



Criminal Justice Policy in Delaware: Options for Controlling Costs and Protecting Public Safety

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Introduction

Delaware has enacted significant reforms in recent years to improve its criminal justice system, balancing the need for public safety with the goal of rehabilitating offenders who are amenable to change. Despite this progress, Delaware faces significant criminal justice challenges. Fortunately, there are opportunities to further improve Delaware's correctional system, including solutions that will help address the state's substantial budget shortfall and prison capacity pressures without compromising public safety.

A myriad of statistics help shed light on the state of the criminal justice system in Delaware. The crime rate in Delaware is about 8 percent higher than the national average.

¹ The violent crime rate is 32 percent higher than other states.² Between January 2005 and 2008, major crimes reported have increased 12.4 percent from 11,945 to 13,431.³ Major crimes dipped slightly in early 2009 but have continued to increase later in the year, resulting in a cumulative 11 percent increase from January 2005 to June 2009.⁴

The state's correctional system has grown substantially in recent years. Some 1 in 26 Delaware residents are under correctional control.⁵ In 1982, only 1 in 59 adults were under correctional control. There are currently 5,655 inmates in Delaware prisons.⁶ The state's prisons are operating at 104 percent of capacity.⁷ The incarceration rate is 482 per 100,000 people, which is 7 percent greater than the national average.⁸ Additionally, there are 1,193 offenders in community corrections facilities or a work release center. There are also 15,582 individuals on probation and parole, with all but a few hundred being probationers.⁹ Another 426 individuals are on home confinement.¹⁰

The Corrections Budget

In 2008, Delaware spent 6.1 percent of its general fund budget on corrections.¹¹ Of the \$253.2 million corrections budget, 64 percent was spent on personnel followed by 16 percent on inmate medical care.¹² The corrections budget rose to \$259 million in 2009 before declining to \$252 million for 2010.

The 2011 corrections budget must be closely scrutinized by state policymakers, as Delaware will face a projected \$604 million shortfall in its next budget, which is approximately 18 percent of current spending.¹³ Plans to build a new prison facility have been proposed, but were placed on hold by Correction Commissioner Carl Danberg due to budget constraints.

The average prison cost in Delaware is \$33,236 per bed per year when annualized construction costs are included.¹⁴ The average cost for work release/violation of probation facilities is \$27,571 when annualized construction costs are included, providing nearly \$5,000 in savings in comparison to the state's prisons.¹⁵ In Delaware, 1 day of prison costs as much as 22 days of probation and parole.¹⁶

Sentencing and Accountability

In 1984, Delaware established the Sentencing and Accountability Commission (SENTAC) to develop and implement a system of sanctions that would enhance accountability in the criminal justice system. There are five categories of sanctions, each escalating in severity:

- Level V Incarceration – These offenders at the highest level of severity are sent to jail if their sentence is for a year or less while those serving more than a year are sent to prison. However, both groups go to the same facilities despite the difference in terminology. Indeed, Delaware is among the few states in which there are no local jails. All incarceration, along with community corrections, probation, and parole, is operated by the state DOC. Accordingly, all offenders immediately become the responsibility of the state, including during pre-trial proceedings. To facilitate reentry, DOC is authorized to place most inmates in a halfway house for the last six months of their Level V sentence.
- Level IV Halfway House/Home Confinement – The offender is placed under nine or more hours of daily supervision through house arrest with electronic monitoring, a halfway house, a restitution center, or a residential drug treatment facility.
- Level III Intensive Supervision – The offender is required to report for at least one hour a day and no more than 56 hours a week. Sentencing options such as community service, payment of a fine, curfews, and day reporting may be included. Each probation officer handling intensive supervision offenders has a reduced caseload of 25 to take into account the additional attention given to these probationers.
- Level II Field Supervision – The offender must meet with a probation officer on a regular schedule to comply with the contract, which can range from 1 to 50 hours per month. Payment of a fine may be allowed to substitute for some office visits. The probationer is not allowed to leave the state without permission and must maintain employment.
- Level I Administrative Probation – These are first-time offenders who are deemed to pose little risk of re-offending in the future. They are required to pay a fine, make restitution, and/or attend a first offender program. First offender programs divert eligible defendants who take responsibility for their actions before standing trial. Among those who are eligible are first-time drunk drivers who did not have blood-alcohol levels above a certain threshold – these offenders lose their driver's license for three months and must complete an educational course.

SENTAC guidelines provide a sentence range for every offense and both aggravating and mitigating factors, such as whether the defendant has a criminal record and, if so, the extent of the record. However, the sentencing guidelines promulgated by SENTAC are voluntary and non-binding, so a judge may impose a sentence outside the range. Since the SENTAC guidelines are not

mandatory, defendants may not appeal their application, though they may appeal on the ground that they are innocent. The philosophy of the SENTAC guidelines is that offenders should be sentenced to the least restrictive and most cost-effective sanction possible given the severity of the offense, the criminal history of the offender, and the need to protect public safety.

Sentencing for Drug Offenders

It is instructive to examine how drug offenders are treated in this sentencing system. Under the SENTAC guidelines, the presumptive sentence for a first-time offender convicted of simple possession of a narcotic is 12 months at Level II (probation).¹⁷ In contrast, drug trafficking and possession with intent to deliver (PWITD) are considered violent offenses. The drug trafficking mandatory minimum requires at least a two-year prison term upon conviction. Minimums range as high as 25 years for large amounts of the most dangerous drugs. The SENTAC recommended sentence for PWITD narcotic offenders is 0 to 30 months at Level V (prison). A mandatory minimum sentence applies to PWITD narcotic offenders with a prior conviction for trafficking, PWITD, or delivery – it is five years for heroin offenders and three years for all others.

The Court may opt to divert first-time drug-trafficking offenders subject to the two-year minimum to Boot Camp. Following Boot Camp, the offender must typically complete at least eighteen months and/or complete the Crest Program at Level IV (or participate in another residential treatment program). Approximately 66 percent of drug offenders successfully complete this term of probation and treatment – the remaining offenders are sentenced again and are subject to the applicable mandatory minimum. In 2007, 32 trafficking offenders were diverted from the mandatory minimum¹⁸; however, 7 first-time drug offenders with no weapons history and 41 repeat drug offenders with no weapons history were sentenced to the mandatory minimum term the same year.¹⁹

Additionally, trafficking offenders convicted within certain weight limits and repeat PWITD offenders are eligible for referral to the boot camp in lieu of a prison sentence. The DOC boot camp is a six-month military-style program that consists of strict discipline, work, and addiction rehabilitation.

Also, some drug offenders are eligible for addiction sentences in which some or all of the sentence may be discharged through successful participation in prison treatment programs. The Key and Greentree in-prison drug treatment programs last between 9 and 15 months depending upon the progress of the offender. In 2007, 168 drug offenders had their sentences suspended and were ordered into these programs. Other inmates in these programs are placed there by DOC as part of their standard prison sentence due to an identified substance abuse problem.

The KEY and Greentree programs are therapeutic communities that address both substance abuse and the mindset behind addiction using treatment stages that demand increased levels of personal and social responsibility. Participants assimilate to social norms and develop better social skills through daily meetings, work assignments, and peer group sessions. Inmates in these programs live in wings of prison units that are separate from the general population. Upon completing the KEY program, many offenders are placed in the Crest program, which has two components. In the first half of the six to nine month program, the offender lives at the Work Release Center and participates in counseling, group sessions and preparation for reentry. In the second half of the program, the offender can leave the facility to attend work, but must return to the Center at night. In both phases, the

offender is subject to drug testing. Finally, graduates of the Crest program are typically placed in the aftercare probation program in which they participate in group sessions, counseling, and routine drug testing, all on a non-residential basis. This combination of an in-prison therapeutic community and step-down reentry treatment programs has been demonstrated by a national study to reduce recidivism.²⁰ It should be noted that the Crest Program has a long waiting list due to the fact that some offenders are sentenced directly to the program, in addition to the offenders who participate as a follow-up to the Key Program. While waiting for available bed space in the Crest Program, offenders may spend time at a work release center or at Level V (prison), depending on their sentence. Some offenders who are sentenced to CREST ultimately are unable to participate due to insufficient space.

The number of SENTAC compliant felony drug sentences that received an addiction or boot camp sentence declined from 58 (14 percent) in 2007 to 23 (7 percent) in 2008.²¹ For those PWITD and simple possession offenders who are sentenced to prison, Delaware's Truth in Sentencing law allows them to earn a 25 percent reduction in their sentence known as "good time" if they do not have any disciplinary violations while behind bars. However, offenders who fail after completing some or all of the boot camp do not receive credit for that time.

Some of the drug offenders who are diverted are sent to the Delaware Drug Court, which was created in 1994 and expanded statewide in 1997. Like other drug courts throughout the country, the court differs from traditional courts where a judge imposes a sentence and moves on to the next case. Instead, in a drug court the offender regularly appears before the judge who assesses compliance and, if necessary, imposes sanctions, with a prison sentence being the most severe sanction for non-compliance. Offenders must accept a plea agreement to participate in the drug court program with the understanding that when they complete the program, their case will be dismissed. Participants who successfully complete the drug court program, which involves a course of treatment and regular drug testing, do not have a conviction on their record.

There are two tracks in the Delaware Drug Court. Track I targets defendants who are arrested while on Superior Court probation and who are charged with one or more drug offenses that do not carry a minimum mandatory sentence. To avoid having the violator wait in jail, a violation hearing is held within 14 to 21 days of arrest to resolve both the violation and the new charge. Many of these offenders are referred to residential substance abuse treatment followed by outpatient treatment. Violators may also be sentenced to "shock incarceration" lasting a few days or may be placed on stricter probation. Data indicates that offenders who successfully completed Track I treatment were less likely to be re-arrested within 18 months following release.²² Among previously addicted mothers who complete the program, they are less likely to give birth to addicted babies than those female offenders not in the program.²³ Track II of the Drug Court is for defendants arrested for drug offenses who have no or minimal prior felony convictions and are charged with offenses other than trafficking and delivery.

A task force is currently meeting to discuss reforming penalties associated with drug offenses, all of which are set forth in Title 16, Chapter 47 of the Health and Safety Code. The task force includes representatives from the Attorney General's office, Public Defender's office, Department of Correction, Police Chiefs' Council, Probation, several defense attorneys, and advocates from the criminal justice reform organization Stand Up for What is Right and Just (SURJ). One of the recommendations being considered by the task force is raising the weight thresholds that trigger the penalties for various categories of drugs.

Probation and Parole

At the front end of Delaware's criminal justice system, probation has been significantly reformed since the creation of SENTAC in 1984, most notably through Senate Bill 50 enacted in 2003. This legislation was designed to reduce the number of offenders revoked to prison for technical violations and make probation terms more manageable for offenders. Probation revocations to prison had increased from 195 when SENTAC was implemented to 4,123 in 2000. Senate Bill 50 shortened probation sentences to two years for violent felonies, 18 months for drug offenses, and one year for all other offenses. These limits do not apply to sex offenders and the two-year limit for violent offenders can be overridden by the sentencing court if it determines that a longer period of probation will reduce the likelihood that the offender will commit another violent offense. Senate Bill 50 also allows for the extension of a probation term by up to 90 days per incident where the offender has not completed the court ordered substance abuse treatment.

Moreover, this landmark legislation gave courts the authority to consolidate probation terms for multiple offenses. Further, it allowed probation officers to resolve violations of parole by short stays at Violations of Probation or Work Release Centers. The bill also permitted the Department to change an offender's level of supervision administratively and created a new probation level to provide a minimum degree of supervision to offenders who simply owed restitution or were required to accomplish or refrain from specific acts. Shorter probation terms reduce the pool of offenders on probation, which means that there are fewer offenders who can be revoked to prison for violating probation rules. Indeed, this legislation has contributed to a decline in the number of probationers from more than 21,000 in 2001 to just over 15,000 in 2008.

When it comes to the back end of the criminal justice system, Delaware was among the states that abolished parole as part of the movement towards "truth in sentencing" in the 1990's. Parole was technically eliminated in 1990 under the state's Truth-In-Sentencing Act, which applied to crimes committed on or after June 30, 1990. Currently, fewer than 400 inmates remain eligible for parole. However, the DOC may recommend inmates sentenced after that date to the Delaware Board of Parole for sentence modification. If the Board determines that there is a good cause for modification, they will forward a favorable recommendation to the sentencing judge for a final decision.

Relatively few inmates are released through the sentence modification process. Since 1990, a total of 409 sentences have been modified by the courts. A total of 556 cases were reviewed, with drug offenders accounting for 76 percent of these cases. Of these drug cases, approximately three-quarters involved drug trafficking convictions. Only 14 sentences were modified in fiscal year 2008 and 15 cases so far in 2009.

Inmates who have been released early have lower recidivism rates than their counterparts released after serving their full sentence.²⁴ In the year following release, 8 percent of the inmates whose sentence was modified committed a violent felony and 10 percent committed a drug felony. Of those inmates released after serving their full sentence, 14.3 percent committed a violent felony and 19 percent committed a drug felony in their first year after release.²⁵

Policy Options

Although significant reforms have been made in recent years, there are additional opportunities for improving Delaware’s criminal justice system, some of which would help avoid the need for prison construction. These approaches would, in many instances, increase the number of offenders who succeed in community supervision, stay drug-free, and obtain gainful employment. The following are among the options Delaware lawmakers should consider:

Hawaii HOPE Court. Like many states, Hawaii faced a problem of probationers not showing up for their appointments and declining to take mandatory drug tests. Probationers could commit numerous infractions before action was taken, leading to revocations to prison that might have been avoided had swift and sure sanctions been used to send a message upon initial violations. The state addressed this challenge by creating Hawaii’s Opportunity Probation with Enforcement Drug (HOPE) Court where offenders are ordered to treatment and must call in a number every morning to see if they must report to the court to take a drug test. If they fail, they are jailed for several days, usually on weekends in order to preserve employment. Although participants can ultimately be imprisoned for multiple failures, it is rare because the immediate accountability of a short jail stay deters future drug use.

This court has proven in a randomized controlled trial to reduce positive drug screens by 91 percent and cut both revocations and new arrests by two-thirds.²⁶ According to U.C.L.A. researchers, for a group of methamphetamine-using probationers, dirty drug tests declined 80 percent after entering the HOPE program.²⁷ Similarly, for the 685 probationers who were in the program for at least three months, the missed appointment rate fell from 13.3 percent to 2.6 percent and “dirty” drug tests declined from 49.3 percent to 6.5 percent.²⁸ HOPE has also been found to reduce new crimes by more than 50 percent.²⁹

A pilot HOPE Court will be launched in Clark County, Nevada (Las Vegas) in November. Delaware does not have a court similar to the HOPE court.

Mandatory Probation, Treatment and Work Requirements for Drug Possession Offenders. This policy should apply only to individuals caught with small quantities of drugs that are for personal use. Simple possession is a misdemeanor in Delaware – incarceration is a possibility but no more than 50 such offenders are sentenced to jail or prison every year. Consequently, this change would have a modest impact on incarceration levels and, therefore, costs to taxpayers. In Arizona which also implemented this policy more than a decade ago, a study by the Arizona Supreme Court found that 77 percent of drug offenders were drug-free after participating in treatment.³⁰

National research also supports the efficacy of treatment. The Drug Abuse Treatment Outcome Survey of 10,000 participants found that residential treatment resulted in a 50 percent reduction in drug use and 61 percent reduction in crime while outpatient treatment resulted in a 50 percent reduction in drug use and 37 percent reduction in crime.³¹ Dr. Nora Volkow, Director of the National Institute on Drug Abuse (NIDA), stated, “Research findings show unequivocally that drug treatment works and that this is true even for individuals who enter treatment under legal mandate.”³² Offenders who are working and attending outpatient treatment on nights and weekends can be required to pay for part or all of the expense of treatment, reducing costs to taxpayers.

Diversion of Mentally Ill Offenders. Diverting mentally ill offenders to probation and community-based treatment programs offers substantial savings. Full outpatient services in Delaware costs \$10,000 per year compared to \$33,000 for prison and \$648 per day (\$236,520 per year) for hospitalization. Delaware has made progress in this regard, particularly with implementing initial assessments of defendants and the Delaware Mental Health Court that began in 2003. The Public Defender's Office employs a staff of psycho-forensic evaluators who conduct an informal assessment immediately after the client arrives in jail. These evaluators follow up with the attorney assigned to the case if there is a mental health issue. The Mental Health Court diverts mentally ill misdemeanants from traditional sentencing, redirecting them into appropriate mental health treatment. A clinical case manager screens offenders for participation in the Court using an instrument designed to identify individuals with serious mental disorders. Defendants with conditions such as major depression and schizophrenia that are on Axis I of the *Diagnostic and Statistical Manual of Mental Disorders* are eligible. With a caseload of only 30 offenders, which is significantly smaller than the average probation caseload, case managers assigned to the Mental Health Court are able to effectively monitor participants' compliance with the treatment plan. Of the 64 offenders who participated in the first three years of the program, 57 completed the program of which 53 did not recidivate within six months of completion.³³ The state should study whether there is need to expand the capacity of the Mental Health Court to serve additional offenders.

Further, legislation could be enacted to provide that treatment in a mental health hospital or one of the state's 17 group homes for the mentally ill counts towards the mandatory minimum sentence. There is often a waiting list for entry into the Delaware Psychiatric Center (the only state-operated mental hospital for adults), which means mentally ill inmates must be held in prison during this time.³⁴ To address the cost of incarcerating mentally ill inmates on the waiting list, policymakers should study whether it is feasible and cost effective given current capacity and staffing constraints for the Center to process inmates with shorter wait times.

Enhanced Use of Graduated Responses for Probationers and Parolees. A technical violation is a failure to obey a term of supervision, as distinguished from committing a new offense. About half of the probation revocations in Delaware are attributable to technical violations with the other half resulting from new crimes. In 2008, according to the DOC, there were 1,198 technical revocations from probation, although some of these cases also included new criminal charges. National research supports the use of swift, sure, and measured responses, often referred to as graduated sanctions, to reduce technical revocations by sending a clear but measured message with each violation.³⁵ Examples of such sanctions are increased reporting, a curfew, or even shock-nights in jail. In most cases, Delaware probation and parole officers are authorized to use graduated sanctions such as curfews, more frequent office visits, and short periods of time a Violation of Probation Center. The majority of violations result in the probationer or parolee being elevated to the next SENTAC level and the most serious violations result in an increase of more than one level. If the increase in level brings the probationer or parolee to Level V, the offender is incarcerated while those probationers and parolees who are elevated to a lower level move a step closer to this result. Case dispositions should be reviewed to identify whether more minor violations such as missing a meeting can be addressed through sanctions such as increased reporting while keeping the offender at the same level.

Additionally, by adopting a graduated sanctions matrix that matches the sanction with the violation, more uniform application of such sanctions can be achieved. A study of the Ohio graduated

sanctions grid found its adoption reduced the number of revocations.³⁶ The grid distinguishes between the severity of violations. For example, a reporting violation, a traffic misdemeanor, or change of residence violation is considered low severity while a non-traffic misdemeanor, absconding, and association violations (often hanging out with a gang) are classified as severe violations.

Oregon provides another example of how intermediate sanctions can be used in lieu of revocations. Given that offenders who are employed are three times less likely to recidivate, the state uses weekend jail time for some technical violators who do not pose a threat to public safety. For unemployed parolees, the state's use of work crews has proven to be effective in reducing recidivism.³⁷ In addition to negative sanctions, positive incentives for good behavior can be offered. Among the incentives in a grid used by the Harris County Adult Probation Department (Houston, Texas) are double time towards the completion of the probation term, reduced reporting, bus tokens, and written commendations.³⁸

Earned Time Credits for Probationers. In 2008, Arizona enacted legislation that gives probationers good time credit for time served when they fully comply with all terms, such as restitution. Probationers receive 15 days credit for every 30 days they are in compliance. Nevada has also adopted a statute authorizing a reduction in the probation term for good behavior. These policies provide probationers an incentive to perform well. Research has shown that positive incentives work to change offender behavior.³⁹ Also, by reducing the total number of offenders on probation, there are fewer opportunities for revocations. This policy would have a somewhat limited impact in Delaware given that probation terms are already relatively short as a result of Senate Bill 50. Accordingly, a credit that is less generous than Arizona's policy should be considered.

Restore Parole for Certain Nonviolent Offenders. Due to the truth-in sentencing law enacted in 1990, Delaware paroles far fewer inmates than the national average. The sentence modification procedure is used somewhat sparingly, with only 29 sentences modified in 2008 and 2009. Consequently, the state has only 81 parolees per 100,000 people compared to the national average of 319 per 100,000 people. An Urban Institute study found females, individuals with few prior arrests, public order offenders, and technical violators are less likely to be rearrested if supervised after their prison term.⁴⁰ This would suggest that offering parole for such offenders could reduce both recidivism and costs to taxpayers.

Performance Measures. The DOC should report recidivism rates to the Legislature and public for both prisons and Work Release Centers. The state has not performed a recidivism study since 2000. That study found that 47.5 percent of Delaware inmates released from 1981 to 1994 returned to prison within three years.⁴¹ The Delaware Statistical Analysis Center, which is part of the Office of Management and Budget, recently agreed to initiate a recidivism study to provide updated data. The DOC reports the educational progress of inmates to the National Reporting System for Adult Education, which is administered by the Division of Adult Education and Literacy in the Office of Vocational and Adult Education at the U.S. Department of Education.

The Probation and Parole Division should be held more accountable for outcomes by being required to report additional performance measures such as recidivism, substance use, percent of restitution collected for offenders at all SENTAC levels, and compliance with "no contact" orders. Such orders prohibit the offender from contacting the victim. These are among the performance measures recommended by the American Correctional Association. Performance measures currently

reported by the Probation and Parole Division and corresponding figures for 2008 include: offenders successfully discharged (75 percent), offenders employed (57 percent), and Level I Restitution cases closed (47 percent). Instituting additional performance measures would enhance transparency, promote accountability for results, and allow policymakers and the public to better assess the effects of legislative and administrative policy changes on performance.

Credit for Time Served in the Boot Camp. Some offenders only make it through part of the boot camp or successfully complete the boot camp but then commit technical violations while on probation after their release. These offenders are subject to the mandatory minimums and do not receive credit towards their prison sentence for the time in which they were confined in the boot camp. However, offenders do receive credit for time served in a residential drug treatment center or restitution center.⁴² Delaware policymakers should apply this same policy to the boot camp.

Solitary Confinement Step Down. Delaware maintains approximately 300 inmates in solitary confinement for disciplinary reasons. Current policy permits some of these inmates to be directly released into the community. Research indicates inmates released directly from solitary confinement are more likely to recidivate, even after adjusting for all other factors.⁴³ Accordingly, the DOC should aim to move these inmates into the general population prior to their release.

Valid Identification Before Discharge. The DOC confirms the identity of inmates using fingerprint technology and, upon release, inmates receive a DOC identification card. However, this card is not accepted by many other Delaware state agencies, including the Department of Motor Vehicles (DMV). The DMV requires a social security card and birth certificate before issuing a driver's license. Though a passport is also acceptable, few inmates have one upon release. Even for released inmates who cannot afford to drive, a State ID card is not only needed to obtain services from other state agencies, but is also far more useful than a DOC identification card in obtaining employment and housing. To address this issue, the Department of Health and Human Services could furnish the DOC with the social security card and birth certificate for inmates awaiting release. Another solution would be for the DMV to visit DOC facilities to take photos of inmates approaching release and then mail their identification cards to the institution. Montana has been a leader in this area, as they have enabled all inmates to either leave with a state identification card or trade in their correctional identification card for a state card within 60 days of release.

Vocational Training and In-Prison Work Programs. The average Delaware inmate has a sixth grade education. Without a marketable skill, these offenders will face difficulty finding employment upon release, increasing the odds that they will resume a criminal lifestyle. A Washington State Institute for Public Policy study found vocational education reduces recidivism by 9.8 percent and correctional industries programs further reduce recidivism by 6.4 percent.⁴⁴ Delaware has programs in both of these areas, but they serve a relatively small percentage of inmates. Only 297 inmates participate in vocational training. Similarly, Delaware Correctional Industries trains and employs inmates in the fields of garment production, concrete design, plumbing and HVAC, vehicle maintenance, embroidering, silk screening, upholstery, and printing, but its capacity is limited to approximately 200 participants. The cost of expanding this program would be partly, if not fully, offset by sales of products that are produced. Delaware Correction Commissioner Carl Danberg indicated earlier this year that he would like to accomplish the following goals with the Correctional Industries program:

- Serve more inmates in as many industries as possible
- Align the program with jobs available in the economy
- Avoid competing with private industry, particularly small businesses
- Enable each industry area to cover its own expenses through sales of products
- Defray the cost of incarceration through sales of products

Employers' Liability for Hiring Ex-Offenders. An ex-offender who is gainfully employed is three times less likely to commit another crime.⁴⁵ Delaware addressed the issue of ex-offenders being denied occupational licenses by enacting Senate Bill 229 in 2004, which specifies that otherwise qualified ex-offenders should receive an occupational license unless their offense directly relates to the occupation. However, many employers will not hire ex-offenders because of the liability risk associated with negligent hiring. SURJ published a report on reentry in Delaware that noted, "There is also a fear [among employers] of being held responsible for the criminal actions of employees. Some insurers have gone so far as to refuse coverage or raise insurance premiums if an employer hires ex-offenders."⁴⁶

In a national study on this topic, the Urban Institute commented, "The high probability of losing coupled with the magnitude of settlement awards suggest that fear of litigation may substantially deter employers from hiring applicants with criminal history records."⁴⁷ That fear is not without basis. Employers lose 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million.⁴⁸

Delaware can address this by immunizing employers from such suits – suits should be permitted for failure to supervise but not merely for hiring an ex-offender. Litigation is particularly unjustified where the conduct giving rise to the suit has no connection to the ex-offender's criminal background. At the least, Delaware can statutorily eliminate punitive damages in such suits. Punitive damages are based on violating public policy, but public policy should encourage the employment of ex-offenders.

Conclusion: Future Directions

In recent years, Delaware has made substantial progress on corrections reform. The state's sentencing system provides significant opportunities for diverting offenders from prison who do not pose a danger to public safety, particularly low-level drug offenders. Legislative accomplishments have included bills to shorten probation terms and enable more ex-offenders to obtain occupational licenses. There are additional measures that Delaware can take to avoid the need for new prisons, reduce recidivism, and control costs. In light of a large budget shortfall, this is an ideal time for Delaware policymakers to make further reforms of the state's criminal justice system a top priority.

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