

COURSE CORRECTIONS: HOUSE BILL 463 AND REFORMING KENTUCKY'S BROKEN CRIMINAL JUSTICE SYSTEM THROUGH EVIDENCE-BASED REINVESTMENT STRATEGIES

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I. INTRODUCTION

The fiscal crisis facing the states¹ has forced state policymakers to reexamine and, when appropriate, abandon tired and long-entrenched policies and programs in an effort to ensure the judicious use of scarce public resources. Perhaps no other area of public policy commands wholesale reexamination and reform more than corrections. With the exception of Medicaid, spending on corrections has emerged as the fastest growing general-fund expenditure in state budgets.² In Fiscal Year 2008, states devoted nearly \$52 billion in general, special and federal funds to corrections, up 303% in just two decades.³ One of every fifteen dollars of state general-fund spending is now dedicated to corrections.⁴ With states allocating such significant portions of their general-fund budgets to operating, maintaining and building prisons,⁵ it is not possible to spare corrections from the significant budget cuts that typically accompany periods of fiscal challenge. Indeed, at least twenty-six states reduced

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¹ See generally Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POL'Y PRIORITIES, <http://www.cbpp.org/cms/?fa=view&id=711> (last updated June 27, 2012).

² CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, *THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3* (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

³ *Id.*

⁴ *Id.*

⁵ See *id.*

funding for corrections in Fiscal Year 2010.⁶ In making these reductions, states struggle to strike the appropriate balance between fiscal constraints and public safety imperatives;⁷ in short, policymakers must find ways to extract savings from an overburdened system without jeopardizing public safety.

This Note will examine the history, purpose and future of House Bill 463, Kentucky's approach to reforming outmoded corrections policies to improve public safety while ensuring the effective use of taxpayer dollars. Part II surveys the history of corrections in Kentucky and the background of House Bill 463. Part III analyzes the major provisions of the legislation, comparing these provisions to reform efforts in other states, as well as to Kentucky's own previous attempts to address its escalating prison population. Finally, Part IV explores the flaws and missed opportunities of the law, offering the conclusion that House Bill 463 represents a critical step—but only a first step—toward development of a more cost-effective corrections system that delivers better results for the citizens of Kentucky.

II. HISTORY

A. Getting Here: A Flawed, Stubborn Philosophy

The increasing fiscal demand that prisons and jails impose upon cash-strapped state budgets is not a product of chance; rather, it is the result of choices, made haphazardly over the decades, which have driven America's incarceration rate to unprecedented and internationally unmatched levels. Since the early 1970s, the number of Americans incarcerated in prisons and jails has grown from 320,000 to 2.3 million.⁸ With this dramatic escalation, the United States has acquired the dubious distinction of imprisoning more people than any other country in the world.⁹ Since 1980, more than 1,000 additional prisons and jails have been built in an attempt to accommodate this rapid rise in inmate population.¹⁰ Today, one of every 100 adults in the United States is incarcerated.¹¹

⁶ *Id.*

⁷ *See id.*

⁸ Robert G. Lawson, *PFO Law Reform, A Crucial First Step Toward Sentencing Sanity in Kentucky*, 97 KY. L.J. 1, 1 (2008).

⁹ PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008) [hereinafter ONE IN 100], available at http://www.pewstates.org/uploadedfiles/pcs_assets/2008/one%20in%20100.pdf. America's total inmate population is more than 50% higher than that of China and more than two and one-half times that of Russia. *See id.*

¹⁰ Lawson, *supra* note 8, at 1.

¹¹ ONE IN 100, *supra* note 9, at 5.

Kentucky is no exception to this national trend. Four decades ago, the Commonwealth incarcerated about 3,000 individuals, operated only two prisons for men and a small prison for women, and utilized neither private prisons nor county jails to house inmates.¹² In 2010, the Commonwealth incarcerated 20,700 individuals,¹³ an increase of 590% from 1970s-era levels. By the end of 2007, one of every ninety-two adults in Kentucky was incarcerated.¹⁴ The percentage increase since the 1970s in Kentucky is roughly comparable to the national increase over the same period,¹⁵ perhaps suggesting that the Commonwealth is no worse off than the rest of the nation. However, as is often the case, the devil finds comfortable refuge in the details. Between 2000 and 2009, Kentucky recorded one of the fastest-growing prison populations in the nation.¹⁶ For example, the Pew Center on the States reported a 12% growth in Kentucky's inmate population in 2007, the highest of any state.¹⁷ Despite a modest reduction in Kentucky's inmate population between 2008 and 2010, the Department of Corrections projected that it would rise by nearly 1,400 over the next decade if existing policies continued unchanged.¹⁸

Kentucky taxpayers have shouldered a heavy financial burden to support the Commonwealth's expanding corrections operations. In the early 1970s, the Commonwealth spent as little as \$10 million per year on corrections.¹⁹ In Fiscal Year 1990, the Commonwealth allocated \$140 million in general funds for corrections; by Fiscal Year 2010, this amount

¹² Lawson, *supra* note 8, at 2.

¹³ PEW CTR. ON THE STATES, 2011 KENTUCKY REFORMS CUT RECIDIVISM, COSTS 2 (2011) [hereinafter 2011 KENTUCKY REFORMS], available at http://www.pewstates.org/uploadedfiles/pcs_assets/2011/2011_kentucky_reforms_cut_recidivism.pdf.

¹⁴ PEW CTR. ON THE STATES, KENTUCKY: A DATA-DRIVEN EFFORT TO PROTECT PUBLIC SAFETY AND CONTROL CORRECTIONS SPENDING 1 (2010) [hereinafter KENTUCKY: A DATA-DRIVEN EFFORT], available at http://www.pewstates.org/uploadedfiles/pcs_assets/2010/kentucky_brief_updated.pdf.

¹⁵ In 1972, the United States incarcerated about 326,000 inmates in its prisons and jails. Robert G. Lawson, *Turning Jails into Prisons--Collateral Damage from Kentucky's "War on Crime,"* 95 KY. L.J. 1, 1 (2005). Since 1972, the number of individuals incarcerated nationwide has risen by 705%, to 2.3 million. Lawson, *supra* note 8, at 1.

¹⁶ KENTUCKY: A DATA-DRIVEN EFFORT, *supra* note 14, at 1. Between 2000 and 2009, total inmate population in Kentucky's prisons and jails increased 45%, compared to 13% nationally. *Id.* At several points throughout the last decade, Kentucky exemplified the dysfunctional nature of America's corrections system. For example, between 2004 and 2005, Kentucky's inmate growth rate was 6.7%, twice the national rate and the fourth highest among the states. Lawson, *supra* note 8, at 2-3.

¹⁷ Lawson, *supra* note 8, at 3.

¹⁸ LEGISLATIVE RESEARCH COMM'N, REPORT OF THE TASK FORCE ON THE PENAL CODE AND CONTROLLED SUBSTANCES ACT 8 (2011) [hereinafter TASK FORCE REPORT], available at <http://www.lrc.ky.gov/lrcpubs/rm506.pdf>.

¹⁹ Lawson, *supra* note 8, at 2.

had increased to \$440 million, far outpacing the rate of inflation.²⁰ Prior to the enactment of House Bill 463, the Department of Corrections projected that the Commonwealth would require at least \$161 million in additional funding over the next ten years to accommodate continued growth in Kentucky's inmate population.²¹

The trend in Kentucky was particularly disturbing because much of the growth in corrections occurred in the last decade.²² As other states slowly began to remedy, or at least consider, the flaws of their own systems, Kentucky continued operating on auto-pilot, with the Commonwealth's prison population rising at a rate more than three times the national average.²³ Although the inmate population declined modestly between 2008 and 2010, there is no evidence that this was the result of any coordinated approach or significant reform effort.²⁴ Inmate population varies from year to year. The long-term trend is what matters, and it is clear that, in the last decade, Kentucky emerged as a national leader in defiantly resisting reform.

The significant increase in prison population was not the result of an increase in crime.²⁵ In 2009, Kentucky's violent crime rate remained well below the national rate; in fact, Kentucky's violent crime rate in 2009 was at its lowest reported level since 1974.²⁶ Policy choices, rather than rising crime, have driven Kentucky's alarming increase in inmate population.²⁷ The advent of "three strikes" laws, repeat offender statutes, sentencing enhancements and other measures—powerful, arguably indiscriminate weapons in the nation's war on crime arsenal—have been the driving forces behind rising incarceration levels at the state and national levels.²⁸ Additionally, many states rely considerably on reimprisonment as the primary means of penalizing those who violate the terms of their probation or parole.²⁹ Finally, the continued failure of many states and the federal government to embrace innovative, effective reentry initiatives means that more than half of offenders released from prison will return within three years.³⁰

²⁰ TASK FORCE REPORT, *supra* note 18, at 1.

²¹ *Id.* at 8.

²² KENTUCKY: A DATA-DRIVEN EFFORT, *supra* note 14, at 1.

²³ See 2011 KENTUCKY REFORMS, *supra* note 13, at 1.

²⁴ Rather, this was the result of an early release program authorized by the General Assembly as part of the 2008–2010 Budget. See *infra* Part II.B.2.

²⁵ 2011 KENTUCKY REFORMS, *supra* note 13, at 2.

²⁶ *Id.*

²⁷ ONE IN 100, *supra* note 9, at 3.

²⁸ *Id.*

²⁹ *Id.* at 3–4.

³⁰ *Id.* at 4.

The challenges facing each state are directly attributable to the so-called war on crime, a creature of the late 1960s,³¹ born of the understandable desire to keep locked away violent criminals and those who consistently threaten public safety.³² The fiscal and social consequences of this war have arguably exceeded its benefits.³³ Indeed, suspicions about the efficacy of the war on crime have emerged in states throughout the country.³⁴ These doubts have even been expressed by officials at the highest levels of government; for example, United States Supreme Court Justice Anthony M. Kennedy posited in 2003 that “[o]ur resources are misspent, our punishments too severe, our sentences too long.”³⁵ Kentucky has waged this war with considerable vigor, elevating numerous misdemeanors to felonies, reclassifying various crimes to enhance prison terms, eliminating parole for a lengthy list of offenses, and enacting, often on a haphazard basis, a number of penalty enhancements and new offenses.³⁶ Professor Robert Lawson observes that Kentucky has “left very few areas of [its] criminal law untouched by a philosophy devoted almost exclusively to harsher punishment of offenders,”³⁷ ostensibly out of the conviction that tougher penalties lead to lower crime rates. Extensive research reveals, however, that sentence length or severity has little impact on crime rates.³⁸ The validity of this thesis is buttressed by an irrefutable reality: a quadrupling of the incarceration rate has not produced anything approaching a proportionate decline in crime rates.³⁹

The war on crime offered a number of attractive illusions that permitted its continuation and intensification with generally unwavering public support.⁴⁰ The mentality undergirding the strategy created the public perception of a government taking aggressive, sweeping action to protect communities while enabling political leaders to proclaim themselves tough

³¹ See Elizabeth Alexander, *The Caged Canary*, 14 WM. & MARY J. WOMEN & L. 257, 258 (2008).

³² ONE IN 100, *supra* note 9, at 4.

³³ See *infra* Part II.B.1.

³⁴ See, e.g., Sasha Abramsky, *Is This the End of the War on Crime?*, NATION, July 5, 2010, available at <http://www.thenation.com/article/end-war-crime>.

³⁵ Justice Anthony M. Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annualmeeting/>.

³⁶ Lawson, *supra* note 8, at 3–4.

³⁷ *Id.* at 4.

³⁸ See generally John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189 (2005) (discussing the ineffectiveness of longer prison sentences as a means of reducing crime rates).

³⁹ Lawson, *supra* note 8, at 5.

⁴⁰ See *id.* at 6.

on crime.⁴¹ Nevertheless, as is the case with most protracted wars, the last decade has revealed signs of war fatigue.⁴² The fear among politicians of the dreaded “soft on crime” label still persists, but, according to Professor Lawson, “there is also an appreciation for the possibility that the tough-on-crime advocates have created at least as many problems as they have solved, enough of the former to suffocate any effort to promote across-the-board moderation of punishments but enough of the latter to spark some hope for modest law reform aimed at the very worst excesses of the tough-on-crime movement.”⁴³

After more than three decades, the war-on-crime philosophy had become well entrenched, but in the last decade, it became clear that creation of a more sustainable, effective corrections system—one that protects the safety of the public without draining their pocketbooks, prioritizes the incarceration and supervision of violent offenders over those who pose relatively minimal risks to public safety, and rejects the disturbing culture of warehousing offenders and instead embraces the potential of effective reentry services to reduce recidivism—would depend upon abandoning the suffocating grip of war on crime dogma and embracing a smarter, more holistic approach to criminal justice policy.

B. Turning the Corner: Moving Toward Reform

1. War Fatigue

The war-on-crime philosophy that prevailed so triumphantly in the 1980s and 1990s eventually collided with the reality of the fiscal crisis that struck state budgets following the 2001 recession.⁴⁴ In late 2002, the Commonwealth of Kentucky faced a budget deficit exceeding \$500 million, forcing Democratic Governor Paul E. Patton to slash state spending in a number of areas, including corrections.⁴⁵ To confront this budget challenge, Patton joined a number of other governors across the nation in ordering the early release of certain incarcerated offenders.⁴⁶ As part of the program, Patton authorized the early release in December 2002 of 567 inmates, all

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 1 (2002), available at http://www.sentencingproject.org/doc/publications/inc_statesentencingpolicy.pdf.

⁴⁵ Fox Butterfield, *Inmates Go Free to Reduce Deficits*, N.Y. TIMES, Dec. 19, 2002, at A1, available at 2002 WLNR 4438872.

⁴⁶ *Id.*

nonviolent offenders, but many of whom had been convicted of serious crimes like burglary, theft, or arson, and some of whom were considered “chronic criminals.”⁴⁷ Patton made no secret of his apprehension in approving the commutations, candidly acknowledging that “[a] percentage of [those released] are going to recommit a crime, and some of them are going to be worse than the crimes they [were] in for,” but concluding that the early release program was necessary to close the budget gap.⁴⁸

The early-release program proved widely unpopular and further crippled Patton’s already-weak public standing.⁴⁹ By the end of January 2003, 883 inmates had been released under the program.⁵⁰ Then-Attorney General Ben Chandler, a 2003 candidate for governor, filed suit in an attempt to block further releases.⁵¹ With an additional 200 inmates slated for release in February, Patton abruptly announced on January 31 that he was halting the program following widespread public outrage over the commission of new crimes by inmates already released.⁵² Despite expressing regret for the victims of the additional crimes, Patton strongly defended the program as necessary given Kentucky’s fiscal challenges.⁵³ State officials estimated that the program saved Kentucky \$2.6 million.⁵⁴ There does not appear to have been any risk- or evidence-based approach to determining which inmates were released or the level of supervision upon release.

Then-U.S. Representative Ernie Fletcher, a Republican candidate for governor in 2003, criticized Patton’s early release program, quipping that a “[g]et out of jail free card for convicted criminals” was not the appropriate

⁴⁷ *Id.*

⁴⁸ *Id.* Patton’s decision was particularly striking given his own proclamations of his Administration’s “tough on crime” record. In his 2003 State of the Commonwealth address, Patton defended the early release program, noting that he had been tough on crime by enacting measures increasing criminal penalties for serious crimes and eliminating parole for violent offenders. Jack Brammer & John Cheves, *Governor Urges Action on Budget, A Call for Unity, But No Specifics*, LEXINGTON HERALD-LEADER, Jan. 10, 2003, at A1, available at 2003 WLNR 2869778.

⁴⁹ *Poll: Patton Popularity Hits New Low*, CINCINNATI POST, Feb. 17, 2003, at K1, available at 2003 WLNR 1879115.

⁵⁰ *Public Outrage Halts Release of Prisoners*, CHI. TRIB., Feb. 2, 2003, at 16, available at 2003 WLNR 15293332.

⁵¹ *Release of Inmates to Stop; Lawmakers Must Find Funds*, CINCINNATI POST, Feb. 1, 2003, at K1, available at 2003 WLNR 1910594.

⁵² *Public Outrage Halts Release of Prisoners*, *supra* note 50. In Western Kentucky, one inmate had been arrested and charged with a series of bank robberies, while another was charged with committing a rape that allegedly occurred three days following his release. *Patton to End Early Release Program*, EVANSVILLE COURIER & PRESS, Feb. 1, 2003, at B3, available at 2003 WLNR 13607897.

⁵³ *Public Outrage Halts Release of Prisoners*, *supra* note 50.

⁵⁴ *Id.*

method of resolving the Commonwealth's fiscal challenges.⁵⁵ Fletcher was elected governor in November 2003,⁵⁶ and in the ensuing two years, economic growth boosted revenues and enabled the Commonwealth to report budget surpluses in Fiscal Years 2005 and 2006.⁵⁷ The Commonwealth's changing financial fortunes allowed the General Assembly to easily satisfy the increasing budgetary demands imposed by the state's corrections system, augmenting the authorized corrections budget significantly between 2005 and 2008.⁵⁸ Meanwhile, the Fletcher Administration and a complacent General Assembly showed no inclination to tackle the Commonwealth's escalating prison population. In 2005, a Blue Ribbon Task Force issued a series of recommendations designed to revise the criminal code and reduce the Commonwealth's incarceration rate; these recommendations were ignored.⁵⁹ By this point, Kentucky's corrections system was but one fiscal crisis away from collapse in the absence of wholesale reform.

2. Fiscal Day of Reckoning

The crisis came in 2007 and intensified in 2008. After several years of strong revenue growth, the Commonwealth faced a \$600 million budget shortfall when Democratic Governor Steven L. Beshear took office in

⁵⁵ Mark R. Chellgren, *Suit Challenges Gov. Patton on Kentucky Inmate Release*, EVANSVILLE COURIER & PRESS, Jan. 19, 2003, at B9, available at 2003 WLNR 13602616.

⁵⁶ Courtney Kinney, *Fletcher Shines in National Spotlight*, CINCINNATI POST, Nov. 6, 2003, at K1, available at 2003 WLNR 1900821.

⁵⁷ Press Release, Governor Ernie Fletcher, Commonwealth Ends Fiscal Year 2005 in Strong Financial Shape (July 27, 2005), available at http://www.e-archives.ky.gov/_govfletcher/records/pressrelease-archive%2804-06%29/050727endfiscalyr.htm; John Stamper, *2007 General Assembly: Kentuckians Want State Surplus Put to Good Use*, LEXINGTON HERALD-LEADER, Dec. 24, 2006, at A1, available at 2006 WLNR 22548712.

⁵⁸ In the enacted budget for Fiscal Years 2007 and 2008, the General Assembly increased annual funding for corrections operations to \$417.6 million. OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2006–2008 BUDGET OF THE COMMONWEALTH, VOLUME 1: JUSTICE AND PUBLIC SAFETY 359 (2006), available at http://www.e-archives.ky.gov/pubs/budget/2006-08/0608_boc_volume1.pdf. This represented an increase of more than 28% above the \$324.1 million revised appropriation for Fiscal Year 2004. See OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2004–2006 EXECUTIVE BUDGET: JUSTICE AND PUBLIC SAFETY 3 (2004), available at http://www.e-archives.ky.gov/pubs/budget/2004-06/0406exex_vol1c.pdf. The General Assembly later revised the Fiscal Year 2008 budget upward to \$459.9 million, an increase of nearly 42% over 2004 levels. See OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2008–2010 EXECUTIVE BUDGET: JUSTICE AND PUBLIC SAFETY 1 (2008), available at http://www.e-archives.ky.gov/pubs/budget/2008-2010/0810execbud_volume1_d.pdf.

⁵⁹ Beth Musgrave, *Lawmakers Prepare Again to Overhaul State's Criminal Laws*, LEXINGTON HERALD-LEADER, Aug. 21, 2009, available at 2009 WLNR 16357145.

December 2007.⁶⁰ In his first budget proposal, Beshear called for a modest increase in corrections spending.⁶¹ The General Assembly cut from Beshear's funding request, effectively freezing corrections spending for 2009 and 2010.⁶² By the end of 2008, the Commonwealth's projected budget gap exceeded \$1 billion.⁶³

The 2008 budget bill included a provision authorizing creation of a controversial early-release plan to reduce the state's prison population.⁶⁴ The program, designed to save \$30 million over two years, provided credits against inmates' prison sentences for the time they were on parole prior to their return to prison for parole violations.⁶⁵ While markedly different from Patton's ill-fated early release program, especially in that it was conceived with legislative approval, the initiative nevertheless engendered considerable controversy. Kentucky Attorney General Jack Conway, a Democrat, filed suit to stop the program, arguing that it jeopardized public safety by authorizing the early release of violent offenders and violated Kentucky's truth-in-sentencing statute.⁶⁶ Senate President David Williams accused the Beshear Administration of sidestepping the intent of the law by affording credits to a broader class of inmates than the legislature intended.⁶⁷

The Kentucky Supreme Court eventually rejected legal challenges to the program by Conway and others, holding that the General Assembly "wanted the DOC to save as much money as is legally feasible," and, thus

⁶⁰ OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2008–2010 EXECUTIVE BUDGET: BUDGET IN BRIEF 1 (2008), available at http://osbd.ky.gov/nr/rdonlyres/83851158-a23f-4455-8164-799039d33ad3/0/0810execbud_budbrief.pdf.

⁶¹ In his Fiscal Year 2008–2010 budget, Beshear proposed increasing corrections spending from \$459.9 million in Fiscal Year 2008 to \$478.7 million in Fiscal Year 2010, a 4% increase. See OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2008–2010 EXECUTIVE BUDGET: JUSTICE AND PUBLIC SAFETY 1 (2008), available at http://www.e-archives.ky.gov/pubs/budget/2008-2010/0810execbud_volume1_d.pdf.

⁶² The General Assembly increased corrections spending to \$464.8 million in Fiscal Year 2010, an increase of just over 1%. See OFFICE OF STATE BUDGET DIR., COMMONWEALTH OF KY., 2008–2010 OPERATING BUDGET: JUSTICE AND PUBLIC SAFETY 321 (2008), available at http://www.osbd.ky.gov/nr/rdonlyres/510295cf-ba72-4faa-8ef2-843b1a3bf5c9/0/0810_boc_volume1d.pdf.

⁶³ John Gramlich, *Strapped States Look to Prisons for Budget Savings*, RICHMOND TIMES DISPATCH, Feb. 14, 2009, at 1, available at 2009 WLNR 3324905.

⁶⁴ Stephanie Steitzer, *14% Freed Under Inmate Program Charged Again*, COURIER-JOURNAL, Oct. 12, 2008, at A1, available at 2008 WLNR 26345221.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Stephanie Steitzer, *Early-Release Plan Draws Fire*, COURIER-JOURNAL, Oct. 26, 2008, at B1, available at 2008 WLNR 26345940. Williams criticized the Beshear Administration for granting the credit to individuals returned to prison before the budget bill went into effect in 2008, arguing that the legislature did not intend for the provision to apply retroactively. *Id.*

intended that the parole credit be applied retroactively.⁶⁸ At the time of the Supreme Court's ruling, the Department of Corrections had released nearly 3,600 inmates from prison and nearly 4,700 from parole under the credit program, saving an estimated \$31.5 million.⁶⁹ Despite the earlier controversy, the General Assembly made the early-release program permanent in 2009.⁷⁰

3. Acrimony Leads to Progress

a. Task Force on the Penal Code and Controlled Substances Act

The political acrimony over the early-release program produced consensus on one thing: it was time to reexamine Kentucky's corrections system in a thoughtful, holistic way.⁷¹ Despite ignoring two previous reports calling for reforms to the Commonwealth's criminal laws, in late 2009 lawmakers began discussing the possibility of forming a committee to study reform of the penal code.⁷² In 2010, the General Assembly created the Task Force on the Penal Code and Controlled Substances Act, composed of members of the General Assembly, the Judiciary, the Executive Branch, a former prosecutor, a former public defender and local officials.⁷³ That summer, the task force, in conjunction with the Pew Center on the States and its partners, began analyzing Kentucky's corrections data as part of a comprehensive evaluation of the Commonwealth's corrections policies.⁷⁴

The task force issued its final report in January 2011, finding that "correctional policies and practices were principally responsible for Kentucky's prison growth, rather than an increase in crime or any demographic shifts."⁷⁵ The task force report identified four major drivers of the Commonwealth's rising prison population: an increase in arrests and court cases,⁷⁶ a high percentage of offenders being sent to prison,⁷⁷ the

⁶⁸ Stephanie Steitzer, *Ky. Supreme Court Rules Early Releases Proper*, COURIER-JOURNAL, Nov. 26, 2009, at B5, available at 2009 WLNR 24094014.

⁶⁹ See *id.* Corrections officials attribute the modest reduction in Kentucky's overall inmate population to the implementation of the early release program. Musgrave, *supra* note 59. This further confirms that the modest reduction in inmate population in the latter part of the 2000s was not the product of genuine reform or the start of a new downward trend, but rather a direct result of the legislature's financially motivated decision to release inmates early.

⁷⁰ Musgrave, *supra* note 59.

⁷¹ See *id.*

⁷² *Id.*

⁷³ KENTUCKY: A DATA-DRIVEN EFFORT, *supra* note 14, at 4.

⁷⁴ *Id.*

⁷⁵ 2011 KENTUCKY REFORMS, *supra* note 13, at 3.

⁷⁶ The task force found that "[w]hile reported crime remained basically flat between 2001 and

return of parolees to prison for technical violations of their parole conditions,⁷⁸ and an increasing number of drug offenders being sent to prison.⁷⁹ The task force predicted that, without substantial changes in policy, the Commonwealth's prison population would increase by nearly 1,400 inmates within a decade, requiring an additional \$161 million in annual funding by 2020.⁸⁰

To improve public safety, transform criminal justice policy, and alleviate the crippling costs of maintaining the Commonwealth's overburdened corrections system, the task force offered several key recommendations: development of a risk-determined, evidence-based approach to making critical public safety resource allocation and funding decisions; strengthened inmate reentry programs; improved parole and probation supervision; enactment of commonsense sentencing reforms; increased political and fiscal accountability for corrections policies; and reinvestment of budgetary savings into programs designed to reduce recidivism.⁸¹

b. Moving Toward Reform: Drafting and Legislative History of House Bill 463

Legislative leaders moved quickly to respond to the task force report.⁸² House Bill 463 and Senate Bill 161, identical measures incorporating most of the task force's recommendations, were introduced in early February

2009, adult arrest rates increased 32% during that time. This was driven by a 70% increase in arrests for drug offenses, a 22% increase in arrests for Part 1 offenses and an increase of 33% for Part 2 offenses." TASK FORCE REPORT, *supra* note 18, at 7.

⁷⁷ *Id.* The report concluded that Kentucky sentenced offenders to prison, rather than alternative sentences such as probation, at a far higher rate than most states. In 2009, for example, Kentucky courts sentenced 57% of all convicted felony offenders to prison, compared to just 41% nationally. *Id.*

⁷⁸ *Id.* Between Fiscal Years 1998 and 2010, the percentage of total prison admissions comprised of offenders sent back to prison, not for a new felony conviction, but rather for technical violations of the terms of their probation, rose from 10.2% to 19.5%. *Id.*

⁷⁹ *Id.* at 7–8. Between 2000 and 2009, the percentage of corrections admissions comprised of drug offenders increased from 30% to 38%, with 25% of current inmates incarcerated for drug offenses. *Id.* at 7. The task force further found that 75% of these offenders are in prison for possession or first-time trafficking offenses. *Id.* at 8.

⁸⁰ *Id.* The \$161 million figure consists of \$120 million in operating expenditures and \$41 million for the construction of additional prison beds. *Id.* This cost estimate might be deceptive; the task force noted that the finance of prison construction through bonds, a strong likelihood given the Commonwealth's fiscal challenges, could triple the cost of constructing new prison beds. *Id.*

⁸¹ *Id.* at 11–22.

⁸² See John Cheves, *Sweeping Bill Filed to Address Prison Crowding in Kentucky*, LEXINGTON HERALD-LEADER, Feb. 11, 2011, available at 2011 WLNR 2773800.

2011.⁸³ Buoyed by widespread support from various public safety stakeholders⁸⁴ and largely spared significant alteration during the legislative process,⁸⁵ House Bill 463 passed unanimously in the Senate⁸⁶ and with only one dissenting vote in the House.⁸⁷ Calling it “an historic piece of legislation,” Governor Beshear signed House Bill 463 into law on March 3.⁸⁸ In stark contrast to decades past, when political leaders aggressively sought to stake their claim to the prized “tough on crime” label, Kentucky political leaders of every ideological stripe clamored to share in the credit and espoused effusive praise for House Bill 463.⁸⁹ Upon Senate passage of the bill, Senate President David Williams, a Burkesville Republican, reflected that enactment of House Bill 463 represented “one of the best days” in his twenty-six-year Senate career.⁹⁰ Indeed, Williams not only praised the bill, but claimed that the measure was an initiative of the legislature, not the governor.⁹¹ For his part, Beshear traced the origins of House Bill 463 to when he “stood shoulder-to-shoulder with representatives

⁸³ Jessie Halladay, *Ky. Lawmakers to Take Up Prison Revamp Plan*, COURIER-JOURNAL, Feb. 12, 2011, at A1, available at 2011 WLNR 2973547. The response from Kentucky’s political leaders was mostly positive. *Id.* Governor Beshear signaled his view that introduction of the bill was a positive step forward, praising its sponsors and expressing hope that Kentucky would become “smarter on crime” in order to control costs and improve public safety. *Id.* House Judiciary Committee Chairman John Tilley, a Democrat from Hopkinsville and sponsor of House Bill 463, called the bill “perhaps the most far-reaching proposal the General Assembly has considered for the criminal justice system in at least a generation . . . [culminating] more than six very productive months of work.” Cheves, *supra* note 82. Senate Judiciary Committee Chairman Tom Jensen, a Republican from London who served on the task force and was instrumental in crafting the legislation, committed to aggressively lobby for the bill, which he said would make Kentucky “smart[er] about how we spend our dollars.” *Id.* Tilley boldly predicted that the General Assembly could reach agreement on “nearly everything.” *Id.*

⁸⁴ Deborah Yetter, *Bill to Overhaul Ky. Prison System Advances*, COURIER-JOURNAL, Feb. 24, 2011, at B1, available at 2011 WLNR 3751541. Kentucky Supreme Court Chief Justice John Minton, Justice and Public Safety Secretary J. Michael Brown, a representative of the state’s commonwealth’s attorneys, and the head of the Kentucky Department of Public Advocacy, all testified in support of the bill. *Id.*

⁸⁵ See Jack Brammer, *Beshear Will Sign into Law a Sweeping Rewrite of State’s Criminal Code*, LEXINGTON HERALD-LEADER, Mar. 1, 2011, available at 2011 WLNR 3929403. The Senate amended some sentencing provisions of the bill, but most of the original provisions remained largely intact. *Id.*

⁸⁶ Deborah Yetter, *Kentucky Senate Passes Corrections Reform Bill*, COURIER-JOURNAL, Feb. 28, 2011, available at 2011 WLNR 3979798.

⁸⁷ Brammer, *supra* note 85.

⁸⁸ *Id.*

⁸⁹ Yetter, *supra* note 84. Calling House Bill 463 “landmark legislation,” Senator Jerry Rhoads, a Democrat, said he could not “think of anything more significant” passing the General Assembly during his tenure. *Id.* Senator Gerald Neal, a Louisville Democrat, called the bill “a step toward common sense.” Yetter, *supra* note 86.

⁹⁰ Yetter, *supra* note 86.

⁹¹ Brammer, *supra* note 85.

of [the] legislative and judicial branches, as well as city and county officials, to support the creation of [the] study and legislation.”⁹²

The bipartisan manner by which House Bill 463 became law symbolizes a new paradigm: political leaders now recognize that reality demands and constituents expect *smart*-on-crime policies. That House Bill 463 was enacted during an election year further crystallizes this new dynamic. While some political leaders may still fear the “soft on crime” label, they are at least devising more creative methods of escaping it. The approach of House Bill 463 represents not a retreat from the fundamental objectives of the war against crime, but rather abandonment of a rigid, tired philosophy in favor of a holistic, evidence-driven approach. It is a retooling of flawed means, not a rejection of essential ends. In this effort, House Bill 463 makes Kentucky a national leader. It is now the responsibility of policymakers to effectively implement House Bill 463 and ensure that this opportunity is not wasted.

III. ANALYSIS

A. *The Four Pillars of House Bill 463*

The report of the Task Force on the Penal Code and Controlled Substances Act embraced the reinvestment philosophy of corrections, which emphasizes alternatives to incarceration, utilization of demonstrably effective community-based treatment, education and rehabilitation services, improved supervision of offenders, and a reduction in recidivism.⁹³ The first sentence of the first section of House Bill 463 recalibrates the sentencing policy of the Commonwealth: “The primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced.”⁹⁴ This approach exemplifies the core principle underlying the task force report: public safety resources must be better targeted, better managed and better focused in order to reduce costs and improve public safety.⁹⁵

⁹² *Id.*

⁹³ TASK FORCE REPORT, *supra* note 18, at 1.

⁹⁴ 2011 Ky. Acts 5 (codified at KY. REV. STAT. ANN. § 532.007 (West, Westlaw through 2012 legislation)).

⁹⁵ *See generally* TASK FORCE REPORT, *supra* note 18.

The law identifies the reduction of recidivism and criminal activity as a “key measure of the performance of the criminal justice system.”⁹⁶ In order to achieve these objectives, House Bill 463 erects four basic pillars.

First, sentencing judges shall consider the “results of a defendant’s risk and needs assessment” during presentence deliberation and the “likely impact of a potential sentence on the reduction of the defendant’s potential future criminal behavior.”⁹⁷ In essence, House Bill 463 imposes upon judges the requirement that a defendant’s risk to public safety be a prominent consideration in determining the nature and duration of the sentence.⁹⁸ Moreover, for the first time, judges are now required to consider the link between possible sentences and the offender’s risk of recidivism.⁹⁹ Specifically, the law requires that courts and corrections officials incorporate this assessment into every stage of the decision-making process, “including for pre-trial supervision, at sentencing, in evaluating parole suitability and setting terms of parole, and throughout the period of probation and parole supervision.”¹⁰⁰ The natural implication of this requirement is that judges should strive to impose sentences that will ultimately diminish an offender’s odds of reoffending. As a result of this requirement, reduction of recidivism is not merely a secondary goal of the criminal justice system, as it has been in the past, but rather its fundamental purpose. House Bill 463, if properly implemented, makes combating the root causes of crime and offering offenders the resources needed to reduce their risk of recidivism a viable alternative to incarceration, rather than a mere afterthought or aspirational lark.

Second, House Bill 463 requires that “[a]ll supervision and treatment programs provided for defendants shall utilize evidence-based practices to reduce the likelihood of future criminal behavior.”¹⁰¹ This includes a requirement that, by 2016, 75% of all state expenditures on offender supervision and intervention programs be spent on programs that are deemed “evidence-based.”¹⁰² Additionally, offenders must be supervised using practices and procedures that have demonstrated success in reducing recidivism.¹⁰³ House Bill 463 further empowers parole and probation

⁹⁶ 2011 Ky. Acts 4–5 (codified at KY. REV. STAT. ANN. § 532.007 (West, Westlaw through 2012 legislation)).

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ 2011 KENTUCKY REFORMS, *supra* note 13, at 7.

¹⁰¹ 2011 Ky. Acts 4–5 (codified at KY. REV. STAT. ANN. § 532.007 (West, Westlaw through 2012 legislation)).

¹⁰² 2011 KENTUCKY REFORMS, *supra* note 13, at 7.

¹⁰³ *Id.*

officers to direct their time and resources to those supervisees most likely to reoffend by mandating administrative caseloads for low-risk offenders, thereby reserving scarce resources and the most intensive intervention techniques for dealing with high-risk offenders.¹⁰⁴ To incentivize good behavior, the law authorizes the issuance of “compliance credits” for parolees and early termination for probationers who comply with the conditions of their supervision.¹⁰⁵ The bill further endorses community-based supervision and broadens the availability of work-release opportunities,¹⁰⁶ strengthening the likelihood that offenders will have the support structure they need to successfully reintegrate into society and avoid reoffending.

Third, the new law requires evaluation of all state-funded supervision and treatment programs “at regular intervals to measure and ensure reduction of criminal behavior by defendants in the criminal justice system.”¹⁰⁷ The policy concern underlying this requirement is simple: House Bill 463’s emphasis on reducing recidivism and lowering incarceration rates will only succeed if policymakers and managers aggressively and meticulously evaluate existing methods, expand those that work, and discard or modify those that do not. The program evaluation provision may be the most crucial element of the law, for its faithful implementation will determine the ultimate success of the overall reform effort. Enabling underperforming or ineffective programs to continue without modification would not only jeopardize the principal objectives of the legislation but also undermine public confidence in the reform effort. Policymakers should not approach the implementation of House Bill 463 with the same rigidity that has characterized war-on-crime doctrinarism. The purpose of House Bill 463 is not to dictate which approaches are acceptable and which are not; rather, its purpose is to provide officials with the flexibility needed to determine which approaches are effective and which are not.

Finally, House Bill 463 requires the estimation of cost savings achieved through the implementation of the various provisions of the law and the reinvestment of a portion of these savings into expanded treatment services and enhanced probation and parole supervision efforts.¹⁰⁸ Although this Note will later highlight the general inadequacy of this reinvestment

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ 2011 Ky. Acts 5 (codified at KY. REV. STAT. ANN. § 532.007 (West, Westlaw through 2012 legislation)).

¹⁰⁸ *Id.* at 42 (codified at KY. REV. STAT. ANN. § 196.288 (West, Westlaw through 2012 legislation)).

mechanism,¹⁰⁹ Kentucky's embrace of the reinvestment principle¹¹⁰ is a significant step forward. The reinvestment pillar complements the measurement pillar of House Bill 463. Under the reinvestment approach, policymakers first analyze data relating to arrest rates and availability of reentry services, treatment and education opportunities for offenders, and recidivism reduction programs.¹¹¹ This data-driven analysis guides officials in developing policy options tailored to the needs of their jurisdiction, allowing them to invest scarce resources where they are most needed and in programs demonstrating maximum effectiveness.¹¹² Policymakers then implement the new policies and institute mechanisms designed to constantly measure program performance.¹¹³ This is achieved through the development of comprehensive implementation plans and progress reports to keep officials updated on the success, or failure, of the initiatives.¹¹⁴ Policymakers use this information to measure progress and decide which programs should receive resources and which should be modified or discontinued.¹¹⁵

These four pillars work in symbiotic collaboration; all must stand or none will stand. The designation of reducing recidivism and lowering incarceration rates as the Commonwealth's two principal public safety objectives will help transform Kentucky's overburdened, inefficient corrections system. The utilization of risk- and need-based assessments in determining both the nature and length of sentences will ensure that scarce public resources are directed where they are most needed. Regular reevaluation of reform efforts and initiatives is essential to determining whether those efforts are succeeding. Finally, reinvestment of cost savings achieved as a result of successful reform programs into the continuation, expansion or emulation of those programs will ensure that progress made and results gained are not short-lived, but rather self-reinforcing and ongoing.

¹⁰⁹ See *infra* Part IV.B.

¹¹⁰ See generally COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT AND PUBLIC SAFETY ADDRESSING RECIDIVISM, CRIME, AND CORRECTIONS SPENDING (2011), available at https://www.bja.gov/Publications/CSG_JusticeReinvestmentSummitReport.pdf (discussing the central tenets of the reinvestment strategy for corrections).

¹¹¹ *Id.* at 54.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

B. Comparison of House Bill 463 and Prior Reform Efforts in Kentucky

The last three decades have been a period of virtually unchecked, seemingly inextricable escalation in Kentucky's incarceration rate with very little corresponding improvement in public safety.¹¹⁶ Indeed, the few efforts to reduce Kentucky's prison population have been born not of a desire for reform or recognition of the flaws inherent in the existing system, but rather because of fiscal exigencies.¹¹⁷ Even when Governor Patton authorized the early release of 883 inmates in late 2002 and early 2003,¹¹⁸ the governor made sure to offer platitudinous expressions of regret as he turned the prison-cell lock.¹¹⁹ Patton made it clear that this was something he *had* to do, not something he *wanted* to do.¹²⁰ In unilaterally releasing the inmates, Patton faced almost universal criticism from political officials anxious to exploit public safety as an election year issue in 2003.¹²¹ Similarly, the temporary alliance of necessity that produced the 2008 parole-credit program, which resulted in the release of nearly 3,600 inmates from prison and 4,700 individuals from parole, quickly gave way to political sniping over the scope and duration of the program.¹²² After these two politically calamitous efforts, it is surprising that corrections reform gained any traction in 2010 and 2011.

Perhaps political leaders and the public recognized that these early-release programs, adopted with the singular purpose of saving taxpayer dollars, did not represent meaningful reform. Patton's early-release program was executed with very little deliberation; release decisions were essentially reached on an ad hoc basis.¹²³ Officials seem to have devoted little consideration to which inmates were actually suitable for release, much less what level of post-release supervision they required. While the program approved by Governor Beshear and the General Assembly in 2008 appears to have been implemented in a somewhat more systematic manner,¹²⁴ it provided only the short-term relief that fiscal circumstances demanded, not the sort of long-term, comprehensive reform that reality required. House

¹¹⁶ See *supra* Part II.A.

¹¹⁷ See Chellgren, *supra* note 55; Steitzer, *supra* note 64.

¹¹⁸ Gennaro F. Vito et al., *Evaluation of Kentucky's Early Inmate Release Initiative: Sentence Commutations, Public Safety and Recidivism*, 74 FED. PROBATION 22, 24 (2010).

¹¹⁹ See Mark L. Chellgren, *Prisoners Get Break in Shortfall*, EVANSVILLE COURIER & PRESS, Dec. 13, 2002, at B10, available at 2002 WLNR 11321197.

¹²⁰ *Id.*

¹²¹ See Chellgren, *supra* note 55.

¹²² See Steitzer, *supra* note 64; Steitzer, *supra* note 68.

¹²³ See Butterfield, *supra* note 45; Chellgren, *supra* note 119.

¹²⁴ See *supra* Part II.B.2.

Bill 463, and the wholesale, evidence-based reform it embraces, has no equivalent in modern Kentucky history; it represents the first meaningful effort to fundamentally change not merely the mechanics of the Commonwealth's corrections system, but its very purpose.

Perhaps most significantly, House Bill 463 was the product of widespread bipartisan agreement, not just in terms of its passage, but in its inception.¹²⁵ Republicans and Democrats were both actively involved in and exceedingly supportive of both the work of the task force and the drafting and passage of the final bill in the General Assembly.¹²⁶ Cynics might be inclined to claim that this bipartisan support was but election-year politicking and posturing. If that is the case, this alone is a sign of progress, an indication of a changing paradigm that rejects as fundamentally unsound the once unrelenting doctrinarism of war-on-crime policies. A decade ago, the notion of abandoning the war-on-crime philosophy would have been politically toxic. House Bill 463 would almost assuredly have been dead on arrival had it been proposed, for instance, in 2003, when Governor Patton was implementing his unpopular early-release program. Indeed, opposition to that program was something of a political litmus test at the time.¹²⁷ That House Bill 463 not only escaped political controversy, but galvanized a broad political coalition of support, is a strong indication that political leaders and the public alike recognize the deficiencies of past policies and are capable of working in good faith to develop a more sustainable path forward. Whether in the name of doing the right thing, saving money or ensuring their own political survival, officials in Kentucky backed the right horse in House Bill 463.

C. Comparing Kentucky's Reform Approach to Those of Other States

Kentucky's reform effort is still in its infancy. It is therefore instructive to look at the experiences of other states that have embraced and implemented, with considerable success, the data-driven reinvestment strategy embodied in House Bill 463.

1. Texas: Messing with a Broken System

In many ways, Texas exemplifies the deleterious consequences of decades of rigid fidelity to a public-safety philosophy that singularly

¹²⁵ See Cheves, *supra* note 82.

¹²⁶ *Id.*

¹²⁷ See Chellgren, *supra* note 55.

focused on lengthening prison sentences as the primary method of controlling crime. From 1985 to 2005, the inmate population in Texas increased by 300%, requiring the expenditure of \$2.3 billion to add 108,000 prison beds.¹²⁸ By 2007, Texas officials predicted that up to 17,000 additional inmates would enter state prisons within five years, costing the state \$523 million to build and operate new prison facilities.¹²⁹ Legislators from both parties sought to simultaneously save money and achieve better public safety outcomes by expanding drug treatment and diversion initiatives, implementing sweeping changes to parole and supervision policies, and creating additional drug courts.¹³⁰ In May 2007, the Texas legislature enacted a comprehensive package of reforms. These reforms included expanding residential- and outpatient-treatment programs for offenders on probation with substance abuse and addiction problems, adding 1,700 beds in halfway houses and inpatient treatment facilities to help prevent individuals who violate the terms of their probation and parole from returning to prison, and adding 3,200 new slots for in-prison substance abuse treatment programs.¹³¹

In addition, the Texas reforms overhauled parole and probation policies by imposing a maximum limit for parole caseloads, reducing probation terms for drug and property offenders, and incentivizing the development of progressive sanctions for technical or minor parole violations.¹³² Kentucky's approach mirrors that of Texas in several respects. As a general matter, the philosophy underlying the reform efforts in both states is the same. To wit, reducing recidivism will bring about substantial improvements in overall public safety outcomes. Texas has now embraced the goals of reducing recidivism and strengthening treatment and reentry initiatives as a cornerstone of its criminal justice system; through House Bill 463, Kentucky has done the same.

The reform efforts in Texas have produced substantial progress. Between 2006 and 2009, for example, the number of parole revocations resulting in the return of offenders to prison declined by 29%.¹³³ Once projected to grow by between 14,000 and 17,000 inmates over five years, the size of the state's prison population has instead stabilized since 2007.¹³⁴ As a result of these reforms, Texas achieved significant budgetary savings,

¹²⁸ ONE IN 100, *supra* note 9, at 17.

¹²⁹ *Id.*

¹³⁰ *Id.* at 17–18.

¹³¹ COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., *supra* note 110, at 57–58.

¹³² *Id.* at 58.

¹³³ *Id.*

¹³⁴ *Id.* at 57–58.

with net savings of \$443.9 million in the Fiscal Year 2008–2009 budget alone.¹³⁵ The 2007 reforms were followed by the enactment of legislation in 2009 requiring the Texas Department of Criminal Justice to create a comprehensive reentry plan for inmates slated for release from the state’s jails and prisons.¹³⁶ These plans are to be developed using needs assessments, a network of transition and rehabilitation programs, and information gathering and sharing across government agencies in coordination with private providers.¹³⁷ Finally, the 2009 legislation created a multi-agency Reentry Task Force, responsible for measuring program performance and strengthening the availability and effectiveness of reentry services.¹³⁸

The four pillars of House Bill 463 substantially mirror these Texas reform initiatives in form. It is especially critical that Texas lawmakers kept their promise to reinvest a portion of the savings in reentry and recidivism reduction initiatives, allocating \$241 million “to expand the capacity of substance abuse, mental health, and intermediate sanctions facilities and programs that focused on people under supervision who would otherwise likely be revoked to prison.”¹³⁹

2. Oregon: A National Leader

Oregon is instructive both because of the success of their reform efforts and the duration of those efforts. Between 1999 and 2004, Oregon led the nation in reducing recidivism, with the number of offenders returning to prison dropping by nearly 32%.¹⁴⁰ Oregon leaders “attribute their success to a comprehensive approach to reform and a commitment to change that reaches across all levels of government—from the supervision officer in the field, to the judiciary, through the state corrections department and up the ranks of legislative leadership.”¹⁴¹ Oregon prison inmates receive risk- and needs-assessments upon admission, are enrolled in targeted case management during the term of their incarceration, and reentry specialists provide comprehensive transition planning beginning six months before

¹³⁵ *Id.*

¹³⁶ SCOTT-HAYWARD, *supra* note 2, at 8.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., *supra* note 110, at 58–59.

¹⁴⁰ PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 20 (2011), available at http://www.pewtrusts.org/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/state_recidivism_revolving_door_america_prisons%20.pdf.

¹⁴¹ *Id.*

release.¹⁴² Committed to eliminating the revolving door that frequently sends parolees back to prison, sometimes for technical or relatively minor violations, Oregon officials developed a graduated-sanctions system, offering a variety of alternative options that have driven parolee readmission rates to record lows.¹⁴³

Further, Oregon's reentry programs are data-driven and consistently monitored to ensure maximum effectiveness.¹⁴⁴ Legislation passed in 2003 requires that any correctional program funded with state dollars be "evidence-based in its design and delivery."¹⁴⁵ The program-evaluation and evidence-based-strategy requirements mirror two of the four pillars of House Bill 463. Oregon's success in reducing its inmate population and strengthening the ability of offenders to effectively reintegrate into society is in part a result of the aggressiveness with which it has implemented these reforms. These results demonstrate that when states take bold action, progress is possible. When officials measure programs for effectiveness, support those that work and change or eliminate those that do not, progress is sustained; when leaders reinvest savings in successful reentry and transitional programs to reduce recidivism, progress is reinforced. The holistic, comprehensive approach undertaken by Oregon serves as a model for Kentucky as it implements House Bill 463.

3. Kansas: Kentucky's Mirror Image

Of all the states that have recently adopted the reinvestment approach, Kansas is perhaps most analogous to Kentucky. Like Kentucky, Kansas had enthusiastically embraced the misguided policies of the war on crime.¹⁴⁶ In 2007, state officials projected that, unless existing policies changed, the inmate population would increase 22% by 2016, requiring the state to add 1,300 new beds over the next ten years at a cost of \$500 million.¹⁴⁷ Kansas' corrections system had already reached a point of near dysfunction. In 2006, for example, probation and parole revocations represented a staggering 65% of prison admissions; 90% of revocations were for technical or substance abuse violations.¹⁴⁸

¹⁴² *Id.*

¹⁴³ *Id.* "[O]nly 5.9 percent of offenders released in 1999 and 3.3 percent of the 2004 cohort were returned to prison on technical violations." *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., *supra* note 110, at 60.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

In 2007, the Kansas legislature enacted legislation establishing a performance-based program for community corrections to help localities devise and implement strategies to reduce recidivism while creating new incentives to encourage inmates to complete various reentry programs.¹⁴⁹ These reforms produced almost immediate results, with the number of probationers and parolees returning to prison declining 16% and 34%, respectively.¹⁵⁰ In embracing the reinvestment approach, Kansas was able to stabilize the growth in its prison population. The Justice Center of the Council on State Governments, which has assisted Kansas and other states in implementing these types of reforms, notes, however, that this progress might falter if emerging trends are left unaddressed.¹⁵¹ The progress made in Kansas is jeopardized by the absence of meaningful methodologies for measuring the effectiveness of programs, as well as the lack of a strong mechanism for ensuring sustained reinvestment over the long term. These elements, two of the four pillars of House Bill 463, are essential to the success of any corrections reform effort. The tenuous nature of Kansas' reform efforts demonstrate the importance of measuring performance and investing in effective programs. If Kentucky is to fulfill the promise of House Bill 463, state leaders must keep the promises made in House Bill 463.

IV. RESOLUTION

The central objective of House Bill 463 is the reduction of recidivism and criminal activity.¹⁵² House Bill 463 establishes the critical foundation necessary to guide the Commonwealth toward a smarter, more sustainable criminal justice system; it is, however, only the foundation. As significant a step forward as it may be, House Bill 463, like all groundbreaking pieces of legislation, still requires revision and fine-tuning. Indeed, recognition and correction of the flaws and missed opportunities of House Bill 463 is every bit as essential as passage of the measure itself. The integrity of the four pillars of House Bill 463 will quickly crumble unless necessary improvements are made to their underlying foundation.

¹⁴⁹ *Id.* at 61.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See 2011 Ky. Acts 5 (codified at KY. REV. STAT. ANN. § 532.007 (West, Westlaw through 2012 legislation)).

A. The Frequency and Aggressiveness of Program Performance Evaluation

The most important provision of House Bill 463 requires that all offender supervision, treatment and rehabilitation programs undergo periodic evaluation designed to measure their effectiveness in achieving their goals.¹⁵³ The law, as enacted, requires such program evaluations be conducted at “regular intervals,”¹⁵⁴ but fails to specify or even provide any guidance as to how frequent or aggressive these evaluations should be.¹⁵⁵ Instead, the Department of Corrections is tasked with the responsibility of establishing a process for auditing the effectiveness of evidence-based treatment, intervention and supervision programs, affording an opportunity for underperforming programs to improve, and creating a mechanism to defund programs which, upon further audit, fail to meet performance objectives.¹⁵⁶ The importance of the program performance evaluation concept is self-evident: the objectives of House Bill 463 will be met only if scarce public resources are invested in demonstrably effective, evidence-based programs that improve public safety and reduce recidivism.¹⁵⁷ Rather than establishing discernible guidelines by which Department of Corrections can develop program performance evaluation mechanisms consistent with legislative intent, the General Assembly instead punted, assigning to the Department full responsibility for determining the mode, frequency and intensity of such evaluations.

Informing the General Assembly’s decision to defer so strongly to the judgment of the Department of Corrections may have been a recognition that sustained, almost obsessive, micromanagement of criminal justice policy by the legislature in past decades helped produce the embarrassingly dysfunctional system that so ails us today. Or, given the realities of the modern legislative process, the decision represented recognition that perhaps the only governmental entity more dysfunctional than corrections is the legislature itself; indeed, a hopelessly dysfunctional process can hardly be relied upon to competently oversee reform of an endlessly dysfunctional system. Whatever the reason, the performance-evaluation mechanism established by House Bill 463 may prove inadequate. The experience of the last four decades demonstrates that legislative direction of criminal justice

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ 2011 Ky. Acts 36 (codified at KY. REV. STAT. ANN. § 196.111 (West, Westlaw through 2012 legislation)).

¹⁵⁷ *See supra* Part III.A.

policy is unwise.¹⁵⁸ However, House Bill 463, at least in this respect, cuts too far the other way. The Department of Corrections is vested with plenary responsibility for the development of the performance-measurement mechanisms.¹⁵⁹ House Bill 463 does mandate that, by July 2016, 75% of state dollars allocated for supervision, treatment and rehabilitation programs be spent on programs that comport with evidence-based practices.¹⁶⁰ Moreover, the legislation provides that, by Fiscal Year 2016–2017, the Department of Corrections must eliminate policies, procedures, programs and practices that are not meeting their performance objectives.¹⁶¹ However, these provisions, while necessary to the success of the evidence-based criminal justice approach, are far from sufficient to fulfill that objective.

While funding determinations must be contingent upon a program's performance, it is imperative that the performance-evaluation mechanisms subject a program to scrutiny of sufficient intensity and frequency to both effectively assess the true level of performance and enable the legislature to make fully informed judgments about which programs should continue to receive funding. The strength of the regulations promulgated by the Kentucky Department of Corrections prescribing the process by which supervision, rehabilitation and treatment programs will be audited, as well as the minimum level of performance such programs must attain in order to continue to receive funding, will largely determine whether the performance evaluation provisions of House Bill 463 are rendered effective or toothless.

The Department of Corrections regulations should provide for an initial wholesale review of all existing programs to determine their general effectiveness. This will both assist in the development of new programs, in that successful models may be emulated, and in the redesign of ineffective programs. Following this initial review, officials should create specific, strict performance objectives for each program. Program-specific objectives are essential; generalized objectives, applicable to all programs, would undermine the integrity of the performance-evaluation process. Establishment of specific goals and targets for each program will provide a clear standard by which officials can determine whether a particular program's performance is up to par, whereas generalized goals would enable officials, reluctant to give up on entrenched programs, to pigeonhole inefficient programs into broad, amorphous categories that fail to

¹⁵⁸ See *supra* Part II.

¹⁵⁹ 2011 Ky. Acts 36 (codified at KY. REV. STAT. ANN. § 196.111 (West, Westlaw through 2012 legislation)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

adequately and holistically gauge whether a program is fulfilling the objectives it was established to achieve.

A three-tiered level of program goals and objectives, whereby officials establish short-, medium-, and long-range targets, is the best option. Short-term targets might encompass a period of several weeks, during and after which officials would assess the program's progress in meeting its objectives. This short-term analysis would serve a tactical purpose, providing program administrators with timely indicators of a program's performance, enabling them to adjust methods or reallocate resources. The medium-term targets would serve a more strategic purpose, providing administrators with a baseline against which to assess their performance over a period of several months. The results of this medium-term assessment would enable administrators to shift, narrow or broaden their focus in order to put the program on track to achieve its long-term objectives. The long-term targets, reflecting a period of one or two years, would provide the basis for program evaluation for funding purposes. Programs that have not made substantial progress in meeting their long-term targets should be placed on probationary status and, consistent with the legislative intent expressed in House Bill 463, discontinued if they fail to demonstrate effectiveness upon a second audit. The purpose of this three-tiered approach is to avoid programs reaching the point of no return; to identify problems early, correct them, and ensure maximum effectiveness.

In implementing the performance measurement provisions of House Bill 463, the Department should embrace an audit approach of this nature, allowing for frequent, intense scrutiny of program effectiveness, for, as the saying goes, "what gets measured gets done."¹⁶²

B. The Integrity of the Reinvestment Mechanism

House Bill 463 envisions the reinvestment of a portion of dollars saved through the implementation of evidence-based corrections strategies into expanded treatment programs and enhanced probation and parole supervision programs.¹⁶³ This reinvestment pillar builds upon the performance-measurement pillar, seeking to ensure that Kentucky's new and developing path toward a more sustainable and efficient corrections system avoids falling victim to the legacy of broken promises that fiscal

¹⁶² See generally Leslie Wolf, *What Gets Measured Gets Done*, CAL. DIGITAL LIBRARY (Sept. 15, 2010), <http://www.cdlib.org/cdinfo/2010/09/15/what-gets-measured-gets-done-key-performance-indicators/>.

¹⁶³ 2011 Ky. Acts 42 (codified at KY. REV. STAT. ANN. § 196.288 (West, Westlaw through 2012 legislation)).

crises and political opportunism have so reliably produced. The success of the evidence-based corrections strategy embraced by House Bill 463 depends upon the longevity and significance of the Commonwealth's investment in and commitment to that strategy.

House Bill 463 requires the Department of Corrections to measure and document cost savings resulting from the implementation of various reform provisions of the law and directs the establishment of a baseline by which these savings can be measured.¹⁶⁴ Presumably on the basis of these findings, the General Assembly shall “[d]etermine the estimated amount necessary for reinvestment in . . . [e]xpanded treatment programs and expanded probation and parole services . . . [and] [a]dditional pretrial services and drug court case specialists.”¹⁶⁵ The General Assembly shall then provide “sufficient” amounts to “fully fund” the reinvestment programs.¹⁶⁶

Ostensibly out of an understandable desire to avoid making funding promises it may not be able to keep, the General Assembly has created a relatively flaccid reinvestment mechanism. In its apparent attempt to avoid overcommitting itself, the General Assembly has instead offered no commitment at all. By the language of the statute, the General Assembly must determine the funding levels necessary for treatment and parole provisions.¹⁶⁷ Based on those determinations, the General Assembly is to allocate sufficient resources to fully fund the programs.¹⁶⁸ Some are perhaps placated by the apparent command that these programs be fully funded. However, the weakness of this provision is apparent. What constitutes full funding is *entirely* dependent upon what the General Assembly determines is “necessary” to support the programs. The legislation seems to say, in essence, that full funding is whatever the General Assembly says it is. This is an empty promise.

The inadequacy of the reinvestment mechanism jeopardizes the prospects for the long-term success of this effort. The provisions contained in House Bill 463 will produce substantial savings for the Commonwealth; however, the ultimate success of reform is not assured by new laws alone. Reformation of a broken system will require a meaningful investment of resources. In creating a weak reinvestment mechanism, the General Assembly apparently seeks to reap the benefits of reform without providing the resources necessary to secure it.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

If the sole motivation behind House Bill 463 is to save money in order to resolve the current fiscal crisis, then its prospects for success are bleak. It is true that the Commonwealth must resolve its short-term budgetary challenges, but perhaps the more important deficit is the one that has gone so long unaddressed: the gap between the empty promises of Kentucky's criminal justice policies and the results achieved. If legislators shortchange the reinvestment strategy to correct the general-fund deficit, they will secure short-term relief at the expense of greater long-term pain, for Kentucky's corrections system will resume its path of dysfunction and torpor. If House Bill 463 becomes merely another vehicle for saving money, rather than the catalyst for a fundamental transformation in policy, the promise of this moment will have been tragically lost. The Commonwealth can ill afford a deficit between the promise of reform offered by House Bill 463 and the reality. A stronger reinvestment mechanism, perhaps in the form of guaranteed minimum funding levels, funding formulas or a special reserve fund, is needed to avoid this deficit.

V. CONCLUSION

House Bill 463 represents a refreshing departure from the tired policies of the past. Its success hinges upon the boldness and innovation with which policymakers guide its implementation. Only a sustained effort will transform a system so long defined by doctrinaire thinking and so stubbornly susceptible to deceptively simple "solutions" to complex problems. This effort will doubtlessly find itself challenged by false starts and unsuccessful tactics. Such setbacks might prompt calls for retreat. Some may even offer proclamations of failure. But House Bill 463 represents the means to an end, not the end itself. That is its very genius, for it departs from the rigidity of past policies toward a more flexible approach that responds to, and evolves with, changing circumstances. House Bill 463 affords Kentucky the opportunity to overcome its legacy of desultory criminal justice and corrections policies; indeed, to lead the nation down the path toward a smarter, more sustainable approach. A just and innovative Commonwealth can seize this opportunity to build a better system, if it will.