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## ESSAY

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### PRISON REFORM IN THE PENNSYLVANIA LEGISLATURE

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#### INTRODUCTION

When I began my career in the Pennsylvania Legislature in 1976, America's drug culture, and public awareness of drug abuse, had been on the rise for two decades. By the 1980s, America's largest urban areas were experiencing a narcotics epidemic, particularly relating to the widespread use of crack cocaine and heroin. Faced with the challenge of controlling this problem, legislators could see only one logical course of action: raise penalties to repress the increasing crime. To the state legislature, Pennsylvania's laws seemed far too lenient. A "tough on crime" movement was under way across the country as most states and federal authorities were rewriting drug laws to increase penalties and guarantee more efficient punishment of offenders. Longer—and more mandatory—sentences passed state legislatures by wide margins, and everyone confidently waited for a corresponding reduction in drug crime.

#### I. PROBLEMS IN THE CURRENT SYSTEM

Now, after nearly thirty years of the tough-on-crime punishment model, we cannot construct prisons fast enough, hire enough police, or sufficiently staff courts to keep pace with the onslaught of drug and

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property-crime offenders entering the system. Among all offenders, low-level offenders who have burdened the prison system beyond capacity pose the least likely threat to public safety, but take up the most resources of law enforcement and corrections departments.<sup>1</sup> Most Pennsylvanians remain unaware of the crisis that has been quietly mounting in our state's prisons. Pennsylvania's inmate population increased 522.6% between 1980 and 2009,<sup>2</sup> while Pennsylvania's total state population increased by only 6.8% during the same period.<sup>3</sup> In absolute terms, between 1940 and 1980, the state's inmate population averaged between 5000 and 8000, while in 2009 that number soared past 50,000.<sup>4</sup> Over the past decade, violent offenders accounted for a little more than 2% of the increase in inmates,<sup>5</sup> while nonviolent drug and property crime offenders accounted for 55% of the growth.<sup>6</sup> In

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<sup>1</sup> Corrections Secretary Jeffrey Beard, in his testimony before the Senate Judiciary Committee, said:

As a direct result of these factors, an ever increasing portion of the costly prison bed space is used for those offenders categorized as Part II offenders (offenders convicted primarily of property and drug crimes). But this heavy reliance on incarceration for these less serious offenders has proven to have limited value in maintaining public safety.

*Hearing on Prison Overcrowding Before the S. Judiciary Comm.*, 2009-2010 Leg., Reg. Sess. 2 (Pa. 2009) [hereinafter *Prison Overcrowding Hearings*] (statement of Jeffrey A. Beard, Secretary, Department of Corrections). In discussing alternative sentencing programs, such as state intermediate punishment and recidivism risk reduction incentive, in the same testimony, Secretary Beard said:

These approaches make sense, given the results. The primary outcome is improved public safety through reduced recidivism and crime. The secondary benefit is reduced cost by allowing us to target resources for more serious cases, and use valuable prison beds for offenders posing the greatest risk to public safety. These initiatives provide a good foundation to begin reversing the trend of ever increasing bed space need and spiraling cost associated with incarceration.

*Id.* at 3.

<sup>2</sup> See *id.* at 1 (stating that the prison population increased from 8243 in 1980 to 51,322 inmates in November 2009).

<sup>3</sup> See U.S. CENSUS BUREAU, INTERCENSAL ESTIMATES OF THE RESIDENT POPULATIONS FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2010, at 1 (2011), available at <http://www.census.gov/popest/intercensal/state/state2010.html> (showing that the state's population estimate for 2009 was 12,666,858); U.S. CENSUS BUREAU, RESIDENT POPULATION AND THE APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES 1 (2000), available at <http://www.census.gov/dmd/www/resapport/states/pennsylvania.pdf> (showing that the state's population in 1980 was 11,864,720).

<sup>4</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 1 (statement of Jeffrey A. Beard).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 2.

Pennsylvania, we have twenty-seven state prisons.<sup>7</sup> Twenty-five years ago, there were only nine.<sup>8</sup> There are an additional 30,000 inmates in Pennsylvania county jails.<sup>9</sup> There is simply no prison sentence long enough or tough enough to stop drug users; nearly half of released offenders return to prison within months of parole.<sup>10</sup> Nonviolent drug offenders are hopelessly caught in a cycle of incarceration that costs billions to maintain with little benefit to society.<sup>11</sup>

While many inmates return to prison for committing a new drug offense, many also return for a technical violation of their parole. Technical parole violators contribute significantly to the state's prison population. For example, 3000 technical parole violators were reincarcerated in 2008 alone for violations such as breaking curfew or failing to report to their parole officer.<sup>12</sup> These technical parole violators spend an average of fourteen additional months in prison without having committed an additional crime.<sup>13</sup> This significant prison sentence for a parole violation does not reduce recidivism any more than would a sentence for a shorter period.<sup>14</sup>

The high rates of incarceration and recidivism create enormous costs for the Pennsylvania taxpayer. In fiscal year 1980-81, the Commonwealth spent \$92.85 million on Corrections Facilities.<sup>15</sup> For fiscal year 2011-2012, the legislature budgeted \$1.875 billion for the Department of Corrections.<sup>16</sup> The prison population is expected to grow 24% over the next five years.<sup>17</sup> At this rate, the Commonwealth will be

<sup>7</sup> *Hearing on S.B. 1045 and Prison Reform Before the S. Judiciary Comm.*, 2007-2008 Leg., Reg. Sess., fig. "Changes Over the Past Several Decades" (Pa. Dec. 4, 2007) [hereinafter *Hearings on S.B. 1045*] (statement of Jeffrey A. Beard, Secretary, Department of Corrections).

<sup>8</sup> *Id.*

<sup>9</sup> This figure was obtained through a personal communication between my office and the County Commissioners Association of Pennsylvania.

<sup>10</sup> See PA. DEP'T OF CORR., INMATE PROFILE 2 (2011), available at [http://www.portal.state.pa.us/portal/server.pt/document/1056164/2011\\_inmate\\_profile\\_pdf](http://www.portal.state.pa.us/portal/server.pt/document/1056164/2011_inmate_profile_pdf) (indicating that, from 2000 to 2007, roughly 46.5% of inmates were reincarcerated within three years of release).

<sup>11</sup> See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 30 tbl. A-2 (2008) (showing nationwide state corrections spending for fiscal year 2007 at \$44.1 billion, or 6.8% of the general fund, and the Pennsylvania corrections spending at \$1.6 billion, or 6.2% of the general fund).

<sup>12</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 3 (statement of Jeffrey A. Beard).

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> General Appropriation Act of 1980, No. 1980-17A, § 201, 1980 Pa. Laws 1391, 1406.

<sup>16</sup> H.B. 1485, 2011-2012 Leg., Reg. Sess. § 211 (Pa. 2011).

<sup>17</sup> *Hearings on S.B. 1045*, *supra* note 7, fig. "Legislative Impact on Prison Popula-

required to build three new prisons by 2012 at a total cost of \$600 million, as well as an additional prison per year after 2012 at the cost of \$200 million per prison.<sup>18</sup> Each prison has an annual operating cost of \$50 million.<sup>19</sup> Another way of looking at these numbers is to say that Pennsylvania citizens annually pay over \$30,000 for each state prisoner.<sup>20</sup> It costs \$3000 to supervise the same offender on parole.<sup>21</sup>

We know now that punishment without rehabilitation is a failure. While we have earnestly sought to incorporate rehabilitation into the punishment process, too few inmates are receiving the needed programming. Programs such as the State Intermediate Punishment Program (SIP), County Intermediate Punishment Program (CIP), state motivational boot camp, and the recidivism risk reduction incentive (RRRI) are underutilized.<sup>22</sup> Many inmates also do not receive parole because they are waiting to complete programs before the end of their minimum sentence.<sup>23</sup>

A prison sentence creates barriers for individuals that last a lifetime. Once inmates have been released, they easily lapse into criminal behavior because it is difficult to find gainful employment while living with the stigma of incarceration. Family ties are broken during incarceration, separating inmates from what is often their only means of support. Mass incarceration has had lasting negative consequences for entire communities. Rather than reducing crime in troubled neighborhoods, incarceration often further cripples economically challenged communities by removing adult men and breaking apart family units.<sup>24</sup>

In the United States, more than two million children have a parent who is currently incarcerated.<sup>25</sup> Nearly ten million children in the United States have or have had a parent who was under correctional

tion: Prison Population Continues to Increase” (statement of Jeffrey A. Beard).

<sup>18</sup> *Id.* This projection does not account for any recent policy changes made by the Department of Corrections.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* fig. “Changes over the Past Several Decades.”

<sup>21</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 8 (statement of Catherine C. McVey, Chairman, Pa. Bd. of Probation and Parole).

<sup>22</sup> *Hearings on S.B. 1045*, *supra* note 7, fig. “Increasing Access to Crime-Reducing State Intermediate Punishment (SIP) Program” (statement of Jeffrey A. Beard).

<sup>23</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 2-3 (statement of Catherine C. McVey).

<sup>24</sup> See TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 9-10 (2007) (“Men who are behind bars are the missing links in the social network of those who remain behind.”).

<sup>25</sup> S. Res. 52, 2009-2010 Leg., Reg. Sess. (Pa. 2009).

supervision at some point in the child's life.<sup>26</sup> Approximately 65% of the women in state prison are mothers of children under eighteen years of age, and nearly two-thirds of these mothers lived with their children before they were arrested and incarcerated.<sup>27</sup> Approximately 55% of the men in state prison are fathers of children under eighteen years of age, and nearly half of these fathers lived with their children before they were arrested and incarcerated.<sup>28</sup> Parental imprisonment and involvement in the criminal justice system can impose serious financial hardships on a family and lead to disrupted living arrangements for children, factors which are linked to an increased risk of delinquency.<sup>29</sup> Children of incarcerated parents suffer emotional and psychological effects when separated from their parents, beginning with the trauma of arrest and continuing throughout the term of imprisonment.<sup>30</sup> Incarcerated parents often lose contact with their children, and once they lose contact,<sup>31</sup> it is very difficult to reestablish that relationship when the parent is released.

Recognizing that basic family stability is critical to reducing overall crime, I sponsored a 2009 Senate resolution directing the Joint State Government Commission to establish an advisory committee to study the effects of parental incarceration on children and to recommend a system for determining and assessing the needs of such children, the services available to them, and the barriers to accessing those services.<sup>32</sup> I expect the committee to release its study within the next few months.

In light of the high number of children of incarcerated parents and the number of at-risk youth in the United States, increased investments in early childhood education programs are needed. A landmark study of the HighScope Perry Preschool Program in Chicago tracked two groups of at-risk three- and four-year-olds throughout their lives.<sup>33</sup> The study concludes that "The group who received high-quality early education had significantly fewer arrests than the non-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (noting that more than half of all incarcerated parents in the United States report never receiving a personal visit from their children).

<sup>32</sup> *Id.*; see also H.R. Res. 203, 2009-2010 Leg., Reg. Sess. (Pa. 2009) (same).

<sup>33</sup> Press Release, HighScope, Long-Term Study of Adults Who Received High-Quality Early Childhood Care and Education Shows Economic and Social Gains, Less Crime (Nov. 2004), available at <http://highscope.org/Content.asp?ContentId=282>.

program group (36% vs. 55% arrested five times or more).<sup>34</sup> In addition, “significantly fewer members of the group who received high-quality early care than the nonprogram group were ever arrested for violent crimes (32% vs. 48%), property crimes (36% vs. 58%), or drug crimes (14% vs. 34%).”<sup>35</sup> While this Essay and Symposium focus primarily on sentencing, studies such as HighScope’s underscore how important the role of early childhood education will ultimately be for prison reform.

To correct these problems with our prison population, many of the state’s nonviolent offenders would be better served completing treatment or other sanctions in a community-based setting rather than in a state prison. This would better enable these individuals to reestablish healthy, crime-free lives while they continue to support their families, saving Pennsylvania’s prison space for dangerous criminals who must be confined.

## II. PAST EFFORTS AT REFORM

In Pennsylvania, the prison reform effort began in earnest about five years ago when the Council of State Governments Justice Center entered into a collaborative process with state officials to address the very substantial growth in Pennsylvania’s state prison population.<sup>36</sup> The Justice Center staff met with administration officials, legislators, legislative staff, and other representatives of the criminal justice system, and developed a plan to address the prison overcrowding issue. On June 4, 2007, the Senate and House Judiciary Committees held a joint public hearing at which the Justice Center presented its proposals.<sup>37</sup>

The Justice Center made clear that Pennsylvania’s prison population growth was being driven by criminal justice practices and policies,

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See COUNCIL OF STATE GOV’TS JUSTICE CTR., INCREASING PUBLIC SAFETY AND GENERATING SAVINGS: OPTIONS FOR PENNSYLVANIA POLICYMAKERS I (2007), available at <http://www.pewcenteronthestates.org/uploadedFiles/PA%20Public%20Safety%20and%20Savings.pdf> (opening its report with the statement that “Republican and Democratic leaders from the Pennsylvania House and Senate have requested technical assistance from the Council of State Governments Justice Center (“Justice Center”) to determine why the state prison population is growing. They have also asked the Justice Center to provide them with policy options, which, if implemented successfully, would increase public safety and curb spending on corrections.”).

<sup>37</sup> *Presentation from the Council of State Governments Justice Center on Corrections Issues: Joint Public Hearing Before the S. and H. Judiciary Comms., 2007-2008 Leg., Reg. Sess. (Pa. 2007).*

and not by an increase in state population or in crime. It also identified the practices contributing to this growth. First, more offenders were being admitted to prison for less severe offenses, and a higher percentage of offenders were being sentenced to prison rather than jail, particularly those offenders with short sentences.<sup>38</sup> Second, the Commonwealth underutilized the SIP program. Third, the system lacked intermediate sanctions for parole.<sup>39</sup>

The Justice Center proposed options for Pennsylvania, such as targeting nonviolent, drug-dependent offenders by making more use of the SIP program; establishing a risk-reduction earned-time program to encourage offenders to complete their programming successfully; and developing intermediate sanctions for technical parole violators rather than prison sentences.<sup>40</sup> Legislation was introduced in both the House of Representatives and the Senate encompassing these options.<sup>41</sup> On December 4, 2007, the Senate Judiciary Committee held a public hearing on one of the bills, Senate Bill 1045, and on prison reform generally.<sup>42</sup> Similar activities took place in the House of Representatives.

As a result, on September 25, 2008, the governor signed four House bills into law as 2008 Acts 81, 82, 83, and 84,<sup>43</sup> enacting some of the Justice Center's specific proposals. First, the Department of Corrections was authorized to recommend to the sentencing court that eligible offenders be resentenced to the SIP program if the department thought the offender would be a good candidate for the program and if program enrollment was overlooked at the time of the original sentencing.<sup>44</sup> Second, the RRRRI program was established, al-

<sup>38</sup> *Id.* at 8 (statement of Dr. Tony Fabelo, Director of Research, Council of State Governments Justice Center).

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.* at 10-13.

<sup>41</sup> See H.B. 4, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to probation, sentencing, and place of confinement); H.B. 5, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to inmate transfer); H.B. 6, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to parole administration); H.B. 7, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to inmate reassignment from prison); S.B. 1044, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to inmate reassignment from prison); S.B. 1045, 2007-2008 Leg., Reg. Sess. (Pa. 2007) (amending legislation relating to probation, sentencing, and place of confinement).

<sup>42</sup> See *supra* note 7.

<sup>43</sup> Act of Sept. 25, 2008, No. 2008-81, 2008 Pa. Laws 1026 (enacting H.B. 4); Act of September 25, 2008, No. 2008-82, 2007 Pa. Laws 1050 (enacting H.B. 5); Act of Sept. 25, 2008, No. 2008-83, 2008 Pa. Laws 1052 (enacting H.B. 6); Act of Sept. 25, 2008, No. 2008-84, 2008 Pa. Laws 1062 (enacting H.B. 7).

<sup>44</sup> Act of Sept. 25, 2008, No. 2008-81, § 8.2, 2008 Pa. Laws at 1041 (current version

lowing an eligible offender to get a reduced minimum prison sentence if he behaved in prison and completed his programming.<sup>45</sup> Third, the Pennsylvania Commission on Sentencing was directed to develop parole guidelines.<sup>46</sup>

Also, as part of this legislation, beginning in November 2011, the court would lose its authority to place state-sentenced offenders in county jails.<sup>47</sup> This practice was often the result of a plea agreement allowing the offender to stay close to home, which then contributed to overcrowding in many county jails. This was based on the legislature's expectation that state prison population growth could be brought under control through the other changes in the legislation, allowing room for these offenders.

Unfortunately, the 2008 legislation had minimal effect on the state prison population growth.<sup>48</sup> Courts rejected the majority of the Department of Corrections' recommendations for resentencing of offenders to the SIP program, which continued to be underutilized more generally. The RRRRI program was difficult to implement because most offenders were unable to complete their programming requirements in time to be released on their RRRRI minimum.<sup>49</sup> And, because of the lack of funding, the sentencing commission was not able to develop the parole guidelines.<sup>50</sup> In addition, because of exter-

at 61 PA. CONS. STAT. § 4104(e) (2010)).

<sup>45</sup> *Id.* § 9, 2008 Pa. Laws at 1041 (current version at 61 PA. CONS. STAT. §§ 4500–4512 (2010)).

<sup>46</sup> *Id.* § 4, 2008 Pa. Laws at 1030 (codified at 42 PA. CONS. STAT. § 2154.5–6 (2010)).

<sup>47</sup> *Id.* § 7, 2008 Pa. Laws at 1034 (amending 42 PA. CONS. STAT. § 9762).

<sup>48</sup> According to the monthly population reports issued by the Department of Corrections, the inmate population was 49,307 as of December 31, 2008, and 51,394 as of September 30, 2011. PA. DEP'T OF CORR., MONTHLY POPULATION REPORT AS OF DECEMBER 31, 2008, at 1 (2008), *available at* <http://www.portal.state.pa.us/portal/server.pt/directory/2008/176736?DirMode=1>; PA. DEP'T OF CORR., MONTHLY POPULATION REPORT AS OF SEPTEMBER 30, 2011, at 1 (2011), *available at* <http://www.portal.state.pa.us/portal/server.pt?open=512&objID=10669&mode=2>.

<sup>49</sup> *See* PA. DEP'T OF CORR., RECIDIVISM RISK REDUCTION INCENTIVE 2010 REPORT 5 (2011), *available at* [http://www.portal.state.pa.us/portal/server.pt/community/research\\_statistics/10669](http://www.portal.state.pa.us/portal/server.pt/community/research_statistics/10669) ("For the RRRRI inmates released as of September 30, 2010, they served approximately 138% of their RRRRI minimum sentence and 100% of their regular sentence. A sizable portion (54%) of RRRRI eligible inmates enter the [Department of Corrections] with 12 months or less to serve until they are eligible for parole release. The combination of short sentences and required treatment and education programming contributes to some inmates not receiving RRRRI certification and therefore not being released at their RRRRI minimum sentence.")

<sup>50</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 5 (statement of Mark H. Bergstrom, Executive Director, Pennsylvania Commission on Sentencing).



nal factors, a moratorium was placed on parole.<sup>51</sup> These factors together caused the state prison population to jump, and Pennsylvania ended up sending over 2000 inmates to Michigan and Virginia because there was no more room in Pennsylvania's prisons.<sup>52</sup>

### III. CURRENT REFORM INITIATIVES

On November 16, 2009, the Pennsylvania Senate Judiciary Committee held a public hearing on prison overcrowding to receive feedback from the corrections secretary, chairman of the parole board, executive director of the sentencing commission, and others on why the prison population continued to grow at a rapid rate and what could be done about it.<sup>53</sup> Following the hearing, I introduced a package of bills to reflect the proposals made at the hearing.<sup>54</sup>

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<sup>51</sup> See *Hearing on Parole for Violent Offenders Before the S. Judiciary Comm.*, 2009-2010 Leg., Reg. Sess. 1 (Pa. Jan. 27, 2009) (statement of Jeffrey A. Beard, Secretary, Department of Corrections) ("The parole moratorium was in effect from September 29, 2008 through December 1, 2008. Over this two month period, our state inmate population increased by a total of 2,300 offenders, from 46,700 to 49,000."). Secretary Beard explained that the Governor issued the moratorium "in response to the series of violent crimes committed by parolees during 2008" and appointed Dr. John Goldkamp to provide and "independent evaluation" of parole practices. *Id.*; see also JOHN S. GOLDKAMP ET AL., RESTORING PAROLE AND RELATED PROCESSING FOR CATEGORIES OF VIOLENT STATE PRISONERS: FINDINGS AND RECOMMENDATIONS II, at 2 (2008), available at <http://nicic.gov/Library/023461>.

<sup>52</sup> According to the monthly population reports issued by the Department of Corrections, the department had a total of 2180 inmates housed in correctional facilities in Michigan and Virginia as of December 31, 2010. PA. DEP'T OF CORR., MONTHLY POPULATION REPORT AS OF DECEMBER 31, 2010, at 4 (2010), available at <http://www.portal.state.pa.us/portal/server.pt/directory/2010/176738?DirMode=1>. As of October 31, 2011, 932 inmates remained in Virginia. PA. DEP'T OF CORR., MONTHLY POPULATION REPORT AS OF OCTOBER 31, 2011, at 4 (2011), available at [http://www.cor.state.pa.us/portal/server.pt/community/research\\_statistics/10669](http://www.cor.state.pa.us/portal/server.pt/community/research_statistics/10669). The inmates in Michigan had been returned to Pennsylvania. *Id.*

<sup>53</sup> *Prison Overcrowding Hearings*, *supra* note 1.

<sup>54</sup> S.B. 1145, 2009-2010 Leg., Reg. Sess. (Pa. 2009) (adopting a risk and needs assessment instrument); S.B. 1161, 2009-2010 Leg., Reg. Sess. (Pa. 2009) (making certain offenders eligible for the Department of Corrections' pre-release program if they were committed to the DOC with a short minimum sentence and authorizing the parole of certain offenders who could finish their programming in the community while they were on parole); S.B. 1193, 2009-2010 Leg., Reg. Sess. (Pa. 2010) (setting guidelines for court-imposed sanctions targeting probation violators); S.B. 1198, 2009-2010 Leg., Reg. Sess. (Pa. 2010) (establishing the Safe Community Reentry Program); S.B. 1275, 2009-2010 Leg., Reg. Sess. (Pa. 2010) (endeavoring to provide positive reinforcement for parolees); S.B. 1298, 2009-2010 Leg., Reg. Sess. (Pa. 2010) (setting appropriations for the Pennsylvania Commission on Sentencing, Commission on Crime and Delinquency, and Board of Probation and Parole); S.B. 1299, 2009-2010 Leg., Rev. Sess. (Pa. 2010) (providing additional directives for intermediate punishment programs).

### A. *Rehabilitation of Nonviolent Offenders*

Last year, the legislature adopted one of those bills, S.B. 1161, as part of Act 95, a statute taking the rehabilitative needs of nonviolent offenders into greater consideration. Act 95 requires the Pennsylvania Sentencing Commission to adopt a risk assessment instrument to determine the relative risk that an offender will reoffend or be a threat to public safety, and whether alternative sentencing might be appropriate.<sup>55</sup> Act 95 also permits inmates who have reached their minimum sentence, are otherwise eligible for parole, but are still detained because they have not had access to their prescribed programs to be released and to complete the programs while on parole.<sup>56</sup> This applies only to nonviolent offenders and those who are not registered under Megan's Law.<sup>57</sup> The legislation also encouraged the parole board to adopt a graduated sanctioning system for technical parole violators.<sup>58</sup>

### B. *Community-Based Treatment*

This legislative session, I introduced Senate Bill 100, the Criminal Justice Reform Act. This legislation combines into one bill earlier proposals that were not enacted last session as part of Act 95.<sup>59</sup>

The bill allows the Department of Corrections to move those offenders with short minimum sentences to community corrections centers for community-based treatment more quickly.<sup>60</sup> Former Department of Corrections Secretary Jeffrey Beard reported that

Over 3563 inmates entered our prison system in 2008 with less than a year to serve. The average offender in this group has eight months to minimum, but because of the need for processing and programming, this group will serve an average [of] 143 percent of their minimum. In

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<sup>55</sup> Act of Oct. 27, 2010, No. 2010-95, 2010 Pa. Laws (forthcoming) (enacting 42 PA. CONS. STAT. § 2154.7 (2010), which provides for the adoption of a risk assessment instrument).

<sup>56</sup> *Id.* (amending 61 PA. CONS. STAT. § 6137(a)(3.1) (2010)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (amending 61 PA. CONS. STAT. §6138(c)(5) (2010), which states that “[p]arole violators shall be supervised in accordance with evidence-based practices that may include . . . use of a graduated violation sanctioning process”).

<sup>59</sup> 2011-2012 Senate Bill 100 combines some parts or all of Senate Bills 1161, 1193, 1198, 1298, and 1299—all from the 2009-10 legislative session.

<sup>60</sup> S.B. 100, 2011-2012 Leg., Reg. Sess. § 7 (Pa. 2011) (as amended on third consideration, Oct. 17, 2011).

many ways, it makes little sense to tie up our valuable and costly prison beds for what, in large part, are less serious offenders.<sup>61</sup>

Senate Bill 100 overturns in part a departmental regulation that prohibited an offender from being transferred to a prerelease center until he has served at least nine months in a state correctional institution, by allowing certain time spent in a county jail to be counted as part of the required nine months.<sup>62</sup> Offenders with short sentences have committed less serious crimes, and there is no reason to hold them in secure prison cells when they are otherwise eligible for the prerelease program. While confined at a community corrections center, these offenders could participate in job training, take advantage of educational opportunities, and complete programming requirements.

### C. Safe Community Reentry Program

The bill also establishes the Safe Community Reentry Program.<sup>63</sup> The Department of Corrections would establish a comprehensive program to reduce recidivism and ensure the successful reentry and reintegration of offenders into the community. About 90% of the offenders who are committed to state prison eventually return to their communities and families.<sup>64</sup> But roughly 50% of released inmates will be arrested for new crimes within three years of their release, and more than 45% will be reincarcerated.<sup>65</sup> We must stop this cycle. Reducing the recidivism rate will make our communities safer while decreasing the prison population and attendant costs. The program will provide offenders with access to a full continuum of services during incarceration and during their release, transition, and reintegration into the community.<sup>66</sup> The Department of Corrections will be required to coordinate the specifics of the offender's reentry plan with the educational training, vocational training, and treatment services that will be provided to the offender during the offender's incarceration.<sup>67</sup> The programs in prison should be structured to make it likely

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<sup>61</sup> *Prison Overcrowding Hearings*, *supra* note 1, at 4 (statement of Jeffrey A. Beard).

<sup>62</sup> S.B. 100, § 7 (as amended on third consideration).

<sup>63</sup> *Id.* § 13.

<sup>64</sup> See PA. DEP'T CORR., *supra* note 10, at 1 (indicating that about 10% of the prison population has been sentenced to life without parole or the death penalty).

<sup>65</sup> *Id.* at 2.

<sup>66</sup> S.B. 100, § 13 (as amended on third consideration).

<sup>67</sup> *Id.*

that the offender will become a productive member of society. There must be close cooperation and coordination with the Pennsylvania Board of Probation and Parole, local government agencies, and community groups.<sup>68</sup> There are many such organizations that want to be part of the solution, and we must identify those organizations and put them to work.<sup>69</sup>

#### D. *Alternative Sentencing Programs*

The bill will make more nonviolent offenders eligible for Pennsylvania's alternative sentencing programs.<sup>70</sup> The Pennsylvania Commission on Sentencing noted,

Many of the sentencing alternatives created by the General Assembly to serve as rehabilitative alternatives to traditional incarceration . . . are presently underutilized. Contributing factors include: prohibitions to use certain programs to satisfy mandatory minimum sentencing provisions; extensive ineligibility criteria, particularly as related to present or past offenses; and/or other restrictions of a sentencing judge's ability to consider the program, such as approval by the prosecutor.<sup>71</sup>

Secretary of Corrections Beard commented,

The problem with both SIP and RRRI is that the eligibility criteria limits some offenders who could benefit from these programs from participation. We should look closely at the criteria for both and consider changes that would expand the eligible pool.

We also need to give judges broader discretion to decide who receives SIP.<sup>72</sup> The legislation expands the eligibility criteria for these programs.<sup>73</sup>

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<sup>68</sup> The legislation makes specific mention of community and faith-based organizations as playing a role in the reentry process. *Id.*

<sup>69</sup> *Id.* (directing the Department of Corrections and the Pennsylvania Board of Probation and Parole to develop and maintain and list of community organizations available to provide reentry services).

<sup>70</sup> *Id.* § 1.1 (relating to eligibility for the RRRI); *id.* § 2, § 4 (relating to eligibility for CIP programs); *id.* § 8 (relating to eligibility for the state motivational boot camp); *id.* § 11 (relating to eligibility for the SIP program).

<sup>71</sup> Report from the Pa. Comm'n on Sentencing to the H. Judiciary Comm. 6 (Oct. 2009) (on file with the author).

<sup>72</sup> *Prison Overcrowding Hearings, supra* note 1, at 3 (statement of Jeffrey A. Beard).

<sup>73</sup> S.B. 100, § 12 (as amended on third consideration).

### E. County Probation Program

The bill establishes a county probation program providing for swift, predictable, and immediate sanctions for offenders who violate their probation.<sup>74</sup> This provision of Senate Bill 100 is based on Hawaii's HOPE program. In Hawaii, Judge Steven S. Alm developed HOPE (Hawaii's Opportunity Probation with Enforcement) to focus on offenders who have committed drug-related crimes.<sup>75</sup> Through HOPE, those offenders who fail a drug test while on probation are subject to immediate and brief incarceration.<sup>76</sup> According to the Institute for Behavior and Health, "An independent evaluation of HOPE shows that it is effective in reducing drug abuse, crime and incarceration in the population of offenders in the community on probation."<sup>77</sup> The Pennsylvania program will be available as an alternative to the normal probation revocation process,<sup>78</sup> and each court of common pleas will have discretion to establish and implement the program.<sup>79</sup>

### F. Expanding Risk Assessment

The bill further amends the powers and duties of the Pennsylvania Commission on Sentencing relating to risk assessment. Act 95 directed the Commission to develop a risk assessment tool as part of the sentencing guidelines.<sup>80</sup> In any misdemeanor or nonviolent felony case, the sentencing judge may use the risk assessment instrument as an aide to determine whether an offender is eligible for alternative sentencing.<sup>81</sup>

Under Act 95's other amendments, the Commission on Sentencing will develop a risk assessment worksheet for judges, which will be based on factors that are statistically relevant in predicting recidi-

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<sup>74</sup> *Id.* § 3.

<sup>75</sup> ROBERT L. DUPONT, INST. FOR BEHAVIOR & HEALTH, HOPE PROBATION: A MODEL THAT CAN BE IMPLEMENTED AT EVERY LEVEL OF GOVERNMENT 1 (2009), *available at* <http://www.ibhinc.org/pdfs/HOPEPROBATION.pdf>.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> Revocation and modification of probation orders are generally governed by 42 PA. CONS. STAT. § 9771 (2010).

<sup>79</sup> S.B. 100, § 3 (as amended on third consideration).

<sup>80</sup> *See* 42 PA. CONS. STAT. § 2154.7(a) (2010) (codifying this directive from Act 95).

<sup>81</sup> *See id.* § 2154.7(d) (2010) ("Subject to the eligibility requirements of each program, the risk assessment instrument may be an aide to help determine appropriate candidates for alternative sentencing, including the recidivism risk reduction incentive, State and county intermediate punishment programs and State motivational boot camps.").

vism.<sup>82</sup> These factors may include offender characteristics and demographics (gender, age, marital status, and employment status); current offense information (whether the offender acted alone, and whether there were additional offenses); and past criminal history (whether the offender had been arrested in the past twelve months, had a prior criminal record, had prior felony drug convictions, and had been previously incarcerated).<sup>83</sup>

The risk assessment instrument is designed to identify offenders with the lowest probability of being reconvicted of a serious crime. These offenders are then considered for alternative sentencing programs, the RRR program, CIP or SIP, or state motivational boot camp.<sup>84</sup>

As previously stated, Pennsylvania's alternative sentencing programs are underutilized.<sup>85</sup> Requiring judges to use the risk assessment instrument as part of the sentencing process will help judges identify appropriate candidates for these programs. Judges will use the risk assessment instrument along with the sentencing guidelines and presentence investigative reports. Risk assessment is not meant to replace sentencing guidelines. Instead, the risk assessment instrument will be used in conjunction with the sentencing guidelines to make sure that every alternative is considered.<sup>86</sup>

This legislative proposal is based on Virginia's risk assessment tool. The Virginia instrument

provides a firm foundation for distinguishing nonviolent offenders less likely to recidivate from those more likely.

... The risk assessment instrument provides an objective, reliable, transparent, and more accurate alternative to assessing an offender's potential for recidivism than the traditional reliance on judicial intuition or perceptual shorthand. At the state level, the risk assessment instrument is a workable tool for managing prison population.<sup>87</sup>

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<sup>82</sup> See *id.* § 2154.7(e) (2010) (defining a "risk assessment instrument" as "an empirically based worksheet which uses factors that are relevant in predicting recidivism").

<sup>83</sup> See Matthew Kleiman et al., *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 CRIME & DELINQ. 106, 111 (2007) (listing factors used in a similar program in Virginia).

<sup>84</sup> See *supra* note 81.

<sup>85</sup> See *supra* text accompanying note 71.

<sup>86</sup> See 42 PA. CONS. STAT. § 2154.7(b) (2010) (authorizing the Commission to incorporate the risk assessment instrument into the sentencing guidelines).

<sup>87</sup> Kleiman et al., *supra* note 83, at 126.

## CONCLUSION

While Act 95 and Senate Bill 100, if enacted, should have an impact on the state prison population, the influx of state-sentenced offenders who in the past would have served their time in a county jail is expected to drive the state prison population upwards once again.<sup>88</sup> With this expectation, the Commonwealth is building three new prisons.<sup>89</sup>

The Council of State Governments Justice Center is back in the picture. Once again, the Justice Center will be collaborating with state officials to determine the impact of the bills enacted in 2008 and subsequent legislation, and it hopes to develop a new plan to assist Pennsylvania in bringing the state prison population under control.<sup>90</sup>

Today, support for prison reform is coming from the most unlikely places. Legislators like me who were at the forefront of the “tough on crime” movement have modified their views. Science and fiscal concerns are driving a new national movement toward a corrections system designed to rehabilitate nonviolent offenders, not simply punish them. From within Pennsylvania’s corrections system, we can begin to rebuild individuals, families, and entire communities that have been ravaged by decades of cyclical incarceration. Until today, we have fought drug abuse by attacking its supply and harshly punishing users. We are reexamining our entire criminal justice system, from policing to incarceration. The result will be increased public safety and stronger, more economically viable communities.

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Preferred Citation: Stewart Greenleaf, Essay, *Prison Reform in the Pennsylvania Legislature*, 160 U. PA. L. REV. PENNUMBRA 179 (2011), <http://www.pennumbra.com/essays/12-2011/Greenleaf.pdf>.

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<sup>88</sup> See *Prison Overcrowding Hearings*, *supra* note 1, at 4 (statement of Mark H. Bergstrom) (“However, delays in implementing this legislation may instead result in a further increase in the state prison population, especially in two years when many offenders presently sentenced to county jails will be serving their sentences in state facilities.”).

<sup>89</sup> The Commonwealth is currently building a new prison, SCI-Benner Township in Centre County, and two new institutions, SCI Phoenix East and West, on the grounds of SCI Graterford in Montgomery County.

<sup>90</sup> The Justice Center has contacted Pennsylvania officials through the Pennsylvania Commission on Crime and Delinquency. I have been contacted personally. The Justice Center website currently states, “Justice Reinvestment staff are currently working with state policymakers to analyze the prison population and spending in Pennsylvania communities.” *Pennsylvania: Implementing the Strategy*, JUST. REINVESTMENT, <http://justicereinvestment.org/states/pennsylvania/how-pa/> (last visited Dec. 1, 2011).