

# THE RICH GET RICHER AND THE POOR GET PRISON

## IDEOLOGY, CLASS, AND CRIMINAL JUSTICE

JEFFREY REIMAN

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POOR GET PRISON**

**Ideology, Class, and Criminal Justice**

Sixth Edition

**JEFFREY REIMAN**

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For Sue

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# PREFACE TO THE SIXTH EDITION

It is now more than 20 years since the first edition of *The Rich Get Richer and the Poor Get Prison* was published. In that time, I have continued to look at the connections between class and criminal justice, starting with the definition of crimes in the lawbooks and progressing through familiar stages of the system, to show that the same pattern persists: The acts defined legally as crimes, the acts treated seriously as crimes, tend to be the acts committed by poor people, often poor nonwhite people. Harmful acts of the well-off—refusal to make the workplace safe, which results in thousands of deaths and injuries each year; on-going pollution of the atmosphere, which increases the rates of lung disease and a variety of deadly cancers; tax cheating and the savings & loan debacle, which cost citizens far more than all the robberies reported to the police each year; and much more—tend rarely to be defined as crimes, and when they are so defined, tend not to be treated as serious crimes. Their perpetrators rarely see the inside of a prison, and when they do, it is for shorter periods and with fewer deprivations than even nonviolent poor criminals who have stolen far less.

There have also been some changes, of course. There is somewhat more punishment of white-collar criminals. Some of the worst of the savings & loan crooks got prison sentences that would have been unheard of ten years ago. But still they rarely get what a young inner-city kid gets for ripping off far less money, or what a low-level drug dealer gets for selling marijuana to willing customers.

And there has been one enormous change: In the last 20 years we have seen an unprecedented imprisonment binge. Today, some 2 million of our fellow Americans are behind bars. Many of them are violent criminals who should be in prison, but most are nonviolent criminals, who now make up a larger percentage of the prison population than they did before the binge. The number of female inmates in our prisons doubled in the 1990s, and most of them are in prison for nonviolent crimes. Most also are mothers, incarcerated at great distances from their children. And of course, the vast majority of these new prisoners are from the lowest economic classes of the society. They are much poorer on average than the population outside prison, and less likely by far to have been employed prior to arrest than their fellows on the outside. There has been one other change as well: In these past 20 years, the gap between the rich and the poor in America has grown. So, with all these changes, one thing remains unchanged: *The rich get richer and the poor get prison.*

In recent years, crime rates around the United States have come down considerably. Police chiefs and politicians right up to President Bill Clinton immediately claimed responsibility for these reductions, even though serious students of crime and criminal justice have consistently found that criminal justice policies have very little impact on crime rates. Far more important are demographic changes, especially recent reductions in the number of young men in the crime-prone ages, and economic changes, especially the recent reduction in unemployment to rates that haven't been seen in 30 years. Of course, imprisoning so many of our fellow citizens must have some effect on the crime rate as well, but that effect comes at enormous cost in money, in suffering, and in the weakening of basic rights. Most of the new prisoners are nonviolent offenders, who would be better and less expensively helped by noninstitutional alternatives. Because of the "war on drugs," many low-level drug dealers and small-time drug users are serving extremely long sentences under mandatory minimum sentence laws. Prison wardens must occasionally release violent criminals to make room for these nonviolent offenders they are mandated to incarcerate. The war on drugs has also seen a whittling away of Constitutional protections against unreasonable searches and seizures. And cities, such as New York, that have taken very aggressive stances against crime have also seen complaints of police brutality and rights violations skyrocket. So, while it is great news that crime is down, criminal justice policy deserves very little credit for the reductions. And, even where it has made some small contribution to reducing the crime rate, it has had many negative effects as well. The original thesis of *The Rich Get Richer and the Poor Get Prison* still holds: The criminal justice system is best understood as a system that aims to keep a visible population of poor criminals before the public's eye. Its crime-fighting strategies aim to keep crime from getting out of control, not to reduce it. The policies that most experts believe really would reduce crime—significant investment in our inner-city neighborhoods, better education for the poor and unemployed, widely available treatment for drug addicts and people with psychological problems, and so on—receive only token support.

In revising the book for this sixth edition, I have mainly tried to show that the main theses of *The Rich Get Richer and the Poor Get Prison* are still true, by bringing statistics on criminal and noncriminal harms up to date, and by incorporating the results of relevant research that has appeared since the last edition. I have tried to introduce these updates with as little violation of the original edition's style and argument as possible, though in some cases I have revised and expanded arguments based on what teachers who have used the book in class have told me about student responses to certain parts of the book.

In this edition, as in previous editions, I have tried to incorporate the most recently reported data and statistics. However, where I compare the relative danger of criminal versus noncriminal harms (such as occupational and environmental hazards), I occasionally use earlier figures when these are the latest

adequate statistics on both types of harm. On topics where new statistics are not available, I have, when it seemed plausible, assumed that earlier statistics reflect continuing trends and enable projections from the past into the present. In all cases, I have tried to keep my assumptions as conservative as possible in order to keep the argument on the firmest ground.

Many readers of earlier editions of *The Rich Get Richer* have voiced the wish that the book offer more practical proposals for dealing with the bias of criminal justice policy against the poor, and the failure of the system to address the real causes of crime. There are recommendations in the book, but these are at a very general level. To provide a forum for discussing criminal justice policy, the publication of this edition of the book is accompanied by the opening of a Web site. The address is: [www.abacon.com/reiman](http://www.abacon.com/reiman). I hope that the Web site will offer the possibility for teachers, students, and other readers of the book to exchange ideas about how the current system works and how it can be improved. Those who have worked or are working in some criminal justice agency are invited to tell about their experiences, how they confirm or disconfirm the ideas in *The Rich Get Richer*. Instructors can share suggestions about teaching strategies that have worked for them in the classroom, and students will find links (and references) to sources of information about crime and current criminal justice policy as well as about related matters, such as successful treatment or rehabilitation strategies, the extent of noncriminal harms and the efforts made to reduce them, and data about poverty and race and class in America and elsewhere. And all are encouraged to make suggestions about how *The Rich Get Richer* can be improved.

In the third edition I introduced two changes aimed at making the book more useful for classroom teachers. First, summaries and study questions were added to the chapters after the Introduction. The study questions require the student both to recall what he or she has read and to think critically about it. The questions can be used by instructors for the purpose of testing and review, and by students as a way of making sure they have covered and thought about the most important issues in each chapter. Second, a short essay on Marxian theory and criminal justice was added as an appendix. The essay covers the ground from a general statement of Marxian theories of capitalism, ideology, and law, to a Marxian theory of criminal justice—and the ethical judgments to which that theory leads. Many instructors have found this a handy and economical way of introducing their students to Marxian theory and its relation to criminal law and criminology. The essay addresses some of the same issues discussed in the main text of *The Rich Get Richer* and thus offers an alternative theoretical framework for understanding those issues. Although this framework is compatible with that developed in the main text, the argument of *The Rich Get Richer* stands alone without it. I have continued these two changes in this edition. I have also continued a change that first appeared in the fourth edition, a list of additional readings at the end of each chapter so that students stimulated



by the material in the chapter could read further on particular topics. Moreover, the additional readings should help instructors when they assign outside reading or research on the topics touched upon in the book.

Because I have revised rather than rewritten *The Rich Get Richer*, I am still indebted to those who helped me with the original edition. They are thanked in the following section, Acknowledgments for the First Edition. I thank also Marcia Trick, who helped me so much on the second and third editions, and Jean Landis, who pitched in on the third. For this sixth, as for the fifth and the fourth edition, I have been assisted by an exceptional young criminologist, Paul Leighton, now Assistant Professor in the Department of Sociology, Anthropology, and Criminology at Eastern Michigan University. Along with Paul, I was helped in the preparation of this edition by Donna Killingbeck, a graduate student in Eastern Michigan's Master of Criminology and Criminal Justice program. I thank Paul and Donna for their hard work and good judgment in gathering the data, statistics, and studies that I used in updating the book; for their excellent suggestions; and for the timely and responsible way in which all this assistance was given. In addition, I am grateful to the following reviewers of the fifth edition for many useful suggestions, some of which have been incorporated into this sixth edition and others of which will find their way into future editions: Tara Gray, New Mexico State University; Dennis W. MacDonald, Saint Anselm College; and Jay R. Williams, Duke University.

As before, I am grateful to American University for providing me with a supportive and lively intellectual environment. I thank Karen Hanson, my editor at Allyn & Bacon, and her assistant, Karen Corday, for their willing and cheerful help and their hard work in getting this sixth edition from idea to reality. I thank also Lynne Lackenbach for a fine job of copyediting. I dedicate the book to Sue Headlee, my wife, friend, partner, colleague, and inspiration for a quarter of a century.

Jeffrey Reiman

## ACKNOWLEDGMENTS FOR THE FIRST EDITION

This book is the product of seven years of teaching in the School of Justice (formerly, the Center for the Administration of Justice), a multidisciplinary criminal justice education program at American University in Washington, D.C. I have had the benefit of the school's lively and diverse faculty and student body. And, although they will surely not agree with all that I have to say, I have drawn heavily on what I have learned from my colleagues over the years and stand in their debt. In addition, more than is ordinarily recognized, a teacher receives guidance from students as they test, confirm, reject, and expand what they learn in class in the light of their own experience. Here, too, I am deeply in debt. My thanks go to the hundreds of students who have shared some part of their world with me as they passed through American University, and in particular to three students whose encouragement, loyalty, and wisdom are very much a part of the development of the ideas in this book: Elizabeth Crimi, Bernard Demczuk, and Lloyd Raines.

I express my gratitude to American University for providing me with a summer research grant that enabled me to devote full time to the book in the summer of 1976 when most of the actual writing was done. I am also grateful to Bernard Demczuk who was my research assistant during the academic year 1975 to 1976 and who gathered much of the research data. I owe thanks as well to Cathy Sacks for ably and carefully typing the final manuscript.

Drafts of the manuscript for this book were read in whole or in part by (or to) Bernard Demczuk, Sue Hollis, Richard Myren, Lloyd Raines, Phillip Scribner, I. F. Stone, and John Wildeman. I am grateful for their many comments and I incorporate many of their recommendations in the final version. I have made my mistakes in spite of them.

Finally, for teaching me about artichokes, the meaning of history, and countless other mysteries, this book is dedicated to Sue Headlee Hollis.

J. R.  
1979

## ABOUT THE AUTHOR



Jeffrey Reiman is the William Fraser McDowell Professor of Philosophy at American University in Washington D.C. He was born in Brooklyn, New York, in 1942. He received his B.A. in Philosophy from Queens College in 1963, and his Ph.D. in Philosophy from Pennsylvania State University in 1968. He was a Fulbright Scholar in India during 1966–67. He joined the American University faculty in 1970, in the Center for the Administration of Justice (now called the Department of Justice, Law and Society of the School of Public Affairs). After several years of holding a joint appointment in the Justice program and the Department of Philosophy and Religion, Dr. Reiman joined the Department of Philosophy and Religion full-time in 1988, becoming Director of the Master's Program in Philosophy and Social Policy. He was named William Fraser McDowell Professor of Philosophy in 1990. He is a member of the Phi Beta Kappa

and Phi Kappa Phi honor societies, and past president of the American University Phi Beta Kappa chapter. In addition to *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, Dr. Reiman is the author of *In Defense of Political Philosophy* (1972), *Justice and Modern Moral Philosophy* (1990), *Critical Moral Liberalism: Theory and Practice* (1997), *The Death Penalty: For and Against* (with Louis P. Pojman, 1998), *Abortion and the Ways We Value Human Life* (1999), and more than 50 articles in philosophy and criminal justice journals and anthologies.

# INTRODUCTION

## Criminal Justice through the Looking Glass, or Winning by Losing

*The inescapable conclusion is that society secretly wants crime, needs crime, and gains definite satisfactions from the present mishandling of it.*

**Karl Menninger**

*The Crime of Punishment*

A criminal justice system is a mirror in which a whole society can see the darker outlines of its face. Our ideas of justice and evil take on visible form in it, and thus we see ourselves in deep relief. Step through this looking glass to view the American criminal justice system—and ultimately the whole society it reflects—from a radically different angle of vision.

In particular, entertain the idea that the goal of our criminal justice system is not to eliminate crime or to achieve justice, *but to project to the American public a visible image of the threat of crime as a threat from the poor.* To do this, the justice system must maintain the existence of a sizable population of poor criminals. To do this, it must fail in the struggle to eliminate the crimes that poor people commit, or even to reduce their number dramatically. Crime may, of course, occasionally decline, as it has recently—*but not because of criminal justice policies.*

This last statement must be qualified. The recent news of declines in the crime rate has been quickly snatched up by leaders at all levels from the White House to the local police station as an occasion to declare the success of their crime-reduction policies. Later, I shall point to a number of causes of the recent decline, for example, the stabilization of the illegal drug trade and thus the reduction in drug-related violence, which have nothing to do with the success of criminal justice policies. If anything, the stabilization of the illegal drug trade is a sign of the failure of a long-standing justice policy, namely, the so-called war on drugs: Rather than end the drug trade, that trade has become “business as usual.” Nonetheless, I will not go so far as to say that criminal justice policy has made *no* contribution to the drop in crime rates.

In recent years, we have quadrupled our prison population and, in cities such as New York, allowed the police new freedom to stop and search people they suspect. No one can deny that if you lock up enough people, and allow the police greater and greater power to interfere with the liberty and privacy of citizens, you will eventually prevent some crime that might otherwise have taken place. Later, I shall point out just how costly this means of reducing crime is, in money for new prisons and prisoners, in its destructive effect on inner-city life, in reduced civil liberties, and in increased complaints of police brutality. I won't deny, however, that these costly means do contribute *in some small measure* to reducing crime. Thus, when I say in this book that criminal justice policy is failing to reduce crime, I mean that it is failing to reduce it in any substantial way—that it is failing to make more than a marginal difference. It is failing nonetheless, because our rates of crime remain high, our crime-reduction strategies do not touch on the social causes of crime, and our citizens remain fearful about criminal victimization, even after the recent declines.

You will rightly demand to know how and why a society such as ours would tolerate a criminal justice system that fails in the fight against crime. A considerable portion of this book is devoted to answering this question. Right now, however, a short explanation of how this upside-down idea of criminal justice was born will best introduce it, and me.

Some years ago, I taught a seminar for graduate students titled "The Philosophy of Punishment and Rehabilitation." Many of the students were already working in the field of corrections as probation officers or prison guards or half-way-house counselors. First we examined the various philosophical justifications for legal punishment, and then we directed our attention to the actual functioning of our correctional system. For much of the semester we talked about the myriad inconsistencies and cruelties and the overall irrationality of the system. We discussed the arbitrariness with which offenders are sentenced to prison and the arbitrariness with which they are treated once there. We discussed the lack of privacy and the deprivation of sources of personal identity and dignity, the ever-present physical violence, as well as the lack of meaningful counseling or job training within prison walls. We discussed the harassment of parolees, the inescapability of the "ex-con" stigma, the refusal of society to let a person finish paying his or her "debt to society," and the nearly total absence of meaningful noncriminal opportunities for the ex-prisoner. We confronted time and again the bald irrationality of a society that builds prisons to prevent crime knowing full well that they do not, and one that does not even seriously try to rid its prisons and postrelease practices of those features that guarantee a high rate of *recidivism*: the return to crime by prison alumni. How could we fail so miserably? We are neither an evil nor a stupid nor an impoverished people. How could we continue to bend our energies and spend our hard-earned tax dollars on cures we know are not working?

Toward the end of the semester I asked the students to imagine that, instead of designing a correctional system to reduce and prevent crime, we had to design one that would maintain a stable and visible "class" of criminals. What would it look like? The response was electrifying. In briefer and somewhat more orderly form, here is a sample of the proposals that emerged in our discussion.

*First.* It would be helpful to have laws on the books against drug use or prostitution or gambling—laws that prohibit acts that have no unwilling victim. This would make many people "criminals" for what they regard as normal behavior and would increase their need to engage in *secondary* crime (the drug addict's need to steal to pay for drugs, the prostitute's need for a pimp because police protection is unavailable, and so on).

*Second.* It would be good to give police, prosecutors, and/or judges broad discretion to decide who got arrested, who got charged, and who got sentenced to prison. This would mean that almost anyone who got as far as prison would know of others who committed the same crime but who either were not arrested or were not charged or were not sentenced to prison. This would assure us that a good portion of the prison population would experience their confinement as arbitrary and unjust and thus respond with rage, which would make them more "antisocial," rather than respond with remorse, which would make them feel more bound by social norms.

*Third.* The prison experience should be not only painful but also demeaning. The pain of loss of liberty might deter future crime. But demeaning and emasculating prisoners by placing them in an enforced childhood characterized by no privacy and no control over their time and actions, as well as by the constant threat of rape or assault, is sure to overcome any deterrent effect by weakening whatever capacities a prisoner had for self-control. Indeed, by humiliating and brutalizing prisoners we can be sure to increase their potential for aggressive violence.<sup>1</sup>

*Fourth.* Prisoners should neither be trained in a marketable skill nor provided with a job after release. Their prison records should stand as a perpetual stigma to discourage employers from hiring them. Otherwise, they might be tempted *not* to return to crime after release.

*Fifth.* Ex-offenders' sense that they will always be different from "decent citizens," that they can never finally settle their debt to society, should be reinforced by the following means. They should be deprived for the rest of their lives of rights, such as the right to vote. They should be harassed by police as "likely suspects" and be subject to the whims of parole officers who can at any time threaten to send them back to prison for things no ordinary citizens could be arrested for, such as going out of town, or drinking, or fraternizing with the "wrong people."

And so on.

In short, asked to design a system that would maintain and encourage the existence of a stable and visible "class of criminals," we "constructed" the American criminal justice system!

What is to be made of this? First, it is, of course, only part of the truth. Some steps have been taken to reduce sentencing discretion. And some prison officials do try to treat their inmates with dignity and to respect their privacy and self-determination to the greatest extent possible within an institution dedicated to involuntary confinement. Minimum-security prisons and halfway houses are certainly moves in this direction. Some prisons do provide meaningful job training, and some parole officers are not only fair but go out of their way to help their "clients" find jobs and make it "legally." And plenty of people are arrested for doing things that no society ought to tolerate, such as rape, murder, assault, or armed robbery, and many are in prison who might be preying on their fellow citizens if they were not. *All of this is true.* Complex social practices are just that: *complex.* They are neither all good nor all bad. For all that, though, the "successes" of the system, the "good" prisons, the halfway houses that really help offenders make it, are still the exceptions. They are not even prevalent enough to be called the beginning of the trend of the future. *On the whole, most of the system's practices make more sense if we look at them as ingredients in an attempt to maintain rather than to reduce crime!*

This statement calls for an explanation. The one I will offer is that the practices of the criminal justice system keep before the public the *real* threat of crime and the *distorted* image that crime is primarily the work of the poor. The value of this to those in positions of power is that it deflects the discontent and potential hostility of Middle America away from the classes above them and toward the classes below them. If this explanation is hard to swallow, it should be noted in its favor that it not only explains the dismal failure of criminal justice policy to make a significant dent in crime but also explains why the criminal justice system functions in a way that is biased against the poor at every stage from arrest to conviction. Indeed, even at the earlier stage, when crimes are defined in law, the system concentrates primarily on the predatory acts of the poor and tends to exclude or deemphasize the equally or more dangerous predatory acts of those who are well off. In sum, I will argue that *the criminal justice system fails to reduce crime substantially while making it look as if crime is the work of the poor.* It does this in a way that conveys the image that the real danger to decent, law-abiding Americans comes from below them, rather than from above them, on the economic ladder. This image sanctifies the status quo with its disparities of wealth, privilege, and opportunity and thus serves the interests of the rich and powerful in America—the very ones who could change criminal justice policy if they were really unhappy with it.

Therefore, it seems appropriate to ask you to look at criminal justice "through the looking glass." On the one hand, this suggests a reversal of common expectations. Reverse your expectations about criminal justice and enter-

tain the notion that the system's real goal is the very reverse of its announced goal. On the other hand, the figure of the looking glass suggests the prevalence of image over reality. My argument is that the system functions the way it does *because it maintains a particular image of crime: the image that it is a threat from the poor.* Of course, for this image to be believable there must be a reality to back it up. The system must actually fight crime—or at least some crime—but only enough to keep it from getting out of hand and to keep the struggle against crime vividly and dramatically in the public's view, never enough to substantially reduce or eliminate crime.

I call this outrageous way of looking at criminal justice policy the *Pyrrhic defeat* theory. A "Pyrrhic victory" is a military victory purchased at such a cost in troops and treasure that it amounts to a defeat. The Pyrrhic defeat theory argues that the failure of the criminal justice system yields such benefits to those in positions of power that it amounts to success. In what follows, I will try to explain the failure of the criminal justice system to reduce crime by showing the benefits that accrue to the powerful in America from this failure. I will argue that from the standpoint of those with the power to make criminal justice policy in America: *Nothing succeeds like failure.* I challenge you to keep an open mind and determine for yourself whether the Pyrrhic defeat theory does not make more sense out of criminal justice policy and practice than the old-fashioned idea that the goal of the system is to reduce crime.

The Pyrrhic defeat theory has several components. Above all, it must provide an explanation of *how* the failure to reduce crime substantially could benefit anyone—anyone other than criminals, that is. This is the task of Chapter 4, "To the Vanquished Belong the Spoils: Who Is Winning the Losing War against Crime?" I argue there that the failure to reduce crime substantially broadcasts a potent *ideological* message to the American people, a message that benefits and protects the powerful and privileged in our society by legitimating the present social order with its disparities of wealth and privilege and by diverting public discontent and opposition away from the rich and powerful and onto the poor and powerless.

To provide this benefit, however, not just any failure will do. It is necessary that the failure of the criminal justice system take a particular shape. *It must fail in the fight against crime while making it look as if serious crime and thus the real danger to society is the work of the poor.* The system accomplishes this both by what it does and by what it refuses to do. In Chapter 2, "A Crime by Any Other Name . . .," I argue that the criminal justice system refuses to label and treat as crime a large number of acts that produce as much or more damage to life and limb as the crimes of the poor. In Chapter 3, "... and the Poor Get Prison," I show how, even among the acts treated as crimes, the criminal justice system is biased from start to finish in a way that guarantees that, *for the same crimes*, members of the lower classes are much more likely than members of the middle and upper classes to be arrested, convicted, and imprisoned—thus

providing living "proof" that crime is a threat from the poor. (A statement of the main propositions that form the core of the Pyrrhic defeat theory is found in Chapter 2 in the section titled "Criminal Justice as Creative Art.")

*One caution is in order:* The argument in Chapters 1 through 4 is not a "conspiracy theory." It is the task of social analysis to find patterns in social behavior and then explain them. Naturally, when we find patterns, particularly patterns that serve some people's interests, we are inclined to think of these patterns as *intended* by those whose interests are served, as somehow brought into being *because* they serve those interests. This way of thinking is generally called a "conspiracy theory." Later I will say more about the shortcomings of this way of thinking, and I will explain in detail how the Pyrrhic defeat theory differs from it. For the present, however, note that although I speak of the criminal justice system as "not wanting" to reduce crime and of the failure to reduce crime significantly as resulting in benefits to the rich and powerful in our society, *I am not maintaining that the rich and powerful intentionally make the system fail to gather up the resulting benefits.* My view is rather that the system has grown up piecemeal over time and usually with the best of intentions. The unplanned and unintended overall result is a system that not only fails to really reduce crime but does so in a way that serves the interests of the rich and powerful. One consequence of this fact is that those who could change the system feel no need to do so. And thus it keeps on rolling along.

Our criminal justice system is characterized by beliefs about what is criminal, and beliefs about how to deal with crime, that predate industrial society. Rather than being anyone's conscious plan, the system reflects attitudes so deeply embedded in tradition as to appear natural. To understand why it persists even though it fails to protect us, all that is necessary is to recognize that, on the one hand, those who are the most victimized by crime are not those in positions to make and implement policy. Crime falls more frequently and more harshly on the poor than on the better off (see Chapter 4). On the other hand, there are enough benefits to the wealthy from the identification of crime with the poor and the system's failure to reduce crime (see Chapter 4, the section "The Poverty of Criminals and the Crime of Poverty") that those with the power to make profound changes in the system feel no compulsion nor see any incentive to make them. In short, the criminal justice system came into existence in an earlier epoch and persists in the present because, even though it is failing—indeed because of the way it fails—it generates no effective demand for change. When I speak of the criminal justice system as "designed to fail," I mean no more than this. I call this explanation of the existence and persistence of our failing criminal justice system the *historical inertia* explanation. In Chapter 4, I shall spell out this explanation in greater detail.

In the concluding chapter, I present an argument that the conditions described in Chapters 1, 2, and 3 (whether or not one accepts my explanation for them in Chapter 4) undermine the essential moral difference between criminal

justice and crime itself. In this chapter, called "Criminal Justice or Criminal Justice," I make some recommendations for reform of the system. However, these are not offered as ways to "improve" the system but as the minimal conditions necessary to establish the moral superiority of that system to crime itself.

It will prevent confusion later if the reader remembers that when I speak of the criminal justice system, I mean more than the familiar institutions of police, courts, and prisons. I mean the entire system that runs from the decisions of lawmakers about what acts are criminal all the way to the decisions of judges and parole boards about who will be in prison to pay for these acts.

I claim no particular originality for the Pyrrhic defeat theory. It is a child of the marriage of several ideas from Western social theory. Although this is discussed at greater length in what follows, it will serve clarity to indicate from the start the parents and the grandparents of this child. The idea that crime serves important functions for a society comes from Émile Durkheim. The notion that public policy can be best understood as serving the interests of the rich and powerful in a society stems from Karl Marx. From Kai Erikson is derived the notion that the institutions designed to fight crime instead contribute to its existence. From Richard Quinney comes the concept of the "reality" of crime as *created* in the process that runs from the definition of some acts as "criminal" in the law to the treatment of some persons as "criminals" by the agents of the law. The Pyrrhic defeat theory combines these ideas into the view that the failure of criminal justice policy becomes intelligible when we see that it creates the "reality" of crime as the work of the poor and thus projects an image that serves the interests of the rich and powerful in American society.

Though the Pyrrhic defeat theory draws on the ideas just mentioned, it changes them in the process. For example, the theory veers away from traditional Marxist accounts of legal institutions insofar as such accounts generally emphasize the *repressive* function of the criminal justice system, whereas my view emphasizes its *ideological* function. On the whole, Marxists see the criminal justice system as serving the powerful by *successfully* repressing the poor. My view is that the system serves the powerful by its *failure* to reduce crime, not by its success. Needless to add, insofar as the system fails in some respects and succeeds in others, these approaches are not necessarily incompatible. Nevertheless, in looking at the ideological rather than the repressive function of criminal justice, I will focus primarily on the image its *failure* conveys rather than on what it actually *succeeds* in repressing.<sup>2</sup>

Having located the Pyrrhic defeat theory in its family tree, I wish to say a word about the relationship between crime and economics. It is my view that the social order (shaped decisively by the economic system) bears responsibility for most of the crime that troubles us. This is true of all classes in the society, because a competitive economy that refuses to guarantee its members a decent living places pressures on all members to enhance their economic position by whatever means available. It degrades and humiliates the poor while encouraging

the greed of the well off.<sup>3</sup> Nevertheless, these economic pressures work with particular harshness on the poor because their condition of extreme need and their relative lack of access to opportunities for lawful economic advancement vastly intensify for them the pressures toward crime that exist at all levels of our society.

These views lead to others that, if not taken in their proper context, may strike you as paradoxical. Evidence will be presented showing that there is a considerable amount of crime in our society at all socioeconomic levels. At the same time, it will be argued that poverty is a *source* of crime—I say “source” rather than “cause” because the link between poverty and crime is not like a physical relationship between cause and effect. Most poor people do not commit serious crimes. Nevertheless, there is evidence suggesting that the particular pressures of poverty lead poor people to commit a higher proportion of the crimes that people fear (such as homicide, burglary, and assault) than their number in the population. There is no contradiction between this and the recognition that those who are well off commit many more crimes than is generally acknowledged, both the crimes widely feared and those not widely feared (such as white-collar crimes). There is no contradiction here, because, as will be shown, the poor are arrested far more frequently than those who are well off when they have committed the same crimes; and the well-to-do are only rarely arrested for white-collar crimes. Thus, if arrest records were brought in line with the real incidence of crime, it is likely that those who are well off would appear in the records far more than they do at present, even though the poor would still probably appear in numbers greater than their proportion of the population in arrests for the crimes people fear. In addition to this, I will argue that those who are well off commit dangerous acts that are not defined as crimes and yet that are as or more harmful than the crimes people fear. Thus, if we had an accurate picture of who is really dangerous to society, there is reason to believe that those who are well off would receive still greater representation. On this basis, the following propositions will be put forth, which may appear contradictory if these various levels of analysis are not kept distinct.

1. Society fails to protect people from the crimes they fear by refusing to alleviate the poverty that breeds them (among other things, documented in Chapter 1).
2. The criminal justice system fails to protect people from the most serious dangers by failing to define the dangerous acts of those who are well off as crimes (documented in Chapter 2) and by failing to enforce the law vigorously against the well-to-do when they commit acts that are defined as crimes (documented in Chapter 3).
3. By virtue of these and other failures, the criminal justice system succeeds in creating the image that crime is almost exclusively the work of the poor, an image that serves the interests of the powerful (argued in Chapter 4).

The view that the social order is responsible for crime does not mean that individuals are wholly blameless for their criminal acts or that we ought not have a criminal justice system able to protect us against them. To borrow an analogy from Ernest van den Haag, it would be foolhardy to refuse to fight a fire because its causes were suspect. The fact that society produces criminals is no reason to avoid facing the realization that these criminals are dangerous and must be dealt with. Also, although blaming society for crime may require that we tone down our blame of individual criminals, it does not require that we eliminate blame entirely or deny that they are responsible for their crimes. This is particularly important to remember because so many of the victims of the crimes of the poor are poor themselves. To point to the unique social pressures that lead the poor to prey on one another is to point to a mitigating, not an excusing, factor. Even the victims of exploitation and oppression have moral obligations not to harm those who do not exploit them or who share their oppression.

## Abbreviations Used in the Notes

**Challenge** *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice* (Washington, D.C.: U.S. Government Printing Office, February 1967).

**Sourcebook—1998** Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics—1998*. U.S. Department of Justice, Bureau of Justice Statistics (Washington, D.C.: U.S. Government Printing Office, 1999). References to other editions of this annual publication will be indicated by *Sourcebook*, followed by the year in the title. Other editions may have different editors. The *Sourcebook* can be reached online at [www.albany.edu/sourcebook/](http://www.albany.edu/sourcebook/).

**StatAbst—1998** U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998*, 118th ed. (Washington, D.C.: U.S. Government Printing Office, 1998). References to other editions of this annual publication will be indicated by *StatAbst*, followed by the year in the title.

**UCR—1998** U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States: 1998* (Washington, D.C.: U.S. Government Printing Office, 1999). References to other editions of this annual report will be indicated by *UCR* followed by the year for which the statistics are reported. In general, these reports are published in the fall of the year following the year they cover. The Federal Bureau of Investigation can be reached online at [www.fbi.gov](http://www.fbi.gov).

**BJS** Bureau of Justice Statistics, a source of many reports cited in this book. The Bureau of Justice Statistics is an agency of the U.S. Department of Justice. It is part of the Justice Department's Office of Justice Programs,

which also includes the Bureau of Justice Assistance, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Reports of the Bureau of Justice Statistics are published by the U.S. Government Printing Office in Washington, D.C., normally in the year following the year in the title of the report. The Bureau of Justice Statistics can be reached online at [www.ojp.usdoj.gov/bjs](http://www.ojp.usdoj.gov/bjs).

**NCJRS** The National Criminal Justice Reference Service is a clearinghouse for government publications from several agencies dealing with crime and criminal justice. The National Criminal Justice Reference Service can be reached on line at [www.ncjrs.org](http://www.ncjrs.org).

## Notes to the Introduction

1. I recently came upon the following account:

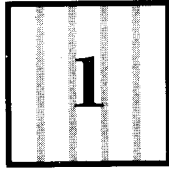
*Dr. Meredith Bombar, a social psychologist and...associate professor of psychology at Elmira College, notes that it would be difficult intentionally to shape a more effective breeding ground for aggression than that which already exists in the average prison. In personal correspondence, Dr. Bombar writes, "When I teach Social Psychology class, I spend a week or so going over the social/learned causes of aggression (e.g., provocation, modeling, punishment, extreme frustration, roles and social norms calling for aggression, physical discomfort, crowding, presence of guns and other objects associated with aggression, etc.). After the students have digested that, I ask them to imagine a horrible fantasy world which would put together all of these known social/environmental causes of aggression. What would it be? A typical prison." Lee Griffith, *The Fall of the Prison: Biblical Perspectives on Prison Abolition* (Grand Rapids: Eerdmans, 1993), p. 65n.*

2. To these remarks should be added the recognition that since the 1960s, a new generation of Marxist theorists, primarily French, has begun to look specifically at the ideological functions performed by the institutions of the state. Most noteworthy in this respect is the work of Louis Althusser and Nicos Poulantzas. See, especially, Louis Althusser, "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy and Other Essays* (London: New Left Books, 1971), pp. 121–73; and Nicos Poulantzas, *Fascism and Dictatorship* (London: New Left Books, 1974), pp. 299–309. These writers refer to the pioneering insights of Antonio Gramsci into the ideological functions of state institutions. See Quintin Hoare and Geoffrey Nowell-Smith, eds., *Selections from the Prison Notebooks of Antonio Gramsci* (London: Lawrence and Wishart, 1971); and Carl Boggs, *Gramsci's Marxism* (London: Pluto Press, 1976). For other contemporary analyses of the relationship between the state and ideology, see Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969), pp. 179–264; and Jürgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975). The Frankfurt School of social theory, of which Jürgen Habermas and Herbert Marcuse are probably the best-known representatives, is distin-

guished by the application of Marxism as well as Freudian theory to the analysis of ideology. See Martin Jay, *The Dialectical Imagination: The Frankfurt School of Social Theory, 1930–1950* (Boston: Little Brown, 1973).

3. See, for example, John Braithwaite, "Poverty, Power, and White-Collar Crime: Sutherland and the Paradoxes of Criminological Theory," in Kip Schlegel and David Weisburd, eds., *White-Collar Crime Revisited* (Boston: Northeastern University Press, 1992), pp. 78–107.





## CRIME CONTROL IN AMERICA

### Nothing Succeeds Like Failure

*My love she speaks softly  
She knows there's no success like failure  
And that failure's no success at all.*

**Bob Dylan**

*Love Minus Zero/No Limit*

### Designed to Fail

After more than 20 years of telling us that crime was growing out of control and proposing more cops and tougher laws and more prisons, crime rates are now coming down and politicians are jumping to claim credit for the reductions. In his 1994 State of the Union Address, President Bill Clinton told us that

*... while Americans are more secure from threats from abroad, I think we all know that in many ways we are less secure from threats here at home.... Violent crime and the fear it provokes are crippling our society, limiting personal freedom and fraying the ties that bind us.<sup>1</sup>*

But then the good news began to arrive: A *New York Times* headline for September 18, 1996, announced: "A Large Drop in Violent Crime Is Reported."<sup>2</sup> According to the article, the Justice Department reported "that violent crime fell more than 9 percent last year, a very large drop that criminologists consider statistically important." The article went on to say that President Clinton "asserted that his policies, including putting more police officers on the streets and regulating the sale of handguns and assault rifles, had helped contribute to the decline."

Less than two weeks later, *U.S. News & World Report* ran a cover article entitled "Popgun Politics," asserting that neither President Clinton nor his oppo-

nent in the race for the presidency, Senator Bob Dole, was telling the truth about the crime issue. For example, while Clinton claims that his policy of putting 100,000 new police on the street "played a big role in [the] recent crime drop," the magazine reported that the facts are that "Clinton has won funding for 44,000 officers; [of whom] 20,000 are on the beat so far. Experts say that number could not have reduced crime much."<sup>3</sup> Bear in mind that with officers working on shifts, taking vacations, etc., it requires at least five officers to provide one officer on the street, around the clock, for a whole year.<sup>4</sup> So those 20,000 probably amount to no more than 4,000 new police on the streets around the clock.

Untroubled by such facts, President Clinton reported, in his radio address to the nation of January 11, 1997, that:

*We had a comprehensive plan to fight crime—to put 100,000 new community police officers on the street and tough new penalties on the books.... This approach is working.*

*This week the FBI reported that serious crime dropped another three percent last year, dropping for the fifth year in a row, the longest decline in more than 25 years. This is great news. . . .*

And how shall we respond to this news? Continues President Clinton:

*Now that we've finally turned crime on the run, we have to redouble our efforts. We have to drive the forces of violence further and further into retreat.<sup>5</sup>*

Two years later, in his 1999 State of the Union Address, the President was singing the same tune:

*I propose a 21st Century Crime Bill to deploy the latest technologies and tactics to make our communities even safer. Our balanced budget will help put up to 50,000 more police on the street in the areas hardest hit by crime, and then to equip them with new tools from crime mapping computers to digital mug shots.<sup>6</sup>*

It's the same story: Whatever the news—whether crime goes up or down—we need more cops arresting more crooks and putting them behind bars.

The plain fact is that virtually no student of the crime problem believes we can arrest and imprison our way out of the crime problem. To be sure, we have seen an enormous increase in the number of Americans behind bars. Between 1980 and 1996 the number of persons incarcerated in state and federal prisons nearly quadrupled, growing from 329,000 to nearly 1.2 million. Including those who are locked up in jails, there are currently more than 1.8 million people behind bars in the United States—a number more than twice the population of San Francisco!<sup>7</sup> The Justice Policy Institute estimates that by February 15, 2000, "America's

prison and jail population will top 2 million[!]”<sup>8</sup> The Bureau of Justice Statistics reports that if current incarceration rates remain unchanged, 9 percent of men and 28 percent of black men can expect to serve time in prison during their lifetime!<sup>9</sup>

And what are the results?<sup>9</sup> Violent crimes have declined since 1992, but they still are not down to where they were in 1985, when crime was still very high. For example, in its *Uniform Crime Reports (UCR)* for 1992, the FBI reported 1,932,270 crimes of violence, and a violent crime rate of 758 per 100,000 persons in the population. In 1998 the FBI reported a decline in the number of violent crimes to 1,531,044, and in the crime rate to 566 per 100,000. In 1985, however, the FBI counted 1,328,800 violent crimes with a rate per 100,000 of 557.<sup>10</sup> And the Justice Department’s *National Crime Victimization Survey (NCVS)*, which picks up many crimes not reported to the police, found 8,116,000 violent crimes in 1998 (3,790 per 100,000)—higher than in 1992, when survey respondents reported 6,621,000 victimizations; and higher than in 1985, when 5,823,000 violent crimes were reported.<sup>11</sup> The recent reductions in crime are little more than a leveling off from the rises in crimes that preceded them, and they have come down to rates that existed when far fewer of our fellows were being locked up. In short, the crime reductions for which our leaders are now claiming credit are actually no more than reductions from *very, very high* crime rates to rates that are merely *very high*.

On October 18, 1999, *The Washington Post* reported more good news: “Crime Rates Down for the 7th Straight Year,” said the headline, but the news was not all good. Violent crime was down again, but no lower than it was in 1987, when it was still very high. And the homicide rate was down to 6 per 100,000 inhabitants, a rate comparable to that in 1967, when it was thought to be a high rate. Moreover, national rates conceal important geographic and demographic differences: “Large cities experienced declines in murder,” says the article, “but small cities (those with populations between 10,000 and 24,999, a total of about 20 million people) experienced the *only* increase in murder volume—4 percent.” And while “[y]outh homicide rates are half of what they were five years ago,” they are “twice as high as they were 15 years ago.”<sup>12</sup>

A less comforting view appeared in a December 5, 1999, article in *The Washington Post* under the headline: “Despite Rhetoric, Violent Crime Climbs.” Begins the article:

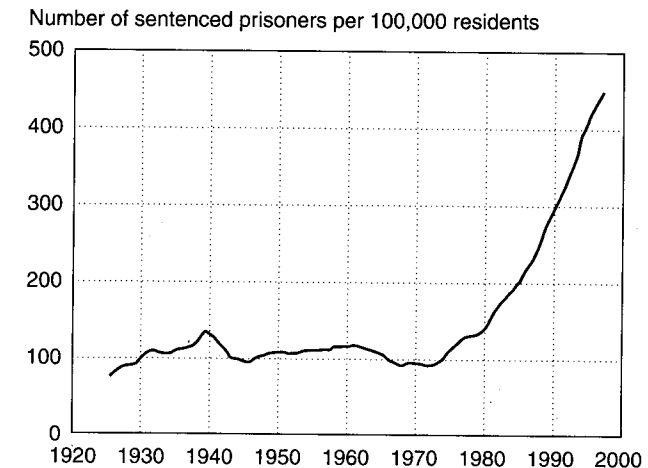
*Rosy assessments of the nation’s declining crime rate wrongly focus on the short-term drops from crime peaks early in the decade and ignore the overall rise of violence since the 1960s, according to a new report.*

*The 30-year update of a landmark study by the National Commission on the Causes and Prevention of Violence found that violent crime in major cities reported to the FBI has risen by 40 percent since 1969.*

*The new study is intended as a counterpoint to the drumbeat of optimistic reports describing the current drop in crime, and it offers a*

*sober reminder that the United States still suffers from a historically high level of violence.*<sup>13</sup>

This new study was conducted by the Milton S. Eisenhower Foundation, an organization devoted to continuing the work of the original 1969 violence commission and the 1968 Kerner commission on race. The foundation study noted the strikingly higher rates of violent crime in the United States compared to other industrialized nations: “In 1995, handguns were used to kill 2 people in New Zealand, 15 in Japan, 30 in Great Britain, 106 in Canada, 213 in Germany, and 9,390 in the United States.”<sup>14</sup> “The most optimistic view after looking at this,” said foundation president Lynn A. Curtis, who also worked on the 1969 violence report, “is that we are in roughly the same ballpark now in the late 1990s as we were in the late 1960s, when everyone said crime is so bad we need a national commission to study it.”<sup>15</sup> The difference is that in 1969 there were 197,136 individuals in state and federal prisons, but by 1997 that number had grown *nearly 600 percent* to 1,130,465—growth that has cost us billions of dollars, given prison records to huge numbers of nonviolent criminals, and torn up inner-city communities, but that has not made much of a difference in the amount of crime we have and leaves Americans significantly more fearful of crime than they were in 1969<sup>16</sup> (see Figure 1-1).



**FIGURE 1-1 Rate (per 100,000 resident population) of Sentenced Prisoners in State and Federal Institutions on December 31: United States, 1925–97.**

Source: Sourcebook—1998, p. 489, Figure 6.4.

Says Jason Zeidenberg, a policy analyst at the Justice Policy Institute:

*A number of jurisdictions—California, Texas and the federal government—have had huge increases in incarceration rates, but those are not necessarily the jurisdictions that have had the biggest drops in crime. New York and California both increased their prison and jail populations, but California did so at a much higher rate that helped to drive up the national total. New York, however, experienced a much, much deeper drop in crime....<sup>17</sup>*

According to Zeidenberg, New York's drop in crime was greatest between 1992 and 1997, a period during which it had the second-slowest-growing prison population in the country.

Moreover, it is not hard to figure out why this unprecedented imprisonment binge has produced such meager effects. First of all, since American jurisdictions have always been highly likely to imprison violent offenders, an increase in the rate of imprisonment necessarily means that we are imprisoning more less-serious criminals than the criminals already in prison. The result is that:

*Violent offenders are now a considerably smaller proportion of the prison population than they were in the recent past, and nonviolent offenders are therefore correspondingly greater. Inmates convicted of violent crimes were 57 percent of the state and federal prison population in 1980 and 44 percent in 1995; drug offenders rose from just 8 percent to 26 percent in the same period.<sup>18</sup>*

In addition, for drug offenders there is a well-documented "replacement effect." That is, an imprisoned drug dealer is quickly replaced by another. Consequently, since drug offenders are the fastest-growing sector of the prison population, increased rates of imprisonment are not likely to pay off in substantial reductions in crime. Indeed, recent reports indicate that "Mexican traffickers are sending greater quantities and larger loads of drugs into the United States," and new statistics show "rising marijuana use among American teenagers."<sup>19</sup> And then there is the troubling fact that the money used to fund the imprisonment boom of the past decades has been taken from public programs to provide welfare, education, and medical treatment for the poor. Criminologist William Chambliss writes that:

*California, whose higher education system was once the envy of every other state, now is "envied" by correctional officers and criminal justice employees, who saw an increase of more than 25,000 employees in the Department of Corrections workforce between 1984 and 1994; at the same time, there was a decline of more than 8,000 employees in higher education.<sup>20</sup>*

This is not to deny that we have recently seen some significant declines in crime rates. The point is that very little of these declines can be attributed to the enormous increase in our prison population. Indeed, numerous students of the crime problem attribute the recent declines to factors other than criminal justice policies. For example, the United States currently has an unemployment rate of slightly above 4 percent, the lowest rate in over 30 years—but none of the officials who are claiming credit for reducing crime, from the President on down, mentions this as a cause of lower crime rates. Moreover, the recent declines in crime come after a period in which much violent crime was attributed to turf wars between inner-city drug gangs. Now that the wars have been fought, more or less stable turf boundaries exist, and the rate of violence subsides—not because the police have succeeded, but in fact because the (surviving) drug dealers have succeeded in turning their trade into a stable inner-city business. Says Temple University professor of criminology and former New York City Police Captain Jim Fyfe: "When a new illegal and profitable substance comes along, there is fighting and scratching for control.... Then dealers kill each other off, and the market stabilizes and the amount of violence decreases."<sup>21</sup> And *U.S. News & World Report* points out that, "contrary to popular impression, turf wars among [drug] gangs are increasingly rare. A staple of the late 1980s and early 1990s...., such battles have now largely succumbed to what criminologist James Lynch of Washington [D.C.]'s American University terms the "routinization of the drug trade."<sup>22</sup>

Other experts attribute at least some of the decline in violent crime to "the fact that the nation's population of young men—the group most likely to commit violent crimes—is smaller now because of the aging of the baby-boomers."<sup>23</sup> The number of people aged 15 to 29 in our population declined steadily from 1976 through 1994, a demographic trend to which many criminologists attribute not only the recent decline but the larger decline that marked the years 1979 through 1984. Now this age group is slowly on the increase again, bringing with it dire predictions of dramatic increases in crime to come. Commenting on these demographic trends, Northeastern University criminologist James Alan Fox says: "This is the calm before the crime storm."<sup>24</sup>

One place where some experts are willing to credit police tactics with helping to reduce crime is New York City, where murder and felony rates have decreased dramatically in recent years. Some of the credit for this is said to go to the aggressive policing encouraged by former New York City Police Commissioner William Bratton. This aggressiveness may have helped reduce crime, but it brought with it a 30 percent increase in the number of citizen complaints to the Civilian Complaint Review Board about police abuse, excessive force, and discourtesy. To "black and Latino leaders who say some of Bratton's cops carry his aggressive style too far—'that's too damn bad,' says Bratton."<sup>25</sup>

And Elliot Currie suggests that some of the reduction in violent crime is due to the fact that:

... a significant number of those at highest risk of being either perpetrators or victims have been removed from the picture—through death, disease, or disability.

Recall that the homicide death rate among black men aged fifteen to twenty-four reached 167 per 100,000 in 1993 (in New York City, it reached 247 per 100,000). At the same time, the death rate from HIV infection among black men aged twenty-five to thirty-four reached 117 per 100,000.... Overall, young black men aged fifteen to twenty-four were 66 percent more likely to die in 1993 than in 1985—a stunning reversal of decades of general improvement in life expectancy.<sup>26</sup>

So, while politicians claim credit for the recent declines in crime, the real story appears to be this: While the enormous growth in our prison population over the last decade coupled with questionable police tactics may have contributed in some measure to the decline, much if not most of the decline can be attributed to factors beyond the criminal justice system: the reduction in unemployment, the stabilization of the drug trade, and the decrease in the number of young men in the crime-prone years. For all that, new growth in crime—"another tidal wave" *Time* calls it, "a ticking time bomb" says *The New York Times*—is right around the corner.<sup>27</sup>

The recent decline in the crime rates does not represent dramatic success in dealing with the U.S. crime problem. It represents rather a reduction from extremely high crime rates to rates that are slightly less high, but high nonetheless. In short, crime is still rampant, and, for all their crowing and claiming credit, neither politicians nor criminal justice policy makers have come close to changing this fact. The criminal justice system may win the occasional skirmish, but it is still losing the war against crime.

In 1960, the average citizen had less than a 1-in-50 chance of being a victim of one of the crimes on the FBI Index (murder, forcible rape, robbery, aggravated assault, burglary, larceny, or auto theft). In 1970, that chance grew to 1 in 25. In 1986, the FBI reported nearly 5,500 Index crimes per 100,000 citizens, a further increase in the likelihood of victimization to a 1-in-18 chance. And by 1991, this had reached 5,898 per 100,000 citizens—a better than 1-in-17 chance. The FBI reported slight declines in 1992 and 1993, with the rate for 1993 at 5,483 per 100,000, roughly where it was in 1986. Most of the decline was accounted for by a drop in property crimes. Even with these declines, the FBI said in its 1993 report: "Every American now has a realistic chance of murder victimization in view of the random nature the crime has assumed."<sup>28</sup> And for 1997, the FBI reports a further decline to 4,615 Index crimes per 100,000 in the U.S. population, a decrease in the chance of victimization to roughly 1 in 22—still higher than the rates and risks of Index crimes for 1970, and much higher than those for 1960, before our enormous investment in prisons began and while a far smaller number of Americans were behind bars.<sup>29</sup>

Moreover, American violent crime rates are still far higher than those in other countries. Writes criminologist Elliot Currie:

*By the mid-1990s... a young American male was 37 times as likely to die by deliberate violence as his English counterpart—and 12 times as likely as a Canadian youth, 20 times as likely as a Swede, 26 times as likely as a young Frenchman, and over 60 times as likely as a Japanese.*<sup>30</sup>

In sum, when we look behind the politicians' claims to have turned the tide against violence, the fact remains that criminal justice policy is failing to make our lives substantially safer. How are we to comprehend this failure? It appears that our government is failing to fulfill the most fundamental task of governance: keeping our streets and homes safe, assuring us of what the Founding Fathers called "domestic tranquility," providing us with the minimum requirement of civilized society. It appears that our new centurions with all their modern equipment and know-how are no more able than the old Roman centurions to hold the line against the forces of barbarism and chaos.

One way to understand this failure is to look at the *excuses* that are offered for it. This we will do—but mainly to show that they do not hold up!

One commonly heard excuse is that we can't reduce crime because our laws and our courts are too lenient. *Translation:* We are failing to reduce crime because we don't have the heart to do what has to be done.

Other excuses point to some feature of modern life, such as urbanization or population growth (particularly the increase in the number of individuals in the crime-prone ages of 15 to 24), and say that this feature is responsible for the growth in crime. This means that crime cannot be reduced unless we are prepared to return to horse-and-buggy days or to abolish adolescence. *Translation:* We are failing to reduce crime because it is impossible to reduce crime.

Some try to excuse our failure by claiming that we simply do not know how to reduce crime. *Translation:* Even though we are doing our best, we are failing to reduce crime because our knowledge of the causes of crime is still too primitive to make our best good enough.

These excuses simply do not pass muster. There is no evidence that we are too lenient on crime, though the belief is widely held and regularly exploited by politicians seeking votes. Our rates of incarceration are as high as or higher than those of other modern nations, and we are the only one that still imposes the death penalty.

Moreover, although increasing urbanization and a growing youth population account for some of our high level of crime, they by no means account for all of it, and certainly not for the impossibility of reducing crime. Crime rates vary widely (and wildly) when we compare cities of similar population size and density. Some very large and densely populated cities have lower crime rates than small and sparsely populated ones. Some cities are high in one type of

crime and low in another, and so on. This means that growing crime is not a simple, unavoidable consequence of increasing urbanization. If crime rates vary among large cities, urbanization cannot explain away our inability to reduce crime *at least* to the *lowest* rates prevalent in large cities. Similarly, the crime rate has increased far more rapidly than the youth population, both in absolute numbers and as a fraction of the total population. This means that growing crime is not a simple, unavoidable consequence of a growing youth population. If crime rates increase faster than the young themselves do, then increasing youth itself is not the cause of increasing crime. We have to know why young people are committing more crimes now than they did in the past, and it is no answer to point to their youth. A growing youth population cannot explain away our inability to reduce crime *at least* to the rate at which the young are increasing (or decreasing) in our population.

On the other hand, the excuse that we do not know how to reduce crime also does not hold up. The bald truth is that we *do* know some of the sources of crime and *we obstinately refuse to remedy them!* We know that poverty increases the pressures to commit crimes in pursuit of property, and that crimes to obtain property account for about 90 percent of the crime rate—and yet we do little to improve the conditions of our impoverished inner-city neighborhoods beyond clicking our tongues over the strange coincidence that these are also the neighborhoods with the highest crime rates. We know that our prisons undermine human dignity and that the ex-con stigma closes the door to many lawful occupations—and yet we do little to improve these conditions beyond shaking our heads over the fact that so much crime is committed by *recidivists*: people who have already enjoyed the hospitality of our jails and penitentiaries. We know that heroin addiction “forces” people into crime because of the high prices of illegal heroin—and yet we refuse to make cheap heroin legally available. We know that guns figure in most murders and make possible many thefts—and yet we refuse to adopt effective gun control. In other words, we may not know how to eliminate crime, but we certainly know how to reduce crime and the suffering it produces. The simple truth is that, as with crime, so with crime reduction, *ignorance is no excuse.*

Later in this chapter, I look at these excuses in greater detail and show that they do not explain our failure to reduce crime. And I present evidence to support my claim that we could reduce crime and the harm it causes if we wanted to. So the question “How are we to comprehend our failure to reduce crime?” still stares us in the face. Examination of the excuses and then of policies that could reduce crime suggest that our failure is avoidable. What has to be explained is not why *we cannot* reduce crime but why *we will not!* Oddly enough, this paradoxical result points us in the direction of an answer to our question.

Failure is, after all, in the eye of the beholder. The last runner across the finish line has failed in the race only if he or she wanted to win. If the runner

wanted to lose, the “failure” is, in fact, a success. Here, I think, lies the key to understanding our criminal justice system.

If we look at the system as “wanting” to reduce crime, it is an abysmal failure—and we cannot understand it. If we look at it as *not* wanting to reduce crime, it’s a howling success—and all we need to understand is why the goal of the criminal justice system is to fail to reduce crime. If we can understand this, then the system’s “failure,” as well as its obstinate refusal to implement the policies that could remedy that “failure,” becomes perfectly understandable.

In other words, I propose that we can make more sense out of criminal justice policy by assuming that its goal is to maintain crime than by assuming that its goal is to reduce crime!

In the remainder of this chapter, I explore in greater detail the excuses for the failure to reduce crime and offer evidence to back up my assertion that there are policies that could reduce crime that we refuse to implement. I then briefly outline the relationship between the Pyrrhic defeat theory and the criminological theory of Kai Erikson and Emile Durkheim, to which it is akin.

## Four Excuses That Will Not Wash, or How We Could Reduce Crime If We Wanted To

On July 23, 1965, President Lyndon Johnson signed an executive order establishing the President’s Commission on Law Enforcement and Administration of Justice to investigate the causes and nature of crime, to collect existing knowledge about our criminal justice system, and to make recommendations about how that system might better meet “the challenge of crime in a free society.” The commission presented its report to the president early in 1967, thick with data and recommendations. Because we are a nation higher on commissions than on commitments, it should come as no surprise that for all the light cast on the crime problem by the President’s Commission, little heat has been generated and virtually no profound changes in criminal justice policy have taken place in the nearly 30 years since the report was issued.

During this period, however, more and more money has been poured into crime control, with the bleak results I have already outlined. When the commission wrote, it estimated that more than \$4 billion was being spent annually at the national, state, and local levels to pay for police, courts, and correctional facilities in the fight against crime.<sup>31</sup> Since that time the total number of reported Index crimes grew from 4,710,000 in 1965 to a staggering 12,475,634 in 1998.<sup>32</sup> The annual cost to the public of this brand of domestic tranquility was more than \$112 billion by 1995, with 2 million persons employed by the criminal justice system.<sup>33</sup> Taking inflation into account, this represents real growth of more than 500 percent in criminal justice spending since 1965. And this

doesn't even count the more than \$50 billion spent each year on private security.<sup>34</sup> Dollar for dollar, crime control is hardly an impressive investment—that is, if you think you are investing in crime reduction. Later, when I comment on the burgeoning private corrections industry, touted by corporations to their stockholders, we shall see that for those who think that high crime rates are here to stay, crime control is quite a good investment!

Multiplying almost as fast as crime and anticrime dollars are excuses for our failure to reduce crime significantly in the face of increased expenditure, personnel, research, and knowledge. Four excuses have sufficient currency to make them worthy of consideration as well as to set in relief the Pyrrhic defeat thesis, which I propose in their place.

### First Excuse: We're Too Soft!

One excuse is that we are too soft on crime.<sup>35</sup> This view is widespread among laypersons (in 1996, 78 percent of people polled thought courts were not harsh enough) and conservative critics of criminal justice policy (Ernest van den Haag, for example, claims that "non-punishment is the major 'social' cause of crime").<sup>36</sup> This view is hard to disprove because, no matter how harsh we are, one can always say we should have been harsher. Nonetheless, the evidence is that we are quite harsh, in general harsher than other modern industrial nations, and that we have gotten strikingly harsher in recent years, with little effect on the crime rate. In 1998, the U.S. rate of incarceration (in jails and prisons) was 668 per 100,000 in the national population.<sup>37</sup> In the early 1990s (the most recent period for which figures are available), the rate for England and Wales was 93 per 100,000, for Germany it was 80, for the Netherlands it was 49, and for Switzerland it was 85. The rate for Canada, with a society in many ways much like our own, was about 116 persons for every 100,000 inhabitants.<sup>38</sup>

Some have argued that our incarceration rates are not so different from those of other countries when compared with our higher crime rates. This finding is based on comparing our incarceration rates for serious crimes with those of other countries for those same crimes. We are still incarcerating more people than those other countries, because we criminalize acts, such as prostitution and other victimless crimes, that other countries do not.<sup>39</sup> But even if our incarceration rates stand in the same proportion to our crime rates as those of other countries, that still indicates that we are no more lenient than other modern nations. Nor, of course, should it be forgotten that we are the only Western industrialized nation that still has the death penalty, let alone that executes people who have committed crimes while under the age of 18. And a recently passed crime bill expands the federal death penalty to cover 52 offenses.<sup>40</sup>

Moreover, we have become markedly harsher during the last decade. Recall the dramatic increases in criminal justice personnel and expenditures men-

tioned above. Here's what we got for this investment: Where we used to have the third-highest rate of incarceration in the world, behind South Africa and the (now former) Soviet Union, we have now pulled ahead of these two paragons of justice to lead the world in the percentage of inhabitants behind bars.<sup>41</sup> Our incarceration rate of 668 prisoners per 100,000 people in the national population doesn't include those who are currently on probation and parole. When these are added to those in jail or prison, the number of *adults* under some form of correctional supervision in 1998 is nearly 6 million—that is, 1 of every 34 American adults was incarcerated or on probation or parole in 1998. This represents nearly a tripling of the number under correctional supervision since 1980, from 1.84 million to 5.36 million persons.<sup>42</sup> Our high crime rates persist in the face of this toughening of sentencing and thus suggests that crime persists even though we have a harsh criminal justice system, leading one criminologist to characterize the get-tough approach to crime as a conservative social experiment that has been tested and shown to fail.<sup>43</sup>

This did not deter our liberal President Clinton from calling for locking up more criminals, as we saw above. Nor did it deter the U.S. Senate from passing a new \$23 billion crime bill aimed at adding "100,000 police officers to the nation's streets [and building] a network of high-security regional prisons."<sup>44</sup> And the National Rifle Association (NRA) has announced a new publicity campaign calling for tougher sentencing and more prisons.<sup>45</sup>

### Second Excuse: A Cost of Modern Life

Another excuse is that crime is an inescapable companion of any complex, populous, industrialized society. As we become more complex, more populous, more industrialized, and particularly more *urbanized*, we will have more crime as inevitably as we will have more ulcers and more traffic. These are costs of modern life, the benefits of which abound and clearly outweigh the costs. Growing crime, then, takes its place alongside death and taxes. We can fight, but we cannot win, and we should not tear our hair out about it.

It takes little reflection to see that this is less an explanation than a recipe for resignation. Furthermore, it does not account for the fact that other complex, populous, and highly industrialized nations such as Japan have crime rates that are not only lower than ours but that do not accelerate as quickly as ours. In 1993, the total number of criminal offenses known to the police in Japan was 1,883,504 (about 1,500 offenses for every 100,000 inhabitants).<sup>46</sup> In other words, about *one-eighth* the number of serious offenses known to the police in America that year occurred in a country with *half* the population of the United States crowded onto a land less than *one-twentieth* the size of the United States.

Reporting the results of her study of the relationship between crime and modernization around the world, Louise Shelley writes:

*Although both societies have undergone urbanization and industrialization, Japan and Switzerland have been exempt from many of the crime problems that currently plague the other developed countries. Most other developed countries have considerably higher rates of crime commission than these two societies, but few developed countries have as high rates of crime commission as the United States.*<sup>47</sup>

This generalization is borne out strikingly by comparing homicide rates in the United States with those in other modern nations. In 1993, Japan had a homicide rate of 1 per 100,000 inhabitants; Switzerland had a rate of 2.5; Denmark, 4.8; France, 4.9; and Canada, 5.6.<sup>48</sup> For 1997, the U.S. homicide rate was 6.8 per 100,000 inhabitants.<sup>49</sup> New York City and Los Angeles each has more killings a year than Japan!

Moreover, the "costs of modern life" or urbanization excuse does not account for the striking differences in the crime rates *within* our own modern complex, populous, and urbanized nation. Within the United States in 1997, the homicide rate ranged from 0.9 per 100,000 inhabitants in North Dakota to 15 in Louisiana.<sup>50</sup> In 1968, *Time* magazine reported that

*Texas, home of the shoot-out and divorce-by-pistol, leads the U.S. with about 1000 homicides a year, more than 14 other states combined. Houston is the U.S. murder capital: 244 last year, more than in England, which has 45 million more people.*<sup>51</sup>

By 1997, Texas (with 1,327 homicides) was in second place, ahead of New York and Illinois, in a virtual tie for third place (with 1,093 and 1,096, respectively), and behind California (with 2,579) in first—and Houston's glory as murder capital had clearly faded. Houston reported 254 homicides for 1998, roundly outdone by New York City with 633.<sup>52</sup>

Such variations are not limited to murder. A comparison of crime rates (incidence of FBI Index crimes per 100,000 inhabitants) for Standard Metropolitan Statistical Areas (areas "made up of a core city with a population of 50,000 or more inhabitants and the surrounding county or counties which share certain metropolitan characteristics") reveals a striking *lack* of correlation between crime rate and population size (which we can take as a reasonable, though rough, index of urbanization and the other marks of modernity, such as complexity and industrialization, that are offered as explanations for the intractability of crime). (See Table 1-1, in which seven metropolitan areas of different sizes and similar crime rates are ranked by population.)

It might reasonably be thought that population *density* (number of persons per square mile) is a better indicator of urbanization than population as such. Thus, if crime is an ineluctable product of urbanization, we should see a clear correlation between population density and crime rates. The facts, however, do

**TABLE 1-1 Metropolitan Areas by Crime Rate (per 100,000 inhabitants) and Population**

Metropolitan Area	Crime Rate	Population
Los Angeles, CA	4,744	9,394,202
Washington, DC	6,820	4,513,915
Baltimore, MD	6,609	2,505,920
Salt Lake City, UT	7,009	1,271,704
Memphis, TN	6,400	631,626
Shreveport, LA	7,302	381,600
Laredo, TX	7,607	172,479
Enid, OK	7,612	57,957

Source: UCR—1997, pp. 88–115, Table 6.

not bear this out. Instead, they indicate a striking lack of correlation between cities' population densities and their crime rates. (See Table 1-2, in which ten large cities are ranked by population density and then by their crime rates.)

In other words, classifying crime with death and taxes and saying that it is an inevitable companion of modernity or urbanization just will not explain our failure to reduce it. Even if death and taxes are inevitable (unfortunately not in that order), some die prematurely and some die suspiciously and some pay too much in taxes and some pay none at all. None of these variations is inevitable or unimportant. So too with crime. Even if crime is inevitable in modern societies, its rates and types vary extensively—and this is neither inevitable nor unimportant. Indeed, the variations in crime rates between modern cities and nations is proof that the *extent* of crime is not a simple consequence of urbanization. Other factors must explain the differences. It is these differences that suggest that although some crime may be an ineradicable consequence of urbanization, this in no way excuses our failure to reduce crime at least to the lowest rates reported in modern cities and nations.

### Third Excuse: Blame It on the Kids!

A third excuse takes the form of attributing crime to young people—particularly young men between the ages of 14 or 15 or 16 and 24 or 25. This explanation goes as follows: Young people in our society, especially males, find themselves emerging from the security of childhood into the frightening chaos of adult responsibility. Little is or can be done by the adult society to ease the transition by providing meaningful outlets for the newly bursting youthful energy aroused

**TABLE 1-2 Large Cities by Population Density and Crime Rates (per 100,000 population)**

City and Population per Square Mile	Overall Crime Rate and Rank	Violent Crime Rate and Rank	Property Crime Rate and Rank
New York City 23,695	5,212 10th	1,344 7th	3,868 10th
Boston 11,378	8,092 7th	1,656 6th	6,435 8th
Miami 10,638	13,745 1st	3,114 1st	10,631 1st
Washington, DC 9,022	11,899 3rd	2,470 2nd	9,419 3rd
Los Angeles 7,385	6,275 9th	1,796 5th	4,928 9th
Detroit 7,190	11,991 2nd	2,318 3rd	9,762 2nd
Milwaukee 6,477	7,912 8th	952 9th	6,960 7th
Columbus 3,345	9,539 6th	970 8th	8,569 6th
New Orleans 2,697	11,042 4th	2,257 4th	8,785 4th
Phoenix 2,585	9,541 5th	923 10th	8,617 5th

Source: *StatAbst*—1998, pp. 47–49, Table 48; *UCR*—1997, pp. 88–115, Table 6.

in still immature and irresponsible youngsters. Hence, these youngsters both mimic the power of manhood and attack the society that frightens and ignores them by resorting to violent crime. Add to this the rapid increase of people in this age group since the baby boom of the 1940s (only tapering off as we entered the 1980s), and we have another explanation that amounts to a recipe for resignation: We can no more expect to reduce crime than we can hope to eradicate adolescence. We can fight crime, but it will be with us until we figure out a way for people to get from childhood to adulthood without passing through their teens.

There can be no doubt that youngsters show up disproportionately in crime statistics. In 1975, *Time* reported that “forty-four percent of the nation’s murderers are 25 or younger, and 10 percent are under 18. Of those arrested for street crimes, excluding murder, fully 75 percent are under 25 and 45 percent are under 18.”<sup>53</sup> In 1994, persons between the ages of 16 and 24 consti-

tuted 12 percent of the nation’s population. They represented, however, more than 37 percent of those arrested for the Index crimes of willful homicide, rape, robbery, aggravated assault, larceny, burglary, motor vehicle theft, and arson.<sup>54</sup>

However, there are problems with attributing crime to youth. The most important is that crime rates have grown faster than either the absolute number of young people or their percentage of the population. (See Table 1-3, comparing national crime rates in recent years with the percent of the population represented by people aged 14 to 24.)

Notice that while there is a rough parallel between the rise and fall of crime rates and percentage of young people in the population, there are also important divergences: The percentage of young people in the population in 1997 was lower than that in 1960, and yet the crime rate in 1997 was almost *five times higher* than that of 1960. Obviously, this growth in crime cannot be attributed to youth. The same can be said of the years 1970 and 1975, when young people’s percentage in the population grew slightly, and crime rates doubled. Or compare 1980 and 1990, when the youth percentage dropped almost 5 points and the crime rate dropped only slightly. In that same period, the number of 15- to 24-year-olds decreased absolutely by 5,660,000, while the absolute number of Index crimes rose by over 1 million.<sup>55</sup>

Similar discrepancies show up when the *National Crime Victimization Survey* is used. Compare, for example, 1981 with 1973, the first year for which we have *NCVS* survey results. In 1973 the number of people aged 16 to 24 was 34,967,000, and in 1981 their number had increased 10 percent to 38,591,000.

**TABLE 1-3 Crime Rates Compared with Youth Population**

Year	Crime Rate (Index crimes per 100,000 persons)	14- to 24-year-olds (percent of population)
1960	1,123	15.1
1970	2,741	19.9
1975	5,282	20.8
1980	5,950	20.4
1985	5,207	18.2
1990	5,820	16.1
1995	5,278	15.2
1997	4,923	13.6

Source: *UCR*—1997, pp. 88–115; *UCR*—1995, p. 5; *UCR*—1990, p. 50; *UCR*—1985, p. 41; *UCR*—1980, p. 41; *UCR*—1970, p. 65; *StatAbst*—1998, p. 21; *StatAbst*—1995, p. 17; *StatAbst*—1992, pp. 14–15; *StatAbst*—1987, p. 14. (Note: Owing to changes in categories, the percent of 14- to 24-year-olds for 1990 is based on the percent of 15- to 24-year-olds in 1990 plus the percent of 14-year-olds in 1991.)



As a percentage of the national population they went from 16.5 to 16.8—an increase of slightly under 2 percent in their percentage of the population (16.8 – 16.5 = 0.3; 0.3 is 1.8 percent of 16.5). During that same period, the NCVS shows an increase in reported violent victimizations of 23 percent, from 5,351,000 to 6,582,000—more than twice the increase in the absolute number of 16- to 24-year-olds, more than ten times the increase in their fraction of the population. Or compare 1975 and 1997, years in which the number of 16- to 24-year-olds are nearly the same (36,544,000 and 36,580,000, respectively). The NCVS reports an increase in violent victimizations of 55 percent from 1975 (5,573,000 victimizations) to 1997 (8,614,000). In 1997 there were 36,000 more 16- to 24-year-olds than there were in 1975, but over 3,000,000 more violent victimizations.<sup>56</sup>

Moreover, the period of decline in the youth population coincided with an increase in serious crime in New York City, and even when crime rates went down recently, they never returned to the levels of the 1940s, when the percentage of young people 16 to 24 years old was about 14, roughly comparable to what it is now.<sup>57</sup>

Note that I am not denying that a large number of crimes are committed by young people. I think it is true that some of the decreases in crime rates that we have experienced in recent years can be attributed to the end of the baby boom and the resultant decrease in the number of persons in the 16- to 24-year-old group.<sup>58</sup> However, that youngsters commit a lot of crime is no basis for treating crime as the inevitable result of youth. One reason is that, while the propensity to commit crimes against persons and property declines with age, it declines much more slowly for crimes of violence than for property crimes: “Age-specific arrest rates peak in the 16 to 18 year age range for all Index crimes, then drop quickly to half the peak by age 21 for the property crimes and slowly by age 35 for person crimes.”<sup>59</sup> Thus property crime is more directly attributable to youth than crimes against persons, which are fewer in number but more generally feared.

The facts suggest that although the number of youngsters in the populace has an important effect on the crime rates, it cannot fully explain them or explain them away. When this group declined, crime went down, but not in proportion to the decline in the youth population. When this group was growing, the crime rates were growing faster than it was. If crime increases faster (or decreases more slowly) than the youth population, that increase (or decrease) cannot be explained by the increase (or decrease) in youths.

If crime *among* these youngsters increases, then this certainly is not explained by their youth. Something other than their youth or their numbers must explain why they are committing more crimes than people their age did in other periods. For example, some observers have suggested that increased youth population increases crime exponentially by, among other things, increasing the competition for jobs. This in turn increases unemployment, which leads predictably to crime.<sup>60</sup> But it doesn't follow from this that the increased crime

results from the increased youth population, because at least part of the responsibility must be ascribed to the failure of the economy to provide jobs for the new youthful candidates. In any case, the greater likelihood of young people committing crime provides no excuse for failing to reduce the growth of crime at least to the rate at which the number of young people is growing (or shrinking). Moreover, this remains a failure even when a declining youth population leads to declining crime rates, because neither decline can be credited to criminal justice policies. So another excuse for our failure fails to excuse.

## Fourth Excuse: We Just Don't Know What to Do

The fourth excuse is that we don't know how to reduce crime. After all, I have just suggested, and many studies bear out, that all the new prisons and longer sentences of the Reagan era have had only little impact on crime rates. We have seen that crime is high even after an enormous increase in the number and percentage of Americans behind bars. The decreases we saw in the 1980s are attributable largely to the shrinking of the youth population. After adjusting crime rates in the 1980s to reflect the decline in number of young people in the population, Steffensmeier and Harer observe:

*Imprisonment rates rose far more sharply in the eighties than in any previous decade in the nation's history. In spite of their record-setting pace, there was no discernible drop in either the nation's Crime Rate as a whole or in the "serious" street crime rate.... [T]he fact that tougher enforcement and bulging prisons have not led to the expected reduction in crime... suggests that the criminal justice system does not contain the solution to the nation's crime problem, and that no law enforcement strategy can be confidently recommended to remedy it.<sup>61</sup>*

This idea is, of course, not new. Although the nation's leaders are still in the grips of the fantasy that more police and prisons will reduce crime, the fact is that the futility of this approach was already recognized before the hardening of the Reagan years. A 1975 article by Joel D. Weisman, titled “Chicago Reflects Police Frustration in Fight against Crime,” in *The Washington Post* gives a good sampling of this view among experts in and outside of police departments.

*Boston Police Commissioner Robert J. diGrazia claims police can only displace crime—not reduce or eliminate it. “It's like squeezing a balloon,” said [David] Fogel [executive director of the Illinois Law Enforcement Commission]. “You push the air away from where you're squeezing but it expands the rest of the balloon.”*

James Q. Wilson, a professor of political science at Harvard University and author of the book *Thinking About Crime*, said police can contribute to reducing crime but it is unclear by how much. The data are too unreliable, he contended.<sup>62</sup>

An article by Leroy Aarons, also from 1975, titled "U.S. Penal System 'Truths' Questioned," reflects similar bewilderment among correctional officials. Reporting the conclusions of a "recent issue of *Corrections* magazine," which "devoted 27 pages to an article on the current ferment in the field," Aarons writes:

*The article concluded, based on interviews with wardens, administrators and students of corrections around the country, that:*

*There is little or no evidence that correctional "treatment" programs work.*

*The gradual restructuring of the correctional system over the last 50 years around the notion of individualized and enforced treatment for all offenders was a mistake.*

Aarons concludes his own article with an observation drawn from current doubts among corrections experts but applicable to the whole criminal justice system:

*It seems clear that, in the long run, solutions to the age-old problem of what to do with those individuals deemed law-breakers still elude society.<sup>63</sup>*

In fact, in his sweeping history of the American criminal justice system from colonial times to the present, *Crime and Punishment in American History*, Stanford's Lawrence Friedman recounts the striking number of "wars on crime" that we have fought and lost, and argues that the criminal justice system can do little about crime.<sup>64</sup> In October 1993, *The Washington Post* ran an article on what to do about violence in the nation's capital. All the experts agreed with FBI director Louis J. Freeh, who said:

*The crime and disorder which flow from hopeless poverty, unloved children, and drug abuse can't be solved merely by bottomless prisons, mandatory sentencing minimums or more police.<sup>65</sup>*

Less than a month later, the U.S. Senate passed a tough federal crime bill calling for more prisons, longer sentences, more cops, and nothing for crime prevention.<sup>66</sup> Not only don't we know, it seems we don't want to know! Says criminologist Alfred Blumstein of Carnegie Mellon University:

*There was a recent action by a House Judiciary subcommittee on a proposal that 1 percent of the crime bill money be allocated to research—just 1 percent to at least start to find out what the effects of a variety of things we're advocating would have on crime. That was voted down on a straight party-line vote. There seems to be a determined view that even though we don't know, don't tell us, we don't want to be confused by the facts, we want to make decisions based on our ideological positions.<sup>67</sup>*

This excuse for our failure is as interesting for what it doesn't say as for what it does say. It doesn't say that we cannot reduce crime. It says that our criminal justice system—cops, courts, prisons—cannot reduce crime. This supports the suggestion I made at the start, namely, that we should stop trying to understand our criminal justice system as a mechanism aimed at reducing crime. We shall still want to know why we maintain such a criminal justice system, and indeed, why we keep feeding it more money and labor power in the face of the enduring knowledge of its enduring failure. But what the excuse doesn't say raises even more questions. It doesn't say that we, the American people, acting through our government and legal system, cannot reduce crime and the harm it causes. It doesn't say that the criminal justice system, understood—in the broad terms I suggested in the Introduction—to include the legal system that defines crime and that determines general policy toward actual and potential criminals, cannot reduce crime. Later in this chapter, I point to some policies that are likely to reduce crime and to some rehabilitation programs that are already producing good results. Then, we shall want to know why we maintain a criminal justice system that doesn't reduce crime and why we don't implement policies that might.

## Known Sources of Crime

There are many things that we do know about the sources of crime. Note that I have said "sources" rather than "causes," because the kind of knowledge we have is far from the precise knowledge that a physicist has about how some event *causes* another. We know that poverty, slums, and unemployment are *sources* of street crime. We do not fully understand how they *cause* crime, because we know as well that many, if not most, poor, unemployed slum dwellers do not engage in street crime. Yet to say that this means we do not know that such conditions increase the likelihood of an individual resorting to violent crime is like saying that we do not know that a bullet in the head is deadly because some people survive or because we do not fully understand the physiological process that links the wound with the termination of life.

## Poverty

Those youngsters who figure so prominently in arrest statistics are not drawn equally from all economic strata. Although there is much reported and even more unreported crime among middle-class youngsters, the street crime attributed to this age group that makes our city streets a perpetual war zone is largely the work of poor ghetto youth. This is the group at the lowest end of the economic spectrum. This is a group among whom unemployment approaches 50 percent, with underemployment (the rate of persons either jobless or with part-time, low-wage jobs) still higher. This is a group with no realistic chance (for any but a rare individual) to enter college or amass sufficient capital (legally) to start a business or to get into the union-protected, high-wage, skilled job markets. We know that poverty is a *source* of crime, even if we do not know how it *causes* crime—and yet we do virtually nothing to improve the life chances of the vast majority of the inner-city poor. They are as poor as ever and are facing cuts in welfare and other services.

The gap between rich and poor worsened during the 1980s. Says *The Economist*, "For all the talk of the fragmentation of America, there is only one division that is dangerously getting worse, and that is the gap between rich and poor."<sup>68</sup> In 1970, the poorest fifth of the nation's families received 5.4 percent of the aggregate income, and the richest fifth received 40.9 percent. In 1980, the share of the poorest fifth was 5.1 percent of aggregate income, and that of the richest fifth was 41.6 percent. By 1996, the share of the poorest fifth had declined to 4.2 percent, while that of the richest fifth had risen to 46.8 percent. During this same period, the share of the top 5 percent rose from 15.6 to 20.1 percent. By 1995, the number of poor Americans was 35.6 million, up from 30.1 million in 1990, and from 25.2 million in 1980.<sup>69</sup> And, due to cuts in welfare,

*... from 1995 to 1997, despite continued economic growth, the average incomes of the poorest 20 percent of female-headed households fell ... an average of \$580 per family.*

*Among the poorest 10 percent of female-headed families with children, income fell an average of \$810 between 1995 and 1997.<sup>70</sup>*

An analysis of data issued by the Congressional Budget Office indicates that "Among the bottom fifth of households, average after-tax income is anticipated to *fall* nine percent from 1977 to 1999." The same report concludes that:

*Income disparities have widened to such a degree that in 1999, the richest one percent of the population is projected to receive as much after-tax income as the bottom 38 percent combined. That is, the 2.7 million Americans with the largest incomes are expected to receive as*

*much after-tax income as the 100 million Americans with the lowest incomes.<sup>71</sup>*

That poverty is a source of crime is not refuted by the large and growing amount of white-collar crime that I shall document later. In fact, poverty contributes to crime by creating need, while—at the other end of the spectrum—wealth can contribute to crime by unleashing greed. Some criminologists have argued that economic inequality itself worsens crimes of the poor and of the well off by increasing the opportunities for the well off and increasing the humiliation of the poor.<sup>72</sup> And inequality has worsened in recent years.

Moreover, this was the predictable outcome of the Reagan administration's strategy of fighting inflation by cutting services to the poor while reducing the taxes of the wealthy. In September 1982, a group of 34 prominent economists sharply criticized Reagan's economic policy as "extremely regressive in its impact on our society, redistributing wealth and power from the middle class and the poor to the rich, and shifting more of the tax burden away from business and onto low- and middle-income consumers."<sup>73</sup> In that same month, a study released by the Urban Institute concluded that "the Reagan administration's policies are not only aiding upper-income families at the expense of the working poor, but also are widening the gulf between affluent and poorer regions of the country."<sup>74</sup> The study maintained that Reagan's tax cuts required sacrifices of low-income families, while yielding small gains for middle-income families and large gains for upper-income families; and that the combined effect of the administration's tax and social service spending cuts was "to penalize working families near the poverty line who receive some federal benefits ... creating 'major work disincentives.'"

Almost a decade later, an article in *Business Week*, looking back at the 1980s, confirms the charge in retrospect: "At the uppermost end of the income scale, tax cuts made aftertax income surge even higher than pretax income. And at the low end of the distribution scale, cuts in income transfers hurt the poor." The article notes also "the extraordinarily high level of child poverty in America today. One in five children under the age of 15 lives in poverty, and a staggering 50% of all black children under the age of six live in poverty."<sup>75</sup> And Edward Wolff writes that the "Equalizing trends of the 1930s–1970s reversed sharply in the 1980s. The gap between the haves and have-nots is greater now than at any time since 1929. The sharp increase in inequality since the late 1970s has made wealth distribution in the United States more unequal than in what used to be perceived as the class-ridden societies of north-western Europe."<sup>76</sup>

Moreover, as unemployment has gone up and down over the past decades, unemployment at the bottom of society remains strikingly worse than the national average. For example, over the past 25 years black unemployment has remained slightly more than twice the rate of white unemployment. In 1967, when 3.4 percent of white workers were unemployed, 7.4 percent of black workers were jobless. By 1997, 4.2 percent of white workers were unemployed

and 10 percent of blacks were. Among those in the crime-prone ages of 16 to 19, 12.7 percent of white youngsters and 31.6 percent (more than one of every three) black youngsters were jobless.<sup>77</sup>

Writes Todd Clear, professor of criminal justice at Rutgers University, "Let's start investing in things that really reduce crime: good schools, jobs and a future for young parents and their children."<sup>78</sup> Why don't we?

## Prison

There is more. We know that prison produces more criminals than it cures. We know that more than 70 percent of the inmates in the nation's prisons or jails are not there for the first time. We know that prison inmates are denied autonomy and privacy and subjected to indignities, mortifications, and acts of violence as regular features of their confinement—all of which is heightened by overcrowding. As of the last day of 1998, state prison systems were operating at between 13 percent and 22 percent over their reported capacity; the federal prison system was operating at 27 percent above capacity.<sup>79</sup> The predictable result, as delineated by Robert Johnson and Hans Toch in *The Pains of Imprisonment*, "is that the prison's survivors become tougher, more pugnacious, and less able to feel for themselves and others, while its nonsurvivors become weaker, more susceptible, and less able to control their lives."<sup>80</sup> Prisoners are thus bereft of both training and capacity to handle daily problems in competent and socially constructive ways, inside or outside of prison. Once on the outside, burdened with the stigma of a prison record and rarely trained in a marketable skill, they find few opportunities for noncriminal employment open to them. According to Professor Michael Tonry, author of *Malign Neglect: Race, Crime and Punishment in America*, "By affecting so many young black men, American criminal laws have further undermined the black family and made it harder for black men to get an education and find good jobs." And a recent study by the Sentencing Project indicates that the enormous number of African-American men who have been convicted of felonies, and therefore deprived of their right to vote, is "having a profound [negative!] impact on the black community's ability to participate in the political process."<sup>81</sup>

Should we really pretend, then, that we do not know why ex-cons turn to crime? Can we honestly act as if we do not know that our prison system (combined with our failure to ensure a meaningful postrelease noncriminal alternative for the ex-con) is a source of crime? Recidivism does not happen because ex-cons miss their alma mater. In fact, if prisons are built to deter people from crime, one would expect that ex-prisoners would be the most deterred, because the deprivations of prison are more real to them than to the rest of us. Recidivism is thus a doubly poignant testimony to the job that prison does in preparing its graduates for crime—and yet we do little to change the nature of prisons or to provide real services to ex-convicts.

## Guns

We know that it is about as difficult to obtain a handgun in the United States as a candy bar. In 1968 Franklin Zimring tried to estimate the number of guns (not only handguns) in civilian hands by using both the results of public opinion polls and the available figures on domestic production, as well as foreign import of firearms for civilian use. He concluded:

*Survey results thus indicate ownership of approximately 80 million firearms, while production and import totals indicate approximately 100 million. We can do no better than average these two figures and conservatively estimate the number of firearms now in civilian hands in this country... 35 million rifles, 31 million shotguns, and 24 million handguns—in 60 million households.<sup>82</sup>*

That was in 1968. Using similar sources of information, Gary Kleck estimates that, by 1990, the civilian stock of guns in the United States had passed the 200 million mark.<sup>83</sup> This estimate is corroborated by a 1993 report from the Bureau of Alcohol, Tobacco and Firearms, which estimated 200 million guns, about 1 percent of which were assault rifles. They also note that the "number of large caliber pistols produced annually increased substantially after 1986."<sup>84</sup> Nearly one-half of U.S. households have at least one gun. And about a quarter have at least one handgun. Half of handgun owners surveyed said that their guns were currently loaded.<sup>85</sup>

The President's Crime Commission reported that, in 1965, "5,600 murders, 34,700 aggravated assaults and the vast majority of the 68,400 armed robberies were committed by means of firearms. All but 10 of 278 law enforcement officers murdered during the period 1960–65 were killed with firearms." The commission concluded almost 30 years ago that

*... more than one-half of all willful homicides and armed robberies, and almost one-fifth of all aggravated assaults, involve use of firearms. As long as there is no effective gun-control legislation, violent crimes and the injuries they inflict will be harder to reduce than they might otherwise be.<sup>86</sup>*

The situation has worsened since the commission's warning. The FBI reported that the "proportion of violent crimes committed with firearms has increased in recent years"—from being employed in the commission of 26 percent of violent offenses in 1987 to 32 percent in 1993. The FBI writes: "In 1975, 66 percent of murders of persons (aged 15 to 19) were attributable to guns, while in 1992 the figure rose to 85 percent. This increase supports the theory that today's high-school-aged youths are exposed to an environment that

includes guns."<sup>87</sup> The Office of Juvenile Justice reports that "By 1997, the homicide rate for 15- to 24-year-olds was 15.2 per 100,000, which is higher than the combined total homicide rate of eleven industrialized nations," and goes on to point out that "Firearms were the weapons of choice in nearly two-thirds of all murders."<sup>88</sup>

Moreover, guns kill and maim outside of crime as well. "Every 14 minutes someone in America dies from a gunshot wound. Slightly more than half of those deaths are suicides, about 44 percent are homicides and 4 percent are unintentional shootings."<sup>89</sup> The Centers for Disease Control report that there were 143,000 nonfatal shootings in 1994.<sup>90</sup> A study published in the *New England Journal of Medicine* in October 1993 found that people in households with guns were almost three times more likely to experience a homicide than people in homes without guns.<sup>91</sup> Guns also take a grave and worsening toll among our children. According to a report from the Children's Defense Fund, nearly 50,000 children were killed by guns between 1979 and 1991.<sup>92</sup>

In the face of facts like these—indeed, in the face of his own nearly fatal shooting by a would-be assassin—President Reagan refused to support any legislative attempts to control the sale of handguns.<sup>93</sup> His successor, President George Bush, followed suit.<sup>94</sup> On Thanksgiving Day, 1993, Bush's successor, Bill Clinton, signed into law the so-called Brady Bill, which goes only so far as imposing a five-day waiting period for gun purchases, to enable checks to see whether would-be gun purchasers have criminal records. The Brady Bill leaves it to the states to enforce the waiting period and to get their police to make a "reasonable effort" to conduct the background checks. However, the bill provides no sanctions for states that do not comply, and it leaves it effectively up to the states to provide funding for the checks and to determine what is a "reasonable effort."<sup>95</sup> It remains to be seen whether the Brady Bill will make a difference.

Can we believe that our leaders sincerely want to cut down on violent crime and the injuries it produces when they oppose even as much as *registering* guns or *licensing* gun owners, much less actually restricting the sale and movement of guns as a matter of national policy? (President Clinton expressed some support for the idea of registering gun owners; but the difficulty of getting even the mild Brady Bill provisions into law gives little reason for optimism that anything will come of the idea.) Are we to believe that the availability of guns does not contribute to our soaring crime rate? Zimring's study indicates that areas with a high number of privately owned guns have more crimes involving guns than do areas with lower numbers of privately owned firearms. His data also indicate that cities that experience an increase in legal gun sales also experience an increase in gun-related suicides, accidents, and crimes.<sup>96</sup>

This is hardly more than what common sense would lead us to expect. Can we really believe that if guns were less readily available, violent criminals would simply switch to other weapons to commit the same number of crimes and do the same amount of damage? Is there a weapon other than the handgun that

works as quickly, that allows its user so safe a distance, or that makes the criminal's physical strength (or speed or courage for that matter) as irrelevant? Could a bank robber hold a row of tellers at bay with a switchblade? Would an escaping felon protect himself from a pursuing police officer with a hand grenade? Zimring's studies also indicate that if gun users switched to the next deadliest weapon—the knife—and attempted the same number of crimes, we could still expect *80 percent fewer fatalities* because the fatality rate of the knife is roughly one-fifth that of the gun. Another researcher found that family and intimate assaults involving firearms were 12 times more likely to result in death than those that did not.<sup>97</sup> In other words, even if guns were eliminated and crimes not reduced, we could expect to save as many as four out of every five persons who are now the victims of firearm homicide, and maybe more!

## Drugs

Finally, the United States has an enormous drug abuse and addiction problem. There is considerable evidence, however, that our attempts to cure it are worse than the disease itself. Consider first heroin. Some people think this drug is out of fashion and no longer widely used. Far from it! Its use is widespread and persistent. The number of heroin users is hard to estimate because we only know about the ones who get caught and because there is a large but unknown number of individuals who (contrary to popular mythology) shoot up occasionally without becoming addicts—a practice known as "chipping." In his book, *The Heroin Solution*, Arnold Trebach suggests that this number may be as high as 3.5 million.<sup>98</sup> A U.S. government report covering 1994 states that "[g]rowing evidence indicated that domestic heroin consumption was on the rise." And further that "[e]stimates suggested that there may be 600,000 hardcore drug users who report heroin as their principal drug of abuse," and that "heroin was readily available to addicts in all major metropolitan areas. Stable wholesale prices per kilogram and high retail-level purities indicated increasing supplies—a development consistent with nationwide trends over the past several years."<sup>99</sup>

As shocking as these numbers may be, it must be at least as shocking to discover that there is little evidence proving that heroin is a *dangerous* drug. There is no evidence conclusively establishing a link between heroin and disease or tissue degeneration such as that established for tobacco and alcohol. James Q. Wilson, a defender of the prohibition on heroin and other drugs, admits that "there are apparently no specific pathologies—serious illnesses or physiological deterioration—that are known to result from heroin use per se."<sup>100</sup> On the basis of available scientific evidence, there is every reason to suspect that we do our bodies more damage, more *irreversible* damage, by smoking cigarettes and drinking liquor than by using heroin. Most of the physical damage associated with heroin use is probably attributable to the trauma of withdrawal—and this is a product not so much of heroin as of its occasional unobtainability.

Says well-known criminologist Alfred Blumstein of Carnegie Mellon University, the drug "that has the strongest pharmacological effect is alcohol.... Heroin is a downer, so heroin doesn't do much. And there hasn't been shown to be much pharmacological effect of the other serious drugs on crime, not anything comparable to that of alcohol, which has been shown to be a strong stimulator of violence."<sup>101</sup>

It might be said that the evil of heroin is that it is *addicting*, because this is a bad thing even if the addicting substance is not itself harmful. It is hard to deny that the image of a person enslaved to a chemical is rather ugly and is repugnant to our sense that the dignity of human beings lies in their capacity to control their destinies. More questionable, however, is whether this is, in the case of adults, anybody's business but their own. Even so, suppose we agree that addiction is an evil worthy of prevention. Doesn't that make us hypocrites? What about all our other addictions? What about cigarette smoking, which, unlike heroin, contributes to cancer and heart disease? Nicotine's addictiveness—according to former Surgeon General C. Everett Koop—is similar to that of heroin. (By the way, cigarettes appear to be *more addicting than cocaine*, more likely to addict the new user, and more difficult to quit once addicted.)<sup>102</sup> What about the roughly 15 million alcoholics in the nation working their way through their livers and into their graves? What about the people who cannot get started without a caffeine fix in the morning and those who, once started, cannot slow down without their alcohol fix in the evening? What of the folks who can't face daily life without their Valium? Are they not all addicts?<sup>103</sup>

Suffice it to say, then, at the very least, our attitudes about heroin are inconsistent and irrational, and there is reason to believe they are outrageous and hypocritical. Even if this were not so, even if we could be much more certain that heroin addiction is a disease worth preventing, the fact would remain that the "cure" we have chosen is worse than the disease. We *know* that treating the possession of heroin as a criminal offense produces more crime than it prevents.

The key to this process is that the legal prohibition on heroin drives its price up, because only people willing to risk punishment will sell it. The heroin for which an addict may be paying \$100 or more a day could be produced legally for small change (as in Great Britain, where heroin has been dispensed to addicts by government-controlled clinics). Moreover, once deprived, a heroin addict begins to experience a painful physical need for the drug. Thus a powerful demand exists for the high-priced supply of heroin. Considering that most heroin addicts don't have high-paying jobs if they have regular employment at all, this means they will be driven by physical need to rob to get the money to pay for their drugs. Add to that the fact that, to get \$100 for stolen goods, one has to rob several times that amount, because fences don't pay list price.

Says former Washington, D.C., Police Chief Maurice Turner, "If you see an addict going through withdrawal, he's in some kind of damn pain.... When they get pretty well strung out, they have about a \$100 to \$120-a-day habit.

When they get that type of habit, they're going to have to steal approximately six times that much."<sup>104</sup> Professor Blumstein agrees, "you need money to buy drugs, so the higher the price of the drug, the greater the incentive to commit the crime."<sup>105</sup> The result is a recipe for large-scale and continual robbery and burglary, which would not exist if the drug were available legally. A recent study by Anglin and Speckart of the relationship between narcotics use and crime concludes that there is "strong evidence that there is a strong causal relationship, at least in the United States, between addiction to narcotics and property crime levels."<sup>106</sup>

Do a little arithmetic. Suppose that there are half a million addicts with \$100-a-day habits. And let's make some conservative assumptions about these addicts. Suppose that they fill their habits only 250 days a year (sometimes they're in jail, or in the hospital). Suppose that they have to steal for half their drug needs, and that they must steal three times the dollar value of what they need, because they must convert their booty into cash through a fence. (These conservative assumptions are similar to those made in a report of the U.S. Department of Health, Education and Welfare, entitled *Social Cost of Drug Abuse*, estimating the amount of theft in which heroin addicts had to engage to support their habits in 1974.)<sup>107</sup> If you've done your arithmetic, you have seen that our half-million addicts need to steal \$18,750,000,000 a year to support their habits. This is more than the \$15 billion that the FBI estimates as the loss due to property crimes during 1997<sup>108</sup>—and it doesn't even take into consideration theft by those addicted to other drugs, such as crack (a potent cocaine derivative).

A report from the Office of National Drug Control Policy (ONDCP) indicates that "[i]n 1995, Americans spent \$57 billion on these illegal drugs: \$38 billion on cocaine, \$10 billion on heroin, \$7 billion on marijuana, and \$3 billion on other illegal drugs and legal drugs used illicitly."<sup>109</sup> Even if you think that this \$18.75 billion in theft is an improbable figure, and even if you also assume that the FBI's estimate of the value of stolen property would increase dramatically if we knew the value of unreported theft, you cannot escape the conclusion that theft by drug addicts—who have few other means of supporting their habit—accounts for an astounding amount of property crime. The Bureau of Justice Statistics reports that, in 1997, roughly one of every six prisoners—19 percent of state inmates, 15 percent of federal inmates—said that they had committed their current offense in order to get money for drugs.<sup>110</sup>

Looking at heroin, we must recognize it is not the "disease" of heroin addiction that leads to property crime. There is, writes Trebach, "nothing in the pharmacology, or physical and psychological impact, of the drug that would propel a user to crime."<sup>111</sup> Nor is there anything about heroin itself that makes it extremely costly. The heroin for which an addict pays \$100 or more a day could be produced legally at a cost of a few cents for a day's supply. Thus, it is not the "disease" of heroin addiction but its "cure" that leads to property crime.

*It is our steadfast refusal to provide heroin through legal sources that, for approximately a half a million individuals on the streets, translates a physical need for a drug into a physical need to steal billions of dollars worth of property a year.*

Prior to 1914, when anyone could go into a drugstore and purchase heroin and other opiates the way we buy aspirin today, hundreds of thousands of upstanding, law-abiding citizens were hooked.<sup>112</sup> Opiate addiction is not in itself a cause of crime—if anything, it is a pacifier.<sup>113</sup> However, once sale or possession of heroin is made a serious criminal offense, a number of consequences follow. First, as already mentioned, the prices go up, because those who supply it face grave penalties, and those who want it want it bad. Second, because the supply (and the quality) of the drug fluctuates, depending on how vigorously the agents of the law try to prevent it, the addict's life is continuously unstable. Addicts live in constant uncertainty about the next fix and must devote much of their wit and energy to getting it and to getting enough money to pay for it. They do not, then, fit easily into the routines of a nine-to-five job, even if they could get one that would pay enough to support their habit. Finally, all the difficulties of securing the drug add up to an incentive to be not merely a user of heroin but a dealer as well, because this both earns money and makes one's own supply more certain. Addicts thus have an incentive to find and encourage new addicts, which they would not have if heroin were legally and cheaply available. If we add to this the fact that heroin addiction has remained widespread and possibly even increased in spite of all our law enforcement efforts, can we doubt that the cure is worse than the disease? Can we doubt that the cure is a source of crime?

Against this conclusion, it is sometimes countered that studies show that a large proportion of criminal heroin addicts were criminals before they were addicts. Such studies would only refute the claim that the illegality of heroin is a source of crime if the claim was that heroin addiction turns otherwise law-abiding citizens into thieves. Rather, the claim is that the illegality of heroin (and thus its limited availability and almost unlimited price) places addicts in situations in which they *must* engage in theft, continually and at a high level, to keep a step ahead of the pains of withdrawal. Anglin and Speckart affirm that "while involvement in property crime activities generally precedes the addiction career, after addiction occurs the highly elevated property crime levels demonstrated by addicts appear to be regulated by similarly high narcotics use levels."<sup>114</sup> Thus, even for addicts who already were criminals, heroin addiction increases the amount they need to steal and works to make them virtually immune to attempts to wean them from a life of crime. Consequently, even if all criminal heroin addicts were criminals before they were addicts, the illegality of heroin would still be a source of crime because of the increased pressure it places on the addict to steal a lot and to steal often. And much the same applies to other illegal addictive drugs.

Recently, attention has shifted from heroin to "crack," a highly addictive derivative of cocaine. The Office of National Drug Control Policy reports that there were nearly 2 million hard-core cocaine users in 1993.<sup>115</sup> Having learned nothing from our experience with heroin, we have applied to cocaine and crack the same policy that failed with heroin—with predictable results: First of all, our large-scale attempts to reduce the flow of cocaine into the country have failed. Says Trebach:

*After seven years of a multi-billion dollar drug war, our prisons are filled to record levels, violent drug traffickers pollute our cities, and drug abuse is rampant. Despite the most aggressive drug war campaign in history, so much cocaine has been imported since 1981 that the price has dropped to one-third its former level. While some of our children now find it more difficult to buy marijuana, many find it much easier to buy crack and cocaine.<sup>116</sup>*

According to the ONDCP, "About 287 to 340 metric tons of cocaine were available for domestic consumption in 1995."<sup>117</sup> According to a United Nations estimate, illicit drugs account for some \$400 billion worldwide, nearly one-tenth of world trade in all products!<sup>118</sup> The General Accounting Office reports that U.S. efforts to reduce cultivation of drug crops in Bolivia and Columbia "have been almost entirely ineffective and the cultivation of drug crops has increased dramatically in both countries."<sup>119</sup> This caps a long history of failure, starting with President Nixon's (successful) attempt to pressure Turkey into eradicating local cultivation of poppies (source of opium and thus of heroin) in 1971 and continuing with both Reagan's and Bush's attempts to pressure foreign countries to reduce domestic production of narcotic substances. Though Nixon was successful with Turkey, the result was just to move production elsewhere. In spite of three U.S.-led international drug wars since then, worldwide illicit opium production rose from 990 tons in 1971 to 4,200 tons in 1989, and Andean coca leaf (source of cocaine and thus of crack) production grew from 291,100 tons in 1987 to 337,100 tons in 1991.<sup>120</sup> (Total world opium production in 1991 was up 8 percent from the year prior, and nearly double the level of the mid-1980s.<sup>121</sup>) Likewise, attempts to use the coast guard and navy to interdict cocaine coming into the United States by sea have failed to put a dent in the traffic—after all, America has over 88,000 miles of coastline.<sup>122</sup> *The Wall Street Journal* reports that a kilogram of cocaine that cost between \$55,000 and \$65,000 in 1981 cost between \$20,000 and \$40,000 in 1987. They even report a "rock-bottom" price in Miami of \$14,000 for a kilo.<sup>123</sup> The National Narcotics Intelligence Consumers' Committee reports cocaine prices as low as \$10,500 per kilogram in 1994.<sup>124</sup> And an April 1999 report from the ONDCP shows steadily declining prices for both cocaine and heroine from 1981 to 1998, and steady if not rising levels of purity.<sup>125</sup> All of which testifies to the general failure of our costly "war on drugs" to make these drugs harder to obtain.

In 1988, the *National Law Journal* surveyed 181 chief prosecutors or their top drug deputies throughout the United States and reported that "nearly two-thirds of the country's top state and local prosecutors say they are having little to no impact in the fight against illegal narcotics."<sup>126</sup> This failing drug war is now costing federal, state, and local governments approximately \$33 billion in 1999, up nearly \$5 billion from 1994.<sup>127</sup> And the current "drug czar," Barry R. McCaffrey, Director of the Office of National Drug Policy, says:

*At present there are 1.8 million Americans incarcerated in the United States. Absent change, we expect that number to exceed 2 million in 2002. The number of people jailed for drug offenses has grown from approximately 50,000 in 1980 to 400,000 today. It costs the American people roughly \$25,000 per year to imprison each of these inmates, or \$150,000 for the typical six-year drug sentence.*

*Despite these tremendous prison expenditures—without proper treatment, including follow-up, after release—many ex-inmates will again use drugs and violate our laws. According to the National Institute of Justice, between 65 and 70 percent of all untreated parolees with histories of cocaine or heroin use will return to drug use within just three months of release. . . . It is clear that we cannot arrest our way out of the problem of chronic drug use and drug-driven crime.<sup>128</sup>*

To that must be added the *nonfinancial* costs, such as increased violence among competing drug traffickers and increased corruption among law enforcement officials on the front line in the drug war. The year 1988 saw the nation's capital reach and overtake its annual homicide record, with all experts attributing the surge in murders to the struggle to capture the lucrative drug market.<sup>129</sup> *The New York Times* reports that "researchers say there are now more than 100 cases each year in state and Federal courts in which law enforcement officials are charged or implicated in drug corruption."<sup>130</sup> Says William Green, assistant commissioner for internal affairs at the U.S. Customs Service, "The money that's being offered by the drug dealers is so big it is just hard to visualize."<sup>131</sup> The Mollen Commission report on police corruption in New York City found "willful blindness" to corruption throughout the police department, resulting in networks of rogue officers who dealt in drugs and preyed on black and Hispanic neighborhoods.<sup>132</sup>

Though many who would call for the legalization of heroin (and less dangerous drugs, such as marijuana) hesitate to call for legalization of crack, it seems clear that our efforts to fight crack are also failing and costing us more than the drug itself. Moreover, as Trebach suggests, there is reason to believe that our policy is contributing to the popularity of crack. The crackdown on importation of marijuana has given drug traffickers an incentive to shift to cocaine because much smaller amounts of it are needed for intoxication and thus much

smaller amounts are needed to make big money. It remains the case that most drug arrests are for marijuana use or possession, and that marijuana is a relatively safe drug.<sup>133</sup>

The 1988 surgeon general's report lists tobacco as a more dangerous drug than marijuana.<sup>134</sup> According to the findings and conclusions of Francis Young, administrative law judge for the Drug Enforcement Administration, there are no documented marijuana user fatalities ("despite [its 5,000 year-] long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death"!), and no amount of marijuana that a person could possibly eat or smoke would constitute a lethal dose. By contrast, even aspirin overdose causes hundreds of deaths a year.<sup>135</sup>

Regarding the drugs that can cause death from overdose, the dangers have been blown wildly out of proportion. Trebach points out that although federal authorities documented 2,177 deaths from the most popular illicit drugs in 1985, between 400,000 and 500,000 people died from alcohol and tobacco during that same year. He adds that 59 children aged 17 and under died from drug overdoses in 1987, while "408 American children (from infants through the age of 14) were murdered by their parents in 1983!"<sup>136</sup>

In sum, we have an antidrug policy that is failing at its own goals and succeeding only in adding to crime. First, there are the heroin and crack addicts, who must steal to support their habits. Then, there are the drug merchants who are offered fabulous incentives to provide illicit substances to a willing body of consumers. This in turn contributes to the high rate of inner-city murders and other violence as drug gangs battle for the enormous sums of money available. Next, there are the law enforcement officials who, after risking their lives for low salaries, are corrupted by nearly irresistible amounts of money. Finally, there are the otherwise law-abiding citizens who are made criminals because they use cocaine, a drug less harmful than tobacco, and those who are made criminals because they use marijuana, a drug that is safer than alcohol and less deadly than aspirin. Much of the recent dramatic growth in our prison population (documented above) is the result of the hardening of drug enforcement policy in the Reagan years: In 1968 there were 162,000 drug arrests nationwide, in 1977 there were 569,000, and in 1989 there were 1,150,000 drug arrests.<sup>137</sup> In 1997 there were 1.6 million drug arrests, 200,000 more than in 1995.<sup>138</sup> And the Bureau of Justice Statistics reports that 63 percent of federal inmates were serving sentences for drug violations, an increase of 3 percent since 1993, and of 28 percent since 1980.<sup>139</sup> Since numerous studies show that arrested drug dealers in inner-city neighborhoods are quickly replaced, it was apparent from the start that this policy would have little success in reducing the availability of illicit drugs.<sup>140</sup>

And all this is occurring at a time when there is increasing evidence that what does work to reduce substance abuse is public education. Because this has



succeeded in reducing alcohol and tobacco consumption and, in some cases, marijuana and cocaine consumption as well, it's time that we take the money we are wasting in the "war on drugs" and spend it on public education instead. Because that would be far less costly than the "war," this would leave over money to fight a more effective war against muggers and rapists rather than recreational drug users. Evidence from the 11 states that decriminalized marijuana possession in the 1970s suggests that decriminalization does not lead to increased use. And President Clinton's former surgeon general, Joycelyn Elders, recommended that we study seriously the possibility of decriminalizing drugs as a means to reducing violence, noting that "other countries had decriminalized drug use and had reduced their crime rates without increasing the use of narcotics."<sup>141</sup> Baltimore Mayor Kurt Schmoke has called for consideration of decriminalization, and so has Jerry Wilson, former Chief of Police of Washington, D.C. (where 42 percent of murders were drug-related in 1990).<sup>142</sup> A draft of a report commissioned by the American Medical Association recommended legalization of marijuana and decriminalization of other illicit drugs. The report was shelved when some doctors "expressed outrage at its recommendation."<sup>143</sup> Some form of decriminalization of marijuana, heroin, and cocaine would reduce the criminalization of law-abiding users, would reduce the need for addicts to steal, would reduce incentives to drug traffickers and smugglers, and would free up personnel and resources for a more effective war against the crimes that people fear most.

In the face of all this, it is hard to believe that we do not know how to reduce crime at all. It is hard not to share the frustration expressed by Norval Morris, former dean of the University of Chicago Law School: "It is trite but it remains true that the main causes of crime are social and economic. The question arises whether people really care. The solutions are so obvious. *It's almost as if America wished for a high crime rate.*"<sup>144</sup> If this is so, then *the system's failure is only in the eye of the victim: For those in control, it is a roaring success!*

## What Works to Reduce Crime

Surveying the programs that might contribute to reducing crime, criminologist Elliot Currie concludes that "four priorities seem especially critical: preventing child abuse and neglect, enhancing children's intellectual and social development, providing support and guidance to vulnerable adolescents, and working extensively with juvenile offenders." About these programs, Currie observes "the best of them work, and they work remarkably well given how limited and underfunded they usually are."<sup>145</sup> A study, entitled *Diverting Children from a Life of Crime: Measuring Costs and Benefits*, issued in June 1996 by the Rand Corporation, concluded:

*Programs that try to steer the young from wrongdoing—the training of parents whose children often misbehave, for example, or incentives to graduate from high school—are far more cost-effective in preventing crime over the long term than are mandatory sentences that imprison repeat adult offenders for long periods.*<sup>146</sup>

A more recent report from the Rand Corporation, entitled *Investing in Our Children: What We Know and Don't Know about the Costs and Benefits of Early Childhood Interventions*, reached a similar conclusion. Evaluating nine programs in which early interventions were targeted at disadvantaged children, the study concludes that such programs lead to decreased criminal activity and save taxpayer dollars at the same time.<sup>147</sup> Similar results were found for Head Start programs. "At age 27, those who participated [in Head Start programs as children] had lower arrest rates, higher education rates, earned more money, were more likely to be homeowners and less likely to receive social services."<sup>148</sup>

The National Treatment Improvement Study, "the largest study of its kind, which followed more than 5,300 clients in programs funded by the federal Center for Substance Abuse Treatment," concludes that "drug and alcohol treatment programs significantly reduced substance use, crime, and homelessness.... Use of most illicit substances in the year after treatment entry declined about 50 percent compared with the year before.... Arrest rates fell substantially in the sample—from 48 percent to 17 percent."<sup>149</sup> And a study by the Rand Corporation Drug Policy Research Center, entitled *Controlling Cocaine: Supply versus Demand Programs*, found that "[t]reatment is seven times more cost-effective than domestic drug enforcement in reducing cocaine use and 15 times more cost-effective in reducing the social costs of crime and lost productivity."<sup>150</sup> The study also concluded that "treatment is the most effective way to reduce violent crime."<sup>151</sup>

In short, there is a growing body of knowledge showing that early childhood intervention and drug treatment programs can work to reduce crime. As Professor Blumstein observed, "If you intervene early, you not only save the costs of incarceration, you also save the costs of crime and gain the benefits of an individual who is a taxpaying contributor to the economy."<sup>152</sup> But, as Peter Greenwood, author of the Rand Corporation Study, *Diverting Children from a Life of Crime*, says, "The big policy question is, Who will act on this?"<sup>153</sup>

## How Crime Pays: Erikson and Durkheim

Kai T. Erikson has suggested in his book, *Wayward Puritans*, that societies derive benefit from the existence of crime and thus there is reason to believe that social institutions work to maintain rather than to eliminate crime. Because the

Pyrrhic defeat theory draws heavily upon this insight, it will serve to clarify my own view if we compare it with Erikson's.

Professor Erikson's theory is based on the view of crime that finds expression in one of the classic works of sociological theory, *The Division of Labor in Society*, by Emile Durkheim. Writing toward the end of the nineteenth century, Durkheim

*... had suggested that crime (and by extension other forms of deviation) may actually perform a needed service to society by drawing people together in a common posture of anger and indignation. The deviant individual violates rules of conduct which the rest of the community holds in high respect; and when these people come together to express their outrage over the offense and to bear witness against the offender, they develop a tighter bond of solidarity than existed earlier.*<sup>154</sup>

The solidarity that holds a community together, in this view, is a function of the intensity with which the members of the community share a living sense of the group's cultural identity, of the boundary between acceptable and unacceptable behavior that gives the group its distinctive character. It is necessary, then, for the existence of a community as a *community* that its members learn and constantly relearn the location of its "boundaries." Erikson writes that these boundaries are learned in dramatic confrontations with

*... policing agents whose special business it is to guard the cultural integrity of the community. Whether these confrontations take the form of criminal trials, excommunication hearings, courts-martial, or even case conferences, they act as boundary-maintaining devices in the sense that they demonstrate to whatever audience is concerned where the line is drawn between behavior that belongs in the special universe of the group and behavior that does not.*<sup>155</sup>

In brief, this means not only that a community makes good use of unacceptable behavior *but that it positively needs unacceptable behavior*. Not only does unacceptable behavior cast in relief the terrain of behavior acceptable to the community; it also reinforces the intensity with which the members of the community identify that terrain as their shared territory. On this view, *deviant behavior is an ingredient in the glue that holds a community together*. "This," Erikson continues,

*raises a delicate theoretical issue. If we grant that human groups often derive benefit from deviant behavior, can we then assume that they are organized in such a way as to promote this resource? Can we assume, in other words, that forces operate in the social structure to recruit*

offenders and to commit them to long periods of service in the deviant ranks?...

*Looking at the matter from a long-range historical perspective, it is fair to conclude that prisons have done a conspicuously poor job of reforming the convicts placed in their custody; but the very consistency of this failure may have a peculiar logic of its own. Perhaps we find it difficult to change the worst of our penal practices because we expect the prison to harden the inmate's commitment to deviant forms of behavior and draw him more deeply into the deviant ranks.*<sup>156</sup>

Drawing on Durkheim's recognition that societies benefit from the existence of deviants, Erikson entertains the view that societies have institutions whose unannounced function is to recruit and maintain a reliable supply of deviants. Modified for our purposes, Erikson's view would become the hypothesis that the American criminal justice system fails to reduce crime because a visible criminal population is essential to maintaining the "boundaries" that mark the cultural identity of American society and to maintaining the solidarity among those who share that identity. In other words, in its failure, the criminal justice system succeeds in providing some of the cement necessary to hold American society together as a society.

As I said in the Introduction, this is one of the ideas that contributes to the Pyrrhic defeat theory, but it is also transformed in the process. Here, then, my aim is to acknowledge my debt to the Durkheim-Erikson thesis and to state the difference between it and the view that I will defend. The debt is to the insight that societies may promote behavior that they seem to desire to stamp out, and that failure to eliminate deviance may be a success of some sort.

The difference, on the other hand, is this: Both Durkheim and Erikson jump from the *general* proposition that the failure to eliminate deviance promotes social solidarity to the *specific* conclusion that the form in which this failure occurs in a particular society can be explained by the contribution the failure makes to promoting consensus on shared beliefs and thus feelings of social solidarity. This is a "jump" because it leaves out the important question of how a social group forms its particular consensus around one set of shared beliefs rather than another; that is, Durkheim and Erikson implicitly assume that a consensus already exists (at least virtually) and that deviance is promoted to manifest and reinforce it. This leads to the view that social institutions reflect beliefs already in people's heads and already largely and spontaneously shared by all of them.

In my view, even if it is granted that societies work to strengthen feelings of social solidarity, the set of beliefs about the world around which those feelings will crystallize are by no means already in people's heads and spontaneously shared. A consensus is made, not born, although, again, I do not mean that it is made intentionally. It is created, not just reflected, by social institutions.

Thus, the failure to stamp out deviance does not simply reinforce a consensus that already exists; it is part of the process by which a very particular consensus is created. In developing the Pyrrhic defeat theory, I try to show how the failure of criminal justice works to create and reinforce a very particular set of beliefs about the world, about what is dangerous and what is not, who is a threat and who is not. This does not merely shore up general feelings of social solidarity; it allows those feelings to be attached to a social order characterized by striking disparities of wealth, power, and privilege, and considerable injustice.

## Summary

In this chapter, I have tried to establish the first part of the Pyrrhic defeat theory, namely, that the war on crime is a failure and an avoidable one: The American criminal justice system—by which I mean the entire process from lawmaking to law enforcing—has done little to reduce the enormous amount of crime that characterizes our society and threatens our citizens. Over the last several decades, crime has generally risen, although in recent years it has declined. No doubt demographic changes, most significantly the growth followed by the decrease in the number of youngsters in the crime-prone years, have played a role in this. This in itself suggests that criminal justice policy and practice cannot be credited with the recent occasional declines. At the same time, however, neither can it be thought on this basis that public policy cannot reduce the crime we have. To support this, I have shown that crime is neither a simple and unavoidable consequence of the number of youngsters nor of the degree of urbanization. I have suggested that there are a number of policies we have good reason to believe would succeed in reducing crime—effective gun control, decriminalization of illicit drugs, and, of course, amelioration of poverty—that we refuse to implement. I concluded the chapter by showing that the Pyrrhic defeat theory shares, with the Durkheim–Erikson view of the functional nature of crime, the idea that societies may promote behavior that they seem to want to eliminate. My theory differs from their view in insisting that the failure to stamp out crime doesn't simply reflect an existing consensus but contributes to creating one, one that is functional for only a certain part of our society.

## Study Questions

1. Why do crime rates rise and fall?
2. What causes crime? What conditions make crime more likely?
3. What excuses have been given for our inability to reduce the amount of crime we have? How do you evaluate these excuses?
4. How do you think we could reduce the amount of crime?
5. What does it mean to say that "crime is functional for a society"? How does the Pyrrhic defeat theory differ on this from the Durkheim–Erikson theory?

6. List the costs and benefits of our current war on drugs. Is it worth it? Do you think that legalizing all or some illicit drugs would reduce crime? If so, would you agree to legalization?
7. What is meant by saying that the criminal justice system is "designed to fail"?

## Additional Readings

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A wide variety of criminal justice materials is now available on the Internet. The home page maintained by the Critical Criminology Division of the American Society of Criminology includes links to a wide variety of official data sources, legal resources, and progressive writings. They can be found at <http://sun.soci.niu.edu/~critcrim/>. See also: <http://www.paulsjusticepage.com>.

Readers can check on criminal justice legislation proposed by Congress through THOMAS (named after Thomas Jefferson) at <http://thomas.loc.gov/>. After typing in the address, select the option of reviewing legislation by topic, then select criminal justice.

## Notes

1. State of the Union Message (January 25, 1994), as reported in *The Washington Post*, January 26, 1994, p. A13.
2. Fox Butterfield, "A Large Drop in Violent Crime Is Reported," *The New York Times*, September 18, 1996, p. A14.

3. "Popgun Politics," *U.S. News & World Report*, September 30, 1996, p. 41.
4. David H. Bayley (Professor of Criminal Justice at the State University of New York at Albany), "The Cop Fallacy," *The New York Times*, August 13, 1993, p. A17.
5. The White House, Office of the Press Secretary, "Radio Address of the President to the Nation," January 11, 1997.
6. State of the Union Address, January 20, 1999; available at [www.washingtonpost.com/wp-srv/politics](http://www.washingtonpost.com/wp-srv/politics).
7. Elliot Currie, *Crime and Punishment in America* (New York: Metropolitan Books, Henry Holt & Company, 1998), p. 12; James Lynch and William Sobol, *Did Getting Tough on Crime Pay?* (Washington, D.C.: The Urban Institute, 1997), p. 1; BJS, *Prisoners in 1998* (NCJ175687).
8. Reported in William Raspberry, "2 Million and Counting," *The Washington Post*, December 13, 1999, p. A25.
9. BJS, *Criminal Offender Statistics*, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last revised December 5, 1999).
10. *UCR—1998*, p. 10; Joseph D. Davey, *The Politics of Prison Expansion* (Westport, Conn.: Praeger, 1998), pp. 118-19.
11. *Sourcebook—1998*, p. 2, Table 1.1; Davey, *Politics of Prison Expansion*, p. 122. There is a divergence between the crime trends portrayed in the FBI's *Uniform Crime Reports (UCR)* and the picture presented by the Bureau of Justice Statistics' *National Crime Victimization Survey (NCVS)*—previously called the *National Crime Survey (NCS)*. For example, the FBI reported 1,029,580 crimes of violence in 1977, 1,488,140 in 1986, and 1,531,044 in 1998. Victimization surveys, however, reported 5,902,000 crimes of violence in 1977, 5,515,000 in 1986, and 8,116,000 in 1998 (though most if not all of this jump is due to redesign of the survey, especially the addition of probing questions about intrafamilial violence and sexual assault). See *UCR—1986*, p. 41; *UCR—1991*, pp. 5, 10; *UCR—1998*, p. 10; *Sourcebook—1987*, p. 240; *Sourcebook—1998*, p. 172, Table 3.1. The *UCR*'s figures reflect crimes reported to the police and are thus subject to the vagaries of victims' and police departments' reporting practices. The *NCVS* probably shows a fuller picture of crime incidence overall because it is mainly a telephone survey asking recipients about victimization experiences, whether reported or not. On the other hand, the *NCVS* does not include crimes against children under 12 or those against businesses. The *UCR* is thought to overstate violent crime because inner-city police departments tend to report more fully than rural or small-town departments. The *NCVS* is thought to understate violent crime because its victims are often in the hospital or otherwise unreachable by a telephone survey. For obvious reasons, the *NCVS* does not include information about murder and nonnegligent homicide. I have generally used the *UCR* figures rather than the *NCVS* figures because the former are more accurate for assessing trends in violent crimes. Violent crimes have a high and generally stable rate of being reported to the police, thus making the *UCR* figures a reasonably accurate indicator of the trends in their occurrence, even if it somewhat overstates their rate per inhabitant nationwide. See, for example, Walter Gove, Michael Hughes, and Michael Geerken, "Are Uniform Crime Reports a Valid Indicator of the Index Crimes? An Affirmative Answer with Minor Qualifications," *Criminology* 23 (1985), pp. 451-501. Cf. William Chambliss, *Power, Politics, and Crime* (Boulder, Colo.: Westview Press, 1999),

- pp. 34-39, 52-55, for sharp criticisms of the accuracy of both the *UCR* and the *NCVS*.
12. Lorraine Adams and David Vise, "Crime Rates Down for 7th Straight Year," *The Washington Post*, October 18, 1999, p. A2 (emphasis in original).
13. David Vise and Lorraine Adams, "Despite Rhetoric, Violent Crime Climbs," *The Washington Post*, December 5, 1999, p. A3.
14. Quoted in *ibid*.
15. Quoted in *ibid*.
16. *Sourcebook—1998*, p. 502, Table 6.48. See also Vise and Adams, "Despite Rhetoric, Violent Crime Climbs."
17. Quoted in Raspberry, "2 Million and Counting."
18. Currie, *Crime and Punishment in America*, p. 60.
19. Molly Moore, "Drugs Flood in from Mexico," *The Washington Post*, November 19, 1999, p. A15.
20. William J. Chambliss, *Power, Politics, and Crime* (Boulder, Colo.: Westview Press, 1999), p. 127; see also Currie, *Crime and Punishment in America*, pp. 30-36.
21. Quoted in Pierre Thomas, "In a Reversal, U.S. Homicide Numbers Fall," *The Washington Post*, December 31, 1995, p. A8.
22. "Popgun Politics," *U.S. News & World Report*, September 30, 1996, p. 33.
23. Thomas, "In a Reversal, U.S. Homicide Numbers Fall," p. A8.
24. Richard Lacayo, "Law and Order," *Time*, January 15, 1996, pp. 48-54.
25. Eric Pooley, "One Good Apple," *Time*, January 15, 1996, pp. 54-56.
26. Currie, *Crime and Punishment in America*, p. 26.
27. Lacayo, "Law and Order," p. 50; Fox Butterfield, "Experts on Crime Warn of a Ticking Time Bomb," *The New York Times*, January 6, 1996, p. 6.
28. *UCR—1992*, p. 58; *UCR—1993*, p. 5; the quote is on p. 287.
29. *UCR—1997*, p. 5.
30. Currie, *Crime and Punishment in America*, pp. 24-25.
31. *Challenge*, p. 35.
32. *UCR—1986*, p. 41; *UCR—1998*, p. 5.
33. BJS, *Justice Expenditures and Employment in the U.S., 1995*, November 1999 (NCJ178235), pp. 1, 6.
34. For 1990, expenditure on private security was \$52 billion, and the number of people employed in some form of private security work was 1.5 million. See Freda Adler, Gerhard Muller, and William Laufer, *Criminology*, 2nd ed. (New York: McGraw-Hill, 1995), p. 417.
35. On this issue, I have made ample use of the discussion and references in Victor Kappeler, Merle Blumberg, and Gary Potter, *The Mythology of Crime and Criminal Justice*, 2nd ed. (Prospect Heights, Ill.: Waveland, 1996), pp. 287-305.
36. *Sourcebook—1997*, p. 134, Table 2.50; Ernest van den Haag, "When Felons Go Free: Worse than a Crime," *National Review*, January 20, 1992, p. 50.
37. Probation and Parole in the US—1998.
38. Kappeler et al., *The Mythology of Crime and Criminal Justice*, p. 290.
39. "When the range of crimes examined is made more comparable in terms of seriousness and when the rates are standardized for differences in the level of crime cross-nationally, the extreme differences in the use of incarceration between the United States and several other Western democracies are lessened considerably and, in

- some cases, disappear." James Lynch, "A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitiveness Hypothesis," *Journal of Criminal Law and Criminology* 79, no. 1 (1988), p. 196, cf. p. 181. This conclusion is based on cross-national comparison of the rates at which convicted persons are sentenced to prison, regardless of the length of the sentence or eventual time actually served. Cross-national comparisons of actual time served show the United States to be roughly comparable to other Western democracies. See James Lynch, "A Cross-National Comparison of the Length of Custodial Sentences for Serious Crimes," *Justice Quarterly* 10, no. 4 (December 1993), pp. 801-23.
40. Clifford Krauss, "Senate Approves Broad Crime Bill; Split over Guns," *The New York Times*, November 20, 1993, p. 1.
  41. See Sharon Lafraniere, "U.S. Has Most Prisoners per Capita in the World," *The Washington Post*, January 5, 1991, p. A3.
  42. BJS, *Probation and Parole in the U.S.—1998* (NCJ178234); and BJS press release, "U.S. Corrections Population Reaches 5.9 Offenders," August 22, 1999. See also "3 in 100 Adults Are in Criminal System," *The Washington Post*, July 1, 1996, p. A7.
  43. Elliott Currie, *Confronting Crime: An American Challenge* (New York: Pantheon, 1985), p. 12; cited in Kappeler et al., *The Mythology of Crime and Criminal Justice*, p. 207.
  44. Krauss, "Senate Approves Broad Crime Bill; Split over Guns," p. 1.
  45. William Claiborne, "Gun Control Battle Behind It, NRA Pushes Effort on Crime Control," *The Washington Post*, December 5, 1993, p. A20.
  46. INTERPOL, *International Crime Statistics 1993* (Lyons, France: ICPO-Interpol General Secretariat), p. 49.
  47. Louise I. Shelley, *Crime and Modernization* (Carbondale: Southern Illinois University Press, 1981), p. 76.
  48. INTERPOL, *International Crime Statistics 1993*, pp. 16, 23, 34, 49, 78.
  49. *UCR—1997*, p. 58.
  50. *UCR—1997*, pp. 76ff.
  51. Quoted in *Violence: An Element of American Life*, eds. K. Taylor and F. Soady (Boston: Holbrook Press, 1972), p. 49.
  52. *UCR—1998*, pp. 135, 145.
  53. *Time*, June 30, 1975, p. 11.
  54. *StatAbst—1995*, Table 16, p. 16; *UCR—1994*, pp. 227-28.
  55. *UCR—1990*, p. 50, Table 1; *UCR—1985*, p. 41, Table 1; *StatAbst—1992*, p. 14, Table 12.
  56. I have calculated the population of 16- to 24-year-olds from *Economic Report of the President* (Washington, D.C.: U.S. Government Printing Office, 1988), p. 283, Table B-31, and *StatAbst—1998*, p. 21, Table 21; the victimization figures are from *Sourcebook—1987*, p. 240, and *Sourcebook—1998*, p. 172.
  57. "Serious Crime Rises Again in New York," *The New York Times*, March 22, 1988, pp. B1, B6.
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  62. *The Washington Post*, August 4, 1975, p. A2.
  63. *The Washington Post*, August 17, 1975, pp. A1, A4.
  64. Yale Kamisar, "Why the Bad Guys Keep Winning" (review of Lawrence Friedman's *Crime and Punishment in American History* [New York: Basic Books, 1993]), *The New York Times Book Review*, September 26, 1993, p. 11.
  65. Athelia Knight, "Strategies to End the Carnage," *The Washington Post*, October 27, 1993, pp. A1 and A16.
  66. Writing on the crime bill before its passage, columnist William Raspberry says, "My objections are... principally that the legislation has nothing to do with crime prevention.... The crime bill would make the principle investment at the back end—in the criminal justice system—where it's already too late." "A Crime Bill with No Hope," *The Washington Post*, October 27, 1993, p. A25.
  67. "A LEN Interview with Professor Alfred Blumstein of Carnegie Mellon University," *Law Enforcement News* 21, no. 422 (April 30, 1995), p. 13.
  68. "UnAmerican Thoughts," *The Economist*, October 26, 1991, p. 23.
  69. *StatAbst—1996*, p. 48, Table 49; p. 467, Table 719; *StatAbst—1998*, p. 51, Table 51; p. 473, Table 747.
  70. Kathy Sawyer, "Poorest Families Are Losing Ground," *The Washington Post*, August 22, 1999, p. A7. The article goes on to point out that a "report from the House Ways and Means Committee... acknowledged that the poorest families are losing ground."
  71. Isaac Shapiro and Robert Greenstein, *The Widening Income Gulf* (Washington, D.C.: Center on Budget and Policy Priorities, September 4, 1999), pp. 1, 2.
  72. See, for example, John Braithwaite, "Poverty, Power, and White-Collar Crime," in Kip Schlegel and David Weisburd, eds., *White-Collar Crime Reconsidered* (Boston: Northeastern University Press, 1992), pp. 78-107.
  73. *The Washington Post*, September 6, 1982, p. 2; the report was issued by the Full Employment Action Council (a coalition of religious, civil rights, and union groups) and the National Policy Exchange (an economic research and educational organization).
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  75. Karen Pennar, "The Rich Are Richer—And America May Be the Poorer," *Business Week*, November 18, 1991, pp. 85, 88.
  76. Edward Wolff, *Top Heavy: A Study of the Increasing Inequality of Wealth in America* (New York: The Twentieth Century Fund Press, 1995), p. 2.
  77. *StatAbst—1992*, p. 399, Table 635; *StatAbst—1998*, p. 51, Table 51; p. 407, Table 651. See also "Racial Gulf: Blacks' Hopes, Raised by '68 Kerner Report, Are Mainly Unfulfilled," *The Wall Street Journal*, February 26, 1988, pp. 1, 9; *StatAbst—1992*, p. 80, Table 109; "Today's Native Sons," *Time*, December 1, 1986, pp. 26-29; and *StatAbst—1988*, p. 75, Table 113.

78. Todd R. Clear, "'Tougher' Is Dumber," *The New York Times*, December 4, 1993, p. 21.
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## A CRIME BY ANY OTHER NAME ...

*If one individual inflicts a bodily injury upon another which leads to the death of the person attacked we call it manslaughter; on the other hand, if the attacker knows beforehand that the blow will be fatal we call it murder. Murder has also been committed if society places hundreds of workers in such a position that they inevitably come to premature and unnatural ends. Their death is as violent as if they had been stabbed or shot.... Murder has been committed if society knows perfectly well that thousands of workers cannot avoid being sacrificed so long as these conditions are allowed to continue. Murder of this sort is just as culpable as the murder committed by an individual.*

**Frederick Engels**

*The Condition of the Working Class in England*

### What's in a Name?

If it takes you an hour to read this chapter, by the time you reach the last page, two of your fellow citizens will have been murdered. *During that same time, more than three Americans will die as a result of unhealthy or unsafe conditions in the workplace!* Although these work-related deaths could have been prevented, they are not called murders. Why not? Doesn't a crime by any other name still cause misery and suffering? What's in a name?

The fact is that the label "crime" is not used in America to name all or the worst of the actions that cause misery and suffering to Americans. It is reserved primarily for the dangerous actions of the poor.

In the February 21, 1993, edition of *The New York Times*, an article appears with the headline: "Company in Mine Deaths Set to Pay Big Fine." It de-

scribes an agreement by the owners of a Kentucky mine to pay a fine for safety misconduct that may have led to "the worst American mining accident in nearly a decade." Ten workers died in a methane explosion, and the company pleaded guilty to "a pattern of safety misconduct" that included falsifying reports of methane levels and requiring miners to work under unsupported roofs. The company was fined \$3.75 million. The acting foreman at the mine was the only individual charged by the federal government, and for his cooperation with the investigation, prosecutors were recommending that he receive the minimum sentence: probation to six months in prison. The company's president expressed regret for the tragedy that occurred. And the U.S. attorney said he hoped the case "sent a clear message that violations of Federal safety and health regulations that endanger the lives of our citizens will not be tolerated."<sup>1</sup>

Compare this with the story of Colin Ferguson, who prompted an editorial in *The New York Times* of December 10, 1993, with the headline: "Mass Murder on the 5:33."<sup>2</sup> A few days earlier, Colin had boarded a commuter train in Garden City, Long Island, and methodically shot passengers with a 9-millimeter pistol, killing 5 and wounding 18. Colin Ferguson was surely a murderer, maybe a mass murderer. My question is, why wasn't the death of the miners also murder? Why weren't those responsible for subjecting ten miners to deadly conditions also "mass murderers"?

Why do ten dead miners amount to an "accident," a "tragedy," and five dead commuters a "mass murder"? "Murder" suggests a murderer, whereas "accident" and "tragedy" suggest the work of impersonal forces. But the charge against the company that owned the mine said that they "repeatedly exposed the mine's work crews to danger and that such conditions were frequently concealed from Federal inspectors responsible for enforcing the Mine Safety Act." And the acting foreman admitted to falsifying records of methane levels only two months before the fatal blast. Someone was responsible for the conditions that led to the death of ten miners. Is that person not a murderer, perhaps even a *mass murderer*?

These questions are at this point rhetorical. My aim is not to discuss this case but rather to point to the blinders we wear when we look at such an "accident." There was an investigation. One person, the acting foreman, was held responsible for falsifying records. He is to be sentenced to six months in prison (at most). The company was fined. But no one will be tried for *murder*. No one will be thought of as a murderer. *Why not?* Would the miners not be safer if such people were treated as murderers? Might they not still be alive? Will a president of the United States address the Yale Law School and recommend mandatory prison sentences for such people? Will he mean these people when he says:

*These relatively few, persistent criminals who cause so much misery and fear are really the core of the problem. The rest of the American people have a right to protection from their violence[?]<sup>3</sup>*



Didn't those miners have a right to protection from the violence that took their lives? *And if not, why not?*

Once we are ready to ask this question seriously, we are in a position to see that the reality of crime—that is, the acts we label crime, the acts we think of as crime, the actors and actions we treat as criminal—is *created*: It is an image shaped by decisions as to *what* will be called crime and *who* will be treated as a criminal.

## The Carnival Mirror

It is sometimes coyly observed that the quickest and cheapest way to eliminate crime would be to throw out all the criminal laws. There is a sliver of truth to this view. Without criminal laws, there would indeed be no "crimes." There would, however, still be dangerous acts. This is why we cannot really solve our crime problem quite so simply. The criminal law *labels* some acts "crimes." In doing this, it identifies those acts as so dangerous that we must use the extreme methods of criminal justice to protect ourselves against them. This does not mean that criminal law *creates* crime—it simply "mirrors" real dangers that threaten us. What is true of the criminal law is true of the whole justice system. If police did not arrest or prosecutors charge or juries convict, there would be no "criminals." This does not mean that police or prosecutors or juries create criminals, any more than legislators do. They *react* to real dangers in society. The criminal justice system—from law makers to law enforcers—is just a mirror of the real dangers that lurk in our midst. *Or so we are told.*

How accurate is this mirror? We need to answer this in order to know whether or how well the criminal justice system is protecting us against the real threats to our well-being. The more accurate a mirror is, the more the image it shows is created by the reality it reflects. The more misshapen a mirror is, the more the distorted image it shows is created by the mirror, not by the reality reflected. It is in this sense that I will argue that the image of crime is created: The American criminal justice system is a mirror that shows a distorted image of the dangers that threaten us—an image created more by the shape of the mirror than by the reality reflected. What do we see when we look in the criminal justice mirror?

On the morning of September 16, 1975, *The Washington Post* carried an article in its local news section headlined "Arrest Data Reveal Profile of a Suspect." The article reported the results of a study of crime in Prince George's County, a suburb of Washington, D.C. It read in part as follows:

*The typical suspect in serious crime in Prince George's County is a black male, aged 14 to 19, who lives in the area inside the Capital Beltway where more than half of the county's 64,371 reported crimes were*

*committed in 1974. [The study] presents a picture of persons, basically youths, committing a crime once every eight minutes in Prince George's County.*<sup>4</sup>

This report is hardly a surprise. The portrait it paints of "the typical suspect in serious crime" is probably a pretty good rendering of the image lurking in the back of the minds of most people who fear crime. Furthermore, although the crime rate in Prince George's County is somewhat above the national average and its black population somewhat above that of the average suburban county, the portrait generally fits the national picture presented in the FBI's *Uniform Crime Reports* for the same year, 1974. In Prince George's County, "youths between the ages of 14 and 19 were accused of committing nearly half [45.5 percent] of all 1974 crimes."<sup>5</sup> For the nation in 1974, the FBI reported that persons in this age group accounted for 39.5 percent of arrests for the FBI Index crimes (criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft).<sup>6</sup> These youths were male and (disproportionately) black. In Prince George's County, males "represented three of every four serious crime defendants."<sup>7</sup> In the nation in 1974, of 1,289,524 persons arrested for FBI Index crimes, 1,043,155, or more than 80 percent, were males.<sup>8</sup> In Prince George's County, where blacks made up approximately 25 percent of the population, "blacks were accused of 58 percent of all serious crimes."<sup>9</sup> In the nation, where blacks made up 11.4 percent of the population in 1974, they accounted for 34.2 percent of arrests for Index crimes.<sup>10</sup>

That was 1974, but little has changed since. In his 1993 book, *How to Stop Crime*, retired Police Chief Anthony Bouza writes: "Street crime is mostly a black and poor young man's game."<sup>11</sup> And listen to the sad words of the Reverend Jesse Jackson: "There is nothing more painful to me at this stage of my life than to walk down the street and hear footsteps and start thinking about robbery—and then look around and see someone white and feel relieved."<sup>12</sup>

This, then, is the *Typical Criminal*, the one whose portrait President Reagan described as "that of a stark, staring face, a face that belongs to a frightening reality of our time—the face of a human predator, the face of the habitual criminal. Nothing in nature is more cruel and more dangerous."<sup>13</sup> This is the face that Ronald Reagan saw in the criminal justice mirror, more than a decade ago. Let us look more closely at the face in today's criminal justice mirror, and we shall see much the same Typical Criminal.

He is, first of all, *a he*. Of 2,481,500 persons arrested for FBI Index crimes in 1998, 2,050,050, or 74 percent, were males. Of persons arrested for violent crimes, 83 percent were men. Second, he is *young*. Almost half (45 percent) of men arrested for FBI Index crimes were aged 25 and under. Third, he is predominantly *urban*. "Among the city population groupings, those with more than 250,000 inhabitants recorded the highest arrest rate, 7,025 [per 100,000 inhabitants], while those with populations from 24,999 to 50,000 recorded the lowest

rate, 5,108 [per 100,000].” Fourth, he is disproportionately *black*—blacks are arrested for Index crimes at a rate two-and-a-half times that of their percentage in the national population. In 1998, with blacks representing 12 percent of the nation’s population, they made up 30 percent of Index crime arrests.<sup>14</sup> Finally, he is *poor*: About one-third of jail and prison inmates were unemployed (without full- or part-time work) prior to being arrested—a rate considerably higher than that of adults in the general population. Among jail inmates in 1996, more than half were not employed full-time prior to arrest, and about half reported prearrest incomes below \$7,200 a year.<sup>15</sup> As the President’s Commission reported more than 30 years ago: “The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country.”<sup>16</sup>

This is the Typical Criminal feared by most law-abiding Americans. Poor, young, urban, (disproportionately) black males make up the core of the enemy forces in the war against crime. They are the heart of a vicious, unorganized guerrilla army, threatening the lives, limbs, and possessions of the law-abiding members of society—necessitating recourse to the ultimate weapons of force and detention in our common defense.

How do we know who the criminals are who so seriously endanger us that we must stop them with force and lock them in prisons? “From the arrest records, probation reports, and prison statistics,” the authors of *The Challenge of Crime in a Free Society* tell us, the “‘portrait’ of the offender emerges.”<sup>17</sup> *These sources are not merely objective readings taken at different stages in the criminal justice process: Each of them represents human decisions.* “Prison statistics” and “probation reports” reflect *decisions* of juries on who gets convicted and decisions of judges on who gets probation or prison and for how long. “Arrest records” reflect decisions about which crimes to investigate and which suspects to take into custody. All these decisions rest on the most fundamental of all decisions: the *decisions* of legislators as to which acts shall be labeled “crimes” in the first place.

The reality of crime as the target of our criminal justice system and as perceived by the general populace is not a simple objective threat to which the system reacts: *It is a reality that takes shape as it is filtered through a series of human decisions running the full gamut of the criminal justice system*—from the lawmakers who determine what behavior shall be in the province of criminal justice to the law enforcers who decide which individuals will be brought within that province. And it doesn’t end with the criminal justice system as such, since the media—particularly television and daily newspapers—contribute as well to the image that people have of crime in our society.<sup>18</sup> Here, too, human decisions are fundamental. The news media do not simply report the facts; there are too many facts out there. Rather, people working in the news media must choose which facts are news, and they must choose how to represent those facts.

Note that by emphasizing the role of “human decisions,” I do not mean to suggest that the reality of crime is voluntarily and intentionally “created” by individual “decision makers.” Their decisions are themselves shaped by the social system, much as a child’s decision to become an engineer rather than a samurai warrior is shaped by the social system in which he or she grows up. Thus, to have a full explanation of how the reality of crime is created, we have to understand how our society is structured in a way that leads people to make the decisions they do. In other words, these decisions are part of the social phenomena to be explained—they are not the explanation.

For the present, however, I emphasize the role of the decisions themselves for the following reasons: First, they are conspicuous points in the social process, easy to spot and verify empirically. Second, because they are decisions aimed at protecting us from the dangers in our midst, we can compare the decisions with the real dangers and determine whether they are responding to the real dangers. Third, because the reality of crime—the real actions labeled crimes, the real individuals identified as criminals, the real faces we watch in the news as they travel from arrest to court to prison—results from these decisions, we can determine whether that reality corresponds to the real dangers in our society. Where that reality does correspond to the real dangers, we can say that the reality of crime simply reflects the real dangers in society. Where the reality of crime does not correspond to the real dangers, we can say that it is a reality *created* by those decisions. And then we can investigate the role played by the social system in encouraging, reinforcing, and otherwise shaping those decisions.

It is to capture this way of looking at the relation between the reality of crime and the real dangers “out there” in society that I refer to the criminal justice system as a “mirror.” Whom and what we see in this mirror is a function of the decisions about who and what are criminal, and so on. Our poor, young, urban, black male, who is so well represented in arrest records and prison populations, appears not simply because of the threat he poses to the rest of society. As dangerous as he may be, he would not appear in the criminal justice mirror *if* it had not been decided that the acts he performs should be labeled “crimes,” *if* it had not been decided that he should be arrested for those crimes, *if* he had had access to a lawyer who could persuade a jury to acquit him and perhaps a judge to expunge his arrest record, and *if* it had not been decided that he is the type of individual and his the type of crime that warrants imprisonment. *The shape of the reality we see in the criminal justice mirror is created by all these decisions.* We want to know how accurately the reality we see in this mirror reflects the real dangers that threaten us in society.

It is not my view that this reality is created out of nothing. The mugger, the rapist, the murderer, the burglar, the robber all pose a definite threat to our well-being, and they ought to be dealt with in ways that effectively reduce that threat to the minimum level possible (without making the criminal justice system itself

a threat to our lives and liberties). Of central importance, however, is that the threat posed by the Typical Criminal is not the greatest threat to which we are exposed. The acts of the Typical Criminal are not the only acts that endanger us, nor are they the acts that endanger us the most. As I shall show in this chapter, we have as great or sometimes even a greater chance of being killed or disabled by an occupational injury or disease, by unnecessary surgery, or by shoddy emergency medical services than by aggravated assault or even homicide! Yet even though these threats to our well-being are graver than that posed by our poor young criminals, they do not show up in the FBI's Index of serious crimes. The individuals responsible for them do not turn up in arrest records or prison statistics. *They never become part of the reality reflected in the criminal justice mirror, although the danger they pose is at least as great and often greater than the danger posed by those who do!*

Similarly, the general public loses more money *by far* (as I show below) from price fixing and monopolistic practices and from consumer deception and embezzlement than from all the property crimes in the FBI's Index combined. Yet these far more costly acts are either not criminal, or if technically criminal, not prosecuted, or if prosecuted, not punished, or if punished, only mildly. In any event, although the individuals responsible for these acts take more money out of the ordinary citizen's pocket than our Typical Criminal, they rarely show up in arrest statistics and almost never in prison populations. *Their faces rarely appear in the criminal justice mirror, although the danger they pose is at least as great and often greater than that of those who do.*

The inescapable conclusion is that the criminal justice system does not simply *reflect* the reality of crime; it has a hand in *creating* the reality we see.

The criminal justice system is like a mirror in which society can see the face of the evil in its midst. Because the system deals with some evils and not with others, because it treats some minor evils as grave and treats some of the gravest evils as minor, the image it throws back is distorted, like the image in a carnival mirror. Thus, the image cast back is false not because it is invented out of thin air but because the proportions of the real are distorted: Large becomes small and small large; grave becomes minor and minor grave. Like a carnival mirror, although nothing is reflected that does not exist in the world, the image is more a creation of the mirror than a picture of the world.

If criminal justice really gives us a carnival-mirror image of "crime," we are doubly deceived. First, we are led to believe that the criminal justice system is protecting us against the gravest threats to our well-being when, in fact, the system is protecting us against only some threats and not necessarily the gravest ones. We are deceived about how much protection we are receiving and thus left vulnerable. The second deception is just the other side of this one. If people believe that the carnival mirror is a true mirror—that is, if they believe the criminal justice system simply reacts to the gravest threats to their well-being—they come to believe that whatever is the target of the criminal justice system

must be the greatest threat to their well-being. In other words, if people believe that the most drastic of society's weapons are wielded by the criminal justice system *in reaction to* the gravest dangers to society, they will believe the reverse as well: that those actions that call forth the most drastic of society's weapons *must be* those that pose the gravest dangers to society.

A strange alchemy takes place when people accept uncritically the legitimacy of their institutions: What *needs* justification becomes *proof* of justification. People come to believe that prisoners must be criminals *because* they are in prison and that the inmates of insane asylums must be *crazy* because they are in insane asylums.<sup>19</sup> The criminal justice system's use of extreme measures—such as force and imprisonment—is thought to be justified by the extreme gravity of the dangers it combats. By this alchemy, these extreme measures become *proof* of the extreme gravity of those dangers, and the first deception, which merely misleads the public about how much protection the criminal justice system is actually providing, is transformed into the second, which deceives the public into believing that the acts and actors that are the target of the criminal justice system pose the gravest threats to its well-being. Thus, the system may not only fail to protect us from dangers as great or greater than those listed in the FBI Crime Index; it may do still greater damage by creating the false security of the belief that only the acts on the FBI Index really threaten us and require control.

In the following discussion, I describe how and why the criminal justice carnival mirror distorts the image it creates.

## Criminal Justice as Creative Art

The Pyrrhic defeat explanation for the "failure" of criminal justice in America holds that criminal justice *fails* (or, what amounts to the same thing, crime is maintained) in order to project a particular *image* of crime. In Chapter 1, I described the failure of criminal justice policy to reduce crime significantly.

It is the task of this chapter and the next to prove that the reality of crime is *created* and that it is created in a way that promotes a particular *image* of crime: *the image that serious crime—and therefore the greatest danger to society—is the work of the poor.* The notion that the reality of crime is created is derived from Richard Quinney's theory of the *social reality of crime*.<sup>20</sup> Here as elsewhere, however, an idea that contributes to the Pyrrhic defeat theory is transformed along the way. Because I understand the idea that the social reality of crime is created in a way different from its meaning for Quinney, it will help in presenting my view to compare it with Quinney's.

Quinney maintains that crime has a "social reality" rather than an objective reality. What he means can be explained with an example. Wherein lies the reality of money? Certainly not in the "objective" characteristics of green printed

paper. It exists rather in the "social" meaning attributed to that paper and the pattern of "social" behavior that is a consequence of that meaning. If people did not act as if that green printed paper had value, it would be just green paper, not real money. The reality of a crime *as a crime* does not lie simply in the objective characteristics of an action. It lies in the "social" meaning attached to that action and the pattern of "social" behavior—particularly the behavior of criminal justice officials—that is a product of that meaning. I think Quinney is right in this. When I speak of the reality of crime, I am referring to much more than physical actions such as stabbing or shooting. I mean the reality that a society gives those physical actions by labeling them and treating them as criminal.

Quinney further maintains that this reality of crime is *created*. By this he means that crime is a definition of behavior applied by lawmakers and other criminal justice decision makers. "Crime," Quinney writes,

*... is a definition of behavior that is conferred on some persons by others. Agents of the law (legislators, police, prosecutors, and judges), representing segments of a politically organized society, are responsible for formulating and administering criminal laws. Persons and behaviors, therefore, become criminal because of the formulation and application of criminal definitions. Thus, crime is created.*<sup>21</sup>

This is *not* what I have in mind when I say that the reality of crime is created. Here is the difference. Quinney's position amounts to this: Crimes are established by the criminal law and the criminal law is a human creation; ergo, crime is created. This is true, but it does not take us very far. After all, who can deny that crime is created *in this sense*? Only someone who has been hypnotized into forgetting that law books are written by lawmakers could deny that "crime" is a label that human beings apply to certain actions. What is controversial, however, is whether the label is applied appropriately. "Crime," after all, is not merely a sound—it is a word with a generally accepted meaning. Roughly speaking, it means at least "an intentional action that is harmful to society." (Of course, "crime" has a technical definition, namely, "an act prohibited by a criminal law." The point of prohibiting an act by the criminal law is to protect society from an injurious act. Thus, though any act prohibited by criminal law is rightly labeled a crime in the technical sense, not every act so prohibited is rightly prohibited, and thus not every act labeled "crime" is labeled appropriately. To determine whether the label "crime" is applied appropriately, we must use the more general definition.) The label is applied appropriately when it is used to identify all, or at least the worst, acts that are harmful to society. The label is applied inappropriately when it is attached to harmless acts or when it is not attached to seriously harmful acts. When I argue that the reality of crime is created, I mean that the label "crime" has not been applied appropriately.

Thus, by calling the social reality of crime created, I mean not just that the label "crime" is applied by human beings but that it is applied inappropriately. One might ask why the inappropriate use of the label "crime" is a reason for saying that crime is created. My answer is this: By calling something *created*, we call attention to the fact that human actors are responsible for it. By calling crime created, I point to human actors rather than objective dangers as determining the shape that the reality of crime takes in our society. If the label "crime" is applied consistently to the most dangerous or harmful acts, then it is misleading to point to the fact that human decision makers are responsible for how the label is applied because their decisions are dictated by compelling objective reasons. Rather than creating a reality, their decisions trace a reality that already exists. On the other hand, if the label is not applied appropriately, it is sensible to assume that it is applied for reasons that lie with the decision makers and not in the realm of objective dangers. This means that when the label "crime" is applied inappropriately, it is essential to call attention to the fact that human actors are responsible for it. Thus, it is precisely when the label "crime" is applied inappropriately that it is important to point out that the reality of crime is *created*.

By calling crime created, I want to emphasize the human responsibility for the shape of crime, not in the trivial sense that humans write the criminal law, *but rather to call attention to the fact that decisions as to what to label and treat as crime are not compelled by objective dangers, and thus that, to understand the reality of crime, we must look to the social processes that shape those decisions.*

By calling crime created, I suggest that our picture of crime—the portrait that emerges from arrest statistics, prison populations, politicians' speeches, news media, and fictionalized presentations, the portrait that in turn influences lawmakers and criminal-justice policy makers—is not a photograph of the real dangers that threaten us. Its features are not simply traced from the real dangers in the social world. Instead, it is a piece of creative art. It is a picture in which some dangers are portrayed and others omitted. Because it cannot be explained as a straight reflection of real dangers, we must look elsewhere to understand the shape it takes.

This argument, which will occupy us in this chapter and the next, leads to *five hypotheses* about the way in which the public's image of crime is created. To demonstrate that the reality of crime is created, that the criminal justice system is a carnival mirror that gives us a distorted image of the dangers that threaten us, I will try to prove that, at each of the crucial decision-making points in criminal justice, the decisions made do not reflect the real and most serious dangers we face. The five hypotheses are as follows.

1. **Of the decisions of legislators:** That the definitions of crime in the criminal law do not reflect the only or the most dangerous of antisocial behaviors.

2. **Of the decisions of police and prosecutors:** That the decisions on whom to arrest or charge do not reflect the only or the most dangerous behaviors legally defined as "criminal."
3. **Of the decisions of juries and judges:** That criminal convictions do not reflect the only or the most dangerous individuals among those arrested and charged.
4. **Of the decisions of sentencing judges:** That sentencing decisions do not reflect the goal of protecting society from the only or the most dangerous of those convicted by meting out punishments proportionate to the harmfulness of the crime committed.
5. **Of all these decisions taken together:** That what criminal justice policy decisions (in hypotheses 1 through 4) do reflect is the implicit identification of crime with the dangerous acts of the poor, an identification amplified by media representations of crime.

The Pyrrhic defeat theory is composed of these five hypotheses, *plus* the proposition that the criminal justice system is failing in avoidable ways to reduce crime (argued in Chapter 1), *plus* the *historical inertia* explanation of how this failure is generated and left uncorrected because of the ideological benefits it produces (argued in Chapter 4). Moreover, these ideological benefits are produced with the cooperation of the media, which portray crime—in reality and in fiction—in ways that overrepresent the crimes of the poor (whether committed by poor or rich folks) and that obscure the social factors that lead to crime in reality (argued in this chapter and in Chapter 4). In presenting this explanation, I try to show how the decisions that create the reality of crime are caused by historical forces and left unchanged because the particular distribution of costs and benefits to which those decisions give rise serves to make the system self-reinforcing.

## A Crime by Any Other Name ...

Think of a crime, any crime. Picture the first "crime" that comes into your mind. What do you see? The odds are you are not imagining a mining company executive sitting at his desk, calculating the costs of proper safety precautions and deciding not to invest in them. Probably what you do see with your mind's eye is one person attacking another physically or robbing something from another via the threat of physical attack. Look more closely. What does the attacker look like? It's a safe bet he (and it is a *he*, of course) is not wearing a suit and tie. In fact, my hunch is that you—like me, like almost anyone else in America—picture a young, tough, lower-class male when the thought of crime first pops into your head. You (we) picture someone like the Typical Criminal described above. The crime itself is one in which the Typical Criminal sets out to attack or rob some specific person.

This last point is important. It indicates that we have a mental image not only of the Typical Criminal but also of the *Typical Crime*. If the Typical Criminal is a young, lower-class male, the Typical Crime is *one-on-one harm*—where harm means either physical injury or loss of something valuable or both. If you have any doubts that this is the Typical Crime, look at any random sample of police or private eye shows on television. How often do you see the cops on *NYPD Blue* investigate consumer fraud or failure to remove occupational hazards? And when Jessica Fletcher (on *Murder, She Wrote*) tracks down well-heeled criminals, it is almost always for violent crimes such as murder. A study of TV crime shows by The Media Institute in Washington, D.C., indicates that, while the fictional criminals portrayed on television are on average both older and wealthier than the real criminals who figure in the FBI *Uniform Crime Reports*, "TV crimes are almost 12 times as likely to be violent as crimes committed in the real world."<sup>22</sup> A review of several decades of research confirms that violent crimes are overrepresented on TV news and fictional crime shows, and that "young people, black people, and people of low socioeconomic status are underrepresented as offenders or victims in television programs"—exactly opposite from the real world, in which nonviolent property crimes far outnumber violent crimes, and young, poor, and black folks predominate as offenders and victims.<sup>23</sup>

Notice, then, that TV crime shows focus on the crimes typically committed by poor people, but they do not present these as uniquely committed by poor people. Rather than contradict the Pyrrhic defeat theory, this combination confirms it in a powerful way. The result is that TV crime shows broadcast the double-edged message that the one-on-one crimes of the poor are the typical crimes of all and thus not caused uniquely by the pressures of poverty; *and* that the criminal justice system pursues rich and poor alike—thus, when the criminal justice system happens mainly to pounce on the poor in real life, it is not from any class bias.<sup>24</sup> In other words, what is most important about the televised portrayals of crime is the kinds of crimes that are shown, not who is typically shown to be guilty. By overrepresenting violent one-on-one crimes, television confirms the common-sense view that these are the crimes that threaten us—and then, since, in the real world, those crimes are disproportionately committed by poor people, that is enough to create the image that it is the poor who pose the greatest danger to law-abiding Americans.

In addition to the steady diet of fictionalized TV violence and crime, there has been an increase in the graphic display of crime on many TV news programs. Crimes reported on TV news are also far more frequently violent than real crimes are.<sup>25</sup> An article in *The Washingtonian* says that the word around two prominent local TV news programs is, "If it bleeds, it leads."<sup>26</sup> What's more, a new breed of nonfictional "tabloid" TV show has appeared in which viewers are shown films of actual violent crimes—blood, screams, and all—or reenactments of actual violent crimes, sometimes using the actual victims playing

themselves! Among these are *Cops*, *Real Stories of the Highway Patrol*, *America's Most Wanted*, and *Unsolved Mysteries*. Here, too, the focus is on crimes of one-on-one violence, rather than, say, corporate pollution. *The Wall Street Journal*, reporting on the phenomenon of tabloid TV, informs us that "Television has gone tabloid. The seamy underside of life is being bared in a new rash of true-crime series and contrived-confrontation talk shows."<sup>27</sup> Is there any surprise that a survey by *McCall's* indicated that its readers had grown more afraid of crime in the mid-1980s—even though victimization studies showed a stable level of crime for most of this period?<sup>28</sup>

It is important to identify this model of the Typical Crime because it functions like a set of blinders. It keeps us from calling a mine disaster a mass murder even if ten men are killed, even if someone is responsible for the unsafe conditions in which they worked and died. One study of newspaper reporting of a food-processing plant fire, in which 25 workers were killed and criminal charges were ultimately brought, concludes that "the newspapers showed little consciousness that corporate violence might be seen as a crime."<sup>29</sup> I contend that this is due to our fixation on the model of the Typical Crime. This particular piece of mental furniture so blocks our view that it keeps us from using the criminal justice system to protect ourselves from the greatest threats to our persons and possessions.

What keeps a mine disaster from being a mass murder in our eyes is that it is not a one-on-one harm. What is important in one-on-one harm is not the numbers but the *desire of someone (or ones) to harm someone (or ones) else*. An attack by a gang on one or more persons or an attack by one individual on several fits the model of one-on-one harm; that is, for each person harmed there is at least one individual who wanted to harm that person. Once he selects his victim, the rapist, the mugger, the murderer all want this person they have selected to suffer. A mine executive, on the other hand, does not want his employees to be harmed. He would truly prefer that there be no accident, no injured or dead miners. What he does want is something legitimate. It is what he has been hired to get: maximum profits at minimum costs. If he cuts corners to save a buck, he is just doing his job. If ten men die because he cut corners on safety, we may think him crude or callous, but not a murderer. He is, at most, responsible for *indirect harm*, not one-on-one harm. For this, he may even be criminally indictable for violating safety regulations—but not for murder. The ten men are dead as an unwanted consequence of his (perhaps overzealous or undercautious) pursuit of a legitimate goal. So, unlike the Typical Criminal, he has not committed the Typical Crime—or so we generally believe. As a result, ten men are dead who might be alive now if cutting corners of the kind that leads to loss of life, whether suffering is specifically aimed at or not, were treated as murder.

This is my point. Because we accept the belief—encouraged by our politicians' statements about crime and by the media's portrayal of crime—that the

model for crime is one person specifically trying to harm another, we accept a legal system that leaves us unprotected against much greater dangers to our lives and well-being than those threatened by the Typical Criminal. Before developing this point further, let us anticipate and deal with some likely objections. Defenders of the present legal order are likely to respond to my argument at this point with irritation. Because this will surely turn to outrage in a few pages, let's talk to them now, while the possibility of rational communication still exists.

The "Defenders of the Present Legal Order" (I'll call them "the Defenders" for short) are neither foolish nor evil people. They are not racists, nor are they oblivious to the need for reform in the criminal justice system to make it more even-handed and for reform in the larger society to make equal opportunity a reality for all Americans. In general, their view is that—given our limited resources, particularly the resource of human altruism—the political and legal institutions we have are the best that can be. What is necessary is to make them work better and to weed out those who are intent on making them work shoddily. Their response to my argument at this point is that the criminal justice system *should* occupy itself primarily with one-on-one harm. Harms of the sort exemplified in the "mine tragedy" are really *not* murders and are better dealt with through stricter government enforcement of safety regulations. The Defenders admit that this enforcement has been rather lax and recommend that it be improved. Basically, though, they think this division of labor is right because it fits our ordinary moral sensibilities.

The Defenders maintain that, according to our common moral notions, someone who tries to do another harm and does is really more evil than someone who jeopardizes others while pursuing legitimate goals but doesn't aim to harm anyone. The one who jeopardizes others in this way at least doesn't try to hurt them. He or she doesn't have the goal of hurting someone in the way that a mugger or a rapist does. Moreover, being directly and purposely harmed by another person, the Defenders believe, is terrifying in a way that being harmed indirectly and impersonally, say, by a safety hazard, is not—even if the resultant injury is the same in both cases. And we should be tolerant of the one responsible for lax safety measures because he or she is pursuing a legitimate goal—that is, his or her dangerous action occurs as part of a productive activity, something that ultimately adds to social wealth and thus benefits everyone—whereas doers of direct harm benefit no one but themselves. Thus, the latter are rightfully in the province of the criminal justice system with its drastic weapons, and the former are appropriately dealt with by the milder forms of regulation.

Further, the Defenders insist, the crimes identified as such by the criminal justice system are imposed on their victims totally against their will, whereas the victims of occupational hazards chose to accept their risky jobs and thus have in some degree consented to subject themselves to the dangers. Where dangers are consented to, the appropriate response is not blame but requiring

improved safety, and this is most efficiently done by regulation rather than with the guilt-seeking methods of criminal justice.

In sum, the Defenders make four objections: (1) Someone who purposely tries to harm another is really more evil than someone who harms another without aiming to, even if the degree of harm is the same; (2) being harmed directly by another person is more terrifying than being harmed indirectly and impersonally, as by a safety hazard, even if the degree of harm is the same; (3) someone who harms another in the course of an illegitimate and purely self-interested action is more evil than someone who harms another as a consequence of a legitimate and socially productive endeavor; (4) the harms of typical crimes are imposed on their victims against their wills, whereas harms such as those due to occupational hazards are consented to by workers when they agree to a job—this too is thought to make the harms of typical crimes evil in a way that occupational harms are not.

All four of these objections are said to reflect our common moral beliefs, which are a fair standard for a legal system to match. Together they are said to show that the typical criminal does something worse than the one responsible for an occupational hazard and thus deserves the special treatment provided by the criminal justice system. Some or all of these objections may have already occurred to the reader. Thus, it is important to respond to the Defenders. For the sake of clarity I shall number the paragraphs in which I start to take up each objection in turn.

1. The Defenders' first objection confuses intention with specific aim or purpose, and it is intention that brings us properly within the reach of the criminal law. It is true that a mugger aims to harm his victim in the way that a corporate executive who maintains an unsafe workplace does not. But the corporate executive acts intentionally nonetheless, and that's what makes his actions appropriately subject to criminal law. What we intend is not just what we try to make happen but what we know is likely to happen as the normal result of our chosen actions. As criminal law theorist Hyman Gross points out: "What really matters here is whether conduct of a particular degree of dangerousness was done intentionally."<sup>30</sup> Whether we want or aim for that conduct to harm someone is a different matter, which is relevant to the actor's *degree* of culpability (not to whether he or she is culpable at all). Gross describes the degrees of culpability for intentional action by means of an example in which a sailor dies when his ship is fumigated while he is asleep in the hold. Fumigation is a dangerous activity; it involves spraying the ship with poison that is normally fatal to humans. If the fumigation was done in order to kill the sailor, we can say that his death was caused *purposely*. But suppose that the fumigation was done knowing that a sailor was in the hold but not in order to kill him. Then, according to Gross, we say that his death was brought about *knowingly*. If the fumigation was done without knowledge that someone was in the hold but without making sure that

no one was, then the sailor's death is brought about *recklessly*. Finally, if the fumigation was done without knowledge that the sailor was there and some, but inadequate, precautions were taken to make sure no one was there, then the sailor's death was brought about *negligently*.

How does this apply to the executive who imposes dangerous conditions on his workers, conditions that, as in the mine explosion, finally do lead to death? The first thing to note is that the difference between purposely, knowingly, recklessly, or negligently causing death is a difference within the range of intentional (and thus to some extent culpable) action. What is done recklessly or negligently is still done intentionally. Second, culpability decreases as we go from purposely to knowingly to recklessly to negligently killing because, according to Gross, the outcome is increasingly due to chance and not to the actor; that is, the one who kills on purpose leaves less to chance that the killing will occur than the one who kills knowingly (the one who kills on purpose will take precautions against the failure of his killing, while the one who kills knowingly won't), and likewise the one who kills recklessly leaves wholly to chance whether there is a victim at all. And the one who kills negligently reduces this chance, but insufficiently.

Now, we may say that the kernel of truth in the Defenders' objection is that the common street mugger harms on purpose, while the executive harms only knowingly or recklessly or negligently. This does not justify refusing to treat the executive killer as a criminal, however, because we have criminal laws against reckless or even negligent harming. Thus the kid-glove treatment meted out to those responsible for occupational hazards and the like is no simple reflection of our ordinary moral sensibilities, as the Defenders claim. Moreover, don't be confused into thinking that, because all workplaces have some safety measures, all workplace deaths are at most due to negligence. To the extent that precautions are not taken against particular dangers (such as leaking methane), deaths due to those dangers are—by Gross's standard—caused recklessly or even knowingly (because the executive knows that potential victims are in harm's way from the danger he fails to reduce). And Nancy Frank concludes from a review of state homicide statutes that "a large number of states recognize unintended deaths caused by extreme recklessness as murder."<sup>31</sup>

And there is more to be said. Remember that Gross attributes the difference in degrees of culpability to the greater role left to chance as we descend from purposely to recklessly to negligently harming. In this light it is important to note that the executive (say, the mine owner) imposes danger on a larger number of individuals than the typical criminal typically does. So, while the typical criminal purposely harms a particular individual, the executive knowingly subjects a large number of workers to a risk of harm. As the risk becomes greater and the number of workers increases, it becomes increasingly likely that one or more workers will be harmed. This means that the gap between the executive and the typical criminal shrinks. By not harming workers purposely, the

executive leaves more to chance; but by subjecting large numbers to risk, he leaves it less and less to chance that someone will be harmed, and thus he rolls back his advantage over the typical criminal. If you keep your workers in mines or factories with high levels of toxic gases or chemicals, you start to approach 100 percent likelihood that at least one of them will be harmed as a result. And that means that the culpability of the executive approaches that of the typical criminal.

A different way to make the Defenders' argument is to say that the executive has failed to protect his workers, while the typical criminal has acted positively to harm his victim. In general, we think it is worse to harm someone than to fail to prevent their being harmed (perhaps you should feed starving people on the other side of town or of the world, but few people will think you are a murderer if you don't and the starving die). But in at least some cases we are responsible for the harm that results from our failure to act (for example, parents are responsible when they fail to provide for their children). Some philosophers go further and hold that we are responsible for all the foreseeable effects of what we do, including the foreseeable effects of failing to act in certain ways.<sup>32</sup> Although this view supports the position for which I am arguing here, I think it goes too far. It entails that we are murderers every time we are doing anything other than saving lives, which surely goes way beyond our ordinary moral beliefs. My view is that in most cases we are responsible only for the foreseeable effects likely to be caused by our action—and are not responsible for those caused by our inaction. We are responsible, however, for the effects of our inaction in at least one special type of case: when we have a special obligation to aid people. This covers the parent who causes his child's death by failing to feed him, the doctor who causes her patient's death by failing to care for her, and the coal mine owner who causes his employees' death by failing to take legally mandated safety precautions. It may also cover the society that fails to rectify harm-producing injustices in its midst. This is another way in which the moral difference between the safety-cutting executive and the typical criminal shrinks away.

Further on this first objection, I think the Defenders overestimate the importance of specifically trying to do evil in our moral estimate of people. The mugger who aims to hurt someone is no doubt an ugly character, but so too is the well-heeled executive who calmly and callously chooses to put others at risk. Compare the mine executive who cuts corners with the typical murderer. Most murders, we know, are committed in the heat of some passion such as rage or jealousy. Two lovers or neighbors or relatives find themselves in a heated argument. One (often it is a matter of chance *which* one) picks up a weapon and strikes the other a fatal blow. Such a person is clearly a murderer and rightly subject to punishment by the criminal justice system. Is this person more evil than the executive who, knowing the risks, calmly chooses not to pay for safety equipment?

The one who kills in a heated argument kills from passion. What she does she probably would not do in a cooler moment. She is likely to feel "she was not herself." The one she killed was someone she knew, a specific person who at the time seemed to her to be the embodiment of all that frustrates her, someone whose very existence made life unbearable. I do not mean to suggest that this is true of all killers, although there is reason to believe that it is true of many. Nor do I mean to suggest that such a state of mind justifies murder. What it does do, however, is suggest that the killer's action, arising out of anger at a particular individual, does not show general disdain for the lives of her fellows. Here is where she is different from our mine executive. Our mine executive wanted to harm no one in particular, but *he knew his acts were likely to harm someone*—and once someone is harmed, the victim is someone in particular. Nor can our executive claim that "he was not himself." His act is done not out of passion but out of cool reckoning. It is precisely here that his evil shows. In his willingness to jeopardize the lives of unspecified others who pose him no real or imaginary threat in order to make a few dollars, he shows his general disdain for all his fellow human beings. Can it really be said that he is less evil than one who kills from passion? The Model Penal Code includes within the definition of murder any death caused by "extreme indifference to human life."<sup>33</sup> Is our executive not a murderer by this definition?

It's worth noting that in answering the Defenders here, I have portrayed harms from occupational hazards in their best light. They are not, however, all just matters of well-intentioned but excessive risk taking. Consider, for example, the Manville (formerly Johns Manville) asbestos case. It is predicted that 240,000 Americans working now or who previously worked with asbestos will die from asbestos-related cancer in the next 30 years. But documents made public during congressional hearings in 1979 show "that Manville and other companies within the asbestos industry covered up and failed to warn millions of Americans of the dangers associated with the fireproof, indestructible insulating fiber."<sup>34</sup> An article in the *American Journal of Public Health* attributes thousands of deaths to the cover-up.<sup>35</sup> Later in this chapter I document similar intentional cover-ups, such as the falsification of reports on coal-dust levels in mines, which leads to crippling and often fatal black lung disease. Surely someone who knowingly subjects others to risks and tries to hide those risks from them is culpable in a high degree.

2. I think the Defenders are right in believing that direct personal assault is terrifying in a way that indirect impersonal harm is not. This difference is no stranger to the criminal justice system. Prosecutors, judges, and juries constantly have to consider how terrifying an attack is in determining what to charge and what to convict offenders for. This is why we allow gradations in charges of homicide or assault and allow particularly grave sentences for particularly grave attacks. In short, the difference the Defenders are pointing to



here might justify treating a one-on-one murder as graver than murder due to lax safety measures, but it doesn't justify treating one as a grave crime and the other as a mere regulatory (or very minor criminal) matter. After all, although it is worse to be injured with terror than without, it is still the injury that constitutes the worst part of violent crime. Given the choice, seriously injured victims of crime would surely rather have been terrorized and not injured than injured and not terrorized. If that is so, then the worst part of violent crime is still shared by the indirect harms that the Defenders would relegate to regulation.

3. There is also something to the Defenders' claim that indirect harms, such as ones that result from lax safety measures, are part of legitimate productive activities, whereas one-on-one crimes are not. No doubt we must tolerate the risks that are necessary ingredients of productive activity (unless those risks are so great as to outweigh the gains of the productive activity). But this doesn't imply we shouldn't identify the risks, or levels of danger, that are unnecessary and excessive and use the law to protect innocent people from them. And if those risks are great enough, the fact that they may further a productive or otherwise legitimate activity is no reason against making them crimes—if that's what's necessary to protect workers. A person can commit a crime to further an otherwise legitimate endeavor and it is still a crime. If, say, I threaten to assault my workers if they don't work faster, this doesn't make my act any less criminal. And, in general, if I do something that by itself ought to be a crime, the fact that I do it as a means to a legitimate aim doesn't change the fact that it ought to be a crime. If acts that intentionally endanger others ought to be crimes, then the fact that the acts are means to legitimate aims doesn't change the fact that they ought to be crimes.

4. Cases like the Manville asbestos case show that the Defenders overestimate the reality of the "free consent" with which workers take on the risks of their jobs. You can consent to a risk only if you know about it, and often the risks are concealed. Moreover, the Defenders overestimate generally the degree to which workers freely consent to the conditions of their jobs. Although no one is forced at gunpoint to accept a particular job, virtually everyone is forced by the requirements of necessity to take some job. At best, workers can choose among the dangers present at various work sites, but they cannot choose to face no danger at all. Moreover, workers can choose jobs only where there are openings, which means they cannot simply pick their place of employment at will. For nonwhites and women, the choices are even more narrowed by discriminatory hiring and long-standing occupational segregation (funneling women into secretarial, nursing, or teaching jobs and blacks into janitorial and other menial occupations), not to mention subtle and not so subtle practices that keep nonwhites and women from advancing within their occupations. Consequently, for all intents and purposes, most workers *must* face the dangers of the jobs that

are available to them. What's more, remember that while here we have been focusing on harms due to occupational hazards, much of the indirect harm that I shall document in what follows is done not to workers but to consumers (of food with dangerous chemicals) and citizens (breathing dangerous concentrations of pollutants).

Finally, recall that the basis of all the Defenders' objections is that the idea that one-on-one harms are more evil than indirect harms is part of our common moral beliefs, and that this makes it appropriate to treat the former with the criminal justice system and the latter with milder regulatory measures. Here I think the Defenders err by overlooking the role of legal institutions in shaping our ordinary moral beliefs. Many who defend the criminal justice system do so precisely because of its function in educating the public about the difference between right and wrong. The great historian of English law, Sir James Fitzjames Stephens, held that a

*... great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment wherever crime is proved.*<sup>36</sup>

One cannot simply appeal to ordinary moral beliefs to defend the criminal law because the criminal law has already had a hand in shaping ordinary moral beliefs. At least one observer has argued that making narcotics use a crime at the beginning of this century *caused* a change in the public's ordinary moral notions about drug addiction, which prior to that time had been viewed as a medical problem.<sup>37</sup> It is probably safe to say that in our own time, civil rights legislation has sharpened the public's moral condemnation of racial discrimination. Hence, we might speculate that if the criminal justice system began to prosecute—and if the media began to portray—those who inflict *indirect harm* as serious criminals, our ordinary moral notions would change on this point as well.

I think this disposes of the Defenders for the time being. We are left with the conclusion that there is no moral basis for treating *one-on-one harm* as criminal and *indirect harm* as merely a regulatory affair. What matters, then, is whether the purpose of the criminal justice system will be served by including, in the category of serious crime, actions that are predictably likely to produce serious harm, yet that are done in pursuit of otherwise legitimate goals and without the aim of harming anyone.

What is the purpose of the criminal justice system? No esoteric answer is required. Norval Morris and Gordon Hawkins write that "the prime function of the criminal law is to protect our persons and our property."<sup>38</sup> *The Challenge of Crime in a Free Society*, the report of the President's Commission on Law Enforcement and Administration of Justice, tells us that "any criminal justice

system is an apparatus society uses to enforce the standards of conduct necessary to protect individuals and the community."<sup>39</sup> Whatever else we think a criminal justice system should accomplish, I doubt if anyone would deny that its central purpose is to protect us against the most serious threats to our well-being. This purpose is seriously undermined by taking one-on-one harm as the model of crime. Excluding harm caused without the aim of harming someone in particular prevents the criminal justice system from protecting our persons and our property from dangers at least as great as those posed by one-on-one harm. This is so because, as I will show, a large number of actions that are not labeled *criminal* lead to loss of life, limb, and possessions on a scale comparable to those actions that are represented in the FBI Crime Index—and a crime by any other name still causes misery and suffering.

\* \* \*

In the remainder of this chapter, I identify some acts that are *crimes by any other name*—acts that cause harm and suffering comparable to that caused by acts called crimes. My purpose is to confirm the first hypothesis: that the definitions of crime in the criminal law do not reflect the only or the most dangerous behaviors in our society. To do this, we will need some measure of the harm and suffering caused by crimes with which we can compare the harm and suffering caused by noncrimes. Our measure need not be too refined because my point can be made if I can show that there are some acts that we do not treat as crimes but that cause harm *roughly comparable* to that caused by acts we do treat as crimes. For that, it is not necessary to compare the harm caused by noncriminal acts with the harm caused by *all* crimes. I need only show that the harm produced by some type of noncriminal act is comparable to the harm produced by *any* serious crime. Because the harms caused by noncriminal acts fall into the categories of death, bodily injury (including the disabling effects of disease), and property loss, I will compare the harms done by noncriminal acts with the injuries caused by the crimes of murder, aggravated assault, and theft.

According to the FBI's *Uniform Crime Reports*, in 1997 there were 18,209 murders and nonnegligent manslaughters and 1,022,492 aggravated assaults. "Murder and nonnegligent manslaughter" includes all "willful (nonnegligent) killing of one human being by another." "Aggravated assault" is defined as an "attack by one person on another for the purpose of inflicting severe or aggravated bodily injury."<sup>40</sup> Thus, as a measure of the physical harm done by crime in 1995, we can say that reported crimes lead to roughly 18,000 deaths and 1,000,000 instances of serious bodily injury short of death a year. As a measure of monetary loss due to property crime, we can use \$15 billion—the total estimated dollar losses due to property crime in 1997 according to the *UCR*.<sup>41</sup> Whatever the shortcomings of these reported crime statistics, they are the statistics on which public policy has traditionally been based. Thus, I will consider any actions that lead to loss of life, physical harm, and property loss comparable

to the figures in the *UCR* as actions that pose grave dangers to the community comparable to the threats posed by crimes. They are surely precisely the kinds of harmful actions from which a criminal justice system whose purpose is to protect our persons and property ought to protect us. *They are crimes by other names.*

## Work May Be Dangerous to Your Health

Since the publication of the *President's Report on Occupational Safety and Health*<sup>42</sup> in 1972, numerous studies have documented the astounding incidence of disease, injury, and death due to hazards in the workplace *and* the fact that much or most of this carnage is the consequence of the refusal of management to pay for safety measures and of government to enforce safety standards—and sometimes of willful defiance of existing law.<sup>43</sup>

In that 1972 report, the government estimated the number of job-related illnesses at 390,000 per year and the number of annual deaths from industrial disease at 100,000. In 1997, the Bureau of Labor Statistics (BLS) found "about 430,000 newly reported cases of occupational illnesses in private industry." Its latest count of fatalities from occupational diseases, in its *National Census of Fatal Occupational Injuries*, found 1,466 fatalities due to occupational diseases in 1993.<sup>44</sup> Before we celebrate what appears to be a dramatic drop in work-related mortality, note that the BLS *Census* states about its data on fatal occupational diseases that

*It is difficult to compile a complete count of fatal occupational diseases because the latency period for many of these conditions may span years. In addition, there is some difficulty in linking illnesses to work exposures. Data presented [here] are incomplete, therefore, and do not represent all deaths that result from occupational diseases.*<sup>45</sup>

Part of the difficulty is that there may be a substantial delay between contracting a fatal disease on the job and the appearance of symptoms, and from these to death. Moreover, the Occupational Safety and Health Administration (OSHA) relies on employer reporting for its figures, and there are many incentives for underreporting. Writing in the journal *Occupational Hazards*, Robert Reid states that:

*OSHA concedes that many factors—including insurance rates and supervisor evaluations based on safety performance—are incentives to underreport. And the agency acknowledges that recordkeeping violations have increased more than 27 percent since 1984, with most of the*

*violations recorded for not maintaining the injuries and illnesses log examined by compliance officers and used for BLS' annual survey.*<sup>46</sup>

A study by the National Institute for Occupational Safety and Health (NIOSH) concludes that "there may be several thousand more workplace deaths each year than employers report."<sup>47</sup>

For these reasons, we must supplement the BLS figures with other estimates. In 1982, then U.S. Secretary of Health and Human Services Richard Schweiker stated that "current estimates for overall workplace-associated cancer mortality vary within a range of five to fifteen percent."<sup>48</sup> With annual cancer deaths currently running at about 500,000, that translates into about 25,000 to 75,000 job-related cancer deaths per year. More recently, Edward Sondik, of the National Cancer Institute, stated that the best estimate of cancer deaths attributable to occupational exposure is 4 percent of the total, with the range of acceptable estimates running between 2 and 8 percent. That translates into a best estimate of 20,000 job-related cancer deaths a year, within a range of acceptable estimates between 10,000 and 40,000.<sup>49</sup>

Death from cancer is only part of the picture of death-dealing occupational disease. In testimony before the Senate Committee on Labor and Human Resources, Dr. Philip Landrigan, director of the Division of Environmental and Occupational Medicine at the Mount Sinai School of Medicine in New York City, stated that:

*Recent data indicate that occupationally related exposures are responsible each year in New York State for 5,000 to 7,000 deaths and for 35,000 new cases of illness (not including work-related injuries). These deaths due to occupational disease include 3,700 deaths from cancer....*

*Crude national estimates of the burden of occupational disease in the United States may be developed by multiplying the New York State data by a factor of 10. New York State contains slightly less than 10 percent of the nation's workforce, and it includes a broad mix of employment in the manufacturing, service and agricultural sectors. Thus, it may be calculated that occupational disease is responsible each year in the United States for 50,000 to 70,000 deaths, and for approximately 350,000 new cases of illness.*<sup>50</sup>

It is some confirmation of Dr. Landrigan's estimates that they imply work-related cancer deaths of approximately 37,000 a year—a figure that is toward the low end of the range in Secretary Schweiker's statement on this issue and toward the top of the range of acceptable estimates according to Sondik. Landrigan's estimates of deaths from occupational disease are also corroborated by a study reported by the National Safe Workplace Institute, which estimates that the number of occupational disease deaths is between 47,377 and 95,479. Mark

Cullen, director of the occupational medicine program at the Yale University School of Medicine, praised this study as "a very balanced, very comprehensive overview of occupational health." The study's figures are low compared with a 1985 report of the Office of Technology Assessment (OTA), which estimated 100,000 Americans die annually from work-related illness.<sup>51</sup> Even if we discount OSHA's 1972 estimate of 100,000 deaths a year due to occupational disease or OTA's 1985 estimate of the same number, we would surely be erring in the other direction to accept the BLS *Census* figure of 1,466. We can hardly be overestimating the actual toll if we take the conservative route and set it at 25,000 deaths a year resulting from occupational disease.

The 430,000 work-related illnesses reported by the BLS for 1997 are of varying severity. Because I want to compare these occupational harms with those resulting from aggravated assault, I shall stay on the conservative side here too, as with deaths from occupational diseases, and say that there are annually in the United States approximately 250,000 job-related serious illnesses. Taken together with 25,000 deaths from occupational diseases, how does this compare with the threat posed by crime?

Before jumping to any conclusions, note that the risk of occupational disease and death falls only on members of the labor force, whereas the risk of crime falls on the whole population, from infants to the elderly. Because the labor force is about half the total population (136,297,000 in 1997, of a total population of 267,901,000), to get a true picture of the *relative* threat posed by occupational diseases compared with that posed by crimes, we should *halve* the crime statistics when comparing them with the figures for industrial disease and death. Using the crime figures for 1997 (cited earlier in this chapter), we note that the *comparable* figures would be

	Occupational Disease	Crime (halved)
Death	25,000	9,500
Other physical harm	250,000	500,000

If it is argued that this paints an inaccurate picture because so many crimes go unreported, my answer is this: First of all, homicides are by far the most completely reported of crimes. For obvious reasons, the general underreporting of crimes is not equal among crimes. It is easier to avoid reporting a rape or a mugging than a corpse. Second, although not the best, aggravated assaults are among the better-reported crimes. Estimates from the Justice Department's *National Crime Victimization Survey* indicate that 59 percent of aggravated assaults were reported to the police in 1997, compared with 28 percent of thefts.<sup>52</sup> On the other hand, we should expect more—not less—underreporting of industrial than criminal victims, because diseases and deaths are likely to cost

firms money in the form of workdays lost and insurance premiums raised, occupational diseases are frequently first seen by company physicians who have every reason to diagnose complaints as either malingering or not job-related, and many occupationally caused diseases do not show symptoms or lead to death until after the employee has left the job.

*A survey conducted... by the University of Washington reported that one in four Americans currently suffers an occupational disease. The report also disclosed that only one of the 10 workers with an occupational disease had been included in either OSHA statistics or in the state's workmen's compensation records.<sup>53</sup>*

In sum, both occupational and criminal harms are underreported, though there is reason to believe that the underreporting is worse for occupational than for criminal harms. Finally, I have been extremely conservative in estimating occupational deaths and other harms. However one may quibble with figures presented here, I think it is fair to say that, if anything, they understate the extent of occupational harm compared with criminal harm.

Note further that the estimates in the last chart are *only* for occupational diseases and deaths from those diseases. They do not include death and disability from work-related injuries. Here, too, the statistics are gruesome. The BLS reported that, in 1997, there were 6,218 fatal work injuries, and "5.7 million ... injuries that resulted in either lost worktime, medical treatment other than first aid, loss of consciousness, restriction of work or motion, or transfer to another job."<sup>54</sup> To make sure that we are counting more serious harms, I will halve the latter figure and say that there were 3.35 million relatively serious work injuries. Added to the previous figures, this brings the number of occupation-related deaths to 31,218 a year and of other physical harms to 3,600,000. If, on the basis of these additional figures, we recalculated our table comparing occupational harms from both disease and accident with criminal harms, it would look like this:

	Occupational Disease and Accidents	Crime (halved)
Death	31,218	9,000
Other physical harm	3,600,000	500,000

Can there be any doubt that workers are more likely to stay alive and healthy in the face of the danger from the underworld than from the work-world? If any doubt lingers, consider this: Lest we falter in the struggle against crime, the FBI includes in its annual *Uniform Crime Reports* several "crime clocks," which illustrate graphically the extent of the criminal menace. For

1997, the crime clock shows a murder occurring every 29 minutes. If a similar clock were constructed for occupational deaths—using the conservative estimate of 31,218 cited above and remembering that this clock ticks for only that half of the population that is in the labor force—this clock would show an occupational death about every 17 minutes! In other words, in about the time it takes for two murders on the crime clock, more than three workers have died just from trying to make a living.

To say that some of these workers died from accidents due to their own carelessness is about as helpful as saying that some of those who died at the hands of murderers asked for it. It overlooks the fact that when workers are careless, it is not because they love to live dangerously. They have production quotas to meet, quotas that they themselves do not set. If quotas were set with an eye to keeping work at a safe pace rather than keeping the production-to-wages ratio as high as possible, it might be more reasonable to expect workers to take the time to be careful. Beyond this, we should bear in mind that the vast majority of occupational deaths result from disease, not accident, and disease is generally a function of conditions outside a worker's control. Examples of such conditions are the level of coal dust in the air ("260,000 miners receive benefits for [black lung] disease, and perhaps as many as 4,000 retired miners die from the illness or its complications each year"; about 10,000 currently working miners "have X-ray evidence of the beginnings of the crippling and often fatal disease"<sup>55</sup> or textile dust (some 100,000 American cotton textile workers presently suffer breathing impairments caused by acute byssinosis, or brown lung, and another 35,000 former mill workers are totally disabled with chronic brown lung)<sup>56</sup> or asbestos fibers (it has been estimated that, under the lenient asbestos standard promulgated by OSHA in 1972, anywhere from 18,400 and 598,000 deaths from lung cancer would result from exposure to asbestos),<sup>57</sup> or coal tars ("workers who had been employed five or more years in the coke ovens died of lung cancer at a rate three and a half times that for all steelworkers"; coke oven workers develop cancer of the scrotum at a rate five times that of the general population).<sup>58</sup> The Bureau of Labor Statistics reported that, in 1994, there were 332,000 cases of repetitive strain diseases, such as carpal tunnel syndrome.<sup>59</sup> Repetitive strain disease "is, by all accounts, the fastest-growing health hazard in the U.S. workplace, reportedly afflicting about 1,000 keyboard operators, assembly-line workers, meat processors, grocery check-out clerks, secretaries and other employees everyday.... OSHA officials argue that... carpal tunnel problems lead the list in average time lost from work (at a median of 30 days per case), well above amputations (24 days) and fractures (20)."<sup>60</sup>

To blame the workers for occupational disabilities and deaths is to ignore the history of governmental attempts to compel industrial firms to meet safety standards that would keep dangers (such as chemicals or fibers or dust particles in the air) that are outside the worker's control down to a safe level. This has been a continual struggle, with firms using everything from their own "independent"

research institutes to more direct and often questionable forms of political pressure to influence government in the direction of loose standards and lax enforcement. So far, industry has been winning because OSHA has been given neither the personnel nor the mandate to fulfill its purpose. It is so understaffed that, in 1973, when 1,500 federal sky marshals guarded the nation's airplanes from hijackers, only 500 OSHA inspectors toured the nation's workplaces. By 1980, OSHA employed 1,581 compliance safety and health officers, but this still enabled inspection of only roughly 2 percent of the 2.5 million establishments covered by OSHA. *The New York Times* reported that in 1987 the number of OSHA inspectors was down to 1,044. As might be expected, the agency now performs fewer inspections than it did earlier.<sup>61</sup> Don Lofgren, a former OSHA inspector, writes that

*... because of understaffing, OSHA attorneys are sometimes forced to enter into penalty-slashing settlements just to keep a burgeoning backlog of cases at bay. Perhaps more influential, OSHA managers and attorneys know that appeal judges often discount penalties regardless of the formal procedures OSHA used in calculating the fine.*<sup>62</sup>

According to a report issued by the AFL-CIO in 1992: "The median penalty paid by an employer during the years 1972-1990 following an incident resulting in death or serious injury of a worker was just \$480."<sup>63</sup> The same report claims that the federal government spends \$1.1 billion a year to protect fish and wildlife and only \$300 million a year to protect workers from health and safety hazards on the job.

An editorial in the January 1983 issue of the *American Journal of Public Health*, titled "Can Reagan Be Indicted for Betraying Public Health?" answers the question in its title affirmatively by listing the Reagan administration's attempts to cut back government support for public health programs. On the issue of occupational safety and health, the editorial states:

*The Occupational Safety and Health Administration (OSHA) has delayed the cotton and lead [safe exposure level] standards. It proposes to weaken the generic carcinogen policy, the labeling standard, the access to medical and exposure records standard. Mine fatalities are rising again, but the Mine Safety and Health Administration and OSHA enforcement have been cut back. Research on occupational safety and health has been slashed more than any other research program in the Department of Health and Human Services. The National Institute for Occupational Safety and Health funding in real dollars is lower in 1983 than at any time in the 12-year history of the Institute. Reporting and data requirements have been devastated.*<sup>64</sup>

The editorial ends by asking rhetorically, "How can anyone believe that the Reagan Administration wishes to prevent disease or promote health or preserve public health in America?"

And so it goes on.

Is a person who kills another in a bar brawl a greater threat to society than a business executive who refuses to cut into his profits to make his plant a safe place to work? By any measure of death and suffering the latter is by far a greater danger than the former. Because he wishes his workers no harm, because he is only indirectly responsible for death and disability while pursuing legitimate economic goals, his acts are not called "crimes." Once we free our imagination from the blinders of the one-on-one model of crime, can there be any doubt that the criminal justice system does *not* protect us from the gravest threats to life and limb? It seeks to protect us when danger comes from a young, lower-class male in the inner city. When a threat comes from an upper-class business executive in an office, the criminal justice system looks the other way. This is in the face of growing evidence that for every two American citizens murdered by thugs, more than three American workers are killed by the recklessness of their bosses and the indifference of their government.

## Health Care May Be Dangerous to Your Health

More than 25 years ago, when the annual number of willful homicides in the nation was about 10,000, the President's Commission on Law Enforcement and Administration of Justice reported that:

*A recent study of emergency medical care found the quality, numbers, and distribution of ambulances and other emergency services severely deficient, and estimated that as many as 20,000 Americans die unnecessarily each year as a result of improper emergency care. The means necessary for correcting this situation are very clear and would probably yield greater immediate return in reducing death than would expenditures for reducing the incidence of crimes of violence.*<sup>65</sup>

On July 15, 1975, Dr. Sidney Wolfe, of Ralph Nader's Public Interest Health Research Group, testified before the House Commerce Oversight and Investigations Subcommittee that there "were 3.2 million cases of unnecessary surgery performed each year in the United States." These unneeded operations, Wolfe added, "cost close to \$5 billion a year and kill as many as 16,000 Americans."<sup>66</sup> Wolfe's estimates of unnecessary surgery were based on studies comparing the operations performed and surgery recommended by doctors

who are paid for the operations they do with those performed and recommended by salaried doctors who receive no extra income from surgery.

The figure accepted by Dr. George A. Silver, professor of public health at the Yale University School of Medicine, is 15,000 deaths a year "attributable to unnecessary surgery."<sup>67</sup> Silver places the annual cost of excess surgery at \$4.8 billion.<sup>68</sup> In an article on an experimental program by Blue Cross and Blue Shield aimed at curbing unnecessary surgery, *Newsweek* reported that

... a Congressional committee earlier this year [1976] estimated that more than 2 million of the elective operations performed in 1974 were not only unnecessary—but also killed about 12,000 patients and cost nearly \$4 billion.<sup>69</sup>

Because the number of surgical operations performed in the United States rose from 16.7 million in 1975 to 23.2 million in 1997,<sup>70</sup> there is reason to believe that at least somewhere between (the congressional committee's estimate of) 12,000 and (Dr. Wolfe's estimate of) 16,000 people a year still die from unnecessary surgery. In 1997, the FBI reported that 1,963 murders were committed with a "cutting or stabbing instrument."<sup>71</sup> Obviously, the FBI does not include the scalpel as a cutting or stabbing instrument. If it did, it would have had to report that between 13,963 and 17,963 persons were killed by "cutting or stabbing" in 1997—depending on whether you take Congress's figure or Wolfe's. No matter how you slice it, the scalpel may be more dangerous than the switchblade.

And this is only a fraction of the problem. Data from the Harvard Medical Practice Study (based on over 30,000 records from New York State hospitals in 1984 and extrapolated to the American population as a whole) indicate that more than 1.3 million Americans are injured by medical treatment, and "that each year 150,000 people die from, rather than in spite of, their medical treatment."<sup>72</sup> One of the authors of the study, Dr. Lucian Leape, a surgeon and lecturer at the Harvard School of Public Health, suggests that one-quarter of these deaths are due to negligence, and two-thirds are preventable. A report issued on November 29, 1999, by the National Academy of Sciences's Institute of Medicine stated that about "98,000 Americans die unnecessarily every year from medical mistakes made by physicians, pharmacists and other health care professionals," that these "deaths, along with serious nonfatal reactions to other medical errors, cost the nation as much as \$29 billion a year." The report goes to predict that, if a "centralized system for keeping tabs on medical errors" were put in place, "the number of deaths from medical mistakes could be cut in half within five years."<sup>73</sup>

While it is at it, the FBI should probably add the hypodermic needle and the prescription drug to the list of potential murder weapons. Silver points out that these are also death-dealing instruments:

*Of the 6 billion doses of antibiotic medicines administered each year by injection or prescription, it is estimated that 22 percent are unnecessary. Of the doses given, 10,000 result in fatal or near-fatal reactions. Somewhere between 2,000 and 10,000 deaths probably would not have occurred if the drugs, meant for the patient's benefit, had not been given.*<sup>74</sup>

These estimates are supported by the Harvard Medical Practice Study. Its authors write that, of the 1.3 million medical injuries, 19 percent (247,000) were related to medications, and 14 percent of these (34,580) resulted in permanent injury or death.<sup>75</sup> Another report estimates that, in part due to faulty warning labels on prescription drugs, "100,000 hospital patients die [annually] of adverse reactions to medication and 2.2 million are injured."<sup>76</sup>

In fact, if someone had the temerity to publish a *Uniform Crime Reports* that really portrayed the way Americans are murdered, the FBI's statistics on the *type* of weapon used in murder would have to be changed for 1997, from those shown in Table 2-1 to something like those shown in Table 2-2.

The figures shown in Table 2-2 would give American citizens a much more honest picture of what threatens them—although remember how conservative the estimates of noncriminal harm are. Nonetheless, we are not likely to see such a table published by the criminal justice system, perhaps because it would also give American citizens a more honest picture of *who* threatens them.

We should not leave this topic without noting that, aside from the other losses it imposes, unnecessary surgery was estimated to have cost between \$4 billion and \$5 billion in 1974. The price of medical care roughly quadrupled between 1974 and 1994. Thus, assuming that the same number of unneeded operations were performed in 1994, the cost of unnecessary surgery would be between \$16 and \$20 billion. To this we should add the unnecessary 22 percent of the 6 billion doses of medication administered. Even at an extremely conservative estimate of \$3 a dose, this adds about \$4 billion. In short, assuming that

**TABLE 2-1 How Americans Are Murdered**

Total	Firearms	Knife or Other Cutting Instrument	Other Weapon: Club, Arson, Poison, Strangulation, etc.	Personal Weapon: Hands, Fists, etc.
15,489 <sup>a</sup>	10,369	1,963	2,001	956

<sup>a</sup>Note that this figure diverges somewhat from the number of murders and nonnegligent manslaughters used elsewhere in the *UCR—1997*, due to the fact that the FBI lacks data on the weapons used in all reported murders.

Source: FBI *Uniform Crime Reports, 1997*, p. 22, Table 2.13.

**TABLE 2-2 How Americans Are Really Murdered**

Total	Occupational Hazard and Disease	Knife or Other Cutting Instrument, including Scalpel	Firearms	Other Weapon: Club, Poison, Hypodermic Prescription Drug, etc.	Personal Weapon: Hands, Fists, etc.
60,507	31,218	13,963 <sup>a</sup>	10,369	4,001 <sup>a</sup>	956

<sup>a</sup>These figures represent the relevant figures in Table 2-1 plus the most conservative figures for the relevant categories discussed in the text.

earlier trends have continued, there is reason to believe that unnecessary surgery and medication cost the public between \$20 and \$24 billion annually—far outstripping the \$15.1 billion taken by thieves that concern the FBI.<sup>77</sup> This gives us yet another way in which we are robbed of more money by practices that are not treated as criminal than by practices that are.

## Waging Chemical Warfare against America

One in four Americans can expect to contract cancer during his or her lifetime. The American Cancer Society estimated that 420,000 Americans would die of cancer in 1981. The National Cancer Institute's estimate for 1993 was 526,000 deaths from cancer. "A 1978 report issued by the President's Council on Environmental Quality (CEQ) unequivocally states that 'most researchers agree that 70 to 90 percent of cancers are caused by environmental influences and are hence theoretically preventable.'"<sup>78</sup> This means that a concerted national effort could result in saving 350,000 or more lives a year and reducing each individual's chances of getting cancer in his or her lifetime from 1 in 4 to 1 in 12 or fewer. If you think this would require a massive effort in terms of money and personnel, you are right. How much of an effort, though, would the nation make to stop a foreign invader who was killing a thousand people a day and bent on capturing one-quarter of the present population?

In the face of this "invasion" that is already under way, the U.S. government allocated \$1.9 billion to the National Cancer Institute (NCI) for fiscal year 1992, and NCI allocated \$219 million to the study of the physical and chemical (i.e., environmental) causes of cancer.<sup>79</sup> Compare this with the (at least) \$45 billion spent to fight the Persian Gulf war.<sup>80</sup> The simple truth is that the government that strove so mightily to protect the borders of a small, un-

democratic nation 7,000 miles away is doing next to nothing to protect us against the chemical war in our midst. This war is being waged against us on three fronts:

- Pollution
- Cigarette smoking
- Food additives

Not only are we losing on all three fronts, it looks as if we do not even have the will to fight. In April 1976, Dr. Umberto Saffioti, director of the National Cancer Institute's (NCI) program of research into the chemical causes of cancer, resigned to protest three years' lack of support by NCI leaders.<sup>81</sup> In a letter stating his reasons for stepping down, he pointed out that there are "people who are now exposed to toxic agents and who are not protected because the necessary support was not provided in time."<sup>82</sup> Earlier the same year, three lawyers for the Environmental Protection Agency resigned "because of the continued failure of the EPA to take effective action, to regulate possible cancer-causing and other toxic chemicals in the air, food supply, drinking water and waterways." In a joint statement, the attorneys said:

*It is clear from recent actions that the agency intends to refrain from vigorous enforcement of available toxic-substances controls and to trench from the few legal precedents which it has set for evaluating the cancer hazards posed by the chemicals.<sup>83</sup>*

More recent observers believe that the

*EPA is locked into a "pathological cycle of regulatory failure." Others assert that, although making limited progress, the EPA is so crippled by institutional and policy deficiencies that major reform is imperative. Almost nobody believes EPA has been a substantial success.<sup>84</sup>*

The evidence linking *air pollution* and cancer, as well as other serious and often fatal diseases, has been accumulating rapidly in recent years. In 1993, the *Journal of the American Medical Association* reported on research that found "'robust' associations between premature mortality and air pollution levels."<sup>85</sup> They estimate that pollutants cause about 2 percent of all cancer deaths (at least 10,000 a year).<sup>86</sup>

During 1975, the epidemiological branch of the National Cancer Institute did a massive county-by-county analysis of cancer in the United States, mapping the "cancer hotspots" in the nation. The result was summed up by Dr. Glenn Paulson, assistant commissioner of science in the New Jersey Department of Environmental Protection: "If you know where the chemical industry

is, you know where the cancer hotspots are.”<sup>87</sup> What distinguishes these findings from the material on occupational hazards discussed above is that NCI investigators found higher death rates for *all* those living in the cancer hotspots—not just the workers in the offending plants.

For instance, NCI researchers found that Deer Lodge County in Montana ranked ninth out of 3,021 U.S. counties in lung cancer death rates. Deer Lodge County is the home of the Anaconda Company's giant copper-smelting works. The county's death rate was twice the rate expected for a rural county. A study by the Montana Department of Health and Environmental Sciences showed that the county's death rates for emphysema, asthma, and bronchitis are also well above the national average. Another study by two NCI researchers found that in *all* U.S. counties with smelters, the incidence of lung cancer is above the national average. “The researchers found high lung cancer death rates not only in men—who are often exposed to arsenic on their jobs inside smelters—but also among women, who generally never went inside smelters and were not previously believed to have been exposed to arsenic.” Explanation: “neighborhood air pollution from industrial sources of inorganic arsenic.”<sup>88</sup>

New Jersey, however, took the prize for having the highest cancer death rate in the nation. NCI investigators found that “19 of New Jersey's 21 counties rank in the top 10 percent of all counties in the nation for cancer death rates.” Salem County, home of E. I. Du Pont de Nemours and Company's Chambers Works, which has been manufacturing chemicals since 1919, “has the highest bladder cancer death rate in the nation—8.7 deaths per 100,000 persons.”<sup>89</sup>

In 1970, Lester B. Lave and Eugene P. Seskin reviewed more than 50 scientific studies of the relationship between air pollution and morbidity and mortality rates for lung cancer, non-respiratory-tract cancers, cardiovascular disease, bronchitis, and other respiratory diseases. They found in every instance a *positive* quantifiable relationship. Using sophisticated statistical techniques, they concluded that a 10 percent reduction in air pollution could be expected to “decrease the total death rate by 0.5 percent.”<sup>90</sup> At current death rates, that would save more than 10,000 lives.

A 1996 study by the Natural Resources Defense Council (NRDC) concludes that:

*Every year, some 64,000 people may die prematurely from cardiopulmonary causes linked to particulate air pollution.... Tens of thousands of these deaths could be averted each year if the Environmental Protection Agency set stringent health standards for fine-particle pollution.*

*In the most polluted cities, lives are shortened by an average of one to two years. Los Angeles tops the list with an estimated 5,873 early deaths, followed by New York (4,024), Chicago (3,479), Philadelphia (2,599) and Detroit (2,123).<sup>91</sup>*

Earlier, the NRDC sued the EPA for its footdragging in implementation of the Clean Air Act, charging that “One hundred million people live in areas of unhealthy air.”<sup>92</sup> This chemical war is not limited to the air. The National Cancer Institute has identified as carcinogens or suspected carcinogens 23 of the chemicals commonly found in our drinking water.<sup>93</sup> Moreover, according to one observer, we are now facing a “new plague—toxic exposure.” Of the extent of contamination, he says:

*... this country generates between 255 million and 275 million metric tons of hazardous waste annually, of which as much as 90 percent is improperly disposed of.... The Office of Technology Assessment estimates that there are some 600,000 contaminated sites in the country, of which 888 sites have been designated or proposed by the Environmental Protection Agency for priority cleanup under the Superfund program.<sup>94</sup>*

New Jersey, by the way, has 109 toxic waste sites bad enough to be on the Superfund cleanup list, which makes New Jersey the number-one cleanup priority.<sup>95</sup> This may be another reason why New Jersey leads the nation in the cancer death rate. Studies have borne out the correlation between nearness to toxic wastes and above-average cancer mortality rates, as well as the positive correlation between residential poverty and nearness to toxic wastes.<sup>96</sup> Other studies indicate that race is an even more important determinant of the location of toxic waste dumps. Writes Robert Bullard:

*Toxic time bombs are not randomly scattered across the urban landscape.... The Commission for Racial Justice's landmark study, Toxic Wastes and Race in the United States, found race to be the most important factor (i.e., more important than income, home ownership rate, and property values) in the location of abandoned toxic waste sites.... [T]hree out of five African Americans live in communities with abandoned toxic waste sites.<sup>97</sup>*

As with OSHA, the Reagan administration instituted a general slowing down of enforcement of EPA regulations. Reagan tried to cut the EPA's enforcement budget by 45 percent in his first two years. By 1983, the EPA's regional offices were staffed at levels substantially lower than needed to enforce the law effectively, according to the agency's own studies. The president also signaled his tolerant attitude toward environmental hazards in his appointments to top-level posts at the EPA of such people as Anne Burford, “who fiercely opposed any legislation regulating hazardous-waste disposal.”<sup>98</sup> President Bush followed suit. The EPA's Research and Development staff, whose



work provides the scientific basis for such regulations, was reduced by nearly 25 percent between 1981 and 1992.<sup>99</sup>

So the chemical war goes on. No one can deny that we know the enemy. No one can deny that we know the toll it is taking. Indeed, we can compute the number of deaths that result from every day that we refuse to mount an offensive. Yet we still refuse. Thus, for the time being the only advice we can offer someone who values his or her life is: If you must breathe our air, don't inhale.

The evidence linking *cigarette smoking* and cancer is overwhelming and need not be repeated here. The Centers for Disease Control estimates that cigarettes cause 87 percent of lung cancers—approximately 146,000 in 1992.<sup>100</sup> Tobacco continues to kill an estimated 400,000 Americans a year and cost taxpayers \$18 billion annually.<sup>101</sup> Cigarettes are widely estimated to cause 30 percent of all cancer deaths.<sup>102</sup> Cigarettes are also blamed for other lung diseases such as emphysema, they play a substantial role in heart disease, and their addictive nature is now well established. According to a report from the American Cancer Society, "Tobacco use... drains the US economy of more than \$100 billion in health care costs and lost productivity."<sup>103</sup>

This is enough to expose the hypocrisy of running a full-scale war against heroin (which produces no degenerative disease) while allowing cigarette sales and advertising to flourish. It also should be enough to underscore the point that once again there are threats to our lives much greater than criminal homicide. The legal order does not protect us against them. Indeed, not only does our government fail to protect us against this threat, it promotes it! The government provided a price-support program for the tobacco industry (making up the difference when market price fell below a target price) from 1933 to 1982, and in 1986 it wrote off \$1.1 billion in loans that it had made to tobacco farmers.<sup>104</sup> Moreover, the Reagan administration first supported and then, under intense lobbying pressure from the tobacco industry, withdrew its support for more and stronger warnings on cigarettes.<sup>105</sup> The former president is not the only offender here. The U.S. Congress has turned down more than 1,000 proposed tobacco control bills since 1964, the year of the first Surgeon General's Report on the dangers of tobacco. This may be related to the fact that members of Congress have accepted some \$9.3 million in campaign contributions from the tobacco companies in the past three elections.<sup>106</sup> And, in the face of movements within the Food and Drug Administration to declare nicotine an addictive drug, the tobacco industry poured "more than \$1.5 million into national Republican Party treasuries in the first half of 1995, five times as much as in the same period" in 1994.<sup>107</sup> And this generosity continues. Common Cause reports that tobacco companies gave over \$3,000,000 in political contributions during 1997, and a total of nearly \$30,000,000 since 1987.<sup>108</sup>

If you think that tobacco harms only people who knowingly decide to take the risk, consider the following. In 1995, the *Journal of the American Medical Association* devoted a special issue to the so-called "Brown and Williamson

Documents," several thousand pages of internal documents from the Brown and Williamson Tobacco Corporation and BAT Industries (formerly British American Tobacco Company). Brown and Williamson (B&W) is the third largest cigarette maker in the United States. It is a wholly owned subsidiary of BAT, the world's second largest private producer of cigarettes. An editorial in this issue states that "[t]he documents show... that executives at B&W knew early on that tobacco use was harmful and that nicotine was addictive..., that the industry decided to conceal the truth from the public..., that despite their knowledge to the contrary, the industry's public position was (and continues to be) that the link between smoking and ill health was not proven..., and that nicotine was not addictive." The editorial concludes that "the evidence is unequivocal—the U.S. public has been duped by the tobacco industry."<sup>109</sup>

Moreover, the cigarette industry intentionally targets young people—who are not always capable of assessing the consequences of their choices—with its ads, and it is successful. Some 2.6 million youngsters between the ages of 12 and 18 are smokers.<sup>110</sup>

In addition, the Environmental Protection Agency has released data on the dangers of "second-hand" tobacco smoke (which nonsmokers breathe when smoking is going on around them). They report that each year second-hand smoke causes 3,000 lung-cancer deaths, contributes to 150,000 to 300,000 respiratory infections in babies, exacerbates the asthmatic symptoms of 400,000 to 1,000,000 children with the disease, and triggers 8,000 to 26,000 new cases of asthma in children who don't yet have the disease.<sup>111</sup> A 1993 issue of the *Journal of the American Medical Association* reported that tobacco contributes to 10 percent of infant deaths.<sup>112</sup> And Dr. Stanton Glantz, author of *The Cigarette Papers*, says that tobacco kills 53,000 nonsmokers a year!<sup>113</sup>

The average American consumes *one pound* of chemical food additives per year.<sup>114</sup> Speaking on the floor of the U.S. Senate in 1972, Sen. Gaylord Nelson said:

*People are finally waking up to the fact that the average American daily diet is substantially adulterated with unnecessary and poisonous chemicals and frequently filled with neutral, nonnutritious substances. We are being chemically medicated against our will and cheated of food value by low nutrition foods.*<sup>115</sup>

A hard look at the chemicals we eat and at the federal agency empowered to protect us against eating dangerous chemicals reveals the recklessness with which we are being "medicated against our will." Beatrice Hunter has taken such a hard look and reports her findings in a book aptly titled *The Mirage of Safety*, a catalog of the possible dangers that lurk in the foods we eat. More than this, however, it is a description of how the Food and Drug Administration, through a combination of lax enforcement and uncritical acceptance of the

results of the food industry's own "scientific" research, has allowed a situation to exist in which the American public is the real guinea pig for nearly 3,000 food additives. As a result, we are subjected to chemicals strongly suspected of producing cancer,<sup>116</sup> gallbladder ailments,<sup>117</sup> hyperkinesis in children,<sup>118</sup> and allergies<sup>119</sup>; to others that inhibit "mammalian cell growth" and "may adversely affect the rate of DNA, RNA, and protein synthesis"<sup>120</sup>; and to still others that are capable of crossing the placental barrier between mother and fetus and are suspected causes of birth defects and congenital diseases.<sup>121</sup>

The food additives are, of course, only some of the dangerous chemicals that we eat. During the 1980s, American farmers normally used about 800 million pounds of the active ingredients in pesticides per year.<sup>122</sup> In 1993, *The New York Times* reported that farmers now use 1 billion pounds of chemicals on crops each year.<sup>123</sup> Dr. Landrigan of the Mount Sinai School of Medicine, writing in a 1992 issue of the *American Journal of Public Health*, points to

... recent data from the US Environmental Protection Agency (EPA) showing that infants and young children are permitted to have dietary exposures to potentially carcinogenic and neurotoxic pesticides that exceed published standards by a factor of more than 1000.<sup>124</sup>

Landrigan also estimates that between 3 and 4 million American preschool children have dangerously elevated blood lead levels, which could result in long-term neuropsychological impairment.

To call government and industry practices reckless is mild in view of the fact that, in spite of the growth in knowledge about the prevention and cure of cancer, "between 1950 and 1988, for U.S. Whites, age-adjusted incidence of cancer rose by 43.5 percent."<sup>125</sup> And according "to the March of Dimes Birth Defects Foundation, each year some 233,000 infants are born with birth defects."<sup>126</sup>

Based on the knowledge we have, there can be no doubt that air pollution, tobacco, and food additives amount to a chemical war that makes the crime wave look like a football scrimmage. Even with the most conservative estimates, it is clear that *the death toll in this war is far higher than the number of people killed by criminal homicide!*

## Poverty Kills

We are long past the day when we could believe that poverty was caused by forces outside human control. Poverty is "caused" by lack of money, which means that once a society reaches a level of prosperity at which many enjoy a relatively high standard of living, then poverty can be eliminated or at least reduced significantly by transferring some of what the "haves" have to the "have-nots." In other words, regardless of what caused poverty in the past, what

causes it to continue in the present is the refusal of those who have more to share with those who have less. Now you may think these remarks trite or naive. They are not offered as an argument for redistribution of income, although I think such a redistribution is long overdue. These remarks are presented to make a much simpler point, which is that poverty exists in a wealthy society like ours *because we allow it to exist*. Therefore, we<sup>127</sup> share responsibility for poverty and for its consequences.

The poverty for which we are responsible "remains," in the words of *Business Week*, "stubbornly high." Moreover, it has particularly nasty features. For example, it affects blacks and children at a rate higher than the national average. Whereas 11 percent of white Americans are below the poverty level, 28 percent of black Americans are. Among children, about 16 percent of white children live in poverty, while nearly 40 percent—two of every five—of black children do.<sup>128</sup> A study published by the Urban Institute ranked the United States highest in child poverty among eight industrialized nations studied. The other nations were Switzerland, Sweden, Norway, West Germany, Canada, the United Kingdom, and Australia. Moreover, the National Law Center on Homelessness and Poverty estimates that there were over 2 million homeless American men, women, and children in 1995. Of these, some 25 to 40 percent work, which means that at least half a million working Americans cannot afford shelter. A quarter of the homeless are children, and about 500,000 children are exposed to interruptions in, or lack of, education each year.<sup>129</sup>

We are prone to think that the consequences of poverty are fairly straightforward: less money means fewer things. So poor people have fewer clothes or cars or appliances, go to the theater less often, and live in smaller homes with less or cheaper furniture. This is true and sad, but perhaps not intolerable. In addition, however, one of the things poor people have less of is *good health*. Less money means less nutritious food, less heat in winter, less fresh air in summer, less distance from other sick people or from unhealthy work or dumping sites, less knowledge about illness or medicine, fewer doctor visits, fewer dental visits, less preventive health care, and (in the United States at least) less first-quality medical attention when all these other deprivations take their toll and a poor person finds himself or herself seriously ill. The result is that the poor suffer more from poor health and die earlier than do those who are well off. Poverty robs them of their days while they are alive and kills them before their time. A prosperous society that allows poverty in its midst is a party to murder.

A review of more than 30 historical and contemporary studies of the relationship of economic class and life expectancy affirms the obvious conclusion that "class influences one's chances of staying alive. Almost without exception, the evidence shows that classes differ on mortality rates."<sup>130</sup> An article in the November 10, 1993, issue of the *Journal of the American Medical Association* confirms the existence of this cost of poverty:

*People who are poor have higher mortality rates for heart disease, diabetes mellitus, high blood pressure, lung cancer, neural tube defects, injuries, and low birth weight, as well as lower survival rates from breast cancer and heart attacks.*<sup>131</sup>

A July 30, 1998, news release from the U.S. Department of Health and Human Services confirms the continued "strong relationship between socioeconomic status and health in the United States for every race and ethnic group studied."<sup>132</sup>

Interestingly, the poor have higher mortality rates even in countries such as Canada and Great Britain, which guarantee access to medical care. The difference can be attributed in large measure to the other disabilities of poverty, such as lower education levels and less healthy work and residential environments. A study of lower respiratory illness in infants found its incidence correlated directly to socioeconomic status, with lower-socioeconomic-status infants showing greater incidence than middle-status infants and more than twice that of higher-status infants. A large portion of the difference was attributed to the unhealthy environmental conditions in which poor infants grow up.<sup>133</sup>

Another indication of the correlation between low income and poor health is found in statistics on the number of days of reduced activity due to illness or injury suffered by members of different income groups. In 1995, persons from families earning less than \$10,000 a year suffered an average of 30 such days, persons from families earning from \$10,000 to \$19,999 suffered 21 days, persons from families earning between \$20,000 and \$34,999 suffered 15 days, and persons from families earning \$35,000 and above suffered 10.6 days of reduced activity.<sup>134</sup>

Here, too, things have gotten worse rather than better recently. The number of poor Americans continues to grow each year. By 1997 it was 34.3 million, up from 30.1 million in 1990 and from 25.2 million in 1980.<sup>135</sup> According to a report in *The Wall Street Journal*, the number of Americans without health insurance grew during the Reagan-Bush years to an estimated 37 million. As of 1997, the number had reached 41.7 million.<sup>136</sup> The percentage of the poor covered by Medicaid has gone from 65 percent to less than 40 percent. Hardest hit have been poor women and their children, many of whom have been removed from Medicaid coverage because of income eligibility rules that have not kept up with inflation. "In 1986, the average state income cutoff for Medicaid was 48 percent of the federal poverty level, compared to 71 percent in 1975."<sup>137</sup> Estimates indicate that only one-third of those who lose Medicaid benefits get private insurance; the rest do without. Moreover, the percent of nonelderly Americans doing without has grown in the past decade: It was 14.8 percent of the population in 1987, 17.3 percent in 1993, and 18.3 percent in 1997. Describing the consequences of this, Dr. Robert Lebow, medical director of a community clinic in Idaho, says: "We're talking about dead mothers because they couldn't afford prenatal care, or diabetes wildly out of control, for lack of simple medications."<sup>138</sup>

A comparison of the health and mortality of blacks and whites in America yields further insight into the relationship of health and mortality to economic class. In 1992, one of every three blacks lived below the poverty line, as compared with one of every nine whites. In 1992, black infant mortality (during the first year of life) was 16.8 per 1,000 live births, compared with 6.9 for whites.<sup>139</sup> In short, black mothers lost their babies within the first year of life more than twice as often as white mothers did. In the face of this disparity (which has been around for years and recently has even grown), the Reagan administration reduced funding for maternal and child health programs by more than 25 percent and attempted to reduce support for immunization programs for American children.<sup>140</sup> In 1987, only 48 percent of American one-year-olds had received the standard immunizations—every Western European nation was at least ten percentage points higher, with France and the United Kingdom in the 80s.<sup>141</sup>

Numerous studies have suggested that allocation of health services is subject as well to racial bias. A 1992 study of patients under Medicare said that older whites are 3.5 times more likely than older blacks to get bypass surgery for blocked arteries. Black kidney patients are 45 percent less likely than whites to get transplants, according to a 1991 New York State Health Department study. There is evidence also of discrimination against Hispanic patients and women.<sup>142</sup> A study of surgery rates in Maryland hospitals by race and income of patients asserts: "The more discretionary the procedure, the lower is the relative incidence among Blacks."<sup>143</sup> Other studies confirm that health-care delivery in the United States remains segregated by race and class.<sup>144</sup>

Cancer survival statistics show a similar picture. Between 1983 and 1990, 40.4 percent of blacks diagnosed with cancer were still alive five years after the diagnosis, compared with 55.5 percent of whites. This disparity has been noted since at least the early 1970s.<sup>145</sup> One important cause of this difference is that "white patients tended to have higher percentages of cancers diagnosed while localized,"<sup>146</sup> that is, earlier in their development. This means, at a minimum, that at least some of the difference turns out to be due to such things as better access to medical care, higher levels of education about the early warning signs of cancer, and so on, all of which correlate strongly with higher income levels. Data reported in the journal *Science* suggest that "blacks get more cancer not because they're black, but because they're poor."<sup>147</sup> A study of the stage at which women had breast cancer diagnosed found that white and black women living in areas characterized by lower average income and educational attainment were diagnosed later than those in areas marked by higher income and educational attainment. Within the same areas, black women were diagnosed later than whites, except in the areas of highest income and education, where the black disadvantage disappeared.<sup>148</sup> "And while black women show a lower incidence of breast cancer than white women, they nevertheless die from it more often."<sup>149</sup>

Life expectancy figures paint the most tragic picture of all. In 1993, life expectancy among blacks was 71.5 years, whereas among whites it was 76.3

years. And projections for the year 2000 suggest a reduction in black life expectancy to 69.7 years and an increase in white life expectancy to 77.4 years.<sup>150</sup> That this difference cannot be attributed wholly to genetic factors is borne out by a “study of the relative contribution of various risk factors and income levels to mortality among blacks” reported recently in the *Journal of the American Medical Association*. The study “estimated that 38 percent of excess [of black over white] mortality could be accounted for by family income and 31 percent by risk factors (smoking status, blood pressure, cholesterol level, body mass index, alcohol use, and diabetes), with 31 percent remaining unexplained.”<sup>151</sup> A stronger conclusion is reached by a study reported in a 1992 issue of the *American Journal of Public Health*, whose authors concluded: “In no instance were Black-White differences in all-cause or coronary mortality significantly different when socioeconomic status was controlled.”<sup>152</sup>

In short, *poverty hurts, injures, and kills—just like crime*. A society that could remedy its poverty but does not is an accomplice in crime.

## Summary

Once again, our investigations lead to the same result. The criminal justice system does not protect us against the gravest threats to life, limb, or possessions. Its definitions of crime are not simply a reflection of the objective dangers that threaten us. The workplace, the medical profession, the air we breathe, and the poverty we refuse to rectify lead to far more human suffering, far more death and disability, and take far more dollars from our pockets than the murders, aggravated assaults, and thefts reported annually by the FBI. What is more, this human suffering is preventable. A government really intent on protecting our well-being could enforce work safety regulations, police the medical profession, require that clean-air standards be met, and funnel sufficient money to the poor to alleviate the major disabilities of poverty—but it does not. Instead we hear a lot of cant about law and order and a lot of rant about crime in the streets. It is as if our leaders were not only refusing to protect us from the major threats to our well-being but trying to cover up this refusal by diverting our attention to crime—as if this were the only real threat.

As we have seen, the criminal justice system is a carnival mirror that presents a distorted image of what threatens us. The distortions do not end with the definitions of crime. As we will see in what follows, new distortions enter at every level of the system, so that in the end, when we look in our prisons to see who really threatens us, all we see are poor people. By that time, virtually all the well-to-do people who endanger us have been discreetly weeded out of the system. As we watch this process unfold in the next chapter, we should bear in mind the conclusion of the present chapter: All the mechanisms by which the criminal justice system comes down more frequently and more harshly on

the poor criminal than on the well-off criminal take place *after* most of the dangerous acts of the well-to-do have been excluded from the definition of crime itself. The bias against the poor within the criminal justice system is all the more striking when we recognize that the door to that system is shaped in a way that excludes in advance the most dangerous acts of the well-to-do. Demonstrating this has been the purpose of the present chapter.

## Study Questions

1. What should be our definition of the term *crime*? Why does it matter what we call things? Should there be an overlap between the acts we label crimes and the acts we think are morally wrong?
2. Quickly—without thinking about it—picture to yourself a criminal. Describe what you see. Where did this picture come from? Are there people in our society who pose a greater danger to you than the individual you pictured? Why, or why not?
3. What is meant by likening the criminal justice system to a “carnival mirror”?
4. Do you think a business executive who refuses to invest in safety precautions with the result that several workers die is morally better than, equal to, or worse than a mugger who kills his victim after robbing him? What if the executive knowingly violated a safety regulation? What if the mugger was high on drugs? Explain your response.
5. What is meant by speaking of criminal justice as “creative art”? How does the view presented here differ from that of Quinney?
6. Give examples of social practices that are more dangerous to your well-being than common crime. How should these practices be dealt with?

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## Notes

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2. "Mass Murder on the 5:33," *The New York Times*, December 10, 1993, p. A34.
3. Gerald R. Ford, "To Insure Domestic Tranquility: Mandatory Sentence for Convicted Felons," speech delivered at the Yale Law School Sesquicentennial Convocation, New Haven, Conn., April 25, 1975, in *Vital Speeches of the Day* 41, no. 15 (May 15, 1975), p. 451.
4. "Arrest Data Reveal Profile of Suspect," *The Washington Post*, September 16, 1975, p. C1.
5. Ibid.; see also Maryland-National Capital Parks and Planning Commission, *Crime Analysis 1975: Prince George's County* (August 1975), p. 86.
6. *UCR—1974*, p. 186.
7. Maryland-National Capital Parks and Planning Commission, *Crime Analysis 1975*, p. 3.
8. See *UCR—1974*, p. 190.
9. "Arrest Data Reveal Profile of Suspect," p. C1; and Maryland-National Capital Parks and Planning Commission, *Crime Analysis 1975*, p. 86.
10. *UCR—1974*, p. 190.
11. Anthony Bouza, *How to Stop Crime* (New York: Plenum, 1993), p. 57.
12. Quoted in George Will, "A Measure of Morality," *The Washington Post*, December 16, 1993, p. A25.
13. Speech to International Association of Chiefs of Police, September 28, 1981.
14. *UCR—1998*, pp. 209, 210, 222.
15. BJS, *Criminal Offender Statistics*, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last revised December 5, 1999); and BJS, *Profile of Jail Inmates 1996* (April 1998), NCJ164620.
16. *Challenge*, p. 44; see also p. 160.
17. Ibid.
18. "Mass news representations in the 'information age' have become the most significant communication by which the average person comes to know the world outside his or her immediate experience" (Gregg Barak, *Media, Process and the Social Construction of Crime* [New York: Garland, 1994], p. 3).
19. This transformation has been noted by Erving Goffman in his sensitive description of total institutions, *Asylums* (Garden City, N.Y.: Doubleday, 1961):

*The interpretative scheme of the total institution automatically begins to operate as soon as the inmate enters, the staff having the notion that entrance is prima facie evidence that one must be the kind of person the institution was set up to handle. A man in a political prison must be traitorous; a man in a prison must be a law-breaker; a man in a mental*

*hospital must be sick. If not traitorous, criminal, or sick, why else would he be here?* [p. 84].

- So, too, a person who calls forth the society's most drastic weapons of defense must pose the gravest danger to its well-being. Why else the reaction? The point is put well and tersely by D. Chapman: "There is a circular pattern in thinking: we are hostile to wicked people, wicked people are punished, punished people are wicked, we are hostile to punished people because they are wicked" ("The Stereotype of the Criminal and the Social Consequences," *International Journal of Criminology and Penology* 1 [1973] p. 16).
20. Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown, 1970). In his later work, for example, *Critique of Legal Order: Crime Control in Capitalist Society* (Boston: Little, Brown, 1973), and *Class, State & Crime* (New York: McKay, 1977), Quinney moves clearly into a Marxist problematic and his conclusions dovetail with many in this book. In my own view, however, Quinney has not yet accomplished a satisfactory synthesis between the "social reality" theory and his later Marxism. Elsewhere, I have examined Quinney's theory from the standpoint of moral philosophy. See Jeffrey H. Reiman, "Doing Justice to Criminology: Reflections on the Implications for Criminology of Recent Developments in the Philosophy of Justice," in Marc Riedel and Duncan Chappell, eds., *Issues in Criminal Justice: Planning and Evaluation* (New York: Praeger, 1976), pp. 134–42.
  21. Quinney, *Social Reality of Crime*, p. 15.
  22. *The Washington Post*, January 11, 1983, p. C10.
  23. Lydia Voigt et al., *Criminology and Justice* (New York: McGraw-Hill, 1994), pp. 11–15; the quotation is on p. 15.
  24. This answers Graeme Newman, who observes that most criminals on TV are white and wonders what the "ruling class" or conservatives "have to gain by denying the criminality of Blacks." Graeme R. Newman, "Popular Culture and Criminal Justice: A Preliminary Analysis," *Journal of Criminal Justice* 18 (1990), pp. 261–74.
  25. Newman, "Popular Culture and Criminal Justice: A Preliminary Analysis," pp. 263–64.
  26. Barbara Matusow, "If It Bleeds, It Leads," *Washingtonian*, January 1988, p. 102.
  27. "Titillating Channels: TV Is Going Tabloid as Shows Seek Sleaze and Find Profits, Too," *The Wall Street Journal*, May 18, 1988, p. 1.
  28. "Crime in America: The Shocking Truth," *McCall's*, March 1987, p. 144.
  29. John P. Wright, Francis T. Cullen, and Michael B. Blankenship, "The Social Construction of Corporate Violence: Media Coverage of the Imperial Food Products Fire," *Crime & Delinquency* 41, no. 1 (January 1995), p. 32. I discuss this case in Chapter 3.
  30. Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), p. 78. See generally Chapter 3, "Culpability, Intention, Motive," which I have drawn upon in making the argument of this and the following two paragraphs.
  31. Nancy Frank, "Unintended Murder and Corporate Risk-Taking: Defining the Concept of Justifiability," *Journal of Criminal Justice* 16 (1988), p. 18.
  32. For example, see John Harris, "The Marxist Conception of Violence," *Philosophy & Public Affairs* 3, no. 2 (Winter 1974), pp. 192–220; Jonathan Glover, *Causing Death and Saving Lives* (Hammondsworth, England: Penguin, 1977), pp. 92–112;

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  50. Philip Landrigan, Testimony before the Senate Committee on Labor and Human Resources, April 18, 1988, p. 2. For cancer deaths, see *StatAbst*—1988, p. 77, Table 117, and p. 80, Table 120.
  51. "Safety Group Cites Fatalities Linked to Work," *The Wall Street Journal*, August 31, 1990, p. B8; and Sally Squires, "Study Traces More Deaths to Working than Driving," *The Washington Post*, August 31, 1990, p. A7.
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  57. Claybrook, *Retreat from Safety*, p. 97. See also Page and O'Brien, *Bitter Wages*, p. 23; and Scott, *Muscle and Blood*, p. 196.
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  59. Curt Suplee, "House to Consider 'Ergo Rider' Restraints on OSHA," *The Washington Post*, July 11, 1996, p. A4.
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  62. Don J. Lofgren, *Dangerous Premises: An Insider's View of OSHA Enforcement* (Ithaca, N.Y.: ILR Press/Cornell University, 1989), p. 223.
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  67. George A. Silver, "The Medical Insurance Disease," *Nation* 222, no. 12 (March 27, 1976), p. 369.

68. Ibid., p. 371.
69. *Newsweek*, March 29, 1976, p. 67. Lest anyone think this is a new problem, compare this passage written in a popular magazine over 40 years ago:

*In an editorial on medical abuse, the Journal of the Medical Association of Georgia referred to "surgeons who paradoxically are often cast in the role of the supreme hero by the patient and family and at the same time may be doing the greatest amount of harm to the individual."*

*Unnecessary operations on women, stemming from the combination of a trusting patient and a split fee, have been so deplored by honest doctors that the phrase "rape of the pelvis" has been used to describe them. The American College of Surgeons, impassioned foe of fee-splitting, has denounced unnecessary hysterectomies, uterine suspensions, Caesarian sections (Howard Whitman, "Why Some Doctors Should Be in Jail," *Colliers*, October 30, 1953, p. 24).*

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71. *UCR*—1995, p. 18.
72. Paul Weiler, Howard Hiatt, Joseph Newhouse, William Johnson, Troyen Brennan, and Lucian Leape, *A Measure of Malpractice: Medical Injury, Malpractice Litigation and Patient Compensation* (Cambridge, Mass.: Harvard University Press, 1993), p. 137. The data given here come from the Harvard Medical Practice Study. See also Christine Russell, "Human Error: Avoidable Mistakes Kill 100,000 Patients a Year," *The Washington Post Health*, February 18, 1992, p. 7.
73. Rick Weiss, "Medical Errors Blamed for Many Deaths: As Many as 98,000 a Year in U.S. Linked to Mistakes," *The Washington Post*, November 30, 1999, p. A1.
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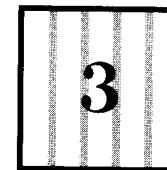
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147. Ann Gibbons, "Does War on Cancer Equal War on Poverty?" *Science* 253 (July 19, 1991), p. 260.
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150. *StatAbst—1995*, p. 87, Table 116; and *StatAbst—1998*, p. 94, Table 128. Although the difference between white and black life expectancy has generally shrunk in recent



times, this tendency is by no means uniform: "Since 1984, life expectancy increased each year for white males; for white females, it increased for 3 of the 5 years; for black females, for only 2 of five years; and for black males, life expectancy decreased for 4 of the 5 years, and remained unchanged for one year" (*Vital Statistics of the United States, 1989, Volume II, Mortality, Part A, Section 6, p. 3*). Richard Allen Williams reports that "there is no reason why the life span of the White should differ from that of the Black," in his *Textbook of Black-Related Diseases* (New York: McGraw-Hill, 1975), p. 2.

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## ...AND THE POOR GET PRISON

*When we come to make an intelligent study of the prison at first hand... we are bound to conclude that after all it is not so much crime in its general sense that is penalized, but that it is poverty which is punished.*

*Take a census of the average prison and you will find that a large majority of people are there not so much because of the particular crime they are alleged to have committed, but for the reason that they are poor and... lacked the money to engage the services of first class and influential lawyers.*

**Eugene V. Debs,**  
*Walls and Bars*

*Laws are like spiders' webs: they catch the weak and the small, but the strong and the powerful break through them.*

**Scythian,** one of the Seven Wise Men  
of Ancient Greece

### Weeding Out the Wealthy

*The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country.<sup>1</sup>*

This statement in the *Report of the President's Commission on Law Enforcement and Administration of Justice* is as true today as it was over three decades ago when it was written. Our prisons are indeed, as Ronald Goldfarb has called them, the "national poorhouse."<sup>2</sup> To most citizens this comes as no surprise—

recall the Typical Criminal and the Typical Crime. Dangerous crimes, they think, are committed mainly by poor people. Seeing that prison populations are made up primarily of the poor only makes them surer of this. They think, in other words, that the criminal justice system gives a true reflection of the dangers that threaten them.

In my view, it also comes as no surprise that our prisons and jails predominantly confine the poor. This is not because these are the individuals who most threaten us. It is because the criminal justice system effectively weeds out the well-to-do, so that at *the end of the road in prison*, the vast majority of those we find there come from the lower classes. This weeding-out process starts before the agents of law enforcement go into action. In Chapter 2 I argued that our very definition of crime *excludes* a wide variety of actions at least as dangerous as those included and often worse. Is it any accident that the kinds of dangerous actions excluded are the kinds most likely to be performed by the affluent in America? Even before we mobilize our troops in the war on crime, we have already guaranteed that large numbers of upper-class individuals will never come within their sights.

This process does not stop at the definition of crime. It continues throughout each level of the criminal justice system. At each step, from arresting to sentencing, the likelihood of being ignored or released or treated lightly by the system is greater the better off one is economically. As the late U.S. Senator Philip Hart wrote:

*Justice has two transmission belts, one for the rich and one for the poor. The low-income transmission belt is easier to ride without falling off and it gets to prison in shorter order.*

*The transmission belt for the affluent is a little slower and it passes innumerable stations where exits are temptingly convenient.*<sup>3</sup>

This means that the criminal justice system functions from start to finish in a way that makes certain that "the offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country."

For the same criminal behavior, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes.<sup>4</sup> In other words, the image of the criminal population one sees in our nation's jails and prisons is distorted by the shape of the criminal justice system itself. It is the face of evil reflected in a carnival mirror, but it is no laughing matter.

The face in the criminal justice carnival mirror is also, as we have already noted, very frequently a black face. Although blacks do not make up the majority of the inmates in our jails and prisons, they make up a proportion that far

outstrips their proportion in the population.<sup>5</sup> Here, too, the image we see is distorted by the processes of the criminal justice system itself. Edwin Sutherland and Donald Cressey write in their widely used textbook *Criminology* that

*... numerous studies have shown that African-Americans are more likely to be arrested, indicted, convicted, and committed to an institution than are whites who commit the same offenses, and many other studies have shown that blacks have a poorer chance than whites to receive probation, a suspended sentence, parole, commutation of a death sentence, or pardon.*<sup>6</sup>

William Wilbanks has attacked this conclusion in *The Myth of a Racist Criminal Justice System*.<sup>7</sup> He uses as "perhaps the most important criticism" of the charge that there is discrimination against blacks in arrests the work of Michael Hindelang, which compares the rate at which respondents to the National Crime Survey report being victimized by assailants perceived to be black with the rate at which blacks are arrested for the relevant crimes according to the UCR, and finds "that the racial gap in *offending* for robbery, assault, and rape (whether or not an arrest occurred) was almost equal to that found for *arrest* statistics." Wilbanks concludes, "these results indicate that police select black and white arrestees in approximately the same proportion as they are found in the pool of offenders," and thus "argue against police bias in the arrest process."<sup>8</sup> Recent statistics, however, suggest quite the opposite. Consider the following.

In 1998, respondents to the *National Criminal Victimization Survey* reported that approximately 22 percent of their assailants in violent victimizations (rape, robbery, simple and aggravated assault) were perceived to be black. That same year, the UCR indicates that 42 percent of the individuals arrested for these crimes were black. If we drop simple assault on the assumption that it is less often reported to the police than the other violent crimes, the figures change only slightly: 25 percent of violent victimizers are perceived to be black, whereas 44 percent of those arrested for rape, robbery, and aggravated assault are black. These figures indicate that police are arresting blacks almost two times more frequently than the occurrence of their perceived offenses.<sup>9</sup> Because arrest determines the pool from which charged, convicted, and imprisoned individuals are selected, this suggests that deep bias persists throughout the criminal justice system.

I am aware that there are various problems with comparing UCR and NCVS statistics and various possible explanations for the divergence of black-white arrest rates from the rates at which blacks and whites are perceived offenders. Thus I do not claim that the results just presented prove definitively the presence of racism. Nonetheless, because they come from the statistics that Wilbanks uses as "the most important criticism" of the discrimination thesis, I

think they suffice to cast significant doubt on Wilbanks's claim. Thus, I shall treat his thesis as currently unsubstantiated and continue to follow the majority of researchers in holding that the criminal justice system is widely marked by racial discrimination as well as by economic bias.<sup>10</sup> Moreover, I shall shortly present the results of numerous studies that demonstrate this point.

Curiously enough, statistics on differential treatment of races are available in greater abundance than are statistics on differential treatment of economic classes. For instance, although the FBI tabulates arrest rates by race (as well as by sex, age, and geographic area), it omits class or income. Similarly, both the President's Crime Commission report and Sutherland and Cressey's *Criminology* have index entries for race or racial discrimination but none for class or income of offenders. It would seem that both independent and government data gatherers are more willing to own up to America's racism than to its class bias. Nevertheless, it does not pay to look at these as two independent forms of bias. It is my view that, at least as far as criminal justice is concerned, racism is simply one powerful form of economic bias. I use evidence on differential treatment of blacks as evidence of differential treatment of members of the lower classes. There are five reasons for this.

1. First and foremost, black Americans are disproportionately poor. In 1996, while slightly more than one of every ten white Americans received income below the poverty line, nearly three of every ten black Americans did.<sup>11</sup> The picture is even worse when we shift from income to wealth (property such as a home, land, stocks). Blacks in America own one-fifth of the wealth that whites do.<sup>12</sup> Moreover, "the homeownership rate among non-Hispanic whites is more than 50 percent higher than that of blacks." Among homeowners, in 1993, the median equity "was about \$50,000 for whites (in 1993 dollars) [and] \$29,000 for blacks." Only about 5 percent of black households owned stocks, compared to 25 percent of white households.<sup>13</sup> Unemployment figures give a similarly dismal picture: In 1997, 2.8 percent of white workers were unemployed and 6.5 percent of blacks were. Among those in the crime-prone ages of 16 to 24, 12.7 percent of white youngsters (with no college) and 31.6 percent of black youngsters (with no college)—nearly one of every three—were jobless.<sup>14</sup>

2. The factors most likely to keep one out of trouble with the law and out of prison, such as a suburban living room instead of a tenement alley to gamble in or legal counsel able to devote time to one's case instead of an overburdened public defender, are the kinds of things that money can buy regardless of one's race, creed, or national origin. For example, as we shall see, arrests of blacks for illicit drug possession or dealing have skyrocketed in recent years, rising way out of proportion to drug arrests for whites—though research shows no greater drug use among blacks than among whites. However, drug arrests are most easily made in "disorganized inner-city" areas, where drug sales are more likely to

take place out of doors, and dealers are more willing to sell to strangers. Blacks are (proportionately) more likely than whites to live in such inner-city areas and thus more likely than whites to be arrested on drug charges.<sup>15</sup> And one very important reason that blacks are more likely than whites to live in disorganized inner-city areas is that a greater percentage of blacks than whites are poor and unemployed. What might at first look like a straightforward racial disparity turns out to reflect economic status.

3. Blacks who travel the full route of the criminal justice system and end up in jail or prison are close in economic condition to whites who do. In 1978, 53 percent of black jail inmates had pre-arrest incomes below \$3,000, compared with 44 percent of whites.<sup>16</sup> In 1983, the median pre-arrest income of black jail inmates was \$4,067 and that of white jail inmates was \$6,312. About half of blacks in jail were unemployed before arrest, and 44 percent of whites were.<sup>17</sup> In 1991, 30 percent of whites in the prison population and 38 percent of blacks reported no full- or part-time employment during the month before their arrest.<sup>18</sup>

4. Some studies suggest that race works to heighten the effects of economic condition on criminal justice outcomes, so that "being unemployed *and* black substantially increase[s] the chances of incarceration over those associated with being either unemployed or black."<sup>19</sup> This means that racism will produce a kind of selective economic bias, making a certain segment of the unemployed even more likely to end up behind bars.

5. Finally, it is my belief that the economic powers that be in America have sufficient power to end or drastically reduce racist bias in the criminal justice system. To the extent that they allow it to exist, it is not unreasonable to assume that it furthers their economic interests.

For all these reasons, racism will be treated here as either a form of economic bias or a tool that achieves the same end.

In the remainder of this chapter, I show how the criminal justice system functions to *weed out the wealthy* (meaning both middle- and upper-class offenders) at each stage of the process and thus produces a distorted image of the crime problem. Before entering into this discussion, however, three points are worth noting.

First, it is not my view that the poor are all innocent victims persecuted by the evil rich. The poor do commit crimes, and my own assumption is that the vast majority of the poor who are confined in our prisons are guilty of the crimes for which they were sentenced. In addition, there is good evidence that the poor do commit a greater portion of the crimes against person and property listed in the FBI Index than the middle and upper classes do, relative to their numbers in the national population. What I have already tried to prove is that the crimes in the FBI Index are not the only acts that threaten us nor are they

the acts that threaten us the most. What I will try to prove in what follows is that the poor are arrested and punished by the criminal justice system much more frequently than their contribution to the crime problem would warrant—thus the criminals who populate our prisons as well as the public's imagination are disproportionately poor.

Second, the following discussion has been divided into three sections that correspond to the major criminal-justice decision points and that also correspond to hypotheses two, three, and four that were stated on page 68 in Chapter 2. As always, such classifications are a bit neater than reality, and so they should not be taken as rigid compartments. Many of the distorting processes operate at all criminal-justice decision points. So, for example, while I will primarily discuss the light-handed treatment of white-collar criminals in the section on charging and sentencing, it is also true that white-collar criminals are less likely to be arrested or convicted than are blue-collar criminals. The section in which a given issue is treated is a reflection of the point in the criminal justice process at which the disparities are the most striking. Suffice it to say, however, that the disparities between the treatment of the poor and the nonpoor are to be found at all points of the process.

Third, it must be borne in mind that the movement from arrest to sentencing is a funneling process, so that discrimination that occurs at any early stage shapes the population that reaches later stages. Thus, for example, some recent studies find little economic bias in sentence length for people convicted of similar crimes.<sup>20</sup> When reading such studies, however, one should remember that the population that reaches the point of sentencing has already been subject to whatever discrimination exists at earlier stages. If, for example, among people with similar offenses and records, poor people are more likely to be charged and more likely to be convicted, then even if the sentencing of convicted criminals is evenhanded, it will reproduce the discrimination that occurred before.

## Arrest and Charging

The problem with most official records of who commits crime is that they are really statistics on who gets arrested and convicted. If, as I will show, the police are more likely to arrest some people than others, these official statistics may tell us more about police than about criminals. In any event, they give us little reliable data about those who commit crimes and do not get caught. Some social scientists, suspicious of the bias built into official records, have tried to devise other methods of determining who has committed a crime. Most often, these methods involve an interview or questionnaire in which the respondent is assured of anonymity and asked to reveal whether he or she has committed any offenses for which he or she could be arrested and convicted. Techniques to check reliability of these self-reports also have been devised; however, if

their reliability is still in doubt, common sense dictates that they would understate rather than overstate the number of individuals who have committed crimes and never come to official notice. In light of this, the conclusions of these studies are rather astounding. It seems that crime is the national pastime. The President's Crime Commission conducted a survey of 10,000 households and discovered that "91 percent of all Americans have violated laws that could have subjected them to a term of imprisonment at one time in their lives."<sup>21</sup>

A number of other studies support the conclusion that serious criminal behavior is widespread among middle- and upper-class individuals, although these individuals are rarely, if ever, arrested. Some of the studies show that there are no significant differences between economic classes in the incidence of criminal behavior.<sup>22</sup> The authors of a recent review of literature on class and delinquency conclude that "Research published since 1978, using both official and self-reported data suggests... that there is no pervasive relationship between SES [socioeconomic status] and delinquency."<sup>23</sup> This conclusion is echoed by Jensen and Thompson, who argue that

*The safest conclusion concerning class structure and delinquency is the same one that has been proposed for several decades: class, no matter how defined, contributes little to explaining variation in self-reports of common delinquency.*<sup>24</sup>

Others conclude that while lower-class individuals do commit more than their share of crimes, arrest records overstate their share and understate that of the middle and upper classes.<sup>25</sup> Still other studies suggest that some forms of serious crime—forms usually associated with lower-class youth—show up *more frequently* among higher-class persons than among lower.<sup>26</sup> For instance, Empey and Erikson interviewed 180 white males aged 15 to 17 who were drawn from different economic strata. They found that "virtually all respondents reported having committed not one but a variety of different offenses." Although youngsters from the middle classes constituted 55 percent of the group interviewed, they admitted to 67 percent of the instances of breaking and entering, 70 percent of the instances of property destruction, and an astounding 87 percent of all the armed robberies admitted to by the entire sample.<sup>27</sup> Williams and Gold studied a national sample of 847 males and females between the ages of 13 and 16.<sup>28</sup> Of these, 88 percent admitted to at least one delinquent offense.

Even those who conclude "that more lower status youngsters commit delinquent acts more frequently than do higher status youngsters"<sup>29</sup> also recognize that lower-class youth are significantly overrepresented in official records. Gold writes that "about five times more lowest than highest status boys appear in the official records; if records were complete and unselective, we estimate that the ratio would be closer to 1.5:1."<sup>30</sup> The simple fact is that for the same

offense, a poor person is more likely to be arrested and, if arrested charged, than a middle- or upper-class person.<sup>31</sup>

This means, first of all, that poor people are more likely to come to the attention of the police. Furthermore, even when apprehended, the police are more likely to formally charge a poor person and release a higher-class person for the same offense. Gold writes that

*... boys who live in poorer parts of town and are apprehended by police for delinquency are four to five times more likely to appear in some official record than boys from wealthier sections who commit the same kinds of offenses. These same data show that, at each stage in the legal process from charging a boy with an offense to some sort of disposition in court, boys from different socioeconomic backgrounds are treated differently, so that those eventually incarcerated in public institutions, that site of most of the research on delinquency, are selectively poorer boys.*<sup>32</sup>

From a study of self-reported delinquent behavior, Gold finds that when individuals were apprehended, "if the offender came from a higher status family, police were more likely to handle the matter themselves without referring it to the court."<sup>33</sup>

Terence Thornberry reached a similar conclusion in his study of 3,475 delinquent boys in Philadelphia. Thornberry found that among boys arrested for equally serious offenses and who had similar prior offense records, police were more likely to refer the lower-class youths than the more affluent ones to juvenile court. The police were more likely to deal with the wealthier youngsters informally, for example, by holding them in the station house until their parents came rather than instituting formal procedures. Of those referred to juvenile court, Thornberry found further that for equally serious offenses and with similar prior records, the poorer youngsters were more likely to be institutionalized than were the affluent ones. The wealthier youths were more likely to receive probation than the poorer ones. As might be expected, Thornberry found the same relationships when comparing the treatment of black and white youths apprehended for equally serious offenses.<sup>34</sup>

Recent studies continue to show similar effects. For example, Sampson found that, for the same crimes, juveniles in lower-class neighborhoods were more likely to have some police record than those in better-off neighborhoods. Again, for similar crimes, lower-class juveniles were more likely to be referred to court than better-off juveniles. If you think these differences are not so important because they are true only of young offenders, remember that this group accounts for much of the crime problem. Moreover, other studies not limited to the young tend to show the same economic bias. McCarthy found that, in metropolitan areas, for similar suspected crimes, unemployed people were more likely to be arrested than employed.<sup>35</sup>

As I indicated above, racial bias is but another form in which the bias against the poor works. And blacks are more likely to be suspected or arrested than whites. A 1988 *Harvard Law Review* overview of studies on race and the criminal process concludes that "most studies ... reveal what many police officers freely admit: that police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest."<sup>36</sup> "A 1994 study of juvenile detention decisions found that African-American and Hispanic youths were more likely to be detained at each decision point, even after controlling for the influence of offense seriousness and social factors (e.g., single-parent home). Decisions by both police and the courts to detain a youngster were highly influenced by race."<sup>37</sup> The study states that "[n]ot only were there direct effects of race, but indirectly, socioeconomic status was related to detention, thus putting youth of color again at risk for differential treatment."<sup>38</sup> Reporting the results of University of Missouri criminologist Kimberly Kempf's study of juvenile justice in 14 Pennsylvania counties, Jerome Miller says that "Black teenagers were more likely to be detained, to be handled formally, to be waived to adult court, and to be adjudicated delinquent."<sup>39</sup> And the greater likelihood of arrest that minorities face is matched by a greater likelihood of being charged with a serious offense. For example, Huizinga and Elliott report: "Minorities appear to be at greater risk for being charged with more serious offenses than whites when involved in comparable levels of delinquent behavior."<sup>40</sup> Bear in mind that once an individual has a criminal record, it becomes harder for that person to obtain employment, thus increasing the likelihood of future criminal involvement and more serious criminal charges.

For reasons mentioned earlier, a disproportionately large percentage of the casualties in the recent war on drugs are poor inner-city minority males. Michael Tonry writes that, "according to National Institute on Drug Abuse (1991) surveys of Americans' drug use, [Blacks] are not more likely than Whites ever to have used most drugs of abuse. Nonetheless, the ... number of drug arrests of Blacks more than doubled between 1985 and 1989, whereas White drug arrests increased only by 27 percent."<sup>41</sup> A study conducted by the Sentencing Project, based mainly on Justice Department statistics, indicates that "Blacks make up 12 percent of the United States' population and constitute 13 percent of all monthly drug users..., but represent 35 percent of those arrested for drug possession, 55 percent of those convicted of drug possession and 74 percent of those sentenced to prison for drug possession."<sup>42</sup> And William Chambliss writes that, in 1997:

*More than 37 percent of all those arrested for drug-related violations were African Americans. Yet the reality of drug use in the United States is that whites are two to three times as likely as blacks to use all illegal drugs except marijuana.... Thus, more whites than blacks use illegal drugs, and more than 70 percent of the population is white. But 66*

percent of inmates in prison convicted of drug offenses are black, and only 33 percent are white or Hispanic.<sup>43</sup>

Numerous studies of police use of deadly force show that blacks are considerably more likely than whites or Hispanics to be shot by the police. For example, using data from Memphis, Tennessee, covering the years from 1969 through 1974, James Fyfe found that blacks were 10 times more likely than whites to have been shot at unsuccessfully by police, 18 times more likely to have been wounded, and 5 times more likely to have been killed.<sup>44</sup> A nation that has watched the brutal treatment meted out to Rodney King by California police officers will not find this surprising. Does anyone think this would have happened if King were a white man?

Any number of reasons can be offered to account for the differences in police treatment of poor versus well-off citizens. Some argue that they reflect that the poor have less privacy.<sup>45</sup> What others can do in their living rooms or backyards, the poor do on the street. Others argue that a police officer's decision to book a poor youth and release a middle-class youth reflects either the officer's judgment that the higher-class youngster's family will be more likely and more able to discipline him or her than the lower-class youngster's, or differences in the degree to which poor and middle-class complainants demand arrest. Others argue that police training and police work condition police officers to be suspicious of certain kinds of people, such as lower-class youth, blacks, Mexicans, and so on,<sup>46</sup> and thus more likely to detect their criminality. Still others hold that police mainly arrest those with the least political clout,<sup>47</sup> those who are least able to focus public attention on police practices or bring political influence to bear, and these happen to be the members of the lowest social and economic classes.

Regardless of which view one takes, and probably all have some truth in them, one conclusion is inescapable: One of the reasons the offender "at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country" is that the police officers who guard the access to the road to prison make sure that more poor people make the trip than well-to-do people.

Likewise for prosecutors. A recent study of prosecutors' decisions shows that lower-class individuals are more likely to have charges pressed against them than upper-class individuals.<sup>48</sup> Racial discrimination also characterizes prosecutors' decisions to charge. The *Harvard Law Review* overview of studies on race and the criminal process asserts: "Statistical studies indicate that prosecutors are more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties in cases involving minority defendants than in cases involving nonminority defendants."<sup>49</sup> One study of whites, blacks, and Hispanics arrested in Los Angeles on suspicion of having committed a felony found that, among defendants with equally serious charges and prior records,

59 percent of whites had their charges dropped at the initial screening, compared with 40 percent of blacks and 37 percent of Hispanics.<sup>50</sup>

The *weeding out of the wealthy* starts at the very entrance to the criminal justice system: The decision about whom to investigate, arrest, or charge is not made simply on the basis of the offense committed or the danger posed. It is a decision distorted by a systematic economic bias that works to the disadvantage of the poor.

This economic bias is a two-edged sword. Not only are the poor arrested and charged out of proportion to their numbers for the kinds of crimes poor people generally commit—burglary, robbery, assault, and so forth—but when we reach the kinds of crimes poor people almost never have the opportunity to commit, such as antitrust violations, industrial safety violations, embezzlement, and serious tax evasion, the criminal justice system shows an increasingly benign and merciful face. The more likely that a crime is the type committed by middle- and upper-class people, the less likely it is that it will be treated as a criminal offense. When it comes to crime in the streets, where the perpetrator is apt to be poor, he or she is even more likely to be arrested and formally charged. When it comes to crime in the suites, where the offender is apt to be affluent, the system is most likely to deal with the crime noncriminally, that is, by civil litigation or informal settlement. When it does choose to proceed criminally, as we will see in the section on sentencing, it rarely goes beyond a slap on the wrist. Not only is the main entry to the road to prison held wide open to the poor, the access routes for the wealthy are largely sealed off. Once again, we should not be surprised at whom we find in our prisons.

Many writers have commented on the extent and seriousness of "white-collar crime," so I will keep my remarks to a minimum. Nevertheless, for those of us trying to understand how the image of crime is created, four points should be noted.

1. White-collar crime is costly; it takes far more dollars from our pockets than all the FBI Index crimes combined.
2. White-collar crime is widespread, probably much more so than the crimes of the poor.
3. White-collar criminals are rarely arrested or charged; the system has developed kindlier ways of dealing with the more delicate sensibilities of its higher-class clientele.
4. When white-collar criminals are prosecuted and convicted, their sentences are either suspended or very light when judged by the cost their crimes have imposed on society.

The first three points will be discussed here, and the fourth will be presented in the section on sentencing below.

Everyone agrees that the cost of white-collar crime is enormous. In 1985, *U.S. News & World Report* reported that "Experts estimate that white-collar

criminals rake in a minimum of \$200 billion annually.”<sup>51</sup> Marshall Clinard also cites the \$200 billion estimate in his recent book, *Corporate Corruption: The Abuse of Corporate Power*.<sup>52</sup> Nonetheless, \$200 billion probably understates the actual cost. Some experts place the cost of white-collar crime for firms doing business in the government sector alone at \$500 billion a year.<sup>53</sup> Tax evasion alone has been estimated to cost from 5 to 7 percent of the gross national product. For 1997, that would be between \$403 and \$564 billion.<sup>54</sup>

In some areas of the economy, white-collar crime is growing dramatically. For example, the North American Securities Administrators Association conducted a survey of state enforcement actions and found that \$400 million had been lost to investors as a result of fraud and abuse in the financial planning industry during the period from 1986 to 1988. Most striking, however, was their finding that “the number of state actions against financial planners rose 155 percent and the amount of lost investor funds climbed 340 percent” since their previous survey in 1985.<sup>55</sup> Then, of course, there is the recent news about fraud in the savings and loan industry, which we look at later in this chapter.

All we need is a rough estimate of the cost of white-collar crime so that we can compare its impact with that of the crimes reported on by the FBI. For this purpose, we can use the conservative estimates in the U.S. Chamber of Commerce’s *A Handbook on White-Collar Crime*.<sup>56</sup> Because the *Handbook* was issued in 1974, we will have to adjust its figures to take into account both inflation and growth in population to compare these figures with losses reported for 1994 by the FBI. (In light of the avalanche of statistics the government puts out on street crimes, it’s worth wondering why the Chamber has not seen fit to revise its 23-year-old figures, and why no other private or public institution—neither the FBI nor the U.S. Department of Commerce—keeps up-to-date statistics on the overall cost of white-collar crime.) In some categories, I shall modify the Chamber’s figures in light of more recent estimates. As usual, I use conservative estimates where there is a choice. The result will be a rough estimate of the costs of different categories of white-collar crime, as well as of the overall total.

First, the modifications: As might be expected, the cost of computer crime is far beyond the \$0.1 billion estimated by the Chamber in 1974. Current estimates which include Internet fraud run from \$9 to \$108 billion annually.<sup>57</sup> I will use the \$9 billion estimate. Government revenue loss has also outstripped the Chamber’s estimate of \$12 billion annually. An article in *U.S. News & World Report* maintains that “25 percent of Americans admit to tax cheating which costs \$100 billion annually.”<sup>58</sup> Since this doesn’t include defense and other procurement fraud, we can take it as a conservative estimate. Credit card fraud has also exceeded the Chamber’s expectations, with several sources estimating its annual cost at over \$1 billion, a figure we can safely use. According to *The New York Times*, “Mastercard International alone experienced \$526 million in fraudulent transactions last year [1998].”<sup>59</sup> And the “National Check Fraud Center

in Charleston, South Carolina, [reported] that more than \$6 billion worth of bad checks were cashed in the United States in 1996.”<sup>60</sup>

The cost of pilferage must be increased as well. “The Bureau of National Affairs estimates total employee theft at \$15 billion to \$25 billion, while the U.S. Chamber of Commerce [recently] says it may be as high as \$20 billion to \$40 billion. And that’s not including theft by government workers, which can be significant.”<sup>61</sup> I’ll use the low end of the range recently given by the Chamber.

Insurance fraud has also gone far beyond the Chamber’s 1974 estimates. The Coalition Against Insurance Fraud estimates that insurance fraud costs more than \$85 billion a year and is still growing.<sup>62</sup> I will use the \$85 billion figure. It will also come as no surprise, after the era of Boesky and Milken (two stockbrokers who served time in prison for illegal stock manipulations), that security thefts and frauds have far outstripped the Chamber’s 1974 estimate of \$4 billion. The North American Securities Administrators Association estimates that investors lost \$40 billion to theft and fraud in 1987.<sup>63</sup> And there is now a new category, not even dreamt of by the Chamber in 1974: theft of cellular phone services, estimated to cost \$1 billion a year.<sup>64</sup>

For the remainder of the Chamber’s figures, I will assume that the rate of white-collar crime relative to the population remained constant from 1974 to 1997 and that its real dollar value remained constant as well (two conservative assumptions in light of the evidence just cited, which shows considerable growth in many white-collar crimes). Thus, I will simply adjust these figures to reflect the growth in population and inflation since 1974. Between 1974 and 1997, the population of the United States increased 27 percent, and the Consumer Price Index increased 226 percent. (That is, 1997’s population is 127 percent of 1974’s, and 1997’s prices are 326 percent of 1974’s.) Thus, we can bring the Chamber of Commerce’s figures up to date by multiplying them by 4.14 ( $1.27 \times 3.26 = 4.14$ ). This, taken together with the modifications indicated in the previous paragraph, gives us an estimated total cost of white-collar crime in 1997 of \$338 billion (more than eight times higher than the Chamber’s 1974 estimated total cost of \$41.78 billion). (See Table 3-1 for the total cost and the breakdown into costs per category of white-collar crime.) The figure \$338 billion jibes with the estimates quoted earlier, but it is surely on the conservative side. Nonetheless, it is more than 10,000 times the total amount taken in all bank robberies in the United States in 1997, and more than 20 times the total amount stolen in all thefts reported in the FBI *Uniform Crime Reports* for that year.<sup>65</sup>

In addition to fraud and tax evasion by individuals, corporate crime is also rampant. Sutherland, in a study published in 1949 that has become a classic, analyzed the “behavior” of 70 of the 200 largest U.S. corporations over a period of some 40 years:

*The records reveal that every one of the seventy corporations had violated one or more of the laws, with an average of about thirteen adverse*

**TABLE 3-1 The Cost of White-Collar Crime (in billions of dollars), 1997**

Bankruptcy fraud		\$ 0.33
Bribery, kickbacks, and payoffs		12.42
Computer- and Internet-related crime		9.00
Consumer fraud, illegal competition, deceptive practices		137.22
Consumer victims	\$ 22.77	
Business victims	14.45	
Government revenue loss	100.00	
Credit card and check fraud		7.00
Credit card	1.00	
Check	6.00	
Embezzlement and pilferage		32.42
Embezzlement (cash, goods, services)	12.42	
Pilferage	20.00	
Insurance fraud		85.00
Receiving stolen property		14.50
Securities thefts and frauds		40.00
Cellular phone fraud		1.00
	Total (billions)	\$338.89

Source: Chamber of Commerce of the United States, *A Handbook on White-Collar Crime*, 1974 (figures adjusted for inflation and population growth through 1997, and supplemented from other sources documented in the text).

*decisions per corporation and a range of from one to fifty adverse decisions per corporation.... Thus, generally, the official records reveal that these corporations violated the trade regulations with great frequency. The "habitual criminal" laws of some states impose severe penalties on criminals convicted the third or fourth time. If this criterion were used here, about 90 percent of the large corporations studied would be considered habitual white-collar criminals.*<sup>66</sup>

Nevertheless, corporate executives almost never end up in jail, where they would find themselves sharing cells with poorer persons who had stolen less from their fellow citizens. What Sutherland found in 1949 continues up to the present. In his 1990 book, *Corporate Corruption: The Abuse of Power*, Marshall Clinard writes:

*Many government investigations, both federal and state, have revealed extensive law violations in such industries as oil, autos, and pharmaceuticals.... [O]ver one two-year period, the federal government*

*charged nearly two-thirds of the Fortune 500 corporations with law violations; half were charged with a serious violation.... According to a 1982 U.S. News & World Report study, more than one out of five of the Fortune 500 companies had been convicted of at least one major crime or had paid civil penalties for serious illegal behavior between 1970 and 1979.*<sup>67</sup>

A recent study of offenders convicted of federal white-collar crimes found "that white-collar criminals are often repeat offenders."<sup>68</sup> As for the treatment of these repeat offenders, Clinard says "a large-scale study of sanctions imposed for corporate law violations found that administrative [that is, noncriminal] penalties were employed in two-thirds of serious corporate law violations, and that slightly more than two-fifths of the sanctions ... consisted simply of a warning to the corporation not to commit the offense again."<sup>69</sup>

The continued prevalence of these practices is confirmed in a recent study of white-collar crime prosecutions by Susan Shapiro, titled "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders." Focusing on the enforcement practices of the Securities and Exchange Commission (SEC), Shapiro writes that:

*... while criminal dispositions are often appropriate, they are rarely pursued to the sentencing stage. Out of every 100 suspects investigated by the SEC, 93 have committed securities violations that carry criminal penalties. Legal action is taken against 46 of them, but only 11 are selected for criminal treatment. Six of these are indicted; 5 will be convicted and 3 sentenced to prison. Thus, for Securities and Exchange Commission enforcement, criminal prosecution most often represents the road not taken. Of those found to have engaged in securities fraud, 88 percent never have to contend with the criminal justice system at all.*<sup>70</sup>

Russell Mokhiber reports that "less than one half of one percent (250) of the criminal indictments brought by the Department [of Justice] in 1994 involved environmental crimes, occupational safety and health crimes, and crimes involving product and consumer safety issues."<sup>71</sup> With upper-class law-breakers, the authorities prefer to sue in civil court for damages or for an injunction rather than treat the wealthy as common criminals. Judges have on occasion stated in open court that they would not make criminals of reputable businessmen. One would think it would be up to the businessmen to make criminals of themselves by their actions, but alas, this privilege is reserved for the lower classes.

Examples of reluctance to use the full force of the criminal process for crimes not generally committed by the poor can be multiplied ad infinitum. We shall see later that a large number of potential criminal cases arising out of the savings and loan scandals have been dismissed by federal law enforcement



agencies because they lack the labor power to pursue them—even as we hire 100,000 new police officers to fight street crime.

Let me close with one final example that typifies this particular distortion of criminal justice policy. Embezzlement is the crime of misappropriating money or property entrusted to one's care, custody, or control. Because the poor are rarely entrusted with tempting sums of money or valuable property, this is predominantly a crime of the middle and upper classes. The U.S. Chamber of Commerce estimate of the annual economic cost of embezzlement, adjusted for inflation and population growth, is \$12.42 billion—more than four-fifths the total value of all property and money stolen in all FBI Index property crimes in 1997. (Don't be fooled into thinking that this cost is imposed only on the rich or on big companies with lots of resources. They pass on their losses—and their increased insurance costs—to consumers in the form of higher prices. Embezzlers take money out of the very same pockets that muggers do: yours!) Nevertheless, the FBI reports that in 1997, when there were 1,805,600 arrests for property crimes, there were 17,100 arrests for embezzlement nationwide.<sup>72</sup> Although their cost to society is comparable, the number of arrests for property crimes was *more than 100 times greater* than the number of arrests for embezzlement. Roughly, this means there was one property crime arrest for every \$8,000 stolen, and one embezzlement arrest for every \$726,000 "misappropriated": Note that even the language becomes more delicate as we deal with a "better" class of crook.

The clientele of the criminal justice system forms an exclusive club. Entry is largely a privilege of the poor. The crimes they commit are the crimes that qualify one for admission—and they are admitted in greater proportion than their share of those crimes. Curiously enough, the crimes the affluent commit are not the kind that easily qualify one for membership in the club.

And as we have seen, the reluctance to use the full force of the criminal justice system in pursuit of white-collar criminals is matched by a striking reluctance to use the full force of current public and private research organizations to provide up-to-date estimates of its cost. This coincidence is worth pondering by anyone interested in how criminal justice policy gets made and how research and statistics function in the process.

## Conviction

Between arrest and imprisonment lies the crucial process that determines guilt or innocence. Studies of individuals accused of similar offenses and with similar prior records show that the poor defendant is more likely to be adjudicated guilty than is the wealthier defendant.<sup>73</sup> In the adjudication process the only thing that *should* count is whether the accused is guilty and whether the prosecution can prove it beyond a reasonable doubt. Unfortunately, at least two other

factors that are irrelevant to the question of guilt or innocence significantly affect the outcome: One is the ability of the accused to be free on bail prior to trial, and the second is access to legal counsel able to devote adequate time and energy to the case. Because both bail and high-quality legal counsel cost money, it should come as no surprise that here as elsewhere the poor do poorly.

Being released on bail is important in several respects. First and foremost is that those who are not released on bail are kept in jail like individuals who have been found guilty. They are thus punished while they are still legally innocent. "On June 30, 1995, an estimated 44 percent of the nation's adult jail inmates had been convicted on their current charge. An estimated 223,000 adult jail inmates were serving a sentence, awaiting sentencing, or serving time in jail for a probation or parole violation. Between 1985 and 1995 the number of convicted inmates rose by nearly 100,000—up from 123,409. During the same period, the number of unconvicted jail inmates, including those on trial or awaiting arraignment or trial, doubled (from 127,059 to an estimated 284,100)."<sup>74</sup> Beyond the obvious ugliness of punishing people before they are found guilty, confined defendants suffer from other disabilities. Specifically, they cannot actively aid in their own defense by seeking out witnesses and evidence. Several studies have shown that among defendants accused of the same offenses, those who make bail are more likely to be acquitted than those who do not.<sup>75</sup> In a recent study of unemployment and punishment, Chiricos and Bales found that "after the effects of other factors [seriousness of crime, prior record, etc.] were controlled, an unemployed defendant was 3.2 times more likely to be incarcerated before trial than his employed counterpart."<sup>76</sup>

Furthermore, because the time spent in jail prior to adjudication of guilt may count as part of the sentence if one is found guilty, the accused are often placed in a ticklish position. Let us say the accused believes he or she is innocent, and let us say also that he or she has been in the slammer for two months awaiting trial. Along comes the prosecutor to offer a deal: If you plead guilty to such-and-such (usually a lesser offense than has been charged, say, possession of burglar's tools instead of burglary), the prosecutor promises to ask the judge to sentence you to two months. In other words, plead guilty and walk out of jail today (free, but with a criminal record that will make finding a job hard and ensure a stiffer sentence next time around)—or maintain your innocence, stay in jail until trial, and then be tried for the full charge instead of the lesser offense! In fact, not only does the prosecutor threaten to prosecute for the full charge, this is often accompanied by the implied but very real threat to press for the most severe penalty as well—for taking up the court's time.

Plea bargaining such as this is an everyday occurrence in the criminal justice system. Contrary to the Perry Mason image, the vast majority of criminal convictions in the United States are reached without a trial. It is estimated that between 70 and 95 percent of convictions are the result of a negotiated plea,<sup>77</sup> that is, a bargain in which the accused agrees to plead guilty (usually to a lesser

offense than he or she is charged with or to one offense out of many he or she is charged with) in return for an informal promise of leniency from the prosecutor with the tacit consent of the judge. If you were the jailed defendant offered a deal like this, how would you choose? Suppose you were a poor black man not likely to be able to retain Johnny Cochran or F. Lee Bailey for your defense?

The advantages of access to adequate legal counsel during the adjudicative process are obvious but still worthy of mention. In 1963, the U.S. Supreme Court handed down the landmark *Gideon v. Wainwright* decision, holding that the states must provide legal counsel to the indigent in all felony cases. As a result, no person accused of a serious crime need face his or her accuser without a lawyer. However, the Supreme Court has not held that the Constitution entitles individuals to lawyers able to devote equal time and resources to their cases. Even though *Gideon* represents significant progress in making good on the constitutional promise of equal treatment before the law, we still are left with two transmission belts of justice: one for the poor and one for the affluent. There is an emerging body of case law on the right to effective assistance of counsel<sup>78</sup>; however, this is yet to have any serious impact on the assembly-line legal aid handed out to the poor.

Indigent defendants, those who cannot afford to retain their own lawyers, will be defended either by a public defender or by a private attorney assigned by the court. Because the public defender is a salaried attorney with a caseload much larger than that of a private criminal lawyer,<sup>79</sup> and because court-assigned private attorneys are paid a fixed fee that is much lower than they charge their regular clients, neither is able or motivated to devote much time to the indigent defendant's defense. Both are strongly motivated to bring their cases to a close quickly by negotiating a plea of guilty. Because the public defender works in day-to-day contact with the prosecutor and the judge, the pressures on him or her to negotiate a plea as quickly as possible, instead of rocking the boat by threatening to go to trial,<sup>80</sup> are even greater than on those who work as court-assigned counsel. In an essay aptly titled "Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender," Jonathan Casper reports the perceptions of this process from the standpoint of the defendants:

*Most of the men spent very little time with their public defender. In the court in which they eventually plead guilty, they typically reported spending on the order of five to ten minutes with their public defender. These conversations usually took place in the bull-pen of the courthouse or in the hallway.*

*The brief conversations usually did not involve much discussion of the details surrounding the alleged crime, mitigating circumstances or the defendants' motives or backgrounds. Instead, they focused on the deal, the offer the prosecution was likely to make or had made in re-*

*turn for a cop out. Often the defendants reported that the first words the public defender spoke (or at least the first words the defendants recalled) were, "I can get you ..., if you plead guilty."<sup>81</sup>*

As might be expected, with less time and fewer resources to devote to the cause, public defenders and assigned lawyers cannot devote as much time and research to preparing the crucial pretrial motions that can often lead to dismissal of charges against the accused. A recent study of 28,315 felony defendants in various county and city jurisdictions in Tennessee, Virginia, and Kentucky showed that public defenders got cases dropped for 11.3 percent of their defendants, and private attorneys got dismissals for 48 percent of their defendants. As also might be expected, the overall acquittal rate for privately retained counsel is considerably better than that for public defenders. The same study shows that public defenders achieved either dismissal of charges or a finding of not guilty in 11.4 percent of the indictments they handled, and private attorneys got their clients off the hook in 56 percent of their cases. The superior record of private attorneys held good when comparisons were made among defendants accused of similar offenses and with similar prior records.<sup>82</sup> The picture that emerges from federal courts is not much different.<sup>83</sup>

The problem of adequate legal representation is particularly acute in capital cases. According to Robert Johnson, "Most attorneys in capital cases are provided by the state. Defendants, as good capitalists, routinely assume that they will get what they pay for: next to nothing." Their perceptions, he concludes, "may not be far from right." Indeed, Stephen Gettinger maintains that an inadequate defense was "the single outstanding characteristic" of the condemned persons he studied. The result: Capital defendants appeared in court as "creatures beyond comprehension, virtually gagged and masked in preparation for the execution chamber."<sup>84</sup> Writes Linda Williams in *The Wall Street Journal*:

*The popular perception is that the system guarantees a condemned person a lawyer. But most states provide counsel only for the trial and the automatic review of the sentence by the state appeals court. Indigent prisoners—a description that applies to just about everybody on death row—who seek further review must rely on the charity of a few private lawyers and on cash-starved organizations like the Southern Prisoners Defense Committee.<sup>85</sup>*

A recent *Time* magazine article on this topic is entitled "You Don't Always Get Perry Mason." Says the author, "Because the majority of murder defendants are ... broke ..., many of them get court-appointed lawyers who lack the resources, experience or inclination to do their utmost.... Some people go to traffic court with better prepared lawyers than many murder defendants get."<sup>86</sup>

Needless to say, the distinct legal advantages that money can buy become even more salient when we enter the realm of corporate and other white-collar crime. Indeed, it is often precisely the time and cost involved in bringing to court a large corporation with its army of legal eagles that is offered as an excuse for the less formal and more genteel treatment accorded to corporate crooks. This excuse is, of course, not equitably distributed to all economic classes, any more than quality legal service is. This means that, regardless of actual innocence or guilt, one's chances of beating the rap increase as one's income increases. Regardless of what fraction of crimes are committed by the poor, the criminal justice system is distorted so that an even greater fraction of those convicted will be poor. And with conviction comes sentencing.

## Sentencing

On June 28, 1990, the House Subcommittee on Financial Institutions Supervision, Regulation and Insurance met in the Rayburn House Office Building to hold hearings on the prosecution of savings and loan criminals. The chairman of the subcommittee, Congressman Frank Annunzio, called the meeting to order and said:

*The American people are furious with the slow pace of prosecutions involving savings and loan criminals. These crooks are responsible for 1/3, 1/2, or maybe even more, of the savings and loan cost. The American taxpayer will be forced to pay \$500 billion or more over the next 40 years, largely because of these crooks. For many Americans, this bill will not be paid until their grandchildren are old enough to retire.*

*We are here to get an answer to one question: "When are the S&L crooks going to jail?"*

*The answer from the administration seems to be: "probably never."*

*Frankly, I don't think the administration has the interest in pursuing Gucci-clad, white-collar criminals. These are hard and complicated cases, and the defendants often were rich, successful prominent members of their upper-class communities. It is far easier putting away a sneaker-clad high school dropout who tries to rob a bank of a thousand dollars with a stick-up note, than a smooth talking S&L executive who steals a million dollars with a fraudulent note.*

Later in the hearing, Chairman Annunzio questioned the administration's representative:

*You cited, Mr. Dennis, several examples in your testimony of successful convictions with stiff sentences, but the average sentence so far is ac-*

*tually about 2 years, compared to an average sentence of about 9 years for bank robbery. Why do we throw the book at people who rob a bank in broad daylight but we coddle people who ... rob the bank secretly?*<sup>87</sup>

The simple fact is that the criminal justice system reserves its harshest penalties for its lower-class clients and puts on kid gloves when confronted with a better class of crook.

We will come back to the soft treatment of the S&L crooks shortly. For the moment, note that the tendency to treat higher-class criminals more leniently than lower-class criminals has been with us for a long time. In 1972, *The New York Times* did a study on sentencing in state and federal courts. The *Times* stated that "crimes that tend to be committed by the poor get tougher sentences than those committed by the well-to-do," that federal "defendants who could not afford private counsel were sentenced nearly twice as severely as defendants with private counsel," and that a "study by the Vera Institute of Justice of courts in the Bronx indicates a similar pattern in the state courts."<sup>88</sup>

More recently, D'Alessio and Stolzenberg studied a random sample of 2,760 offenders committed to the custody of the Florida Department of Corrections during fiscal year 1985. Although they found no greater sentence severity for poor offenders found guilty of property crimes, they found that poor offenders did receive longer sentences for violent crimes, such as manslaughter, and for morals offenses, such as narcotics possession. Nor, by the way, did sentencing guidelines reduce this disparity.<sup>89</sup> A study of individuals convicted of drunk driving found that increased education (taken as an indicator of higher occupational status) "increase[d] the rate of movement from case filing to probation and decrease[d] the rate of movement to prison." And though, when probation was given, more-educated offenders got longer probation, they also got shorter prison sentences, if sentenced to prison at all.<sup>90</sup>

Chiricos and Bales found that, for individuals guilty of similar offenses and with similar prior records, unemployed defendants were more likely to be incarcerated while awaiting trial, and for longer periods, than employed defendants. They were more than twice as likely as their employed counterparts to be incarcerated upon a finding of guilt. And defendants with public defenders experienced longer periods of jail time than those who could afford private attorneys.<sup>91</sup> McCarthy noted a similar link between unemployment and greater likelihood of incarceration.<sup>92</sup> In his study of 28,315 felony defendants in Tennessee, Virginia, and Kentucky, Champion also found that offenders who could afford private counsel had a greater likelihood of probation, and received shorter sentences when incarceration was imposed.<sup>93</sup> A study of the effects of implementing Minnesota's determinate sentencing program shows that socioeconomic bias is "more subtle, but no less real" than before the new program.<sup>94</sup>

Tillman and Pontell examined the sentences received by individuals convicted of Medicaid provider fraud in California. Because such offenders normally

have no prior arrests and are charged with grand theft, their sentences were compared with the sentences of other offenders convicted of grand theft and who also had no prior records. While 37.7 percent of the Medicaid defrauders were sentenced to some jail or prison time, 79.2 percent of the others convicted of grand theft were sentenced to jail or prison. This was so even though the median dollar loss due to the Medicaid frauds was \$13,000, more than ten times the median loss due to the other grand thefts (\$1,149). Tillman and Pontell point out that most of the Medicaid defrauders were health professionals, while most of the others convicted of grand theft had low-level jobs or were unemployed. They conclude that "differences in the sentences imposed on the two samples are indeed the result of the different social statuses of their members."<sup>95</sup>

As usual, data on racial discrimination in sentencing tell the same story of the treatment of those who cannot afford the going price of justice. A study of offender processing in New York State counties found that, for offenders with the same arrest charge and the same prior criminal records, minorities were incarcerated more often than comparably situated whites.<sup>96</sup> A study of sentencing in Miami concludes that when case-related attributes do not clearly point to a given sentence, sentencing disparities are more likely to be based on race.<sup>97</sup> A study of 9,690 males who entered Florida prisons in 1992 and 1993, and who were legally eligible for stricter sentencing under the habitual offender statute, shows that, for similar prior records and seriousness of crime, race had a "significant and substantial" effect: Black defendants were particularly disadvantaged "for drug offenses and for property crimes."<sup>98</sup>

Most striking perhaps is that, in 1993, 51 percent of inmates in state and federal prisons were black and 44 percent of inmates of jails were black, whereas blacks make up only 36.5 percent of those arrested for serious (FBI Index) crimes.<sup>99</sup> Furthermore, when we look only at federal prisons, where there is reason to believe that racial and economic discrimination is less prevalent than in state institutions, we find that in 1986, nonwhite inmates were sentenced, on average, to 33 more months for burglary than white inmates and to 22 more months for income tax evasion. In 1989, the average federal sentence for blacks found guilty of violent offenses was 10 months longer than that for whites.<sup>100</sup>

Here must be mentioned the notorious "100-to-1" disparity between sentences for possession of cocaine in powder form (popular in the affluent suburbs) and in crack form (popular in poor inner-city neighborhoods). Federal laws require a mandatory five-year sentence for crimes involving 500 grams of powder cocaine or 5 grams of crack cocaine. This yields a sentence for first-time offenders (with no aggravating factors, such as possession of a weapon) that is longer than the sentence for kidnapping, and only slightly shorter than the sentence for attempted murder!<sup>101</sup> About 90 percent of those convicted of federal crack offenses are black; about 4 percent are white. "As a result, the average prison sentence served by Black federal prisoners is 40 percent longer than the average sentence for Whites."<sup>102</sup> In 1995, the United States Sentencing Com-

mission recommended ending the 100-to-1 disparity between powder and crack penalties, and, in an unusual display of bipartisanship, both the Republican Congress and the Democratic President rejected their recommendation.<sup>103</sup>

Sentencing disparities between the races are, of course, not new. An extensive study by the *Boston Globe* of 4,500 cases of armed robbery, aggravated assault, and rape found that "blacks convicted in the superior courts of Massachusetts receive harsher penalties than whites for the same crimes."<sup>104</sup> The authors of a study of almost 1,200 males sentenced to prison for armed robbery in a southeastern state found that "in 1977 whites incarcerated for armed robbery had a greater than average chance of receiving the least severe sentence, while nonwhites had a greater than average chance of receiving a moderately severe sentence."<sup>105</sup> A study of 229 adjudicated cases in a Florida judicial district yielded the finding that "whites have an 18 percent greater chance in the predicted probability of receiving probation than blacks when all other things are equal."<sup>106</sup> A recent study of criminal justice systems in California, Michigan, and Texas by Petersilia confirms the continuation of this trend. "Controlling for the factors most likely to influence sentencing and parole decisions," she writes, "the analysis still found that blacks and Hispanics are less likely to be given probation, more likely to receive *prison* sentences, more likely to receive longer sentences, and more likely to serve a greater portion of their original time."<sup>107</sup> Myers found that "harsher treatment of persons with fewer resources (e.g., female, unemployed, unmarried, black) is... pronounced in highly unequal counties."<sup>108</sup>

The federal government has introduced sentencing guidelines and mandatory minimum sentences that might be expected to eliminate discrimination, and many states have followed suit. The effect of this, however, has been not to eliminate discretion but to transfer it from those who sentence to those who decide what to charge—that is, from judges to prosecutors. Prosecutors can charge in a way that makes it likely that the offender will get less than the mandatory minimum sentence. Says U.S. District Judge J. Lawrence Irving of San Diego, "the system is run by the U.S. attorneys. When they decide how to indict, they fix the sentence."<sup>109</sup> And discrimination persists. To examine the effects of mandatory minimum sentences, Barbara Meierhoefer studied 267,178 offenders sentenced in federal courts from January 1984 to June 1990. She found that whites were consistently more likely than blacks to be sentenced to less than the minimum sentence. The disparity varied from year to year, reaching a high point in 1988, when blacks were 30 percent more likely than whites to receive at least the minimum. Hispanics fared even worse than blacks. Concludes Meierhoefer,

*... despite the laws' emphasis on offense behavior, sentences still vary by offender characteristics.... Further, both black and Hispanic offenders now receive notably more severe sentences than their white counterparts.*

*The latter trend suggests that there may be questions to be considered concerning the impact of shifting discretion affecting sentencing from the court to the prosecutor's office.*<sup>110</sup>

A growing number of judges are speaking out against the system of sentencing guidelines and mandatory minimum sentences. According to U.S. District Judge Terry Hatter of Los Angeles, "the toughest sentences are now strictly 'applied to basically one group of people: poor minority people.'" Appellate Judge Gerald W. Heaney of Duluth, Minnesota, conducted his own study "and found that young black men got longer sentences than their white counterparts for similar crimes. Using 1989 data, he compared sentences under the new system with those under the old. The average sentence for black males was 40 months longer, he found, while the average sentence for white males was 19 months longer."<sup>111</sup>

There is considerable evidence that *double discrimination*—by race of the victim and of the offender—affects death penalty sentencing. In Florida, for example, blacks "who kill whites are nearly forty times more likely to be sentenced to death than those who kill blacks." Moreover, among "killers of whites, blacks are five times more likely than whites to be sentenced to death." This pattern of double discrimination was also evidenced, though less pronouncedly, in Texas, Ohio, and Georgia, the other states surveyed. Together, these four states "accounted for approximately 70 percent of the nation's death sentences" between 1972 and 1977.<sup>112</sup>

More recent studies have shown the same pattern. It was on the basis of such research that what may have been the last constitutional challenge to the death penalty was raised and rejected. In the 1987 case of *McCleskey v. Kemp*, evidence of discrimination on the basis of the victim's race was provided by a study by Professor David Baldus, of the University of Iowa, who examined 2,484 Georgia homicide cases that occurred between 1973 (when the current capital murder law was enacted) and 1979 (a year after McCleskey received his death sentence).<sup>113</sup> After controlling for all legitimate nonracial factors—such as severity of crime and the presence of aggravating factors—Baldus found that "murderers of white victims are still being sentenced to death 4.3 times more often than murderers of black victims."<sup>114</sup> The justices of the Supreme Court acknowledged the systemic disparities, but a majority held that the disparities would not invalidate death penalty convictions unless discrimination could be shown in the individual case at hand.

A 1990 report of the General Accounting Office to the Senate and House Committees on the Judiciary reviewed 28 studies on racial disparities in death penalty sentencing and concluded that the race of the victim strongly influenced the likelihood of a death penalty: "[T]hose who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks."<sup>115</sup> Note that all these discriminatory sentences were rendered under

statutes that had passed constitutional muster and were therefore presumed free of the biases that led the Supreme Court to invalidate all American death penalty statutes in *Furman v. Georgia* in 1972.

Another study has shown that among blacks and whites on death row, whites are more likely to have their sentences commuted. Also, blacks or whites who have private counsel are more likely to have their execution commuted than condemned persons defended by court-appointed attorneys.<sup>116</sup>

As I have already pointed out, justice is increasingly tempered with mercy as we deal with a better class of crime. The Sherman Antitrust Act is a criminal law. It was passed in recognition of the fact that one virtue of a free enterprise economy is that competition tends to drive consumer prices down, so agreements by competing firms to refrain from price competition is the equivalent of stealing money from the consumer's pocket. Nevertheless, although such conspiracies cost consumers far more than lower-class theft, price fixing was a misdemeanor until 1974.<sup>117</sup> In practice, few conspirators end up in prison, and when they do, the sentence is a mere token, well below the maximum provided in the law.

In the historic *Electrical Equipment* cases in the early 1960s, executives of several major firms met secretly to fix prices on electrical equipment to a degree that is estimated to have cost the buying public well over \$1 billion. The executives involved knew they were violating the law. They used plain envelopes for their communications, called their meetings "choir practice," and referred to the list of executives in attendance as the "Christmas card list." This case is rare and famous because it was one in which the criminal sanction was actually imposed. Seven executives received and served jail sentences. In light of the amount of money they had stolen from the American public, however, their sentences were more an indictment of the government than of themselves: *thirty days in jail!*

Speaking about the record of federal antitrust prosecution, Clinard and Yeager write that

*...even in the most widespread and flagrant price conspiracy cases, few corporate executives are ever imprisoned; of the total 231 cases with individual defendants from 1955 to 1975, prison sentences were given in only 19 cases. Of a total of 1,027 individual defendants, only 49 were sentenced to prison.*<sup>118</sup>

There is some (slight) indication of a toughening in the sentences since antitrust violations were made a felony in 1974 and penalties were increased. "In felony cases prosecuted under the new penalties through March 1978, 15 of 21 sentenced individuals (71 percent) were given terms averaging 192 days each."<sup>119</sup> Nevertheless, when the cost to society is reckoned, even such penalties as these are hardly severe.

After the "anything goes" attitude of the Reagan era, which brought us such highly publicized white-collar skulduggery as the multibillion dollar savings and loan scandal, the 1990s have seen a kind of backlash, with the government under pressure to up the penalties for corporate offenders. Here too, however, progress follows a slow and zigzagging course. Consider, for example, the following series of titles of articles from *The Washington Post*: March 2, 1990, "Criminal Indictments: Training Bigger Guns on Corporations"; April 1, 1990, "Going Soft on Corporate Crime"; April 28, 1990, "Justice Dept. Shifts on Corporate Sentencing" ("Attorney General Dick Thornburgh last month withdrew the Justice Department's longstanding support for tough mandatory sentences for corporate criminals following an intense lobbying campaign by defense contractors, oil companies and other *Fortune* 500 firms."); April 27, 1991, "Corporate Lawbreakers May Face Tougher Penalties."<sup>120</sup> Lest this last one be taken as truly reversing the trend to leniency, note that it reports new sentencing guidelines approved by the U.S. Sentencing Commission, and it points out: "The only penalties set forth by the guidelines are fines and probation because the defendants in such cases are not individuals." Compare this with a statement from Ira Reiner, Los Angeles district attorney, quoted in the first of the articles just listed: "A fine, no matter how substantial, is simply a cost of doing business for a corporation. But a jail term for executives is different. What we are trying to do is to change the corporate culture." Good luck, Ira.

Studies have shown that even though corporate and white-collar lawbreakers are being more frequently brought to justice and more frequently being sanctioned, they still receive more lenient sentences than do those who are sentenced for common property crimes.<sup>121</sup> A study by Hagan and Palloni, which focuses particularly on the differences between pre- and post-Watergate treatment of white-collar offenders, concludes that likelihood of prosecution after Watergate was increased, but that the effect of this was canceled out by the leniency of the sentences meted out:

*... the new incarcerated white-collar offenders received relatively light sentences that counterbalanced the increased use of imprisonment. Relative to less-educated common criminals, white-collar offenders were more likely to be imprisoned after Watergate than before, but for shorter periods.*<sup>122</sup>

Even after the heightened public awareness of white-collar crime that came in the wake of Watergate and the S&L scandals, it remains the case that the crimes of the poor lead to stiffer sentences than the crimes of the well-to-do (see Table 3-2). Keep in mind while looking at these figures that *each* of the "crimes of the affluent" costs the public more than *all* of the "crimes of the poor" put together.

I do not deny that there has been some toughening of the treatment of white-collar offenders in recent years. Nonetheless, this toughening has been

**TABLE 3-2 Sentences Served for Different Classes of Crime, 1996-97**

	Percent Sentenced to Prison	Average Time Served (in months)
<i>Crimes of the poor</i>		
Robbery	99	60
Burglary	89	28
Auto Theft	63	24
<i>Crimes of the affluent</i>		
Fraud	63	16
Tax Law Violation	42	15
Embezzlement	58	9

Source: *Sourcebook—1998* (compiled from Tables 5.28 and 6.54, and rounded off).

relatively mild, especially when compared with the treatment dealt out to lower-class offenders. Before turning to the "great" scandals of Watergate and the savings and loan industry, here are two "small" cases that illustrate the new developments.

In September 1991, a fire destroyed a chicken-processing plant in Hamlet, North Carolina. When the 100 employees in the plant tried to escape, they found that the company executives had ordered the doors locked "to keep out insects and to keep employees from going outside for coffee breaks, or stealing chickens." Twenty-five workers died in the fire; some were found burned to death at the doors they couldn't open. Another 50 people were injured. The owner of the company and two plant managers were charged with involuntary manslaughter. The outcome: The owner pleaded guilty and was sentenced to 19 years and 6 months in prison. You may or may not think this is severe as a punishment for someone responsible for 25 very painful deaths, but note three revealing facts. First, as part of the plea agreement, the involuntary manslaughter cases against the two plant managers were dismissed, though they surely knew that the doors were locked and what the risks were. Second, the owner is eligible for parole after 2½ years. And third, the sentence is "believed to be the harshest judgment ever handed out for a workplace safety violation."<sup>123</sup>

Consider the case I referred to briefly at the beginning of Chapter 2. It occurred earlier but was decided later than the chicken-processing plant fire. In September 1989, "the worst American mining accident in nearly a decade occurred... at the William Station Mine near Madisonville," Kentucky. Ten workers were killed in a methane explosion. "The grand jury found that supervisors at

the William Station Mine had falsified daily and weekly safety reports, including those that recorded methane levels." Other violations were cited as well, "including requiring miners to work under unsupported roofs, historically the leading causes of death in mines." On February 20, 1993, the company that operates the mine "pleaded guilty to a pattern of safety misconduct there and agreed to pay the Government a fine of \$3.75 million," said to be "the largest criminal fine ever imposed for violations of the Mine Safety Act." Is this severe for ten deaths? Was this an accident, if it resulted from intentionally covering up safety violations? Note that there was the possibility of a prison sentence for this. "James H. Tichenor, who was acting foreman at the mine, pleaded guilty to charges of falsifying records of methane levels.... Prosecutors said that Mr. Tichenor [who was the only individual charged] was cooperating in the investigation and that they had agreed to recommend he receive a minimum sentence. Under Federal guidelines, the minimum sentence for his violations could be probation to six months in prison."<sup>124</sup>

We turn now to the greatest examples of upper-class crime in our era, the savings and loan debacle and the Watergate scandal. The federally insured system of savings and loan associations (also known as "thrifts") was created in the 1930s to promote the building and sale of new homes during the Great Depression. The system had built into it important limitations on the kinds of loans that could be made and was subject to federal supervision to prevent the bank failures that came in the wake of the Depression of 1929. Starting in the 1970s and speeding up in the early 1980s, this entire system of regulation and supervision was first loosened, and then essentially dismantled, as part of the Reagan administration's policy of deregulation. Although S&Ls could now make riskier investments, their deposits were still insured by the Federal Savings and Loan Insurance Corporation (FSLIC). Translation: The S&Ls could make risky investments shooting for windfall profits, with the taxpayers picking up the tab for losses. This combination proved to be financial dynamite. The thrifts made high-risk investments, and many failed. By 1982, the bill to the FSLIC for bailing out insolvent thrifts was over \$2.4 billion. By 1986, the FSLIC was itself insolvent!<sup>125</sup> In 1996, *The Wall Street Journal* announced that a Government Accounting Office report put the total cost to the American taxpayer of the S&L bailout at \$480.9 billion!<sup>126</sup>

Not all this loss is due to crime. Some is due to foolish but legal investments, some is due to inflation, and some is due to foot-dragging by federal agencies that allowed interest to accumulate. Nonetheless, there is evidence that fraud was a central factor in 70 to 80 percent of the S&L failures.<sup>127</sup> Much of this fraud took the form of looting of bank funds for the personal gain of bank officers at the expense of the institution. The commissioner of the California Department of Savings and Loans is quoted as saying in 1987: "The best way to rob a bank is to own one."<sup>128</sup> Says *Fortune* magazine, "Though yet perceived only in hazy outline, today's S&L fraud dwarfs every previous carnival of white-collar crime in America."<sup>129</sup>

In response to the enormity of this scandal, American public opinion has hardened toward white-collar crime, and federal law enforcement agencies have been prosecuting, fining, and even jailing offenders at unprecedented rates. Nonetheless, considering the size of the scandal and the far-reaching damage it has done to the American economy, the treatment is still light-handed compared with that of even nonviolent "common" crime. According to a study conducted at the University of California at Irvine, "[t]he average prison term for savings and loan offenders sentenced between 1988 and 1992 was 36 months, compared to 56 months for burglars and 38 months for those convicted of motor vehicle theft." The study goes on to point out that S&L offenders were given lengthier sentences than first-time property crime offenders (who received an average sentence of 26 months), but, lest we think that this shows a new severity, the study notes that the average loss in an S&L case is \$500,000.<sup>130</sup> The average loss per property offense in 1995 was \$1,251.<sup>131</sup>

Note that these sentenced S&L offenders represent just a small fraction of the crooks involved in the S&L looting. One observer points out that "from 1987 to 1992, Federal bank and thrift regulators filed a staggering 95,045 criminal referrals with the FBI. The volume was so large that more than 75 percent of these referrals have been dropped without prosecution."<sup>132</sup> At the same time, the Justice Department advised against funding for 425 new agents requested by the FBI and 231 new assistant U.S. attorneys, and the administration recommended against increasing funds authorized by Congress for the S&L investigations from \$50 million to \$75 million.<sup>133</sup> But soon after we find the president and the Congress ready to spend \$23 billion on criminal justice and hire 100,000 new police officers to keep our streets safe!

To give you a concrete idea of what some of the S&L crooks did and the treatment they are getting, I have culled, from various sources, a roughly representative "rogues gallery" (see Table 3-3). In looking at these rogues, their acts, and their punishments, keep in mind the treatment meted out to the Typical Criminal when he steals a fraction of what they did.

The Watergate scandal was a different sort of affair. Rather than seeking to rob money, former President Richard Nixon's henchmen sought to steal the 1972 presidential election by burglarizing, wiretapping, and generally disrupting the opposing party. Nixon himself was never indicted. He was forced to resign the presidency in disgrace, and "sentenced" to a \$148,000-a-year federal pension (plus office, staff, and other perks, costing the taxpayer an additional \$335,000 a year).<sup>134</sup> His underlings did occasionally go to jail. Nonetheless, considering that their crime involved an attempt to undermine the constitutional processes of the American republic, their treatment must also be regarded as lenient (see Table 3-4). And in case you are wondering what became of these crooks after they returned to society as ex-cons: John Dean is an investment banker in Beverly Hills, John Ehrlichman moved to Atlanta and became a business consultant, H. R. Haldeman worked as a real estate developer

TABLE 3-3 The Savings and Loan Roster

Michael Hellerman aka Michael Rapp	Defrauded Flushing Federal S&L (New York) of \$8.4 million and Florida Center Bank of \$7.5 million.	Sentenced to 32 years for Florida theft and 15 years for New York theft, plus \$1.75 million fine. Reduced on appeal to 15 years and a fine of \$100,000. Released on parole in 1992 after serving 5½ years; has not paid any of fine, but lawyer claims \$100 a month is being deducted from Hellerman/Rapp's salary.
Charles Bazarian	Convicted for "swindling \$20 million from two California S&Ls and skimming at least \$100,000 from a low-income H.U.D. project." Also convicted with Rapp in Florida case.	Sentenced to 2 years and \$100,000 fine in Florida case; sentenced to 2 years in prison, 3 years probation, and \$10,000 fine for other incidents. Served less than 2 years for cooperating with authorities and has paid \$18,000.
Mario Renda	As partner in a brokerage business, he stole about \$16 million.	Sentenced to prison, ordered to pay \$9.9 million in restitution and \$125,000 in criminal fines; was given early parole after serving 21 months. As of April 1992, he had paid \$950 of the fine and only about \$500,000 of the restitution.
Herman Beebe	Involved in widespread loan fraud involving more than \$30 million.	Pleaded guilty to two counts under a bargain in which he received a sentence of 1 year and 1 day. Served 10 months and is immune from prosecution for fraud charges in Louisiana and Texas.
Richard Mariucci	As branch manager of Gibraltar Federal (California), stole \$3.4 million, which he spent on gambling and raising racehorses.	Sentenced to 2 years and 3 months.
Walter Vladovich	Video store owner, defrauded Westlake Thrift and Loan (California) out of \$4 million and bribed First United Federal (California) vice president to approve a \$556,269 loan, which he pocketed.	Sentenced to 4 years and \$50,000 fine.
Arthur Kick	President of North Chicago Federal S&L, stole \$1.2 million by misappropriating loans.	Sentenced to full restitution and 3 years probation.
Jack Lee Odon	President of Sioux Valley Savings (Iowa), stole \$1 million, took kickbacks from developers, and set up a slush fund to hide bad loans from examiners.	Sentenced to 6 years.
Edward Jolly, Jr.	Assistant regional vice president and consumer loan manager at First Federal Savings and Loan (South Carolina), stole \$4.5 million through fictitious loan applications and lost all the money playing the futures market.	Sentenced to 2 years and 9 months.
Ted Musacchio	President of Columbus Marin S&L (California), stole \$9.3 million and lied about it on federal disclosure forms.	Sentenced January 1990 to 5 years probation and immediate restitution of \$9.3 million, but as of April 1992 no restitution has been paid.
Gina Loren	Investment manager, together with stockbroker Daniel Burkhardt and attorney Charles Lusin, "conned California thrifts, individuals, and an order of nuns out of \$4.1 million."	Sentenced to 6 years (Lusin sentenced to 5 years and Burkhardt to 4 years).

Source: Stephen Pizzo and Paul Muolo, "Take the Money and Run: A Rogues Gallery of Some Lucky S & L Thieves," *The New York Times Magazine*, May 9, 1993; Alan Fomhan, "S & L Felons," *Fortune*, November 5, 1990, p. 93; "Former Columbus President Guilty of Misapplying Funds," *American Banker*, December 26, 1989, and "Why S&L Crooks Have Failed to Pay Millions of Dollars in Court-Ordered Restitution: Nineteen Case Studies," *A Staff Report for the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the Committee on Banking, Finance and Urban Affairs, House of Representatives*, 102nd Congress, Second session, April 1992.



TABLE 3-4 The Watergate Roster

Richard M. Nixon	Unindicted co-conspirator	Pardoned	
Dwight L. Chapin	Convicted of lying to a grand jury	Sentenced to serve 10 to 30 months	Served 8 months
Charles W. Colson	Pleaded guilty to obstruction of justice	Sentenced to serve 1 to 3 years and fined \$5,000	Served 7 months
John W. Dean III	Pleaded guilty to conspiracy to obstruct justice	Sentenced to serve 1 to 4 years	Served 4 months
John D. Ehrlichman	Convicted of conspiracy to obstruct justice, conspiracy to violate civil rights, and perjury	Sentenced to serve concurrent terms of 20 months to 8 years	Served 18 months
H. R. Haldeman	Convicted of conspiracy to obstruct justice and perjury	Sentenced to serve 30 months to 8 years	Served 18 months
E. Howard Hunt	Pleaded guilty to conspiracy, burglary, and wiretapping	Sentenced to serve 30 months to 8 years and fined \$10,000	Served 33 months
Herbert W. Kalmbach	Pleaded guilty to violation of the Federal Corrupt Practices Act and of promising federal employment as a reward for political activity	Sentenced to serve 6 to 18 months and fined \$10,000	Served 6 months
Richard G. Kleindienst	Pleaded guilty to refusal to answer pertinent questions before a Senate committee	Sentenced to 30 days and fined \$100	Sentence suspended
Egil Krogh, Jr.	Pleaded guilty to conspiracy to violate civil rights	Sentenced to serve 2 to 6 years (all but 6 months were suspended)	Served 4½ months
Frederick C. LaRue	Pleaded guilty to conspiracy to obstruct justice	Sentenced to serve 1 to 3 years (all but 6 months were suspended)	Served 5½ months
G. Gordon Liddy	Convicted of conspiracy to violate civil rights, burglary, and wiretapping	Sentenced to serve 6 years and 8 months to 20 years and fined \$40,000	Served 52 months
Jeb S. Magruder	Pleaded guilty to conspiracy to obstruct justice, wiretapping, and fraud	Sentenced to serve 10 months to 4 years	Served 7 months
John N. Mitchell	Convicted of conspiracy to obstruct justice and perjury	Sentenced to serve 30 months to 8 years	Served 19 months
Donald H. Segretti	Pleaded guilty to campaign violations and conspiracy	Sentenced to serve 6 months	Served 4½ months
Maurice H. Stans	Pleaded guilty to five misdemeanor violations of the Federal Elections Campaign Act	Fined \$5,000	
James W. McCord, Jr.	Convicted of conspiracy, burglary, wiretapping, and unlawful possession of intercepting devices	Sentenced to serve 1 to 5 years	Served 4 months
Bernard L. Barker	Pleaded guilty to conspiracy, burglary, wiretapping, and unlawful possession of intercepting devices	Sentenced to serve 18 months to 6 years	Served 12 months
Virgilio R. Gonzalez	Pleaded guilty to conspiracy, burglary, wiretapping, and unlawful possession of intercepting devices	Sentenced to serve 1 to 4 years	Served 15 months
Eugenio R. Martinez	Pleaded guilty to conspiracy, burglary, wiretapping, and unlawful possession of intercepting devices	Sentenced to serve 1 to 4 years	Served 15 months
Frank A. Sturgis	Pleaded guilty to conspiracy, burglary, wiretapping, and unlawful possession of intercepting devices	Sentenced to serve 1 to 4 years	Served 13 months

Source: Lawrence Meyer, "Nixon and Watergate Destroyed Our Innocence," *The Washington Post*, June 17, 1982.  
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in southern California, Gordon Liddy hosts a conservative radio talk show, Jeb Magruder is a Presbyterian pastor, and so on.<sup>135</sup> Even a criminal record and the “ex-con” stigma fall more lightly on the well-to-do.

We have seen in this chapter and the one before that the criminal justice system is triply biased against the poor. First, there is the economic class bias *among harmful acts* as to which get labeled crimes and which are treated as regulatory matters, as we saw in the previous chapter. Second, there is economic class bias *among crimes* that we have already seen in this chapter. The crimes that poor people are likely to commit carry harsher sentences than the “crimes in the suites” committed by well-to-do people. Third, *among defendants convicted of the same crimes*, the poor receive less probation and more years of confinement than well-off defendants, assuring us once again that the vast majority of those put behind bars are from the lowest social and economic classes in the nation. On either side of the law, the rich get richer...

### ... and the Poor Get Prison

At 9:05 A.M. on the morning of Thursday, September 9, 1971, a group of inmates forced their way through a gate at the center of the prison, fatally injured a guard named William Quinn, and took 50 hostages. The Attica uprising had begun. It lasted four days, until 9:43 A.M. on the morning of Monday, September 13, when corrections officers and state troopers stormed the prison and killed 29 inmates and 10 hostages.<sup>136</sup> During those four days the nation saw the faces of its captives on television—the hard black faces of young men who had grown up on the streets of Harlem and other urban ghettos. Theirs were the faces of crime in America. The television viewers who saw them were not surprised. Here were faces of dangerous men who should be locked up. Nor were people outraged when the state launched its murderous attack on the prison, killing many more inmates and guards than did the prisoners themselves. Maybe they were shocked—but not outraged. Neither were they outraged when two grand juries refused to indict any of the attackers, nor when the mastermind of the attack, New York Governor Nelson Rockefeller, was named vice president of the United States three years after the uprising and massacre.<sup>137</sup>

They were not outraged because the faces they saw on the TV screens fit and confirmed their beliefs about who is a deadly threat to American society—and a deadly threat must be met with deadly force. How did those men get to Attica? How did Americans get their beliefs about who is a dangerous person? These questions are interwoven. People get their notions about who is a criminal at least in part from the occasional television or newspaper picture of who is inside our prisons. The individuals they see there have been put in prison because people believe certain kinds of individuals are dangerous and should be locked up.

I have argued in this chapter that this is not a simple process of selecting the dangerous and the criminal from among the peace-loving and the law-abiding. It is also a process of *weeding out the wealthy* at every stage, so that the final picture—a picture like that that appeared on the TV screen on September 9, 1971—is not a true reflection of the real dangers in our society but a distorted image, the kind reflected in a carnival mirror.

It is not my view that the inmates in Attica were innocent of the crimes that sent them there. I assume they and just about all the individuals in prisons in America are probably guilty of the crime for which they were sentenced and maybe more. My point is that people who are equally or more dangerous, equally or more criminal, are not there; that the criminal justice system works systematically not to punish and confine the dangerous and the criminal, *but to punish and confine the poor who are dangerous and criminal*.

It is successful at all levels. In 1973, there were 204,211 individuals in state and federal prisons, or 96 prisoners for every 100,000 individuals (of all ages) in the general population. By 1979, state and federal inmates numbered 301,470, or 133 per 100,000 Americans. By 1998, there were a total of 1,825,400 persons in state and federal prisons and in local jails, a staggering 672 for every 100,000 in the population. One in 149 U.S. residents (of all ages and both sexes) was behind bars in 1998. However, of the 1,825,400 inmates in federal and state prisons and in jails, some 1,715,000 are men, virtually all above the age of 18. Because the adult male population in the United States is about 94 million, *this means that roughly one out of every 55 American adult men is behind bars*.<sup>138</sup> This enormous number of prisoners is, of course, predominantly from the bottom of society.

Of the estimated 1.2 million people in state prisons in 1998, one-third were not employed at all (full or part time) prior to their arrests. Just over half were employed at all, thus nearly half were without full-time employment prior to arrest. These statistics are comparable to those in 1986, when 31 percent of state inmates had no pre-arrest employment at all, and 43 percent had no full-time pre-arrest employment.<sup>139</sup> Among jail inmates in 1996, 36 percent were not employed prior to arrest—20 percent were looking for work and 16 percent were not. Approximately half of jail inmates reported pre-arrest incomes below \$7,200 a year.<sup>140</sup>

To get an idea of what part of society is in prison, we should compare these figures with comparable figures for the general population. Because more than 90 percent of inmates are male, we can look at employment and income figures for males in the general population in the mid-1990s.

In 1994, 5.4 percent of males, 16 years old and above, in the labor force were unemployed and looking for work. Since it is normally thought that the number of unemployed people who are not looking for work is something less than equal to the number looking, doubling this rate will give us a conservative estimate of the percentage of males above age 16 who are unemployed, looking

and not looking. Then, whereas one-third of state prison inmates and 36 percent of jail inmates were unemployed (looking and not looking for work) in the year prior to their arrest, the rate for unincarcerated males above the age of 16, was approximately 11 percent. Prisoners were unemployed at a rate more than three times that of their counterparts in the general population.<sup>141</sup> In 1994, the median income for males, 15 years old and above, with any income at all, was \$22,995.<sup>142</sup> This means that half of these males in the general population with any income at all were earning this amount or less. Compare this to jail inmates, about half of whom earned \$7,200 a year or less in the year before they were arrested.

Our prisoners are not a cross section of America. They are considerably poorer and considerably less likely to be employed than the rest of Americans. Moreover, they are also less educated, which is to say less in possession of the means to improve their sorry situations. Of all U.S. prison inmates, 41 percent did not graduate from high school, compared to 20 percent of the U.S. adult population.<sup>143</sup>

The criminal justice system is sometimes thought of as a kind of sieve in which the innocent are progressively sifted out from the guilty, who end up behind bars. I have tried to show that the sieve works another way as well. It sifts the affluent out from the poor, so it is not merely the guilty who end up behind bars, but the *guilty poor*.

With this I think I have proven the hypotheses set forth in Chapter 2, in the section titled "Criminal Justice as Creative Art." The criminal justice system does not simply weed the peace-loving from the dangerous, the law-abiding from the criminal. At every stage, starting with the very definitions of crime and progressing through the stages of investigation, arrest, charging, conviction, and sentencing, the system *weeds out the wealthy*. It refuses to define as "crimes" or as serious crimes the dangerous and predatory acts of the well-to-do—acts that, as we have seen, result in the loss of thousands of lives and billions of dollars. Instead, the system focuses its attention on those crimes likely to be committed by members of the lower classes. Thus, it is no surprise to find that so many of the people behind bars are from the lower classes. The people we see in our jails and prisons are no doubt dangerous to society, but they are not *the danger* to society, not *the gravest danger* to society. Individuals who pose equal or greater threats to our well-being walk the streets with impunity.

In Chapter 1, I argued that the society fails to institute policies that have a good chance of reducing crime. In the present chapter and the previous one, I have argued that the criminal justice system works to make crime appear to be the monopoly of the poor by restricting the label "crime" to the dangerous acts of the poor and rarely applying it to the dangerous acts of the well off (previous chapter), and by more actively pursuing and prosecuting the poor rather than the well off for the acts that are labeled crime (present chapter). *The joint effect of all these phenomena is to maintain a real threat of crime that the vast*

*majority of Americans believes is a threat from the poor.* The criminal justice system is a carnival mirror that throws back a distorted image of the dangers that lurk in our midst—and conveys the impression that those dangers are the work of the poor. In Chapter 4, I suggest who benefits from this illusion and how.

## Summary

In this chapter I have mainly tried to document that, *even among those dangerous acts that our criminal justice system labels as crimes*, the system works to make it more likely that those who end up in jail or prison will be from the bottom of society. This works in two broad ways:

1. *For the same crime*, the system is more likely to investigate and detect, arrest and charge, convict and sentence, sentence to prison and for a longer time, a lower-class individual than a middle- or upper-class individual. To support this we reviewed a large number of studies comparing the treatment of high- and low-socioeconomic offenders and of white and nonwhite offenders, from arrest through sentencing for the same crimes.

2. *Between crimes that are characteristically committed by poor people (street crimes) and those characteristically committed by the well-off (white-collar and corporate crimes)*, the system treats the former much more harshly than the latter, even when the crimes of the well off take more money from the public or cause more death and injury than the crimes of the poor. To support this we compared the sentences meted out for robbery with those for embezzlement, for grand theft, and Medicaid provider fraud, and we looked at the treatment of those responsible for death and destruction in the workplace as well as those responsible for the savings and loan scandal and the Watergate crimes.

## Study Questions

1. Who is in our jails and prisons? How do the people behind bars in America compare with the general population in employment, wealth, and level of education?
2. What is meant by "white-collar crime"? How costly is it compared with the crimes on the FBI's Index?
3. What factors make it likelier that a poor person who commits a crime such as shoplifting or nonaggravated assault will be arrested than a middle-class person who commits the same crime?
4. What factors make it likelier that a middle- or upper-class person charged with a crime will be acquitted than a lower-class person charged with the same crime?
5. Are the people responsible for white-collar crime, including crimes that result in serious injury, more or less blameworthy than muggers? Do we punish white-collar criminals justly?

6. Is the criminal justice system racist? What evidence would establish or refute your view?
7. If killers of whites are more likely to be sentenced to death than killers of blacks, what should we do? Should we abolish the death penalty? Do you agree with the Supreme Court's decision in *McCleskey v. Kemp*? Why?

## Additional Readings

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## Notes

1. *Challenge*, p. 44.
2. Ronald Goldfarb, "Prisons: The National Poorhouse," *New Republic*, November 1, 1969, pp. 15-17.
3. Philip A. Hart, "Swindling and Knavery, Inc.," *Playboy*, August 1972, p. 158.
4. Compare the statement, written more than half a century ago, by Professor Edwin H. Sutherland, one of the major luminaries of twentieth-century criminology:

*First, the administrative processes are more favorable to persons in economic comfort than to those in poverty, so that if two persons on different economic levels are equally guilty of the same offense, the one on the lower level is more likely to be arrested, convicted, and committed to an institution. Second, the laws are written, administered, and implemented primarily with reference to the types of crimes committed by people of lower*

*economic levels [E. H. Sutherland, Principles of Criminology (Philadelphia: Lippincott, 1939), p. 179].*

5. For example, in 1991, when blacks made up 12 percent of the national population, they accounted for 46 percent of the U.S. state prison population. BJS, *Survey of State Prison Inmates*, 1991, p. 3.
6. Edwin H. Sutherland and Donald R. Cressey, *Criminology*, 9th ed. (Philadelphia: Lippincott, 1974), p. 133. The following studies are cited in support of this point (p. 133, note 4): Edwin M. Lemert and Judy Roseberg, "The Administration of Justice to Minority Groups in Los Angeles County," University of California Publications in Culture and Society 2, no. 1 (1948), pp. 1-28; Thorsten Sellin, "Race Prejudice in the Administration of Justice," *American Journal of Sociology* 41 (September 1935), pp. 212-217; Sidney Alexrad, "Negro and White Male Institutionalized Delinquents," *American Journal of Sociology* 57 (May 1952), pp. 569-74; Marvin E. Wolfgang, Arlene Kelly, and Hans C. Nolde, "Comparisons of the Executed and the Commuted among Admissions to Death Row," *Journal of Criminal Law, Criminology, and Police Science* 53 (September 1962), pp. 301-11; Nathan Goldman, *The Differential Selection of Juvenile Offenders for Court Appearance* (New York: National Council on Crime and Delinquency, 1963); Irving Piliavin and Scott Briar, "Police Encounters with Juveniles," *American Journal of Sociology* 70 (September 1964), pp. 206-14; Robert M. Terry, "The Screening of Juvenile Offenders," *Journal of Criminal Law, Criminology, and Police Science* 58 (June 1967), pp. 173-81. See also Ramsey Clark, *Crime in America* (New York: Simon & Schuster, 1970), p. 51: "Negroes are arrested more frequently and on less evidence than whites and are more often victims of mass or sweep arrests"; and Donald Taft, *Criminology*, 3rd ed. (New York: Macmillan, 1956), p. 134:

*Negroes are more likely to be suspected of crime than are whites. They are also more likely to be arrested. If the perpetrator of a crime is known to be a Negro the police may arrest all Negroes who were near the scene—a procedure they would rarely dare to follow with whites. After arrest Negroes are less likely to secure bail, and so are more liable to be counted in jail statistics. They are more liable than whites to be indicted and less likely to have their case nol prossed or otherwise dismissed. If tried, Negroes are more likely to be convicted. If convicted they are less likely to be given probation. For this reason they are more likely to be included in the count of prisoners. Negroes are also more likely than whites to be kept in prison for the full terms of their commitments and correspondingly less likely to be paroled.*

7. William Wilbanks, *The Myth of a Racist Criminal Justice System* (Monterey, Calif.: Brooks/Cole, 1987).
8. *Ibid.*, pp. 64-65.
9. *Sourcebook-1998*, p. 186, Table 3.26; p. 342, Table 4.10, *UCR-1998*; pp. 228.
10. For an overview of this double distortion, see Thomas J. Dolan, "The Case for Double Jeopardy: Black and Poor," *International Journal of Criminology and Penology* 1 (1973), pp. 129-50.

11. *StatAbst*—1998, p. 480, Table 762. See also Karen Pennar, "The Rich are Richer—And America May Be the Poorer," *Business Week*, November 18, 1991, pp. 85–88.
12. Francine Blau and John Graham, "Black-White Differences in Wealth and Asset Composition," *Quarterly Journal of Economics* (May 1990), p. 323; David Swinton, "The Economic Status of African Americans during the Reagan-Bush Era: Withered Opportunities, Limited Outcomes, and Uncertain Outlook," in *The State of Black America* (New York: National Urban League, 1993), p. 138.
13. *Economic Report of the President*, February 1998, pp. 130–31.
14. *StatAbst*—1998, p. 407, Table 651.
15. Michael Tonry, "Racial Politics, Racial Disparities, and the War on Crime," *Crime & Delinquency* 40, no. 4 (October 1994), pp. 483, 485–86.
16. *Sourcebook*—1981, p. 463.
17. *StatAbst*—1988, p. 175, Table 304.
18. BJS, *Profile of Inmates in the United States and in England and Wales, 1991* (October 1994, NCJ-145863), p. 13.
19. Theodore Chiricos and William Bales, "Unemployment and Punishment: An Empirical Assessment," *Criminology* 29, no. 4 (1991), p. 718.
20. "An offender's socioeconomic status...did not impact sentence length for any of the property offenses." Stewart J. D'Alession and Lisa Stolzenberg, "Socioeconomic Status and the Sentencing of the Traditional Offender," *Journal of Criminal Justice* 21 (1993), p. 73. The same study did find that lower-socioeconomic status offenders received harsher sentences for violent and moral-order crimes. Another study that finds no greater likelihood of incarceration based on socioeconomic status is Michael Benson and Esteban Walker, "Sentencing the White-Collar Offender," *American Sociological Review* 53 (April 1988), pp. 294–302. And yet another found higher-status offenders to be more likely to be incarcerated: David Weisburd, Elin Waring, and Stanton Wheeler, "Class, Status, and the Punishment of White Collar Criminals," *Law and Social Inquiry* 15 (1990), pp. 223–41. These last two studies are limited to offenders convicted of white-collar crimes, and so they deal with a sample that has already been subject to whatever discrimination exists in the arrest, charging, and conviction of white-collar offenders.
21. Isidore Silver, "Introduction" to the Avon edition of *The Challenge of Crime in a Free Society* (New York: Avon, 1968), p. 31.
22. This is the conclusion of Austin L. Porterfield, *Youth in Trouble* (Fort Worth: Tex.: Leo Potishman Foundation, 1946); Fred J. Murphy, M. Shirley, and H.L. Witmer, "The Incidence of Hidden Delinquency," *American Journal of Orthopsychiatry* 16 (October 1946), pp. 686–96; James F. Short, Jr., "A Report on the Incidence of Criminal Behavior, Arrests, and Convictions in Selected Groups," *Proceedings of the Pacific Sociological Society, 1954*, pp. 110–18, published as vol. 22, no. 2 of *Research Studies of the State College of Washington* (Pullman: State College of Washington, 1954); F. Ivan Nye, James F. Short, Jr., and Virgil J. Olson, "Socioeconomic Status and Delinquent Behavior," *American Journal of Sociology* 63 (January 1958), pp. 381–89; Maynard L. Erickson and Lamar T. Empey, "Class Position, Peers and Delinquency," *Sociology and Social Research* 49 (April 1965), pp. 268–82; William J. Chambliss and Richard H. Nagasawa, "On the Validity of Official Statistics: A Comparative Study of White, Black, and Japanese High-School Boys," *Journal of Research in Crime and Delinquency* 6 (January 1969), pp. 71–77; Eugene Doleschal, "Hidden Crime," *Crime and Delinquency Literature* 2, no. 5 (October 1970), pp. 546–72; Nanci Koser Wilson, *Risk Ratios in Juvenile Delinquency* (Ann Arbor, Mich.: University Microfilms, 1972); and Maynard L. Erickson, "Group Violations, Socioeconomic Status, and Official Delinquency," *Social Forces* 52, no. 1 (September 1973), pp. 41–52.
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24. Gary F. Jensen and Kevin Thompson, "What's Class Got to Do with It? A Further Examination of Power-Control Theory," *American Journal of Sociology* 95, no. 4 (January 1990), p. 1021.
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27. Empey and Erickson, "Hidden Delinquency and Social Status," pp. 549, 551. Nye, Short, and Olson also found destruction of property to be committed most frequently by upper-class boys and girls, "Socioeconomic Status and Delinquent Behavior," p. 385.
28. Williams and Gold, "From Delinquent Behavior to Official Delinquency."
29. Gold, "Undetected Delinquent Behavior," p. 37.
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31. Comparing socioeconomic status categories, "scant evidence is found that would support the contention that group delinquency is more characteristic of the lower-status levels than other socioeconomic status levels. In fact, only arrests seem to be more characteristic of the low-status category than the other categories." Erickson, "Group Violations, Socioeconomic Status and Official Delinquency," p. 15.
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34. Terence P. Thornberry, "Race, Socioeconomic Status and Sentencing in the Juvenile Justice System," *Journal of Criminal Law and Criminology* 64, no. 1 (1973), pp. 90–98.
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37. Jerome Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (New York: Cambridge University Press, 1996), p. 76. The study reported is M. Wordes, T. Bynum, and C. Corley, "Locking up Youth: The Impact of Race on Detention Decisions," *Journal of Research in Crime and Delinquency* 31, no. 2 (May 1994).
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*Compared to other youths, Negroes and boys whose appearance matched the delinquent stereotype were more frequently stopped and interrogated by patrolmen—often even in the absence of evidence that an offense had been committed—usually were given more severe dispositions for the same violations. Our data suggest, however, that these selective apprehension and disposition practices resulted not only from the intrusion of long-held prejudices of individual police officers but also from certain job-related experiences of law-enforcement personnel. First, the tendency of police to give more severe dispositions to Negroes and to youths whose appearance correspond to that which police associated with delinquents partly reflected the fact, observed in this study, that these youths also were much more likely than were other types of boys to exhibit the sort of recalcitrant demeanor which police construed as a sign of the confirmed delinquent. Further, officers assumed, partly on the basis of departmental statistics, that Negroes and juveniles who "look tough" (e.g.,*

*who wear chinos, leather jackets, boots, etc.) commit crimes more frequently than do other types of youths [p. 212].*

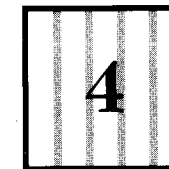
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## TO THE VANQUISHED BELONG THE SPOILS

### Who Is Winning the Losing War against Crime?

*In every case the laws are made by the ruling party in its own interest; a democracy makes democratic laws, a despot autocratic ones, and so on. By making these laws they define as "just" for their subjects whatever is for their own interest, and they call anyone who breaks them a "wrong-doer" and punish him accordingly.*

Thrasymachus, in Plato's *Republic*

### Why Is the Criminal Justice System Failing?

The streams of my argument flow together at this point in a question: *Why is it happening?* I have shown how it is no accident that "the offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country."<sup>1</sup> I have shown that this is not an accurate group portrait of who threatens society—it is a picture of whom the criminal justice system *selects* for arrest and imprisonment from among those who threaten society. It is an image distorted by the shape of the criminal justice carnival mirror. This much we have seen and now we want to know why: *Why is the criminal justice system allowed to function in a fashion that neither protects society nor achieves justice? Why is the criminal justice system failing?*

My answer to these questions will require looking at who benefits from this failure and who suffers from it. More particularly, I will argue that the rich and powerful in the United States—those who derive the greatest advantage from

the persistence of the social and economic system as it is currently organized—reap benefits from the failure of criminal justice that has been documented in this book. However—as I cautioned early on—this should not lead the reader to think that my explanation for the current shape of the criminal justice system is a “conspiracy theory.”

A conspiracy theory would argue that the rich and the powerful, seeing the benefits to be derived from the failure of criminal justice, consciously set out to use their wealth and power to make it fail. There are many problems with such a theory. First, it is virtually impossible to prove. If the conspiracy succeeds, then this is possible only to the extent that it is kept secret. Thus, evidence for a conspiracy would be as difficult to obtain as the conspiracy was successful. Second, conspiracy theories strain credibility precisely because the degree of secrecy they would require seems virtually impossible in a society as open and fractious as our own. If there is a “ruling elite” in the United States that comprises a group as small as the richest *one-thousandth of 1 percent* of the population, it would still be made up of more than 2,000 people. To think that a conspiracy to make the criminal justice system fail in the way it does could be kept secret among this number of people in a country like ours is just unbelievable. Third, conspiracy theories are not plausible because they do not correspond to the way most people act most of the time. Although there is no paucity of conscious mendacity and manipulation in our politics, most people most of the time seem sincerely to believe that what they are doing is right. Whether this is a tribute to human beings’ creative capacities to rationalize what they do or just a matter of shortsightedness, it seems a fact. For all these reasons, it is not plausible that so fateful and harmful a policy as the failure of criminal justice could be purposely maintained by the rich and powerful. Rather, we need an explanation that is compatible with believing that policy makers, on the whole, are simply doing what they sincerely believe is right.

To understand how the Pyrrhic defeat theory explains the current shape of our failing criminal justice policy, note that this failure is really *three* failures that work together. First, there is the failure to implement policies that stand a good chance of reducing crime and the harm it causes. (This was argued in Chapter 1.) Second, there is the failure to identify as crimes the harmful acts of the rich and powerful. (This is the first of the hypotheses listed on page 67 in Chapter 2 and it is confirmed by the evidence presented in Chapter 2.) Third, there is the failure to eliminate economic bias in the criminal justice system, so that the poor continue to have a substantially greater chance than better-off people of being arrested, charged, convicted, and penalized for committing the acts that are treated as crimes. (This corresponds to the second through fourth hypotheses listed on page 68 in Chapter 2 and is confirmed by the evidence presented in Chapter 3.) The effect of the first failure is that there remains a large amount of crime—even if crime rates occasionally dip as a result of factors outside the control of the criminal justice system, such as the decline

in unemployment or the routinization of the illicit drug trade. The effect of the second failure is that the acts identified as crimes are those done predominantly by the poor. The effect of the third failure is that the individuals who are arrested and convicted for crimes are predominantly poor people. The effect of the three failures working together is that we are largely unprotected against the harmful acts of the well off, while at the same time we are confronted on the streets and in our homes with a real and large threat of crime and in the courts and prisons with a large and visible population of poor criminals. And lest it be thought that the public does not feel threatened by crime, consider that a recent poll shows that, though crime is down, 64 percent of Americans believe that there is more crime than there was the year before.<sup>2</sup> In short, the effect of current criminal justice policy is at once to narrow the public’s conception of what is dangerous to acts of the poor and to present a convincing embodiment of this danger.

The Pyrrhic defeat theory aims to explain the *persistence* of this failing criminal justice policy, rather than its origins. The criminal justice system we have today originated as a result of complex historical factors that have to do with the development of the common law tradition in England, the particular form in which this was transplanted on American soil, and the zigzagging course of reform and reaction that has marked our history since the English colonies were transformed into an independent American nation. The study of these factors would surely require another book longer than this one—but, more important, for our purposes it would be unnecessary because it is not the origin of criminal justice policy and practices that is puzzling. The focus on one-on-one harm reflects the main ways in which people harmed each other in the days before large-scale industrialization; the refusal to implement policies that might reduce crime (such as gun control or legalization of heroin or amelioration of poverty) reflects a defensive and punitive response to crime that is natural and understandable, if not noble and farsighted; and the existence of economic bias in the criminal justice system reflects the real economic and political inequalities that characterize the society in which that system is embedded. What is puzzling, then, is not how these policies came to be what they are, but why they persist in the face of their failure to achieve either security or justice. The explanation I shall offer for this persistence I call “historical inertia.”

The historical inertia explanation argues that current criminal justice policy persists because it fails in a way that does not give rise to an effective demand for change, for two reasons. First, this failing system provides benefits for those with the power to make changes, while it imposes costs on those without such power. Second, because the criminal justice system shapes the public’s conception of what is dangerous, it creates the impression that the harms it is fighting are *the real threats* to society—thus, even when people see that the system is less than a roaring success, they generally do no more than demand more of the same: more police, more prisons, longer prison sentences, and so on.

Consider first the benefits that the system provides for those with wealth and power. I have argued that the triple failure of criminal justice policy diverts attention from the harmful (noncriminal) acts of the well off and confronts us in our homes and on our streets with a real, substantial threat of crime and in the courts and prisons with a large and visible population of poor criminals. This in turn conveys a vivid image to the American people, namely, that *there is a real threat to our lives and limbs, and it is a threat from the poor*. This image provides benefits to the rich and powerful in America. It carries an *ideological message* that serves to protect their wealth and privilege. Crudely put, the message is this:

- The threat to “law-abiding Middle America” comes from below them on the economic ladder, not above them.
- The poor are morally defective, and thus their poverty is their own fault, not a symptom of social or economic injustice.

The effect of this message is to funnel the discontent of middle Americans into hostility toward, and fear of, the poor. It leads Americans to ignore the ways in which they are injured and robbed by the acts of the affluent (as catalogued in Chapter 2) and leads them to demand harsher doses of “law and order” aimed mainly at the lower classes. Most important, it nudges middle Americans toward a *conservative* defense of American society with its large disparities of wealth, power, and opportunity—and nudges them away from a progressive demand for equality and an equitable distribution of wealth and power.

On the other hand, but equally important, is that those who are mainly victimized by the “failure” to reduce crime are by and large the poor themselves. The people who are hurt the most by the failure of the criminal justice system are those with the least power to change the system. The Department of Justice’s *National Criminal Victimization Survey* says of 1991: “In general, persons from households with low incomes experienced higher violent crime victimization rates than did persons from wealthier households. Persons from households with an income under \$7,500 had significantly higher rates of robbery and assault than persons in most other income groups, particularly those from households earning \$50,000 or more.”<sup>3</sup> In 1996, households with annual incomes less than \$7,500 were victims of violent crimes at a rate nearly four times that of those earning \$75,000 and above (see Table 4-1).

The difference in the rates of property crime victimization between rich and poor understates the difference in the harms that result. The poor are far less likely than the affluent to have insurance against theft, and because they have little to start with, what they lose to theft takes a much deeper bite out of their ability to meet their basic needs. Needless to add, the various noncriminal harms documented in Chapter 2 (occupational hazards, pollution, poverty, and

**TABLE 4-1 Criminal Victimization by Family Income, 1996**  
(estimated rate of personal victimization per 1,000 persons age 12 and older)

Type of Victimization	Family Income			
	Less than \$7,500	\$7,500 to \$14,999	\$25,000 to \$34,999	\$75,000 or More
Crimes of violence	28.4	18.4	12.0	8.1
Robbery with injury	2.9	2.0	0.5	0.7 <sup>a</sup>
Rape/sexual assault	3.5	1.6	1.5	0.8 <sup>a</sup>
Aggravated assault	16.5	10.0	8.9	5.5
Household burglary	71.4	55.0	42.0	43.0

Source: *Sourcebook—1997*, Tables 3.11 and 3.24.

<sup>a</sup>Estimate is based on about ten or fewer sample cases.

so on) also fall more harshly on workers and those at the bottom of society than on those at the top.

To summarize, those who suffer most from the failure to reduce crime (and the failure to treat noncriminal harms as crimes) are not in a position to change criminal justice policy. Those who are in a position to change the policy are not seriously harmed by its failure—indeed, there are actual benefits to them from that failure. Note that I have not said that criminal justice policy is created to achieve this distribution of benefits and burdens. Instead, my claim is that the criminal justice policy that has emerged piecemeal over time and usually with the best of intentions happens to produce this distribution of benefits. And because criminal justice policy happens to produce this distribution, there is no inclination to change the criminal justice system among people with the power to do so. Moreover, because the criminal justice system shapes the public’s conception of what is dangerous, it effectively limits the public’s conception of how to protect itself to more of the same. Thus, though it fails, it persists.

Before proceeding, a new component of the explanation of the failure of criminal justice now deserves mention: the growing trend toward the privatization of prisons. The rapid and enormous increase in the U.S. prison population over the past 15 years or so has placed strains on state budgets. New policy initiatives, such as the “three strikes and you’re out” statutes enacted in numerous states, are likely only to continue the increase and the budgetary strains. This has given states an incentive to hire out their prison facilities to private contractors, who can run prisons at 10 to 15 percent less cost than state governments. Already, 25 states plus Puerto Rico and the District of Columbia

have passed laws allowing private contractors to run correctional facilities. The result has been a dramatic increase in the number of prisoners under private control. In the ten years from 1985 to 1995, the number of prison beds under private management grew from 935 to 63,595—an increase of nearly 7,000 percent! Though this is still only a small percentage of all prison beds, Charles Thomas, director of the Private Prisons Project at the University of Florida, estimates that there will be some 360,000 privately run prison beds by the year 2004.<sup>4</sup>

Wall Street has not failed to notice this trend, and many stock analysts are urging their clients to invest in the major corporations in the field, such as Corrections Corporation of America and Wackenhut Corrections. An article in *The Wall Street Journal* carries the headline: "Shares of Wackenhut Break Out as Prisons Become a Hot Industry." An article on private prisons in *Forbes* is titled: "A Surefire Growth Industry."<sup>5</sup> Writes Paulette Thomas, in a *Wall Street Journal* article titled "Making Crime Pay":

*The gritty work of criminal justice has become the kind of big-ticket commerce to attract the loftiest names in finance. Goldman Sachs & Co., Prudential Insurance Co. of America, Smith Barney Shearson Inc., and Merrill Lynch & Co. Inc. are among those competing to underwrite prison construction with private tax-exempt bonds—no voter approval required.*<sup>6</sup>

Ms. Thomas likens the new development to that of the old "military-industrial complex," of which President Eisenhower warned in his farewell address. The comparison is appropriate because many firms in "the defense establishment are cashing in too, sensing a logical new line of business to help them offset military cutbacks."<sup>7</sup>

Eric Schlosser takes up this analogy in an article in the *Atlantic Monthly*, titled "The Prison-Industrial Complex." He writes:

*The prison-industrial complex is not a conspiracy... It is a confluence of interests that has given prison construction in the United States a seemingly unstoppable momentum. It is composed of politicians... who have used the fear of crime to gain votes; impoverished rural areas where prisons have become a cornerstone of economic development; [and] private companies that regard the roughly \$35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market.*<sup>8</sup>

What is most troubling about these developments is that, as criminologist Paul Leighton points out, "they create large numbers of people who have a vested financial interest in having a large and increasing incarceration rate."<sup>9</sup>

In short, thus far in this book I have been pointing out how *the rich get richer WHILE the poor get prison*, but the privatization movement points to a new phase in which *the rich get richer BECAUSE the poor get prison!*

My argument in the remainder of this chapter takes the following form. In the section titled "The Poverty of Criminals and the Crime of Poverty," I spell out the content of the ideological message broadcast by the failure of the criminal justice system. In the section titled "Ideology, or How to Fool Enough of the People Enough of the Time," I discuss the *nature* of ideology in general and the *need* for it in America. For those who doubt that our legal system could function in such questionable ways, I also present evidence on how the criminal justice system has been used in the past to protect the rich and powerful against those who would challenge their privileges or their policies. These sections, then, flesh out the historical inertia explanation of the failure of criminal justice by showing the ideological benefits that that failure yields and to whom.

Ultimately, the test of the argument in this chapter is whether it provides a plausible explanation of the failure of criminal justice and draws the arguments of the previous chapters together into a coherent theory of contemporary criminal justice policy and practice.

## The Poverty of Criminals and the Crime of Poverty

Criminal justice is a very visible part of the American scene. As fact and fiction, countless images of crime and the struggle against it assail our senses daily, even hourly. In every newspaper, in every TV or radio newscast, there is at least one criminal justice story and often more. It is as if we live in an embattled city, besieged by the forces of crime and bravely defended by the forces of the law, and as we go about our daily tasks, we are always conscious of the war raging not very far away. Newspapers bring us daily and newscasts bring us hourly reports from the "front." Between reports, we are vividly reminded of the stakes and the desperateness of the battle by fictionalized portrayals of the struggle between the forces of the law and the breakers of the law. There is scarcely an hour on television without some dramatization of the struggle against crime. (A report to the Federal Communications Commission estimates that by the time the average American child reaches age 14, he or she has seen 13,000 human beings killed by violence on television. Although a few of these are killed by science fiction monsters, the figure still suggests that the extent of the impact of the televised portrayal of crime and the struggle against it on the imaginations of Americans is nothing short of astounding—particularly on children: As of 1990, U.S. children aged 2 to 5 were watching on average 27 hours of TV a week. Another report estimates that, by age 18, the average child will have viewed 200,000 acts of violence on television. And a 1993 report of the American

Psychological Association asserts that “[t]here is absolutely no doubt that higher levels of viewing violence on television correlate with . . . increased aggressive behavior.”<sup>10</sup> In the mid-1980s, it was estimated that “detective, police, and other criminal justice-related programs accounted for some eighty percent of prime-time TV viewing.”<sup>11</sup> If we add to this the news accounts, the panel discussions, the movies, the novels, the comic books, and the TV cartoon shows that imitate the comics, as well as the political speeches about crime, there can be no doubt that as fact or fantasy or both, criminal justice is vividly present in the imaginations of most Americans.

This is no accident. Everyone can relate to criminal justice in personal and emotional terms. Everyone has some fear of crime, and as we saw in Chapter 3, just about everyone has committed some. Everyone knows the primitive satisfaction of seeing justice done and the evildoers served up their just deserts. Furthermore, in reality or in fiction, criminal justice is naturally dramatic. It contains the acts of courage and cunning, the high risks and high stakes, and the life-and-death struggle between good and evil missing from the routine lives so many of us lead. To identify with the struggle against crime is to expand one’s experience vicariously to include the danger, the suspense, the triumphs, the meaningfulness—in a word, the drama—often missing in ordinary life. How else can we explain the seemingly bottomless appetite Americans have for the endless repetition, in only slightly altered form, of the same theme: the struggle of the forces of law against the forces of crime? Criminal justice has a firm grip on the imaginations of Americans and is thus in a unique position to convey a message to Americans and to convey it with drama and with conviction.

Let us now look at this message in detail. Our task falls naturally into two parts. There is an ideological message supportive of the status quo, built into *any* criminal justice system by its very nature. Even if the criminal justice system were not failing, even if it were not biased against the poor, it would still—by its very nature—broadcast a message supportive of established institutions. This is the *implicit ideology of criminal justice*. Beyond this, there is an additional ideological message conveyed by the *failure* of the system and by its *baised* concentration on the poor. I call this the *bonus of bias*.

## The Implicit Ideology of Criminal Justice

Any criminal justice system like ours conveys a subtle yet powerful message in support of established institutions. It does this for two interconnected reasons. First, it concentrates on *individual* wrongdoers. This means that *it diverts our attention away from our institutions, away from consideration of whether our institutions themselves are wrong or unjust or indeed “criminal.”*

Second, the criminal law is put forth as the *minimum neutral ground rules* for any social living. We are taught that no society can exist without rules against theft

and violence, and thus the criminal law seems to be politically neutral, the minimum requirements for *any* society, the minimum obligations that any individual owes his or her fellows to make social life of any decent sort possible. Thus, it not only diverts our attention away from the possible injustice of our social institutions, the criminal law bestows upon those institutions the mantle of its own neutrality.

Because the criminal law protects the established institutions (the prevailing economic arrangements are protected by laws against theft, and so on), attacks on those established institutions become equivalent to violations of the minimum requirements for any social life at all. In effect, the criminal law enshrines the established institutions as equivalent to the minimum requirements for *any* decent social existence—and it brands the individual who attacks those institutions as one who has declared war on *all* organized society and who must therefore be met with the weapons of war.

This is the powerful magic of criminal justice. By virtue of its focus on *individual* criminals, it diverts us from the evils of the social order. By virtue of its presumed neutrality, it transforms the established social (and economic) order from being merely *one* form of society open to critical comparison with others into *the* conditions of *any* social order and thus immune from criticism. Let us look more closely at this process.

What is the effect of focusing on individual guilt? Not only does this divert our attention from the possible evils in our institutions, it puts forth half the problem of justice as if it were the *whole* problem. To focus on individual guilt is to ask whether the individual citizen has fulfilled his or her obligations to his or her fellow citizens. *It is to look away from the issue of whether the fellow citizens have fulfilled their obligations to him or her.* To look only at individual responsibility is to look away from social responsibility. Writing about her stint as a “story analyst” for a prime-time TV “real crime” show based on videotapes of actual police busts, Debra Seagal describes the way focus on individual criminals deflects attention away from the social context of crime and how television reproduces this effect in millions of homes daily:

*By the time our 9 million viewers flip on their tubes, we’ve reduced fifty or sixty hours of mundane and compromising video into short, action-packed segments of tantalizing, crack-filled, dope-dealing, junkie-busting cop culture. How easily we downplay the pathos of the suspect; how cleverly we breeze past the complexities that cast doubt on the very system that has produced the criminal activity in the first place.<sup>12</sup>*

Seagal’s description illustrates as well how a television program that shows nothing but videos of actual events, that uses no reenactments whatsoever, can distort reality by selecting and recombining pieces of real events.

A study of 69 TV law and crime dramas finds that fictional presentations of homicide focus on individual motivations and ignore social conditions:

*Television crime dramas portray these events as specific psychological episodes in the characters' lives and little, if any, effort is made to connect them to basic social institutions or the nature of society within which they occur.<sup>13</sup>*

To look only at individual criminality is to close one's eyes to social injustice and to close one's ears to the question of whether our social institutions have exploited or violated the individual. *Justice is a two-way street—but criminal justice is a one-way street.* Individuals owe obligations to their fellow citizens because their fellow citizens owe obligations to them. Criminal justice focuses on the first and looks away from the second. *Thus, by focusing on individual responsibility for crime, the criminal justice system literally acquits the existing social order of any charge of injustice!*

This is an extremely important bit of ideological alchemy. It stems from the fact that the same act can be criminal or not, unjust or just, depending on the circumstances in which it takes place. Killing someone is ordinarily a crime, but if it is in self-defense or to stop a deadly crime, it is not. Taking property by force is usually a crime, but if the taking is retrieving what has been stolen, then no crime has been committed. Acts of violence are ordinarily crimes, but if the violence is provoked by the threat of violence or by oppressive conditions, then, like the Boston Tea Party, what might ordinarily be called criminal is celebrated as just. This means that when we call an act a crime, *we are also making an implicit judgment about the conditions in response to which it takes place.* When we call an act a crime, we are saying that the conditions in which it occurs are not themselves criminal or deadly or oppressive or so unjust as to make an extreme response reasonable or justified or noncriminal. This means that when the system holds an individual responsible for a crime, *it implicitly conveys the message that the social conditions in which the crime occurred are not responsible for the crime, that they are not so unjust as to make a violent response to them excusable.*

Judges are prone to hold that an individual's responsibility for a violent crime is diminished if it was provoked by something that might lead a "reasonable man" to respond violently and that criminal responsibility is eliminated if the act was in response to conditions so intolerable that any "reasonable man" would have been likely to respond in the same way. In this vein, the law acquits those who kill or injure in self-defense and treats leniently those who commit a crime when confronted with extreme provocation. The law treats understandingly the man who kills his wife's lover and the woman who kills her brutal husband, even when neither has acted directly in self-defense. By this logic, when we hold an individual completely responsible for a crime, we are saying that the conditions in which it occurred are such that a "reasonable man" should find them tolerable. In other words, by focusing on individual responsibility for crimes, *the criminal justice system broadcasts the message that the social order itself is reasonable and not intolerably unjust.*

Thus, the criminal justice system focuses moral condemnation on individuals and deflects it away from the social order that may have either violated the individual's rights or dignity or literally pushed him or her to the brink of the crime. This not only serves to carry the message that our social institutions are not in need of fundamental questioning, it further suggests that the justice of our institutions is obvious, not to be doubted. Indeed, because it is deviations from these institutions that are crimes, the established institutions become the implicit standard of justice from which criminal deviations are measured.

This leads to the second way in which a criminal justice system always conveys an implicit ideology. It arises from the presumption that the criminal law is nothing but the politically neutral minimum requirements of any decent social life. What is the consequence of this? As already suggested, this presumption transforms the prevailing social order into justice incarnate and all violations of the prevailing order into injustice incarnate. This process is so obvious that it may be easily missed.

Consider, for example, the law against theft. It does seem to be one of the minimum requirements of social living. As long as there is scarcity, any society—capitalist or socialist—will need rules to deter individuals from taking what does not belong to them. The law against theft, however, is more: It is a law against stealing what individuals *presently own*. Such a law has the effect of making present property relations a part of the criminal law.

Because stealing is a violation of the law, this means that present property relations become the implicit standard of justice against which criminal deviations are measured. Because criminal law is thought of as the minimum requirements of any social life, this means that present property relations become the equivalent of the minimum requirements of *any* social life. The criminal who would alter the present property relations becomes someone who is declaring war on all organized society. The question of whether this "war" is provoked by the injustice or brutality of the society is swept aside. Indeed, this suggests yet another way in which the criminal justice system conveys an ideological message in support of the established society.

Not only does the criminal justice system acquit the social order of any charge of injustice; it specifically cloaks the society's own crime-producing tendencies. I have already observed that by blaming the individual for a crime, the society is acquitted of the charge of injustice. I would like to go further now and argue that by blaming the individual for a crime, the society is acquitted of the charge of *complicity* in that crime. This is a point worth developing, because many observers have maintained that modern competitive societies such as our own have structural features that tend to generate crime. Thus, holding the individual responsible for his or her crime serves the function of taking the rest of society off the hook for their role in sustaining and benefiting from social arrangements that produce crime. Let us take a brief detour to look more closely at this process.

Cloward and Ohlin argued in their book, *Delinquency and Opportunity*,<sup>14</sup> that much crime is the result of the discrepancy between social goals and the legitimate opportunities available for achieving them. Simply put, in our society everyone is encouraged to be a success, but the avenues to success are open only to some. The conventional wisdom of our free-enterprise democracy is that anyone can be a success if he or she has the talent and the ambition. Thus, if one is not a success, it is because of one's own shortcomings: laziness or lack of ability or both. On the other hand, opportunities to achieve success are not equally open to all. Access to the best schools and the best jobs is effectively closed to all but a few of the poor and becomes more available only as one goes up the economic ladder. The result is that many are called but few are chosen. Many who have taken the bait and accepted the belief in the importance of success and the belief that achieving success is a result of individual ability must cope with feelings of frustration and failure that result when they find the avenues to success closed. Cloward and Ohlin argue that one method of coping with these stresses is to develop alternative avenues to success. Crime is such an alternative avenue.

Crime is a means by which people who believe in the American dream pursue it when they find the traditional routes barred. Indeed, it is plain to see that the goals pursued by most criminals are as American as apple pie. I suspect one of the reasons that American moviegoers enjoy gangster films—movies in which gangsters such as Al Capone, Bonnie and Clyde, or Butch Cassidy and the Sundance Kid are the heroes, as distinct from police and detective films whose heroes are defenders of the law—is that even when we deplore the hero's methods, we identify with his or her notion of success, because it is ours as well, and we admire the courage and cunning displayed in achieving that success.

It is important to note that the discrepancy between success goals and legitimate opportunities in America is not an aberration. It is a structural feature of modern competitive industrialized society, a feature from which many benefits flow. Cloward and Ohlin write that

*... a crucial problem in the industrial world is to locate and train the most talented persons in every generation, irrespective of the vicissitudes of birth, to occupy technical work roles. Since we cannot know in advance who can best fulfill the requirements of the various occupational roles, the matter is presumably settled through the process of competition. But how can men throughout the social order be motivated to participate in this competition?*

*One of the ways in which the industrial society attempts to solve this problem is by defining success-goals as potentially accessible to all, regardless of race, creed, or socioeconomic position.*<sup>15</sup>

Because these universal goals are urged to encourage a competition to select the best, there are necessarily fewer openings than seekers. Also, because

those who achieve success are in a particularly good position to exploit their success to make access for their own children easier, the competition is rigged to work in favor of the middle and upper classes. As a result, "many lower-class persons are the victims of a contradiction between the goals toward which they have been led to orient themselves and socially structured means of striving for these goals."<sup>16</sup>

*[The poor] experience desperation born of the certainty that their position in the economic structure is relatively fixed and immutable—a desperation made all the more poignant by their exposure to a cultural ideology in which failure to orient oneself upward is regarded as a moral defect and failure to become mobile as a proof of it.*<sup>17</sup>

The outcome is predictable. "Under these conditions, there is an acute pressure to depart from institutional norms and to adopt illegitimate alternatives."<sup>18</sup>

This means that the very way in which our society is structured to draw out the talents and energies that go into producing our high standard of living has a costly side effect: It produces crime. By holding individuals responsible for this crime, those who enjoy that high standard of living can have their cake and eat it too. They can reap the benefits of the competition for success and escape the responsibility of paying for the costs of the competition. By holding the poor crook legally and morally guilty, the rest of society not only passes the costs of competition on to the poor, they effectively deny that they (the affluent) are the beneficiaries of an economic system that exacts such a high toll in frustration and suffering.

William Bonger, the Dutch Marxist criminologist, maintained that competitive capitalism produces egotistic motives and undermines compassion for the misfortunes of others and thus makes human beings literally *more capable of crime*—more capable of preying on their fellows without moral inhibition or remorse—than earlier cultures that emphasized cooperation rather than competition.<sup>19</sup> Here again, the criminal justice system relieves those who benefit from the American economic system of the costs of that system. By holding criminals morally and individually responsible for their crimes, we can forget that the motives that lead to crime—the drive for success at any cost, linked with the beliefs that success means outdoing others and that violence is an acceptable way of achieving one's goals—are the *same motives* that powered that drive across the American continent and that continue to fuel the engine of America's prosperity.

David Gordon, a contemporary political economist, maintains "that nearly all crimes in capitalist societies represent perfectly *rational* responses to the structure of institutions upon which capitalist societies are based."<sup>20</sup> Like Bonger, Gordon believes that capitalism tends to provoke crime in all economic strata. This is so because most crime is motivated by a desire for property or

money and is an understandable way of coping with the pressures of inequality, competition, and insecurity, all of which are essential ingredients of capitalism. Capitalism depends, Gordon writes,

*...on basically competitive forms of social and economic interaction and upon substantial inequalities in the allocation of social resources. Without inequalities, it would be much more difficult to induce workers to work in alienating environments. Without competition and a competitive ideology, workers might not be inclined to struggle to improve their relative income and status in society by working harder. Finally, although rights of property are protected, capitalist societies do not guarantee economic security to most of their individual members. Individuals must fend for themselves, finding the best available opportunities to provide for themselves and their families. Driven by the fear of economic insecurity and by a competitive desire to gain some of the goods unequally distributed throughout the society, many individuals will eventually become "criminals."<sup>21</sup>*

To the extent that a society makes crime a reasonable alternative for a large number of its members from all classes, that society is itself not very reasonably or humanely organized and bears some degree of responsibility for the crime it encourages. Because the criminal law is put forth as the minimum requirements that can be expected of any "reasonable man," its enforcement amounts to a denial of the real nature of the social order to which Gordon and the others point. Here again, by blaming the individual criminal, the criminal justice system serves implicitly but dramatically to acquit the society of its criminality.

## The Bonus of Bias

We now consider the additional ideological bonus derived from the criminal justice system's bias against the poor. This bonus is a product of the association of crime and poverty in the popular mind. This association, the merging of the "criminal classes" and the "lower classes" into the "dangerous classes," was not invented in America. The word *villain* is derived from the Latin *villanus*, which means a farm servant. The term *villein* was used in feudal England to refer to a serf who farmed the land of a great lord and who was wholly subject to that lord.<sup>22</sup> In this respect, our present criminal justice system is heir to a long tradition.

The value of this association was already seen when we explored the average citizen's concept of the Typical Criminal and the Typical Crime. It is quite obvious that throughout the great mass of Middle America, far more fear and hostility are directed toward the predatory acts of the poor than toward the acts of the rich. Compare the fate of politicians in recent history who call for tax

reform, income redistribution, prosecution of corporate crime, and any sort of regulation of business that would make it better serve American social goals with that of politicians who erect their platform on a call for "law and order," more police, fewer limits on police power, and stiffer prison sentences for criminals—and consider this in light of what we have already seen about the real dangers posed by corporate crime and "business as usual."

It seems clear that Americans have been effectively deceived as to what are the greatest dangers to their lives, limbs, and possessions. The very persistence with which the system functions to apprehend and punish poor crooks and ignore or slap on the wrist equally or more dangerous individuals is testimony to the sticking power of this deception. That Americans continue to tolerate the comparatively gentle treatment meted out to white-collar criminals, corporate price fixers, industrial polluters, and political-influence peddlers while voting in droves to lock up more poor people faster and for longer indicates the degree to which they harbor illusions as to who most threatens them. It is perhaps also part of the explanation for the continued dismal failure of class-based politics in America. American workers rarely seem able to forget their differences and unite to defend their shared interests against the rich whose wealth they produce. Ethnic divisions serve this divisive function well, but undoubtedly the vivid portrayal of the poor—and, of course, blacks—as hovering birds of prey waiting for the opportunity to snatch away the workers' meager gains serves also to deflect opposition away from the upper classes. A politician who promises to keep working-class communities free of blacks and the prisons full of them can get votes even if the major portion of his or her policies amount to continuation of the favored treatment of the rich at their expense. The sensationalistic use, in the 1988 presidential election, of photos of Willie Horton (a convicted black criminal who committed a brutal rape while out of prison on a furlough) suggests that such tactics are effective politics.

The most important "bonus" derived from the identification of crime and poverty is that it paints the picture that the threat to decent middle Americans comes from those below them on the economic ladder, not from those above. For this to happen the system must not only identify crime and poverty, *it must also fail to reduce crime so that it remains a real threat*. By doing this, it deflects the fear and discontent of middle Americans, and their possible opposition, away from the wealthy.

There are other bonuses as well. For instance, if the criminal justice system sends out a message that bestows legitimacy on present property relations, the dramatic impact is greatly enhanced if the violator of the present arrangements is without property. In other words, the crimes of the well-to-do "redistribute" property among the haves. In that sense, they do not pose a symbolic challenge to the larger system in which some have much and many have little or nothing. If the criminal threat can be portrayed as coming from the poor, then the punishment of the poor criminal becomes a morality play in which the sanctity and



legitimacy of the system in which some have plenty and others have little or nothing is dramatically affirmed. It matters little whom the poor criminals really victimize. What counts is that middle Americans come to fear that those poor criminals are out to steal what they own.

There is yet another bonus for the powerful in America, produced by the identification of crime and poverty. It might be thought that the identification of crime and poverty would produce sympathy for the criminals. My suspicion is that it produces or at least reinforces the reverse: *hostility toward the poor*.

There is little evidence that Americans are very sympathetic to poor criminals. Very few Americans believe poverty to be a cause of crime (6 percent of those questioned in a 1981 survey, although 21 percent thought unemployment was a cause). Other surveys find that most Americans believe that the police should be tougher than they are now in dealing with crime (83 percent of those questioned in a 1972 survey); that courts do not deal harshly enough with criminals (78 percent of those questioned in 1996); that a majority of Americans would vote for the death penalty for convicted murderers (73 percent of those questioned in 1996); and that most would be more likely to vote for a candidate who advocated tougher sentences for lawbreakers (83 percent of those questioned in a 1972 survey).<sup>23</sup> And, in a poll of what they think is the most important problem facing the United States today, respondents put crime and violence in first place, and poverty and homelessness in fifth.

Indeed, the experience of Watergate suggests that sympathy for criminals begins to flower only when we approach the higher reaches of the ladder of wealth and power. For some poor ghetto youth who robs a liquor store, five years in a penitentiary is our idea of tempering justice with mercy. When a handful of public officials try to walk off with the U.S. Constitution, a few months in a minimum security prison will suffice. If the public official is high enough—say, former president Richard Nixon—resignation from office and public disgrace tempered with a \$148,000-a-year pension is sufficient punishment.

My view is that, because the criminal justice system, in fact and fiction, deals with *individual legal and moral guilt*, the association of crime with poverty does not mitigate the image of individual moral responsibility for crime, the image that crime is the result of an individual's poor character. It does the reverse: It generates the association of poverty and individual moral failing and thus *the belief that poverty itself is a sign of poor or weak character*. The clearest evidence that Americans hold this belief is to be found in the fact that attempts to aid the poor are regarded as acts of charity rather than as acts of justice. Our welfare system has all the demeaning attributes of an institution designed to give handouts to the undeserving and none of the dignity of an institution designed to make good on our responsibilities to our fellow human beings. If we acknowledged the degree to which our economic and social institutions themselves breed poverty, we would have to recognize our own respon-

sibilities toward the poor. If we can convince ourselves that the poor are poor because of their own shortcomings, particularly moral shortcomings such as incontinence and indolence, then we need acknowledge no such responsibility to the poor. Indeed, we can go further and pat ourselves on the back for our generosity in handing out the little that we do, and, of course, we can make our recipients go through all the indignities that mark them as the undeserving objects of our benevolence. By and large, this has been the way in which Americans have dealt with their poor.<sup>24</sup> It is a way that enables us to avoid asking the question of why the richest nation in the world continues to produce massive poverty. It is my view that this conception of the poor is subtly conveyed by the way our criminal justice system functions.

Obviously, no ideological message could be more supportive of the present social and economic order than this. It suggests that poverty is a sign of individual failing, not a symptom of social or economic injustice. It tells us loud and clear that massive poverty in the midst of abundance is not a sign pointing toward the need for fundamental changes in our social and economic institutions. It suggests that the poor are poor because they deserve to be poor or at least because they lack the strength of character to overcome poverty. When the poor are seen to be poor in character, then economic poverty coincides with moral poverty and the economic order coincides with the moral order. As if a divine hand guided its workings, capitalism leads to everyone getting what he or she morally deserves!

If this association takes root, then when the poor individual is found guilty of a crime, the criminal justice system acquits the society of its responsibility not only for crime *but for poverty as well*.

With this, the ideological message of criminal justice is complete. The poor rather than the rich are seen as the enemies of the majority of decent middle Americans. Our social and economic institutions are held to be responsible for neither crime nor poverty and thus are in need of no fundamental questioning or reform. The poor are poor because they are poor of character. The economic order and the moral order are one. To the extent that this message sinks in, the wealthy can rest easily—even if they cannot sleep the sleep of the just.

We can understand why the criminal justice system is allowed to create the image of crime as the work of the poor and fails to reduce it so that the threat of crime remains real and credible. The result is ideological alchemy of the highest order. The poor are seen as the real threat to decent society. The ultimate sanctions of criminal justice dramatically sanctify the present social and economic order, and *the poverty of criminals makes poverty itself an individual moral crime!*

Such are the ideological fruits of a losing war against crime whose distorted image is reflected in the criminal justice carnival mirror and widely broadcast to reach the minds and imaginations of America.

## Ideology, or How to Fool Enough of the People Enough of the Time

### What Is Ideology?

The view that the laws of a state or nation are made to serve the interests of those with power, rather than to promote the well-being of the whole society, is not a new discovery made in the wake of Watergate. It is a doctrine with a pedigree even older than Christianity. Writing during the fourth century B.C., virtually at the dawn of Western thought, Plato expressed this view through the lips of Thrasymachus.<sup>25</sup> A more contemporary and more systematic formulation of the idea is found in the works of Karl Marx, written during the nineteenth century, not long after the dawn of Western industrialism. Marx wrote in *The Communist Manifesto* that the bourgeoisie—the class of owners of businesses and factories, the class of capitalists—has

*...conquered for itself, in the modern representative State, exclusive political sway. The executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie.*<sup>26</sup>

Anyone who thinks this is a ridiculous idea ought to look at the backgrounds of our political leaders. The vast majority of the president's cabinet, the administrators of the federal regulatory agencies, and the members of the two houses of Congress come from the ranks of business or are lawyers who serve business. Many still maintain their business ties or law practices, with no sense of a conflict of interest with their political role.<sup>27</sup> Even those who start from humble beginnings are usually quite rich by the time they finally make it into office. If either Thrasymachus or Marx is right, there is no conflict with their political role because that role is to protect and promote the interests of business.

It is clear that the most powerful criminal justice policy makers come from the have-plenties, not from the have-littles. It is no surprise that legislators and judges—those who make the laws that define criminality and those who interpret those laws—are predominantly members of the upper classes, if not at birth then surely by the time they take office. One study of justices appointed to the U.S. Supreme Court between 1933 and 1957 found that 81 percent were sons of fathers with high-social-status occupations and that 61 percent had been educated in schools of high standing. Richard Quinney compiled background data on key members of criminal justice policy-making and policy-advising committees and agencies, such as the President's Commission on Law Enforcement and Administration of Justice, the National Advisory Commission on Civil Disorders, the National Commission on the Causes and Prevention of Violence, the Senate Judiciary Committee's Subcommittee on Criminal Laws and Proce-

dures (the subcommittee had a strong hand in shaping the Omnibus Crime Control and Safe Streets Act of 1968), the Law Enforcement Assistance Administration, the Federal Bureau of Investigation, and, last but not least, the U.S. Department of Justice. With few exceptions, Quinney's report reads like a *Who's Who* of the business, legal, and political elite. For instance, 63 percent of the members of the President's Crime Commission had business and corporate connections.<sup>28</sup>

Further, there is considerable evidence that the American criminal justice system has been used throughout its history in rather unobvious ways to protect the interests of the powerful against the lower classes and political dissenters. The use of the FBI and local police forces to repress dissent by discrediting, harassing, and undermining dissident individuals and groups has been recently revealed. The FBI, often with active cooperation or tacit consent of local police, has engaged in literally hundreds of illegal burglaries of the offices of law-abiding left-wing political parties,<sup>29</sup> and in political sabotage against the Black Panthers (e.g., "a Catholic priest, the Rev. Frank Curran, became the target of FBI operations because he permitted the Black Panthers to use his church for serving breakfasts to ghetto children").<sup>30</sup> It conducted a campaign to discredit the late Martin Luther King, Jr. ("the FBI secretly categorized King as a 'Communist' months before it ever started investigating him").<sup>31</sup> Directors of the FBI have said that the bureau is "truly sorry" for these past abuses and that they are over. Later reports indicate that abuses continue.<sup>32</sup>

These acts of repression are only the latest in a long tradition. The first organized uniformed police force in the English-speaking world was established in London in 1829. They came to be called "bobbies" because of the role played by Sir Robert Peel in securing passage of the London Metropolitan Police Act, which established the force. The first full-time uniformed police force in the United States was set up in New York City in 1845.<sup>33</sup> It was also in the period from the 1820s to the 1840s that the movement to build penitentiaries to house and reform criminals began in New York and Pennsylvania and spread rapidly through the states of the young nation.<sup>34</sup> That these are also the years that saw the beginnings of a large industrial working class in the cities of England and America is a coincidence too striking to ignore.

The police were repeatedly used to break strikes and harass strikers.<sup>35</sup> The penitentiaries were used mainly to house the laborers and foreigners (often one and the same) whom the middle and upper classes perceived as a threat.<sup>36</sup> Throughout the formative years of the American labor movement, public police forces, private police such as the Pinkertons, regular army troops, and the National Guard were used repeatedly to protect the interests of capital against the attempts of labor to organize in defense of its interests. The result was that "the United States has had the bloodiest and most violent labor history of any industrialized nation in the world"—with most of the casualties on the side of labor.<sup>37</sup>

Marx, of course, went further. Not only are the laws of a society made to protect the interests of the most powerful economic class, but also, Marx argued, the prevailing ways of thinking about the world—from economic theory to religion to conventional moral ideas about good and evil, guilt and responsibility—are shaped in ways that promote the belief that the existing society is the best of all possible worlds. Marx wrote that

*... the ideas of the ruling class are in every epoch the ruling ideas: i.e. the class which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production.<sup>38</sup>*

Because those who have economic power own the newspapers, endow the universities, finance the publication of books and journals, and (in our own time) control the television and radio industries, they have a prevailing say in what is heard, thought, and believed by the millions who get their ideas—their picture of reality—from these sources. This does not mean that the controllers of the “means of mental production” consciously deceive or manipulate those who receive their message. What it means is that the picture of reality held by these controllers—believed by them, no doubt sincerely, to be an accurate representation of reality—will be largely the picture of reality that fills the heads of the readers and viewers of the mass media. Recognizing this involves no disrespect of the so-called common person. It is simply a matter of facing reality. The average man or woman is almost wholly occupied with the personal tasks of earning a living, piloting a family, and the like. He or she lacks the time (and usually the training) necessary to seek out and evaluate alternative sources of information. Most people are lucky when they have the time to catch a bit of news on television or in the papers. Moreover, except when there is division of opinion among those who control the media, the average person is so surrounded by unbroken “consensus” that he or she takes it simply as the way things are, with no particular reason even to consider the possibility that there are other sides of the issue to be considered, much less to seek these out. Then, even if people do come up with alternative sources of information, there are no general forums available for the sharing of views among members of the public. What we call mass communication is communication *to* the masses, not among them.

Consequently, the vast majority of people will accept, as a true picture of reality, the picture held by those who control the media. This is likely to be a distorted picture, even if those who create it act with the best of intentions and sincerity. The point is that, for a wide variety of reasons, people will tend to view the world in ways that make their own role in it (particularly the advantages and privileges they have in it) seem morally just, indeed, part of the best of all possible worlds. Thus, without any intention to deceive at all, those who

control the content of the mass media are virtually certain to convey a picture of reality that supports the existing social order.

As a result, even in a society such as ours, where freedom of expression has reached a level probably unparalleled in history, there is almost never any *fundamental* questioning of our political-economic institutions in the mass media, that is, television and radio, the major newspapers, or the news weeklies such as *Time* or *Newsweek*. There is much criticism of individuals and of individual policies. How often, though, does one find the mass media questioning whether the free-enterprise system is really the best choice for America, or whether our political and legal arrangements systematically promote the domination of society by the owners of big business? These issues are rarely, if ever, raised. Instead, it is taken for granted that, although they need some reform tinkering from time to time, our economic institutions are the most productive, our political institutions the freest, and our legal institutions the most just that *there can be*.

In other words, even in a society as free as ours, the ideas that fill the heads of most Americans and shape their picture of reality either explicitly or implicitly convey the message that our leaders are pursuing the common good (with only occasional lapses into personal venality—note how we congratulate ourselves on how “the system is working” when we expose these “aberrations” and then return to business as usual). Thus, we are told that the interests of the powerful coincide with the common interests of us all<sup>39</sup>—that “what’s good for General Motors is good for the country.” Where this picture of reality shows up some blemishes, they will always be portrayed as localized problems that can be remedied without fundamental overhaul of the entire social order, aberrations in an otherwise well-functioning social system. Indeed, the very willingness to publicize these blemishes “proves” there is nothing fundamentally wrong with the social system, because if the media are free, willing, and able to portray the blemishes, they would surely portray fundamental problems with the social system if there were any—and because they do not, there must not be any! When ideas, however unintentionally, distort reality in a way that justifies the prevailing distribution of power and wealth, hides society’s injustices, and thus secures uncritical allegiance to the existing social order, we have what Marx called *ideology*.<sup>40</sup>

Ideology is not conscious deception. People may spout ideology simply because it is all they know or all they have been taught or because they do not see beyond the “conventional wisdom” that surrounds them. This can be just as true of scholars who fail to see beyond the conventional assumptions of their disciplines as it is of laypersons who fail to see beyond the oversimplifications of what is commonly called “common sense.” Such individuals do not mouth an ideology out of a willful desire to deceive and manipulate their fellows, but rather because their own view of reality is distorted by untruths and half-truths—and criminal justice is one source of such distortion. One way in which this works without conscious lying is that we have become so used to the criminal justice carnival mirror (described in Chapter 2) that we don’t notice its

curves. It looks flat, and thus we take it as an accurate picture of who threatens us in society.

It should be noted in passing that not everyone uses the term *ideology* as I have, to point to what is necessarily deceptive. Some writers speak of ideology as if it meant any individual or group's "belief system" or "value system" or *Weltanschauung*, that is, "world view."<sup>41</sup> I do not intend to quibble about semantics. However, such a moral neutralization of the concept of "ideology" strikes me as dulling an instrument that thinkers such as Marx and others have sharpened into an effective tool for cutting through the illusions that dog our political life. Such tools are few and hard to find. Once found, they should be carefully preserved, especially when concepts such as "belief system" and "world view" are available to perform the more neutral function.

### ***The Need for Ideology***

A simple and persuasive argument can be made for the claim that the rich and powerful in America have an interest in conveying an ideological message to the rest of the nation. The have-nots and have-littles far outnumber the have-plenties. This means, to put it rather crudely, that the have-nots and the have-littles could have more if they decided to take it from the have-plenties. This, in turn, means that the have-plenties need the cooperation of the have-nots and the have-littles. Because the have-plenties are such a small minority that they could never *force* this cooperation on the have-nots and have-littles, this cooperation must be voluntary. For the cooperation to be voluntary, the have-nots and the have-littles must believe it would not be right or reasonable to take away what the have-plenties have. In other words, they must believe that for all its problems, the present social, political, and economic order, with its disparities of wealth and power and privilege, is about the best that human beings can create. More specifically, the have-nots and have-littles must believe that they are not being exploited by the have-plenties. Now this seems to me to add up to an extremely plausible argument that ours is a social system that requires for its continued operation a set of beliefs necessary to secure the allegiance of the less-well-off majority. These beliefs must be in some considerable degree false, because the distribution of wealth and power in the United States is so evidently arbitrary and unjust. Ergo, the need for ideology.

A disquisition on the inequitable distribution of wealth and income in the United States is beyond the scope and purpose of this book. This subject, as well as the existence of a "dominant" or "ruling" class in America, has been documented extensively by others.<sup>42</sup> I will make only two points here. First, there are indeed wide disparities in the distribution of wealth and income in the United States. Second, these disparities are so obviously unjust that it is reasonable to assume that the vast majority of people who must struggle to make ends meet put up with them only because they have been sold a bill of goods, that is, an ideology.

In 1999, the richest 20 percent of American families were expected to receive 50.4 percent of the after-tax income received by all families, whereas the poorest 60 percent of American families will receive 28.6 percent of the total income. In crude terms, this means that while the wealthiest 53 million Americans will have more than half the money pie to themselves, the least wealthy 159 million Americans will share less than a third of that pie among them. At the outer edges the figures are more extreme: The richest 1 percent of families are expected to receive 12.9 percent of total after-tax income, about the same as the poorest 40 percent of families, who will receive 13.9 percent. This means that the richest 5 percent—maybe 13 million people—have more money to divide among themselves than the 106 million persons who make up the bottom 40 percent.<sup>43</sup>

The distribution of *wealth* (property such as stocks and land that generate income and tend to give one a say in major economic decisions) is even worse than the distribution of income.<sup>44</sup> In 1995, it was estimated that the top one-fifth of households own 84 percent of the nation's wealth, and the remaining four-fifths own 16 percent.<sup>45</sup> A recent study of long-term trends in wealth inequality shows that the top one-fifth of households has owned three-quarters of the nation's wealth at least over the period from 1962 to 1989. The author writes: "If anything, wealth concentration increased during the 1980s. It is estimated that the top 1 percent of households in 1989 owned 33 percent of household wealth, compared to 30 percent in 1986 and 28 percent in 1983." Looking back over the whole period from colonial times to the present, the author concludes, "at no time has the majority of the U.S. adult population or households managed to gain title to any more than about 10 percent of the nation's wealth." And, she adds, "the governmental policies of the past two decades have been hostile to progressive tax rates and economic measures benefiting workers. Real per capita income began declining in the early 1970s, benefits eroded in the 1980s. . . . This situation suggests that the lower four quintiles' share of total wealth may well shrink in future years."<sup>46</sup>

I offer no complicated philosophical argument to prove that these disparities are unjust, although such arguments abound for those who are interested.<sup>47</sup> It is a scandal that, in a nation as rich as ours, some 36.5 million people (somewhat less when reckoned with the most generous valuation of in-kind benefits) live below what the government conservatively defines as the poverty level and that many millions more must scramble to make ends meet.<sup>48</sup> It is shameful that more than a third of the individuals below the poverty line are children! It is tragic that in our wealthy nation so many millions cannot afford a proper diet, a college education, a decent place to live, and good health care. We know too much about the causes of wealth and poverty to believe that the rich become rich simply because of their talent or contribution to society or that the poor are poor because they are lazy or incapable. Because we are nowhere near offering all Americans a good education and an equal opportunity to get ahead, we have no right to think that the distribution of income reflects

what people have truly earned. The distribution of income in America is so fundamentally shaped by factors such as race, educational opportunity, and the economic class of one's parents<sup>49</sup> that few people who are well off can honestly claim they deserve *all* that they have. Those who think they do should ask themselves where they would be today if they had been born to migrant laborers in California or to a poor black family in the Harlem ghetto.

Enough said. I take it, then, as established that the disparities of wealth and income in America are wide and unjustified. For the vast majority, the many millions struggling hard to satisfy basic needs, to acquiesce to the vast wealth of a small minority, it is necessary that the majority come to believe that these disparities are justified, that the present order is the best that human beings can accomplish, and that they are not being exploited by the have-plenties. In other words, the system requires an effective ideology to fool enough of the people enough of the time.

This account of the nature and need for ideology, coupled with the historical inertia explanation of the persistence of criminal justice in its current form and the analysis of the ideological benefits produced by the criminal justice system, adds up to an explanation of the continued failure of criminal justice in the United States.

## Summary

This chapter has presented the "historical inertia" explanation of the triple failure of criminal justice in the United States (1) to institute policies likely to reduce the incidence of crime, (2) to treat as crime the dangerous acts of the well off, and (3) to eliminate the bias against the poor in the treatment of those acts labeled crimes. It was argued that these failures harm most those who lack the power to change things and benefit those who have that power. They benefit the latter by broadcasting the message that the threat to Americans' well-being comes from below them on the economic ladder, not from above them, and that poverty results not from social causes but from the moral depravity of the poor. It was also argued that, aside from these "bonuses of bias," there is an implicit ideological message of any criminal justice system, insofar as such systems, by focusing on individual guilt, implicitly broadcast the message that the social system itself is a just one.

## Study Questions

1. What is a conspiracy theory? What are the shortcomings of such a theory? Is the Pyrrhic defeat theory a conspiracy theory?

2. What is meant by ideology? What is the difference between ideology and propaganda? Is ideology needed in the United States?
3. How does any criminal justice system broadcast an ideological message supportive of the prevailing social and economic arrangements?
4. What additional ideological benefits result from the bias against the poor in the definition and treatment of crime?
5. Why are poor people in the United States poor?
6. Now that you have reviewed the historical inertia explanation of criminal justice in the United States, has the Pyrrhic defeat theory been proven?
7. What risks are posed by the privatization of prisons?

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## Notes

1. *Challenge*, p. 44.
2. *Sourcebook—1997*, p. 120, Table 2.31.
3. BJS, *National Criminal Victimization Survey*, 1991, p. 6.
4. Robert Bryce, "Prison Business Booms in the U.S.," *The Christian Science Monitor*, August 12, 1993, p. 8; Bryan W. Rutenbur, "Privatization/Corrections," *Equitable Securities Research: Industry Update* (Equitable Securities Corporation, March 20, 1996), p. 9.
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6. Paulette Thomas, "Making Crime Pay," *The Wall Street Journal*, May 12, 1994, p. A1.
7. Ibid.
8. Eric Schlosser, "The Prison-Industrial Complex," *Atlantic Monthly*, December 1998, p. 54.
9. Paul Leighton, "Industrialized Social Control," *Peace Review* 7, no. 3/4 (1995), p. 390.
10. See Eve Merriam, "We're Teaching Our Children That Violence Is Fun," in *Violence: An Element of American Life*, eds. K. Taylor and F. Soady Jr. (Boston: Holbrook Press, 1972), p. 155; Brandon Centerwall, "Television Violence: The Scale of the Problem and Where to Go from Here," *Journal of the American Medical Association* 267, no. 22 (June 10, 1992), pp. 3059, 3062; Jean Tepperman, "TV: The Violence Teacher," at <http://www.4children.org>; report of the American Psychological Association cited in Sisela Bok, *Mayhem: Violence as Public Entertainment* (Reading, Mass.: Perseus, 1998), p. 57.
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14. Richard A. Cloward and Lloyd E. Ohlin, *Delinquency and Opportunity: A Theory of Delinquent Gangs* (New York: Free Press, 1960), especially pp. 77–107.
15. Ibid., p. 81.
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18. Ibid., p. 10.
19. Willem Bonger, *Criminality and Economic Conditions*, abridged and with an introduction by Austin T. Turk (Bloomington: Indiana University Press, 1969), pp. 7–12, 40–47. Willem Adriaan Bonger was born in Holland in 1876 and died by his own hand in 1940 rather than submit to the Nazis. His *Criminalité et conditions économiques* first appeared in 1905. It was translated into English and published in the United States in 1916. Ibid., pp. 3–4.
20. David M. Gordon, "Capitalism, Class and Crime in America," *Crime and Delinquency* (April 1973), p. 174.
21. Ibid.
22. William and Mary Morris, *Dictionary of Word and Phrase Origins*, vol. 2 (New York: Harper & Row, 1967), p. 282.
23. *Sourcebook—1974*, pp. 203, 204, 207, 223; *Sourcebook—1981*, pp. 192, 205, 210–11; *Sourcebook—1995*, pp. 172–73, Table 2.57; p. 181, Table 2.68; *Sourcebook—1997*, Tables 2.50 and 258.
24. Historical documentation of this can be found in David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971); and in Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Pantheon, 1971), which carries the analysis up to recent times.

25. *The Republic of Plato*, trans. F. M. Cornford (New York: Oxford University Press, 1945), p. 18 [I. 338]. Plato was born in Athens in the year 428 B.C. (or 427, depending on the reckoning) and died there in 348 B.C. (or 347). Scholars generally agree that at least Book One of *The Republic* (the section in which Thrasymachus speaks) was written between the death of Socrates in 399 B.C. and Plato's first journey to Sicily, from which he returned in 388 B.C. (or 387). See Frederick Copleston, S. J., *A History of Philosophy, Volume I: Greece and Rome* (Westminster, Md.: Newman Press, 1946), pp. 127–141.
26. Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: Norton, 1972), p. 337. Marx was born in Trier, Prussia (now in Germany) on May 5, 1818, and died on March 14, 1883. *The Manifesto* was first published in London in February 1848—when Marx was nearly 30 years old. Ibid., pp. xi–xiv.
27. An article on congressional ethics in *Newsweek* (June 14, 1976) makes the point so graphically that it is worth quoting at length:

*Some of the Hill's most powerful veterans have long earned part of their income from outside business interests—and may be tempted to vote with their own bank accounts in mind when legislation affecting those interests has come before Congress. House whip Thomas P. (Tip) O'Neill is active in real estate and insurance in Massachusetts. Minority Leader John Rhodes of Arizona is a director and vice-president of a life insurance company and scores of other senior members are involved with the banking industry, oil and gas companies and farming operations. Do these connections destroy their judgment? Not necessarily, argues Russell Long of Louisiana, chairman of the powerful Senate Finance Committee and a reliable defender of oil interests—who nevertheless refuses to disclose the size of his personal oil and gas holdings, most of them inherited from his father, former Gov. Huey Long. "A long time ago I became convinced that if you have financial interests completely parallel to your state, then you have no problem," says Long. "If I didn't represent the oil and gas industry, I wouldn't represent the state of Louisiana."*

*Even more difficult to trace is the influence of representatives who keep their law practices—and their clients, many of whom do business with the Federal government—when they become members of Congress [p. 25].*

For recent analyses of the marriage of economic and political power, see William Greider, *Who Will Tell the People? The Betrayal of American Democracy* (New York: Touchstone/Simon & Schuster, 1993); Phillip Stern, *Still the Best Congress Money Can Buy*, revised and expanded edition (Washington, D.C.: Regnery Gateway, 1992); John Jackley, *Hill Rat: Blowing the Lid off Congress* (Washington, D.C.: Regnery Gateway, 1992); Donald Axelrod, *Shadow Government: The Hidden World of Public Authorities—And How They Control over \$1 Trillion of Your Money* (New York: Wiley, 1992); Michael Useem, *The Inner Circle: Large Corporations and the Rise of Business Political Activity in the US and UK* (New York:

- Oxford University Press, 1984); and Kim McQuaid, *Big Business and Presidential Power: From FDR to Reagan* (New York: Morrow, 1982).
28. J. A. Schmidhauser, "The Justices of the Supreme Court: A Collective Portrait," *Midwest Journal of Political Science* 3 (1959), pp. 2-37, 40-49, cited in William J. Chambliss and Robert B. Seidman, *Law, Order and Power* (Reading, Mass.: Addison-Wesley, 1971), p. 96; and Richard Quinney, *Critique of Legal Order: Crime Control in Capitalist Society* (Boston: Little, Brown, 1973), pp. 60-82, 86-92.
  29. See Ross Gelbspan, *Break-ins, Death Threats and the FBI: The Covert War against the Central American Movement* (Boston: South End Press, 1991); Margaret Jayko, *FBI on Trial: The Victory in the Socialist Workers Party Suit against Government Spying* (New York: Pathfinder Press, 1988); "F.B.I. Burglarized Leftist Offices Here 92 times in 1960-66, Official Files Show," *The New York Times*, March 29, 1976, p. A1; "Burglaries by FBI Listed in Hundreds," *The Washington Post*, July 16, 1975, p. A1. See also *Cointelpro: The FBI's Secret War on Political Freedom*, ed. Cathy Perkus, introduction by Noam Chomsky (New York: Monad Press, 1975).
  30. "Hill Panel Raps FBI's Anti-Panthers Tactics," *The Washington Post*, May 7, 1976, pp. A1, A22.
  31. "FBI Labeled King 'Communist' in '62," *The Washington Post*, May 6, 1976, pp. A1, A26; Michael Friedly and David Gallen, *Martin Luther King, Jr. The FBI File* (New York: Carroll & Graf, 1993). See also Carson Clayborne and David Gallen, *Malcolm X: The FBI File* (New York: Carroll & Graf, 1991); and Kenneth O'Reilly, *Racial Matters: The FBI's Secret File on Black America, 1960-1972* (New York: Free Press, 1989).
  32. "Kelley Says FBI Is 'Truly Sorry' for Past Abuses," *The Washington Post*, May 9, 1976, pp. A1, A14; "FBI Break-Ins Still Go on, Panel Reports," *Washington Post*, May 11, 1976. For more recent accounts, see "FBI Tactics Questioned in Probe of Activists," *Chicago Tribune*, March 2, 1990, p. 1:5; "Here Come the '60s, with FBI in Tow," *Los Angeles Times*, June 26, 1990, p. A3; Peter Matthiesses, *In the Spirit of Crazy Horse* (New York: Viking, 1983) (FBI and the American Indian Movement [AIM]; FBI sued author and delayed publication for several years); Rex Weyler, *Blood of the Land: The Government and Corporate War against First Nations* (Philadelphia: New Society Publishers, 1992) (FBI and AIM). For other agencies of the government see, for example, "Military Spied on King, Other Blacks, Paper Says: Army Reportedly Targeted Southern Churches," *The Washington Post*, March 21, 1993, p. A16.
  33. James F. Richardson, *Urban Police in the United States* (Port Washington, N.Y.: Kennikat Press, 1974), pp. 8-13, 22. See also Richardson's *The New York Police: Colonial Times to 1901* (New York: Oxford University Press, 1970).
  34. Rothman, *The Discovery of the Asylum*, pp. 57-108, especially pp. 79-81. Cf. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977).
  35. Richardson, *Urban Police*, pp. 158-61. See also R. Boyer and H. Morais, *Labor's Untold Story* (New York: United Electrical, Radio & Machine Workers of America, 1976).
  36. Rothman, *The Discovery of the Asylum*, pp. 253-54.
  37. Philip Taft and Philip Ross, "American Labor Violence: Its Causes, Character, and Outcome," in *The History of Violence in America*; eds. H. D. Graham and T. R. Gurr (New York: Bantam, 1969), pp. 281-395, especially pp. 281, 380; and Richard E. Rubenstein, *Rebels in Eden: Mass Political Violence in the United States* (Boston: Little, Brown, 1970), p. 81 inter alia. See also Center for Research in Criminal Justice, *The Iron Fist and the Velvet Glove*, pp. 16-19.
  38. Karl Marx, *The German Ideology*, in *The Marx-Engels Reader*, ed. Tucker, p. 136.
  39. Each new ruling class "is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society." Marx, *The German Ideology*, p. 138.
  40. Marx was not the first to use the term *ideology*. The term was coined by a Frenchman, Antoine Destutt de Tracy, who was among the intellectuals named in 1795 to direct the researches of the newly founded Institut de France. The idéologues of the Institut generally believed that existing ideas were prejudices rooted in individual psychology or in political conditions and that the path to liberation from these prejudices and thus toward a rational society lay in a science of ideas (literally, an "idea-ology"), which made human beings aware of the sources of their ideas. Thomas Jefferson tried (albeit unsuccessfully) to have Destutt de Tracy's theory made part of the original curriculum of the University of Virginia. See George Lichtheim, "The Concept of Ideology," *History and Theory* 4, no. 2 (1965), pp. 164-95; and *Ideology, Politics, and Political Theory*, ed. Richard H. Cox (Belmont, Calif.: Wadsworth, 1969), pp. 7-8. Needless to say, Marx used the term ideology in ways that neither Destutt de Tracy nor Jefferson anticipated.
  41. Lichtheim's essay provides a good discussion of the philosophical antecedents of the gradual separation of the notion of ideology from that of false consciousness. Undoubtedly, this separation is of a piece with the current wisdom that insists that all views of the world are conditioned and rendered partial by the limits of the viewer's historical and social vantage point, and thus shrinks from trying to say anything true about the human condition. An illuminating contemporary example of this "current wisdom" applied to the criminal justice system is Walter B. Miller, "Ideology and Criminal Justice Policy: Some Current Issues," *Journal of Criminal Law and Criminology* 64, no. 2 (1973), pp. 141-62. I shall use the concept of ideology in the Marxian sense, that is, to include that of false consciousness.
  42. What follows is just a smattering of the literature documenting the wide and abiding disparities of wealth in America or the existence of a very small, not necessarily organized, group of individuals who, in addition to being extremely wealthy, make most of the economic and political decisions that shape America's destiny: Douglas Massey and Nancy Denton (Cambridge, Mass.: Harvard University Press, 1993); Thomas Dye, *Who's Running America: The Bush Era*, 5th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1990); G. William Domhoff, *The Power Elite and the State: How Policy Is Made in America* (New York: de Gruyter, 1990); Michael Parenti, *Democracy for the Few*, 5th ed. (New York: St. Martin's Press, 1988); William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1987); P. J. Quirk, *Industry and Influence in Federal Regulatory Agencies* (Princeton, N.J.: Princeton University Press, 1981); Bertram Gross, *Friendly Fascism: The New Face of Power in America* (Boston: South End Press, 1980); G. William Domhoff, *The Powers That Be: Processes of Ruling Class Domination in America* (New York: Vintage, 1979); Edward S. Greenberg, *Serving the Few: Corporate Capitalism and the Bias of Government*

- Policy* (New York: Wiley, 1974); Joseph Pechman and Benjamin A. Okner, *Who Bears the Tax Burden?* (Washington, D.C.: Brookings Institution, 1974); Philip M. Stern, *The Rape of the Taxpayer* (New York: Vintage, 1974); Richard C. Edwards, Michael Reich, and Thomas E. Weisskopf, *The Capitalist System: A Radical Analysis of American Society* (Englewood Cliffs, N.J.: Prentice-Hall, 1972); John Kenneth Galbraith, *The New Industrial State* (New York: Signet, 1968); G. William Domhoff, *Who Rules America?* (Englewood Cliffs, N.J.: Prentice-Hall, 1967); Gabriel Kolko, *Wealth and Power in America: An Analysis of Social Class and Income Distribution* (New York: Praeger, 1962); C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956).
43. Isaac Shapiro and Robert Greenstein, *The Widening Income Gulf* (Washington, D.C.: Center on Budget and Policy Priorities, 1999), p. 7.
  44. Alan S. Blinder, "The Level and Distribution of Economic Well-Being," in *The American Economy in Transition*, ed. Martin Feldstein (Chicago: University of Chicago Press, 1980), p. 466.
  45. Shapiro and Greenstein, "The Widening Income Gulf," p. 10.
  46. Carole Shammas, "A New Look at Long-Term Trends in Wealth Inequality in the United States," *American Historical Review* 98, no. 2 (April 1993), pp. 420, 421, 429. See Denis Kessler and Edward N. Wolff, "A Comparative Analysis of Household Wealth Patterns in France and the United States," *Review of Income and Wealth* 37 (1991), pp. 249-66., which concludes: "The major finding of this study is that wealth is distributed more unequally in the U.S. than in France. The differences are considerable" (p. 262).
  47. Undoubtedly, the most interesting recent work on this topic is John Rawls's *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). The noted British philosopher Stuart Hampshire has called it the most important work in moral philosophy since World War II. It has largely dominated theoretical discussions of political, legal, and economic justice for the last three decades. Rawls's approach is essentially "naturalistic"; that is, he takes the "good" to be that which people rationally desire, and the "moral good" to be that which would best serve all people's rational desires. From this, he takes justice to be those social (legal, political, economic) arrangements that best serve the interests of all. To reach specific principles of justice, he asks for those principles that it would be rational for all people to agree to if each could not use force or influence to tailor the principles to his or her own interest. On the question of the distribution of income or wealth, this way of questioning leads to the principle that economic inequalities are just only if they work to everyone's advantage, for instance, as incentives that work to raise the level of productivity and thus the level of well-being for all. It would be the task of government to rectify inequalities that exceed this point, by means of taxes and transfers. I cannot, of course, do justice here to what Rawls takes 600 pages to explain and defend. However, I offer this short summary to suggest that the disparities of income in the United States are far from just in the light of contemporary moral philosophy. Clearly, those disparities are far greater than anything that could be claimed to be necessary to increase the well-being of all. Indeed, one would have to be blind not to see that they are not increasing the well-being of all. Robert Nozick has replied to Rawls in a book titled *Anarchy, State and Utopia* (New York: Basic Books, 1974), which no doubt represents the free-enterprise system's theory

- of justice. Nozick holds that no theory (such as Rawls's) that calls for government intervention to rectify income distribution can be just. His argument is that if people acquire their property (including money) legitimately, then they have the right to sell or spend it as they wish. If this leads to disparities in wealth, one cannot alter this outcome without denying that those sellers or spenders had the right to dispose of their property or money as they saw fit. I shall not try to answer Nozick here. It should be noted, however, that his view starts from the assumption that the property or money that is sold or spent was acquired legitimately. In light of the fact that so much U.S. property was stolen at gunpoint from Indians or Mexicans and so much wealth was taken from the hides of black slaves, applying Nozick's theory in the U.S. context would require a massive redistribution of wealth to reach the starting point at which we could say that individuals own what they own legitimately. For an extended discussion of these theories of justice, see Jeffrey Reiman, *Justice and Modern Moral Philosophy* (New Haven, Conn.: Yale University Press, 1990).
48. *StatAbst—1998*, p. 477, Table 756.
  49. One study reports that "among high school graduates with equal academic ability, the proportion going on to college averages nearly 25 percentage points lower for males (and nearly 35 for females) in the bottom socioeconomic quarter of the population than in the top quarter." Another indicates that "the sons of families in the top fifth of the socioeconomic pyramid have average incomes 75 percent higher than those coming from the bottom fifth." Arthur M. Okun, *Equality and Efficiency* (Washington, D.C.: Brookings Institution, 1975), pp. 81, 75.



## CONCLUSION

### *Criminal Justice or Criminal Justice*

*Justice being taken away, then, what are kingdoms but great robberies?*

**St. Augustine**  
*The City of God*

*... unjust social arrangements are themselves a kind of extortion, even violence.*

**John Rawls**  
*A Theory of Justice*

*... the policeman moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where he is, and the reason he walks in twos and threes.*

**James Baldwin**  
*Nobody Knows My Name*

### The Crime of Justice

*Robbers, extortionists, occupying soldiers* are terms used to characterize those who enforce an unjust law and an unjust order. It would be a mistake to think this is merely a matter of rhetoric. There is a very real and very important sense in which those who use force unjustly or who use force to protect an unjust social order are no different from a band of criminals or an occupying army. If this isn't understood, you are likely to think that what has been described in the first three chapters and accounted for in the fourth amounts to no more than another call for reform of the criminal justice system to make it more effective and fairer, when in fact it is much more. A criminal justice system that functions like ours—that imposes its penalties on the poor and not equally on all who threaten society, that does not protect us against threats to our lives and possessions equal to or graver than those presently defined as “crimes,” and that fails even to do those things that could better protect us against the crimes of the poor—is *morally no better than the criminality it claims to fight*.

At the end of this chapter, I propose some reforms of the system. However, these should not be taken as proposals aimed merely at improving the effectiveness or fairness of American criminal justice. If the argument of this chapter is correct, then these proposals represent the necessary conditions for estab-

lishing the moral superiority of criminal justice to criminality. They are the conditions that must be fulfilled if the criminal justice system is to be acquitted of the indictment implicit in the above statements of Baldwin, Rawls, and St. Augustine. Bear in mind that by the criminal justice system I do not mean only police, courts, and prisons. I include the entire legal system, from lawmakers to law enforcers.

What is common to the charge implicit in the statements of Baldwin, Rawls, and St. Augustine is the idea that *injustice transforms a legal system into its opposite*. What is common to the robber, the extortionist, and the occupying soldier is that each uses force (or the threat of force) to coerce people to serve the interests of others at the expense of their own. The robber and the extortionist use force to make other people hand over things of value. The occupying soldier uses force to subject one people to domination by another. The injustice that characterizes criminal acts is the forcing of people to serve the interests of others.

A legal system, of course, also uses force. Its defenders, however, maintain that it uses force to protect people's control over the things they value and over their own destinies. They claim that the legal system protects what people possess against robbers and extortionists and protects their autonomy against those who would try to impose their will on them by force. In short, although both a legal system and its opposite, either criminality or military domination, use force, the moral superiority of the legal system lies in the fact that it uses force to protect the interests of all people subject to its force equally, whereas criminals and occupation troops use force to subject some people to the interests of others. The moral legitimacy of a legal system and the lack of legitimacy of crime and military domination hinge, then, on the question of whether coercion is being used in the interests of all equally, or to promote some people's interests at the expense of others.

To say that the criminal justice system uses force to coerce people into serving the interests of others at the expense of their own is to say *the same thing about the criminal justice system that we say of crime!* In the absence of some compelling moral reason, force used to coerce people into serving the interests of others at the expense of their own is *morally no better than criminal force*. Because a legal system purports to do the reverse—to use force to protect *everyone's* interest in freedom and security equally by preventing and rectifying violations of those interests—legal systems call themselves *systems of justice*.<sup>1</sup>

This adds up to something that should be obvious but is not. A criminal justice system is criminal to the extent that it is not a system of justice. To call the criminal justice system a system of justice is to assert that the force used by the criminal justice system is morally opposite from, and morally superior to, the force used by criminals or conquerors. But then we must ask whether this assertion is true. A criminal justice system is a system of justice to the

extent that it protects equally the interests and rights of all and to the extent that it punishes equally all who endanger these interests or who violate these rights. To the extent that it veers from these goals, the criminal justice system is guilty of the same sacrificing of the interests of some for the benefit of others that it exists to combat. It is, therefore, morally speaking, guilty of crime. Which is it?

The experience of the twentieth century has taught us that we should not take for granted that every legal system is a system of justice. Hitler's Germany and Stalin's Soviet Union, as well as South Africa when it practiced apartheid, are testimony to the fact that what is put forth as law may well be outrageously unjust. We have come to recognize the truth implicit in the statements of Baldwin, Rawls, and St. Augustine: What is put forth under color of law may be morally no better than crime or tyranny. Therefore, we can no longer uncritically take for granted that our own legal order is just merely because it is legal. We must subject it to the moral test of whether it serves and protects the interests of all to make sure it is not injustice disguised as justice, criminality wearing the mask of law.

It is, of course, not my aim to place the U.S. legal system on par with that of Hitler's Germany or Stalin's Soviet Union. As I have acknowledged, there is much in the system that is legitimate, and many are caught by the system who should be. Rather my claim is this:

*To the extent that the American criminal justice system fails to implement policies that could significantly reduce crime and the suffering it produces (as argued in Chapter 1)*

*To the extent that the American criminal justice system fails to protect Americans against the gravest dangers to their lives and property (as argued in Chapter 2)*

*To the extent that the American criminal justice system apprehends and punishes individuals not because they are dangerous but because they are dangerous and poor (as argued in Chapter 3)*

*Then, to that same extent, the American criminal justice system fails to give all Americans either protection or justice, aids and abets those who pose the greatest dangers to Americans, and uses force in ways that do not serve equally the interests of all who are subject to that force, and thus its use of force is morally no better than crime itself.*

## Rehabilitating Criminal Justice in America

The criminal justice system in America is morally indistinguishable from criminality insofar as it exercises force and imposes suffering on human beings *while violating its own morally justifying ideals: protection and justice*. Once this is

understood, the requirements for rehabilitating the system follow rather directly. The system must institute policies that make good on its claim to protect society and to do justice. In the remainder of this chapter I briefly suggest the outlines of a "treatment strategy" for *helping the system go straight*. It cannot be reiterated too frequently that these proposals are not offered as a means of *improving* the system. Nor am I under any illusion that these proposals will be easily adopted or implemented. They are presented as the necessary requirements for establishing the criminal justice system's moral difference from, and moral superiority to, *crime*; and even if not implemented or not likely to be implemented, they stand as a measure against which this moral difference and superiority can be judged. The proposals fall under the headings of the two ideals that justify the existence of a criminal justice system. These ideals are that the criminal justice system protect us against the real dangers that threaten us and that it not be an accomplice to injustice in the larger society. To realize these ideals, it is necessary that the harms and injustices done by the criminal justice system itself be eliminated.

## Protecting Society

First, it must be acknowledged that every day that we refuse to implement those strategies that have a good chance of cutting down on the crimes people fear—the crimes on the FBI Index—the system is an accomplice to those crimes and bears responsibility for the suffering they impose. Thus:

***We must put an end to the crime-producing poverty in our midst.***

Throughout this book I have documented the striking persistence of large-scale poverty in the United States as well as the link between that poverty and much of the crime people fear the most. The elimination of poverty is the most promising crime-fighting strategy there is, and, in the long run, the most cost-effective. It is sometimes observed that poverty itself doesn't cause crime, because, for example, there was more poverty during the Great Depression than there is now and yet less crime. There is an important truth here, but it is easy to miss it. The truth is that it is not poverty as such that breeds crime, but the things that poverty brings with it in a modern, free, and free-enterprise society like ours: lack of good education (because schools are financed primarily out of local property taxes), lack of parental authority (because unemployed parents easily lose their children's respect), lack of cohesive local community (because those who can, escape the poor inner cities as quickly as possible), and so on. It is these things, rather than lack of money itself, that lead to crime. Investing in our inner cities and providing high-quality education, job training, and jobs for the unemployed will give us more productive citizens with a stake in playing

by the rules. And it will be cheaper than paying for police and prisons to house those who break the rules.

Eliminating the debilitating and crime-producing poverty around us is essential to any serious, long-term effort to protect society from crime. But along with it, we must:

***Let the crime fit the harm and the punishment fit the crime.***

For the criminal justice system to justify its methods, it must make good on its claim to protect society. This requires that the criminal law be redrawn so that the list of crimes reflects the real dangers that individuals pose to society. I am not saying we should start punishing people for things that are currently not crimes. For all that I have said about the harms of occupational hazards, for example, I do not say that we should simply treat the people responsible for them as if they were criminals, if there are not yet criminal laws against what they have done. The traditional prohibition against ex-post-facto criminal laws—against punishing people for things they did before those things were crimes—is an important principle of justice. Rather, we must make new and clear laws against imposing certain dangers on workers and citizens generally, and then hold people to those laws no matter what their class standing. Crime in the suites should be prosecuted and punished as vigorously as crime in the streets.

The law must be drawn carefully so that individuals are not punished for harm they could not foresee or could not have avoided, or that others have freely consented to risk. Moreover, this is not a matter of punishing people for any and everything they do that might lead to harm. The pursuit of security must not swamp the legitimate claims of liberty and progress. Some risks are the inevitable companions of freedom, and some are part of modern life. For every mile of highway we build, we can predict the number of people who will be killed in accidents on it. This does not justify treating the highway engineer as a murderer. Rather, we must have an open and ongoing discussion about risk and decide together which risks are worth taking and what level of risk is reasonable to impose on workers or citizens generally. Within this framework, we must rid the law of the distinction between *one-on-one* harm and *indirect* harm and *treat all harm-producing acts in proportion to the actual harm they produce. We must enact and implement punishments that fit the harmfulness of the crime without respect to the class of the criminal.* There is, for instance, general agreement that incarceration functions as an effective deterrent to corporate crime when the threat of imprisonment is believed.<sup>2</sup> To be believed, however, it must be used.

Because responsibility for corporate actions tends to be spread or even blurred in large organizations, we need legal requirements that make corporations identify in advance the individuals who are legally responsible for specific

acts. Kip Schlegel recommends that a standard of “reckless supervision” be built into sentencing guidelines for corporate offenses, so that individuals with supervisory authority could be held responsible for failure to exercise that authority when there is substantial risk of harm.<sup>3</sup>

But this is only the beginning. There is much more that can and should be done. In his book, *Corporate Crime and Violence*, Russell Mokhiber sets out a “50-Point Law-and-Order Program to Curb Corporate Crime.”<sup>4</sup> Mokhiber’s suggestions are quite realistic, and many fit well within the framework just outlined. Among them are recommendations for new laws that would require corporate executives to report activities that might cause death or injury, that would make it a criminal offense to willfully or recklessly fail to oversee an assigned activity that results in criminal conduct, that would enable federal prosecutors to bring federal homicide charges against companies that have caused death on a national scale (such as Manville or the tobacco companies), that would hold corporations responsible for how they respond to wrongful acts (do they cover up or take measures to prevent repetition, etc.?), that would facilitate class action suits against corporations, that would require convicted companies to notify their victims and to make restitution to them, that would better protect whistle blowers from reprisal, that would increase the penalties for convicted corporate executives, that would make it a crime for a corporation to have a faulty system for ensuring compliance with the law, and that would—for serious or repeated offenses—“execute” corporations (by stripping them of their corporate charters). Such laws, duly applied, would begin to make the criminal justice system’s response proportionate to the real dangers in our society.

The other side of the coin is the decriminalization of “victimless crimes,” acts such as prostitution, homosexual sodomy, gambling, vagrancy, drunkenness, and, of course, drug use. As long as these acts involve only persons who have freely chosen to participate, they are no threat to the liberty of any citizen. This also means that there is generally no complainant for these crimes, no person who is harmed by these acts and who is ready and able to press charges and testify against the wrongdoers. Therefore, police have to use a variety of shady tactics involving deception and bordering on entrapment, which undermine the public’s respect for the police and the police officers’ respect for themselves. In any event, the use of such low-visibility tactics increases the likelihood of corruption and arbitrariness in the enforcement of the law. Beyond this, because these acts produce no tangible harm to others, laws against them make criminals out of people who have no intention to harm or take advantage of others. In short, such laws fill our prisons with people who aren’t dangerous, while leaving truly dangerous people on the streets. To make good on its claim to protect society, the criminal justice system must not only treat the dangerous acts of business executives as crimes but must also decriminalize those acts that are not clearly dangerous.<sup>5</sup>

More than 100 years ago, John Stuart Mill formulated a guiding principle, still relevant to our time, for the design of legislation in a society committed to personal liberty:

*That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>6</sup>*

Although the principle has had to be modified in recognition of the ways in which individuals can cause future harm to themselves because of present injudicious choices, particularly in a complex modern society where people must deal with machines and chemicals beyond their understanding,<sup>7</sup> the heart of the principle is still widely accepted. This is the notion that a necessary condition of any justifiable legal prohibition is that it prohibit an act that does foreseeable harm to someone other than the actor himself. Because priority should be given to freedom of action, this harm should be *demonstrable* (i.e., verifiable by some widely agreed-upon means, say, those used by medical science), and it should be of sufficient gravity to outweigh the value of the freedom that is to be legally prohibited.<sup>8</sup>

This principle should not only guide legislators and those engaged in revising and codifying criminal law but should be raised to the level of an implicit constitutional principle. The U.S. Supreme Court recognizes certain traditional principles of legality as constitutional requirements even though they are not explicitly written into the Constitution. For instance, some laws have been held unconstitutional because of their vagueness<sup>9</sup> and others because they penalized a condition (such as being a drunk or an addict), rather than an action (such as drinking or using drugs).<sup>10</sup> The tenor of the Bill of Rights is to enshrine and protect individual liberty from the encroachment of the state, and thus Mill's principle is arguably already implicitly there.

Whether as a legislative or a judicial criterion, however, applying Mill's principle would undoubtedly rid our law of the residues of our puritan moralism. And it would eliminate the forced induction into criminality of the individuals, mainly those of the lower class, who are arrested for "victimless crimes." It would eliminate the pressure toward secondary crime (the need of the prostitute for a pimp to provide protection, theft by drug addicts to support their habits, violent turf wars between drug gangs, and so on). And it would free up resources for the fight against the really dangerous crimes. Before all, then:

***We must legalize the production and sale of "illicit drugs" and treat addiction as a medical problem.***

When drug addicts cannot obtain their fix legally, they will obtain it illegally. Because those who sell it illegally have a captive market, they will charge high prices to make their own risks worthwhile. To pay the high prices, addicts must, will, and do resort to crime. Thus, every day in which we keep the acquisition of drugs a crime, we are using the law to protect the high profits of drug black marketeers, *and* we are creating a situation in which large numbers of individuals are virtually physically compelled to commit theft. There can be little doubt that our present "cure" for narcotics use is more criminal (and criminogenic) than the narcotics themselves. Kurt Schmoke, while mayor of Baltimore, said that of 335 homicides committed in Baltimore in 1992, 48 percent were drug-related.<sup>11</sup> Another observer says that it is the drug war—not the drugs—that is shattering our inner cities. One of its effects is that a quarter of all black American men between the ages of 20 and 29 are behind bars, on parole, or on probation—which in turn makes them even less likely to find decent employment, and this locks them further into poverty.<sup>12</sup> And while we lock up so many young black men, we wonder why there are so many single black mothers and we don't notice the connection.

Ethan Nadelmann, of the Woodrow Wilson School of Public and International Affairs, points out that "there is no single legalization option. Legalization can mean a free market, or one closely regulated by the government, or even a government monopoly.... Legalization under almost any regime, however, does promise many advantages over the current approach. Government expenditures on drug-law enforcement would drop dramatically. So would organized crime revenues."<sup>13</sup> I will not enter into debate about the various ways in which drugs can be legalized. Although most observers seem to agree that the British system of dispensing heroin to registered addicts is superior to our own punitive system, a number of experts have gone even further. Norval Morris and Gordon Hawkins urge that narcotics use be decriminalized and the drugs be sold in pharmacies by prescription. Arnold Trebach urges that doctors be permitted to prescribe heroin for the treatment of addicts and as a powerful painkiller. Kurt Schmoke, former mayor of Baltimore, has called for permitting health professionals to give drugs to addicts as part of a treatment and detoxification plan. Phillip Baridon recommends that pure heroin—clearly labeled as to contents, recommended dosage, and addictive potential—be sold at a low fixed price in pharmacies, without prescription, to anyone aged 18 or over.<sup>14</sup> Jerry Wilson, former Washington, D.C., police chief, has suggested the possibility of selling and taxing marijuana in the way that tobacco is currently sold and taxed, and treating opiates and cocaine derivatives the way alcohol currently is treated, while keeping some psychoactive drugs available only at pharmacies with a doctor's prescription.<sup>15</sup>

Any reasonable plan of legalization will start by decriminalizing marijuana, which is virtually harmless. On the other hand, there may be some drugs that are so addictive or so likely to stimulate people to violence that we must keep

them illegal. This may be the case with "crack" and with PCP, also known as "angel dust." If this turns out to be true (and the government has so exaggerated the dangers of illicit drugs over the years that healthy skepticism is warranted about these recent claims), it may be necessary to exclude these from the general program of decriminalization. With less dangerous drugs decriminalized, however, many users of crack or PCP might switch to the less dangerous ones, and, in any event, already overstretched law enforcement resources would be freed up to concentrate on the really dangerous drugs and on the crucial problem of keeping drugs away from youngsters.

Ending poverty, criminalizing the really dangerous acts of the well off, and decriminalizing victimless crimes will reduce crime, protect society, and free up our police and prisons for the fight against the criminals who really threaten our lives and limbs. For these, however:

***We must develop correctional programs that promote rather than undermine personal responsibility, and we must offer ex-offenders real preparation and a real opportunity to succeed as law-abiding citizens.***

The scandal of our prisons has been amply documented. Like our drug policy, our prisons seem more calculated to produce than reduce crime. The enforced childhood of imprisonment may be the painful penalty offenders deserve, but if it undermines their capacity to go straight after release, we are cutting off our noses to spite our faces. People cannot learn to control themselves responsibly if they have spent years having every aspect of their lives—the hour they wake, the number of minutes they wash, the time and content of eating and working and exercising, the hour at which lights go out—regulated by someone else. Add to this the fact that convicts usually emerge with no marketable skill and little chance of getting a decent job with the stigma of a prison sentence hanging over them. The result is a system in which we never let criminals finish paying their debt to society and give them every incentive to return to crime.

If we are going to continue to punish people by depriving them of their liberty, we must do it in a way that prepares them for the life they will lead when their liberty is returned. Anything less than this is a violation of the Constitution's Eighth Amendment guarantee against "cruel and unusual punishment." Depriving a person of his or her liberty may be an acceptable punishment, but *depriving people of their dignity and a chance to live a law-abiding life when their punishment is supposed to be over is cruel and* (should be but sadly is not) *unusual!*

If, as I think, depriving people of a chance to live a law-abiding life after prison is cruel and unusual punishment, then pursuant to the guarantee of the Eighth Amendment, every imprisoned person should have a right to training at a marketable skill as well as a right to compete equally with non-ex-convicts for a job once the punishment is over. This might require making it illegal to dis-

criminate against ex-convicts in hiring and illegal to require job applicants to state whether they had ever been arrested, convicted, and/or imprisoned for a crime. This requirement might have to be modified for particularly sensitive occupations, although on the whole I think it would be fairer and more effective in rehabilitating ex-cons to enact it across the board and to have the government finance or subsidize a fund to insure losses incurred as a result of hiring ex-convicts. My hunch is that this would be much less costly than paying to support ex-cons in prison and their families on welfare when they return to crime for lack of a job. Beyond this, prison industries should pay inmates at prevailing wages; this money then could be used for restitution to victims and to purchase privileges and possibly increased privacy or freedom for the prisoners—all of which might tend to give them greater practice at controlling their own lives so that they will be prepared to do so after release.

To release them back into a safer and more peaceful society, however:

***We must enact and vigorously enforce stringent gun controls.***

Americans are armed to the teeth. The handgun is the most easily concealed, the most effective, and the deadliest weapon there is. Its ubiquity is a constant temptation to would-be crooks who lack the courage or skill to commit crime without weapons or to chance hand-to-hand combat. Its ubiquity also means that any dispute may be transformed into a fatal conflict beyond the desires or expectations of the disputants. And the handgun is only part of the story. In recent years it has become relatively easy to obtain rapid-firing assault rifles. Trying to fight crime while allowing such easy access to guns is like trying to teach a child to walk and tripping him each time he stands up. In its most charitable light, it is hypocrisy. Less charitably, it is complicity in murder.<sup>16</sup>

If, because of the 2nd Amendment, we continue to allow private individuals to own guns, we can at least require that gun-owners be registered and perhaps certified after completing a course on safe use of guns. We can surely ban assault rifles and require all guns to have trigger locks that children and gun thieves cannot open.

These changes, taken together, would be likely to reduce dangerous crime and to bring us a legal order that actually punished (and, it is hoped, deterred) all and only those acts that really threaten our lives, limbs, and possessions and punished them in proportion to the harm they really produce. Such a legal system could be truly said to protect society.

## Promoting Justice

The changes recommended above would, in part, make the criminal justice system more just, because people would be punished in proportion to the seriousness

of their antisocial acts, and the number of innocent persons victimized by those acts would be reduced. At the same time, however, we have seen that the criminal justice system is biased against the poor, and until poverty is eliminated, much must be done to assure justice for the poor people who become caught up in the criminal justice system.

A criminal justice system should arrest, charge, convict, and sentence individuals with an eye only to their crime, not to their class. Any evidence of more frequent arrest or harsher penalties for poor persons than for others accused of the same crime is a grave injustice that tends to undermine the legitimacy of the criminal justice system. Because many of the decisions that work to the disadvantage of the poor—police decisions to arrest, prosecutors' decisions to charge, and judges' decisions on how long to sentence—are exercises of discretion normally out of public view, they are particularly resistant to control. Because, unlike prosecutors' or judges' decisions, the police officer's decision *not* to arrest is *not* a matter of record, it is the least visible exercise of discretion and the most difficult to control. Our best hope to make arrests by police more just lies in increased citizen awareness and education of police officers so that they at least become aware of the operation and impact of their own biases and are held more directly accountable to, and by, the public they serve and sometimes arrest.

As for prosecutorial and judicial discretion, two approaches seem potentially fruitful. First, lawmakers ought to spell out the acceptable criteria that prosecutors may use in deciding whether or what to charge and the criteria that judges may use in deciding whether or what to sentence. The practice of multiple charging (charging an accused burglar with "the lesser included crimes" of breaking and entering, possession of burglar's tools, and so on) should be eliminated. It is used by prosecutors to "coax" accused persons into pleading guilty to one charge by threatening to press *all* charges. Of all the dubious features of our system of bargain justice, this seems most clearly without justification because it works to coerce a plea of guilty that should be uncoerced if it is to be legally valid.<sup>17</sup> The law should also set out more specific sentencing ranges because the present system leads to individuals receiving widely varying sentences for the same crimes—a practice that can be viewed only as arbitrary and capricious, that violates the principle that citizens should know in advance what is in store for them if they break a law, and that produces in convicts disrespect for the law rather than remorse for their violations. In addition to, and in conjunction with, these legislative changes, we ought to require prosecutors and judges to put in writing the reasons they have charged or sentenced in one way rather than another. They should be required to give an account of their policies and practices to some truly representative body to show that they are fair and reasonable.

The recently developed federal sentencing guidelines (followed by the inception of sentencing guidelines in many states) are an important step in this

direction.<sup>18</sup> But they are only a step. They have not eliminated discrimination. D'Alessio and Stolzenberg found that lower-socioeconomic-status offenders were likely to receive harsher sentences for nonproperty and morals offenses than higher-socioeconomic-status offenders, and that sentencing guidelines did not appear to reduce these disparities.<sup>19</sup> And as I pointed out in Chapter 3, for similar charges white defendants are more likely to get sentences below the guideline minimums than blacks. It appears that such guidelines have not so much eliminated discretion as shifted it from judges to prosecutors (who decide what to charge), and because prosecutors are less insulated from political pressures than judges, that is a step backwards. Thus, sentencing guidelines must be matched with charging guidelines.<sup>20</sup> Neither sort of guidelines need be so rigid as to leave no room for the expert judgment of judges or prosecutors. Rather, we need rules that hold those officials accountable for their judgments by requiring them to explain and justify their decisions.

Moreover, the sentencing guidelines that we have arose during the Reagan era, with its emphasis on extreme punitiveness. They often either include or are accompanied by draconian mandatory minimum sentences for small crimes, particularly anything to do with drugs. In response to this, an advocacy group was recently formed called Families Against Mandatory Minimums, whose "files bulge with cases of citizens serving drug sentences of 5, 10 and 20 years without parole chances for first and often minor offenses."<sup>21</sup> Because this very punitive approach has dramatically expanded our prison populations without seriously reducing crime, it is time to separate the task of assuring even-handed sentencing from that of hard-fisted sentencing. However we achieve it, it is clear that to make the criminal justice system function justly:

***We must narrow the range in which police officers, prosecutors, and judges exercise discretion, and we must develop procedures to hold them accountable to the public for the fairness and reasonableness of their decisions.***

All these changes still leave standing what is probably the largest source of injustice to the poor in the system: *unequal access to quality legal counsel*. We know that, by and large, privately retained counsel will have more incentive to put in the time and effort to get their clients off the hook, and we know that this results in a situation in which, *for equal crimes*, those who can retain their own counsel are more likely to be acquitted than those who cannot. The present system of allocating assigned counsel or public defenders to the poor and privately retained lawyers to the affluent is little more than a parody of the constitutional guarantee of *equal protection under the law*.

There are simply no two ways about this. In our system, even though lawyers are assigned to the poor, justice has a price. Those who pay get the choicest cut—those who cannot, get the scraps. Little over a century ago, before there

were public police forces in every town and city, people got "police protection" by hiring private police officers or bodyguards if they could afford it. Protection was available for a price, and so those who had more money were better protected under the law. Today, we regard it as every citizen's right to have police protection, and we would find it outrageous if police protection were allocated to citizens on a fee-for-service basis. *This is precisely where we stand with respect to the legal protection provided by lawyers!*

Legal protection is provided not only by the police. Attorneys are necessary to protect individuals from losing their freedom at the hands of the laws before they have exhausted the legal defenses that are theirs by right. Both police officers and lawyers are essential to the individual's legal protection. It is sheer hypocrisy to acknowledge everyone's right to equal protection under the law by the police and then to allocate protection under the law by lawyers on the basis of what individuals can pay. As long as this continues, we cannot claim that there is anything like equal treatment before the law in the criminal justice system. Therefore:

***We must transform the equal right to counsel into the right to equal counsel as far as it is possible.***

Although this would appear to be a clear requirement of the "equal protection" and "due process" clauses of the Constitution, the Supreme Court has avoided it, perhaps because it poses massive practical problems—and surely it does. However, the creation of public police forces to protect everyone posed many practical problems in its time as well.

Certainly it would not be appropriate to use the police as a model for resolving the problem of equal counsel. To establish a government legal service for all—in effect, to nationalize the legal profession—might make equal legal representation available to all. It would, however, undermine the adversary system by undercutting the independence of defense attorneys from the state. Some form of national legal insurance to enable all individuals to hire private attorneys of their own choice, however, could bring us closer to equal legal protection without compromising the adversarial relationship.

Such insurance would undoubtedly have to be subsidized by the government, as are the police, the courts, and prisons; but it would not necessarily have to be totally paid for out of taxes. People can rightly be expected to pay their legal bills up to some fraction of their income, if they have one. The rest would be paid for by a government subsidy that would pay the difference between what the accused could afford and the going rate for high-quality legal counsel. Nothing in the system need interfere with the freedom of the accused to select the lawyer of his or her choice (an option closer to the hearts of free enterprisers than the present public defender system allows) or interfere with the independence of the lawyer.

Undoubtedly, such a system would be costly. Our commitment to equal justice, however, remains a sham until we are willing to pay this price. Americans have paid dearly to protect the value of liberty enshrined in the Constitution. Is it too much to ask that they pay to realize the ideal of justice enshrined there too?

One final recommendation remains to be made. I have already argued that the criminal justice system, by its very nature, embodies the prevailing economic relations in its laws. This means that it is an error to think of the criminal justice system as an entity that can be reformed in isolation from the larger social order. A criminal justice system is a means to protect that social order, and it can be no more just than the order it protects. A law against theft may be enforced with an even and just hand. But if it protects an unjust distribution of wealth and property, the result is *injustice evenly enforced*. A criminal justice system cannot hold individuals guilty of the injustice of breaking the law if the law itself supports and defends an unjust social order.

Without economic and social justice, the police officer in the ghetto is indeed an occupying soldier with no more legitimacy than his or her gun provides. Without economic and social justice, the criminal justice system is the defender of injustice and is thus morally indistinguishable from the criminal. *A criminal justice system can be no more just than the society its laws protect.* Along with the other recommendations I have made in this chapter, the achievement of economic and social justice is a necessary condition for establishing the criminal justice system's moral superiority to crime.

***We must establish a more just distribution of wealth and income and make equal opportunity a reality for all Americans.***

This is not merely a matter of throwing money in the direction of poor people. It is a call for investment in our most important resource—people—and for targeting that investment where it is most urgently needed and morally required: to rebuild our squalid inner cities, to educate our young, to offer real opportunity to poor people to lift themselves out of poverty without lowering themselves into dependency. This would amount to a redistribution of wealth and income in the direction of greater social and economic justice. Because it would also reduce the temptations to crime produced by poverty, it brings us full circle to the first recommendation that I made for protecting society. *Here the requirements of safety and justice converge.*

## Summary

Every step toward reducing poverty and its debilitating effects, toward criminalization of the dangerous acts of the affluent and vigorous prosecution of

“white-collar” crime, toward decriminalization of “illicit drugs” and “victimless crimes,” and toward domestic disarmament; every step toward creating a correctional system that promotes human dignity, toward giving ex-offenders a real opportunity to go straight, toward making the exercise of power by police officers, prosecutors, and judges more reasonable and more just, toward giving all individuals accused of crime equal access to high-quality legal expertise in their defense; and every step toward establishing economic and social justice is a step that moves us from a system of *criminal justice* to a system of criminal *justice*. The refusal to take those steps is a move in the opposite direction.

## Study Questions

1. What do the three quotations at the beginning of this chapter mean? How do they apply to the American criminal justice system?
2. Do you support gun control legislation? Why or why not?
3. What is meant by “victimless crimes”? Should they be kept criminal?
4. Would you be willing to have your taxes go to pay for equal-quality legal counsel for the poor?
5. Is the distribution of wealth and income in America just? How is this related to the justice of the criminal justice system?
6. Are the recommendations made in this chapter likely to be instituted? What does your answer imply about your view of the American legal system?

## Additional Readings

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## Notes

1. Although I think this way of looking at the legal system, at justice, and at the moral legitimacy of the law is common to most moral and legal philosophers, it should be acknowledged that my own formulation bears a heavy debt to the conceptions of justice and morality developed by John Rawls, Kurt Baier, and Herbert Morris. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Kurt Baier, *The Moral Point of View: A Rational Basis of Ethics* (New York: Random House, 1965); and Herbert Morris, “Persons and Punishment,” in *Human Rights*, ed. A. I. Melden (Belmont, Calif.: Wadsworth, 1970), pp. 111–34. On the issue of the legitimacy of states (i.e., political-legal systems), see Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1976); Jeffrey H. Reiman, *In Defense of Political Philosophy* (New York: Harper & Row, 1972); Reiman, “Autonomy, Authority, and Universalizability,” *The Personalist* (January 1978), pp. 85–92; and Reiman, “Anarchism and Nominalism: Wolff’s Latest Obituary for Political Philosophy,” *Ethics* (October 1978), pp. 95–110. On the issue of the legitimacy and moral justification of police authority in particular, see Jeffrey H. Reiman, “Police Autonomy vs. Police Authority: A Philosophical Perspective,” in *The Police Community*, eds. Jack Goldsmith and Sharon S. Goldsmith (Pacific Palisades, Calif.: Palisades Publishers, 1974), pp. 225–33; and Roger Wertheimer, “Are the Police Necessary?” in *The Police in Society*, eds. Emilio C. Viano and Jeffrey H. Reiman (Lexington, Mass.: Lexington Books, 1975), pp. 49–60. See also Jeffrey Reiman, *Justice and Modern Moral Philosophy* (New Haven, Conn.: Yale University Press, 1990); and Jeffrey Reiman, *Critical Moral Liberalism: Theory and Practice* (Lanham, Md.: Rowman & Littlefield, 1997).
2. These are the words of a former director of the fraud division of the Department of Justice:
 

*No one in direct contact with the living reality of business conduct in the United States is unaware of the effect the imprisonment of seven high officials in the Electrical Machinery Industry in 1960 had on the conspiratorial price fixing in many areas of our economy; similar sentences in a few cases each decade would almost completely cleanse our economy of the cancer of collusive price fixing and the mere prospect of such sentences is itself the strongest available deterrent to such activities.*

Gordon B. Spivak, “Antitrust Enforcement in the United States: A Primer,” *Connecticut Bar Journal* 37 (September 1963), p. 382.
3. Kip Schlegel, *Just Deserts for Corporate Criminals* (Boston: Northeastern University Press, 1990), p. 137. This book contains a very extensive and valuable analysis of the jurisprudential and philosophical issues involved in assessing the guilt of both individual corporate officers and corporations themselves.



4. Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of Public Trust* (San Francisco: Sierra Club, 1988), pp. 38–65.
5. See chap. 1, "The Overreach of the Criminal Law," in Morris and Hawkins, *The Honest Politician's Guide to Crime Control*, pp. 1–28; Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford University Press, 1968); and Jeffrey H. Reiman, "Can We Avoid the Legislation of Morality?" in *Legality, Morality and Ethics in Criminal Justice*, eds. Nicholas N. Kittrie and Jackwell Susman (New York: Praeger, 1979), pp. 130–41.
6. John Stuart Mill, *On Liberty* (1859) (New York: Appleton-Century-Crofts, 1973), p. 9.
7. See, for example, Gerald Dworkin, "Paternalism," in *Morality and the Law*, ed. Richard Wasserstrom (Belmont, Calif.: Wadsworth, 1971), pp. 107–26; and Joel Feinberg, "Legal Paternalism," in *Today's Moral Problems*, ed. Richard Wasserstrom (New York: Macmillan, 1975), pp. 33–50.
8. See, for instance, the excellent discussion of the principle in Peter T. Manicas, *The Death of the State* (New York: Putnam, 1974), chap. 5, "The Liberal Moral Ideal," pp. 194–241; and H. L. A. Hart, *Law, Liberty and Morality* (New York: Vintage, 1963).
9. The standard laid down in *Conally v. General Constr. Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926), is "whether or not the vagueness is of such a character, 'that men of common intelligence must necessarily guess at its meaning.'" See also *Lanzetta et al. v. State of New Jersey*, 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618 (1939), in which the Supreme Court struck down a New Jersey statute that made it a felony for anyone not engaged in any lawful occupation to be a member of a gang because the terms of the statute were "vague, indefinite and uncertain" and thus "repugnant to the due process clause of the Fourteenth Amendment." Both cases are cited and discussed in Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (New York: Bobbs-Merrill, 1960), pp. 36–48. For a constitutional and philosophical argument for treating Mills's harm principle as an implied constitutional principle, see David A. J. Richards, *Sex, Drugs, Death, and the Law: An Essay on Human Rights and Overcriminalization* (Totowa, N.J.: Rowman and Littlefield, 1982), pp. 1–34, inter alia.
10. See *Robinson v. California*, 370 U.S. 66 (1962), in which the court held that a state law penalizing a person for a "status" such as addiction constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. Cited and discussed in Nicholas N. Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (Baltimore: Johns Hopkins University Press, 1971), pp. 35–36, inter alia.
11. Kurt Schmoke, "It's Time to Get Real about Guns and Drugs," *The Washington Post Outlook*, October 3, 1993, p. C4.
12. Jonathan Marshall, "How Our War on Drugs Shattered the Cities," *The Washington Post Outlook*, May 17, 1992, pp. C1, C2.
13. Ethan Nadelmann, "U.S. Drug Policy: A Bad Export," in Robert Lang, ed., *Drugs in America* (New York: Wilson, 1993), p. 232.
14. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1970), pp. 3, 8–10; Arnold S. Trebach, *The Heroin Solution* (New Haven, Conn.: Yale University Press, 1982), pp. 267–70; Phillip C. Baridon, *Addiction, Crime, and Social Policy* (Lexington, Mass.: Lex-

- ington Books, 1976), p. 88; Schmoke, "It's Time to Get Real about Guns and Drugs," pp. C1, C4.
15. Jerry V. Wilson, "Our Wasteful War on Drugs," *The Washington Post*, January 18, 1994, p. A20.
16. See the thoughtful recommendations for gun control and their rationale in Morris and Hawkins, *The Honest Politician's Guide to Crime Control*, pp. 63–71.
17. I have already pointed out that the vast majority of persons convicted of crimes in the United States are not convicted by juries. They plead guilty as the result of a "bargain" with the prosecutor (underwritten by the judge), in which the prosecutor agrees to drop other charges in return for the guilty plea. Kenneth Kipnis argues that the entire system of bargain justice is a violation of the ideal of justice because it amounts to coercing a guilty plea and often to punishing an offender for a crime other than the one he or she has committed. It is an argument worth considering. See Kenneth Kipnis, "Criminal Justice and the Negotiated Plea," *Ethics* 86, no. 2 (January 1976), pp. 93–106.
18. "Justices Uphold Disputed System of U.S. Sentencing," *The New York Times*, January 19, 1989, p. A1.
19. Stewart D'Alessio and Lisa Stolzenberg, "Socioeconomic Status and the Sentencing of the Traditional Offender," *Journal of Criminal Justice* 21 (1993), pp. 71, 73, 74.
20. This proposal is also made in Note, "Developments in the Law: Race and the Criminal Process," *Harvard Law Review* 101 (1988), pp. 1550–51. The authors of this article recommend that charging guidelines be supplemented with an "impact-inference standard." Under this standard, a defendant who believes that he or she has been discriminatorily charged would have to show that (1) he or she is the member of an identifiable class, (2) there is statistical evidence of discriminatory impact of prosecutorial decisions in the jurisdiction, and (3) the prosecutor's office lacked internal guidelines and procedures adequate to prevent abuse. If a defendant succeeded in showing these three elements, the burden of proof would shift to the government to explain its actions. *Ibid.*, pp. 1552–53.
21. Colman McCarthy, "Justice Mocked: The Farce of Mandatory Minimum Sentences," *The Washington Post*, February 27, 1993, p. A23.

## APPENDIX

### The Marxian Critique of Criminal Justice<sup>1</sup>

Here in the Appendix I shall try to present the reader with an overview of Marxian theory that goes from Marxism's theory of capitalism to its theory of law and from there to criminal justice. This addresses some of the same aspects of criminal justice we discussed in the main text of this book, but it sets them in a theoretical framework different from (although not incompatible with) the Pyrrhic defeat theory, with its historical inertia explanation of the failure of criminal justice. I shall close with comments on the ethical implications of the Marxian analysis.

Criminal justice has a concrete reality comprising police, prisons, courts, guns, and the rest. What is most important for our purposes, however, is the particular shape that this concrete reality takes in capitalism. This shape is governed according to certain principles that spell out what shall count as violations, what shall be done to violators, and so on. (For simplicity's sake, I shall use the term *criminal justice* as shorthand for the principles that normally govern criminal justice practices and practitioners in capitalism, and use the term *criminal justice system* as shorthand for the concrete reality of the practices and practitioners so governed.) Marxian analysis is in the first instance directed toward these governing principles. It aims to show that these principles are "economic reflexes," that is, they reflect and thus support the existing economic arrangements—in our case, the capitalist mode of production.

Criminal justice plays an ideological role in support of capitalism because people do not recognize that the principles governing criminal justice are reflections of capitalism. The principles of criminal justice appear instead to be the result of pure reason, and thus a system that supports capitalism is (mistakenly) seen as an expression of rationality itself! Engels—Marx's long-time collaborator—writes that "the jurist imagines he is operating with *a priori* [i.e., purely rational] principles; whereas they are really only economic reflexes; so everything is upside-down. And it seems to me obvious that this inversion . . . , so long as it remains unrecognized, forms what we call *ideological conception*."<sup>2</sup> As a consequence of this "inversion," criminal justice embodies and conveys a misleading and partisan view of the reality of the whole capitalist system. Because

capitalism requires laws that give individual capitalists the right to own factories and resources, a view of these laws that makes them appear to be purely rational makes capitalism appear purely rational as well.

Before proceeding, a few words about the nature of Marxian theory are in order. First of all, Marx's theory of capitalism is separate from his advocacy of socialism and communism. Marx might be right about how capitalism works or about capitalism's unjust nature, even if socialism or communism would in fact be worse or even if they are just utopian dreams that cannot be made real. This is important because of the tendency to think that the collapse of communism in eastern Europe and the former Soviet Union (as well as the unpalatable features of that communism before it collapsed) refutes Marxian theory generally. This is quite untrue. What the collapse of eastern European and Soviet communism refutes is, if anything, the theories of Lenin and Stalin about how to establish communism. Marx himself said very little about such things, and what he does say generally favors a much more democratic kind of socialism and communism than what Lenin and Stalin managed to bring about. Accordingly, it is still useful to look at what Marx thought about capitalism, even if one is convinced by recent events of the undesirability of actual communism or the impossibility of ideal communism.

Second, when we turn to Marx's theory of capitalism, we see that Marx portrays capitalism in pure form. He does so not to claim that that is how it actually exists anywhere, but rather to show the shape to which it tends everywhere. Actual systems will be a product of the force of that tendency versus the force of local factors, traditions, talent, innovation, luck, resources, the success or failure of particular human actions, and so on. Likewise, a Marxian analysis of criminal justice will indicate the pure form toward which criminal justice systems tend insofar as they support the functioning of capitalism. Actual criminal justice systems will be approximations of this tendency. Actual criminal justice systems will also clearly be shaped by human actions—often substantially so. No Marxist need deny that criminal justice in the capitalist United States is quite a different thing from criminal justice in, say, capitalist Chile. What she must claim, rather, is that as capitalism develops in both, their criminal justice systems will increasingly tend to take on the shape that the theory implies.

I shall try to show how Marxism leads to a theory of the structure that criminal justice systems tend to have under capitalism, while at the same time recognizing that any existing criminal justice system is only an approximation of this structure. To give the reader as complete a picture as possible (in this short space) of the whole of Marxian theory—from general theory of capitalism to particular theory of criminal justice, and from there to ethical evaluation—I will have to sacrifice a lot of detail. I shall largely ignore the differences that individual actions may make in determining the shape of actual systems. I hope I have said enough to suggest that this in no way implies that human actions are irrelevant to actual historical outcomes.

I proceed in the following way. In the first section, "Marxism and Capitalism," I sketch out enough of Marx's theory of the capitalist mode of production as is necessary to lay the foundation for a Marxian theory of law. Because law is, for Marxism, a form of ideology, we shall have to see how ideology works in capitalism. I take this up in the next section, "Capitalism and Ideology." In "Ideology and Law," I develop the Marxian theory of law and from it the Marxian theory of criminal justice. Then in the final section, "Law and Ethics," I consider the characteristic Marxian moral judgments about criminal justice—particularly about guilt and punishment—that are appropriate in light of the Marxian account.

## Marxism and Capitalism

Marx says that capitalism is a system of "forced labour—no matter how much it may seem to result from free contractual agreement."<sup>3</sup> Here is both the truth that Marx asserts about capitalism and the legal ideology that shrouds that truth. To understand precisely how this works, we must consider the nature of the coercion that Marx discovered in capitalism.

For Marx, the value of any commodity is equivalent to the average amount of labor-time necessary to produce it.<sup>4</sup> Under capitalism, the worker's ability to labor—Marx calls this *labor-power*—is sold to the capitalist in return for a wage. Because labor-power is also a commodity, its value is also equivalent to the average amount of labor-time necessary to produce it. "Producing labor-power" means producing the goods needed to maintain a functioning worker. The value of labor-power then is equivalent to the labor-time that on the average goes into producing the goods (food, clothing, shelter, and so on) necessary to maintain a functioning worker at the prevailing standard of living, which Marx understood to differ among countries depending on their respective histories (*Capital*, vol. 1, p. 171). The worker receives this in the form of a wage, that is, in the form of the money necessary to purchase these goods.

The capitalist obtains the money she pays as a wage by selling what the worker produces during the time for which he is employed. If the worker produced an amount of value equivalent only to his wage, there would be nothing left over for the capitalist and no reason for her to hire the worker in the first place. Labor-power, however, has the unique capacity to produce more value than its own value (*Capital*, vol. 1, pp. 193–94). The worker can work longer than the labor-time equivalent of the value of the wage he receives. The amount of labor-time that the worker works to produce value equivalent to his wage Marx calls *necessary labor*. The additional labor-time that the worker works beyond this Marx calls *surplus labor*, and the value it produces he calls *surplus value*. The surplus value, of course, belongs to the capitalist and is the source of her profit (*Capital*, vol. 1, pp. 184–86); that is, when the capitalist

sells the product made by the worker, the capitalist gives some of the money she gets back to the worker as a wage (this corresponds to the value that the worker put into the product during his necessary labor-time), and the capitalist keeps the rest as profit (this corresponds to the surplus labor-time that the worker puts in after his necessary labor-time).

Profit, then, rests on the extraction of unpaid surplus labor from the worker. To see this, one need only recall that although all products in the economy are produced by labor, only a portion of those products are wage-goods that the workers get paid with (they get them for the money they receive as wages). The remainder belongs to their bosses and is effectively uncompensated. The wage-goods only compensate necessary labor-time to which they are equivalent in value. What workers produce beyond this goes to the capitalist gratis. Thus, writes Marx, "The secret of the self-expansion of capital [that is, the secret of profit] resolves itself into having the disposal of a definite quality of other people's unpaid labour" (*Capital*, vol. 1, p. 534).

For Marx, however, capitalism is not only a system in which unpaid labor is extracted from workers, it is a system in which workers are *forced* to provide this unpaid labor. Workers are not merely shortchanged, they are enslaved. Capitalism is "a coercive relation" (*Capital*, vol. 1, p. 309). The coercion, however, is not of the direct sort that characterized slavery or feudal serfdom. It is, rather, an indirect force built into the very fact that capitalists own the means of production and laborers do not. Means of production are things such as factories and machines and land and resources—things that are necessary for productive labor. Lacking ownership of means of production, workers lack their own access to the means of producing a livelihood. *By this very fact* workers are compelled to sell their labor to capitalists for a wage because the alternative is (depending on conditions) either painful or fatal: relative pauperization or absolute starvation.

This compulsion is not in conflict with the fact that the terms upon which the worker works for the capitalist are the result of free contractual agreements. Indeed, the compulsion works *through* free agreements. Because the agreements are free, each side must offer the other a reason for agreeing. If workers offered capitalists only as much labor as went into the wage-goods they will get back in return from the capitalists, the capitalists would have no reason to purchase their labor. It follows that, no matter how free the wage contract is, as long as it occurs in a context in which a few own all the means of production, those who do not own means of production will be compelled to give up some of their labor without compensation to those who do. Thus, Marx describes the wage-worker as a "man who is compelled to sell himself of his own free will" (*Capital*, vol. 1, p. 766). The compulsion of the worker operates through the structure of property relations: "The dull compulsion of economic relations completes the subjection of the labourer to the capitalist. Direct force, outside

economic conditions, is of course still used, but only exceptionally" (*Capital*, vol. 1, p. 737).

The very existence of the social roles of capitalist and worker—defined by ownership and nonownership of means of production, respectively—is what coerces the worker to work without compensation. It coerces in the same way that a social structure that allotted to one group ownership and thus control of all the available oxygen would coerce. Beyond what was necessary to defend this group against challenges to its ownership of the oxygen, no additional force would be necessary for the coercion to operate. Indeed, it would operate quite effectively by means of bargains freely struck in which the non-oxygen-owners had to offer something to the owners to get the chance to breathe. They, too, would be compelled to sell themselves of their own free will. The same can be said of capitalism. Once its structure of social roles is in place, all that is necessary is that individuals choose, from among the alternatives available to them in their roles, the course of action that best serves their self-interest, and the extraction of unpaid surplus labor is enforced without further need for overt force except in unusual circumstances.

As with the oxygen-owning society, so too with capitalism: Overt force is used or threatened to defend owners against challenges to their ownership. That is just another way of saying that, in capitalism, the state uses overt force to protect private property. And this force is used to protect both the property of the capitalist (her factories and resources) and the property of the worker (his labor-power). This differs crucially from the way in which overt force is exercised in social relations like slavery. In slavery, the use of overt force is part of the normal exercise of the master's power. In capitalism, overt force is used to defend all against forceful interference with their right to dispose of whatever property they happen to own, be it means of production or labor-power. Accordingly, such force is not part of the capitalist's power but left to a third party that is neutral toward all owners—the state.

With both capitalists and workers protected in their capacity to dispose of what they own, the process by which workers are forced to work gratis can proceed apace. This effect can be achieved with the state functioning neutrally. Although the state normally favors the interests of capitalists over workers,<sup>5</sup> it can serve the process of forced extraction of unpaid labor by protecting both capitalists and workers alike in their freedom to dispose of what they happen to own. Thus the state can treat capitalists and workers as having the same or "equal" property rights over what they own. It just turns out that what capitalists happen to own is means of production, and what workers happen to own is the muscles in their arms. Capitalism, then, naturally appears as a system of free exchanges between people with equal rights (over unequal amounts of property). This brings us to the phenomenon of ideology.

## Capitalism and Ideology

Of the study of social revolutions, Marx writes:

*In considering such transformations a distinction should always be made between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic—in short, ideological forms in which men become conscious of this conflict and fight it out.*<sup>6</sup>

The legal, then, is an ideological form. This is not to say that it is merely mental. It has a material reality in the form of police and prisons and guns and courts and legislators and law books and the rest. What is crucial is how this material reality is shaped, and for that we must understand how ideology is shaped.

As its etymology suggests, *ideology* means the science of ideas, where science can be taken in the ordinary sense as the study of causal connections. (Recall the discussion of ideology in Chapter 4.) In the context of Marxian theory, ideology comes to mean the ideas caused by the mode of production (in our case, the capitalist mode of production), and, equally important for Marxism, the caused ideas are in some important way false. Thus understood, for Marxism, the study of ideology denotes the study of how the mode of production gives rise to people's false beliefs about society. In *The German Ideology*, Marx writes:

*If in all ideology men and their circumstances appear upside down as in a camera obscura, this phenomenon arises just as much from their historical life-process as the inversion of objects on the retina does from their physical life-process.*

*... The phantoms formed in the human brain are also, necessarily, sublimates of their material life-process, which is empirically verifiable and bound to material premises.*<sup>7</sup>

As this statement makes clear, the study of ideology requires that both the existence and the falsity of ideological beliefs be given a *materialist* explanation.

To understand this requirement, consider that Marxian materialism is the conjunction of two distinct claims, an ontological claim and a social scientific one. The *ontological* claim is that what exists is material, that is, physical objects in space. Mind or spirit in any immaterial sense are chimera. ("From the start the 'spirit' is afflicted with the curse of being 'burdened' with matter, which here makes its appearance in the form of agitated layers of air, sounds, in short, of language" [*German Ideology*, p. 19].) The *social scientific* claim is that the way in which a society is organized for the production of the material conditions

of its existence and reproduction ("the mode of production") plays the chief (though by no means the only) causal role in determining the nature and occurrence of social events. ("The mode of production of material life conditions the social, political and intellectual life process in general."<sup>8</sup>) According to this social scientific claim, the belief that societies are shaped primarily by their members' attitudes, or that history is shaped by the progressive development of knowledge or ideals, is false. Rather, it is primarily the organization of production that shapes people's attitudes, and the progressive development of modes of production that shapes history. ("That is to say, we do not set out from what men say, imagine, conceive, nor from men as narrated, thought of, conceived, in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life-process we demonstrate the development of the ideological reflexes and echoes of this life-process" [*German Ideology*, p. 14]; "it is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness."<sup>9</sup>)

Of these two claims, the social scientific is more restrictive than the ontological. The ontological claim requires only that we attribute ideology to material realities, be they brains or agitated layers of air or modes of production. The social scientific claim requires that among these material realities, priority be given to the mode of production as the primary cause of ideological beliefs. This means that the *main* source of false ideology is to be looked for not in the perceiving subject but in the perceived objects. It is not a "subjective illusion," the result of erroneous perception by individuals of their material conditions, but an "objective illusion," the result of more or less accurate perception of those conditions.<sup>10</sup> Viewing ideology this way has the added benefit of leaving the door open just wide enough so that the theory of ideology does not exclude the possibility of all true beliefs—and thus of the very science upon which it is based. A materialist theory of ideology, then, must show that false ideology is an *objective illusion* arising primarily from more or less accurate perception of the organization of material production, rather than from some subjective error.<sup>11</sup> Bear in mind that this is a matter of placing primary emphasis on objective factors, not of absolutely excluding subjective ones.

We can fix the idea of an "objective illusion" by considering a very common example of one, namely, the illusion that the sun goes around the earth. Any illusion, any erroneous belief that an individual holds, can be *stated* as a subjective error—but not every erroneous belief arises primarily *because* of a subjective error. A person who believes that the sun rises above a stationary horizon in the morning makes a mistake. However, this sort of mistake differs crucially from, say, the mistake that a color-blind person might make of believing that the light is green when it is red, or the mistake a person balancing her checkbook might make of believing that a number is 4 when it is 2. In these latter cases, the mistaken beliefs are not merely held by the individuals; they arise in the individuals primarily as the result of a defective perceptual faculty or misuse of

a sound one. These are subjective illusions. In these cases, correcting the defect in or the use of the perceptual faculty should undo the mistake. The mistaken belief that the sun goes around the earth, by contrast, arises as a result of a sound perceptual faculty properly exercised. This is an objective illusion. Neither healthier vision nor looking more carefully is likely to enable an individual to correct this mistake and see that what occurs at dawn is not the sun rising above the horizon, but the horizon tipping down before the sun.

The ideology of capitalism is the illusion that capitalism is uncoercive. This illusion is a mistake of the same type as the illusion that the sun goes around the earth. What corresponds in capitalism to the movement of the sun seen from the earth is the free exchange of wages and labor-power between capitalists and workers. That the sphere of exchange is the objective basis of ideology is recognized in effect by Marx, when he writes that this sphere,

*... within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their free will [Capital, vol. 1, p. 176].*

The normal perception of what goes on in exchange gives rise to the ideological illusion that capitalism is uncoercive. This is not because the freedom in exchange is an illusion. The fact is that, for Marx, capitalism works only because the moment of exchange, through which the circuit of capital continually passes, is truly free.

*For the conversion of his money into capital, therefore, the owner of money must meet in the market with the free labourer, free in the double sense, that as a free man he can dispose of his labour-power as his own commodity, and that on the other hand, he has no other commodity for sale, is short of everything necessary for the realization of his labour-power [Capital, vol. 1, p. 169].*

That the second of these senses of freedom is the worker's "freedom from" ownership of means of production does not deny the reality of the first sense, without which we would have slavery or serfdom rather than capitalism.

In exchange, the power that capitalists have over workers recedes from view. If we distinguish two sorts of power—the power to withhold one's commodity until offered something preferable and the power to command obedience and back this up with violent force—then it is clear that, in the sphere of exchange, the latter power is suspended and all that remains is the former power. This former power is a power that all parties to the exchange have equally. Thus, the unequal power of capitalist and worker appears as their equal

power to withhold from exchange what they happen to own, and their social inequality appears as the difference between the things that they happen to own. To use the celebrated words of Marx's analysis of the fetishism of commodities, a "social relation between men assumes, in their eyes, the fantastic form of a relation between things" (*Capital*, vol. 1, p. 72).

If this accurate perception of what goes on in exchange is to explain how capitalism appears uncoercive, we need to understand how the sphere of exchange—which is only part of capitalism—should be the source of beliefs about the whole of capitalism. Why should the experience of freedom in exchange, rather than, say, the experience of taking orders on the production line, determine the beliefs that members of capitalist societies come naturally to have? How is the representation of exchange *generalized* into a view of capitalism as a whole?

Marx offers a clue to the answer to this question when he says that the fetishism of commodities results because "the producers do not come into contact with each other until they exchange" (*Capital*, vol. 1, p. 73). Exchange transactions are the salient points of social contact for economic actors in capitalism. They literally punctuate capitalist social relations. Every social interaction between individuals playing roles in the capitalist mode of production begins with such a transaction (say, the signing of a wage contract exchanging labor-power for money) and can be ended with such a transaction (say, the dissolution of the wage contract). Each of these beginnings and endings is characterized by the absence of either party's having the power to command the other's obedience and use violence to get it. Each party knows that he can enter or withdraw from any capitalist social interaction without being subject to the command or the overt force of the other. What constraint either feels seems to be only a matter of what he happens to own, which naturally appears as a feature of his own good or bad fortune rather than a condition coercively imposed by the other. Thus, *all* capitalist social interactions, *not just the exchanges themselves*, appear as voluntary undertakings between equal people who happen to own different things.

Exchange accurately perceived and then generalized is what leads workers in capitalist societies to believe that they are free, although they take orders most of their waking lives. Thus, ideologically false beliefs about capitalism result from accurate perception of exchange, when the rest of capitalism is, by default, assumed to be more of the same. The law follows suit.

## Ideology and Law

"Law," wrote Marx in *The Poverty of Philosophy*, "is only the official recognition of fact."<sup>12</sup> For capitalist law, the fact is exchange. Law in capitalism is the official recognition of the fact of the economic relations in which the exchangers stand to one another. This insight—which will guide the materialist explanation

of criminal law that I shall develop in this section—must be credited to the work of the Soviet legal theorist Evgeny Pashukanis, whose *General Theory of Law and Marxism* was published in Russian in 1924.<sup>13</sup> Among the things for which Pashukanis argued was that law was a product of capitalism and consequently had no legitimate place in socialism. As Stalin took firm control of the Soviet Union and saw fit to use the law to shore up that control, Pashukanis came eventually into disfavor. He recanted his views to some extent, but it was too late. By 1937 he had been declared an enemy of the people, and he “disappeared” shortly thereafter. Recently rediscovered by Western Marxists, Pashukanis’s work was first the object of lavish praise and subsequently the target of harsh criticism. I do not intend to endorse or defend the whole of Pashukanis’s theory. He aimed at a general theory of law and made only a few observations about criminal law, which is my main concern here. I shall try to show that his basic insight about the relation between law and exchange can be developed into an explanation of the content of the criminal law and of the constitutional protections relevant to criminal justice.

Marx writes that parties to an exchange

*... must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognize in each other the rights of private proprietors. This juridical relation, which thus expresses itself in a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two [Capital, vol. 1, pp. 88–89].*

Exchangers must in fact refrain from forcing those with whom they would trade to part with their goods or services or money. Official recognition of this fact takes the form of granting to exchangers “the rights of private proprietors.” Because this recognition is related to the ideological failure to perceive the coerciveness reproduced in exchanges between proprietors of capital and proprietors of labor, exchanges are understood legally as acts of the free will of the parties as long as no overt violence is used or threatened. Consequently, exchangers treat one another as *free subjects* whose freedom is expressed in their *right to dispose of their property without interference from others*.

It is the difference between what capitalists own and what workers own that, for Marx, makes it possible to reproduce a coercive relation through free exchange. If the law follows ideology in representing the relation between exchangers as noncoercive, then the law must abstract from this difference in what is owned and treat each party as having the same right to dispose of his property regardless of what that property is. The law reflects this in its formality. The legal right of property is an empty form to be filled in with different content,

depending on what an individual owns. Capitalists and workers have the same right of property; they just happen to own different things. It just happens that what some people own are factories and what others own are their bodies, but their property rights in these things are the same. Their freedom to dispose of their property also is the same.<sup>14</sup> Thus, exchangers treat each other as *equal free subjects with equal property rights*—that is to say, as *legal persons*.<sup>15</sup>

We saw in the previous section that ideology is not to be understood as merely an illusion. Ideology reflects the real way in which capitalism appears to its participants. By the same token, the ideological nature of law reflects the real relations in which exchangers stand to one another. The written law, even the institutions of law (from lawmakers to law enforcers), are not the source of law. They reflect real, objective relations between members of a capitalist society, relations that exist, so to speak, on the ground first and only later on the page or in the courts for that matter. It is here that the “inversion” of which Engels wrote does its ideological work. Although the law is a reflection of the relations of exchangers on the ground, it appears that the law is an expression of rationality itself, with the consequence that the relations among exchangers seem so as well.

Here, however, a problem arises for the Marxian materialist: If law is the reflection of the actual practice of economic exchange, how does law come to function as a norm? A simple reflection would represent whatever occurs and thus could not identify some actions as infractions. How can the materialist account for the normative dimension of law that arises as a reflection of economic relations?

The answer to this is that law is not a simple reflection of economic relations but an *idealized* reflection. As exchanges occur over and over, people naturally tend to average out the peculiarities of individual cases and discern an “essential core.” In time, when individual cases diverge enough from this essential core, they are seen as deviant and thus as violations. The legal reflex of economic relations, then, is not an exact replica but the result of a natural sifting out of arbitrariness and idiosyncrasy such that what emerges is an idealized “average” that stands in a normative relation to particular instances. This tendency to go from what happens “on average” to what is normative is a common feature of human social existence. People tend to take what usually happens as what should happen. This tendency of the statistical norm (what people can generally be expected to do) to become the moral norm (what is expected of people) is visible in early civilization (where, for example, natural and moral law are not distinguished from each other) and in advanced civilization (where, for example, existing business practice is often taken by courts as creating legally enforceable obligations).

This brings us to a second question. It would seem that law that reflects (even the idealized “average” core of) exchanges would include not only the criminal law but also what we currently understand as contract or civil law. How

can the theory that traces law to exchange account for the nature of the criminal law per se, with its special content and its unique remedies?

To answer this, note first that there is considerable overlap in the content of criminal and civil law; criminal acts, such as theft or battery, also can be causes of civil action. This overlap, however, is largely asymmetrical: Virtually any criminal act can be a cause of civil action, but only some civil causes are subject to criminal prosecution. This suggests that the criminal law is more distinctive in its remedies than in its content. In general, criminal prosecution seeks punishment of the guilty, and civil action seeks recovery of damages from the one responsible for a loss. Now, on the materialist theory, both sorts of law—criminal and civil—represent the “essential core” of normal exchange and aim to rectify violations of or deviations from that core. Thus, to explain the nature of the criminal law per se, we must show why some class of deviations from normal exchange is singled out for the distinctive “criminal” remedy, namely, punishment. Because punishment is generally a graver matter than recovery of damages, we should expect the criminal law to be addressed to the most serious violations of normal exchange, whereas the civil law can be addressed to all violations.

Violations of normal exchange can be distinguished in the following way: Some threaten the very possibility of free exchange by depriving people of the ability to dispose of their property. Other violations threaten not the possibility of free exchange but its success in meeting the wishes of the exchangers. What threatens the very possibility of exchange are acts of violence that overtly block the capacity of individuals to exercise their wills, acts of theft that overtly bypass the capacity of individuals to choose how their property is disposed of, and acts of deception that have the same effect, so to speak, behind the backs of their victims. These are so serious that they must be prevented in advance—and that requires a standing threat of punishment. Accordingly, the criminal law is primarily aimed at acts of violence, theft, and fraud.<sup>16</sup>

Less serious violations are compatible with the existence of exchange but cause exchanges in some way to fall short of the wishes of the exchangers. These violations are mainly failures to live up to the terms of explicit or implied contracts. They can be remedied by requiring performance or payment from the one responsible. These are suitable targets for the civil law, although nothing is lost by allowing the civil law to apply to recovery of losses due to the more serious violations as well.

Actual exchanges will be characterized by the full range of violations and deviations, from failure to meet agreed-upon deadlines to gross expropriation with the threat or use of violence. All such violations undermine the likelihood of the same parties exchanging again. Because it is generally in people’s long-term interest that stable trading relationships be maintained, it will generally be in people’s interest to eliminate such violations. Accordingly, over time the vast majority of exchanges, particularly those between people in continuing ex-

change relationships, will tend to be free of violations. Thus, an average core of exchange, characterized by absence of violence and fraud as well as by dependable fulfillment of agreements, will emerge as the norm. The law in general will represent this norm.

However, of the violations, there is a class that stands out in the extremity of the threat it poses to the possibility of exchange. This is the class of threats and acts of violence, theft, and fraud because all of these directly attack the ability of people to dispose of what they own according to their own free will. Consequently, the maintenance of stable exchange relations will require establishing a secure peace, free of violence, theft, and fraud.<sup>17</sup> Because these violations are so serious as to threaten the very possibility of ongoing exchange relations, they must be prevented in advance by the standing threat of punishment, rather than remedying them afterward. They are appropriately the subject of the criminal law.

On the whole, then, although the entire law in capitalism reflects the conditions of normal exchange, the content of the criminal law—the acts it identifies as “crimes”—are those that threaten the very possibility of normal exchange. Moreover, because the normal relations of exchange are not only idealized but (as we saw in the previous section) generalized to the whole of capitalism, they will shape people’s normative expectations beyond exchange. Thus, they determine the limits that will be imposed on officials taxed with the job of finding and prosecuting criminals, the shape of court proceedings, the relation of punishment to offense, and the emphasis on the free will of the offender. Accordingly, by tracing law to its source in exchange, we can account for at least the general content of criminal law and the general shape of the criminal justice system and of the constitutional limits within which that system operates. Here, briefly sketched and numbered for ease of identification, are the main ways in which this works.

1. Normal exchange presupposes that people are treated as having property rights in whatever they are to trade, and that must mean not only goods but their bodies as well, because bodily actions are what workers trade with capitalists for their wage. Crime, then, is any violation by one individual of the property rights of another in whatever he owns, including his body. This explains why the criminal law is directed primarily against acts of violence, theft, and fraud. Moreover, because criminal law protects an individual’s body because he owns it (and not, say, because it is the earthly vessel of his immortal soul), the law will be concerned primarily with injuries done to people’s bodies against their will—otherwise such injuries do not violate the individual’s ownership of his body. This accounts for the liberal principle, *volenti non fit injuria* (no injury to one who has consented) and thus, via generalization, for the tendency in capitalism to decriminalize (or reduce in importance) “victimless crimes” or “morals offenses.”



2. This account also tells us what we are not likely to see as crime in capitalist society, namely, exercises of the power inherent in the ownership of property itself. Thus, we will not generally find that death due to preventable dangers in the workplace will be taken as murder because that would assume that the worker was somehow forced into the workplace by the power inherent in his boss's private ownership of the means of production. Because that is just the power that is invisible in capitalism, the worker is taken as freely consenting to his job and thus freely accepting its risks. Accordingly, when the criminal law is used against employers to get them to eliminate occupational hazards, it is never with the understanding that employers who do not eliminate such hazards are violent criminals. If the criminal law is used in these cases at all, it is as a regulatory mechanism applied to employers because this is the most efficient way to reduce the social costs of occupational injury and disease. The treatment of guilty employers is generally light-handed, even though far more people lose their lives due to preventable occupational hazards than as a result of what the law currently treats as murder. In capitalism, subjection to one person is seen as arbitrary and thus unlawful coercion, but subjection to the capitalist class is not seen at all. (Here is how the Marxian theory understands the phenomena we discussed in the main text of this book and accounted for with the historical inertia explanation.)

3. The other side of criminal law—the limits placed on legal officials in their pursuit of suspected criminals (for example, in the Bill of Rights)—likewise reflects the generalized conception of people as owners of their bodies and other property. Accordingly, we find protections against official invasions of suspects' property (for example, the Fourth Amendment protections against unreasonable search and seizure) and against penetration of suspects' bodies or minds (for example, the Fifth Amendment protection against self-incrimination). Moreover, this explains why corporal punishment, which was the norm in feudalism and slavery, tends to be eliminated in capitalism. The bodies of slaves are literally owned by their masters, and lords have natural (that is, parentlike) authority over their serfs. In these cases corporal punishment fits the existing social relations. In capitalism, employer and employee meet as owners of their respective bodies, and thus corporal punishment looks increasingly out of place.

The existence of these various limitations on what can be done to enforce the law is evidence that the Marxian view of law includes recognition of the way law functions not only to control the working class but as a limit on the behavior of the ruling class. Indeed, the Marxian view can be taken as claiming that it is precisely as a system that protects everyone alike in her property (including the body), by limiting both what citizens and law enforcers can do to the bodies (and other property) of other citizens, that the law most effectively serves the purpose of keeping the working class selling its labor-power to owners of means of

production—both classes safe in the knowledge that no one can interfere with their right to dispose of what they happen to own.

4. As crime is a violation of normal exchange, so punishment is thought of on the same model of equivalence as exists in exchange. "Punishment emerges as an equivalent which compensates the damage sustained by the injured party."<sup>18</sup> The commercial model doesn't end here. The adversary system reproduces it in court. "The public prosecutor demands a 'high' price, that is to say a severe sentence. The offender pleads for leniency, a 'discount,' and the court passes sentence in equity."<sup>19</sup> Crime deforms exchange by taking with force rather than payment. Punishment restores exchange by using force to pay the criminal back for his force. This is the tribute in retribution. The court is the extraordinary market where this extraordinary exchange is negotiated. The scales in Justice's hands are the same as those used by the merchant.

5. Because exchange normally brings payment to an individual only when she freely chooses to offer up her goods or services for it, so then the payment of punishment comes due only when the offender has freely chosen to commit the offense for which the punishment is payment. Accordingly, liability for punishment is subject to conditions of the same sort as apply to liability to contractual obligations. One is not bound by a contract that she has not signed freely, or that she signed while insane or in ignorance of its contents, and so on. Likewise, the offender is liable to punishment, and thus is truly a criminal, only if he has committed his violation freely, sanely, and with knowledge of what he was doing. By the same logic, the law generally prohibits *ex post facto* attribution of criminal liability because a person cannot choose freely to violate a law before it has been passed.

Here, then, we read off the face of exchange, albeit idealized and generalized, the main contours of criminal justice as it develops in capitalism. As I suggested at the outset, this is no more than a skeleton. It does not aim to account for the full, rich detail of any particular criminal justice system. Actual criminal justice systems exist in societies with other modes of production present alongside capitalism and are affected by the complex interplay of human actions, and so on, so that each actual system—like each actual face—will have a distinct physiognomy while sharing in the basic structure. Some criminal justice systems will be slower in eliminating "morals offenses," some will be stricter on occupational hazards, some will abolish the death penalty while others will retain it, and so on.<sup>20</sup> These specific outcomes will be a function of the strength various social groupings (such as religious organizations, labor unions, academia, the press, and the like) come to have in the specific history of specific countries, and of all the largely unpredictable features that determine the outcome of particular battles over the content of the law and the funding of the

legal apparatus. This notwithstanding, the Marxian claim is that criminal justice will tend toward the shape sketched out above.

## Law and Ethics

We reach now the question of the moral stance toward capitalist criminal justice that is appropriate if the Marxian account is correct. Marxism describes capitalism as an exploitative system, meaning one in which workers are forced to work for capitalists without compensation. Marxists characteristically regard exploitation, and consequently capitalism, as unjust or immoral. Broadly speaking, they reach this condemnation by one of three routes. One is to view capitalist exploitation as wrong because it promotes antagonistic or alienated relations between human beings.<sup>21</sup> The second way is to view capitalist exploitation as wrong because it is a form of forced servitude or slavery.<sup>22</sup> The third way is to view capitalist exploitation as wrong because it is based on an unjust distribution of wealth, namely, the unjustifiable exclusive ownership by a few of the means of production.<sup>23</sup> I shall call these three views, respectively, "the alienation charge," "the slavery charge," and "the maldistribution charge." Each of these has moral implications for capitalist criminal justice. The task of identifying these implications is simplified by the fact that the second and third charges incorporate each other. The slavery charge accepts that private ownership of means of production is a case of unjust maldistribution (because it is a means of forcing servitude), and the maldistribution charge accepts that private ownership of means of production is a means of enslavement (because it is a power wrongly monopolized by a few). For our purposes, then, the charges against capitalism can be reduced to two: the alienation charge and the slavery-maldistribution charge.

Those who raise the alienation charge point out that capitalism is a system in which each person's well-being is in conflict with that of others. Capitalism pits class against class (competing over the division of the economic product into wages versus profit), worker against worker (competing for jobs), and capitalist against capitalist (competing for market shares). Moreover, proponents of this charge hold that antagonism of interests is neither a necessary feature of human life nor a desirable condition. It is caused by capitalism. It was less marked in feudalism and might be eliminated in the future if a more cooperative arrangement, such as socialism, could be established. Criminal justice as it emerges in capitalism is understood as a means to regulate this antagonism of interests. Because it assumes that this antagonism is inevitable, criminal justice serves to confer permanent validity on capitalism. Moreover, criminal justice promotes this antagonism by teaching people that the rights of each are in conflict with the rights of others rather than mutually supportive, that freedom is *freedom from* invasion by others rather than freedom to develop with others, that what people owe each other is noninterference rather than a helping hand.

Also important is the fact that a society based on antagonism of interests is one in which people earn their daily bread only as long as someone else can profit as a result. When that changes, workers may find themselves in need and with little in the way of help from the rest of society. On this view, then, the high crime rates characteristic of capitalism are due to the fact that people in capitalism are taught to see their interests as in conflict with others' and thus they are trained to have limited altruism and fellow feeling, and to the fact that a society based on antagonism of interests is one in which economic need and insecurity are endemic. When limited fellow feeling meets economic need and insecurity, the result is crime. (Recall the views of Bonger and Gordon, discussed in Chapter 4.) The same system that calls criminals individually guilty, then, is responsible for the antagonism of interests that breeds crime in the first place. The upshot of this charge is that criminals are not—or at least not wholly—guilty of the crimes they commit. On this charge, criminals are in large measure unjustly punished for actions caused by the very system that punishes them.

On the slavery-maldistribution charge, the emphasis is on the wrongness and coerciveness of private ownership of means of production. Capitalism promotes a system of criminal justice based on protecting the freedom of individuals to dispose of what they rightly own; but the system itself is based on the wrongful appropriation of means of production, and with it the power to coerce others to labor without compensation. On this view, socialism would cure capitalism not so much by replacing antagonism of interests with harmony but by replacing private ownership of means of production by a few with social ownership by everyone.

To understand the moral implications for criminal justice of this charge, imagine for a moment that we see someone take a sheep from a field owned by another. In response, suppose that we make the normal judgment that a theft, an unjust expropriation, has occurred. Now suppose further that we learn that the field owner had himself stolen the sheep from the sheep taker some time before. According to these new facts, we shall change our views about the moral status of the sheep taking. Now we are likely to say that the one we saw take the sheep was not, morally speaking, a criminal but the opposite, a victim responding justifiably to an earlier crime. Likewise, if we come to see ownership of means of production as itself a violation of justice (because it is unjustly maldistributive or unjustifiably coercive), we will see the things that people do in response to it as more just than they appeared when we didn't question the justice of ownership of means of production. Recall the discussion in Chapter 4 of how a judgment that an individual is guilty of a crime presupposes that the social context in which his act occurred was just. By the same logic, judgment that the social context is unjust weakens the judgment that the individual is guilty.

On the slavery-maldistribution view, then, the individuals normally labeled "criminal" are seen as the victims of a prior "crime" to which they are responding.

That criminals may not (and usually do not) see themselves as doing this only reflects the fact that they are taken in by capitalist ideology no less than law-abiding folks are. The "criminal" then is not a doer of injustice but the reverse. He is a victim of injustice trying to improve his situation by means that have been made necessary by the fact that capitalism leaves him few alternatives. The upshot of this charge is that criminals are not really morally guilty. They are in large measure unjustly punished for reacting against crimes perpetrated by the very system that punishes them.

In sum, the Marxist critique of criminal justice does lead to a moral condemnation of criminal justice under capitalism. This moral condemnation comes in two forms, both of which share the claim that capitalist criminal justice wrongly punishes people who do not deserve to be punished. In the first form, the alienation charge, criminals are thought not to deserve punishment because their acts are caused by socially conditioned antagonism to their fellows in conjunction with limited and unstable opportunities to satisfy their needs and desires. In the second form, the slavery-maldistribution charge, criminals are thought not to deserve punishment because their apparent crimes are reactions against conditions that are themselves, morally speaking, criminal. Needless to say, it is possible for the same person to endorse both forms of condemnation.

Several things that apply to both charges are worth noting. First of all, in both cases, the features of capitalist criminal justice that come in for ethical condemnation reflect the failure to see the way criminal justice reflects the mode of production—mentioned at the outset. In the case of the alienation charge, the failure is that of not seeing that capitalist criminal justice emerges to regulate the antagonistic relations between human beings that capitalism produces. Seeing capitalist criminal justice as the product of independent reason, it sees those antagonistic relations as a natural feature of human life that always must be so regulated. Then, capitalist criminal justice, rather than protecting the interests of capitalists, appears merely to be the necessary condition of any peaceful social coexistence.

In the case of the slavery-maldistribution charge, the failure is of not seeing how property in capitalism is an expression of a particular and morally questionable constellation of social forces. Seeing capitalist criminal justice as the product of independent reason, it sees the property criminal justice protects as a natural feature of human life that is always in need of such protection. Then, capitalist criminal justice, rather than protecting the interests of capitalists, appears merely to be protecting everyone's interest.

What's more, it follows that the continued and heavily publicized activities of criminal justice serve to reinforce ideological blindness, on the first view, blindness to capitalism's role in causing the alienated and antisocial attitudes and conditions that lead to crime and, on the second view, blindness to the moral dubiousness of capitalist property relations.

It also must be borne in mind that the ethical implications of both charges are general propositions that will fit actual criminal cases in varying degrees. For example, while the alienation charge suggests that criminals are not culpable because they are shaped by an antagonistic society, in actual cases the degree to which individual lawbreakers have been so shaped will vary. There may be some who have largely escaped the deleterious influences and yet, out of selfishness or greed, commit crimes. Marxism naturally claims that the number of criminals of this sort is small compared with the number of criminals all told. Marxism, however, need not deny that there are some criminals like this and thus that they deserve punishment. Likewise, on the slavery-maldistribution charge, whereas criminals are generally taken to be victims of the prior injustice of private ownership of means of production, actual criminals differ in the degree to which they are so victimized and in the degree to which their actual crimes can be thought of as reactions thereto. Relatively privileged persons, or others whose crimes bear little relation to their class position (some rapists, for example), may well be more culpable than the general run of criminals. It seems to me appropriate for Marxists to view responsibility—and thus guilt—as existing in varying degrees, relative to the actual impact of the social structure on a given individual's criminal act.

Finally, note that on neither of the two views we have discussed does the criminal emerge as any kind of "proto-revolutionary," as is sometimes asserted of Marxism. On the alienation charge, the criminal is at best relieved of responsibility because he has been shaped by the social system to have antisocial attitudes and fated by that system to experience need and insecurity that, together with those attitudes, lead to crime. On the slavery-maldistribution charge, the criminal is at best a victim because he is the object of the unjust coercion or expropriation characteristic of private ownership of means of production. His crime, rather than being a kind of rebellion against what victimizes him, is most often a narrowly self-interested striking out against whatever he can get his hands on. On both charges, Marxism does imply reduced or no blame for (most) criminals; but it does not imply any celebration of their acts. This is particularly so in light of the fact that most victims of crime are other exploited people, members or would-be members of the working class. Crime and criminality must on the whole be placed by Marxism among the costs of capitalism, lined up alongside poverty, unemployment, pollution, and the rest.

## Notes

1. This essay is a revised and shortened version of an article that appeared in *Criminal Justice Ethics* 6, no. 1 (Winter/Spring 1987). Peter Darvas assisted me with the research for that article.

2. Frederick Engels, "Letter to Conrad Schmidt (October 27, 1890)," in Karl Marx, *Selected Works*, ed. V. Adoratsky (Moscow: Cooperative Publishing Society of Foreign Workers in the USSR, 1935), vol. 1, p. 386.
3. Karl Marx, *Capital* (New York: International Publisher, 1967), vol. 3, p. 819.
4. Note that Marx does not hold that the value of a commodity is equivalent to the actual amount of labor-time that goes into producing it. On that view, commodities would increase in value the more inefficiently they were produced. Instead, recognizing that a commodity will command a price no higher than that for which commodities like it are selling, Marx takes the commodity's value to be determined by the average or socially necessary labor-time it takes to produce commodities of its kind. See *Capital*, vol. 1, p. 189. Furthermore, although Marx claims that value is equivalent to average labor-time, he assumes that values and market prices coincide only for the purposes of the argument of volume 1 of *Capital* about the fundamental nature of capitalism. In the subsequent volumes, Marx shows at length the mechanisms in capitalism that lead prices to diverge from values. Even after these common misinterpretations of the theory are eliminated, it must be admitted that Marx's labor theory of value has come in for so much criticism in recent years that many, even many Marxists, have given it up for dead.
5. See, for example, G. William Domhoff, *Who Rules America?* (Englewood Cliffs, N.J.: Prentice-Hall, 1967); M. Green, J. Fallows, and D. Zwick, *Who Runs Congress?* (The Ralph Nader Congress Project) (New York: Grossman, 1972); Edward S. Greenberg, *Serving the Few: Corporate Capitalism and the Bias of Government Policy* (New York: Wiley, 1974); and Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969).
6. Karl Marx, "Preface to A Contribution to a Critique of Political Economy," in *The Marx-Engels Reader*, 2nd ed., ed. Robert Tucker (New York: Norton, 1978), p. 5.
7. Karl Marx and Friedrich Engels, *The German Ideology*, parts 1 and 3 (New York: International Publishers, 1947), p. 14.
8. Marx, "Preface to A Contribution to a Critique of Political Economy," p. 4.
9. *Ibid.*
10. "It is not the subject who deceives himself, but reality which deceives him," Maurice Codelier, "Structure and Contradiction in Capital," in *Ideology in Social Science*, ed. Robin Blackburn (Glasgow: Fontana/Collins, 1977), p. 337.
11. Examples of theories of ideology that trace its distortions to subjective illusions are the attempt by some members of the Frankfurt School to explain the affection of German laborers for fascism by means of a Freudian account of the persistence of irrational authoritarian attitudes and the attempt of some sociologists to trace ideology to an existential need to reify a mythic worldview as protection against the terrors of meaninglessness. For the former, see Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute for Social Research, 1923-1950* (Boston: Little, Brown, 1973). For the latter, see Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (New York: Doubleday, 1966).
12. Karl Marx, *The Poverty of Philosophy* (Moscow: Progress Publishers, 1955), p. 75.
13. Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, trans. B. Einhorn, ed. C. Arthur (London: Ink Links, 1978).
14. "The labor contract is to be freely entered into by both parties. But it is considered to have been freely entered into as soon as the law makes both parties equal on

- paper. The power conferred on the one party by the difference of class position, the pressure thereby brought to bear on the other party—the real economic position of both—that is not the law's business." Frederick Engels, *The Origin of the Family, Private Property, and the State* (New York: International Publishers, 1942), p. 64.
15. Pashukanis, *Law and Marxism*, pp. 112-13, inter alia.
  16. Pashukanis approvingly attributes to Aristotle "the definition of crime as an involuntarily concluded contract" (*ibid.*, p. 169).
  17. Pashukanis observes that the exchange contract or pactum derives from pax or peace (*ibid.*, p. 167).
  18. *Ibid.*, p. 169; see also Alan Norrie, "Pashukanis and 'the Commodity Form Theory': A Reply to Warrington," *International Journal of the Sociology of Law* 10 (1982), pp. 431-34.
  19. Pashukanis, *Law and Marxism*, p. 177.
  20. See Georg Rusch and Otto Kirchheimer, *Punishment and Social Structure* (New York: Russell & Russell, 1968), for a classic Marxian-inspired historical study of the relationship between penal policy and the supply and demand for labor.
  21. This is the view of, for example, Allen Buchanan in *Marx and Justice* (Totowa, N.J.: Rowman and Littlefield, 1982).
  22. This is essentially the view argued for by, for example, Allen Wood, in "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (Spring 1972), pp. 244-82.
  23. This is the view of, for example, G. A. Cohen in "Freedom, Justice and Capitalism," *New Left Review* 126 (March/April 1981), pp. 3-16. There is, by the way, a substantial literature on the question of whether Marxism holds that capitalism is wrong because it is unjust or that justice is part of what's wrong with capitalism. See articles in M. Cohen, T. Nagel, and T. Scanlon, eds., *Marx, Justice, and History* (Princeton, N.J.: Princeton University Press, 1980); K. Nielsen and S. Patten, eds., *Marx and Morality* (*Canadian Journal of Philosophy*, supplemental vol. 7, 1981), and J. Pennock and J. Chapman, eds., *Nomos XXVI: Marxism* (New York: New York University Press, 1983); as well as Norman Geras's review of the whole discussion, "The Controversy about Marx and Justice," *New Left Review* 150 (March/April 1985), pp. 47-85. My own views are presented in "The Possibility of a Marxian Theory of Justice," in *Marx and Morality*, eds. Nielsen and Patten, pp. 307-22.

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