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CRIMINAL JUSTICE REFORM RECOMMENDATIONS

for Wisconsin Policy-makers

Policy ideas from the Wisconsin Criminal Justice Coalition

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Introduction: The Justice System in Wisconsin

Wisconsin currently incarcerates more than 23,000 individuals in its state prison system and supervises over 65,000 in some form of community supervision. The state has seen its prison population steadily increase since the turn of the century, even though crime rates have decreased since 2000. Every day of imprisonment costs the state $89 for males and $106 for females.

The Department of Corrections' budget called for $1.08 billion in taxpayer spending in 2016, seven times more than 25 years ago. This sum is only expected to increase as the state's prison population continues to grow and age at a time when corrections costs are rising rapidly. Wisconsin can decrease taxpayer expenditures and increase public safety concurrently by adopting the simple recommendations contained within this document.

Extended Supervision

The Problem

Wisconsin is an outlier on two fronts in the way it imposes and calculates extended supervision. The first is the length of the supervision term. The second is how time is calculated in the event of a revocation.

Truth in sentencing requires every prison sentence to be bifurcated into periods of initial confinement and extended supervision. The latter must equal at least 25 percent of the total period of initial confinement and, with few exceptions, may be as long as the maximum sentence minus the period of initial confinement.

> Example – Substantial Battery (under section 940.19 (4)) carries a six-year maximum sentence. If a judge orders a two-year term of initial confinement, the term of extended supervision can range from a minimum of six months (25 percent of the initial confinement) up to a maximum of four years (total maximum sentence minus the initial confinement).

Reforms from Other States

Unlike Wisconsin, many states with truth-in-sentencing laws strictly limit the time a person can spend on post-release supervision. Ohio requires that all individuals sentenced to prison for serious felonies be given a period of post-release control that may not exceed five years. Kansas has similar laws, requiring individuals serving determinate sentences to receive periods of post-release supervision ranging from 12-60 months. Research has shown that shorter periods of supervision have been linked to lower recidivism and that the likelihood of additional crimes decreases dramatically over time. Long periods of supervision after release from prison lessens the probability of successful re-entry by continuing to impose limitations that impede an individual's ability to secure meaningful employment and acceptable housing conditions.

Wisconsin also calculates extended supervision in a way that can extend it further still. Time spent following rules of supervision in the community does not count against extended supervision in the same way that days spent in custody count against initial confinement. As a result, there is a potential for people to spend more time on extended supervision than originally ordered by the court. This is often referred to as "doing life on the installment plan."

Example – Same sentence, two different systems. Under Wisconsin's old law parole system, a person sentenced to a maximum sentence of 10 years might be paroled after five years of confinement. If, in year eight of the sentence, that person was revoked, he would face up to two more years in prison. Under Wisconsin's current truth-in-sentencing system, if a person sentenced to 10 years' imprisonment (five years initial confinement and five years extended supervision) is revoked in year eight of the sentence, he faces up to five years in prison. With no credit for any of the time spent successfully following rules of supervision in the community, the person faces the possibility of cycling repeatedly in and out of prison. This is a particularly significant risk for individuals who struggle with substance abuse or untreated mental illness, for whom compliance with supervision rules is often more challenging.

The result is the potential of being involved with DOC supervision for a significantly longer period than the sentencing judge contemplated. Currently 54.3 percent of all reincarceration admissions to Wisconsin DOC are for revocations only, in the absence of a conviction for a new criminal offense. This is costing Wisconsin millions in taxpayer dollars with little to show for it in terms of public safety.

In many states, individuals serving terms of post-release supervision are given credit for time spent in compliance with the rules of supervision. In Kentucky, for example, after serving a minimum term of 12-24 months on supervision, certain categories of offenders can receive "compliance credit" for every month spent in compliance with the terms of their parole release. In Louisiana, earned compliance credits are available for all non-violent, non-sex offender parolees not participating in a specialized court program for each month spent in compliance with the conditions of release. In Alaska, all parolees are eligible for earned compliance credits, at a day-for-day rate, awarded on a monthly basis. Similarly, all Mississippi offenders on

probation, parole, and post-release supervision who are in compliance with the terms and conditions of supervision, earn day-for-day sentence credit against the length of their supervision terms. In theory, these laws function both as a way of crediting releasees for restraints on their liberty, and also serves as an incentive for greater compliance.

Solutions

- Establish lower maximum caps for length of extended supervision.
- Provide credit against the term of extended supervision for every month spent in compliance with the terms of supervision.
- Conduct a study of how frequently revocations result in more time involved with DOC than originally ordered by the court.
- Examine the average lengths of supervision imposed for high frequency crimes in each county, and determine what value, if any, is created by providing supervision for a period longer than five years after release.

Bail Jumping

The Problem

Bail jumping is one of the most charged offenses in Wisconsin. The crime is defined as the intentional violation of a condition of bond. Whether bail jumping is a felony or a misdemeanor depends solely on the underlying charge: if the original charge is a misdemeanor, then any bail jumping will be charged as a misdemeanor. If the original charge is a felony (even if the case is resolved with misdemeanor charges), then any bail violation will be charged as a new felony offense. It can be used by the State to secure a guilty plea on an underlying offense or bolster the number of felony offenses charged—a key data point for allocating the number of prosecutors to which

counties are entitled. Bail jumping charges can remain even when the underlying charges have been dismissed.

Example – The defendant is charged with felony uttering (writing a bad check). When the defendant shows up to court 10 minutes late, the State adds a charge of felony bail jumping. Because most bail jumping charges are simple to prove, there is now increased pressure on the defendant to reach a plea deal even though the underlying charge may be worthy of a jury trial.

Bond conditions imposed on defendants may or may not be related to the underlying offense. Common conditions can include not only avoiding contact with putative victims, but also curfews, restrictions on the consumption of alcohol (even for non-alcohol-related offenses), and other terms that unnecessarily restrict liberty broadly. Moreover, violations of these bond conditions range in seriousness. Even so, every single violation, however overlapping or unrelated to the underlying charges, can form the basis of a new misdemeanor or felony offense. Given these facts, it appears that the current statutory classification may be more of a means of securing plea deals rather than serving its original goal of preventing law violations by people awaiting trial.

Reforms from Other States

In other states, the penalty for failing to appear in court or otherwise violating bond conditions is usually the forfeiture or modification of bond. In many states, bail jumping – violating a condition of bond – is only punishable as a crime when a defendant intentionally fails to appear in court. Violation of other bond conditions may lead to forfeiture of the bond, and a potential return to custody, but does not create new criminal liability. When non-appearance (or any other violation) does form a basis for criminal charges, frequently—though not always—the violation is capped at the misdemeanor level (with the apparent expectation that serious violations, such as the commission of a new crime, will be charged separately).

Solutions

- Examine other states' charging schemes to see if Wisconsin is in line with other states.
- Cap the crime of bail jumping at the misdemeanor level in most cases, and limit it to non-appearance, with amendment of the bond amount or bond conditions as the consequences for violation of all other conditions of release.

Conditions of Court Supervision

The Problem

In Wisconsin, the Department of Corrections monitors compliance with release conditions by people serving sentences of probation, parole, and extended supervision. There are currently 18 standard conditions of supervision for all offenders, and six additional standard conditions for sex offenders. Individuals can also be given additional "special conditions" that apply to them individually. As is true in most states, judges set the conditions of supervision for people on probation and extended supervision

Unlike many other states, however, Wisconsin allows the Department of Corrections to impose additional conditions of supervision. This can lead to lengthy lists of supervision conditions. Complying with these conditions—some of which clearly promote public safety and some of which do not—can create practical and financial challenges for individuals on supervision.

Both judges and the Department of Corrections serve an important role in monitoring those on supervision and ensuring they comply with their conditions. Many rules doled out by judges and the DOC are justifiable and necessary to ensure public safety, but imposing and enforcing too many rules—particularly those that restrict otherwise-legal behavior that has no nexus to

the individual's underlying offense—can make it more difficult for individuals to successfully complete their terms of supervision. A more streamlined approach where judges and the DOC work together on creating conditions commensurate with the underlying offense and tailored to the monitored individual will allow for more successful supervision without sacrificing public safety.

Reforms from Other States

Several states such as Utah, Maryland, Alabama, Mississippi, Tennessee, Arizona, Missouri, Ohio, Pennsylvania and South Carolina have implemented incentivized funding at the adult and/or juvenile level that awards community corrections departments with a percentage of savings to the state by reducing revocations to prison by implementing recidivism-reducing strategies such as electronic monitoring, specialized caseloads, lower caseloads for supervision officers, increased drug treatment, etc. Results of these programs have generally been successful. For example, Arizona was able to decrease revocations and avoid millions of dollars in prison spending after implementing this type of incentivized funding.

Additionally, states such as Alaska, Maryland, Utah, Alabama, Mississippi, South Dakota, West Virginia, Kansas, Georgia, Delaware, Pennsylvania, Arkansas, Kentucky, Louisiana, North Carolina, South Carolina, and Texas have all authorized in statute graduated sanctions for technical violations. Jurisdictions that have implemented swift and certain sanctions for technical violations, along with rewards for compliance, have been shown to be more effective in reducing reoffending, particularly for drug offenders, than ordinary probation.

Solutions

- Clarify the standards for imposing rules of supervision. Require all conditions to have an articulable connection to the crime of conviction, or to risks posed by an individual at the time of the current offense.

- Require judicial oversight on a condition of supervision imposed by the DOC and require that they must meet the same standards as above.
- Increase array of incentives available for those on extended supervision, (including credit for time spent in compliance with the rules of supervision) to help incentivize good behavior.
- Implement incentivized funding to the department of corrections in order to increase the number of people successfully completing terms of supervision and to reduce revocations to state prisons.

Data

The Problem

In many ways, Wisconsin has long been a leader in making data about criminal cases transparent and available to the public. Our Circuit Court Automated Program (CCAP) allows people to obtain data about specific cases easily from an on-line source. Analyzing larger data sets is more difficult, in part because CCAP lacks a publicly accessible interface. Data about other stages of the justice system is not as readily available.

Some states, such as Florida, gather data about the criminal justice system throughout the process in hopes of identifying systemic and geographic anomalies that could provide insight into bottlenecks. Wisconsin should also consider collecting data to see if different approaches cause disparate impacts.

There are a number of areas where information about Wisconsin's justice system is lacking transparency and consistency from county to county. One involves criminal charges that are brought against defendants or those on supervision. For example, district attorneys' charging practices differ greatly for each jurisdiction for similar conduct. Additionally, the Department of

Corrections' handling of violations of supervision varies greatly from case to case. Without accurate and consistent data, these critically important components of the criminal justice system cannot be accurately assessed.

Wisconsin has gaps and inconsistencies in other important data points related to corrections. For example, county jails and state community corrections offices do not have a uniform and easy way of collecting information about many aspects of their work that are relevant to public policy. Data points such as the average amount of time probationers spend incarcerated on "holds," and the available programs, program capacities, and waiting list numbers for correctional programs in jails, prisons and in the community would all be valuable information for the public and for policymakers. Currently, much of that information is unavailable or inaccessible.

Making data collection more robust and uniform would allow policymakers to have a clearer understanding of how tax dollars are being spent, how and when custody is being used, and how effective our interventions are in the lives of people involved in the criminal justice system.

Reforms from Other States

Tennessee requires monthly average data from the counties' jail be collected and reported.

Florida recently enacted a law that requires the collection of a whole range of criminal justice data.

Solutions

- Create a statewide system for uniform and robust data reporting pertaining to county jails, community supervision, and juvenile detention and supervision to augment our already robust prison and court operations data. Permit the state Criminal Justice Coordinating Council, policymakers and researchers access to the data for regular review.

Over-Criminalization

The Problem

Wisconsin law criminalizes roughly 1,000 different acts, some of which regulate identical conduct in overlapping ways. Many of these offenses relate to occupational regulation, environmental or business activity that were never handled traditionally by the criminal justice system and are rarely charged criminally. Under a 1996 decision of the Wisconsin Court of Appeals, many of these regulatory crimes can be prosecuted even when defendants did not intend to violate the law or know they were doing so.

In 2014, the Legislature made a first effort to examine the problem of over-criminalization by establishing the Study Committee on the Review of Criminal Penalties. The Committee was charged with reviewing the penalties for misdemeanor and low-level felony offenses within the state's criminal laws. The Committee published a report in 2015 that provided substantial recommendations for reforms of the state's criminal code, which would classify unclassified misdemeanors, repeal obsolete criminal laws, and change the penalties for certain misdemeanors to a more appropriate civil forfeiture form of accountability.

None of these recommendations were adopted by the Legislature, however, leaving in place unnecessary, vague, duplicative and obsolete criminal penalties that can be exploited by the government as a means of exerting pressure on defendants charged with non-violent, low-level crimes. Nor has the Legislature acted to clarify the traditional rule that, unless otherwise specified by statute, intent is a necessary element of criminal behavior. Curtailing the number and kind of activities that are deemed criminal in nature and moving them towards civil and administrative sanctions, or, in the alternative, to more clearly define crimes, is necessary.

A portion of over-criminalization occurs when crimes lack a clear element of *mens rea* (literally, "guilty mind"). Without

an established required criminal mentality, people acting in good faith may have no idea if they are subject to criminal penalties. For the most part, Wisconsin statutes within the criminal code are explicit as to the level of *mens rea* required for conviction. (The most common *mens rea* is intent, followed closely by criminal recklessness.) Many regulatory crimes outside the criminal code are silent on *mens rea*, however. For example, Wis. Stat. 442.11 cites a variety of behavior related to CPAs and impostor CPAs that can be punished by up to a year in the county jail. The law is silent on whether the penalties apply to honest mistakes that are promptly corrected.

One exception within the criminal code is the crime of disorderly conduct found at Wis. Stat. 947.01. One of the most-charged crimes, disorderly conduct does not state the level of intent the state needs to prove.

Reforms from Other States

Both Ohio and North Carolina recently addressed over-criminalization in their jurisdictions.

In 2014, Ohio passed legislation creating the Ohio Criminal Justice Recodification Committee to review and propose changes to the state's entire criminal code. Last summer, the committee released its 4,000-page report containing recommended reforms to the state's criminal code. This report sought to simplify the code in a consistent manner, eliminate redundancy, and ensure proportionally in the imposition of penalties. Ultimately, the committee proposed that 26 sections of the state's criminal code be eliminated or merged with other sections.

North Carolina in 2018 passed legislation to begin its own recodification initiative, requiring all government agencies and the Administrative Office of the Courts to submit a complete list of conduct subject to criminal punishment under North Carolina law. The law also requires all counties, cities, and towns to submit a list of ordinances that subject residents to criminal punishment. Once these

lists are submitted to the legislature, a working group will use them to simplify and streamline the state's criminal code.

Additionally, states such as Texas, Michigan and Ohio have all implemented default *mens rea* standards that dictate what the level of criminal intent is when a statute is silent. This ensures that people are generally not criminally liable when they did not have the intent to break the law, unless the legislature is clear that negligence will suffice to commit the crime.

Solutions

- Require a default standard of intent when a statute is silent.
- Create a task force to analyze every criminal law within and outside the Criminal Code to determine whether it is duplicative, unnecessary, overly broad, unclear or otherwise insufficient to serve its intended purpose.
- Establish "safe harbor" provisions for crimes outside the penal code. A safe harbor provision is an element in a statute or regulation that affords protection from liability or penalty if certain conditions are met. Often these conditions require that no harm has occurred as a result of the violation and that the offender take prompt steps to come into compliance with the statute or regulation that has been violated.

Collateral Consequences

The Problem

The collateral consequences of a criminal conviction in Wisconsin are wide and varied based on the offense. There are cases when barring people with certain past convictions from holding specific jobs makes sense. In many cases, though, collateral consequences

can impose unnecessary hardships on people who have already paid their debts to society, making it difficult to obtain gainful, appropriate employment or to fully reintegrate into the community. According to the Federal Bureau of Prisons, ex-offenders who are employed are three to five times less likely to reoffend.

Wisconsin law is in many ways a leader in preventing private employment discrimination: employers are generally permitted only to consider past convictions as a factor in hiring when a person's crime of conviction is "substantially related" to the job for which the person is applying. What it means to be "substantially related" is less clear: many Wisconsin statutes require denial of employment licenses unless a person "[d]oes not have an arrest or conviction record subject to ss. 111.321, 111.322 and 111.335, Stats," without specifying how the laws interact. Licenses that fall into this category include first responders, landscape architects, chiropractors, funeral directors, and nurses, among others. These ambiguities make Wisconsin law often unclear on the consequences of a conviction related to obtaining a state-issued occupational license.

Additionally, many occupational licenses only act as unnecessary barriers to good-paying jobs in vocations that are taught in prison. These obstacles to employment in turn affect the ability to secure housing and other key elements that increase the likelihood of successful reentry.

Wisconsin has done important work already to reduce unnecessary barriers, including the establishment of a legislative study commission in 2016 to study Reducing Recidivism and Removing Impediments to Ex-Offender Employment. Wisconsin has also enacted substantial reforms aimed at ensuring second chances, including the adoption of legislation that bars government agencies from denying an occupational license based solely on an individual's arrest or conviction record.

This type of reform could be paired with a liability limitation which bars or limits legal action against employers solely for hiring an individual with a criminal record.

Reforms from Other States

Ohio has had early success with its Certificate of Qualification for Employment (CQE), and other states have enacted similar provisions, such as Illinois's Certificate of Good Conduct and Connecticut's Certificate of Rehabilitation. While the effectiveness of these certificates is still in question, some research has shown that they increase the "likelihood of receiving an interview invitation or job offer more than threefold." In addition, several model laws exist for such legislation, including the Model Penal Code's Certificate of Restoration of Rights, and the Uniform Law Commission's certificate of the same name.

Texas has adopted limited liability provisions for hiring and/or housing individuals with certain criminal records to provide protections to employers and housing managers who want to give ex-offenders a second chance.

States such as Arizona, Texas and Louisiana have passed laws that authorize a provisional license to ex-offenders who are otherwise qualified for the license but for their criminal record. These probationary-style licenses strike a balance between getting someone back on their feet and the interests of public safety.

Solutions

- Provide clearer guidance to licensing agencies about how to decide when a conviction is "substantially related" to a crime.
- Create a certificate of relief program.
- Create a liability limitation for employers and housing managers who hire/house employees with criminal records.
- Implement a provisional licensing scheme for certain occupations.

Expunction

The Problem

As is true in many states, the situations in which a criminal law can be expunged in Wisconsin are limited by both the age of defendant and the level of offense. Typically, expunction is available to young, lower-level offenders as a means of helping them avoid the ongoing stigma and collateral consequences of past indiscretions. What makes Wisconsin's law unique is that it requires judges to order relief at the time of sentencing, with the actual expunction (if approved) occurring at a later date, contingent on the defendant's successful completion of his sentence.

In other words, judges are asked to decide whether expungement is appropriate very soon after the crime has been committed, rather than a year or more later, when the defendant's rehabilitation (or lack thereof) is more readily apparent. That oddity of timing, combined with a lack of statutory clarity about when it is appropriate to grant expunction, means that the mechanism is underutilized for people who go on to live law-abiding lives following a criminal conviction.

Changes that might improve the law would include raising the age of those eligible for expunction and expanding the categories of offenses for which expunction is potentially available. Recent reports on this topic were published by the Badger Institute and The Public Policy Forum.

Reforms from Other States

Many states, including Tennessee, Montana, Indiana and Illinois allow an individual to seek expunction of multiple convictions after a prescribed period of time if the offenses are independently eligible and the individual has no subsequent convictions. This saves both the court system and the ex-offenders significant money and time by not requiring expunction of each conviction separately and provides relief to those who may have been guilty of multiple crimes but later became productive citizens.

Tennessee, North Carolina, Illinois and Pennsylvania allow for partial expungement that removes from digital court any records of past arrests, dismissed charges, indictments or dropped charges related to a successful conviction that may or may not itself be eligible for expunction. This process allows individuals to remove items from their criminal record that did not actually relate to the conduct for which they were convicted.

States like Texas allow for a record to be sealed from the public for certain first-time convictions but allow law enforcement and sensitive industries such as healthcare and education to see through the sealing.

California, Colorado, Idaho, North Dakota and West Virginia have enacted mechanisms that allow individuals to ask courts to reduce their (mostly non-violent) felony convictions to misdemeanors after a certain waiting period without another conviction.

Solutions

- Authorize judges to rule on petitions for expunction after a sentence has been served, as well as at the time of sentencing.
- Eliminate the age restriction for expunction.
- Allow partial expunction of past arrests, dismissed or dropped charges, and indictments.
- Allow judges, as an alternative to expunction, to reduce the classification of a criminal conviction from a felony to a misdemeanor (without altering the crime of conviction) after a certain waiting period without another criminal conviction.

Reentry Services Combined with Workforce Development

Data about literacy, educational attainment and work experience of those who are incarcerated reveals a startling

truth: they do not have the education, literacy and numeracy skills, and work experience necessary to acquire meaningful employment when they return to our communities. Studies clearly show that, while people with a criminal history face significant barriers to securing employment, providing educational and vocational classes is an effective way to assist them in overcoming these barriers and increasing public safety. Prison academic and vocational programs have been found to reduce recidivism by up to 13 percent, and trade or job training programs increase the likelihood of post-release employment by up to 21 percent.

Wisconsin's Department of Corrections provides a variety of educational and vocational programs for those incarcerated in its facilities, but these programs do not have enough capacity to fill the demand needed to allow those who are incarcerated to acquire skills they can utilize to achieve success upon reentry. Currently, these programs take the form of partnerships with local technical colleges or temporary work release programs. Wisconsin's 2016 Study Committee on Reducing Recidivism and Removing Impediments to Ex-Offender Employment recommends that the state expand the current evidence-based programming in prisons and adopt a new model allowing the DOC to secure funding for additional programming.

The state could also expand access to evidence-based programming in a cost-effective manner by providing community organizations with facility access to host such programs in Wisconsin prisons. Some examples of local non-profits providing programming in prisons include The Last Mile, Miles of Freedom, Prison Fellowship and Hudson Link.

Solutions

- Expand access to prisons for local and national non-profit organizations that provide evidence-based, recidivism-reducing strategies.
- Examine how workforce development programs in prisons can be transitioned to more specific localities that the prisoner will return to upon release.

As individuals and organizations that care about the future of Wisconsin, we recommend the above solutions as proven strategies for increasing public safety, saving taxpayer dollars, respecting human dignity, growing the labor force and ensuring stronger families.

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