

AMERICAN CRIMINAL JUSTICE

The Punishment Is the Crime

On October 2, 2009, Travis Bourda, a twenty-nine-year-old Louisiana oil rig worker, was sentenced to fourteen years in prison for possession of roughly a quarter of a pound of marijuana. Because Bourda had two prior convictions, he received the fourteen-year sentence required under Louisiana's three-strikes law. The tough-on-crime prosecutor was not satisfied. He appealed the sentence to the Louisiana appellate court, arguing that it was excessively lenient. The appellate court agreed and sentenced Bourda to life without parole.

Jack Marble was a twenty-two-year-old African American who was arrested and convicted of robbery. He was unarmed when he committed the robbery, and it was his first offense as an adult or juvenile. He was sentenced to four years in a Texas prison.

Brian Aitken, twenty-five, was recently divorced and moving from Colorado to New Jersey to be closer to his two-year-old son. After arriving at his parents' home in New Jersey, Aitken, under a good bit of stress, lost his temper and jumped in his car to go for a drive to cool off. His mother was concerned for his welfare when he did not return, so she called 911. The police greeted him when he returned to his parent's house and asked to search his car. Buried under clothing and other personal items was a bag containing two disassembled, cleaned, and wrapped

handguns, which he had legally purchased in Colorado. Police also found large-capacity magazines and bullets, also legally purchased in Colorado.

The police arrested him because transporting the weapons and magazines without a special permit is illegal in New Jersey. The prosecutor indicted the case, and it went to trial. The judge did not allow the jury to consider an exemption in the law for individuals who are in transit or moving. Aitken was convicted and sentenced to seven years in prison.

These stories, all of which reflect lawful sentences, serve to illustrate the past forty-five years of American criminal justice.¹ For a variety of reasons, some good, some illogical and hard to fathom, we have been conducting an experiment of all-out punishment for those who break the law. We refer to it as *crime control*, also called *tough on crime* or *zero tolerance*, and we use catchy phrases like “lock ‘em up and throw away the key” and “do the crime, do the time.” Prosecutors say that by imposing a harsh punishment, they are sending a message to the community. Judges tell offenders that they are giving a tough sentence to teach them a lesson and to deter them from committing additional offenses. Legislators pass punitive three-strikes and mandatory minimum sentence laws to ostensibly get offenders off the streets and back up their tough-on-crime rhetoric. We have been angry at criminals, and that anger has seen expression in the extensive punishment we mete out to those who break the law.

AN AMERICAN PENCHANT FOR PUNISHMENT

The United States has been engaged in what some refer to as “waste management” incarceration, in which we round up large numbers of bad guys and warehouse them to make the streets safer. It sounds right—putting distance between the offenders and the public. Segregating criminals by placing them in secure prisons and jails to give them time to contemplate their wrongdoing and see the light certainly seems, on the surface, like a reasonable way to go. Simple, intuitive, proactive, and tough. How could it not work?

The evidence of America’s punishment binge is compelling. In 1980, we imprisoned about 320,000 inmates in state and federal prison facilities. In 2017, we incarcerated 1,527,000 (roughly the population of Philadelphia). This is nearly a 400 percent increase (see figure 1.1).

The growth in federal incarceration has outpaced that of the states. Between 1980 and 2017, the number of federal prison inmates increased by 600 percent. Much of the federal increase has been driven by drug enforcement.

Figure 1.1 depicts the increase in prison inmates in state and federal facilities between 1936 and 2017.² This growth in the prison population is something unprecedented in US history and, as best we know, unprecedented in the history of any other nation.

When we add those in jail, typically awaiting disposition of their cases or sentenced to confinement after conviction for a misdemeanor, the total number of incarcerated offenders is over 2.2 million. That amounts to the combined population of San Diego and San Jose, California, the eighth- and tenth-largest cities in the United States.

As stated in the introduction, the United States is presently home to 5 percent of the world’s population; yet we have 25 percent of the world’s

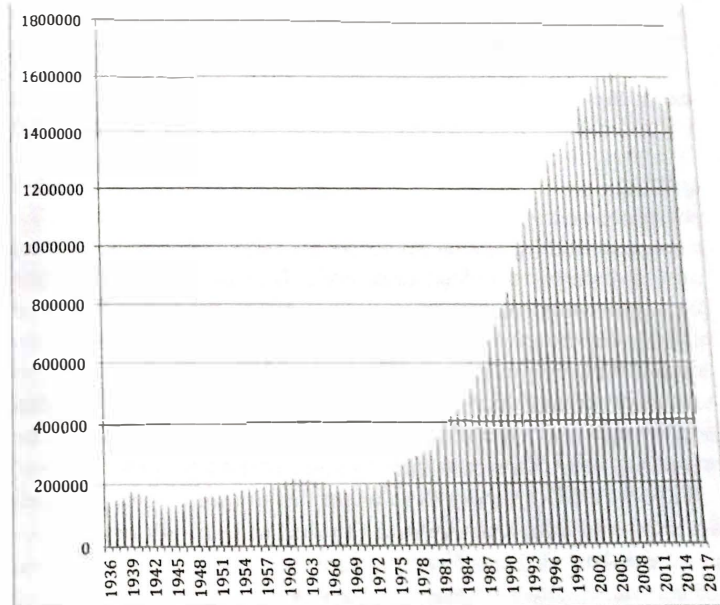


Figure 1.1. State and Federal Prisoners, 1936–2017

incarcerated population. Consistent with that percentage, the United States has the highest incarceration rate (the number incarcerated per one hundred thousand population) in the world. Our imprisonment rate of around 700 per 100,000 US residents far exceeds that of all other nations, including many that we probably consider rather punitive, countries such as Russia, China, Rwanda, Kazakhstan, Iran, Saudi Arabia, Pakistan, Singapore, and South Africa. There are currently 10.1 million individuals incarcerated worldwide. If the rest of the world incarcerated citizens like the United States (that is, had the same incarceration rate), the world's incarcerated population would increase fivefold to over fifty-three million.³

In the late 1990s, I was working with some researchers at the Criminology Institute at Cambridge University in England. On a visit to Cambridge, I was given a tour of one of their maximum-security prisons. Part of this tour was observing something they called a dialogue group, where the inmates sit in a room and discuss their concerns, fears, and so forth about incarceration and eventual release. When I was introduced, they were told I was from the United States and, in particular, Texas. They spent about an hour asking me about the reputation of the American criminal justice system, whether what they had heard was true about it being so tough, so punitive. This is what the marketers call "living the brand"—the US justice system has a tough-on-crime brand, but it is not just words. We fulfill that perception on a daily basis.

What do we know about the inmates in state and federal prisons? They are mainly men and largely minorities. The black imprisonment rate is a phenomenal 2,290, 5.5 times that for whites. Today, one out of every nine young (twenty to thirty-four) black males is incarcerated; one in three black men can expect to be incarcerated at some point in their lives. The odds for Hispanic men are one in six; for white men, they are one in seventeen. The majority of individuals admitted to US prisons are admitted for a nonviolent offense. In 2013, approximately 70 percent of prison admissions were for conviction of a property crime, drug crime, or public order crime. Only about 30 percent of prison admissions are for violent crimes.⁴

While the media typically focus on the massive increase in incarceration, referred to as the incarceration explosion, the reach of the justice system goes well beyond that. Understanding the overall scope of our crime policies requires a look at correctional control more broadly. Correctional control includes prison, jail, probation, and parole, as well as a variety of

other types of smaller programs such as drug courts. Prison is reserved for the incarceration of convicted felons who have been sentenced to confinement. A *felony*, which is the label we give to more serious crimes, is defined as an "imprisonable offense." Jail is used to detain individuals who are awaiting disposition of their cases and to confine individuals convicted of the less serious category of crimes referred to as misdemeanors. *Probation* is defined as conditional, supervised release to the community. Probation is diversion from incarceration, used in lieu of prison. While on probation, offenders are subject to revocation to prison or jail if they violate the conditions of their release. Parole is conditional supervised release to the community after someone has served a period of confinement in prison. Parole violators are also subject to revocation back to prison if they violate the conditions of parole and are caught.

In 1980, there were approximately 1.9 million individuals under correctional control in the United States (again, prison, jail, probation, or parole).⁵ By 2016, that had grown to nearly eight million (6.6 million officially counted and an estimated one million in forms of control/supervision not included in the official counts). This is an increase of over 375 percent. The nearly eight million represent the entire population of New York City or the combined populations of Wyoming, Vermont, the District of Columbia, North Dakota, Alaska, South Dakota, Montana, and Rhode Island.

What do we know about the officially counted 6.6 million individuals under correctional control in the United States? Today, the majority (56 percent) are on probation, one-quarter are in prison, 12 percent are on parole, and 11 percent are in jail. They are mainly men and minorities. There is wide variation across states in the odds of being under correctional control. Georgia leads the way (one in thirteen), followed by Idaho (one in eighteen), Texas (one in twenty-two), Ohio (one in twenty-five), and Indiana and Louisiana (one in twenty-six). Those with the lowest rates of correctional control include New Hampshire (one in eighty-eight), Maine (one in eighty-one), West Virginia (one in sixty-eight), and Utah (one in sixty-four).⁶

These statistics do not adequately describe the impact of correctional control on certain communities in the United States. For example, in the 53206 zip code in Milwaukee, 62 percent of the males age thirty to thirty-four have been to prison. Approximately two-thirds of the thirty-five

thousand prisoners who are released from Illinois prisons each year return to just seven zip codes in Chicago. Ten zip codes in Houston account for over one-third of Texas's annual spending on incarceration. Eleven of the zip codes in Philadelphia account for over one-half of Pennsylvania's spending for incarceration.⁷ It was not uncommon to see newspaper headlines in recent years declaring something to the effect that "56% of Young Black Men in Baltimore Are in the Justice System" or "50% of Black Men 18 to 35 in DC Are Under Correctional Supervision." The dramatic growth in the scale and reach of the American corrections system over the past four decades was new to us and new to the world. One obvious question is "Why?"

WHY WE GOT HERE

Crime control is a series of policies, laws, and procedures that aim at getting tough on criminal offenders. The goal was to reduce crime and recidivism; the means was increasing the severity of punishment. Understanding why we got here involves a look back, initially, at the events of the 1960s and then turning our attention to a series of factors that played very

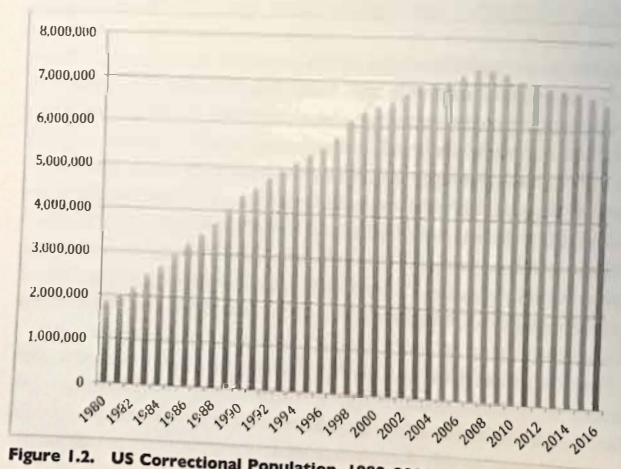


Figure 1.2. US Correctional Population, 1980–2016

important roles in subsequent decades in sustaining what was launched in the late 1960s and early 1970s. The pivotal point in the birth of crime control was the 1968 presidential election, and the primary player was, ironically, Richard Nixon.

Crime and Chaos in the Streets

The 1960s was a period of profound domestic turmoil in the United States. Crime rates were at an all-time high and continuing to rise. In 1960, the violent crime rate was 160 per 100,000 inhabitants. By 1968, it was three hundred and rising.⁸ These increases in crime were unheard of in the American experience.

Race riots swept across the nation, starting in 1965 in the Watts neighborhood of Los Angeles. That riot was followed by hundreds between 1965 and 1969. Essentially, every city of any size (roughly one hundred thousand and more) experienced substantial race-related violence. When it was over, the toll was sobering; approximately 750 separate riots, with 230 killed, 12,700 injured, nearly 70,000 arrested, and tens of billions of dollars in property damage.⁹ Protests of the Vietnam War added to the disorder on America's streets and college campuses. The Robert Kennedy and Martin Luther King Jr. assassinations were high-profile events signaling the profound instability the United States was experiencing. Each night during the latter half of the 1960s, Walter Cronkite would report the events of the day, and the message was pretty clear—America was in the throes of chaos, lawlessness, and disorder.

As disorder unfolded in the streets, there were other events taking place in Washington that played a role in the shift in criminal justice policy. First, landmark federal legislation was passed as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 became law. As Michelle Alexander tells us in her influential book *The New Jim Crow*:

For more than a decade—from the mid-1950s to the late 1960s—conservatives systematically and strategically linked opposition to civil rights legislation to calls for law and order, arguing that Martin Luther King Jr.'s philosophy of civil disobedience was a leading cause of crime. Civil rights protests were frequently depicted as criminal rather than political in nature, and federal courts were accused of excessive "lenience" toward lawlessness, thereby contributing to the spread of crime. In the words of

then-vice president [sic] Richard Nixon, the increasing crime rate "can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them."¹⁰

The Warren Court and Judicial Liberalism

In addition to civil rights and voting rights laws, the US Supreme Court, under the leadership of Chief Justice Earl Warren, was handing down historic decisions regarding the protection of criminal defendants' constitutional rights. Cases included *Mapp v. Ohio* (1961), which applied the exclusionary rule to state prosecutions, stipulating that when law enforcement violates a suspect's Fourth Amendment protection against unreasonable searches and seizures, the evidence discovered in such a search shall be suppressed or excluded at trial. The Warren Court also gave us *Escobedo v. Illinois* (1964), which provides the right to counsel during custodial interrogation of criminal suspects, and *Miranda v. Arizona* (1966), which codified the now well-known Miranda warnings, which advise criminal suspects to remain silent and to seek legal counsel. *Gideon v. Wainwright* (1963) established that any individual arrested for a felony shall have counsel provided by the state if the individual is indigent. The series of cases that the Warren Court decided constituted the incorporation of a variety of due process protections in the Bill of Rights, requiring that state procedural standards be in line with federal requirements.

There were quite negative reactions to many of these decisions. *Mapp* was seen as a major impediment to proactive law enforcement and prosecution of criminals. Such was the reaction to *Escobedo* and *Miranda*, where objections predicted substantial declines in confessions and convictions and, in turn, increases in crime. On balance, efforts at enhancing due process, focusing on upholding the procedural protections that the Constitution affords suspects and defendants, are often seen in opposition to crime control. Heightened attention to due process issues, as well as the consequences of violating due process rights, are seen by many as hindering criminal investigation, prosecution, conviction, and punishment. This was the case when the major procedural decisions of the Warren Court were handed down. And it was no secret that the Nixon administration and many members of Congress had very strong, vocal objections to the Warren Court's due process decisions.

Richard Nixon avoided the more conservative "Impeach Earl Warren" initiative, but even his relatively controlled communications made clear his position on Chief Justice Warren. In his 1968 address "Toward Freedom from Fear," Nixon stated:

Only one of eight major crimes committed now results in arrest, prosecution, conviction and punishment—and a twelve percent chance of punishment is not adequate to deter a man bent on a career in crime. Among the contributing factors to the small figure are the decisions of a majority of one of the United States Supreme Court . . . the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities. . . . The barbed wire of legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment.¹¹

Additionally, in a 1967 *Reader's Digest* article, Nixon stated, in reference to Lyndon Johnson's initiatives on poverty (which reflected Johnson's belief that a war on crime must be linked to a war on poverty in order to address the root causes of crime), "Far from being a great society, ours is becoming a lawless society." He placed blame on "judges who have gone too far in weakening the peace forces against the criminal forces," referring in particular to the Warren Court.¹²

The launch of crime control emerged from massive civil unrest, assassinations, and high crime rates, but the political upheavals were associated with the civil rights movement, the Civil Rights Act, and the Voting Rights Act, as well as the affront to public safety that many, including Nixon and many conservatives in Congress, perceived the Warren Court's due process decisions to be. All of these elements undeniably played a part, some more than others, but the fact that they all coincided in the 1960s set the stage for a sea change in American criminal justice policy.

The Conservative Agenda: Nixon through Bush 41

Political strategists and elected officials used the events of the day to begin linking crime, civil rights legislation, and the urban riots with racial insecurities among whites, especially whites in the South. What became known as the "southern strategy" was an effort to bring southern and northern working-class whites into the Republican Party by appealing to racial

anxieties. These appeals linked crime and disorder to race, leveraging the fact that many whites felt threatened and marginalized by advances in the civil rights of blacks. Not only was this strategy successful in propelling crime control onto the national agenda, but it also fundamentally changed the landscape of electoral politics in the United States.

Part of the irony of the launch of crime control is the role played by Richard Nixon. Nixon came back on the national political scene in 1967 and won the Republican nomination for president in 1968. In speeches and TV ads during the 1967–1968 presidential campaign, Nixon, along with the Republican National Committee, articulated the chaos, disorder, and lawlessness the nation was experiencing. In his 1968 “Toward Freedom from Fear” address, Nixon hit a variety of points regarding crime and its solution:

If we allow it [crime increase] to happen, then the city jungle will cease to be a metaphor. It will become a barbaric reality, and the brutal society that now flourishes in the core cities in America will annex the affluent suburbs. This nation will then be what it is in fact becoming—an armed camp of two hundred million Americans living in fear . . . it would be difficult to exaggerate the urgency of the need for greater police presence—of the danger to social order if we do not get it. . . . We can reduce crime by making it a more hazardous and less rewarding occupation.¹³

The message was concise—there is good reason for fear and anxiety, and the solution is more criminal convictions and more incarceration. Nixon stated during the campaign, “Doubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for Humphrey’s war on poverty”¹⁴ (Hubert Humphrey was Nixon’s opponent in the 1968 presidential election campaign). Nixon and the Republican Party latched onto crime and disorder (and the resulting fear and insecurity) as the problem, and punishment as the solution. “Tough on crime” was the message, and it resonated. Needless to say, Nixon beat Humphrey in the 1968 presidential election, and the southern strategy played a significant role in Nixon’s election—Nixon won five formerly Democratic states in the South.

Thus was born crime control and the profound political leverage it provided. After taking office, the Nixon administration primarily relied on tough rhetoric and leveraging fear (replacing the war on poverty with

the war on crime), sponsorship of congressional funding for local law enforcement, a new initiative focused on drug control, and heightened investigation and prosecution of organized-crime activities.

After Nixon left office with his own legal problems in 1974, crime and crime control took a bit of a hiatus, with Gerald Ford completing Nixon’s second term and then the Carter administration from 1977 to 1981. The Carter administration was distracted by a variety of other issues and was relatively silent on crime.

The crime-control momentum reemerged in 1980 with the Reagan administration, which repeatedly dismissed social and economic explanations of crime and drug use and rejected anti-poverty and public assistance remedies in favor of punishment and control. This Reagan quote sums up how the fortieth president thought about crime and punishment: “We must reject the idea that every time a law’s broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions.”¹⁵

The Reagan administration sought and found new ways for the federal government to be involved in crime control at the local level. The primary avenue for federal involvement was a renewed drug-control effort, which gave federal law enforcement an enhanced role in local crime since state and federal authorities share jurisdiction over drug cases.¹⁶

The Reagan administration also oversaw massive changes to federal sentencing laws, substantially ramped up drug-control enforcement as a consequence of the introduction of crack in the early 1980s, and continued the escalation of crime-control efforts through numerous get-tough changes to federal laws and policies. Among other results of these federal initiatives, the Reagan administration set examples for states to emulate. Most noteworthy is the 1984 Sentencing Reform Act, which ushered in the highly punitive federal sentencing guidelines, a sentencing scheme that was tough all around but particularly targeted drug offenders. The federal guidelines are known, among other things, for mandatory minimum drug sentences and for the crack/powder cocaine differential of one hundred, meaning possession of one gram of crack has the same punishment as one hundred grams of powder cocaine. Much of the hypersensitivity regarding crack was due to the violence that accompanied its introduction into urban drug markets and the demographics of those involved in dealing and using crack. That violence, thought at the time to be an effect of ingesting crack,

was actually due to gangs "negotiating" markets for the new, popular, highly profitable drug.

The election of George H. W. Bush (Bush 41) in 1988 serves as one of the clearest examples of the political power of fear, anxiety, and race, on the one hand, and tough-on-crime rhetoric, on the other. The Bush campaign was relentless in its portrayal of his Democratic opponent Michael Dukakis as a liberal who was soft on crime. Perhaps the quintessential illustration of this is the Willie Horton TV ad that aired during the campaign. Willie Horton was an inmate in the Massachusetts prison system, and Dukakis was the governor of that state. The ads relay the story of Horton, a scary-looking black man, who was incarcerated for violent crime and allowed to leave prison on a weekend furlough (his term of incarceration was nearly over). While on furlough, Horton kidnapped a couple and raped the woman. The video shows, among other things, a line of tough-looking inmates walking down a corridor of fencing and razor wire through a revolving door. The message was clear—Dukakis and liberal Democrats were to blame for all of the Willie Hortons in the nation, as well as the revolving door of the criminal justice system. It was a masterful mix of fear, race, crime, and weakness in portraying Dukakis as the ineffectual liberal and Bush, by contrast, as the tough, proactive crime solver. Bush's solution was the familiar one: more convictions, more prisons, and a continuing, ramped up war on drugs.

The Nixon, Reagan, and Bush administrations masterfully leveraged fear and anxiety. They "managed" fear by coming to the rescue with tougher and tougher crime-control policies, much to the political detriment of Democrats. That was about to change.

Clinton and the Democrats Get Tough on Crime

By 1992, the national Democratic Party had learned the political lesson of being perceived as soft on crime. Bill Clinton campaigned as a different kind of Democrat. Among other things, Clinton effectively leveraged fear much as his Republican predecessors had—he campaigned for more police on the streets, boot camps for juvenile offenders, expansion of prisons, and tougher drug penalties. To reinforce the point, Clinton took time out of the 1992 campaign to return to Arkansas (the state where he served as governor) with media in tow to witness the execution of an individual

convicted of capital murder. The message was clear—it's time for Clinton and Democrats to get their share of tough on crime. And they did.

The centerpiece of the Clinton crime-control effort was the Violent Crime Control and Law Enforcement Act of 1994. The act, which had substantial bipartisan support, provided \$7 billion for crime prevention, \$4 billion for local law enforcement, and \$10 billion for state prison expansion. It did not take long for the Democrats to see the benefits of these efforts in public-opinion polls showing that Republicans no longer held the monopoly on tough on crime. At the same time, congressional Republicans were calling for more punitive approaches. The 1994 Republican "Contract with America" called for even tougher treatment of criminals through changes to sentencing laws, \$10 billion to states to expand prisons, elimination of funding for crime prevention, and a legislative package called the Taking Back Our Streets Act, which in the end accomplished little but sounded tough.

September 11, Fear, and the War on Terror

The terrorist attacks on the World Trade Center and the Pentagon helped define the George W. Bush presidency and substantially impacted crime policy for the first decade and a half of the 2000s. The 9/11 attacks and the subsequent anthrax scare changed the landscape of criminal justice policy in important ways, including the enhancement of the federal role in local criminal matters and drawing connections between everyday crime and terrorism. As then President Bush stated in a speech given at the signing of the Drug Free Communities Reauthorization Bill, December 14, 2001, "It is so important for Americans to know that the trafficking in drugs finances the work of terror, sustaining terrorists. Terrorists use drug profits to fund their cells to commit acts of murder. If you quit drugs, you join the fight against terror in America." The 9/11 attacks thus served to instill even more insecurity and fear where fear and anxiety were well entrenched. The aftermath of 9/11 was, among other things, the reinforcement of the standard of tough, but now tough on crime *and* terrorism.

One of the most far-reaching anticrime bills ever passed was the USA Patriot Act (an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). Passed with little debate or opposition, the Patriot Act dramatically

expanded the investigative abilities of law enforcement through bypassing provisions of the Fourth Amendment's protection against unreasonable search and seizure and expanding opportunities for warrantless searches. While the intentions of the framers of the Patriot Act may have been to facilitate investigation of terrorist activity, there is considerable opportunity for spillover into the investigation of traditional, predatory street crime.

On balance, it seems that in the 1960s there was good reason to launch a radical new path for reducing crime and enhancing public safety. While there was no compelling scientific evidence at the time supporting the idea that harsher punishment would reduce crime and recidivism (and there still is none today), it did not seem to matter. Punishment is intuitive and logical. It is something that we all routinely experience. It is what, in part, shapes our behavior. Thus, the message that we are going to go down a different road, one defined by increasing the severity of punishment, made sense at the time. It seemed clear that what we had been doing in order to control crime was not working. High crime rates and massive disorder certainly reinforced that conclusion. Common sense and the profound political power of tough on crime set in motion and sustained an elaborate shift in priorities, policies, laws, politics, and spending that all led to the United States as the world leader in mass punishment.

Obama and the 2008 Recession: The Beginning of Something Different?

The first term of the Obama administration pretty much stayed the course in terms of crime policy. At the same time, the recession that began in 2008 required states to take a hard look at how much they spend, including how much they spend on incarceration and crime control. The impact of the recession triggered the front end of modest reductions in prison populations. It has also provided the opportunity to begin discussing alternatives to mass incarceration. In August 2013, US attorney general Eric Holder launched a new Smart on Crime Initiative, which, among other things, focused on lessening the punishment of low-level, nonviolent offenders and bolstering prison reentry efforts to reduce recidivism. The Justice Department has also recently been pressing for the release of lower-level drug offenders incarcerated in federal prison on lengthy man-

datory sentences. In July 2015, President Obama commuted the prison sentences of forty-six nonviolent federal drug offenders. Perhaps a step in the right direction, but forty-six does not register on any radar.

The Obama administration ended without implementing much in terms of significant advances in criminal justice reform, while the federal Smart on Crime initiative was headed in the right direction, it essentially fizzled out without providing a roadmap for meaningful criminal justice reform at the state or federal level.

Trump and Law and Order

Candidate Donald Trump ran as the Law and Order candidate, straight out of the 1980s playbook. He did so in part by conflating illegal immigration and crime. This excerpt from a June 2016 speech aptly illustrates the point.

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.

Trump also believes that violent crime is considerably higher than official statistics indicate. In a speech at a conference of sheriffs in February 2017, Trump claimed that the murder rate is the highest it's been in forty-seven years. A common denominator to all of this, which has been the common denominator throughout the tough on crime era, is fear. Fear of immigrants, fear of violent crime, fear of drugs and drug users.

Attorney General Jeff Sessions has been carrying the tough-on-crime torch for the Trump administration. Among other things, he has ordered federal prosecutors to charge the maximum offenses that are readily provable, and has resurrected the war on drugs by reversing the Obama administration's hands-off policy regarding prosecution of marijuana cases in states where recreational use is legal.

Trump's son-in-law Jared Kushner, whose father served fourteen months in federal prison for tax evasion, illegal campaign contributions, and witness tampering, is supposedly leading an initiative for criminal justice reform. His focus appears to be on the back end of the system, in particular

prison operations and reentry. It is unclear at this point what the Trump administration will support in terms of criminal justice reform as the president is known for changing his mind frequently on matters of policy.

The Politics of Crime: Leveraging Tough

It is undeniable that the political impact of tough on crime is profound. One outcome of crime control becoming a bipartisan issue in the early 1990s was that each side of the aisle began trying to out tough the other. This bipartisan support goes a long way in explaining the sustainability of crime control long after the triggering events of the 1960s and 1970s disappeared and as crime rates began to decline significantly, especially in the 1990s, and drug use dropped beginning in the 1980s.

The National Democratic Party, in an effort to position Democrats as tough on crime, formally adopted a variety of crime-control initiatives and policies. The 1996 platform states:

Today's Democratic party believes the first responsibility of government is law and order. . . . We believe that people who break the law should be punished and people who commit violent crimes should be punished severely. President Clinton made three-strikes-you're-out the law of the land, to ensure that the most dangerous criminals go to jail for life, with no chance for parole. . . . We provided almost \$8 billion in new funding to states for new prison cells. . . . We call on states to meet the President's challenge and guarantee that violent offenders serve at least 85% of their sentence.¹⁷

The 2000 Democratic platform states:

Bill Clinton and Al Gore took office determined to turn the tide in the battle against crime, drugs and disorder in our communities. They put in place a tougher more comprehensive strategy than anything tried before, a strategy to fight crime on every single front . . . more police on the streets . . . tougher punishments. . . . We will not go back to the old approach which was tough on the causes of crime, but not tough enough on crime itself.¹⁸

The 2004 Democratic platform promises "to keep our streets safe for our families, we support tough punishment for violent crime. . . . We will crack down on the gang violence and drug crime."¹⁹

These policies are largely out of the historical Republican playbook—rejection of the focus on the social and economic origins of crime in favor of a largely punitive approach, which included expansion of prison capacity; increasing time served in prison; mandatory sentencing, including three-strikes and mandatory minimums; more law enforcement presence; and continuing the war on drugs. Among other things, this added substantial momentum to America's punitive, crime-control path. And it ramped up the political rhetoric and kept considerable attention focused on crime and crime control. Consider the following recent examples from political campaign communications.

Phil Bryant, a Republican running for lieutenant governor in Mississippi, pledged in a campaign TV ad to require second-time crack and meth offenders to be sentenced to life in prison. Bryant was subsequently elected governor of Mississippi.

It is hard to comprehend the relevance of an ultra-tough-on-crime stance when running for the Alabama agriculture commissioner, but that is exactly what Dale Peterson, the Republican candidate, did in TV ads during the 2010 race. Peterson states in the ad that the agriculture commissioner is responsible for \$5 billion, and then he says, "Bet you didn't know that. You know why? Thugs and criminals. If they can keep you in the dark, they can do whatever they want with all that money. And they don't give a rip about Alabama."²⁰

The Republican Governor's Association has recently attacked South Carolina Democratic state senator Vincent Sheheen, who is running for governor. Their reason for the attack ad is because Sheheen is a lawyer who has defended accused criminals in court proceedings. The ad states that "Sheheen defended violent criminals who abused women and went to work setting them free." It ends with "Vincent Sheheen protects criminals, not South Carolina."²¹ The South Carolina Republican Party joined the fray by issuing a press release detailing that Sheheen defended sex offenders, child molesters, and spouse abusers for pay.

Republicans have also been attacking their own. In Texas, Jerry Madden, the conservative Republican chair of the House Corrections Committee, was opposed for reelection by a twenty-three-year-old Republican who accused Madden of being soft on crime because Madden opposed the construction of more prisons in Texas.

In 2013, Joe Lhota, a Republican candidate for mayor of New York, ran an ad portraying his Democratic opponent Bill de Blasio as soft on crime. New York has been at the center of considerable attention over the years because of the turnaround in serious and petty crime in the 1990s and 2000s supervised by Mayor Rudolph Giuliani and Police Commissioner William Bratton. Today, New York City has the lowest crime rates (both violent and nonviolent) in decades. A recent *New York Post* headline proclaims that New York is on track to be the safest city in the nation. Those facts did not stop the Lhota campaign from running a classic fear-based, soft-on-crime attack ad. The claim is that, as a councilman, de Blasio voted in support of Mayor Michael Bloomberg's budget that reduced the New York Police Department's workforce. Because of that, a vote for de Blasio will take New York back to the days of rampant crime. The narrator states, "Bill de Blasio's recklessly dangerous agenda on crime will take us back to this," and then there are images of homicide victims, riots, bikers attacking citizens, a black man aiming a gun at someone, and graffiti-covered subway cars. As recently as August 20, 2018, President Trump declared that Democrats who oppose his building a wall on the US-Mexico border "Don't mind crime," a statement he made at a White House event applauding the work of Immigration and Customs Enforcement (ICE) and Customs and Border Protection.

There are many, many more examples of candidates' positions on crime serving as a central, divisive element in political campaigns. Whether true or not, being perceived as soft on crime is a substantial political liability. Since the mid-1990s, both sides of the political aisle have been free to accuse opponents of being weak on crime, which has provided added exposure to crime and punishment in the political process. In turn, the political value of tough on crime has provided substantial momentum to crime-control policies and funding and played a significant role in carrying our punitive approach to where it is today.

The Media and Tough on Crime

There is an old adage in television news: "if it bleeds, it leads." When it comes to crime, the evidence indicates that this is more than just a clever rhyme. In fact, how local media, especially local TV news, cover crime

influences public perception of crime, fear of crime, and support for punitive policies such as mandatory minimum sentences and longer time served in prison.

It is probably no surprise that economic forces have fundamentally changed news media. Financial considerations often drive content of the news, especially crime and criminal justice coverage. Local coverage of more sensational crime, especially violent crime, has increased substantially since 1990, precisely during the period when violent crime was dropping to the lowest levels in recent memory. Research shows that coverage of crime drives levels of fear of crime and the public's perceptions of the prevalence of crime.²² Media coverage goes a long way toward explaining the disconnection between public perceptions of crime today and actual crime rates—the public believes crime is increasing when in reality crime rates have been declining. It also helps explain why fear of crime has remained relatively high even though crime rates have been dropping.

Crime is the number-one topic on local TV news. Coverage of crime, typically violent crime, ranges from roughly 20 percent to 45 percent of the content. How much of local TV news content is crime is unrelated to how much crime is occurring in that area.²³ Rather, it is determined by who is watching the programming (the demographics of viewers). Moreover, coverage of crime stories by what are called "high-crime stations" is treated more as entertainment—dramatic video, fast paced, little explanation, and teasers throughout about more crime stories to come.

The primary role the media have played regarding crime policy is in terms of helping to sustain the punitive focus of crime control. The media's influence in this is largely indirect but essential in driving public support for tough-on-crime initiatives. The narrow, sensational, graphic snapshot of crime that readers and viewers see influences their perceptions of the nature and frequency of violent crime, in turn promoting often-distorted beliefs that crime is more common and closer to home than is the reality. Such concerns have played into support for tough-on-crime policies.

We now turn to the question of how crime control was achieved. In the next chapter, we'll address what it did and didn't accomplish and what it cost.

HOW WE GOT HERE

Overcriminalization

It is the responsibility of state legislatures and Congress to determine which behaviors are crimes and incorporate those into what is usually called the criminal code. As more behaviors are identified as criminal, the reach of the justice system expands. Overcriminalization is the broad expansion of criminal law at both the state and the federal levels. As the net is cast more widely, more individuals end up in the justice system. Consider these examples.

Abner Schoenwetter spent six years in federal prison for legally importing lobsters from Honduras to the United States. The problem was that an obscure Honduran regulation required that lobsters be shipped in paper bags. Unfortunately for Mr. Schoenwetter, he was unaware of the regulation and shipped the lobsters in plastic bags. Even more unfortunate for Mr. Schoenwetter was the Lacey Act, which makes it a felony to violate any foreign law while importing plants or animals into the United States.

Skylar Capo, an eleven-year-old girl, saw a woodpecker about to be killed by a cat. She rescued the bird with the intention of nursing it back to health. She put it in a box and, because she did not want to leave it alone, she took it with her when her mother took her on an errand to a local home improvement store. A US Fish and Wildlife agent who was in the store, stopped Skylar and told her that under the Migratory Bird Treaty Act, transporting a woodpecker is a violation of federal law. The agent gave Skylar and her mom a ticket with a fine of \$535.

Seventeen-year-old Cody Chitwood committed a felony by bringing a fishing knife to school. The knife was in the trunk of his car in a tackle box. Georgia law stipulates that possessing a knife with a blade of two inches or more in a school zone is a felony. There is no requirement in this law that there be any criminal intent. All that is required is that the knife is in a school zone.²⁴

Today there are over forty-five hundred federal criminal laws and three hundred thousand federal regulations with criminal consequences.²⁵

This is a product of a zealous Congress, which enacts, on average, fifty new federal criminal laws each year, as well as zealous bureaucrats who are responsible for developing administrative regulations. This expan-

sion of the criminal law sometimes comes at the expense of *mens rea*, or criminal intent. A joint 2010 report by the Heritage Foundation and the National Association of Criminal Defense Lawyers notes this concern: "The recent proliferation of federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize."²⁶ As the late Bill Stuntz recently noted in his book *The Collapse of American Criminal Justice*, "criminal intent has become a modest requirement at best, meaningless at worst."²⁷

States are far from immune to these trends. Whether a product of selective lobbying, media reports of particular crimes, or simply tough-on-crime legislators, the states have held their own when it comes to overcriminalizing. For example, Texas has eleven felony laws related to harvesting and handling oysters, in addition to the other seventeen hundred criminal laws on the books. Illinois has identified special offenses of theft of delivery containers, damaging library materials or an animal facility, defacing delivery containers, and damaging anhydrous ammonia equipment.²⁸ Illinois also has forty-eight separate assault crimes and ten kidnapping crimes. Virginia law identified twelve distinct kinds of arson and attempted arson and seventeen trespass crimes. Massachusetts law has 170 different crimes against property.

Expanding the scope and reach of criminal law is illustrated, for example, by laws that cover possession of drug paraphernalia. Simply being in possession of certain devices (blenders, bowls, spoons) that can be used to compound or consume drugs is a crime, whether drugs are present or not. There are also laws making it a crime to be in possession of burglary tools, which could include simply having a screwdriver or crowbar. There are also many enhancements in the criminal law, such as certain acts that occur in a school zone or a drug-free zone. It is estimated that roughly 70 percent of American adults have, often unwittingly, committed a crime for which they could be incarcerated.²⁹

Much of overcriminalization involves overlapping offenses, such that the same behavior is covered under different laws. This can be in the form of lesser-included offenses, such as aggravated assault and assault or aggravated robbery and robbery. This can also be in the form of different crimes sharing common criminal elements. For example, an offender

stealing a car when the driver is present could be charged with robbery, motor vehicle theft, assault, and perhaps kidnapping if the owner is in the car when the offender drives off. That could also involve an enhancement to carjacking under federal law. One consequence is that criminal prosecution is easier since there is more leverage on the government's part by bringing multiple charges. This is a practice called *charge stacking*, and it usually results in easier plea negotiation for the government. Another consequence is that enhanced punishment is more easily obtained because of conviction on multiple charges.

The combination of the expansion of criminal law and the relaxing of the criminal intent requirement results in more individuals more easily entering the justice system and being successfully prosecuted and more severely punished.

Building Prisons and Jails and Increasing Supervision Capacity

As correctional populations have exploded, one obviously necessary component to accommodate this is increased capacity. Over the course of our crime-control policies, from the mid-1970s onward, prison capacity in the United States increased by 430 percent, requiring a massive capital outlay for construction and a subsequent massive outlay for operations and maintenance.³⁰ While the responsibility for funding the expansion and operation of state prisons is that of the states, the federal government played a significant role in capacity expansion by providing funding to the states for prison construction.

One perhaps unwitting player in the expansion of prison capacity was litigation over prisoner's rights, especially overcrowding. Between 1969 and 1996, there were eighty federal lawsuits filed in forty-one states over allegations of prison overcrowding creating violations of the Eighth Amendment protection against cruel and unusual punishment. All in all, the courts found for the plaintiffs in seventy out of the eighty cases in forty of the forty-one states. While the likely intention in the litigation and the courts' decisions was to divert offenders from incarceration and therefore reduce prison populations, the effect appears to have been to increase capacity.³¹

At the same time, jail populations and jail capacity skyrocketed. Jails are used for pre-trial detention—detaining offenders prior to the disposition of their cases—as well as for individuals convicted on a misdemeanor and sentenced to incarceration. Beginning in the early 1980s, jail capacity began to expand dramatically, increasing fourfold over the following three decades.

When we speak of the revolving door of the justice system, it is appropriate to envision the door of a local jail, as jails are the gateway into the justice system. Not everyone with justice-system involvement goes to prison, but most spend at least some time in jail.

On any given day, there are over 615,000 individuals in America's 3,000 local county and city jails. But these figures seriously understate the reach of America's jails. This year, nearly twelve million individuals will be booked into jail, a rate twenty times the admission rate to state and federal prisons. Not only has the admission rate to jail doubled over the past thirty years, but the average length of stay has likewise increased, from fourteen days in the 1980s to twenty-three days today.³²

What these statistics don't tell is how we use jails and the consequences of that use. First, the vast majority of individuals in jail have not been convicted of a crime. Roughly two-thirds of local jail populations consist of individuals too poor to post bond or, less commonly, those who have been denied release. The majority are in jail for relatively minor crimes such as nonviolent traffic, property, drug, and public order offenses.

Community supervision (probation and parole) also increased dramatically in recent decades (probation by 390 percent and parole by 475 percent). However, the expansion of the capacity for probation and parole is much quicker and less expensive than for prisons and jails. In effect, all that is required to expand community supervision is to increase caseloads. The recommended caseload for a typical probation officer is fifty probationers. However, today the average probation caseload is 150–200. The typical caseload for parole officers is seventy to eighty, but this is across the board a higher-risk population since these individuals have been incarcerated and in all likelihood have much more extensive criminal histories than probationers. At seventy to eighty, these parole caseloads exceed recommended standards and make risk management of these offenders very difficult.³³

Increasing capacity is not enough. "If you build it, they will come" did not always work in the world of criminal justice. There was a fundamental change that was required to get more offenders in prison for longer periods of time, to extend the reach of correctional control/supervision, and to bring crime control up to scale. That change is known as sentencing reform.

Sentencing Reform: More Offenders Serving Longer Sentences

Before the late 1970s, judges were the true gatekeepers of the American justice system. Yes, police investigate and arrest and prosecutors make key decisions such as who to prosecute and what to charge. But when crime control began, judges had nearly unfettered influence over the sentence.

Before sentencing reform, every convicted criminal defendant, state and federal, was sentenced under what are called *indeterminate sentencing laws*. Indeterminate sentencing is a system whereby the judge has considerable discretion in determining the sentence. This is because indeterminate sentencing typically provides for wide ranges of punishment, and the judge is to select something within that range. For example, Texas is generally an indeterminate sentencing state. Upon conviction of a first-degree felony (the most serious level of felony except for a capital felony), the punishment range is probation to five to ninety-nine years of incarceration to incarceration for life. Conviction of a second-degree felony involves the court selecting between probation and two to twenty years in prison. Third degree is probation to two to ten years in prison. Because the punishment ranges under indeterminate sentencing are typically so broad, judges are generally permitted under law to hear and assess a wide range of evidence at the sentencing hearing. The process is one where the prosecutor presents what is known as *aggravating evidence*, information designed to lead to a more severe sentence. The defendant presents *mitigating evidence*, designed to reduce the punishment. Judges then somehow consider the totality of the evidence, weigh it as they see fit, and determine an appropriate punishment. In addition to having free rein over their consideration of the evidence presented, judges are free

to consider any of a number of sentencing goals: retribution, deterrence, incapacitation (getting the offender off the street), rehabilitation, and any combination of those. One of the primary benefits of indeterminate sentencing is that it allows tailored sentencing, where the judge can sentence not only the offense but also the offender.

And therein lie two of the perceived problems. First, there is a concern that although we hold judges to a standard of impartiality, they nevertheless are human—they have biases. The fact that judges have wide discretion under indeterminate sentencing and are subject to a variety of influences raises the concern of what is called *sentencing disparity*, a situation where similar offenders, convicted of similar crimes, receive different sentences. In its extreme version, sentencing disparity becomes discrimination (willful, intentional, illegal). As the argument goes, the law should not give judges such wide latitude or discretion when there is such potential for unfair outcomes. The sentence should not be the luck of the draw; the sentence should not depend on which judge gets the case or what mood the judge is in the day someone is sentenced.

It is not hard to make a case for sentencing disparity. It is undeniable that historically some judges have exhibited overt racism in American courtrooms. And it is not a huge stretch to think that some judges could consider characteristics and circumstances that someone else might think improper. Furthermore, there is simple disagreement about what should or should not be considered, as well as how it should be considered. For example, is substance abuse an aggravating factor or a mitigating factor? Should the fact that a female defendant has a nine-month-old child matter in sentencing? What about intellectual ability? An emerging area of the law considers legal responsibility and culpability for individuals with brain damage or other neurocognitive defects. Should that matter? It depends on who you ask and how you ask it. If it is couched in terms of equality or disparity, the answer is probably no, such things should not matter because the goal is that similar offenders convicted of similar crimes should receive essentially the same sentence. Most "extenuating" factors should not matter in the eyes of those behind sentencing reform.

The second perceived problem with indeterminate sentencing is the belief that when judges have so much discretion, they tend toward leniency in their sentences. Real or perceived, it can have important consequences.

The Center for American Progress tracks partisan judicial election trends and reported the following recent examples of attack ads portraying judges as soft on crime:

A 2012 candidate for the Ohio Supreme Court, for example, was attacked by the state Republican Party, which alleged in an ad that the judge—Democrat Bill O'Neill—had “expressed sympathy for rapists” in one of his opinions. During the 2004 West Virginia Supreme Court election, a group funded by coal mogul Don Blankenship warned that an incumbent justice “voted to release” a “child rapist” and then “agreed to let this convicted child rapist work as a janitor in a West Virginia school.” Another campaign ad, this one in the 2012 Louisiana Supreme Court race, claimed that one of the candidates had “suspended the sentence of a cocaine dealer, of a man who killed a state trooper, two more drug dealers, and over half the sentence of a child rapist.”³⁴

There is more evidence in support of the disparity argument than the leniency one, although in one-on-one judicial election campaign ads, attacks on leniency run rampant. And just because there is no systematic evidence that judges as a group lean in the direction of leniency, that did not hamper efforts at fundamentally changing sentencing in American courtrooms.

The fairness/equity issue, expressed mainly by liberals, and the leniency one, expressed mainly by conservatives, had the same solution—eliminate or reduce judicial discretion. Politically, sentencing reform was a bipartisan masterpiece. The momentum for sentencing reform was, therefore, substantial. And it played an absolutely fundamental role in accomplishing crime control.

The changes to sentencing did not result in a uniform set of sentencing laws in the United States. Rather, the outcome is a patchwork of sentencing statutes that all aim roughly in the same direction (reduced judicial discretion, increases in mandatory sentences, longer sentences, and greater time served) but do so in different ways and to different extents. One of the outcomes of this reform is what is called *determinate sentencing*, which, as the name implies, reduces the uncertainty of sentences by determining or specifying in the statute what the appropriate punishment is for each offense. For example, under determinate sentencing, the penal code may state that upon conviction of aggravated armed robbery, the punishment is fifteen years in prison. This is quite a contrast to five to

ninety-nine years under Texas's indeterminate sentencing laws. When sentences are clearly prescribed, where the punishment range is narrowed considerably, and when the aggravating and mitigating evidence the court may lawfully consider is highly restricted, the discretion of the judge is substantially reduced, largely because there are not that many decisions for the judge to make.

Sentencing reform shifted much of the discretion from judges to legislators, on the one hand, and prosecutors, on the other. The legislative role is enhanced in states with determinate sentencing since legislators determine in the statute what the punishment is for a particular crime. They also have greater influence when they write mandatory sentencing laws. Prosecutors have enhanced discretion since the decisions they make, such as what to charge and what to plea negotiate, have the primary impact on the sentence.

The federal government implemented one of the more extreme versions of sentencing reform in the federal sentencing guidelines. The federal guidelines gutted indeterminate sentencing in federal cases, specified the particular punishment for each federal crime, and, in turn, reduced the judge's role dramatically. Some states followed suit and implemented guidelines, some shifted their statutes to determinate sentencing but without guidelines, and others maintained indeterminate sentencing but have incorporated mandatory sentences and mandatory minimum sentences. Whether states implemented guidelines, determinate sentencing without guidelines, or the hybrid indeterminate sentencing with mandatory sentences, the end result was a substantial shift in the responsibility for sentencing. It also resulted in stiffer punishment across the board. The goal of crime control is to get more individuals in prison, on longer sentences, and serving longer proportions of those sentences. Sentencing reform accomplished that by removing what was thought to be the weak link in the process (judges), by rewriting laws to increase the number of offenses and offenders that are subject to incarceration, and by increasing the sentences imposed.

There is one more piece to this sentencing reform effort—increasing time served for those sentenced to prison. Indeterminate sentencing is also called *indeterminate* because how much of the sentence imposed the offender actually serves is not up to the judge or prosecutor; it is up to the parole authorities, those individuals who assess when someone shall be released early from prison on parole. So until sentencing reform took place, the portion of the sentence imposed that the offender actually served was

up to the discretion of the parole board, once a required statutory minimum of the sentence was served. Sentencing reform also included addressing concerns about what was labeled "truth in sentencing." Truth in sentencing refers to the gap between the sentence imposed (say, ten years) and the fact that the offender actually only serves four years because he or she is released early on parole. So we have a fairness/equity issue, a leniency issue, and now an honesty issue. Truth in sentencing gained considerable traction as a fix to a broken piece of the justice system. The solutions varied from elimination of parole or early release altogether (that is, what the federal system and a handful of states did) to modifying parole eligibility laws across the board to persuading parole commissions to restrict release among those eligible for parole to implementing so-called truth in sentencing laws that target particular offenders, most typically violent offenders, to serve much longer percentages of their sentences before becoming eligible for parole consideration. A common truth in sentencing provision is 85 percent, meaning targeted offenders must serve 85 percent of the sentence imposed.

Prosecutorial Charging Decisions

As I have stated elsewhere and will suggest in later chapters, prosecutors are the most important decision makers in the American criminal justice system.³⁵ Recent evidence demonstrates that among the mix of factors that have contributed to the growth of punishment and incarceration are changes in prosecutorial charging decisions.³⁶ In effect, the likelihood that local prosecutors charge someone with a felony (as opposed to a misdemeanor) has increased significantly over time, resulting in increases in prison sentences. It is important to note that there is some debate about the research results that are the basis for these observations.³⁷ As such, it seems appropriate to conclude that prosecutors' charging decisions played a significant role in the expansion of incarceration and correctional control, but it was not the exclusive cause.

Plea Negotiation: Expediting Case Processing

Plea negotiation or plea bargaining is a method of expediting the prosecution of offenders, making it not just easier but also possible to process

the vast number of offenders that enter the justice system, many of them through the revolving door of recidivism. Today, 95 percent of all felony indictments are disposed of through a negotiated plea. This is the case in state and federal courts. It is as high for misdemeanors.

Plea bargaining played a primary role in facilitating the corrections boom. The 400 percent increase in the prison population and the 375 percent increase in the overall correctional population were accomplished with a modest 60 percent increase in the number of prosecutors.³⁸ That speaks to the efficiency of plea negotiation.

In addition, sentencing reform played a key role in plea negotiation and case disposition, further accelerating the flow of individuals into the correctional system. As punishments became more severe as a consequence of determinate sentencing and mandatory sentences, the leverage for plea negotiation was greatly enhanced.

One common way for prosecutors to get to where they want in terms of sentencing severity is to charge a defendant with multiple overlapping offenses (called *charge stacking*). Charge bargaining, a common plea negotiation strategy, involves reduction in the severity of the pled charge and/or dismissal of other, related, overlapping charges. The result is expedited guilty pleas and generally harsher punishment. For example, someone could be charged with possession of a controlled substance, as well as with intent to distribute, criminal conspiracy, and engaging in organized crime. The prosecutor generally has discretion to pursue all of the charges, none of them, or some subset. Part of the plea deal could be the prosecutor's promise to dismiss some of the charges in exchange for a plea and what the prosecutor sees as appropriate punishment. Or a defendant could be subject to a mandatory sentence. The prosecutor could agree to charge the defendant so he is not subject to the mandatory sentence. The leverage of facing much more severe punishment consummates the plea deal and results in generally harsher punishment.

A substantial priority in America's criminal courtrooms is the quick, efficient processing of people and cases. The pressure to dispose of larger and larger numbers of cases as quickly as possible has led to significant questions about due process. Stuntz points out in his 2011 book, *The Collapse of American Criminal Justice*,³⁹ that over the past thirty years or so, there was significant broadening of the laws that define criminal conduct, the overcriminalization discussed above. This

broadening of criminal liability had important consequences for plea bargaining and the processing of large numbers of criminal defendants. At the same time, it created some compromises to criminal procedure. As Stuntz concludes:

All these doctrines make guilty pleas easier to extract by eliminating issues that might otherwise lead to jury trials. The broader criminal liability is, the less likely the defendant can raise any colorable defense to the charges against him, and the more likely a defendant will agree to plead guilty. . . . The combination of these two related trends—expanding criminal liability and a rising number of guilty pleas—meant that, as the quantity of criminal punishments grew, its quality declined. . . . Not only have Americans chosen, at least tacitly, to punish millions more criminal defendants than in past generations, we have also chosen to do the punishing with less justification and with sloppier procedures.⁴⁰

Drug Crime and the Scale of Correctional Control

The sheer size and scale of the corrections boom was significantly aided by the influx of large numbers of drug offenders into prison, jail, probation, and parole. While admissions to prison increased for all felony offenses, the admissions for drug offenders increased at a rate many times that of other felonies, including murder, robbery, assault, burglary, and sex offenses. Between 1980 and 2016, the overall state and federal prison and jail populations increased by 345 percent. The number of offenders incarcerated in state and federal prison and jail for drug offenses increased by over 1,100 percent.⁴¹ Clearly, drug incarcerations far outpaced any other offender type over the course of the incarceration boom. Today, drug offenders are the largest single offense type among individuals incarcerated, averaging about 18–20 percent of state prison inmates and 50 percent of federal prison inmates.⁴²

I am not suggesting a conspiracy, but the war on drugs provided a robust supply of drug offenders, which dramatically expanded the size of the incarcerated population over the course of the past forty years. In terms of scale, the incarceration explosion would not have been nearly as dramatic without the 3.8-million-plus drug offenders admitted to state and federal prisons since 1980.

Dismantling Public Mental Health Treatment: Prisons and Jails Became Default Asylums

A July 14, 2014, Associated Press story is titled “The Big Story—U.S. Jails Struggle with Role as Makeshift Asylums.” The good news is that this is newsworthy. The bad news is that this is newsworthy. It is good to bring attention to the issue, but it is not the new big story to those who have had much involvement with mental health and criminal justice over the past several decades. The stories and the statistics are becoming all too familiar.

Melissa C., twenty-two years old, has been sitting in the Cook County (Chicago) jail for a year. She was most recently arrested for felony robbery after she fought a security guard who caught her stealing food from a Whole Foods Market. Like so many mentally ill individuals, Melissa often refused to take her psychotropic medication in favor of street drugs. The former cheerleader has been homeless and addicted to heroin and has cycled in and out of jail and rehab facilities for much of her teen years and early twenties.⁴³

Janet, a forty-five-year-old Latina, hears voices when she is not taking her medication. She has served six sentences in prison for drug possession and drug dealing and one stretch in jail for selling drugs to support her addiction. Her revolving door is often a product of lack of access to medication. “When I got out of jail this time I still didn’t have no medication,” she said. “I [couldn’t] see a psych doctor until a month later. I don’t think that shouldn’t be like that.”⁴⁴

The largest mental institution in California is a wing of the Los Angeles County Jail known as the Twin Towers. It incarcerates fourteen hundred mentally ill offenders. The largest mental health facility in Illinois is the Cook County (Chicago) jail, housing between twenty-five hundred and twenty-eight hundred mentally ill inmates, or about 25–30 percent of the jail population. A recent report by the Board of Corrections documented that 40 percent of the 12,200 inmates in the Rikers Island Jail in New York City are mentally ill.⁴⁵ In forty-four states and the District of Columbia, there are more seriously mentally ill individuals in prisons and jails than in any state psychiatric in-patient facilities or hospitals. In fact, there are ten times more mentally ill individuals in prisons and jails than are in state mental hospitals. As was the case with drug offenders, the scale

of the correctional boom was significantly supported by the influx of mentally ill into the American criminal justice system. How did we get to this point?

In 1955, the United States had 340 public, in-patient mental health treatment beds per 100,000 population. By 2005, that had radically declined to seventeen beds per one hundred thousand. The decline has continued; in 2016, the ratio was fourteen per one hundred thousand. Today, public, in-patient treatment capacity is 4 percent of what it was in 1955. Or, put differently, 96 percent of the beds available in 1955 are no longer available today.⁴⁶ The in-patient psychiatric-bed capacity today is at the same relative level as it was in 1850, the era when the United States began to treat mental illness in an in-patient setting. Mental health experts have indicated that the consensus target for minimal in-patient capacity is fifty per one hundred thousand. There are eleven states that have fewer than twelve beds per one hundred thousand, and twenty-two with between twelve and twenty. One state, Mississippi, meets the minimal standard of fifty. By way of comparison, the ratio for England is sixty-three per one hundred thousand.⁴⁷

This situation—the profound lack of public mental health treatment resources and the flood of mentally ill individuals into the American criminal justice system—is a consequence of what is called deinstitutionalization of public mental health treatment. Deinstitutionalization consisted of the release of individuals from long-term in-patient hospitals, the diversion of new admissions to alternative treatment, and the development of local, community-based facilities that make greater use of outpatient care and local resources. The first two components of this process (the release of existing patients and diversion of potential new patients) have proceeded very quickly. The third, the development of alternative, community-based treatment facilities has lagged far behind and has not come close to meeting the need or demand.

The logic or motivation for these changes was therapeutic, on the one hand, and fiscal/pragmatic, on the other. The creation of local, alternative-treatment resources was seen from a clinical perspective as preferable to the long-term psychiatric hospital model. In theory, community-based treatment is more flexible, offering a wider array of services to meet the varying needs of patients. Research investigating treatment outcomes in those limited areas where community-based facilities have been ad-

equately implemented indicates that the quality of care has improved, patient satisfaction is higher, and treatment outcomes are enhanced.⁴⁸ On the fiscal/pragmatic side, it was seen as more cost-effective. As it turns out, it has been “cheaper” but not more cost-effective since it has not been properly and adequately implemented. As one expert observer put it:

Deinstitutionalization of people with psychiatric disabilities was by and large successful in opening the back doors of large state institutions so residents could leave—and in closing the front doors so that new residents could not come in. But it was less successful in promoting investments in the kind of community service infrastructure that enables people with psychiatric disabilities to thrive in the community.⁴⁹

Reductions in federal assistance for housing and Social Security Income (SSI) starting in the 1980s have conspired with deinstitutionalization to create a growing homeless population, significant proportions of which suffer from mental illness. The evidence regarding the coincidence of homelessness and mental illness is compelling: between one-third and one-half of the homeless in the United States have a major mental illness and roughly 75 percent suffer from a major mental illness, a substance abuse disorder, or both. Whether the shuttering of the psychiatric hospitals was the primary culprit in the increase in the homeless mentally ill population does not matter today. What does matter is that the community-based resources, services, and supports required to address the needs of this population are largely absent.

For a variety of reasons that will be discussed later in this book, the American criminal justice system has become the de facto asylum for many of the individuals who have been released and diverted from mental hospitals through the process of deinstitutionalization. The failure to provide an adequate community-based capacity to replace the loss of treatment beds has resulted in the criminal justice system becoming the system that just can't say no. A 2006 Department of Justice study revealed that 56 percent of state prison inmates, 44 percent of federal prisoners, and 65 percent of jail inmates had a mental health problem. Obviously, the severity of those illnesses varies, but the bottom line is that the mentally ill are substantially overrepresented in prison, jail, probation, and parole by a factor of two to four times the incidence in the general, noncorrectional population.⁵⁰

The fact that prisons and jails have become de facto mental institutions is not a positive thing. Managing criminal offenders is difficult enough. Adding in large proportions of inmates who are mentally ill adds dramatically to the complexity of operating prisons and has profound consequences for public safety when mentally ill offenders are released. Moreover, the evidence is clear that prison is not an environment that is conducive to the effective treatment of the mentally ill.

The Public Broadcasting System's *Frontline* gained unique access to the Ohio prison system a few years ago and produced a program on the mentally ill in prison called "The New Asylums." While they profiled many of the mentally ill inmates in the prison, Keith Williams is a metaphor for much of what's wrong. Williams was preparing to be released from prison after serving the full two years of his sentence. When asked where he would go, he said he would go to a homeless shelter to be with his people. When asked who "his people are" he replied, "my mommies, angels, and cats."⁵¹ He was released with a two-week supply of psychotropic medication. The chief of the Bureau of Mental Health for the prison system informs us that it takes at least three months for released inmates to get an appointment to get their prescriptions renewed. Keith Williams was rearrested and reincarcerated less than a month after release when he assaulted a worker at the homeless shelter where he was staying. He had run out of his medication when the assault occurred.

John James was incarcerated in the Utah state prison system. His behavior in prison is in large part influenced by his psychiatric diagnosis of psychosis (paranoid states, delusional disorders). On one occasion, he was ordered to remove a cup and his hands from the port in the door where prison staff place food. Because he did not remove the cup and his hands quickly enough from the port, he was written up for refusing to fully and immediately obey an order. His punishment for this violation was twenty days in solitary confinement, an environment that promotes further decompensation among mentally ill offenders.

In 2002, I was visiting one of Texas's supermax prisons, a new type of facility for administrative segregation, and the realities of incarcerating the mentally ill became glaringly evident. Administrative segregation (ad seg) is a type of prison custody where individuals are single celled, with very limited access outside of the cell. They are fed through a slot in the door and are allowed out between one hour and three hours per

week, depending on what type of restrictions they are assigned. Ad seg is designed for inmates who cannot behave in the general population, often due to assaultive behavior on inmates and/or staff. The cells have solid steel doors with a narrow vertical window and a slot for food trays. As I walked the range, looking into the cells, it was immediately obvious that most of the inmates were engaging in what most would consider bizarre behavior—masturbating in the window, screaming, walking in circles in the cell, and so on. I asked the warden who was giving the tour how many of these individuals he thought were mentally ill. He replied, "None. If they were, they wouldn't be here. They would be in the mental health unit." I am not a psychiatrist, but it probably does not require clinical training to recognize that someone is mentally unstable, the conclusion I reached about most of the men I saw in that unit. It is a fact of life in most of the prisons across the country that ad seg is one of the few methods prison officials have for dealing with mentally ill inmates who do not (or cannot) follow the rules. It is also probably the worst thing that can happen to someone who is mentally ill.

The Prison-Industrial Complex

The label *prison-industrial complex* refers to substantial private-sector financial interests in corrections. Those interests include the construction of secure facilities as well as the management and staffing of correctional facilities. The primary correctional facilities construction companies include Gilbane, Hensel Phelps, and Turner. These are all major capital construction companies. Hensel Phelps is number 218 on *Forbes'* list; Gilbane is number 137, and Turner is number 117. These corporations, and many of their smaller counterparts, have profited well from the expansion of prison and jail capacity over the past forty years. And they have a clear interest in maintaining that path. The major management and operations corporations include Corrections Corporation of America (CCA), the GEO Group, and the Management and Training Corporation (MTC). All three are publicly traded, and all three are financially robust. Over the past five years, CCA's stock price increased by over 200 percent. In February 2016, the GEO Group reported \$1.52 billion in revenue. MTC employs nearly fifty-six hundred people in its corrections division and reported gross revenues of \$704 million for 2016.

Today, for-profit corrections management companies operate about 10 percent of the correctional facilities in the United States. These companies make substantial revenues, thus they have a clear interest in maintaining prison populations and expanding their market share. In fact, many contracts that these companies have with state corrections agencies stipulate occupancy minimums, requiring 80–90 percent occupancy, and even if populations go below those limits, states are nevertheless required to pay them.

CCA, MTC, and the GEO Group all engage in aggressive lobbying of Congress and state legislatures, as well as making extensive contributions to political campaigns. Their lobbying budgets and campaign contributions are in the millions. Over the past few years, CCA has employed nearly 180 lobbyists in thirty-two states, and GEO Group has employed nearly seventy lobbyists across sixteen states.⁵²

Financial interest in corrections also includes small, rural communities lobbying for prisons to be located nearby. In quite a contrast to forty years ago, when the prevailing attitude was “not in my backyard,” small communities seek correctional facilities since the employment and tax revenue they bring are economic drivers.

For-profit corrections companies are expanding their reach beyond incarceration to probation, treatment, and community reentry programs such as halfway houses. One of the problems is that offenders are required to foot much of the cost of privatization. For example, for-profit probation companies collect not only probation and court fees but also their own fees, which the offenders are required to pay. The result is that it is cheaper for the local jurisdiction and the courts because more of the cost is shifted to probationers. The mounting financial burden on offenders, who often have significant problems finding legitimate employment, creates a pathway back into incarceration, as they are often revoked from probation for failure to pay the fees.

THE REVOLVING DOOR OF FAILURE CONTINUES

We tend to assume that when someone has finished a criminal sentence, the government has finished punishing and controlling him. In some respects, this is true. But the bigger picture is that substantial constraints are placed on ex-offenders, constraints that significantly limit where they

can work and live, as well as whether they are able to access community resources and assistance. When offenders finish lengthy periods in prison or are discharged from probation, they typically encounter considerable roadblocks to accessing things like housing, health care, employment, education, and mental health and substance abuse treatment, among others. Whether intentional or coincidental, we continue to punish offenders well after they have “paid their debt to society.” In most states, legislatures have passed laws restricting ex-offenders from being employed in a wide variety of occupations that typically require state approval through licensing or certification. When we step back and take a good, hard look, it is no wonder that recidivism rates are as high as they are and that we have a true revolving-door justice system. What do we expect when we do little to change those crime-related factors that play a substantial, fundamental role in criminal offending? What do we expect when ex-offenders cannot find employment or cannot get access to psychotropic medications or drug treatment or cannot find suitable housing?

When the record is complete, we shall see that the past forty-five years of crime control have been substantially fueled by the failures of a variety of public institutions. It is impossible to quantify how many individuals have entered the justice system or are endlessly caught in its revolving door as a result of these failures, but the numbers would likely take our breath away. Consider what the American criminal justice system would look like if we had adequate capacity for publicly funded, evidence-based drug and alcohol treatment. After all, 80 percent of individuals in the justice system have alcohol and/or drug problems. Imagine a justice system in an era when those with mental illness can obtain appropriate, evidence-based treatment in the community. What would it look like if public education was fulfilling its promise? Again, these are not excuses for bad behavior. But we all have a role in this scenario. Conscious decisions have led to the current state of public drug/alcohol treatment, public mental health treatment, public housing, and public education, to name just four factors that share some responsibility for the current status of the justice system. Those decisions, made by either commission or omission, have led to the use of the American criminal justice system as the repository for many of these failures.

American criminal justice policy, culture, politics, laws, and funding have coincided in a very concerted effort to enhance public safety, reduce

crime and recidivism, and make the public feel safer through the nearly exclusive reliance on punishment. With much rhetoric and posturing, with fear-inducing political campaign ads and very simple, tough messages, sometimes with accompanying swagger and occasional chest thumping, and fist pounding, we launched and have sustained an all-out assault on crime, an offensive that has resulted in the largest prison system in the world, record-breaking incarceration rates and corrections populations, and massive expenditures of public funds. To what end? We address this question in the next chapter.

2

THE HIGH COST OF FAILURE

Ricky Minor was a meth addict who struggled with depression and drug addiction as he worked and tried to support his family. He had several relatively minor prior convictions (possession of drugs, simple assault), none of which resulted in incarceration. Based on a confidential informant's statement, local police found 1.2 grams of meth in Minor's home. They also found an over-the-counter decongestant, acetone, matches, and lighter fluid. Although they did not find a meth lab, these items were estimated to render nearly two hundred grams of meth. Minor stated he never sold meth and just made enough to support his and his wife's drug addiction. He was charged under state law in Florida but refused to cooperate with prosecutors, who wanted him to snitch on others. His case was transferred for federal prosecution, where he pled guilty and was sentenced to life without parole in 2001.¹

Ricky Minor's case is a metaphor for tough on crime. While a relatively small number, the ten thousand individuals serving life or life without parole sentences in state and federal prisons for nonviolent crimes serve as just one example of our policy of intolerance. The vast majority of these life-without-parole sentences are mandatory, meaning the judges had no choice in the sentence. As we have become more punitive, getting more and more individuals into prison for much longer sentences and time

served, the obvious question is: What is the result? We have been witness to one of the largest and costliest policy experiments in US history. What are the consequences of this massive investment in punishment? What reduced crime, and, if so, how much? What about the effects of punishment on recidivism? Do we feel safer? Are there, perhaps, unanticipated or unintended consequences or outcomes? What are the financial and collateral costs of American crime policy?

WHAT HAVE WE ACCOMPLISHED?

Tough punishment and no parole works. Our communities continue to get safer. Our violent crime rate is now lower than any time since the early 1960's, the lowest in the South and the 5th lowest in the nation. Our property crime rate is the lowest in the South and the 8th lowest nationally. Tough punishment and no parole works.

—Bob McDonnell, Republican governor of Virginia, January 2013

Figure 2.1 displays trends in the prison population and crime rates between 1960 and 2016.³ A quick glance would suggest that punishment has been pretty successful, as Governor McDonnell asserted in his address to the Virginia legislature in 2013.³ As prison populations increased during the 1980s and 1990s, we saw both property crime and violent crime begin a precipitous decline, beginning in the early 1990s. That decline in violent and property crime has essentially persisted to today, as has the incarceration rate, with only minor reductions in the prison population in the past five years.

The decline in crime in the past two decades is often referenced as evidence of the effectiveness of punitive policies. Untold numbers of public officials and policy makers have enthusiastically passed stiffer sentencing laws and continued expanding prison capacity based on evidence like what is presented in the graph.

While logical, intuitive, and reasonable, the conclusion that crime control is responsible for the crime decline of the 1990s is routinely and substantially exaggerated. Consider the following claim made by the National Rifle Association on the relationship between legal gun ownership and crime rates:

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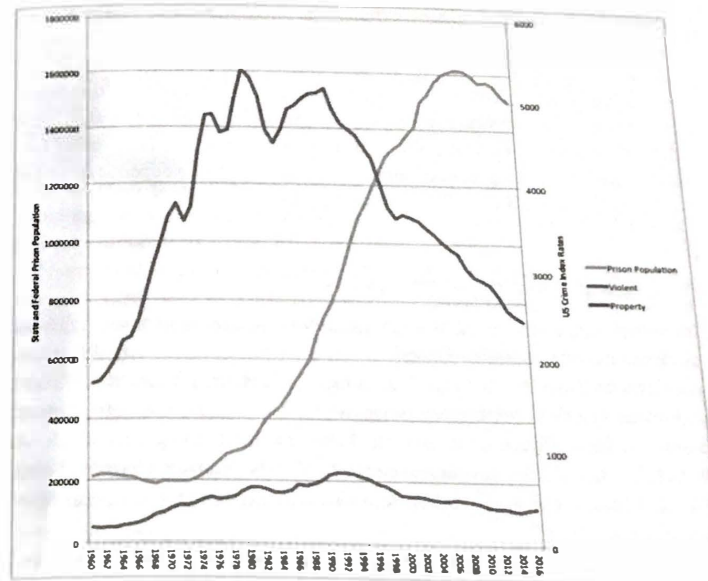


Figure 2.1. Crime Rates and Prison Population, 1960-2016

Gun control supporters believe that RTC [right to carry guns] laws cause crime. However, since 1991, when violent crime hit an all-time high, 25 states have adopted RTC laws, the number of people with carry permits has risen to over 12 million, and the nation's violent crime rate has decreased 51 percent, to a 43-year low.⁴

The assertions of both the tough-on-crime advocates and the gun rights advocates appear to be based on something other than the criteria for establishing cause and effect. While the logic may seem convincing on the surface, a little scrutiny uncovers the flaw in the reasoning. First, nothing is as simple as x causes y . Crime is complex. There are many factors that influence crime rates, some far more important than others.

The drop in crime across the United States was comparable in terms of timing and scale. Crime began declining relatively uniformly across states

and cities, regardless of how extensively those states and cities adopted tough-on-crime policies. States differed dramatically in terms of sentencing laws and prison capacity. Cities implemented a wide variety of law enforcement initiatives, some tougher than others. The point is that while the decline in crime was essentially uniform across states and cities, what they did in terms of crime policies differed considerably. Thus, other factors were influencing crime rates, factors that were independent of the presence and extent of crime-control policies.

The Crime Decline of the 1990s

Importantly, the crime decline of the 1990s, which has served many as evidence of the success of US crime policy, was not a uniquely American experience. Other nations that had comparable reductions in both violent and property crime on roughly the same time line and scale as the United States include Canada, Australia, New Zealand, Belgium, England, Wales, Estonia, Finland, France, the Netherlands, Hungary, Russia, South Africa, Spain, Northern Ireland, Poland, Scotland, Switzerland, and Sweden, among others.⁵

On balance, between 1995 and 2004, twenty-six nations experienced substantial declines in crime, including a 77 percent decline in theft from cars, a 60 percent drop in theft from persons, a 26 percent reduction in burglary, a 21 percent decline in assault, and a 17 percent reduction in car theft. In the United States, crime dropped 29 percent during this period; violent crime fell by 31 percent, and property crime fell by 29 percent. None of these twenty-six countries that experienced the crime decline of the 1990s implemented tough-on-crime initiatives like the United States. A particular comparison of the United States and Canadian experiences is telling. The crime declines in both nations occurred at the same time and had the same defining characteristics in terms of scale and breadth. The punishment policies in the United States and Canada were radically different, with US incarceration rates two to four times those of Canada. The evidence is clear. At best, American's correctional growth, and in particular the incarceration explosion, accounted for roughly 10–15 percent of the crime decline.⁶ While counterintuitive, the evidence indicates that punishment policies had a quite modest impact on crime in the United States.⁷

Recidivism

A more direct indicator of crime control's effectiveness is recidivism. It is a more direct measure since it is specific to those who have been punished and assesses the outcome of that punishment in terms of reoffending. Recidivism is measured in various ways—typically rearrest and reincarceration. There are two primary ways in which individuals released from prison can recidivate: committing a new offense and/or violating the conditions of parole (this can lead to revocation of parole and reincarceration).

There have been several major US recidivism studies released relatively recently, one in April 2014 by the Bureau of Justice Statistics in the US Department of Justice,⁸ another in 2011 by the Pew Center on the States, and most recently by the Bureau of Justice Statistics and the Pew Charitable Trusts, both in 2018.⁹ To be clear, recidivism statistics are based on individuals who are caught. Substantial numbers of crimes are unreported, and many of those that are reported do not lead to an arrest. Moreover, many parole violations go undetected. Thus, official recidivism statistics are undercounts of actual reoffending and supervision violations.

What do we know about the recidivism of offenders released from prison during the period of time when more individuals were entering prison on longer sentences and serving longer proportions of those sentences? The Pew study tracked the reincarceration of inmates released from prison in 1999 and 2004. The study found that over 45 percent of those released in 1999 were reincarcerated within three years of their release. The reincarceration rate for those released in 2004 was 43 percent. The Pew researchers compared their results with those of earlier studies and concluded that reincarceration rates have been relatively constant since the early 1990s, suggesting that the ramp up in punitiveness in American corrections has *not* had an appreciable impact on reincarceration over time.

One Justice Department recidivism study tracked offenders released in 2005 in thirty states. It uses rearrest outcomes as well as tracking prison releases for five years. They found that two-thirds of those released from prison were rearrested for a new offense within three years of release and over three-quarters were rearrested within five years. Property offenders

had the highest rearrest rate (82 percent) and violent offenders the lowest (71 percent). Fifty percent of offenders released in 2005 were reincarcerated after three years; 55 percent were reincarcerated within five years. A 2012 California study shows that two-thirds of inmates released from the California prison system between 2002 and 2008 were reincarcerated within three years.¹⁰ The Justice Department researchers also conducted a special comparison of recidivism in twelve states among offenders released in 1994 and those released in 2005. The results indicate that the overall recidivism rates increased from 67 percent in 1994 to 72 percent in 2005, a pattern opposite of what one would expect if harsher punishment was deterring reoffending and parole violations.

A 2018 Pew study revealed that three-year follow-up data show that reincarceration rates have declined by roughly 25 percent for offenders released in 2012. The most recent Bureau of Justice Statistics recidivism study (May 2018) followed 2005 releasees for nine years and found that 83 percent were rearrested. Eighty percent were rearrested within six years.¹¹ So, recent research shows conflicting trends in recidivism. Reincarceration data indicate a decline in recidivism while rearrest data indicate it is higher than previously thought. Perhaps one way to think about this is that the reincarceration data reflect changes in policy regarding who and how many are returned to prison, while the rearrest data are a more accurate metric of the effectiveness of the criminal justice system in reducing recidivism.

It is difficult to know what an acceptable recidivism rate is. The architects of crime control never went on the record and said what they expected in terms of recidivism outcomes. However, it is probably safe to assume that a rearrest rate of 80 percent and a reincarceration rate of 50 percent are not the outcomes expected and probably do not represent a reasonable return on investment. Moreover, the fact that recidivism rates did not decline over the course of harsher and harsher crime-control policies, and in fact increased in many instances, raises very serious doubts about the effectiveness of the American punishment experiment. Federal, state, and local governments have spent nearly \$1 trillion on tough on crime over the past forty-five years, not counting the war on drugs, which is another \$1 trillion. This has been an experiment that bet the farm on punishment. We lost the farm.

Public Perceptions about Crime and Safety

Crime rates and recidivism aside, has crime control influenced how we feel about crime? Do we feel safer? Has fear of crime changed over the course of America's punishment binge? There are various ways of measuring fear of crime and perceptions of safety. Gallup, the national public opinion polling organization, has been tracking fear of crime and feelings of safety for many years. Fear typically has been assessed by asking respondents, "Is there any area near where you live—that is, within a mile—where you would be afraid to walk alone at night?" In 1964, 34 percent responded yes. During the latter 1960s and 1970s, the percentage increased and then peaked in 1982 at 48 percent. It then declined during the 1990s to a low of 30 percent in 2002. In 2012, it was back up to 38 percent. Today, the United States is experiencing the lowest crime rates in decades; yet fear is at the levels we saw in 1970, 1980, and 1990.¹²

We know that public opinion about crime is influenced by many factors, crime rates being only one of them. If the goal of crime control was to reduce crime and recidivism, thus helping us feel safer, the evidence regarding our feeling safer indicates otherwise. We are still relatively fearful despite decades of some of the most punitive policies in the world. A significant contributor to feelings of insecurity is the media treatment of crime. As we discussed in chapter 1, the media tend to sensationalize crime, especially violent crime, to the point where our fears of crime and crime risk are artificially inflated.

Best we can tell, crime control has not had a detectable impact on recidivism (except for the mounting evidence that incarceration actually increases recidivism), has only had a minimal impact on crime rates, and apparently has not made us feel much safer. We now turn to the question of how we make sense of this.

WHY PUNISHMENT DOESN'T WORK

Eric Hutchings is the chair of the Utah legislature's Criminal Justice Appropriations Committee. This is his take in an op-ed piece in the *Salt Lake Tribune* on March 10, 2015:

Treating a drug addict or someone with mental illness the same as a hard core criminal has proven over time to do nothing to break the cycle. Our own data proves that when you put an addict and a real criminal in the same prison space together, all you get is a criminally-minded addict. We can no longer afford to run the system this way. It does not work.

Crime control is premised on the assumption that punishment will reduce crime and recidivism through two primary mechanisms: deterrence (where the punishment or its threat prevents engaging in crime) and incapacitation (physically preventing crime through incarceration).¹³

While on the surface deterrence and incapacitation are reasonable, logical ways to reduce crime and recidivism, the evidence indicates otherwise. We begin with deterrence.

Deterrence

The deterrence argument proposes two different types of deterrence—specific and general. Specific deterrence refers to the effect of punishment on the particular individual being punished, suggesting that punishment lowers the likelihood that the offender will reoffend. General deterrence refers to the threat of punishment that keeps all of the rest of us from engaging in crime in the first place. Embedded in our crime-control policies is the explicit belief that the harsher the punishment, the greater the threat. I begin with the evidence for general deterrence.

We often hear or read about what is presumably general deterrence in action—a judge or prosecutor stating that a harsh sentence is intended to send a message to the community. Somewhere in the reasoning of crime control is the assumed need for this threat of severe consequences in order to keep crime in check. At some level, this makes intuitive sense. That is, after all, why we have laws and norms and rules and regulations that serve as the guidelines for proper behavior and social interaction. So in one sense, the threat of harsh punishment is simply an extension of all of these other mechanisms and processes that keep most of us on the straight and narrow.

Despite common sense and logic, the evidence is clear that there is no scientific support for a general deterrent effect from harsh punishment. While prosecutors and judges often articulate general deterrence in sentencing decisions, the research indicates that it just does not matter. The scientific community has weighed in on this issue:

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Can we conclude that variation in the severity of sentences would have differential general deterrent effects? The reply is a resounding no. . . . Given the significant body of literature from which this conclusion is based, the consistency of findings over time and space, and the multiple measures and methods employed in the research conducted, we would suggest that a stronger conclusion is warranted. . . . The severity of sentence does not matter.¹⁴

There are at least three reasons why sentence severity does not translate into a crime-reducing general deterrent effect: First, there is the requirement that the community hears the message that judges and prosecutors are sending. There is no compelling evidence indicating that the messages are being communicated in any systematic way or that the community is listening. A second reason is that the community may not need to hear the message in order to remain crime free. Most of us are law-abiding citizens, absent the occasional speeding ticket, petty misdemeanor, or creative tax accounting. We do not see the need to engage in crime (we have other options or alternatives) and/or we have too much to lose by going down that road (shame, loss of a job or family, the wrath of the IRS). We will remain crime free regardless of the consequences of breaking the law; thus, even if we hear the message, it is not going to alter our behavior. The third reason is that for those who should hear the message, those already involved in crime, the threat of harsh punishment is not sufficient to alter their behavior. (More on why this is the case below.)

Specific deterrence is based on the idea that as punishment severity increases, the experience becomes more negative, in turn, increasing the cost of committing crime. As the logic plays out, the harsher the punishment, and, in turn, the higher the cost, the lower the probability of reoffending. Again, this resonates with common sense. That would work for me, so why not for others? Common sense may very well have been the justification for the focus on punishment severity, because there was essentially no scientific evidence indicating that enhanced punishment would deter those we punish.

The evidence contrary to the harsh punishment-reduced recidivism argument is compelling. First, as we saw earlier, recidivism data indicate very high rates of reoffending and very little change in reoffending over the course of harsher and harsher punishment. Moreover, a wide variety of other research confirms what the recidivism rates reflect—a remarkable

lack of evidence supporting the assertion that harsher punishment deters.¹⁴ Research shows that, compared to noncustodial sentences (like probation), those who have been incarcerated either are no different in terms of subsequent offending or actually reoffend at higher rates, indicating that incarceration increases reoffending.

So what is the disconnect between common sense and logic, on the one hand, and reality, on the other? Perhaps the punishment is not harsh enough. Maybe we need to get to some tipping point where the punishment is sufficiently noxious to outweigh the rewards of crime. That is a road we probably don't want to go down for a variety of good reasons, including the fact that there is no evidence that it would be effective (after all, there is very little research supporting the assumption that the death penalty deters homicide),¹⁶ in addition to the constitutional provisions against cruel and unusual punishment and concerns with due process and equal protection, to name but a few.

Another reason why punishment as we have done it does not deter is because policy makers rarely have considered all of the elements of the deterrence argument, which suggests that in order to deter, punishment needs to be severe, swift, and certain. We have nearly universally focused on severity to the exclusion of swiftness and certainty. It is not hard to see how these other two conditions are largely nonstarters in the American justice system. Consider the series of predicate events that are required before an offender can be punished. A felony crime needs to occur and then come to the attention of law enforcement. Law enforcement must then make an arrest; the prosecutor needs to indict, prosecute, and plea negotiate; and then the court needs to impose a harsh punishment. This may come as troubling news, but the odds are heavily in the offender's favor. First, across the board, approximately only one-half of violent crimes and 40 percent of property crimes are even reported to the police. Of those reported, half of violent crimes and one in five property crimes lead to an arrest. This is in part a function of offense severity. The greater the severity, the higher the likelihood of reporting. All else being equal, the greater the offense severity, the higher the likelihood that a reported crime results in an arrest. Overall, the odds of even coming in the front door of the justice system are relatively low, and many offenders probably know that. So certainty of punishment is problematic. Swiftness is also highly questionable. The due process requirements for

a proper disposition of a case involve considerable time, something that runs counter to the swiftness element of deterrence. Severity was the one element of deterrence that could realistically be altered in the American criminal justice system, assuming that the architects of crime control even knew of deterrence theory.

Perhaps the greatest fallacy in the logic is how we generalize our experiences to those of criminal offenders. Punishment is a part of the socialization process, part of growing up. It is what shapes our behavior and helps us learn to engage in appropriate social interaction. Punishment is something that *we* understand and that *we* believe will work because it works for *us*. The problem is that criminal offenders are not "*us*." They differ in important ways from the rest of us, who are law abiding. A typical criminal offender comes from substantial disadvantage, has a substance abuse problem, and has a significant likelihood of having some form of mental illness or cognitive problems. It is also typical that those who cycle in and out of the justice system have limited education and infrequent opportunities for legitimate employment. Once they enter the justice system, their odds of turning their lives around drop dramatically. We make it that much more difficult for offenders to find housing, employment, and education, and the list goes on and on. For many criminal offenders, crime is seen as the norm—an understandable or "rational" response to their perceived situation.

This is not an apology for crime. It is not a pass or a get-out-of-jail-free card for criminal offenders. Rather, it is an explanation for why the principles that seem reasonable to us do not work for others. If we appreciate the circumstances of many criminal offenders, we can begin to understand why punishment does not deter. Punishment likely does not outweigh the lack of opportunity and the barriers many offenders face. What kind of a threat is potential punishment to someone addicted to drugs? Or someone who realistically has no opportunity for legitimate work? Or someone who is unable to resist antisocial impulses because of a brain disorder?

Moreover, deterrence generally assumes a decision-making process in which an offender weighs the likelihood of getting caught and punished against the immediate rewards of a criminal act. Researchers have conducted extensive interviews with prison inmates. In those interviews, offenders describe the decision-making process as one of just not thinking about the consequences, since their immediate needs prevail.

I didn't think about nuthin but what I was going to do when I got that money, how I was going to spend it, what I was going to do with it.

See, you're not thinking about those things [arrest]. You're thinking about that big paycheck at the end of 30 to 45 minutes.

At the time, you throw all your instincts out the window. . . . Cause you're just thinking about money, and money only. That's all that's on your mind, because you want that money.

Toss in drug or alcohol problems, something that characterizes the vast majority of criminal offenders, and the decision-making process is predictable and understandable.

It gets to the point that you get into such desperation. You're not working, you can't work. You're drunk as hell, been that way two or three weeks. You're no good to yourself, you're no good to anybody else . . . you're spiritually, physically, financially bankrupt. You ain't got nuthin to lose.

[You didn't think about going to prison?] Never did. I guess it was all that alcohol and stuff and drugs. . . . The day I pulled that robbery. No. I was so high, I didn't think about nuthin.

Often the decision to commit a crime is impulsive.

I see somebody leave their car runnin or something with the keys in it . . . I might just hop in and drive off. . . . That's how easy it is. Just hop in the car and leave.

Dude was at the gas station in a Monte Carlo. . . . He's putting gas in there and I just jumped in the shit and drive off. . . . I just needed a ride home. . . . With a young dude in a Monte Carlo, easiest thing in the world.

Oh yeah, you know. . . . We stole and shit like that, you know. I didn't give it no thought, no plan, don't know how much money's in it. You know what I mean? Just go in there and say "We're gonna do it, we're gonna do it." That was it.¹⁷

When we consider that roughly 45–50 percent of offenders are mentally ill and many have substantial neurodevelopmental impairments or defi-

cits, what sense does it make to presume a process of deliberation about cost and benefit, an assessment of reward and punishment?¹⁸

Punishment Does Little to Change Circumstance and Behavior

Importantly, punishment does essentially nothing to change behavior. How does incarceration make one employable? How does prison treat substance abuse or mental illness? How does solitary confinement overcome a neurocognitive impairment? Moreover, we continue to punish criminal offenders well after they have "paid their debt to society." We restrict access to housing, health care, employment, mental health care, substance abuse treatment, and education, to name a few. Thus, when we appreciate that many offenders experience limited opportunities, as well as significant deficits and impairments, when we realize that nothing that happens in prison changes any of that and that we make it even more difficult once released, it then makes sense to ask: What should we expect? Not hope or wish, but what should we realistically expect? The answer is precisely what we see—high recidivism rates.

We have gone about the business of sentencing assuming that punishment deters. Even if deterrence did work and severity reduced recidivism, we have no way of knowing how severe is severe enough. We make no effort to determine how much punishment is enough except for the tendency to maximize severity. And we put lawyers (judges and prosecutors) in charge of making those decisions. As Judge Michael Marcus, Multnomah County district court judge, Portland, Oregon, put it in 2003:

Sentencing has been a ceremony of punishment for a very long time. We wear robes and conduct what is in large part a morality play—maintaining a secular equivalent of a state church. . . . If our job is to deliver an appropriate sermon, we need only work on our delivery and steer towards severity.¹⁹

Incapacitation

The other function of punishment is incapacitation, physically removing the offender from the street and eliminating access to targets or victims. Unlike deterrence, which focuses on reducing motivation for offending, incapacitation focuses on interrupting criminal opportunity.

While "lock 'em up and throw away the key" may sound good in principle, the reality, as we have already seen, is that any effect incapacitation has on crime in the United States is quite modest. Moreover, the marginal return from incapacitation diminishes as incarceration increases. The logic is that as incarceration expands, as it has done dramatically in the United States, we eventually start incarcerating larger numbers of lower-risk offenders. As the risk of those being admitted to prison declines, the effectiveness of incapacitation and thus its marginal utility decline. Most experts conclude that we have long passed the point of significant marginal returns from incapacitation.

Even if the marginal utility of incapacitation was significant, one of the primary barriers to its effective implementation is knowing who specifically should be incapacitated. Who should be targeted for the greatest crime-reduction effect? We currently lack the means to accurately determine that.

Much of the attention in recent decades has been on habitual or career offenders, those who have been punished repeatedly and still keep reoffending. We have seen many attempts at incorporating incapacitation into sentencing, such as the creation of mandatory three-strikes laws, which target repeat offenders. These statutory approaches at identifying habitual offenders are fraught with error. When it comes to identifying a chronic offender, what is magical about the number 3 other than that it works with a baseball metaphor? When prosecutors or judges try to identify habitual offenders to incapacitate, they typically rely on prior criminal history and little else. While prior behavior is a predictor of future behavior, it is a rather imperfect predictor. The point is that while the argument sounds logical—lock up the career offenders and prevent their future offending—we just do not have accurate ways of knowing who these career offenders are. While incapacitation requires the precision of a rifle, we have used a shotgun. Our tendency over the past forty-five years has been overkill—locking up many more individuals for much longer periods of time. That has been ineffective, and from a cost-efficiency and marginal-utility perspective, it is wasteful.

There is another version of overkill when it comes to incapacitation. Just as age is related to the onset of criminal offending, age is also related to desistance from crime. Once offenders get to a certain point in the life

cycle, beginning around age eighteen and continuing consistently as one ages, there are dramatic reductions in offending. By age forty, the likelihood of engaging in crime is one-seventh of what it was at age seventeen. By age fifty, it is nearly zero. That seems to be lost on legislators who write laws implementing mandatory long-term sentences and truth in sentencing laws requiring that very high percentages of sentences are served before parole eligibility. It also seems to be lost on prosecutors who make lengthy sentence recommendations, judges who sentence offenders to long terms in prison, and parole boards that keep offenders well past the age at which there is any risk of reoffending. Evidence of this is that the inmate population is aging at a rate that is many times that of the general population. Over the past seven years, the percentage of inmates age sixty-five and older has doubled.²⁰ The incapacitation effect from incarcerating someone who has aged out of crime is zero. The marginal utility is at least zero and perhaps negative.

Finally, the assumption that when we lock up the criminal, we lock up the crime is often incorrect. In many instances of criminal offending, there is a substitution or replacement effect. Take, for example, the case of drug dealing. If the police arrest a drug dealer and he or she is prosecuted and incarcerated (as we have done for hundreds of thousands of drug offenders over the years), we are not eliminating that drug dealing. The likely scenario is that someone will take his or her place. The same thing probably occurs when criminal offending is part of an organization such as a gang. Just because a member of the gang is caught does not mean that the crime goes with him or her to prison.

The Big Picture on Punishment

So where does this leave us in terms of punishment, deterrence, and incapacitation? Is this to say that no one is effectively deterred and no one is effectively incapacitated? No, it does not. But in terms of sentencing and corrections policy, the numbers of offenders who are effectively deterred and the numbers of crimes that are averted because the perpetrator is incapacitated are small indeed. Moreover, focusing on punishment severity has been counterproductive since the evidence indicates that severity tends to increase recidivism.

Ironically, the idea that punishment does not change criminal behavior is embedded in federal law. In 18 US Code § 3582—Imposition of a Sentence of Imprisonment—the federal code states,

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553 (a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

As we have incarcerated more and more individuals for longer periods of time, we have also reduced or eliminated many of the traditional incentives for good behavior while incarcerated. For example, substantial changes to release laws and reductions in good-conduct credit have significantly increased time served and limited early release from prison. As the incentives disappear, behavior worsens. One of the few methods for dealing with bad behavior while incarcerated is administrative segregation or solitary confinement. On any given day, America's prisons incarcerate eighty thousand to one hundred thousand inmates in solitary confinement.²¹ Solitary is isolation and sensory deprivation. Inmates are essentially kept in their cells twenty-four hours per day, fed in their cells, and have very limited human contact. The goal is separation of offenders from other inmates and prison staff. Deprivation and isolation often take a tremendous toll on mental health. Far too often inmates end up serving their entire sentence in segregation since their behavior never improves to the point that they can go back to the general population. Every year, America's prisons discharge thousands and thousands of offenders who go from isolation directly to the community. Because they have served their entire sentence, they are not released under parole supervision. We have no legal ability to supervise or monitor them. So we cut loose thousands of offenders each year who are too dangerous to be in the general prison population, and we have no ability to monitor or supervise them in order to mitigate the risk they pose to the public. How smart is that? How is that in the interest of public safety?

As Judge Marcus puts it:

The single most daunting impediment to meaningful sentencing improvement: our wholesale surrender to undifferentiated just deserts [punishment

severity] as mainstream sentencing's only responsibility. That surrender is a demonstrably dysfunctional, cruel, and wasteful allocation of the bulk of corrections resources—jail and prison included. Our use of jail and prison under the resulting paradigm frequently does more harm than good. The harm consists of accelerated recidivism by offenders whose criminality would be better addressed with wiser sentencing choices, by victimizations that smarter sentencing would have avoided, the excessive punishments that serve neither society nor the offender, of an enormous waste of public resources, and a continuing erosion of public trust and confidence.²²

THE COSTS OF PUNISHMENT

There are a number of ways to think about the costs of tough on crime. One is the financial cost associated with administering criminal justice (law enforcement, the courts, and corrections). Another is the cost of crime (victim costs, social costs). Yet another is the cost of the failure of the American justice system to effectively reduce recidivism—that is, the costs associated with repeat offenders' multiple entries into the justice system. There are also the costs of avoidable victimizations, also due to failures to reduce crime and recidivism. We will look at all of these in the following pages.

The administration of the American criminal justice system requires spending approximately \$260 billion per year on law enforcement, prosecution, the court system, and corrections.²³ The United States spends more on criminal justice in one year than the total annual gross domestic product of 80 percent of the nations in the world. But this is only a portion of the total-cost picture.

Crime itself takes a tremendous toll on victims, on communities, on our sense of well-being, safety, and security. And this toll has economic consequences. Estimates of the financial costs of crime more broadly have been developed by monetizing various effects or impacts of crime.²⁴

Some of these estimates are based on a limited number of offenses (just thirteen).²⁵ The broader costs associated with these thirteen crimes are estimated to be \$200 billion annually. It is important to realize that this estimate is a fraction of the true cost of crime. First of all, these thirteen offenses represent just one-fifth of all arrests. Second, because these estimates are based on arrests, they include only reported crimes that,

in turn, lead to an arrest. As discussed earlier, only about 50 percent of violent crimes and 40 percent of nonviolent crimes are even reported to law enforcement, and for those offenses reported, the arrest rate for violent crimes is just under 50 percent, and roughly 20 percent for reported property crimes.

Another estimate that includes unreported major crimes (murder, assault, rape, robbery, burglary, theft, arson, motor vehicle theft) puts the cost at \$310 billion per year. Still another analysis, which includes all crimes, as well as direct and indirect justice system, victim, and society costs, places the net annual cost at over \$1 trillion annually.²⁶ The \$1 trillion annual estimate is based on the most comprehensive set of assumptions because it includes all crimes, not just major crimes, and does not rely solely on reported crimes.

All of these cost figures are estimates based on a variety of limitations and assumptions. The one thing they all share is that they highlight the extraordinary cost of the justice system and our failure to effectively address crime and recidivism. Moreover, since most of the costs of crime are public costs, we as taxpayers foot most of the bill.

The Pew recidivism study discussed above estimated the savings to corrections agencies due to the reduction in recidivism. They determined that the forty-one states in the study would save \$635 million in the first year alone by reducing recidivism by 10 percent. California would save \$233 million, New York would save \$42 million, and Texas would save \$33.6 million, all in the first year. A separate study by the Pennsylvania Department of Corrections estimates a \$44 million annual cost savings due to a 10 percent reduction in recidivism.²⁷ But these estimates are just the corrections cost savings. Each time an offender returns to the justice system, all of the costs are incurred again, including police resources to investigate, arrest, and book into jail; jail costs for post-arrest detention and subsequent pre-trial detention if the defendant is not bonded out prior to adjudication; costs of the prosecutor's office for reviewing and then indicting and prosecuting the case, including pre-trial hearings, grand jury hearings, and plea negotiations, arraignment, a plea negotiation hearing, and a sentencing hearing; costs of the court for many of the same proceedings listed above; and costs of corrections, including jail, probation, or prison and parole. So the estimated cost savings that are typically available, like the Pew figure of \$635 million, are only a fraction of the total

savings from reducing recidivism. And it is important to appreciate the cumulative cost savings over the longer term due to interrupting the cycle of recidivism of typical habitual or career offenders.

In 2016, there were twenty-two million criminal victimizations, roughly six million violent victimizations, and sixteen million property victimizations.²⁸ Because the American justice system has failed to effectively reduce recidivism, the risk of criminal victimization is higher, resulting in hundreds of thousands of avoidable victimizations each year. The effective reduction of recidivism, which in turn leads to reductions in victimizations, has ripple effects in terms of reducing the costs to the justice system and victim costs, as well as effects on quality of life, among others.

Criminal offenders bring a variety of crime-related problems into the justice system (more on this in chapter 3), and the justice system does little to redress them. In fact, the evidence seems pretty clear that our justice policies often aggravate many of these problems, compromising public safety and aggravating other problems. Once an offender is released from incarceration, we end up passing on the problems to other agencies and institutions in the community. Justice policy has in effect created hundreds of thousands of dependents for public assistance, public housing, public health and mental health care, remedial education, and so on, as the typical individuals we turn out of the justice system are in need of more programs and services than when they went in. That seems to be the nature of what the American justice system churns out on a daily basis. These costs are rarely discussed in the big picture of the failures of the justice system.

Moreover, our failure to appropriately address crime and its causes has profound impacts on families and communities, impacts that increase crime and recidivism. As Professor Todd Clear recently stated in a PBS interview:

One of the things we know is that going to prison reduces your lifetime earnings by 30 to 40 percent. So if you have a neighborhood where every male has been in prison, you have a neighborhood where the men as a group are earning 40 percent less income. . . . Having a parent going to prison increases the chances of a child ending up in the criminal justice system by about 25 percent. So if you have a neighborhood where all the adult males