

CRIMINAL JUSTICE REFORM: AN AGENDA FOR TENNESSEE



AMERICANS FOR
PROSPERITY

TENNESSEE

OUR VISION FOR CRIMINAL JUSTICE REFORM

Americans for Prosperity believes that an effective criminal justice system protects people and preserves public safety, respects human dignity, restores victims, removes barriers to opportunity for people with criminal records, and ensures equal justice for all under the law.

OUR 2020 AGENDA

Americans for Prosperity-Tennessee's four criminal justice reform priorities for the 2020 session span the breadth of the system, reflecting our vision. They are: civil asset forfeiture protections, automatic expungement for the legally innocent, restitution reform, and establishing a statewide pretrial risk assessment tool.

CIVIL ASSET FORFEITURE: OPEN THE BOOKS; CLOSE THE LOOPHOLES

Background

In Tennessee, law enforcement can seize and keep the property of citizens without charging or convicting them of a crime, placing the burden on the accused to contest these seizures or lose their property—even if they are innocent. What's more, Tennessee law enforcement can keep up to 100% of the proceeds of civil forfeitures, creating perverse incentives to police for revenue.ⁱ In the past three years alone, Tennessee law enforced forfeitures of over \$50 million in cash, including over \$15 million last year alone.ⁱⁱ Unfortunately, seizures of other property, such as vehicles and homesteads, go unreported, meaning this true figure is even higher.

With Tennessee's violent crime clearance rate declining for eight of the last ten years,ⁱⁱⁱ we should be looking for ways to help our state and local law enforcement prioritize more serious offenses without incentivizing practices that damage community relations, making their jobs harder over the long-term.

Americans for Prosperity-Tennessee believes that criminals should be held accountable and prevented from keeping the fruits of their wrongdoing—we do not oppose law enforcement's ability to seize property during investigations when they believe it was used in a crime. But forfeiting someone's property is a serious matter and should be handled with traditional due process. Unfortunately, Tennessee's lax protections earn its forfeiture laws a D- from the Institute for Justice's national index. Improving these laws will take years of work, but AFP-Tennessee sees several shorter-term solutions that can help put us on the path to a more just system.

Principled Solutions

Though Tennessee took small steps forward in 2016 and 2018, its forfeiture policies remain in need of a drastic overhaul. As one the 29 states^{iv} that have tightened their forfeiture laws in the past five years, Tennessee should continue to strive for strong transparency and due process requirements in forfeiture.

Institute Robust Reporting

Though Tennessee's new forfeiture auditing system passed in 2018 now shines much needed light on how resulting revenues are spent, seized property remains poorly tracked and reporting requirements here must be significantly improved.

Annual forfeiture reports do not currently contain the location of seizures (including the direction of traffic flow if on a highway), the value of individual seizures and forfeitures, the alleged crime and case number that resulted in the seizure or the case's outcome, whether the forfeiture was pursued under state or federal law, if the owner contested it, storage expenses associated with a seizure, and whether an owner was awarded attorney's fees after successful recovery.^v

Each of these data-points should be codified to give Tennesseans a holistic picture of how their property is being taken. A practice so easy for law enforcement to

engage in with such high stakes for property owners is too important not to be better tracked and more thoroughly reported to the public.

Raise Forfeiture Thresholds

Small amounts of cash and lower-value property should be exempt from seizure and forfeiture. People understandably decide it's not worth contesting forfeitures when the attorney fees or time off work to appear in court may cost them more than the property they stand to lose. Innocent Tennesseans should not be forced into this impossible situation. State law should exempt cash totaling \$2,500 or less and vehicles worth \$5,000 or less from seizure and forfeiture.

Close the Federal Forfeiture Loophole

Another problematic source of forfeitures is the federal equitable sharing loophole. While Tennessee's state forfeiture laws need improvement, property state law enforcement seize in conjunction with, or turn over to federal authorities for a portion of the proceeds, bypasses any due process protections Tennessee puts in place.

From 2000 to 2013, **Tennessee authorities received nearly \$70 million** through these forfeitures outside state law.^{iv}

Tennessee law enforcement should have to follow Tennessee laws to take Tennesseans' property.

Closing the federal forfeiture loophole does not stop state and federal law enforcement from cooperating. Ending Tennessee's participation in the equitable sharing program would simply prevent state law enforcement from turning over forfeited property to federal authorities for forfeiture, requiring Tennessee authorities to use Tennessee law for any such procedures. By closing the federal forfeiture loophole, Tennessee would join the District of Columbia and seven states, including neighboring North Carolina, in stopping this end-around of state law.^{vii}

EXPUNGEMENT FOR THE LEGALLY INNOCENT

Background

Over 77 million Americans have criminal records recorded in the FBI's Next Generation Identification System—nearly a quarter of American adults.^{viii} That's roughly as many Americans as have a college degree.^{ix} Unfortunately, the mark of a criminal record too often presents severe barriers to the opportunities of Tennesseans making good faith efforts to turn their lives around.

Tennessee alone **imposes roughly 960** legal or regulatory consequences that follow citizens with a criminal record.^x

Though many of these are prudent or at least well-intended, they can also impact otherwise well-deserving individuals' ability to find jobs, obtain housing, or pursue educational opportunities.^{xi} Americans for Prosperity-Tennessee believes in the potential of all people to transform their lives and in providing second chances to those who have demonstrated they deserve them.

In 2019, Governor Lee's administration made important progress on this front by eliminating Tennessee's expungement fee, making second chances more accessible to thousands who have earned them. This was a commendable step forward, but an even more basic problem remains. Tennesseans who were arrested but not charged, whose charges were dismissed, or who were found not guilty at trial must still petition the court system to have their records expunged.^{xii}

Principled Solutions

A Tennessean who has been found legally innocent should not bear the burden of clearing their name of a criminal record—especially if they have already suffered the stress of being mistakenly accused of a crime. When courts have not determined that a Tennessean committed wrongdoing, that person

should not have to pay an un-owed debt to society if they do not know that expungement is an option or they lack the time to acquire the necessary documentation. Tennesseans who are legally innocent should have their criminal records cleared instead of having to affirmatively petition the courts.

States as diverse as Pennsylvania^{xiii} and Utah^{xiv} have already recognized the importance of a streamlined process, passing legislation in this year to automate expungement for their legally innocent citizens as well as those convicted of low-level offenses who have remained crime free for a set time period. Tennessee would be wise to follow in the footsteps of its 2019 progress with even more impactful reform in the upcoming session.

RESTITUTION REFORM: SUPPORTING VICTIMS

Background

Tennessee lacks a standardized framework for how its jurisdictions allocate court-ordered restitution payments. Unfortunately, this results in many courts choosing as a matter of procedure to take their portion of restitution payments dedicated for covering costs before actual crime victims waiting to be made whole get a dime. While unpaid restitution fees are a nationwide problem,^{xv} institutionally disregarding victims does nothing to support those recovering from the impacts of crime and reinforces a flawed funding mechanism. Because courts benefit the whole community, they should be funded by the whole community, not through reliance on user fees.

Principled Solutions

Tennessee should pass a statute directing all court jurisdictions to issue restitution revenue dedicated to crime victims first and only collect court costs after the victim has been made fully whole. User fees should not be the basis for court budgets.

PRETRIAL DECISIONS BASED ON RISK, NOT RESOURCES

Background

Last year, an average of **15,582 Tennesseans were serving pre-trial detention in local jails, comprising over half of jail inmates.**

^{xvi} With the **fifth-highest pre-trial detention rate in the country**,^{xvii} it's no surprise that Tennessee jails suffer from severe overcrowding issues, placing burdens on state and local resources alike.

Unfortunately, the use of cash bail as a first, rather than last resort in Tennessee's pretrial system contributes to exploding jail populations. Hampered by statutory bail schedules, Tennessee judges are forced to make pre-trial decisions too often based on a defendant's resources, not their danger to others or flight risk. Too often, people that don't need to be detained before trial have no choice. As a result, pretrial detainees often lose their jobs, hurting their families and Tennessee's economy while plunging into deeper financial crisis. As a result, pre-trial detainees are typically even more likely to recidivate, regardless of initial innocence or guilt.^{xviii}

Principled Solutions

Tennessee courts should adopt a statewide comprehensive risk assessment system when sentencing defendants. Risk assessment tools that use empirical data to reduce unwarranted disparities in sentencing, identify high-risk offenders for specialized services, and determine whether an alternative to incarceration is appropriate.

Risk assessments rely on a list of factors that strongly correlate with the likelihood of a defendant to recidivate, like their criminal history and the type of offense. At sentencing, these tools give judges an individualized analysis of a defendant's likelihood to re-offend.

As a result, judges can make more informed decisions about whether alternatives to incarceration would be more appropriate than a prison term. Under this system, each defendant is assigned a score that reflects their risk of re-offending ahead of trial or after release if sentenced. For instance, a defendant with no previous criminal history would have no points assigned. A defendant convicted of a violent offense would receive more points than a non-violent offender. By identifying defendants this way, risk assessment tools equip judges to more easily make proportional decisions—allowing them to keep their discretion while helping reduce potential biases.

New Jersey overhauled its pretrial system in 2017 by offering a presumption of pretrial release and using a risk assessment tool, the Arnold Foundation’s public-safety assessment (PSA), to assess whether bail or pretrial detention was necessary for defendants. In the first year of implementation, New Jersey was able to reduce its jail population by over a fifth.^{xix} Most importantly, defendants were no more likely

to commit new offenses or to fail to appear at court than before, and the state crime rate decreased 15.4 percent.^{xx} In Kentucky, the first 6 months of implementation of the PSA tool saw crimes committed by pre-trial releases decline 15 percent.^{xxi} At the very least, risk assessments have not been shown to increase crime, often improve outcomes, and save pre-trial defendants and their families from unnecessary pain, while reducing pressure on courts and local jails.

To support the implementation of a statewide risk assessment tool, Governor Lee should also reestablish the Tennessee Sentencing Commission. A diverse group of stakeholders assisting in the creation and ongoing evaluation of risk assessment of factors, including academics, law enforcement, attorneys, community leaders, and the broader public, will ensure such a tool succeeds. Tennessee would further establish itself as a leader on criminal justice issues by adopting one statewide.

ⁱ T.C.A. § 40-33-211(a)-(b)

ⁱⁱ Tennessee Department of Safety and Homeland Security.

ⁱⁱⁱ Tennessee’s violent crime clearance rate has declined from a peak of 57.7% in 2008 to 49.7% in 2018, the lowest rate in 16 years. *Tennessee Incident Based Reporting system*.

^{iv} “[Civil Forfeiture Reforms on the State Level](#).” *Institute for Justice*. 2019.

^v Angela Erickson, Jennifer McDonald, and Mindy Menjou, “[Forfeiture Transparency & Accountability: State-by-State and Federal Report Cards](#).” *Institute for Justice*. May 3, 2019.

^{vi} Dick Carpenter, et. al. “[Policing for Profit: Tennessee](#).” 2nd Edition. *Institute for Justice*. 2015.

^{vii} [Ibid.](#)

^{viii} [NGI Monthly Fact Sheet: June 2019](#). *Federal Bureau of Investigation*.

^{ix} [National Center for Education Statistics](#).

^x [National Inventory of Collateral Consequences of Conviction](#). *Council of State Governments Justice Center*.

^{xi} Job applicants with a criminal record are nearly half as likely to get a callback or a job offer. See: Deva Prager, *The Mark of a Criminal Record*, 108 *American Journal of Sociology*. 937, 955. March 2003.

^{xii} T.C.A. § 40-31-101(a)(1)(A)

^{xiii} Brenda Waters, “[Pennsylvania Becomes First State to Automatically Seize Certain Criminal Records](#).” CBS Pittsburgh. June 28, 2019.

^{xiv} Jessica Miller, “[Utah lawmakers pass the ‘clean slate’ bill to automatically clear the criminal records of people who earn an expungement](#).” *The Salt Lake Tribune*. March 16, 2019.

^{xv} The Government Accountability Office calculates over \$110 billion in outstanding restitution debt federally. See: [Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could Be Improved](#). Government Accountability Office. February 2018.

^{xvi} Tennessee Department of Corrections. December 2018.

^{xvii} Tennessee’s jail incarceration rate was 252.64 per 100,000 in 2013, outpacing every state except Wyoming, Pennsylvania, Georgia, and New Mexico. Joshua Aiken, [Era of Mass Expansion: Why State Officials Should Fight Jail Growth](#). Prison Policy Initiative. May 31, 2017.

^{xviii} “Pretrial detention has a substantially negative economic impact on individuals, disrupting their labor market activities and causing increased recidivism.” [The Economics of Bail and Pretrial Detention](#). *The Hamilton Project*. December 2018.

^{xix} “[Pretrial Justice Reform](#).” American Civil Liberties Union New Jersey. 2018.

^{xx} “Concerns about a possible spike in crime and failures to appear did not materialize.” [2018 Criminal Justice Reform Report to the Governor and the Legislature](#). *New Jersey Administrative Office of the Courts*.

^{xxi} [Results from the First Six Months of the Public Safety Assessment -Court in Kentucky](#).” *Laura and John Arnold Foundation*. July 2014.