resources to local sanctions and to alternatives to incarceration considering the high cost of building new prisons. The Commission's Package 1 recommendations, along with key principles that have guided successful reforms in other states, can serve Oregon policymakers as a starting place to adopt sensible policies to control taxpayer costs, protect public safety, and ensure the correctional system holds offenders accountable.

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<sup>1</sup> Edwin Meese III, "[Remarks on Sentencing Commission Guidelines Before American Law Institute](#)," May 22, 1987.

<sup>2</sup> Grover Norquist, "[Reducing crime needn't mean building bigger prisons](#)," *The Bend Bulletin*, November 21, 2012.

<sup>3</sup> [Oregon Department of Corrections](#) website (accessed February 11, 2013).

<sup>4</sup> Les Zaitz, "[Oregon Prison Puzzle: Cut Costs but Keep Public Safe](#)," *The Oregonian*, October 28, 2012.

<sup>5</sup> [Commission on Public Safety Report to the Governor](#), December 17, 2012, at 7 (citing Bureau of Justice Statistics, [National Prisoner Statistics \(NPS\) Series](#)).

<sup>6</sup> Oregon Office of Economic Analysis, [Oregon Corrections Population Forecast](#), October 1, 2012, at 6.

<sup>7</sup> Error rate calculated by the Pew Public Safety Performance Project based on Oregon Office of Economic Analysis, [Excel file for Oregon Prison Forecast Deviations in Oregon's Corrections Forecast Historical Accuracy, 2000 to 2012 \(xls\)](#), September 2012.

<sup>8</sup> Oregon Office of Economic Analysis, [Oregon's Corrections Forecast Historical Accuracy, 2000 to 2012](#), September 2012, at 5.

<sup>9</sup> [Commission on Public Safety Report](#), at 7.

<sup>10</sup> [Commission on Public Safety Report](#) at 8 (citing William Spelman, "The Limited Importance of Prison Expansion," in *The Crime Drop in America*, eds. Alfred Blumstein and Joel Wallman (Cambridge University Press, 2000), 97-129

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and Steven D. Levitt, "[Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not](#)," J. ECON. PERSPECT. 18, no 1 (Winter 2004): 163-190).

<sup>11</sup> [Commission on Public Safety Report](#) at 8 (citing William Spelman, "The Limited Importance of Prison Expansion," in *The Crime Drop in America*, eds. Alfred Blumstein and Joel Wallman (Cambridge University Press, 2000), 97-129 and Steven D. Levitt, "[Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not](#)," J. ECON. PERSPECT. 18, no 1 (Winter 2004): 163-190).

<sup>12</sup> Calculated by the Pew Public Safety Performance Project based on data from The Bureau of Justice Statistics (Paul Guerino, Paige Harrison, & William J. Sabol, [Prisoners in 2010](#), U.S. Department of Justice, Bureau of Justice Statistics (December 2011)) and The Federal Bureau of Investigation ([Crime in the United States 2010](#)).

<sup>13</sup> Anne Morrison Piehl & Bert Useem, "Prisons," in *Crime and Public Policy* (eds. James Q. Wilson and Joan Petersilia) (Oxford University Press 2011), at 542.

<sup>14</sup> *Ibid.*

<sup>15</sup> John J. Dilulio, Jr., "[Two million prisoners are enough](#)," *Wall Street Journal*, March 12, 1999.

<sup>16</sup> For a discussion of Oregon's historically well-regarded policies, see Pew Center on the States, [State of Recidivism: The Revolving Door of America's Prisons](#), April 2011, at 18-20.

<sup>17</sup> Les Zaitz, "[Oregon Prison Puzzle: Cut Costs but Keep Public Safe](#)," *The Oregonian*, October 28, 2012.

<sup>18</sup> *Ibid.*

<sup>19</sup> [Commission on Public Safety Report](#), at 15-29.

<sup>20</sup> *Ibid.* at 24-26.

<sup>21</sup> *Ibid.* at 15-29.

<sup>22</sup> Eric Boehm, "[Probation Changes Could Solve Prison Dilemma: Shift funds to front end of system to save money, says expert](#)," *Pennsylvania Independent*, February 10, 2010.

<sup>23</sup> Mark A.R. Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (Princeton University Press 2009), at 34-48.

<sup>24</sup> Mark A.R. Kleiman, "[Jail Break](#)," *Washington Monthly* (July/August 2009).

<sup>25</sup> Meghann Cuniff, "[Officials hope swift probation punishment will deter probation violators](#)," *Spokane Spokesman-Review*, May 20, 2012.

<sup>26</sup> Council of State Governments Justice Center, "[Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative](#)," (April 2009).

<sup>27</sup> Zen T.C. Zheng, "[Lawmakers agree to shut 102-year-old Sugar Land prison](#)," *Houston Chronicle*, May 18, 2011 (accessed January 23, 2013). Additionally, for an interesting comparison of the successful Texas model with the failing California model, see Ashley Stebbins, "[A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better \(and Model\) Position](#)," 62 BAYLOR L. REV. 873, 880 (2010).

<sup>28</sup> Vikrant Reddy, "[Texas Crime Rate Falls Faster than the National Rate](#)," *Right on Crime*, Sept. 24, 2012.

<sup>29</sup> Rand Corporation, [Are Mandatory Minimum Drug Sentences Cost-Effective?](#), 1997; see also Christopher Mascharka, "[Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences](#)," 28 FLA. ST. U. L. REV. 935, 945-49 (2001).

<sup>30</sup> Cynthia A. Kempinen, "[A Multi-Method Study of Mandatory Minimum Sentences in Pennsylvania](#)" (Pennsylvania Commission on Sentencing Research Bulletin: April 2010), at 8.

<sup>31</sup> Right On Crime [Statement of Principles](#) (accessed February 11, 2013).

<sup>32</sup> Quick Facts, [Issue Brief 2012](#), Oregon Department of Corrections; Texas Legislative Budget Board, [Criminal Justice Uniform Cost Report](#).