



Overcriminalization and Excessive Punishment: Uncoupling Pipelines to Prison

Report from the December 2011 Workshop at Yale Law School

Co-sponsored by the American Bar Association Section of Litigation, John Jay College of Criminal Justice, and the Liman Public Interest Program at Yale Law School

July 2012

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CONTENTS

<i>Foreword: Moving Away from Incarceration</i> , JoAnne A. Epps	1
<i>Mass Incarceration: Finding Our Way Back to Normal</i> , Ronald L. Marmer	2
<i>Uncoupling Pipelines to Prison</i> , Hope Metcalf and Sia Sanneh	5
<i>INCARCERATION IN THE UNITED STATES: 1 IN 100</i>	5
<i>THE EXPANSION OF CRIME AND THE EROSION OF CRIMINAL INTENT</i>	6
<i>THE SCHOOL-TO-PRISON PIPELINE</i>	8
<i>EXCESSIVE PUNISHMENT AND CONTROL</i>	10
<i>GROWING AWARENESS OF THE COSTS</i>	11
<i>THE DECEMBER WORKSHOP</i>	13
<i>Overcriminalization and the Production of Crime</i>	13
<i>Criminalizing Adolescent Misbehavior: Schools and Streets</i>	14
<i>Increasing Punishment and Control</i>	16
<i>What Role for Courts?</i>	19
<i>Creative Interventions</i>	19
<i>Supermax and the Judiciary</i> , Judith Resnik.....	21
<i>Summoning the Superheroes: Harnessing Science and Passion to Create a More Effective and Humane Response to Crime</i> , Jeremy Travis	24
List of Participants.....	36
Selected Readings and Questions.....	40

Foreword: Moving Away from Incarceration, JoAnne A. Epps^{*}

A task ahead is determining the causes of this nation's fixation with incarceration. Is it an addiction? There is much to suggest that the answer is yes. As the number of those incarcerated continues to grow, the satisfying benefits decrease. But is the explanation more mundane? Is the number of incarcerated individuals growing from momentum fueled not by addiction but by indifference? Do most Americans know the incarceration rates? Do they know that for African-American males born between 1940 and 1949 the lifetime odds of being incarcerated are 10.4%, but for the next generation the lifetime odds are 26.8%? Most Americans probably don't know these sobering statistics. But even if they did, would they care?

Our country has demonstrated over and over again that it will fight for what it values, that it will press for change it deems essential, but that it will turn a blind eye to realities of no concern. The most wonderful news is that voices from across the political spectrum are beginning to speak out in favor of greater attention to this issue – if not for moral or social reasons, then for economic ones. Incarcerating those with whom we are angry is just too costly to sustain. Let us hope the momentum builds. Its logic and appeal are compelling.

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Mass Incarceration: Finding Our Way Back to Normal, Ronald L. Marmor*

It hasn't always been this way. From the 1920s to the early 1970s, the average incarceration rate in America was around 100 per 100,000. In 1925, the rate was 119. We hit 200 in only one year (1939). In 1974, it was 153. By the mid-1970s America changed course, with a vengeance. By 2006, our rate was 750 per 100,000 — an increase of almost 500% in 30 years. In 2008, when inmates in local jails were added to the count, we reached an astonishing 1 in 100 adults behind bars.

Even those numbers tell only part of the story. They report how many adults per 100,000 are in prison at any point in time. But consider what those incarceration rates mean over a lifetime. For a Latino man born between 1945 and 1949, his lifetime chance of incarceration is 2.8%. For the next generation born between 1975 and 1979, the lifetime incarceration rate is 12.2%, a 430% increase. For African American males, the older man born between 1945 and 1949 has a lifetime chance of incarceration of 10.4%, but the next generation's lifetime chance is 26.8%. Put another way, for *all* African American men born between 1975 and 1979, their lifetime chance of spending at least a year in prison is 1 in 4. At current rates, African American men have been projected to face a lifetime chance of imprisonment of 1 in 3. For an African American man born between 1975 and 1979 who dropped out of high school, his lifetime chance of incarceration is a whopping 68%. For a provocative look at mass incarceration and race, you may want to read Michelle Alexander's book, "The New Jim Crow — Mass Incarceration in the Age of Colorblindness."

The number of arrests also defies belief. In 2008 there were 14 million arrests. A recent study reports that by age 23, the number of young people arrested for crimes other than a minor traffic offense has increased to 30.2%.

The reach of the criminal justice system extends even further. For every person in prison, America has two more people on parole, probation, or some related form of control by the criminal justice system. In actual numbers, that means we have a total of over 7 million people behind bars or subject to some kind of control that can land them behind bars. That is larger than the combined populations of Los Angeles and Chicago. It would be the second largest city in America, one of the many insights in Ernest Drucker's book, "A Plague of Prisons — The Epidemiology of Mass Incarceration in America." In just under 200 pages, Drucker presents a stark assessment of mass incarceration using the tools of epidemiology.

A faint glimmer of hope comes from a recent decline in the prison population. One report shows that at the start of 2010, a slight decrease in state prisoners was offset by an increase in federal prisoners. Another report shows that at the end of 2010, the total prison population declined by 9,228. It was, sadly, historic to see any national decline. Even at year-

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end 2010, we had 7.1 million people behind bars or under some form of adult correctional supervision. That is 1 in 33 adults.

When the ABA House of Delegates considered these issues in 2009, the ABA called for a “national study of the state of criminal justice in the United States” to develop recommendations on how to fix this horribly broken system. Legislation calling for a bipartisan national commission has stalled in the Congress. It is beyond belief that, as a nation, we have refused even to convene a bipartisan group to tackle the problem.

In December 2011 the ABA Section of Litigation co-sponsored a workshop at Yale Law School with the Arthur Liman Public Interest Program and the John Jay College of Criminal Justice. The symposium brought together federal judges, state court chief justices, prosecutors, defense counsel, officials from departments of corrections, leading academics, and representatives from organizations as diverse as the NAACP and the ACLU as well as the Heritage Foundation and the Cato Institute. In a series of candid conversations, participants searched for solutions, drawn from programs adopted in cities and states across the nation.

The symposium highlighted Rhode Island’s efforts to confront the problem of burgeoning incarceration rates by participating in a “justice reinvestment” initiative. Working with the Justice Center of the Council of State Governments, Rhode Island sought to reduce its prison population, and reinvest some of the money saved into strategies that increase public safety. Equipped with specific statistical data on what changes would produce how many fewer prisoners, government stakeholders agreed upon initiatives to reduce the prison population. From 2008 to 2009, Rhode Island had the steepest percentage decline in prison population: 9.2%. Rhode Island’s experience can provide a blueprint for other states.

Yet another encouraging lesson from the symposium is that the politics cut across what many might expect. For example, we learned that when business leaders were asked to consider sentencing standards, they expected to see some evidence that there really is a bang for the buck. The usual answer, of course, is to point to declining rates of crime as proof that mass incarceration, whatever else one might think of it, has worked. Our academic colleagues called that rationale into question. Although the United States has become the world leader in incarceration, it has not produced significantly less crime than countries with small fractions of our incarceration rates. As it turns out, crime rates ebb and flow in many countries, including Canada, in patterns similar to our own, but no other country has responded with incarceration rates even remotely approaching ours.

One thoughtful proposal urged this simple principle: when confronting any social issue, the criminal law should be the tool of last resort. Judged by that test, how many laws would pass muster?

As anyone who has witnessed the events of even the last three years knows, we often respond to the most recent headlines with some blunt instruments. To borrow from the literature of regulation, a common illustration supposes that a bad business practice occurs in 1 out of 100 companies; the bad business practice produces \$50 million of injury; and a

regulatory and monitoring system could detect and prevent the injury at a cost of only \$1 million per company. The math is pretty compelling, for only \$1 million of regulation and monitoring we can prevent \$50 million worth of injury. The problem, of course, is that if we impose \$1 million of costs on 100 companies, the total cost is \$100 million to prevent \$50 million worth of harm. In the wisdom of the aphorism, is the cure worse than the disease?

Consider a different example drawn from recent newspaper accounts and familiar in kind to all of us. A county prosecutor recently testified before his state legislature to urge longer prison sentences for persons who have killed innocent victims while driving drunk. It was an all too familiar logic: (1) drunk driving is bad; (2) we still have drunk drivers killing people; and therefore (3) we should impose harsher prison sentences. We can all agree with the first two points, that drunk driving is bad and that we still have too many drunk drivers killing people. But before we embrace the third point, that the logical next step is to impose harsher sentences, we have to pause and consider what we are trying to accomplish.

The county prosecutor's flawed syllogism suggests that the best way to reduce the number of drunk driving deaths is by keeping the drunk drivers in prison for more years. There is some common sense to the notion that we ought to be able to discourage bad behavior by making it more costly. And whatever else one can say about prisons, if a drunk driver is in prison, we know that he won't be driving drunk and killing anyone else. Indeed, the county prosecutor's argument packs a potent one-two punch, satisfying our desire to mete out harsh punishment as a matter of justice — the drunk driver killed someone — and our desire to make the streets safer through social policy.

But the rhetorical appeal of the argument tempts us to ignore another question: are harsher prison sentences the most effective way to reduce drunk driving deaths? What if it turns out — and I am not claiming this will be the case — that for the same amount of money we spend keeping drunk drivers in prison for more years, we could come up with a different program that reduces drunk driving deaths by, say, ten fewer deaths per year? You can imagine all kinds of alternatives: house arrest, monitoring bracelets, twelve-step programs. The question is whether we would be satisfied by reducing the number of deaths, even if that meant we dealt less harshly with the guy who killed an innocent child when he got behind the wheel drunk?

As a nation we have become addicted to incarceration. We have convinced ourselves that the best way to control any kind of behavior is to criminalize it. And if that doesn't work, we will increase the penalties, and then increase them again. Like other addictions, this one is wreaking havoc in our lives. For over a hundred years, America didn't behave this way. In the mid-1970s we made some disastrous choices that have taken a terrible toll. What we have come to think of as normal is anything but.

Uncoupling Pipelines to Prison, Hope Metcalf and Sia Sanneh*

On December 9-10, 2011, a group of approximately forty officials, scholars, and practitioners gathered to discuss the phenomenon commonly referred to as “mass incarceration.” The workshop, held at Yale Law School, was co-sponsored by the ABA Section of Litigation, the Arthur Liman Public Interest Program and Fund at Yale Law School, and the John Jay College of Criminal Justice, and was co-chaired by Ronald Marmer, Chair, Litigation Section; JoAnne Epps, the Dean of the Beasley School of Law at Temple University; Judith Resnik, the Arthur Liman Professor of Law at Yale Law School; and Jeremy Travis, the President of the John Jay College of Criminal Justice of the City University of New York.

The conversation focused on three areas, all of which are fueling rising prison populations: (1) over-criminalization through the erosion of intentionality; (2) criminalizing adolescent misbehavior in schools and on the streets; and (3) excessive punishment and control of those convicted of criminal behavior. Participants included officials from the three branches of state and federal government, criminologists, legal scholars, practitioners, and experts in education, public policy, sociology, and comparative law. Discussions occurred over the course of a day and a half, and materials circulated beforehand enabled participants to develop a shared literature in advance of the sessions.

This report provides a brief summary of the discussion, including key points of consensus and divergence. Also included as appendices are a list of the participants and a bibliography.

INCARCERATION IN THE UNITED STATES: 1 IN 100

The United States imprisons more people (both youth and adult) than any other country in the world. One in 31 adults in the United States is either in prison or on some form of supervision in the community. One in 100 is incarcerated, and one in 45 adults in the United States is under community supervision (whether it be on supervised release, probation, or parole) as part of his or her sentence.¹ That amounts to 2.5 million people in prisons or jails at any given moment. If every incarcerated person were gathered into one enormous penal colony—it would rank just below Chicago as the fourth largest city in America.

African Americans and Latino/as comprise approximately 30% percent of the population² but amount to 61.4% of people under correctional jurisdiction.³ African American

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¹ Pew Center on the States, *1 in 100: Behind Bars in America in 2008* (February 2008).

² U.S. Census 2010, 2010 Census Briefs, The Black Population: 2010 at Table 1 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (African Americans account for 13.6% of the U.S.

men are incarcerated at a rate 7 times higher than white males (3,059 per 100,000 vs. 456 per 100,000); the rate for Latino men is nearly 3 times higher than for White men (1,258 per 100,000).⁴ African Americans are drastically overrepresented at all levels—arrest, jail, prison, parole, and probation.⁵ Not only are people of color more likely to encounter law enforcement—they are also punished more harshly. African Americans account for “56.4 percent of those serving life without parole, though they are 37.5 percent of prisoners in all state prisons.”⁶ They are five times more likely to be sentenced to death.⁷

The widespread use of the criminal justice system and its various forms of control and supervision makes the United States stand out from peer nations. With roughly 5% of the world’s population, the United States currently confines about 25% of the world’s prison inmates.⁸ Despite the fact that the English imprisonment rate has itself almost doubled, the United States’ rate is almost 5 times higher than that of England and Wales.⁹

Of the various factors that contribute to overcriminalization and overuse of excessive punishment – many of which have been well-documented – the symposium focused on three subject areas.

THE EXPANSION OF CRIME AND THE EROSION OF CRIMINAL INTENT

One factor driving mass incarceration is the increased use of the criminal law, often without exacting requirements of intentionality, and of the ability of the state or federal government to place an individual, sentenced to some form of supervision, in prison for infractions that would not constitute independent crimes. As legal scholar William Stuntz wrote, “[c]riminal intent has become a modest requirement at best, meaningless at worst.”¹⁰ In 2010, the Heritage Foundation and the National Association of Criminal Defense Lawyers issued a report entitled “Without Intent — How Congress Is Eroding the Criminal Intent Requirement in Federal Law.”¹¹ That report found that “[o]ver 57 percent of the offenses

population); U.S. Census 2010, 2010 Census Briefs, The Hispanic Population: 2010 at Table 1 (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (Hispanics account for 16.3% of the U.S. population).

³ United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, PRISONERS IN 2010 at Appendix 12, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>

⁴ BJS Statistics 2010, supra note 2, at Appendix 14.

⁵ Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System* at 4 (National Council on Crime and Delinquency, March 2009), available at <http://www.nccd-crc.org/nccd/pdf/CreatedEqualReport2009.pdf> (explaining that rates for African Americans of arrest, probation, parole, and incarceration are 2.5, 5, 6, and 7 times the comparable rates for Whites).

⁶ Editorial, *The Misuse of Life Without Parole*, N.Y. Times (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/opinion/the-misuse-of-life-without-parole.html>.

⁷ Hartney & Vuong, supra note 5, at 4.

⁸ Becky Pettit & Bruce Western, *The Challenge of Mass Incarceration in America*, 139 DAEDALUS 6 (Summer 2010).

⁹ Lacey, *American Imprisonment in Comparative Perspective*, 139 DAEDALUS 108 (Summer 2010).

¹⁰ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* at 260 (Harvard Univ. Press, 2011)

¹¹ Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 1-10, 22-32 (Heritage Foundation, May 2010).

considered by the 109th Congress contained inadequate *mens rea* requirements”¹² The Report, which offered several recommendations, explained the problem:

The number of new criminal offenses proposed and enacted in the 109th Congress was by no means exceptional. The recent proliferation of federal criminal law has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize. The study reported here supports the conclusion of a growing number of commentators and experts that the time has come for Congress to stop this dangerous trend, to acknowledge the threat represented to individual and business civil liberties by this unprincipled form of criminalization, and to carry out critical reforms to federal criminal law that will protect individuals and businesses from the risk of unjust prosecution and conviction.¹³

The federal government is not alone in punishing activities that lack the traditional hallmarks of criminal activity. A Texas report described how “Texas lawmakers have created over 1,700 criminal offenses, including 11 felonies alone relating to harvesting and handling oysters.”¹⁴ As lawmakers increasingly turn to criminal sanctions to regulate occupational or residential conduct, the effects are experienced disproportionately by the poor, who can often afford neither to remedy the underlying offense nor to pay the resulting fine.¹⁵ And many jurisdictions criminalize subsistence activities—such as sleeping in public spaces—by the homeless and the poor, regardless of criminal intent and regardless of available alternatives.¹⁶

The Honorable Alex Kozinski and co-author Misha Tseylin considered how the proliferation of criminal penalties can erode the rule of law:

¹² Id. at 1.

¹³ Id. at 2.

¹⁴ Mark Levin, *Time to Rethink What’s a Crime: So-Called Crimes Are Here, There, and Everywhere* (Texas Public Policy Institute, February 2010).

¹⁵ See e.g., Ala. Code. Sec. 22-25-15 (criminalizing violations of state water and wastewater laws, including “all rules and regulations”; following notice, each day of continuing violation constitutes a separate misdemeanor offense punishable by a \$100 fine or 30 days in jail). See also The U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, delivered to the General Assembly*, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011), available at

http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf. (“In 1999, the Alabama Department of Public Health initiated legal action (litigations and arrests) against 41 sites for releasing raw sewage into the ground surface, despite repeated violation notices in an attempt to oblige wastewater management to meet minimum environmental and health standards. Many individuals, who could not afford to take remedial action, were arrested. They now have arrest records for not having been able to afford the costly remedy. More recently in 2008, following complaints from a neighbour, the Department of Public Health initiated steps towards the arrest of a 27-year-old single mother, who lived in a mobile home with her autistic child, for not maintaining her septic system according to applicable health standards. The septic system replacement cost was higher than her annual income of \$12,000, and she did not have the means to access funding.”).

¹⁶ See generally National Law Center on Homelessness & Poverty, *Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities* (November 2011) (providing survey of municipal ordinances restricting actions of homeless people).

The overwhelming majority of police and prosecutors try to enforce the law dutifully. After catching the few obvious hard-core crooks, they vacillate between randomly enforcing laws and selectively enforcing them based on their own judgment and the public's demands. This approach undermines the rule of law and makes luck, conspicuousness, and the subjective opinions of government officials the most important factors in determining whether someone ends up in jail. And that's just what happens in the best case. When malicious prosecutors or would-be tyrants get hold of a ubiquitous criminal law fortified by the public's belief in the moral force of that law, they can go after pretty much anyone they choose.¹⁷

For the many millions who live in neighborhoods of concentrated poverty, the effects of overcriminalization are profound and immediate. As legal scholar William Stuntz observed, “[n]owhere have the consequences of criminal liability been greater than in the criminal law of drugs,”¹⁸ and those consequences are borne especially by communities of color. One example is the handling of marijuana offenses. Although marijuana arrests have increased across the country, this increase has been particularly dramatic in minority communities. In 2006, for example, African Americans were arrested for marijuana at a rate of 7.8 times the arrest rate of whites.¹⁹ Examples of excessive enforcement include the police producing the crime of illegal display of marijuana by demanding that individuals empty their pockets on the street.²⁰

THE SCHOOL-TO-PRISON PIPELINE

For many Americans, “[o]vercriminalization is a cradle-to-grave phenomenon.”²¹ Under the expansive *parens patriae* doctrine, Jeffrey Fagan explains, society exerts extraordinary control over young lives:

We incarcerate children because their homes are too dangerous or criminogenic; because they are both delinquent and mentally ill or addicted to intoxicants and there are no other appropriate placements; because they need therapies that are unavailable elsewhere, even though they pose no serious security risks; because they are homeless; because they are sexually active at young ages; or because we think they may commit some crime in the near future.²²

¹⁷ Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal* in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” 49-56 (Tim Lynch, ed., 2009).

¹⁸ Stuntz, *supra* note 10, at 145.

¹⁹ Jeremy Travis, *Race, Crime and Justice: A Fresh Look at Old Questions*, Orison S. Marden Lecture delivered to the New York City Bar Association (March 19, 2008).

²⁰ See Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 4 J. OF EMPIRICAL LEGAL STUD. 591 (2010); see also John Jay College of Criminal Justice, *Primer on Stop and Frisk* (2010).

²¹ Levin, *supra* note 14, at 3.

²² Jeffrey Fagan, *The Contradictions of Juvenile Crime and Punishment*, 139 DAEDALUS 43 (2010).

For example, each year, “tens of thousands of Texas students as young as 10 years old receive tickets for Class C misdemeanors in school, most commonly disrupting class.”²³ Many of these children, who lack family support and are unable to pay fines, will serve time for these “offenses.” Nationally, on any given night, approximately 81,000 youth are confined in juvenile facilities and 10,000 children are held in adult jails and prisons.²⁴ Approximately one in 10 young male high school drop-outs is incarcerated or in juvenile detention. For African Americans, that number is one in four.²⁵

Many organizations have focused on what has come to be called the “school-to-prison pipeline.” In October 2009, the ABA Section of Litigation convened a symposium at Northwestern University, entitled: “*Raising Our Hands: Creating a National Strategy for Children’s Rights to Counsel and Education.*” As Sarah Biehl described in the ABA Children’s Rights Litigation Committee newsletter:

[t]he consequences of relying on removing children from school as a primary tactic to address misbehavior are nothing short of devastating. Prior suspension is more likely to cause a child to drop out of high school than any other factor, including low socioeconomic status, not living with both biological parents, a high number of school changes, and having sex before age 15. Students who are expelled from school — that is, removed from school for more than 10 days — are even less likely to graduate from high school.

The consequences of not graduating from high school, of course, are severe. Children who do not finish high school are 3.5 times more likely to be arrested as adults. Additionally, approximately 82 percent of the adult prison population is composed of high-school dropouts.²⁶

Other groups have focused on the disproportionate use of the juvenile and criminal justice systems to penalize adolescent misbehavior in school. In 2010, for example, the ACLU and NYCLU filed a class action lawsuit against the NYPD for the use of aggressive policing techniques in the New York City public school system. The complaint alleges that the NYPD wrongfully arrested students for minor disciplinary infractions such as talking back, being late for class, and using a cell phone in school. The lawsuit seeks system-wide reform in New York City’s middle and high schools, including a return to disciplinary decisions by school administrators.

Working as a Liman Fellow and with the ACLU Racial Justice Project, Jamie Dycus documented this phenomenon in Connecticut in a report, *Hard Lessons: School Resource Officer*

²³ Id.

²⁴ Constitution Project, *Smart on Crime: Recommendations for the Administration and Congress* at 91, 2011.

²⁵ Sam Dillon, “Study Finds High Rate of Imprisonment for Male Dropouts,” *NEW YORK TIMES*, October 8, 2009.

²⁶ Sarah Biehl, *School Expulsion: A Life Sentence?*, ABA Section of Litigation Newsletter (March 15, 2011) (citing Suhyun Suh, Jingyo Suh, & Irene Houston, *Predictors of Categorical At-Risk High School Dropouts*, 85 J. OF COUNSELING AND DEVELOPMENT 196, 196-203 (2007)).

Programs and School-Based Arrests in Three Connecticut Towns. The report revealed that police arrests of students at Hartford-area schools are on the rise, a trend that disproportionately impacts children of color. During the 2006-07 school year, for example, black and Hispanic students in West Hartford accounted for 24 percent of the population, but experienced 63 percent of the arrests. The report also found that students of color committing minor disciplinary infractions were more likely to get arrested than white students committing the very same offenses.²⁷

EXCESSIVE PUNISHMENT AND CONTROL

The data from the Pew Center make plain the degree to which the United States imposes restrictions on a huge and growing number of individuals. Litigation has documented the harms imposed on persons subject to over-populated prisons. In *Brown v. Plata*, the Supreme Court chronicled the decades of litigation involving the California Prison System and the deaths and failures to provide medical care to inmates as a result of overcrowding, as the Court upheld an order by a three-judge court to reduce the numbers in prison.²⁸

Alternatives to incarceration, originally enacted in the early twentieth century to encourage rehabilitation, can in fact often serve to extend prison sentences. Community supervision programs (including parole, probation, and supervised release) have become more stringent and often lead people back to prison rather than supporting their efforts to succeed on the outside. State and federal offenders under community supervision must abide by an ever-expanding series of conditions, imposed by judges, probation officers, and parole boards. Typical conditions include reporting to probation or parole officers, refraining from drug-use, attending specified treatment, upholding curfews, paying fines and/or fees, not associating with felons, and submitting to property searches and drug testing. Judges frequently incarcerate people for violating these conditions – under a system of sharply limited rights and due process protections – even though the underlying conduct is either not criminal or marginally so.

The economic and civic harms that flow from incarceration do not stop at the prison door. Since 1996, federal legislation has limited or excluded altogether people with criminal histories from receiving many forms of federal assistance, including housing, food stamps, and student loans.²⁹ Federal and state statutes bar ex-offenders from working in certain categories of jobs. Moreover, people with criminal records have a more difficult time finding work and tend to earn far less relative to their pre-incarceration levels.³⁰ One New York study of former

²⁷ ACLU, *Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns* (November 2008).

²⁸ 131 S. Ct. 1910 (2011).

²⁹ Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, 23-24 (Marc Mauer and Meda Chesney-Lind, eds., 2002).

³⁰ Becky Pettit & Christopher J. Lyons, *Incarceration and the Legitimate Labor Market*, 43 *LAW & SOCIETY REV.* 725 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. OF SOCIOLOGY* 937 (2003).

offenders found that serving time in prison was associated with a forty percent reduction in earnings.³¹

GROWING AWARENESS OF THE COSTS

Across the spectrum, recognition is growing that the high costs—financial and social—of U.S. incarceration policies are unsustainable.³² The year 2010 marked the first time since 1972 that the overall prison and jail population declined.³³

Many jurisdictions are revisiting the sentencing policies of the 1980s, including mandatory minimums for drug-related offenses and so-called “three strikes” laws, which have contributed to lengthier terms and increased incarceration rates.³⁴ Several states have convened sentencing commissions to recommend reforms. In Virginia, the Sentencing Commission must prepare a fiscal impact statement for any bill that would result in a net increase in the population of offenders housed in state adult correctional facilities.³⁵ Rhode Island halted projected increases in prison population by creating incentives for inmates to participate in education and vocational training, treatment, and other services, standardizing parole review, and shifting funds to post-release programs.³⁶ Other states, such as Kansas, New York, and Michigan, have reduced or eliminated mandatory minimums for some drug-related offenses.³⁷ And many states have organized alternatives to incarceration for people with drug addiction or mental illness.

States have also reexamined early release and revocation policies and developed “reentry” programs to support those whose prison terms are ending. New Jersey increased its rate of granting parole by adopting risk assessment instruments and expanding community

³¹ Marc Mauer, *Downscaling Prisons, Lessons from Four States*, at 13 (Sentencing Project, 2010).

³² See, e.g., *ACLU Joins Right on Crime, Prison Ministries, Bipartisan Legislators, and the ABA to Prioritize Criminal Justice Reform*, May 11, 2011, <http://www.aclu.org/blog/prisoners-rights-racial-justice/aclu-joins-right-crime-prison-ministries-bipartisan-legislators>. Right on Crime, comprised of self-proclaimed conservatives, has proposed criminal justice reforms that would, among other things, reduce overall prison population and rely on evidence-based sentencing and punishments. Statement of Principles, available at <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/>.

³³ Paul Guerino, Paige M. Harrison, & William J. Sabol, *Prisoners in 2010*, at 1 (Bureau of Justice Statistics, December 2011). These figures are localized and vary greatly. The federal prison population grew by 0.8% in 2010, as did the prison populations for half of the states. California (down 6,213) reported the largest decline in absolute numbers, while Rhode Island (down 8.6%) reported the largest percentage decrease. Meanwhile, even the overall prison population rose by 12 percent from 2000-2009, several states were successful at reducing populations by up to 20 percent during that same time period. Mauer, *supra* note 31, at 2 (reporting that New York reduced its population by 20% from 1999 to 2009; Michigan experienced a 12% reduction from 2006 to 2009; New Jersey a 19% reduction from 1999 to 2009; and Kansas a 5% reduction from 2003 to 2009).

³⁴ See generally Todd R. Clear & Dennis Schrantz, *Strategies for Reducing Prison Populations*, 91 *Prison Journal* 138 (2011).

³⁵ Va. Code Ann. §30-19.1:4.

³⁶ Ashbel T. Wall, II, *Rhode Island Halts Growth in the Inmate Population While Increasing Public Safety*, 72 *Corrections Today* 40, 45 (February 2010).

³⁷ Mauer, *supra* note 31, at 4-5; see also Patricia Caruso, *Operating a Corrections System in a Depressed Economy: How Michigan Copes*, 72 *CORRECTIONS TODAY* (February 2010).

monitoring programs. To help cut back on re-incarceration for technical violations, New Jersey established Regional Assessment Centers that provide input to the parole board in determining whether parole violators should be allowed to continue on supervision; consequently, 46 percent of violators have been referred for additional prison time, down from 81 percent.³⁸ The federal Sentencing Commission has begun to consider ways to reduce the number of offenders on post-release supervision.³⁹

Efforts in a growing number of states and localities aim to help people leaving prison avoid a cycle of poverty and incarceration. For example, Hawaii's HOPE program pairs intensive services with relatively small but certain penalties; participants demonstrated a 55 percent reduction in recidivism over the course of one year.⁴⁰ Kansas' Risk Reduction Initiative provides funding to county-operated programs that emphasize neighborhood revitalization, substance abuse and mental health treatment, and housing services.⁴¹

States have also initiated reforms around the treatment of youth in the juvenile justice system. Missouri has pioneered a comprehensive set of reforms; treatment—not punishment—is the guiding principle.⁴² For children charged with certain crimes, detention is a last resort, and children are housed in small facilities set in the communities. Rates of recidivism are far lower than other states, and positive measures—such as how many youth return to school following release—are much higher.⁴³

Parallel work is underway at the national level. In August 2009, the ABA House of Delegates voted to support the enactment of legislation to provide for “a national study of the state of criminal justice in the United States to consider ways to reduce crime, lower incarceration rates, save taxpayer money, enhance the fairness and accuracy of criminal justice outcomes, and increase public confidence in the administration of the criminal justice system” (ABA 111B.)

On February 8, 2011, Senator Webb (Virginia) re-introduced the National Criminal Justice Commission Act (S. 306) to create a blue-ribbon, bipartisan commission to review the United States criminal justice system. Senator Webb said in reference to the rates of incarceration in America: “Either we have the most evil people on Earth living in the United States or we are doing something dramatically wrong in terms of how we approach the issues of criminal justice.”⁴⁴ The bill had the support of a broad array of organizations, including the

³⁸ Mauer, *supra* note 31, at 45-46.

³⁹ United States Sentencing Commission, “Notice of Proposed Amendments,” 55-67, January 13, 2011.

⁴⁰ Pew Center on the States, *The Impact of Hawaii's HOPE Program on Drug Use, Crime and Recidivism*, January 2010.

⁴¹ Mauer, *supra* note 31, at 53-54.

⁴² Annie E. Casey Foundation, *The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders* (2010).

⁴³ *Id.* at 1-2.

⁴⁴ Rhonda MacMillan, *A Hard Look: ABA Supports Bipartisan Legislation Calling for In-depth Study of U.S. Criminal Justice System*, ABA Journal (July 1, 2010).

National Sheriffs' Association, the International Association of Chiefs of Police, the U.S. Conference of Mayors, the Fraternal Order of Police, the Sentencing Project, the NAACP, the ACLU, and Prison Fellowship. The bill ultimately failed in the Senate by a vote of 57-43; Senator Webb remarked that “[a]fter years of building the case for reform, we have earned the trust and support of advocates across the philosophical and political spectrum. We will not back down.”⁴⁵

THE DECEMBER WORKSHOP

To build on these efforts, we convened a group of some forty officials, scholars, and practitioners with diverse views and experiences to outline ideas for uncoupling the many pipelines to prison.

Overcriminalization and the Production of Crime

The session began with several framing concepts for the conference. Participants were encouraged to think about areas of common ground among the different viewpoints and backgrounds of the speakers and to think creatively about interventions.

The session proceeded with several opening presentations. The first presentation discussed the mechanisms of overcriminalization in politically, socially, and economically isolated communities, focusing on stop and frisk policies. The research was based on the Brownsville neighborhood of Brooklyn, NY. The speaker described the problem of overcriminalization as a “series of connected engines that propel the system.” Some of those mechanisms include unregulated discretion, an expansion of criminal law, and overenforcement as a policy response to fear. For example, Section 140.05 of the New York Penal Law criminalized trespassing, which used to be a civil violation. The resulting trend is to use criminal law to solve problems that can be, and previously have been, handled through other methods.

The second presentation focused on the growth of the federal criminal code and the elimination of mens rea requirements in criminal statutes. Since the 1980s, a common election platform has been “tough on crime,” which has resulted in a rapid expansion of new crimes, including violations of agency regulations in fields such as environmental law and food and drug law. The elimination of the mens rea requirement in many of these statutes has created additional costs to businesses, including a greater need for lawyers to explain what the law actually is. More basically, this trend has eroded the principle that everyone should “know the law.”

The final presentation considered a case study of Seattle, where trespass enforcement criminalizes otherwise lawful conduct. On privately owned but publicly traversed property (such as a path to/from public transport), police can “ban” an unwanted person. If that person returns, she may be arrested. In practice, the policy is enforced against teenagers of color.

⁴⁵ Senator Webb, Press Release—Republicans Filibuster Criminal Justice Reform Act (Oct. 20, 2011).

Actual arrests are rare; instead, the bans are used as a pretext to stop and question teens. The Seattle PD publicly recanted this policy after a graphic video of a stop went public, but the presenter explained how the policy continues to be applied in certain areas.

Following the presentations, discussion began by noting the common use of the criminal law to address social problems. Participants agreed that a trend in all areas is a knee-jerk response to criminalize conduct, rather than as a last resort. Another area of broad agreement was that police and prosecutors have too much unregulated discretion, which is a direct result of their having too many criminal laws to enforce. The ultimate result is the arbitrary and selective enforcement of those policies. One speaker disagreed and said that discretion is necessary in our system, because the alternative would be something even more egregious, like mandatory minimums.

A third point of agreement was that fear is a major contributor to overcriminalization and overpolicing. The individual actors in the system do not want to be the people responsible for releasing a parolee who commits a horrible crime; this fear can drive decisionmaking for all parolees, regardless of individual histories. One speaker agreed and said that the current level of risk aversion is dangerous because people are unwilling to take “educated risks” based on empirical work.

One overlapping question was whether overpolicing in communities of color and overcriminalization in the federal system were parts of the same problem. One speaker said that there are three trends visible – 1) changing the definitions of crime, 2) supervision and dealing with people who have committed crimes and 3) police misconduct in communities of color. She argued that even solving the first two problems would leave the third untouched. Another speaker disagreed and said that all three problems overlap. Speakers generally agreed that reform is most feasible when it is supported by a broad constituency and is pitched in a pragmatic way.

Criminalizing Adolescent Misbehavior: Schools and Streets

The first speaker focused on brain science. Scientists now understand that the adolescent brain develops over a much longer period than originally thought and is more impulsive. That science has impacted the Supreme Court in cases such as *Graham v. Florida*, but there is still a long way to go in terms of the science and how to use it well. The speaker then described how children today are more at risk of being arrested in school than they are in the street, as exemplified in a recent Texas study.⁴⁶ The speaker pointed out that even among schools with similar socio-economic demographics, levels of discipline and suspension varied greatly.

The second speaker thought that zero tolerance policies had good intentions but were poorly enforced and do not achieve intended goals. Statistics show that children in zero tolerance schools do not have better outcomes. Meanwhile, children of color and children with

⁴⁶ Tony Fabelo, Michael D. Thompson & Martha Plotkin, *Breaking Schools' Rules: A Statewide Study on How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, (Council of State Governments, July 2011), <http://www.justicecenter.csg.org/resources/juveniles>.

emotional disorders do not actually act out more, but are disproportionately punished. The end result of zero tolerance policies is to build criminal capital instead of social capital. Schools, under pressure to increase test scores, often push out children deemed to be too disruptive. Many schools also rely on police to handle discipline, but police are typically far less effective than mental health counselors. The speaker thought that removals should only happen in the most serious cases and that police in schools should have training specific to that environment. Finally, with respect to troubled youth, policies should reflect what is known about trauma and neuroscience. Moreover, not all potential crimes should lead to arrest.

The last speaker stated that most conversations about adolescent brain science focus too much on “serious” cases, such as the death penalty and juvenile life without parole. The speaker would instead have us think about how we can use this science at the front end, such as at intake or at arrest. She would like to see the development of better models for school offense protocols and risk assessment instruments. Underlying much of the discussion is whether a certain behavior is “normal” adolescent behavior or something worth criminalizing. A bigger question about “problem-solving” courts is if prosecution is not appropriate, where do we send or treat these children? The problem with courts is that they assume the involvement of the state is needed – instead, the speaker would focus on community assets and processes. Lastly, the speaker described a specific useful mechanism that courts can use – a “you’ve got to be kidding” motion, whereby judges can dismiss charges against a youth notwithstanding a guilty verdict because the charges are simply ridiculous. The speaker gave an example of a youth who was charged with assault with a dangerous weapon for throwing pebbles in the school yard.

Other participants observed that rates of victimization of juveniles (youth tend to be victimized by other youth) have been generally flat and relatively low for the last 15 years. The Harlem Children’s Zone was described as a great model of an alternative to incarceration while another participant commented that federal agencies are looking at school environments, prompted by the Texas Report. Some participants suggested that part of the problem has been caused by the decline in mens rea. One participant wondered whether it is possible that today’s children are behaving the same as in previous generations, but their behavior is simply perceived differently.

The conversation then turned to the idea that police and judges may place children in the criminal justice system because it is one of the very few places to access services. Many children, therefore, may be enmeshed in the criminal justice system not primarily because they have committed a chargeable offense, but because they have unmet needs. One explanation is that the system conflates high risk and high needs. Social workers put children in detention to save or to protect them but they do not perceive that this option can itself be criminogenic. Several participants echoed a theme from the previous session: the disparate and disproportionate enforcement on communities of color is possible because children of powerful people are subject to the same rules. Many participants hoped that better knowledge of adolescent development could help to develop more effective interventions, but others worried about “medicalizing” social problems.

One suggestion was to use more positive reinforcement, such as the “good behavior gang” model. Studies show that students who are randomly assigned to teachers using the “good behavior gang” model are more likely to graduate and are less likely to use drugs or to be arrested. Other speakers thought it was important to keep victims in mind, recognizing that we value safe environments for children. A response was that holding a young person accountable does not necessarily mean criminal punishment. The conversation continued to question how we can meet the needs of victims in a more constructive way.

The discussion turned to the dilemmas faced by public servants, who live in fear of being sued and being tried by the court of public opinion as well. This led another participant to ask whether we have taken away non-criminal tools for school administrators. A third participant questioned whether the absence of familial governance and the taking away of social services have made the criminal justice system a surrogate.

One participant thought that the issue might be a response to a lack of trust in institutions and people while another opined that we’re only over-criminalizing certain populations and neighborhoods. Another participant commented that in California, it is possible a TRO against a minor in superior court for any reason, which could mean the minor cannot go to school. Someone else mentioned that because police departments are important actors, it would be helpful to engage them in discussing whether cost-effective or persuasive arguments existed for shifting police resources away from policing youth. Further, the participant wondered if we could help police back out of their current corner, which is doing their job, enforcing the law.

The conversation again turned to U.S. society has become extremely risk-averse and errs on the side of over-reacting: to many, it seems easier and safer to send people to prison rather than to rely on “squishy” alternatives. Virginia was cited as an example where using data enabled lawmakers to reduce sentences and to take more risks in releasing people back into the community, but some participants thought that more training would not satisfy the public’s concern for certainty.

Next, the conversation turned to potential solutions, including the idea that incentivizing the police to make fewer arrests needs to come from the top, such as the chief of police. Alternatively, Judge Tesky and the Huff Initiatives present a more collaborative effort and were cited as positive solutions. In all events, participants agreed that developing and sharing quality data are essential.

Increasing Punishment and Control

The panel began with an animated discussion of a proposition advanced by one participant – namely, that the United States criminal justice system reflects the values of our society. This panelist suggested that Americans prefer a system that responds to crime in a punitive fashion because we believe that crime is immoral and criminals are bad people. Consequently, a strong demand for punishment and retributivism shapes our system, rather than a rational consideration of economic cost and recidivism rates. In advocating for change, we must confront the fact that our society has struck a bargain: we choose excessive

punishment, despite the greater costs, because we want a system that responds to crime in a punitive way. Because the criminal justice system is shaped by these values, the only way to achieve real change is to engage in an open discussion about values and norms with individuals who can influence criminal justice policy. By turning the discussion towards decency, human rights, and the morality of wasting lives and doing harm to children and adults, we can begin to change the bargain.

Complicating this proposition, participants pointed out that structural factors inherent in our political system affect the way in which these values are implemented. An “excess of democracy” – that many of our prosecutors and judges are elected, that voters make decisions through referendum in some states, and that there has been a shift towards greater legislative discretion in sentencing – makes our system more punitive by making it politically expedient to continually increase punishment. Other participants voiced their concerns about how the American political system discourages reform and change, citing examples of reforms that were derailed by a “Willie Horton moment.”

While participants agreed that values play an important role in shaping the criminal justice system, several panelists believed that the current economic climate could play a significant role as a catalyst for reform. Participants discussed the extent to which the recession could be used as a vehicle to prompt meaningful change. One panelist pointed out that plans to create change during a similar recession in the 1970s fell on deaf ears. Others felt that the current economic moment is unique: crime isn’t nearly as significant an issue for voters as it used to be, and correctional reform is relatively appealing compared to the prospect of cutting funding for other valuable social programs.

Participants also confronted skepticism about the potential for programs designed to reduce recidivism as vehicles for reform. Some were optimistic about the success of these programs, such as drug courts in the federal system. Others raised concerns that while some individual programs have a positive effect on recidivism at a small scale, it has proven difficult to implement these programs on a larger scale.

Hawaii’s HOPE (Hawaii’s Opportunity Probation with Enforcement) Program was discussed at length as an example of a program that has successfully reduced recidivism rates and can be operated on a large scale. At the heart of the HOPE program is the idea that participants will benefit from plain rules that are clearly communicated and fairly, consistently, and immediately enforced: for example, participants aren’t sent to prison for technical violations or required to participate in mandated treatment, but they will go to jail for a short period of time for every positive drug test. Advocates of the program argue that this approach produces better results than probation, where the results of non-compliance are unpredictable. Other participants challenged the program for failing to take into account the experience of the offender and the debilitating effects of incarceration, however brief.

Other participants suggested that we look to other measures of correctional success, rather than focusing solely on recidivism. Some participants suggested that we measure success in terms of the extent to which individuals successfully reintegrate into society. Some

suggested that we redefine recidivism: for example, instead of focusing on whether individuals are re-arrested, focus on whether they avoid reverting to harmful behaviors.

In conjunction with discussion of programs like HOPE, one panelist suggested that we ought to think about crime control as a progressive value. In support of this idea, participants cited the fact that underpolicing is a significant problem in low-income and minority communities; policing resources are allocated based on population rather than crime rate as an equal protection issue. Some came to the conclusion that some degree of social control for people who commit crimes – for example, curfew enforcement and GPS monitoring – is necessary, as long as it isn't enforced unfairly. Others cautioned against relying on these new forms of social control as an alternative to incarceration.

Panelists also considered these issues from the perspective of prison administrators. As an example, participants discussed the successful reform of the Rhode Island prison system. Confronted with a record-high inmate population that was wreaking havoc on the state's budget, a coalition of legislators, prosecutors, police, public defenders, victim's advocates, the parole board chair, and judges agreed among themselves to consider recommendations for reform made by neutral, trusted organizations. The coalition agreed to take recommendations off the table if any member of the coalition disagreed, and – more significantly – to support unanimously the reforms in the public eye once they agreed. Remarkably, this diverse coalition came to an agreement on certain recommendations that, once implemented, resulted in a significant decrease in the prison population and the average length of stay.

Participants addressed the impact of the development of the prison industrial complex on prison reform. In Michigan, another state that reduced the scale of incarceration, de-incarceration had devastating effects on rural Michigan communities that were built around a prison economy. Participants discussed the importance of analyzing the reasons that people support the criminal justice system as it exists – for example, prisons are the economic lifeblood of certain communities – and trying to minimize the negative effects of change.

Several threads of agreement ran throughout the discussion. Panelists discussed the value of building coalitions, particularly with conservatives and religious groups. As an example, one panelist described how conservative legislators, motivated by financial considerations and a genuine concern about incarceration statistics, strongly supported South Carolina's sentencing reform and the creation of its statewide public defender system. Others cited several successful reforms – for example, the Prison Rape Elimination Act, the Second Chance Act, and the Fair Sentencing Act – that succeeded because of left-right coalitions with religious groups. Some suggested turning to science to find empirical evidence of the debilitating effects of incarceration and how the trauma of incarceration affects offenders' physical and emotional health. One panelist raised the idea of a "grand gesture" – for example, one political figure pledging to bring crime down and cut incarceration rates in half in a period of ten years. And, despite initial skepticism, many participants were optimistic about a perceived shift in public perception: people, from legislators to constituents, are coming to understand that broken people aren't fixed and society isn't made safer by mass incarceration.

What Role for Courts?

The first speaker began the session by proposing that we turn too quickly to the criminal justice system, that our response to risk is exaggerated and that we focus too much on retribution and a search for certainty. The speaker described three different roles that courts could have: as adjudicators, program innovators, and policy leaders. As adjudicators, courts can shift power to legislators and initiate process, they can impose constitutional limits, and can provide cover for legislators – the California *Plata* case was given as an example, with the question of whether such a case is not entirely helpful since it was driven by such extreme circumstances and facts. As program innovators, judges can help address scalability and resources. As policy leaders and collaborators, judges can convene people who would otherwise not get together. Judges should embrace the role of convenor because they have the credibility necessary to get things done.

The second presentation focused on the role of state courts. The speaker said that state court judges do not necessarily have the freedom of independence, because many must be reelected. However, state judges have focused on getting people who are not lawyers invested in the survival of state courts, including the business community and lobbyists. The speaker stressed that different voices are important and made several recommendations including: 1) taking school discipline out of family courts; 2) revamping judicial culture about sentencing; 3) drawing attention to state constitutions as sources of innovative change; 4) changing the relationship with probation and parole and working more closely with those actors in developing policy; and 5) taking on greater responsibility for convening and lobbying for federal involvement. The speaker also suggested starting Eighth Amendment conversations at the state level and consolidating and by putting pardons, probation, and parole in an executive cabinet agency. The speaker questioned whether courts should move beyond being adjudicators and asserted that judges should participate in conversations about justice because not speaking out risked normalizing the problem.

There was some disagreement about whether courts should have a role in anything other than adjudication. One speaker said that it would be improper for judges to take policy positions and that it might harm the credibility of impartial judges. Another participant vehemently disagreed and said that the federal bench had been cowed by Congress and the public. Some federal judges fear being seen as activists. The speaker said that judges must be involved in the discussion about policy and about justice in order to avoid normalizing what is not normal. Another participant agreed that caution is necessary, but insisted that courts must interact with the other two branches and the public to accomplish change.

Creative Interventions

In the final session, participants were asked to name “one thing” they would do to address the many issues raised at the conference. Participants’ responses revealed several strong points of consensus.

Participants agreed on the importance of building coalitions, concluding that if people with power and influence can reach an understanding, it will be possible to effect and sustain major change. Everyone enthusiastically agreed that major players must continue to convene

and have conversations about these important issues. In particular, participants emphasized the importance of reaching out to the business and religious communities. While acknowledging the importance of coalitions with other groups, participants agreed that the bar must play a role in bringing about change, and emphasized the importance of figuring out how members of the bar could bring their skill sets to bear on these issues.

There was less consensus and certainty regarding the role that science can and should play in creating change. Some participants were optimistic about the potential for using neuroscience and new discoveries about cognitive and psychosocial development to inform decision-making and develop risk management tools. Others cautioned that the value of neuroscience is limited when it comes to legal line-drawing, making decisions in individual cases, and making predictions about individuals. Still others cautioned that these sciences are a double-edged sword that can be used against clients at sentencing or in civil commitment proceedings.

Panelists suggested that the institutions of probation, parole, and supervised release, and the effect that these institutions have on seemingly intractable recidivism numbers, be carefully examined and studied. Many felt that the numerous conditions imposed by these forms of “back-door punishment” impose an overwhelming burden on individuals and contribute to high rates of recidivism. Voices cautioned that we should be wary of turning to greater supervision as an alternative to incarceration.

Finally, many strong voices advanced an agenda of empathy. One panelist stressed the importance of meeting prisoners, listening to them, and working with them to gain a better understanding of their experience. By working with prisoners, the public perception of people in prison and the stereotypes that go along with that perception can be altered. Other suggestions included having an open and frank discussion about the roles played by race and poverty, figuring out why people end up in prison in the first place and addressing these front-end causes, examining pretrial detention policies in an attempt to eliminate the punishing effects of the process, and expanding the use of pretrial services to prevent incarceration.

One participant responded to the initial query by suggesting that we set a goal of reducing the national prison population by half and engage in detailed discussions about what it would take to accomplish this goal. While acknowledging the ambitious nature of this goal, panelists agreed that the current economic moment is forcing states to de-incarcerate, and that it’s important to have this conversation and to develop policies that can be used to direct de-incarceration. The conference ended on an optimistic note, with all participants confident about the possibility for change and committed to continuing the conversation.

Supermax and the Judiciary, Judith Resnik*

In the last few decades, a new level of secured incarceration in facilities called “supermax” has developed, subjecting inmates to a level of confinement beyond that in high security or temporary punitive segregation. These facilities rely on a practice of prolonged isolation that one physician termed a “hellhole.”¹ Details of one supermax, opened in Ohio in 1998 to confine more than five hundred prisoners, come from a 2005 unanimous Supreme Court decision, *Wilkinson v. Austin*, 545 U.S. 209 (2005):

more restrictive than any other form of incarceration in Ohio, including conditions on its death row [A]lmost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration . . . is synonymous with extreme isolation. In contrast to any other Ohio prison . . . [the] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate’s cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say [supermax] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at [the supermax] is for an indefinite period of time, limited only by an inmate’s sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated . . . once assigned there.

One might think that such a description would lead to a prohibition—that individuals could not be subjected to isolation, sensory deprivation, and observance indefinitely. Indeed, in 1890, the Supreme Court objected to the solitary confinement of a person convicted of murder; the Court described that, “after even a short confinement,” such detention put a prisoner “into a semi-fatuous condition,” making him unable to “recover sufficient mental activity to be of any subsequent service to the community.”² About a century later, in the 1970s, the Court approved district court findings that Arkansas’s use of indefinite punitive isolation (in that instance, an “average of 4 . . . prisoners were crowded into windowless 8’x10’ cells containing no furniture other than a source of water and a toilet

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¹ Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, THE NEW YORKER, Mar. 30, 2009.

² *In re Medley*, 134 U.S. 160, 168 (1890).

that could only be flushed from outside the cell”) violated the Eighth Amendment.³ Several lower court decisions addressing prison conditions in various parts of the United States limited the duration of isolation and regulated the process for placement.

In 2005, in the *Wilkinson* case, the Eighth Amendment issue was not directly before the Court, as some claims relating to the constitutionality of conditions had been dealt with by way of settlement. Although an amicus brief by health care professionals documented the disabling effects of supermax and the limited evidence of its utility, none of the justices pursued a discussion of whether, if challenged, courts ought to consider banning long-term isolation. The decision was not silent on the question of supermax; rather the opinion appeared to bolster its legitimacy. Justice Kennedy’s opinion commented on the fearsomeness of inmates and the fragility of prison security; the Court described the institution as “imperiled by the brutal reality of prison gangs, . . . [c]landestine, organized, fueled by race-based hostility, and committed to fear and violence.” The *Wilkinson* Court further advised that the “harsh conditions [of supermax] may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.” Thus, “[p]rolonged confinement in Supermax may be the State’s only option for the control of some inmates.”

The Court’s gruesome details (“almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell”) served as a way to distinguish supermax placements from other decisions made by prison officials that had, over the last twenty years, been insulated from court oversight. In the 1970s, the Court had affirmed that the Constitution did not stop at the prison door, and the Court obliged correctional officials to provide procedural safeguards when disciplining prisoners by taking away good-time or by placing persons in administrative or punitive segregation.⁴

But over the last decades, the Court had retreated from that level of engagement with prisoners. Instead, the Court concluded that conviction and incarceration extinguished most liberty interests of prisoners, and the justices limited judicial review of various prison officials’ rules, such as restrictions or prohibitions on visitors,⁵ prisoner transfers from one facility to another,⁶ and placement in segregation after alleged disciplinary infractions.⁷ Under current doctrine, absent a showing of an “atypical and significant hardship,”⁸ no federal judicial intervention is permissible.

The Court’s detailed description of the isolating conditions at the Ohio Supermax, however, sufficed to constitute a “dramatic departure from the basic conditions of [the inmate’s] sentence.” Because Ohio’s supermax imposed an “atypical and significant hardship,” prisoners had a “protected liberty interest in avoiding assignment” to the Ohio Supermax Prison.

That appraisal had been the basis for the trial judge in the *Wilkinson* litigation to install a system of court-based oversight of the substantive grounds for solitary confinement—that certain kinds of minor infractions could not result in that severe a sanction. Further, the lower courts had

³ *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

⁴ See *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974).

⁵ See, e.g., *Overton v. Bazzetta*, 539 U.S. 126 (2003).

⁶ See, e.g., *Meachum v. Fano*, 427 U.S. 215 (1976).

⁷ See, e.g., *Sandin v. Conner*, 515 U.S. 472 (1995).

⁸ *Sandin*, 515 U.S. at 484.

detailed procedural protections required for placements. In contrast, the Supreme Court cut back on the lower courts' imposition of more procedural requirements (such as a right of review of the supermax placement) and reinstated Ohio's minimal process. All that was required was notice of "a brief summary of the factual basis for the classification," and "a rebuttal opportunity" at the two levels of internal review. Detained prisoners could not present adverse witnesses; the Court concluded that any right to confront adverse witnesses was outweighed by the state's interests in order and control. The obligation for a short statement of reasons for confinement was, according to the Court, enough to buffer against "arbitrary decision-making."

Since the ruling, a few forms of solitary confinement have been found actionable, such as "28 to 35 year confinements" in lockdown in the Louisiana State Penitentiary in Angola.⁹ But courts also have rejected a variety of claims, including the isolation of a prisoner for an aggregate of thirty months, the transfer of an individual for six weeks to isolation pending the investigation into his culpability for a prison murder, and a three-year stint in segregation.¹⁰ On the other hand, a few lower court judges have found for prisoners. As Judge Terence Evans of the Court of Appeals for the Seventh Circuit began one opinion reinstating a case that the lower court had dismissed:

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but "nutri-loaf"; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002.¹¹

⁹ *Wilkerson v. Stalder*, No. 00-304-C, 2007 WL 2693852, at *1 (M.D. La. Sept. 11, 2007).

¹⁰ *See, e.g., Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1336 (10th Cir. 2007); *Al-Amin v. Donald*, 165 Fed.Appx. 733, 738 (11th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 485 (1st Cir. 2005).

¹¹ *Gillis v. Litscher*, 468 F.3d 488, 489 (7th Cir. 2006).

Summoning the Superheroes: Harnessing Science and Passion to Create a More Effective and Humane Response to Crime, Jeremy Travis^{*}

I have been given a challenging assignment today – to envision the world of criminal justice policy in 2036. In taking on this assignment, one is tempted to paint a future world of peace and harmony, where lions and lambs lie together, our elected officials are all wise and enlightened, and debates over crime policy are resolved rationally, by referring to agreed upon principles, shared values and scientific evidence. I doubt this ideal world will exist in 2036. But we can still set lofty goals for ourselves. I hope we can agree that, in the next quarter century, we should aspire to create a crime policy that is both more effective, and more humane. By “more effective,” I mean that we should respond to crime in ways that produce socially desirable results – greater safety, less fear, less suffering, greater respect for the rule of law and less injustice – and that we do so efficiently, investing our precious financial and human resources in ways that maximize the results we desire. By “more humane,” I mean we should respond to crime in ways that recognize the humanity of those victimized by crime, those arrested and convicted of crime, and others who experience the ripple effects of crime and our justice system. This affirmation of humanity, as I see it, incorporates values we hold dear in our democracy, such as equal protection of the laws, access to the rights guaranteed by our Constitution, and our fundamental belief in the dignity of the individual.

I need not detail for this audience the many ways our current reality falls short of these goals. Too many victims have difficulty getting their lives back on track. Too often, our police use excessive force, fail to follow legal dictates, and undermine respect for the rule of law. Our system of adjudication too often coerces defendants to act against their interests, and excludes victims from meaningful engagement. Our jails and prisons are frequently full beyond capacity and too often resemble human warehouses rather than humane places for reflection, rehabilitation and restoration. Our response to crime is marked by racial disparities that belie our commitment to equal protection of the laws. And we have become a society with a growing population of individuals with felony records, and prison experience, a population that we marginalize through legal barriers and social stigma.

If we want our response to crime to be more effective and more humane than this, we must summon the assistance of two powerful superheroes -- two forces that, working together, can sweep away the cobwebs in our minds, clear the highest organizational hurdles and move political mountains. Our two superheroes are science – the quest for empirical truth – and passion – the human impulse to seek justice. People sometimes think that science and passion are opposite human endeavors, that they must be mutually exclusive. In my view, these superheroes are not rivals. In fact, the power of each is enhanced by the power of the other. To

^{*} Jeremy Travis is President of John Jay College of Criminal Justice. These comments—which were presented to the December roundtable—are adapted from a speech given at the National Press Club in Washington, D.C. on October 11, 2011, in honor of the twenty-fifth anniversary of the Sentencing Project.

advance the cause of justice by 2036, we must be passionate about the importance of science, and must incorporate the lessons of science in our passionate advocacy for a more effective and humane response to crime.

So, let's think about the challenges that we face to see how science and passion can work well together. I nominate, for your consideration, the following five great challenges for the next quarter century:

1. We must help crime victims rebuild their lives.

When a crime is committed, the social contract is broken. Our typical response to that event is to focus our resources and energy primarily on finding the offender, prosecuting him, and providing an appropriate criminal sanction if he is convicted. Why do we overlook the legitimate needs of the victim? Why does our passion for justice not extend to those harmed by crime? What would science tell us about the experiences, needs, and life course of crime victims?

Let's begin with the science. First, one of the most important criminological discoveries of the past two decades concerns the phenomenon of repeat victimization, the research finding that for some crimes, once someone is victimized, there is a high probability that the same individual will be victimized again.¹ Indeed, the risk of re-victimization is highest in the period immediately following the first incident. In my view, this scientific finding, which applies to victims of burglary, sexual assault, and domestic violence, among other crimes, should create a social obligation to intervene to prevent the next crime. Second, science also tells us that for many crime victims, the crime causes long-term negative effects. Victims are more likely to experience mental illness, suicide and substance abuse than the general population.² Victims of violent crimes suffer elevated levels of post-traumatic stress disorder (PTSD) and suffer from many PTSD symptoms, such as becoming fearful and withdrawn, and experiencing difficulties in professional, social and intimate relationships.³ Given these social harms, why do we not intervene to help mitigate the damage caused by crime?

Third, research also tells us that child abuse and neglect frequently create an intergenerational "cycle of violence", to use a phrase coined by Cathy Spatz Widom.⁴ Children who suffer in this way are more likely than a comparable peer group to engage in delinquent and criminal acts when they grow up. Given this fact, how can we not provide special interventions for these, our most vulnerable, to help them secure a brighter future, while simultaneously preventing future crimes?

¹ Graham Farrell, Ken Pease, *Once Bitten, Twice Bitten: Repeat Victimization and its Implications for Crime Prevention* (Crime Prevention Unit Series Paper No. 46, Home Office Police Research Group, London, UK, 1993).

² Dean G. Kilpatrick, Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes* (Journal of Traumatic Stress, 16, no.2, 2003)

³ Michael B. First, Allan Tasma, eds., *Anxiety Disorders: Traumatic Stress Disorders*, in *DSM-IV-TR Mental Disorders: Diagnosis, Etiology, and Treatment* (West Sussex, UK: John Wiley & Sons, Ltd., 2004, 927-8).

⁴ Cathy Spatz Widom, *The Cycle of Violence*, *Science* 244, no. 4901 (1989): 162.

Finally, we have known for decades that most victims never see their cases go to court because most crimes do not result in an arrest.⁵ In the small percentage of all reported crimes where an arrest is made – about 20% – most cases are resolved through plea bargains or result in dismissals, so victims play a minor role, if any. Even in cases that go to trial, where the crime victim may be a more active participant, the victim’s immediate and long-term needs are rarely addressed. Given this statistical reality, why have we focused so much attention on the role of victims in criminal proceedings, at the expense of devising a societal response to all victims, whether or not the offender is ever arrested and prosecuted? Where is our passion, our concern for human suffering, our sense of justice?

My thinking on this topic has been influenced, I hasten to acknowledge, by the work of my wife, Susan Herman, who developed the concept of Parallel Justice.⁶ According to the principles of Parallel Justice, we should not conceptualize our response to crime victims simply as an act of charity, nor merely through the creation of rights in criminal proceedings. Rather, the concept of Parallel Justice requires that we respond to victims more effectively, and more humanely, because the pursuit of justice requires it.

The science is clear. A more effective response to victims will reduce repeat victimization and future offending. It will prevent long-lasting social harms and repair the social fabric. We can hypothesize that a more humane response to crime victims would enhance their respect for the rule of law and would reduce the overall retributive mood in our country. So we need to ask ourselves why we have not taken the needs of crime victims seriously. Unfortunately, we have created a two-track world that sees the interests of victims and offenders as oppositional, that counts individuals as either victim advocates or justice reform advocates, that pits the suffering of prisoners against the suffering of victims. We are a better nation than this history suggests. Between today and 2036, we must expand our concept of justice to embrace a societal obligation to those harmed by crime. Our passion for justice, working in tandem with strong science, will lead the way.

2. We must pursue a focused and scientific crime prevention agenda.

We are fortunate to be meeting at a time when the crime rates in America are at historic lows. There are two distinct narratives about crime trends in America. The story of violent crime is well known. After a decline in the early 1980s, rates of violence in America spiked upward starting in the mid-1980s with the introduction of crack cocaine in America’s cities.⁷ Then, as that epidemic subsided, violent crime rates started a historic decline, dropping to rates lower than those seen in the 1960s, with another 12% decline from 2009 to 2010 reported last month by the FBI.⁸ Less well known is the story of property crime, which has been in steady decline since the early 1970s. Our rates of property crime today are half their level

⁵ Jennifer L. Truman, *Criminal Victimization, 2010* (US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, September 2011).

⁶ Susan Herman, *Parallel Justice for Victims of Crime* (National Center for Victims of Crime, 2010).

⁷ Arthur S. Goldberger and Richard Rosenfeld, Editors, *Committee on Understanding Crime Trends, Understanding Crime Trends: Workshop Report*, (The National Research Council, 2008).

⁸ Truman, 2011.

when the decline started. These are remarkable stories. Who among us – particularly those working in this field for the past 25 years – would have thought we could stand in our nation’s capital and say that crime rates are at their lowest levels in our professional lifetimes?

I draw three lessons from this story. First, we need a much better understanding of why this happened. I can think of no stronger indictment of our field than this: we do not have a satisfactory, much less a sophisticated, understanding of the reasons that crime has increased and decreased so dramatically. Imagine we were meeting at a medical convention, noting that the incidence of one type of cancer had dropped in half since 1970, and another type of cancer devastated America’s inner cities, particularly its communities of color, for several years, then dropped precipitously. Would we not expect the medical research community to have a deep understanding of what happened, what treatments worked, what environmental factors influenced these results, and which strains of these cancers proved particularly resistant? Of course we would.

So, the crime scientists among us need to get to work, with appropriate funding from foundations and the federal government, to help us understand our own history of crime trends. And, looking forward, we need to develop a much more sophisticated data infrastructure to allow us to track crime trends in real time.⁹ Think about this the next time you hear about a business report on television: If economists can tell us which sectors of the economy were growing or declining last month, certainly we can build a data infrastructure to help us understand crime trends last year.

A second lesson: we need to rethink what we mean by “crime prevention.” Too often we narrowly define “crime prevention” only in terms of programmatic investments in young people to help them lead more productive, pro-social lives. But clearly, over the past forty years, this historic decline in crime rates has not come about because we invested massively in programs that helped our young people avoid criminal activity. Other policy choices have also made a difference. Let me give one example: according to a provocative new book by Frank Zimring on the crime decline in New York City, that city’s auto theft rate in 2008 is 6 percent – six percent—of what it was in 1990.¹⁰ How were those crimes prevented? How much can be attributed to changes in safety practices and theft-prevention technologies developed by the auto industry, by new federal regulations requiring marking of auto parts to deter the operation of chop shops, and by more effective police investigations? My point is simple: a rigorous, scientific exploration of changes in crime rates will identify a broad set of practices that prevent crime, assign costs and benefits to those practices, and hopefully help us invest money and political capital in those crime prevention strategies that are proven to reduce harm. If we are

⁹ At a minimum, a robust national data infrastructure to track crime trends would include: an expanded National Crime Victimization Survey (NCVS) so that the victimization trends could be tracked in the 75 largest cities of America; an expanded Arrestee Drug Abuse Monitoring (ADAM) system in those 75 cities, as proposed by the Department of Justice fifteen years ago, to track trends in drug use, gun use, intergroup violence and other variables among the arrestee population; and federally-administered annual recidivism reports for all 50 states to track arrest rates among those under community supervision.

¹⁰ Franklin E. Zimring, *The City that Became Safe: New York and the Future of Crime Control* (Oxford: Oxford University Press, 2011).

passionate about reducing our crime rates even further by 2036, we will broaden our frame of reference and bring many more sectors of our society to the crime prevention table.

There's a third, uncomfortable lesson of the great American crime decline: we have no reason to be complacent. The rates of lethal violence in America are still higher than in Europe, by a factor of five. (Our rates of property crime are, we should note, lower than in Europe.) And, if we were ruthless about our science, we must confront the reality that violent crime is highly concentrated in a small number of communities of color in urban America, and in those communities is concentrated among a small number of young men. These men are at high risk of being both victims of violence, and agents of violence.

Let me cite some data that make the point. A few years ago, John Klofas, a professor at the Rochester Institute of Technology, examined that city's homicide data to determine who was at the highest risk of being killed.¹¹ At the time of his research, the homicide rate for the nation as a whole was 8 per 100,000. Among those aged 15-19, it was nearly triple that: 22 per 100,000. Among males in that age group, it was more than quadruple the national rate, or 36 per 100,000. For African-American males aged 15-19 in Rochester, it was 264 per 100,000. Finally, for African-American males aged 15-19 in the "high-crime crescent," the most dangerous neighborhood in Rochester, the homicide rate was 520 per 100,000, or 65 times the national rate.

More recently, Andrew Papachristos of the University of Massachusetts, Amherst, took this approach one step further. Using a database including all young men involved in criminally active groups in a high crime Chicago neighborhood, Dr. Papachristos calculated that the homicide rate within these groups was 3,000 per 100,000, or 375 times the national rate.¹² This kind of social network analysis is not just about victimization rates. The 1,593 people included in Papachristos' analysis were also responsible for 75% of the homicides in this neighborhood. This rate of killing constitutes a national crisis, yet we turn a blind eye to this reality, lulled into inaction by our self-congratulatory sense of progress and our collective unwillingness to get serious about the issue of violence in inner city communities of color.

To reduce rates of violence in America over the next quarter century, we must tackle this phenomenon head on. I strongly recommend that we embrace and replicate the focused deterrence strategies developed by David Kennedy, a Professor at John Jay College of Criminal Justice.¹³ First tested in Boston 15 years ago to address youth violence, then expanded to drug markets in High Point, North Carolina, and now being implemented in 70 cities across the country through the National Network for Safe Communities, these strategies have been

¹¹ John M. Klofas, Christopher Delaney, Tisha Smith, Strategic Approaches to Community Safety Initiative (SACSI) in Rochester, NY (US Dept. of Justice, National Institute of Justice, 2005) as referenced in: Jeremy Travis, New Strategies for Combating Violent Crime: Drawing Lessons from Recent Experience (Testimony before the U.S. Senate Judiciary Committee, Washington DC, September 10, 2008).

¹² Andrew Papachristos, The Small World of Murder (retrieved from the World Wide Web on October 7, 2011: http://www.papachristos.org/Small_World.html).

¹³ David Kennedy, Don't Shoot: One Man, A Street Fellowship, and the End of Violence in Inner-City America (New York: Bloombury USA, 2011).

proven highly effective at reducing group violence – typically by 40-50% – and virtually eliminating overt drug markets. These strategies have two other benefits – they reduce incarceration rates, and promote a process of racial reconciliation between police and communities of color. If we are serious about creating communities that are safer and more just, we will insist that these strategies are replicated nationwide.¹⁴

A scientifically based crime prevention agenda would simultaneously expand our vision to incorporate the many ways crimes are prevented, while focusing laser-like on the neighborhoods and individuals at highest risk of the most extreme violence. On this latter point, strong science will direct us, but passionate advocacy is necessary to win the day. Unfortunately, American society is not sympathetic to the argument that, because young African-American men, many of them involved in crime themselves, are at greatest risk of being killed, we should therefore devote our greatest resources to preventing those crimes. To advance that agenda we must overcome barriers of racism, fear and stereotyping. But if our crime policy is to be more effective and more humane, we must bring all our tools – science and passion – to the task.

3. We must use science to develop professional standards for the justice system.

One of the most important recent developments in social policy generally – and in crime policy specifically – has been the embrace of the notion of “evidence-based practices.” The Office of Management and Budget has adopted this mantra with gusto. The Office of Justice Programs in the Justice Department has joined the chorus. George Mason University now hosts a Center for Evidence-based Crime Policy. With some reservations, I applaud this development. Rather than discuss my reservations, however, I would like to challenge us to imagine the world of 2036, when we hopefully will have much more evidence about what works and what doesn’t, and ask ourselves this question: How will we enforce the science of effectiveness? How do we ensure that practice follows research, and criminal justice agencies are held to evidence-based standards?

In imagining this new world, we are immediately confronted with the realities of our federal system in which the states are primarily responsible for criminal justice operations. Granted we have some national standards of practice imposed by federal courts through constitutional interpretations – think of the Miranda warnings, required of all police agencies. We have other standards imposed by federal oversight agencies – think of the FBI’s reporting guidelines for the Uniform Crime Reports. Yet, as a general matter, we shy away from federally imposed standards of practice. Must it always be so? Can we create a national framework in which certain standards of practice, validated by strong science, have equal force and effect across the country?

¹⁴ The National Network for Safe Communities, housed at John Jay College for Criminal Justice, is dedicated to working with jurisdictions to implement these focused deterrence strategies and to incorporating them into national practice. See www.nnscommunities.org.

This dilemma was highlighted recently by a court ruling in New Jersey¹⁵ and a research report issued by the American Judicature Society.¹⁶ Both examined the same issue – the unreliability of eyewitness memory. As we know from hundreds of exonerations based on DNA analysis, errors attributable to faulty eyewitness memory can result in serious miscarriages of justice. Hundreds – perhaps thousands – of individuals have spent years in America’s prisons for crimes they did not commit. Some have been put to death. But we also know from strong scientific studies that eyewitness evidence can be gathered in a way that reduces the likelihood of error, without compromising our ability to identify the true suspect.¹⁷ This method is called “sequential, double-blind”, meaning that the witness sees possible suspects (either in lineups or in photos) one after another, and that the procedure is administered by someone with no connection to the investigation. The power of this method was conclusively demonstrated in the field experiment conducted by AJS.

But now we face a significant question: How do we, as a nation, ensure that all investigations involving eyewitness evidence are conducted according to this proven procedure? In the Henderson case, the New Jersey Supreme Court established standards for that state, with commendable reference to the strong scientific basis for those standards.¹⁸ Perhaps the United States Supreme Court will issue a similar, Miranda-like ruling, but let’s not count on this outcome. In the meantime, what should be the rule in states other than New Jersey? In those states, will we allow innocent defendants to be convicted and sentenced to prison terms based on faulty eyewitness identification as our sacrifice on the altar of federalism?

In less dramatic terms, we have faced this question before. To cite well-known examples, we continue to fund DARE, “scared straight” programs, and batterers’ interventions long after research has shown they are ineffective. On a broader scale, we fund programs of unknown effectiveness that have never been rigorously tested. And even when we have competent evaluations in hand, we care little about effect sizes (does the program make a big or small difference?) and even less about cost-benefit analysis (did the positive program effects more than offset the cost of the program?). In making the case for strong crime science, I turn again to the medical model for an analogy. Imagine that medical research had found an effective treatment of migraines. Wouldn’t we expect the entire medical profession to adopt that procedure? Wouldn’t we be shocked if a migraine patient in Washington was told that, even though the treatment is available in New Jersey, we will wait until we validate it in Washington? Imagine if the Washington doctor said something we hear too often in the criminal justice world: “Well, migraines in Washington are just different and anything they learn in New Jersey won’t work here.”

¹⁵ State v. Larry R. Henderson (A-8-08)(062218) (2011).

¹⁶ Gary L. Wells, Nancy K. Steblay, Jennifer Dysart, A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies (American Judicature Society, 2011).

¹⁷ Elizabeth F. Loftus, James M. Doyle, Jennifer E. Dysart, Eyewitness Testimony: Civil and Criminal (Newark, NJ: Lexis Nexis, 2007).

¹⁸ State v. Larry R. Henderson (A-8-08)(062218) (2011).

We cannot alter our federalist structure of government, but we can develop a robust concept of justice professionalism, in which policies and practices of proven effectiveness are adopted by police, prosecutors, judges, corrections, service and treatment providers. We need a professional ethic that views failure to adopt those proven policies and practices as a form of justice malpractice.¹⁹ As our science becomes stronger, and our evidence base becomes deeper, we need to be passionate about demanding that the agencies of justice follow the dictates of science.

4. We must rethink the role of the criminal sanction.

One of the great advances in our profession came nearly a half century ago when the President's Commission on Law Enforcement and Administration of Justice specified, for the first time, the complex interactions of the agencies that comprise the "criminal justice system".²⁰ This system is now depicted in the famous chart, resembling a funnel, with the number of crimes committed on the left hand side, the operations of police, prosecutors and courts in the middle, and prisons and community corrections on the right hand side.

This portrayal of the criminal justice system may have clarified the working relationships of those agencies, but it created a new problem: the "case" has become our unit of analysis. We focus our attention on the cases that move down the assembly line of the justice system, from the outbox of one agency to the inbox of another.²¹ Over the past twenty years, another metaphor has emerged, one that stands in stark contrast to the image of the assembly line. In this metaphor, the agencies of the justice system are organized around a problem, not a case. Rather than the assembly line, this approach envisions a collaborative table at which the assets of various agencies are deployed to address an underlying problem, not just to determine the outcome in a criminal prosecution.

This new approach was first championed by the police, inspired by the pioneering work of Herman Goldstein, titled *Problem-Oriented Policing*.²² Prof. Goldstein said the unit of analysis for effective policing was a community problem, not a 911 call. This powerful insight led directly to the concept of "hot spots policing," which focuses police resources on addressing crime problems that are spatially concentrated.²³ In a broader sense, the problem-centered

¹⁹ Christopher Stone, Guggenheim Professor of Practice at Harvard's Kennedy School of Government, and I outlined a similar approach to professionalism in policing. One of the cornerstones of this "new professionalism" is the emergence of a framework of "national coherence" in the work of police agencies. Christopher Stone, Jeremy Travis, *Toward a New Professionalism in Policing* (Harvard: Harvard Kennedy School of Government, 2011).

²⁰ The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, DC: Government Printing Office, February 1967).

²¹ Jeremy Travis, *Building Communities with Justice: Overcoming the Tyranny of the Funnel* (Keynote address delivered at the Marquette Law School Public Service Conference on the Future of Community Justice in Wisconsin on February 20, 2009).

²² Herman Goldstein, *Problem-Oriented Policing* (New York: McGraw-Hill, 1990).

²³ David Weisburd, Cody W. Telep, *Spatial Displacement and Diffusion of Crime Control Benefits Revisited: New Evidence on Why Crime Doesn't Just Move Around The Corner* (book chapter in N. Tilley & G. Farrell (eds.), *The reasoning criminologist: Essays in honor of Ronald V. Clarke*, publication forthcoming, New York: Routledge). This body of research was highlighted at the 2010 Stockholm Criminology Symposium at which time Prof. David Weisburd received the Stockholm Prize in Criminology.

approach to crime lies at the heart of community policing, with its emphasis on community partnerships to address community problems.

A problem-oriented focus also led to the creation of the first drug courts in Miami in 1989, the first community court in Manhattan in 1993, and a generation of innovative problem-solving courts addressing issues such as mental health, domestic violence and drunk driving.²⁴ This new way of thinking informs the work of David Kennedy, whose strategies were designed to address the problems of group violence and overt drug markets. It undergirds the premise of Project Hope, a highly successful project first launched in Hawaii designed to reduce drug use and crime among the community corrections population.²⁵ It lies at the heart of the restorative justice movement, which convenes victims, offenders and other stakeholders to address harms and repair relationships. Finally, this pragmatic approach to problems, not cases, provides the framework for the reentry movement, which is bringing new partners to the table to address the challenges faced by individuals leaving prison.²⁶

In this new world, everyone's role is changing. In the focused deterrence work, probation officers are part of a strategy designed with police, prosecutors and community members in which their supervisory authority is used to achieve certain behavioral outcomes for probationers. In drug courts, prosecutors and defense attorneys collaborate with judges to impose minor criminal penalties on participants who violate their treatment terms. In Project Hope, drug tests are used explicitly to prevent drug use and cut recidivism, only secondarily to detect drug levels.

These initiatives challenge conventional wisdom. They envision a very different system, one that is more collaborative than adversarial. But they are even more revolutionary than that. At their core, they envision a very different role for the criminal sanction and the relationship between the criminal sanction and individual behavior. If, as in the case of drug courts, the behavior of drug addicts changes because of the possibility of the imposition of a criminal sanction, why would we not defer more prosecutions and suspend more sentences? If, as in the case of the focused deterrence model, gang members and drug dealers no longer engage in violence (or drug dealing) because of the combination of peer pressure, community influence, and a credible threat that they will be arrested if the violence and drug dealing continues, why would we not package the criminal sanction this way more frequently?

I believe we are on the verge of a fundamental conceptual breakthrough. These problem-oriented innovations are showing us that if we apply the criminal sanction in a very parsimonious way, in combination with other interventions, we can reap enormous benefits in crime reduction and enhanced legitimacy of the justice system. These innovations, in turn, require us to reconsider our approach to sentencing, to become less rigid and less punitive. Finally, these problem-solving approaches show us how to engage more effectively the forces of informal social control -- such as family, positive peer pressure, and community supports -- so

²⁴ For a discussion of the problem-solving court movement, see: *Good Courts: The Case for Problem-Solving Justice*, by Greg Berman and John Feinblatt (2005).

²⁵ Mark A.R. Kleiman, *When Brute Force Fails* (Princeton, NJ: Princeton University Press, 2009)

²⁶ Jeremy Travis, *Reflections on the Reentry Movement* (Federal Sentencing Reporter, 20, no. 2, 1-4, 2007).

we can rely less on the forces of formal social control, such as arrest, prosecution and prison. In the future, if the science continues to support these interventions, and we are passionate about applying these lessons, the criminal justice system, as a mechanical assembly line, may be a relic of our past.

5. We must rethink a venerable American institution, the prison.

Anyone who follows the work of the Sentencing Project knows the sobering facts. The rate of incarceration in America has nearly quadrupled between 1980 and 2009.²⁷ America holds one quarter of the world's prisoners, even though we constitute only five percent of the world's population.²⁸ An African-American man faces a one-in-three lifetime chance of spending at least a year in prison.²⁹ In 1972, there were 200,000 people in our nation's prisons; we now have over 140,000 people serving life sentences alone.³⁰ In California, 20% of the prison population is serving a life sentence.³¹ In 2007, we spent \$44 billion on corrections, up from \$10.6 billion in 1987.³² The number of people incarcerated in state prisons on drug offenses has increased at least by 550% over the past 20 years.³³ This year, approximately 735,000 individuals will leave state and federal prison, compared to fewer than 200,000 in 1980.³⁴

We should quickly acknowledge that the era of prison growth in America might have ended. For the last three years, the prison population actually declined.³⁵ In some states prison populations have actually declined substantially, led by California, Michigan, and New York, which have seen declines of 4,257, 3,260, and 1,699 respectively between 2008 and 2009.³⁶ We

²⁷ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Incarceration rate 1980-2009 (retrieved from the World Wide Web on October 7, 2011:

<http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm>.

²⁸ The Pew Charitable Trust Center, 1 in 100: Behind Bars in America 2008. (Retrieved from the World Wide Web on October 7, 2011: http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

²⁹ Thomas P. Bonczar, Allen J. Beck, Prevalence of Imprisonment in the U.S. Population, 1974-2001. Washington DC: U.S. Department of Justice; Office of Justice Programs; Bureau of Justice Statistics Special Report, 2003).

³⁰ Ashley Nellis, Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009, retrieved from the World Wide Web on October 7, 2011:

http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf).

³¹ Robert Weisberg, Debbie A. Mukamal and Jordan D. Segall, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California (Stanford Law Criminal Justice Center, retrieved from the World Wide Web on October 7, 2011:

http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf).

³² The Pew Charitable Trust Center, 2008.

³³ Amanda Petteruti, Nastassia Walsh, Tracy Velázquez, Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety (Justice Policy Institute, May 2009, retrieved from the World Wide Web on October 7, 2011: http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf).

³⁴ The National Reentry Resource Center, Reentry Facts (Retrieved from the world wide web on October 7, 2011: http://www.nationalreentryresourcecenter.org/facts#foot_3).

³⁵ The Pew Center on the States, Prison Count 2010: State Population Declines for the First Time in 38 Years (The Pew Research Center, retrieved from the world wide web on October 7, 2011:

http://www.pewtrusts.org/uploadedFiles/Prison_Count_2010.pdf).

³⁶ Ibid.

should also note that a number of states have significantly reduced their juvenile detention rates.³⁷ But these slight decreases should not be a cause for celebration. We have a long way to go to bring our incarceration rate into line with other Western democracies, or even our own history.

As Americans, we should be deeply troubled by the current state of affairs. In fact, I think we should consider our current level of imprisonment a stain on our national conscience. We can certainly criticize our high rate of incarceration on any number of policy grounds: Prisons are a very expensive response to crime. As a crime control strategy, imprisonment is highly inefficient, requiring lots of resources for very little benefit in terms of crime control. They have become part of the national landscape – literally, scattered throughout the land – and have become embedded in local economies. They are supported by powerful unions, fueled by corporate interests and perpetuated by the reality that some elected officials have become dependent on the economic and political benefits of having prisons in their districts.

But I would hope that our critique of the American experiment with high rates of incarceration would begin with a consideration of the human cost -- a recognition that we have wasted hundreds of thousands of lives, subjected thousands of our fellow citizens to the inhumane treatment of solitary confinement, separated families in a modern version of the slave auction block, and consigned millions of Americans to a state of marginalized life, cut off from meaningful work, benefits, political participation and family support. Many years ago, as the system of apartheid was just being installed in South Africa, Alan Paton, a white South African author, wrote a novel describing the racial realities in that society with the memorable and powerful title, *Cry the Beloved Country*. When we look at our current imprisonment practices, we should have the same reaction: what has happened to our beloved country?

Turning around this quarter century experiment will take enormous help from our superheroes. We need strong science to show the impact of imprisonment on the people held in prisons, their families and the communities they left behind. We need strong science to demonstrate the effectiveness of alternatives to incarceration, in-prison programs, reentry initiatives, and new approaches to community supervision.

But this is a policy area where even the strongest science will not be enough. We need to call upon our second superhero, passion, to play a primary role in promoting a system that is more humane. We need to remind people that prisons hold people, that millions of children are growing up without their parents, that corrections officers also live in prisons and must endure challenging circumstances, and that victims are not helped if the person who harmed them is simply incarcerated and neither the victim's nor the offender's needs are addressed.

Of the five challenges I have offered this morning, this is the toughest. I would suggest that we start with a clean slate, asking the deepest philosophical and jurisprudential questions. Why should anyone be sent to prison? Under what circumstances is the state authorized to deprive someone of their liberty? How long is long enough? If we had fewer prisons, how could

³⁷ Jeffrey A. Butts, Douglas N. Evans, *Resolution, Reinvestment, and Realignment: Three Strategies for Changing Juvenile Justice* (John Jay College of Criminal Justice Research and Evaluation Center, September 2011).

the money saved be better invested -- to help victims recover, provide alternatives to incarceration, to fund the tougher work of solving the problems that give rise to crime? Our biggest challenge will require our greatest feat of imagination. It will require the very best of our two superheroes, science and passion. It will require deep and sustained political work to persuade our elected officials that we need to reverse course and abandon our over-reliance on prison as a response to crime.

The work that lies ahead builds on some sobering lessons from the past 25 years. We punish too much and heal too little. Too often, we isolate, rather than integrate, those who have caused harm. Too often, we neglect, rather than comfort, those who have been harmed. Our over-reliance on the power of the state rather than the moral voice of family and community undermines the promise of our democracy. Yet, despite these realizations, we still face the next quarter century with hope – a fervent hope that in the next chapter of our history we can be more effective, and more humane, as we respond to crime; we can address the compelling problem of violence in our inner cities while reducing rates of incarceration and promoting racial reconciliation between the police and the policed; and we can return to rates of imprisonment that are consistent with our values as a nation. We have every reason to be optimistic about our future.

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SELECTED READINGS AND QUESTIONS

Overcriminalization and the Production of Crime

What does “overcriminalization” mean? Should changes be made in the mens rea? In the types criminalized? What are the respective roles of the state and federal systems in generating the phenomenon of overcriminalization?

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VA. CODE ANN. §30-19.1:4

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We have focused thus far on facets of the justice system that have produced overcriminalization, excessive punishments, and large numbers of young people in detention. For our closing discussions, we suggest considering both the challenges that limited resources impose and the sectors of the criminal justice system that have the capacity, authority, and willingness to limit or reshape presumptions. One shorthand for the question is: who can say no?

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