

How to Avert Another Texas Prison Crowding Crisis

by Marc Levin Esq., director of the Center for Effective Justice

Introduction

From 1968 to 1978, Texas' population increased by 19 percent while the prison population grew 101 percent to 22,439.¹ This laid the groundwork for the ruling by U.S. District Judge William Wayne Justice in 1980 in the *Ruiz v. Estelle* case, which found that overcrowding in Texas prisons created inhumane conditions that violated inmates' rights under the 8th Amendment of the U.S. Constitution. However, even by 1988, the Texas prison system had only 39,664 inmates. Today, the prison system is at capacity with over 150,000 inmates.² From 1988 to 2004, the state's prison population has grown by 278 percent while the state's overall population has only risen by 35 percent.

If policies are not changed to reduce prison inflows, House Corrections Chairman Jerry Madden estimates that another 14,000 prison beds will be needed by 2010.³ The Legislative Budget Board projects that 7,270 of these beds will be needed by 2008 and 10,976 by 2009.⁴ Although the Texas Department of Criminal Justice (TDCJ) has indicated the greatest need is in the more expensive medium and high security units, even assuming these new beds were allocated equally among units of varying security levels, the state would incur prison construction costs of \$1.24 billion over the next several years.⁵ This is in addition to annual operation costs of \$224 million that would be associated with 14,000 new beds. And today, the state has a shortage of approximately 2,500 prison guards.⁶

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Policy Recommendations

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- Shorten probation terms to terminate probationers who have met obligations
- Legislatively limit probation revocations for nonviolent new offenses, such as minor drug possession that would not otherwise result in prison

State Jail Confinees Eligible for Supervised Release

- Allow state jail confinées to apply for parole through the Texas Board of Pardons and Paroles
- Release selected state jail confinées exhibiting good behavior to probation

Drug Sentencing Reform

- Reduce offense levels for possession of small quantities of drugs
- Empower judges to consider factors other than quantity in sentencing
- Expand drug courts and judge-ordered mandatory treatment and counseling as alternatives to incarceration
- Increase availability of residential and outpatient substance abuse treatment facilities

Leasing New Beds from Private Operators

- Use short-term leases in lieu of building any new state prisons or jails
- Select private operators with full range of prison and reentry services

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Due to the specter of another federal court takeover of the state prison system, the current and future crowding crisis cannot be solved through putting more inmates in each cell or pitching tents. Similarly, TDCJ has already taken very creative administrative measures to fully maximize the capacity at each unit. Fortunately, there are policy changes that can reduce or eliminate the need for these new beds without endangering public safety.

Probation Reform

One in 20 Texans are on probation and probation revocations are a significant component of the state’s prison overcrowding problem. Some 37 percent of prison intakes and 41 percent of state jail intakes are revoked probationers, resulting in \$547 million in direct incarceration costs.⁷ The 79th Legislature offered the 121 local probation departments additional funds to hire new probation officers if they would agree to implement progressive sanctions, which reduce revocations by responding to each probation infraction with measured punishments, such as increased reporting requirements, a curfew, or a shock night in jail. In addition to graduated punishments, progressive sanctions programs also offer positive incentives, rewarding probationers who meet terms of their agreements, such as paying restitution, holding a job, and successfully completing counseling and treatment, with early termination from probation.

In the first quarter of 2006, we have seen a 12 percent decrease in felony probation revocations from the departments which accepted the new money and implemented progressive sanctions. As a result, statewide felony probation revocations declined from 6,306 in the first quarter of 2005 to 5,569 in the first quarter of 2006, a 11.69 percent drop.⁸ Since progressive sanctions most directly reduce technical revocations—revocations for violating terms of probation as

opposed to committing a new offense—it is even more striking that felony technical revocations have declined from 3,638 in the first quarter of 2005 to 2,893 in the first quarter of 2006, a 20.48 percent drop. If these trends continue, Texas would achieve a 3,000 annual reduction in the rate of increase of the prison population, substantially reducing the anticipated need for new prison beds. However, the 80th Legislature can do even more to reduce statewide probation revocations to prison.

Fiscal Year	Incarceration Population (End-of-Year)	TDCJ Operating Capacity	Number	Percent
2005	151,676	150,834	842	0.6%
2006	152,604	150,834	1,770	1.2%
2007	154,720	150,834	3,886	2.6%
2008	158,104	150,834	7,270	4.8%
2009	161,810	150,834	10,976	7.3%
2010	165,324	150,834	14,490	9.6%

A large percentage of revocations continue to come from Harris and Dallas County, where the progressive sanctions model is not being fully implemented. In Harris County, for example, each of the 21 criminal district court judges runs their own probation docket and only six have committed to using progressive sanctions, even though Harris County received its share of the new money. The Legislature should insist on full cooperation and note that judges may be referred to the State Commission on Judicial Conduct if they do not follow state law, including conditions for administering probation that are tied to the receipt of state funds. The Legislature could also simply require probation departments with probation populations over a certain threshold that refused the funds to take the funds and implement progressive sanctions.

During the interim, the House Corrections Committee is refining House Bill 2193, the vetoed probation reform measure that passed last session. A key feature of the bill is shortening Texas’ probation terms, which at up to ten years are the longest in the country. By shortening probation terms, revocations to prison will be reduced in several ways. First, those no longer on probation will not be at risk of revocation for a technical revocation such as missing a meeting or

failing a drug test. For example, Dallas County District Judge Keith Dean revoked Tyrone Brown to prison for life simply for testing positive for marijuana while on probation.⁹ Second, since most revocations occur in the first few years that a person is on probation, releasing longtime probationers who have met their obligations will free up additional supervision resources to focus on closely monitoring and disciplining the remaining probationers who need the most attention. Travis County Probation Department Director Geraldine Nagy has developed an innovative matrix for classifying probationers based on their original offense and socialization level so that the Department can target each probationer with the most appropriate type and degree of supervision.

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While most of the focus has been on reducing technical revocations, the Legislature should also consider whether revocations should be limited for nonviolent new offenses. For example, someone not on probation caught with a small amount of marijuana would only be guilty of a misdemeanor, which at most would result in a year or less in jail, and more likely just a fine. However, the same offense by someone on probation usually leads to being revoked to prison for an average of four years. Before successfully completing a drug treatment program, most addicts have at least one relapse.¹⁰ The Legislature should require that probationers undergoing drug treatment, or willing to enter drug treatment, not be revoked to prison, upon their first commission (while on probation) of a nonviolent drug offense involving possession of a small amount of drugs.

Parole or Probation for State Jail Felons

In 1993, the Legislature revised the state's criminal law code and established a new felony offense class, state jail felonies. The Legislature shifted low-level drug and property offenders (previously nonviolent Class A misdemeanors and third-degree felons) into this category. While 78 percent of offenders convicted of a state jail felony offense are sentenced to a term of probation, most of the remaining offenders are sentenced to a period of incarceration in one of Texas's 17 state jails, which currently house 14,755 confinees.¹¹ However, over half of those confined in state jails have been convicted of at least a third degree felony and have been transferred there due to capacity issues and/or because they will be released from the state jail.¹²

While state jail felons can only be sentenced to a maximum of two years in a state jail, they, unlike other felons, are ineligible for parole or release through mandatory supervision as a result of good-time credits. Therefore, although state prisoners on average serve only 47 percent of their sentences, state jail felons serve 100 percent of their sentences, with the exception of the 2 percent who are released at a judge's discretion.¹³ Another difference is that 97 percent of state jail offenders are not supervised upon release while 84 percent of state prisoners are.¹⁴

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Texas could reduce the need for new prison beds by making state jail felons eligible for parole and mandatory supervision through the same procedures that the Texas Board of Pardons and Paroles now uses for state prisoners. Early release of some of these nonviolent offenders, particularly those who have behaved well in jail and completed treatment programs there,

would free up space for violent offenders. Nonviolent third-degree felons in state prisons could be transferred to fill the new openings in state jails, which have a substantially lower per day cost than prisons.

Early release of select state jail felons could also be accomplished by placing them on probation for the remainder of their term. Many probation departments have expressed concern that, as a result of the probation reform bill shortening probation terms, they will see a decline in the number of probationers and therefore lose funds, because 40 percent of their budgets come from probation fees. Releasing some state jail felons early and placing them on probation would address this concern. Moreover, it would provide those being released with the supervision they need to successfully reintegrate into the community while ensuring that probation resources are expended on those who need it rather than those who do not.

Drug Sentencing Reform

The Legislature should review and revise the state's drug statutes so that, for possession of a small amount of drugs, the minimum sentence is low enough to provide sufficient discretion for the judge to choose an alternative to a long prison term. Some 21.7 percent of Texas prisoners, which amounts to approximately 32,550 inmates, are incarcerated for nonviolent drug offenses.¹⁵ Even for drug offenses where prison time may be appropriate, excessively high upper ceilings should be lowered.

For example, Chapter 481 of the Health and Safety Code creates a third degree felony for possession of between one and four grams of drugs in Penalty Group 1, which include morphine and methadone. Under Section 12.34 of the Penal Code, a third degree felony requires a prison sentence of between two and ten years. By raising the threshold for the amount of drugs that turns a state jail felony into a third degree felony, dealers could continue to face significant prison terms while mere users can be redirected into mandatory treatment in inpatient or outpatient rehabilitation programs. Similarly, some current state jail felonies for possessing small amounts of drugs could be lowered to Class A misdemeanors. This would spare many minor drug offenders the difficulty that convicted felons face when trying to find employment and housing, obstacles that sidetrack recovery and community reintegration.

In a February 2006 policy brief,¹⁶ we highlighted drug courts as a highly successful vehicle for diverting small-time drug offenders from prison, but given the appropriate sentencing laws and sufficient capacity at inpatient and outpatient drug treatment programs, all judges could participate in an effort to reduce the unnecessary incarceration of nonviolent, non-dealing drug offenders. A key problem is that, due to the lack of residential drug treatment beds, there is currently a six-month waiting list for such programs, leading many judges and even some offenders to choose incarceration rather than wait in the county jail for a bed to open up. Residential drug treatment centers are substantially cheaper than prison, costing \$7,957 per year compared to \$16,000 for prison.¹⁷ Outpatient drug treatment programs, also known as day treatment centers, are still far cheaper.

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Drug laws such as Chapter 481 could also be modified to allow or instruct judges and juries to consider the specific factual circumstances other than simply the quantity to distinguish between users and dealers. For instance, the offender's criminal history, if any, and age should be considered in determining whether incarceration is appropriate. Those caught possessing drugs in their late teens or early 20's may have come under the influence of older individuals and are especially likely to benefit from community-based treatment as compared with incarceration.

Leasing New Beds from Private Operators

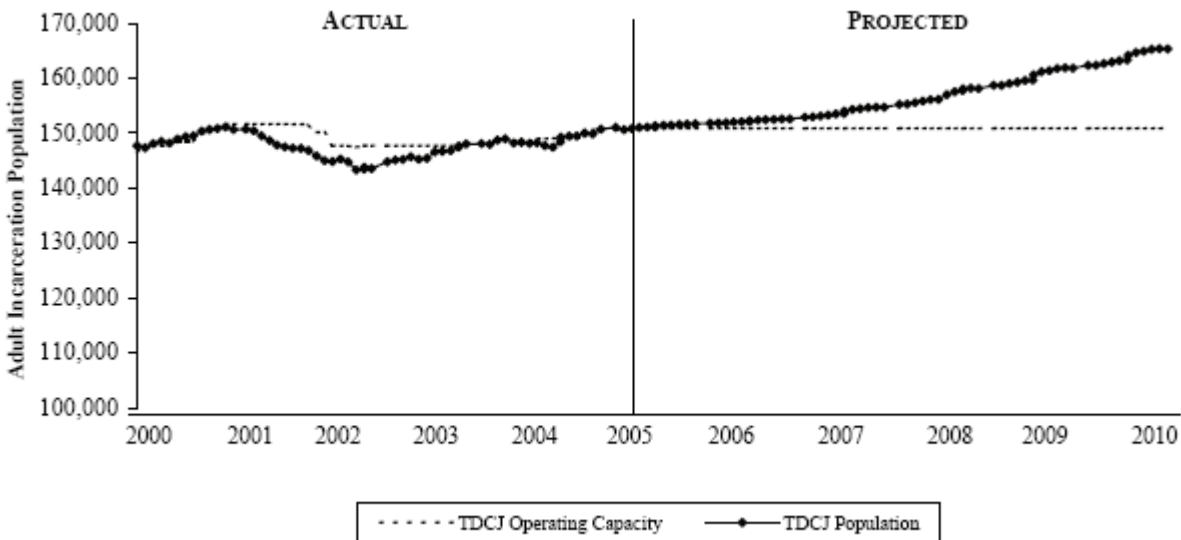
While the policy recommendations highlighted above have the potential to eliminate any need for new beds, if new beds must be freed up, no new state prisons should be constructed. Historically, such building sprees have created an ever-escalating prison population floor. To avoid building new prisons, the state has appropriated funds to lease 6,000 beds in county jails and a handful of beds in other states over the next two years.¹⁸

However, the continued leasing of county jail beds for \$40 a day offers a poor value to the state because these jails have a dearth of education, treatment, or job training services, all of which are correlated with reduced recidivism. According to a 2005 study, only a third of Texas county jails have any kind of substance abuse treatment program.¹⁹ Private corrections facilities can incarcerate offenders in pre-release minimum security facilities with a full array of education, treatment, and reentry services for \$30 a day. While private operators traditionally required a long-term contract from the state to justify their upfront construction costs, at least one operator in Texas has agreed to begin taking overflow inmates without any such commitment, but TDCJ continues to lease beds from county jails instead.

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In February, California Governor Arnold Schwarzenegger announced a groundbreaking plan to move at least 4,500 nonviolent women prisoners from traditional prisons in rural areas to privately operated community centers near their families where they would receive education, drug treatment, job training, and counseling.²⁰ If the California Legislature approves this plan which is based on years of academic research, the results will be instructive for Texas and other states looking to reduce traditional incarceration and harness the benefits of community-based corrections and private sector innovation.

**Adult Incarceration Actual & Projected Populations
Fiscal Years 2000-2010**



Source: "Adult and Juvenile Correctional Population Projections, Fiscal Years 2005-2010," Legislative Budget Board 2005, available at http://www.lbb.state.tx.us/PubSafety_CrimJustice/Projections_Reports_2005.pdf.

Conclusion

Texas prisons have once again reached their breaking point, and policy changes will be required to avoid the necessity of creating even more new prison beds. In addition to averting the costs associated with bringing new beds online, the reforms discussed herein could have many other positive consequences.

The sheer number of prisoners in Texas and the budgetary demands they create means that many soon-to-be-released inmates cannot obtain services such as treatment for drug addiction or mental illness.

Not only could these changes eliminate the need for more prison beds, but they could also result in a reduction in the current prison population. Prison crowding increases the likelihood of riots, prison rape, and other disturbances, which have recently spiraled out of control in California.²¹ Crowding also makes it nearly impossible for TDCJ to assign inmates to units by matching the services offered with the inmate's needs because of the overriding capacity concerns that drive assignments and transfers. Finally, the sheer number of prisoners in Texas and the budgetary demands they create means that many soon-to-be released inmates cannot obtain services such as treatment for drug addiction or mental illness.

To be sure, there are many unreformed violent offenders who must be in prison to incapacitate them during their prime crime-committing years. However, the state would be better served with a smaller prison system that can better tend to such inmates while freeing up resources for more effective correctional alternatives for nonviolent offenders. ✦

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Endnotes

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¹⁴See Note 10.

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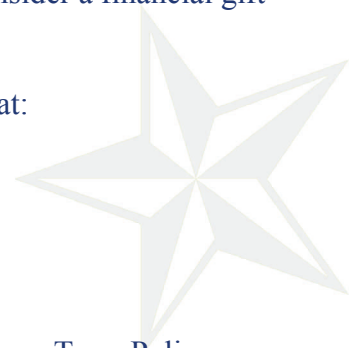
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