

*Theodore Caplow and Jonathan Simon*

# Understanding Prison Policy and Population Trends

## ABSTRACT

American incarceration numbers increased fivefold between 1973 and 1997. Changes in penal policies and practices, not changes in crime rates, are the primary explanation, but there is disagreement about the causes of penal policy changes. Two prevalent explanations are that rising crime rates led to public demand for harsher policies and that politicians used crime policy to exacerbate public fears and win electoral favor. Both have merit but either is too simple. More likely the causes are some combination of crime policy's broad public appeal in an era of fractionated politics, unintended consequences of the war on drugs, and the increased reflexivity of the justice system that, with improved accountability and efficiency, becomes a major source of demand for its penal services.

By now the image of figure 1 is a familiar one. Since the mid-1970s the national prison population has grown rapidly. In 1997, there were more than 445 adults in prison for every 100,000 residents of the United States (Gilliard and Beck 1998, p. 1). If we count jail inmates the incarceration rate was more than 645 per 100,000 residents. While the rate of increase has slowed in the 1990s, the great surge in imprisonment that began in the mid-1970s has not peaked, let alone run its course. While the eye is drawn relentlessly to that dramatic curve, it is worth pausing to consider how this pattern looked twenty years ago.

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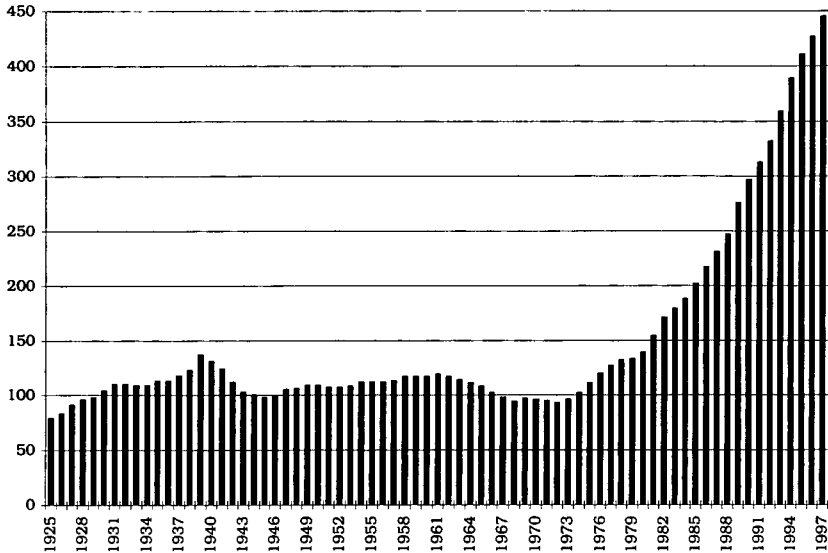


FIG. 1.—Rate of sentenced prisoners per 100,000 residents. Source: Maguire and Pastore (1997), table 6.21.

When Blumstein and Cohen (1973) wrote a famous article about American imprisonment rates in the early 1970s, they described a curve whose relatively gentle oscillations struck them as remarkable evidence that punishment was a self-regulating system. When you see what came next, you are reminded of the intrinsic limits of sociological prediction.

Still, this dramatic shift in a relatively stable long-term trend cries out for explanation and reflection. The most often heard explanations focus on the interaction of crime and politics. The view held by many political leaders and by some penal experts (DiIulio 1991; Bennett, DiIulio, and Waters 1996) points to the role of the crime waves that began in the 1960s and have kept American crime rates at elevated levels relative to earlier decades. From this perspective, the great surge of imprisonment is a response to the great surge of crime. It reflects both social outrage at crime and rational aspirations to control it. Imprisonment may not deter many criminals (DiIulio 1996), but it suppresses their criminal activity while they are confined and lessens the total social cost of crime (DiIulio and Piehl 1991).

An alternative view, virtually absent from political discourse but held by many penal experts and social scientists (Gordon 1990, 1994;

Scheingold 1991; Donziger 1996; Miller 1996; Beckett 1997; Tyler and Boeckman 1997; Currie 1998) sees the surge of imprisonment as the result of a "moral panic" (Cohen 1972; Hall, Critcher, and Jefferson 1978). According to this view, the growth of crime, real enough from the 1960s through the late 1970s, leveled off before the great surge of imprisonment began in the 1980s, and cannot explain the recent expansion of penal sanctions. Concern about the crime wave has become a symbolic vehicle to channel anxieties about social order spurred by the dismantling of racial and gender hierarchies (Beckett 1997), economic restructuring (Currie 1998), and large-scale immigration (Tyler and Boeckmann 1997). From this perspective the mobilization of laws and resources for imprisonment is political opportunism rather than rational public policy. This may be reinforced by the economic interests that have grown to serve the demand for punishment (Christie 1993; Irwin and Austin 1994; Miller 1996; Donziger 1996).

We can see these opposed positions in the ongoing debate about contemporary imprisonment policies as efforts to answer a classic sociological question, that is, What drives trends in punishment? (See Garland [1990] for an extraordinarily rich survey of the major schools of thought on this question.) The two positions bear at least a family resemblance to two important sociological approaches to punishment, one identified with the functionalist sociology of Durkheim (1933, 1983), and one related to the conflict and power perspectives in the work of Thompson (1975), Rusche and Kirchheimer (1939), and Foucault (1977).

Durkheim viewed punishment as a collective response to the violation of social norms (1933). He argued that the intensity of that response varied with the social organization and with the authoritarian character of governments (Durkheim 1983). The crime wave theory shares with Durkheim a focus on the reactions of ordinary citizens to crime, but often ignores the implications that social and political organization might have in the character of that response.<sup>1</sup>

Power and conflict theorists have analyzed the quantity and forms of punishment as related to the instrumental and ideological needs of governments and ruling classes. Like the power perspective, current moral panic theory emphasizes the strategies of political leaders, the

<sup>1</sup> There is some empirical evidence, for example, to suggest that support for the tough "Three Strikes" law in California was driven by concerns about the increasing cultural diversity of the state independent of views on the degree of crime threat and of social values (Tyler and Boeckmann 1997).

ideological consequences of economic restructuring, and the social control needs of postindustrial societies. Public support for punitive policies, from this perspective, may be a moral response, but the response is a political artifact.

In addition to the two opposing perspectives, a variety of other explanations have been invoked for the growth of incarceration. Some point to the growth of "the dangerous classes" (reviving the notorious nineteenth-century term for the poor) (Gordon 1994). Economic restructuring, especially the decline of well-paying but low-skilled industrial jobs, has left large numbers of uneducated young males with few job opportunities and expanded the pool of people most likely to be attracted to crime as an economic option (Currie 1998). At the same time the presence of such a pool exacerbates the tendency of the public to support coercive control strategies (Simon 1993; Gordon 1994).

Racism is another theme raised by students of the imprisonment surge (Tonry 1995; Donziger 1996; Miller 1996; Beckett 1997). It is undeniable that the incarcerated population is disproportionately composed of minorities (especially African Americans and Hispanics), and that the disproportion has increased during the period of rising imprisonment. Less clear is whether the growth of imprisonment is driven in any sense by racial animus. Tonry (1995) has suggested that penal policies leading to increasing imprisonment of minorities are a form of "malign neglect" reflecting the unintentional but foreseeable consequences of political choices. Miller (1996) suggests that pervasive racism in the law enforcement community has led to higher arrest rates for African Americans. Beckett (1997) argues that fears about crime and demands for punishment were mobilized by conservative politicians regrouping after the disaster of supporting segregation.

Another related theme is growing social distance (Black 1989, 1993). The incomes of the rich have grown much faster in the past twenty years than the incomes of poor (Greenberg and West 1998). Income inequality along with the physical separation of the poor, largely trapped in older central cities, and by the weakening or dismantling of government programs intended to reduce inequality.

In this essay, we review these arguments and provide an explanation of the growth of incarceration that ties many of these themes together. We admit in advance to a bias toward complexity in explanation. There is an illustrious tradition in sociology of interpreting changes in the prison as a reflection of overarching social trends. The rise of the prison in the nineteenth century has been interpreted as a function of

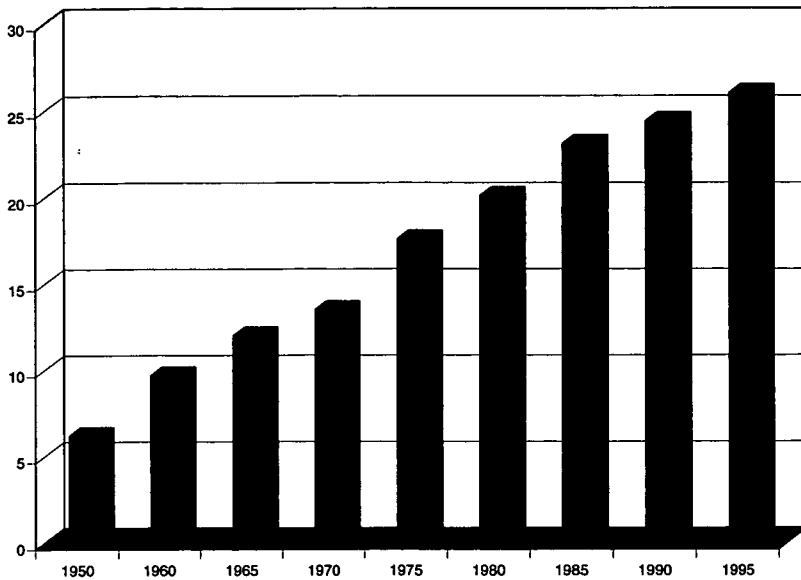


FIG. 2.—Percentage of persons over twenty-five with four years of college or more. Source: Statistical Abstracts of the United States (1996), table 242.

modernization, including the increasing economic value of human subjects (Rusche and Kirchheimer 1939); the reduced need for ritual to produce solidarity in a society characterized by an intensive division of labor (Durkheim 1933); and transformations in the technology of power through which political authority is constituted (Foucault 1977). But Garland (1990) has argued that it is a mistake to reduce our readings of punishment in society to singular social forces or processes. Punishment serves so many different functions, involves the life choices of so many different people, and bears on so many other social institutions that reductionist explanations are necessarily misleading.

Here it is useful to contemplate some other provocative time series. Figure 2 shows that the percentage of American adults who graduated from college quadrupled in the four decades between 1950 and 1990. How should we explain the great higher education boom of the past forty years? Relevant factors include the cold war, national economic planning to avoid another Depression, the need for a technically trained work force, state governments looking for ways to exercise their post-New Deal vigor, Baby Boomers pursuing the suddenly plausible ambitions that their Depression-era parents communicated to

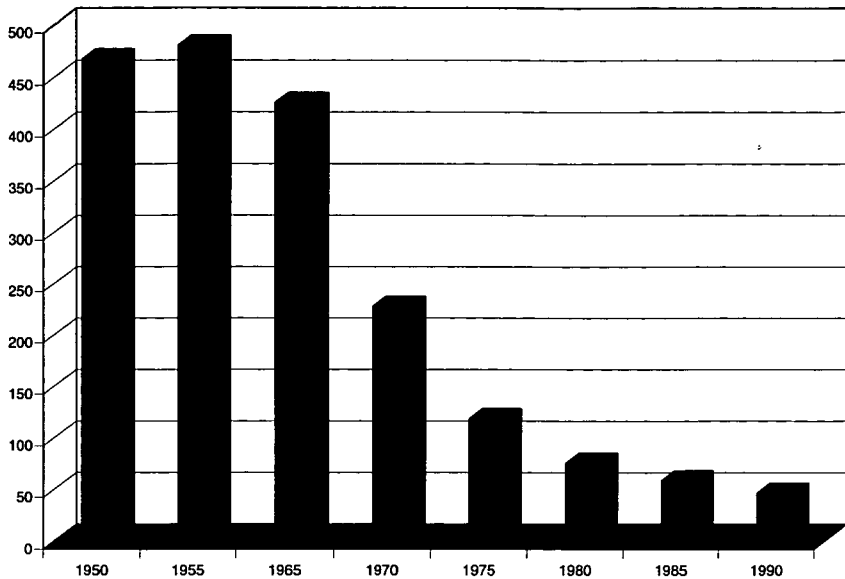


FIG. 3.—Inmates of state mental hospitals per 100,000 residents age fifteen and over. Source: Mechanic and Rochefort (1990).

them, and the work of government and financial institutions to generate the capital to build and fill hundreds of new two- and four-year colleges (Freeman 1976).

Consider Figure 3. Between 1950 and 1990, we experienced a “decarceration” boom with regard to our asylum system. The population of hospitalized mentally ill shrank from over four hundred per 100,000 adults in 1960,<sup>2</sup> to less than fifty. What would it take to provide a cogent explanation of this decarceration movement (see Scull 1977; Brown 1985; Torrey 1997)? Such an explanation would consider, among other factors, the changing fiscal pressures on the state, the changing social meaning of mental illness, new pharmacological options, the willingness of families to undertake greater responsibility for their mentally ill kin, and greater social tolerance for disturbed and disorderly people in public spaces.

When we examine institutional trends like the expansion of higher education we discover that the need for young people to obtain a college degree in order to improve their economic choices is no more sus-

<sup>2</sup> Here the rate is calculated on the denominator of adult residents rather than all residents.

ceptible to objective determination than the effects of imprisonment on crime. It is difficult to imagine that a massive state and private partnership to expand higher education could have happened without very tangible signals that college graduates would improve their lot (repeatedly confirmed by studies of average earnings of those with and without college). It is also difficult to believe that a near quadrupling of the prison population in the 1980s and 1990s could have been sustained by the states and the federal government without tangible experiences of and continuing public exposure to news about violent crime. In neither case does the reality of education or crime as public issues produce a self-realizing social initiative of the scale discussed here. While it is tempting to see in the growth of the incarceration rate, the decline of the asylum population, and the expansion of higher education a reflection of society's collective intentions, this ignores the frequency of unintended consequences (Caplow 1991). For college classrooms, missiles, asylums, or prisons to be produced, great numbers of people need to get involved for reasons independent of the general social sentiments that drive these trends.<sup>3</sup>

As much as possible, an interpretation of the incarceration rise should explain its rapidity, extent, and endurance. This requires us to consider what is different about America since 1980. Many of the usual suspects, including crime, unemployment, and poverty do not tightly track the path of incarceration rates (Zimring and Hawkins 1991).<sup>4</sup> Shifts in political ideology are also less obviously helpful than one might expect. The public desire to "get tough" with criminals is widely acknowledged, but whether one treats this as a rational response to crime, or the result of political and media manipulation, the measured desire to get tough has remained relatively constant over a period of huge growth in incarceration. The time series of responses to the question whether courts are too lenient has remained remarkably stable since 1972 (Rossi and Berk 1997, p. 7).

Shifts in basic political orientation (where Americans place themselves on a liberal/conservative spectrum) have also changed less than might be assumed (King 1997). Slightly fewer people define them-

<sup>3</sup> One need not assume that there is an inevitable trade-off between these but the growth of incarceration did take place during a time when the confinement of the mentally ill had been dramatically reduced and the growth of the college-bound population was flattening.

<sup>4</sup> One important trend that has tracked incarceration rates over the past twenty-five years is growing wealth inequality (Greenberg and West 1998). We think this plays a role in the massive increase in incarceration, but through shifts in political culture.

selves as very liberal and slightly more define themselves as very conservative on a scale of political ideology than was true in the 1960s. Somewhat more than half of survey respondents identify themselves as moderately conservative and somewhat fewer than half view themselves as moderately liberal, just as they did in the 1960s.

Our interpretation of the growth of the U.S. prison population focuses on change in three dimensions: political culture, public policy, and institutional organization.

*Crime Control as a Privileged Mode of Governing.* Congress has adopted crime bills in virtually every election cycle in the 1980s and 1990s (Chernoff, Kelly, and Kroger 1996). It is widely accepted that political candidates for statewide office must establish themselves as favoring more severe punishments to stand a chance of election. Between elections, crime control has also become a more salient feature of governing, with legislative bodies at all levels devoting large portions of their time and budgets to crime control measures.

We see this as a function, primarily, of two developments. First, governance measures intended to improve welfare have lost credibility. For much of the twentieth century, programs to invest capital and expertise in the education, health, and financial stability of the population enjoyed strong public support. The decline of social welfare governance is a massive subject in its own right (Weir, Orloff, and Skocpol 1988; Baldwin 1990; Burchell, Gordon, and Miller 1991; Pierson 1994; Rose 1996; Lo and Schwartz 1998). It is clear that the majority of Americans now view some of these efforts by government as more expensive than expected and less effective than hoped. Programs with an extremely broad base of beneficiaries, such as Social Security and Medicare, command more support (if not exactly confidence), but even their broad public endorsement does not extend to much expansion of benefits.

Whatever its sources, the loss of confidence in social welfare programs has removed an important set of responses that politicians (both liberals like Lyndon Johnson and conservatives like Richard Nixon) could once use to confront social problems. Moreover, the delegitimation of welfare policies has taken a heavy toll on the legitimacy of the federal government, because it was the major architect of welfare policies. For much of the twentieth century, the politics of punishment were largely subordinated to the politics of welfare. Indeed, during the era of the rehabilitative ideal (1940s–1970s) imprisonment was ration-



alized as a form of state benefit. The delegitimation of welfare has allowed the politics of punishment to come into its own.

A second development that seems to have raised the salience of crime control is a shift in the underlying structure of American politics—away from traditional class and ethnicity conflicts toward conflicts based on values, identity, and risk. The old politics lent itself to bargaining over resources but the new “postmaterialist” politics (Inglehart 1977, 1990) and the “new social movements” (Giddens 1991; Beck 1992) operate in terms resistant to bargaining. Conflict about abortion, gay and lesbian rights, or the death penalty are not easily compromised. Politicians seeking to build viable majorities inevitably look to the few issues that can bring people together in the new political landscape. And crime control has a presumptive validity that makes it a preferred choice. For example, in few states is there any prospect of openly negotiating a compromise on affirmative action or set-asides in public contracting, but renewed prosecutions of decades-old civil rights murders produce symbolic benefits and arouse little opposition. Not surprisingly, politicians from both parties have found a strong profile on crime issues to be indispensable.

*The Unintended Consequences of the War on Drugs.* The political attractiveness of crime control is not capable of accounting for the scope and unprecedented scale of the rise in incarceration. There have been other times when crime control has emerged as a more general model for governing including the 1920s and 1930s with prohibition and gang crime, and then again in the late 1950s with the first wave of heavy narcotics law enforcement. But in neither case was there more than a moderate rise in the incarceration rate. It is possible that our current turn toward crime control governance would have produced a similar moderate rise in the incarceration rates had it not been for the rapid growth of a drug-crime economy in the 1980s.

“Tough on crime” policies produce prison population increases only to the degree that offenders are available to be imprisoned (Zimring and Hawkins 1991). The growth in nondrug crime has simply not been sufficient to sustain the rapid growth of imprisonment. By the 1970s there were already an active culture of drug use and networks of drug importation and sales in the United States, but their economic importance increased in the 1980s due to new products and distribution strategies, especially for “crack” cocaine (Chitwood, Rivers, and Inciardi 1996). This transformation in the marketing of illegal drugs coin-

cided with political decisions to intensify the punishments for drug crimes.<sup>5</sup> The result was an enlargement of the population available for criminal justice processing. On any given day in any given large metropolitan area, the police can arrest as many drug offenders as they have time and resources to pursue. That is simply not true of property or violent crime. Thus while more prison time for violent crime accounts for much of the growth of incarceration, a significant portion (how much is difficult to estimate) is associated with a vector of supply with few apparent constraints. This allows growth to continue, even if at a slower pace, during cycles when for whatever reason violent crime declines (as it has lately).

*Reflexivity of the Penal System.* The growth of incarceration is not only dependent on positive forces, but on the weakening of those forces that act as a brake on imprisonment.<sup>6</sup> These include limitations on the operation of courts, community sympathy for some lawbreakers, and the ideologies of the organizations that process offenders. Foremost among these historically was the limited capacity of the justice system to absorb arrestees and keep them on track to incarceration, and the disappearance of cases along the way from arrest to imprisonment. Also important was the capacity of the correctional system to control its own population by means of parole release and revocation (Messinger et al. 1985).

Changes in the criminal justice system, beginning in the 1960s, have disabled these brakes on the growth of imprisonment, and enhanced the tendency for the system to drive its own growth, a form of institutional "reflexivity."<sup>7</sup> The reform of bail, indigent defense, and institutional due process, carried out by states in the 1960s and 1970s under pressure from the Supreme Court, have produced state court systems that are capable of keeping more people on line to incarceration. This means that political pressures to get tough are less likely to be ab-

<sup>5</sup> To some extent, to be sure, the tough new laws have been a response to the growth of drug markets, but they also reflect independent political decisions to focus on drug crimes that began even before the death of college basketball star Len Bias, which was attributed to crack cocaine, led to a media obsession with the drug over the next decade.

<sup>6</sup> We would like to thank David Garland for raising this issue—the brakes on incarceration—during a presentation of a draft of this chapter to the Fortunoff Colloquium at New York University Law School in February 1998.

<sup>7</sup> The term has been used by sociologists (Giddens 1991; Beck 1992) to describe a more general trend in postindustrial societies whereby the social institutions become increasingly focused on managing their own negative effects (industrialization creates pollution, welfare creates dependency, medical treatments produce treatment-resistant diseases, and so on).

sorbed and neutralized by bottlenecks and escape valves along the way. For those actually convicted and sentenced to prisons, a powerful feedback loop has developed between prison and correctional supervision in the community. The correctional population on supervised release has grown even faster than the prison population, but rather than operating as alternatives to prison, parole and probation increasingly return people to prison.

*Beyond Crime Waves and Moral Panics.* In what follows we explore these themes in greater detail. In Section I we examine the results of the incarceration boom from a sociological perspective. In Section II we look at incarceration as a solution, not to the problem of crime per se, but to the problems of government (i.e., how to govern, what to govern, to what ends). Here we examine more closely both of the dominant explanations for the incarceration boom. Sections III and IV examine the contribution of the developments identified above in driving this trend. Section V offers concluding remarks.

### I. The Results of the Imprisonment Surge

Blumstein and Beck, in this volume, have offered an analysis of the links between growth in the prison population and changes in policy at various points in the criminal justice system. In particular, they point to the increased chances of arrest for drug crimes and the increased likelihood for imprisonment if convicted of any crime. Rather than repeat their analysis this section looks briefly at the resulting accumulation of population. Who is in prison does not necessarily explain why they are there (at least in such numbers) but it may point to the social processes that led to the policies and practices that Blumstein and Beck describe.

At the end of 1997 there were 1.25 million prisoners under the jurisdiction of state and federal prison authorities, a rate of 445 prisoners for every 100,000 residents of the United States (Gilliard and Beck 1998, p. 1). Together with inmates held in jails, more than 1.7 million people were incarcerated at the end of 1997 for an incarceration rate of 645 prisoners for every 100,000 residents (p. 2) and more than 800 per 100,000 adults. At the end of 1997, more than five million persons were in the custody of the correctional system including parole, probation, and other community supervision sanctions—a little under 3 percent of the total resident population (Bureau of Justice Statistics 1998, p. 5). These figures are unprecedented in American history. The only other industrialized country with greater rates is Russia (690 per

100,000 residents) (Currie 1998, p. 15). Other countries with high incarceration rates but still well below the United States include Estonia (270), Romania (200), Singapore (229), and South Africa (368) (Currie 1998, p. 15). Among traditional democratic countries in Europe, and Japan, the highest rates are around 120, and the average is much lower (Currie 1998, p. 15; see also Young and Brown [1993], showing European rates at the end of the 1980s; Kuhn [1997], showing European rates for the early 1990s; and Stern [1998], eyewitness descriptions of foreign prisons).

While the rate of growth has slowed some in the 1990s (Gilliard and Beck 1998, table 2), there is no reason to expect a reversal of direction anytime soon. Indeed, while many states stiffened their criminal penalties during the 1980s, actual time served did not rise dramatically because of various offsetting administrative measures and court orders capping population. In the 1990s, these hidden brakes on prison population have been largely dismantled. Federal legislation has encouraged states to adopt "truth in sentencing" laws, which typically require offenders to serve at least 85 percent of their nominal sentences.<sup>8</sup> Other federal legislation attacks court ordered caps by making it harder for federal court consent decrees to be enforced.<sup>9</sup> Growth in time served is likely to sustain growth in overall prison population even if prison admission rates should decline.

Overcrowding has become an endemic feature. As of 1997, the federal system was operating at 119 percent of capacity while the average of state systems was at 115 percent (Gilliard and Beck 1998, p. 1). Three states—California, Pennsylvania, and Virginia—were operating in excess of 150 percent of capacity (Gilliard and Beck 1998, table 9).<sup>10</sup> California, with the nation's largest prison population, was assessed at 206 percent of its highest measure of capacity (Gilliard and Beck 1998, table 9). The situation seemed to be improving as of 1995, when the last federal census of prisons was conducted, as a result of heavy investments by the states in prison construction since 1985. More than half of all the prisons in the United States have been built within the past twenty years (Stephan 1997, p. 6).

<sup>8</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. no. 103-322.

<sup>9</sup> Prison Litigation Reform Act of 1995 (PLRA), Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. no. 104-34.

<sup>10</sup> Capacity is an imprecise notion. The Bureau of Justice Statistics asks states for several different measures of capacity and then compares their current population. The numbers above are based on the highest possible measure of capacity. If a lower one is used, twice as many states are at 150 percent or above.

With so many aspects of state budgets mandated by federal or state formulas, more money for prisons must come from borrowing, taxing, or raiding other discretionary expenditures. In nearly every state of the Union, the rising burden of prison expenditures has been met in part by cutting expenditures for higher education. From 1987 to 1995, state governments expenditures on prisons increased by 30 percent while spending on higher education fell by 18 percent (Justice Policy Institute 1997). In California, for example, the percentages of the state budget devoted to corrections and higher education were 4 and 14 percent, respectively, in 1970 and 8.5 and 12.5 percent, respectively, in 1998 (Schrag 1998, p. 95).<sup>11</sup> While no new campus of the University of California system has been built since the 1960s, some twenty prisons have been built since 1984 (Schrag 1998, p. 97).

The expansion of the prison population by about 300 percent, or over 800,000 souls, between 1980 and 1997 involved every one of the fifty states as well as the federal government and the District of Columbia, but with a great deal of variation. Texas held over 700 prisoners per 100,000 residents in 1997, while North Dakota held only 112 (Gilliard and Beck 1998, p. 5). California had a rate of 475 compared with 232 in Oregon. Between 1987 and 1997, the state-by-state increases in the prison population varied from a low of 25 percent in Maine to a high of 180 percent in Colorado (Gilliard and Beck 1998, p. 4).

As Zimring and Hawkins (1991) noted, there is a significant and relatively stable regional pattern to incarceration rates. The South and the West have experienced the highest growth in imprisonment, followed by the Midwest and the Northeast. In 1995, the ten highest rates in the nation were all in southern or western states, while the lowest were in midwestern and northeastern states (Morgan, Morgan, and Quitno 1996, p. 102). But the variation within regions was nearly as great: in the West, Washington and Oregon had relatively low rates of 210 and 199 prisoners per 100,000 while California and Arizona had rates of 402 and 473, respectively.<sup>12</sup> In the midwest, Michigan's rate of 434 contrasted with Minnesota's rate of 103 (Morgan, Morgan, and Quitno 1996, p. 102).

<sup>11</sup> In California, the two are on a particularly narrow collision course because state constitutional amendments have capped taxing and spending, and mandated a certain level of expenditures on K-12 public education (Schrag 1998, p. 96).

<sup>12</sup> This calculation excludes federal prisoners altogether, whether from the state, or confined in a federal prison there.

Who are these people? In 1996, just under half were violent offenders, 23 percent were property offenders, 23 percent were drug offenders, and another 7 percent were so-called public order offenders (Gilliard and Beck 1998, p. 11).<sup>13</sup> Nonviolent offenders make up a much bigger percentage of prison admissions. Of felons sent to prison by state courts in 1994, only 26 percent had been convicted of violent offenses (Langan and Brown 1997, p. 3). Property and drug offenders made up 61 percent of the prison bound, and more than 10 percent were nonviolent offenders convicted of crimes such as receiving stolen property and vandalism (Langan and Brown 1997, p. 3). Since violent offenders generally receive longer sentences than nonviolent offenders do, they constitute a larger proportion of a prison's resident population at any given moment than of its intake population.

Prisoners are also more likely than not to be repeat players to the criminal justice system. Only 38 percent of state prison inmates in the 1991 survey were experiencing prison for the first time, only 19 percent were serving their first criminal sentence of any kind (Beck et al. 1993, p. 11). This reflects sentencing procedures that punish previous convictions by increasing the likelihood and length of imprisonment. First offenders manage to escape incarceration some of the time, even for serious offenses. Nonconfinement sentences went to 3 percent of murderers, 13 percent of robbers, 25 percent of burglars, and 29 percent of drug traffickers convicted in state courts in 1994; most were first offenders. At the other end of the scale, some repeat offenders received life sentences for simple assault, burglary, or drug possession.

As always before, the occupants of our prisons today are overwhelmingly male. Although the female prison population has been growing faster than the total prison population for some years, it still made up only 6.4 percent of the total in 1997 (Gilliard and Beck 1998, p. 3). The proportion of women in local jails is considerably higher but still came to only 12 percent in 1996. Women commit many fewer offenses, are less likely to be charged when they do, and receive shorter sentences if convicted.

It is not surprising that most prisoners are recruited from the ranks of the poor, the uneducated, and the unaffiliated, as is normal every-

<sup>13</sup> This relies on state counts. A 1991 survey of state prison inmates calculated that only 45 percent were serving sentences for violent offenses (Beck et al. 1993). It is possible that the percentage of violent offenders is going up as longer sentences make themselves felt on the mix in prison.

where and always. In the most recent Bureau of Justice Statistics survey of state prison inmates, the median preincarceration income of prisoners during their last full year of freedom was barely a third of the national median income for year-round full-time workers (Beck et al. 1993). Only 34 percent of prisoners said they had completed high school (Beck et al. 1993, p. 3) compared to approximately 79 percent of the national population. Fewer than one in five were married (Beck et al. 1993, p. 3), less than half the rate for the general population of comparable age.<sup>14</sup> Thirty-seven percent had an immediate family member who had served time, including 7 percent who had a parent and 31 percent who had a brother who had served time (Beck et al. 1993, p. 9). Despite massive growth in prison admissions, these factors have not changed significantly since earlier surveys. The prison seems to be absorbing more of its traditional constituency of lower-class males than before, but it is not pursuing new targets.

African-American overrepresentation is a long-term feature of the U.S. prison system, but it seems to have been exacerbated by the rapid growth of the 1980s and 1990s (Tonry 1995, chap. 2). In 1960, 37 percent of prison inmates were African American. At the end of 1995, 48 percent of U.S. prisoners were African American (Bureau of Justice Statistics 1997a, p. 91).<sup>15</sup> When the Bureau of Justice Statistics estimated lifetime incarceration risks based on 1991 rates of incarceration, they found that 29 percent of African-American males, 16 percent of Hispanic males, and 4 percent of white males would be expected to serve time in prison within their lifetime (Bonczar and Beck 1997, p. 1). It has been estimated that over 30 percent of African-American males between the ages of nineteen and twenty-nine were in some sector of criminal justice custody as of 1994 (Mauer 1997). In inner cities with heavy poverty zones, such as Washington, D.C., and Baltimore, more than 50 percent of young African-American men were in the criminal justice system (Miller 1997a, 1997b). African-American women were also comparably disproportionately represented in prison, although on a much lower absolute level.

<sup>14</sup> They were otherwise disadvantaged as well. More than half had grown up without fathers (as many of their children will also). More than a third had an immediate family member who had served time. More than a quarter had parents or guardians who drank heavily.

<sup>15</sup> Hispanics, a category that can include African Americans and whites, made up 15 percent of the prison population in 1995 (Bureau of Justice Statistics 1997a, p. 94).

## II. Governing through Crime

Crime control has acquired a new importance among the strategies available to government for confronting the complex array of domestic (and foreign) problems facing the United States. Political leaders at all levels of government in the 1990s recognize that their public commitment to punitive policies against crime is vital to election. To talk about crime control as governance in this respect does not imply that public support for crime control is irrational or the product of artful manipulation. For any kind of risk to become a major source of public concern it helps greatly for it to have some objective reality, either in incidence or severity, that captures the imagination of the public. But this objective foundation can never fully account for an end product like imprisonment. Knowing that chemical contamination of former factory sites is a real problem does not tell us whether public policies committing us to spend billions of dollars to restore the site to a normal condition are rational. Likewise, whether the current level of imprisonment in the United States is or is not optimal is a difficult question for experts to answer.

Crime control has been an enduring source of popular legitimacy for state and local governments in the United States. In the twentieth century, crime control has also emerged as a source of legitimacy for the federal government as well, with gangsters and prohibition during the 1920s (Ruth 1996), street crime and terrorism in the 1970s, and drugs in the 1980s and 1990s (Wright 1995). Historically, American political culture appears to favor crime control as a mode of governing because of the strength of individual responsibility as a dominant virtue (Scheingold 1991). American crime policy has also been more open to pressure from public opinion than is the case in other liberal democracies. Savelsberg (1994) compared American and German policy discussions of crime and found that far more attention is given to popular views in America than in Germany. German crime policy tends to be set by bargaining within a relatively insulated set of governmental bureaucracies with little direct accountability to the electorate. In the United States, at least in recent years, crime policy has been influenced by elected legislators and executives.

But if Americans are pulling politicians toward more and more punitive policies, the functionaries of the state may have their own reasons to favor crime control as a mode of governance. Looking broadly at advanced liberal societies including the United States, Garland (1996)



suggests that the growth of punishment at the end of the century reflects the relative weakness of the state. The contemporary state finds itself rather routinely confronted with failure, and its most refined twentieth-century techniques of government—welfare, redistribution, and regulation—no longer seem to work well. The effect of such state interventions on the well being of national economies is increasingly viewed as unfavorable. Belief in the self-regulatory capacity of markets, restored to a kind of orthodoxy in Western societies that have not experienced a market collapse in more than half a century, has generated pressure to trim government growth and privatize public services. Globalization of the economy has limited the capacity of national governments to deploy effective countercyclical controls. Finally surges in crime, experienced not just in the United States, but in most of the advanced industrial societies, have diminished the prestige of governments in their most traditional function of maintaining civil order. In the face of losses in its perceived competence, purposes, and boundaries, the state finds the intensification of crime control attractive. Punishment invokes a primordial understanding of state power that remains highly credible. Imprisonment, especially when promoted as incapacitation, is something government knows it can accomplish.

These arguments shed important light on the American experience with the growth of imprisonment over the last quarter century, but none seems complete. The individualistic and populist aspects of American culture existed for a long time. If punishment compensates for a weaker overall state, it is hard to see why the United States would be so much more prone to punish than are other Western democracies. The forces which are undermining the traditional position of the national state are if anything less severe for the United States, with its huge economy and singular military position.

Nevertheless, it is noteworthy that the past twenty-five years have seen an unprecedented expansion of the role of the federal government with very mixed results. And for largely unrelated reasons, American politics since the 1960s have moved away from traditional class and regional conflicts, toward conflicts about “values.” The former divisions have not disappeared, but have been submerged under new issues. Political campaigns are now won by finding themes that attract and link minorities with strong value-based identities. Crime control has come to be a rare source of agreement in a factionalized public.

### *A. Welfare and Government's Crisis of Confidence*

In 1960, huge areas of collective action were outside the federal orbit—health care, education, street crime, civil litigation, infant care, occupational safety, personnel procedures, the regulation of sexual relationships, child care, environmental protection, music and art, historic preservation, the content of advertising, the design of consumer products, the menus of school lunches, the smoking habits of the population, the labeling of used cars, the grading practices of colleges. Today all of them are subject to federal oversight. Whatever the merits of these myriad interventions they have worked a constitutional transformation in American politics. A vast range of issues now implicate federal authority.

The expanded terrain of the federal government has coincided with a catastrophic decline in the public's confidence in the capacities of government. It is startling to consider just how much this has changed since the mid-1960s. In response to the survey question, "How much of the time do you trust the government in Washington to do the right thing," 76 percent of a national sample in 1964 answered "just about always" or "most of the time." When the same question was put to a similar sample in 1995, only 25 percent gave that answer (Pearlstein 1996). Indeed, a 1996 survey showed solid majorities of respondents agreeing with a whole gamut of disgruntled statements: (1) the federal government controls too much of our daily lives (62 percent); (2) our system of government is good but the people running it are incompetent (66 percent); (3) most elected officials don't care what people like me think (69 percent); (4) our leaders are more concerned with managing their images than with solving the nation's problems (79 percent); (5) most politicians are more interested in winning elections than in doing what is right (80 percent); (6) our government is pretty much run by a few big interests looking out for themselves (81 percent); and (7) people in government waste a lot of the money we pay in taxes (91 percent).

While some of the government's efforts at social amelioration, for example, Social Security, are seen as successful and enjoy wide support, many others are perceived as failures (Murray 1984; Wattenberg 1995).<sup>16</sup> In a relatively short span of time, large portions of the public became convinced that however attractive government programs

<sup>16</sup> This view of welfare has been forcefully contested by scholars but there is little doubt that it has largely prevailed in public opinion.

might sound, in practice they would be incompetently implemented and reward the wrong people for doing the wrong things. This includes not only government aid to the poor (which has received the most critical scrutiny) but also efforts to improve education, promote job training, provide affordable housing, and assure retirement benefits. This was apparent in the 1993 debate on health care reform where despite high levels of public support for general health coverage, the involvement of the federal government in such a program was the source of vulnerability that opponents were able most effectively to exploit. Thus for politicians, especially federal politicians, seeking to fill the rather large role in public life that the federal government has staked out for itself in the late twentieth century, there is a limited range of governmental strategies available. State governments enjoy somewhat higher esteem, but they too are limited in their ability to mount new social programs in the face of a public that regards such efforts as likely to be wasteful and counterproductive (Dionne 1991).

The impact of this shift in sentiment has been felt broadly across the spectrum of policy formation. The discrediting of welfare initiatives has closed off a broad range of options for addressing the threats to social order that every modern government confronts. Crime and punishment have become important vehicles for doing the work of politics precisely because the major alternatives have been moved off the table.

### *B. Crime and the New Politics*

We often talk as if the center dominated U.S. politics, but today's center is little more than a floating set of preferences on a vast range of issues charted by polls and pundits. Instead, our politics has moved farther away from the center once defined by key issues of economic and national security and toward a borderland of values and identity based politics (Wattenberg 1995). Today, public discourse is dominated by culture wars, including controversies over abortion, affirmative action, mass immigration, school prayer, capital punishment, animal rights, and assisted suicide (Wattenberg 1995). These issues have long been part of American politics, but rarely have they enjoyed as much political influence as now. They have not abolished traditional American divisions about wealth and national security, but displaced them in public discourse.

The United States is hardly unique in this. Sociologists and political scientists studying postindustrial societies have been pointing to profound changes in the sources of political mobilization and identity

since the 1970s (Inglehart 1977, 1990; Giddens 1991; Beck 1992). In the early 1970s, the central issues of political concern in all these countries remained the classic ones of economic and military security. Since then, largely through a process of generational change, increasingly large portions of European and American publics bring to politics what has been described as “postmaterialist” values, including concerns with the environment, public morality, and quality of life (Inglehart 1990). These changes have altered the traditional right-to-left political spectrum that defined politics in most industrial democracies during most of the twentieth century. In place of broad divisions based on issues of wealth and national security, publics are divided by innumerable value conflicts. Moreover, while traditional publics were dominated by elites who could effectively represent them in bargaining at the center, social movements have become increasingly skilled in political participation from the grassroots. Thus minority factions are less likely to be submerged in the grand compromises of politics, and more likely to make themselves directly visible to political leaders, what Inglehart (1990, p. 335) describes as a shift from “elite directed” to “elite directing” politics. These new social movements have not replaced the traditional parties that have anchored politics in most Western democracies, but have rendered their underlying support increasingly unreliable.

It is clear that these well-documented transformations in political identity and participation pose tremendous challenges to the forging of the majority coalitions necessary to legislate and govern. The value conflicts that most potently mobilize publics today do not lend themselves to the logrolling and bargaining that were characteristic of traditional American politics. Rather than seeking a bigger piece of the pie for people like themselves, members of the new social movements invite people to join the fight of good against evil. To antiabortion activists, abortion is cold-blooded murder; to their adversaries, the right to abortion secures women’s ownership of their own bodies. To advocates of strict gun control, the private possession of firearms is a wicked aberration; to their adversaries, it is the keystone of liberty. The well-organized pressure groups that represent such interests have few lateral mechanisms of coordination outside of the federal courts and Congress. Nor do they have many incentives to cooperate in making government more effective. This makes coalition building and the effective implementation of policies more and more difficult.

The relationship of the new politics to crime is not obvious. Most students of this shift have focused on postmaterialist values of the left,

for example, ecology (Douglas and Wildavsky 1982), feminism, and peace movements (Beck 1992). Crime control is often presumed to be a traditional conservative political value along with economic and military security (Inglehart 1990). No doubt many people who value crime control efforts by government do so for the promise of security for their lives and property. But it is clear that crime as a political issue is increasingly linked to values rather than to materialist choices. Unlike most values issues of the left or right, crime control seems to cut across the political spectrum. That is why those most supportive of punitive policies are not necessarily those who face the greatest crime risks. That is also why crime has become a key issue on both the left and the right. That is why election campaigns continue to focus on crime and punishment issues even when opposing candidates agree in their support of punitive anticrime measures.<sup>17</sup> Faced with voters who split on so many issues and who are profoundly skeptical about the ability of government to improve their lives through welfare-oriented interventions, the mode of governing that commands the broadest support—punitiveness toward criminal offenders—is understandably precious.

### *C. Crime Control as a Value*

In recent years, a number of social movements have grown up around crime, including Mothers against Drunk Driving, the feminist movements against rape and domestic violence, and popular mobilizations around punitive policies like “Three Strikes and You’re Out.” But if crime is the explicit subject of some movements, it is well suited to appeal to groups primarily mobilized along other axes. Historically, conservative politicians were initially responsible for promoting crime as a political issue (Chernoff et al. 1996; Beckett 1997). For conservatives, crime as a values issue has proved a potent tonic. It provided a compelling representation of the cost of liberal “permissiveness.” It also provided a critical defense against the potentially devastating effects of having been on the wrong side of the civil rights issue during

<sup>17</sup> During the 1998 gubernatorial campaign in California, the death penalty (along with abortion) emerged as key issues. There was a difference on abortion between the two contenders, but both candidates strongly supported the death penalty. It remained a focus of competition however. Campaign professionals defend the relevance of this kind of campaign as legitimate. In the words of one Republican expert: “We in society have sort of chosen the death penalty as a symbol of crime and abortion as a social issue. From that, the discussion gets into what each of them are about. What the voter is really looking for is what kind of a person is the candidate—a look into the soul of the candidate” (Decker 1998).

the 1960s when a clear moral consensus formed against race discrimination. But the origin of something is often a misleading indicator of its significance. Crime control has clearly emerged as an effective mobilizing issue for liberals.

This is true for centrist Democrats, such as Bill Clinton, who have been able to take the crime issue away from the right in some recent elections (Wattenberg 1995; Chernoff et al. 1996). But it is also true for groups farther to the left, including feminists, gays and lesbians, and empowerment movements of racial and ethnic minorities. These are groups whose members have experienced victimization of a sort that is not only metaphorically related to crime. Justice is an ambiguous term, and while historically many on the left have viewed it in welfare terms, punitive justice provides an alternative. Not surprisingly, hate crimes and domestic violence have become priority issues for these constituencies (Jacobs and Potter 1998).

If the postmaterialist politics tends toward issues of good and evil, crime is a natural metaphor for evil. In their insightful analysis of the antinuclear power wing of the environmental movement, Mary Douglas and Aaron Wildavsky (1982) argued the ecology movement of the 1970s reflected a popular concern with moral pollution for which environmental contamination was a perfect metaphor. Like witchcraft in the seventeenth century and communist subversion in the twentieth century, environmental pollution was presented as invisible, unavoidable, and irreversible (Douglas and Wildavsky 1982).

More than a decade and half later, the environmental movement remains an important force in the new political landscape, although not the dominant one that Douglas and Wildavsky thought it might become.<sup>18</sup> Instead the postmaterialist value that has been most successful in dominating political discourse has been crime control. In ways that closely track Douglas and Wildavsky's analysis, crime in contemporary public discourse is the "pollution" issue of the 1980s and 1990s. Crime is portrayed as stealthy. It operates through deception or surprise. It is envisioned as unavoidable. Criminologists routinely note that many violent crime victims know their assailants, and could choose to avoid them, but media attention is attracted by incidents of random violence. Likewise "stranger rape" dominates the popular image of rape, even though studies indicate that rape commonly occurs among family and

<sup>18</sup> Recent elections have shown that while environmentalism may not dominate the political agenda of Americans, a majority of American voters are turned off by candidates who appear expressly antienvironmental.

friends (Estrich 1987). Crime is also portrayed as irreversible in its effects. The damage to the victim of violent crime is, by general consent, very difficult or impossible to overcome fully. Although the damage of most property offenses can be reversed by insurance, the public is much more concerned with violent crime precisely because it poses risks of permanent harm. Not surprisingly most political mobilization against crime targets violent crime, even if the same policies affect property offenders (Miller 1996).

#### *D. Drugs and Kids: Moral Panics and Crime Control Values*

“Moral panics” occur when policies are made in response to particular crimes that have captured the public imagination (Cohen 1972; Hall, Critcher, and Jefferson 1978). Sexually tinged homicides have long been triggers for such panics (Jenkins 1998, p. 10).<sup>19</sup> The term implies a “wave of irrational public fear” (Jenkins 1998, p. 6), or a response “out of all proportion to the actual threat offered” (Hall, Critcher, and Jefferson 1978, p. 16). But as we suggested above, the boundaries of rationality are never easy to draw in responding to serious social problems. One need not assume that the American response to crime has been wholly irrational to believe particular crimes signal a threat to the fundamental moral order of society. Two types of criminality that currently provoke moral panic are drug trafficking and child abuse. Since the 1970s, both topics have caused high levels of public concern with notable peaks (on drugs, see Gordon 1994; Beckett 1997; on child abuse, see Jenkins 1998).

The focus of drug concern in America is on marijuana, heroin, cocaine, and an assortment of stimulants and hallucinogens with varied pharmacological effects. We say more below about the effect of the war on drugs on the growth of the prison population (as do Blumstein and Beck, in this volume). Here we want to point to features of the moral panic about drugs that help explain the priority of crime control as governance. Drugs as a form of criminality exemplify the features that make crime such a compelling source of “pollution” in contemporary society, that is, invisibility, unavailability, and irreversibility. Drugs operate invisibly. Parents and employers have been encouraged

<sup>19</sup> Evans (1996, p. 592) provides a fascinating picture of a moral panic over sex murders in Weimar Germany that helped feed fascist sentiments. Examples are multiple and across time. Only recently the government of Belgium was severely challenged by accusations of bungling a case in which a young girl was kidnapped for sexual purposes and killed.

to fear that their children and employees may be using drugs with dire consequences that only emerge when a crime or accident takes place. (This has in turn led to a market for drug testing.) Drug use may begin by choice, but a major part of the lore of drugs is that addiction follows and makes continued use involuntary and unavoidable. Drugs are also portrayed as irreversible. In much drug education and public service advertising, drugs are portrayed as so irresistibly attractive that a single taste usually leads to lifelong addiction and that users destroy their health and their minds.<sup>20</sup> This picture may be overdrawn but it drives public policy.

Because much of the contemporary moral panic about drugs has been about children (crack babies, addicted students), it is linked to another moral panic that has gathered force in the same years concerning the abuse, and especially the sexual abuse, of children. Beginning in the 1980s a growing sensitivity to persistent child abuse within families has converged with a host of related problems, including missing children, sexually abused children, and especially horrific cases in which children are taken, sexually abused, and killed (Best 1990; Forst and Blomquist 1991; Nathan and Snedeker 1995; Costin, Krager, and Stoesz 1996; Jenkins 1998). While some elements are also found in other societies, the panic about children has been almost exclusively American. Even more than drugs, the physical and sexual abuse of children is thought to lead to irreversible damage. Frightening cases greet us in the newspaper often enough to suggest that such events are becoming more frequent, although statistics fail to confirm the supposed trend. Child deaths classified as homicides (an admittedly imperfect measure) have remained stable at a very low level for the past thirty years (averaging about one thousand cases per year among children under ten in the entire United States) (Gilbert 1995).<sup>21</sup> As with drug abuse, clinical findings of damage are easy to find in a handful of extreme cases. But the scope of the panic and resulting laws has ensnared a far wider range of conduct. Invisibility, unavoidability, and irreversibility take on heightened dimensions with children. They cannot be expected to perceive even visible threats, or make sensible voluntary

<sup>20</sup> The federal government has recently entered into a remarkable relationship with a public service advertising consortium, the Partnership for a Drug Free America, to place high quality and extremely aggressive antidrug ads, largely aimed at parents of children, on prime time television.

<sup>21</sup> Jenkins reports that about nine hundred children under the age of twelve were killed each year between 1980 and 1994 with no upward trend (Jenkins 1998, p. 10).



decisions, and damage to the young psyche or body is assumed to have lasting consequences.

We think these topics have been important not because they contribute to the growth of imprisonment directly (although drugs are a major source of imprisonment), but because as key images in public discourse about crime, they have contributed to the selection of crime as an issue for value-oriented politics. Not only have they captured a share of public attention out of all proportion to their share of the overall crime problem, but they fix the larger moral features of crime. Burglaries and robberies do not easily lend themselves to the metaphors of ritual contamination,<sup>22</sup> but drug trafficking and child abuse carry evocative images of moral depravity. The high rates at which arrestees are found to test positive for drugs helps tie property crime to that contamination. Likewise some of the most widely publicized child murder cases, like that of Polly Klaas, have involved repeat offenders, which helps tie all ex-prisoners to the potential for the most horrendous of violent crimes (Jenkins 1998).

#### *E. Moral Panic or Crime Wave?*

For many observers the key question is whether the historic rise in incarceration should be seen largely as a response to the great crime wave that occurred between 1965 and 1980. Those who think so tend to dismiss discussion of the politics of crime as elitist. Those who disagree, view the politics of crime as a manipulative effort by politicians to accomplish short-term goals with little heed to long-term consequences. We think the explanation for the surge in incarceration rates must address the politics of crime, but most existing explanations do not acknowledge the deeper changes in American political culture that make crime so productive politically. Just as Douglas and Wildavsky (1982) argued that the reality of the threat posed by environmental pollution was both necessary and insufficient to account for its prominence as a mobilizing force in politics during the 1970s, we think the crime threat is both necessary and insufficient to account for the incarceration rise of the 1980s and 1990s.

A great surge of violent crime did take place in the United States between 1967 and 1975, when the number of murders, rapes, robberies, and aggravated assaults reported to the police increased by 91 per-

<sup>22</sup> But see Rock (1986), p. 38, noting the widely circulated rumors in Britain that burglars defecate in the houses they invade, which Rock links to the pollution idea.

cent in only eight years. After a brief interruption, violent crime continued to rise until 1980 before leveling off, dropping in the early 1980s, rising again in the late 1980s, and declining again after 1992 (Boggess and Bound 1993; Currie 1998, p. 22). The total inmate population, which had declined from 211,000 in 1965 to 196,000 in 1970, then rose back to 240,000 in 1975 (Maguire and Pastore 1998). Thereafter, the rates of all index crimes leveled off while the incarceration rate began its spectacular climb into unfamiliar territory.

But the wave's most important effects may have been on our views about government. Garland (1996) argued that the international crime waves of the 1960s and 1970s helped diminish the prestige of national governments all over the industrial world, by calling into question their capacity to maintain social order. The increase of crime rates at a time of increasing government efforts to help the poor undermined many of the traditional arguments for welfare, and helped confirm the view of many conservatives that efforts to help the poor only made things worse by eliminating incentives to self improvement. This is not the place to determine whether the crime wave was caused by expansions in welfare programs or simply coincided with them. The important point is that in addition to the direct links between high rates of crime (especially violent crime) and demands for punitive governmental responses, the crime wave may have indirectly diminished the prestige of welfare-oriented government. It also raised the priority of crime in everyday life and our customary practices (e.g., locking doors, not walking through certain areas) (Garland, n.d.). Even if the crime rate should continue its recent decline and reach new lows, these enduring changes in the priority of crime control in everyday life will probably sustain a continued demand for strict crime control policies.

The average citizen's fear of being victimized by strangers is not unrealistic. According to the National Victimization Survey, one in seventeen males over twelve was victimized by a reportable felony (excluding homicide) in 1994 (Bureau of Justice Statistics 1997b, p. v). Urban dwellers know that there are some neighborhoods where they walk at risk at any time and many more where they cannot walk at night. Nearly half of the respondents to the General Social Survey locate such places within a mile of their homes (Davis and Smith 1994). American victimization rates are not, contrary to popular belief, extraordinary compared with Europe, but violent crime is more prevalent here, and lethal violence extraordinarily so (Zimring and Hawkins 1997; Langan and Farrington 1998). For those who live in affluent

suburbs and gated communities, the personal risks are slight but the fear is no less acute.<sup>23</sup>

The sense of being embattled by crime is partially explainable by the fact that Americans spend a large fraction of their time in the virtual world of television where crime is more ubiquitous, consequential, and violent than in the real world. Television news programs are obsessed with crime. Local news broadcasts routinely feature the local crime of the day, easy to identify and report, sure to attract viewer interest. National broadcast news focuses on celebrity crimes and trials; the O. J. Simpson case dominated the networks for more than a year. Television fiction is equally obsessed. Murder and robbery account for nearly a quarter of all television crimes (Surette 1992). In the virtual world, people in all contexts are potentially violent. Bankers plan murders. Schoolteachers kidnap their pupils. Crimes are serious and well planned. And the perpetrators, when unmasked, are revealed as thoroughly evil.

#### *F. The Dangerous Classes*

Every highly stratified society regards its least favored stratum as a source of disorder and contamination requiring careful management. The greater the social and cultural distance that separates the underprivileged from the main body of society, the more punitive that management is likely to be. The class that most white Americans identify as dangerous consists largely of African Americans and Hispanics (especially Mexican-Americans, and Puerto Ricans), living in largely segregated districts in large metropolitan areas, and characterized by poverty, high unemployment, single-parent families, disorderly schools, and high levels of interpersonal violence. A history of prejudice, combined with a constant display of grim social images through the media, has fostered a sense that members of these communities are uniformly dangerous. Most of the government programs directed toward such communities, including welfare, foster care, school busing, and public housing, are widely resented (Wattenberg 1995; Gilens 1996). But law enforcement and incarceration, which target these communities while identifying them as contaminating, are more favorably regarded by the general public (Wattenberg 1995).

Given this background it is tempting to view the growth of incarcer-

<sup>23</sup> As in Tom Wolfe's 1987 novel *Bonfire of the Vanities*, in which a rich Manhattanite takes a wrong turn off a highway into a dangerous neighborhood and is hopelessly entangled in crime.

ation in the 1980s and 1990s as a product of America's complex class and racial politics. While the classic forms of animus against African Americans and other minorities show signs of abating, fear and loathing of the "underclass" in the inner cities seems to have hardened (Schuman, Steeh, and Bobo 1985; Jaynes and Williams 1989; Jackman 1994; Hochschild 1995; McDaniel 1995; Gilens 1996). The period of rapid growth in incarceration rates has seen a significant increase in the proportion of minorities in the inmate population (Tonry 1995), especially among drug offenders, the fastest growing segment of that population (Blumstein and Beck, in this volume).

Among criminological observers there have been two basic explanatory narratives. One takes the predominance of African Americans and Hispanics in the correctional population as a direct consequence of their disproportionate criminal activity. Research in the early 1980s showed that as much as 80 percent of the racial discrepancies in imprisonment rates could be accounted for by the racial distribution of perpetrators in the National Victimization Surveys.<sup>24</sup> In the 1994 survey, for example, over 50 percent of respondents who had been robbed identified their assailant or assailants as African American (Maguire and Pastore 1997, tables 3.28, 3.30). Additional support comes from recent studies of street gang activity showing that street gangs have spread from the major metropolitan centers to many smaller cities, that they routinely engage in criminal activities, and that they are predominantly African American (Klein 1995; Decker and Van Winkle 1996). Moreover, studies of felony sentences seem to show that racial disparity in sentencing is minimal and disappearing (Blumstein 1982; Klein, Turner, and Petersilia 1988). This narrative does not propose any particular explanation for the concentration of crimes likely to lead to imprisonment among African Americans and other minorities, but it treats the racial composition of the prison population as more or less in balance with the pattern of offending.

The other approach emphasizes enduring sources of discrimination in the criminal justice system that promote the incarceration of African Americans and Hispanics in several ways. Although the public fears vi-

<sup>24</sup> Perhaps the most often cited piece of research is Blumstein (1982). Blumstein was careful to note that significance of the unexplained 20 percent of the variation. His more recent research suggests that the strong association between imprisonment rates and victim reports had weakened slightly in the late 1980s and early 1990s, largely as a result of the increasing role of drug offenses in prison admissions (Blumstein 1993).

olent and consequential criminal incidents, of the kind that are repeated endlessly in the virtual world of television, the great majority of criminal convictions are for essentially trivial offenses (Miller 1996, p. 19). Despite efforts to limit discretion in the interest of fighting discrimination (Walker 1993), the broad inventory of minor offenses available to the police leaves much discretion in place. Given the undeniable history of discriminatory application of the criminal law to minorities, it is not implausible that some police continue to use arrests against those elements of the population whom they dislike and fear, and for whom little public outcry can be expected.<sup>25</sup> Even though such trivial offenses rarely lead directly to prison, they become part of an offender's record and raise the odds that subsequent contacts with the police or the courts will lead to harsher treatment. An arrest record is relevant to probable-cause determinations for police searches and seizures. Prior convictions for petty offenses can tip sentencing decisions from probation to prison. In the aggregate and over time, a systematic effect of subjecting African Americans to greater scrutiny for minor offenses will produce effects in the imprisonment rates (although how much of the racial disproportion they account for would be difficult to estimate).

It is undeniable that some white Americans were pleased to see the benefits of the civil rights movement and affirmative action partly canceled by the rise in the incarceration of African Americans, but there is no evidence that such bigotry drives the trend.<sup>26</sup> We think the rise in incarceration is better understood as the product of forces independent of racism but which have interacted with America's unfinished agenda of racial equality. Indeed, it is possible to view the increased demonization of criminals as a reflection of the decline of classic racial animus. For much of American history it was taken for granted that

<sup>25</sup> The Supreme Court has declined in recent years to increase monitoring of potentially discriminatory discretion by police, see *Whren v. United States*, 116 S.Ct. 1769 (1996) (refusing to question the legitimacy of pretextual stops as long as the officer was aware of facts sufficient to justify a traffic stop); *United States v. Armstrong*, 517 U.S. 456 (1996) (setting high initial showing for defense to make a selective prosecution claim against the prosecution).

<sup>26</sup> Some scholars have found an association between punitive attitudes and racial discrimination (Stinchcombe et al. 1980), but that does not mean punitive attitudes are necessarily or commonly proxies for racism. Likewise, there is evidence that crime as a political issue was promoted aggressively by politicians from the South seeking to expand their political base for resistance to the civil rights movement (Beckett 1997). But neither of these facts really proves that the dynamics of American racial formation provide the key impetus to the incarceration explosion.

the state should govern for the benefit of white Christian men and their legitimate families. The criminal law was always part of that sanctioning system, and until the threshold of our era, it routinely punished miscegenation and illegitimacy while protecting male violence in the home. One of the distinctive changes of recent decades has been the divorce of government from this implicit racial communitarianism. Driven by the courts and by elite public opinion, the same government that formerly supported white and male domination now vigorously opposes gender and ethnic discrimination. In this climate, the traditional moral stigma attached to crime has become one of the few areas where the state can openly signal its sympathy with majoritarian moral values. As Gaubatz (1995) noted in her study of popular views of crime, criminals are the only remaining minority that it is acceptable to hate.

But while we doubt racism has driven the rise in incarceration, we acknowledge that the rise of punitive governance cannot be separated from popular racial associations with crime and punishment (Mendelberg 1997). The delegitimation of welfare strategies, which we view as critical to the priority of punishment, is rooted in part in racial assumptions about the beneficiaries of government social programs (Gilens 1996). But the priority of punishment also derives from the reconfiguration of politics around values issues, a shift that seems to have no direct link to our history of racism. Indeed the rise of identity politics in the civil rights community exemplifies this reconfiguration.

If race does not drive the rise of incarceration, the effects of this trend on minorities is one of its most disturbing implications. The large number of African American adult males either confined or disadvantaged in the labor market by being ex-prisoners means that a large proportion of African-American women must go without husbands and many who do marry cannot expect much financial or moral support. This is having drastic effects on family life in inner-city African-American communities. Some scholars even suggest that the capacity of these communities to suppress crime by informal means has been undermined by the removal of so many actors from the scene (Meares 1998). Even without intentional harm, the racial consequences of these policies are too serious to ignore. Indeed, if these consequences are ignored after becoming apparent they may become, in some sense, retroactively intentional or at least a form of "malign neglect" (Tonry 1995). A recent and glaring example was in 1995 when Congress rejected the U.S. Sentencing Commission's recommendation

on diminishing the racially sensitive disparity between punishments for possessing crack and possessing powder cocaine.

### III. The War on Drugs

In the preceding section we examined the intensification of public demands for punitive justice. Such demands always exist in modern democracies, but in the United States in the past two decades they have reached a rare peak, observable in the public discourse on crime, in the resources allocated to building and staffing prisons, and in the severity of criminal sanctions. American society in the late twentieth century has developed a political culture in which crime occupies a central place, but that political culture does not provide a complete account of the unprecedented rise in incarceration. As Zimring and Hawkins point out (1991, p. 126), there is no necessary relationship between popular political mobilization around law and order and the accumulation of people in prison. The country has seen similar episodes before without a sustained growth in incarceration rates. In the early 1920s, public alarm over radical immigrants and Prohibition-related violence combined with the increase in automobiles and personal consumption to drive an earlier incarceration boom (Walker 1998, pp. 157–58). Imprisonment rates rose from 79 per 100,000 residents in 1925 to a peak of 110 in 1931 (see fig. 1). But the growth of the prison rate from trough to peak represented only a 40 percent increase. Although Prohibition ended in the early 1930s, a second peak occurred later in the decade (Walker 1998, pp. 157–58). The second panic was fed by the Depression and well-publicized crimes such as the Lindbergh kidnapping, which intensified federal efforts in crime control (Friedman 1993, pp. 266–67). After peaking at 137 in 1939, the incarceration rate declined and remained low until the beginning of the current rise. The 1939 rate was not matched until 1980 (fig. 1).

For political mobilization around law and order to produce a sustained increase in imprisonment, other conditions must be present. A key condition is a large pool of offenders available to be imprisoned. America's crime surge in the late 1960s increased the supply of burglars, robbers, and other serious felons, and sentencing changes in the 1980s led to a much greater portion of those convicted receiving imprisonment than before (Blumstein and Beck, in this volume). But even a dramatic shift in the punitiveness toward ordinary felons could not have quadrupled the prison population. The large-scale imprisonment

of drug offenders has become a major factor in the rise in incarceration (Donziger 1996; Miller 1996; Blumstein and Beck, in this volume). The expansion of criminal sanctions for drug crimes began in the 1970s but picked up speed after President Reagan's election in 1980. The punitive response to drugs has been so potent that drug trafficking can lead to longer prison sentences than for homicide. More importantly, the rise of a large retail drug sales force in the 1980s and 1990s has furnished a nearly unlimited pool of offenders.

#### *A. The Economic Base*

None of the index crimes is especially lucrative. Murder and rape seldom pay. The average monetary yield of robberies and burglaries is very low—much lower than average losses to victims (Gottfredson and Hirschi 1990, pp. 25–31). The maintenance of a large criminal population requires a better resource base than street crime. Prohibition, of course, assured a generous cash flow, but only for a few years. Gambling—especially the numbers game and illegal bookmaking—were the main sources of underworld income until driven out of business by state lotteries, Indian casinos, and off-track betting. Meanwhile, prostitution ceased to generate much protection income. Extortion still thrives in some localities but is highly vulnerable to energetic prosecution. Drug smuggling and trafficking are the only activities capable of providing a solid economic base for a large criminal population under current conditions. The initial cost of goods is low and law enforcement efforts sustain high retail prices and guarantee extraordinary profit margins (Reuter and Kleiman 1986).

Prior to 1980, the relatively small market for hard drugs and the ease with which marijuana could be domestically produced limited the scale of drug enterprises. The introduction of crack cocaine in the mid-1980s changed all that. It created a market far larger than those for previously available drugs (including heroin in the 1960s and 1970s). It was retailed more openly and on a larger scale than other drugs. Crack created large numbers of job openings for low-paid retail sellers and assistants at a time when youth unemployment was high in the inner cities. Although such work is less lucrative than is commonly believed (Reuter, MacCoun, and Murphy 1990), the paucity of other alternatives, and the relative social benefits compared with other work in the low end of the service sector (McDonalds, Burger King) produced an apparently inexhaustible supply of new recruits to replace those imprisoned or killed. The drug economy has spillover effects,



like the popularity of being armed<sup>27</sup> that may independently raise the odds of imprisonment.

The economic base provided by drug trafficking has enabled street gangs—almost exclusively African American except in a few cities—to flourish as never before, to expand in size and diversify their activities, and to spread from the major urban centers to smaller cities and towns (Klein 1995; Decker and Van Winkle 1996). Few of them seem to specialize in drug trafficking but most are somewhat involved. Their recreational, protective, and combative activities typically involve the versatile participation of gang members, individually and in groups, in drug transactions and in street crimes ranging from vandalism to murder.

Under our criminal justice system the penalty for a criminal offense is jointly determined by the severity of the offense, as defined by statute, and the criminal history of the defendant. First offenders are treated rather leniently; even for relatively serious crimes, many first offenders are sentenced to probation rather than imprisonment. Subsequent convictions bring sentences of increasing severity. Sometimes, under the new regime of mandatory penalties, life sentences without possibility of parole are handed down for such offenses as shoplifting and drug possession.

Thus in the early stages of a criminal career, the system offers some possibility of escape. Although the median age of felony perpetrators is about nineteen, the median age of first prison commitment is about twenty-five. But once incarcerated, the individual's opportunities for education, employment, military service, political participation, or any other lawful activity, are so drastically curtailed that further convictions are the normal expectation. Incarceration fixes the stamp of a criminal career (Freeman 1996). Men who complete a prison term have a better than two-thirds chance of being arrested for a new felony within four years (Conklin 1998, pp. 516–17). Those released on probation and parole have a better than even chance of being returned to prison for violations of probation or parole (more on that shortly). And those incarcerated without a drug habit are likely to acquire one in

<sup>27</sup> Blumstein has argued that this had important ripple effects among young persons not directly involved in drug trafficking who nonetheless have armed themselves to keep up with their peers who are (Blumstein 1996). Between 1985 and 1992, the portion of prison admissions from weapons offenses went from 1.8 percent of state prison admissions to 2.4 percent, and from 4.9 percent of federal prison admissions, to 10.2 percent (Bureau of Justice Statistics 1995).

confinement. The spoiling of identity is a gradual process but in most cases inexorable. It accounts for the extraordinary proportion of the African-American male population that has become criminalized since 1980.

### *B. Police Prosperity*

Economically disadvantaged minority youth are not the only group attracted by drug markets: they alter the incentives and practices of law enforcement agencies as well. Because inner-city cocaine markets are often public and visible, and because mere possession has become a serious offense, police and other agents have had a far easier time making arrests than in any other law enforcement sector. In effect, the police in any large city in the United States can make as many drug arrests on any given day as departmental resources will allow. That is not possible for crimes like robbery and burglary.

Since arrests have historically been the most valued marker of police success, the opportunities provided by narcotics may already distort police priorities. But the allocation of large federal bloc grants to local drug efforts and the practice of asset forfeiture have provided law enforcement agencies and even individual officers a direct financial stake in drug arrests unmatched by any other kind of crime threat (Blumenson and Nilsen 1998, p. 40). On the darker side, their intervention in a market where all transactions are in cash and huge amounts of cash are passed from hand to hand, provides opportunities for corrupt enrichment unlike anything seen before. Few law enforcement agencies—federal, state, or local—have been untainted by drug money.

The drug economy and the war on drugs have produced a kind of substitute economy for the populations most affected by the shrinkage of the low-skilled industrial labor market in the United States. Both the drug trade and law enforcement (and also correctional employment) offer job opportunities to those without college educations (or in the case of the drug trade, without high school educations) with better financial compensation than other low-skilled employment can offer. Moreover, these jobs offer prestige (in their communities), excitement, and a space for the kind of aggressive masculinity that was tolerated in the old industrial jobs but is discouraged in the service economy.<sup>28</sup>

<sup>28</sup> Feminist theorists might find here an important way in which the society continues to subsidize male identities.

#### IV. The Increasing Reflexivity of the U.S. Penal System

The war on drugs has produced a new and seemingly endless supply of potential prisoners. But the rapidity with which the prison population has grown suggests that other factors are at work within the criminal justice system itself. The formal institutional structure of criminal justice looks much the same as it did at the end of the 1920s (police, courts, corrections, etc.), but fundamental changes in organization and program have taken place, most of them since 1970 (Cohen 1995; Feeley and Simon 1992; Walker 1993). In 1960, most of the criminal justice system at the state and local levels was organized in a pre-bureaucratic manner with highly personalistic executives, few rules, and many forms of exchange with the environment. By the late 1980s, this had changed. In many parts of the system, agencies have become fully modernized.

Sociologists such as Luhman (1985), Giddens (1991), and Beck (1992) have recently focused attention on reflexivity as a central feature of institutional practice in advanced liberal and industrial societies like the United States and Western Europe. Reflexivity describes the tendency of individuals, institutions, and whole societies to be mobilized by the collateral consequences of their own purposeful actions. Thus Beck (1992) argues that the struggle over the distribution of wealth, so central to the politics of modernizing societies, is being joined by the struggle over the distribution of the risks created by wealth-producing activities. Advanced societies find their politics increasingly focused on threats to social stability arising from their own political and economic practices, including environmental degradation, welfare dependency, and the dissolution of families. As Beck notes: "Modernization is becoming *reflexive*; it is becoming its own theme. Questions of development and employment of technologies (in the realms of nature, society and the personality) are being eclipsed by questions of the political and economic 'management' of the risks of actually or potentially utilized technologies—discovering, administering, acknowledging, avoiding or concealing such hazards with respect to specially defined horizons of relevance. The promise of security grows with the risks and destruction and must be reaffirmed over and over again to an alert and critical public through cosmetic or real interventions in the techno-economic development" (p. 21).

The primary social institutions put in place from the middle of the nineteenth century to respond to the problems of industrialization have themselves become sources of threat in the late twentieth century.

Mass education, welfare, social insurance, liberal liability rules, and economic regulation—the triumphs of progressive government—are now seen as the source of problems like the underclass and declining personal responsibility. The prison was one of the first institutions consciously designed to cope with the problems of what would come to be called modernization (Rothman 1972). From the start its reflexive potential was already visible. As the penitentiary developed, it created a shadow population of ex-prisoners, those “recidivists” who have haunted us for more than a century. The visibility of failure engendered numerous efforts at reform. From early on, the prison has been proposed as the solution to the problem it seems to create (Foucault 1977). But two developments in the twentieth century have accentuated this. First, a series of reforms aimed at improving the fairness of the system has operated to make the criminal justice system more efficient with the result that it can be far more responsive to pressures for growth than it might have been in the past. Second, the creation of large populations under correctional supervision in the community provides a supply of potential prisoners who can be handled faster and less expensively than in the ordinary criminal process.

#### *A. Taming the System and Growing It*

Using terms such as “the new penology” (Feeley and Simon 1992, 1994; Simon and Feeley 1995) and “managerialism” (Bottoms 1994), some observers claim that criminal justice institutions, especially the penal system, are now less focused on transforming criminal subjects and more focused on managing a seemingly permanent criminal population. Moving away from the nineteenth- and twentieth-century aspirations to individualization, normalization, and community benefits, contemporary penal policy is oriented to efficient control of the populations that flow through its institutions. These institutions are becoming more reflexive in the sense that they respond more and more to their own initiatives.

One sign of this transformation is visible in the heightened rationality of criminal justice. In his aptly titled book *Taming the System*, Walker (1993) traces a number of reforms at different levels of the criminal justice system aimed at greater control of discretion. These reforms have increased the inherent reflexivity of the penal enterprise both by making it easier to keep larger numbers of people under correctional supervision, and by intensifying the accountability of decision makers for the conduct of this enlarged population.

Law contributes to reflexivity generally (Luhman 1985) by creating feedback loops between the operation of an institution and its responses. This has been a major factor in the criminal justice system. For example, the rise of successful civil suits against police for violation of constitutional rights has encouraged the rise of what some experts call "passive policing," whereby more and more management attention is devoted to monitoring police action and discouraging conduct likely to provoke litigation (Langan and Farrington 1998, p. 11). Law has played a crucial role in bringing about rationalization in each segment of criminal justice since the 1960s.

The legal initiatives to reform state criminal justice agencies since the 1960s are one of the great success stories of twentieth-century government (Walker 1993; for a contrary view see Rosenberg 1991). Ironically, the chief initiatives that have increased the reflexivity of the criminal justice system have come from both liberals and conservatives (Walker 1993). Most of them have been pursued because of substantive issues that had relatively little to do with the overall scale or severity of punishment.

### *B. Bail Reform*

Much of the emphasis today is on the use of administrative detention for explicit crime prevention purposes. In 1992, nearly a third of federal defendants were subjected to preventive detention under the Bail Reform Act of 1984 (Maguire and Pastore 1995, p. 442). But even so, detention levels are lower than they were a generation ago. Cash bail was a crucial choke point in the old system. Reformers at the time complained that it resulted in large numbers of indigent arrestees being held prior to trial simply because of their inability to raise the 5 or 10 percent cash payment required for commercial bail in those days (President's Commission on Law Enforcement and Administration of Justice 1967, pp. 130–31). In 1962, more than half of all arrestees were not released on bail. In many states, more than 60 percent of arrestees were not released (the median was 56 percent) (Silverstein 1965, pp. 7–8). In 1992, about two-thirds of all state court defendants in the seventy-five largest counties in the United States were released prior to the disposition of their cases, most of them on a noncash basis (Bureau of Justice Statistics 1994, p. 2). While we cannot calculate the precise effect without far more information, releasing a larger proportion of offenders pretrial allows the system to extend the time permitted to resolve the case and thus keep more cases in the queue toward convic-

tion.<sup>29</sup> Not all of these cases result in prison time, but they often increase the chances of going to prison next time.

### *C. Right to Counsel*

The right to counsel has also enlarged the managerial capacity of the criminal justice system. Typically it is assumed that the right to counsel raises the odds of dismissal or acquittal if charged at trial rather than a guilty plea or conviction without counsel. This does occur. But overall capacity of the system to process cases efficiently may increase with more adequate representation.<sup>30</sup> Judges and prosecutors have long recognized that the unrepresented defendant can prove extremely difficult to manage. Public defenders or court-appointed counsel are crucial members of the court work group. Their organizational incentives are to aid in the goal of smoothly processing cases—incen- tives that sometimes conflict with a defense counsel's ethical duties of representation (Blumberg 1967).

In 1962, fewer than half of defendants in state courts had assigned counsel or public defenders (the median was 43 percent) (Silverstein 1965, p. 8). In 1992, about 80 percent of the defendants in the seventy-five largest counties in the United States were so represented (Smith and DeFrances 1996, p. 1). It is highly likely that the extension of counsel for the indigent has increased the chances that those wrongly accused will have their charges dismissed or be acquitted. It is probably also true, however, that many of those factually guilty are moved through to conviction more rapidly and reliably.

### *D. Administrative Due Process*

The due process revolution<sup>31</sup> has also been counted among the legal changes that made crime control less effective after the 1960s (Wilson 1983). However, it has almost surely increased the tendency of the system to establish formal custody over individuals and thus subject them

<sup>29</sup> Offenders denied bail have the recourse of demanding a speedy trial. While there are disadvantages for the defense in moving quickly to trial, too many such speedy trials would clearly strain the system or require major investment in courts and court personnel. It is noteworthy that spending on courts increased 177 percent between 1982 and 1993 but spending on corrections increased 253 percent, suggesting that the rise in incarceration has been carried out in a manner which has achieved economies in the use of courts (Maguire and Pastore 1998, table 1.2).

<sup>30</sup> Especially when one considers that the sorts of charges flushed out by the involvement of counsel will be weak cases and that there is a surplus of cases to charge.

<sup>31</sup> The expansion of procedural rights against police searches and seizures and procedural due process generally, as in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

to further monitoring and potential punishment. Before the 1970s, both police and correctional agents used their arrest powers combined with the absence of any pressure to file charges quickly to administer short-term jail time as a quasi-informal punishment. Due process rights have made that tactic more difficult to use. Incarceration, even for relatively short periods, triggers the application of procedural rights that require the government to make a definitive decision whether to process the case forward. Police and correctional agents are forced to choose earlier whether or not to seek a formal sanction against an accused. This may in some cases result in a decision against arrest, but we suspect that far more often it results in a decision to move forward (Simon 1993, pp. 119–22). In short, due process raises the costs of informal sanctioning. In a system that is prepared to respond even to relatively minor violations with incarceration, the cost of formality is more incarceration.

Due process reforms have made the criminal justice system better and fairer in many respects. As a collateral (and almost certainly unintentional) result, they have also made the system more responsive to political pressure and flexible. This does not determine the direction of change. Under different political and social conditions, that flexibility might be used to reduce the prison population. One might predict that greater systemic rationality would make the system more stable, since the greater degree of administrative control would support management's interest in predictability and smooth functioning. But here reflexivity works at cross-purposes with other aspects of rationalization. The measures that allow the system to process its criminal subjects with greater efficiency and precision also compel it to confront regular evidence of its failures.<sup>32</sup> This is exacerbated in the American context by a criminal justice system that has always been highly vulnerable to populist pressures. Indeed, many of the recent administrative reforms have shifted discretion toward those agents of the system most sensitive to populist pressures, especially prosecutors and legislators.

<sup>32</sup> This was always a feature of parole systems but less critically so than when administrative procedures were less rigorous and the insulation from populist political pressures was thicker than it is today. For example, in an era when it was difficult to track parolees after they left prison it was easy to count as successes those who did not show up again in court. In contrast, contemporary parole, with far greater capacities to track its subjects, is far better at discovering violations. The taming of the system has in large part been a story of increasing internal auditing capacity. These failures demand responses and responses that may become the subject of populist political concern. This encourages officials to respond (often with imprisonment). Thus the paradox that the better managed these systems are, the more they seem to fail.

### *E. The Transformation of Parole and Probation into Imprisonment Systems*

Perhaps the most important source of reflexivity in the criminal justice system is the changing function of parole and probation (Messinger et al. 1985; Simon 1993). While receiving far less public attention, probation and parole populations have grown along with the prison population. Between 1985 and 1995, the prison population increased by 121 percent, while probationers increased by 57 percent, and parolees by 133 percent (Bureau of Justice Statistics 1997a, p. 5). At one time, probation and parole operated as alternatives to imprisonment by providing correctional supervision in the community. Since the 1980s, however, parole and probation have become an increasing source of prison admissions. Rather than operate as alternatives to, or exits from, the prison system, both are becoming alternative routes to prison (Simon 1993, pp. 205–29).

The development of parole in the early twentieth century greatly increased the reflexivity of the prison. Parole gave prison officials a means of controlling the size of the inmate population when dozens of local judges did the sentencing. In a study of California prisons during the twentieth century, Messinger (1969) found a constant struggle by the department of corrections to increase its influence over the parole release function as a way of handling population stress. Parole revocation, the power to return parolees back to prison for committing new crimes or for violating the rules of parole, provided a less visible device for managing prison populations.<sup>33</sup> But until the 1980s, the contribution of parole revocations to prison admissions was modest compared to new commitments coming from the courts.<sup>34</sup>

### *F. Community Supervision as Source of Prison Admissions*

That changed in the 1980s. The function of channeling people to prison increasingly took precedence over the provision of rehabilitative support. Parole and probation as sources of prison admissions have become almost as important as the court system itself. In the Bureau of

<sup>33</sup> In a series of fascinating papers written in the late 1960s, department criminologists Robison and Takagi argued that parole revocation rates were largely a function of variation among parole agents and units, and thus dominated by parole organization (part of the department of corrections; see Robison and Takagi 1968; Robison 1969).

<sup>34</sup> Except for brief surges in the mid 1960s and mid 1970s, the rate of parolees returning to prison in California (by either court action or administrative action) remained under 20 percent. In the 1980s and 1990s, it climbed to above 40 percent (Simon 1993, pp. 206–9).



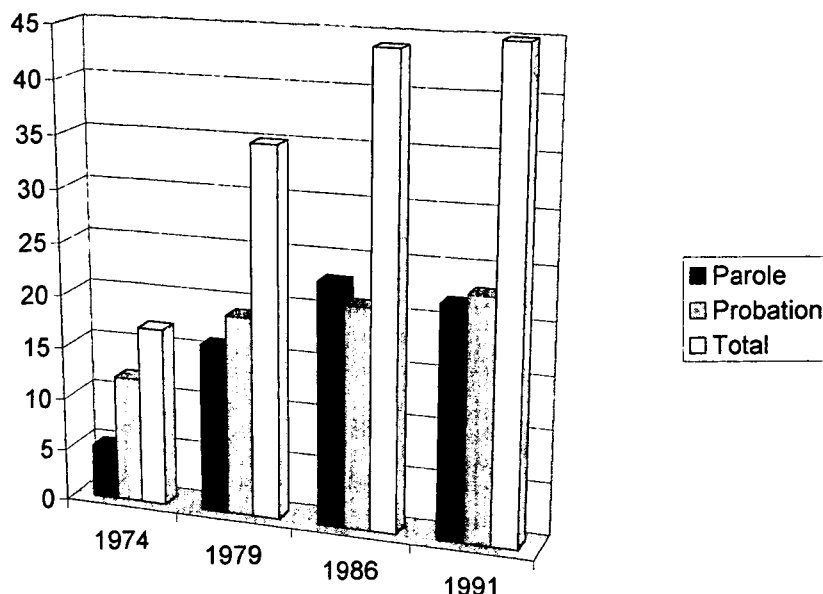


FIG. 4.—Parolees and probationers in the state prison surveys. Source: Cohen (1995)

Justice Statistics' 1991 survey of state prison inmates (Beck et al. 1993), 45 percent of prisoners had been on parole or probation before their current incarceration. Figure 4 compares the 1991 figures to those calculated from similar surveys in 1974, 1979, and 1986 (Cohen 1995). The number of prisoners who were previously on parole or probation has nearly tripled. Parole's contribution to the prison population has grown especially fast. In 1974, only 5 percent of surveyed prisoners had been on parole prior to their current incarceration; by 1991, the figure was 22 percent, more than four times the earlier level. Probation violators were 12 percent of the prison population in 1974 and 20 percent in 1991.

As figure 5 shows, persons on parole or conditional release (not including probation) and returned to prison for violating that status, have accounted for an increasing proportion of prison admissions throughout the century, but especially since the early 1980s (Cohen 1995, p. 4, app. 2). The Bureau of Justice Statistics found that from 1975 to 1991 the number of parole or probation violators entering prison grew at twice the rate of ordinary admissions (Cohen 1995, p. 1).

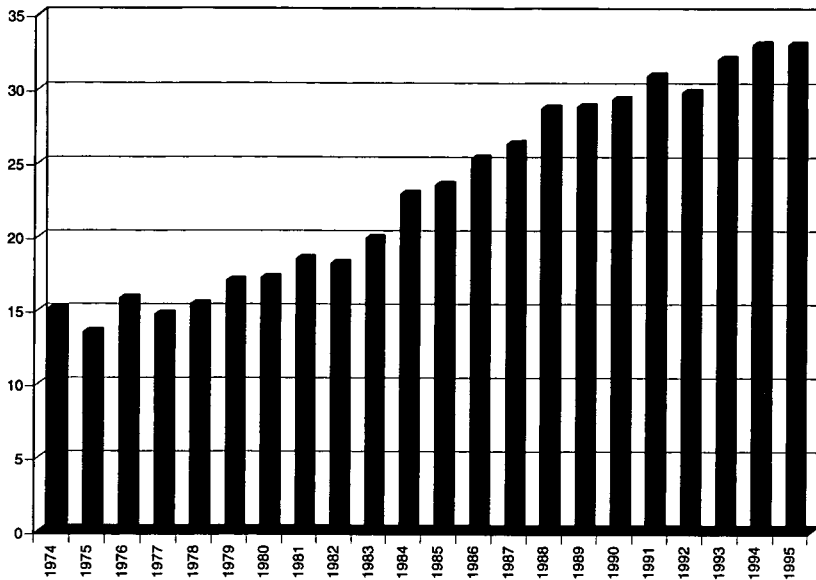


FIG. 5.—Parole violators in state prison admissions. Sources: Bureau of Justice Statistics (1997a); Cohen (1995), app. 2.

Figure 6 shows that this story is more complicated when states are considered individually.<sup>35</sup> For all states, the percentage of parolees among those admitted to prison climbed from 12 percent in 1974, to 24 percent in 1986, to 33 percent in 1995.<sup>36</sup> In California over the same period, parolees went from 19 percent, to 49 percent, to 60 percent of prison admissions. Among the five largest state parole populations, only New York had a smaller percentage of parolees among prison admissions in 1995 than in 1974. In Pennsylvania and Texas the rise has been especially substantial.

### G. Shortening the Feedback Loop

Parole and probation make the system much more reflexive because they shorten the feedback loop between prison and the community.

<sup>35</sup> Surveys of prison population tend to understate the role of parole and probation in prison admissions since these returnees usually have shorter sentences and are thus less likely to be present than offenders with convictions for violent felonies.

<sup>36</sup> On our reading of the Bureau of Justice Statistics data, this does not include probationers who are included among the court commitments. We have not found a way to separate them out and add them to the parole population but we estimate that it would bring admissions closer to 50 percent.

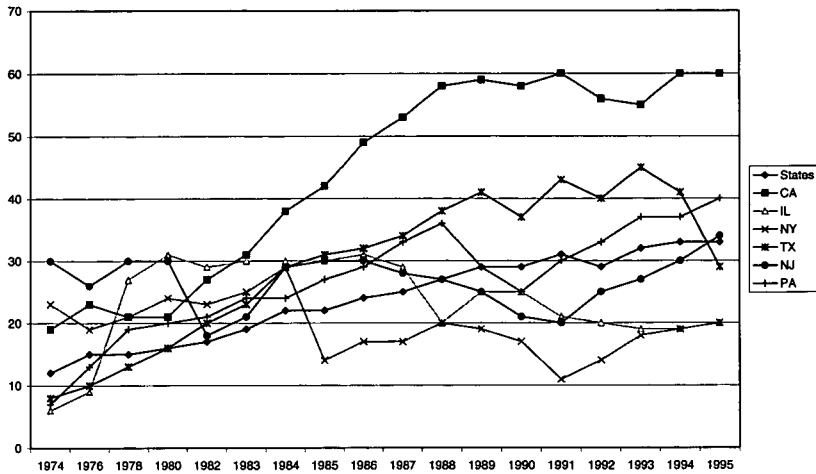


Fig. 6.—Parole violators as a percentage of prison admissions. Sources: Maguire and Flanagan (1991); Maguire, Pastore, and Flanagan (1993); Simon (1993); Maguire and Pastore (1998).

First, parole and probation make it easier for law enforcement and prosecutors to discover offenses and convict offenders. Second, administrative revocation permits the return of the subject to prison more easily than could be done through the courts. Third, parole and probation agents can also seek return for technical violations of the conditions of release for which there are no sanctions in criminal law. All this means that the defendant on parole or probation can be sent to prison more quickly and easily than the defendant with no criminal justice status. In a study of felony defendants in the seventy-five largest counties, just over one-third of felony defendants were detained in custody prior to final disposition of their case: 68 percent of parolees, and 56 percent of those on probation were detained (Bureau of Justice Statistics 1994, p. 6). Pretrial release has long been seen as providing significant advantages to those defendants who receive it. Only 45 percent of felony defendants who obtained pretrial release were convicted in contrast to 70 percent of those denied releases (Bureau of Justice Statistics 1994, p. 13). Nineteen percent of felony defendants who had been given pretrial release received a prison sentence when convicted, but more than twice as many detained defendants were imprisoned (Bureau of Justice Statistics 1994, p. 13).

Indeed, if a defendant violates parole or probation, return to prison

may be by revocation, that is, an administrative proceeding far less protective of defendants than the adjudicatory route. Parole and probation also have a considerable influence over the discovery of violations. By routinely administering drug tests, and by being able to ignore the Fourth Amendment limitations on searches and seizures, parole and probation officers have advantages in law enforcement that are not available to police.<sup>37</sup> Thus parole and probation practices influence the level of criminality the system confronts. Not only can the administrative procedures available to parole and probation officers accelerate the speed of imprisonment, but also these low-friction procedures can feed the perception that criminality is spiraling out of control.

None of this is very surprising. Parole and probation were justified historically as a means of effective surveillance over risky former offenders, with the object of returning to prison those posing a threat to the community. But historically these powers were coupled with strong internal pressures to work with offenders in the community and to reserve reimprisonment for those posing a serious threat to the community (Simon 1993). Indeed, the Supreme Court in *Morrissey v. Brewer* (408 U.S. 471 [1972]) limited the application of full adversary rights to parolees and probationers facing revocation on the grounds that parole and probation authorities, unlike prosecutors, have strong incentives to exercise their discretion for the benefit of their subjects. That has changed dramatically in the 1980s and 1990s.

As the prison population grows, it is probably inevitable that a larger proportion of the total pool of criminals will be on parole or probation. Thus even if there were no change in the rate at which parole and probation systems returned their subjects to prison, we would expect the proportion of prison admissions coming from parole and probation to go up. There is reason, however, to believe that policies (often informal) have changed to make return to prison even more likely. Reflecting the internal narratives of parole agencies, and the growing political pressure for imprisonment, revocation rates have gone up nationally and in many of the largest states since the 1970s. Although we have not developed better tools for predicting future dangerous criminality, with rehabilitation discredited, and strong political support for reimprisonment, parole and probation agents tend to return offenders to prison for less serious activity than in the past.

<sup>37</sup> The Supreme Court will soon decide whether the exclusionary rule applies in parole or probation revocation hearings. See *Pennsylvania Board of Probation and Parole v. Scott*, no. 97-581, 66, *United States Law Week* 3283.

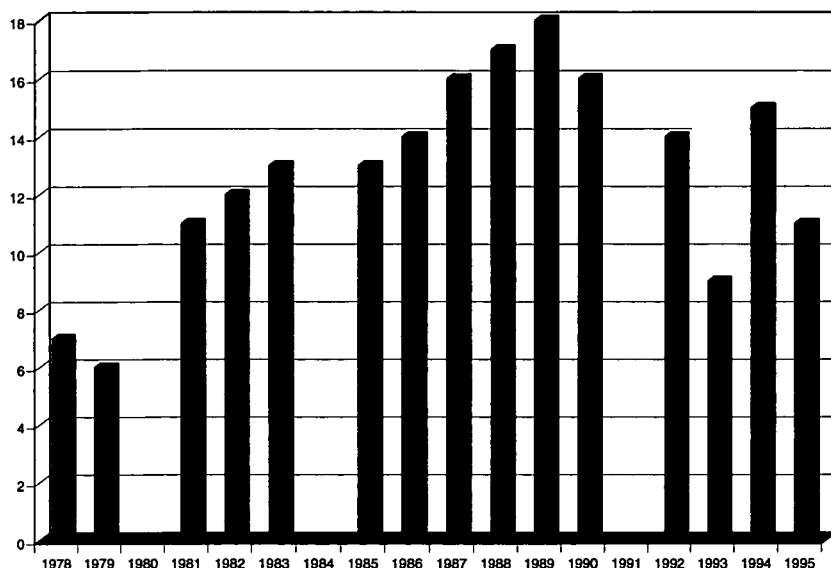


FIG. 7.—Parolees returned to state prison as a percentage of all adults on parole. Sources: *Sourcebook of Criminal Justice Statistics* (1990–97); Simon (1993).

Figure 7 shows the total number of parolees or conditional release violators returned to prison as a percentage of all persons on parole or conditional release in that year.<sup>38</sup> State parole and conditional release systems have increased the rate at which they return their subjects to prison from 7 percent in 1978 to 11 percent in 1995. The rate went as high as 18 percent in the late 1980s. Some states have experienced particularly strong trends. California, with the nation's largest parole system, doubled its revocation rate during the 1980s.

Returns to prison are at their most reflexive when administrative procedures are used to accomplish imprisonment. These procedures carry no automatic right to counsel, minimal confrontation rights, and a lower standard of proof. In California, the rate of parolees returning through new court commitments and through administrative revocation was about even during the 1970s. By the mid 1980s, more than

<sup>38</sup> This is a conservative calculation since it defines the relevant parole population as each person on parole on January 1 of each year, plus all persons added to parole during the rest of the calendar year. Of the 368,746 adults leaving state parole or community release status in 1995, nearly 42 percent were being reincarcerated (Bureau of Justice Statistics 1997a, table 6.5).

three times as many parolees were returning through revocation (Simon 1993, p. 206, figure based on Messinger et al. 1985).

During the 1980s, there seems to have been an increasing tendency for parole and probation systems to return their subjects to prison and to do so using more expedited administrative procedures. Assessment of the net effect depends in part on whether parole and probation revocation is simply substituting for the more cumbersome process of convicting the same person of a new offense. To the degree that parole and probation systems are generating violations that return people to prison who would not be subject to imprisonment for any new crime, the reflexivity of the system is compounded considerably.

The California experience suggests that in the course of the 1980s a growing number of revocations reflected both new crimes that might have resulted in imprisonment even without the administrative process and violations that were less likely to be prosecuted or not even cognizable under the regular criminal process. Thus Simon (1993, p. 246) found that the percentage of parolees returned to prison by revocation for violence more than doubled from 2.4 in 1971–72 to 5.4 in 1987, and property offenses quintupled from one percent to 5.4 percent. Drug offenses, likewise, increased from 2.7 percent to 7.2 percent. These are acts that quite likely would have resulted in imprisonment for a recently released prisoner even if no parole system existed. But the single largest category of violations in 1987 was “technical” violations, which were mainly violations of the conditions of parole that do not correspond to the other criminal categories (violence, property, and drugs). In 1971–72, a negligible .04 percent of parolees were returned to prison for technical violations. In 1987, nearly 10 percent were returned to prison for technical violations.

The 1991 Bureau of Justice Statistics survey of state inmates provides support for the proposition that technical violations of parole and probation have become a major route to prison.<sup>39</sup> Overall, 10.5 percent of all inmates in 1991 were there for violating a technical condition of parole and probation without having been convicted of a new crime (Cohen 1995, p. 1). Of inmates who had been on parole or probation, more than three-quarters were convicted of a new crime while 25 percent of probation violators and 20 percent of parole violators were

<sup>39</sup> The overall tone of Cohen (1995) is very much to the contrary. The publication seeks to emphasize that most parole and probation violators are there for a new and often serious crime. That is correct but the fact that as many as 10 percent of all prison inmates are there for technical violations of parole and probation is substantial.

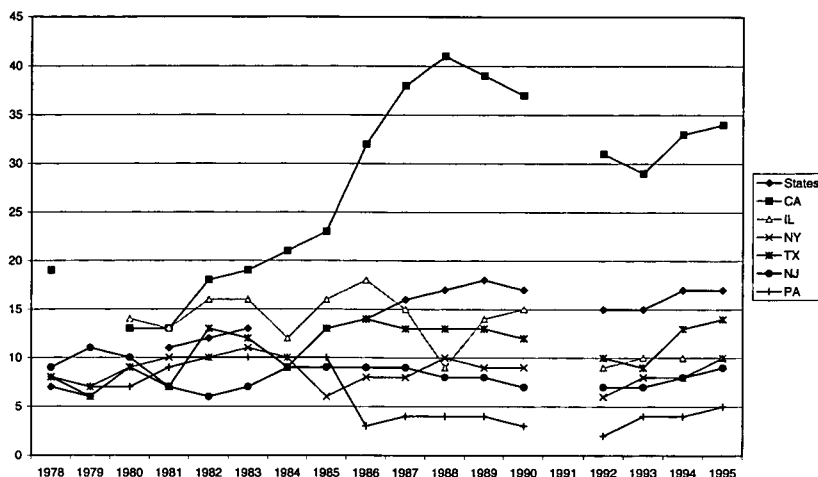


FIG. 8.—Parolees returned as a percentage of all persons on parole. Sources: *Correctional Populations in the United States* (1990–95); Simon (1993).

there for technical violations alone (Cohen 1995, p. 2).<sup>40</sup> Many of these technical violators were returned to prison for acts that would not be cognizable as crimes. Among parole violators, 10 percent had a revocation hearing for failing a drug test (regular submission of drug tests is a frequent condition of parole). Among parole and probation violators, 36 percent had a revocation hearing for failure to report for supervision or for “absconding.”<sup>41</sup> Because the Bureau of Justice Statistics survey data included detailed information about parole and probation violators for the first time in 1991, we cannot know whether there is an increasing trend toward technical violations.

Reflexivity does not inevitably lead to increased incarceration. The same administrative capacity that drives imprisonment today could potentially be used to divert parole and probation violators away from prison. Indeed, as figure 8 shows, several of the states with large parole populations decreased their revocation rates during the late 1980s or early 1990s as the weight of the incarceration boom began to press on state budgets. California is a case in point. Between 1990 and 1993,

<sup>40</sup> The Bureau of Justice Statistics notes that 87 percent of the technical probation violators and 43 percent of the technical parole violators had been arrested for some crime other than violation (Cohen 1995, p. 2). Arrest, of course, is not a reliable indicator of guilt.

<sup>41</sup> Absconding usually involves willful avoidance of parole or probation supervision, including failing to show up for meetings and evading contact with agents.

California's revocation rate dropped from over 40 to under 30 percent.<sup>42</sup> This was at least in part the result of administrative strategies designed to balance the organizational incentives toward revocation with incentives for effective surveillance.

This strategy was introduced in memoranda and amended procedures that sought to harness the reflexivity of the system to retard growth. For example, parole supervision units all over the state were provided with statistical information about their revocation rates in comparison with other units. Without any change in formal policies, outlier units began to bring their rates closer to the statewide norms.

In 1994, political pressure began to mount. Right-wing newspapers in coalition with sheriffs, district attorneys, and parole agent union leaders, helped to mobilize a media panic about parole decision making. These reports claimed that as many as ten persons had been murdered by parolees whose paroles would have already been revoked under previous practice. The Democrats picked up the issue, including the nominee for governor, Kathleen Brown, who promised if elected to immediately imprison any parolee who violated parole conditions. Without any official change in policy (there never was much of an official policy to begin with), the department changed direction. The revocation rate shot up significantly by the end of 1994 and has remained high.

## V. Conclusion

We have tried to suggest that the rise in incarceration is a result of independent but interactive factors. First, crime control has emerged as a privileged function of government. To an extraordinary degree the rhetoric of punishment is being drawn on to resolve basic administrative problems. In Florida, for example, a successful 1998 ballot proposal shifted financial responsibilities for trial courts from counties to the state government. The move had been long sought by public administrators and was widely supported by liberals and conservatives alike. Despite that, it was promoted in commercial messages that featured the families of murder victims bemoaning that the death penalty could not be pursued in their loved one's case because the county just could not afford the capital prosecution. When it comes to domestic

<sup>42</sup> California figures show an even steeper drop from nearly 60 percent to just under 40 percent. These figures were made available to one of the authors in his capacity as an expert witness in *Cervantes v. California*, a federal civil rights suit challenging parole revocation practices in the state.



policy at least, crime control has become the dominant model for governing.<sup>43</sup>

Second, the intensification of the war on drugs in the early 1980s coincided with the introduction of crack cocaine and the ensuing creation of an illegal mass market. That produces a virtually limitless supply of candidates for imprisonment. Moreover, they are available for apprehension on an ongoing basis without any need for complainants, and in a way that is largely self-financing from confiscations.

Third, the penal system has become more reflexive in that reforms introduced since the 1960s have made it more responsive to political pressures for growth and capable of handling such growth. The penal system maintains large populations of offenders under conditions that make the discovery (and in some sense the production) of large numbers of violations inevitable.

Governing through crime and the reflexivity of the criminal justice system have clear parallels in other advanced industrial societies, although in different ways and to different degrees. The war on drugs is largely an American situation (although one which we are aggressively seeking to export). For reasons imperfectly addressed here, these elements have interacted in a uniquely powerful way in the United States.

We are not abolitionists. The prison offers a potentially humane and legal way to address violent offenders that society must be protected from. Indeed, the twentieth century has given us plenty of other examples of how societies can deal with populations they deem troubling, including killing fields, deportation camps, and death squads. From its start, the promise of the prison was its ability to secure and punish without extraordinary measures or cruelties. It remains a potential locus of accountability and human rights.

The historically unprecedented incarceration rates of the past two decades tell a different story. We believe that they carry serious risks for American society, regardless of whether they can be shown to have lowered crime rates at the margins. No comparable society has ever tried to govern itself with such a large percentage of its adults in cor-

<sup>43</sup> Some have compared the current imprisonment build-up to the role the cold war played in the United States from the 1940s through the 1980s. We find that analogy helpful when it highlights the breadth of terrain across which one should look for effects. The cold war provided careers and ways of life, generated many cultural responses, modeled approaches to governing which spread to other fields, and linked levels of government and different centers of power (e.g., unions and political parties). Crime control works in many of the same ways to effectuate government. Less clear is the question of scale.

rectional custody. It is difficult to assess the long-term consequences of this move. Imprisonment has always harmed a prisoner's future prospects, but its consequences seem to be becoming more dire as the labor market for low-skilled workers worsens and the fear of crime itself marks former prisoners as unemployable (Freeman 1996; Beckett and Western 1997).<sup>44</sup> Just as important is the question of how a large population of former prisoners will affect the communities in which they live. A recent hate crime in Texas, in which an African-American man was dragged to his death tied to a car driven by several whites, sparked comparisons to the worst racial violence of the early 1960s (Hart 1998). The killers developed their racist attitudes in the Texas Department of Corrections where they had participated in a white supremacist gang. What will it mean to have exposed millions of less than stable adults to such ideas and practices?

The incarceration rate can be expected to continue to rise for some time, even if the crime rate continues to decline. The political dynamics that have made crime control such a good platform for politicians reflect long-term changes in U.S. political culture. Less clear is whether some of the brakes that once constrained cycles of governing through crime in the United States may begin to be felt. One traditional brake was popular sympathy for some law breakers. There are stirrings of such populist responses in America's inner cities (Butler 1995). Another brake is resistance from prison managers to increasing the population. As suggested by the California experience above, there may be lots of ways that mid-level penal managers can slow the growth of the prison population even without changing official policies.

Perhaps the most important brake is the potential demand of voters for other kinds of public goods like education. As state governments look for revenues to pay for these new initiatives, the corrections budget is almost an inevitable place to look (Petersilia 1997). Despite the great political appeal for being punitive, solutions that promise administrative savings by moving offenders from prisons to less expensive alternatives are also attractive to voters. The pressure to combine these imperatives has already produced heavy investment in "boot camps" (Little Hoover Commission 1995) and has led some to call for greater use of shame sanctions (Kahan 1996). There are signs in several states of just this kind of change. In Wisconsin, Republican Governor

<sup>44</sup> The recent high-growth rate of the U.S. economy may offer more hopeful prospects for prisoners. In Texas, prisons held a successful series of job fairs with employers quite interested in lining up those soon to be released.

Tommy Thompson has quietly encouraged plans to channel nonviolent offenders out of prison and into community supervision (Wisconsin Governor's Task Force on Sentencing and Corrections 1996). Similar proposals have been made for California (Petersilia 1997; Little Hoover Commission 1998).

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