REVIEW: THE CRIME DECLINE, MASS INCARCERATION, AND SOCIETAL WELL-BEING

- *Thomas Ulen*[*]

I. INTRODUCTION

One of the most dramatic events in the United States of the past almost 30 years has been the remarkable decline in the amount of crime. Since 1991 there has been an almost (an important qualifier, as we shall see) continuous decline in both violent and non-violent crime in the United States.[1]

At the same time that this decline was occurring, there was an increase (although not a continuous increase, as we shall also see) in the number of people incarcerated in prisons and jails in the U.S. The figures are stark. In 1980 there were approximately 500,000 people being held in all federal and state prisons and local jails in the country. By 2005 there were 2.5 million people incarcerated in the United States. That figure was by far the highest rate of incarceration in the developed world. In addition, the United States accounted for 25 percent of all the prisoners in the world.

These two developments raise mixed emotions. The crime decline has been, as Professor Sharkey demonstrates, an unqualified social benefit. On the other hand, the fact that recently 1 in every 100 people was incarcerated raises mixed emotions. There are large direct and indirect costs of incarceration on that large scale. The direct costs of building, maintaining, and staffing prisons and jails are immense, estimated to be around $80 billion per year. The indirect costs to the individuals incarcerated and their families and communities in the lives that are disrupted and frequently never quite put back on track are also immense. If, however, that high rate of incarceration and its costs have played a significant role in causing the decline in crime, then just possibly the mass incarceration may have been worth pursuing. Even if that is so, it does

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I would like to thank, very warmly, Professor and Dean Ranita Nagar of GNLU for her invitation to write this review and for her many kindnesses over the past years. I want to offer my congratulations to her and her team on the inauguration of this review and of their great success in building their law-and-economics program at GNLU.
[1] See Section II for statistics on and various explanations of the crime decline.

not speak well for U.S. society that we had such high rates of crime before 1991 and had, apparently, to adopt such draconian measures to reduce those crime rates.

These matters have been the subject of a great deal of scholarly inquiry. That scholarship has focused on two related questions: First, why did crime decline so dramatically after 1991? And second, what role did "mass incarceration," as it is called, play in the crime decline? The payoff to getting correct answers to these questions is extremely high. For instance, to the extent that we can identify the causes of the long decline in crime (and presumably, the causes of the large rise in crime in the late 1960s, 1970s, and 1980s), the greater our ability to adjust policy levers so as to stave off a future increase in crime (on the assumption that the factors we identify repeat their causal roles in the future) or to reduce crime if it spikes. Relatedly, if we can identify the reasons for increases and decreases in the rate of crime, the more focused our criminal justice policy can become. Although the scholarly search for reasons for fluctuations in the crime rate has become far more sophisticated, there are still a distressingly large number of potential reasons adduced to explain both the rise and fall of crime in the U.S. and, as a result, the lack of a clear, agreed-upon account of what happened and why after 1991. In view of that hodgepodge, our criminal justice system policy is struggling to figure out what lessons to take from the last 30 years.

As the readers of this journal will know, the field of law and economics has been deeply interested in criminal law and punishment issues for a long time. One of the foundational articles in the field is Gary Becker's 1968 article on the economics of crime and punishment, which shifted the focus on crime away from socio-economic causes to the consideration of incentives to commit crime and to avoid punishment.[2] Many readers will be familiar with this literature, including the remarkably robust literature over the last 40 years on the deterrent effect of the death penalty.

The books that I shall review here – John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (2017) and Patrick Sharkey, *Uneasy Peace: The Great Crime Decline, the Renewal of City Life, and the Next War on Violence* (2018) – examine two different aspects of crime in the United States. Pfaff focuses on mass incarceration and offers a novel theory of the reasons for mass incarceration and empirical evidence to support that theory. Sharkey focuses on crime and the urban landscape. In particular, he

[2]Gary S Becker, *Crime and Punishment: An Economic Analysis*, 76 J. POL. ECON. 169 (1968).

examines the great benefits of the crime decline to urban living and particularly to urban minority communities.

Before turning to those works, I shall, in Section II, give some background on what is called the "great crime decline" of the 1990s and early 2000s.

Then in Section III I shall turn to a discussion of Professor Pfaff's account of why there has been such heavy use of incarceration as a crime-deterring strategy in the United States. He argues that society has been driven to overuse imprisonment because prosecutors have overly strong incentives to pursue imprisonment for criminal offenders. Pfaff suggests that the result is that, from a societal well-being perspective, there are too many prisoners. He offers correctives that will, he argues, trim prosecutors' incentives to overuse imprisonment.

Then in Section IV, I turn to a discussion of Professor Sharkey's account of the important relationship between the level of crime and societal well-being. He first shows that the increase in crime in the 1960s through the late 1980s had a wide-ranging adverse effect on society. Crime obviously has very ill effects on the victims of crime, but Sharkey points out that the knock-on effects of crime on all of society are also devastating. It follows, as he demonstrates, that when crime declines, the benefits to society as a whole are very large. In the course of these important demonstrations, Sharkey identifies at least one interesting and heretofore underreported causal effect on the crime decline.

A brief conclusion follows.

A fair question is, "What has all this got to do with India?" The matters discussed in these two books should have appeal to those who are curious about broad social trends in crime, why crime rates fluctuate, what the consequences for societal well-being are when crime declines or increases, and what tools the United States has used to combat crime increases and whether those tools are effective. Moreover, those who are interested in the field of law and economics ought to find these books of interest in that they explore areas in which law-and-economics scholars have taken a deep interest.

II. THE GREAT CRIME DECLINE AND MASS INCARCERATION

To put these two books into context, we need to review the "great crime decline" that began in 1991, continued until the present, and has been one of the defining events in recent U.S. history. I shall first review some of the principal facts about the decline and then briefly survey some of the scholarly literature that seeks to explain what happened and why.

A. The Great Crime Decline

From 1965 to 1974, United States crime rates (typically measured as the incidence of a reported crime per 100,000 people) rose significantly and became a significant public policy issue. Between the mid-1970s and the early 1990s, crime rates in the U.S. remained high and fluctuated within a relatively narrow band. Interestingly for what will come later, our closest neighbor, Canada, also experienced a parallel 10-year increase in crime between the mid-1960s and the mid-1970s but delayed from the U.S. increase by one year.[3]

To give a sense of this era, note that in the early 1960s "fewer than 500 people were murdered annually in New York City. But by 1980 more than 1,800 homicides took place every year. A decade later the level of violence worsened: More than 2,000 people were murdered [in New York City] in each of the first few years of the 1990s."[4]

Then in 1991 and continuing through at least 2015 the crime rate fell to about half of what it was in 1991. "Violent crime has fallen by 51 percent since 1991, and property crime by 43 percent."[5] This decline was not localized or affecting only certain regions of the country. It happened everywhere – in "cities, suburbs, towns, and rural areas, [and] in all regions."[6] It affected all manner of crimes and, after 1993, all ages and categories of offenders and victims.[7] Nothing of this duration had occurred in the U.S. since World War II, and no decline has lasted as long as either the one in the 1990s or the one that has continued through at least the mid-2010s.

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[3]FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 200 (2006).
[4]PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE xv (2018).
[5]OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, WHAT CAUSED THE CRIME DECLINE? 3 (2015). This study is the source of much of the information in this section.
[6] Zimring, *supra* note 5, at 196.
[7]*Id.*

At about the same time, other developed countries experienced a similar but smaller decline in some crimes. Only one of the G-7 countries, Canada, had as long and large a decline as that that occurred in the U.S.[8]

To illustrate how much things had changed since before 1991, Professor Sharkey reports:

> In [New York City,] where more than 2,000 people used to be murdered each year, 328 people were killed in 2014, the lowest tally since the first half of the twentieth century. … Violent crime fell in almost every American city from the early 1990s to the early 2010s, and it plummeted in many major urban centers. In Atlanta, Dallas, Los Angeles, and Washington, the murder rate fell by 60 to 80 percent, similar to the crime drop in New York City. Even in places that continued to have high levels of violence, like Oakland and Philadelphia, the homicide rate fell by at least 33 percent.[9]

Put somewhat differently, "By 2014, the homicide rate in New York City had fallen to 4 per 100,000."[10]

As we shall see in Section IIC below, some have contended that there has been a recent uptick in crime and that a worrisome reversal of the trend of the past nearly 30 years has begun.

B. Causes of the Crime Decline

[8] *Id.*, at 197. Michael Tonry, Professor of Law and Public Policy at the University of Minnesota, in a marvelous piece of scholarship, *Why Crime Rates Are Falling Throughout the Western World*, 43 CRIME AND JUSTICE 1 (2014), takes partial issue with Zimring's account. Tonry persuasively argues that "crime rates have moved in parallel in Western societies since the late Middle Ages." For example, over 400 years or so homicide rates had declined from between 20 and 100 per 100,000 in most Western countries to about 1 per 100,000 around 1900. Then, from "the 1960s to the 1990s, rates for violent and property crimes rose in all wealthy Western countries. Since then, rates in all have fallen precipitately for homicide, burglary, auto theft, and other property crime." On the general theme of declining violence in human societies, see STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011) and PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS (2018); At the same time that homicide has been declining in much of the developed world, Latin America has become the center of homicide. For example, "[o]n January 11, 2017, no one was murdered in El Salvador – a fact that was reported as far away as New Zealand, Thailand, and Russia. … [El Salvador] had [at that time] the highest murder rate in the world: 81 per 100,000, more than ten times the global average. On most days more than a dozen Salvadoreans lost their lives to gang warfare, police shootings, and domestic disputes." "Murder in Latin America: Shining Some Light," *The Economist*, April 7, 2018, at 16. "Latin America, which boasts just 8 percent of the world's population, accounts for 38 percent of its criminal killing[,] 140,000 people last year, more than have been lost in wars around the world in almost all of the years this century." *Id.* at 16.

[9] Sharkey, *supra*note 6, at xvii-xxviii.

[10] *Id.* at 31.

Naturally, there is great interest in explaining why crime declined. I shall briefly describe two relatively early attempts to explain the decline of the 1990s and then turn to more recent attempts to explain the entire period of 1991 to the present.

1. Accounts of the Decline of the 1990s

In 2004, Professor Steve Levitt published an important article in the *Journal of Economic Perspectives* that attributed the decline of the 1990s to four factors and dismissed six other factors that although plausible possible explanations, are far from being causal factors in the decline.[11]

The six factors that Levitt argued had little or no effect on the crime decline of the 1990s were (1) the strong economy, (2) changing demographics, (3) better policing strategies, (4) gun control laws, (5) laws allowing the carrying of concealed weapons, and (6) the death penalty. Bob Cooter and I have elsewhere summarized Levitt's arguments as to why these factors played little or no role in causing the crime decline.[12]

The four factors that Levitt believes to have had a large effect on the crime decline of the 1990s are (1) increases in the number of police, (2) the rising prison population, (3) the receding crack cocaine epidemic, and (4) the legalization of abortion in the early 1970s.[13]

In his previous work, Levitt had found that the elasticity of crime with respect to numbers of police was between -0.43 and -.50, meaning that a ten percent increase in the numbers of police would cause between a 4.3 and 5 percent decline in the amount of crime.[14] Given that the number of police in the United States increased by 50,000 to 60,000 in the 1990s (an increase of 14 percent) and assuming an elasticity of crime with respect to police officers of -0.4, this factor alone explains 5 to 6 percent of the decline in crime in the 1990s – that is, between one-fifth and one-tenth of the entire crime decline.

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[11] See Levitt, *supra* note 7.

[12] ROBERT D. COOTER & THOMAS S. ULEN, LAW AND ECONOMICS 526-29 (6th ed. 2012).

[13] *Id.* at 530-31. We shall return to the possibility that changing police strategies played a significant part in the crime decline when we look at more recent studies of the entire 1991-to-the-present period.

[14] Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997). But see Justin McCrary, *Do Electoral Cycles in Police Hiring Really Help Us Estimate the Effect of Police on Crime?*, 92 AM. ECON. REV. 1236 (2002) and this reply: Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effects of Police on Crime: Reply*, 92 AM. ECON. REV. 1244 (2002). See also AARON CHALFIN & JUSTIN MCCRARY, THE EFFECT OF POLICE ON CRIME: NEW EVIDENCE FROM U.S. CITIES, 1960-2010 (2014) (using a broader panel database and stronger estimation techniques that largely support Levitt's 1997 estimates).

We know that the U.S. prison population increased by fourfold between 1980 and 2000, and the deterrence theory of punishment suggests that this increase might have played a significant role in the decline in crime in the 1990s. Earlier research suggested that the elasticity of crime with respect to expected punishment (measured by the change in the number of prisoners) was between -0.10 and -0.40, meaning that a 10 percent increase in the number of prisoners causes between a 1 and 4 percent decline in the amount of crime. The suggestion of these earlier estimates is that the elasticity of violent crimes with respect to imprisonment was at the higher end of this range and that for property crimes was at the lower end. Using estimates of -0.30 for the elasticity of violent crimes and -0.20 for that of property crimes, and assuming that approximately half of the growth in prisoners from 500,000 to 2 million occurred in the 1990s, Levitt writes that increased imprisonment "can account for a reduction in crime of approximately 12 percent [for violent crime] and 8 percent for property crime, or about one-third of the observed decline in crime" in the 1990s.[15]

Crack cocaine was an innovative consumer product introduced in the mid-1980s to make cocaine affordable to lower-income consumers.[16] The innovation was so successful that it set off fierce (and deadly) competition among criminal enterprises to capture greater market share.[17] As a result, homicides among young black males rose significantly from 1985, becoming the leading cause of death among black males 35 years of age and younger. But then for reasons that are not entirely clear, the crack epidemic began to recede. As it did, so did the homicide rate among young black males, falling 50 percent between 1991 and 2001. (During that same period the homicide rate among adult white males fell by 30 percent.)

Levitt estimates about 15 percent of the 1990s homicide decline to the receding crack cocaine epidemic and about 3 percent of the entire crime decline of the 1990s to the reduction in the crack cocaine market.

[15] See Steven D Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163. 178-79 (2004).
[16] See Steven D. Levitt, "The Freakonomics of Crack Dealing," TED2004, February, 2004, available at https://www.ted.com/talks/steven_levitt_analyzes_crack_economics.
[17] The definitive account of the effects of this market on a city – its police, the dealers, education, labor, politics, and newspaper sectors – are the five seasons of *The Wire* (2002-2008). See https://www.hbo.com/the-wire.

Finally, Levitt and his co-author John Donohue[18] famously attributed 50 percent of the decline in crime in the 1990s to the legalization of abortion in *Roe v. Wade* in January, 1973.[19] The article and its argument are famous, and so, I can sketch it here. Moreover, I shall return to this topic in my discussion of Professor Zimring's book in this section and in the discussions of more recent scholarship in the following section. Levitt and Donohue both noted that the beginning of the great crime decline coincided with the 18th anniversary of *Roe* in 1991 and wondered whether there might be a connection. What connection could there possibly be? As a result of the decision legalizing abortion in the first two trimesters of pregnancy, the number of legal abortions increased from a very small number in 1972 to 1.6 million in 1980 – that is, one abortion for every two live births. One of the implications of that remarkable number is that there was a declining percentage of children in U.S. society from 1973 on. About half of those children, born and unborn, are male, and young males account for a disproportionately high percentage (between 40 and 45 percent) of all crime. So, all other things equal, fewer young males in society means less crime. Additionally, the five states that legalized abortion before Roe was handed down, experienced crime declines before the other 45 states.

Donohue and Levitt refer to this as the "cohort size effect" and attribute 25 percent of the total decline in crime in the 1990s to the decline in the percentage of young males in the population.

But there is more. The authors also argue that the legalization of abortion empowered women to choose when to have children. That is, if circumstances were not good for having a child – if, for example, there was no partner or family member who could provide childcare; there was no suitable medical coverage for birth and healthcare expenses; or the mother or father was unemployed, then abortion allowed early termination of pregnancy and waiting till circumstances improved. As a result, the young people – especially the males – born after 1973 tended to arrive in what were better circumstances. Generally, their families were in better financial shape; they had help with childcare; they were employed. The implication is that these post-1973 children were less likely to commit crime.

Donohue and Levitt refer to this as the "cohort quality effect" and attribute 25 percent of the decline in crime in the 1990s to this effect.

[18]John J. Donohue III & Steven D Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379 (2001).
[19]*Roe v. Wade*, 410 U.S. 113 (1973).

The distinguished criminal law expert and criminologist Professor Franklin Zimring[20] took stock of the 1990s crime decline in a 2008 book[21] and reached slightly different conclusions from those of Professor Levitt about the causes of that decline.

First, Zimring holds that the "crime decline of the 1990s was a classic example of multiple causation, with none of the many contributing causes playing a dominant role."[22]

He notes some of the same factors as had Levitt:

> The percentage of the population in the high-risk ages of 15-29 dropped from 27.4 percent of the U.S. population in 1980 to 20.9 percent in 2000, a major decline. The economy expanded consistently after 1992 – and this longest consecutive postwar economic expansion tracks the crime decline almost exactly. The boom years of the late 1990s reduced the percentage of 16- and 17-year-olds who were neither working nor in school by one-third, a measure of activity that is plausibly related to crime commission rates.[23]

But Zimring departs from Levitt by noting that the parallel decline in crime in Canada is a control case that sheds great light on the U.S. experience. Canada had none of the increase in numbers of police nor of prisoners that the U.S. had during the 1990s but did have the same "reduction in the relative size of the youth population."[24] Therefore, Zimring is inclined to give that demographic factor more weight than is Levitt. And for different reasons, as we shall see.

And he is understandably puzzled by the failure of professional students of crime to foresee the crime decline:

> This lack of certainty about the causes of fluctuations in crime is the only explanation for the failure of crime and criminal justice specialists to see some crime decline on the horizon in the 1990s. The population and imprisonment trends of the 1990s were well known by 1995, but nobody was predicting that a crime decline was just around the corner, even after it had begun! Liberals and conservatives seemed united in pessimism about the

[20] Zimring is William G. Simon Professor of Law and Wolfen Distinguished Scholar at the University of California at Berkeley School of Law (Boalt Hall).
[21] See Zimring, *supra* note 5.
[22] *Id.* at 197.
[23] *Id.*
[24] *Id.* at 198.

period after 1995, even when an economic boom joined the prison and demographic trends. The reason for this was the 1980s. Between 1985 and 1990, the prison population grew at the greatest rate in history, the youth population declined, the economy boomed, and life-threatening crime in the United States went up.[25]

Additionally, as I have already noted, Zimring contends that one cannot undertake causal explanations of the U.S. crime decline without also examining the reasons for Canada's parallel experience in the 1990s. Recall that Canada also had a significant decline in violent and property crimes that matched the timing and duration of the U.S. decline and was at about 70 percent of the U.S. magnitude.[26] Canada and the U.S. had very similar abortion liberalization (although Canada had more limited abortion rights prior to 1989 than did the U.S.), and yet there is no evidence that the decline in serious offenses in Canada was concentrated in younger offenders, as was the case in the U.S. This suggests that something besides abortion legalization and changing demographics were significant in the Canadian experience. Nor did Canada experience a crack epidemic like that in the late 1980s in the U.S.

Zimring also draws special attention to the experience of New York City during the 1990s. The crime drop in the 1990s in the nation's largest city (at 75 percent) was twice as large as the national average. What could have been the cause for this much-larger-than-average decline? Zimring notes that New York City went through three major changes in its police department: "more cops, more aggressive policing, and management reforms [that may] account for as much as a 35 percent decrease (half the total)."[27]

Zimring's final lesson of *The Great American Crime Decline* is what he calls the last and most important lesson of the 1990s: *Whatever else is now known about crime in America, the most important lesson of the 1990s was that major changes in rates of crime can happen without major changes in the social fabric*.[28]

[25]*Id.* at 198-99. Recall that Canada had an increase in crime from the mid-1960s to the mid-1970s that also paralleled the U.S. increase in that period. See text at n. 10 *supra*.
[26]*Id.* at 199.
[27]*Id.* at 201.
[28]*Id.* at 206, italics in original.

For example, we know that New York City during the 1990s experienced a crime decline that was twice as large as the national average, and yet:

> The most remarkable part of this story is not what changed in New York City over the 1990s but what did not change, which was most of New York: the subways didn't change, nor did the schools, the streets and surface transportation system, the population, or the economy. … The very substantial drop in crime was most important not for its testament to particular causes but as evidence that crime propensities are not inherent characteristics of either a population or an urban setting but rather are highly variable aspects of an urban environment. The same city can have radically different rates of crime if only relatively superficial environmental conditions change.[29]

Moreover and amazingly, this lesson was lost on politicians and on professionals who follow criminal justice matters:

> The right had confidently predicted crime increases through the 1990s. That didn't happen. The left has typically said 'no peace without justice' and has cited socioeconomics, lack of opportunity, cultural factors, racism, and discrimination as causes of crime. None of that changed in New York City even while the crime rate went down so dramatically. The sharp decline in crime that happened to New York City is thus of no comfort to either side in the endless debate about human nature versus social environment as an explanation for crime in the United States.[30]

2. More Recent Accounts of the Decline Over the Period 1991-2015.

There was no doubting the reality of the great American crime decline of the 1990s. There was, as we have seen, a lack of consensus about what caused the decline. Professor Zimring noted that none or few of those whose professional expertise was in criminal justice predicted the decline of the 1990s. And not having fully understood why that decline occurred, they did not accurately predict what would happen to crime after 2000. I think that it is fair to say that scholars and criminal justice professionals have been surprised by the continued decline in the 2000s. The surprise is partly just a confession of a primitive belief that there are cycles in crime as in other social forces and that the 1990s decline was inevitably to be followed by an increase in crime.

[29] *Id.* at 207.
[30] *Id.* at 208.

But there are other reasons for surprise. One such reason is the Great Recession of 2008-2009. To the extent that the long economic boom of the 1990s was one cause of the crime decline of the 1990s, the severe financial and real downturn near the end of the first decade of the twenty-first century should have signaled that an uptick in crime might be imminent. But crime did not increase after the Great Recession. Indeed, it continued to fall, although more slowly than in the 1990s.

Another reason for surprise was that the percentage of 18- to 24-year-old males in the population began to increase early in the twenty-first century. It rose from just below 25 percent of the entire population around 2000, to about 27 percent around and slightly after 2010, has receded slightly since then, but is expected to resume a long upward crime from about 25 percent in 2020 to close to 35 percent in 2050.[31] On the assumption that 18-24-year-old males account for a disproportionately large number of crimes committed in any society, the demographic figures for the post-2000 period would seem, all other things equal, to predict an increase in crime. Again, that did not happen or, more cautiously, has not happened yet.

One more surprise is that, as we shall soon see, the number of prisoners incarcerated in the United States in the first 15 years of the new century has not changed very much, if at all. (Indeed, it may have declined.) So, those who associate crime decreases with incarceration increases should be surprised by the twenty-first century record.

In my view, the best and most comprehensive overview of the causes of the crime decline since 1991 is that produced in 2015 by the Brennan Center for Justice at New York University School of Law.[32] Their analyses consider a wide range of possible factors contributing to the crime decline and also divide the period of 1991 to 2014 (or so) into two distinct sub-periods: the 1990s and the 2000s in order to explore whether the causal factors in those two periods might be different. Their principal analytical technique is multiple regression.

The center has three central findings:

1. "Increased incarceration at today's levels has a negligible crime control benefit: Incarceration has

[31] See http://www.newgeography.com/content/00269-number-18-24-year-olds-united-states-2000-2050. That graph does not distinguish between males and females. But I also consulted U.S. Census 2010 figures for males and females of particular ages and found a general consistency between the figures reported there and the pattern shown in the text.
[32] See Roeder et al., *supra* note 7.

been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s and accounted for *less than 1 percent* of the decline in property crime this century. Increased incarceration has had little effect on the drop in violent crime in the past 24 years. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall."[33]

2. "One policing approach that helps police gather data used to identify crime patterns and target resources, a techniques called CompStat, played a role in bringing down crime in cities: Based on an analysis of the 50 most populous cities, this report finds that CompStat-like programs were responsible for a 5 to 15 percent decrease in crime in those cities that introduced it. Increased number of police officers also played a role in reducing crime."[34]
3. "Certain social, economic, and environmental factors also played a role in the crime drop: According to this report's empirical analysis, the aging population, changes in income, and decreased alcohol consumption also affected crime. A review of past research indicates that consumer confidence and inflation also seem to have contributed to crime reduction."[35]

Below is a summary table that captures the Brennan Center's findings:

Table 1: Popular Theories on the Crime Decline[36]

Decade	**Factors Contributing to the Crime Drop**	**Factors that Did Not Seem to Affect Crime**	**Disputed Factors**
1990-1999	Aging Population (0-5%)	Enactment of Right-to-Carry Gun Laws (no evidence of effect)	Decreased Crack Use*
	Consumer Confidence*	Use of Death Penalty (no evidence of effect)	Decreased Lead in Gasoline*

[33] *Id.* at 4.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 5.

	Decreased Alcohol Consumption (5-10%)		Legalization of Abortion*
	Decreased Unemployment (0-5%)		
	Growth in Income (0-7%)		
	Increased Incarceration (0-10%)		
	Inflation*		
2000-2013	Consumer Confidence*	Aging Population (no evidence of an effect)	
	Decreased Alcohol Consumption (5-10%)	Decreased Crack Use*	
	Growth in Income (5-10%)	Decreased Lead in Gasoline*	
	Inflation*	Enactment of Right-to-Carry Gun Laws (no evidence of effect)	
	Introduction of CompStat**	Increased Incarceration (0-1%)	
		Increased Unemployment (0-3%)	
		Legalization of Abortion*	
		Use of Death Penalty (no evidence of effect)	

Source: Brennan Center analysis.
**Denotes summaries of past research. All other findings are based on original empirical analysis.*
***This report found that the introduction of CompStat-style programs is associated with a 5-15 percent decrease in crime in cities where it was implemented. From this finding, it can be concluded that CompStat had some effect on the national crime drop in the 2000s.*

A moment's study of Table 1 will show that there is some overlap between the factors that Professor Levitt identified as being important or unimportant in explaining the crime decline of the 1990s and those identified by the Brennan Center as important or unimportant for both the 1990s and the 2000s. For

instance, both studies find the aging population, economic improvement (decreased unemployment and growth in income), and increased incarceration to be important in explaining the crime drop in the 1990s.

But notice further that the Brennan Center study finds some new factors to be important for the entire period of 1991-2013, such as consumer confidence, decreased alcohol consumption, growth in income, and inflation (although those factors contribute differing amounts to the declines of the 1990s and the 2000s).

Additionally, both studies do not believe that enactment of right-to-carry gun laws or the use of the death penalty explain any of the decline in crime in the 1990s. The Brennan Center study is skeptical of the end of the crack cocaine epidemic, the decreased amount of lead in gasoline, and the legalization of abortion as factors in the crime drop in 1990s. The study goes farther than skepticism and finds no discernible effect of an aging population, decreased crack cocaine use, decreased lead in gasoline, enactment of right-to-carry gun laws, and the use of the death penalty in explaining the continued crime decline in the 2000s.

The Brennan Study adds the introduction of CompStat and similar software programs as an important factor in the crime drop of the 2000s.

There are two more tables in the Brennan Study report that I think are important in summarizing, first, the pattern of the crime decline over the entire period and in its subperiods and, second, the various causes of the crime decline over the entire period of 1991-2013 and two subperiods.

Table 2: Crime and Incarceration Rates (1990-2013)[37]

	1990-2013	**1990-1999 ("1990s")**	**2000-2013 ("2000s")**
Violent Crime (murder, nonnegligent manslaughter, forcible rape, robbery,	50% decline	28% decline	27% decline

[37] *Id.* at 7.

aggravated assault)			
Property Crime (burglary, larceny-theft, motor vehicle theft)	46% decline	26% decline	25% decline
Imprisonment	61% increase	61% increase	1% increase

Sources: Federal Bureau of Investigation, Uniform Crime Reports; U.S. Department of Justice, Bureau of Justice Statistics.

There is much of interest in this simple table, but focus for just a moment on the differences in the increases in imprisonment over the subperiods. The 1990s saw a significant increase in imprisonments – a 61 percent increase. During the 1990s there was a 28 percent decline in violent crimes, and a 26 percent decline in property crimes. The period 2000-2013 saw a trivial, 1 percent increase in imprisonment but also saw declines in violent and property crimes that were roughly the same as those of the 1990s. That supports Professor Zimring's speculation that the increased use of incarceration contributed virtually nothing to the decline of crime after the 1990s.

This final table from the Brennan Center study summarizes, on the basis of a state-level analysis, the contribution that various criminal justice polices, economic factors, environmental and social factors, and CompStat contributed to the crime drops of the entire 1991-2013 period and its subperiods:

Table 3: State-Level Analysis on the Crime Decline (1990-2013)[38]

Theory		**Percentage Factor in Crime Decline, 1990-2013**	**Percentage Factor in Crime Decline, 1990-1999**	**Percentage Factor in Crime Decline, 2000-2013**
Criminal Justice Policies	1. Increased Incarceration.	Violent: no effect Property: 0-7%	Violent: no effect Property: 0-12%	Violent: no effect Property: 0-1%#
	2. Use of Death Penalty	No evidence of an effect	No evidence of an effect	No evidence of an effect
	3. Increased	0-5%	0-10%	No evidence of

[38] *Id.* at 8.

	Police Numbers			an effect[#]
	4. Enactment of Right-to-Carry Gun Laws	No evidence of an effect	No evidence of an effect	No evidence of an effect
Economic Factors	5. Unemployment	0-3%	0-5%	No evidence of an effect
	6. Growth in Income	5-10%	5-10%	5-10%
	7. Inflation*	Some effect on property crime	Some effect on property crime	Some effect on property crime
	8. Consumer Confidence*	Some effect on property crime	Some effect on property crime	Some effect on property crime
Environmental and Social Factors	9. Decreased Alcohol Consumption	5-10%	5-10%	5-10%
	10. Aging Population	0-5%	0-5%	No evidence of an effect[#]
	11. Decreased Crack Use*	Possibly some effect	Possibly some effect on violent crime	Negligible
	12. Legalized Abortion*	Possibly some effect	Possibly some effect	Negligible
	13. Decreased Lead in Gasoline*	Possibly some effect	Possibly some effect	Negligible
Criminal Justice Policy	14. Introduction of CompStat**	5-15% decline in violent and property crime**		

Source: Brennan Center Analysis

**Denotes summaries of past research. All other findings are based on original empirical analysis.*

***These results were presented in Table 4 in the report, entitled "CompStat's Effect on Crime in 50 Most Populous Cities (1994-2012)." A note to the table reads: "The city-level analysis relies on monthly data. Monthly city-level crime data were unavailable for 2013 at time of publication of this report and therefore could not be included."*
[#] Indicated this variable did not increase or decrease significantly during the period to have an impact on crime.

CompStat is a police resource management software program that New York City Police Department Commissioner Bill Bratton introduced in 1994.[39] Other police departments around the country also used CompStat and similar programs, apparently to great effect, being responsible for between 5 and 15 percent of the crime decline in 1990-2013.

C. An Uptick in the mid-2010s?

Our President, a commentator not known for scrupulous accuracy,[40] has claimed that serious crime is on the rise, with the most dramatic increases coming in homicides in large cities like Chicago and Baltimore. He threatened to send federal officers into those cities to restore order if the local government officials could not do so.

Not surprisingly, there is no factual basis for the President's claim.[41] Nonetheless, Trump tweeted, under the title "USA Crime Statistics – 2015," a picture of a black man with a gun and cited some statistics – said to come from something called the "Crime Statistics Bureau," which does not exist – that, he said, showed that blacks killed 81 percent of murdered whites. Professor John Donohue calls that number "ludicrous."[42]

Then on October 28, 2016, near the end of the presidential campaign, Trump said, "You won't hear this from the media: We have the highest murder in this country in 45 years."[43] Wrong again.

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[39] See USDOJ BUREAU OF JUSTICE ASSISTANCE & POLICE EXECUTIVE RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013), https://www.bja.gov/publications/perf-compstat.pdf.
[40] Glen Kessler, Salvador Rizzo, and Meg Kelly, "President Has Made 3,251 False or Misleading Claims in 497 Days," *Washington Post*, June 1, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/06/01/president-trump-has-made-3251-false-or-misleading-claims-in-497-days/?utm_term=.0b16b8808675. That is an average or more than 6 false or misleading claims per day across all days of Trump's presidency, including weekends.
[41] It must be said, however, that the President is not the only one confused by these events. In October, 2015, then FBI Director James Comey, in a speech at the University of Chicago Law School, predicted an explosion in violent crime on the basis of an uptick in murders in early 2015. Comey attributed the increase largely to an increase in urban, black crime. And he attributed that increase in urban, black crime to the so-called "Ferguson Effect," which hypothesized that urban police had scaled back their policing efforts in black urban areas in response to the events in Ferguson, Missouri, and the Black Lives Matter movement. The murder rate in 2014 was the lowest rate in the U.S. since 1957.
[42] John J. Donohue III, *Comey, Trump, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297, 1297 (2017). The vast majority of all crime, including homicide, is intraracial.
[43] *Id.* at 1298.

The facts are that although there was a *jump* in the murder rate in 2015, "the murder rate in 2015 was around 50 percent lower than at its peak in 1991. Prior to Obama's presidency the last time the U.S. murder rate was as low as it was in 2015 was in 1963, 52 years ago."[44]

Professor Donohue calls the jump in the 2015 murder rate "unusually, indeed, shockingly large," but notes that even with that jump, the murder rate in 2015 was still about half what the prevailing U.S. murder rate was in the early 1990s.[45] Of course, we will not know for several years whether the jump on 2015 was the beginning of an upward trend or just a short-term jump. Consider the recent experience of homicide in Chicago as an illustration of the volatility of homicide totals in one of the leading cities in the U.S. for homicide:

Table 4: Homicides in Chicago, 2011-2018

Year	Homicides
2011	441
2012	532
2013	415
2014	416
2015	468
2016	762
2017 (through July 6)	650 (357)
2018 (through July 6)	252

There is no clear trend in these numbers, year-to-year or over the entire period. The numbers go up one year, down the next, or are about the same. Of course, 2016 stands out. That is a 58 percent increase in homicides over those of 2015.[46]

[44] *Id.*
[45] *Id.* at 1308.
[46] See Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike?: An Empirical Examination of the 'ACLU Effect' and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. --- (forthcoming). Cassell and Fowles argue that a voluntary agreement between the American Civil Liberties Union and the Chicago Police Department to suspend stop-and-frisks led to more armed criminals on the street and, therefore, more violence.

Another aspect of the data that warrants attention is Director Comey's and President Trump's specious claim that the 2015 increase in homicides is the result of criminal behavior by urban black males, especially Trump's race-baiting claim that four-fifths of the murders are of whites by blacks. Professor Donohue reports that the five states with the highest increases in violent crime in 2015 were Hawaii (a 24.0 percent increase), South Dakota (16.7 percent), Vermont (15.1 percent) Alaska (14.9 percent), and Wyoming (13.7 percent). All of those states have very small black populations.

Finally, this alleged and spurious increase in homicides in 2015 is an example of something that "everyone knows that isn't so." Even though, as we have repeatedly seen in this review, there has been a long-term decline of more than 50 percent in the rate of violent crimes since 1991, since 9/11/2001 and till today, "60-70 percent of Americans consistently answered that crime has risen over the last year."[47]

D. Mass Incarceration

I have already referred to the fact that the United States prison population increased significantly after 1980 so that today almost 20 percent of all the world's prisoners are in the United States, even though we account for only 5 percent of the world's population. Additionally, we have seen that a large part of this increase in incarcerations occurred in the 1990s and may have contributed to the crime decline of that decade but that there was a minor increase (of about 1 percent) in prisoners between 2000 and 2010 and yet crime continued to decline during that first decade of the twenty-first century (implying that imprisonment contributed little if anything to that second decade of crime decline).

I have also suggested that the principal reason for relying on imprisonment as our principal crime deterrent grew out of the work of Professor Gary Becker of the University of Chicago Departments of Economics and of Sociology. In his famous article of 1968,[48] Becker examined the decision to commit a crime using standard economic analysis. A potential criminal, he argued, might compare the expected benefits of successfully completing a crime with the expected costs and be deterred from committing the crime if those expected costs exceed the expected benefits. The criminal justice system could elevate those expected costs by increasing the probabilities of detection, arrest, and conviction and the size of the sanction that it would impose on a convicted criminal. Alternatively or collaterally, increasing the likelihood and remuneration for legitimate work could also be an effective means of deterring crime.

[47] *Id.* at 1302.
[48] See Becker, *supra* note 4. See also Cooter & Ulen, *supra* note 15, Ch. 12.

This relatively simple formulation of the problem of deterring crime led to an explosion of research that purported to show the deterrent effect of imprisonment and other sanctions (such as death). And the effect on criminal justice policy can hardly be exaggerated. Punishment and precaution could, the literature demonstrated, deter crime. States and the federal government grew serious about making the sanctions more certain and more severe through a series of changes that included reducing the discretion that judges had in sentencing, imposing extremely severe sanctions on those convicted of a third felony ("three strikes laws"), and imposing the death penalty more enthusiastically. And a casual observer (performing what a friend of mine refers to as an "ocular regression") could conclude that there was a causal connection between society's imposition of more severe sanctions and sentencing more people to prison and the later decline in crime.

Before we turn to a discussion of Professor Pfaff's account of mass incarceration in Section III, let me establish more groundwork by considering some additional facts about the rise of U.S. imprisonment.[49] "Between 1973 and 2009 the U.S. prison population grew from about 200,000 to about 1.5 million, a sevenfold increase in 36 years. [For the sake of comparison, the] U.S. population as a whole grew by about 46 percent during that same period."[50]

A widespread consensus has begun to emerge in the late 2000s that there were too many people in prison.[51] There were different motivations for those in this consensus. Some were troubled by the fact that so many black males (about one-third) had their lives disrupted by serving prison sentences and found it difficult to get back on the standard life track that so many of us enjoy. Some were troubled by the fact that our imprisonment rate (676 inmates per 100,000 people) is the second highest in the world and almost five times the average imprisonment rate of other developed counties (which is 145 per 100,000[52]). Our current rate is also remarkable by historical standards for this country. For the 50 years prior to 1975, our imprisonment rate was not significantly different from that in other developed countries – about 100 prisoners per 100,000 population.[53] Some were distressed by mass incarceration because there was

[49] I am here following the argument in the recent work of my colleague, Andrew Leipold. See Andrew D. Leipold, *Is Mass Incarceration Inevitable?* University of Illinois College of Law Working Paper (2018).
[50] *Id.* at 4-5.
[51] See Thomas S. Ulen, *Skepticism about Deterrence*, 46 LOY. U. CHI. L.J. 381 (2014).
[52] See Leipold, Table 2, at 13.
[53] Leipold, *supra* note 52, at 6.

believable evidence that its deterrence value had fallen close to zero. Some were appalled, in addition to all the reasons given heretofore, by the estimated $80 billion per year that localities, states, and the federal government were spending on imprisonment.

For these and additional reasons, the emerging consensus began to result in reforms designed to release prisoners and to find alternative means of sanctioning criminals. "Between 2006 and 2011, more than half the states reduced their prison populations, and in 10 states the number of people incarcerated fell by 10 percent or more.[54] … Between 2009 and 2015, the number of people behind bars dropped by about 5 percent, leaving about 1.5 million in state and federal prison, and about 728,000 in local jails."[55]

Suppose that we are in agreement that our incarceration rate is too high. And suppose, further, that we take as our goal to get our rate back to the non-U.S. average of 145 prisoners per 100,000 population. What would that involve? We would have to reduce approximately 75 percent of the 2.145 million people imprisoned to about 500,000. "We could empty every state and federal prison in the country, leaving only inmates in state and local jails, and still not reach that level."[56] That would be foolhardy.

Suppose instead that the U.S. took as its goal to cut its incarceration rate in half (to roughly 333 prisoners per 100,000 population). If it were to do so, thereby reducing its total imprisoned population to slightly over 1 million, we would still have a higher rate than 24 of the 25 largest economies (everyone except Russia, which has a rate of 430 prisoners per 100,000 population).

Other goals, such as dropping out of the top 10 leading imprisoners by rate or cutting the imprisonment rate by 25 percent, would be somewhat easier to achieve but still nearly a Herculean labor.

There are other ways. Suppose that we focus our attention on those prisoners who have been convicted of non-violent crimes. First, we must recognize that the number of property crimes is seven times larger than the amount of violent crime.[57] Nonetheless and second, we need to be aware that half of all state prison

[54] *Id.* at 3;JEREMY TRAVIS, BRUCE WESTERN & EDS. REDBURN, STEVE, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014).
[55] Leipold, *supra* note 52 at 5-6.
[56] *Id.* at 14.
[57] "Violent crimes in general have higher clearance rates; on conviction these defendants are more likely to receive a prison sentence rather than probation, and those convicted of violent crimes receive the longest sentences among those who are sent to

inmates have been convicted of a violent crime. And third, the vast majority of all prisoners are state prisoners. The most recent U.S. Department of Justice, Bureau of Justice Statistics report on all state and federal prisoners indicates that at the end of December, 2015, there were 1,298,159 state prisoners and 178,688 federal prisoners.[58] That is a ratio of slightly more than 7:1, state prisoners to federal prisoners.[59]These three facts, taken together, mean that if we are to make a significant reduction in the total number of prisoners, we have to look to reducing the state prisoners first. But we are constrained by the fact that the majority of state prisoners have been convicted and sentenced for violent crimes. If we believe that it is far riskier to release violent criminals early than to release property criminals early, we need to focus principally on prisoners who have committed less-serious crimes. To illustrate that we have a starkly limited number of options in reducing the prison population, here are the percentages of all inmates in state prisons by category of crime:

Table 4: State Prison Inmates by Crime Category (2015)

Crime of Conviction	Percent of Inmates
Violent crime	54
Property	18
Drug	15.2
Public Order	11.6
Other	0.7

Source: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Prisoners in 2016," Table 12, p. 18 (January, 2016).

Just for the sake of comparison, note that the percentages of federal prisoners in different crime categories is markedly different, as the following table shows:

Table 5: Federal Prison Inmates by Crime Category (2015)

prison. (Indeed, more than 7 percent of state prisoners nationwide are incarcerated for murder or manslaughter, even though these crimes make up less than 0.2 percent of the index crimes each year.)" *Id.* at 16.

[58] See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Prisoners in 2016," Table 4, p. 6 (January, 2016).

[59] According the U.S. Bureau of Justice Statistics, if we add all the people held in local jails, the total number of inmates in the U.S. in 2013 was about 2.2 million. Another 4.7 million adults are on probation or parole. https://en.wikipedia.org/wiki/Incarceration_in_the_United_States.

Crime of Conviction	Percent of Inmates
Violent crime	7.7
Property	6.1
Drug	47.5
Public Order	38.2
Other	0.5

Source: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Prisoners in 2016," Table 14, p. 20 (January, 2016).

We have just seen how very difficult it will be to achieve almost any meaningful goal in reducing mass incarceration. But there is additional depressing news about seeking to have fewer prisoners: It might not save much money. One would have thought that cutting, say, 10 percent of the prisoners in a state's prison system would save about 10 percent of the state's total recurring prison budget (excluding the fixed costs of operating a prison system). For example, between 2010 and 2015 the State of New York decreased its prison population by 10 percent (about 6,000 people), which allowed it to close 14 prisons and reduce its prison employment by 11 percent."[60]

But New York may not be typical. There are at least three reasons to be skeptical. First, reductions in state prison inmates may be achieved (as they were, partially, in California[61]) by transferring state prisoners to county and local jails. This simply transfers the costs from the state budget to the county or municipality budgets but may not actually save money. Similarly, those released from state prison into mandatory supervised release (MSR) may require the hiring of additional probation officers.

Second, punishment is supposed to deter prospective criminals and convicted criminals from committing crimes. But the circumstances that contributed to a person's deciding to commit crime (such things as "lack of education, substance abuse, mental health problems, lack of a stable family like, and lack of

[60] Leipold, *supra* note 52, at 19.

[61] California made these transfers and some releases in response to a federal court order requiring them to reduce the number of prisoners in overcrowded state prisons. See *Brown v. Plata*, 563 U.S. 493 (2011). See also Nina Totenberg, "High Court Rules California Must Cut Prison Population," *All Things Considered, National Public Radio*, May 23, 2011, available at https://www.npr.org/2011/05/23/136579580/california-is-ordered-to-cut-its-prison-population.

realistic economic opportunities"[62]) will probably have to be addressed by both short- and long-term state and federal expenses designed to ameliorate those circumstances.

Third, assuming that states reduce prisoners only by releasing some subset of nonviolent prisoners, some of them may commit crimes after release, and those new crimes will have social costs. We know "that nationally about 50 percent of former prison inmates will be reincarcerated within three years of their release."[63]

These ambiguities about whether reducing the amount of mass incarceration will reduce state costs are reflected in the experience of the 23 states that have, since 2010, reduced their prison populations. As Professor Leipold reports:

> [S]lightly more than half [of the States] (13 of 23, or 57 percent) also decreased their spending, while the other 10 increased spending despite the lower inmate numbers. Among the States that decreased both the inmate population and prison spending, the relationship between the two was also murky. Some States cut their prison populations a lot and saved very little; other States cut their population very little and saved a great deal. [For example,] South Carolina cut its prison population 12 percent between 2010 and 2015 but decreased its prison spending by only 2 percent. Colorado cut its inmate population by 9 percent but saw a 0 percent change in constant dollars. Florida cut its inmate population by 1 percent but saw a 12 percent decrease in spending. Ohio cuts its prison size by 1 percent but saw a 12 percent decrease in spending. Ohio cut its prison size by 1 percent and cut its prison spending by 13 percent.[64]

Professor Leipold says that four factors must be present for the release of prisoners to save state costs: (1) that enough prisoners must be released so that prisons or parts of prisons can be closed and prison employees let go or reassigned to lower-paying jobs; (2) that "government dollars previously spent on prison inmates will be higher than the public assistance, housing, and health care dollars spent on those who are now incarcerated or are released earlier than they would have been; (3) that the costs saved by the first two points will not be fully absorbed by services needed to reduce the risk of recidivism

[62] Leipold, *supra* note 52, at 21.
[63] *Id.* at 9. There is some evidence to suggest that California's prisoner release mandated by a federal court was carefully done so that the increase in nonviolent crime did not increase significantly after the releases. See STEVEN RAPHAEL & MICHAEL A. STOLL, A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME (2014).
[64] Leipold, *supra* note 52, at 21.

among those who are no longer in prison [or transferred to county or municipal jails]; and (4) that if we do not spend the money saved on programs addressing the criminogenic problems of former inmates, the recidivism rate will not drive the prison population up to unacceptable levels."[65]

III. PROFESSOR PFAFF ON THE CAUSES OF MASS INCARCERATION

Professor John F. Pfaff's[66] *Locked In* offers an important hypothesis on the causes of mass incarceration and empirical evidence that the author offers to support his hypothesis. Pfaff's hypothesis, in brief, is that "[p]rosecutors have been and remain the engines driving mass incarceration."[67] Legislators and judges do not play a central role, and, therefore, we should not look to legislative or judicial reforms to correct the problem of warehousing prisoners. Rather, Pfaff argues that if prosecutors are the problem, then we should look to restraints on prosecutorial discretion to cure the problem.[68] Because, as we shall see, he believes that prosecutors have exercised that discretion principally to accept more cases for prosecution (or plea bargaining) and to engage in more hard-nosed plea bargaining, Pfaff's correctives are to limit that discretion to proceed with cases or to be hard-nosed in plea bargaining.

Pfaff's hypothesis is meant to be a critique of what he calls the "Standard Story." That story, he claims, blames two principal developments for increasing prison populations: first, the "war on drugs,"[69] and, second, the increasing "harshness" of criminal sentences, which resulted in longer and longer prison sentences over the period 1980 to 2010. The policy implications of this version of the Standard Story, which Pfaff deems to be, like the theory, off target, are to decriminalize drugs and allow for less harsh sentences.

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[65] *Id.* at 23.

[66] JOHN F. PFAFF, LOCKED-IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017). Professor Pfaff is Professor at Fordham Law School.

[67] *Id.* at 206.

[68] *Locked In* has been reviewed, mostly favorably, by the following, David Brooks, "The Prison Problem," *The New York Times*, Sept. 29, 2015; Jeffrey Toobin, "The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans," *The New Yorker*, May 11, 2015; Barack Obama, "The President's Role in Advancing Criminal Justice Reform," 130 HARV. L. REV. 811 (2017); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017); Daryl K. Brown, *What Can Kafka Tell Us About American Criminal Justice?*, 93 TEX. L. REV. 487 (2014); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823 (2014); Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 10163 (2016); and Stephanos Bibas, "The Truth About Mass Incarceration," *National Review*, Sept. 16, 2015).

[69] This portion of the story is particularly associated with MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

Pfaff's view is that the war on drugs is not responsible for the vast numbers of state and federal prisoners. In this he is right, as we have seen in the previous section. While drug offenders account for a large percentage (nearly half) of all federal prisoners, they account for just 15 percent of all state prison inmates. With adjustments for local jails, those held in pre-trial detention, and others, at most 20 percent of all inmates are there for drug offenses. This is a large number, but it had to have increased dramatically in the 1980s and 1990s, which it did not, to be the reason why so many of our fellow citizens are in the hands of the criminal justice system.

Pfaff also does not believe that harsher sentencing practices account for the large number of U.S. prisoners. Rather, he argues that the principal cause of rising incarceration numbers is that more people were sent to prison. Prosecutorial discretion took the form of an increasing number of criminal filings. Prosecutors decide whether to dismiss or charge criminal defendants when presented with a case from the police, and they can plea bargain with the defendant once he or she is charged. In effect, Pfaff claims that over the relevant time period federal and state prosecutors, apparently determined to appear to be "tough on crime," dismissed fewer cases and pled down fewer cases over time. The result was a significant increase in prison commitments.

There is much to admire in Pfaff's book. He has drawn attention to the important role of prosecutors in the criminal justice system. And in so doing, he has drawn attention away from legislators and judges, heretofore – in an alternative Standard Story – widely thought to have been the most important state actors in criminal justice. This is an important hypothesis, and Pfaff has done powerful empirical work to support that hypothesis.

I am not, however, convinced that his hypothesis is correct. I have three principal reasons for my skepticism. First, I find his "Standard Story" to be a straw man. There is a different standard story that is emerging from the scholarship of the past 20 or so years about both the decline in crime and the causes and consequences of mass incarceration. Indeed, we have already seen much of that story in the earlier sections of this review. I shall elaborate below.

Second, the evidence that Pfaff marshals does not provide strong support for his hypothesis. Those data are flawed in several technical ways so that they cannot buttress the case he wants to make. Pfaff has not

made the case that prosecutorial discretion can explain more than a fraction of the remarkably large change in our state and federal prison populations between 1980 and 2010. Indeed, other respected scholars have reached diametrically opposite conclusions to those of Pfaff about the principal reason for increase in prisoners – namely, that it was the lengthening of sentences, not just an increase in the number of prisoners committed to prison, that played the crucial role in mass incarceration.

Finally, as Section IID has already argued, I am not yet fully convinced that the premise of *Locked In* and much of the public debate is on target. That is, I am clear that mass incarceration has significant costs and may cry out for alternatives. I am also clear on the fact that in the 2000s incarceration had no discernible deterrent effect on crime, particularly violent crimes, even though it may have done so in the 1990s. But as Professor Leipold has so persuasively argued, there is no easy or clear path for getting from where we are now, to a United States in which there is far less incarceration and continuing low levels of both violent and property crimes.

Let me turn to these points in a little more detail.[70]

Pfaff's hypothesis is that increases in prison population through new commitments, and not the lengthening of sentences, is the principal factor responsible for mass incarceration. He writes that the "amount of time most people spend in prison [] is surprisingly short, and there is no real evidence that it grew much as prison populations soared."[71] He includes a table that shows that the time served by prisoners sentenced in 2000 and in 2010 for the same crimes has been "fairly stable."[72] He takes this as evidence that longer sentences have not been an important factor in mass incarceration. But it is, in fact, what we would expect. Remember that Zimring, the Brennan Center authors, and others have shown that during the period 2000 to 2010 the number of prisoners barely changed.

Raphael and Stoll, however, believe that longer sentences have been an important factor, especially in the 1990s.[73] They say that "in 1984 an inmate convicted of murder or manslaughter could expect to serve 9.2 years. By 2004 this figure had increased to 14.27 years." For the crime of rape, time served increased from

[70] I have benefited a great deal from the review of Pfaff's book by Professor Jeffrey Bellin of the William & Mary College of Law: *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018).
[71] Pfaff, *supra* note 69, at 52.
[72] *Id.* at 57.
[73] Raphael & Stoll, *supra* note 66.

5 to 8 years; for robbery, from 3.5 to 5 years. For aggravated assault a year longer in 2004 than in 1984.[74]

Other scholars of these matters, such as Beck and Blumstein[75] and Neal and Rick,[76] have also found increases in length of criminal sentence to be a significant factor in the 1990s and 2000s. Bellin writes that Beck and Blumstein said that the "entire growth over the 30 years of the incarceration boom, 1980 to 2010, is 'attributed about equally to the two policy factors – prison commitments per arrest and time served.'"[77]

Why did Pfaff go wrong with all this? Largely because he focused on the first decade of the 2000s. As we have already seen, there was not much growth in prison population then. Such growth as occurred was mostly in the federal system, not the states, but Pfaff used largely state data.

The principal empirical evidence in support of Pfaff's other contention – that an increase in prison commitments is the principal cause of mass incarceration throughout the 1990s and early 2000s – is his finding that state felony filings rose significantly in the early 2000s. This happened, he argues, because prosecutorial discretion led prosecutors to do less plea bargaining than they had before the early 2000s and to dismiss fewer cases than they had before.

The evidence on which he relies comes from the National Center for State Courts (NCSC) and shows, he says that "between 1994 and 2008 the number of felony cases filed in state courts 'rose by almost 40 percent,' neatly paralleling the 40 percent increase in state prison admissions over that period."[78] But apparently there is some question about the data from the NCSC that Pfaff used. In 2003 the NCSC issued new guidelines for reporting state courts' workloads. Among other changes the guidelines recommended the following:

1. "Include 'reopened' and 'reactivated cases' – for example, probation or parole violations, to illustrate courts' '*actual* workload'";
2. "Move domestic violence prosecutions from the 'domestic relations' category into the criminal

[74] Bellin, *supra* note 73, at 840-41, citing Raphael & Stoll, *supra* note 66.
[75] ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES: 1980-2010 (2012). Beck and Blumstein say that increases in the number of prisoner committals explains the bulk of the increase in state and federal prison populations for the 1980s. Thereafter, they say that increases in prisoner committals and length of sentence were about equally responsible for changes in the total number of prisoners.
[76] Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEG. STUD. 1 (2016).
[77] Bellin, *supra* note 73, at 840-41.
[78] *Id.* at 841, citing Pfaff, *supra* note 69, at 72.

filing category";

3. "Count preliminary hearings that occurred in one court prior to a case being filed in another as two felony cases."[79]

Assuming that the NCSC data reflected these changes only from 2003 forward, there would be a tendency to report more state felony filings even if there had been no real change (that is, under the older definitions) in the actual number of felony filings. For example, Raphael and Stoll report that as the prison population reached its highest level around 2000, "parole revocations grew to over a third of new prison admissions. Raphael and Stoll estimate that probation violations [at about the same time] account for another 10 percent of prison admissions."[80] Under the new guidelines, the NCSC would have counted these parole and probation violations as felony cases. And if those percentages persisted through the end of Pfaff's time period (2008), then taken together they would account for 40 percent of prison commitments. If so, then Pfaff's finding that state felony filings increased from 1994 to 2008 may largely be due to these definitional changes, not to a real change in the number of filings.

There's more. There is an alternative source of data on state courts – the Department of Justice, Bureau of Justice Statistics' "State Court Processing Statistics" (SCPS). That publication includes state court felony filings, and for the period 1994-2008 the SCPS series does *not* show an increase in state court felony filings.[81]

There are some other criticisms that Bellin and others have leveled at the Pfaff hypothesis. I take these criticisms seriously – for example, that prosecutors have discretionary power but that so do the police, legislators, judges, and the state governor; it would not be fair, these critics say, to place *all* of the blame for increased imprisonment on prosecutors; there is blame to be spread around. To be clear, there is some bite in Pfaff's contention that prosecutors may have (over a longer period than just 1991-2013) become "tougher" on crime by dismissing fewer cases and engaging in less plea bargaining. But even if so, prosecutors are responsible for a relatively small portion of the remarkable increase in prisoners.

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[79] Bellin, *supra* note 73, at 842.
[80] *Id.* at 844, citing Raphael & Stoll, *supra* note 66.
[81] Bellin, *supra* note 72, at 843. Bellin reports that in a 2011 paper posted on SSRN, "The Causes of Growth in Prison Admissions and Populations," Professor Pfaff says that the SPSC data contradict his finding that felony filings increased.

The "standard story" that emerged from the review of the literature on the great crime decline and on mass incarceration suggests that just as we are still not certain why crime rose from the mid-1960s to the late 1980s, we are not certain about the causes of the subsequent decline, although we know that those causes were many and varied over time. We suspect that the criminal justice system, legislators, and judges responded to the crime increases with the main tool that they had – punishment in the form of incarceration. And although Zimring is clear that even experts on criminal matters did not see the crime decline coming – even when they were in the middle of it, once it did become evident that something had changed, they "put down their [punishment] tools." So, to the casual observer, the criminal justice system worked: When crime increased, that system sent more people to prison. And when crime declined, the system stopped sending people to prison.

We know from Zimring, the Brennan Center, Levitt, Donohue, Raphael & Stoll, and many others that the story is much more complex, with multiple causes, gaps in the explanation, and confounding comparative experiences to bring into the story.

IV. PROFESSOR SHARKEY ON THE SOCIAL CONSEQUENCES OF THE CRIME DECLINE

Professor Patrick Sharkey[82] has written a different and fascinating book on the great crime decline, particularly about its consequences. Although Professor Sharkey includes brief and fresh summaries of the literature on the causes of the decline, his principal focus is on the effect that the decline had on societal well-being.

Sharkey uses a fluid prose style and compelling statistics to show that one of the underreported effects of the great crime decline was to make many of our largest cities much more pleasant places to live than they were before the early 1990s:

In 1993 about 40 percent of big cities had a homicide rate above 20 per 100,000 residents, but in 2014 only 13 percent still had a homicide rate this high. A small group of cities, like Flint, Michigan; Hartford, Connecticut;

[82] Patrick Sharkey is Professor in and Chair of the Department of Sociology at New York University and scientific director of Crime Lab New York (see https://urbanlabs.uchicago.edu/people?labs=crime-new-york).

Newark, New Jersey; and Baton Rouge, Louisiana, did not change much by 2014. But in cities like Fort Worth, New York, San Diego, and Washington, DC, the murder rate dropped by at least 75 percent. In Atlanta, Boston, San Francisco, Seattle, Tampa, and many other cities, it fell by at least half.[83]

A moment's reflection would suggest that these remarkable decreases would be felt by most residents as an increase in their safety. They might feel more comfortable walking around their neighborhood; they might spend more time in parks, not worrying so much about being accosted or the victims of drive-by shootings; they might not hesitate to send their children to the store for groceries; they might feel more comfortable driving through neighborhoods that they had theretofore avoided.

Sharkey surveys the literature on the causes of the great crime decline. He points, first, to some scholarly evidence that was new to me about the beneficial effect of having more police around. He notes that for many years scholars thought that "police were powerless to control crime [but that now] the new consensus is that more police on the street translates into less crime."[84] For example, citing the work of Jonathan Klick and Alex Tabarrok, Sharkey says that "if police patrols are increased by half, one should expect crime to drop by roughly 15 percent."[85]

Another factor in the crime decline to which Sharkey points is community groups. As an example, he describes the work on Juanita Tate and the group she founded, the Concerned Citizens of South Central Los Angeles. "They took action to make sure that alleys were no longer used for dumping or drug dealing, they worked with the city to train formerly incarcerated residents to clean up sidewalks and maintain the streets, and they built more than one hundred units of housing in their community."[86]

Sharkey was so taken by this example that he undertook a study to see if nonprofit community organizations formed in the largest cities in the U.S. between 1990 and 2012 could have played a role in reducing crime. "In a given city with 100,000 people, we found that every new organization formed to confront violence and build stronger neighborhoods led to about a 1 percent drop in violent crime and

[83] Sharkey, *supra* note 6, at 26.
[84] *Id.* at 47.
[85] *Id.* at 46, citing Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J. L. ECON. (2005).
[86] *Id.* at 51. This is a private organization putting into action the "broken windows" hypothesis of reducing crime. See James Q Wilson & George L Kelling, *Broken Windows*, 249 ATLANTIC MONTHLY, 1982, at 29–38.

murder … We concluded that the explosion of community organizations that took place in the 1990s likely played a substantial role in explaining the decline of violence."[87]

Sharkey concludes his survey of the causes of the crime decline with the same conclusion as Zimring– that there is no single factor that can explain the decline. "Instead, I have come to believe that violent crime fell because many different segments of American society mobilized to confront it, and that the crime decline was largely caused by 'endogenous' forces – changes that were a response to the crisis of violence itself."[88]

I find the most striking contribution of Sharkey's to be his chapters on the benefits of the crime decline. I think that it is worth remarking that many of us – those of us leading stable, rewarding lives touched by nothing more than the usual travails of life – had been only tangentially affected by the violent crime of the 1970s and 1980s. We were, of course, disturbed to learn about it from newspapers, TV, and radio, and it might have affected the routes we drove in major cities or where we ventured in New York City, but we could, by and large, avoid being victims.

But there was one group that bore the brunt of the crime wave, particularly its violent component – the black community. Sharkey notes that of the 459 people murdered in Chicago in 2009, three-quarters were young black men.[89] Shockingly large as that number and percentage are, they are a significant reduction from the numbers of the late 1980s and early 1990s (or, as we have seen, from Chicago's record for 2015). Sharkey gives a very vivid example of the result for black men of that decline in violent crime:

> In 1991 black men could expect to die about eight years earlier than white men, on average. By 2012 the gap in life expectancy between white and black men was five years [72 instead of 77] … For black and white women and for white men, there is virtually no difference between trends in life expectancy with and without the crime decline. … Our estimates indicate that an African American boy born at the end of the crime wave could expect

[87] *Id.* at 53, citing Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOC. REV. 1214 (2017).

[88] *Id.* at 57. I think that one has to understand Sharkey's remark as suggesting not that community groups and grassroots movements were the endogenous causes of the decline but that all of the factors we have heretofore seen – more police, more vigorous prosecutors, incarceration, the vibrant economy, community groups, changing technology of crime fighting and precaution, and more – contributed and that all of them in one sense or another arose in response to the spike in crime from the mid-1970s to the early 1990s.

[89] Sharkey, at 64, urges his readers to Google "Derrion Albert murder" to see a particularly disturbing example. It is very hard to watch, but it is unforgettable. Another comparison – of lives lost to violence – across different social groups in 2012 illustrates the lingering problem: "For every 100,000 white women, just 82 years of life were lost to homicide in 2012. For every 100,000 white men, 192 years of potential life were lost, and for every 100,000 black women, 230 years of potential life were lost. For every 100,000 black men, on the other hand, 1,341 years of potential life were lost due to homicide." *Id.* at 70.

to live, on average, about three-quarters of a year longer due purely to the drop in homicides that took place from 1991 to 2012.[90]

To indicate what a remarkable achievement in life expectancy this is, Sharkey compares it to the increase in life span that would accrue to every American adult if they should all lose their excess weight – between one-third to three-quarters of a year, roughly equal to the effect on young black men of the crime decline.

There were other social benefits from the crime decline. Violent crime affects not just its victims but also friends, families, the children who witness it, and residents nearby. Sharkey tells us that he thought about these ripples of violence throughout society when he heard a lecture on epigenetics by Dr. Frances Champagne, a neuroscientist. One of the phenomena that Dr. Champagne described came from studies by David Diamond, a neuroscientist at the University of South Florida. Diamond measured what he called "predator stress" among rats, outside whose cages a cat prowled. After their exposure to that stress of the cat, those rats were given mazes to navigate. They were more error-prone when doing mazes than rats that had not been exposed to a predator.

Sharkey wondered if the same sort of lingering stress could affect children whose neighborhoods had been the sites of violent crimes. "If rats perform worse when they're exposed to a nearby cat, what happens to children if they are assessed just days after a homicide down the street?"[91] Sharkey undertook to study black Chicago children by means of a cognitive skills (IQ) test "in the days after a local homicide took place."[92] He found that those children did "on average four-tenths of a standard deviation worse on tests of verbal and language skills than black children in the same neighborhoods who were assessed at a different, (safer) time." That difference is equivalent to the homicide-affected children's having "missed the previous two years of schooling and regressed back to their level of performance from years earlier."[93]

Finally, Sharkey finds a direct effect of the crime decline on the degree of inequality in urban areas. Specifically, he finds that those cities that have had the greatest decline in violent crime have also and simultaneously experienced a significant decline in the concentration of poverty and a greater mixing of

[90] Sharkey, *supra* note 6, at 68.
[91] *Id.* at 84.
[92] *Id.* at 86, drawing on Patrick Sharkey, *The Acute Effect of Local Homicides on Children's Cognitive Performance*, 107 PROC. NAT'L. ACAD. SCI. USA 1173 (2010).
[93] *Id.*

low-, middle-, and upper-income residents.[94] And after summarizing the remarkable work of Raj Chetty and his co-authors,[95] Sharkey finds that:

> children who reached their teenage years at a time when the level of violence had subsided were substantially more likely to move upward in the income distribution by early adulthood, advancing further than their parents and further than others in the same city who had lived through a more violent time. Our results suggest that children who lived in an area where violence had declined by roughly half – which was not uncommon during this period – could expect to earn about $2,000 more in income every year during early adulthood.[96]

As should be clear, most of the societal benefits from the great American crime decline accrued to the most disadvantaged segments of our largest cities.[97]

Sharkey summarizes these societal benefits from the decline in crime ably:

> If there is a single fact that reveals just how much urban life has changed over the past twenty years, it is this: The poorest Americans are now victimized at about the same rate as the richest Americans were back at the start of the 1990s. … A poor, unemployed city resident in 2015 had about the same chance of being robbed, beaten up, stabbed, or shot as a well-off, high-paid urbanite in 1993.[98]

The final section of Sharkey's marvelous work turns to the broader topic of urban poverty. He disagrees with the view that the central issue to advance economic, social, and personal development in our largest cities is to rein in "warrior policing," as he calls it. That is an element of what needs doing – changing "warrior police" into "urban guardians," restoring the trust in the police and their communities, and re-establishing the "legitimacy of the law enforcement enterprise" – but there is so much more that must be done. I commend this section of the book with the same enthusiasm with which I commend the prior three sections.

[94] *Id.* at 105, drawing on Sharkey, Torrats-Espinosa, and Takyar, *supra* note 82.
[95] See Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017), and Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).
[96] Sharkey, *supra* note 6, at 108.
[97] Magnus Lofstrom & Steven Raphael, *Crime, the Criminal Justice System, and Socioeconomic Inequality*, 30 J. ECON. PERSP. 103 (2016) reach the same conclusion.
[98] Sharkey, *supra* note 6, at 112.