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CONFRONTING THE OVERCRIMINALIZATION OF AMERICA

TIMOTHY P. O'NEILL*

Serving this year as the Lee Chair of Constitutional Law has given me an opportunity to look back on my life as both a lawyer and a professor. I have been a lawyer for 40 years. I have been a professor for 33 years – one-third of a century. During this whole time I've been involved with criminal law. I have tried to look back – with the advantage of 20/20 hindsight – to try to identify the different periods of criminal law that I have lived through.

Today, I am going to suggest that during the last half-century we have experienced three different eras in criminal justice in America. The first era, the “Procedural Rights Era,” was effected by the Warren Court in the 1960s and made the criminal justice guarantees of the federal Bill of Rights applicable against the states through selective incorporation.

The second era – the “Wrongful Conviction Era” – began in the 1990s and was spawned by the development of forensic technology which made it possible to conclusively establish the guilt or innocence of many defendants. Based on DNA evidence, there have been 329 post-conviction exonerations.¹ But the movement expanded to find incorrect eyewitness identifications, false confessions, and incompetent defense lawyering as additional bases for exoneration. Currently, the National Registry of Exonerations at the University of Michigan Law School lists 1,570 total exonerations.²

Each of these two eras has been highly visible. In fact, you could literally attach human faces to each of them. The Procedural Rights Era was epitomized by Anthony Lewis's Pulitzer Prize-winning book, *Gideon's Trumpet*,³ which told the story behind the Supreme Court case that extended the right to counsel to state felony defendants.⁴ Some may picture the face of the real Clarence Gideon; others may see Henry Fonda playing Gideon in the movie. The Wrongful Conviction Era has no end of human faces attached

*Edward T. and Noble W. Lee Chair in Constitutional Law, 2014–2015, The John Marshall Law School. I wish to express my gratitude to both The John Marshall Law School and the Lee family for the opportunity I have had this past year.

1. *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment> (last visited Apr. 3, 2015).

2. *About the Registry*, THE NAT'L REGISTRY OF EXONERATIONS, U. MICH. L., <http://www.law.umich.edu/special/exoneration/pages/about.aspx> (last visited Apr. 3, 2015).

3. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

4. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

to the many wrongful conviction that have been established over the past 25 years. Think of the West Memphis Three,⁵ the Ford Heights Four,⁶ and the Central Park Five.⁷

But the third era I want to discuss has been much less visible – at least to non-minority members of the American middle and upper classes. It deals, on one level, with the enormous number of people in prisons, making the American prison system the largest in the world. On another level, it deals with individuals who are living not actually in prison, but in the shadow of prison. These are people – often minorities, often poor – caught up in cycles of low level misdemeanors, missed court dates, and bench warrants for unpaid court costs. Both phenomena – the people in prison and those in the shadow of prison – are caused by the pervasiveness of the criminal justice system in all facets of society. Professor Douglas Husak has characterized this state of affairs with the word “overcriminalization,”⁸ so I will call this third era the “Overcriminalization Era.”

Overcriminalization has roots going back to the 1970s. Perhaps the best way to describe the mind-set behind it is this: if asked to give the opposite of “good,” most of us would answer “bad.” During the last four decades, however, American society has increasingly acted on the premise that “[t]he opposite of ‘good’ is ‘crime.’” To encourage good behavior, American society has increasingly decided that the opposite behavior is not just “bad” or “unwise”; it is considered criminal or quasi-criminal and must be punished.

One of the more infamous examples was when New York City made it illegal for restaurants and delicatessens to sell sugared soft drinks in a serving larger than 16 ounces.⁹ A business violating this could be fined up to \$200. The law was struck down last year by the Appellate Division of the New York Supreme Court.¹⁰ Jonathan Simon has described the mind-set that fosters such a law as “governing through crime.”¹¹ The late William Stuntz characterizes

5. Campbell Robertson, *Deal Frees ‘West Memphis Three’ in Arkansas*, N.Y. TIMES (Aug. 19, 2011), <http://www.nytimes.com/2011/08/20/us/20arkansas.html>.

6. Steve Mills, *Ford Heights Four’ Exonerated, But Not Free from Past*, CHI. TRIB. (Apr. 11, 2014), http://articles.chicagotribune.com/2014-04-11/news/ct-ford-heights-four-met-20140411_1_two-decades-ford-heights-four-northwest-indiana.

7. Ray Sanchez, *Judge Approves \$41M Settlement in Central Park Jogger Case*, CNN.COM (Sept. 7, 2014), <http://www.cnn.com/2014/09/05/justice/new-york-central-park-five/>.

8. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (1st ed. 2008).

9. Michael Howard Saul, *NYC Board of Health Passes ‘Soda Ban,’* WALL ST. J.: METROPOLIS (Sept. 13, 2012), <http://blogs.wsj.com/metropolis/2012/09/13/nyc-board-of-health-passes-soda-ban/>.

10. N.Y. Statewide Coal. Hispanic Chambers of Commerce v. N.Y.C. Dep’t. Health & Mental Hygiene, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013).

11. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON

it as “the rule of too much law.”¹² And, again, Douglas Husak simply calls it “overcriminalization.”¹³

Today, I want to focus on the effect this overcriminalization has had in America over the last few decades. I want to begin with a broad review of how we came to believe that the opposite of *good* is *crime*. In the course of this review, I want to draw on the work of both Stuntz and Simon, who have each offered insights on this issue. I then want to look at the impact overcriminalization has had on individual lives through sociologist Alice Goffman’s analysis of a minority neighborhood in Philadelphia in her recent book, *On the Run: Fugitive Life in an American City*.¹⁴ I will close by suggesting some possible reforms.

First, consider what I called the Procedural Rights Era in American criminal justice. In the 1960s, the Warren Court selectively incorporated the criminal procedural protections of the Bill of Rights, thus making them enforceable against the states. The Bill of Rights has fourteen rights related to criminal procedure, and the Warren Court incorporated thirteen of them one right (and one case) at a time.¹⁵ By the end of the 1960s, criminal defendants in state cases had the right to speedy and public trials by jury, the right to confront witnesses and the right to produce witnesses on their behalf, the right to counsel, rights against self-incrimination and double jeopardy, the right to reasonable searches and seizures by the government, and the right against cruel and unusual punishment.

Defense attorneys saw each of these as tools to fight prosecutions. But the rights that were most valuable were those that allowed them to suppress incriminating evidence. The Warren

CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

12. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011).

13. HUSAK, *supra* note 8.

14. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

15. *See* *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Ker v. California*, 374 U.S. 23 (1963) (exclusion of unlawfully seized evidence); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Gideon*, 372 U.S. 335 (representation by counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process to obtain witnesses, public trial, and notice of charge); and *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy). *McDonald v. Chicago*, 561 U.S. 742 (2010), selectively incorporated previously stated procedural rights to round out the number to thirteen. However, the Supreme Court has never incorporated the Fifth Amendment’s Grand Jury/Indictment Clause. *See* *Hurtado v. California*, 110 U.S. 516, 521 (1884) (holding that “due process of law in the [Fourteenth] amendment [does] not mean and [has] not the effect to limit the powers of state governments to prosecutions for crime by indictment”).

Court created two major ways to do this. First, in 1961 in *Mapp v. Ohio*, the Court held that unconstitutionally seized evidence could not be used by the prosecution at a criminal trial.¹⁶ This became known as the “exclusionary rule of the Fourth Amendment,” and while it had been the rule in federal courts since 1914,¹⁷ *Mapp* now applied it to the states as well. Secondly, in 1966, the Warren Court’s *Miranda* decision¹⁸ provided defense attorneys with a variety of new tools to keep confessions out of trial. With these two decisions, the Warren Court gave defense lawyers in state criminal cases a couple of very powerful constitutional weapons.

Motion practice is fast, efficient, and cheap. But, while success on suppression motions can result in either dismissal or reduction of charges, the use of time is a zero-sum game. When overburdened criminal defense attorneys began spending more time on motion practice, it took time away from other vital jobs. A 1980s study of court-appointed lawyers showed that they visited the crime scene in only 12% of homicide cases and only 4% of other felonies.¹⁹ There is evidence that although the Procedural Rights Era resulted in an increase in motions practice, it also may have contributed to an unfortunate decrease in the time devoted to basic factual investigation.

Perhaps the decrease in factual investigation was partly the result of the idea that a person charged with a crime was probably guilty. And non-lawyers were not alone in this view. In his book, *The Best Defense*, published in 1982, Harvard Law professor and criminal defense lawyer Alan Dershowitz baldly stated, “Almost all criminal defendants . . . are factually guilty of the crimes they have been charged with. The criminal lawyer’s job, for the most part, is to represent the guilty.”²⁰

The fact that Dershowitz said this in 1982 is significant. Only seven years later, the second era – the Wrongful Conviction Era – began with the first exonerations produced by DNA evidence. As of today, the Innocence Project counts 329 post-conviction DNA exonerations throughout the United States.²¹ The stories are profoundly disturbing. Twenty of these exonerees had actually been sentenced to death before DNA proved their innocence and resulted in their release. The average sentence served by a DNA exoneree was 13.6 years. About 70% of the 329 are people of color. And, in nearly 50% of the cases, the actual perpetrator was subsequently found through DNA.²²

Although the last fifty years have been filled with news and

16. *Mapp*, 367 U.S. 643 (1961).

17. *Weeks v. U.S.*, 232 U.S. 383 (1914).

18. *Miranda v. Arizona*, 384 U.S. 436 (1966).

19. STUNTZ, *supra* note 12, at 228.

20. ALAN DERSHOWITZ, *THE BEST DEFENSE* 117–18 (1982).

21. *The Cases: DNA Exoneree Profiles*, *supra* note 1.

22. *Id.*

stories about the Procedural Rights Era and the Wrongful Conviction Era, during those same fifty years too few of us realized that we were actually living through a third era: the Overcriminalization Era. To understand how the Overcriminalization Era evolved, we need to go back to the 1960s.

When the Warren Court began extending rights to state criminal defendants, America had recently seen a decline in crime during the post-World War II Eisenhower years. But, ironically, as the Warren Court was deciding their landmark criminal cases such as *Gideon*²³ and *Miranda*,²⁴ crime in the country was on the rise. The FBI Crime Index shows that, between 1960 and 1975, the total number of violent crimes tripled.²⁵ The number of murders doubled. The number of rapes tripled.²⁶ The number of robberies quadrupled.²⁷ And, the number of murders in New York City actually quintupled, increasing around 500%.²⁸ A drop in serious crime would not occur until the 1990s.²⁹

One example of the federal government's reaction was the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA).³⁰ Jonathan Simon cites this law as the birth of the government's obsession with the "war on crime," which continues to this day.³¹ This is the reason Simon titled his book about the last five decades in America, *Governing Through Crime*.³² In passing this law in 1968, Congress was reacting to the entire decade of the 1960s: the alleged excesses of the Warren Court; the assassinations of President Kennedy and Martin Luther King; urban riots in Watts, Newark, and Detroit; and rising crime rates, in general. If lower economic classes could get a "war on poverty," then the Democratic-controlled Congress wanted to give the middle-class a "war on crime."

And I should add one chilling fact: Congress passed the law on June 6, 1968. Several hours later that same day, Robert Kennedy was assassinated in Los Angeles.

Substantively, OCCSSA aided federal prosecutors by making wiretaps easier. It also reacted to the Supreme Court's recent *Miranda* decision by providing that the *Miranda* rules did not have to be followed in federal criminal prosecutions. (The Supreme Court

23. *Gideon*, 372 U.S. 335.

24. *Miranda*, 384 U.S. 436.

25. *Estimated Crime in United States – Total: 1960–1975*, UNIFORM CRIME REPORTING STATISTICS, <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (table created and last visited Apr. 3, 2015).

26. *Id.*

27. *Id.*

28. STUNTZ, *supra* note 12, at 133.

29. STUNTZ, *supra* note 12, at 244.

30. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 (1968).

31. SIMON, *supra* note 11, at 89–90.

32. *Id.*

would subsequently hold this provision to be unconstitutional.³³) But the most important aspect was the influx of federal money into state law enforcement, corrections, and the courts. It provided for over \$400 million dollars in block grants to be distributed to state and local agencies, which would then have to follow federal guidelines in spending the money.³⁴ It established a new agency to oversee this program called the Law Enforcement Assistance Agency (LEAA).³⁵ Most importantly, it turned law enforcement – which had traditionally been a local government issue – into a federal issue.³⁶

At the same time, on both the state and federal levels, government “got tough on crime” through three different routes: first, by creating more crimes; second by having the police and prosecutors make greater use of “proxy crimes”; and third, by providing for longer sentences for all crimes. No legislator ever wants to be known as being “S.O.C.,” or “soft on crime,”³⁷ which is particularly dangerous in the age of so-called “headline crime laws,” such as “Megan’s Law,”³⁸ the “Adam Walsh Law,”³⁹ “Amber’s Law.”⁴⁰ And the list goes on. There is a strong tendency for legislators never to meet a new crime law they will not support, and so the Criminal Code keeps growing.

This brings us to the second issue of why crimes dealing with possession of drugs and weapons became so popular with police and prosecutors. First, in the 1960s, the Warren Court made the Confrontation Clause of the Sixth Amendment fully applicable to state prosecutions.⁴¹ Thus, criminal trials are heavily dependent on the testimony of live witnesses. The late Bill Stuntz noted that violent street gangs do an effective job of intimidating witnesses and discouraging them from testifying, thus reducing the possibility of a trial. The “no snitch” culture in so many urban neighborhoods

33. *Dickerson v. U.S.*, 530 U.S. 428 (2000).

34. SIMON, *supra* note 11, at 90.

35. SIMON, *supra* note 11, at 93.

36. SIMON, *supra* note 11 at 90–94.

37. I am indebted to Careen Gordon, a former student of mine and a four-term member of the Illinois House, for providing me with this insight.

38. See *Megan’s Law*, SMART: OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, OFFICE OF JUSTICE PROGRAMS, <http://ojp.gov/smart/legislation.htm> (last visited Apr. 3, 2015) (describing the history of the laws being passed through the states and D.C. during the 1990s and the federal law enacted in 1996).

39. Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. §§ 4247–4248 (2006); see *2006 – Adam Walsh Child Protection and Safety Act*, SMART: OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, OFFICE OF JUSTICE PROGRAMS, <http://ojp.gov/smart/legislation.htm> (last visited Apr. 3, 2015) (describing the law and its expansive effect on the sex offender registry).

40. Amber’s Law, 42 U.S.C. §5791 (2003); AMBER ALERT, OFFICE OF JUSTICE PROGRAMS, <http://www.amberalert.gov/> (last visited Apr. 3, 2015).

41. *Pointer*, 380 U.S. 400.

makes it difficult for prosecutors to prosecute some of the most violent crimes.⁴²

So police and prosecutors started using “proxy crimes.” A proxy crime is a substitute crime; prosecution of a proxy crime is a stand-in for prosecuting a different crime that cannot be proven. If an eyewitness will not come forward for a crime of violence, then the solution is to find a proxy crime that does not require a citizen-eyewitness. And this is why drug and weapon possession cases take up so much of today’s criminal docket. These offenses require only one witness: the arresting police officer. Much like the use of income tax evasion against Al Capone, drug and weapons possession have been used as proxy crimes for the violent felonies such as murders and assaults for which prosecutors cannot produce witnesses willing to testify.⁴³

Along with more crimes and a greater use of proxy crimes came a third trend: starting in the 1970s, both Congress and state legislatures sharply increased the severity of sentences. During the 1960s, a large number of jurisdictions (including Illinois)⁴⁴ made use of a system called “indeterminate sentencing.” This was based on the idea that, because the purpose of incarceration was rehabilitation, an inmate should be released once he had reformed. Instead of a fixed sentence of, say, “ten years,” a defendant would be sentenced to a term such as “one to twenty years.” The philosophy behind indeterminate sentencing was that the prisoner himself held the key to the jail cell.⁴⁵

The “war on crime” quickly ended indeterminate sentencing. Not only did legislatures in the 1970s make sentences determinate, they also removed discretion from sentencing judges by imposing “mandatory minimum sentences.” For example, under the so-called “Rockefeller Drug Laws” passed in New York in 1973, possession of four ounces of heroin, cocaine, or marijuana mandated a mandatory minimum sentence of fifteen years imprisonment.⁴⁶ Congress reacted similarly, but also emphasized consecutive sentences along with mandatory minimums. For example, if you are convicted for conspiracy to distribute five kilograms or more of cocaine, that merits a mandatory minimum of ten years. If one weapon is involved, five years is added to make it fifteen years total; however, if a second weapon is involved, that second weapon tacks on another

42. STUNTZ, *supra* note 12, at 269–70.

43. *Id.* The “no snitch” culture in Chicago was the subject of a series of articles that appeared in the *Chicago Sun-Times* in 2010 that was awarded the 2011 Pulitzer Prize for local reporting. Mark Konkol & Frank Main, *No Snitch’ Code Keeps Shooters on Streets as Police Fight Uphill Battle for Public Trust*, CHI. SUN-TIMES (Jul. 27, 2010), <http://www.pulitzer.org/archives/9167>.

44. Sentence and Parole Act, ILL. REV. STAT. 1941, Ch. 38, par. 802.

45. SIMON, *supra* note 11, at 127, 159–60.

46. Jed S. Rakoff, *Why Innocent People Plead Guilty*, NEW YORK REVIEW OF BOOKS (Nov. 20, 2014), available at <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>.

twenty-five for a total sentence of forty years. And, again, this is a *mandatory* sentence that the trial judge cannot reduce.⁴⁷

These changes provided prosecutors with a large increase in power. Defendants soon realized that the prosecutor – with the discretion to decide how many of these mandatory minimum charges to levy – controlled the sentencing, not the trial judge. A prosecutor could offer a plea bargain where she would allow the defendant to plead guilty to lesser charges that do not demand mandatory minimums; but if the defendant did not take the plea he would face the charges *with* the mandatory minimums. The prosecutor became much more than just a prosecutor; he was prosecutor, judge, and jury rolled into one. For many crimes, the charge – not the judge – completely determined the sentence.

Indeed, prosecutorial overcharging can certainly influence a defendant to “split the difference” and plead.⁴⁸ For example, John Pfaff at Fordham did a study showing that, between 1994 and 2008, the probability that a state prosecutor would file a felony charge against an arrestee in America doubled from about a one-in-three chance to two-in-three.⁴⁹ During this period, the number of felony cases sharply increased, even though crime itself was decreasing.

Additionally, there are other pressures on a defendant to waive trial and plead guilty. A defendant who refuses a plea bargain, but cannot make bail, may very well wait months, if not years, in custody awaiting trial.⁵⁰ For federal drug defendants, statistics show that those who are convicted and sentenced after a trial, on average, receive sentences that are 300% higher than those who plead. Consequently, defendants learned that they had to pay a “sentencing tax” for demanding trial, especially a jury trial. These are among the reasons Judge Jed S. Rakoff titled a recent article, *Why Innocent People Plead Guilty*.⁵¹

The effect is this: in 1980, 19% of federal criminal defendants actually went to trial. By 2000, the number had slipped to 6%. It is now less than 3%. In other words, today 97% of federal criminal defendants plead guilty.⁵² And it is no different on the state level, where around 95% of criminal defendants plead guilty.⁵³ Stuntz compares this to the fact that before the Warren Court years, the

47. *Id.*

48. Leon Neyfakh, *Why Are So Many Americans in Prison?*, SLATE (Feb. 6, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.html.

49. JOHN PFAFF, THE CAUSES OF GROWTH IN PRISON ADMISSIONS AND POPULATIONS at 3 (Jan. 23, 2012) (unpublished study), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508.

50. For the true story of a murder defendant who had to wait six years in jail before being acquitted, see LAURA CALDWELL, *LONG WAY HOME* (2010).

51. Rakoff, *supra* note 46.

52. *Id.*

53. STUNTZ, *supra* note 12, at 32.

felony plea rate in America was closer to 67%.⁵⁴ So, the good news is that the Warren Court provided state defendants with an arsenal of new trial rights. But, the bad news is that hardly anyone goes to trial anymore.

All this has led to yet another effect: the United States now has the largest prison system in the world. Between 1972 and 2000, the nation's imprisonment rate increased by 500%. Stuntz expressed it this way: "In the span of a little more than three decades, Americans first embraced punishment levels lower than Sweden's, then built a justice system more punitive than Russia's."⁵⁵ In Illinois alone, the yearly prison budget is \$1.3 billion.⁵⁶

A few statistics will illustrate this. According to the Bureau of Justice Statistics, at the end of 2013 the United States had 6,899,000 persons under the supervision of adult correctional systems.⁵⁷ We currently have 2.2 million adults actually imprisoned in America. This means almost 1 out of every 110 American adults is either in prison or jail.⁵⁸ This is the largest number of prisoners in any country in the world. The United States has only 5% of the world's population, but it has 25% of the world's prisoners. The 6.9 million includes roughly 4.7 million adults currently on probation, parole or supervision.⁵⁹ This means that about 3% of American adults are either in prison, or are on probation, parole, or supervision.⁶⁰ Therefore, when looking at the problem of mass imprisonment,⁶¹ it's not just about the people who are literally behind bars; it also concerns the millions of people who are *figuratively* imprisoned by the American justice system and the toll this takes on families, neighborhoods, and communities.

The best description of this situation is found in Alice Goffman's remarkable new book, *On the Run: Fugitive Life in an American City*.⁶² She is currently an assistant professor of sociology at the University of Wisconsin. But before that, she spent six years living in a poor, largely African-American neighborhood in Philadelphia. You are probably aware of the racial aspect of

54. *Id.*

55. *Id.* at 34.

56. Andrew Maloney, *Long-serving Prisoners Look for a Way Out*, CHI. DAILY L. BULL., Feb. 2, 2015, at 1, available at <http://www.chicagolawbulletin.com/Archives/2015/02/02/C-Number-Prisoners-02-02-15.aspx>.

57. Lauren E. Glaze & Danielle Kaeble, *Correctional Populations in the United States, 2013*, BUREAU OF JUSTICE STANDARDS (Dec. 19, 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5177>. This includes persons incarcerated, on probation, and on parole. *Id.*

58. *Id.*

59. *Id.*

60. GOFFMAN, *supra* note 14, at xi.

61. The term "mass imprisonment" was popularized by sociologist David Garland. See David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1-4 (David Garland ed., 2001).

62. GOFFMAN, *supra* note 14.

American criminal justice. African-Americans make up 13% of the U.S. population, but 37% of the prison population. About 60% of African-American men who do not finish high school will go to prison by their mid-30s.⁶³ But these are just abstract statistics. Goffman puts a human face on them.

Goffman begins not by talking about those with serious felony charges, but rather from the opposite angle, by examining how stringent enforcement of “quality of life” offenses affects poor neighborhoods. These offenses are low-level misdemeanors for conduct such as loitering, vandalism, public drinking, and subway fare-jumping.⁶⁴ Strict enforcement of these types of offenses was the cornerstone of the “broken windows” theory of law enforcement introduced by James Q. Wilson and George Kelling in 1982.⁶⁵ The theory was that enforcement of smaller offenses creates an atmosphere of order and lawfulness that militates against the commission of more serious crimes.⁶⁶ The problem is that strict enforcement of minor offenses brings into the criminal justice system a large number of non-violent people who would otherwise be left alone. And even for those not arrested, a citation will involve fines and court costs that can be onerous.

For example, here is what New York City charges people for various minor offenses: for an open container of alcohol – \$25; for stopping or standing in a roadway – \$115; for disorderly conduct – \$250; for a noise disturbance – \$250.⁶⁷ Police obviously have broad discretion in determining what constitutes “disorderly conduct” or a “noise disturbance.”⁶⁸ Now consider what a \$250 fine means to someone who is making the federal minimum wage of \$7.25 an hour. It would take that person 34.5 hours of work – more than four eight-hour days – to pay it off. A fine that is merely a nuisance to a middle-class person is a serious hardship to a person earning minimum wage.

Goffman examines the very real effects that strict enforcement of “quality of life” offenses can have on a poor community. In 2010, there were 80,000 open warrants in Philadelphia. A small number were “body warrants” for new crimes, but most were “bench warrants” for missing a court date, not paying court fees, or technical violations for violations of parole or probation.⁶⁹

63. *Id.* at xi.

64. Aurin Squire, *Why Black New Yorkers Like Me Are Celebrating the NYPD Work Slowdown*, NEW REPUBLIC (Jan. 7, 2015), <http://www.newrepublic.com/article/120709/nypd-work-slowdown-being-celebrated-new-yorkers-color>.

65. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

66. STUNTZ, *supra* note 12, at 292.

67. Squire, *supra* note 64.

68. Squire, *supra* note 64.

69. GOFFMAN, *supra* note 14, at 18.

Goffman then interviewed 308 young men who lived in her neighborhood.⁷⁰ She found that 144 were subject to arrest warrants for either unpaid fines or for missing a court date.⁷¹ Another 119 were subject to warrants for technical violations of their probation or parole, for offenses such as curfew violations or open container violations.⁷² People with open warrants are known on the street as being “dirty.”⁷³

A dirty person with an open warrant is a target for arrest. Police know that a key element of their performance review is the number of arrests they make. So this begins a game of “cat and mouse.” Dirty people must go underground to escape the notice of the police, and police need to arrest “dirty people” as part of their job performance.

And, here is the “Catch-22.” A “dirty person” needs to earn money to pay off the fines and court costs. But a “dirty person” is unable to look for work because providing an ID would open himself up to arrest. Dirty people with open warrants have to avoid any place that requires an ID. This means that employment offices, government aid agencies, and even hospital emergency rooms are all off limits.⁷⁴ And the open warrant affects more than just the dirty person himself. Goffman found that police will lean on mothers, girlfriends, and relatives to find men with open warrants.⁷⁵ Goffman occasionally found police threatening arrest, eviction from public housing, or loss of child custody in order to obtain the information they needed.⁷⁶

The problem is not just in Philadelphia. In 2013, it may not surprise you to learn that the city that issued the highest number of arrest warrants relative to its size in the state of Missouri was a small town named Ferguson. Compare Ferguson’s arrest rate with Columbia’s, home to the University of Missouri. Columbia issued fewer than 50 arrest warrants per 1,000 residents.⁷⁷ Ferguson, however, led the state with about 1,500 arrest warrants for each 1,000 residents.⁷⁸ That means Ferguson’s rate was thirty times that of Columbia’s. Records show that 20% of Ferguson’s \$12 million

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 6.

74. *Id.* at 39–47.

75. *Id.* at 62–63.

76. *Id.* at 62–72.

77. Hannah Battah, *Report Shows Arrest Rate Disparities in Missouri*, 8-KOMU NEWS (Feb. 16, 2015), <http://www.komu.com/news/target-8-report-shows-arrest-rate-disparities-in-missouri/> (citing report created by Professor David Herzog and graduate students at the University of Missouri-School of Journalism).

78. Frances Robles, *Ferguson Sets Broad Change for City Courts*, N.Y. TIMES, Sept. 9, 2014.

budget is paid through fines.⁷⁹

Civil rights lawyers recently filed federal lawsuits against Ferguson and another predominantly African-American Missouri town named Jennings.⁸⁰ The suit alleges that these towns are essentially running the equivalent of “debtors’ prisons” by jailing hundreds of mostly poor, black residents for unpaid debts, many of them arising from traffic tickets.⁸¹ At this time, Ferguson has three arrest warrants outstanding for each household in the city.⁸² In fact, the number of outstanding arrest warrants in St. Louis County is 900% higher than the number of outstanding arrest warrants in the entire city of Chicago.⁸³

This endless cycle of hiding to avoid arrest for unpaid fines and court costs – that inevitably leads to even more fines and court costs – may also have another disturbing consequence. In their new book, *Suspicious Minds: How Culture Shapes Madness*, Joel and Ian Gold examine the causes of psychosis.⁸⁴ They cite a study of 12,000 people conducted over 16 years finding that African-Americans had twice the incidence of schizophrenia as whites.⁸⁵ Moreover, there is evidence that racial discrimination may indeed increase the risk of psychosis.⁸⁶

The Golds cite a study by Jean-Paul Selten and Elizabeth Cantor-Graae that suggests what might be common to the social determinants of psychosis is a concept called “social defeat.”⁸⁷ Social defeat is described as “an actual social encounter in which one person physically or symbolically loses to another.”⁸⁸ This theory suggests that the risk of developing psychosis will be raised in people who repeatedly feel demeaned or subordinated. For that reason alone, attention needs to be paid to the fact that, of the 7.3 million New Yorkers penalized for quality of life violations between 2001 and 2013, 80% were either black or Latino.⁸⁹ These facts may suggest why prisons and jails are increasingly considered by law enforcement to be more like mental health facilities than penal

79. *Id.*

80. Complaint, *Fant v. City of Ferguson*, No. 4:2015 CV 00253 (E.D. Mo. Feb. 8, 2015), available at <http://www.nytimes.com/interactive/2015/02/08/us/ferguson-complaint.html>.

81. Monica Davey, *Ferguson One of 2 Missouri Suburbs Sued over Gantlet of Traffic Fines and Jail*, N.Y. TIMES, (Feb. 8, 2015), <http://www.nytimes.com/2015/02/09/us/ferguson-one-of-2-missouri-suburbs-sued-over-gantlet-of-traffic-fines-and-jail.html>.

82. Robles, *supra* note 78.

83. Davey, *supra* note 81.

84. JOEL GOLD & IAN GOLD, *SUSPICIOUS MINDS: HOW CULTURE SHAPES MADNESS* (2014).

85. *Id.* at 136.

86. *Id.* at 135–36.

87. *Id.* at 204.

88. *Id.* at 136.

89. Squire, *supra* note 64.

institutions.⁹⁰

Recently, the Vera Institute issued a report titled, *Incarceration's Front Door: The Misuse of Jails in America*.⁹¹ The report notes that in the last thirty years the number of Americans in local jails has almost doubled to close to 12 million.⁹² Consistent with Goffman's research, Vera found that many are incarcerated simply because poverty prevents them from paying bail and fines.⁹³ And, significantly, 68% of jail inmates have a history of abusing drugs, alcohol, or both.⁹⁴

The bottom line is that we have an enormous number of Americans – disproportionately people of color or the poor – either imprisoned or caught up in some other way in the criminal system. And more people are asking whether these high levels can be justified.

Let's be clear. Along with the 500% increase in the rate of imprisonment since 1970, there has also been a substantial drop in crime. Since 1990, America has seen a roughly one-third decrease in violent crime.⁹⁵ This raises the question, "Is what we are doing worth it?" This can be broken into two separate inquiries. First, is the increase in the intensity of quality-of-life policing on the streets of poor urban neighborhoods worth it? And secondly, is the huge increase in the number of people in prison or in the penal system worth it?

As to "quality of life" policing, begin by looking at a recent study by Franklin Zimring, the renowned criminologist from University of California, Berkeley. A few years ago, Zimring became intrigued by the large crime drop in New York City and decided to write a book about it: *The City That Became Safe: New York's Lessons for Urban Crime and Its Control*.⁹⁶ As mentioned, crime has generally decreased in America since 1990, but the decrease in New York City has been particularly sharp. The average drop in New York has been twice that of other American cities.⁹⁷ Since 1990, New York City's rates of homicide, burglary, and robbery have declined 80%.⁹⁸

90. See, e.g., Steve Schmadeke, *Cook County Jail's Inmate Population Rising*, CHI. TRIB. (Sept. 13, 2014), http://articles.chicagotribune.com/2013-09-13/news/ct-met-cook-jail-overcrowding-20130913_1_cook-county-jail-jail-population-cermak-health-services.

91. VERA INSTITUTE, *INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA* (Feb. 2015), available at <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

92. *Id.* at 7.

93. *Id.* at 2.

94. *Id.* at 11.

95. See Erik Eckholm, *In a Safer Age, U.S. Rethinks Its 'Tough on Crime' System*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/14/us-with-crime-down-us-faces-legacy-of-a-violent-age-.html?_r=0

96. FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012).

97. *Id.* at x.

98. *Id.*

Auto theft has dropped 94%.⁹⁹ In fact, the murder rate is lower now than it was in New York in 1961.¹⁰⁰ Zimring calls this “the largest crime drop ever documented during periods of social and governmental continuity.”¹⁰¹ The question Zimring asked was “Why?”

He looked at variables such as population, economic indicators, ethnic balance, and unemployment.¹⁰² None of these factors had any appreciable impact. So what did? He concluded that “[t]he circumstantial evidence that some combination of policing variables accounts for much of the New York difference is overwhelming.”¹⁰³ Some of it was the simple increase in the number of police beginning in 1990. But Zimring also gave some credit to proactive tactics such as aggressive street intervention and concentration on “hot spots” where crimes have repeatedly been committed.¹⁰⁴ The police used drug arrests not as ends in themselves, but rather as a means to take weapons off the street and to prevent drug-related violence.¹⁰⁵ The same could be said for the millions of “quality of life” arrests and citations.

There is, however, a very dark side to all this. Between 1990 and 2009, the number of stops performed on a yearly basis by the NYPD increased fourteen-fold.¹⁰⁶ In 2011 alone, the NYPD performed almost 700,000 stops, a 14% increase over 2010.¹⁰⁷ Tellingly, over the last decade only 1 stop out of 650 resulted in an arrest for a firearms violation.¹⁰⁸ This resulted in a lawsuit being filed against the City of New York. Fourteen years of litigation ended with a finding from a federal court that the NYPD engaged in racial discrimination in their stop-and-frisk policies.¹⁰⁹ In 2014, the City of New York dropped its appeal and agreed that a court-appointed monitor should supervise the NYPD’s implementation of new stop-and-frisk policies.¹¹⁰

Will crime go up? According to Zimring’s findings, it is a

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 101.

103. *Id.*

104. *Id.* at 142.

105. *See id.* at 122, 142 (discussing NYPD’s tactical approach insofar as these arrests were not fundamentally “drug control,” but rather crime control).

106. *Id.* at 128.

107. NYCLU, STOP-AND-FRISK 2011: NYCLU BRIEFING 2 (May 9, 2012), available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

108. *Id.*

109. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

110. Press Release, Ctr. for Const. Rts., N.Y.C. & Ctr. for Const. Rts. Announce Agreement in Landmark Stop and Frisk Case, (Jan. 30, 2014), <http://www.ccrjustice.org/newsroom/press-releases/city-of-new-york-and-center-constitutional-rights-announce-agreement-landmark-stop-and-frisk-case>.

possibility. Of course, this is irrelevant if the police activity involved is racially discriminatory and actually violates the Constitution. But even if the aggressive, pro-active, “broken windows” policy could be carried out in a constitutional manner, we have to ask whether in the long run it is worth it, even if it may actually contribute to some decrease in crime.

Minority citizens in New York have felt pressured by the police, but, at the same time, police officers themselves have been under pressure to produce stops, arrests, and citations. It is important to look at this issue from the beat officer’s perspective. Steve Osborne, a 20-year veteran of the NYPD, recently made this observation about police work in New York:

Most cops I know feel tired of being pushed to do more and more, and then even more. More police productivity has meant far less crime, but at a certain point New York began to feel like, yes, a police state, and the police don’t like it any more than you do. Tremendous successes were achieved in battling crime and making this city a much better place to live and work in and visit. But the time has probably come for the Police Department to ease up on the low-level ‘broken windows’ stuff while re-evaluating the impact it may or may not have on real, serious crime. No one will welcome this more than the average cop on the beat, who has been pressed to find crime where so much less of it exists.¹¹¹

Again, these are not the words of an ACLU lawyer, but a 20-year veteran of the NYPD. One can’t help but wonder what kind of pressure was felt by the NYPD officer who confronted Eric Garner over selling “loosies” on Staten Island. Was confronting and arresting Garner something the officer would have done solely in an exercise of his professional judgment? Or was he, in the words of Lt. Osborne, “under pressure to produce stops, arrests, and citations”?¹¹² I, for one, would like to believe Lt. Osborne that police officers themselves may welcome a new policy to, in his words, “ease up on the low level ‘broken windows’ stuff.”¹¹³ It may turn out that for many inner-city residents “quality of life” may be improved by fewer police-citizen confrontations – even if that results in a few more (either literal or figurative) broken windows.

“Quality of life” policing is the first aspect of the overcriminalization issue. The second aspect is the rate of imprisonment. Since 1970, there has been approximately a 500% increase in the rate of imprisonment.¹¹⁴ And since 1975, there has been a 25% decrease in all violent crime, including a 53% decrease

111. Steve Osborne, *Why We’re So Mad at de Blasio: The N.Y.P.D. Protests: An Officer’s View*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/2015/01/08/opinion/the-nypd-protests-an-officers-view.html>.

112. *Id.*

113. *Id.*

114. STUNTZ, *supra* note 12, at 244.

in murder.¹¹⁵ On the surface, this makes sense. The more people you take off the streets, the less crime occurs on the streets. If everyone were imprisoned, there would be zero crime on the streets, and all crime would occur in prison.

Yet, most experts contend that the increase in imprisonment is not wholly responsible for the decrease in crime. Other factors such as an aging population and the unemployment rate also impact this. Indeed, Franklin Zimring doubts whether it is possible to fully explain the decrease, referring to such attempts as “criminological astrology.”¹¹⁶ He also notes that countries such as Canada have had similar decreases in crime rate without any of the American policy changes, including sharply higher imprisonment rates.¹¹⁷

Nevertheless, William Stuntz contends that the best work in assessing how much the crime drop has been caused by increased incarceration has been done separately by economist Steven Levitt and sociologist Bruce Western.¹¹⁸ Levitt – the co-author of the bestseller *Freakonomics* – estimated that increased imprisonment was probably responsible for about 12% of the total drop in crime.¹¹⁹ Western was less optimistic, estimating that the increased imprisonment probably accounted for between 2% and 5% of the decrease.¹²⁰

Assume for the sake of argument that increased imprisonment did have an effect on the decrease in crime. Now consider the fact that Levitt estimates that increased police hiring accounted for about 6% of the total drop in crime.¹²¹ That is only half of the 12% caused by the increase in incarceration. But here is the sticking point. According to Levitt, it cost about \$800 million to pay for the extra policing to get a 1% drop in violent crime.¹²² To get the same 1% drop in crime through an increase in imprisonment, however, it cost \$1.6 billion – twice the amount. Western’s figures are even more stunning. He estimates that to get a 1% drop in crime through increased incarceration it cost somewhere between 43.9 billion and \$9.6 billion.¹²³

The bottom line is that it costs a lot less to reduce crime with more police than with more prisoners. And the enormous amounts of taxpayer money needed to support our current level of imprisonment – estimated to be \$80 billion a year nationally – is starting to create some strange political bedfellows.

For example, the Smarter Sentencing Act was introduced in

115. *Id.*

116. ZIMRING, *supra* note 96.

117. *Id.*

118. STUNTZ, *supra* note 12, at 278.

119. STUNTZ, *supra* note 12, 278–79.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 278–79.

the Senate by Tea Party favorite Sen. Mike Lee (R-Utah) and Sen. Dick Durbin (D-IL).¹²⁴ This bill would have reduced some mandatory minimum sentences, as well as allowed those convicted under the old draconian crack cocaine laws to take advantage of the favorable sentencing changes in a 2010 law even if they were convicted before that.¹²⁵ The Record Expungement Designed to Enhance Employment (REDEEM) Act is co-sponsored by Sen. Rand Paul (R-KY) and Sen. Cory Booker (D-NJ) and is designed to keep juveniles out of the adult criminal justice system and provides incentives to states to make it easier to have their criminal records sealed.¹²⁶ Another group to weigh in on sentencing reform is the Conservative Political Action Conference. They recently presented a panel featuring Gov. Rick Perry (R-TX) and Grover Norquist, president of Americans for Tax Reform and addressed how to refocus the justice system on rehabilitation rather than retribution.¹²⁷

On the state level, Oregon, Alaska, and the District of Columbia all legalized marijuana, creating one fewer reason for police-citizen confrontations.¹²⁸ Also, California voters passed a proposition reducing six low-level felonies to misdemeanors, thus freeing up room in the state penitentiaries.¹²⁹ And Delaware, Illinois, Nebraska, and New Jersey confronted the serious problem of reintegrating the large number of former inmates back into society by approving “Ban the Box” legislation that removes questions related to criminal records from employment applications.¹³⁰

In the area of police-citizen relations, President Obama recently appointed a “Task Force on 21st Century Policing” comprised of individuals from all sides of the criminal justice system to “examine how to strengthen public trust and foster strong relationships between local law enforcement and the communities they protect, while also promoting effective crime reduction.”¹³¹

And in Illinois, Governor Bruce Rauner, through an executive order, recently created a commission with the specific mandate of reducing the number of adults and juveniles sent to Illinois

124. Smarter Sentencing Act, S. 1410, 113th Cong. (2013).

125. *Id.*

126. Record Expungement Designed to Enhance Employment Act (REDEEM Act), S. 2567, 113th Cong. (2013).

127. Lauren-Brooke Eisen, *Are More Justice Reforms on the Horizon in 2015?*, MOYERS & COMPANY (Dec. 31, 2014), <http://billmoyers.com/2014/12/31/criminal-justice-reforms-horizon-2015/>.

128. Dan Merica, *Oregon, Alaska and Washington, D.C. Legalize Marijuana*, CNN.COM (Nov. 5, 2014), <http://www.cnn.com/2014/11/04/politics/marijuana-2014/index.html>.

129. *Proposition 47 – What You Need to Know*, CAL. DEP’T OF CORR. & REHAB., http://cdcr.ca.gov/News/Proposition_47.html (last visited Apr. 3, 2015).

130. Eisen, *supra* note 127.

131. *Id.*

correctional facilities by 25% over the next ten years.¹³²

One of the most far-reaching proposals for criminal justice reform was recently made in an op-ed article published in the *Chicago Tribune* titled, *Crime and Too Much Punishment*.¹³³ The article puts forward a five-point plan to combat the joint problems of overcriminalization and mass imprisonment.¹³⁴ First, legislatures need to stop creating new criminal laws. They are unnecessary.¹³⁵ Second, we must stop prosecutorial abuses in the grand jury and discovery phases.¹³⁶ Third, we must guarantee that indigents receive truly effective appointed counsel in criminal cases.¹³⁷ Fourth, we must end unduly harsh sentencing and begin by eliminating “mandatory minimum” sentences.¹³⁸ Sentencing discretion should be returned to those who have traditionally exercised it: the trial judges. Fifth, we must restore all civil rights to ex-prisoners who have served their sentences.¹³⁹ We must do all we can to get them back into the job market so that they may begin having productive lives. (This refers to the “Ban the Box” movement that seeks to prohibit employers from asking about prior convictions on a job application form. Illinois’s version of the law went into effect in January 2015.¹⁴⁰)

The author? It might surprise you to learn it is Charles G. Koch, one of the Koch brothers.¹⁴¹

So, it is very encouraging that on these issues of overcriminalization and mass imprisonment, there may be a growing consensus from all parts of the political spectrum – and for reasons ranging from moral to philosophical to economic – that change has to occur. We are seeing a mixture of pro-defense liberals, fiscal conservatives, and Tea Party libertarians who are finding common ground. And, that is a very good thing.

Reform, however, may still be trickier than it looks – as illustrated in a recent story from the Chicago mayoral campaign.

William “Dock” Walls was an African-American running for mayor in 2015. In January, he appeared before the *Chicago Tribune* Editorial Board to explain why he deserved to be the next mayor.

132. Monique Garcia & Jessie Hellmann, *Rauner Seeks Justice System Overhaul*, CHI. TRIB., Feb. 12, 2015, § 1, at 12.

133. Charles G. Koch & Mark V. Holden, Op-Ed, *Crime and Too Much Punishment*, CHI. TRIB., Jan. 28, 2015, § 1, at 21.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Jim Burns, *Illinois Joins ‘Ban the Box’ Bandwagon by Limiting When Employers Can Ask for or Use Criminal History*, FORBES.COM (July 28, 2014), <http://www.forbes.com/sites/theemploymentbeat/2014/07/28/illinois-joins-ban-the-box-bandwagon-by-limiting-when-employers-can-ask-for-or-use-criminal-history/>.

141. Koch & Holden, *supra* note 133.

During his presentation, he made a case that overactive policing by a “trigger-happy” Chicago Police Department was destroying families in Chicago’s poor communities.¹⁴² Yet, later in the presentation, he complained that Chicago’s streets were unsafe and criticized the fact that arrests by the Chicago Police Department *decreased* by 15% last year. Eric Zorn spotted this inconsistency and wrote that if you are complaining about overactive, trigger-happy police, shouldn’t you believe that fewer arrests is a *good thing*?¹⁴³

And this is our problem. How do you achieve the proper balance between community safety, good policing, and imprisonment for the worst offenders? How much policing is too much (or too little) policing? There is obviously no one correct answer. In fact, the answer may vary from neighborhood-to-neighborhood. It is a balance that will have to be continually corrected and recalibrated. And, if you believe Frank Zimring, you may simply have to put up with more crime if you want to reduce overactive policing. There may be a zero-sum aspect to this, and that is a very difficult thing for Americans to accept. Americans do not like zero-sum games; they prefer silver bullets. And, unfortunately, the Lone Ranger has left the house.

The truth is we may not be able to define the proper balance between the level of policing and public safety. It is probably an issue that is going to require constant tinkering. But the good news is that we may finally be reaching a broad political consensus that, at this time in America, a new balancing is overdue.

142. Eric Zorn, *The Recipe to Beat Rahm Emanuel*, CHI. TRIB., Jan. 28, 2015, § 1, at 22.

143. *Id.*

