

Malign Neglect

Throughout this century, black Americans, especially men but increasingly also women, have been more likely than whites to commit violent and property crimes. They have also been more likely to be in jail or prison, on probation or parole. People of goodwill, from W. E. B. Du Bois at the turn of the century through Gunnar Myrdal in the 1940s, to most contemporary scholars of crime, agree that disproportionate black criminality is the product of social and economic disadvantage, much of it traceable to racial bias and discrimination, more overt in earlier times than today.

For at least seventy years, scholars have differed on how much more involved in crime blacks are than whites. Bias in police arrest and crime-recording practices, insufficient sympathy for black victims, exaggerated sympathy for white victims, and official practices adverse to blacks are often said to distort official statistics. The disagreements, however, have principally concerned the extent, not the existence, of higher levels of black crime.

Racial disparities in prisons, jails, and other corrections programs trigger larger and harsher disagreement. Some argue that the disparities result from racial bias operating at every criminal justice stage from arrest to parole release. However, although no one denies that there is bias in the system, many scholars and most officials believe that racial disproportions result largely from different racial patterns of criminality and that bias is a relatively small, though immensely important, part of the problem.

So summarized, it might appear that these are chronic problems about which broadly shared understandings have emerged. That appearance would be deceptive. Crimes and punishments of blacks

are acute social problems; their ramifications dig deeply into the fabric of American life; and there is no agreement on their solution.

Crime by blacks is not getting worse. The proportions of serious violent crimes committed by blacks have been level for more than a decade. Since the mid-1970s, approximately 45 percent of those arrested for murder, rape, robbery, and aggravated assault have been black (the trend is slightly downward). Disproportionate punishments of blacks, however, have been getting worse, especially since Ronald Reagan became president. Since 1980, the number of blacks in prison has tripled. Between 1979 and 1992 the percentage of blacks among those admitted to state and federal prisons grew from 39 to 54 percent. Incarceration rates for blacks in 1991 (1,895 per 100,000) were nearly seven times higher than those for whites (293 per 100,000). Widely publicized studies in 1990 showed that 23 percent of black males aged 20 to 29 in the United States were under criminal justice system control (as were 23 percent in New York and 33 percent in California). Studies by the National Center on Institutions and Alternatives showed that in 1991 in Washington D.C., and Baltimore, 42 and 56 percent, respectively, of black males aged 18 to 35 were under justice system control.

Those numbers are, or ought to be, shocking to every American. It is not hard to understand why many interpret them as *prima facie* evidence of a racist criminal justice system. Disturbing though the numbers are on the surface, what lies below is even more disturbing, for three reasons. First, the rising levels of black incarceration did not just happen; they were the foreseeable effects of deliberate policies spearheaded by the Reagan and Bush administrations and implemented by many states. Anyone with knowledge of drug-trafficking patterns and of police arrest policies and incentives could have foreseen that the enemy troops in the War on Drugs would consist largely of young, inner-city minority males. Blacks in particular are arrested and imprisoned for drug crimes in numbers far out of line with their proportions of the general population, of drug users, and of drug traffickers.

Although damaging the lives of countless young blacks was probably not their primary aim, the architects of the War on Drugs no doubt foresaw the result. Any conventional ethical analysis would hold them accountable for the consequences of their policies. For most purposes, an action taken to achieve a result is ethically indistinguishable from an action taken with knowledge

that a result will almost certainly occur. In the criminal law, for example, if death results, setting fire to a house for the purpose of killing the sleeping occupants is first-degree murder, as is setting fire to a house for the purpose of defrauding an insurance company, but with knowledge that the occupants will most likely die. In equal employment opportunity law, use of screening criteria for job applicants with knowledge that they will exclude proportionately more minority than white applicants is as objectionable as use of a device intended to achieve that result, and is allowable only if exacting tests can be met to show that the screening criteria validly measure qualities related to successful job performance.

Sometimes, of course, undesirable side effects are an inevitable consequence of socially desirable policies. Using automobiles predictably results in traffic fatalities, and building skyscrapers predictably results in the deaths of construction workers, so knowledge of undesired side effects is not always a basis for ethical indictments. Undesired side effects like these can be distinguished from the racial disparities caused by recent crime control policies. Although automotive engineers and architects try to minimize the collateral harms their activities cause, crime controllers made no effort to minimize foreseeable racial disparities. Although automakers and builders are involved in self-evidently useful activities, the effectiveness of recent crime control policies is far from self-evident. Finally, foreseeable racial disparities in human suffering are, in the late twentieth century, a uniquely undesirable side effect.

Race Matters (1993), the title of Cornel West's recent book reminds us. Howell Raines, a *New York Times* editor, writes of the shame that he and his family felt on meeting a former, much loved family maid thirty-four years after she left them. Her life had been hard, and her opportunities for developing talents and improving material conditions had been few. The family, however, could easily have paid to send her to college, and if they had, her life would have been very different.

Raines writes:

Mother said at dinner last night, "If we had just known, we could have done something." Mary Jo said: "Well, how could we not have known?"

Yes, precisely, how could we not have known—and how can we not know of the carnage of lives and minds and souls that is going on among young black people in this country today?

In the 1950s, Raines's family may well have been blind to the interests of blacks around them. Government officials in the 1980s cannot credibly claim to have been similarly blind.

Second, and worse, support for repressive crime control policies, with their foreseeable disproportionate impact on blacks, has been national Republican policy at least since the presidential campaign of Richard Nixon, part of what Thomas Edsall calls "a conservative politics that had the effect of polarizing the electorate along racial lines." The text may be crime. The subtext is race. The infamous Willie Horton ads run to support George Bush's presidential election campaign in 1988, ostensibly a critique of Michael Dukakis's criminal justice policies, again quoting Edsall, "tapped these concerns through a particularly threatening and dangerous archetype: of the black man as the rapist of a white woman."

Third, and perhaps worst of all, the crime control policies of recent years have undermined achievement of the overriding national goal of full unbiased incorporation of black Americans into the nation's social, political, and economic life. No modern social policy subject has received more attention than the black urban underclass, living in pockets of concentrated poverty, unemployment, and disadvantage, in which illegitimacy, teenage pregnancy, single-parent households, and welfare dependency are at record and growing levels. As one indicator of the problems of the black underclass, William Julius Wilson developed an index that shows changes over time in the number of employed males per 100 females for whites and nonwhites. Among whites, the number of employed men per 100 women has been stable or increasing for every age group. Among nonwhites, the number of employed men per 100 women has been declining since 1960 for every age group, with the sharpest declines among those under twenty-five. There is disagreement, especially from radical feminists, about the normative relevance of Wilson's index (after all, it implies that marriage is a good thing), but it captures a commonsense reality. Men who have no jobs, no prospects, and few skills are not attractive candidates for marriage or a long-term relationship.

Particularly since 1980, the effects of crime control policies have been a major contributor to declining levels of lawful employment by young black males. The extraordinary levels of black male involvement with the justice system—far, far higher than twenty years ago—are a serious impediment to the achievement of wel-

fare policy goals. Many disadvantaged black males start out with bleak life chances, and disadvantaged young men ensnared in the criminal justice system have even bleaker prospects. No solution to problems of the urban underclass or, more broadly, of black poverty can succeed if young men are not part of it. The crime problem is no longer simply a criminal justice system concern. Unless America can devise ways to make its crime control policies less destructive of poor black males and poor black communities, there can be no solution to the problems of the black underclass.

The traditional left/right disagreement over whether crime control efforts should concentrate on root causes or on the preventative effects of punishment, exemplified by then Attorney General Richard Thornburgh's acerbic remark at a 1991 "Crime Summit," "We are not here to search for the roots of crime or to discuss sociological theory," is obsolete. The issue is no longer whether social disorganization and economic disadvantage predispose the people affected by them to crime; it is whether crime control policies and justice system practices can be made less socially destructive.

This introduction has three aims: first, to demonstrate that crime control and social welfare policies are inextricably connected; second, to show that blacks disproportionately bear the burdens of the crime control policies of the Reagan and Bush administrations; and third, to sketch the elements of a crime policy that would reduce conflicts with social welfare policies and begin to undo the damage caused by twelve years of indifference.

Social welfare is an elastic term that could encompass virtually any domestic social policy from economic development to prenatal health care. Here I use it more narrowly to refer generally to social programs aimed at improving the living conditions and incomes of disadvantaged people and specifically to programs like Aid to Families with Dependent Children that provide cash payments to enable recipients to cover their basic living costs.

Crime and Social Welfare

Intellectual dishonesty and political cynicism have long characterized both crime control and social welfare policies in the United States. We are unlikely to improve either until we become less

cynical and more honest. Both crime and social welfare are conundra, because they provoke conflicting emotions. We are at once afraid and resentful of criminals and yet troubled by our understanding of the miseries that shaped them. We are at once disdainful and resentful of welfare recipients and yet troubled by our understanding of the miseries of their lives, especially the lives of the children.

Welfare dependence elicits different reactions from the stony puritanical side of our national psyche and from the sunny optimistic side. We sympathize with people whose work cannot support them and their children, and yet wonder whether they ought not to have gotten more education or delayed having children until they could afford them. We want to help those in need, without patronizing those who are struggling barely to get by. We want to boost the incomes of those whose work cannot support them, without giving them incentives to work less. We empathize with mothers and children in disadvantaged, single-parent households, but do not want to encourage the births of more such children or the formation of more such households.

Crime likewise elicits contradictory reactions. Crime and fear of crime corrode our collective sense of well-being. We want our streets safe, our homes secure, our children protected. We want government to devise ways to prevent crime, the police to come when we call, the courts to convict wrongdoers, and punishments to work. However, we also know that experiences of physical and sexual abuse, poverty, and single-parent homes as a child are strongly associated with offending as an adult. We wish that children could be spared those experiences, and we wish that erring adults could be helped to become self-supporting, law-abiding citizens.

These all are hard problems without easy answers. That is why, as anyone who has spent time around criminal courts knows, many trial judges' ideological preconceptions disappear soon after they begin hearing cases. Whether newly selected judges are liberal Democrats or conservative Republicans, they are soon disabused of simplistic stereotypes by the suffering of victims, the sadness of the lives of most victims and offenders, and the limited ability of the legal system to rebuild broken lives or make a safer society. (Appellate judges are a different matter; they see lawyers and

paper, not defendants; it is far easier to believe in stereotypes when you never see the people they purportedly describe.)

And so it is with the American public. Notwithstanding the sensationalism of media coverage of crime and the simplicities of pandering politicians, the public has the same conflicted reactions to crime and criminals that practitioners do: Crime is inexcusable and should be punished; if we can rehabilitate offenders and make them less likely to offend again, we should, for our sake and theirs.

Most people believe that a deprived background is the primary cause of criminality. According to Julian Roberts of the University of Ottawa, the leading North American authority on research on public opinion about crime, "Gross economic factors predominate in public explanations of crime." A 1989 Gallup survey found that when asked to choose between improving law enforcement and "attacking social and economic problems that lead to crime," 61 percent of a representative national sample of adults would rather attack social problems. Thirty-two percent preferred law enforcement measures. Similarly, the Public Agenda Foundation, a non-profit research organization that uses focus groups in order to get richer, fuller views of public opinion, found the same thing in Delaware. When asked to identify the most important or major causes of crime, 94 percent cited drug use, followed by a breakdown in family structure (71 percent) and lack of education (67 percent). By contrast, half or fewer cited "the belief that crime pays," "bad or greedy people," or "not enough emphasis on basic law and order."

Similarly, although National Opinion Research Center surveys for many years have shown that large majorities of respondents say they believe that sentences are insufficiently harsh, large majorities of Americans also want prisons to rehabilitate offenders. When the Gallup survey just mentioned asked respondents to choose between punishment and rehabilitation as the primary goal of imprisonment, by 48 percent to 38 percent they chose rehabilitation. When the Public Agenda Foundation asked Delawareans whether the state should "build more prisons and pay for them by raising taxes," only 32 percent answered yes. Yet when the same Delawareans were asked whether taxes should be increased to pay for drug treatment for every drug addict, 67 percent answered yes. Crime and poverty are part of the human condition and likely

always will be. In most Western countries, public safety is not a partisan political issue on which electoral campaigns are based, but is one of the unglamorous continuing responsibilities of government, like public health or public transportation. Public officials, with such expert assistance as is available, work to prevent crime and to manage decent, efficient justice system institutions. In the United States, by contrast, especially in the last twenty years, both criminal justice and social welfare have been converted by conservative politicians from subjects of policy to objects of politics.

Americans have negative feelings and resentments about both subjects, and conservative politicians have exploited them. In doing so, they have relied on racial stereotypes that have fanned the embers of racial enmity. In the politics of racial division, Willie Horton is to crime control as the Welfare Queen is to welfare policy. Willie Horton is known to anyone who lived through the 1988 presidential campaign. The person caricatured by Ronald Reagan in his 1976 campaign for the Republican nomination and in the 1980 general election was Linda Taylor, a Chicago woman who reportedly collected welfare benefits under several aliases and, as mythology has it, traveled to the welfare office in a rented limousine to pick up her checks. Both Willie Horton and Linda Taylor were black.

These two black people were used as metonyms to caricature in their blackness and in their behavior entire areas of government policy. Their blackness reminded voters that in 1991 there were slightly more non-Hispanic black (38.8 percent) than non-Hispanic white (38.1) families among AFDC recipients and that slightly more than half of those admitted to prison that year were black.

Willie Horton and the Welfare Queen communicate to voters that the foreseeable failures of criminal justice and welfare policies are the most important things about them, rather than unhappy but inevitable aspects of human institutions. No program that dis-tributes things of value—export subsidies, public works contracts, subsidized loans to disaster victims, or welfare benefits—can avoid fraud. If men were angels, none would be tempted to take more than is their due, but men are not angels. When the subject is defense contracts or compliance with environmental laws or securities regulations, conservative politicians tend to regard fraud as a predictable but regrettable side effect of otherwise worthy pro-

grams. Of course, we should work to prevent, discover, and punish fraud, the argument goes, but we should not let it obscure the value of important programs or policies. Equally foreseeable and regrettable welfare cheating, however, is used to symbolize both the nature and the problems of income maintenance programs for the nonelderly.

Similarly, no program that relies on predictions of human behavior can avoid making bad predictions. To the rue of bankers and merchants, predictions of creditworthiness are often wrong. So are predictions from the Educational Testing Service and college admissions offices about prospective students' academic performance. So are doctors' prognoses about their patients' future health and psychiatrists' predictions about their patients' likely dangerousness to themselves or others. Inevitably, decisions by criminal justice officials are sometimes wrong.

Willie Horton's is a terrible story, but it shows the cynicism of racial politics. Horton, who in 1975 had been convicted of the 1974 murder of a seventeen-year-old boy, failed to return from a June 12, 1986 furlough. In April of the following year, he broke into an Oxon Hill, Maryland, home where he raped a woman and stabbed her companion.

Lee Atwater, George Bush's campaign strategist, decided in 1988 to make Willie Horton a "wedge" issue for the Republicans. Atwater reportedly told a group of party activists that Bush would win the election "if I can make Willie Horton a household name." He reportedly told a Republican gathering in Atlanta, "There's a story about a fellow named Willie Horton who, for all I know, may end up being Dukakis's running mate." For a time, Atwater denied making both widely reported remarks. In 1991, however, when he was dying of cancer, he apologized for the "naked cruelty" of the attacks on Dukakis: "In 1988, fighting Dukakis, I said that I would 'strip the bark off the little bastard' and 'make Willie Horton his running mate.' I am sorry for both statements."

The sad reality is that tragedies like the crimes of Willie Horton are inevitable. So are airplane crashes, 40,000 to 50,000 traffic deaths a year, and Defense Department cost overruns. Every person convicted of a violent crime cannot be held forever. Furloughs are used in most corrections systems as a way to ease offenders back into the community and to test their suitability for

eventual release on parole or by commutation. (Another politically awkward truth: The sentences of most prisoners serving life sentences are eventually commuted or otherwise shortened.) While Horton had been granted nine previous furloughs, from each of which he had returned without incident, under a Massachusetts program established in 1972 under a Republican governor, Francis Sargent. The tenth was a disaster, but it should not have been used to exacerbate racial tensions and caricature corrections policies.

Public discourse about crime and social welfare has been debased by the cynicism that made Willie Horton and the Welfare Queen major participants in presidential campaigns. That cynicism has made it difficult to develop sensible public policies.

Policy and Mendacity

Crime control and welfare policies of recent years have been based on false premises. Welfare policies have been based on the premise that benefit levels will allow a modest living standard of safety and decency. They won't, as even a cursory look at benefit levels and policy research shows and as every honest politician knows. Crime control policies have been based on the premise that harsh penalties and escalating prison populations will make Americans safer. They won't, as the accumulated research in this and other countries shows and as every honest politician knows.

Social Welfare

Conservative critiques of social welfare programs focus mainly on Aid to Families with Dependent Children, commonly known as AFDC, and on the claim that experience with AFDC shows that social welfare programs foster dependence, sap character, and provide perverse incentives to recipients to have illegitimate children and to form single-parent households.

Focusing on AFDC is itself a distortion, since AFDC is a tiny part of federal social welfare spending. In 1992, the federal share of AFDC benefits was a little over \$12 billion. In 1990, AFDC spending for children totaled \$7 billion, and Social Security spend-

ing for the elderly exceeded \$193 billion. Social Security spending for children totaled \$9 billion.

American social welfare policies, notably Medicare and Social Security, have greatly improved the lives of older Americans, who vote. The story concerning children, who do not vote, is not so encouraging. If there is one point on which conservatives and liberals agree, it is that expansion of Social Security coverage and annual cost-of-living-indexed increases in benefits have greatly diminished poverty among the elderly. The percentage among those over sixty-five living in poverty fell from 29.5 percent in 1967 to 12.4 percent in 1991, according to the Census Bureau. Among children, the shift was in the opposite direction: 16.6 percent lived in poverty in 1967, a level that rose to 21.8 percent in 1991.

Most of the details of conservative critiques even of AFDC, such as those in Charles Murray's *Losing Ground* (1984) and Lawrence Mead's *The New Politics of Poverty* (1992), are wrong or misleading, as important recent books by Andrew Hacker and Christopher Jencks show. High rates of illegitimacy among recipients, for example, are often blamed on AFDC. Illegitimacy rates, however, have been rising for twenty-five years, for a variety of reasons, in every racial group and income class. During much of that period, fertility rates (live births per 1,000 women) were declining, but an increasing proportion of births were out of wedlock. The same pattern held for poor women, including AFDC recipients: By 1991, the average AFDC household contained 2.9 people; 42 percent consisted of a woman and one child, and another 30 percent consisted of a woman and two children. For comparison, among all households with children in 1992, 41 percent had one child and 38 percent had two, numbers not much different from those for AFDC families.

The largest percentage increase in illegitimate births between 1980 and 1990 was not among teenage women but among women aged 35 to 39, with the next largest increases among those 40 and over and those aged 30 to 34. In all age groups, the percentage increases in illegitimacy were higher among white women than among blacks. So in the end, the honest conclusion is yes, increasing percentages of children born to AFDC recipients were illegitimate, but they were having fewer children overall, and the patterns mirrored those occurring throughout American society.

Many of the detailed conservative critiques are similarly misleading. But this is a book about crime control policy, not social welfare, and so I do not discuss other examples. Interested readers should consult Andrew Hacker's *Two Nations* (1992) and Christopher Jencks's *Rethinking Social Policy* (1992).

Those arguments, however, obscure the more important point that AFDC is a fundamentally dishonest program premised on the notion that benefits provide an adequate subsistence income. Failure to report additional income is a crime and is the basis of many allegations of cheating by AFDC recipients. The reality, however, is that women cannot raise children in minimum standards of comfort and security on AFDC benefits. This can be seen by contrasting benefit levels with the federal poverty level and by considering a recent study by Kathryn Edin and Christopher Jencks of the household economies of AFDC recipients in Chicago.

In January 1993, not one state provided AFDC benefits for a single-parent household of three people that reached the Bureau of the Census's 1992 poverty threshold of \$11,187 (\$932 per month) for a household of that size. The median monthly benefit level nationally was \$367, ranging from \$120 and \$164 in Mississippi and Alabama to \$703 in Suffolk County, New York, and \$923 in Alaska (where living costs are the nation's highest). In Mississippi, AFDC benefits equal 13 percent of the federal poverty level. In only fourteen states did benefits reach even half the federal poverty level.

The inadequacy of AFDC to provide even a poverty-level income should be no surprise. Unlike Social Security, AFDC payments are not adjusted to take account of changes in the Consumer Price Index. As a result, adjusting for inflation, the average monthly benefit per family fell from \$644 in 1970 to \$388 in 1992, a 40 percent decline.

A critic might argue that focusing on AFDC benefit levels understates recipients' incomes because other federal programs provide support. Some, like Medicaid and Head Start, do provide valuable services but do not put food in children's stomachs, roofs over their heads, or shoes on their feet. The exception is the federal food stamp program, which provides certificates that can be exchanged for food. When food stamps and AFDC benefits are combined, recipients' incomes in Alaska and Hawaii reach

the federal poverty level, and those in a few other states exceed 90 percent. But even taking food stamps into account, only in nineteen states do recipients' incomes reach 75 percent of the poverty line. The national median is 70 percent. Thus, the picture changes slightly, but the final conclusion is unchanged: AFDC, augmented by food stamps, does not provide enough money for people to live on.

In 1988 and 1990, Kathryn Edin interviewed fifty women living in Chicago and Cook County about their incomes and expenses. It was not a representative sample. Many women would understandably be reluctant to discuss possibly felonious behavior with a stranger and would be unlikely to cooperate, thereby ruining the representativeness of a scientifically selected sample. Instead, Edin asked people she knew to refer her to AFDC recipients and then moved through networks of acquaintances. Fifty of fifty-nine women contacted were willing to talk to her. As the findings indicate, they were apparently willing to trust her.

Four crucial findings stand out. First, each of the fifty women had outside sources of support, ranging from unreported jobs to support from families to illegal income from prostitution and drug dealing. Second, not one reported all her additional income and support to the welfare authorities, and only four reported any of it. Third, adding together AFDC benefits, food stamps, housing subsidies that a few received, and unreported income, most nonetheless had below-poverty-line incomes, and living standards that few Americans would willingly endure. Fourth, they felt morally entitled to ignore the income-reporting rules because otherwise there was no way they could support their children or improve their and their children's lives through working.

Edin and Jencks concluded that without cheating, an AFDC-dependent big-city mother "will almost inevitably end up in a public shelter." Legal income and outgo just do not match. To reach this conclusion, they looked in detail at the women's finances. Some of the women were slightly better off because they lived in subsidized housing. Of twenty-eight who did not, Edin found that their AFDC checks averaged \$327 monthly and their combined rent, heat, and electricity averaged \$364. For all fifty mothers, food costs exceeded food stamp allowances by \$50 per month. Thus before paying for clothing, laundry, cleaning supplies, school

supplies, telephone, transportation, and all the other things besides housing and food that families need, a typical AFDC mother was \$90 in the hole each month. These other expenses averaged \$351 per month, meaning that the household ran a monthly deficit of \$440. Almost all this money came from unreported income.

The fruits of the women's welfare crimes did not include lavish living. Six families escaped absolute deprivation because of earnings from drug dealing and theft, undisclosed support from family or boyfriends, an unreported \$8,000-an-hour job, or a \$7,000 award in an auto accident. The other forty-four families

did without things that almost everyone regards as essential. Half lived in very bad neighborhoods. Half lived in badly run-down apartments, where the heat and hot water were frequently out of order, the roof leaked, plaster was falling off the walls, or windows fitted so badly that the wind blew through the apartment in the winter. One in four did without a telephone. . . . Most said their food budgets were too tight for fresh fruit or vegetables.

Edin and Jencks's most powerful finding, however, is that the welfare mothers operated on the same moral principles as do other Americans. They believed they were obligated to feed, dress, house, and love their children. When following welfare rules would make that impossible, they felt entitled to ignore the rules. Many wanted to improve their circumstances by working. When welfare rules denied them any benefit from working, by reducing their benefits dollar-for-dollar, they felt entitled to ignore the income-reporting rule.

The genius of the Edin and Jencks study is its systematic demonstration that AFDC benefits and food stamps do not provide enough money for recipients to live on, a conclusion that should be numerically evident from comparing benefit levels with the poverty level. Edin and Jencks, however, converted numbers into people. Anyone who has struggled to provide for a child or who has been unable to pay for a child's eyeglasses or school trip or videogames or whatever clothes "everyone else" is wearing can empathize with a mother who, month after month, can do few or none of those things.

The scandal of American welfare policy is that policymakers know this. Whether they be cabinet secretaries, Department of

Health and Human Services bureaucrats, legislators, or staffers to congressional subcommittees, and whether they be liberals or conservatives, anyone who has worked with welfare policy knows that benefit levels do not support people in decency and that as a result many or most recipients must cheat to survive. When, therefore, conservative politicians try to define welfare cheating as the central welfare problem and the Welfare Queen as the typical welfare recipient, they are indulging in a particularly cruel form of intellectual dishonesty, and one that disproportionately injures black Americans.

Crime Control Policy

Crime control policy has similarly been debased. For at least twenty-five years, researchers have shown and honest politicians have known that manipulations of penalties have relatively little or no effect on crime rates. In 1993, for example, a National Academy of Sciences report commissioned and paid for by the Reagan administration's Department of Justice, noting that the average prison time per violent crime had *tripled* between 1975 and 1989, asked, "What effect has increasing the prison population had on levels of violent crime?" The answer, "Apparently, very little."

No one doubts that society is safer having some penalties for crime rather than none at all, but that choice is not in issue. On the real-world question of whether increases in penalties significantly reduce the incidence of serious crimes to which they attach, the answer is maybe, a little, at best, but usually not. Minor misconduct is a different matter. Parking patterns do change, for example, when ticketing becomes more common, towing is more often used, or "boots" immobilize illegally parked vehicles. Financial crimes involving extensive planning and calculation likewise are susceptible to influence through penalties. This is why the Internal Revenue Service initiates tax evasion prosecutions each spring, shortly before income tax returns are due, and it is why great prominence is given to securities law and antitrust prosecutions.

The evidence concerning the limited influence of penalties on ordinary crimes against people and property comes from research in many countries on the deterrent and incapacitative effects of penalties, from evaluations of mandatory penalty laws in the

United States, and from governmental surveys in the United States, Canada, Australia, and England of knowledge concerning the effects of penalties.

That the question is not even close is shown by official statements of conservative national governments in other English-speaking democracies. In Margaret Thatcher's England, for example, a 1990 White Paper (an official policy statement of the government), based on three years' study, called for a major overhaul of sentencing laws to emphasize the reduction of sentencing disparities as a primary objective. The government expressed its skepticism about the preventive effects of penalties:

Deterrence is a principle with much immediate appeal. . . . But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation.

Canada is the other English-speaking democracy that recently had a conservative government. In Brian Mulroney's Canada, the Committee on Justice and the Solicitor General of the Canadian House of Commons, chaired by a member of Mulroney's party, proposed in February 1993 that Canada shift from an American-style law enforcement approach to crime to a European-style preventive approach. The report observed that "the United States affords a glaring example of the limited impact that criminal justice responses may have on crime. . . . If locking up those who violate the law contributed to safer societies than the United States should be the safest country in the world." Six years earlier, the Canadian Sentencing Commission had premised its recommendations on similar conclusions: "Evidence does not support the notion that variations in sanctions (within a range that could reasonably be contemplated) affect the deterrent value of sentences. In other words, deterrence cannot be used, with empirical justification, to guide the imposition of sentences."

American governments have not always been outside the mainstream of knowledge about the effects and limits of criminal penal-

ties. In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that measures directed expressly at crime and criminals could have little effect without much larger simultaneous efforts being directed at crime's underlying social and economic causes. "The Commission . . . has no doubt whatever that the most significant action that can be taken against crime is action designed to eliminate slums and ghettos, to improve education, to provide jobs. . . . We will not have dealt effectively with crime until we have alleviated the conditions that stimulate it." In 1978, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded more narrowly, "In summary. . . we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence." The panel's principal consultant on the subject, Daniel Nagin of Carnegie-Mellon University, was more categorical: "The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist. . . . Policymakers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence . . . strongly supports the deterrence hypothesis."

Nonetheless, from 1981 onward, the Reagan and Bush administrations repeatedly called for tougher penalties, mandatory penalties, death penalties, more prisons, and reduced habeas corpus rights—as if those policies would make a safer America. And in arguing for those proposals, they repeatedly made claims that defied well-established knowledge. Three warrant discussion: that the greater use of imprisonment reduces crime rates; that 95 percent of those in prison are violent or other dangerous offenders, and that building prisons saves, not costs, money.

REDUCING CRIME RATES

The clear weight of the evidence in every Western country indicates that tough penalties have little effect on crime rates. In addition, in 1993, after the most exhaustive and ambitious analysis of the subject ever undertaken, the National Academy of Sciences Panel on the Understanding and Control of Violent Behavior concluded that greatly increased use of imprisonment has had little effect on violent crime rates. Recent national administrations, however, on the basis of deceptive and distorted presentations of data,

have claimed the contrary. The baldest claims came from Steven D. Dillingham, director during the Bush administration of the Department of Justice's Bureau of Justice Statistics, an agency that should be a nonpartisan source of statistical knowledge concerning criminal justice in America, and from William Barr, attorney general during the Bush administration's final months. At the Attorney General's 1991 Crime Summit, Dillingham claimed that "statisticians and criminal justice researchers have consistently found that falling crime rates are associated with rising imprisonment rates, and rising crime rates are associated with falling imprisonment rates." For authority, he cited the 1978 report of the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects which, as I demonstrated a few paragraphs ago, found no such thing. Barr, in a tract entitled "The Case for More Incarceration" that was released late in his administration, made the same claim in much the same language. Because Barr's claims purport to be well documented, I discuss them in some detail.

Before presenting Barr's evidence, a look at data on crime trends provides a necessary backdrop, because Barr's claims refer to it. Figure 1-1 shows police data from the FBI's *Uniform Crime Reports* on aggravated assaults, robberies, burglaries, thefts, and total index crimes from 1970 to 1992. Rates for burglary, theft, and total index crimes have been divided by 10 in order to show trends for all these offenses in a single figure. The broad pattern is of an increase in rates for most crimes until the early 1980s, followed by declines until the mid-1980s and increases thereafter. Among important offenses not shown in Figure 1-1, the homicide rate in 1980 was 10.2 per 100,000 population, falling to 7.9 in 1984 and 1985 and returning to 9.3 in 1992. The rape rate in 1980 was 36.8 per 100,000 and in 1992 was 42.8. Because public attitudes have rightly become less tolerant of assaults and sex offenses, in recent decades most analysts believe that significant parts of the apparent increases for rape and aggravated assault result from the greater likelihood that incidents will be reported to the police and that the police will record them as crimes. That this is so for assaults can be seen by comparing the steadily growing rates for assault with the mild decline for homicide. A homicide is a lethally successful assault. Given the greater availability of ever-more-lethal firearms, the proportion of assaults proving fatal (that is, the ratio of homi-

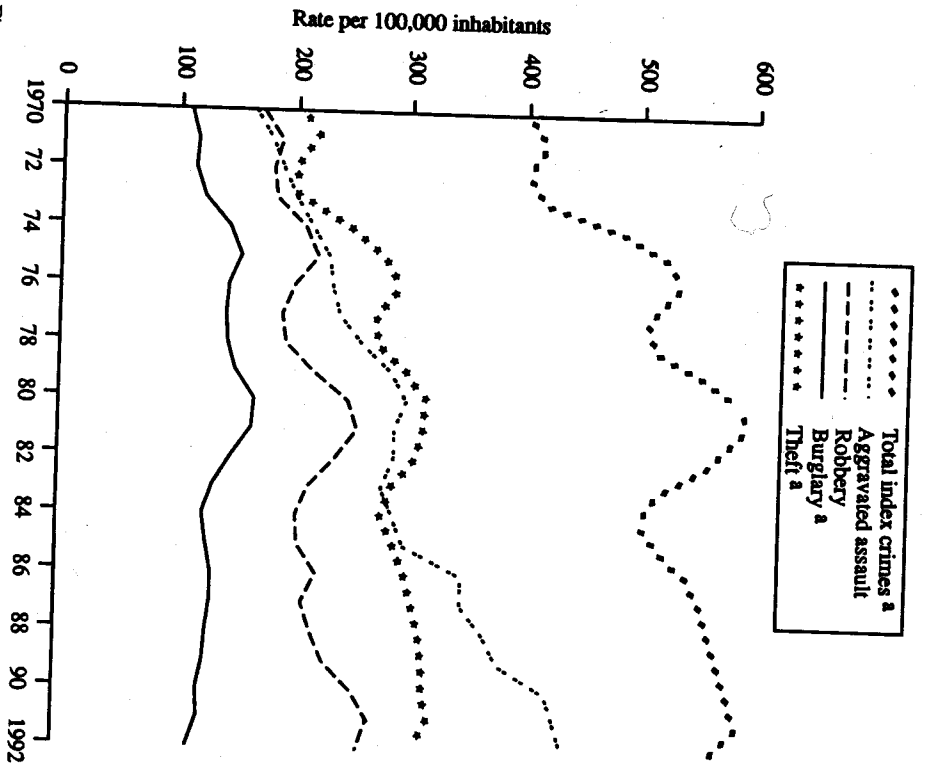


Figure 1-1. U.S. Rates of Aggravated Assault, Robbery, Burglary, Theft, and Total Index Crimes and Offenses Known to Police, 1970-92. Rates for these offenses have been divided by 10 to fit to scale. "Total index crimes" include homicide, rape, robbery, aggravated assault, burglary, theft, and auto theft. Sources: Maguire, Kathleen, Ann L. Pastore, and Timothy J. Flanagan, *Sourcebook of Criminal Justice Statistics—1992* (Washington, D.C.: U.S. Government Printing Office, 1993); Federal Bureau of Investigation, *Uniform Crime Reports for the United States—1992* (Washington, D.C.: U.S. Government Printing Office, 1993), Table 1, p. 58.

cides to assaults) should be increasing. To the contrary, it has steadily fallen. This suggests that much of the apparent rise in assault rates reflects higher reporting and recording rather than a higher incidence of assault.

Barr's "Case for More Incarceration" came from deceptive presentation of some of the data shown in Table 1-1. Barr explained that Table 1-1 shows a declining incarceration rate in state and federal prisons in the 1960s, when crime rates increased, and sharply increased incarceration rates in the 1970s and 1980s, when violent crime rates also rose but at lower percentage rates; the rates for "all crimes" fell slightly during the 1980s. From this comparison, Barr claimed that reduced use of incarceration led to the substantial increase in rates for "all crimes" between 1960 and 1970 and that the 112 percent increase in incarceration between 1980 and 1990 led to a 2 percent decline in crime rates.

The problems with Barr's analysis can be seen in Table 1-2, which repeats Table 1-1 but in highlighted form fills in missing data so that differences are shown at five- rather than ten-year intervals. It becomes apparent that the years Barr compared were chosen deceptively. For example, had he compared the crime rates in 1985 with those in 1990, a five-year period when the percentage and absolute increases in prison populations were the largest in the nation's history, he would have found it difficult to claim a cause-and-effect relation between incarceration and crime rates. Crime

Table 1-1. Crime and Incarceration Rates, State and Federal Prisons, 1960-90 (per 100,000 population)

	1960		1970		1980		1990	
		Change 1960-70		Change 1970-80		Change 1980-90		Change 1980-90
"All crimes"	1,887	+111	3,985	+49	5,950	+5,820		-2
Violent crimes	161	+126	364	+64	597	+732		+23
Incarceration	117	-18	96	+44	138	+292		+112

Sources: William P. Barr, "The Case for More Incarceration" (Washington D.C.: U.S. Department of Justice, Office of Policy Development, 1992), table 2; Bureau of Justice Statistics, *Prisoners in America*, various years.

Table 1-2. Crime and Incarceration Rates, State and Federal Prisons, 1960-90 (per 100,000 population)

	1960	1965	% Change 1960-65	1970	% Change 1965-70	1975	% Change 1970-75	1980	% Change 1975-80	1985	% Change 1980-85	1990	% Change 1985-90
	"All crimes"	1,887	2,449	+30	3,985	+63	5,282	+33	5,950	+13	5,206	-13	5,820
Violent crimes	161	200	+24	364	+82	482	+32	597	+24	556	-7	732	+32
Incarceration	117	108	-8	96	-11	111	+16	138	+24	200	+45	292	+46

Note: Bold data not provided in "The Case for More Incarceration."

Sources: William P. Barr, "The Case for More Incarceration." (Washington, D.C.: U.S. Department of Justice, Office of Policy Development, 1992), table 2; FBI, *Uniform Crime Reports*, various years; Bureau of Justice Statistics, *Prisoners in America*, various years.

rates overall rose 12 percent, and violent crime rates climbed more than 32 percent. There is little to celebrate in a one-third increase in violent crime.

Barr also deceptively selected the crime rates to be compared: "From 1960 to 1970, the crime index rate [for all crimes] more than doubled, increasing by 111 percent; from 1970 to 1980, it rose by 49 percent; but from 1980 to 1990, it actually *declined* by 2 percent" (emphasis in original). By focusing on 1980 and 1990 rates for "all crimes," Barr could claim that a decade's more-than-doubling of incarceration rates had produced a slight decrease in crime rates (from 5,950 per 100,000 population to 5,820). Had he focused on changes in violent crime rates during the same years, he would have had to acknowledge (and explain away) a 23 percent increase.

A critic might suggest that it is unfair to subject a politician's numbers to close scrutiny. In this case, however, "The Case for More Incarceration" was more than an unstudied speech by a politician. It was, after all, a formal public statement by the attorney general of the United States. Moreover, it was an official, widely disseminated publication of the U.S. Department of Justice, and as an accompanying press release made clear, it was prepared under the direction of Stephen R. Schlesinger, for many years director of the department's Bureau of Justice Statistics. Between them, Schlesinger and Steven Dillingham, whose Barr-like claims were quoted earlier, were directors of the bureau through most of the Reagan and Bush presidencies. They are the most sophisticated conservative students of criminal justice statistics in America, and Barr's claims are theirs. Thus, the "Case" is probably the best statement of their position that can be made. It does not provide a very strong basis for explaining why, alone among the governments of the major English-speaking countries, the United States government long claimed that harsh law-and-order policies would decrease crime rates.

WHO IS IN PRISON?

A second defense of law-and-order imprisonment policies is the claim that any sympathy with prisoners is misplaced because the vast majority of those sent to prison are dangerous people who

have committed very serious crimes. In speeches, the claim is usually made that only 5 percent of offenders are nonviolent first offenders. In writing, the statements are slightly more careful. Thus Steven Dillingham at the Attorney General's 1991 Crime Summit: "National statistics reveal that 95 percent of state prisoners have been convicted of violent crimes, or are recidivists." This suggests that prisons are used parsimoniously and are reserved for violent and other serious offenders. That impression is false, for two reasons.

First, the combination of violent offenders and "recidivists" in one category suggests that both are equally threatening. They are not. Numerous minor nonviolent offenders have been convicted before of theft, shoplifting, passing bad checks, selling small amounts of marijuana or other drugs, or other trifling crimes. This makes them recidivists, but neither very important nor very scary ones, and certainly not ones who need to be held in expensive prisons.

So what proportion of the 95 percent are violent offenders, most of whom presumably deserve to be in prison, and what proportion are recidivists who may or may not deserve to be in prison? We know the answer for 1991, the latest year for which sufficiently detailed national data have been published. In that year, 46.6 percent of those in state prisons on a census date had been convicted of violent crimes (another 25 percent had been convicted of property crimes, 21 percent of drug crimes, and 7 percent of "public-order" crimes). And of those in prison in 1991, 38 percent had not been incarcerated before. In other words, well over half of state prisoners had been convicted of crimes not involving violence, and two-fifths had never before been sentenced to jail or prison. The claim that only 5 percent of prisoners are nonviolent first offenders begins to take on a different, less threatening, hue.

Second and more important, the 95 percent claim confuses prison populations with prison admissions. Because people convicted of violent crimes deservedly receive longer sentences than do people convicted of most property crimes, they remain in prison longer. On any day, the proportion of violent prisoners among those in prison is larger than the proportion of violent offenders among those admitted to prison. The proportion of those admitted to prison for violent

crimes has been declining steadily (down from 42 percent in 1977 to 35 percent in 1985 to 27 percent in 1990).

Perhaps the most extreme claims about the threatening nature of modern prisoners were made by John Dilulio of Princeton University, who ought to know better. In a January 26, 1994, column in the *Wall Street Journal*, Dilulio wrote, "More than 95 percent of state prisoners are violent criminals, repeat criminals (with two or more felony convictions), or violent repeat criminals." Pretty scary, if true, but it is not true. Here is what the U.S. Department of Justice had to say in its report on the 1991 survey of state prisoners: "About 38% of all inmates had not been incarcerated before: 19% were sentenced for the first time [hence this was a first conviction]; 19% had [previously been sentenced] to probation." Dilulio's numbers do not add up.

In thinking rationally about imprisonment policies, what we should want to know is who goes to prison, not what percentage of those in prison are "nonviolent first offenders." We know the answer for 1990. Twenty-seven percent were violent offenders; 32 percent each were property and drug offenders; 8 percent were "public-order" offenders, and 1 percent were "other." There is lots of room for debate about the wisdom of contemporary patterns of prison use.

THE COST-EFFECTIVENESS OF IMPRISONMENT

The final disingenuous explanation for why more imprisonment is appropriate is that incarcerating offenders saves money and that building more prisons will save more money. As former Attorney General Barr put it in the 1992 "Case for More Incarceration", "inadequate prison space costs money" (emphasis in original). This implausible proposition is based on a series of discredited cost-benefit analyses of prison use. The first, by Edwin Zedlewski of the Justice Department's National Institute of Justice, claimed that locking up one additional prisoner, net of criminal justice system and prison costs, would save \$430,000. His estimate was based on the assumption that each confined offender would otherwise have committed 187 offenses and thus that each offense avoided would save \$2,300. His use of the number 187, taken from a RAND Corporation survey in the late 1970s in which prisoners were asked about their past criminality, involved, however, a number of confu-

sions. It was an average, for example, and half the inmates surveyed admitted to offending at less than one-tenth the average rate. More important, because only a small percentage of offenders are highly active, as more people are sent to prison, their average criminal activity declines. The RAND survey was done in the 1970s when the average state prisoner was a much more serious offender than today.

Franklin Zimring and Gordon Hawkins of the University of California at Berkeley soon published a rejoinder to Zedlewski's analysis, pointing out his mistakes. They also reran his analysis by applying it to 1977 FBI data on reported crime and showed that, given Zedlewski's assumptions, the 237,000 increase in the American prison population between 1977 and 1986 should have "reduced crime to zero on incapacitation effects alone On this account, crime disappeared some years ago." Zedlewski's analysis lost all credibility, except in the eyes of the U.S. Department of Justice.

A series of later, similar analyses were made by John Dilulio of Princeton University and Mark A. R. Kleiman and David Cavanagh of Harvard's Kennedy School of Government. These studies used methods and assumptions similar to Zedlewski's and reached similarly implausible conclusions. The Kleiman and Cavanagh analysis, though never published, was cited by Barr as demonstrating "benefits of incarcerating that *one inmate* for a year at between \$172,000 and \$2,364,000" (emphasis in original).

The Kleiman-Cavanagh findings in turn were premised on a farfetched cost-benefit analysis of imprisonment by economist Mark Cohen of Vanderbilt University. Cohen attempted to calculate the "true" cost of crimes by taking account of the economic value of victims' "pain and suffering." To do this, he obtained data from jury awards in accident cases and applied the resulting dollar estimates to crime. There were, however, two fundamental problems in doing this, and they paralleled Zedlewski's mistakes. First, contested tort actions that are resolved by jury trials are that small percentage of cases in which the liability is so clear, the plaintiff so sympathetic, or the damages sought so large as to make worthwhile the time and expense of years-long civil litigation. In other words, such cases are far from representative of run-of-the-mill accident claims or, by implication, of ordinary crimes. Second, civil damage awards are inflated to take account of enormous trans-

actions costs, including attorneys' fees and expenses that frequently equal one-third to one-half of any award.

On the basis of Cohen's estimates, raised to take account of inflation since the time of Cohen's analysis, Barr claimed that the total cost in 1990 to victims of ordinary crimes (that is, excluding white-collar crimes, environmental crimes, and so forth) was \$140 billion. That this is somewhat exaggerated may be seen by comparing it with an estimate prepared by Barr's own Bureau of Justice Statistics—direct economic losses to victims in 1992 of \$17.6 billion.

None of these financial or empirical claims about the need for or benefits of harsh crime control policies withstands scrutiny. Even Princeton's Dilulio eventually backed away from the most exaggerated claims:

A debate has raged over the cost-effectiveness of imprisonment. This debate has been waged as a numbers game, with conservatives citing figures to show that "prison pays," and liberals citing figures to insist that it doesn't. The truth, we find, lies in between, though arguably closer to the liberal than to the conservative view.

Reasonable people disagree over what penalties should attach to what crimes and over the general directions that crime control efforts should follow. There are, however, important costs to alternative choices, and one of the most important is the effects of policies of historically unprecedented harshness on members of minority groups. The claims of the Reagan and Bush administrations notwithstanding, these are and should be hard choices, not easy ones.

The Burden on Black Americans

American crime policies since 1980 have had disastrous consequences for black Americans. On any given day, blacks are six to seven times more likely than whites to be in jail or prison. Astonishingly high percentages of young black males are under the control of the criminal justice system. These patterns, all of which have worsened steadily since 1980, do not result from increases in the proportions of serious crimes committed by blacks.

Black Americans are far more likely than whites to be in prison or jail. Although blacks make up less than 13 percent of the U.S. population, they comprise nearly half of the populations of U.S. prisons and jails and, in recent years, more than half of those sent to jails and prisons. Most people's first reaction is to compare 13 percent of the general population with 50 percent of the prison population and to be surprised that black imprisonment rates are four times higher than they ought to be. Although the surprise is warranted, the calculation is misleading because it understates racial disparities.

What should be compared is the likelihood, relative to their numbers, that black and white Americans will be locked up. In 1991, the black rate was 6.47 times higher than the white rate. Among black Americans, 1,895 per 100,000 were in prison or jail on the counting dates. Among white Americans, 293 per 100,000 were in prison or jail. Between December 1991 and December 1993, the number of jail and prison inmates grew by more than 150,000. Both the incarceration rates by race and the black-white differentials have also grown.

Another, even more remarkable pattern of black-white disparities has been revealed by a series of studies attempting to determine the proportions of blacks under the control of the criminal justice system on a given day. Of all the people in prison or jail, on probation or parole, or released on bail or recognizance pending trial, what percentage are black? The first such analysis, in 1990 by Marc Maurer of The Sentencing Project, showed that nationally 23 percent of black males aged 20 to 29 were under justice system control. Table 1-3 shows the findings of five such recent studies.

Two studies done at the state level have been widely reported. The Correctional Association of New York found that 23 percent of black males aged 20 to 29 were under justice system control in 1990. California's Center on Juvenile and Criminal Justice found in 1990 that 33 percent of black males aged 20 to 29 were under justice system control.

Two studies at the city level were carried out by Jerome Miller of the National Center on Institutions and Alternatives. In Washington, D.C., Miller found that 42 percent of black males aged 18 to 35 were under justice system control in 1991. In Baltimore in

Table 1-3. Percentages of Young Black Males Under Justice System Control

Source	Area	Coverage	Year	Ages	Percent
Correctional Association of New York (1990)	New York State	JPPP	1990	20-29	23
Mauer (1990, The Sentencing Project)	United States	JPPP	1990	20-29	23
Center on Juvenile and Criminal Justice (1990)	California	JPPP	1988/89	20-29	33
Miller (1992a, National Center on Institutions and Alternatives)	Washington, D.C.	JPPP, PTAW	1991	18-35	42
Miller (1992b, National Center on Institutions and Alternatives)	Baltimore	JPPP, PTAW	1991	18-35	56

JPPP = jail, prison, probation, parole.

PTAW = Pretrial release or sought on arrest warrant.

1991, the corresponding figure for 18- to 35-year old black males was 56 percent.

All of these estimates are based on readily available statistical data. Some of them may be slightly exaggerated because of the double counting of people who are simultaneously in two corrections populations. Louis W. Jankowski, a senior career statistician at the Bureau of Justice Statistics, however, estimates the effects of double counting at between 3 and 10 percent and probably nearer the lower estimate: "The number of inmates double counted may be small relative to the total population under correctional control." This is because there is little chance of double counting between people in prison and jail or between people in jail and released before trial. There is some chance of overlap between offenders in confinement and those in parole and probation case-loads. People committing new offenses may be in jail and, until news of the arrest reaches a probation or parole officer, may con-

tinue to be counted in a supervision population. However, because new arrests typically result in revocation proceedings and because justice system records in most jurisdictions have been computerized, the likely overlap is small.

In addition, there is a special problem with the city analyses. If the justice system control percentage—56 percent in Baltimore—is thought of as a fraction—56/100 of young blacks—the numerator and denominator will not match up. First, the Census Bureau is known to undercount mobile, inner-city young people, which means that the denominator is too small. There are more young blacks in Baltimore than the Census Bureau knows about. Second and more important, the numerator is too large because it includes all young blacks under justice system control, whether they are residents of Baltimore City, Baltimore County, the District of Columbia, or anywhere else.

The problems of double counting and, in the city studies, with identifying the relevant populations to be compared do not in any significant way deprive these studies of their force. Even if the correct national level of justice system control of black 20 to 29 year olds is *only* 21 percent or the Baltimore 18 to 35-year-old figure is *only* 46 percent, they still are astonishing figures that should disturb anyone who thinks about them.

The punishment patterns underlying those different rates are explained in Chapters 2 and 3. Since 1980, the black incarceration rate has been rising much faster than the white rate; the proportions of blacks among those admitted to prisons and jails have been climbing to historic highs; and the proportions of blacks among those held in prisons and jails have been growing also to historic highs.

Justifying the Unjustifiable

It seems a bit odd in the 1990s to have to explain why the adoption of policies with foreseeable racially disparate impacts is a bad thing. Avoiding undesirable side effects and rejecting iatrogenic policy options seem obviously right. Consider, for example, the questions of registering of persons who are HIV positive and of notifying family members and other inmates of the infection. Homosexuals have consistently opposed registration laws and notification policies because

of fears that they would be stigmatizing and would adversely affect them as a group. Public health officials' views have changed over time. In the mid-1980s, many supported registration policies and contact tracing. More recently, because registration might deter people from being tested for HIV, most public health officials have been opposed, and few such policies have been adopted, in part from respect for homosexuals' concerns about their disparate impact.

Other examples are available of policy realms in which the desirability of avoiding disparate impacts is generally seen as self-evident. In employment discrimination law, proof of a disparate impact on women or members of minority groups is enough to create inferences of discriminatory intent and to shift burdens of proof. Likewise, on constitutional grounds, statistical evidence that jury-selection criteria or processes create racial disparities is enough to create an inference of bias and, often, to win a jury-composition lawsuit.

As a matter of policy, de facto discrimination on racial or ethnic grounds is as damaging to the people affected as is de jure discrimination; the law's failure to treat them identically results not from a judgment that one form of discrimination is less harmful than another but from practical concerns. Whether or not remediable by the courts, many claims of innocent de facto discrimination meet with skeptical reactions from bystanders.

There are a number of other ways to think about the ethical justification of law-and-order crime policies' disparate impact on blacks. The criminal law's mens rea analyses, for example, offer the law's most highly developed schema for analyzing culpability and moral responsibility. In the criminal law, purpose and knowledge are equally culpable states of mind. An action taken with a purpose to kill is no more culpable than an action taken with some other purpose in mind but with knowledge that a death will probably result. Blowing up an airplane to kill a passenger is equivalent to blowing up an airplane to destroy a fake painting and thereby to defraud an insurance company, knowing that the passenger will be killed. Both are murder. Most people would find the latter killing more despicable. By analogy with the criminal law, the responsibility of the architects of contemporary crime control policies is the same as if their primary goal had been to lock up disproportionate numbers of young blacks.

The architects do no better under criminal law *actus reus* analysis. Although the common law imposed no criminal responsibility for harms caused by omissions, unless the actor put the victim at risk or had some duty regarding that person's care, this is almost universally seen as a retrograde doctrine. If with no significant risk to himself a person can save a child from drowning in a shallow pool, why should he not be expected to do so? In any case, whatever the criminal law provides, most people would hold the bystander morally responsible. If the crime control architects could have adopted policies that would not have damaged the lives of so many young black Americans, as of course they could have done, why should they not have done so? Are they not morally responsible for having omitted to do so?

One last argument using a criminal-law analogy involves the defense of necessity. In most American legal systems, an action that produces harm can be justified if a greater harm is thereby avoided. A classic example is of people who open a swollen dam and divert its flow into a valley, thereby destroying a farm and perhaps killing its inhabitants, in order to prevent the dam's breaking and jeopardizing an entire town and its inhabitants. Whether the defense of necessity applies depends on balancing the harms caused and avoided. Given the absence of credible evidence for believing that harsh crime and drug policies would significantly reduce crime rates, the harms that those policies have caused to black Americans cannot be justified.

There are thus a number of modes of analysis that condemn the conscious adoption of policies foreseeably detrimental to blacks. One final step, however, is to examine three defenses that have been or could be put forward by conservative crime controllers. The "Don't blame us" defense is that in a democracy, public officials respond to the fears and preferences of the electorate and, in the 1980s, the "public" was concerned about crime and drug abuse. The public wanted harsh penalties and a drug war, and the federal government (and those state governments that followed the federal lead) were simply, and rightly, giving the public what it wanted. In his *No Escape* (1991), Princeton's Dilulio argued that "the sensitivity of politicians to the will of a persistent majority of their constituents should be a cause for celebration, not lamentation."

The defect of "Don't blame us" is that it gets the causal chain backward. Throughout the 1980s and earlier, conservative politicians used "law and order" (remember Willie Horton?) as an emotional issue to curry favor with voters, in effect heightening their fears and then promising to assuage them. Common-law and street criminals do not vote very much and do not attract much sympathy from those who do vote. It is easy to provoke voters' fears, and, as both Michael Dukakis's fumbling of the crime issue in the 1988 presidential campaign and the immobilizing fears of many elected officials to be portrayed as "soft on crime" attest, it is difficult for others to dampen them.

Almost all the premises underlying the "Don't blame us" defense were wrong. First, as explained above, there is no basis for claiming a good-faith belief that harsh crime control policies can achieve their ostensible objectives.

Second, although politicians' harping on rising crime rates made the public believe that crime was increasing, all of the evidence points the other way. FBI data on reported crimes showed that reported rates of most serious crimes fell from 1980 through 1986 and slowly rose thereafter (during the height of toughened crime control initiatives) to levels that in 1993 for most offenses remained below those in 1980. The other source of national data on crime trends—data on victimization published by the Bureau of Justice Statistics of the U.S. Department of Justice—showed that victimization rates for all serious crimes, except murder, fell throughout the 1980s. (Murder rates did decline during the 1980s, throughout the 1980s. (Murder rates did decline during the 1980s, but murder victims do not participate in victimization surveys.) Most crime statistics experts consider the victimization data a more dependable indicator of crime trends because they are not affected by changes in victims' willingness to report crimes to the police or in police willingness to record reported incidents as crimes. Although the data sources have different strengths, weaknesses, and uses, the critical finding for present purposes is that neither shows a significant overall increase in crime since 1980.

Third, politicians' claims that the public "wanted" tougher crime policies were disingenuously based on misleading poll results. It is true that, when asked simplistic questions like "Are the sentences that judges impose too harsh, too lenient, or about right?" most people answer "too lenient," and they have done so for as long as

such questions have been asked. Relying on such results as the basis for policy is no more warranted than relying on similar, unformed, off-the-cuff answers to pollsters' questions about foreign policy or support for DNA research. The problem is not that people answering pollsters do not know what they think. It is that people's uninformed first reactions often change once they give informed consideration to a problem.

A huge body of public opinion data is available that shows that Americans have complicated opinions about crime and punishment, just as most practitioners do. Most people want to see offenders punished, for example, but they also want to see them rehabilitated. Americans believe that many offenders should be sentenced to meaningful community-based penalties rather than to prison. Americans believe that a disadvantaged upbringing is the primary cause of crime and want to see efforts made to rehabilitate offenders. Surveys show that people who do not want their taxes increased to pay for more prisons do support tax increases to pay for drug treatment and other rehabilitative programs. Americans are not alone in harboring ambivalent feelings about offenders. Similar results were found in Australia, England and Wales, Canada, Germany, Scotland, and the Scandinavian countries. Complicated problems elicit complicated reactions.

The point is not that Americans lack punitive instincts. They have them. But they also have other more generous instincts that policymakers can encourage or ignore. The architects of recent crime control policies chose to ignore them.

A second defense, "It's not unconstitutional," is that despite their foreseeable disparate impact on blacks, punitive crime control strategies were not wrong, in the sense that they were not unconstitutional. This is a non sequitur. It is true that since *Washington v. Davis*, 426 U.S. 229 (1976), an intent to discriminate must be shown to establish a civil rights claim under the Constitution. Since courts will not look behind the ostensible crime- and drug-use reduction goals claimed for the anticrime and antidrug policies, the unconstitutionality claim can be set aside. However, that a policy is not unconstitutional does not make it right, or even not wrong. One need only look at the U.S. Supreme Court's death penalty jurisprudence to see that law and morality sometimes march in different directions.

Last, there is the "We are concerned about black victims and black communities" defense. As Attorney General Barr put it in his *Case for More Incarceration*, perhaps in ill-chosen words, "The benefits of increased incarceration would be enjoyed disproportionately by black Americans." Fleshed out, the argument is that most crime is intraracial, that drug trafficking is associated with guns, gangs, and violence, that drug markets ruin neighborhoods and make it nearly impossible for law-abiding people to enjoy the peace and stability that should be every person's right, and that wars on crime and drugs were launched to vindicate that right. All the empirical statements that precede the last comma are true. What is false is the final clause. The cure does not follow from the diagnosis, as previous parts of this chapter demonstrate.

A variation on the concern-for-black-victims defense is the assertion that black inner-city residents want the police to close down street drug markets and to arrest drug dealers and that failing to do these things would be a form of bias against blacks. This also is a half-true argument. No one wants to live in a neighborhood in which drug dealing is common, in which gangs are active, in which children cannot be allowed to go outdoors, in which ordinary citizens feel at risk. Minority citizens want help from the police in dealing with acute problems, even if the young men and women who will be arrested are their neighbors' sons and daughters, nieces and nephews. In a crisis, people need help and ask for it, and the police are often the only source of available help. There is little reason to doubt that minority citizens want order brought to their communities.

Requesting help in a crisis and supporting harsh crime and drug control strategies with racially disparate impacts, however, are not the same thing. The relevant distinction is between acute and chronic problems. Recent crime control policies treat crime and drug trafficking as if they were only acute problems: Apply a deterrence and incapacitation poultice and the problem will be solved. But inner-city crime and drug abuse and related social pathologies are not acute problems amenable to easy solutions. Rather, they are symptoms of chronic social and economic conditions shaping disadvantaged inner-city communities and the life chances of the people in them.

Law-abiding minority citizens would much prefer policy solutions that preponderantly treated crime and drug abuse as chronic rather than as acute conditions. This may explain, for example, why the Congressional Black and Hispanic Caucuses opposed the harsh crime bills under consideration in the winter of 1993/94 and why they have consistently favored more spending on drug treatment, early childhood programs, and crime prevention initiatives. A recent *New York Times* story reports on a January 1994 meeting of black politicians, academics, ministers, and civil rights leaders to consider solutions to crime problems affecting black communities: "While they agreed that the problem was spinning out of control, they condemned the solution most often offered to deal with it: stiffer prison sentences and more jail cells." Representative John Conyers, Jr., observed that "we've got to take the initiative . . . to move government and the country away from this simplistic approach to the crime problem."

That people in frustration and desperation want to see their neighbors' children and their children's friends locked up (virtually no one wants to see his or her own children incarcerated) does not mean that they would not prefer policies that made the locking up less likely. Given the choice, minority citizens would greatly prefer social policies that made it much less likely that so many minority young people would wind up living lives in which crime and drugs are common. Most parents I know want good lives and rich opportunities for their children and for other people's children. People who live in disadvantaged minority communities do not hope for less for their children. "Hello Brother—What a Wonderful World," a staple in Louis Armstrong's repertory, gets it right:

You can travel all around the world and back.

You can fly or sail or ride a railroad track.

But no matter where you go—

You're gonna find that people have the same things on their mind.

A man wants to work for his pay.

A man wants a place in the sun.

A man wants a gal proud to say that she'll become his loving wife.

He wants the chance to give his kids a better life.

There is some evidence to support the preceding speculations. First, there are chilling reports that large percentages of black Americans see contemporary crime and drug policies as a near-genocidal effort by whites to control blacks. University of Chicago law professor Norval Morris describes a seminar with black maximum security inmates in Stateville Prison in Illinois in which patterns of race, crime, and punishment were discussed. Of twenty-six prisoners present, only three doubted that American drug and crime policies were a genocidal (their word) assault on blacks by whites. In their 1991 book *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*, Thomas and Mary Edsall describe focus groups held in the late 1980s under both Democratic and Republican party auspices; in every session with black participants, the view was expressed that crime and drug control policies were a deliberate effort to destabilize black communities. A Democratic pollster, Ed Reilly, reported a belief among northern, urban blacks "that there is an organized approach to keep them [blacks] isolated from mainstream America, that the government system is rigged to keep them in poverty." A *New York Times*/WCBS-TV poll in 1990 found that 29 percent of blacks (only 5 percent of whites) thought it was true or might be true that the HIV virus was "deliberately created in a laboratory to infect black people," that 60 percent (16 percent of whites) believed it was true or might be true that government makes drugs available "in poor black neighborhoods in order to harm black people," and that 77 percent of blacks believed the government "singles out and investigates black officials in order to discredit them." (The poll results were reported in an October 29, 1990 *Times* article by Jason DeParle.)

Second, evidence from public opinion surveys over many years shows that much larger percentages of blacks than whites believe that the government has social welfare responsibilities to its citizens. In 1986 in surveys conducted as part of the University of Michigan's National Election Studies, blacks by 64 to 36 percent said they believed the federal government had a responsibility to guarantee every adult a job and a good standard of living (whites came out the other way, by 66 to 34 percent). During most of the 1980s, whites split evenly on whether the government should increase spending for improved services; blacks were in favor by margins as high as 77 to 23 percent (These data are reported in

Warren E. Miller and Santa A. Traugott's *American National Election Studies* [1989]). According to National Opinion Research Center surveys conducted from 1975 to 1989 and summarized in a book by Floris Wood, among blacks, 53 to 70 percent believed that the government has a "special obligation to help blacks improve their living standards." Only 12 to 20 percent of whites agreed, and 60 percent of whites disagreed. With similar and sometimes sharper racial contrasts, blacks supported and whites opposed more spending on welfare, on income redistribution, and on improving conditions in cities.

Crime and drug abuse do disproportionately affect disadvantaged minority communities. Amelioration of their effects should be a paramount policy priority. So much is clear. Racially sensitive policies would, however, take account of foreseeable racially disparate impacts as well as the policies' likely instrumental effects.

All that is left is politics. The War on Drugs and the set of harsh crime control policies in which it was enmeshed were undertaken to achieve political, not policy, objectives. It is the adoption for political purposes of policies with foreseeable disparate impacts, the use of disadvantaged black Americans as means to achieving politicians' electoral ends, that must in the end be justified. It cannot.

Doing Less Harm

Basic changes in the social and economic conditions that shape the lives of disadvantaged black Americans and cause their disproportionate involvement in crime are beyond the power of the criminal justice system. However, although we do not know much about using the criminal justice system to do good, we do know how to change its policies so that they do less harm. Such a harm-reduction strategy would have six elements.

First, be honest. Admit that no war against crime will ever be won, that criminal sanctions have at most a modest influence on short-term crime rates, and that locking up many more people is not likely to produce a demonstrably safer America. Crime is part of all human societies and is shaped by the ways in which societies organize themselves. If crime rates in America are to decline in the

long term, the causes will lie in major changes in social policies toward job creation, income maintenance, medical care, housing, education, drugs, and firearms.

If the insight that crime rates are the product of fundamental social and economic forces were to be ignored, it would be easy to blame the Reagan and Bush administrations for increasing crime rates. Here is how the argument would go. Both administrations openly and successfully fought to reduce federal funding for social, educational, and housing programs and for aid to cities. Authorized federal spending on low-income housing programs, for example, fell by 75 percent between 1981 and 1989. Presidents Reagan and Bush promoted a strategy of federal disinvestment in the inner cities, which accelerated their deterioration and diminished the scope and quality of urban public services. The Reagan and Bush administrations thereby increased criminogenic pressures in the cities.

The only reason that this Republican crime-causing process is not widely recognized is that Republican crime control strategies simultaneously raised the number of people in jail or prison from under 500,000 in 1980 to nearly 1.5 million in 1994. Crime rates in 1993 were at about the same level as in 1980. There are two plausible explanations for the contrast between stable crime rates and soaring incarceration rates. The first is a proposition that Reagan and Bush administration spokesmen would reject, that increased incarceration has had little effect on crime rates. Second, crime rates would have risen to unprecedented levels between 1980 and 1993, but increased incarceration prevented this, in effect soaking it up. But why would crime rates have climbed to unprecedented levels? Something must have happened during the 1980s that would have caused more crimes to take place. Disinvestment in the cities and in social services for poor people are the most probable answers. Increased violence surrounding drug trafficking, a result of the punitive policies of the War on Drugs, no doubt would be part of the explanation, as would the refusal, for political reasons, to adopt serious gun control measures. Thus, if the second explanation is the right one, increased incarceration has prevented the rise in crime that the social and drug policies of the Reagan and Bush administrations would otherwise have caused.

There is probably some truth to this Reagan-and-Bush-policies-

cause-crime argument. Crime rates are highest in the most disadvantaged neighborhoods and policies that create more disadvantaged neighborhoods and make the existing ones worse are likely to be criminogenic. The problems of poverty, social disadvantage, and the black underclass existed, however, when Ronald Reagan took office, and they would exist had he never taken office. There are no quick or easy solutions to crime, and we debate policy discussions when we pretend there are.

As long as politicians continue to make cynical and disingenuous appeals to the deepest fears and basest instincts of the American people, and to make crime-preventive promises that police, courts, and prisons cannot keep, the prospects of reducing racial disparities in the criminal justice system will remain small. There is considerable evidence in this country and others that most people are deeply ambivalent about crime, fearful and wanting wrongdoers to be punished and yet sympathetic and wanting wrongdoers to be rehabilitated. Appeals to only one side of that ambivalence with allusions to Willie Horton and similarly visceral and powerful stereotypes make honest policymaking impossible.

Second, think about the foreseeable effects of crime control policies on members of minority groups. When policies are likely to burden members of minority groups disproportionately and, through them, their families and communities, reconsider the policies. One extreme example is the 100-to-1 distinction made between crack and powder cocaine in federal law and the federal sentencing guidelines. Presumptive sentences vary directly with the amount of illicit substance involved, and the guidelines direct judges to multiply quantities of crack by 100 in order to determine the amount on which the sentence will be based. The problem is that crack, though it is pharmacologically indistinguishable from powder, tends to be used and distributed by blacks, and powder by whites. One federal court of appeals reported that 95 percent of federal crack defendants are black and 40 percent of powder defendants are white. As could have been expected, blacks convicted of crack offenses receive much harsher sentences in federal courts than do whites convicted of powder offenses.

Another extreme example is the War on Drugs. All sources of relevant knowledge, ranging from experienced police narcotics squad members to ethnographers studying inner-city street life,

supported predictions that the enemy troops would consist mostly of young minority males. Any experienced police official could have predicted that policies of wholesale arrests of dealers would sweep up mostly young minority user-dealers in the cities. This is not necessarily because more members of minorities use or sell drugs, but because arrests are easier to make in disorganized inner-city areas where many minority dealers operate than they are in middle- and working-class neighborhoods where white dealers operate. As could have been expected, the number of blacks in prison for drug crimes has risen sharply. In 1986, among white non-Hispanic state prisoners, 8 percent had been convicted of drug crimes, compared with 7 percent of black non-Hispanic prisoners. By 1991, the white percentage had increased by half to 12 percent, and the black percentage had increased by three and one-half times to 25 percent.

The examples of policies with foreseeable racially disparate effects could go on and on and include the effects of refusing to make drug abuse treatment available on demand, underinvestment in other treatment programs, greater use of capital punishment, and sharp increases in penalties for crimes for which blacks are disproportionately likely to be arrested. Asking whether contemplated policies will adversely affect blacks and other members of minority groups will seldom provide easy answers, because the problems that crime poses are difficult. Much serious crime, for example, is intraracial, and the interests of black victims, especially of violent crimes, need to be considered. Nonetheless, routinely asking the race-effects question should provide some easy answers: The 100-to-1 crack/powder cocaine punishment differential is hard to defend once challenged. So is the death penalty: Death rows are nearly as disproportionately black as are prisons generally. At least in Georgia, research whose validity even the death penalty-promoting U.S. Supreme Court in *McCleskey v. Georgia*, 107 S. Ct. 1756 (1987) accepts, shows that blacks who killed whites were, in that state, twenty-two times more likely to be sentenced to death than were blacks who killed blacks.

Third, establish sentencing guidelines with strong presumptive upper limits on punishment severity. Experience with guidelines in the United States has been mixed. Some guidelines are broad and flexible and place few constraints on judges' discretion. Others are

narrow and rigid and greatly constrain judges' options. Most have reduced sentencing disparities and racial differences in sentencing. Some are followed most of the time; others are often ignored. In every system on which data are available, we know that judges much more often impose sentences less severe than the guidelines direct than more severe, and that sentences more severe than the guidelines direct are everywhere uncommon.

The worst injuries that biased sentencing can produce are cases in which racial bias or judicial idiosyncrasy results in the imposition of aberrantly severe penalties. In American systems of indeterminate sentencing that existed in every state before 1976, maximum lawful penalties were often extremely long. Twenty-year, thirty-year, and life maximums were not uncommon. The rationale was that the maximum had to cover the worst imaginable instance of any crime and had to allow for sentence reductions for good behavior (often one-third to one-half the maximum) and for release on parole (eligibility often ripened after serving one-third the sentence). Thus a thirty-year sentence meant ten to twenty years served, and sometimes less if good-behavior time reduced both maximum and minimum terms. In many modern determinate sentencing systems, good-behavior time has been reduced and parole release eliminated. In the federal system, for example, a nominal twenty-year sentence means at least seventeen years in prison. In both indeterminate and determinate sentencing systems, a willfully biased judge can easily impose an exceedingly harsh sentence, but the risk is greater under determinate sentencing.

There are two solutions. First, cut the statutory maximums. The difficulty is that a move to cut a twenty-five year maximum for burglary to a more realistic five years will open legislators to accusations of reducing sentences and being soft on crime. The second solution is to establish sentencing guidelines that, if past experience is repeated, will reduce sentencing disparities in general to some degree and will greatly lower the risk of aberrantly long, racially motivated sentences. Even if the guidelines are exceptionally harsh, like the current federal guidelines, they will lessen the risks of even longer extraordinary sentences.

Fourth, abolish all mandatory penalties. The evidence is overwhelming that mandatory penalties for serious crimes have few if any deterrent effects (which, if they exist, soon waste away), are

frequently circumvented by judges and lawyers, and sometimes result in imposition of penalties that everyone involved believes are too severe. Moreover, they are often applied to drug and other crimes with which blacks are disproportionately likely to be charged and accordingly have a disproportionate impact on blacks.

Mandatory penalties are an especially pernicious part of contemporary punishment policies. Their principal purposes are political and short term—to allow officials at a time of heightened concern about crime to show that they are “tough on crime.” Such laws, however, once passed, are seldom repealed and continue to affect the lives of offenders long after the concern that produced them has dissipated. For at least two centuries, the failures of mandatory penalties to achieve their ostensible purposes have been well documented and well known. There are no bases other than cynical politics to justify their retention.

Fifth, empower and encourage judges to mitigate sentences to take account of individual circumstances. Minority offenders would especially benefit from broadened judicial discretion. The movement in the last twenty years toward systems of rigid sentencing standards based solely on offenders’ crimes and criminal records, and premised on just-deserts theories, was a mistake. Ethnically and humanly relevant differences among offenders extend well beyond their crimes, and most judges and many prosecutors want to take account of some of these differences. Examples include distinctions between user and nonuser drug dealers, between offenders from distressed and privileged backgrounds, between offenders with and without dependent spouses and children, between offenders motivated by want and motivated by greed, and between stranger and nonstranger assailants.

Part of the rationale in many jurisdictions for limiting judges’ powers to mitigate sentences was the just-deserts argument that crimes, not criminals, should be punished and that basing punishments only on crimes and criminal histories will ensure equality in sentencing, that “like cases are treated alike.” The second half of the equality maxim, “and treat different cases differently,” highlights the problem. Criteria must be prescribed by which cases are deemed alike and unlike, and crimes and criminal histories offer only an impoverished set of criteria. As Nigel Walker, the English criminologist, pointed out, a system of punishment truly premised

on notions of moral culpability and morally deserved punishments would take account of all the particulars of an offender’s life, just as the Recording Angel would for purposes of grander judgments.

A second rationale for limiting judges’ powers to mitigate punishments was that the resulting discretion would be exercised for the benefit of middle-class defendants. This is why many sentencing guidelines systems expressly forbid judges to take into account employment prospects, education, and family status as mitigating considerations. The problems are that there are very few “middle-class” defendants in most felony courts and that the offenders who might benefit from mitigating consideration of personal circumstances are mostly disadvantaged people who to some degree have overcome the odds against their establishing a conventional pattern of life. Thus the people most likely to benefit from increased powers of mitigation are mostly disadvantaged, and many are from minority backgrounds.

Sixth, greatly limit the use of imprisonment, and use part of the money saved to support enhanced community corrections and treatment programs. The rest can be applied to putting state and federal budgets back in balance. If the combined prison and jail population was lowered to 1980 levels, adjusted for population increase and a bit more, \$10 billion to \$20 billion a year could be saved on institutional corrections budgets, and additional billions could be saved (or reallocated) on police, prosecutorial, and court operations. Crime rates in 1993 were about the same as in 1980 when the prison and jail population was under 500,000, which makes 600,000 a reasonable target to set for 1999. Between 1980 and 1993, the resident population of the United States rose by less than 12 percent. Thus 600,000 inmates would allow for population growth and still permit some increase over 1980 levels. It would also generate a national incarceration rate of 225 per 100,000 population, which is somewhat higher than the 1980 rate and would still be two to five times higher than that of any other country with which the United States ordinarily wants to be compared. Many would still find these levels unacceptably high in light of recent evidence that American crime rates, except for gun crimes, are about the same as those of most Western nations.

Several questions arise. How could inmate populations be cut so sharply? If my first two proposals, be honest and worry about race

effects, were taken seriously by policymakers, the answers would be easy. Stop imprisoning most user-dealers and most property offenders. Revise sentencing standards and guidelines to prescribe prison sentences for violent offenses at 1980 levels. Rescind all mandatory penalty laws retroactively. Create special parole boards with the power to consider the release of every prisoner who is over age fifty and has served at least five years and every prisoner who has served ten years or more. The only valid general criterion for denying release would be that, on actuarial grounds, the offender presents an unacceptable risk of future violent criminality. Denying release might also be justified for especially notorious offenders like political assassins and serial murderers.

How much money would be saved? At a modest estimate of \$25,000 in annual operating costs per inmate, the gross savings from 900,000 fewer inmates would be \$22.5 billion. The net would be less; experience with deinstitutionalization of mental health programs demonstrates that governments have difficulty terminating employees and closing facilities that are no longer needed. However, many new jobs would open up in community corrections and in treatment programs for which current corrections workers would be qualified. There would also be one-time charges as out-moded facilities were closed forever, offset to some extent by gains from converting some prisons and jails to other uses. Whatever the details, in the end the annual net savings would permit a massive rise in funding for community corrections and treatment programs and still lower government spending by many billions.

What would be done with the diverted offenders? For some, nothing. Most former prisoners over age thirty-five present little threat of violence or other serious offending. The best thing to do is to let many of those released early get on with their lives. For current offenders, depending on the gravity of their crimes, confinement or community penalties are the answer. Those confined should receive sentences scaled down at least by half from current levels of time served to 1980 levels and never more than is commensurate with the relative severity of their offenses. Most, however—again depending on the gravity of their crimes—should be sentenced to community penalties like intensive supervision probation, community service, house arrest, daytime or nighttime confinement, and financial penalties coupled when appropriate with

compulsory participation in treatment programs. When it is feasible, restitution or community service should routinely be ordered. Conditions of community penalties should be vigorously enforced, with prompt but graduated consequences attaching to violations.

From a public safety perspective, a combination of community penalties and greatly expanded treatment programs for offenders is more effective than the current program of excessive incarceration and insufficiently supported community punishments and treatment programs. Community penalties do no worse than prisons in regard to recidivism, and sometimes better. Well-managed drug treatment programs have repeatedly been shown to be capable of reducing both drug use and offending by drug-dependent offenders. Sex offender programs likewise have been shown to lessen later offending when the programs are well run and appropriately targeted. A number of types of programs for young offenders have been shown to lower reoffending. Educational and vocational training programs must enhance peoples' employment prospects, or millions of people would not pay to participate in them. Even public-sector programs like manpower training and the Jobs Corps, although often badly managed and insufficiently funded, have modest positive effects.

My first two proposals, be honest and think about the foreseeable race effects of policy decisions, are odd in a way, because they should go without saying. If they were widely accepted, the rest of my proposals would be uncontroversial. There are no sound, knowledge-based justifications for current crime control policies, and they create disastrous racial disparities, with all the accompanying negative consequences. Only the proposal to roll back prison and jail populations to slightly above 1980 levels is likely to be startling, but that need not even be a separate goal. It would happen as the other proposals were implemented.

So there are things that could be done to make current criminal justice policies less destructive of the lives and life chances of disadvantaged black Americans and their children. Of course, disadvantaged Americans of all races would benefit, but that is a happy product of nondiscriminatory public policies. All Americans would benefit from saving the tens of billions of unnecessary dollars now spent on crime control policies that are cruel and destructive and that do not make America a safer place. All Americans would also benefit from living in a kinder, gentler country.