

Conserving Criminal-Justice Reform

Lars Trautman and Arthur L. Rizer, III

WHEN CARL HARRIS was released from prison in 2009, he described himself as “a man coming out of a cave after 20 years.” Convicted of assault at age 24 after injuring two people who had stolen his crack cocaine, Harris had been a drug dealer since he was 18 years old. After six years in prison, he realized he wanted more out of life. He found God, got clean, and focused on his education. Despite his efforts at personal redemption and societal rehabilitation, Harris sat in prison for another 14 years, costing the federal government more than \$300,000.

During his 20 years in prison, Harris worked a \$1.15-an-hour prison job; his wages failed to cover the cost for his wife, Charlene Hamilton, to visit him in prison, let alone help provide for their two young daughters. As a newly single mother, Hamilton turned to welfare payments and relatives for support; she briefly became homeless a couple of times after being unable to make ends meet. As Hamilton put it: “Basically, I was locked up with him.” None of this is to suggest that Harris should not have gone to prison—even he agrees that he deserved some prison time—but his experience in the criminal-justice system demonstrates that incarceration affects not only prisoners themselves, but also their families, communities, and all American taxpayers.

Harris is merely one of millions of Americans who experience the country’s outsized and inefficient criminal-justice system. Though Americans constitute less than 5% of the world’s population, we hold around 22% of the prisoners. Worse, around 21% of those incarcerated

LARS TRAUTMAN is a senior fellow in justice and national security policy at the R Street Institute.

ARTHUR L. RIZER, III is director of justice and national security policy for the R Street Institute. a former police officer, U.S. Army officer, and federal prosecutor.

are being held in pretrial detention prior to a conviction—a troubling exertion of government power. The growth in prison populations represents a relatively recent development: America’s incarceration rate has more than quadrupled since 1972. The warehousing of so many Americans is not cheap; between federal, state, and local governments, we spend more than \$80 billion every year on incarceration.

Not only does the criminal-justice system come with these staggering costs, it also delivers a paltry return on investment. Within three years of release, as many as two-thirds of prisoners are re-arrested; that recidivism rate rises to as high as three-quarters after five years. Even for a government program, this is a remarkable failure. Given the overcrowding, generally poor conditions, and lack of programming at many prisons across the country, it should not come as a surprise. Once prisoners are released, they often face occupational-licensing restrictions and other employment barriers that make it exceedingly difficult to find and hold a job. This further hinders re-integration and increases recidivism.

Conservatives have long been associated with a “tough-on-crime” approach to criminal justice, advocating longer prison sentences to deter crime. Crime rates have indeed fallen dramatically over the past quarter-century. But it is time to ask whether our system now leans much too far in the direction of imprisonment. For conservatives who have traditionally espoused strong families and communities, upward mobility, and a reduced role for the welfare state, criminal-justice reform merits serious consideration.

In recent years, conservatives have begun to do just that: Across the country, conservative lawmakers have enacted criminal-justice reforms in dozens of states. This renaissance has been led in large part by deep-red Texas, which, by instituting a series of “smart-on-crime” initiatives in the last decade, accomplished a feat previously believed to be impossible: the simultaneous reduction of its crime, recidivism, and incarceration rates. These successes have been emulated and expanded by other states through various measures, including the expansion of drug courts in Georgia, the increase of parole eligibility for non-violent offenders in South Carolina, and the reduction of sentence ranges and the limitation of mandatory minimums in Louisiana.

In other states such as Oklahoma, Alaska, and Arkansas, however, politicians have resisted and stalled such efforts. Instead, these state leaders have dismissed the successes of reforms and used crime as a wedge

issue to divide their opponents and score cheap political points. Opaque legislative processes and arcane procedural mechanisms have allowed them to halt legislation behind the scenes.

As a result, an overview of criminal-justice reform in the states yields a mixed picture, and one with lessons for policymakers eager to reduce crime and spending while improving their political profile and serving the cause of a more just social order.

TURN TOWARD REFORM

For a long time in our nation's history, "criminal justice" was not a significant issue in public debates. It was not until crime rates started to spike in the 1960s that the status quo began to change—particularly as Republicans saw an opportunity to gain traction in the South amid brewing social and racial tensions.

Barry Goldwater's presidential campaign in 1964 brought criminal justice into the spotlight. Goldwater's bid was a near-historic failure; he won only 52 votes in the Electoral College, compared to President Lyndon Johnson's 486. Goldwater's "divide-and-conquer" political strategy, however, which used crime as a wedge issue, helped him carry five of the Deep South states, most of which had not voted for a Republican presidential candidate since the end of Reconstruction. The message to the Republican Party was clear: The Democratic Party's grip on the South was vulnerable, and crime could be an effective tool in the effort to wrest away political control.

Just four years later, Richard Nixon emphasized a tough approach to crime and won the White House, running a "law-and-order" campaign. Indeed, in Nixon's acceptance speech at the Republican National Convention, he used the words "law" and "order" 21 times and famously said: "[T]he nation with the greatest tradition of the rule of law is plagued by unprecedented lawlessness."

In the next few decades, "tough on crime" became a central mantra of the Republican Party, in large part because it helped win elections. Democrats, instead of articulating an alternative policy, embraced the GOP's law-and-order stance so as to not miss out on the political benefits. By the turn of the century, virtually every politician in both parties had adopted a tough-on-crime approach.

Goldwater, Nixon, and other heralds of the tough-on-crime mantra were not wrong in advocating public safety and law and order as

preconditions for a successful society. What they got wrong was how increased public safety is actually achieved. The truth is that longer sentences do not meaningfully deter crime. For example, a study in the late 1990s found that harsh sentencing laws for gun crimes in Virginia had virtually no deterrence effect.

In fact, the greatest crime deterrent is the certainty and imminence of punishment, not its magnitude. Therefore, if a conservative politician wants to be tough on crime, it is better to move to a system that favors probation, with brief but immediate and certain sanctions and incentives. This kind of approach would also yield significant cost savings, allowing taxpayer dollars to be spent in more effective ways.

While there was no definitive turning point at which conservatives began to embrace criminal-justice reform, Texas can be credited as the locus of reform efforts. In the mid-2000s, Texas was facing a financial crisis caused by a rising prison population. This growth incurred billions in increased costs and would have necessitated the construction of more prisons and thousands more beds in just a few years.

In response to this crisis, Right on Crime (ROC) was founded under the umbrella of the Texas Public Policy Foundation (TPPF) to spearhead a movement for conservative policy reforms on criminal justice. The movement recruited conservative heavyweights such as Pat Nolan from the American Conservative Union Foundation (then with the Prison Fellowship), Grover Norquist from Americans for Tax Reform, and even Newt Gingrich, the former House speaker. ROC's leadership included Marc Levin (now a vice president at TPPF), Vikrant Reddy (now with the Charles Koch Institute), and Derek Cohen (now the director of ROC).

These leaders viewed conservative involvement as imperative; as Gingrich and Nolan put it, "The criminal justice system is broken, and conservatives must lead the way in fixing it." Norquist recast criminal-justice reform as the true fulfillment of conservative principles: "There is no reason that conservatives should be tied to the 'lock 'em up and throw away the key' strategy; rather, we must stand for the very principles of limited government, federal accountability, and reduced spending that our forefathers effectively deployed."

Branching out from its roots in Texas, conservative criminal-justice reform has flourished. Republican governors in particular began to support these efforts. For Governor Nathan Deal of Georgia, for example, combating the explosion of the prison population in his state has been a

high priority. As a result of the diligent efforts of Deal and many others across the United States, our national incarceration rate has declined from a peak in 2008 of 1 in 100 adults—amounting to 2,310,300 people—to a 2016 rate of approximately 1 in 115 adults, or 2,162,400 people. And this drop in incarceration has been achieved without negatively affecting public safety: According to statistics from the U.S. Department of Justice, the nation's combined violent- and property-crime rate decreased by 14.6% from 2010 to 2015.

STATE-LEVEL REFORMS

In the last decade, dozens of states have enacted criminal-justice reforms and begun to reap their benefits. Texas's comprehensive legislative agenda and sustained attention to criminal-justice issues, in particular, has served as a model to other states. In recent years, a cluster of other traditionally conservative states, including Georgia and South Carolina, have followed suit and passed landmark measures that are already transforming their criminal-justice systems. These successes have inspired new entrants such as Louisiana and Utah to enact their own measures. While these states represent a fraction of those who have embraced the movement, examining their reforms provides an excellent survey of the past, present, and future of criminal-justice reform.

When Texas's political leaders confronted the escalating costs of their prison system, they decided to adopt a new, more measured approach. Instead of raising taxes and building more prisons to cover the swelling inmate population, politicians, policy experts, and practitioners studied the drivers of prison growth. Collecting and studying this data produced a historic \$241 million package of criminal-justice reforms, which focused on diversion programs and treatment for individuals suffering from addiction and mental-health conditions. Reforms at the front end of the system included adding 800 more beds for substance-abuse treatment, as well as increasing the capacity for outpatient substance-abuse treatment by 3,000. These reforms were designed to be alternatives to formal judicial intervention, thus diverting thousands of people away from prison cells.

But the reforms did not stop with the entry side of the penal system. The Texas Board of Pardons and Paroles, political leaders learned, was underutilizing parole because of the lack of reentry services both in and out of prison. In essence, the board denied parole because it did not

trust that the system made inmates less likely to commit new crimes. This meant that thousands of individuals who were approved for parole lingered in prison due to a lack of beds in halfway houses or other treatment programs. Further, there was no middle ground for those who committed minor parole violations, which resulted in individuals being sent back to prison simply because there was a lack of other options. To address these shortcomings, lawmakers added more capacity in prisons for substance-abuse treatment, 300 more slots in halfway houses, and intermediate beds for those individuals who committed only technical parole violations, and for whom being sent back to prison would have little utility.

For years, Texas had responded to increased inmate populations by simply building new prisons. But after implementing this new approach, the state actually started to close prisons, allowing for more resources to be reinvested elsewhere.

The true testament to the Texas paradigm shift on criminal justice, however, has been the improvement in public safety. Since its enactment of criminal-justice reform, Texas has experienced a decrease in probation revocations, as well as a decrease in the rate at which parolees commit new crimes. Most impressive, while the national crime index fell by 20% from 2007 to 2014, Texas's fell by 26%. Texas has proven that, by simultaneously lowering both crime and incarceration rates, states can reduce spending on their prison populations without endangering public safety.

Georgia, like Texas, also found itself facing a fiscal crisis due to prison growth. Between 1990 and 2011, Georgia doubled its prison occupancy, increasing its budget by \$500 million per year. The state ranked fourth in overall incarceration rates, but first in the number of individuals under some type of penal supervision, with 1 in 13 residents under correctional control. Spurred by the state's fiscal challenges, Governor Deal, along with ROC and other leading conservatives, called for reform. In response, Georgia's legislature passed House Bill 1176 in 2012, which reduced penalties for many low-level crimes, created alternatives to incarceration, and mandated better data collection, enabling the state to develop a more evidence-based criminal-justice system. Additionally, the bill instituted programs to encourage offenders to obtain job training while in prison and it addressed recidivism through a robust monitoring program that included graduated sanctions for probation

violations. The bill is estimated to have saved taxpayers \$264 million over a five-year period.

Across the border in South Carolina, the state saw a 500% increase in prison-system spending from the 1980s to 2008. Its prison population had tripled, and its recidivism rates were increasing; the state was on the edge of an economic abyss. To combat this, the state established a commission to assess its sentencing and parole systems and devise a data-based solution to improving public safety.

Based on the commission's findings, South Carolina's legislature passed Senate Bill 1154, the 2010 Omnibus Crime Reduction and Sentencing Reform Act. Among other reforms, this act made significant changes to the state's sentencing structure and required the parole board to adopt risk- and needs-assessment tools when making parole decisions. It also allowed terminally ill prisoners to petition for parole, added release mechanisms for certain nonviolent offenders, established a credit system for good behavior, and created a more robust legislative-oversight mechanism for its penal system.

The results have been impressive. Over a five-year period, the legislation is estimated to have reduced the projected growth in the prison population by half, with savings of \$175 million in new construction costs and \$66 million in prison-operating costs. Perhaps more remarkable, the state has experienced a 46% drop in parole or probation revocations for technical violations.

In 2015, Louisiana's political leaders found themselves confronting correctional and fiscal crises similar to those of the other states profiled here. The state had an incarceration rate nearly double the national average, and it had spent a decade as the state with the highest proportion of incarcerated individuals in the country. Policies such as mandated four-year minimum sentences for individuals caught with possession of Schedule I drugs exacerbated an already overwhelmed criminal-justice system. These policies also helped contribute to the state's \$1.6 billion deficit in the FY 2016 budget. State leaders knew this status quo could not be sustained.

Between 2012 and 2015, the state managed to lower its prison population by 9% through several reform initiatives that expanded evidence-based correctional practices. Yet even with this reduction, Louisiana still held more of its residents behind bars, per capita, than any other state.

On June 15, 2017, Governor John Bel Edwards signed a legislative package consisting of 10 criminal-justice bills that set an aggressive agenda for reform. The reform measures included the establishment of procedures for diverting low-risk individuals away from prison, the improvement of re-entry procedures, and the reduction of sentences for those who could be supervised outside of a custodial setting. These reforms are expected to reduce the prison population by 10% and save the state \$262 million over a 10-year period; 70% of those savings will be reinvested into other criminal-justice reforms.

Utah governor Gary Herbert has also joined other governors in taking action to address their states' growing prison populations. In 2014, he called for "a full review of our current [corrections] system to develop a plan to reduce recidivism, maximize offenders' success in becoming law-abiding citizens, and provide judges with the tools they need to accomplish these goals." The review revealed that Utah's prisoner population had increased by 18% between 2004 and 2014, and that many of the prison admissions during that time were for non-violent offenses. In response, Utah's legislature passed House Bill 348, which went into effect in 2015. The bill reduced sentences for certain drug offenses, diverted low-risk individuals into treatment and community-based programs, and addressed the growing need for mental-health treatment. It also provided a framework to allow some individuals on probation or parole to reduce their time.

These reforms have produced promising results. Based on data from the state's Justice Reinvestment Initiative, Utah's average prison population was reduced from 7,065 in 2014 to 6,276 in 2017. Other promising results include a decrease in the imprisonment of nonviolent offenders, thereby allowing a greater proportion of prison beds to be allocated to violent offenders. Additionally, there was a 20% increase in the number of individuals released on parole from 2016 to 2017.

RESISTANCE AND ROLLBACK

While conservatives have succeeded in enacting criminal-justice reforms in several states, they still face setbacks and ongoing resistance. As evidenced by recent legislative battles in Oklahoma, Alaska, and Arkansas, several factors can stymie reform and even threaten enacted legislation.

In Oklahoma, Governor Mary Fallin recognized that her state's criminal-justice system — which featured the second-highest incarceration rate

in the country in 2016, according to the Bureau of Justice Statistics—was in desperate need of reform. In July 2016, Governor Fallin announced the creation of a task force that would review Oklahoma’s adult criminal-justice system and use a data-driven approach to guide reform. The task force released 27 policy recommendations, which inspired a dozen pieces of legislation. Along with the passage of two ballot referendums that had been shepherded by the conservative former speaker of the Oklahoma House, substantive reform appeared to be within reach for the state.

The subsequent legislative session had barely begun, however, before recalcitrant lawmakers started to mobilize against the ballot measures and reform package. Almost immediately, Oklahoma legislators filed bills to revoke the ballot measures passed only months earlier by popular vote. Likewise, after sailing through the Oklahoma Senate, many of the task-force bills hit a wall in the state House. The chairman of the state House Criminal Justice and Corrections Committee refused to allow the bills out of committee, arguing that the majority of the bills neglected the victims of crime and that the reforms were moving too quickly.

Despite the pleas of fellow state House Republicans, Governor Fallin, and members of the business community, the chairman refused to release the bills. Repeated calls to reassign the bills to another committee went unanswered, as the state House speaker decided that the concerns of a handful of members were reason enough to delay consideration of the bills until the following year. In the end, significant public and legislative support could only get three of the 12 bills enacted into law. The ballot measures, however, fared better; legislative inertia helped defeat the revocation efforts, allowing both referendums to take effect in July 2017. But for lawmakers reluctant to embrace these measures, the imperative for reform can no longer be ignored: Oklahoma now has the highest incarceration rate in the country, according to a report released in May by the Prison Policy Initiative.

In Alaska, at least initially, conservatives found greater success in promoting criminal-justice reforms. Building upon the results of the Alaska Criminal Justice Commission, lawmakers introduced legislation to transform the state’s approach to every stage of the criminal-justice life-cycle. Sponsored by one of the most conservative members of the Alaska Senate and supported by Governor Bill Walker, the bill encountered

limited opposition from both parties, passing both houses of the state legislature by large margins. Enacted in July 2016, the law's expansive provisions were set to be phased in over the next year and a half.

Before the new criminal-justice reforms could be fully implemented, however, opponents began trying to roll back the advances. These efforts gained additional traction after the release of new crime data, which showed that Alaska had experienced an uptick in some types of crime in 2016. Despite the fact that the law was not enacted until July of 2016, and many provisions had not even taken effect that year, opponents blamed it for the increase in crime. Opponents of the law also ignored evidence that it was starting to reduce correctional costs and the state's prison population.

In response to opposition from lawmakers, Governor Walker added a partial repeal measure to a special session called on the state budget at the end of 2017. "Clearly," Walker said at a press conference, "the crime report shows we can't wait until next year." In their haste, lawmakers passed legislation that partially rolled back a portion of the reform; this inconsistently raised certain jail sentences, immediately calling its legal viability into doubt. Opponents of the reforms are pushing for additional reversals in the 2018 session, meaning that conservatives must once again defend their advances.

Reform efforts in Arkansas have also encountered resistance. In the 1990s and 2000s, the state's prison population more than doubled, while corrections costs increased from 3% of the state budget to nearly 8%. Meanwhile, crime and recidivism rates remained high. In an attempt to curtail this crisis, a bipartisan group helped pass a sweeping criminal-justice measure in 2011 that proposed sentencing alternatives, a new approach to parole revocations, and recidivism-reduction programs. The early returns were promising; Arkansas's crime and incarceration rates both declined in the two years following passage of the 2011 reform.

By 2013, however, politicians opposed to the reforms started to counter them. In the spring of that year, a measure quietly passed the legislature that made mandatory parole-revocation hearings more common. The momentum created by the original reforms was finally shattered in May 2013, when a teenager was murdered by a recently released parolee. Local media hammered the state for allowing a serial parole violator back on the streets, and politicians soon adopted the same criticism. Democratic governor Mike Beebe went so far as to

initiate a state police investigation into the actions of parole officials in the case.

The state board of corrections quickly wilted under the pressure and instituted strict new parole policies; these led to a more than 300% spike in parole revocations in the second half of 2013. As a result of this massive increase in revocations, Arkansas's prison population grew by 17% in 2013, more than seven times the national average. Within months, the gains of the previous two years had evaporated, and Arkansas's prison population has remained stubbornly high ever since.

SUSTAINING REFORM

There is, unfortunately, no magic mix of policies or procedures that can guarantee the successful enactment of reform or prevent it from being subsequently eroded. Only through the ongoing and persistent effort of committed policymakers can enduring change be achieved. This means working hard to ensure that reform remains a unifying issue that not only captures support, but also retains the focus of conservatives in the states. Only if initial support is coupled with prioritization can reform survive. Many good criminal-justice reforms are only one well-intentioned conservative lawmaker away from being rolled back in many states. Therefore, it is crucial that conservatives take pride of ownership in their many accomplishments, approaching the maintenance of reform with the same urgency that inspired it in the first place.

Reformers no longer need to concentrate on winning hearts and minds. In fact, more than three-quarters of voters, including 68% of Republicans, believe that the criminal-justice system needs significant improvement, while an even higher percentage believe that rehabilitation should be the guiding tenet of the system. Rather than generating support for reform, the focus should be on marshalling existing support to productive ends. For conservatives, this means a push for criminal-justice reform that raises the profile of the issue, enmeshes it into larger political narratives, and places it at the forefront of legislative agendas.

The first step in the elevation of criminal-justice reform is to help the wider public understand its impact on their lives. This can be the difference between agreeing that something ought to be done and lending one's voice to actually getting it done. Too many Americans think that the criminal-justice system doesn't affect them; so long as one remains law-abiding, the thinking goes, there's no need to consider the system

or make it a priority. Reformers should stress, however, that whether criminal-justice issues result in threats to public safety or higher taxes, these problems inevitably have ramifications well beyond the individuals committing crimes. Additionally, the criminal-justice system has a more extensive impact than many Americans realize: As many as 70 to 100 million Americans have some sort of criminal record.

Although criminal-justice reforms have appeared as ballot measures in a few states, the involvement of political leadership is often key to their success. Leaders control the procedural levers of power, and, since the public is largely supportive of most criminal-justice reforms, resistance often occurs through procedural maneuvers. Killing a reform behind closed doors, rather than out in the open, can help a politician minimize the public blowback for opposing a popular measure. As evidenced by the ability of a single intransigent committee chairman to stall reform in Oklahoma, supportive and engaged political leaders can be essential to ensuring a bill is given a vote.

Notwithstanding widespread conservative support for criminal-justice reform, the issue has traditionally been neglected by associations and advocacy organizations that have championed other conservative causes and ensured their sustained consideration by politicians. This has made it tougher, at times, to hold politicians accountable and preserve advances on criminal justice. A unified front for reform helps to substitute for the absence of vested, vocal interest groups and keeps the pressure on lawmakers. Furthermore, broad support that transcends the usual divisions in the conservative movement will make reforms more attractive to leaders as a way to serve multiple constituencies.

Collective ownership of reform also helps to insulate members from any later finger-pointing or scapegoating, which can occur easily on an emotional issue like crime. No rational politician wants to find himself out of step with a majority of his party while a crisis dominates the news. Even if reform proposals are driven by data and will be better for a community in the long run, they will likely encounter some setbacks along the way. And to be sure, improving average outcomes in the system does not eliminate the occurrence of bad events. When it comes to criminal justice, that bad event can mean that lives are lost or destroyed. While remaining sensitive to these events, reformers must stick together and tout the long-term benefits of their ideas for public safety.

Conservatives, especially, understand that no political issue is ever

perfectly settled or resolved. Constant attention and work are required in order to maintain a fair system that can adapt and respond to new crises and challenges. Reformers need to work diligently and creatively to help ease the suffering caused by our outsized and inefficient criminal-justice system, and then be prepared to engage on whatever comes next. This long-term view requires patience. For many of the evidence-backed reforms that conservatives advocate, it will take time for benefits to be realized. Patience, diligence, and a strong bench of conservative supporters must be cultivated to ensure reform is carried into the future.

Moreover, laws are not enacted and implemented in a vacuum, and lawmakers are not infallible. Reform will always be imperfect, requiring further refinements and corrections. But instead of succumbing to overreactions that could hurt all involved, we must acknowledge any flaws and then seek to maintain and improve reforms, with the same measured diligence that helped to pass them in the first place.

THE PATH FORWARD

Conservatives have long been unfairly tarred as unsympathetic and hard-hearted on criminal-justice issues. But if they do not engage on an issue as widely supported as criminal-justice reform, or do so only after the system has directly affected a loved one, this reputation will stick, and they will be left behind. The movement for criminal-justice reform has established a solid foundation and strong public support, but efforts must now be directed to channeling it productively.

Preserving and building on the reforms of the past decade will enhance public safety, strengthen our families and communities, lead to more efficient uses of taxpayer dollars, and reduce the size of government—all long-standing conservative goals. Reform is often a slow and arduous process, but conservatives are already leading the way in statehouses across the country. Criminal-justice reform also has the potential to be one of the unifying conservative messages of our time, and policymakers and activists should embrace it as such. Doing so would not only benefit Americans like Carl Harris, but also our families, communities, and ultimately the country.