

## Our Crisis of Justice

Criminal justice systems in the United States are in crisis. Currently over 7.3 million adults in the United States are under some form of supervision, including probation, jail, prison, and parole, by state, local, or federal criminal justice systems.<sup>1</sup> At midyear 2009, nearly 1.6 million people were in prison, and nearly 800,000 were in jail.<sup>2</sup> These numbers represent a gross increase in the rate of incarceration in the United States over the last several decades. In 1972, the rate of incarceration in prisons was ninety-three people per hundred thousand U.S. residents. Over nearly forty years, this rate has increased by almost 540 percent; it was 502 people per hundred thousand U.S. residents in 2009 (these rates do not include jail inmates, who bring the overall rate of incarceration up to 762 people per hundred thousand).<sup>3</sup> Although the United States has less than 5 percent of the world's population, it holds nearly 25 percent of the world's incarcerated people.<sup>4</sup> The United States incarcerates its residents at higher rates than any other nation, and we incarcerate more people than any other nation (China, with an overall population more than four times as large as the U.S.

1. Heather C. West, "Prison Inmates at Midyear 2009—Statistical Tables," Bureau of Justice Statistics, U.S. Department of Justice, accessed July 21, 2010, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. In what follows, I draw on statistics that highlight the plight of prison and jail inmates. However, a larger proportion of the population of the United States experiences criminal justice systems through probation or parole. When we see statistics about incarceration rates, we really see only the proverbial tip of the iceberg of criminal justice systems.

2. *Ibid.* Jails differ from prisons in that the former typically confine only people prior to trial or sentencing and those who have been convicted of a misdemeanor, usually resulting in a sentence of less than one year. That is, jails are used for holding and restraining people temporarily while prisons generally have more permanent populations.

3. *Ibid.* "Key Facts at a Glance: Correctional Populations," Bureau of Justice Statistics, U.S. Department of Justice, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>. See also Kathleen Maguire, ed., *Sourcebook of Criminal Justice Statistics* (table 6.28.2009), <http://www.albany.edu/sourcebook/pdf/t6282009.pdf>.

4. Adam Liptak, "U.S. Prison Population Dwarfs That of Other Nations," *New York Times*, April 23, 2008.

population, incarcerates the second-highest number of people at 1.6 million inmates, more than 700,000 fewer people than the United States).<sup>5</sup> In short, we have more people locked up in the United States and at higher rates than at any other time in our history and any other nation.

While these numbers are troubling enough to raise serious questions about our criminal justice systems, discrepancies related to race and ethnicity among prison and jail populations add greater urgency. Racial and ethnic minority populations are incarcerated at astounding rates in comparison with whites. At midyear 2009, the incarceration rate of black non-Hispanic men was six times that of the incarceration rate of white non-Hispanic men and nearly three times that of Hispanic men.<sup>6</sup> Although about 93 percent of people in state and federal prisons in 2009 were men, in recent years the incarceration rate of women has increased twice as quickly as that of men. While women are incarcerated at about a tenth of the rate of men, the population of incarcerated women reflects similar racial and ethnic disparities as the male inmate population.<sup>7</sup> Black non-Hispanic women are incarcerated at nearly four times the rate of white non-Hispanic women and over twice that of Hispanic women.<sup>8</sup> Increasing incarceration hits racial and ethnic minority populations in the United States especially hard.

In addition to racial and ethnic disparities, criminal justice systems in the United States are also marred by disparities related to socioeconomic status. Measures of the socioeconomic status of people in jail or prison are difficult to find; income and wealth are not noted upon incarceration as are sex and race. However, according to Marc Mauer of The Sentencing Project, “a 1997 survey of state inmates conducted by the Justice Department found that 68 percent of prisoners had not completed high school, 53 percent earned less than \$1,000 in the month prior to their incarceration, and nearly one half were either unemployed or working only part-time prior to their arrest.”<sup>9</sup> Another measure of socioeconomic status of inmates is whether they need publicly financed counsel.<sup>10</sup> In 1998, about two-thirds of federal felony defendants

5. Roy Walmsley, “World Prison Population List,” 8th edition, International Centre for Prison Studies, King’s College London, [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf).

6. See West, “Prison Inmates at Midyear 2009.” The incarceration rate of black non-Hispanic men at midyear 2009 was 4,749 per 100,000; for white non-Hispanic men, it was 708 per 100,000; and for Hispanic men, it was 1,822 per 100,000.

7. *Ibid.* The incarceration rate for women at midyear 2009 was 131 per 100,000, versus 1,398 per 100,000 for men.

8. *Ibid.* The incarceration rate of black non-Hispanic women at midyear 2009 was 333 per 100,000; for white non-Hispanic women, it was 91 per 100,000; and for Hispanic women, it was 142 per 100,000.

9. Marc Mauer, *Race to Incarcerate*, 2nd ed. (New York: New Press, 2006), 178.

required public defense. In 1996, more than four-fifths of felony defendants in the seventy-five most populous counties in the United States required public defense. While conviction rates did not vary according to whether defendants had privately or publicly financed counsel, defendants with public defense were sentenced to prison or jail at higher rates and for longer sentences than those with private defense. In other words, persons with private defense are just as likely as those with public defense of being convicted. However, persons with private defense are less likely to be sentenced to jail or prison, instead given sentences that involve fines or probation, but no time behind bars. Criminal justice systems not only disproportionately incarcerate racial and ethnic minorities; they also tend to hold higher numbers of poor people behind bars.

These trends within adult criminal justice systems in the United States are also apparent within juvenile justice systems, which in many ways feed our prisons and jails through what the Children's Defense Fund calls the "cradle-to-prison pipeline."<sup>11</sup> On February 22, 2006, the last date of a census by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), over 92,000 juvenile offenders were in "residential placement facilities."<sup>12</sup> According to the OJJDP, this number represents roughly how many juveniles occupy these facilities on "any given day." So, we could then expect about 15 percent of children in these facilities to be girls, and about 767 per hundred thousand black non-Hispanic children living in our country to be in a residential placement facility. The rate for Hispanic children was 326, and the rate for white non-Hispanic children was 170. Thus, the rate at which black children are placed in these facilities is about four-and-a-half times that of whites; the rate for Hispanics is about twice that of whites—statistics that echo patterns among adults.

More sixteen-year-olds than any other age group occupied residential placement facilities—about 25,000.<sup>13</sup> Sixteen-year-olds edged out seventeen-year-olds because thirteen states send seventeen-year-olds directly to adult criminal courts, and many other states allow for seventeen-year-olds to be sent to adult criminal courts via statutory exclusion or concurrent jurisdiction provisions. As a result, every year, over 200,000 youth under age eighteen are tried as adults.<sup>14</sup> During the 1990s, every state except Nebraska expanded

10. "Defense Counsel in Criminal Cases," Bureau of Justice Statistics, U.S. Department of Justice, [bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf).

11. "America's Cradle to Prison Pipeline," Children's Defense Fund, <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html>.

12. For comprehensive statistics on juvenile justice in the United States, see "Statistical Briefing Book," Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Office of Justice Programs, <http://ojjdp.ncjrs.gov/ojstatbb/>.

13. *Ibid.*

the number of children it sends through adult criminal justice systems rather than treat as juveniles. Thus, not only do our criminal justice systems disproportionately affect minority and impoverished individuals and communities; they also increasingly affect young people within these communities, blurring once well-established lines between youth and adults.

Together, these data suggest that as the reach of criminal and juvenile justice systems in the United States continues to expand, these systems grip certain groups of people in our society—especially racial and ethnic minorities and socioeconomically disadvantaged people, and increasingly, women and young people—more tightly than others. Being young, poor, black, and male greatly increases the likelihood that a person will be incarcerated. Sociologist Bruce Western found that twenty in one hundred black men born between 1965 and 1969 (men who were born at the dawn of the growth of our criminal justice systems) were imprisoned by their early thirties, in contrast with only about three in one hundred white men born in the same time period.<sup>15</sup> Class distinctions exacerbated the likelihood that young black men would be imprisoned. Nearly 60 percent of black men in this age group who dropped out of high school were imprisoned by their early thirties; only about 11 percent of white men who dropped out of high school were imprisoned by the same age. These numbers also represent a drastic change from previous generations. For white men born between 1945 and 1949, only 1.5 in one hundred were imprisoned by their early thirties. For black men in the same generation, only about eleven in one hundred experienced the same fate—still a significant racial disparity, but the disparity has grown over the last four decades despite other advances in civil rights for African Americans. This disparity continues to affect young black men in the United States. Western writes, “The stratification of incarceration by race and education produced extraordinary incarceration rates for young [age twenty to forty] black male [high school] dropouts by the end of the 1990s. Nearly a third were in prison or jail on a typical day in 2000, three times their incarceration rates just thirty years earlier.”<sup>16</sup>

The current state of our criminal justice systems constitutes what social theorist David Garland calls “mass imprisonment,” to distinguish incarceration

14. “2008 KIDS COUNT Message FACT SHEET: A Road Map for Juvenile Justice,” The Annie E. Casey Foundation, <http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={29CFCA70-348B-416B-8546-63C297710C5D}>.

15. Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006), 24–28. These numbers actually *underestimate* the reach of our criminal justice systems for these men, as they do not include the risk of being jailed or otherwise placed under supervision.

16. *Ibid.*, 17.

in the United States currently from incarceration in similar nations.<sup>17</sup> He describes two defining features of mass imprisonment. The United States clearly meets the first criterion: “a rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type.”<sup>18</sup> Data about the concentration of incarceration on young black men from socioeconomically disadvantaged backgrounds reveal that our society also fulfills the second feature: “Imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.”<sup>19</sup> Because many, if not most, members of our society have never been to prison and may not know (or think they know) someone who has, the claim that imprisonment has become so common in the United States as to be a major part of the lives of many of our neighbors, to be systematically affecting whole groups of the population, may seem untenable. However, for young black men in large, impoverished urban centers and their families and friends,

[i]mprisonment has become normalized. It has come to be a regular, predictable part of experience, rather than a rare and infrequent event. . . . It becomes part of the socialization process. Every family, every household, every individual in these neighbourhoods has direct personal knowledge of the prison—through a spouse, a child, a parent, a neighbour, a friend. Imprisonment ceases to be the fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population.<sup>20</sup>

For these men, the typical life events of the young—education, military service, employment, marriage—have been circumscribed by the prison.

The problem of mass incarceration is not the problem alone of those sectors of the population most directly affected by our criminal justice systems. The crisis of these systems both *reflects* and *helps sustain* a broader crisis of social justice in the United States that marginalizes, disempowers, and endangers our neighbors. Catholic social teaching holds that social justice concerns the cultural, social, political, and economic requirements for treating all members of society as fully human persons and ensuring that each person has the resources

17. David Garland, “Introduction: The Meaning of Mass Imprisonment,” in *Mass Imprisonment: Social Causes and Consequences*, ed. David Garland (Thousand Oaks, CA: Sage, 2001), 1–3.

18. *Ibid.*, 1.

19. *Ibid.*, 1–2.

20. *Ibid.*, 2.

necessary to participate in the dignity, unity, and equality of all people. In the United States, racial, ethnic, and class inequality undermine social justice and fuel the crisis of our criminal justice systems. At the same time, our criminal justice systems contribute to the ongoing effects of these disparities in our society, exacerbating our failures to achieve social justice. Criminal and social justice are fundamentally intertwined. Addressing failures of criminal justice requires addressing failures of social justice, and vice versa. Social theorist Loïc Wacquant has argued that the state of mass incarceration in the United States has led to the creation of “*the first genuine prison society of history*,”<sup>21</sup> in contrast with merely a society with prisoners. If we wish for our society to no longer be distinguished by the practice of imprisonment, then we must rethink both what kind of society we would like to be and how we use prisons to maintain the inequalities within our society now. We must address our crises of criminal and social justice.

### BECOMING THE FIRST GENUINE PRISON SOCIETY

Demonstrating the link between social and criminal justice depends, in part, on understanding how the United States came to have the largest prison population and highest incarceration rate in our history and in the world. A naïve assessment of the reasons behind this shift might assume that we incarcerate more people because more people are committing crime in our society. If this were the case, then the argument that the crisis of our criminal justice systems reflects a crisis of social justice in the United States could not be supported. Rather our large prison populations would simply reflect a reality of criminality plaguing our society.

At least two bodies of evidence, however, show the faults of this assumption. First, while U.S. rates of incarceration are much higher than all other nations, our rates of crime do not differ significantly from other similar countries. While the United States is exceptional in its levels of lethal violence, perhaps due to relatively lax gun control laws, rates of nonlethal violence, property crime, and drug offending in the United States are comparable to rates in other Western industrialized democracies.<sup>22</sup> Some of these nations, such

21. Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,” in *Mass Imprisonment*, ed. Garland, 82–120. Emphasis in original.

22. The key here is *lethal* violence. Other countries have similar rates of violence, but because of the accessibility of fire arms, violence in the United States is much more likely to result in death. For a thorough discussion of international comparisons of crime and incarceration rates, see James P. Lynch and William Alex Pridemore, “Crime in International Perspective,” in *Crime and Public Policy*, ed. James

as England and Wales, the Netherlands, and Switzerland, have higher rates of crime overall, while nations such as Australia, Canada, and Sweden have roughly equivalent crime rates to those of the United States. Despite these similarities in crime rates, incarceration rates in the United States exceed those of all of these nations to a staggering degree. After the United States, the second-highest rate of incarceration among these nations is that of England and Wales with 152 people in prison per hundred thousand residents, leaving us with a rate at least 4.5 times that of similar nations with comparable crime rates.<sup>23</sup> This difference can be explained in part by higher rates of serious violent crimes in the United States, which virtually every nation punishes with longer prison terms; the argument would suggest that the higher rate of serious violent offenses in the United States contributes to our higher incarceration rates because we experience more crimes that call for longer punishments. However, the likelihood of being arrested for a drug, property, or nonlethal violent offense and sentenced to a long prison term in the United States, despite similar offending rates, contributes more significantly to higher rates of incarceration in our society. Because other nations find other means for responding to these offenses, their incarceration rates are not impacted by drug, property, or nonlethal violent offending as much as incarceration rates in the United States are. The punitiveness of our responses to crime—not exceptional crime rates in the United States—accounts largely for our exceptional incarceration rates.

A second body of evidence also shows that crime rates cannot explain incarceration rates in the United States. This evidence arises from the observation that the growth of incarceration rates over the last forty years has not coincided with increasing crime rates. While the beginning of our increased use of prisons may have reflected higher crime rates (or at least the *perception* of growing crime rates) in the late 1960s and early 1970s, Mauer notes, “A steadily increasing prison population has twice coincided with periods of increase in crime and twice with declines in crime.”<sup>24</sup> The most dramatic

Q. Wilson and Joan Petersilia (New York: Oxford University Press, 2011), 5–52. For other discussions, see Alfred Blumstein, Michael Tonry, and Ashley Van Ness, “Cross-National Measures of Punitiveness,” in *Crime and Punishment in Western Countries, 1980–1999*, ed. Michael Tonry and David P. Farrington (Chicago: University of Chicago Press, 2005), 347–76; and David P. Farrington, Patrick Langan, and Michael Tonry, eds., *Cross-National Studies in Crime and Justice* (Washington, DC: Bureau of Justice Statistics, 2004).

23. Walmsley, “World Prison Population List.”

24. Mauer, *Race to Incarcerate*, 94. For a thorough, yet brief, discussion of the relationship between crime and incarceration rates—and why throwing more people in jails and prisons will not necessarily result in less crime—see Ryan S. King, Marc Mauer, and Malcolm C. Young, “Incarceration and Crime: A Complex Relationship,” The Sentencing Project, <http://www.sentencingproject.org/doc/publications/>

decline began in the early 1990s and has persisted for the last twenty years. Crime rates therefore can explain only a small proportion of the growth in incarceration rates over the last four decades. Criminologists Alfred Blumstein and Allen Beck found that only 12 percent of the tripling of the national prison population between 1980 and 1996 can be explained by changes in crime rates; a greater likelihood of incarceration upon conviction and longer prison terms explain the remaining 88 percent of growth.<sup>25</sup> That is, we have more people in prison not primarily because of increased crime rates, but because we have a greater willingness than we used to as a society to imprison more people for longer periods of time.

A protest remains against this second body of evidence and its ability to disprove the notion that we incarcerate more people because more people are committing crime. Rather than examining crime data of the U.S. population in aggregate, this protest avers that since our criminal justice systems disproportionately affect young black men from disadvantaged socioeconomic backgrounds, the growth in incarceration rates could be explained if this sector of the population alone engaged in more crime than they used to do. It could be that the racial, ethnic, and class disparities in our criminal justice systems are legitimate because they reflect differences in criminal offending, not failures of social justice.

For this protest to have merit, young black men today must commit more crime than previous generations. Data from the National Longitudinal Surveys of Youth, however, show that this is not true.<sup>26</sup> Between 1980 and 2000, violent crime among poor black male youth, age fifteen to eighteen, dropped 21 percent; property crime dropped 68 percent; and drug dealing dropped 69 percent. While African-American men commit violent crimes at slightly higher rates than white men, the differences are not large enough to explain differences in incarceration rates.<sup>27</sup> Furthermore, most of the growth

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25. Alfred Blumstein and Allen J. Beck, “Population Growth in U.S. Prisons, 1980–1996,” in *Prisons*, ed. Michael Tonry and Joan Petersilia (Chicago: University of Chicago Press, 1999), 17–62.

26. Cited in Western, *Punishment and Inequality*, 41.

27. Differences in violent offending between blacks and whites may be better explained by class than by race. Among young men who have steady employment or who live in a steady relationship, violent offending rates do not vary by race. Because of links between poverty and race, however, young black men are less likely to have the stabilizing forces of steady employment and relationships in their lives, and

in incarceration rates since the 1970s is due to the greater likelihood, first, that someone would receive a prison sentence for a drug crime and, second, that his prison sentence would be longer than it would have been in the past. The African-American proportion of arrests for drug crimes has increased, especially among juveniles, as low-income minority communities in inner cities are targeted for the enforcement of drug laws. As a result, in 2000, African Americans comprised 32 percent of total arrests (adult and juvenile) for drug possession and 47 percent of total arrests for drug selling. However, African Americans use and sell drugs at rates approximately proportionate to their representation in the general population. About 12 percent of drug users in 2000 were African American, and the vast majority of drug users buy from sellers of the same racial and ethnic background as themselves.<sup>28</sup> Rates of arrest of young black men for drug crimes far exceed their actual involvement in them. This disparity, along with more punitive sentencing, explains a significant proportion of the growing racial disparities in our incarceration rates over the last forty years. Against the protest that we have more young black men in prison because they are committing more crimes, these data instead indicate that we have more young black men in prison because we have become more willing to throw more of them in prison for longer periods of time than we, as a society, used to be.<sup>29</sup>

If crime rates in the United States, either of the aggregate population or of young black men in particular, cannot explain the current crisis of our criminal

any young man in such circumstances is more prone to violent offending. Thus, young black men are more likely to engage in violent offending because they are more likely to experience poverty than young white men. See Mauer, *Race to Incarcerate*, 176–86. See also Delbert S. Elliott, “Serious Violent Offenders: Onset, Development Course, and Termination—the American Society of Criminology 1993 Presidential Address,” *Criminology* 32, no. 1 (1994): 1–21.

28. See Mauer, *Race to Incarcerate*, 157–76, for fuller discussion of the relationship between race and disparities in incarceration and crime rates. Also, Michael Tonry, *Punishing Race: A Continuing American Dilemma* (New York: Oxford University Press, 2011), 26–47, 59–76; and Western, *Punishment and Inequality*, 35–51.

29. Of course, we have been willing to exert other forms of social control on young black men in our history, beginning with slavery and moving to Jim Crow and segregation laws. Michelle Alexander ties the increased use of incarceration of African Americans to an effort to “ensure the subordinate status of a group defined largely by race.” See *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2012), 13. To say that we have become more willing to throw more young black men in prison for longer periods of time is not to say that we are now oppressing young black men in ways worse than we did in the past. It is to say that we are repeating patterns of social control, subordination, and oppression in *different* ways than we did in the past. What is new in our circumstances is our dependence on the prison as the primary means of social control.

justice systems, then we must look elsewhere for the cause of the creation of the first genuine prison society. Garland describes the difficulty of this task:

Mass imprisonment was not a policy that was proposed, researched, costed, debated, and democratically agreed. America did not collectively decide to get into the business of mass imprisonment in the way that it decided to build the institutions of the New Deal, or the Great Society, or even the low-tax, low-spending, free-market institutions of Reaganomics. Instead, mass imprisonment emerged as the overdetermined outcome of a converging series of policies and decisions. . . . America has drifted into this situation, with voters and politicians, and judges and corporations willing the specific means without anyone pausing to assess the overall outcome.<sup>30</sup>

Understanding our drift into the crisis of our criminal justice systems requires consideration of the mixed and complicated history from which it arose.

#### *SOCIAL AND CULTURAL FACTORS*

Prior to the 1970s, the rate of incarceration in the United States hovered for decades around one hundred people per hundred thousand, with a high of 137 per hundred thousand in 1939.<sup>31</sup> Few Americans were concerned with crime as a major issue. Beginning in 1973, the incarceration rate started climbing. The initial growth of prison and jail populations at this time was probably due to climbing crime rates linked to the large number of adolescent and young adult baby boomers, although the extent of the crime boom of the late 1960s and early 1970s cannot be fully known because of limitations in the collection of crime statistics nationwide prior to the formation of the Law Enforcement Assistance Administration in 1968. Growing crime rates (or at least the *perception* of growing crime rates), alongside several other factors, contributed to greater anxiety about crime in the U.S. population during this period. Other factors include a heroin epidemic in many cities, sparked by Vietnam veterans returning from the war as addicts; numerous riots across the United States, especially with the stifling of many of the objectives of the civil rights movement; cases of police brutality that often accompanied these riots; rapid urbanization, particularly with many rural southern African Americans migrating to northern cities; and high-profile assassinations, notably

30. Garland, ed., *Mass Imprisonment*, 2.

31. Kathleen Maguire, ed., *Sourcebook of Criminal Justice Statistics* (table 6.28.2009), <http://www.albany.edu/sourcebook/pdf/t6282009.pdf>.

those of Martin Luther King Jr. and Robert Kennedy. In addition to these factors, the challenges brought by the civil rights movement and by the antiwar movement exacerbated an overall sense of social disorder, especially among white Americans. By the end of the 1960s, polls showed that 81 percent of the public believed that law and order in the United States had broken down and that the majority traced the roots of this failure to “Negroes who start riots” and “communists.”<sup>32</sup>

Greater fear about crime and lawlessness coincided with an unprecedented shift among criminologists and criminal justice professionals concerning the purpose and effectiveness of criminal justice systems in responding to crime. Since the advent of the prison in the United States in the early nineteenth century, our criminal justice systems worked toward the goal of rehabilitation of criminal offenders. Beginning in the 1970s, the majority of criminologists and criminal justice professionals rejected rehabilitation as unattainable and began to emphasize deterrence and incapacitation—more punitive goals—as the purpose of criminal justice systems. Proponents of deterrence and incapacitation could justify their rejection of rehabilitation, in part, through appeal to a landmark 1974 study by criminologist Robert Martinson titled “What Works: Questions and Answers about Prison Reform.”<sup>33</sup> Through a meta-analysis of studies of rehabilitative programs conducted between 1945 and 1967, Martinson concluded that “nothing works” to rehabilitate criminal offenders. This thesis drew widespread public attention—Martinson was even interviewed by *People* magazine in 1976—although the original study received significant, justifiable criticism. A 1976 panel for the National Academy of Sciences reviewed the work and concluded, “When it is asserted that ‘nothing works,’ the Panel is uncertain as to just what has even been given a fair trial.”<sup>34</sup> In 1978, Martinson admitted that he had omitted pieces of research that would have shown that some rehabilitation practices are more effective than he had originally stated. Despite the weaknesses of the study, its “nothing works” thesis caught on as a sort of mantra among criminologists and criminal justice

32. Cited in Mauer, *Race to Incarcerate*, 52. For more detailed discussions of the historical factors contributing to the cultural context leading up to the growth of our criminal justice systems, see John Irwin, *The Warehouse Prison: Disposal of the New Dangerous Class* (Los Angeles: Roxbury, 2005), especially chapter 8; Mauer, *Race to Incarcerate*, 40–91; Tonry, *Punishing Race*, 77–143; Michael Tonry and Joan Petersilia, “American Prisons at the Beginning of the Twenty-First Century,” in *Prisons*, ed. Tonry and Petersilia, 1–16; and Western, *Punishment and Inequality*, 52–66.

33. Robert Martinson, “What Works: Questions and Answers about Prison Reform,” *Public Interest* 35 (1974): 22–54.

34. Quoted in Jerome G. Miller, “Is Rehabilitation a Waste of Time?,” *Washington Post*, April 23, 1989.

professionals, a mantra that spread to policymakers and the general public. In response to questions of what could be done about crime and disorder, the answer now became to use prisons more frequently for incapacitation and deterrence and to abandon rehabilitative practices.

### *ECONOMIC FACTORS*

In conjunction with the cultural and social phenomena of growing anxiety about crime, often with racial undertones, and rejection of rehabilitation, economic factors also underlie the buildup of our criminal justice systems. The deindustrialization of cities contributed to the transformation of inner cities from what sociologist William Julius Wilson calls “institutional ghettos” (borrowing from historian Allan Spear) to “jobless ghettos.”<sup>35</sup> Wacquant similarly describes this transformation as a shift from “communal ghettos” to “hyper-ghettos.”<sup>36</sup> Institutional, or communal, ghettos were based largely on the segregation of black populations in our cities. While unjustly exclusionary, these ghettos also offered a measure of protection, solidarity, and autonomy among their residents, whose socioeconomic statuses ranged widely. African American lawyers, doctors, and ministers lived alongside and offered their services to African American working-class and poor families. Low-skilled, poorer residents, especially men, could typically find work near to home with relatively good blue-collar jobs in the industrial sector. Such jobs were often unionized and came with decent pay and comparatively strong benefits packages. Industrial workers in turn supported locally owned businesses in their neighborhoods, which provided myriad goods and services to residents. These businesses, alongside clubs, religious congregations, local newspapers, and other communal organizations, offered some level of informal social control in ghettos as well as some basic opportunities and resources that made for vibrant, even if still segregated and in many ways disadvantaged, neighborhoods.

The deindustrialization of inner cities triggered the demise of institutional ghettos beginning in the 1970s, brought on by increasing globalization, shifts toward higher-skilled jobs, and the suburbanization of employment. Deindustrialization resulted in fewer jobs for low-skilled men, leading to

35. William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Alfred A. Knopf, 1997).

36. Wacquant, “Deadly Symbiosis.” For a more detailed history of economic factors linked to the creation of jobless, or hyper-, ghettos, see also Wilson, *When Work Disappears*; and Irwin, *The Warehouse Prison*, especially chapter 8.

increased bargaining power for corporations against unions. Those low-skilled men who could get jobs could expect lower wages, depleted benefits, and fewer hours. One of the most significant consequences of deindustrialization is a precipitous drop in real wages for low-skilled workers since 1970. The best employment many residents of ghettos could find was in the growing service sector, which tends to hire more women, pay them less, and offer little stability. Furthermore, most service sector jobs were located outside of cities in new suburbs. Formerly thriving businesses in ghetto neighborhoods collapsed as industrial workers were laid off and could no longer afford to patronize local groceries, barbershops, and hardware stores. Suburban service sector jobs proved difficult for ghetto residents to hold given the distances they had to travel to and from work, often using public transportation. While deindustrialization killed jobs in inner cities, many middle-class African American residents left the ghettos in the late 1960s and early 1970s, liberated to move to more affluent neighborhoods by the advances of the civil rights movement. The confluence of deindustrialization with the loss of many middle-class residents resulted in the creation of jobless ghettos, or hyper-ghettos, in which the poorest members of our society are isolated from the rest of the population, left with few economic, political, or social resources. Poverty is concentrated in inner-city neighborhoods largely populated by African Americans. Between 1970 and 1990, the number of “ghetto poverty census tracts” (those with poverty rates exceeding 40 percent) doubled. Seven out of eight of the people living in these tracts in 1990 were minority group members.<sup>37</sup>

In themselves, these changes to ghetto neighborhoods should not necessarily feed into our growing criminal justice systems. However, the transformation of inner-city neighborhoods into jobless ghettos increased their level of what sociologists call “social disorganization.” A trajectory within criminological theory rooted in the seminal work of Clifford Shaw and Henry McKay examines the relationship between social disorganization and community characteristics such as poverty, ethnic heterogeneity, and residential mobility.<sup>38</sup> Residents of neighborhoods with these characteristics tend to have little human capital, or “the personal resources that an individual brings to the social and economic marketplace,” such as education or job and social skills.<sup>39</sup> They also have sparse social networks, which provide them with little access to

37. Wilson, *When Work Disappears*, 14.

38. Clifford R. Shaw and Henry D. McKay, *Juvenile Delinquency and Urban Areas* (Chicago: University of Chicago Press, 1942).

39. Todd R. Clear, *Imprisoning Communities*, 76.

new resources. As a consequence, their communities as a whole have little social capital, or a limited “capacity of [their] networks to provide goods for people within these networks.”<sup>40</sup>

With weakened human and social capital along with sparse social networks, members of these communities may also experience lessened “collective efficacy.”<sup>41</sup> On one hand, they have less ability to work together to address problems faced by the community as a whole, particularly as community members may not agree on what the problems are or how to fix them. On the other hand, institutions outside of the formal social control of the state, such as families, voluntary social groups, businesses, or religious organizations, may not have the wherewithal to sustain order and compliance with communal norms through informal social controls. As a consequence, the social disorganization of these communities may result in higher crime rates, especially higher rates of violence and the presence of “overt drug markets” in public spaces.<sup>42</sup>

A core community of hard-working, law-abiding residents remains in these neighborhoods, but they do not have the power to control the minority of people who are shooting guns and selling drugs on street corners to white people driving into the neighborhood from the suburbs. Criminologist and co-chair of the National Network for Safe Communities David Kennedy describes the fate of these neighborhoods in the period following the deindustrialization of inner cities:

There was nothing inevitable about the crack epidemic that took these neighborhoods down. But it was inevitable that when it hit, it would hit here hardest. It was, especially, where young men whose present and future both offered next to nothing were most likely to think that standing on a corner and selling it was a good and reasonable choice, and where the reeling community around them would be least able to keep them in check.<sup>43</sup>

40. *Ibid.*, 80.

41. “Collective efficacy” is originally the term of Robert Sampson and colleagues. See Robert J. Sampson, Stephen W. Raudenbush, and Felton Earls, “Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy,” *Science* 277 (August 1997): 918–24.

42. David Kennedy, *Don’t Shoot: One Man, A Street Fellowship, and the End of Violence in Inner-City America* (New York: Bloomsbury, 2011).

43. *Ibid.*, 142. For ethnographic descriptions of life in these neighborhoods and the tensions between the numerically predominant law-abiding residents and the relatively few residents engaged in illegal activities, see Mary Pattillo McCoy, *Black Picket Fences: Privilege and Peril among the Black Middle Class*

Although young white and black men commit crime at roughly the same rates (with the exception of serious violent offenses) the dynamics within jobless ghettos enable violent, property, and especially drug offenses to take place in the open, in abandoned buildings and dilapidated street corners. Arrests of young black men in these neighborhoods are then also much easier for police, particularly when compared with the challenges of enforcing drug laws when the suburban trade takes place behind the closed doors of ranch houses. These neighborhoods easily become seen as the core of a “crime problem” in the United States, and their images can be easily manipulated to support a “war on crime” or a “war on drugs” that demonizes their residents.

With the spread of ghettos and the increasing isolation of their residents, the perception that “bad neighborhoods” are getting worse has perhaps exacerbated the sense of anxiety about law and order in our society. Sociologist Paul Jargowsky summarizes the effects of this perception:

The geographic size of a city’s ghetto has a large effect on the perception of the magnitude of the problem associated with ghetto poverty. How big an area of the city do you consider off limits? How far out of your way will you drive not to go through a dangerous area?<sup>44</sup>

The spread of ghettos and the isolation of their residents make it easier to point to these “bad neighborhoods” as hotbeds of crime, especially when we add racial, ethnic, and class stereotypes about criminality to the mix. People living outside these neighborhoods—perhaps particularly people working in law enforcement—come to see the residents of these communities as irredeemably bad. No one can be trusted; everyone is a criminal, or at least, a potential criminal. When operating on these assumptions, the best thing to do seems to be to stop and search anyone who seems suspicious (that is, anyone who is young, black, and male) and to arrest anyone who commits even the slightest infraction. Kennedy critically summarizes the response of our criminal justice systems to residents of jobless ghettos: “all we can do is occupy them, stop everybody, arrest everybody we can . . . send all the men to prison.”<sup>45</sup>

(Chicago: University of Chicago Press, 1999) and Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (New York: Norton, 1999).

44. Quoted in Wilson, *When Work Disappears*, 14–15.

45. Kennedy, *Don’t Shoot*, 18.

*POLITICAL FACTORS*

The economic factors rooted in the deindustrialization of our inner cities have helped to feed political agents touting “tough on crime” policies since at least the early 1970s. Political efforts to combat crime were furthered also by the cultural and social phenomena of a growing sense of anxiety about crime and the rejection of rehabilitation as a viable response to crime. Cultural, social, economic, and political factors thus coalesced in the early 1970s into forces for more punitive criminal justice systems.

Prior to 1964, crime had never been a significant political issue, especially on the national stage. It had been viewed as a local problem with local solutions. Barry Goldwater introduced this issue to national politics in his 1964 presidential campaign, running ads that called for political leaders “to restore proper respect for law and order in this country.”<sup>46</sup> Despite Goldwater’s loss, Richard Nixon picked up the call to address “crime in the streets” in his 1968 run for the presidency. He replaced Lyndon Johnson’s war on poverty with new wars on crime and drugs. Other conservative Republicans followed Nixon’s lead, viewing the “tough on crime” stance with its often thinly veiled racial rhetoric as part of a winning platform for wooing disaffected southern Democrats to the party. In all levels of government, but especially in the states, Republican political leadership resulted in more punitive criminal justice systems: “There is strong evidence that imprisonment rates have grown faster under Republican governors. Accounting for state effects shows that imprisonment rates are about 14 percent higher under Republicans than under Democrats.”<sup>47</sup> Not to be outdone, Democrats joined the charge against crime and drugs, especially after the failure of Michael Dukakis’s 1988 presidential bid, which was brought down by George H. W. Bush’s infamous Willie Horton advertising campaign. Bill Clinton then declared in his own campaign, following the execution of Ricky Ray Rector in Arkansas in the weeks before for the New Hampshire primary, that he refused to be outflanked on the right by accusations of being soft on crime. At least since the early 1990s, both political parties have fully waged battles in the wars on crime and drugs in order to win votes.

Mass incarceration emerged from the convergence of these social, cultural, economic, and political factors. Several specific policies, enacted on both state and federal levels, combined to create our crisis of criminal justice. To be clear:

46. To see some of Barry Goldwater’s campaign advertising, see the archive of presidential television campaigns from Eisenhower to Obama at the Museum of the Living Image website, under the title “The Livingroom Candidate,” <http://www.livingroomcandidate.org/>.

47. Western, *Punishment and Inequality*, 71.

this crisis is the result primarily not of high crime rates, but of policy decisions to which politicians, academics, criminal justice professionals, and voters have consented. Among these policies are mandatory minimum and determinate sentences that have replaced indeterminate sentences, which provided judges and parole boards more freedom to respond to the particular circumstances of each case.<sup>48</sup> First instituted in New York with the passage of the Rockefeller Drug Laws in 1973, by the mid-1990s, thirty-five other states and the federal government had enacted mandatory minimum sentences. The demise of indeterminate sentencing also brought about the end of the parole board in many states, beginning with Maine in 1976. By 2000, thirty-three states had eliminated or abolished parole. Many states also created sentencing commissions that established sentencing guidelines based on the severity of offense and an offender's criminal history alone. These guidelines limited the power of judges to respond to mitigating circumstances for individual offenders, increasing the severity of punishment in many cases. By the early 1990s, twenty-two states and the federal government had sentencing guidelines established by such commissions (the federal guidelines were found unconstitutional by the U.S. Supreme Court in 2005). Other policies such as three-strikes and truth-in-sentencing laws followed.

Together these policies resulted in greater likelihood of being incarcerated upon conviction and of being sentenced to a longer prison term. Even though most of these policies have no explicit racial or class-based prejudices, they resulted in greater disparities in sentencing, with young, poor black men more likely to be caught up in our criminal justice systems. Most of these disparities are the result of police disproportionately arresting black people for drug crimes in comparison with whites and relative to their actual involvement in drug use and trade. Furthermore, black people arrested for drug crimes are more likely than whites to be convicted and imprisoned.<sup>49</sup> Since most of the crime policies developed over the last forty years primarily focus on creating more punitive responses to drug crimes, these policies exacerbate the problems with arrest, conviction, and sentencing, thus generating a crisis in these systems.

Beneath this crisis lies a failure to treat all members of our society as fully human persons and to ensure that each person in our society has the resources

48. Both sides of the political spectrum criticized indeterminate sentencing. On the right, indeterminate sentencing was viewed as too soft on crime. On the left, critics worried that indeterminate sentencing offered few protections against the biases of judges and parole boards. Both sides thought that determinate sentencing was preferable because it more consistently punished offenders—but the two sides worried about inconsistency in sentencing for very different reasons.

49. See Tonry, *Punishing Race*, 47–52, 67–76.

necessary to participate in the dignity, unity, and equality of all people. Racial, ethnic, and class disparities evident in these factors fuel the crisis of our criminal justice systems. That is, our criminal justice crisis reflects a crisis of social justice in our society. But further and in turn: our criminal justice crisis also helps sustain a social justice crisis that marginalizes, disempowers, and endangers our neighbors.

### EFFECTS OF CRIMINAL JUSTICE ON SOCIAL JUSTICE

Despite the problems of social justice underlying our criminal justice crisis, one argument for maintaining, or even augmenting, our incarceration rates might be that a more punitive response helps to decrease crime. Advocates of this position often cite the drop in crime rates since the 1990s as evidence that despite all of the problems, our criminal justice systems make the majority of us safer. From this perspective, the relationship between social and criminal justice may be irrelevant if incarcerating more people can improve the quality of life for the rest of us. Of course, incarcerating certain people does make us safer and helps to combat crime. Putting a serial killer in prison does ensure that fewer people will be murdered and is likely the best course of action available. However, putting in prison a man who got in a bar fight or a boy who sells drugs on the street corner does not necessarily mean that barroom brawls will be deterred or that another boy will not take over the neighborhood drug trade. Although our use of prisons often has been justified by theories of deterrence and incapacitation, prisons do not deter or incapacitate offenders in uniform or necessarily effective ways.<sup>50</sup> Most evidence suggests that while

50. On the effectiveness of incarceration for *detering* crime, see Robert Apel and Daniel S. Nagin, "General Deterrence: A Review of Recent Evidence," in *Crime and Public Policy*, ed. Wilson and Petersilia, 411–36; Anthony N. Doob and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," in *Crime and Justice: A Review of Research*, ed. Tonry, 30:143–95; Don M. Gottfredson, "Effects of Judges Sentencing Decisions on Criminal Careers," in *NIJ Research in Brief* (Washington, DC: U.S. Department of Justice, 1999); Timothy A. Hughes, Doris James Wilson, and Allen J. Beck, *Reentry Trends in the United States: Inmates Returning to the Community After Spending Time in Prison* (Washington, DC: Bureau of Justice Statistics, 2006); Patrick Langan and David Levin, *Recidivism in Prisoners Released in 1994* (Washington, DC: Bureau of Justice Statistics, 2002); Paula Smith, Claire Goggin, and Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Ottawa: Public Works and Government Services of Canada, 2002); and Michael Tonry, "Learning from the Limits of Deterrence Research," *Crime and Justice* 37, no. 1 (2008): 279–311. On the effectiveness of incarceration for *incapacitation*, see Raymond V. Liedka, Anne Morrison Piehl, and Bert Useem, "The Crime-Control Effect of Incarceration: Does Scale Matter?" *Criminology and Public Policy* 5 (2006): 245–76; Alex R. Piquero and Alfred Blumstein, "Does