

## **Criminal Justice Policy in New Mexico: Keys to Controlling Costs and Protecting Public Safety (Updated)**

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### **Introduction: Current Policies and Challenges**

In October 2013, a bipartisan joint legislative committee was designed to develop a rewrite of the state's criminal laws.<sup>1</sup> This represents an ideal opportunity for New Mexico to learn from recent successful reforms in other states that can enhance public safety, reform offenders, and control costs to taxpayers.

New Mexico currently has 11 prisons, of which six are privately operated. The New Mexico prison population has increased from 6,145 in June 2003 to 6,695 in June 2013, which represents a slower growth rate than most other states over this time.<sup>2</sup> However, New Mexico's prison population was only 4,945 in 1998.<sup>3</sup>

New Mexico had approximately 1 in 35 residents are under correctional control in 2009.<sup>4</sup> In 2008, New Mexico spent 4.6 percent of its general fund on corrections.<sup>5</sup> 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.<sup>6</sup> The average prison cost in New Mexico is more than \$31,000 per year when annualized construction costs are included. Despite this spending, the three year re-incarceration rate for New Mexico prisons is 44.62 percent.<sup>7</sup>

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<sup>1</sup> Amanda Goodman, "Lawmakers Launch Rewrite of N.M. Criminal Laws," KRQE News 13, Oct. 24, 2013, <http://www.krqe.com/news/local/lawmakers-launch-rewrite-of-nm-criminal-laws>.

<sup>2</sup> Alex Adams, "Estimated Number of Offenders in New Mexico Corrections Department Facilities in October Eligible for Controlled Release," New Mexico Sentencing Commission, Fall 2013 <http://nmsc.unm.edu/reports/2013/estimated-number-of-offenders-in-new-mexico-corrections-department-facilities-in-october-eligible-for-controlled-release.pdf>. New Mexico Sentencing Commission Data Report: An Overview of the Juvenile Justice and Criminal Justice Systems, July 2004, <http://nmsc.unm.edu/reports/2004/NMSCDataReport.pdf>.

<sup>3</sup> New Mexico Department of Corrections, "Offender Statistics," <http://corrections.state.nm.us/statistics/intro.html>

<sup>4</sup> "1 in 31 Report," Pew Center on the States, March 2009, [http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact\\_Sheets/PSPP\\_1in31\\_factsheet\\_NM.pdf](http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact_Sheets/PSPP_1in31_factsheet_NM.pdf).

<sup>5</sup> *Ibid.*

<sup>6</sup> Iris J. Lav and Elizabeth McNichol, "New Fiscal Year Brings No Relief From Unprecedented State Budget Problems," Center on Budget and Policy Priorities, July 29, 2009, <http://www.cbpp.org/cms/?fa=view&id=711>.

<sup>7</sup> New Mexico Corrections Department, "2010-2011 Annual Report," Available at: [http://corrections.state.nm.us/pio/docs/2010-2011\\_Annual\\_Report.pdf](http://corrections.state.nm.us/pio/docs/2010-2011_Annual_Report.pdf).

There are an estimated 19,638 individuals on probation and parole<sup>8</sup>. The average caseload size is 93. Probation and parole violators accounted for 2,069 admissions to prison in 2011 more than a third of the total admissions<sup>9</sup>. Of these 2,069 revocations from supervision, new convictions for violating state laws accounted for only 15 percent of the revocations, while positive drug tests, failure to report, and alcohol use accounted for 37 percent, 20 percent, and 17 percent, respectively. This illustrates how more effective supervision could slow the rate of prison admissions, yet probation and parole caseloads per officer have risen from 95 in fiscal year 2010 to 114 in the third quarter of fiscal year 2012, making it more difficult to safely supervise offenders in the community.

Fortunately, there are numerous policy options that New Mexico policymakers can take to avoid building the new prisons that would likely 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.<sup>10</sup> Approximately 85 percent of New Mexico offenders have substance abuse problems.<sup>11</sup> 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.<sup>12</sup> Similarly, the General Accounting Office reported recidivism reductions of 10 to 30 percentage points below the comparison group.<sup>13</sup> A 2006 California study found drug courts cost less than \$3,000 per participant, far cheaper than prison.<sup>14</sup> 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.

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<sup>8</sup> Bureau of Justice Statistics, "Adults On Probation, Federal And State-By-State, 1977-2011." Available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2026>. "Adults On Probation, Federal And State-By-State, 1977-2011." Available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1997>.

<sup>9</sup> New Mexico Department of Corrections, Report to the Legislative Finance Committee, "Reducing Recidivism, Cutting Costs and Improving Public Safety in the Incarceration and Supervision of Adult Offenders," June 2012, <http://www.nmlegis.gov/lcs/lfc/lfcdocs/perfaudit/Reducing%20Recidivism.%20Cutting%20Costs%20and%20Improving%20Public%20Safety%20in%20the.pdf>.

<sup>10</sup> New Mexico Department of Corrections, "Offender Statistics," <http://corrections.state.nm.us/statistics/intro.html>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Drug Court Facts, Alameda County Drug Court, <http://www.alameda.courts.ca.gov/dcs/facts2.html>.

<sup>13</sup> "Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes," General Accounting Office, February 2005, <http://www.gao.gov/new.items/d05219.pdf>.

<sup>14</sup> "California Drug Court Cost Analysis," May 2006, <http://www1.spa.american.edu/justice/documents/2189.pdf>

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.<sup>15</sup> 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.<sup>16</sup>

**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 commit 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 93 percent and cut both revocations and new arrests by two-thirds.<sup>17</sup> 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, likely saved California an estimated \$1.4 billion in its first five years.<sup>18</sup>

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.<sup>19</sup> 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

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<sup>15</sup> "Bernalillo County Metropolitan Court DWI-Drug Court Stage One Outcome Study," New Mexico Sentencing Commission, June 2009, [http://nmsc.isrunm.net/index.php/download\\_file/-/view/279](http://nmsc.isrunm.net/index.php/download_file/-/view/279).

<sup>16</sup> Governor Richardson's Task Force On Prison Reform Increasing Public Safety in New Mexico, "Before, During and After Incarceration: New Directions for Reform in New Mexico Corrections," June 24, 2008, [http://corrections.state.nm.us/reentry\\_reform/pdf/prision\\_reform.pdf](http://corrections.state.nm.us/reentry_reform/pdf/prision_reform.pdf).

<sup>17</sup> Angela Hawken and Mark Kleiman, "Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE," December 2009. Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> [http://www.pewcenteronthestates.org/uploadedFiles/HOPE\\_Research\\_Brief.pdf](http://www.pewcenteronthestates.org/uploadedFiles/HOPE_Research_Brief.pdf).

<sup>18</sup> Douglas Longshore, et. al., "Evaluation of the Substance Abuse and Crime Prevention Act," UCLA Integrated Substance Abuse Programs, March 13, 2006, [http://www.uclaisap.org/prop36/documents/SACPA\\_COSTANALYSIS.pdf](http://www.uclaisap.org/prop36/documents/SACPA_COSTANALYSIS.pdf).

<sup>19</sup> V. Dion Haynes, "Study Backs Treatment, Not Prison, For Addicts—Drug Habits Broken, Money Saved Through Arizona Law," <http://community.seattletimes.nwsourc.com/archive/?date=19990421&slug=2956358>.

50 percent reduction in drug use and 37 percent reduction in crime.<sup>20</sup> 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.”<sup>21</sup>

**Graduated Responses for Probationers and Parolees:** Nationally, a third to a half of prison admissions are individuals revoked from probation or parole. As noted above, the figure is even higher in New Mexico. 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.<sup>22</sup>

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.<sup>23</sup>

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 recidivate<sup>24</sup>, 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.<sup>25</sup>

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<sup>20</sup> Eric Martin, et. al., “Oregon Research Brief on Addiction Treatment Effectiveness,” The Association of Alcoholism & Drug Abuse Counselors of Oregon, <http://www.oregon.gov/DHS/addiction/outcome-flyer.pdf>.

<sup>21</sup> “An Examination of Drug Treatment Programs Needed to Ensure Successful Re-entry - Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary,” United States House of Representatives, <http://www.nida.nih.gov/Testimony/2-8-06Testimony.html>

<sup>22</sup> Achieving Better Outcomes for Adult Probation, California Legislative Analyst’s Office, May 29, 2009, [http://www.lao.ca.gov/2009/crim/Probation/probation\\_052909.aspx](http://www.lao.ca.gov/2009/crim/Probation/probation_052909.aspx).

<sup>23</sup> Brian Martin, “Examining the Impact of Ohio’s Progressive Sanction Grid, Final Report,” October 2008, <http://www.ncjrs.gov/pdffiles1/nij/grants/224317.pdf>.

<sup>24</sup> North Carolina Department of Corrections, <http://www.doc.state.nc.us/transition/workforce/index.htm>.

<sup>25</sup> “The Effectiveness of Community-Based Sanctions in Reducing Recidivism,” Oregon Department of Corrections, September 5, 2002, [http://www.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness\\_of\\_sanctions\\_version2.pdf](http://www.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf).

**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. During the period of Arizona's program, the revocation-to-prison rate was reduced by over 39 percent and new felony convictions fell by more than 41 percent.<sup>26</sup>

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.

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 20 percent, compared with a 54 percent rate for such offenders in state lockups.<sup>27</sup>

**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.<sup>28</sup> 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.<sup>29</sup> 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

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<sup>26</sup> Vera Institute of Justice, "Performance Incentive Funding: Aligning Fiscal and Operational Responsibility to Produce More Safety at Less Cost." November 2012. Available at: <http://www.vera.org/files/performance-incentive-funding-report.pdf>.

<sup>27</sup> Chris Lowenkamp and Ed Latessa, "Evaluation of Ohio's RECLAIM Funded Programs, Community Correctional Facilities, and DYS Facilities, August 2006," 2 Nov. 2008  
<http://www.dys.ohio.gov/dysweb/Reclaim/DYSRECLAIMreportAugust17.pdf>.

<sup>28</sup> Ariz. Rev. Stat. § 12-267, 13-901, 13-903 AND 13-917.

<sup>29</sup> Joan Petersilia, "When Prisoners Come Home: Parole and Prisoner Reentry" (New York: Oxford University Press, 2003); Joan Petersilia, "Employ Behavioral Contracting for 'Earned Discharge' Parole," *Criminology and Public Policy*, 6 (4), pp. 807-814 (2007)



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.

**Halfway Houses:** In 2012, the number of New Mexico prisoners still behind bars on “in-house parole” reached a record of 278.<sup>30</sup> Some 40 percent of these inmates have been approved for parole but remain behind bars because they have no home plan.<sup>31</sup> These inmates are typically broke and have no family available to take them in. Expanding the number of halfway house beds can address this. Halfway houses cost \$25 per day while prisons are more than twice as much.

**Modernize Sentencing Laws:** New Mexico should revise its sentencing laws to ensure prison space is prioritized for violent and dangerous offenders. One illustration of the need for change is that aggravated battery – inflicting great bodily harm or injuring someone with a deadly weapon – has a maximum sentence of only three years in prison. Meanwhile, someone dealing drugs convicted of a second offense can receive up to 18 years in prison. While drug dealing is indeed a serious offense, it is clear that there is a lack of proportionality in current sentencing laws.

**Utilize Victim-Offender Conferencing:** This is a proven restorative justice approach whereby the victim and offender reach a binding agreement that typically requires restitution and community service. If the offender fully performs the agreement, the case is not referred for prosecution. Conferencing is often used in property offense cases, particularly for first-time offenders, and must be chosen by both the victim and the offender, since the offender is required to take responsibility for his conduct. Statutes authorizing conferencing have been enacted in 14 states, but New Mexico is not one of them.<sup>32</sup>

Restitution agreements are fulfilled in 89% of cases whereas most court-ordered restitution is never collected.<sup>33</sup> A multi-site study found that 79 percent of victims that participated in conferencing arrangements were satisfied, compared with 57 percent of victims who went through the traditional court system.<sup>34</sup> In conferencing programs in the U.S. and Canada, victims who went through conferencing were more than 50 percent less likely to express fear of re-victimization than the sample of victims who did not go through conferencing.<sup>35</sup>

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<sup>30</sup> New Mexico Department of Corrections, Report to the Legislative Finance Committee, “Reducing Recidivism, Cutting Costs and Improving Public Safety in the Incarceration and Supervision of Adult Offenders,” June 2012, <http://www.nmlegis.gov/lcs/lfc/lfcdocs/perfaudit/Reducing%20Recidivism,%20Cutting%20Costs%20and%20Improving%20Public%20Safety%20in%20the.pdf>.

<sup>31</sup> *Ibid.*

<sup>32</sup> Mark Umbreit, et. al., “Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls.” *Marquette Law Review*. 89(2):251-304, <http://law.marquette.edu/s3/site/images/restorative/lawreviews/Umbreit.pdf>.

<sup>33</sup> J.Gehm, “Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation” (1990). In B. Galaway & J. Hudson (Eds.), *Criminal Justice, Restitution, and Reconciliation*, Monsey, NY: Criminal Justice Press.

<sup>34</sup> Mark Umbreit, Robert Coates and Boris Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Conferencing*. Monsey, N.Y.: Criminal Justice Press (1994).

<sup>35</sup> Mark Umbreit, Robert Coates, and Betty Vos, “Impact of Restorative Justice Conferencing with Juvenile Offenders: What We Have Learned From Two Decades of Victim Offender Dialogue Through Conferencing and

Conferencing can also reduce recidivism as the offender often realizes the harm they have caused and develops empathy and, without a criminal record, is better able to maintain or obtain employment.

A meta-analysis found that 72% of programs lowered recidivism.<sup>36</sup> Conferencing costs as little as \$75 per case; far less than the traditional system. New Mexico Attorney General Gary King recently endorsed this approach as a solution for relieving the growing burdens on the state's criminal justice system and providing more expedited justice for victims.<sup>37</sup>

**Solitary Confinement Step Down:** New Mexico has some 16 percent of its inmates in solitary confinement, more than twice the national average, and releases some inmates directly from solitary confinement into the community.<sup>38</sup> Research indicates inmates released directly from solitary confinement are more likely to recidivate, even after adjusting for all other factors.<sup>39</sup> 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.<sup>40</sup> 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."<sup>41</sup> That fear is not without basis. Employers lose 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million.<sup>42</sup> 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.

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Conferencing," Balanced and Restorative Justice Project, Community Justice Institute, Florida Atlantic University, November 28, 2000, available at

[http://rjp.umn.edu/img/assets/13522/Victim\\_Impact\\_RJC\\_with%20Juvenile\\_Offenders.pdf](http://rjp.umn.edu/img/assets/13522/Victim_Impact_RJC_with%20Juvenile_Offenders.pdf).

<sup>36</sup> Latimer, Dowden & Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis." (2000).

<sup>37</sup> Lauren Villagran, "Restorative justice may be good fit for NM, attorney general says," Albuquerque Journal, Nov. 7, 2013, [http://www.abqjournal.com/295936/news/nm-news/ag-restorative-justice-may-be-good-fit-for-nm.html?paperboy=loggedin&utm\\_source=emailed2friend](http://www.abqjournal.com/295936/news/nm-news/ag-restorative-justice-may-be-good-fit-for-nm.html?paperboy=loggedin&utm_source=emailed2friend).

<sup>38</sup> Erica Zucco, "Percentage of NM prisoners in solitary confinement higher than national average," Nov. 5, 2013, KOB Eyewitness News 4, <http://www.kob.com/article/stories/s3210264.shtml#.Uo6X0cQslhk>.

<sup>39</sup> David Lowell, L. Clark Johnson, and Kevin Cain, "Recidivism of Supermax Prisoners in Washington State," *Crime & Delinquency*, October 2007

<sup>40</sup> "A Look At Negligent Hiring Law Suits," VeriRes, Inc., <http://www.verires.com/nhiring.htm>.

<sup>41</sup> Harry Holzer, "Employment Barriers Facing Ex-Offenders," Urban Institute, May 19, 2003, [http://www.urban.org/UploadedPDF/410855\\_holzer.pdf](http://www.urban.org/UploadedPDF/410855_holzer.pdf).

<sup>42</sup> Mary Connerley, Richard Avery, and Charles Bernardy: "Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies." *Public Personnel Management* Vol. 20, No. 2.

**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.<sup>43</sup> 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.

**Adopt Default *Mens Rea* Provision:** In contrast to the Model Penal Code and approximately 20 other states, New Mexico law does not include a provision for a default culpable mental state or *mens rea* that would apply where criminal statutes are silent on the issue, meaning they do not contain an intent element. However, civil and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind—*mens rea*—but increasingly regulatory offenses such as those involving ordinary business and recreational activities disregard the *mens rea* requirement because it is inconvenient for a speedy prosecution. The American Legislative Exchange Council (ALEC) has enacted model legislation that would apply a strong *mens rea* element to all criminal laws that are silent on this issue.<sup>44</sup> While the legislature could still create a strict criminal liability statute, they would have to expressly specify that no culpable mental state is required for conviction.

**Eliminate Unnecessary Criminal Laws:** Like other states and the federal government, New Mexico’s body of criminal laws has grown to include a variety of behaviors that should not necessarily be criminal. For example, one New Mexico statute prohibits “improper use of official anthems” in public. While it not likely such laws would be routinely enforced, the overarching principle is that the body of criminal laws should not be so vast and complex that the average person cannot be on notice as to what is legal and what is criminalized.

**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 or even allow for the closing of unneeded facilities. In identifying prisons that could be shuttered, policymakers should keep in mind that private prisons have 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.<sup>45</sup> 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

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<sup>43</sup> “Collateral Consequences in New Mexico: A First Look,” New Mexico Sentencing Commission, September 1, 2008, [http://nmsc.isrunm.net/index.php/download\\_file/-/view/144](http://nmsc.isrunm.net/index.php/download_file/-/view/144).

<sup>44</sup> *Ibid.* 29-30.

<sup>45</sup> Matthew Mitchell, “The Pros of Privately-Housed Cons: New Evidence on the Cost Savings of Private Prisons,” Rio Grande Foundation, Mar. 2003, available at [http://www.riograndefoundation.org/papers/prison\\_study\\_march18.pdf](http://www.riograndefoundation.org/papers/prison_study_march18.pdf).



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.<sup>46</sup>

Despite these benefits, it is important that privatization be done in a way that ties funding to outcomes such as recidivism, rather than using per diem cost as the only criterion in procurement. Additionally, the state should not guarantee a minimum level of occupancy or sell prisons to private operators, as these approaches reduce the state's leverage and ability to ensure that many providers compete for the opportunity to operate correctional facilities each time contracts are up for renewal.

### **Conclusion: Future Directions**

With the establishment of a special committee devoted to improving New Mexico's criminal laws, New Mexico has an ideal opportunity to implement criminal justice policies that have worked in other states to control costs and reduce recidivism.

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<sup>46</sup> James Blumstein, et. al., Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons, Vanderbilt Law and Economics Research Paper No. 03-16, Dec. 2007.