



How the Sunshine State Can Shine on Criminal Justice

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Florida has long been one of the nation's top importers in the most important category of all – people. Whether to find opportunity in a state with no income tax or to enjoy a blissful retirement, Florida has been a shiny beacon for millions of people from other states and countries. Now, in addition to importing people, Florida has an opportunity to import conservative criminal justice reforms from states like

Texas, Georgia, and South Carolina that have proven it is possible to reduce both crime and incarceration.

In 2016, Florida began taking small, but important, steps in the direction of reform. Advocates in Florida who are eager to see the state go further in the coming years will need to continue doing what they did in 2016: making conservative arguments that focus on holding both offenders and

the criminal justice system accountable, keeping families together, and reintegrating offenders into the workforce. In the world of criminal justice, there is a right way and a wrong way to pursue reform. The conservative arguments are the right way forward—they always have been—and advocates should continue to have confidence in the conservative argument for why reform is imperative.

To fully understand how we can chart a path forward to a criminal justice system that is at once smaller and more effective, we must understand how we arrived at the status quo in which, as of 2017, 700 out of every 100,000 Americans is behind bars.

For the sake of comparison, Australia incarcerates 150 out of every 100,000; England and Wales incarcerate 130 out of every 100,000; and Canada incarcerates only 114 out of every 100,000. In these Anglo-American nations that share a common legal and political heritage with the United States—and thus where reasonable comparisons can be made—incarceration rates are far, far lower. America's prison-focused strategy for crime control made sense in an earlier era, but the pendulum has swung too far in the direction of incarceration.

The 1950s and early 1960s were a relatively peaceful and low-crime era. The “white picket fences” caricature of this period is perhaps overstated, but it is true that levels of basic street crime, such as theft, murder, and assault, were fairly low. For reasons that are still unclear, this tranquility began to ebb in the late 1960s.

Some sociologists blame the debased social mores of the period—the phrase “if it feels good do it” may have become a criminal mantra, not just a hippie mantra—but whatever the cause, crime began to rise throughout the Western, developed world, including America.

As violent crime increased rapidly every year from 1968 to 1994, Americans understandably lost patience with politicians they perceived as having little to offer but excuses for lawbreaking. Progressive policy-makers argued that criminal behavior was rooted in social pathologies

like racism that could not be fixed with mere legislation, and thus, lost credibility with the public due to their inaction.

Conservatives who believed in personal responsibility stepped in to fill the breach, arguing for more incarceration. To this day, Americans of a certain age remember how Richard Nixon, Ronald Reagan,

and George H. W. Bush (not to mention countless state and local politicians) placed crime control at the center of their political agendas and “tough on crime” rhetoric at their center of their campaigns. By the 1990s, even progressives got the message, and politicians like Bill Clinton ran for office on the promise that they too would be “tough on crime.” Clinton notoriously even left the presidential campaign trail in 1992 to return to Arkansas to oversee an execution.

In the mid-1990s, crime began to decline. According to FBI data, crime declined steeply from 1994 to 2014,¹ and it

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has now returned to levels not previously enjoyed since the late 1960s. The extent to which ratcheting up incarceration caused the crime decline is unclear. Crime during this period fell in countries throughout the developed world, even in countries that did not pursue policies as punitive as America's. Moreover, even within the U.S., some "holdout" states did not increase sentence lengths quite so dramatically, and yet crime fell in these states just as it did in those that had increased sentence lengths.² Criminologists suspect that approximately 75 percent of the decline can be attributed to a mix of demographic and technological changes.³

A quarter, however, was probably the result of a "tough on crime" sentencing and corrections policy, and conservatives, therefore, had won at least a partial public policy victory. Understandably, many of them were resistant to altering their "tough on crime" message. For this reason, incarceration rates continued to rise, and whereas it could plausibly have been argued in the late 1960s that the U.S. was under-incarcerating, it is now clear that the U.S. is dramatically over-incarcerating.

Legislators in our home state of Texas were among the earliest conservatives to recognize this new reality. In 2007, they were presented with a startling estimate: due to extraordinary population growth

in Texas, an additional 17,000 prison beds would be needed by 2012, at a cost of \$2 billion. Historically, the legislature tended to accept estimates of this sort without dispute and simply enact the recommended policies. In 2007, however, legislators put their foot down and asked whether there was a different path available.

State judges explained to them that there was in fact a different path. The judges did not have adequate community-based alternatives, and thus they frequently sent low-level, nonviolent offenders to the default option: prison. These prison beds were more expensive than the community supervision alternatives (in Texas, incarceration costs about \$50 per day, while probation costs about \$3 per day), and thus Texans were paying more money and getting worse results.

The Texas Legislature and Governor Rick Perry took the advice of the judges and the advocacy community, and rather than spending \$2 billion on new prison beds, they spent approximately \$300 million on improving the community-based supervision of offenders: parole, probation, and drug courts.

These reforms worked. When 2012 arrived, the state was one year removed from having closed a prison. Then, in 2013, the state closed yet another two prisons. In



early 2017, it shuttered yet another.

To evangelize across the country about Texas's exciting success, we organized a national initiative in 2010 called Right On Crime (where Marc still serves as the Policy Director). Its premise was simple: criminal justice reform is a conservative issue, and anyone who cares about public safety, government spending, the scope of government power, and rebuilding American families must care about it.



The message resonated. In the six years since Right On Crime launched, dozens of deeply conservative “red” states like Alabama, Alaska, Georgia, Mississippi, and South Dakota (among others) have adopted reforms like Texas’s 2007 reforms, and some have gone even further.

For example, over the last six years, nearly a dozen states—including Florida’s neighbor Georgia—have expanded the ability of prisoners to acquire “earned time credits.” These credits are time earned off the end of a sentence, and they incentivize

offenders to take certain steps while under supervision, such as drug treatment and job training, that will help them to be successful when later re-entering society.

More than a dozen states—including both of Florida’s neighbors, Alabama and Georgia—have authorized graduated sanctions for offenders who are on parole or probation so that violations are met with short, immediate jail stays—rather than lengthy revocations to prison. Most research now indicates that the swiftness and certainty of a punishment is more important than its harshness. These graduated sanctions act as a kind of “shock treatment” for offenders. If you miss appointments with your probation officer or fail to participate in treatment, you may be instantly sent to jail for a weekend. After that, if the probationer is still non-compliant, a week-long jail stay may result. Other graduated sanctions include curfews, electronic monitoring, and an extension of the probation term.

These graduated sanctions are far more successful at reducing re-offending than simply sending an offender back to prison for many months or years even though they did not commit a new offense.

The American Legislative Exchange Council (ALEC), the nation’s largest group of conservative state legislators, has enacted model legislation encouraging the use of graduated sanctions, and it also includes graduated incentives for exemplary behavior. In addition to earning time off the supervision term, these incentives in

some jurisdictions have ranged from bus tokens to reduced reporting requirements. Notably, such reduced reporting likely enhances public safety, as the research has found that it enables supervision officers to maximize the time spent with those most likely to recidivate. Those offenders who have established a track record of exemplary compliance and who have already been on supervision for at least two years are very unlikely to recidivate, and in fact many should be eligible for early termination.

Additionally, more than 10 states have reclassified drug and property offenses so that crimes previously punished as felonies are now more appropriately treated as misdemeanors. These changes have generally come through legislative action, but in 2016 in Oklahoma, they were passed by ballot initiative. In the very same election, Oklahoma voted overwhelmingly in support of Donald Trump for president (he won every county), thus demonstrating that there is no reason a deep red state can't support criminal justice reform.

These policies—earned time credits, graduated sanctions, the reclassification of certain offenses—are just a few of the many reforms that states have pursued. Other reforms include creating a presumption of probation for certain low-level offenses and expanding the use of electronic monitoring. Many states have also authorized

“performance-incentive funding” so prisons are compensated for “correcting” offenders, not merely for housing them (importantly, this means that counties no longer have a fiscal incentive to simply dump nonviolent offenders on the state). Some states have additionally tackled the overcriminalization of ordinary business activities by ensuring that all crimes contain an appropriate intent standard or “mens rea.” Reforms of this sort would be valuable in Florida, where a Miami man was recently sentenced to 18 months in prison merely for filing the incorrect paperwork when importing orchids.

In 2016, Florida also took steps in the direction of reform by changing a notorious mandatory minimum in the state (the “10-20-life” law), by reforming civil asset forfeiture practices which allow law enforcement to seize and keep personal property based merely on the suspicion that

it has been involved in a crime, and by allocating new funds to improve mental health services.

The key to passing these reforms was understanding and communicating how they are essential to a conservative, limited government vision. One of Margaret Thatcher's most famous bits of wisdom was counseling that “first you win the argument, then you win the vote.” The advice applies here. Legislators who care about criminal justice reform will not earn the votes of their conservative colleagues unless they

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argue persuasively that criminal justice reform is a conservative issue.

The argument shouldn't be hard to make. Governments these days engage far too often in tedious and unproductive debates about areas in which they should not be involved. Criminal justice is different. Everyone understands that criminal justice is a legitimate function of government. The question is how to exercise government power in this space in a way that maximizes public safety while looking out for taxpayers and civil liberties.

All signs indicate that Florida may now build on several important though non-comprehensive bills that have been passed in the last few sessions. It can for instance become a national pioneer on the use of civil citations. In 2016, the people of Duval County overwhelmingly elected a reform-minded state's attorney in the Republican primary named Melissa Nelson. In Pinellas County, Sheriff Bob Gaultieri has redefined the office by operating highly effective police diversion programs for juveniles and adults and redirecting hundreds of homeless people who committed minor offenses like criminal trespass from languishing for months in jail where it costs \$80 a day to

a shelter that with charitable support costs taxpayers only \$13 a day. Thanks to the Sheriff's leadership, more officer, court, and prosecutorial resources can be focused on violent and serious crime.

Conservatives have always been on the right side when arguing that individuals must be held accountable for their actions, but too often accountability has been confused with retribution. Apart from the most heinous offenses such as murder and rape, survey research has found the public is most interested not in punishment for punishment's sake, but in reducing recidivism and increasing the chances that the offender will emerge from the criminal justice system as a productive, law-abiding citizen who is

an asset, not a burden, to both their family and society. Conservative states have been leading the way to a system that increasingly delivers on this goal and now it is time to bring this approach to the Sunshine State.

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1. Crime rates ticked up slightly in 2015, but the increase was minor and criminologists will not know for some time whether it represents random year-to-year variation (such as the kind that existed in the low-crime 1960s) or whether it indicates the start of a trend.
2. Prison and Crime: A Complex Link, Pew Charitable Trusts, Sept. 11, 2014.
3. John F. Pfaff, Locked In (Hachette Book Group, Inc. 2017), 114-15.