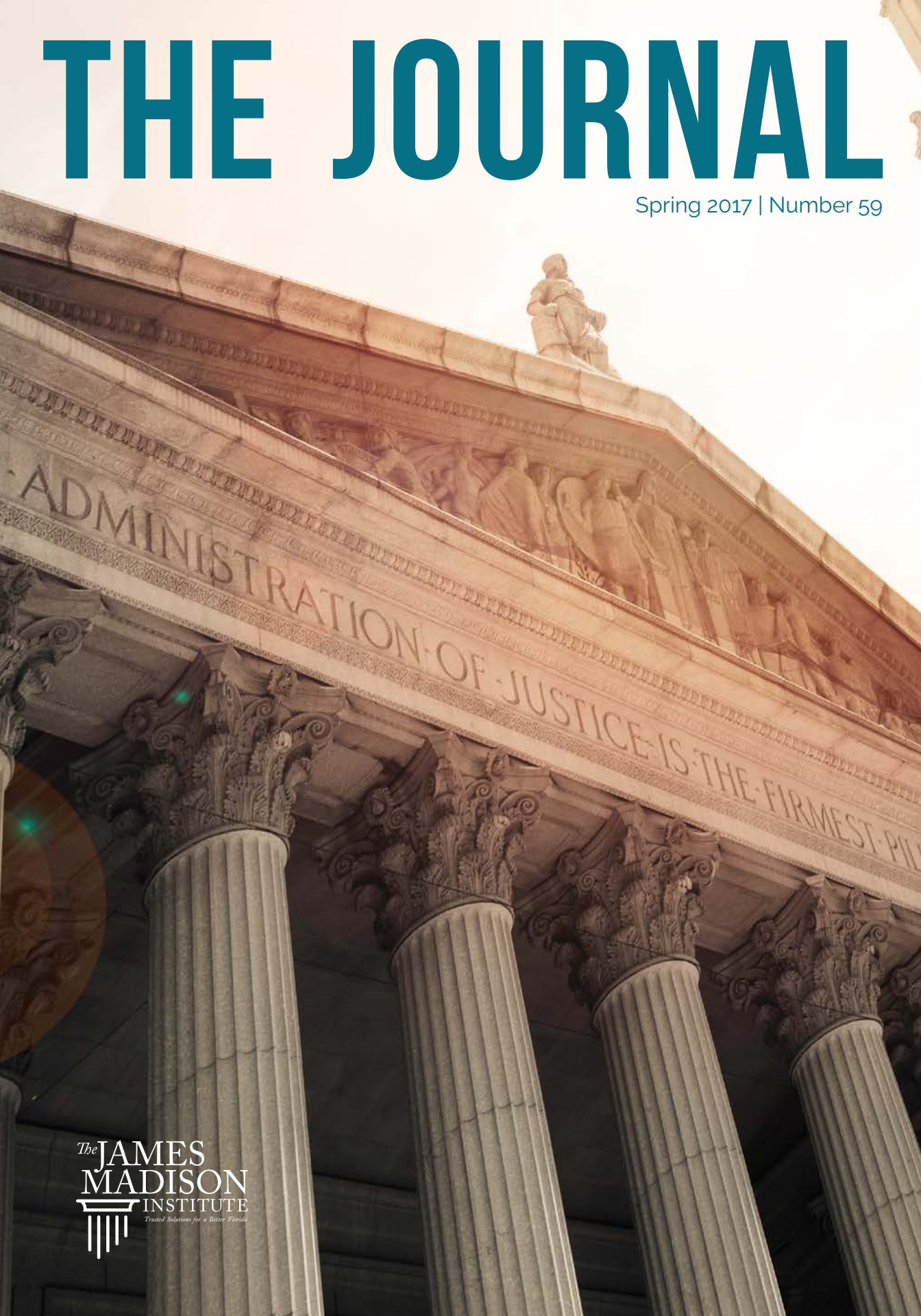
THE JOURNAL

Spring 2017 | Number 59



The JAMES MADISON INSTITUTE
Trusted Solutions for a Better Florida

THE JOURNAL

Spring 2017 | Number 59

COVER STORY

At the Heart of Conservatism

Dr. Robert McClure

PRESIDENT & CEO, THE JAMES MADISON INSTITUTE

No doubt, over the past 20 years, the definition of what it means to be a conservative has evolved significantly with respect to the issue of criminal justice policy and the conservative movement's approach to individuals who have been accused, tried, and adjudicated of crimes.

As crime rates climbed throughout the 70s and 80s, a sentiment among conservatives that government needed to be "tough on crime" grew with them. As these policies began to take effect in the early 90s, crime rates began to decline. The violent crime rate fell approximately 50 percent from 758.2 in 1991 to 372.6 in 2015[1], the most recent year for which we have data. Property crime also fell around 50 percent from 5,140.2 in 1991[2]

to 2487 in 2015[3].

However, with this trend, new and disturbing realities have also emerged. While crime rates have fallen, incarceration rates have skyrocketed, splintering families in a society that already struggles to keep families together. The total population incarcerated in the United States increased by almost 50 percent in the period from 1991-2015[4,5], at a time when the total U.S. population increased by less than 30 percent.[6] Today close to 7 million people are incarcerated in the United States and the number continues to grow. Almost 7 million people, because of being incarcerated at the state level, must necessarily be dependent on the state and funded by the taxpayer.

Criminal justice reform focuses on the twin goals of increasing public safety and saving taxpayer dollars. This issue is especially important for Floridians. In the last four years, conservatives in Florida have examined the issues of criminal justice most substantively in the juvenile arena, passing reforms like juvenile civil citations, expanding the confidentiality of records and expungement of records for juveniles that have turned their lives around. At the same time, JMI has partnered with national groups, such as Right on Crime, to promote positive economic and constitutionally-principled reforms in the adult criminal justice system.

As the third-largest state in the U.S., and possessing one of the highest incarceration rates, Florida has a unique opportunity to be a pioneer in criminal justice reform. Florida's example can be a blueprint to other states, making the case that principles of limited government, free markets and personal liberty are exactly the remedy for what ails the nation's criminal justice system.

Conservative ideals of small government are difficult to reconcile with a system that keeps millions of nonviolent offenders incarcerated and stuck in a cycle of poverty, recidivism, and dependence.

Conservative ideals of small government are difficult to reconcile with a system that keeps millions of nonviolent offenders incarcerated and stuck in a cycle of poverty, recidivism, and dependence. In Florida, close to one out of every 100 persons is incarcerated. And, post-release, offenders are subjected to ever-more discriminatory and intrusive government policies that hamper their ability to regain their social and financial footing while becoming productive members of society. With recidivism rates close to 30 percent, perhaps it is time to look at how criminal justice policy reform can be a driver of rehabilitation and productivity, and can put a damper on recidivism. New policies that incentivize and allow past non-violent offenders the ability to become productive members of society are conservative reforms that can both shrink the size and economic

burden of the criminal justice system and promote public safety at the same time.

As an increasing percentage of the population is housed in the prison system, the cost of running the criminal justice system inevitably grows. The economic burden of this system on the country has been estimated at close to a trillion dollars annually. Researchers estimate that attached to every dollar spent on incarcerations there is an additional 10 dollars of economic burden.[7] Even more pressing is the reality that at least half of the costs of incarceration are borne by the families and communities of those incarcerated. When the opportunity costs from years of lost work during a prison term, and an even greater loss of productivity in the years after release, are factored in, it becomes evident that something must be done. The costs of the status quo are far greater than the benefits.

For too long, ideas that promote generating revenue, increasing government, and limiting freedom have been the norm when it comes to criminal justice reform. A true conservative vision that emphasizes public safety, personal responsibility, restitution, rehabilitation and accountable government can be the framework for a justice system that works for everyone. A simple reversion to the way things were before does not work.

Many of our existing policies are decades old, far removed from new scientific and sociological research. We need new and improved solutions for the modern challenges of the justice system. And in addressing reform, we must be conscious of two equally vital measures when formulating policy: the costs to taxpayers and the impact on public safety. Reforms that increase public safety while at the same time allow for rehabilitation for those who go through the criminal justice system and save the taxpayer money are in fact possible.

This wave is relatively new, but not completely unchartered. Our friends in Texas have shown that conservative principles can have a positive impact and succeed. Over the past seven years, organizations such as Right on Crime have been actively reforming criminal justice policy in Texas. Conservatives have saved the state billions of dollars and simultaneously increased public safety. It's one of the reasons that The James Madison Institute has been a signatory to this now-national effort.

It is a privilege to dedicate this latest issue of The Journal to the vital task of reforming our criminal justice policies in Florida. The writers in this edition of The Journal are thoughtful and experienced on this subject. My guess is that most of us have been touched by this issue in many ways personally or in the lives of family members, friends, or neighbors. I hope that our readers will find these writings informative and encouraging.

1. https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resolveuid/4ad41efb-fee5-455a-8155-2e6e5f031762
2. https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls
3. https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/property-crime
4. http://www.albany.edu/sourcebook/pdf/section6.pdf
5. https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5870
6. https://fred.stlouisfed.org/series/POP
7. https://advancingjustice.wustl.edu/SiteCollectionDocuments/The%20Economic%20Burden%20of%20Incarceration%20in%20the%20US.pdf

How the Sunshine State Can Shine on Criminal Justice

By Vikrant Reddy **CHARLES KOCH INSTITUTE**
& Marc A. Levin **RIGHT ON CRIME**

Florida has long been one of the nation's top importers in the most important category of all – people. Whether to find opportunity in a state with no income tax or to enjoy a blissful retirement, Florida has been a shiny beacon for millions of people from other states and countries. Now, in addition to importing people, Florida has an opportunity to import conservative criminal justice reforms from states like Texas, Georgia, and South Carolina that have proven it is possible to reduce both crime and incarceration.

In 2016, Florida began taking small, but important, steps in the direction of reform. Advocates in Florida who are eager to see the state go further in the coming years will need to continue doing what they did in 2016: making conservative arguments that focus on holding both offenders and

the criminal justice system accountable, keeping families together, and reintegrating offenders into the workforce. In the world of criminal justice, there is a right way and a wrong way to pursue reform. The conservative arguments are the right way forward—they always have been—and advocates should continue to have confidence in the conservative argument for why reform is imperative.

To fully understand how we can chart a path forward to a criminal justice system that is at once smaller and more effective, we must understand how we arrived at the status quo in which, as of 2017, 700 out of every 100,000 Americans is behind bars.

...as of 2017, 700 out of every 100,000 Americans is behind bars.

For the sake of comparison, Australia incarcerates 150 out of every 100,000; England and Wales incarcerate 130 out of every 100,000; and Canada incarcerates only 114 out of every 100,000. In these Anglo-American nations that share a common legal and political heritage with the United States—and thus where reasonable comparisons can be made—incarceration rates are far, far lower. America's prison-focused strategy for crime control made sense in an earlier era, but the pendulum has swung too far in the direction of incarceration.

The 1950s and early 1960s were a relatively peaceful and low-crime era. The "white picket fences" caricature of this period is perhaps overstated, but it is true that levels of basic street crime, such as theft, murder, and assault, were fairly low. For reasons that are still unclear, this tranquility began to ebb in the late 1960s. Some sociologists blame the debased social mores of the period—the phrase "if it feels good do it" may have become a criminal mantra, not just a hippie mantra—but whatever the cause, crime began to rise throughout the Western, developed world, including America.

As violent crime increased rapidly every year from 1968 to 1994, Americans understandably lost patience with politicians they perceived as having little to offer but excuses for lawbreaking. Progressive policy-makers argued that criminal behavior was rooted in social pathologies like racism that could not be fixed with mere legislation, and thus, lost credibility with the public due to their inaction. Conservatives who believed in personal responsibility stepped in to fill the breach, arguing for more incarceration. To this day, Americans of a certain age remember how Richard Nixon, Ronald Reagan, and George H. W. Bush (not to mention countless state and local politicians) placed crime control at the center of their political agendas and "tough on crime" rhetoric at their center of their campaigns. By the 1990s, even progressives got the message, and politicians like Bill Clinton ran for office on the promise that they too would be "tough on crime." Clinton notoriously even left the presidential campaign trail in 1992 to return to Arkansas to oversee an execution.

In the mid-1990s, crime began to decline. According to FBI data, crime declined steeply from 1994 to 2014,[1] and it

has now returned to levels not previously enjoyed since the late 1960s. The extent to which ratcheting up incarceration caused the crime decline is unclear. Crime during this period fell in countries throughout the developed world, even in countries that did not pursue policies as punitive as America's. Moreover, even within the U.S., some "holdout" states did not increase sentence lengths quite so dramatically, and yet crime fell in these states just as it did in those that had increased sentence lengths.[2] Criminologists suspect that approximately 75 percent of the decline can be attributed to a mix of demographic and technological changes.[3]

A quarter, however, was probably the result of a "tough on crime" sentencing and corrections policy, and conservatives, therefore, had won at least a partial public policy victory. Understandably, many of them were resistant to altering their "tough on crime" message. For this reason, incarceration rates continued to rise, and whereas it could plausibly have been argued in the late 1960s that the U.S. was under-incarcerating, it is now clear that the U.S. is dramatically over-incarcerating.

Legislators in our home state of Texas were among the earliest conservatives to recognize this new reality. In 2007, they were presented with a startling estimate: due to extraordinary population growth in Texas, an additional 17,000 prison beds would be needed by 2012, at a cost of $2 billion. Historically, the legislature tended to accept estimates of this sort without dispute and simply enact the recommended policies. In 2007, however, legislators put their foot down and asked whether there was a different path available.

State judges explained to them that there was in fact a different path. The judges did not have adequate community-based alternatives, and thus they frequently sent low-level, nonviolent offenders to the default option: prison. These prison beds were more expensive than the community supervision alternatives (in Texas, incarceration costs about $50 per day, while probation costs about $3 per day), and thus Texans were paying more money and getting worse results.

The Texas Legislature and Governor Rick Perry took the advice of the judges and the advocacy community, and rather than spending $2 billion on new prison beds, they spent approximately $300 million on improving the community-based supervision of offenders: parole, probation, and drug courts.

These reforms worked. When 2012 arrived, the state was one year removed from having closed a prison. Then, in 2013, the state closed yet another two prisons. In

early 2017, it shuttered yet another.

To evangelize across the country about Texas's exciting success, we organized a national initiative in 2010 called Right On Crime (where Marc still serves as the Policy Director). Its premise was simple: criminal justice reform is a conservative issue, and anyone who cares about public safety, government spending, the scope of government power, and rebuilding American families must care about it.

The message resonated. In the six years since Right On Crime launched, dozens of deeply conservative "red" states like Alabama, Alaska, Georgia, Mississippi, and South Dakota (among others) have adopted reforms like Texas's 2007 reforms, and some have gone even further.

For example, over the last six years, nearly a dozen states—including Florida's neighbor Georgia—have expanded the ability of prisoners to acquire "earned time credits." These credits are time earned off the end of a sentence, and they incentivize offenders to take certain steps while under supervision, such as drug treatment and job training, that will help them to be successful when later re-entering society.

More than a dozen states—including both of Florida's neighbors, Alabama and Georgia—have authorized graduated sanctions for offenders who are on parole or probation so that violations are met with short, immediate jail stays—rather than lengthy revocations to prison. Most research now indicates that the swiftness and certainty of a punishment is more important than its harshness. These graduated sanctions act as a kind of "shock treatment" for offenders. If you miss appointments with your probation officer or fail to participate in treatment, you may be instantly sent to jail for a weekend. After that, if the probationer is still non-compliant, a week-long jail stay may result. Other graduated sanctions include curfews, electronic monitoring, and an extension of the probation term. These graduated sanctions are far more successful at reducing re-offending than simply sending an offender back to prison for many months or years even though they did not commit a new offense.

The American Legislative Exchange Council (ALEC), the nation's largest group of conservative state legislators, has enacted model legislation encouraging the use of graduated sanctions, and it also includes graduated incentives for exemplary behavior. In addition to earning time off the supervision term, these incentives in

some jurisdictions have ranged from bus tokens to reduced reporting requirements. Notably, such reduced reporting likely enhances public safety, as the research has found that it enables supervision officers to maximize the time spent with those most likely to recidivate. Those offenders who have establish a track record of exemplary compliance and who have already been on supervision for at least two years are very unlikely to recidivate, and in fact many should be eligible for early termination.

Additionally, more than 10 states have reclassified drug and property offenses so that crimes previously punished as felonies are now more appropriately treated as misdemeanors. These changes have generally come through legislative action, but in 2016 in Oklahoma, they were passed by ballot initiative. In the very same election, Oklahoma voted overwhelmingly in support of Donald Trump for president (he won every county), thus demonstrating that there is no reason a deep red state can't support criminal justice reform.

The key to passing these reforms was understanding and communicating how they are essential to a conservative, limited government vision.

These policies—earned time credits, graduated sanctions, the reclassification of certain offenses—are just a few of the many reforms that states have pursued. Other reforms include creating a presumption of probation for certain low-level offenses and expanding the use of electronic monitoring. Many states have also authorized "performance-incentive funding" so prisons are compensated for "correcting" offenders, not merely for housing them (importantly, this means that counties no longer have a fiscal incentive to simply dump nonviolent offenders on the state). Some states have additionally tackled the overcriminalization of ordinary business activities by ensuring that all crimes contain an appropriate intent standard or "mens rea." Reforms of this sort would be valuable in Florida, where a Miami man was recently sentenced to 18 months in prison merely for filing the incorrect paperwork when importing orchids.

In 2016, Florida also took steps in the direction of reform by changing a notorious mandatory minimum in the state (the "10-20-life" law), by reforming civil asset forfeiture practices which allow law enforcement to seize and keep personal property based merely on the suspicion that it has been involved in a crime, and by allocating new funds to improve mental health services.

The key to passing these reforms was understanding and communicating how they are essential to a conservative, limited government vision. One of Margaret Thatcher's most famous bits of wisdom was counseling that "first you win the argument, then you win the vote." The advice applies here. Legislators who care about criminal justice reform will not earn the votes of their conservative colleagues unless they

argue persuasively that criminal justice reform is a conservative issue.

The argument shouldn't be hard to make. Governments these days engage far too often in tedious and unproductive debates about areas in which they should not be involved. Criminal justice is different. Everyone understands that criminal justice is a legitimate function of government. The question is how to exercise government power in this space in a way that maximizes public safety while looking out for taxpayers and civil liberties.

All signs indicate that Florida may now build on several important though non-comprehensive bills that have been passed in the last few sessions. It can for instance become a national pioneer on the use of civil citations. In 2016, the people of Duval County overwhelmingly elected a reform-minded state's attorney in the Republican primary named Melissa Nelson. In Pinellas County, Sheriff Bob Gualtieri has redefined the office by operating highly effective police diversion programs for juveniles and adults and redirecting hundreds of homeless people who committed minor offenses like criminal trespass from languishing for months in jail where it costs $80 a day to a shelter that with charitable support costs taxpayers only $13 a day. Thanks to the Sheriff's leadership, more officer, court, and prosecutorial resources can be focused on violent and serious crime.

Conservatives have always been on the right side when arguing that individuals must be held accountable for their actions, but too often accountability has been confused with retribution.

Conservatives have always been on the right side when arguing that individuals must be held accountable for their actions, but too often accountability has been confused with retribution. Apart from the most heinous offenses such as murder and rape, survey research has found the public is most interested not in punishment for punishment's sake, but in reducing recidivism and increasing the chances that the offender will emerge from the criminal justice system as a productive, law-abiding citizen who is an asset, not a burden, to both their family and society. Conservative states have been leading the way to a system that increasingly delivers on this goal and now it is time to bring this approach to the Sunshine State.

1. Crime rates ticked up slightly in 2015, but the increase was minor and criminologists will not know for some time whether it represents random year-to-year variation (such as the kind that existed in the low-crime 1960s) or whether it indicates the start of a trend.
2. Prison and Crime: A Complex Link, Pew Charitable Trusts, Sept. 11, 2014.
3. John F. Pfaff, Locked In (Hachette Book Group, Inc. 2017), 114-15.

Reforming Florida's Pre-Trial Decision Making

Deborrah Brodsky **DIRECTOR, PROJECT ON ACCOUNTABLE JUSTICE AT FLORIDA STATE UNIVERSITY**

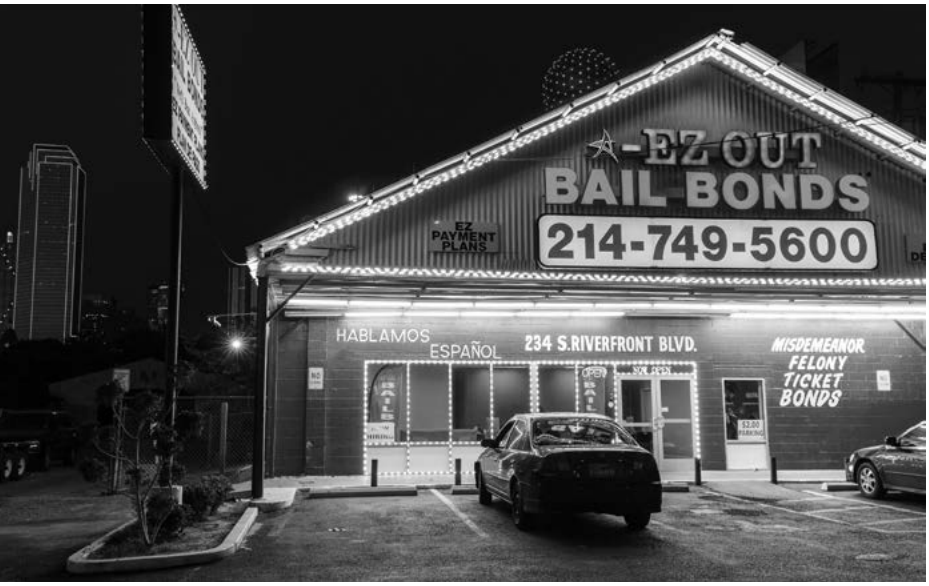
At the heart of the United States' criminal justice system is the principle that someone accused of a crime is innocent until proven guilty. Nevertheless, 60 percent of those detained in Florida jails—35,000 people on any given day[1] are awaiting trial, not convicted of a crime—at an average cost of more than $815 million per year to Florida taxpayers.[2]

As it stands, current practices related to the pretrial phase of our criminal justice system do not fully promote public safety, fair and equitable treatment of defendants, or the effective use of community resources. It is instead a system based on a defendant's financial resources, as opposed to their

measured risk.

As Florida sets its sights on making significant and positive changes to our criminal justice system, it is imperative to examine pretrial decision making through a more rational, modern lens.

The point in the process where defendants are accused of a crime and are legally considered innocent until proven otherwise is among the most important decision making thresholds criminal defendants face. Yet this period (post-arrest and prior to trial, often termed "pretrial") is handled arbitrarily, with money serving as a much too powerful factor in the decision to release or detain a defendant. Chance is seldom if ever a game to be played in matters of public safety, and yet it is in fact the scenario we engage when money—instead of public safety—drives these decisions.



EZ Out Bail Bonds in downtown Dallas Texas.

The challenge is that, often, having the money to pay a bail fee does not ensure a person accused of a crime is not a public safety threat or that he or she will show up for court. Conversely, not having the ability to pay one's bail does not ensure that the accused is a public safety threat or won't show up for court. This inequitable treatment of the criminally accused at this stage by itself would warrant serious examination, and yet there are additional concerns with existing policy. Even the shortest of stays in a county jail can have significant impacts on both individual and longer-term public safety outcomes. Imagine, for example, the consequences on employment, family security, and on a defendant's children. Further, the inability of an individual to afford bail can and often does exert additional pressure to enter a guilty plea, without regard to innocence or guilt, when facing the prospect of a destabilizing jail stay.

Pretrial release is a constitutionally protected right for defendants,[3] with many qualifiers in place to safeguard public safety.[4] The presumption for most defendants is that they will be released pending resolution of their case. Florida law defines that the purpose of a bail determination is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.[5] As such, when bail determinations/release decisions are made,

the majority fall under three categories:

- ROR (release on own recognizance—or with a personal pledge to return to court)
- release on cash or surety bond, and/or
- release under conditions (such as electronic monitoring or drug testing, often supervised through a branch of the court know as a pretrial services agency[6]).

For those released with monetary conditions, the decision on the cost of bail is guided by a bond schedule, for allowable offenses,[7] which is a uniform list of recommended amounts by offense, with increasing amounts relative to the seriousness of the offense.[8] While uniform bond schedules are an attempt to tie a monetary amount to the seriousness of the offense for which the individual is accused, they cannot account for factors that are illustrative of a person's potential risk of flight and reoffending, the protective purposes of bail.[9]

> *"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."*
>
> *Chief Justice William Rehnquist*

Money is not a proxy for public safety. However, money is a major determinant regarding pretrial release, and is a release factor for three out of every five felony defendants. Further, it has been a growing determinant. Between 1990 and 2009 the percentage of pretrial releases involving financial conditions rose from 37 percent to 61 percent. Money is also a substantial factor in the unnecessary detention of too many defendants. Of those pretrial defendants detained with money set as a condition for release, nine out of 10 are not able to afford release.[10]

In 2015, Florida law enforcement made more than 750,000 arrests across the state.[11] What happens to these individuals as a function of pretrial status varies across the state. And while differentials do exist from county to county, there is an important parallel across all counties that compels additional statewide scrutiny: the cost. At more than $8.2 billion annually, public safety demands the largest expenditures of Florida's county budgets by category, with law enforcement and jails comprising half of that total.[12]

Apart from the sheer gravity of the taxpayer expense, there now exist bodies of research that can and should be leveraged to bring better value to both public safety and taxpayer investment. Defendants detained pretrial tend to experience harsher penalties than those who are not detained, and emerge with an increased likelihood for future criminal activity. Comparing defendants detained pretrial versus those who are released, research by the Arnold Foundation found that those who were detained were:

- four times more likely to be sentenced to jail;
- three times more likely to be

sentenced to prison; and
- when sentenced, sentenced for longer—almost three times as long for those sentenced to jail and more than twice as long for those sentenced to prison.[13]

Another Arnold Foundation study found that jailing someone unnecessarily affects short and longer-term public safety outcomes. Both low- and moderate-risk defendants detained in the pretrial period were more likely to commit crimes in both the immediate-term pretrial period, as well as years later. Low-risk defendants held for as little as three days were nearly 40 percent more likely to commit a new crime before trial than a low-risk defendant held no longer than a day, while the longer low-risk defendants were held, the more likely they were to re-offend.[14]

... jailing someone unnecessarily affects short and longer-term public safety outcomes.

However, there is room for hope. Promisingly, research and practice in risk-based decision making is propelling changes in pretrial practices all over the country.[15] Even more, Florida has a sound foundation and infrastructure of court practices and processing that is amenable to change, and indeed in some places innovation is already occurring.[16]

Pretrial services agencies exist in 29 of Florida's 67 counties. These agencies are branches of the court charged with interviewing defendants and verifying information, administering assessments, making release and supervision recommendations to the court, and supervising defendants. What's missing is consistent across most jurisdictions throughout the country: an empirically-based risk assessment instrument[17] to inform the processes.

Currently, most jurisdictions do not require a risk assessment. Instead, Florida law provides guidance on what information should be considered by judicial officers charged with decision making.[18] However, while the law encourages that assessments are routinely employed, unlike an empirically-driven assessment, the law does not account for how much weight should be given these factors—or whether the information required is even useful.

Additionally, as required by Section 907.043 (4)(a)(b), Florida Statutes, the "Citizens' Right-To-Know Act," each pretrial services agency is required to submit weekly and annual reports intended to increase transparency of operations in these programs, yet which have no mechanism for measuring program outcomes. Instead, the law requires the collection of already publicly available information described by the Florida Legislature's auditing and accountability arm, OPPAGA, as adding, "limited value or are ambiguous."[19]

Taking into account both the strengths and weaknesses of Florida's current system and the universe of research available to address challenges being faced, there are policy prescriptions that can work on the margin. The following are two recommendations:

Require the use of scientific pretrial risk assessments across Florida, to integrate the science of risk into modern and safe detention and release practices, to better inform the court, to reduce the costs and impacts of unnecessary pretrial detention, and to advance public safety.

Amend the statutorily required reporting by pretrial services agencies to focus on measures that reflect the core work of supervision and less on bureaucracy and information of limited value. Further study should include a statewide assessment and evaluation of current statutes and practices, focused on performance, and a more robust collection of local jail population data.

Change can be challenging, and policy makers and criminal justice practitioners are well positioned to reduce the negative impacts of crime when the evidence stacks so compellingly against it. At the front-end of the system, in the decision-making process of whether to detain or release those accused of crimes prior to trial, we now have ample opportunity to do things differently, more driven by evidence, in order to achieve greater public safety and individual and societal gains. Every decision matters in cost and in consequence.

1. Project on Accountable Justice analysis of FL Dept. of Corrections monthly county detention facilities' statistics, at: http://www.dc.state.fl.us/pub/jails/index.html. Note, this does not include all counties.
2. Florida average cost per day per detainee is $64. Florida Department of Corrections and Florida Legislature's Office of Economic and Demographic Research, 2014 Annual Jail Population Survey, accessed at: http://www.dc.state.fl.us/pub/jails/2014/2014AnnualJailCapacitySurvey.pdf.
3. The Eighth Amendment of the U.S. Constitution bars "excessive bail."
4. Article I, Section 14, Florida Constitution: "Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained."
5. 903.046 (1), F.S.
6. There are 29 Pretrial Services agencies in Florida.
7. Many offenses are "not bondable," including for capital crimes and felonies punishable by life in prison.
8. See: 13th Circuit at: http://www.fljud13.org/Portals/0/AO/DOCS/S-2014-023.pdf.
9. The U.S. Supreme Court in Stack v. Boyle: bail must be based on an individualized assessment of a defendant's strengths and weaknesses.
10. BJS, Felony Defendants in Large Urban Counties-2009, 2013, accessed at: https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4845.
11. Florida Department of Law Enforcement, at http://www.fdle.state.fl.us/cms/FSAC/Documents/PDF/arr_age_race.aspx
12. Florida Office of Economic and Demographic Research, Total County Expenditures, 2014, accessed at: http://edr.state.fl.us/Content/local-government/data/revenues-expenditures/cntyfiscal.cfm. Note: Courts are a separate category at nearly $1 billion annually.
13. Lowenkamp et al., Laura & John Arnold Foundation, Investigating the Impact of Pretrial Detention on Sentencing Outcomes, 2013.
14. Lowenkamp et al., Laura & John Arnold Foundation, The Hidden Costs of Pretrial Detention, 2013.
15. Recent reform has included legal challenges and changes handled administratively, statutorily, and constitutionally. See: http://www.cleveland.com/metro/index.ssf/2016/12/13_places_that_saw_bail_reform.html#1.
16. Volusia County is testing an instrument with the Arnold Foundation, see: http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/. Palm Beach County is part of the MacArthur Foundation's Safety and Justice Challenge, see: http://www.safetyandjusticechallenge.org/. In 2011, a validated risk assessment instrument was made available to all counties. See: http://www.pretrial.org/download/risk-assessment/FL%20Pretrial%20Risk%20Assessment%20Report%20(2012).pdf.
17. "The pretrial risk assessment should be empirically based and locally validated to be predictive of failure to appear in court and re-arrest while on pretrial status." See: http://www.pretrial.org/solutions/risk-assessment/
18. See: 903.046(2), F.S.
19. In 2010, OPPAGA reviewed the requirements of Citizens Right to Know and concluded that the Legislature could amend the statutes, "to improve accuracy and data uniformity, streamline reporting requirements, and reduce local costs…" to…"minimize administrative requirements that impede programs' ability to screen and supervise defendants."

Poor Results, Good Intentions

The Case for Reform of Florida's Mandatory Minimum Statutes

Greg Newburn

In 1999 the Florida Legislature established mandatory minimum sentences for drug trafficking.[1] "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of" a minimum quantity of various illegal drugs, is guilty of "trafficking" in those drugs. The 1999 bill established minimum sentences that escalated based on the quantity involved in the offense.

Sixteen years later, the evidence is clear.

Florida's mandatory minimum drug laws have not achieved their intended purposes, but have led to substantial negative unintended consequences. Given an inmate population hovering around 100,000, a corrections budget consistently over $2 billion, and a state prison system described by its own guards as a "ticking time bomb,"[2] Florida lawmakers should reform Florida's outdated and ineffective drug laws by restoring some discretion in low-level drug sentencing.

A Failed Public Policy

Proper analysis judges public policy not by its intentions, but by its results. By that standard, Florida's mandatory minimums have failed. Mandatory minimums were intended to deter drug trafficking, drug abuse, and drug overdoses, but have accomplished none of those objectives.

...Florida's mandatory minimums have failed. Mandatory minimums were intended to deter drug trafficking, drug abuse, and drug overdoses, but have accomplished none of those objectives.

For instance, the sponsor of the 1999 bill that established mandatory minimums said the new sentences were intended to apply only to "major players"[3] in the drug trade, the kind of offender "who's growing three barns full of marijuana, or bringing in a boatload of cocaine."[4] Harsh sentences were designed to deter what others described as "multi-billion dollar organizations" that "make the American Mafia look like schoolchildren,"[5] with trafficking threshold weights "drawn very tight" to distinguish between bona fide drug traffickers and "somebody that's merely using."[6]

Unfortunately, the 1999 bill established absurdly low threshold weights for some drugs, particularly opioids like Oxycodone and hydrocodone. Those low trafficking thresholds have subjected thousands of low-level drug offenders to harsh mandatory minimum prison sentences. Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA) found most offenders sentenced to prison in FY 2010-11 for opioid trafficking either possessed illegally or sold amounts of pills equivalent to one or two prescriptions, between 30 and 90 pills.[7] A quarter of offenders sentenced to prison for hydrocodone trafficking that year were caught with fewer than 15 pills.[8]

Moreover, most of these offenders did not have significant criminal histories. Approximately 74 percent had never previously been admitted to prison.[9] Further, per OPPAGA:

> Half had either never been on probation or had been on probation solely for drug possession, and 81 percent did not have a prior history of offenses involving selling or trafficking drugs. Most (84 percent) had no current or past violent offenses . . . [and] tended to have substance abuse problems and were at low risk for recidivism.[10]

In 2014, Florida took a modest step toward correcting the low threshold problem when it passed SB 360, which

raised trafficking thresholds for Oxycodone and hydrocodone and recalibrated some mandatory sentences for trafficking in those drugs.[11] However, current threshold weights are still far too low to meaningfully distinguish between users and kingpins anticipated by the law. In fact, drug users are commonly also low-level dealers themselves. About 70 percent of state inmates incarcerated for drug trafficking reported using drugs in the month before their offense, 42 percent reported using at the time of their offense, and 25 percent reported committing their offense to get money for drugs.[12] Nevertheless, current law requires a three-year mandatory minimum for simple possession of as few as 14 Percocet tablets,[13] and a 25-year mandatory minimum for possession of less than 200 Percocet tablets, the same sentence one would receive for importing just under 30 kilograms of pure heroin.[14]

These mandatory sentencing laws succeeded in sending low-level addicts to prison for decades, but a Florida Senate report found no evidence that the laws had a general deterrent effect.[15] Prison admissions data supports that conclusion. By FY 2011, drug admissions to Florida prisons were twice what they were in 1996.[16] Opioid trafficking admissions quadrupled between FY 2006-07 and FY 2010-11.[17] Florida Attorney General Pam Bondi reported a 14-fold increase in prison commitments for the lowest threshold opioid trafficking crime between FY 2000-01 and FY 2010-11.[18]

Meanwhile, mandatory minimums failed to deter drug abuse. Florida's cocaine-related death rate increased 33 percent between 1999 and 2015.[19] Heroin-related deaths fell, then rebounded to a rate 204 percent higher than in 1999.[20] Between 2003 and 2009, Oxycodone overdoses increased 246 percent.[21] Florida's overall drug-induced death rate increased nearly 150 percent between 1999 and 2015.[22]

In the 16 years since Florida adopted mandatory minimums to catch kingpins, reduce drug trafficking prison admissions, and reduce drug overdoses, Florida has instead caught thousands of low-level drug addicts, increased drug trafficking prison admissions, and suffered more drug overdoses. This is the definition of public policy failure. It is also consistent with 40

years of evidence on mandatory minimum drug laws.[23]

This failure comes at a steep cost to public safety. In 2011 Florida TaxWatch found that Florida spends nearly $100 million annually incarcerating drug offenders serving mandatory minimums.[24] Recent evidence suggests that number is even higher today. Given the opportunity costs of that spending – every dollar spent on unnecessary incarceration cannot be spent in other needed areas, such as hiring more police officers, pay raises for corrections officers and first responders, and testing more rape kits – Florida's failing mandatory minimum drug laws come with tangible public safety costs.

Improving Florida's criminal justice system should start with fixing its mandatory minimum drug laws. And that should begin with passing a safety valve for drug offenses.

Florida spends nearly $100 million annually incarcerating drug offenders serving mandatory minimums.

What are Safety Valves?

A safety valve is an exception to a mandatory minimum sentencing law that authorizes a court to give an offender less time in prison than the otherwise required minimum.[25] Some safety valve laws give judges wide discretion to avoid mandatory minimums. Others authorize sentencing courts to depart from the minimum only if the offender meets certain special requirements.[26]

Safety valves do not eliminate mandatory minimums, but they do allow sentencing courts to make common sense distinctions between dangerous offenders – for whom prison is a necessary and appropriate sanction – and offenders for whom public safety might be better protected through alternatives to prison. These distinctions will reserve expensive prison space for offenders who represent a threat to public safety, ease problems related to prison understaffing, and free up resources to fight crime. The federal government and many states already have safety valves in statutes. Their experiences are instructive.

Federal Safety Valve

In 1986 the federal government adopted harsh mandatory minimums for certain drug trafficking crimes. As a result, many first-time, low-level, and nonviolent drug offenders received mandatory minimums disproportionate to their crimes.[27] Led by Senator Strom Thurmond in the Senate, and with the support of key Republicans in the House, Congress passed a safety valve to its drug trafficking laws in 1994. As of 2015 more than 97,000 federal drug offenders had received lower sentences under the federal safety valve, saving taxpayers hundreds of millions of dollars. Over this same period, the nation's crime rate dropped to generational lows.[28]

Florida

Florida has several safety valves already in place. For instance, Florida law requires courts to sentence defendants

designated as "habitual felony offenders," "habitual violent felony offenders," and "violent career criminals" to mandatory minimums.[29] However, if the court finds the mandatory minimum "is not necessary for the protection of the public," then the mandatory minimum does not apply.[30] These safety valves have been in Florida statutes since 1995. During that time Florida's violent crime and property crime have fallen approximately 57 percent.[31]

Florida law also imposes a four-year mandatory minimum for certain hit-and-run offenses.[32] The same statute, however, allows sentencing courts to depart from the minimum if the court finds that the mandatory minimum "would constitute or result in an injustice."[33]

In 2014, Florida passed a safety valve to its 10-20-Life gun sentencing law, allowing a court to depart from the mandatory minimum for aggravated assault committed with a firearm if it made certain findings.[34] This provision was repealed in 2016 when the Legislature repealed the mandatory minimum for aggravated assault.[35]

Georgia

In 2013, facing a corrections budget crisis, Georgia passed a safety valve to its mandatory minimum drug trafficking sentencing laws as part of a larger criminal justice reform package.[36] According to Georgia's Council on Criminal Justice Reform, "There is mounting evidence that the reforms enacted to date are improving the effectiveness of Georgia's criminal justice system and producing benefits for taxpayers as well as offenders and their families."[37] Georgia's prison population was reduced about 5.5 percent between 2012 and 2015. Further, Georgia has avoided spending $264 million on new prison capacity,[38] and crime has fallen about 10 percent since 2013.[39]

South Carolina

In 2010, South Carolina passed the "Omnibus Crime Reduction and Sentencing Reform Act of 2010." Among other reforms, the legislation removed the 10-year mandatory minimum sentence for Drug-Free School Zone violations, allowed the possibility of probation for certain second and third drug possession convictions, and eliminated mandatory minimum sentences for first convictions of simple drug possession. Since those reforms were adopted, South Carolina has closed six prisons, saved nearly $500 million,[40] and crime has fallen 16 percent.[41]

Mississippi

In 2014 Mississippi passed a safety valve to its drug trafficking statute. The new law allows sentencing courts to depart from mandatory sentences up to 25% of the statutory minimum under certain circumstances. Since 2014 Mississippi's prison population has fallen, and the state's violent crime rate and property crime rate have fallen, as well.

Other State Safety Valves

Several other states have safety valves in their statutes, all with similar results. New York allows courts to depart from certain gun mandatory minimums.[42] Connecticut gives courts discretion to depart from certain drug mandatory minimums.[43] Sentencing courts in Maine are authorized to impose sentences below the mandatory

minimums for drug trafficking offenses if they find imposing the minimum would "result in a substantial injustice to the defendant," and "would not have an adverse effect on public safety," among other findings.[44] Virginia adopted a drug safety valve that mirrors federal law.[45] Minnesota has saved tens of millions in unnecessary prison costs using a safety valve for certain firearm-related offenses.[46] Montana and Oregon also have broad safety valves that allow courts to depart from mandatory minimums for a variety of crimes.

The American Legislative Exchange Council (ALEC) recently developed the Justice Safety Valve Act,[47] a model safety valve that provides sentencing courts with discretion to depart from mandatory sentences for nonviolent offenders who meet specified criteria. In 2015, Oklahoma, Maryland, and North Dakota all adopted some version of the ALEC model language. (In 2016, Maryland repealed most of its mandatory minimum drug laws.)

The evidence supporting safety valves is overwhelming. Many states have used them to avoid unnecessary and costly incarceration.

Conclusion and Recommendations for Florida

Protecting public safety is inarguably an essential function of government. And few would contend that Florida has failed at that core mission. But while governments are obligated to keep their citizens safe, they are also obligated to provide public services as efficiently as possible. That principle is especially important for public safety, where waste and inefficiency manifest themselves not only in bloated budgets and higher taxes, but in broken families and victims of crime.

The evidence supporting safety valves is overwhelming. Many states have used them to avoid unnecessary and costly incarceration. Those states have reduced prison populations, closed unnecessary prisons, saved hundreds of millions of dollars, and, most importantly, continued to reduce their crime rates. Florida's nearest neighbors – Georgia, Mississippi, South Carolina, and Alabama – have all embraced drug sentencing discretion in one form or another, and provided models that reduce crime and eliminate unnecessary corrections spending. Florida should follow their lead.

1. Ch. 99-188.
2. "Florida prison 'time bomb' is ticking." Sun Sentinel. September 16, 2016. Available: http://www.sun-sentinel.com/opinion/fl-editorial-prison-funding-20160916-story.html.
3. Florida House of Representatives Crime and Punishment Committee, February 3, 1999.
4. Id.
5. "Developing a Comprehensive Drug Control Strategy in Florida." Florida Senate Criminal Justice Committee Report Number 98-13. November 1998.
6. Crime and Punishment Committee, February 3, 1999.
7. Office of Program Policy Analysis and Government Accountability. "Opinions are Mixed About Sentencing Laws for Painkiller Trafficking." Report No. 12-02. January 2012. Available: http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1202rpt.pdf.
8. Id.
9. Id.
10. Id.
11. Ch. 2014-176.
12. Sevigny, E. L. & Caulkins, J. P. (2004). Kingpins or Mules:

An Analysis of Drug Offenders Incarcerated in Federal and State Prisons. Criminology and Public Policy.
13. Lauren Galik, "The High Cost of Incarceration in Florida: Recommendations for Reform." Reason Foundation Policy Study No. 444. April 2015. Available: http://reason.org/files/florida_prison_reform.pdf.
14. Id.
15. Florida Senate Committee on Criminal Justice, "A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers." October 2009. Available: http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf.
16. Florida TaxWatch Center for Smart Justice. "Review of Criminal Justice Data." December 2011. Available: http://www.floridataxwatch.org/resources/pdf/CSJFindings.pdf.
17. "Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking."
18. Florida Office of the Attorney General. "Florida's Prescription Drug Diversion and Abuse Roadmap 2012–2015." April 2012. Available: http://myfloridalegal.com/webfiles.nsf/wf/kgrg-8t8l5k/$file/prescriptiondrugdiversionandabuseroadmap.pdf.
19. Florida Department of Law Enforcement. "Drugs Identified in Deceased Persons by Florida Medical Examiners, 2015 Annual Report." September 2016. Available: https://www.fdle.state.fl.us/cms/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2015-Annual-Drug-Report.aspx.
20. Id.
21. Centers for Disease Control and Prevention, "Morbidity and Mortality Weekly Report: Drug Overdose Deaths – Florida, 2003-2009." July 8, 2011, 60(26); 869-872.
22. Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2015 on CDC WONDER Online Database, released December 2016. Data are from the Multiple Cause of Death Files, 1999-2015, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. Accessed at http://wonder.cdc.gov/mcd-icd10.html.
23. See Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings," 38 Crime & Justice 94-96. See also Eric Luna and Paul G. Cassell, "Mandatory Minimalism," 32 Cardozo L. Rev. 1 (2010).
24. "Review of Criminal Justice Data."
25. See Families Against Mandatory Minimums, "Turning Off the Spigot: How Sentencing Safety Valves Can Help States Protect Public Safety and Save Money," March 2013. Available: http://famm.org/Repository/Files/Turning percent20Off percent20the percent20Spigot percent20web percent20final.pdf.
26. Id.
27. Stephen Chapman, "A `Safety Valve' To Ease Pressures Is A Good Start." Chicago Tribune. August 4, 1994.
28. See "Turning Off the Spigot."
29. s. 775.084, F.S.
30. s. 775.084(e), F.S.
31. FBI, Uniform Crime Report.
32. s. 316.027, F.S.
33. S. 316.027(2)(g), F.S.
34. Ch. 2014-195.
35. Ch. 2016-007.
36. Public Safety Performance Project. "2012 Georgia Public Safety Reform." The Pew Charitable Trusts. July 2012. Available: http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewgeorgiasafetyreformpdf.pdf.
37. Special Council on Criminal Justice Reform. "Report of the Georgia Council on Criminal Justice Reform," February 2016. Available: https://dcs.georgia.gov/sites/dcs.georgia.gov/files/related_files/site_page/GA percent20Council percent20on percent20Criminal percent20Justice percent20Reform percent202016 percent20Report.pdf.
38. Id.
39. FBI, Uniform Crime Report.
40. Robert Kittle, "2010 law saved South Carolina taxpayers almost $500 million." WSPA News. November 28, 2016.
41. FBI, Uniform Crime Rate.
42. N.Y. PEN. LAW § 265.09(1) (2012).
43. CGS § 21a-283a (2012).
44. 17-A MRS § 1252(5)(A-C) (2012).
45. VA. CODE ANN. § 18.2-248 (2012).
46. Minn. Stat. § 609.11, subd. 8
47. The text of the model policy is available at: http://famm.org/wp-content/uploads/2013/07/ALEC-Justice-Safety-Valve-Act-8-5-13.pdf.

Staying Moored: Why a Meaningful Mens Rea Requirement Should Matter to You

By Shana O'Toole **DIRECTOR, NACDL**
Mario Meeks **COUNSEL FOR WHITE COLLAR CRIME POLICY, NACDL**

As the recent Presidential election attested, Florida regularly commands the national spotlight. This is evident in the world of criminal justice.

An adequate mens rea (which is legalese for a "guilty mind") requirement in all criminal laws protects anyone that did not intend to commit a crime from unjustly being exposed to criminal prosecution and the unfortunate consequences that result. The collateral consequences of even an arrest, in itself, regardless of whether the charges are dismissed or an individual is ultimately prosecuted, convicted or sentenced can dramatically impact an individual's future job prospects or higher

education admissions. The erosion of this protection should be unsettling, especially to Floridians.

Mens rea is a foundational anchor of the American criminal justice system and even predates the days of the founding fathers. At its core, this concept requires an individual to have intended to commit a crime before he can be subjected to the criminal punishment associated with that crime. It is the moral justification for bringing to bear on a single individual the incredible might of the government. Ensuring that every law has an adequate criminal intent requirement preserves society's faith in the criminal justice system.

Because the greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law, this power must be vigilantly scrutinized and checked.

Because the greatest power that any civilized government routinely uses against its own citizens is the power to prosecute and punish under criminal law, this power must be vigilantly scrutinized and checked. More than any other area of law, criminal law must be firmly grounded in fundamental principles of justice, for its abuse (intended or not) by elected and unelected public servants alike can rob well-intentioned citizens of their most sacred, unalienable right: Liberty.

This criminal law anchor is based on a stalwart constitutional principle: fair notice. The Due Process clause of the Constitution requires that before a person can be criminally punished, that person must be given adequate notice that the conduct in question was prohibited. Only when the government has made its edicts clear, should a person be subjected to condemnation and prolonged deprivation of liberty, and all the serious, life-altering collateral consequences that follow.

Over the last several decades, however, the protections that an adequate criminal intent requirement provide have been systematically eroded away by hastily enacted and overly broad legislation. This legislation has often then been implemented, administered, and enforced by a plethora of additional criminal regulations drafted by unelected government agencies with no direct accountability to the public. The end result is that there are now hundreds of thousands of federal criminal laws and regulations on the books that are so broadly defined that most anyone can be deemed a "criminal." Of course, this is not what James Madison intended when he drafted what would become the framework for the Constitution of the United States.

The erosion of criminal intent requirements has not been limited to only federal law. Many states have also enacted legislation undermining this important legal anchor. Sadly, Florida is no exception. In Florida, there are a number of foolish

criminal laws, lacking sufficient criminal intent requirements, that many Floridians would be shocked to learn are crimes, including the individuals who have been arrested for committing them.

For example, in September 2016, a 34-year-old man from Auburndale was arrested and jailed after a deputy spotted him with a red, plastic milk crate that was stamped "Sunshine State Dairy Farms" attached to his bicycle. When asked by the deputy, the man said he found the crate on the side of the road and attached it to his bike. He was arrested and charged with unlawful possession of a dairy crate—a crime that could land him up to one year in prison.

In August 2016, a 74-year-old Bushnell man was arrested after trying to protect his horses and stepson from a 10-foot alligator. He shot at the alligator four times with his pistol, but it still attacked and latched on to his son's leg. Authorities eventually arrived at the scene and killed the predator, but then arrested the man for unlawfully attempting to kill it without a permit. Another man in Naples was arrested in April 2015 for attempting to nurse a baby alligator back to health after he and his son rescued it from being attacked. In Florida, both crimes are felonies punishable with up to five years in prison.

Other recent examples of Floridians being arrested or prosecuted for crimes that they probably did not even know existed, let alone intended to purposefully commit, include: a University of Florida student-athlete who was arrested in July 2013 for barking at a police dog, a misdemeanor punishable with up to 60 days in jail; and a man who was arrested in February 2013 when he released a dozen heart-shaped balloons on Dania Beach as a romantic Valentine's Day gesture for his girlfriend—a gesture that could have cost him up to five years in prison under the Florida Air and Water Pollution Control Act.

Florida's lack of adequate criminal intent requirements, however, is not limited to mere "regulatory" laws. With its strict liability drug law, Florida is actually at the forefront of the erosion of the criminal intent anchor in the criminal justice system. In fact, Florida is only one of two states that have implemented such a law.

Under § 893.13 of the Florida Statutes, the mere possession of a controlled substance constitutes a felony regardless of whether you knew you were in possession of the drug or whether you knew that the

specific controlled substance that was in your possession was illegal to possess. Depending on the controlled substance at issue and other facts, a violation of this statute is punishable by anywhere from one to thirty years in prison.

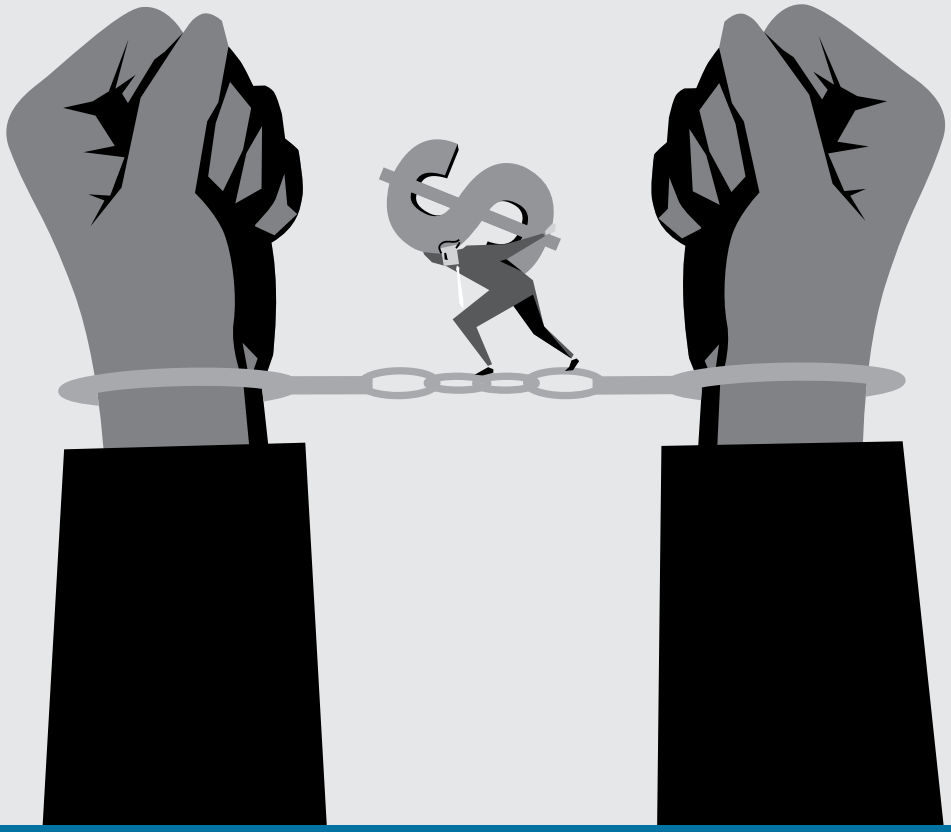
In 2012, in State v. Adkins, this troubling law was deemed constitutional by the Supreme Court of Florida. Thus, any Floridian (or person physically present in Florida) can be guilty of and sentenced for possessing a controlled substance without requiring the government to prove any intentional conduct whatsoever. As noted by Justice James Perry in his scathing dissent in Adkins, this drug law unjustly exposes an "endless" list of innocent people to criminal punishment and imprisonment, including, but not limited to:

- The student in whose book bag a classmate stashes his drugs to avoid detection;
- A roommate unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home;
- A driver who rents a car in which a previous passenger has dropped marijuana under the seat;
- A traveler who mistakenly retrieves from a luggage carousel a bag identical to her own containing Oxycodone; and
- An ex-wife who is framed by an ex-husband in an effort to get the upper hand in a bitter custody dispute.

Justice Perry's non-exhaustive list of possible scenarios demonstrates just how easily unsuspecting citizens could be ensnared by Florida's broad strict liability drug law. The statute currently excludes common carriers, like postal workers, but this law would apply still to a neighbor who innocently agreed to accept delivery for a package that, unbeknownst to them, contained unlawfully prescribed medication for an out-of-town neighbor.

So what can Floridians do to prevent the further erosion of criminal intent requirements in their state laws?

For starters, Floridians can demand their legislators engage in common sense lawmaking before proposing additional unnecessary or overly broad criminal statutes or regulations. Second, Florida should follow the example of a couple of its sister states, like Michigan and Ohio, and demand their state representatives pass a default mens rea criminal law. Legislation should include a provision that if a statute is silent on the "state of mind" or criminal intent to commit the crime, the state of mind the government must prove is something meaningful, like "purposefully" or "willfully" in order to avoid unfairly prosecuting innocent people. It should also include a provision that makes clear that any criminal intent requirement applies to every element of the crime. Lastly, it should state that if the offense consists of conduct that a reasonable person would not know was unlawful, the government must prove the accused person knew or had reason to believe that the conduct was unlawful, i.e., the person had adequate notice that the conduct was criminal. Laws of this type are a meaningful step in mooring the criminal justice system back to the Founding Father's original goal of fundamental fairness.



Stuck in the 80s

Time for Reform of Florida's Felony Theft Threshold

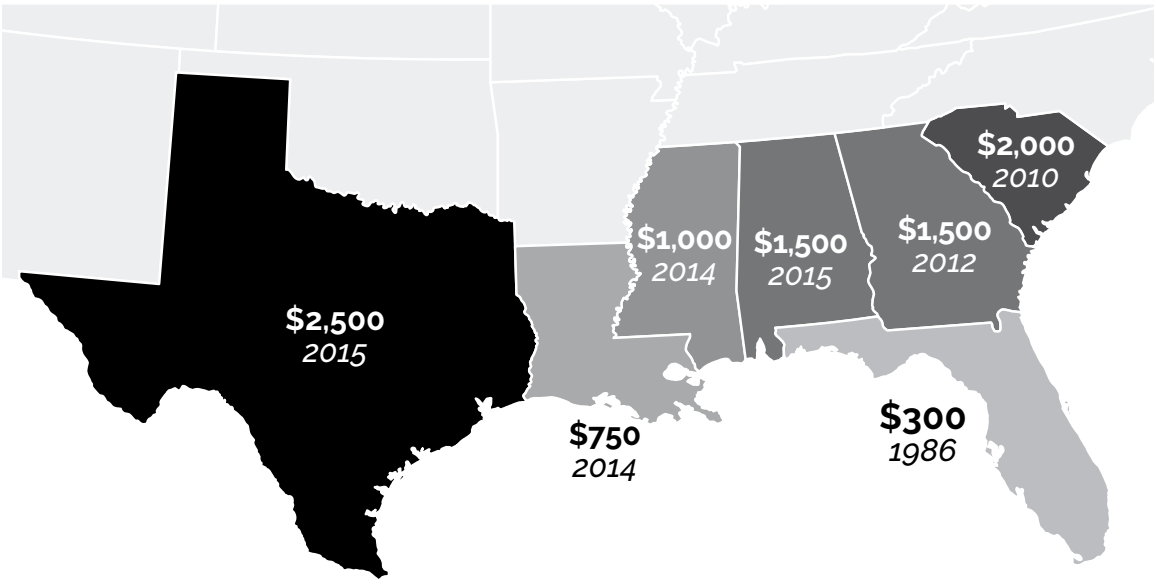
Lauren Krisai

DIRECTOR OF CRIMINAL JUSTICE REFORM, REASON FOUNDATION

In 1986, Florida was a very different place than it is today. A gallon of gasoline cost an average of $0.93, Floridians had just elected Bob Martinez as their governor, and Apple was known to the average American only as a fruit.[1]

Today, a gallon of gasoline costs $2.13, Florida has seen six additional governors since Bob Martinez, and Apple is getting ready to launch its eighth version of an iPhone—something unimaginable in the 1980's.[2] Much has changed in the state of Florida since 1986, but unfortunately, its threshold for a first-time felony theft offense has remained stubbornly the same: a mere $300.[3]

In recent years, while many states—including all of Florida's neighboring



Source: "The Effects of Changing State Theft Penalties," The Pew Charitable Trusts. Map created by author.

states—have significantly increased their felony theft thresholds to adjust either for inflation or as a retreat from more punitive punishment for low-level offenders, Florida has remained an outlier. The last time Florida increased its felony theft threshold was with the passage of Senate Bill 83 in 1986, which raised the amount from $100 to $300.[4]

The Basics

Florida statutes define theft as an act a person commits if he or she "knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: a) deprive the other person of a right to the property or a benefit from the property; or b) appropriate the property to his or her own use or to the use of any person not entitled to the use of the property."[5]

There are varying degrees and types of theft in Florida, each of which carry different types of punishments. There is petit theft, typically a misdemeanor offense, and grand theft, a felony offense.

Grand theft in the third degree is the lowest level felony grand theft offense. The offense is defined as the theft of property valued at between $300 and $20,000, among other things.[6] In Florida, this offense is a felony in the third degree, which can result in up to five years in prison and up to a $5,000 fine upon conviction.[7]

There are two other low-level felony theft offenses that can result in prison time in Florida, both involving theft of property valued below the $300 felony grand theft threshold. These offenses include petit theft as a third offense, and grand theft of a dwelling.

In Florida, petit theft is either a first degree or second degree misdemeanor, depending on the value of the property involved. However, if a person commits any petit theft offense and has previously been

convicted of two or more theft offenses as an adult or juvenile, it is considered a third degree felony, which can result in an up to five-year prison term and $5,000 fine—the same punishment for felony grand theft.

Theft of property valued at a minimum of $100 and $300 is also considered felony grand theft in the third degree if the property was taken from a "dwelling" or the "unenclosed curtilage of a dwelling," which, according to Florida law, means "the enclosed land or grounds, and any outbuildings, that are directly and intimately adjacent to and connected with the dwelling and […] used in connection with that dwelling."[8] As a practical example, a person who steals property valued at $100 while they're attending a party at someone's home can be charged with felony grand theft of a dwelling.

Inmates Incarcerated for Low-Level Theft Offenses:

While one may think that prison sentences for individuals who are convicted of the lowest level theft offenses is an anomaly in Florida, unfortunately the opposite is true. As of November 2016, 1,890 inmates were incarcerated for one or more low-level felony theft offenses.[9]

The majority, or 1,327 inmates, were incarcerated for a grand theft in the third degree offense ($300 threshold), while 758 were serving sentences for a petit theft as a third offense (less than $100 threshold). Finally, 45 inmates were serving a sentence for a third degree grand theft of a dwelling offense where the value was between $100 and $300. These figures overlap, as some inmates were serving sentences for multiple theft offenses.[10]

It is routine for individuals convicted of low-level theft offenses involving theft of property valued at much less than $100 to receive lengthy prison terms.

For example, Latasha Wingster was convicted of petit theft as a third offense, and was sentenced to two years in prison. Her offense? She walked out of Wal-Mart without paying for a twelve-pack of Seagram's wine coolers, which was valued at less than $15. Because she had been convicted of petty theft on two previous occasions, this crime became a felony offense that carried 5-years maximum in prison, and up to a $5,000 fine. Despite having a low criminal sentencing point score that otherwise would require community supervision over incarceration, and despite noting that her three children would have to enter into the foster care system if she was incarcerated,

the only deal the state offered was a two-year prison sentence, which she is currently still serving.[12]

While it's important for Latasha to be held accountable for her actions, a two-year prison term seems disproportionate for the crime committed when alternative sanctions are available. If the threshold for felony theft charges were higher, taxpayers would not be paying for her incarceration and her children arguably would not be in the foster care system today.

Cost of Incarceration per day

It costs taxpayers substantially to incarcerate low-level theft offenders. With the average cost of incarcerating each inmate per day at $51.65 in FY 2015, taxpayers are footing a bill of $97,600 each day these 1,890 inmates are held in a Florida Department of Corrections facility. This amounts to roughly $35.6 million per year.[12]

While one may think that prison sentences for individuals who are convicted of the lowest level theft offenses is an anomaly in Florida, unfortunately the opposite is true.

Adjusting for Inflation

While individuals who commit these types of offenses should not be let off the hook – after all, theft is not a victimless crime – it's important to remember that $300 in 1986 was worth more than $300 today. When adjusting for inflation, $300 in 1986 has the same buying power as roughly $661 in 2016.[13] If legislators believed that theft of property or money valued at $300 in 1986 was what should constitute a felony over a misdemeanor offense, then it should at least have been adjusted for inflation over time. Instead, the figure has remained persistent over the past 30 years, which in theory means that lower-level offenders are being punished more harshly today than they were in earlier years.

Reform in Other States

Florida has not only failed to increase its felony theft threshold over the past 30 years, but it has lagged behind the rest of the country in re-thinking the way it punishes low-level offenders.

Over the past 15 years, at least 30 states have raised their felony theft threshold, with three states—Alabama, Colorado, and Mississippi—having raised it twice.[14]

In 2010, South Carolina raised its felony theft threshold from $1,000 to $2,000. Georgia followed in 2012 when it raised its felony theft threshold from $500 to $1,500. In 2014, Louisiana raised its felony theft threshold from $500 to a modest $750. That same year, Mississippi raised its threshold for the second time in 11 years, from $500 to $1,000. In 2003, the state raised its threshold from $250 to $500. Finally, in 2015, both Alabama and Texas raised its felony theft threshold, respectively. Texas increased its threshold from $1,500 to $2,500, the highest threshold of the states listed here. Alabama increased its felony threshold from $500 to $1,500.[15]

Increasing Theft Thresholds and Crime

One may believe that increasing felony theft rates will mean that criminals will be emboldened to steal more to skirt the new threshold. That, however, is not what Florida's neighboring states have seen. Over the past 10 years, none of Florida's neighboring states saw increases in their larceny-theft rates. In fact, the majority of these states saw a larger percentage decrease in its larceny-theft rate as compared to Florida, with Mississippi and Louisiana being the exceptions.[16]

Of these states, the one with the highest felony theft threshold, Texas, saw the largest percentage decrease in its larceny-theft rate between 2005 and 2015 – 31.5 percent. South Carolina, with the second highest threshold of the states listed, saw its larceny-theft rate decrease by 27 percent between 2005 and 2015. Florida, conversely, saw its larceny-theft rate decrease by 22 percent between 2005 and 2015.[17]

Of course, many of these states increased their felony theft rates within the past couple of years, so it's still possible that rates of theft may increase (or not) over time. It's difficult to predict. However, it's important to emphasize that all of these states had higher felony theft thresholds than Florida even prior to increasing them in recent years.

While the causes of varying crime rates, and specifically larceny/theft, are difficult to pinpoint, it is safe to suggest that the decrease in Florida's larceny-theft rate over the past 10 years cannot be solely attributed to its low felony theft threshold, as states that both had higher felony theft thresholds and increased them further all saw similar or even larger percentage decreases in these crimes over the past ten years as well.[18]

One may conclude, then, that it is possible to have both significantly higher felony theft thresholds than Florida's $300 level and reduce rates of larceny-theft simultaneously.

Conclusion

Florida's felony grand theft threshold—set at a low $300—is 30 years old, and petit theft as a third offense has no monetary threshold whatsoever needed to be considered a felony offense. While the majority of other states, including all of its

neighbors, have begun to re-think punitive sentences for low-level offenders and have significantly increased their felony theft thresholds, Florida has remained steadfast in keeping things as they were in the 1980's.

As Florida's neighboring states have shown, it is possible to have higher felony theft thresholds and reductions in larceny-theft offenses simultaneously over time. It is not only possible for Florida to effectively prioritize public safety by increasing its theft threshold, but it would also be more cost-effective for taxpayers. By requiring alternative sanctions, such as restitution and/or community based supervision, Florida can ensure that individuals convicted of low-level theft offenses maintain their ties to their communities and become more productive members of society while also being fairly punished for their crimes—factors which are proven to reduce recidivism. Prison, on the other hand, ensures that these individuals come out with felony records, difficult employment prospects, and in some cases, as better criminals.

Incarceration should be reserved for high-level and the most dangerous offenders—not necessarily individuals who commit low-level crimes. Again, while criminals should always be held accountable for their actions, Florida should look to the success its neighboring states have had with higher felony theft thresholds in order to form better policy for Floridians state wide. It's time for the Sunshine State to get smarter on crime.

1. Average price of gasoline for the months of January through December, 1986. Calculated using average monthly prices provided by the Bureau of Labor Statistics. https://data.bls.gov/timeseries/APU000074714
2. Average price of gasoline for the months of January through November, 2016. Calculated using averages provided by the Bureau of Labor Statistics. https://data.bls.gov/timeseries/APU000074714
3. Florida 2016 Statutes 812.014(2)(c). http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0812/Sections/0812.014.html
4. Florida Legislature Summary of General Legislation 1986. P. 354-355. http://fall.fsulawrc.com/collection/FlSumGenLeg/FlSumGenLeg1986.pdf
5. Florida 2016 Statutes 812.014(1). http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0812/Sections/0812.014.html
6. Florida 2016 Statutes 812.014(2)(c). http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0812/Sections/0812.014.html
7. Florida 2016 Statutes 775.082(3)(e) http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0775/Sections/0775.082.html; Florida 2016 Statutes 775.083(1)(c) http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0775/Sections/0775.083.html
8. Florida 2016 Statutes 812.014(2)(d). http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0812/Sections/0812.014.html
9. Analysis of data provided by the Florida Department of Corrections to the author on November 26, 2016.
10. Ibid.
11. 2016-CF-000278-A-O : STATE OF FLORIDA - VS - WINGSTER, LATASHA MONIQUE.
12. "Inmate Cost Per Day Over Five Years (For all department facilities, excluding private prisons)," Budget Summary FY 2014-15. 2014-2015 Agency Statistics, Florida Department of Corrections. http://www.dc.state.fl.us/pub/annual/1415/budget.html
13. Figure calculated with the Bureau of Labor Statistics Consumer Price Index Inflation Calculator. https://www.bls.gov/data/inflation_calculator.htm
14. "The Effects of Changing State Theft Penalties," The Pew Charitable Trusts. February 2016. http://www.pewtrusts.org/~/media/assets/2016/02/the_effects_of_changing_state_theft_penalties.pdf
15. Ibid.
16. Mississippi saw a 10.6% reduction in its larceny-theft rate between 2005 and 2015; Louisiana saw a 4.4% reduction in its larceny-theft rate between 2005 and 2015;
17. Calculations done by author. Source of larceny-theft rates per 100,000 citizens: "Crime in the United States by Region, Geographic Division, and State, 2004-2005," Crime in the United States, 2005. Federal Bureau of Investigation, U.S. Department of Justice. https://www2.fbi.gov/ucr/05cius/data/table_04.html; "Crime in the United States by Region, Geographic Division, and State, 2014–2015," Crime in the United States, 2015. Federal Bureau of Investigation, U.S. Department of Justice
18. "The Effects of Changing State Theft Penalties," The Pew Charitable Trusts. February 2016. http://www.pewtrusts.org/~/media/assets/2016/02/the_effects_of_changing_state_theft_penalties.pdf

Pre-Arrest Diversion

Can Innovative Programs Benefit Public Safety Before the Booking Photo?

Greg Frost **PRESIDENT, CIVIL CITATION NETWORK**

Why do we arrest and prosecute people who break the law? Because our sense of justice demands accountability; punishment produces deterrence; we have an obligation to protect our communities from those who do us harm. All of these are good reasons and each is fundamental to the U.S. criminal justice system. But what about those of us who just make a mistake out of overwrought emotions, drug use, youthful exuberance, or in some cases an emerging mental illness? There are many people society would classify as "good citizens" that have broken the law and could have been arrested.. The growing knowledge about the societal cost of having an arrest record points to the need to find alternatives to arrest for those who commit

a low-level offense, but who are not a threat to public safety.

A Tallahassee, Florida police officer told me his goal, like most law enforcement officers, is to gain voluntary compliance with people who have committed a first-time, non-violent misdemeanor crime. The temporary compliance that results from arrest can be counter-productive. Law enforcement officers recognize that exposing first-time misdemeanor defendants to a courtroom full of "real criminals" can have a negative impact on that person's future behavior. For some, being confronted by a uniformed law enforcement officer after committing a crime is enough of a wakeup call that they change their behavior with only a verbal warning. Others, however, require additional intervention to change behavior patterns. This is especially true for individuals whose crimes involve substance abuse. The difficult issue is providing officers with a tool that gives them an alternative between a verbal warning and arrest.

After spending 30 years working in law enforcement agencies, I'm well aware there is evil in the world that has no respect for human life or the truth behind right and wrong. It's for these people that we have jails and prisons. Criminology research consistently shows the path to incarceration usually occurs over time. The majority of individuals who end up in prison began with an arrest for a low-level crime. Approximately 65 percent of those without an arrest record were arrested the first time for committing a misdemeanor offense[1].

When arrested, the front door to the criminal justice system is the most dangerous door anyone can pass through. Yet millions of people each year in the U.S. are introduced to the criminal justice system when they are shuffled through a local misdemeanor court. During FY15 in Florida, approximately 268,000 arrestees were prosecuted in a misdemeanor court - over 65,000 of these cases were first-time arrestees. Because of the workload associated with misdemeanor courts, prosecutors most likely will not have spent more than a few minutes looking over a police report and criminal history before deciding how to proceed. The time defendants have in front of the judge can

be measured in seconds. A University of Tampa study found that the average Florida misdemeanor defendant, after spending several hours in a courtroom, gets less than three minutes - 180 seconds - with a judge and the vast majority of defendants are not represented by legal counsel and plead guilty.[2] The time in court for these relative minor offenses may be short, but the results include severe, life-changing consequences.

Once there is an arrest record, and about 30 percent of Americans have one, it follows you for a lifetime. Even without being convicted, just the arrest record reduces earning power for the rest of your life. The Wall Street Journal compared people in their mid-20's who had an arrest record to those who didn't. For those with an arrest record, their median income was 10 percent less, significantly fewer had college degrees, and twice as many lived below the poverty line.[3] As former Missouri state senator Jeff Smith wrote in his book, *Mr. Smith Goes to Prison*, "The criminal justice system is not, as many people claim, broken. It's more like a well-oiled machine that keeps millions of individuals out of the economic mainstream." Not only is this poor public policy, but the economic consequences are not sustainable. Reductions in income resulting from an arrest record mean lost tax dollars. Billions of dollars in lost productivity contributes to our country's overall economic instability.

Several years ago the American Bar Association (ABA) undertook a project to inventory the collateral consequences of having a criminal arrest and conviction. Even though misdemeanor offenders have paid their required fines and court costs, they are still subject to other administrative sanctions. Many of the consequences serve an important public safety purpose when applied correctly. However, the past twenty years of being "tough on crime" has led to collateral consequences that are unrelated to the offense committed and in many cases unnecessarily impede the person's ability to financially support themselves. In Florida, according to the ABA's National Inventory of Collateral Consequences(NICC), there are 44 mandatory and 200 discretionary administrative restrictions that result from a misdemeanor arrest and conviction.[4] The restrictions include denial or revocation of professional licensures and certifications in a broad range of professional fields:

- Medical/Pharmacy
- Law Enforcement Officer
- Landscape Architect
- Firefighter
- Home Inspector

"Everyone loves a second chance. The civil citation program puts the ball in the offender's court and gives them the opportunity to learn without the stigma of being arrested."

Tallahassee Police Department officer

- Construction Contractor
- Real Estate Agent
- Athletic Trainer
- Septic Tank Contractor
- Real Estate Broker
- Land Surveying
- Mortgage Broker/Lender
- Accounting
- Mold/Asbestos Abatement
- Mobile Home Installer
- Educator
- Interior Designer

As described on the ABA's NICC website there are significant social ramifications to having collateral consequences that,"...apply across the board to people convicted of crimes, without regard to any relationship between crime and consequence, and frequently without consideration of how long ago the crime occurred or what the individual has managed to accomplish since. Many consist of nothing more than a direction to conduct a criminal background check, and an unspoken warning that it is safest to reject anyone with a record. When convicted persons are limited in their ability to support themselves and to participate in the political process, this has both economic and public safety implications."

The impact of collateral consequences is not limited to reducing the ability to have financial stability through gainful employment. There are consequences triggered by a misdemeanor conviction that, if not appropriately applied, serve little purpose other than additional punishment. These include:

- Termination of parental rights
- Ineligibility to Adopt Children
- Denial of Shared Custody
- Loss of Public Housing
- Loss of Unemployment Benefits
- Eviction from Mobile Home Park

The emerging body of research clearly shows the need to find alternatives to arrest for low-level offenders. The individual and social costs are too high to not make the effort to reform the front-end of the criminal justice system. If the front door to the criminal justice system is in fact the most dangerous door a person can pass through, then strategic change should start there.

Law enforcement officers are the gatekeepers for the entire criminal justice system. No one goes through "the door" without first being arrested. On the street at 2 o'clock in the morning, officers have few options once they develop probable cause that a person committed a crime - either they arrest the person or they let them go with a verbal warning. During the era of "tough on crime" and "zero tolerance" policing the default practice has been to make the arrest. In Florida, the arrest could mean a trip to the local jail to be booked or under the right circumstances the offender could receive a notice-to-appear in court and be released without going to jail. Either way, the person ends up with an arrest record and is subject to criminal prosecution.

What if law enforcement officers had a third choice?

What if law enforcement officers had a third choice? A choice that would hold

the offender accountable for their actions, improve public safety, and allow the person the opportunity to avoid an arrest record. Criminal justice reform efforts in a handful of communities are exploring pre-arrest diversion programs that embrace these common goals. One variation of pre-arrest diversion focuses primarily on diverting individuals with a history of serious substance abuse into drug treatment programs. Other programs attempt to divert those with a mental illness away from the traditional criminal justice system. In Florida, the pre-arrest diversion concept-started in Tallahassee/Leon County-encompasses a much broader target population.

The Pre-Arrest Diversion Adult Civil Citation program in Leon County is a public/private community partnership between area law enforcement agencies and DISC Village, a local non-profit behavioral health agency. The model program empowers law enforcement officers with the discretion to divert eligible first-time misdemeanor offenders away from the criminal justice system. Instead of being arrested and prosecuted, the person is offered the opportunity to receive behavioral intervention services and, if they successfully complete the program, avoid an arrest record. To be eligible for diversion the person must not have been arrested previously, they must cooperate with the law enforcement officer, and voluntarily agree to the referral. Diversion is at the officer's discretion with the victim's preference of arrest or diversion taken into consideration.

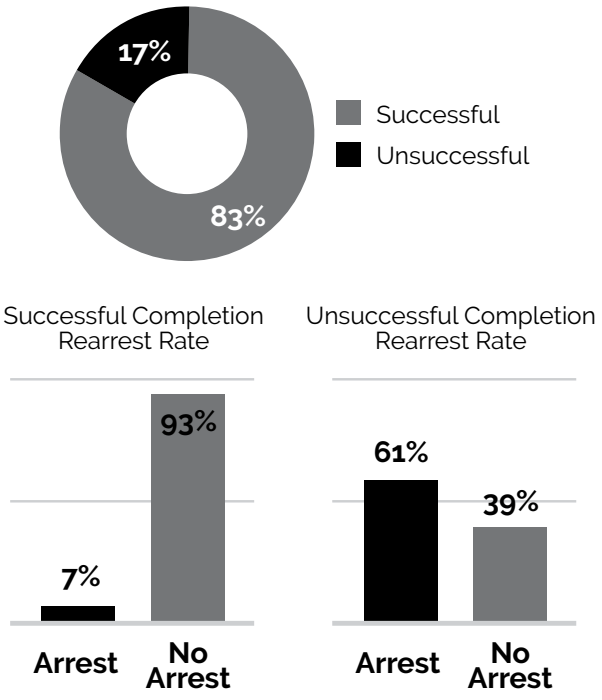
The results from the first three years of the Adult Civil Citation program reflect that meaningful strategic change to the criminal justice system is possible. Since the program started March 2013, over 1,100 individuals were diverted for behavioral health intervention services - not arrested. Following a comprehensive behavioral assessment, 83 percent of those diverted successfully completed the required individualized intervention plan.

"Successful" completion means they participated in at least two individual counseling sessions with a behavioral therapist, did not use drugs or alcohol during the 90-day program - as determined by an initial and random drug screens,

completed 25 hours of community service, and completed assigned on-line educational modules. A fee of $350 is also required, although payment plans, reductions, and payment waivers are available for those who cannot afford the fee. No one is denied participation because of the inability to pay. Fees paid by participants fund all program services and there is no cost to participating law enforcement agencies.

The first person to receive an adult civil citation in Tallahassee was a Florida State University student. He was stopped for a traffic violation and, during interaction with the officer, drug paraphernalia - a marijuana pipe - was found in his car. Because possession of drug paraphernalia is an eligible offense in the Tallahassee program and he was cooperative and didn't have an arrest record, the officer elected to offer him the chance to voluntarily participate in the civil citation program. Several weeks later he completed the program and avoided an arrest record. If the officer didn't have the civil citation option the student would have received a notice-to-appear and an arrest record. For this particular student this was a career-saving opportunity. At the time of the traffic stop, he was a graduating senior with a letter of acceptance to law school. An arrest record would have jeopardized his future opportunities.

While the evidence is clear that alternatives to arrest for low-level crimes are needed to reduce the individual and societal harm created by an arrest, the question remains can it be done without negatively impacting public safety? An integral part of the Pre-Arrest Diversion Adult Civil Citation program has been an on-going evaluation. Through a leading researcher at Western Carolina University a comprehensive study, including recidivism, was recently completed for the first three and a half years of the program - March 2013 through August 2016. The rearrest rate for program participants was used as the outcome measure for the impact on public safety. For those who successfully complete the program their rearrest rate for a subsequent arrest following program completion was only 7 percent. For those who did not successfully complete the program their rearrest rate was 61 percent.



(March 2013 - August 2016 1,113 Referrals)

There is extensive criminal justice research on recidivism among felony offenders and those released from

incarceration. However, only very limited research is available for first-time misdemeanor offenders. This makes a direct public safety comparison of the Adult Civil Citation program to the traditional criminal justice system difficult. One study commissioned by the Oregon Criminal Justice Commission reviewed court data to determine recidivism rates for those with a first-time misdemeanor conviction. The study found a 40-50 percent reconviction rate over a three-year period depending on the type of offense.[5] It is safe to extrapolate that for rearrest as the outcome measure, and not just conviction, the rate would be even higher. If pre-arrest diversion, with appropriate behavioral intervention services as implemented in the Tallahassee program significantly reduces recidivism, then public safety is improved.

Positive outcomes are being reported by other pre-arrest diversion programs in the U.S. Because of their initial success, public policy leaders are beginning to realize strategically reforming the front-end of the criminal justice system is possible. There is, however, extensive work to do. A recent national review of diversion programs by the Center for Court Innovation concluded,

"...there is untapped potential in the area of police-led diversion, in particular as a response to low level defendants that currently clog criminal court dockets nationwide. Unfortunately, the lack of general information and empirical research on police-led diversion in the U.S. presents a formidable obstacle to understanding and potentially replicating the model more widely."[6]

Through organizations recognized for their national leadership, like The James Madison Institute, information about pre-arrest diversion programs is beginning to circulate, filling the gap identified by the Center for Court Innovation. In addition, a consortium of law enforcement officials, behavioral health organizations involved with pre-arrest diversion, and leading researchers will gather later this spring in a first-ever national summit. The summit is intended to document the current state of research on pre-arrest diversion initiatives and create an inventory of current practices. The outcome of the summit will hopefully ignite extensive public safety and public policy discussion on expanding the effective use of pre-arrest diversion.

1. Arrestee Drug Abuse Monitoring Program II in the United States. (2010). Retrieved: http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/32321
2. Smith, A., Maddan, S. (July 2011). Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts: National Association of Criminal Defense Lawyers. Retrieved http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794
3. Fields, Gary. (2014, August 18). As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime. The Wall Street Journal. Retrieved: http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402
4. American Bar Association. National Inventory of Collateral Consequences. Retrieved: http://www.abacollateralconsequences.org
5. Jones, Richard A. (2005) Analysis of the Oregon Computerized Criminal History Records, Oregon Criminal Justice Commission. Retrieved from: http://www.oregon.gov/CJC/docs/cch98.pdf
6. Tallon, Jennifer., et. al. (2016) Creating Off-Ramps: A National Review of Police-Led Diversion Programs, Center for Court Innovation. Retrieved: www.courtinnovation.org/research/creating-ramps-nationalreview-police-led-diversion-programs?url=research%2F9%2Fall&mode=9&type=all)

Florida's Prisoner Dilemma: Crime, Civics, and Citizenship

Marshall DeRosa **PROFESSOR, FLORIDA ATLANTIC UNIVERSITY**

The efficacy of the tough on crime mantra of American politics may have reached its apex in Florida politics. A September 2016 poll conducted by The James Madison Institute and the Charles Koch Institute revealed that 72 percent of Floridians agree or strongly agree that there should be criminal justice reform; 75 percent agree or strongly agree that the cost of incarceration is too high; 65 percent agree or strongly agree that there are too many nonviolent offenders in prison; and 74 percent favor a greater focus on rehabilitation.[1]

The public's frustration is understandable. The prison population in

Florida has increased by 1,048 percent from 1970 to 2014, while the total population has increased 193 percent. Florida has the third largest prison population in the country, trailing California and Texas. Approximately 0.50 percent of Florida's population is incarcerated. Much of this growth is attributable to voters' earlier demands that policymakers be "tough on crime," which at the time meant locking up criminals and giving them longer sentences. The assumption was that this approach provided the socially beneficial outcome of less crime. That assumption is losing its appeal. Legislators ought to heed this trend, otherwise the trajectory for Florida's prison population will increasingly stoke the ire of the public and evoke initiatives to amend the Florida Constitution, taking the matter out of legislative hands.

The prison population in Florida has increased by 1,048 percent from 1970 to 2014, while the total population has increased 193 percent.

Viewed through the lens of political efficiency, the burgeoning prison population scores high. Politicians, bureaucrats, and various other criminal justice-oriented interest groups collectively benefit. However, viewed through the lens of public interest economic efficiency, the score is low. In other words, the costs to be tough on crime have reached the tipping point where the costs outweigh the benefits. Consider the following:

Incarceration has both a direct and indirect cost to Florida's taxpayers. The average direct cost to the taxpayer is approximately $21,000 per inmate. With over 101,000 inmates, the total cost exceeds $2.4 billion per year. These costs do not include tax-funded expenditures to families placed into poverty due to inmates' lost incomes and the lost economic output from non-employed inmates. Consequently, the taxpayer is supporting the inmates in a variety of ways difficult to quantify and these costs should not be dismissed as inconsequential.

With over 70 percent of Floridians agreeing that the cost of incarceration is too high, reforming the criminal justice system will continue to gain momentum. One way to alter the financial burden to the taxpayer is to reduce incarceration. To do so will require adjustments to the criminal code, sentencing guidelines, and the revolving recidivism door.

Recidivism is a significant contributing factor to the burgeoning Florida prison population.

Florida TaxWatch reports that "statistics show that there is a 27.6 percent chance that a released inmate will return to prison (known as "recidivating" or "recidivism") within three years of release, irrespective of the crime that initially landed them in prison. Additionally, nearly 50 percent of new admissions to prison will have previously served time."[2]

The Florida Department of Corrections

is well aware of this problem. In 2009 the department issued its strategic plan to reduce recidivism.[3] The plan has 32 specific recommendations. These recommendations notwithstanding, the revolving door of recidivism, although slowing from 33 percent in 2005 to 26 percent in 2009, continues to turn. This may be due to a glaring omission in the strategic plan. Inmates are returned to civil society with the same, if not worsened, attitudes about civil society. These attitudes can be summarily stated as follows: the American political and economic systems are oppressive.

In a peculiar way this is true. Many of the inmates have been victimized by decades of governmental policies that have subjected them to inadequate educational opportunities, dependency on the welfare state, crime-ridden neighborhoods, and deconstructed families. The prospect of successful reentry into civil society are negatively impacted by returning released inmates to similar social and economic circumstances from which they first entered the criminal justice system. In addition, with the additional burden of being a convicted felon with the same, if not worsened, attitudes about the political and economic system, the environment for reoffending is ripe.

Education is quite possibly the most important component of Florida's prisoners' dilemma.

The elephant in the room is that "class inequalities in incarceration are reflected in the very low educational level of those incarcerated. The legitimate labor market opportunities for men with no more than a high school education have deteriorated as the prison population has grown, and prisoners themselves are drawn overwhelmingly from the least educated. State prisoners average just a 10th grade education, and about 70 percent have no high school diploma."[4] A reliable indicator of an inmate's socio-economic background is educational level, and a reliable indicator of potential incarceration is a person's socio-economic status.

In other words, education is quite possibly the most important component of Florida's prisoners' dilemma.

This is especially true regarding civics education. It's not that civics education is absent in public schools; the problem is the type of civics education. Through the various agents of political socialization, e.g., schools, media, and entertainment, the message is that the American political order is rotten at its roots. Examples are legion, but the following will suffice as representative:

This country's history is written by people who believe God himself granted them, and only them, the unalienable right to that American Dream. The Constitution ensured this privilege would only be accessible to a select group of people. Every bit of progress this country has made has been toward expanding access to that dream to millions of people who were previously denied it.[5]

The prospects of successful reentry for a returning citizen believing such nonsense

is greatly diminished. If a returning citizen reenters civil society convinced that he is a victim of an unjust political order designed to oppress him, despair rather than optimism would be the norm. In other words, why play by the rules of civil society if those rules are rigged against your success? Even if the recidivism rate could be substantially reduced, the unemployed released felon will still be a burden to the taxpayer as he becomes dependent upon the welfare state and/or resorts to additional crime. Hence, a vicious cycle of dependency, whether in or out of prison, continues unabated.

Rather than detach themselves from the system of failed government policies that contributed to their incarceration, they turn to that system for support. Consequently, a substantial number of convicted felons, in or out of prison, continue to be tax burdens.

Is there a way to effectively address this dilemma? The answer to that question is emphatically yes. However, it is a long road, and one that starts with an effective civics education program within prison walls. A civics education program, based on facts and not fiction, should be available for all of the 100,000 plus Florida inmates, including those with life sentences.

As director of the Inmate Civics Education Enhancement Project (ICEEP), funded by the Charles Koch Foundation in partnership with Florida Atlantic University, The James Madison Institute, and GEO, Inc., I have had the opportunity to introduce to inmate students that as Americans they had and have a unique opportunity in human history to succeed. That as Americans they have certain rights and duties, with the emphasis on the latter. And that the primary cause of incarceration was their failure to perform the duties requisite to the functioning of a free society. Civics education begins the process of changing the narrative and inmates' perceptions that they are victims of the system and places responsibility where it belongs, on the individual. They come to understand that society was the victim of their crimes, rather than they being society's victims. This realization is a major step towards successful reentry into civil society as responsible and productive citizens.

Access to civics education has been transformative for the inmates receiving it. The evidence of this transformation is documented in the essays each student is required to write. The topic of the essays is "What It Means to Be an American." Writing the essays requires some serious introspection, application of lessons learned and the realization that rights and duties are integrally linked.

The successful reintegration of civically-minded returning citizens into civil society should be a priority of policymakers as a first step towards the reduction of recidivism. Towards that end, inmates that successfully complete the civics education program should be welcomed back into civil society as properly recognized citizens. The welcome mat could be the immediate restoration of their voting rights upon completion of their sentences.

Article VI, section 4, of the Florida Constitution disqualifies any person convicted of a felony to vote or hold office until that fundamental civil right is restored through a bureaucratic (and extremely cumbersome) process. This is commonly referred to as felony disenfranchisement.

There are approximately two million Floridians not eligible to vote due to this constitutional provision.[6] Denying them this fundamental right reduces them to second-class citizens and confirms in their minds that the political system is oppressive. Martin Luther King reiterated an axiomatic principle of American politics when he wrote "An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because it did not have the unhampered right to vote."[7] It's unreasonable to suspect that disenfranchised felons would not paint with a broad brush as unjust the laws they "had no part in enacting."

I have had the opportunity to gain unique insights into the unreasonableness of felony disenfranchisement from the perspective of convicted felons. Floridians would benefit from learning about these insights and hearing from a small sample of my inmate students about why felony disenfranchisement is unreasonable.

What qualifies these convicted felons to lecture Floridians? Consider the following: These students have been engaged in an intense curriculum that explores the fundamental principles of the American political and economic order.

Nevertheless, Florida's constitutional disenfranchisement de jure and de facto hampers reintegration into civil society, which in turn increases the probability of recidivism.

The ICEEP students contend that disenfranchisement does the following:

- It violates the fundamental right of property through taxation without representation, the clarion call of the American Revolution.
- Subjects them to a government not predicated upon their consent.
- Stamps upon them the stigma of second-class citizens. After the completion of their sentences, i.e., the deprivation of the fundamental right to liberty, their debt to society has been paid in full. [This is to be distinguished from compensation to victims of their crimes, when feasible. It is society that denies them the restoration of voting rights upon completion of their sentences, not the victims of their crimes.]
- Requiring convicted felons to appeal to the discretion of the Florida Commission on Offender Review for the restoration of their voting rights is anathema to the principle that inalienable rights are from the Creator, not government grants.
- It is a form of involuntary servitude, as substantial portions of their labor is required to pay the taxes they are excluded from voting for or against.
- It places all Floridians on the slippery slope of rights violations. If two million convicted felons can be denied the fundamental right to vote, then all fundamental rights are jeopardized by a lackadaisical defense of this fundamental right. This is particularly true regarding the right to private property.
- It denies them the opportunity to perform a fundamental duty to be engaged in the civic life of their communities.
- It exposes the failure of Floridians to perform their duty to a substantial number of their fellow citizens, the duty to provide the latter a voice in

the electoral process.
- It places them in a hostile posture towards their fellow citizens, because the latter are not fulfilling their duty to respect a fundamental right of citizenship.

Floridians need to ask themselves if felony disenfranchisement is compatible with the Declaration of Independence's demand that government be based upon the consent of the governed. In the words of Thomas Jefferson,

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . ."

ICEEP students maintain that it is not. However, they also maintain that as convicted felons the restoration of voting rights should have conditions attached. For example, it should be statutorily mandated that while serving their sentences they should be provided opportunities to learn about their rights and duties as Americans. They, in short, should be prepared for successful reentry into civil society by better understanding that individual responsibility within the context of a free society is the path to success.

Felony disenfranchisement could be ended within a few short years either through the upcoming renewal of the Voting Rights Act[8] or amending the Florida Constitution. There is broad and deep bipartisan support for reform. The question is not "if" but "how" that reform will take shape.

The concern that felony disenfranchisement would shift Florida politically should be the last thing considered in any discussion of this policy reform. The common theory is that restoring the rights of felons will result in more votes for Democrat candidates. According to a Republican and Heritage Foundation fellow, Dr. Darryl Paulson, the issue "is 98 percent due to racial politics . . . Dems want to restore the felon vote because they think they will benefit; Republicans want to restrict felon voting because they

believe they will be harmed."[9]

That theory has little basis in practical application. Further, if conservatives were to rally around a practical reform-minded approach that looked to restore rights to those who have completed civics programming while incarcerated, the results would be to expose thousands of new voters to the very constitutional principles which conservatives hold dear.

Politics, like nature, abhors a vacuum. Inmates do learn in prison, and in many instances are radicalized. Will they learn, i.e., be radicalized, about the value of life, liberty, and property within the context of the rule of law, or learn how to be better criminals thereby continuing to be ongoing burdens to their fellow tax-paying citizens? Establishing a framework for ending felon disenfranchisement via successful completion of civics education, properly understood, would be an important step towards addressing Florida's prisoner dilemma. The Florida legislature should be proactive on this issue and adequately prepare convicted felons for the restoration of their civil rights, most especially the right to vote.

1. See http://www.jamesmadison.org/publications/detail/strong-majority-of-floridians-want-criminal-justice-reform.
2. http://floridataxwatch.org/resources/pdf/Reentry2013FINAL.pdf
3. [http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf]
4. Incarceration & social inequality, Bruce Western & Becky Pettit (Dædalus, Summer 2010), https://www.amacad.org/content/publications/pubContent.aspx?d=808
5. The Huffington Post, November 9, 2016; see http://www.huffingtonpost.com/steve-iannelli/we-must-continue-to-fight_b_12879312.html.
6. According to the Sentencing Project, approximately 75% of Floridians disenfranchised are white and 25% black [see "State-Level Estimates of Felon Disenfranchisement in the United States", 2010 Christopher Uggen and Sarah Shannon, University of Minnesota Jeff Manza, New York University July 2012; file:///C:/Users/Marshall/Downloads/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf.
7. Letter from Birmingham Jail, 1963; file:///C:/Users/Marshall/Desktop/Letter_Birmingham_Jail.pdf.
8. In Johnson v. Bush [405 F.3d 1214 (11th Cir. 2005)] upheld the constitutionality of Florida's felony disenfranchisement, but also stated that a clear statement in an amended Voting Rights Act would definitively put an end to it.
9. Miami Herald, AUGUST 12, 2016, http://www.miamiherald.com/news/politics-government/election/article95076927.html.

Why Occupational Licensing Reform Goes Hand-in-Hand with Criminal Justice Reform

By Stephen Slivinski **SENIOR RESEARCH FELLOW, CENTER FOR THE STUDY OF ECONOMIC LIBERTY, ARIZONA STATE UNIVERSITY**

The revolving door of America's prison systems has proven highly costly for taxpayers, society, and those whom the system is supposedly aimed to rehabilitate: individuals who have served their time and are hoping to reintegrate themselves into society. The highest rate of "recidivism" (a relapse into crime and often, as a result, a return to incarceration) occurs within the first three years after a prisoner is released. Nationally, an average of nearly 68 percent of released prisoners recidivate during this time. For Florida, that number is around 33 percent, but when the timeframe

is expanded to five years, Florida's recidivism rate goes up to nearly 65 percent.

The problem persists even though we have a general idea of what works: gainful employment is able to cut recidivism rates dramatically, sometimes as much as half. As a result, many states have created re-entry programs — which include options for job training and obtaining more formal education — for prisoners trying to re-enter the workforce. These efforts are not misguided if they are informed by a sober analysis of what works and what doesn't. The impetus is sound, too: those leaving prison have much lower levels of education and workplace skills than the average worker. While only about half of all workers lack a high school degree, the number is over 80 percent for ex-convicts.

Gainful employment is able to cut recidivism rates dramatically, sometimes as much as half.

This practical barrier is compounded by a government-imposed barrier, and one that policymakers should strive to reform: state occupational licensing requirements for jobs that are the most likely to give an ex-prisoner the best chance of staying out of jail.

Males with low levels of education and formal job experience are exactly the sort of people that occupational licensing harms the most. Florida has the fourth-heaviest licensing burden in the U.S., according to a study by the Institute for Justice (IJ). These burdens don't just include the requirement to have a license to work in a particular field, but also include testing requirements, fees, and sometimes requirements of a minimum level of educational attainment. For instance, Florida requires a license for carpenters and door repair contractors and the education/experience requirements are such that it takes four years to obtain a license. Meanwhile, pest control worker licenses require roughly 3.5 years of education or experience. The average education/experience requirement for someone seeking to enter a licensed occupation in Florida clocks in at around 1.5 years. Such restrictions are a barrier to many of those coming out of prison. Additionally, these periods extend well into or beyond the three years after release from prison — the most crucial time during which to integrate those leaving prison into the workforce to reduce the chances of recidivism.

Lack of skills and educational attainment among the ex-prison population is merely one reason to think these barriers to entry are prohibitive. There are other barriers that are specific to those with criminal records that are nearly impossible to overcome. For instance, the American Bar Association has cataloged an estimated 32,000 state laws specific to occupational licenses and business licenses that include provisions regarding the consideration of criminal records. Among them are automatic exclusions for those with a criminal record, which make up one-third of the laws cataloged. Florida ranks poorly in this respect as well. A 2016 report from the National Employment Law Project (NELP) — based on the ABA analysis — gives

Florida the lowest score available in their report regarding the ability of occupational licensing boards to automatically reject a license applicant solely on the basis of a criminal record or sometimes even simply a misdemeanor.

We can see the effects of these government-imposed licensing barriers in the real world. Recent data from The Pew Center on the States — based on a survey conducted jointly with the Association of State Correctional Administrators — includes three-year recidivism rates for 33 states between 1999 to 2007. These states account for around 90 percent of all releases from state prisons during this period. What makes the Pew survey unique is that it reports two separate recidivism rates — one for new crimes and one for technical violations, such as parole violations. Any connection between legal barriers to entry into the labor force and a return to crime is likely to be seen using the new crime recidivism rate. That's because the definition of "technical violation" can vary greatly between states but the definition of what constitutes a "new crime" is highly consistent.

The Pew data indicates that the average three-year, "new crime" recidivism rate didn't change much between the 1999-2002 and 2004-2007 periods in the overall sample survey: it stayed relatively constant (around 20 percent) during that time. Yet the individual states in the survey vary greatly in the rate of growth in their new-crime recidivism rate. For instance, the rate of change ranges from 40 percent growth in Utah to a decline in Montana of a roughly equal amount. The timeframe presented in the Pew study is also useful since it occurs prior to changes in criminal sentencing laws and state-based programs to reduce recidivism that a number of states passed after 2007. That makes this time period a good candidate for isolating the effect that government-imposed barriers to entry would have on the recidivism rate since the analysis won't be affected by changes in policy during the same period.

Occupational licensing barriers can help explain the difference in these rates. Comparing the average change in the new

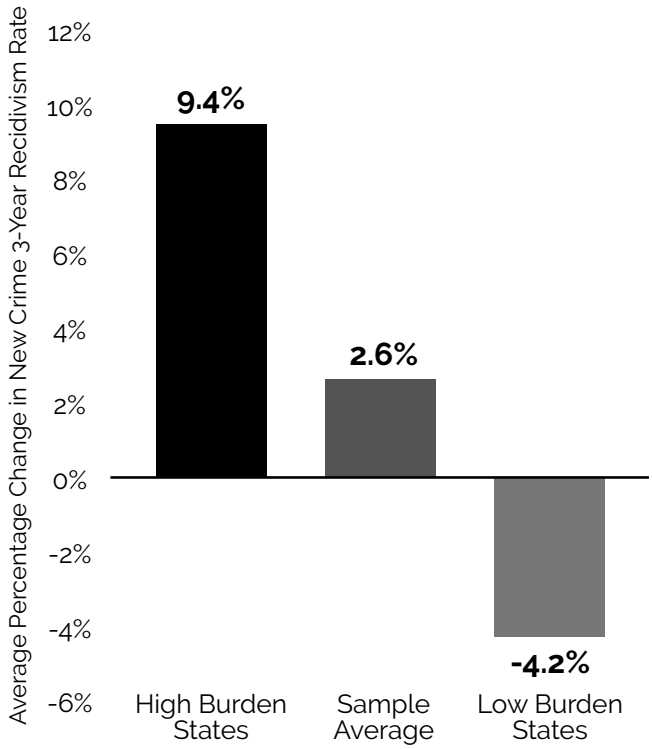
crime recidivism rate in states with high licensing burdens and those with low occupational licensing burdens can give a broad understanding of how these laws bear on the recidivism rate of a state. This can, by extension, provide some evidence of how occupational licensing laws can diminish a state's ability to reintegrate ex-prisoners into the labor force.

This can be done using state scores in the Institute for Justice (IJ) study. The scores indicate whether a state is more or less "free" in terms of occupational licensing, particularly among low-income professions. But we cannot simply compare states with high scores to those with low scores. It is not always an apples-to-apples comparison between ex-felons and non-felons. Many states with otherwise low occupational licensing burdens for those without a criminal record explicitly prohibit the awarding of occupational licenses to applicants with a criminal record even if they meet all other requirements to obtain a license (29 states, including Florida, allow occupational licensing boards to reject outright the application of someone with a criminal record).

The aforementioned 2016 study from the National Employment Law Project (NELP) has graded the state laws pertaining to the powers of licensing boards when reviewing a license application from someone with a criminal record. Ranging from a grade of "unsatisfactory" to "most effective," the NELP study has essentially quantified the severity of those particular occupational licensing burdens that specifically target ex-prisoners. Florida receives a grade of "unsatisfactory" in this report.

In addition, 11 of the states included in a recent Arizona State University study are what I call "prohibition states" — that is, they either automatically penalize ex-prisoners in the licensing process or have no other legal restrictions on the power of a licensing board to base denial of a license on anything other than the presence of a criminal record (even for a non-violent offense) or if the ex-prisoner's conviction has no material relationship to the license being sought by the ex-prisoner. Because of this extremely high barrier, it's more appropriate

Figure 1
Average Change in Recidivism Rate by Occupational Licensing Burden Category

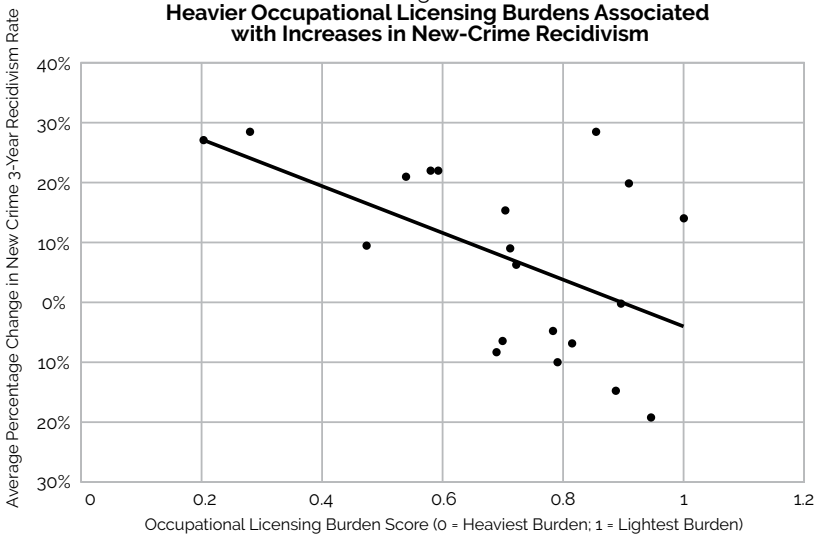


to include these "prohibition states" in the high-burden category regardless of the licensing burden faced by the general non-convict population as measured by the IJ study. A state law that mandates or allows a licensing board to reject a candidate based on a criminal record, which are sometimes called "good character" provisions, should be viewed as the highest barrier of entry of all — a nearly impossible-to-clear hurdle for former prisoners specifically. Those states have the most inhospitable environment possible and automatically rule out an essential first step at reintegrating a former prisoner into the workforce.

Incidentally, these "prohibition states" also happen to have lower average licensing burdens based on the scores assigned in the Institute for Justice report — all but four of the 11 "prohibition states" in this study have licensing burdens that are among the nation's lightest as ranked by IJ. So, while these states may look on paper like they have a low occupational licensing burden, the truth is exactly the opposite for ex-prisoners.

The results of comparing the average change in the new crime recidivism rates between states with low occupational licensing and those with effectively high burdens are seen in Figure 1: the average increase in the new crime recidivism rate during the survey period was larger than average and much larger than the states that do not prohibit occupational licenses to former prisoners or do not have some kind of restrictions on the conditions for which an ex-prisoner may be denied a license. These "prohibition states" experienced a more than 9 percent increase in the three-year, new crime recidivism rate. This is over 3.5 times the 2.6 percent average increase for all the states in the survey and substantially more than the 4.2 percent decline in the average new crime recidivism rate in the low burden, non-prohibition states.

Figure 2
Heavier Occupational Licensing Burdens Associated with Increases in New-Crime Recidivism



Meanwhile, states in which these "prohibition" provisions are largely absent but maintain heavy licensing burdens are also still not able to reduce their recidivism rate on average. Figure 2 shows the correlation between the occupational licensing scores based on the IJ study and the change in the three-year, new crime recidivism rate in these states. (On a scale of zero to one, the closer to one the state's score

is, the lower their occupational licensing burden. To put it another way, the higher their score, the freer the occupational licensing climate.) Although this sample of states does not include the above-mentioned "prohibition states," the slope of the trend line still indicates a strong and clear negative correlation, meaning that a state with a high occupational licensing burden and no "good character" provision would still see general increases in the recidivism rate on average. The policy implication here is that policymakers in states with high-licensing burdens cannot expect to substantially reduce their recidivism rate simply by weeding out these "good character" provisions in their licensing laws. It will require actually lowering the licensing burdens as well.

In this light, it becomes clear that occupational licensing reform should be a crucial piece of criminal justice reform. As more states explore reforming their criminal justice systems, much of the attention is likely to be paid to liberalizing sentencing laws — how and when to incarcerate someone, and when probation or alternative means of punishment will suffice. Those reforms are extremely important and overdue. Yet those reforms, while valuable, don't address how best to reintegrate someone into the labor force once they have served their sentence.

Removing or reforming "good character" provisions in occupational licensing laws will undoubtedly help labor force reintegration. This action alone, however, will not deliver the biggest impact. Liberalizing the occupational licensing burdens themselves — the skill level required or even the requirement itself that a license be required at all to work in a chosen occupation — will be the most likely to lead to widespread employment success for those with a criminal record. Reforms like this will unlock the greatest opportunity for those who need it the most: individuals who have served their debt to society and are committed to getting back on their feet again.

The James Madison Institute
The Columns
100 North Duval Street
Tallahassee, FL 32301

850.386.3131

www.jamesmadison.org

The James Madison Institute
@JmsMadisonInst
/JamesMadisonInstitut
/jmsmadisoninst
/jmsmadisoninst