3 Incapacitation and Sentencing

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Punishments may serve multiple purposes, and these may include rehabilitation, retribution, deterrence, and incapacitation. This chapter focuses on the punishment goal of incapacitation, which is accomplished when a judge imposes a sentence that limits or completely does away with an offender’s physical ability to commit a crime. The ultimate form of incapacitation, because it completely neutralizes an offender, is death. A less drastic example is the surgical or chemical castration of a sex offender, because such an action alters the individual’s physiological state and, thereby, minimizes his likelihood of reoffending. But, the death penalty is not often imposed and sentences that require an offender to undergo a process of castration are far from common. In comparison, jail and prison sentences are imposed far more frequently; the primary method of offender incapacitation in the United States is incarceration. Prison and jail inmates are incapacitated due to their secure isolation from the general public; individuals who are physically removed from society cannot harm law-abiding citizens.

More than two million Americans are currently incarcerated in the United States, and rates of incarceration have increased markedly over time (Kaeble, Glaze, Tsoutis, and Minton 2015). Changes in sentencing policy largely explain the current extent of American incarceration. To put it another way, sentences to incarceration are far more likely today than they once were because punishment laws were modified over time to reflect the goal of crime prevention through incapacitation.

This chapter begins with an overview of the use of incarceration in the United States, and highlights increases over time. The section that follows explains how a sizeable amount of the spike in incarceration resulted from the passage of laws that mandated determinate sentences, guidelines-based sentences, mandatory-minimum prison sentences for first-time offenders convicted of specified crimes, lengthy prison terms for repeat offenders (sometimes with no opportunity for release), and fewer days of credit that could be earned by prison inmates to reduce their time behind bars. The chapter then turns to an examination of research findings from studies of the effects of such laws. The conclusion provides a discussion of some recently implemented sentencing reforms.

American Lockup

The rate of incarceration in the U.S. more than tripled from 1980 to 2014. In 1980, slightly more than 500,000 individuals were incarcerated in jails and prisons across the United States and the rate of incarceration was 221 inmates per 100,000 U.S. residents (Beck and Gillard 1995: 2). By 1994, the rate of incarceration increased to 562 inmates per 100,000 people and over 1.4 million individuals were in custody (Gillard and Beck 1996: 2). At yearend 2014, over two million people were housed in U.S. jails and prisons and the estimated rate of incarceration was 690 inmates per 100,000 Americans (Kaeble et al. 2015: 2–3).
To provide a bit more context to these figures, the current U.S. rate of incarceration is more than five times higher than the rate found for almost every other country (Wagner and Walsh 2016). In fact, “38 states lock up greater portions of their populations than El Salvador, a country that recently endured a civil war and now has one of the highest homicide rates in the world” (Wagner and Walsh 2016: n.p.).

The size of prison populations and the rate of incarceration are, of course, determined by the number of admissions to prison and by inmate length of stay. The number of inmates in federal and state prisons for violent, property, drug, and public-order (e.g., drunk driving, obstruction of justice, gambling) offenses has increased dramatically over time. Increases have been especially notable for inmates serving time for drug offenses; the likelihood of being sent to prison for a drug-related crime increased by 350 percent from 1980 to 2010 (Mitchell and Leachman, 2014: 5). At the federal level, 25 percent of the U.S. prison population (4,900 inmates in total) consisted of drug offenders in 1980 (Brown, Gilliard, Snell, Stephan, and Wilson 1996: 12). In 2014, nearly half of all federal inmates (96,500 inmates) were serving time for drug offenses (Carson 2015). Across state prisons, only 6.4 percent of inmates (19,000 in total) were incarcerated for drug offenses in 1980 (Brown et al. 1996: 10). By yearend 2013, about 16 percent of state prison inmates (208,000 in total) were drug offenders (Carson 2015). In short, the number of people incarcerated in state prisons for a drug offense has increased more than ten-fold since 1980. It is also interesting to point out that “most of these people [were] not high-level actors in the drug trade, and most [had] no prior criminal record for a violent offense” (Sentencing Project 2015: 3).

Furthermore, inmates are serving longer prison sentences today than they did decades ago. Researchers from the Pew Center on the States (2012: 13) reported that inmates released from state prisons in 2009 spent an average of nine months longer behind bars than inmates released in 1990. From 1990 to 2009, the average length of time served in state prisons increased by 37 percent for violent offenders, 36 percent for drug offenders, and 24 percent for property offenders (Pew Center on the States 2012: 3). And, among specific categories of violent crime, time served in state prisons for aggravated assault, burglary, and robbery increased by 83 percent, 41 percent, and 79 percent, respectively, from 1980 to 2010 (National Research Council 2014: 53).

Similar trends have also been observed among federal inmates. The average amount of time served by federal inmates was more than two and a half times longer in 2012 (Motivans 2015: 39) than in 1986 (Bureau of Justice Statistics 1996: 18). With regard to increases among specific categories of federal inmates, from 1986 to 2012, the average amount of time served increased by more than two years (from 46.4 months to 71.6 months) for those convicted of violent crimes and by more than three years (from 20.6 months to 58.6 months) for those convicted of drug offenses (Bureau of Justice Statistics 1996: 18; Motivans 2015: 39). Lengthier average prison sentences, particularly among drug offenders, have significantly increased the federal inmate population. In fact, researchers from the Urban Institute concluded “the increase in expected time served by drug offenders was the single greatest contributor to growth in the federal prison population between 1998 and 2010” (Mallik-Kane, Parthasarathy, and Adams 2012: 3).

It is also worth noting that more inmates are serving life sentences today than during the 1980s. Since 1984, the number of people serving life sentences has more than quadrupled (Sentencing Project 2015: 8); an estimated one in nine prison inmates is currently serving a life sentence (Sentencing Project 2015: 8) and one third of these inmates is serving a sentence without the possibility of parole (Nellis 2013: 1). Before 1970, only seven states authorized judges to impose life sentences without the opportunity for parole (LWOP), but even though allowed, LWOP was infrequently given and was generally used only as an alternative to the death penalty for those convicted of homicide (Nellis 2013: 3–7). However,
beginning in the 1980s when incapacitation gained prominence as a punishment goal, and as support for the goal of rehabilitation diminished, policymakers and the public got behind the idea of putting many different sorts of offenders away for the rest of their lives. Today, the federal government and every state (with the exception of Alaska) allow judges to impose LWOP sentences, and life sentences are authorized for individuals convicted of homicide, assault, robbery, sex-related crimes, drug offenses, and some property offenses (Nellis 2013: 5–7). While most lifers are serving time for violent offenses, “more than 10,000 people serving life sentences have been convicted of a nonviolent crime, including more than 2,500 for a drug offense and 5,400 for a property crime” (Nellis 2013: 7).

**Changes in Sentencing Policy**

A review of sentencing policy is necessary in order for one to better grasp how an offender may end up serving time behind bars, as well as how changes in sentencing policy have resulted in increases in imprisonment likelihood and length. During the 1970s and earlier, judges exercised considerable discretion when deciding which punishments to impose on convicted offenders. Judges were free to impose punishments that were generally not limited by legislators, and sentences were intended to be tailored to an individual offender’s needs and unique circumstances; most offenders could be given community-based punishments (e.g., such as probation) and prison or jail sentences were (for the most part) not mandatory (Ellison and Brennan 2016; Spohn 2009; Tonry 2013). Moreover, in 1970, every state and the federal government allowed judges to impose indeterminate prison sentences, which meant that a sentencing judge set the minimum and maximum amount of time that a convicted offender could serve in prison but the exact amount of time would ultimately rest with a discretionary parole board (Tonry 2013). For example, a judge could sentence an offender to serve one to five years in prison. Such an inmate, if deemed by a parole board to be sufficiently rehabilitated and no longer a risk to society, could be released before the five-year mark. But, a parole board could also deny early release, which meant that an inmate could end up serving the maximum set prison term. In short, under indeterminate sentencing systems, some inmates served mere fractions of their possible prison sentences while other inmates ended up serving considerably longer periods of time behind bars.

Because a wide-range of punishment options were possible prior to the 1980s and because there did not seem to be consistency in the likelihood of imprisonment or in the imposed length of prison sentences for similar offenders, critics argued that punishments were often wildly disproportionate to the types of offenses committed, highly disparate across offenders, not sufficiently punitive, and did not work to reduce the likelihood of reoffending (Frankle 1972; Martinson 1974; Von Hirsch 1976). Due process advocates (i.e., liberals) stressed that courts should impose equitable punishments across similar offenders, and that evidence of possible discriminatory treatment undermined notions of fair treatment and threatened the legitimacy of the criminal justice system (Ellison and Brennan 2016; Packer 1968). Conservatives, on the other hand, advocated for the adoption of a crime control model and argued that inconsistent punishments undermined the crime prevention goals of retribution (because punishments were often too lenient), deterrence (because prison sentences ended up being shorter than expected), and incapacitation (because inmates who were released from prison on parole ended up reoffending) (Packer 1968). As concern over the criminal justice system grew, sentencing policies changed across the nation. Changes to sentencing policy came in the form of determinate sentencing, sentencing guidelines, mandatory imprisonment, habitual offender laws, and truth-in-sentencing legislation.

Critics of indeterminate sentencing structures argued that determinate, or fixed, prison sentences were necessary. With determinate sentencing, a judge is required to impose a
specified amount of prison time at the time of the sentencing hearing, which eliminates the need for a later decision about possible early release from prison by a discretionary parole board. In other words, under determinate sentencing, early release from prison via parole is not possible. The California legislature was the first to enact a determinate sentencing law in 1976, and shortly thereafter “the number of adults incarcerated by the state rose substantially” and prisons became overcrowded (California Budget and Policy Center 2015: 4). Determinate sentencing laws were also passed in Illinois, Indiana, and Arizona (Tonry 2013). Like California, prison populations increased in each of these states after indeterminate sentencing ceased to exist. In Illinois, for example, roughly 11,000 prison inmates were incarcerated in 1977, the year when its legislature passed a determinate sentencing law (Peters and Norris 1991: 829). By 1991, close to 29,000 inmates were housed in prisons across the State (Peters and Norris 1991: 829).

Sentencing guidelines were another type of sentencing reform intended to assure that similar offenders received equally punitive sanctions, and Minnesota was the first jurisdiction to initiate the use of guidelines-based sentencing in 1980 (Tonry 2013). The federal government and 19 states currently require judges to use some form of sentencing guidelines when imposing punishments (Harmon 2014). In 1984, for example, Congress passed the Sentencing Reform Act (SRA), which did away with parole and mandated that federal judges impose stipulated punishments for convicted offenders (Nagel and Schulhofer 1992; Spohn 2009). To be more specific, the SRA required judges to use a predetermined grid of presumptive punishments at the sentencing hearing—the point at which an offender’s criminal history and offense seriousness intersected on the grid specified the intended punishment. If incarceration ended up being the designated punishment (which is the result in 89 percent of the cells in the guidelines grid), a judge was required to impose the denoted length of prison time (USSC 2015a: 403). A judge who decided to impose a different punishment (i.e., meaning a departure from the guidelines occurred) had to specify his or her reasons in writing and the decision was subject to review (Spohn 2009).

A United States Sentencing Commission (USSC) report on the consequences of the SRA for the first 15 years after implementation indicated that sentence severity in the federal courts increased after 1990 and the use of probation as a sanction declined (USSC 2004: 42–43). The 2004 USSC report also found that the average length of federal prison sentences more than doubled from 1986 to 1992, immediately following the implementation of sentencing guidelines. To put it another way, the average sentence received by a federal inmate in 2002 was more than twice the going rate for 1986 (USSC 2004: 46). In short, the mandated use of federal sentencing guidelines increased imprisonment likelihood and length for many federal offenders. Similar outcomes were observed in Washington State after it enacted sentencing guidelines in 1981 (Boerner 1993; Engen and Steen 2000).

An array of new mandatory minimum sentencing laws that greatly expanded the use of prison time also emerged during the 1980s and 1990s. In fact, “between 1975 and 1996, mandatory minimums were the most frequently enacted change in sentencing law in the United States” (National Research Council 2014: 83). With mandatory minimum laws, those found guilty of stipulated crimes, regardless of their criminal histories, must be sent to prison. Thus, judges cannot use their discretion to impose other punishments, even when mitigating circumstances may warrant alternatives to incarceration. By 1994, every state required mandatory prison terms for certain first-time offenders (Austin, Jones, Kramer, and Renninger 1996). At the federal level, “between mid-1985 and mid-1991, the U.S. Congress enacted at least 20 new mandatory penalty provisions; by 1991, more than 60 federal statutes subjected more than 100 crimes to mandatory penalties” (Tonry 2013: 165).

Most mandatory minimum laws apply to those convicted of drug offenses, murder, sex crimes, and felonies involving firearms (National Research Council 2014; Tonry 2013).
Some offenders convicted of property crimes must also be given mandated prison sentences. Prior to the enactment of mandatory minimum laws, judges could impose community-based punishments, such as probation and community service, on almost all offenders.

Oregon’s Measure 11 provides an example of a mandatory sentencing law that went into effect in 1995 (Merritt, Fain, and Turner 2006). The law required the imposition of lengthy mandatory minimum prison sentences for individuals convicted of 16 designated crimes (Merritt et al. 2006). Five more offenses were added to the list via an amendment to the law in 1997. For the 21 offenses ultimately included in Measure 11, the stipulated mandatory terms of imprisonment ranged from a minimum of 70 months for second-degree assault, kidnapping, robbery, and certain sex offenses to a minimum of 300 months for murder (Merritt et al. 2006: 16). Penalties could not be reduced for first-time offenders or for juveniles.

Researchers found that Oregon’s law increased both the likelihood of incarceration and the length of incarceration for individuals convicted of the 21 offenses included in Measure 11. Before implementation of the law, 66 percent of those convicted of the eligible offenses received prison terms, but more than 90 percent of eligible offenders were sentenced to prison by 1998 (Merritt et al. 2006: 23). Moreover, within one year of implementation, “the average sentence length for M11-eligible cases increased from 77 to 105 months. Average prison sentence lengths continued to rise through the end of the decade, peaking at 118 months in 1999” (Merritt et al. 2006: 29).

Connecticut, like Oregon and all other states, also requires the imposition of mandatory minimum prison sentences on some of its convicted offenders. In fact, there are now 74 crimes in Connecticut that require minimum prison sentences of varying durations (Office of Legislative Research 2015: 1). For example, a minimum of 25 years in prison must be given to a first-time offender convicted of murder or aggravated sexual assault of a minor (Office of Legislative Research 2015: 4). An individual convicted for a second time of sexual assaulting a minor in an aggravated manner must serve at least 50 years in prison. With regard to other crimes, at least ten years must be given to those found guilty of home invasion or first-degree kidnapping with a firearm. At least two years must be spent in prison by anyone convicted of second-degree larceny involving property taken from an elderly, blind, physically disabled, pregnant, or intellectually disabled person. And, with regard to certain drug offenses, those found guilty of selling drugs to minors must be sentenced to serve at least two years in prison and, with some exceptions, at least one year of incarceration must be imposed on non-students found guilty of using, possessing, or delivering drug paraphernalia near a school (Office of Legislative Research 2015: 8–9).

It is worth noting that prior to the 2014 legislative session, Connecticut’s law mandated a minimum three-year prison sentence for anyone who committed a drug offense within 1,500 feet of a school, public housing complex, or day care center (Porter and Clemons 2013: 3).

All 50 states have drug-free-zone laws that mandate prison time for individuals convicted of certain drug crimes near places where children are most likely to be present (Porter and Clemons 2013: 1). While most of these laws pertain to those convicted of selling or distributing drugs within protected areas, “in nine states—Alaska, Arkansas, Arizona, Connecticut, Indiana, Minnesota, New Mexico, Michigan, and Oklahoma—defendants in drug-free zones can also face enhanced penalties even for simple drug possession that does not involve sale to school children” (Porter and Clemons 2013: 1). In Arkansas, for example, simple possession of two grams of methamphetamine in a drug-free zone—which may include a public park, school, university, school bus stop, skating rink, community center, public housing complex, or church—is sufficient to trigger a ten-year prison sentence (Porter and Clemons 2013: 1–7).
At the federal level, Congress passed a series of laws mandating prison sentences for many first-time drug offenders. One of these laws, the Anti-Drug Abuse Act of 1986, required a minimum of five or ten years in prison for those convicted of selling certain quantities of specific drugs (USSC 1991: 10). To elaborate, the federal law mandated at least a five-year prison sentence for the sale of 1 gram of LSD, which is roughly the equivalent of a single packet of sweetener, and a ten-year sentence for the sale of 10 grams of LSD (Families Against Mandatory Minimums (FAMM) 2011: 4). Sale of 5 grams of crack cocaine triggered a five-year prison sentence, while 50 grams resulted in at least a ten-year term. For powder cocaine, sale of 500 grams netted a five-year minimum prison sentence and 5 kilos (or 11 pounds) triggered a mandatory ten years. “Congress established [these] mandatory sentences with the intention of locking up high-level drug traffickers. But only 11% of those incarcerated in federal prisons on drug charges fit that definition . . . The rest are low-level offenders” (FAMM 2011: 8).

Congress then passed the Omnibus Anti-Drug Abuse Act of 1988, which required a mandatory minimum sentence of five years for individuals convicted of possessing more than 5 grams of crack cocaine (USSC 1991: 10). One hundred times that amount of powder cocaine (500 grams) also triggered a minimum sentence of five years in prison (Spohn 2009: 242). The Act also doubled the amount of required prison time for those who “engaged in a continuing drug enterprise” from a minimum of 10 years to a minimum of 20 years (USSC 1991: 10). Moreover, mandatory minimum penalties increased substantially for those convicted of conspiring to sell or distribute drugs (USSC 1991:10).

A recent report by the USSC found steady increases over a 20 year period in the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing (USSC 2011: xxxix). Almost 25 percent of all offenders sentenced in the federal courts in fiscal year 2014 were convicted of an offense that carried a mandatory minimum amount of prison time (USSC 2014: 1). More than two-thirds of offenders convicted of an offense carrying a mandatory minimum penalty in 2014 were drug offenders, with crack cocaine offenders subject to such penalties most often (USSC 2014: 1–2). These figures serve to demonstrate the extent to which federal offenders are affected by mandatory minimum sentencing laws.

Similar to mandatory-minimum sentencing laws, habitual offender laws restrict judicial discretion at sentencing by requiring judges to impose lengthy prison terms. Habitual offender laws are known by a variety of names, including three-strike laws, repeat offender laws, persistent offender laws, and prior and persistent offender laws. The purpose of these laws is to assure that individuals who have shown a propensity to reoffend will be locked away in prison for long periods of time, in order to protect the general public from further harm (Auerhahn 1999; Russell 2010; Shichor 1997).

All states had some form of enhanced sentencing for repeat offenders prior to 1970, but a variety of new laws for repeat offenders were enacted across the U.S. during the early 1990s that were less flexible, applied to a longer list of felonies, and significantly increased the duration of required time behind bars (Russell 2010: 1149; Spohn 2009: 265). Between 1993 and 1995, 24 states and the federal government passed laws that mandated very lengthy prison terms, often life sentences, for repeat felony offenders (Clark, Austin, and Henry 1997: 1). Three prior convictions or “strikes” were required in most states for an offender to be taken “out” of society for a prolonged period of time, but “two-strikes” were enough to trigger recidivist enhancements in nine states (Clark et al. 1997).

For example, a second felony conviction in Georgia for kidnapping, armed robbery, rape, aggravated sodomy, aggravated sexual battery, or aggravated child molestation requires a life sentence without the option of parole (Nellis 2013: 15). LWOP is also mandatory for anyone convicted of homicide (Nellis 2013: 15). More than 700 prison inmates in Georgia were...
serving LWOP by the end of 2012, and more than 40 percent were convicted of something other than homicide (Nellis 2013: 15).

In California, an offender may end up serving a minimum of 25 years in prison if convicted of a second qualifying felony (Clark et al. 1997: 7). A sentence of 25 years to life is mandated for a person found guilty of a third felony, no matter how minor, if the offender has two prior serious or violent felony convictions (Nellis 2013: 15). Under California’s law, people have been sentenced to 25 years to life for stealing golf clubs from a country club, stealing meat from a grocery store, and stealing cookies from a restaurant (Spohn 2009: 264). While California’s three-strike law was intended to take persistent offenders off the street, by 2008 fewer than half the individuals sentenced under the law were convicted of a violent offense as their third strike; “55% were convicted of a nonviolent offense, including 16% for a drug offense and 30% for a property crime” (Nellis and King 2009: 28). An estimated 22 percent of inmates currently serving life terms in California received their sentences under the State’s three-strike law (Nellis 2013: 15). An even higher percentage of lifers in the State of Washington (68 percent) is estimated to be serving LWOP sentences due to a three-strike law that went into effect in 1994 (Nellis 2013: 16).

Truth-in-sentencing (TIS) laws, which generally limit the amount of good-time credit inmates may earn in order to gain early release from prison, have also lengthened prison sentences. These laws were enacted throughout the United States due to the Violent Crime Control and Law Enforcement Act of 1994, which awarded federal funds for prison construction to states that (a) increased the percentage of violent offenders sent to prison, (b) lengthened prison sentences for violent offenders, and (c) required violent offenders to serve at least 85 percent of their imposed sentences (Tonry 2013: 162). Many reasoned that the 85 percent rule would make prison sentences more “truthful,” because inmates would be required to serve the vast majority of their imposed sentences. By 1999, 42 states and the District of Columbia had enacted some form of a TIS policy (Sabol, Rosich, Mallik-Kane, Kirk, and Dubin 2002: 7). Shortly after these laws were enacted, researchers from the Urban Institute concluded that “when implemented as part of a larger sentencing reform process, TIS reforms are associated with large changes in prison population outcomes” (Sabol et al. 2002: vi). Evaluators from the RAND Corporation also found that TIS laws contributed to increases in prison populations (Turner, Fain, Greenwood, Chen, and Chiesa 2001: 134).

Research on the Effectiveness of Sentencing and Incapacitation

Numerous issues have been raised regarding America’s use of imprisonment as a crime-prevention strategy. To begin, mass incarceration has little or no clear influence on crime rates (National Research Council 2014: 337; Mauer 2010: 6; Tonry 2013: 147). While some may disagree and point to the widely noted inverse relationship between violent crime rates and rates of incarceration in the U.S. during the 1990s as “proof” that incarceration reduces crime, scholars stress that the predictors of crime are complex, so the extent of crime in any society cannot simply be due to the number of people incarcerated (Austin and Irwin 2001; Gainsborough and Mauer 2000; King, Mauer, and Young 2005). For example, the relationship between age and crime is well-known; crime is disproportionately committed by individuals in their late teens and early twenties, and the likelihood of engaging in crime diminishes notably with age (Hirschi and Gottfredson 1983). Therefore, crimes rates will be higher in places with large percentages of young people.

Those who believe incarceration offers a simple panacea to the crime problem also fail to consider the phenomenon of replacement for certain types of offenders. To elaborate, researchers find that incarcerated drug dealers are quickly replaced by individuals with limited options who overestimate the benefits that may materialize through illegal pursuits (National
Further flaws in the argument that “prison works” become apparent after one considers trends in different places. For example, as was the case in the United States, the crime rate in Canada decreased during the 1990s, yet this occurred as the Canadian prison population declined (Mauer 2010: 7). New York also experienced a crime drop during the 1990s, when “New York State had the second slowest growing prison system in the country” and at a time when its largest city jail system downsized (Justice Policy Institute 2000: 4). This finding is all the more poignant when one also takes into account rates of imprisonment and crime in California during the same time period:

California’s prison population grew by 30%, or about 270 inmates per week, compared to New York State’s more modest 30 inmates a week. Between 1992 and 1997, New York State’s violent crime rate fell by 38.6%, and its murder rate by 54.5%. By contrast, California’s violent crime rate fell by a more modest 23%, and its murder rate fell by 28%. Put another way, New York experienced a percentage drop in homicides which was half again as great as the percentage drop in California’s homicide rate, despite the fact that California added 9 times as many inmates to its prisons as New York.

(Justice Policy Institute 2000: 4)

In other words, changes in the use of incarceration do not necessarily result in the same changes in crime rates in all places.

Furthermore, lengthy terms of imprisonment are not necessary to secure the goal of community protection, although many people believe that select offenders are certain to reoffend if released from prison and must, therefore, be locked up for the rest of their lives. In a recent study, researchers from Stanford University examined recidivism outcomes for a cohort of 860 California inmates who were convicted of homicide, sentenced to life, and then released on parole (Weisberg, Mukamal, and Segall 2011). Among the group of 860 inmates released from prison beginning in 1995, only five individuals (less than 1 percent) were returned to jail or prison for new felonies by 2010 (Weisberg et al. 2011: 17). Marquart and Sorensen (1988) reported similar outcomes for a group of inmates who once sat on Texas’ death row. All the inmates became eligible for parole after their death sentences were commuted to life terms as a result of the U.S. Supreme Court’s 1972 ruling in Furman v Georgia, and 31 were released from prison between 1973 and 1986 (Marquart and Sorensen 1988). Of the entire group, only two committed subsequent felonies—one was returned to prison for burglary and one murdered his girlfriend and then committed suicide. While two crimes would have been prevented if these inmates had remained incarcerated, the execution or the permanent detention of all 31 inmates would not have greatly protected society. In fact, the vast majority of inmates remained crime-free while in the community. “These so-called ‘successes’ or ‘false positives’ demonstrate the futility of trying to predict future dangerousness” (Marquart and Sorensen 1988: 690). In fact, findings from multiple other studies stress that it is not possible to identify high-rate future offenders with sufficient accuracy (Auerhahn 1999; Blumstein, Cohen, Roth, and Visher 1986; Tonry 2013).

The problem with false prediction is that it leads to unnecessary detention, which is both unfair to affected individuals and a waste of money for taxpayers. The estimated cost to house an offender is high, at approximately $28,000 per year for a federal inmate (National Association of State Budget Officers [NASBO] 2013: 2) and about $31,000 per year for a state inmate (Henrichson and Delaney 2012: 10). It is even more expensive to house an elderly inmate due to added costs related to health care (e.g., required medications, hearing aids, walkers, breathing machines), dental care (e.g., root canals and dentures), and required modifications to prisons (e.g., installation of ramps for wheel chairs) and prison cells (e.g.,
widening doorways and adding hand rails near toilets) in order to accommodate physical issues that come with age. Indeed, prisons spend “two to three times more to incarcerate geriatric individuals than younger inmates” (Chiu 2010: 5). These costs can be quite high when one considers that 10 percent of all state prisoners (131,500 inmates in total) are 55 years old or older, and the number of such inmates more than quadrupled between 1993 to 2013 (Carson 2016: 1). Habitual offender laws and mandatory minimums account for the increase in the elderly inmate population.

Increases in prison populations have been matched with surges in correctional spending. Between 1980 and 2013, annual spending for the federal prison system rose 595 percent, from $970 million to more than $6.7 billion (The Pew Charitable Trusts 2015: 2). From 1986 to 2012, state-level spending on corrections increased by more than 400 percent, from approximately $10 billion to over $50 billion (NASBO 2013: 4). In 2002, America spent more money incarcerating non-violent offenders than the federal government spent on welfare programs that served over eight million people (Justice Policy Institute 2000: 6). And, in 2013, 11 states spent more money on corrections than on higher education (Mitchell and Leachman 2014: 8). The high cost of corrections to taxpayers is clear.

There are also hidden costs of incarceration for offenders and their families. Incarceration is a stressful experience for inmates, due to separation from loved ones, concerns over safety, limited autonomy, and shame. Moreover, the stigma of being an ex-prisoner may make it difficult for released inmates to find employment and housing (Pew Center on the States 2010a: 22). With regard to the collateral consequences of incarceration for families, “it strains them financially, disrupts parental bonds, separates spouses, places severe stress on the remaining caregivers, leads to a loss of discipline in the household, and to feelings of shame, stigma, and anger among the children left behind” (Barreras, Drucker, and Rosenthal 2005: 168; see also Turanovic, Rodriguez, and Pratt 2012: 916–919).

These hidden costs of incarceration have been disproportionately felt by racial and ethnic minorities. Approximately 60 percent of people in prison today are black or Hispanic (Carson 2015). In 2014, black men were almost six times more likely to end up behind bars than white men (Carson 2015: 15). The rate of incarceration for Hispanic men was 2.3 times higher than the rate for white men. When compared to white women, incarceration was twice as likely for black women and 1.2 times as likely for Hispanic women (Carson 2015: 15). Differential treatment by the criminal justice system provides a reason for the racial and ethnic disparities in imprisonment. For example,

the War on Drugs has been waged in racially disparate ways. From 1999–2005, African Americans constituted roughly 13% of drug users on average but 36% of those arrested for drug offenses and 46% of those convicted for drug offenses. While the War on Drugs creates racial disparity at every phase of the criminal justice process, disparities in sentencing laws for various types of drugs and harsh mandatory minimum sentences disproportionately contribute to disparity.

(Sentencing Project 2013: 14–15)

In particular, upon assessing the federal sentencing guidelines for 15 years, the USSC concluded that mandatory penalties for crack cocaine contributed significantly to differences in average sentences for blacks and whites (USSC 2004: 132). Until recently, 100 times more powder cocaine than crack cocaine was required for the same mandatory prison sentence; the ratio is now 18:1, which still means that notably higher amounts of powder cocaine are necessary to elicit the same penalties (FAMM 2011: 4; Sentencing Project 2013: 15). When one considers that 83 percent of those sentenced under federal crack cocaine laws are black (USSC 2015b), harsher penalties for black offenders are the result.
It is also worth mentioning that close to half of those convicted of offenses that require mandatory amounts of prison time will end up with more lenient punishments, due to “safety valve” provisions linked to offender acceptance of responsibility or prosecutorial requests for departures for defendants who provide assistance with criminal investigations (USSC 2011: xxix). A recent report from the United States Sentencing Commission indicated that black offenders were the least likely to escape the imposition of a mandatory penalty (USSC 2011: xxix). With regard to the effect of prosecutorial discretion on sentencing disparity, Hartley and colleagues (2007: 404) found that federal prosecutors filed motions for substantial assistance to mitigate the sentences of offenders perceived to be sympathetic and non-dangerous, and found that such departures were likely for females, whites, and more educated offenders. In another study, Spohn and Brennan (2011: 59) reported that close to 40 percent of drug defendants in Iowa, Minnesota, and Nebraska received substantial assistance departures, which (on average) cut their sentences in half. An offender’s ethnicity mattered; Hispanics were less likely than whites to be given substantial assistance departures (Spohn and Brennan 2011: 62). Overall, these findings suggest that prosecutors’ discretionary decisions regarding departures for substantial assistance result in unwarranted disparity in the federal sentencing process.

State-specific sentencing laws have also resulted in racial and ethnic disparities in imprisonment. “In California, for example, the state with the most far-reaching [three-strike] law, African Americans constitute 29% of persons serving a felony sentence in prison, but 45% of persons sentenced under California’s three-strike law” (Mauer 2010:8). In Florida, Crawford, Chiricos, and Kleck (1998: 498) examined outcomes for 9,690 males who met the requirements to be sentenced as habitual offenders and found that the race of the defendant mattered. Among eligible property offenders, blacks were sentenced as habitual offenders 2.3 times as often as nonblacks. And, among drug offenders, blacks were 3.6 times more likely to be incarcerated as habitual offenders (Crawford et al. 1998: 498). These findings shed light on the issue of inequality under the law and, therefore, the need for one to reconsider many current sentencing policies.

Summary and Concluding Thoughts

Prison and jail populations have increased significantly over time due to sentencing policies that stressed incapacitation as the primary purpose of punishment, despite evidence that imprisonment offers few (if any) long-term benefits for community protection. Soaring prison populations have resulted in concomitant increases in correctional costs, often at the expense of education and other socially beneficial programs. Offenders and their families have also fallen victim to immense collateral consequences of incarceration, and these adverse effects have been disproportionately felt by racial and ethnic minorities.

Given the costs of imprisonment, research findings that question the necessity of mass incarceration, and obvious disproportionate minority confinement, one must wonder whether alternative punishments would provide a better option. A 2013 online report by the Administrative Office of the U.S. Courts (AOC) indicated that the annual cost of supervision by a federal probation officer (about $3,000 per probationer) was about eight times lower than the cost of incarceration in a federal prison (about $28,000 per inmate) (AOC 2013). In addition, some researchers find that rates of reoffending are lower among probationers than among inmates released from prison. In a study of 1,077 offenders convicted of felonies in Kansas City, Spohn and Holleran (2002: 350) found that offenders who had been incarcerated were more likely to be charged with a new offense, convicted of a new offense, and incarcerated for a new offense than those who were put on probation. Moreover, released prisoners reoffended more quickly than probationers. Differences were
especially pronounced among drug offenders; incarcerated drug offenders were five to six

times more likely to reoffend upon release than drug offenders who remained in the
community on probation (Spohn and Holleran 2002: 350). Gendreau, Goggin, Cullen, and
Andrews (2000) also reported that recidivism was more likely for individuals who had been
incarcerated than for those given community sanctions. In short, alternatives to incarceration,
such as probation, may provide more cost-effective methods for crime prevention. Such
alternatives may also alleviate the collateral consequences of incarceration that are felt by so
many individuals.

In line with such a suggestion, steps have been taken across jurisdictions in recent years
to reduce inmate populations and direct resources to incarceration alternatives. For example,
California voters approved Proposition 47 in 2014, which reclassified some drug and

property offenses from felonies to misdemeanors (Sentencing Project 2016). The measure
also mandated redirection of resources to mental health services, drug treatment, and
diversion programs to enable offenders to reduce their likelihoods of reoffending
(Mitchell and Leachman 2014: 17). A year after the law went into effect, a study conducted
by the Justice Advocacy Project at Stanford University reported that Proposition 47
reduced California’s prison population by 13,000 inmates and saved taxpayers an estimated
$150 million (Romano 2015: 1). South Carolina changed its sentencing practices in 2010
to allow for certain nonviolent offenders to be given community-supervision options in
lieu of imprisonment (Henrichson and Delaney 2012: 11), and analysts estimated that
South Carolina would reduce correctional costs by $241 million as a result (McLeod
2011: 1).

Other states have taken steps to reduce time spent in prison by allowing inmates to earn
more good-time credits towards their release. For example, in 2008, Mississippi reduced the
percentage of sentences that nonviolent offenders were required to serve prior to parole
eligibility from 85 percent to 25 percent (Henrichson and Delaney 2012: 11). After just one
year, the State’s prison population decreased by over 1,000 inmates (Pew Center on the
States 2010b: 2). In Nevada, State legislators feared that prison populations would increase
by 60 percent and would cost taxpayers $2 billion (Pew Center on the States 2010b: 4).
Therefore, the 2007 Nevada legislature “voted nearly unanimously” to increase the number
of good-time credits that inmates could earn for in-prison participation in educational
programs, vocational training, and substance abuse treatment. This change in policy helped
Nevada save $38 million in operating expenditures (McLeod 2011: 1; Pew Center on the
States 2010b: 4). As evidence of cost-effective solutions to incarceration will continue to
amass, it is likely that even more energy will be directed at strategies designed to reduce the
number of people in U.S. prisons in the years to come.

References

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