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Patrick Jonathan Steck

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Reducing Texas' Prison Population Through Release Policy Changes

**APPROVED BY
SUPERVISING COMMITTEE:**

Supervisor:

Chandler Stolp

Michele Deitch

Reducing Texas' Prison Population Through Release Policy Changes

by

Patrick Jonathan Steck, B.S.

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Abstract

Reducing Texas' Prison Population Through Release Policy Changes

Patrick Jonathan Steck, M.P.Aff.

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Supervisor: Chandler Stolp

Texas' prison population has grown rapidly over the last twenty years, tripling in size from 45,000 prisoners to more than 150,000 today. This report looks at ways to reduce the prison population by changing policies affecting odds of a prisoner's release. Often, advocates focus on sentencing reform. Yet, with nearly all prisoners returning to society after serving time in prison, the release side of the prison system should be given due attention. With policy considerations of cost, public safety, racial disparity, and impact on communities, this paper looks at how policies can be adjusted to reduce the prison population using the many "back-end" policy levers that are available. Specific recommendations include giving drug offenders slightly greater odds at release and making a concerted effort to reduce the racial disparity in prison release practices.

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Section 1: Introduction

Texas is a leader when it comes to prisons. By nearly any measure of size, the Lone Star State is at or near the top of all fifty states in incarceration in terms of the human and fiscal impact of the state's prisons. As Robert Perkinson puts it in *Texas Tough*, his authoritative history of Texas' prison system: "just as New York dominates finance and California the film industry, Texas reigns supreme in the punishment business."¹

This report is concerned primarily with the size of the prison system in Texas and, to an extent, the United States. Not only is the Texas prison system large, but it grew to its present size very quickly, over just a few years in the 1990s. This system is costly and has resulted in harmful unintended consequences, while being of questionable value to public safety. Section 2 of this report will attempt to convey the magnitude and growth of the prison system, while offering reasons for the sudden expansion. Section 3 will lay out four policy frames to consider when discussing the size of the prison population and any policy proposals to change it. Those considerations are: public safety, the state budget, racial disparity, and the effect on family and community. Section 4 will set the stage for policies affecting prison release mechanisms in Texas. Section 5 reviews the methodology and results I used to determine factors affecting the decision to release an inmate in a given year. The section covers the extent to which factors like type of crime, race, and sex affect an inmate's odds of being released. Section 6 discusses my recommendations for how release policies might be addressed. Within my four policy

¹ Robert Perkinson, *Texas Tough: the Rise of America's Prison Empire* (New York: Metropolitan Books, 2010), 4.

frames, I suggest areas that release decisions can be changed that would safely reduce Texas' sprawling prison population. Finally, Section 7 offers some concluding thoughts.

Section 2: Background and Problem²

In illustrating the size of Texas prisons, some numbers require context, while others are stunning enough to stand on their own. This section provides a brief introduction to the scope of incarceration in Texas, which in itself generates more questions. Two of the more immediate questions will be addressed here: how did we get to this point and why should any of this matter?

SIZE OF TEXAS' PRISON SYSTEM

Prisoner population

The number of prisoners in Texas is so large that technical details of who to count as a prisoner can cause a wide variation in the count. In a widely cited survey of the fifty states' prisoner populations, the Pew Center on the States worked with the Association of State Correctional Administrators (ASCA) to compile an apples-to-apples portrait of state prisoner counts. By that measure, Texas had 171,249 prison inmates on December 31, 2009.³ However, in the data solicited from the ASCA survey, Texas' prison operators, the Texas Department of Criminal Justice (TDCJ), note that the figure includes:

offenders in state and privately operated correctional facilities, as well as parolees in halfway houses; offenders temporarily released to a county less than 30 days; offenders in local jails awaiting paperwork for transfer to state funded custody; and parolees in local jails awaiting disposition for a parole violation.⁴

By narrowing the definition for population count, the population decreases markedly. In the same report TDCJ provides a "custody count" of 139,066, which figures

² Much of this section is drawn from Professor Michele Deitch's graduate class on corrections and sentencing, Spring 2011, University of Texas at Austin.

³ Pew Center on the States, *Prison Count 2010*, 7, http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf.

⁴ Association of State Correctional Administrators, *ASCA/Pew Prisoner Population Survey* (n.p., 2010), 9.

only those inmates in the custody of state-operated facilities.⁵ Using yet a third definition, the Legislative Budget Board (LBB) reported 154,183 prisoners at the end of December 2009.⁶ This figure includes inmates actually incarcerated in all TDCJ facilities, not just state-operated ones (that is, this includes the many privately-operated prisons in Texas). For purposes of this report, the LBB number, which is generally the most accepted in literature on Texas, will be used. Yet, for comparison purposes the Pew report provides the best basis for comparison to other states.

Using Pew's definition, Texas ranks second in overall prison population, only behind California, which claimed 173,670 at the start of 2010.⁷ While Texas does not technically lead the nation in most prisoners, California's general population is one and a half times the size of Texas,⁸ which makes the difference of just over one thousand prisoners (according to the Pew numbers) tremendously significant.⁹ No state comes close to locking up as many prisoners as Texas and California. Third-place Florida locks up about 40% fewer inmates than either of these states with 102,388.¹⁰ Even considering the "official" LBB number of 154,183, Texas easily comes in near the top of all states in number of people behind bars.

Compared to populations around the world, Texas lives up to the travel slogan "it's like a whole other country."¹¹ If Texas were placed in the international rankings of

⁵ Ibid.

⁶ Legislative Budget Board, "Monthly Tracking of Adult Correctional Population Indicators (February 2010)," in *Current Correctional Population Indicators: Adult and Juvenile Correctional Populations Monthly Report*, 185, http://www.lbb.state.tx.us/PubSafety_CrimJustice/2_Current_Corr_Pop_Indicators/MonthlyReport.pdf.

⁷ Pew Center on the States, *Prison Count 2010*, 7.

⁸ U.S. Census Bureau, State and County QuickFacts, last modified November 4, 2010, <http://quickfacts.census.gov/qfd/index.html>.

⁹ See section on Incarceration Rate.

¹⁰ Pew Center on the States, *Prison Count 2010*, 7.

¹¹ Michele Deitch, "Mass Incarceration: Why are so many people locked up?" (class lecture, LBJ School of Public Affairs, January 26, 2011).

prison populations,¹² even with the lower LBB figure, the state alone would have the tenth biggest prison population in the world.¹³

Imprisonment and Incarceration Rates

While TDCJ controls roughly the same number of people as there are residing in the entire South Texas city of Brownsville, population is but one measure of the size of Texas' prison system.¹⁴ It is logical that Texas, as one of the most populous states, should have one of the largest prison systems. Yet, as we have seen, the much larger California has a prison population of nearly the same size. To get a better feel for a state's propensity to lock up residents, we must look at the imprisonment and incarceration rates of states. These are defined as the number of prisoners and the number of prison and jail inmates, respectively, per 100,000 in the jurisdiction's general population.

In Texas, the imprisonment rate in 2009 was 648 per 100,000 in population.¹⁵ This placed Texas fourth out of fifty states, behind only Louisiana (881), Mississippi (702), and Oklahoma (657).¹⁶ Indeed, the rate of imprisonment in Texas far outstripped the national average of 442 among state prisons. So, while Texas is less likely to put its residents in prison than some of its neighbors, Texas still sends more of its residents to prison than most states, making the prison system all the more important, given Texas' size. Even Texas' close competitor for largest population, California, has a far lower imprisonment rate at 458.¹⁷

¹² Even removing Texas prisoners from the United States total, the US remains firmly in first place, imprisoning about 700,000 more people than China.

¹³ International Centre for Prison Studies, "Entire World - Prison Population Totals," World Prison Brief, last modified March 18, 2010, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal.

¹⁴ In 2006, the Census Bureau estimated Brownsville's population at 172,437.

¹⁵ Heather C. West, William J. Sabol, and Sarah J. Greenman, *Prisoners in 2009*, ed. Georgette Walsh and Jill Duncan (Washington, DC: U.S. Department of Justice, 2010), 24.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

The scope of the issue is similarly great when looking at the incarceration rate, the number of prisoners and inmates in local jails per 100,000 people in the general population. To obtain the most recent numbers for Texas, the prison population count from LBB is added with totals from the Texas Commission on Jail Standards, which tracks county jail conditions and populations. At the end of January 2010, the prison count stood at 153,537,¹⁸ while the county jail count totaled 68,779.¹⁹ Added together, Texas had 222,316 people behind bars, yielding a total incarceration rate of 897.²⁰ The last comprehensive state comparison study to be done on the incarceration rate was published in 2006, looking at 2005 data from prisons and jails. In that report, the Bureau of Justice Statistics found Texas to have a total incarceration rate of 976, ranking third behind Louisiana (1,138) and Georgia (1,021).²¹

At the international level, these incarceration rates are astronomical by comparison. The United States overall incarcerates at a rate of about 743, with closest competition from Russia at 582.²² By this comparison, Texas incarcerates nearly 60% more of its residents than Russia. Around the globe, incarceration rates only drop after Russia. Among Western European countries, the highest incarceration rate can be found in Spain, with a comparatively paltry 159 prisoners per 100,000 of population.²³ In short, the United States incarcerates at a greater rate than any other country in the world, and

¹⁸ Legislative Budget Board, "Monthly Tracking of Adult Correctional Population Indicators (February 2010)," 185.

¹⁹ Texas Commission on Jail Standards, *Texas County Jail Population*, 1, accessed February 5, 2011, <http://www.tcjs.state.tx.us/docs/popsum.pdf>.

²⁰ Calculated using Census estimates for Texas population in 2009. (U.S. Census Bureau, State and County QuickFacts).

²¹ Paige M. Harrison and Allen J. Beck, *Prison and Jail Inmates at Midyear 2005*, Department of Justice, Bureau of Justice Statistics, 9, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim05.pdf>.

²² International Centre for Prison Studies, "Entire World - Prison Population Rates per 100,000 of the national population," World Prison Brief, last modified March 18, 2010, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate.

²³ *Ibid.*

Texas ranks among the highest of U.S. states in the rate at which it locks people behind bars.

Physical and Fiscal Size

A final way to measure the scale of Texas' prison system is to look at the physical and fiscal impact it has on the state's government. All told, the Texas Department of Criminal Justice utilizes and/or controls 117 facilities in the state. Fifty-two are state-run prisons for felons, and fifteen are state-run jails for the lowest level of state felons.²⁴ In addition, the state contracts with private companies to run an additional twenty prisons, holding or transfer facilities, and a work program. The remaining thirty complexes are run by the state and include buildings with specialized functions such as transfer facilities, medical units, and substance abuse facilities, all of which hold convicted felons.²⁵ In 2005, when the Department of Justice included 132 facilities in its Texas count, Texas led all states in number of facilities, with Florida (109) and California (100) closest behind.²⁶

All of these facilities cost the state money. In fiscal year 2010, the state's budget appropriated \$2.45 billion to the goal to "incarcerate felons", with a slight increase to \$2.50 billion in fiscal year 2011.²⁷ These figures account for most of the budget for TDCJ, but do not include other programs such as probation, capital expenditures, and parole supervision. A noteworthy part of TDCJ's budget is that an overwhelming majority of funding comes from the general revenue fund. According to the budget

²⁴ Texas Department of Criminal Justice, "Unit Directory," Texas Department of Criminal Justice, accessed February 6, 2011, <http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm>.

²⁵ Ibid.

²⁶ James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, ed. Georgette Walsh (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2008), 9.

²⁷ These figures do not include subsequent requirements made by the LBB and state leadership officials for reductions in expenditures. Source: General Appropriations Act, S.B. 1, 81st Leg., Regular Session Art. V (Tex.), accessed February 7, 2011, <http://www.lbb.state.tx.us>, V-11.

document, roughly \$2.9 billion of the agency's total budget of \$3.1 billion was funded through general revenue, which is otherwise unrestricted state money.²⁸ Many state agencies (especially those dealing in education and health and human services) rely on federal funding to supplement large parts of their agency budgets. By contrast, TDCJ received only \$18.6 million per year from the federal government for reimbursement of handling "incarcerated aliens."²⁹ The prison agency's reliance on general revenue means that state legislators use nearly 8% of their unrestricted funds (that could go to any program the state wished to finance) to run a prison system. To compare, TDCJ received nearly triple the amount of general revenue that was marked for public community and junior colleges in the state.³⁰

GROWTH IN TEXAS' PRISON SYSTEM

Numbers explaining the size of Texas' prisons today illustrate a system that is large, both in population (absolute and relative) and in dollars. Yet, to truly appreciate the size of the Texas prison system, we must place these numbers in time and examine recent trends. The growth in prisons in Texas, especially over the last three decades, is nothing short of stunning. Indeed, the prison population of over 150,000 is a far cry from the three prisoners housed in the Texas State Penitentiary in Huntsville in 1849.³¹

For much of the state's early history, the prison population remained small and grew in proportion to the general population. In 1939, the total prison population was nearly 7,000. During World War II, that number dropped by more than half, before

²⁸ General Appropriations Act, S.B. 1, 81st Leg., Regular Session Art. V (Tex.), accessed February 7, 2011, <http://www.lbb.state.tx.us>, V-11

²⁹ *Ibid.*, V-12.

³⁰ *Ibid.*, V-12 and III-253.

³¹ Paul M. Lucko, "Prison System," in *The Handbook of Texas Online* (Texas State Historical Association), <http://www.tshaonline.org/handbook/online/articles/jjp03>.

rebounding to 6,424 by 1950.³² As the state grew quickly in the post-war era, so did the prisons: edging from 11,890 prisoners in 1962 to 15,709 in 1972. During the 1970s, the pace of prison expansion outpaced growth in the state's population. From 1968 to 1978, the state population grew by 19 percent, while the prison system swelled by 101 percent.³³ By 1983, the prison population was more than 36,000.

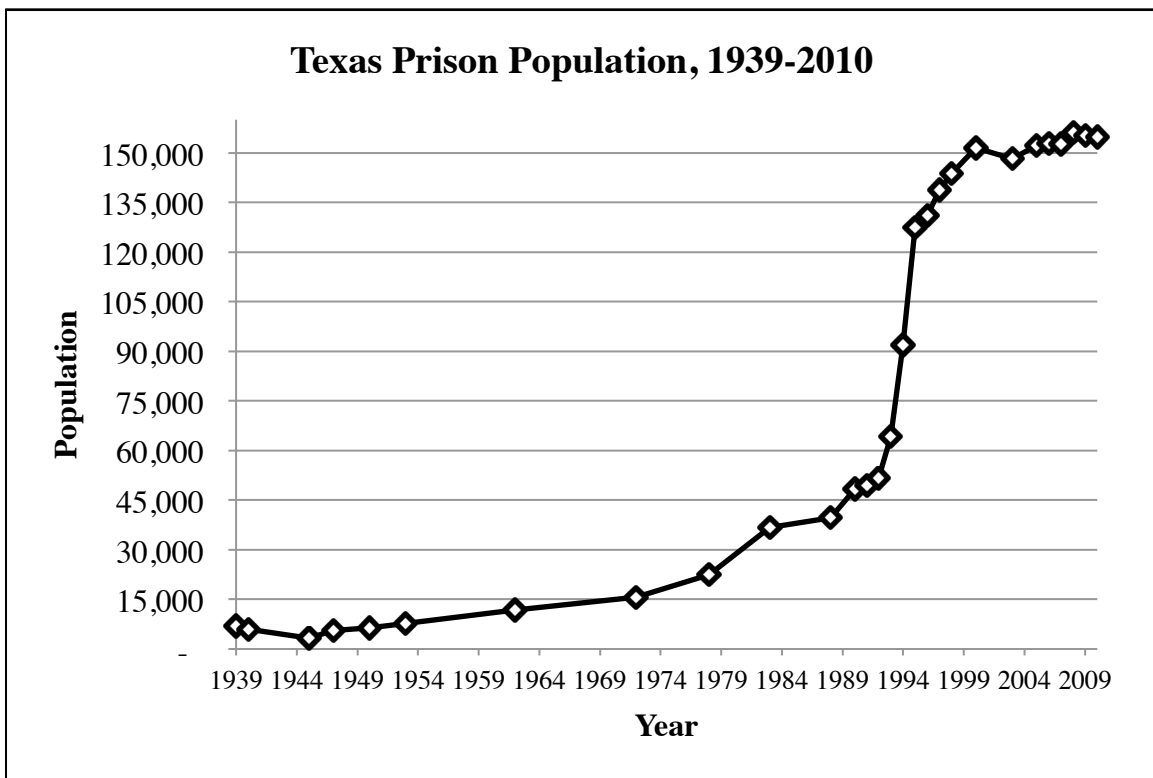


Figure 1: Texas Prison Population, 1939-2010

Then, population growth sped up even more. The graph above visually shows the rapid rise in the prison population from the early 1990s to nearly 2000.³⁴ Over the period

³² Ibid.

³³ Ibid.

³⁴ Compiled from: Paul M. Lucko, "Prison System"; Texas Department of Criminal Justice, Closing of a Millennium: Reviewing the Past Decade, 2, accessed February 10, 2011, <http://www.tdcj.state.tx.us/publications/finance/closemill.pdf>; Council of State Governments Justice Center, Recent and Projected Growth of the Texas Prison Population, 2, accessed February 11, 2011, <http://justicereinvestment.org/files/>

from 1988 to 2000 alone, Texas' prison population grew 282%. Over the same time, the state's population as a whole grew by about 30%.³⁵

Before examining the causes of this sudden jump in prison population in Texas, it is worth noting that the state was generally in line with national prison population trends. Data from the Bureau of Justice Statistics show a similar rise in the sum of state prisoners from around the country.

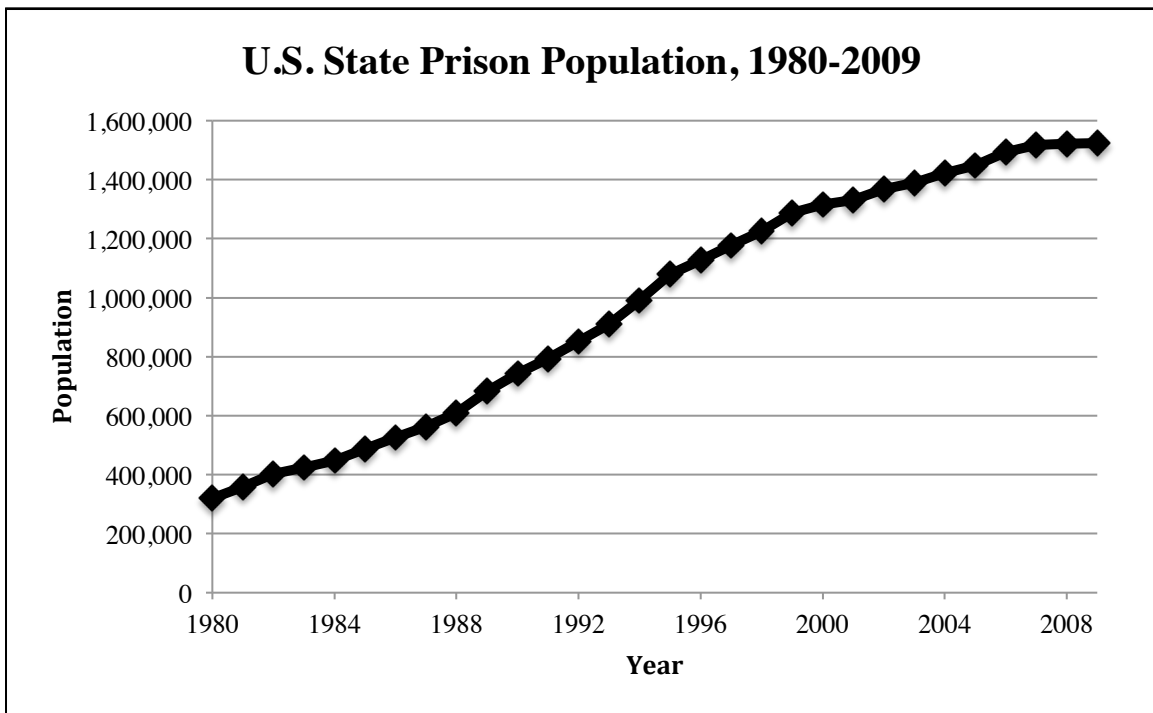


Figure 2: U.S. State Prison Population, 1980-2009

Nationally, the state prison population rose 116% over the 1988 to 2000 period in which Texas saw so much growth.³⁶ Yet, from the beginning of the 1980s to today, total

texas-growth.pdf; Tony Fabelo, Adult Correctional Population Projection for Fiscal Year 2000 - 2005 and Long-Term Planning Options, June 8, 2000, 5, http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/OfficialProj5-2000.pdf; Legislative Budget Board, "Monthly Tracking of Adult Correctional Population Indicators (February 2010)".

³⁵ U.S. Census Bureau, State and County QuickFacts.

counts in state prisons grew by 377%, while Texas similarly saw a jump of nearly 450%.³⁷

REASONS FOR GROWTH

The tremendous footprint of incarceration outlined in the first part of this section is clearly a relatively new phenomenon. What led to the sudden tripling of the inmate population in Texas? Why does Texas now spend \$2.5 billion to keep offenders behind bars? And why is Texas' imprisonment rate higher than forty-six other states?

National Trends

Despite Louis Brandeis' oft-cited metaphor of the fifty states' governments as laboratories to "try novel social and economic experiments", state-level policies tend to follow trends, as they have in the case of corrections.³⁸ Between 1982 and 2007, the incarceration rate grew in every single state in the Union, with only four states that did not quite double their rates of imprisoning residents.³⁹ Texas' growth over the same period was the median of all states with a 203% increase in the rate of lock-up. For this reason, prison growth in Texas is not particularly unusual, despite the Lone Star State's clear propensity for favoring punishment. Theories abound as to why there was a sudden nationwide increase in imprisonment; a few notable authors' views on the matter are reviewed here. It is important to note that there is consensus that prison growth is not

³⁶ Bureau of Justice Statistics, "Key Facts at a Glance," Total Correctional Population, last modified February 13, 2011, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>.

³⁷ Ibid.

³⁸ *New State Ice Co. v. Liebmann* (March 21, 1932), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=285&page=262>.

³⁹ Maryland (86% growth), Nevada (93%), North Carolina (93%), and New York (99%). Source: Pew Center on the States, *One in 31: The Long Reach of American Corrections*, 43, accessed February 13, 2011, http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

entirely (or sometimes even remotely) attributed to a more dangerous or crime-ridden society, but rather to policy actions (or inactions) by the government.⁴⁰

In *The Challenge of Crime*, Ruth and Reitz offer two main reasons for the sudden shift in crime policy. First, real and perceived crime rates “shot up” during the 1960s and remained high, and second, the liberal policies that promoted low incarceration rates were intellectually weak and vulnerable to attack.⁴¹ With regard to the crime rate, the authors note that the rate of crime did rise during the late 1960s, just as imprisonment was on a slight decline. Combined with other liberal policies like increased checks on police power and rights for suspects, the public saw punishment on a downward trend, while crime was on an upswing. This “scissors effect” of crime and punishment going opposite directions, gave conservatives a political window to promote their views of increased imprisonment.⁴²

One of the most important political voices in the corrections debate in the early 1970s was James Q. Wilson, a conservative intellectual and author of *Thinking About Crime* in 1975.⁴³ Wilson promoted a rational economic approach to crime, arguing that prison sentences and punishment act as a deterrent to criminal activity because criminals are rational actors who take into account costs and benefits before acting. Despite using questionable research claims to back up his theories, this view resonated with Americans, who used the political process to push for more punishment. Ruth and Reitz argue that the lack of a coherent liberal rebuttal strengthened the conservative position, making it a dominant policy position for years to come.⁴⁴

⁴⁰ Ibid., 1.

⁴¹ Henry Ruth and Kevin R. Reitz, *The Challenge of Crime: Rethinking our Response* (Cambridge, Mass.: Harvard University Press, 2003), 72.

⁴² Ibid., 78.

⁴³ Ibid., 81.

⁴⁴ Ibid., 86.

In another view, Marc Mauer writes in *Race to Incarcerate* about the political gains to policymakers from advancing the use of incarceration. He notes that even up until 1973, credible calls were being made for a moratorium on prison building.⁴⁵ Yet at the same time, a political movement to get “tough on crime” began, initially by taking aim at sentencing practices. Politicians began to make sentencing more determinate, reducing the discretion of judges.⁴⁶ Once strict guidelines took hold, it was very easy for tougher punishment to follow. Tinkering with guidelines by extending the length of sentences became simple and politically expedient. By increasing the amount of time offenders were sentenced, prison populations began to swell. Yet, there was no stopping the windfall that “tough on crime” had become for politicians. Mauer walks through each presidential administration, pointing to how presidents of both parties used crime to their advantage, especially making frenzy out of the war on drugs.⁴⁷

Mauer also illustrates the political flip side by calling up the portrait of Willie Horton, a furloughed murderer who committed rape while Michael Dukakis was governor of Massachusetts. The “image of this black killer [flooding] the airwaves” sunk Dukakis’ presidential bid in 1988.⁴⁸ Mauer’s central argument is that crime was a very successful political tool that built on American’s fear of crime and a variety of enabling circumstances during the 1970s. He argues that for many years, being “tough on crime” was necessary for political success. As a result, sentence lengths grew, and prison populations exploded.

Many theories about prison expansion due to policy have been published, but a final opinion worth examining in this space comes from Jonathan Simon. In *Governing*

⁴⁵ Marc Mauer, *Race to Incarcerate*, revised ed. (New York: The New Press, 2006), 55.

⁴⁶ *Ibid.*, 56.

⁴⁷ *Ibid.*, 61.

⁴⁸ *Ibid.*, 63.

Through Crime, Simon makes the case that government officials created and grew mass incarceration as a means of hiding government's inability to solve other problems in society.⁴⁹ Simon highlights the racial disparity of mass imprisonment in describing prisons as “waste management” facilities that are only successful at removing people from society.⁵⁰ He cites political rhetoric that focuses solely on inputs like building new prisons or housing more inmates in arguing that detention has become more important than anything else in a system supposedly geared toward keeping the public safe.

As noted, Texas is not immune to any of these national trends or explanations. For years “tough on crime” has sold well politically in the generally conservative arena of Texas politics. While many of the explanations reviewed above likely apply to Texas, one other factor played a major role in the massive growth of the state's prison population.

Ruiz and Growth in Texas

Much of Perkinson's history of Texas prisons is devoted to the abysmal conditions that prisoners faced for decades in the late 1800s and much of the twentieth century. The issue of prison conditions came to a head in the federal court case of *Ruiz v. Estelle*, filed in 1972. The tireless Federal Judge William Wayne Justice handed down a decision in early 1981 in the most significant prisoners' rights case in Texas history.⁵¹ Its impact is difficult to overstate. Justice's opinion decried “the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC [the predecessor to TDCJ].”⁵² One of the most significant provisions of Justice's remedial order was his directive to stop overcrowding by capping the overall size of the prison system. In 1985,

⁴⁹ Jonathan Simon, *Governing Through Crime* (Oxford: Oxford University Press, 2007), 159.

⁵⁰ *Ibid.*, 152.

⁵¹ Perkinson, *Texas Tough*, 278.

⁵² *Ibid.*

the state agreed to “facilities upgrades, staffing ratios, and population caps” in a settlement to meet the judge’s population demands.⁵³

At the same time, Texas’ judges and juries began sentencing more people to prison and for longer terms under increasingly tougher sentencing policies. From 1985 to 1991 the number of offenders in state prisons more than doubled from 26,000 to 54,000 per year.⁵⁴ This number fails to capture an even larger increase, as many thousands of sentenced inmates began creating a dangerous backlog in county jails, due to a lack of state bed space. In turn, counties sued the state for not taking prisoners in a timely manner, which was a significant impetus to the rapid physical expansion of the Texas prison system.⁵⁵ The increase in number of prisoners sentenced was partly driven by a quadrupling in prison sentences handed down to drug offenders, as drug enforcement and punishment efforts were enhanced at all levels of the system. Especially significant was the number of Blacks sentenced for drug offenses, which contributed to much of the prison growth and pushed incarceration rates for Blacks in Texas to eight times that of whites.⁵⁶

Ever increasing sentencing, driven by reasons outlined above, combined with *Ruiz* limits on prison crowding and conditions, led to a crisis in Texas prisons. As a short-term solution, parole rates grew 260% over the 1985 to 1991 period, keeping populations down, but drastically shortening the amount of time prisoners served.⁵⁷ In a 1987 statistical study, it was projected that even with 100% parole approval and construction of

⁵³ *Ibid.*, 287.

⁵⁴ Tony Fabelo, "Sentencing Reform and Prison Crowding in Texas: Facing the Tough Choices of the 1990s," in *Texas Criminal Justice Reforms: The Big Picture in Historical Perspective* (n.p.: Criminal Justice Policy Council, 1997), 6.

⁵⁵ Michele Deitch, "Giving Guidelines the Boot: The Texas Experience with Sentencing Reform," *Federal Sentencing Reporter* 6, no. 3 (November-December 1993): 138.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

4,500 beds within two years, Texas would face a total shortfall of over 7,500 beds.⁵⁸ The solution that lawmakers adopted in 1993, rather than rolling back drug policies or enacting meaningful sentencing reform, was massive prison building. To partly build its way out of the crowding problem, voters approved \$1 billion to build over 25,000 prison beds in 1991 to supplement other legislative building efforts.⁵⁹ Eventually, construction slowed down, but the consequences remain. Texas has kept its prisons full. As the graph of Texas' prison population (Figure 1) shows, the prison population has remained relatively flat since 2000. Not until 2010 has there been serious talk by government leaders of closing a prison in Texas, an event that is thought to have never happened in the state's history.⁶⁰

⁵⁸ Pablo Martinez, *Projections of TDC Admissions and Population, 1987-1991* (Austin, Texas: Criminal Justice Policy Council, 1987), 9.

⁵⁹ Michele Deitch, "Giving Guidelines the Boot: The Texas Experience with Sentencing Reform," 138.

⁶⁰ Mike Ward, "State officials consider closing some prisons," *Austin American Statesman*, February 10, 2010, <http://www.statesman.com/news/local/state-officials-consider-closing-some-prisons-227430.html>.

Section 3: Policy Frames

Numbers and statistics show a tremendous increase and plateau in the size of Texas prisons. At first blush, this should appear to be an important problem. But, why is it a problem, and how should we think about it from a policy perspective? I suggest four main areas of concern that should frame the policy debate about prison population: public safety, the state budget, racial disparity, and effect on community.

PUBLIC SAFETY

At the front of TDCJ's mission statement is the goal to "provide public safety."⁶¹ Political leaders, even when giving voice to some of the other policy considerations included in this section, always come back to the notion of keeping the public safe.⁶² Indeed, as Todd Clear notes, "we are used to the idea that public safety is the task of criminal justice."⁶³

On a theoretical level, the purpose of incarcerating an individual is based in one of two philosophies: a utilitarian, crime-control model or a retributive model. Shawn Bushway and Raymond Paternoster write that the utilitarian model is based on several factors that work toward the goal of reducing crime in society: incapacitating someone that would/could otherwise commit crime, rehabilitating offenders so they do not commit crimes again, deterring offenders from committing crime through fear of returning to prison, and deterring the public from committing crime under general threat of

⁶¹ Texas Department of Criminal Justice, *Closing of a Millennium: Reviewing the Past Decade*, i.

⁶² For example, Rep. Jerry Madden, a leader of reforms in slowing Texas' prison growth in 2007, said in a hearing of the Texas House Committee on Corrections on February 23, 2011 that any policy changes or budget cuts must not affect the public safety.

⁶³ Todd R. Clear, "The Problem with 'Addition by Subtraction': The Prison-Crime Relationship in Low-Income Communities," in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind (New York: The New Press, 2002), 185.

punishment.⁶⁴ On the other hand, a theory of retribution places people in prison for a period of time based on the moral outrage and “just deserts” of the crime and/or the offender.⁶⁵ Today, sentencing is based on a mixture of the two philosophies. Bushway and Paternoster note that it is “extraordinarily difficult to empirically disentangle these various effects [on crime and public safety].”⁶⁶ Yet, several studies have attempted to tackle the net effect of incarceration on public safety.

The first challenge in assessing this is defining what public safety is or how to measure it. Victimization surveys provide the best picture of crime in society by gleaning responses from public polling about whether or not an individual has been a victim of crime and what kind. This is different from crime rates in that a great number of crimes are not reported to the police for various reasons. On the other hand, victimization rates are only available on a national level, and more importantly, they do not account for “victimless” crimes like drug offenses.⁶⁷ While we might prefer to use victimization rates as an indicator of public safety, crime rates provide an adequate and more accessible proxy.

As discussed in the previous section, prison populations around the country have risen dramatically over the last thirty years. Over the same time period, serious violent crime has dropped, especially since about 1994.⁶⁸ While such numbers suggest that incarceration has reduced crime, it is important to remember an early lesson in statistics that correlation does not imply causation. In one of the most often-cited studies on the

⁶⁴ Shawn D. Bushway and Raymond Paternoster, "The Impact of Prison on Crime," in *Do Prisons Make us Safer?*, ed. Steven Raphael and Michael A. Stoll (New York: Russell Sage Foundation, 2009), 119.

⁶⁵ *Ibid.*, 120.

⁶⁶ *Ibid.*, 123.

⁶⁷ Marc Mauer, *Race to Incarcerate*, revised ed. (New York: The New Press, 2006), 94.

⁶⁸ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (New York: New York University Press, 2005), 110.

influence of prison on crime, Professor William Spelman found that increasing incarceration rates only explain about 27% of the decrease in crime.⁶⁹ After controlling for factors like age distribution in the population, economic indicators, and others, Spelman's study concludes that violent crime would have dropped "a lot" even without a large prison buildup.⁷⁰

Others studying this question opt to review states on a case-by-case basis to draw comparisons about the effectiveness of incarceration. Michael Jacobson (who also cites Spelman) found that states that increased their prison populations the least during this time period also saw some of the largest drops in violent crime. As an example, over the period from 1992 to 2002, New York's prison population grew by only 9% at the same time that violent crime rates dropped 53%.⁷¹ While this and other positive correlations in prison use and crime rates do not imply causation, it does lend evidence to the view that increasing incarceration does not necessarily reduce crime. Instead, crime rates are a combination of many other social factors like economic conditions, the market for drugs, and policing.⁷² Indeed, there is extensive literature that mass incarceration may unintentionally increase crime, with possible criminogenic effects such as teaching criminal behavior and harming prisoners' sense of self through brutalization or isolation.⁷³

⁶⁹ William Spelman, "The Limited Importance of Prison Expansion" (2000), in *The Crime Drop in America*, ed. Alfred Blumstein and Joel Wallman, rev. ed., Cambridge Studies in Criminology (New York: Cambridge University Press, 2006), 123.

⁷⁰ *Ibid.*, 125.

⁷¹ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration*, 128.

⁷² *Ibid.*, 129.

⁷³ Martin H. Pritikin, "Is Prison Increasing Crime," *Wisconsin Law Review*, no. 6 (2008): 1052.

STATE BUDGET

As noted in the previous section, mass incarceration eats up a huge part of states' budgets, especially in Texas. Initially allotted about \$2.5 billion annually to run incarceration facilities in fiscal years 2010 and 2011, TDCJ's budget has come under intense scrutiny as the State of Texas, like nearly every other state in 2011, faces a tremendous budget shortfall of upwards of \$27 billion.⁷⁴

Because of the budget woes of Texas and many other states, legislators everywhere are questioning their return on prison spending; this is something that criminal justice analyst Peggy McGarry indicates has not been of great concern over the last three decades.⁷⁵ A report from McGarry's Center on Corrections and Sentencing at the Vera Institute showed that state budgets face a total shortfall of about 19 percent in FY2011. At the same time, corrections spending totaled about 3.5 percent of state budgets in FY2008.⁷⁶ While stimulus funds softened states' shortfalls in the earlier part of the national recession, budget officers and lawmakers are faced with a drastic fiscal problem that gives political opportunity to take a new look at the sentencing practices and incarceration growth that marked the last thirty years.

Compared to other states, Texas is not an outlier in corrections spending per capita, despite being slightly above the national average.⁷⁷ However, Texas ranks second (to Delaware) among the states in percentage growth in corrections spending between

⁷⁴ Mike Ward, "Report: Prison Cuts Could Cause Bed Shortage in 2 Years," *Austin American-Statesman*, March 1, 2011, <http://www.statesman.com/news/texas-politics/report-prison-cuts-could-cause-bed-shortage-in-1291294.html>.

⁷⁵ Center on Corrections and Sentencing, *The Continuing Fiscal Crisis in Corrections: Setting a New Course* (New York: Vera Institute of Justice, 2010), 2.

⁷⁶ *Ibid.*, 7.

⁷⁷ John W. Ellwood and Joshua Guetzkow, "Footing the Bill: Causes and Budgetary Consequences of State Spending on Corrections," in *Do Prisons Make Us Safer*, ed. Steven Raphael and Michael A. Stoll (New York: Russell Sage Foundation, 2009), 212.

1978 and 2000.⁷⁸ In their research, Ellwood and Guetzkow argue that corrections spending only significantly crowds out welfare spending from the states.⁷⁹ Nevertheless, by budgeting one in every 15 general revenue dollars for FY2011 to TDCJ, Texas is making a statement of priority over the many other agencies and programs that the state funds or could fund (and especially welfare).⁸⁰

States' first policy responses to reigning in their previously unrestrained corrections budgets were generally timid. Through FY2011, virtually all states had implemented staff reductions or hiring freezes, frozen or reduced pay, and most had reduced programming.⁸¹ Notably though, 15 states had closed prisons in part or in whole, a clear departure from recent incarceration policy.⁸² As noted, the budget crises give states an opportunity to "take a fresh look at the way they punish criminals."⁸³ At an average of \$50.79 per day per bed in Texas, incarceration in a TDCJ prison is one of the most expensive methods of punishment an offender can be sentenced to.⁸⁴ Because incarceration represents a significant portion of Texas' budget and because of the availability of options to lawmakers, now is an opportune time to consider the cost-effectiveness of prison as it stands today.

RACIAL DISPARITY

As mentioned in the previous section, a large and disproportionate amount of the prison growth in Texas can be attributed to the increasing number of Blacks incarcerated.

⁷⁸ Ibid., 213.

⁷⁹ Ibid., 239.

⁸⁰ General Appropriations Act, S.B. 1, xiv and V-11.

⁸¹ Center on Corrections and Sentencing, *The Continuing Fiscal Crisis in Corrections: Setting a New Course*, 11.

⁸² Ibid.

⁸³ Ibid., 14.

⁸⁴ Legislative Budget Board, *Criminal Justice Uniform Cost Report, Fiscal Years 2008-2010* (Austin, 2011), 6.

According to inmate population data obtained from TDCJ by the author through the Texas Public Information Act, at the end of FY 2010, over 36% of the inmate population in Texas was Black.⁸⁵ At the same time, the Black population of Texas was only about 12%.⁸⁶ Non-Hispanic whites represented the smallest of the three major ethnic/racial groups at 31% of the prison population, but the largest group in the state population at 47%.⁸⁷ Hispanics in Texas were very slightly underrepresented (though this could be within the margin of error of data reporting). While Texas locks up Hispanics in rough proportion to their share of the population, this is certainly not the case in many other states, where Hispanics are a disproportionately larger group of the prison population.⁸⁸

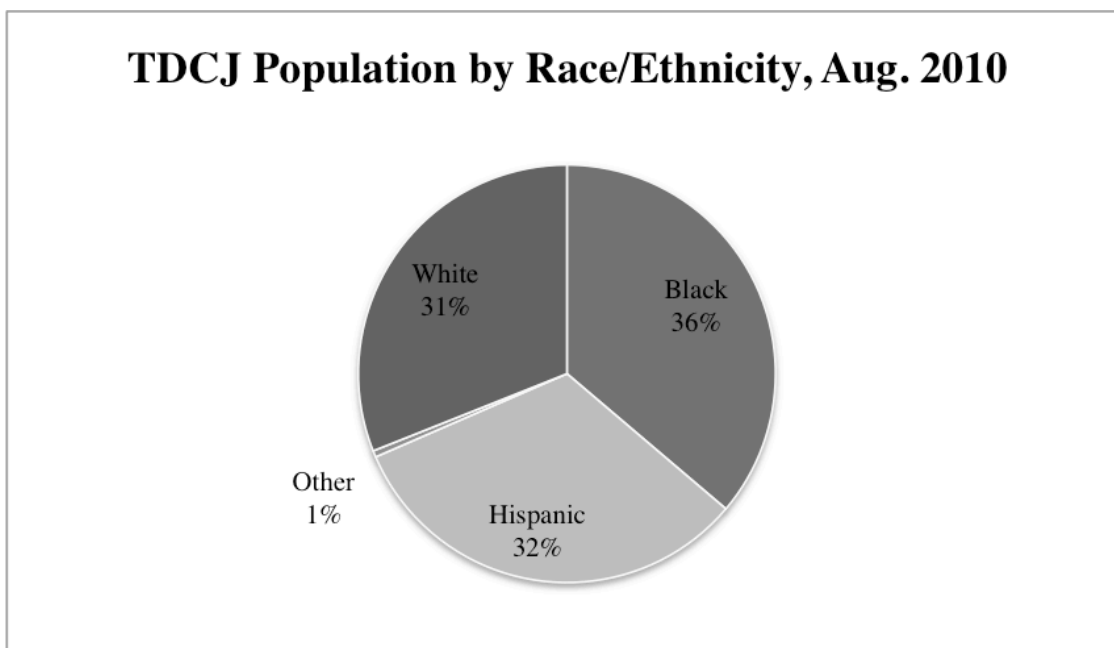


Figure 3: TDCJ Population by Race/Ethnicity, Aug. 2010

⁸⁵ This data set will be used extensively and described in greater detail in the second half of the paper. Racial classification is based on TDCJ assignment; an inmate's own racial identification may not be accurately reflected.

⁸⁶ U.S. Census Bureau, State and County QuickFacts.

⁸⁷ Ibid.

⁸⁸ Marc Mauer, *Race to Incarcerate*, revised ed. (New York: The New Press, 2006), 131.

As if the gap in representation between the prison population and the general population were not wide enough, national statistics show that a black male born in the late twentieth century had a one in three chance of going to prison at some point in his life.⁸⁹ The human impact on the African American community and all communities is detailed in the next part of this section, but let us consider the motivations and concerns over the large and disparate impact that incarceration has on Blacks.

Criticism continues to grow about the reasons behind the tremendous racial gap in imprisonment. Certainly, the civil rights movement of the late twentieth century afforded many new opportunities for Blacks and other racial minorities, but for those “left behind” there was and is no opportunity. Instead, as Mauer writes, “prisons and jails became the temporary or permanent home of the down-trodden.”⁹⁰ Yet, nowhere in the Penal Code is it written that Blacks should make up the largest racial group in Texas prisons or that they should be sentenced disproportionately more than any other racial group. Nevertheless, the racial disparity we see today is largely due to the impact of policy and practice in our system.

As Mauer carefully argues, “the entire criminal justice system is predicated on the use of discretion.”⁹¹ From police to prosecutors to judges, discretion is utilized in determining who goes to prison and for how long. Evidence suggests that conscious or subconscious racial bias is pervasive through all steps of the system.⁹² While this is difficult to quantify and analyze, the results are clear with an overwhelmingly minority prison population. One of the clearest policy changes that researchers point to is the creation and escalation of the war on drugs in the United States. In Texas, just between

⁸⁹ Ibid., 130.

⁹⁰ Ibid., 137.

⁹¹ Ibid., 152.

⁹² Ibid., 154.

1985 and 1991, the incarceration rate per racial group population more than doubled for Blacks from 683 to 1,414, with drug offenses accounting for “most of the growth” in arrests and sentences to prison.⁹³ While the percentage of Blacks in Texas prisons has come down from 48% in 1991, a significant racial gap, aggravated by drug sentencing laws and drug enforcement actions, remains.⁹⁴

For many observers, this is cause for concern, but unfortunately, not a new issue, given the struggles with race relations in the United States and especially Texas. Loïc Wacquant, extending Michel Foucault’s notions of control, writes that the prison system’s growth is not a tool of public safety, but rather a way to control the African American population that those with power would rather not deal with.⁹⁵ Wacquant, like many others, makes the case that mass incarceration is part of another step in “an evolving project to control and exploit African Americans,” with previous stages including slavery, the Jim Crow South, and the Ghetto North.⁹⁶ Michelle Alexander continues this theme in her recent book *The New Jim Crow*, where she argues that mass incarceration is just that – an extension of the politically-driven race policies to control Black Americans.⁹⁷ This view comports with Perkinson’s view on the subject. Writing in the conclusion of his book on the history of Texas prisons, he notes

As Jim Crow finally collapsed, criminal justice emerged as a final bulwark of “white man’s government.” Under assault from Washington, the judiciary, and the streets, Texas and other southern polities eventually yielded on integration. But as they did so, they set a higher premium on public order and law

⁹³ Criminal Justice Policy Council, *Criminal Justice Trends in Texas: Overview by Race*, Sentencing Dynamics Study 4 (Austin: Criminal Justice Policy Council, 1992), Note from the Director.

⁹⁴ *Ibid.*, 1.

⁹⁵ Bert Useem and Anne Morrison Piehl, *Prison State: The Challenge of Mass Incarceration*, Cambridge Studies in Criminology (New York: Cambridge University Press, 2008), 41.

⁹⁶ *Ibid.*, 42.

⁹⁷ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 57, EBook Library.

enforcement and began assembling an incarceration apparatus of unprecedented scale.⁹⁸

The racial disparity in mass incarceration compounds the gravity of the problem of America and Texas' propensity to keep people behind bars. Based in a long history of institutionalized racism, the racial inequity in imprisonment is largely driven by policy choices (the same reason so many people are incarcerated in the first place) and discretionary application of the laws. While the percentage of inmates of color has edged slightly downward in Texas over the last 15 years, Blacks are still significantly overrepresented in prisons. This in itself should be a major concern for policymakers, yet as a sensitive issue, it is too often left unaddressed or swept in with other policy frames.

EFFECT ON FAMILY AND COMMUNITY

If concerns over the racial inequity in Texas prisons weren't enough from a moral perspective, then the practical considerations of the effect it has on families and communities of color should be. Though the externalities of mass incarceration are not color blind, they do have a disproportionate impact on the Black community. The effects on this and all families and communities make up the fourth major policy frame that we should consider about mass incarceration.

As Jacobson finds, recent literature has brought forth concerns over the "unintended" social consequences of incarceration.⁹⁹ Much of this concern arises over the impact that incarceration has on the family. The absence of a parent or spouse that is in prison engenders a host of negative consequences on the family environment.¹⁰⁰ For example, the absence of a father can impact a family's financial means, cause personal

⁹⁸ Robert Perkinson, *Texas Tough: the Rise of America's Prison Empire* (New York: Metropolitan Books, 2010), 364.

⁹⁹ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration*, 46.

¹⁰⁰ *Ibid.*, 47.

feelings of stigma and isolation to the mother, and cause difficulty in caring for children.¹⁰¹ In 1997, Mary Dallo estimated over 1.5 million children had at least one parent in jail or prison. These children can feel rejection or guilt over their plight, and it is clear that children stand to suffer from the absence of a parent in prison.¹⁰² A study by Rucker C. Johnson finds that the impact of incarceration is felt across generations. Citing a linkage between an incarcerated parent and an increased likelihood for criminal behavior by their children, Johnson suggests that our crime policy may actually have the effect of working to perpetuate criminal activity in the next generation.¹⁰³

In addition to the impact on family, incarceration of a large number of residents of a community can have a tremendous negative impact that can even be detrimental to public safety, our first policy frame. Donald Braman writes about the “corrosion of social bonds” that incarceration causes, which limits what support network families have, causing communities to suffer. He adds that not only is this harm done to families and communities, but to some of the most vulnerable groups in society.¹⁰⁴ Likewise, Todd Clear concludes that

Well-established theory and a solid body of evidence indicate that high levels of incarceration concentrated in impoverished communities has a destabilizing effect on community life, so that the most basic underpinnings of informal social control are damaged. This, in turn, reproduces the very dynamics that sustain crime.¹⁰⁵

¹⁰¹ R. Robin Miller, "Various Implications of the 'Race to Incarcerate' on Incarcerated African American Men and Their Families," in *Impacts of Incarceration on the African American Family*, ed. Othello Harris and R. Robin Miller (New Brunswick, NJ: Transaction Publishers, 2003), 7.

¹⁰² *Ibid.*, 8.

¹⁰³ Rucker C. Johnson, "Ever-Increasing Levels of Parental Incarceration and the Consequences for Children," in *Do Prisons Make Us Safer?*, ed. Steven Raphael and Michael A. Stoll (New York: Russell Sage Foundation, 2009), 202.

¹⁰⁴ Donald Braman, "Families and Incarceration," in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind (New York: The New Press, 2002), 135.

¹⁰⁵ Todd R. Clear, "The Problem with 'Addition by Subtraction': The Prison-Crime Relationship in Low-Income Communities," 193.

While this is not to say that high levels of incarceration in a community necessarily lead to more crime, it does mean that there is a correlation between the effects of incarceration and the circumstances that engender crime. Because of the strain that incarceration causes, it is imperative that policymakers do not take mass incarceration lightly. The body of literature on the subject suggests that the effect on family and community, especially for African Americans, causes negative externalities such that cycles of poverty and perhaps crime are actually perpetuated. At the very least, many see that mass incarceration that disproportionately affects Blacks is the extension of other social control mechanisms that have been employed throughout the nation's history.¹⁰⁶

By considering all four of the policy frames outlined in this section, we are able to make a more informed decision when setting policy toward incarceration. It should be clear that our current policies in Texas, which have led to enormous growth in the prison system, do not adequately address these four considerations. Because of this, I propose a handful of policy changes in the next section that could lead to better outcomes in most, if not all, of these four areas.

¹⁰⁶ See above notes: Bert Useem and Anne Morrison Piehl, Michelle Alexander, and Robert Perkinson.

Section 4: Policy Alternatives

As we have seen, Texas' prison system is huge both in relative and absolute terms and has grown to that size through an abrupt expansion within the last quarter century. To meet the concerns of the policy frames outlined in the previous section, I propose several policy recommendations that aim to counter the rapid prison expansion and decrease Texas' prison population in a gradual manner so as to be politically feasible. To alter the prison population, policymakers have a number of mechanisms at their disposal. This section will walk through the factors influencing population, describe current Texas laws and practices, and make the case for giving attention to decreasing the prison population through release policies (i.e. the "back end") to compliment "front end" efforts to reform sentencing practice or divert offenders from prison.

CONCEPTUALIZING THE PRISON POPULATION

The prison population is a basic system with a stock variable of population size and two flow variables of prisoners coming in and prisoners exiting the system. It may be easiest to think of it with an analogy to a bathtub, as used by many experts in the field including Tony Fabelo.¹⁰⁷ Bathtubs fill from a tap, which can be opened or closed to varying degrees, into a basin of fixed size to hold the water, and then drain through an opening. In this analogy the tap is admissions to prison. This is based on a wide variety of social factors including crime rate (which, in turn, is based on a number of exogenous factors), but the tap can be controlled. Policing policies, prosecutorial policies, trends in judicial or jury sentencing, parole and probation revocation practices, state law, and other policies and practices can influence the rate at which inmates enter prison. Like a bathtub

¹⁰⁷ Tony Fabelo, "Justice Reinvestment: A Framework to Improve Effectiveness of Justice Policies in Texas" (briefing, Texas Legislature, Austin, TX, 2007), JFA Institute, <http://www.jfa-associates.com/publications/jr/FinalJointComm13007.pdf>.

is a fixed size, so too is prison capacity. Measured in number of beds, expanding capacity is a large and long-term undertaking and involves huge capital costs to the state. (Consider the cost of remodeling your bathroom to accommodate a larger bathtub.) Nevertheless, Texas took the “build a bigger bathtub” approach in the 1990s, as noted in Section 2. The final part of the prison system is release. Just as many bathtub drains can be opened and closed partially, so too can the release process be carefully controlled by the state. Unlike intake, which is partially influenced by social factors, release is entirely governed by policy and practice decisions. Many prisoners are released via parole, with a minority serving their entire sentence length; nationally, about 5% of inmates die in prison or will eventually die there, due to a capital sentence or life without parole, or terminal illness, etc.¹⁰⁸

Clearly, policy heavily influences the size of the prison population. Indeed, prisons would not exist without certain policies arranging for them. A basic model for the size of the prison population is to multiply the number of inmates admitted by the average length of detention.¹⁰⁹ In their analysis comparing incarceration policies around the world, Warren Young and Mark Brown find that prison population is more sensitive to changes in length of stay than to changes in admissions. This is largely because changes in admissions policy intuitively first targets low-level offenders that receive short sentences if they are not diverted. (Murderers and robbers will almost always be imprisoned regardless of jurisdiction or time.) While low-level offenders may constitute a significant portion of admissions, because they do not stay in custody for very long, diverting them has minimal impact on the overall population.¹¹⁰ Instead, great change in

¹⁰⁸ Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration*, 131.

¹⁰⁹ Warren Young and Mark Brown, "Cross-national Comparisons of Imprisonment," *Crime and Justice: A Review of Research* 17 (1993): 14.

¹¹⁰ *Ibid.*, 19.

population can be achieved by adjusting the length of stay component of the equation. This can be done through policy changes that reduce sentence lengths or release prisoners after a shorter amount of their sentence is completed.

At the front end, sentencing reform has received plenty of attention from advocacy groups and some legislators, but the last significant effort to achieve meaningful reform in Texas was a report from the Punishment Standards Commission in 1993 that largely failed to win policymakers' approval.¹¹¹ In addition, front-end reforms in 2007 to divert more felons from prison altogether saw some success (see below), but merely in curbing prison growth.¹¹² For these reasons, my recommendations focus on decreasing the prison population at the "back end" of the system, thereby incarcerating felons for a shorter period of time and beginning to address the critical issues described above.

CURRENT ISSUES IN TEXAS

While the number of prisoners in Texas jumped significantly as described in the sections above, the prison population has been relatively flat for the past few years, even as the state's population has continued to grow at a strong pace. In the 2007 legislative session, Texas lawmakers were faced with projections of more prison growth, given status quo policies. Five-year projections forecasted the need for 17,000 more beds at a cost in the neighborhood of one billion dollars.¹¹³ Instead of trying to continue to build their way out of the problem, Senator John Whitmire and Representative Jerry Madden carried legislation to divert offenders from prison through residential and drug treatment facilities. Many observers agree that this has worked, as projections have remained

¹¹¹ Michele Deitch, "Giving Guidelines the Boot: The Texas Experience with Sentencing Reform," 141.

¹¹² Pew Center on the States, *Changing Direction: A Bipartisan Team Paves a New Path for Sentencing and Corrections in Texas*, Expert Q&A 4 (Washington, DC: Pew Charitable Trusts, 2008), 1.

¹¹³ *Ibid.*

relatively flat.¹¹⁴ Even with these efforts though, the most recent projections forecast an increase of nearly 4,000 more inmates in the next five years if policies are held constant.¹¹⁵

In early 2011, the state faced a yawning budget gap of upwards of \$27 billion. The initial proposed budget from the House of Representatives slashes funding for the diversion programs set up in 2007, a move which Tony Fabelo says would increase the demand for beds by over 8,600, essentially placing policymakers in the position they found themselves in four years earlier.¹¹⁶ I cannot forecast now how the final budget may turn out, but there is a serious risk that the front-end reforms of 2007 may be in peril, and with them, the strides that have been made to maintain the prison population at its current levels.

RELEASE POLICY IN TEXAS

Partly in response to potential front-end changes, I propose a focus on policies affecting the length-of-stay component of the prison population equation. My research and resulting proposals have the goal of reducing the current population and lowering forecasted populations in the out years. A statistical model of the factors affecting release and suggested policy changes are detailed in the following sections.

First though, a brief overview of the current state of release policy in Texas is required. The first true parole law was adopted by the state in 1911, allowing for the Board of Prison Commissioners to set rules governing the release of prisoners in

¹¹⁴ Ibid.

¹¹⁵ Legislative Budget Board, *Adult and Juvenile Correctional Population Projections: Fiscal Years 2011 – 2016* (Austin, Tex.: Legislative Budget Board, 2011), 10.

¹¹⁶ Mike Ward, "Report: Prison Cuts Could Cause Bed Shortage in 2 Years."

coordination with the governor.¹¹⁷ Since then, much has changed, but the basic framework of: executive branch control, set guidelines based on type of offense, and parole supervision still remains today.

Today, there are three ways a prisoner can be released: parole, mandatory supervision, and direct discharge.¹¹⁸ Release eligibility and decisions within these three areas are a complicated amalgamation of policies that have been developed over the years. In fact, Chapter 508 of the Texas Government Code, which governs parole and mandatory supervision, weighs in at 22,000 words.¹¹⁹

Parole

Parole decisions are completely at the discretion of a parole board appointed by the governor. An offender becomes eligible for parole after he has served a certain amount of time on his sentence, based on the type of offense.¹²⁰ For example, capital murderers are not eligible for parole; 3(g) offenders (most of the violent and sexual offenses in the Penal Code) are eligible after actually serving half their sentence, but no less than two and no more than 30 years.¹²¹ Most felons are eligible for parole after actual time served plus “good time” equals one fourth of the sentence length. (The exception to this is state jail felons, who must serve every day of their sentence, a maximum of two years.)¹²² “Good time” or “good conduct time” is credit given to prisoners for calculating release eligibility, based on positive conduct in prison and participation in certain special

¹¹⁷ Texas Department of Criminal Justice, "History of Parole in Texas," Texas Department of Criminal Justice Parole Division, last modified March 18, 2009, <http://www.tdcj.state.tx.us/parole/parole-history.htm>.

¹¹⁸ Texas Board of Pardons and Paroles and Texas Department of Criminal Justice Parole Division, *Parole in Texas*, 7, http://www.tdcj.state.tx.us/bpp/publications/PIT_english.indd%2003-04-2011.pdf.

¹¹⁹ Tex. Government Code, Title 4, §508, <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.508.htm>.

¹²⁰ Texas Board of Pardons and Paroles and Texas Department of Criminal Justice Parole Division, *Parole in Texas*, 7.

¹²¹ *Ibid.*, 38.

¹²² *Ibid.*, 40.

programs.¹²³ In addition, there are numerous other stipulations and exceptions for certain offenses and certain offenders who have committed more than one offense. For the past decade, parole approval rates have moved between about 25% and 35%,¹²⁴ and in 2002, about 23% of all prisoner releases were through parole.¹²⁵

Mandatory Supervision

Similar to parole, mandatory supervision is a truly bureaucratic invention that rivals parole in its intricacies. For most prisoners who committed an offense before August 31, 1996, mandatory supervision meant automatic release when actual time spent in prison and good time added up to the length of the full sentence.¹²⁶ Inmates released under this policy (which happens still today) are under terms of supervision set by the parole board for the remainder of their sentence as a way to ensure public safety.¹²⁷ A change in law in the mid-1990s created “discretionary mandatory supervision,” under which mandatory supervision eligibility still applies, but the decision to release is subject to review by the parole board.¹²⁸ In addition, most 3(g) offenders are ineligible for mandatory supervision.¹²⁹

Offenders released to mandatory supervision face similar restrictions and requirements as those out on parole. This, in effect, creates two tiers of parole in the system with slightly different calculations for eligibility. Discretionary mandatory supervision (DMS) approval rates have been on the decline over the last decade, from a

¹²³ Ibid., 8.

¹²⁴ Legislative Budget Board, "Monthly Tracking of Adult Correctional Population Indicators (February 2010)," in *Current Correctional Population Indicators: Adult and Juvenile Correctional Populations Monthly Report*, 222.

¹²⁵ Jamie Watson et al., *A Portrait of Prisoner Reentry* (Washington, DC: The Urban Institute, 2004), 40.

¹²⁶ Texas Board of Pardons and Paroles and Texas Department of Criminal Justice Parole Division, *Parole in Texas*, 7.

¹²⁷ Jamie Watson et al., *A Portrait of Prisoner Reentry*, 43.

¹²⁸ Ibid., 7.

¹²⁹ Ibid., 40.

high of just over 65% approval to the current rate of about 50%.¹³⁰ In 2002 about 15% of all releases were through DMS and about 14% were through automatic mandatory supervision.¹³¹

Direct Discharge

The final method of release is by serving the entire sentence in prison, called direct discharge.¹³² These offenders are released into the community without any supervision restrictions or requirements.¹³³ This is virtually the only way to be released from prison for state jail felons and for prisoners that the parole board refuses to release on either parole or discretionary mandatory supervision. In 2002, about 16% of prisoners were directly discharged after serving their full term, a significant number directly from administrative segregation, a form of solitary confinement with little access to programming or socialization. This is a drastic change from the 0.4% that were released this way in 1988.¹³⁴ Clearly, current release policy has contributed to lengthening terms of stay in prison, increasing the overall population.

IMPROVING RELEASE POLICY

The central question for this paper is how to safely reduce the prison population by improving release policies. Working within the existing release framework, I hope to identify areas that need specific improvement, while keeping all four of the policy frames in mind. By analyzing inmate data from TDCJ, I will make policy recommendations for

¹³⁰ Legislative Budget Board, "Monthly Tracking of Adult Correctional Population Indicators (February 2010)," in *Current Correctional Population Indicators: Adult and Juvenile Correctional Populations Monthly Report*, 222.

¹³¹ Jamie Watson et al., *A Portrait of Prisoner Reentry*, 40.

¹³² Texas Board of Pardons and Paroles and Texas Department of Criminal Justice Parole Division, *Parole in Texas*, 7.

¹³³ Jamie Watson et al., *A Portrait of Prisoner Reentry*, 43.

¹³⁴ *Ibid.*

the release process that will reduce the prison population and maintain public safety, save taxpayer dollars, reduce racial disparity, and strengthen communities.

Section 5: Methodology and Results

The Texas Board of Pardons and Paroles and the Legislative Budget Board both release data about parole approval rates and discretionary mandatory supervision approval rates. This helps build a picture of release policy, but, as noted in the previous section, many inmates serve their full term and are directly discharged. Moreover, available descriptive data does not help to readily identify release trends for the entire prison population. In other words, many factors come into play in an inmate's chances at release, some of which are documented and some of which are not.

The goal of my research is to identify those factors that contribute either positively or negatively to an inmate's odds of being released within a given year.

MODELING RELEASE OUTCOMES

To better investigate the issue of release policy, I looked to model a prisoner's odds of release, given a wide set of factors, then interpret the impact that each factor bore on the overall chances of release. Using data obtained from TDCJ via a Public Information Request, I constructed a data set of all inmates under TDCJ custody that were released during FY 2010 and that were held in custody at the end of FY 2010 (that is, not released during the year). This was achieved by combining the set of releases during FY 2010 with the set of inmates that were on hand on August 31, 2010, the end of the fiscal year. By definition, those that were not released during FY 2010 were on hand on that date.¹³⁵ The population used here includes all inmates in TDCJ. A population of only those inmates eligible for release would be useful for analyzing the decisions of the

¹³⁵ Undoubtedly, some inmates released during FY 2010 reentered prison later in the same year either committing a new crime, being tried, convicted, and transferred to prison, or, more likely, by having their parole revoked through a violation of terms. About 3,500 offenders fall into this category, out of 221,853 total inmates. While not an insignificant number, the fact remains that the inmate was released during the fiscal year, making that data point meaningful to the model.

parole board. However, all inmates are included here because the scope of the prison population problem includes all prisoners, not just those currently eligible for parole. By looking at all inmates, the model better illustrates how limiting (or liberating) the current scheme is, based on the various crimes that determine eligibility. Thus, interpretation of this model can be critical of the current eligibility system as a whole, but at the same time, give some perspective of areas of concern within the current parole guidelines. Nevertheless, a similar model using only the population of parole-eligible inmates would be of value.

The dependent variable in this case is a dummy variable calculated by the offender's release status during FY 2010, with 1 indicating release. Independent dummy variables are created for each of the 25 categories of crime. While many more crimes exist, there are notorious problems with the uniform recording of crime titles and/or codes at the county and district level, which translate to potential problems in analyzing data.¹³⁶ Further, by aggregating crimes into groups, I am able to obtain slightly better estimates (some crimes may only involve a handful of offenders) and observe trends at a broader level that is adequate for this review. In addition to these changes, statistical software automatically discarded incomplete data. Finally, as a proxy for an inmate's criminal background, I include a variable consisting of the number of convictions an inmate has received previous to his or her current sentence.

Independent factors contributing to the release decision are: percent of sentence served, the category of the offense committed, race, sex, age, and conviction history. A strong limitation of this model is the exclusion of factors describing an inmate's period in prison. Data on institutional violations (e.g. fighting, contraband, rules violation, etc.) and

¹³⁶ Garron Guszak, manager, Legislative Budget Board, interview by author, January 17, 2011.

classification level (e.g. maximum security, close custody, etc.) are unavailable for public release because of security concerns by TDCJ. Because the parole board takes such information into account when making a release decision, its exclusion from the model leaves a somewhat incomplete picture.

Because of the binary nature of the dependent variable (i.e. released or not released), I use logistic regression to estimate a model. The logit model also has the advantage of providing results that are easier to interpret than those of a probit model.

The specification for the model is:

$$\begin{aligned}
 Prob_release = & \beta_1 + \beta_2 PercentServed + \beta_3 Offense_1 + \beta_4 Offense_2 + \\
 & \dots + \beta_{26} Offense_{24} + \beta_{27} Race_1 + \beta_{28} Race_2 + \beta_{30} Sex_1 + \beta_{31} Age + \\
 & \beta_{32} CrimHistory + \beta_{31} Race_1 * Offense_8 + \beta_{32} Race_4 * Offense_8
 \end{aligned}$$

The base cases for the dummy variables are as follows: offense = weapons offense, race = white, sex = male. After running this model, the category for “other offenses” (n = 1,316) was found to have a very high p-value, and thus is not statistically significant or particularly useful to the model. Because this category of offense applies to less than 1% of the data set, I had no qualms about removing this from the set of crime variables. As we will see, all other variables were statistically significant at the $\alpha = 0.1$ level.

FINDINGS

Using this model with the available data, we can see to what extent each factor contributes to an inmate’s odds of release in a given year. Each factor variable in the logit model returns a coefficient that represents the weighted log of the odds in favor of release. Because this is not an immediately useful value, we will use the antilog of the coefficient, which allows us to observe the odds ratio. This can be interpreted as the

increase (or decrease) in odds of release for a unit change in that variable. The results of the model, in odds ratios, are as follows, with offenses ordered by odds ratio for convenience:

Table 1: Factors Determining Release

Dependent variable: Release		
Independent variables:	Odds Ratio	P> z
Percent Served (1%, calendar time)	1.033	0.000***
Offense:		
DWI	2.393	0.000***
Drug Other	1.904	0.000***
Commercialized/Sex Offense	1.871	0.000***
Drug Possession	1.719	0.000***
Larceny	1.350	0.000***
Obstruction/Public Order	1.323	0.000***
Fraud	1.291	0.000***
Drug Delivery	1.241	0.000***
Forgery	1.215	0.000***
Stolen/Damaged Property	1.186	0.090*
Family Offense	1.139	0.113
Escape	1.109	0.034**
Stolen Vehicle	1.086	0.122
Burglary	0.871	0.000***
Failure to Register as a Sex Offender	0.550	0.000***
Arson	0.544	0.000***
Assault/Terroristic Threat	0.513	0.000***
Robbery	0.287	0.000***
Sexual Offense Against a Child	0.247	0.000***
Kidnapping	0.232	0.000***
Sexual Assault	0.145	0.000***
Homicide	0.128	0.000***
Sexual Assault Against a Child	0.123	0.000***
Race:		
Black	0.897	0.000***

Table 1: Factors Determining Release (continued)

Hispanic	0.949	0.001***
Other Factors:		
Female	1.307	0.000***
Age (years)	0.988	0.000***
Criminal History (number prior convictions)	0.906	0.000***
Black & Drug Possession	0.945	0.093*
White & Drug Possession	1.094	0.014**

Number of observations = 220,961

Pseudo R-squared = 0.2477

*=statistically significant at the 0.1% level; **=statistically significant at the 0.05% level; ***=statistically significant at the 0.01% level

As we can see, the odds ratios associated with each explanatory variable are all highly significant, except for “family offense” and “stolen vehicle,” which have small enough p-values to include in the model. While the pseudo R-squared is somewhat low at 0.25, many statisticians caution against reliance on this value, due to the cloudy interpretation of the number.¹³⁷ In addition, the directions of the effects align with expectations. For example, an increase of 1% in the proportion of a sentence that an inmate serves increases the odds of release by about 3.3%. That is, a prisoner with 20% more of his sentence served than an otherwise similarly situated prisoner (e.g. same race, crime, etc.), has about 60% greater odds of being released. We also see that “less serious” crimes increase odds of release, while “more serious” crimes decrease odds of release. This makes sense, since inmates convicted of more serious 3(g) crimes are ineligible for parole until they have served half of their sentence and therefore are not released,

¹³⁷ J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables*, Advanced Quantitative Techniques in the Social Sciences (Thousand Oaks, Calif.: SAGE Publications, 1997), 105, <http://books.google.com/books?id=CHvSWpAyhdIC>.

regardless of percentage of sentence served and other factors. Despite this form of data censoring, these inmates are included for reasons outlined above. All told, the odds ratios above give us a useful framework for analyzing areas of interest in the policies of release.

Section 6: Discussion and Recommendations

From the results in the previous section, a few things stand out. Out of these unique parts of the model, I make policy recommendations that fit within the four policy frames outlined in Section 3.

DRUG POSSESSION

Of the three categories of drug offense (delivery, possession, and other), all have an odds ratio greater than one, meaning an inmate's odds of release improve, all else equal, for this wide-ranging category of crime. Though being incarcerated for drug possession increases the relative odds of release by 72%, this still falls behind other drug charges and well behind felony driving while intoxicated; its seriousness is considered similar to commercialized/sex offenses. As has been noted, the "war on drugs" was a significant driver of the prison population, especially among the Black community. Though it is always a thorny issue to value the harm of certain crimes relative to others, the Texas Penal Code uses a form of seriousness ranking by categorizing offenses from capital through state jail felonies, largely the product of the 1993 Punishment Standards Commission.¹³⁸ As such, simple drug possession falls relatively low on the range of felonies in the results of this model, in the Penal Code, and in the minds of many residents. Of the offenders released in 2010, 24% had been sentenced for drug possession, 17,161 of the 70,867 inmates that reentered society.

Still, we must ask if more can be done in this area to reduce the prison population. While drug possession ranks as the highest percentage of released offenders, it is also keeping the prisons full. Drug offenders are the third largest group in the stock of population left at year's end. Indeed, on nearly any given day almost 11,000 inmates are

¹³⁸ Michele Deitch, "Giving Guidelines the Boot: The Texas Experience with Sentencing Reform," 139.

serving time in prison for drug possession. Front-end diversions have often targeted drug offenders; this data provides further evidence that this large group of offenders is prime for diversion, since drug offenders get out of prison relatively quickly. This reform should be encouraged, but for those convicted of drug possession and sentenced to prison, there is room for improvement in giving the group greater odds of release. Taken together, this lends further evidence that the crime of drug possession an especially key target for meaningfully decreasing the size of prison.

As a policy matter, there are a number of practical ways to increase the odds of release for drug possession offenders at the back end. Most intuitively, leaders could expand eligibility and available space in programs for substance abuse treatment. Often, attending in-prison programs generates good time credit for offenders, which can make them eligible for parole or DMS sooner. This would have the added benefit of reducing an inmate's current and future drug use, thereby reducing the likelihood of recidivism and reducing the prison population in the out years. Another way to improve odds of release is to simply carve out these crimes for less stringent eligibility or approval guidelines, increasing the number of drug offenders that are released. While pushing drug users out of prison faster would reduce access to in-prison treatment, quality parole officers (such as they are available) can assist individuals and supervise them as necessary.

Finally, increasing the odds of release for drug possession offenders fits well within our four policy frames. First, drug possession has a relatively low impact on the public safety. While offenders' actions violate the law and cause some amount of harm, their crime does not victimize other residents nearly as much as many of the other crimes that felons commit. Second, reducing the number of prisoners would save the State of Texas money. By not spending \$51 per prisoner per day, but instead a fraction of that amount on substance abuse treatment, parole supervision and assistance, or virtually

anything else, the state government makes a far wiser investment with its precious budget dollars. Third is the issue of race. Of the 80,000 Black inmates in prison or released during 2010, 17% were in for drug offenses. For Hispanics and whites, this number was 13.5% (for each group). Improving drug offenders' odds of release would disproportionately release more Black people, which is a goal of decarceration, given the significant overrepresentation of Blacks in prison today. Fourth and finally, by returning more drug offenders to the community more quickly, there is potential for the return of a parent to his or her children, a partner to a spouse, or a son or daughter to a parent and family. With adequate resources, this can be a tremendously positive outcome for the community.

RACIAL DISPARITY

A second eye-catching number in the results of the model is the odds ratio for Black inmates of 0.897. This shows that even if all other factors considered in the model are held equal, a Black inmate has 10% smaller odds of being released than an equivalent white inmate. While the difference in odds between 0.9 and 1 is small, it is noteworthy, especially given the large sample size. Certainly, there is racial bias throughout the criminal justice system, as discussed in Section 3. Most important to the issue of the prison population is sentencing length. While this is a front-end issue, the length of sentence does have an impact on the prison dynamic. For FY 2010, the mean sentence length for Black offenders was 15.7 years, while white offenders were sentenced to an average of 14.0 years. Even at the 0.0001 significance level, this mean is statistically different. This is largely due to the more serious nature of crimes that Blacks are sentenced for, but in practical terms, a nearly two-year gap is simply stunning.¹³⁹

¹³⁹ Summary statistics are as follows: Black: mean=15.684 years, standard deviation=17.821, n=80,707; White: mean=13.988 years, standard deviation=16.804, n=70,567.

Nevertheless, it is evident that release policies are not unaffected by racial disparity. As noted above, drug offenses appear to be disproportionately Black crimes. By addressing drug possession, the racial disparity in release can also be alleviated to a degree. To show this, the model includes a variable interacting both Black and white races with drug possession. As we saw, the whole of drug possessors see increased odds of release, but being Black diminishes those odds by about 5.5%, while being white increases odds of release by over 9%. These numbers are in addition to the racial impact across all offense categories, ages, and other factors.

The other crime worth considering for racial reasons is robbery. Robbery offenses just edged drug possession offenses as the top crime for all Black inmates during FY 2010. Considering it another way, of all inmates in prison or released from prison for robbery offenses, 51% were Black, making it clear that Blacks are overrepresented in the offense of robbery.

The problem with addressing this issue is that robbery has one of the lowest odds ratios of any crime (0.287), decreasing the odds of release for an inmate sentenced for this crime (all else equal) by about 71%. In other words, robbery is one of the most serious crimes in the eyes of the parole board. Relaxing release policies for robbery would help balance the disparity in odds ratios by race. This could be done by changing eligibility guidelines, but most likely would take a concerted effort by the parole board to increase approval rates for Black robbers. Most certainly, this action would fit three of the four policy frames. Reducing the population would save the state money; it is almost self-evident that the racial disparity would be reduced, and the impact on community would be slightly alleviated.

The less certain question is the impact on public safety. This is a huge concern, but should not be dismissed out of hand as a reason to maintain status quo. Robbery

victimizes others both personally and materially. It is a visible, often violent, crime and can harm victims and entire communities. It would be against the policy goal of public safety to implement a change that would significantly increase the number of robberies that take place. Still, by slightly raising the odds of release for robbery offenses and releasing such inmates just a few months earlier, the deterrent, rehabilitative, and punitive aspects of incarceration would be almost entirely maintained. At the same time, the changes could have a huge impact on the population of prisons and the other three policy considerations, notably the persistent racial disparity.

EFFECT ON POPULATION

It is clear that the goal of the above recommendations is to reduce the prison population of Texas. Out of this research, it would be possible to calculate, roughly, the impact a policy change might have on the total prison population. By expanding drug programs and the number of inmates eligible for parole or by increasing parole approval rates to reduce racial disproportionality, a resulting impact on odds of that subset of inmates' release could be determined. This effect on odds could be combined with the model showing the current state, resulting in a model to describe a proposed policy environment. By running information on current inmates through the model, an expected number of prisoner releases could be calculated. From here, the reduced prison population would be calculable. Present population modeling systems often make assumptions that factors will remain generally stable across time.¹⁴⁰ Making this assumption, future research could take assess the exact impact of policies, not just on release numbers, but also on prison population as a whole.

¹⁴⁰ Garron Guszak, manager, Legislative Budget Board.

Section 7: Conclusion

The goal of this paper is not to call for a wholesale release of tens of thousands prisoners. There are certainly dangerous individuals that deserve and need to be incarcerated in a penitentiary.¹⁴¹ If used correctly, prisons can serve their intended purpose to keep the public safe, while minimizing other costs to society.

However, if policymakers feel the need to devote billions of dollars per year to incarceration, the public deserves to know that it is getting the best value, not just with respect to monetary return, but social concerns as well. There is considerable evidence that prisons are overutilized, spending millions of dollars, disproportionately harming racial minorities, and tearing at the fabric of many communities. Many people on all parts of the political spectrum recognize that our reliance on incarceration is overextended.¹⁴² Various efforts to curb prison populations have been made toward sentencing reform and prison diversion. This paper looks to extend the dialog of back end policies, which can be effective tools in reducing the length of time inmates are incarcerated, thereby lowering the size of our prisons.

I cannot pinpoint a prison population size that should be a goal of policymakers, but evidence shows that the results of the hasty expansion of the 1990s should not be sustained, which has been the case in Texas thus far. For too long, politicians have maintained the prison population, relying on the rhetoric of public safety, without considering the true impact incarceration has had on crime, and especially not addressing the many unintended consequences of prison. Through a concerted policy effort including

¹⁴¹ While I have not discussed prison conditions, I would add that incarceration must be relatively humane, with a greater focus on rehabilitation, which was, in many respects, lost in the prison buildup of the late twentieth century.

¹⁴² In Texas, I would note the views of the conservative Texas Public Policy Foundation's Center for Effective Justice, particularly on overcriminalization. See: "Overcriminalization" by Marc Levin at <http://www.texaspolicy.com/pdf/2011-Overcriminalization-CEJ-ml.pdf>.

front-end and back-end changes, Texas can bring down prison population, save money for other purposes, reduce subjugation of racial minorities, and restore families and communities, all while maintaining the public's safety.

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Vita

Patrick Steck was born and raised in College Station, Texas. After graduating from Texas A&M University with a B.S. in economics, he worked as a legislative aide for a member of the Texas House of Representatives. Patrick began at the LBJ School of Public Affairs in Fall 2009, and has continued working for various stints for both the Legislative Budget Board and the Texas House of Representatives.

Permanent email: patricksteck@gmail.com

This report was typed by the author.