

Criminal Justice Policy in New Mexico: Keys to Controlling Costs and Protecting Public Safety

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Introduction: Current Policies and Challenges

New Mexico currently has 10 prisons, of which four are privately operated. New Mexico prison population has declined from 6,887 in August 2006 to 6,404 in April 2009.¹ However, New Mexico's prison population has been projected to grow by 21 percent from its 2007 level to 8,477 by 2011.² New Mexico's prison population was only 4,945 in 1998.³

Some 1 in 35 New Mexico residents are under correctional control.⁴ In 2008, New Mexico spent 4.6 percent of its general fund on corrections.⁵ Every area of the budget must be scrutinized by state policymakers, as the state will face a projected \$345 million shortfall in its next budget.⁶ The average prison cost in New Mexico is more than \$31,000 per year when annualized construction costs are included.

There are 19,388 individuals on probation and parole. The average caseload size is 93. Parole violators accounted for 35 percent of admissions to prison in 2006, the largest percentage of total admissions since 1997. The three year re-incarceration rate for New Mexico prisons is 46.7 percent.⁷

Fortunately, there are numerous policy options that New Mexico can take to avoid building the new prisons that would be needed based on current projections. The approaches would in many instances increase the number of offenders who comply with community supervision, stay drug-free, and are gainfully employed. The following are among the options New Mexico lawmakers should consider:

Proven Solutions

Drug Courts: New Mexico has 853 inmates incarcerated for drug possession.⁸ Approximately 85 percent of New Mexico offenders have substance abuse problems.⁹ According to data provided by the New Mexico Department of Corrections Probation and Parole Division, between 44 and 62 percent of probationers test positive for drugs in any given month. Drug courts are a proven alternative to incarceration for low level drug offenders. Drug courts offer intensive judicial oversight of offenders combined with mandatory drug testing and escalating sanctions for failure to comply. According to the National Association of Drug Court Professionals, the average recidivism rate for those who complete drug court is between 4 percent and 29 percent, in contrast to 48 percent for those who do not participate in a drug court program.¹⁰ Similarly, the General Accounting Office reported recidivism reductions of 10 to 30 percentage points below the

comparison group.¹¹ A 2006 California study found drug courts cost less than \$3,000 per participant, far cheaper than prison.¹² New Mexico has 35 drug courts in 25 of 33 counties, which have processed 9,500 offenders since 1994. The recidivism rate of New Mexico drug courts is 11.9 percent. A New Mexico Sentencing Commission study of the Bernalillo County Metropolitan DWI-Drug Court found graduates were one-third as likely to recidivate as comparable offenders who did not participate in the drug court.¹³ As recommended in the June 2008 report by Governor Bill Richardson's Task Force on Prison Reform, New Mexico can benefit further from the expansion of drug courts.¹⁴

Hawaii HOPE Court: Like many states, Hawaii faced a problem of probationers not showing up for their appointments and declining to take mandatory drug tests. Probationers could submit numerous infractions before action was taken, leading to unnecessary revocations to prison because a swift and sure sanction was not used to send a message upon initial violations. The state addressed this challenge by creating Hawaii's Opportunity Probation with Enforcement Drug (HOPE) Court where offenders are ordered to treatment and must call in a number every morning to see if they have to report to the court to take a drug test. If they fail, they are jailed for several days, usually weekend jail in order to preserve employment.

Although participants can ultimately be imprisoned for multiple failures, it is rare because the immediate accountability of a short jail stay deters future drug use. This court has proven in a randomized controlled trial to reduce positive drug screens by 91 percent and cut both revocations and new arrests by two-thirds.¹⁵ New Mexico does not have a court similar to the HOPE court.

Mandatory Probation, Treatment and Work Requirements for First-Time Drug Offenders: This policy should apply only to individuals caught with small quantities of drugs that are for personal use. By redirecting these first-time offenders from prison, New Mexico can save substantially on incarceration costs. For example, a U.C.L.A. study found Proposition 36, which diverted nonviolent drug possession offenders into treatment, saved California \$1.4 billion in its first five years.¹⁶

Research has proven that treatment is effective. In Arizona which also implemented this policy more than a decade ago, a study by the Arizona Supreme Court found that 77 percent of drug offenders got clean as a result of the treatment.¹⁷ The national Drug Abuse Treatment Outcome Survey of 10,000 participants found that residential treatment resulted in a 50 percent reduction in drug use and 61 percent reduction in crime while outpatient treatment resulted in a 50 percent reduction in drug use and 37 percent reduction in crime.¹⁸ Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), stated, "Research findings show unequivocally that drug treatment works and that this is true even for individuals who enter treatment under legal mandate."¹⁹

Graduated Responses for Probationers and Parolees: Nationally, a third to a half of prison admissions are individuals revoked from probation or parole. According to data obtained from the New Mexico Corrections Department (NMCD), parole violators accounted for 35 percent of prison admissions in 2006-07.²⁰ In 2008, the NMCD reports that there were 413 revocations of probation or parole for technical violations. A technical violation is a failure to obey a term of supervision, but is distinguished from committing a new offense. With a graduated sanctions policy, each technical violation is met with a swift and certain response such as increased reporting, a curfew, or even a shock-night in jail. Research indicates this approach reduces technical revocations

to prison because the swift but proportionate responses effectively lay down the law, deterring future violations.²¹ Depending on the judicial district, some New Mexico probation and parole offices are allowed to utilize graduated sanctions for probation violations if an agreement is in place with the sentencing court. By adopting a graduated sanctions matrix or grid that matches the sanction with the violation, more uniform application of sanctions can be achieved. A study of the Ohio graduated sanctions grid found its adoption reduced the number of revocations.²²

Parole offices in New Mexico do not use a grid. Probation offices that have the authority from the judge to sanction do use a grid, which is as follows: 1st violation: 24-48 hours in jail, 2nd violation: 48-72 hours in jail, 3rd violation: 72 hours-1 week in jail, 4th or greater violation: Return to court for revocation proceedings. Unlike the more sophisticated Ohio grid, it does not distinguish between the severity of violations, which can range from missing a meeting to harassing the victim, or include types of sanctions in addition to jail.

Sanctions that are swift and certain but proportionate to the technical violation can help avoid the use of incarceration as an intermediate sanction. From January 2008 to June 2008, 171 parole violators were sanctioned with incarceration, including 13percent served a 30-day sanction, 47 percent served a 45 or 60 day sanction, and 40 percent served a 90-day sanction. Given that offenders who are employed are three times less likely to recidivate²³, weekend jail time may be more effective those violators who do not pose a threat to public safety. For unemployed parolees, work crews have been proven to effective in reducing recidivism.²⁴

Performance-Based Probation Funding: In December 2008, Arizona implemented performance-based probation funding. Under this incentive-based approach which has not been adopted in New Mexico, probation departments receive a share of the state's savings from less incarceration when they reduce their revocations to prison without increasing probationers' convictions for new offenses. The probation departments are required to reinvest the additional funds in victim services, substance abuse treatment, and strategies to improve community supervision and reduce recidivism.

Unlike Arizona, New Mexico has one unified, statewide probation and parole department. The Pew Center on the States Public Safety Performance Project recommends that a performance-based probation funding system appropriate 30 percent of savings from a reduced revocation rate to the department and an additional 5 percent if the department demonstrates improvement in employment, drug test results, and victim restitution collection. Although results of Arizona's measure are not yet available, Ohio adopted a somewhat similar funding policy called RECLAIM (Reasoned and Equitable Community and Local Alternative to Incarceration of Minors) that gives money to counties that treat juveniles who would otherwise be incarcerated and deducts funds for low-risk juveniles who are sent to state facilities. The policy has been highly successful, as the recidivism rate for moderate risk youth placed through RECLAIM was 22 percent, compared with a 54 percent rate for such offenders in state lockups.²⁵

Earned Time Credits: In 2008, Arizona enacted legislation that gives probationers good time credit for time served when they fully comply with all terms, such as restitution. Probationers receive 15 days credit for every 30 days they are in compliance. Nevada and Delaware have also adopted statutes authorizing a reduction in the probation term for good behavior. This gives probationers an incentive to perform and research has shown that positive incentives work to change offender behavior.²⁶ Also, by reducing the total number of offenders on probation, there are

fewer opportunities for revocations. New Mexico has not enacted earned time credits for probationers.

Performance Measures: Probation and parole departments should be held accountable for outcomes by being required to report recidivism, employment, substance use, payment of victim restitution, and compliance with “no contact” orders. The New Mexico Probation and Parole Division tracks these performance measures as part of an Outcome Measures report for the American Correctional Association, but these measures are not reported to the public or the Legislature on a regular basis. Doing so would enhance transparency, ensure departments are answerable for results, and allow policymakers and the public to identify when changes may be needed.

Geriatric Release: New Mexico is not one of 37 states with a geriatric release law. These laws allow for the release of inmates who are incapacitated and no longer a threat to the public. Geriatric inmates have three times the medical costs of non-geriatric inmates.²⁷ Studies have shown that offenders over 60 have a minimal recidivism rate, with rates as low as 3.8 percent.²⁸ Even inmates over 55 have a recidivism rate of between 2 and 8 percent.²⁹ For example, since Oklahoma adopted a geriatric release law in 2000, 135 inmates have been released with none recidivating.³⁰

Accordingly, New Mexico should adopt a policy that permits the safe release of such inmates. Given the challenges these inmates face in reintegrating into society, a reentry plan should be developed that ensures they have appropriate housing, such as in a state nursing home, and the federal benefits to which they are entitled. Since incarcerated individuals are ineligible for federal benefits, the release of geriatric inmates results in significant savings to the state while shifting the majority of their health care costs on to the federal government.

Halfway Houses: At any given time, there are 130 inmates in New Mexico prisons who have been approved for parole but remain behind bars because they have no home plan. Expanding the number of halfway house beds can address this. Halfway houses cost \$25 per day while prisons are more than twice as much.

Solitary Confinement Step Down: New Mexico releases some inmates directly from solitary confinement into the community. Research indicates inmates released directly from solitary confinement are more likely to recidivate, even after adjusting for all other factors.³¹ Accordingly, the Department of Corrections should aim to move many of these inmates into the general population prior to their release.

Employers’ Liability for Hiring Ex-Offenders: Currently, 41 percent of New Mexico probationers and parolees are employed. One barrier to employment is that New Mexico employers have been held liable for negligent hiring of employees with questionable backgrounds.³² The Urban Institute noted, “The high probability of losing coupled with the magnitude of settlement awards suggest that fear of litigation may substantially deter employers from hiring applicants with criminal history records.”³³ That fear is not without basis. Employers lose 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million.³⁴ New Mexico can address this by immunizing employers from such suits – suits should be permitted for failure to supervise but not merely hiring an ex-offender.

Suits are particularly unjustified where the conduct giving rise to the suit has no connection to the ex-offender's criminal background. At the least, New Mexico can eliminate punitive damages in such suits. Punitive damages are based on violating public policy, but public policy should encourage the employment of ex-offenders.

Barriers for Nonviolent Ex-Offenders to Obtain Occupational Licenses: Under the New Mexico Criminal Offender Employment Act, even convictions not directly related to the occupation are grounds for ineligibility.³⁵ One solution is to allow ex-offenders to obtain provisional licenses that are valid for a shorter period of time and subject to immediate revocation if they commit a new offense, violate a term of probation or parole, or violate a rule of the occupation. Such provisional licenses provide a positive incentive for success while still holding the ex-offender accountable. Texas lawmakers enacted House Bill 963 in 2009 authorizing provisional licenses. The legislation specifies that a provisional license becomes a permanent license after six months if the license holder is in full compliance.

Use of Private Facilities. The recent decline in New Mexico's prison population coupled with the potential of many the proposals outlined here for controlling the demand for prison beds should render the current capacity adequate. However, to the extent new capacity is needed at some point, expanding an existing private prison would be the most economical solution. Private prisons are proven to be less costly to operate. A Rio Grande Foundation study examined per-prisoner department of corrections budgets across 46 states and found that states with at least 5 percent of their prison population in private prisons spent about \$4,804 less per prisoner in 2001 than states without any private prisons.³⁶ The study further found that cost savings increase along with the percentage of inmates in private facilities. For example, New Mexico was calculated to save more than \$50 million as a result of having 45 percent of its inmates in private prisons. Similarly, a December 2007 study by Vanderbilt University researchers found that states with a higher percentage of inmates in private facilities had lower public prison costs per inmate, suggesting that competition drives efficiencies in state-run prisons.³⁷

Conclusion: Future Directions

New Mexico is fortunate its prison population has recently declined after significantly increasing, though the potential for long-term population pressures remains. Additionally, the state budget shortfall is less than most other states as a percentage of the total state budget. Nonetheless, New Mexico should seize the opportunity to benefit from criminal justice policies that have worked in other

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⁹ *Id.*

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