

## The Chicago Lawyers' Committee's Review of Alternatives for Non-Violent Offenders

High incarceration rates have necessarily shed light on the issue of incarcerating non-violent offenders. With approximately 2.4 million people incarcerated, America has the highest incarceration rate in the world.<sup>1</sup> Non-violent offenders comprise over 60% of the prison and jail population in America,<sup>2</sup> and in Illinois specifically they constitute almost 70% of inmates in prisons.<sup>3</sup>

States across the country are on notice of these facts, and are increasingly implementing legislative reforms relating to non-violent offenders. Such reforms have laudable associated benefits. Experts estimate states would save 16.9 billion dollars a year if they reduced the incarceration rate of non-violent offenders by 50%.<sup>4</sup> Furthermore, such a reform would not negatively impact public safety. The Pew Center on the States argues that there is little or no evidence that keeping non-violent offenders locked up longer prevents additional crime.<sup>5</sup> The Center also found widespread public support for using incarceration alternatives for non-violent offenders, especially when prison savings are reinvested in less costly supervision options.<sup>6</sup>

Given the importance of this issue, the Chicago Lawyers' Committee for Civil Rights thought it critical to assess relevant reforms that provide for alternatives to incarceration for non-violent offenders. This article first addresses specific reforms that have been implemented nationwide relating to non-violent offenders. It then highlights examples of states that have implemented more aggressive aspects of such reforms. And finally, it discusses Illinois' policies towards non-violent offenders.

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<sup>1</sup> Tara Herivel and Paul Wright, *PRISON NATION*, 1 Routledge (2003); Ryan King and Marc Mauer, *A 25-Year Quagmire: The War on Drugs and its Impact on American Society*. THE SENTENCING PROJECT, 2007

<sup>2</sup> John Schmitt, Kris Warner, and Sarika Gupta, *The High Budgetary Cost of Incarceration*, CENTER FOR ECONOMIC AND POLICY RESEARCH (2010) 1, <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

<sup>3</sup> *The Cost of Prison Overcrowding in Illinois*, JOHN HOWARD ASSOCIATION, <http://www.thejha.org/overcrowding>.

<sup>4</sup> John Schmitt, Kris Warner, and Sarika Gupta, *The High Budgetary Cost of Incarceration*, CENTER FOR ECONOMIC AND POLICY RESEARCH (2010) 1, <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

<sup>5</sup> *The High Cost, Low Return of Longer Prison Terms*, PEW CENTER ON STATES, 40, [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf).

<sup>6</sup> *Id.*

## **I: Alternatives for Non-Violent Offenders**

Recently, many states have enacted policy reforms in an effort to proportionately penalize non-violent offenders rather than use overly harsh long prison sentences. Studies have found that releasing non-violent offenders or reducing their sentences would not jeopardize public safety and save state governments millions of dollars.<sup>7</sup> In fact, during the past decade, all 17 states that have cut their imprisonment rates also experienced a decline in crime rates.<sup>8</sup> Reform efforts include: establishing diversion programs and drug courts, reforming sentencing laws, reforming criminal justice policies, and decriminalizing low-level drug use.

### **A. Drug Courts and Diversion Programs**

Drug Courts have gained popularity as a specially tailored, alternative court system to deal with drug offenders. There were over 2600 drug courts operating throughout the U.S as of December 31, 2011.<sup>9</sup> There are two models for drug courts: deferred prosecution programs and post-adjudication programs. Under deferred prosecution, defendants who meet certain eligibility requirements are diverted into the drug court system prior to being prosecuted. Diversion programs offer non-violent offenders the opportunity to dismiss their criminal charges by participating in drug treatment programs; such programs are often paired with mandatory community service and paying restitution to the victims of the crimes.<sup>10</sup> Following completion of diversion programs, the charges against the offenders are often dismissed. Thus, drug court participants can avoid a criminal record and all the disabling collateral consequences associated with a criminal record. These programs have been successful in states like Kansas and Texas.

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<sup>7</sup> Based on an analysis of arrest and incarceration data from Florida, Maryland and Michigan. : Pew Center study; *Time Served The High Cost, Low Return of Longer Prison Terms*, PEW CENTER ON THE STATES (June 2012) 4, [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf).

<sup>8</sup> These states are Alaska, California, Connecticut, Delaware, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah, and Wisconsin. See Id. at 7

<sup>9</sup> Drug Courts, NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/nij/topics/courts/drug-courts/welcome.htm> (last visited 1/18/2013).

<sup>10</sup> See Strategies to Enhance and Coordinate Cook County Diversion Programs, CHICAGO APPLESEED FUND FOR JUSTICE (July 2012), <http://chicagoappleseed.files.wordpress.com/2012/06/chicago-appleseed-diversion-strategies-for-cook-county1.pdf>.

Alternatively in the post-adjudication model, if defendants plead guilty to their charges, their sentences are deferred or suspended while they participate in the drug court program. If they successfully complete the program, their sentences are waived and occasionally their offenses are expunged from their criminal record. However, when offenders fail to meet the requirements of the drug court, they are returned to the criminal system.<sup>11</sup>

While drug courts are generally lauded for their low-recidivism rates and cost effectiveness, they have garnered important criticism lately. The Open Society Foundation and the Justice Policy Initiative have criticized treatment programs as treating drug offenses as a criminal matter rather than a health issue.<sup>12</sup> Critics argue that the drug courts and their treatment programs are ill-equipped to deal with drug addiction as a disease, and encourage the use of probation and community-based treatments in the alternative. Critics also cite data that shows people of color are more likely to be redirected back to the criminal courts if drug court personnel have discretion. Similarly, many community-based programs that permit drug offenders to avoid incarceration have significant admission costs that many poor people simply cannot afford.<sup>13</sup>

## **B. Decriminalization of Marijuana**

Several states have passed legislation decriminalizing marijuana. Typically, decriminalization means making small amounts of marijuana possession punishable by civil fines rather than criminal charges. Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon have all passed laws decriminalizing some sort of marijuana possession.<sup>14</sup> Decriminalizing low-level marijuana possession helps prevent tens of

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<sup>11</sup> Ryan S. King and Jill Pasquarella, *Drug Courts: A Review of the Evidence*, THE SENTENCING PROJECT (April 2009) 3, [http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf)

<sup>12</sup> Margaret Dooley-Sammuli, *Drug Courts are Not the Answer*, OPEN SOCIETY FOUNDATIONS (Mar. 29, 2011) <http://www.opensocietyfoundations.org/voices/drug-courts-are-not-answer>; *Addicted to Courts*, JUSTICE POLICY INSTITUTE, (Mar. 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted\\_to\\_courts\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf).

<sup>13</sup> Bryan Stevens, *Drug Policy, Criminal Justice, and Mass Imprisonment*, GLOBAL COMMISSION ON DRUG POLICIES 5 (January 2011), <http://www.globalcommissionondrugs.org/wp->

<sup>14</sup> *States That Have Decriminalized*, NORML (last visited 1/18/2013), <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized>.

thousands of people from entering the criminal justice system in the first place.<sup>15</sup> Furthermore, it impacts incarceration stemming from probation and parole violations.<sup>16</sup> With over 5 million people on probation or parole in the United States, drug use on parole or probation has become the primary basis by which thousands of people are returned to prison. These technical violations of parole or probation account for as many as 40% of new prison admissions in some jurisdictions.<sup>17</sup>

### **C. Alternative Sentencing**

Rather than sentencing non-violent offenders to prison or requiring that they go to drug court, some states have begun using alternative sentencing. Alternative sentences can include probation, home incarceration, electronic monitoring, day-reporting centers, halfway houses, community-based treatments and fines.<sup>18</sup> Non-prison sanctions save prison space for more dangerous offenders, are cost-effective, and can provide a high degree of monitoring. Furthermore, community-based treatment can often better address substance abuse and mental health needs than drug courts and diversion programs can. The Center for Impact Research estimates that if only 10% of the non-violent drug offenders in Illinois prisons were sentenced to community supervision and treatment in 2003 rather than incarceration, the state could have saved about \$17 million in annual incarceration costs.<sup>19</sup> Community supervision can also cut crime and recidivism rates by as much as 30%.<sup>20</sup>

Under probation, non-violent offenders are often required to undergo community-based treatment instead of being incarcerated or participating in a court-sponsored treatment program. The Substance Abuse and Crime Prevention Act, in California, is an

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<sup>15</sup> *Marijuana Law Reform*, ACLU, <http://www.aclu.org/criminal-law-reform/marijuana-law-reform> (last visited 1/18/2013).

<sup>16</sup> *Id.*

<sup>17</sup> Bryan Stevens, *Drug Policy, Criminal Justice, and Mass Imprisonment*, GLOBAL COMMISSION ON DRUG POLICIES 6 (January 2011), [http://www.globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/Global\\_Commission\\_Report\\_English.pdf](http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf).

<sup>18</sup> Lise McKean and Susan K. Shapiro, *Sentencing Reform for Nonviolent Offenses: Benefits and Estimated Savings for Illinois*, CENTER FOR IMPACT RESEARCH (Oct. 2004); <http://www.impactresearch.org/documents/sentencingreformreport.pdf>

<sup>19</sup> *Id.* at 20.

<sup>20</sup> *I in 31: The Long Reach of American Corrections*, PEW CENTER ON THE STATES (March 2009), 24 [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf)

example of such a probation program.<sup>21</sup> Kansas implemented mandatory probation sentences for individuals convicted of simple drug possession in 2003. Under Senate Bill 123, the state created mandatory community-based supervision and substance abuse treatment for individuals convicted of a first or second offense of simple drug possession.<sup>22</sup> Similarly Alabama capped the length of stay at 90 days for non-violent probationers who met the conditions of supervision for six months but were subsequently revoked to prison.

#### **D. Criminal Justice Policy Reform**

Many states have modified how they classify or define non-violent offenses, revising legislation to reduce the severity level of non-violent offenses and the accompanying sentence lengths. A few states have eliminated sentence enhancements for repeat offenses. It is often drug and property crimes that are subject to this kind of reform. By reclassifying minor crimes as civil offenses or misdemeanors, incarceration is no longer an option for offenders.

Many states have reduced drug crimes from felonies to misdemeanors.<sup>23</sup> A few states have implemented presumptive probation for minor drug possession, allowing offenders to be incarcerated only upon a judge's specific instruction.<sup>24</sup> A number of state legislatures have passed bills that have raised the felony threshold dollar amounts for low-level non-violent property crimes.<sup>25</sup> Montana, for example, raised the threshold dollar amounts for selected felony property crimes from \$1,000 to \$1,500.<sup>26</sup>

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<sup>21</sup> Cal. Penal Code § 1210.1(a)

<sup>22</sup> Kansas Statutes Annotated §21-4729

<sup>23</sup> Nicole D. Porter, *State of Sentencing 2011: Development in Policy and Project*, THE SENTENCING PROJECT (Feb. 2012) 6, [http://sentencingproject.org/doc/publications/publications/sen\\_State\\_of\\_Sentencing\\_2011.pdf](http://sentencingproject.org/doc/publications/publications/sen_State_of_Sentencing_2011.pdf)

<sup>24</sup> Id. at 9

<sup>25</sup> Like Delaware, Montana, Washington, Alabama, California, and Iowa.

<sup>26</sup> SB 476 (2009), <http://data.opi.mt.gov/bills/2009/billhtml/SB0476.htm>.

## **II: State Practices**

Many states have recently implemented aspects of reforms discussed above to curb their incarceration rates. Outlined below are elements of those reforms enacted by Georgia, New Jersey, Kentucky and Vermont. These pieces of legislation, which all relate to incarcerating non-violent offenders, were often adopted with strong bi-partisan support. The examples put forth by these states is a useful reference for the Illinois legislature.

### **A. Kentucky**

In 2011, Kentucky enacted HB 463, a bill introducing comprehensive reforms to drug sentencing and incarceration.<sup>27</sup> Like Georgia, Kentucky also worked with the Pew Center on States to develop HB 463 and overhaul their penal code. In Kentucky, drug offenders accounted for 25% of the prison population, but accounted for 38% of inmates admitted since 2000.<sup>28</sup>

Under the new law, small time drug offenders are presumptively put on probation unless a judge believes that the offender should be incarcerated. The law reduced penalties for small time drug dealing and increased the penalties for large-scale trafficking. Specifically, sales of less than four grams of cocaine, two grams of heroin or methamphetamine, or 10 dosage units of other controlled substances were reduced a felony class, which requires a one to five years sentence rather than a five to ten years sentence. It also requires reforms of the probation and parole system. It created "graduated sanctions" for parole violators, allowing authorities to impose short jail stays instead of sending them back to prison for technical violations. It also removes drug offenses from consideration when judges impose sentencing enhancements based on previous felony convictions.

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<sup>27</sup> HB 463 (2012): Public Safety and Offender Accountability Act, <http://www.lrc.ky.gov/record/11rs/hb463.htm>.

<sup>28</sup> Philip Smith, *Kentucky Cuts Drug Sentences*, Stop the Drug War.Org (Mar. 7, 2011), [http://stopthedrugwar.org/chronicle/2011/mar/07/kentucky\\_cuts\\_drug\\_sentences\\_fea](http://stopthedrugwar.org/chronicle/2011/mar/07/kentucky_cuts_drug_sentences_fea).

## **B. Georgia**

In 2012, Georgia enacted legislation, HB 1176, which addressed its high incarceration rates by introducing reforms directed at non-violent offenders. Research indicated that prior to the passage of the bill, drug and property offenders accounted for almost 60 percent of prison admission in Georgia.<sup>29</sup> Georgia's prison population was projected to rise by eight percent over the next five years at a cumulative cost of \$264 million dollars. The bill was a product of a bi-partisan working group who consulted with The Pew Charitable Trusts, and was approved by the Senate and House unanimously.

The Bill itself attempts to divert non-violent offenders from incarceration by implementing graduated penalties for property and drug crimes, reducing sentences for low-level drug offenses and theft; and investing in drug treatment and mental illness courts. The legislation creates degrees of drug possession, which are based on weight. It then implements a graduated scale of penalties, with higher penalties for third and subsequent convictions.

## **C. New Jersey**

A few state legislatures have begun recognizing drug addiction as an illness, rather than a crime, requiring medical treatment – New Jersey is one of them. In early 2012, New Jersey Governor Chris Christie signed a bill eliminating jail time and expanding rehabilitation programs for non-violent drug offenders. New Jersey was the first state to require drug treatment for eligible offenders.<sup>30</sup>

The legislation, S-881, requires eligible nonviolent drug-addicted offenders to participate in drug treatment regardless of whether they apply for admission to program.<sup>31</sup> The law expanded upon a successful voluntary drug-court program, and requires participation in the drug court program if the defendant is determined to be drug-

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<sup>29</sup> *2012 Georgia Public Safety Reform Legislation to Reduce Recidivism and Cut Corrections Costs*, PEW CENTER ON THE STATES (July 2012) 1, [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Georgia\\_Safety\\_Reform.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Georgia_Safety_Reform.pdf).

<sup>30</sup> Jim Malewitz, *With Governor's Signature, New Jersey Expands Drug Courts*, STATELINE: THE DAILY NEWS SERVICE OF THE PEW CENTER ON THE STATES (July 20, 2012) <http://www.pewstates.org/projects/stateline/headlines/with-governors-signature-new-jersey-expands-drug-courts-85899406300>.

<sup>31</sup> S-881 (2012), [http://www.njleg.state.nj.us/2012/Bills/S1000/881\\_R6.PDF](http://www.njleg.state.nj.us/2012/Bills/S1000/881_R6.PDF).

dependent and meets the eligibility criteria of the New Jersey Drug Court program.<sup>32</sup> In addition to eliminating prosecutorial discretion to admission to drug court, the law also provides for increased identification of eligible drug addicted non-violent offenders and court ordered clinical assessment to determine suitability for drug court. Under the law, judges have the ultimate discretion in determining whether an individual poses a threat to society and if the offender should be sent to a drug treatment facility as part of his or her sentencing.

#### **D. Vermont**

In 2007, experts projected that Vermont's prison population would increase by 23% by 2013.<sup>33</sup> Policymakers responded by enacting strategic legislation designed to lower recidivism and negate the high incarceration of non-violent offenders. Property and drug offenders were the fastest growing segment of the prison population, making up over half of the increase in the felony prison population between 2000 and 2006.<sup>34</sup> In response, the legislature enacted HB 859 in 2008 and S 292 in 2010.<sup>35</sup> Vermont is now a leader among states in restorative justice, with a declining incarceration rate.<sup>36</sup>

Both bills aimed to reduce the prison population, and S 292 explicitly sought to reduce the number of non-violent prisoners, probations and detainees. S 292 and HB 859 provides for the right to bail to non-violent probation violators; requires early discharge for offenders sentenced to an unlimited term of probation on a non-violent misdemeanor conviction upon the completion of all court-ordered programs; and authorizes administrative probation with low supervision for certain low-risk offenders.<sup>37</sup>

### **III: Non-violent Offenses in Illinois**

Illinois has adopted legislation that could lower the incarceration rates of non-

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<sup>32</sup> S-881 (2012), [http://www.njleg.state.nj.us/2012/Bills/S1000/881\\_R6.PDF](http://www.njleg.state.nj.us/2012/Bills/S1000/881_R6.PDF).

<sup>33</sup> State Initiatives: Vermont, Right on Crime, <http://www.rightoncrime.com/reform-in-action/state-initiatives/v2ermont/> (last visited 1/18/2013).

<sup>34</sup> Id.

<sup>35</sup> Vermont Legislature, Act of the General Assembly, No. 179 (H.859), Act Summary, 2007-2009, <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT179SUM.HTM>; S 292 (2001).

<sup>36</sup> Taylor Dobbs, *Vermont's Prison Reforms Tamp Down Incarceration Rates*, VTdigger.com (Apr. 25, 2012), <http://vtdigger.org/2012/04/25/vermonts-prison-reforms-tamp-down-incarceration-rates/>.

<sup>37</sup> Vermont Legislature, Act of the General Assembly, No. 179 (H.859), Act Summary, 2007-2009, <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT179SUM.HTM>.



violent offenders. It has done so by reforming its drug policies, instituting drug courts, and adopting sentencing reforms. Although Illinois has taken positive steps, there are many more reforms it can undertake to curb its incarceration rate of non-violent offenders.

Cook County operates two diversion programs: the Drug School and the State's Attorney's Deferred Prosecution Program (SADPP). These programs divert felony defendants into drug education programming, community service, GED, or job training programs prior to a plea. Generally, all defendants arrested for a qualifying non-violent offense are eligible for the Deferred Prosecution Program if they have no prior felony convictions.<sup>38</sup> The State's Attorney, with the approval of the judge, has the discretion to decide if an offender can be placed in a diversion program instead of being incarcerated. If the defendant complies with the terms of the program, the charges are dismissed and may be expunged. If the court determines that a participant has breached the program participation conditions, however, the State's Attorney may re-initiate prosecution of the criminal case. Recently, Senate Bill 3349 expanded Cook County's pilot program that sends first-time, non-violent offenders to diversion programs throughout the rest of the state.<sup>39</sup> Entitled the Offender Initiative Program, offenders can participate in the diversion program with the approval of the State's Attorney and judge.<sup>40</sup>

Illinois has also enacted sentencing reform, aimed at reducing incarceration time for non-violent offenders. This summer Governor Pat Quinn signed a bill that allows non-violent prisoners the opportunity to earn time off their sentences for good behavior.<sup>41</sup> Offenders must serve at least 60 days of their sentences in state custody before being awarded "sentence credit" and the maximum amount of time an inmate will be able to shave off of his or her sentence is 180 days.

Illinois, and Chicago in particular, has revised its policy towards low-level marijuana possession. On June 27<sup>th</sup>, 2012 Chicago partially decriminalized possession of

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<sup>38</sup> *Strategies to Enhance and Coordinate Cook County Diversion Programs*, CHICAGO APPLESEED FUND FOR JUSTICE (July 2012), <http://chicagoappleseed.files.wordpress.com/2012/06/chicago-appleseed-diversion-strategies-for-cook-county1.pdf>.

<sup>39</sup> SB 3349 (2012),

<http://www.ilga.gov/legislation/fulltext.asp?DocName=09700SB3349sam001&GA=97&SessionId=84&DocTypeId=SB&LegID=64579&DocNum=3349&GAID=11&Session=0>.

<sup>40</sup> Id.

<sup>41</sup> SB 2621 (2012),

<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2621&GAID=11&DocTypeID=SB&SessionID=84&GA=97>.

marijuana.<sup>42</sup> The ordinance gives Chicago police the discretion to issue citations between \$250 to \$500 for someone in possession of 15 grams or less of marijuana.<sup>43</sup>

## **Conclusion**

Incarceration reform is gravely needed in Illinois, and addressing the issue of non-violent offenders is imperative to that reform. Enacting policies that employ incarceration alternatives for non-violent offenders is an important component of incarceration reform. Decriminalization of low-level drug possession, sentencing reform, and drug courts are all methods states have adopted to curb the incarceration rate of non-violent offenders. The Chicago Lawyers' Committee recognizes the racial inequity of our incarceration system, and is alert to the need for reform.

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<sup>42</sup> Mary Wisniewski, *Chicago Decriminalizes Possession of Small Amounts of Marijuana*, REUTERS (June 27, 2012), <http://www.reuters.com/article/2012/06/27/us-usa-crime-marijuana-chicago-idUSBRE85Q1FU20120627>.

<sup>43</sup> Id.