

Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform

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Luke tells us that Jesus

entered Jericho and was passing through. And there was a man named Zacchae'us; he was a chief tax collector, and rich. And he sought to see who Jesus was, but could not, on account of the crowd, because he was small of stature. So he ran on ahead and climbed up into a sycamore tree to see him, for he was to pass that way. And when Jesus came to the place, he looked up and said to him, "Zacchae'us, make haste and come down; for I must stay at your house today." So [Zacchae'us] made haste and came down, and received him joyfully. And when they saw it they all murmured, "He has gone in to be the guest of a man who is a sinner." And Zacchae'us stood and said to the Lord, "Behold, Lord, the half of my goods I give to the poor; and if I have defrauded any one of anything, I restore it fourfold." And Jesus said to him, "Today salvation has come to this house, since he also is a son of Abraham. For the Son of man came to seek and to save the lost."¹

Matthew tells us that

Peter came up and said to [Jesus], "Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?" Jesus said to him, "I do not say to you seven times, but seventy times seven. Therefore the kingdom of heaven may be compared to a king who wished to settle accounts with his servants. When he began the reckoning, one was brought to him who owed him ten thousand talents; and as he could not pay, his lord ordered him to be sold, with his wife and children and all that he had, and payment to be made. So the servant fell on his knees, imploring him, 'Lord, have patience with me, and I will pay you everything.' And out of pity for him the lord of that servant released him and forgave him the debt. But that same servant, as he went out, came upon one of his fellow servants who owed him a hundred denarii; and seizing him by the throat he said, 'Pay what you owe.' So his fellow servant fell down and besought him, 'Have patience with me, and I will pay you.' He refused and went and put him in prison till he should pay the debt. When his fellow servants saw what had taken place, they were greatly distressed, and they went and reported to their lord all that had taken place. Then his lord summoned him and said to him, 'You wicked servant! I forgave you all that debt because you besought me; and should not you have had mercy on your fellow servant, as I had mercy on you?' And in anger his lord delivered him to the jailers, till he should pay all his

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1. *Luke* 19:1-10.

debt. So also my heavenly Father will do to every one of you, if you do not forgive your brother from your heart.”²

Jesus ate with tax collectors,³ one of the worst classes of sinner the gospel writers knew because they were often corrupt and abusive and because they were Quislings, collaborators with the Roman occupiers.⁴ He consorted with adulterers and prostitutes.⁵ He embraced sinners because all are sinners, and more particularly because all have the potential to change and achieve redemption. He preached a gospel of forgiveness, not only divine forgiveness in the hereafter, but an imperative of forgiveness between human beings in the here and now.

I. INTRODUCTION

You, gentle reader, doubtless thought that this was to be a hard-headed piece about sentencing reform in America. I hope it will prove to be just that. But a part of my thesis is that the future of sentencing reform may rest on whether some of the most publicly ardent followers of the man from Nazareth can be brought to extend his message of redemption and forgiveness to those convicted of crime. But first, I want to sketch what has happened in American criminal justice during the last twenty-five years or so.

I. BACKGROUND

Beginning in the late 1970s, the United States began responding to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails. Between 1974 and 2002, the number of inmates in federal and state prisons rose from 216,000⁶ to 1,355,748,⁷ a more than five-fold increase. Between 1974 and 2001, the rate of imprisonment rose from

2. *Matthew* 18:21-35.

3. *Luke* 5:27. In addition to the story of Zacchaeus, there is the story in which Jesus enlists the tax collector Levi as one of his followers and is thereafter entertained by Levi at a dinner with “a great crowd of tax collectors and others.” *Luke* 5:29.

4. MICHAEL GRANT, *JESUS: AN HISTORIAN'S REVIEW OF THE GOSPELS* 47, 55 (1977) (noting that a “besetting sin” of tax collectors was thought to be dishonesty, and that tax collectors were obliged to mix with and serve pagan masters and thus “it was impossible for them to keep the Law”); Hyam Maccoby, *How Unclean Were Tax-Collectors?*, *BIBLICAL THEOLOGY BULLETIN* (summer 2001), at http://www.findarticles.com/p/articles/mi_m0LAL/is_2_31/ai_94332332 (emphasizing that the “quisling behavior” of tax collectors was an important factor in their categorization as sinners by the Jewish religious establishment); *HARPER'S BIBLE COMMENTARY* 1036 (James L. Mays ed., 1988) (“As a chief tax collector . . . , Zacchaeus is part of a corrupt system of economic oppression.”).

5. *Luke* 7:37 (recounting the story of the sinful woman or prostitute who washes Jesus' feet and dries them with her hair and is accounted saved by her faith).

6. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001*, 1 tbl.1 (Aug. 2003) [hereinafter BJS, Prevalence].

7. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISON AND JAIL INMATES AT MIDYEAR 2002*, 1 (Apr. 2003) [hereinafter BJS, Prison and Jail, 2002].

149 inmates to 628 inmates per 100,000 population, a more than four-fold increase.⁸ Jail populations have increased markedly. Between 1985 and 2002, the number of persons held in local jails more than doubled, from 256,615⁹ to 665,475.¹⁰ By mid-year 2002, the combined number of inmates in federal and state prisons and jails exceeded two million.¹¹

These developments are unprecedented in American history and represent a marked departure from a long period of relative stability in imprisonment rates. The current rate of imprisonment in the United States is five times what it was during the forty-five years leading up to the 1970s.¹² Moreover, U.S. practice is strikingly different than most of the rest of the world. The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union.¹³ And the United States incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.¹⁴

III. OUR NATIONAL EXPERIMENT WITH MASS INCARCERATION

For some, the mere recitation of these figures evokes an almost Pavlovian reaction—usually, “My God! This is madness! These figures are a national scandal and a human tragedy! How can we bring the country to its senses and return to a more humane and enlightened policy?” I couldn’t agree more that two million people in cages is a tragedy. I also agree that we imprison too many people for terms that are often too long. It is less clear that our twenty-five-year national experiment with mass incarceration is mad or scandalous, at least in the sense of being either irrational or ineffective. Assessing our current situation and prescribing desirable change requires that we take a clear-eyed view of how we got where we are, and what have been the gains and losses along the way.

Our experiment in mass incarceration has been driven by six factors: (1) fear of crime and social disorder; (2) disillusionment with the rehabilitative model of sentencing that dominated American criminal courts for decades prior to the 1970s; (3) the success—or at least ap-

8. BJS, PREVALENCE, *supra* note 6.

9. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, 21 tbl.2.4 (Nov. 2000).

10. BJS, PRISON AND JAIL, 2002, *supra* note 7, at 1.

11. *Id.* at 2 tbl.1.

12. MARC MAUER, RACE TO INCARCERATE 19 (1999).

13. See Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends 2* (June 20, 2003), available at <http://www.sentencingproject.org/pdfs/pub9036.pdf>.

14. *Id.*

parent success—of the new get-tough approach; (4) timidity, an excessive fear or unwillingness to bear up against even the ordinary and avoidable risks of life and human society; (5) the dehumanization of those who commit crime; and (6) money, the Mammon of my title.¹⁵

A. *Fear*

The fear of crime and general social disorder that triggered and has continued in part to fuel mass incarceration was not irrational or unfounded. The homicide rate, which held steady at five or fewer per 100,000 in the population throughout the 1950s and early 1960s, began rising steeply in 1966 and nearly doubled by 1974.¹⁶ Non-homicidal violent crime increased steadily throughout the 1960s and 1970s, declined slightly in the early 1980s, but rose again to peak at all-time highs in the early 1990s.¹⁷ Property crime also rose steadily throughout the 1960s and 1970s, peaking in around 1979-1980.¹⁸

Not only did the country face a real increase in crimes against persons and property, but in the 1960s and 1970s, it also faced social upheavals caused by the civil rights movement, the anti-war movement, the women's movement, changes in sexual mores, and notably for our purposes, the arrival on the American scene for the first time of widespread use and abuse of non-alcoholic recreational drugs. All of these trends, some undeniably good, such as the civil rights and women's movements, and others arguably less good, combined to unsettle and frighten voters and their representatives. Drugs require special mention, because they figure so largely in the recent history of American sentencing.

Most readers probably cannot remember a time when marijuana, cocaine, speed, heroin, LSD, and the rest of the illegal pharmacopoeia were not a part of the American social and law enforcement landscapes. For those of us in the generations that have come of age since

15. The term "mammon" appears in various places in the Bible as a term for wealth. See, e.g., *Matthew* 6:24 ("No man can serve two masters Ye cannot serve God and mammon."). In *Luke* 16:9 and 11, Mammon is personified, suggesting that it was at some point a deity. See IX THE CATHOLIC ENCYCLOPEDIA Mammon (2003), available at <http://www.newadvent.org/cathen/09580b.htm> (last updated Nov. 3, 2004).

16. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE Trends in the U.S.: Long Term Trends (1950-2002), available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalslab.htm>.

17. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY VIOLENT CRIME TRENDS (1973-2003), available at <http://ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm>; (last modified Sept. 28, 2004); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FOUR MEASURES OF SERIOUS VIOLENT CRIME, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/4meastab.htm> (last modified Oct. 25, 2004).

18. U.S. Census Bureau, No. HS-23, Crimes and Crime Rates by Type of Offense: 1960-2002, available at <http://www.census.gov/statab/hist/HS-23.pdf>; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NAT'L CRIME VICTIMIZATION SURVEY PROPERTY CRIME TRENDS (1973-2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/proprtrdtab.htm> (last modified Sept. 12, 2004).

the late 1950s, there has never been a time when we were not either consuming, being tempted to consume, saying no to, or conducting a war on drugs. In fact, however, the widespread use of non-alcoholic recreational drugs that began in the 1960s was a genuinely new phenomenon.¹⁹ Alcohol with its blessings and curses has, of course, been with us for thousands of years.²⁰ In consequence, most human societies have developed social rituals and legal mechanisms for dealing with the disinhibiting and addictive qualities of alcohol. Society was not prepared for the simultaneous introduction on a large scale of multiple new kinds of recreational intoxicants whose properties were quite different from alcohol and from each other, and for which society had not developed any mediating or civilizing social responses. Moreover, the United States to this day has one of the world's worst drug problems.²¹

Therefore, the vehemence of American society's response to the onset of large-scale drug use—in particular the declaration of a “war on drugs”²² with its attendant punishments—should not be that surprising. We should be even less surprised when we consider that the rise of widespread recreational drug use arrived in the 1960s and 1970s in tandem with rising crime rates and other forms of social disruption. Societies take time to adjust to new conditions. Drug use as a major social issue is only between thirty and forty years old. Understandably, we are still trying to sort things out. We are pulled first one way and then another by fear of the very real damage done by hard narcotics to our children²³ and neighborhoods; pity for the plight of addicts

19. The 1960s saw quite startling increases in drug usage. For example, prior to that period, the use of marijuana was rare, becoming common only in the late 1960s. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 45 (1993). One source estimates that between 1965 and 1970, the number of active heroin addicts in the United States grew from about 68,000 to roughly 500,000. DAVID J. BELLIS, *HEROIN AND POLITICIANS: THE FAILURE OF PUBLIC POLICY TO CONTROL ADDICTION IN AMERICA* 19 (1981). For a summary discussion of the history of narcotics usage in America from the 1800s through the 1960s, see Frank O. Bowman, III, *Playing “21” with Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 951-55 (1995) [hereinafter Bowman, *Playing “21”*].

20. Both the Greeks and Romans worshipped a god of wine or viniculture, Dionysus for the Greeks, and Bacchus for the Romans. See ROBERT GRAVES, *THE GREEK MYTHS* 104-05 (Folio Soc'y 2000) (depicting the worship of Dionysus); 3 Euripides, *The Bacchae*, in *THE ATHENIAN DRAMA* (Gilbert Murray trans., Longmans, Green & Co. 4th ed. 1908) (depicting the worship of Bacchus). The Old Testament makes repeated references to wine drinking and intoxication. See, e.g., *Joel* 1:5 (“Wake up and weep, you drunkards; cry, you wine-drinkers; for the grapes for making new wine have been destroyed.”).

21. “The United States has the western world's most serious drug problem, whether expressed in (per capita) terms of addiction to illicit drugs, crime or IVDU [intravenous drug use]-related HIV [human immunodeficiency virus].” Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 989 (2002).

22. Richard Nixon was the first of a series of presidents to employ this term as a description for his anti-drug policies. He spoke of the government's “all-out global war on the drug menace.” *Nixon Plans to Unify Drug Enforcement Agencies*, N.Y. TIMES, Mar. 29, 1973, at 26 (on file with author). For discussion of the drug war metaphor, see Bowman, *Playing “21,” supra* note 18, at 964-67.

23. See, e.g., David Sheff, *My Addicted Son*, N.Y. TIMES MAG. Feb. 6, 2005, at 42.

condemned to prison for conduct at least partly beyond their control; and uncertainty about the effectiveness of law enforcement and prison as a drug control strategy.²⁴

B. *Disillusionment*

Not only were folks afraid of what they saw as a rising tide of crime, violence, and social disorder, but they were also disillusioned with the existing model of criminal sentencing. Two very disparate impulses combined to produce a revolution in sentencing and corrections. Many critics felt that the dominant American model of sentencing and corrections, characterized by faith in rehabilitation and discretionary decision-making by judges at the front end and parole boards at the back end, was unfair and led to sentencing disparity, with potential for racial and other bias. Others felt that judges and prosecutors were abusing their discretion and imposing less severe sanctions than were called for by the law and were required by considerations of crime control. Liberal critics of parole board decisions concerning when to release prisoners criticized the expertise of parole board and suspected them of bias. Conservative critics felt that the parole system was both dishonest since it created a false impression in the public mind about how long defendants were really required to serve, and ineffective insofar as it released potentially dangerous criminals back into the community too soon. Across the political spectrum, there was profound skepticism of the capacity of prison systems to rehabilitate prisoners.²⁵

The result was the determinate sentencing revolution, characterized by: (1) limitations on front-end judicial discretion through passage of mandatory minimum sentences and sentencing guidelines; (2) elimination of or drastic limitations on parole or other forms of administrative early release authority; and (3) in most places, increases in the statutory and/or guideline penalties for most serious crimes, particularly violent crimes involving firearms and drug offenses.²⁶

C. *Success*

Fear and disillusionment gave birth to policies producing ever-rising prison populations, but other factors have sustained the trend.

24. See generally Frank O. Bowman, III, *The Geology of Drug Policy in 2002*, 14 FED. SENTENCING REP. 123 (2001-2002) (surveying the state of the debate over American drug policy).

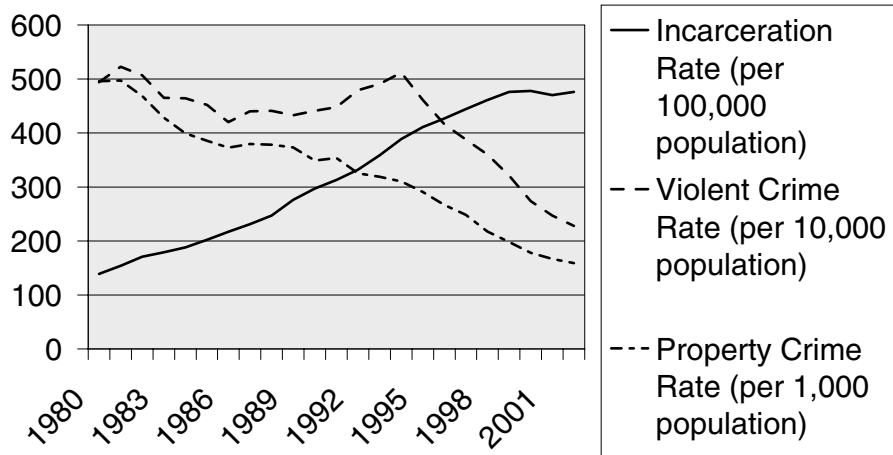
25. See generally Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680-89 (1996) (summarizing and enumerating common critiques of the discretionary rehabilitationist sentencing model).

26. *Id.* at 689-95 (describing the effects of the determinate sentencing movement on federal courts).

The first and probably most important of these is that mass imprisonment at least appears to work.

The steady increase in incarceration rates over the past two decades has been matched by a steady decrease in the incidence of property crimes. And although increases in incarceration rates during the 1980s had no obvious effect on violent crime, as the more punitive sentencing policies that evolved during the 1980s steadily increased inmate populations into the early 1990s, the decrease in property crime continued and the rate of violent crime began a steady, unprecedented, and so far unabated decline. Figure 1 illustrates these complementary trends.²⁷

FIGURE 1: CRIME RATES VS. INCARCERATION RATE, 1980-2002



Perhaps even more striking than the overall declines in both property and violent crime are the recent dramatic drops in homicides and firearm-related violent offenses. Between 1991 and 2002, the *number* of homicides in the United States fell from its all-time high of 24,700 to 15,517, and the *rate* of homicide per every 100,000 in the population dropped from 9.8 to 5.5.²⁸ From 1994 to 2002, the absolute number of non-fatal firearm crimes dropped from 1,286,860 to 430,930, a decline of 66.5%. In the same period, the rate of firearm

27. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATION RATE (1980-2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/incrttab.htm> (last modified Nov. 7, 2004); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NAT'L CRIME VICTIMIZATION SURVEY VIOLENT CRIME TRENDS (1973-2003), available at <http://www.ojp.usdoj.gov/bjs/glance/table/viortrdtab.htm> (last modified Sept. 12, 2004); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NAT'L CRIME VICTIMIZATION SURVEY PROPERTY CRIME TRENDS (1973-2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/proptrdtab.htm> (last modified Sept. 12, 2004).

28. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: LONG TERM TRENDS (1950-2002), available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm> (last modified Sept. 12, 2004).

crimes per 1,000 residents declined from 6.0 to 1.9, a decrease of 68.3%.²⁹

There is a vigorous debate among criminologists about the correlation between increased imprisonment and decreased violent and property crime. Some conservative students of the problem have concluded that increased imprisonment has been the most important cause of the crime drop. As Charles Murray of the American Enterprise Institute wrote in 1997, "We figured out what to do with criminals. Innovations in policing helped, but the key insight was an old one: Lock 'em up."³⁰ Most academic criminologists have been more skeptical, emphasizing that crime rates are affected by a wide array of factors, including changing demographics (particularly the changing proportion of crime-prone young males in the population), fluctuating economic conditions, changes in the drug trade, the availability of firearms, and changes in law enforcement practices.³¹ For example, Professor William Spelman studied violent crime and prison data between 1972 and 1997 and concluded that violent crime would have declined when it did even if the prison buildup had never occurred, but the decline would have been 27% smaller than it actually was without the prison buildup.³² In a later review of studies in the field, Professor Spelman concluded that the doubling of a state's prison population produces a reduction in the crime rate of between twenty to forty percent.³³ A majority of academic criminologists would probably concede that increased incarceration causes a decrease in crime, but would emphasize that the amount of the resulting decrease is uncertain and depends on the interaction of a wide variety of factors, some of them unquantifiable.

Even if one agrees that relatively high rates of incarceration have played an important role in the continuing reduction of violent and property crime in America, there are nonetheless reasons to doubt that it makes either utilitarian or moral sense to lock up as many types of offenders as we now do for as long as we often do. For example,

29. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NONFATAL FIREARM-RELATED VIOLENT CRIMES (1993-2003), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfatal.htm> (last modified Sept. 12, 2004).

30. Charles Murray, *And Now for the Bad News*, WALL ST. J., Feb. 2, 1999, available at <http://216.247.220.66/archives/politics/murray2-2-99.htm>. In a similar vein, Professor James Q. Wilson said in 1998, "Putting people in prison is the single most important thing we've done to decrease crime." Gordon Witkin, *The Crime Bust*, U.S. NEWS & WORLD REP., May 25, 1998, at 28.

31. See, e.g., THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000); JENNI GAINSBOROUGH & MARC MAUER, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s (The Sentencing Project, Washington D.C. Sept. 2000), available at <http://www.sentencingproject.org/pdfs/9039.pdf>.

32. William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA, *supra* note 31, at 123.

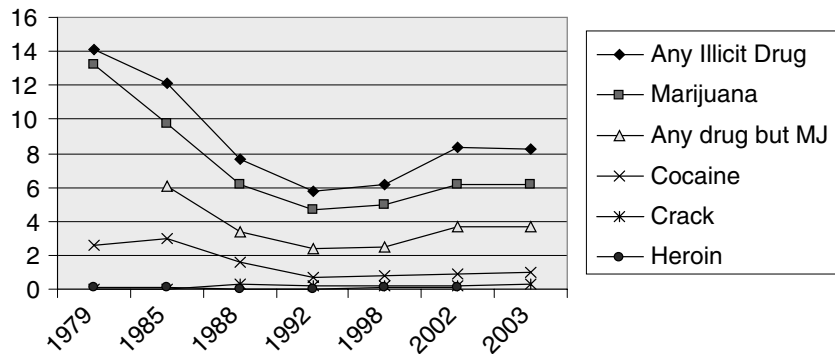
33. William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, in 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 422 (Michael Tonry ed., 2002).

the effectiveness of law enforcement and imprisonment as an anti-drug strategy is less apparent than in the case of property and violent crime. Measuring the incidence of drug crime is far tougher than with so-called “index crimes”—crimes against persons or property that have victims who generally report their victimization. However, the data we have suggests that tough law enforcement responses to drugs may have had some initial successes, but that their effectiveness plateaued some time ago.

FIGURE 2: PERCENTAGE OF GENERAL POPULATION WHO REPORT USING DRUGS IN LAST MONTH³⁴

	1979	1985	1988	1992	1998	2002	2003
Any Illicit Drug	14.1	12.1	7.7	5.8	6.2	8.3	8.2
Marijuana	13.2	9.7	6.2	4.7	5	6.2	6.2
Any drug but MJ	—	6.1	3.4	2.4	2.5	3.7	3.7
Cocaine	2.6	3	1.6	0.7	0.8	0.9	1
Crack	0	0	0.3	0.2	0.2	0.2	0.3
Heroin	0.1	0.1	0.04	0.04	0.1	0.1	—

FIGURE 2A: MONTHLY DRUG USE: 1979-1985
(AS PERCENT OF POPULATION)



As Figures 2 and 2A illustrate, although use of most common types of illegal drugs seems to have declined steeply from the late 1970s until about 1992, it then flattened out into a virtually straight

34. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, 260 tbl.3.91. Data drawn from U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse, 1997*, tbl.2.4.; Trends in Percentage of Respondents Aged 12 or Older Reporting Drug Use in the Past Month: 1979-1997, available at <http://www.oas.samhsa.gov/nhsda/1997Main/nhsda1997mfWeb-15.htm#Table2.1>; U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse, 1998*, tbl.5B, available at http://www.oas.samhsa.gov/nhsda/98SummHtml/NHSDA98SummTbl-09.htm#P3103_31981; National Household Survey 2002, available at <http://www.oas.samhsa.gov/nhsda/2k2nsduh/2k2Tabs.pdf>; 2003 data, available at <http://www.oas.samhsa.gov/nhsda/2k3tabs/PDFindex.htm#DU>. Data on the “any drug but marijuana” category is unavailable for 1979. Data on heroin use is unavailable for 2003.

line, with some modest increases beginning in 1998. Some observers have argued vehemently that the flat or slightly rising drug use trend line of the past decade in the face of rising rates of incarceration for drug crime proves the ineffectiveness of imprisonment as an anti-drug weapon.³⁵ Moreover, studies of incarcerated drug abusers suggest that “over 95% of drug-abusing offenders returned to drug use within three years of their release from prison, with the lion’s share (85%) relapsing within only the first six to twelve months.”³⁶

Even in the areas of violent and property crime, where mass incarceration seems effective as a crime control strategy, one must ask whether it achieves its effects in part by over-predicting who will reoffend, and thus over-punishing many thousands of defendants whose prison stays may be neither deserved nor even socially useful. One example of policies which may over-predict recidivism or impose punishments longer than necessary to achieve the goal of crime reduction may be the tough repeat offender sentencing statutes passed by many states, the most prominent example being California’s “three strikes” law.³⁷ Such statutes customarily require imposition of very long minimum sentences upon defendants convicted of a certain number of felonies arising from different incidents. These statutes are based on several plausible premises. First, persons who continue to commit serious crimes after having been previously convicted and punished are less amenable to rehabilitation and less responsive to the deterrent effects of punishment than first-time offenders. Second, persons who reoffend after having received society’s admonition against crime in the form of a prior conviction are more blameworthy than first-time offenders. Third, and probably most important, tough recidivist sentencing laws are based on the belief that serious crime is disproportionately attributable to a relatively small proportion of repeat offenders and that incapacitating such offenders will significantly reduce crime. The third point is supported not only by the experience of

35. See, e.g., Debate, *The War on Drugs: Fighting Crime or Wasting Time: Congressman Bob Barr v. Mr. Eric Sterling*, 38 AM. CRIM. L. REV. 1537, 1542 (2001) (remarks of Eric Sterling).

36. Douglas B. Marlowe, David S. DeMatteo & David S. Festinger, *A Sober Assessment of Drug Courts*, 16 FED. SENTENCING REP. 153 (2003) (citing Steven S. Martin et al., *Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare*, 79 PRISON J. 294 (1999)). On the other hand, at least one scholar has suggested that the failure of the federal government to enforce drug laws with the maximum possible stringency during the 1990s provides a partial explanation for the lack of progress against drugs during that period. See Stephen D. Easton, *Everybody Knows It, But Is It True? A Challenge to the Conventional Wisdom That the War on Drugs Is Ineffective*, 14 FED. SENTENCING REP. 132 (2002).

37. CAL. PENAL CODE § 667 (Deering 2005). For a detailed and critical analysis of the California “three strikes” experience, see FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

lawyers, judges, and probation officers who work in the criminal courts, but also by a reasonable body of social science research.³⁸

The arguments in favor of recidivist sentencing statutes have considerable force. However, experience suggests that the statutes passed in response to such arguments have produced results that are both remarkably expensive and inconsistent with their underlying rationale. In the first place, many state recidivist statutes have defined the category of persons subject to recidivist treatment very broadly, sweeping in not only repeat violent offenders, but also persons who have multiple convictions for a wide array of crimes, including non-violent drug and property crimes.³⁹ Second, recidivist statutes create mandatory sentences that are customarily very long, often exceeding twenty years and sometimes reaching life imprisonment.⁴⁰

The combination of very broad application of recidivist statutes and very long recidivist sentences has produced effects arguably very much at odds with the premises upon which recidivist laws were based. Instead of focusing scarce prosecutorial and prison resources on a hard core of repeat violent or serious offenders, recidivist statutes have often simply inflated prison populations with persons whose criminal history consists of relatively inconsequential, even if technically felonious, violations. Moreover, while social science research generally supports the notion that crime is disproportionately committed by high-volume repeat offenders, it also suggests that most of those who embark on criminal careers largely cease their activities by the time they reach their mid-to-late thirties, irrespective of any intervention by the criminal justice system.⁴¹ Consequently, to the extent that recidivist sentencing laws are designed to prevent crime by incapacitating those at high risk of repeat offending, sentence lengths which leave inmates in prison at taxpayer expense long past the point when they stopped presenting the risk that justified their sentences in the first place make little economic sense.

Whatever its effectiveness as a crime control strategy, the human and economic costs of the American experiment in mass incarceration have been high. Between 1982 and 1999, direct expenditures by federal, state, and local governments on corrections jumped from \$9 bil-

38. See, e.g., CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumskin et al. eds., 1986) [hereinafter CRIMINAL CAREERS].

39. See, e.g., *Ewing v. California*, 538 U.S. 11, 53-57 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 74 (2003). In *Ewing*, the Supreme Court found no constitutional error in a sentence of twenty-five years to life imposed on the defendant following his conviction for stealing three golf clubs valued at just under \$1200 from the El Segundo Golf Course pro shop. See *Ewing*, 538 U.S. at 15-31. In *Andrade*, the Court upheld a sentence of fifty years to life following conviction for stealing \$150 in videotapes. *Andrade*, 538 U.S. at 66-68.

40. See *Ewing*, 538 U.S. at 16; *Andrade*, 538 U.S. at 67.

41. CRIMINAL CAREERS, *supra* note 36.

lion to \$49 billion, an increase of over 440%.⁴² During the same period, combined criminal justice expenditures (for police, judicial, and corrections activities) by federal, state, county, and municipal governments rose from \$35.7 billion in 1982 to \$146.5 billion in 1999.⁴³ Moreover, the costs of an aggressive program of incarceration extend beyond the direct dollar outlays of governments on functions easily identifiable as part of the criminal justice system. Governments themselves incur a variety of collateral costs when a defendant is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates and lost tax revenues from income that would have been earned or expenditures that would have been made by defendants left free in the community. Perhaps more importantly, the families and communities from which inmates come suffer a wide variety of tangible and intangible harms from the absence of the inmate. These include the emotional, economic, and developmental damage to the children of incarcerated offenders,⁴⁴ as well as the disenfranchisement and consequent political alienation of a significant portion of the young men in the minority communities in which both crime and punishment are most frequent.⁴⁵ Most criminologists would also agree that, whatever the precise correlation between increased imprisonment and lowered crime, there comes a point at which increased imprisonment begins to produce diminishing marginal returns.⁴⁶

All of which leads to several questions: If the policy of mass incarceration stems primarily from an interplay of fear of crime and a public perception that raising imprisonment rates succeeds in reducing at least the violent and property crime, have we nonetheless reached—and maybe long since passed—the point where the remedy

42. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DIRECT EXPENDITURES BY CRIMINAL JUSTICE FUNCTION (1982-2001), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/exptytab.htm> (last modified Feb. 6, 2004).

43. *Id.*

44. See generally MARC MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (2002); *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*, 14 HUM. RTS. WATCH REP. 1 (June 2002), available at <http://www.hrw.org/reports/2002/usany/USA0602.pdf>.

45. See SENTENCING PROJECT AND HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, available at <http://www.hrw.org/reports98/vote/> (last visited Mar. 15, 2005). This report finds that an estimated 3.9 million Americans, or one in fifty adults, have currently or permanently lost the ability to vote because of a felony conviction; that 1.4 million African-American men, or 13% of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average; that more than one-third (36%) of the total disenfranchised population are black men; and that, given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetimes. In states with the most restrictive voting laws, 40% of African-American men are likely to be *permanently* disenfranchised.

46. WASH. STATE INST. FOR PUB. POL'Y, THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE: INCARCERATION RATES, TAXPAYER COSTS, CRIME RATES, AND PRISON ECONOMICS (Jan. 2003), available at <http://www.wsipp.wa.gov> (last updated Apr. 6, 2005).

of imprisonment for crime is overused, both in frequency and length? And if, as I suspect, the policy of mass incarceration is at times poorly directed and may have passed the point of diminishing returns even for violent and property crime, how has this hugely expensive experiment been sustained?

D. *Timidity and Dehumanization*

My own entirely unscientific assessment suggests that two important factors in the persistence of the policy of mass incarceration are timidity and dehumanization. Let us first consider timidity, or what political science professors refer to as “risk-aversion.” The timidity of which I speak is not the same thing as the fear of crime discussed above. Fear is sometimes a perfectly rational response to genuinely threatening events. Even the stout of heart are sometimes afraid. Sometimes only fools are not afraid. Timidity is excessive fear, an unwillingness to bear up against even the ordinary and unavoidable risks of life and human society.

As a society, modern Americans may be the biggest chickens in the history of human civilization. We are willing to impose huge costs on society at large, on ourselves, and particularly on others to remove even small risks of harm to ourselves or those we care about. Evidence of this hallmark of modern America is everywhere, from the local schoolyard stripped of merry-go-rounds, see-saws, monkey bars, and other threats to life and limb, and padded from stem to stern with recycled hypoallergenic composite soft stuff, to our national over-reaction to terrorism generally⁴⁷ and non-nuclear “weapons of mass destruction” particularly.⁴⁸ This trait of the American character manifests itself in our prison policy as well. We are willing to condemn hundreds of thousands of people to prison for numbingly long terms to protect ourselves against the risk that some of them will commit other crimes. And we do so despite the fact that both social science and common sense tell us that thousands of prisoners are being kept behind bars for years, and sometimes decades, past the point at which they represent a really significant risk of doing more serious harm.

We are psychologically able to do this not only because we are unduly fearful of crime, but also because we dehumanize “criminals”—a vast undifferentiated category in which petty thieves and drug addicts are lumped with mobsters and serial killers.

47. John Mueller, *A False Sense of Insecurity?*, REGULATION, fall 2004, at 42.

48. Gregg Easterbrook, *The Meaninglessness of Term Limits*, THE NEW REPUBLIC, Oct. 7, 2002, at 22 (arguing that non-nuclear weapons such as chemical and biological agents included within the “weapons of mass destruction” category are relatively inefficient weapons and not a sufficient justification for war against Iraq).

Criminals are “them,” not us. We deny to felons membership in the human family, or at least in our family, our community. In part, of course, this is entirely natural and indeed part of the objective of punishment. Stigmatization, exclusion from the tribe, hurts, and it’s supposed to. But in modern America we have carried the process of exclusion to extraordinary lengths—largely banishing those convicted of crime to a netherworld which allows us not to care very much about them while they are in prison and to make their return to the community difficult and something to be postponed as long as possible.

This extreme mental expulsion of felons from the community is possible in part because, for most of the voting population felons really are “them,” at least in the sense of belonging to a different racial or ethnic group or social class. For example, one of the most salient facts about prison populations in America today is their minority character. Forty-four percent of all prison inmates, federal and state, are African-American.⁴⁹ Just under 16% are Hispanic.⁵⁰ In federal court, roughly 34% of the defendants sentenced each year are non-U.S. citizens.⁵¹ The conventional liberal academic response to these figures is to suspect institutional racism in the organs of criminal justice—the police, the prosecutors, the courts. I would not disagree for a moment that America has a discreditable history of racially-tainted justice, or that there is value in ferreting out and, so far as humanly possible, stamping out the bias, conscious or unconscious, that still infects the system. On the other hand, the sad truth is that a disproportionate share of serious crime, particularly non-drug crime, is committed by members of minority groups.⁵² For example, between 1976 and 2002, African-Americans committed 52% of all homicides.⁵³ Similarly, more than 40% of robbery victims report that their assailants were black.⁵⁴ Likewise, as any longtime practitioner in America’s

49. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, 500, tbl.6.28, available at <http://www.albany.edu/sourcebook/pdf/t628.pdf> (last visited Apr. 13, 2005).

50. *Id.* The percentage of African-Americans in both prisons and jails is about 44%, while the percentage of Hispanics in prisons and jails combined is about 19%. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2003, tbl.13 (May 20, 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>.

51. U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 19, tbl.9 (2004).

52. Minorities are also disproportionately victims of serious crime. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 1999, CHANGES 1998-99 WITH TRENDS 1993-99, 6 tbl.2 (Aug. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv99.pdf>. For example, “[f]rom 1993 to 2001, blacks were 12% of the U.S. population age 12 or older but 49% of all homicide victims and 54% of all victims of firearm homicide.” U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, WEAPON USE AND VIOLENT CRIME 9 (Sept. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf>.

53. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: TRENDS BY RACE, available at <http://www.ojp.usdoj.gov/bjs/homicide/race.htm> (last revised Sept. 28, 2004).

54. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002 STATISTICAL TABLES, tbl.40 (Dec. 17, 2003), available at <http://>

criminal courts can testify, the many non-minority-group inhabitants of America's prisons come disproportionately from backgrounds of social or economic disadvantage.

The undeniable fact that, for most Americans, most of the people who live in our prisons and jails are really not like us, either because they belong to racial minorities or they come from a social class with which we do not associate, makes it all too easy to treat convicted felons as less deserving of our compassion. As less capable of redemption. As less valuable potential citizens of the free community.

Thus, a nation afraid of crime, disdainful of criminals, hesitant to take even the modest risks posed by less punitive sentencing policies, and hearing that crime is going down as prison populations go up has continued to support the incarceration of an ever-larger fraction of its fellows.

E. *Money*

Which brings us to Mammon. Money, or more broadly economics, has a great deal to do with both the current state of criminal justice policy and with where we might go from here.

At the most fundamental level, America's experiment in mass incarceration has been made possible only by our immense wealth. No previous society could have supported such a policy. In a sense, the groaning walls of our prisons are a perverse tribute to our economic success.

However, even America's economic resources have limits. Prisons grew and grew during the 1980s, and particularly during the boom times of the 1990s, because constant economic expansion provided tax revenues to support both prisons and other social priorities. At least in the states, which are customarily required to balance their budgets,⁵⁵ we are seeing a reexamination of sentencing and corrections policies forced on lawmakers by the combination of lower tax revenues and the imperative of stretching state budgets to accommodate not only prisons but also other social goods like schools and roads and health care. States have to make real choices. The necessity of making such choices has forced even the most reflexively anti-crime lawmakers to reconsider the more draconian of their sentencing laws. Many states have tried very hard to focus shrinking resources on punishing and incapacitating those thought most dangerous to society—

www.ojp.usdoj.gov/bjs/pub/pdf/cvus0202.pdf. The data reported here is for 2002 only, but it is consistent with victim surveys for many years.

55. See RONALD K. SNELL, NATIONAL CONF. OF STATE LEGIS., STATE BALANCED BUDGET REQUIREMENTS, PROVISIONS AND PRACTICE, at <http://www.ncsl.org/programs/fiscal/balbuda.htm> (last updated Mar. 2004) (outlining the nature of balanced budget requirements in all fifty states and Puerto Rico).

notably violent offenders.⁵⁶ The exception that proves the rule of the importance of money to crime legislation is the federal government. Because it can run deficits and because law enforcement is such a small percentage of the federal budget, Congress has thus far felt no fiscal pressure to moderate sentencing rules. Even in the states, the retrenchment has been slow and irregular.⁵⁷

But declining government revenue is not the only way in which money, speaking broadly, may change the sentencing debate. There is some evidence that attitudes are changing in a number of quarters,⁵⁸ that a broad, and in some respects unlikely, coalition favoring ameliorating sentencing reforms may be forming. Some obvious members of such a coalition include the institutional bar; judges (who often think that sentences in general are too long, but who certainly favor sentencing reform that increases their discretion to be merciful in particular cases); liberal social action advocacy groups; and leaders of minority communities, particularly African-Americans and Hispanics, disproportionately impacted by tough sentencing laws, and virtually the entire legal academic community (although it does not possess much political clout). These usual suspects have been joined in recent years by a growing number from the right. They include: conservatives who take federalism seriously and oppose the increasing federalization of previously local crime, with concomitant increases in penalties;⁵⁹ fiscal conservatives, particularly those in statehouses who have to balance budgets; and libertarians who oppose the “war on drugs.”⁶⁰

The concerns of a number of these groups have coalesced over drug-related crime in particular. Perhaps due to the combination of the high costs of imprisoning thousands of drug offenders and a paucity of evidence that increased incarceration has a material impact on

56. Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, in ISSUES IN BRIEF (June 2002) at 8, available at http://www.vera.org/publication_pdf/167_263.pdf.

57. The last few months have seen, on the one hand, major modifications of New York State's punitive “Rockefeller Drug Laws,” and on the other, rejection by California voters of a ballot initiative to amend the state's draconian “three strikes” laws. See *Making Drug Laws Tough But Fair*, N.Y. DAILY NEWS Dec. 10, 2004, available at http://www.nydailynews.com/news/ideas_opinions/story/260476p-223058c.html; Mark Martin, *Proposition 66: Efforts to Reform “Three Strikes” Law Likely to Be on Ballot Again*, S.F. CHRON. (Nov. 4, 2004), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2004/11/04/BAG0V9LLJF1.DTL>.

58. Jon Wool & Don Stemens, *Changing Fortunes or Changing Attitudes: Sentencing and Corrections Reforms in 2003*, in ISSUES IN BRIEF March 2004, available at http://www.vera.org/publication_pdf/226_431.pdf.

59. See, e.g., John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, in 5 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 23 (Oct. 2004); REPORT OF AMERICAN BAR ASSOCIATION TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW (1998); AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998).

60. For a discussion on this in particular, see the extensive writings of scholars associated with the Cato Institute. CATO INST., THE DRUG WAR, available at <http://www.cato.org/current/drug-war> (last visited Apr. 13, 2005).

drug crime, many states have begun considering alternative approaches. The most prominent approach is the growing national movement towards creating specialized drug courts for non-violent drug offenses. Although the design and operation of drug courts varies widely between jurisdictions, the underlying theory is that drug abusers respond better to drug treatment than any other type of intervention, but that they often lack access to treatment and tend not to stay in treatment even when it is available unless compelled to do so. Drug courts customarily divert non-violent drug offenders or drug-dependent defendants who have committed non-violent, non-drug offenses away from prison or jail and into treatment programs using the supervisory authority of the court to coerce compliance with the treatment regimen. The drug court movement has both enthusiastic proponents⁶¹ and vigorous detractors.⁶² Probably the most accurate assessment of them at this point is that they represent the most promising available approach to successful intervention with drug-involved offenders, but that they are not a panacea and much more experimentation and research is needed to identify their useful limits and the components of a maximally effective program.⁶³ The critical point for the present discussion is that the spreading drug court movement represents a convergence of budgetary, ideological, and public policy concerns which is producing a pervasive national reconsideration of the incarcerative approach to a major category of crime.

“Money” plays a role in sentencing reform in a second respect. I refer to “money” in the sense of moneyed corporate America, which may for perhaps the first time be troubled by get-tough-on-crime policy. One of the unintended side-effects of the dramatic increase in sentences for crime generally, and non-violent drug crime more particularly, is that it has changed our expectations of what an appropriate criminal sentence should be. Setting criminal sentences, both at the individual and legislative level, is inevitably a comparative exercise. We have a very hard time deciding in the abstract what the optimum sentence for any particular offense or offender should be, but we tend to have pretty strong instincts about the relative severity of different types of crime. Therefore, when the case of a young black man who is sentenced to five years for mere possession of five grams of crack⁶⁴ is placed alongside the case of a white middle manager who

61. See, e.g., William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENTENCING REP. 179 (2001-2002).

62. See, e.g., Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENTENCING REP. 172 (2001-2002); Morris B. Hoffman, *A Reply to Messrs. Meyer and Ritter*, 14 FED. SENTENCING REP. 186 (2001-2002).

63. See Marlowe, *supra* note 21.

64. 21 U.S.C. § 841(b) (2001) (setting minimum mandatory sentence of five years' imprisonment for possession of five grams or more of crack cocaine).

embezzles half a million dollars from his company and gets probation or minimal time in prison, we instinctively feel that something is wrong.

One reaction to disparities of this sort would be to lower drug sentences. But at least at the federal level, the devotion of the political classes, congressional Republicans in particular, to lengthy drug sentences has so far proven unshakable. Consequently, the only way to assuage the deep discomfort created by the unjustifiably disparate treatment of drug and white collar defendants is to raise white collar sentences. Which, you may be surprised to find, is exactly what the federal government has done—slowly and incrementally at the beginning of the Guidelines era and throughout the 1990s, and quickly and quite dramatically during the last three years.⁶⁵

As a result, in federal courts at least, white collar defendants are now facing the kinds of multi-decade sentences that have been common for drug defendants since the mid-1980s.⁶⁶ Why is this a good thing for sentencing reform? It is (or at least may be) good because, perhaps for the first time, the wealthy are paying attention to America's sentencing laws. You may not know the name of Jamie Olis, a mid-level accounting executive recently sentenced in Houston to twenty-four years for his part in a fraud scheme,⁶⁷ but his name is familiar to virtually everyone in corporate America. His sentence and others like it have occasioned shock, dismay, and fear in managerial suites and corporate boardrooms across the country.⁶⁸

To my mind, this fear is altogether a good thing. On the one hand, corporations are now expending a great deal of effort to ensure that they do not engage in the kind of conduct that produces federal indictments and twenty-four year sentences. On the other hand, Jamie Olis's sentence has caused the inhabitants of corporate America to question the premises of a sentencing system that threatens its members personally. Federal defendants doing decades behind bars are no longer just "them," faceless members of the underclass, but "us," men and women who sit in the next pew at church or synagogue and whose kids are on our kids' soccer teams. If opinion begins to

65. See generally Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. LAW 373 (2004) (describing the gradual toughening of white collar sentencing rules from 1987-2001 and the more dramatic increases brought about by the 2001 Economic Crime Package of guidelines amendments, the Sarbanes-Oxley Act of 2002, and the post-Sarbanes-Oxley Guidelines amendments of 2003).

66. *Id.*

67. See Press Release of U.S. Attorney for Southern District of Texas (Mar. 25, 2004), available at <http://www.usdoj.gov/usao/txs/releases/March2004/042503-Olis.htm>.

68. See, e.g., James K. Glassman, *Jamie Olis' Tragedy, and Ours*, CAPITALISM MAG. Apr. 12, 2004, available at <http://www.capmag.com/article.asp?ID=3594>; Neil Weinberg & Mary Ellen Egan, *White Collar Crime Sentencing Goes Overboard?*, FORBES.COM (Apr. 11, 2004), at <http://www.msnbc.msn.com/id/4796446/>.

coalesce in corporate circles that federal sentencing law has gone astray, the view will be felt on Capitol Hill. Money talks in politics. Moreover, since it would be politically difficult to ease the severity of white collar sentences alone, any ameliorating change would probably have to be broad-based and probably procedural in character, applying relatively equally to all classes of offenders.⁶⁹ My own sense of the matter is that the concern raised by the *Olis* case is not merely the reflexive worry that the criminal law is now touching those we know, but includes the more nuanced observation that, while serious punishment for serious non-violent crime is warranted, too much punishment can be irrational, unnecessary, and cruel. This observation is easily expanded beyond the ranks of corporate wrongdoers.

III. "MORAL VALUES"

In the end, however, even enlisting the forces of Mammon in the effort to moderate America's policy of mass incarceration may not be enough to do more than nibble at the edges. Criminal sentencing policy is a political question. Lawmakers perennially perceive that there is political advantage in being "tougher" on crime. Still more importantly, they are afraid that voters will punish them if they ever relent from toughness. Lawmakers need *permission* to make the moderating changes that many of them know need to be made.

Some of that permission can come from the moneyed classes, but I suggest that one key to really fundamental reconsideration of criminal justice policy is gaining the permission of the socially conservative base of the Republican Party, and more particularly the politically engaged evangelical Christian right. Getting that permission will undoubtedly be tough because there are genuine differences between the views of conservative Christian denominations and folks of other religious stripes on the question of crime and punishment.

The language of mainline liberal Protestantism is one from which the ideas of judgment and punishment have largely been excised. Several Sundays ago, the priest at my Episcopal church could say with no apparent sense of having uttered anything controversial, "We're all going to heaven." By contrast, evangelical Protestantism and the conservative strains of Catholicism have always spoken of a God with a power and will to punish sin, to turn his back on those who do not embrace salvation in the form of the risen Christ. This strain of Prot-

69. This discussion does not attempt to account for the as-yet uncertain effects of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Booker v. United States*, 125 S.Ct. 738, 756 (2005) (invalidating the Federal Sentencing Guidelines as applied and transforming them into an "effectively advisory" system).

estantism found its most famous colonial exemplar in Jonathan Edwards, who famously preached that:

[t]he God that holds you over the pit of hell, much as one holds a spider, or some loathsome insect over the fire, abhors you, and is dreadfully provoked: his wrath towards you burns like fire; he looks upon you as worthy of nothing else, but to be cast into the fire; he is of purer eyes than to bear to have you in his sight; you are ten thousand times more abominable in his eyes, than the most hateful venomous serpent is in ours.⁷⁰

Edwards's current successors are Tim LaHaye and Jerry Jenkins, the less-gifted, but far richer, authors of the "Left Behind" series of novels chronicling God's rough treatment of unbelievers at the time of the Second Coming.⁷¹ It is therefore perhaps not surprising that conservative evangelical churches are more willing than their mainline counterparts to see tough judgments passed by human judges here on Earth.

But there is another side to conservative evangelical Christianity. Its passionate belief in the merciful Jesus of the Gospels. Its belief in the possibility of redemption for sinners. Its genuine involvement with the tribulations of its congregants. Moreover, while the Christian right is thought of as being largely white and the majority of American inmates are minorities, it is both mistaken and profoundly unfair to conclude that conservative Christians care only for those whose skin color matches their own. In any case, roughly four in ten inmates of American prisons are white,⁷² many of them the sons and daughters, fathers and mothers, brothers and sisters of the congregants of white evangelical churches across America. Many of them are serving long sentences for non-violent drug offenses involving marijuana, methamphetamine, and other substances, or have been caught up by repeat offender laws for histories of relatively minor crime. In addition, under George Bush, the Republican Party has been making special efforts to reach out to minorities through the avenue of socially conservative evangelical Protestant and conservative Catholic clergy. I think it not impossible that politically active evangelicals, and through them Republican politicians, can be brought to see that taking the Gospels seriously means forgiveness of at least some criminal sinners and the possibility of redemption for those sinners in this life as well as the next. Finally, politically active evangelicals are hardly

70. Jonathan Edwards, *Sinners in the Hands of an Angry God*, Sermon Preached at Enfield, Connecticut (July 8, 1741), available at <http://www.ccel.org/e/edwards/sermons/sinners.html> (last visited Apr. 13, 2005).

71. TIM LAHAYE & JERRY B. JENKINS, *LEFT BEHIND: A NOVEL OF THE EARTH'S LAST DAYS* (1995).

72. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISON AND JAIL INMATES AT MIDYEAR 2003 tbl.13* (May 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>.

immune to sound public policy arguments based on fiscal responsibility and careful analysis of what works in sentencing.

There are some signs that these lines of thought are gaining a foothold on the evangelical right. Former Watergate felon Chuck Colson has for years been running a successful prison ministry with a strong evangelical emphasis.⁷³ President Bush himself recently endorsed a new federal initiative to facilitate the successful reentry of convicts into free society.⁷⁴ It is not a terribly long distance from enthusiasm for easing the reentry of convicts into society to skepticism about the necessity of putting quite so many folks in prison in the first place and keeping them there for quite so long.

IV. CONCLUSION

I hasten to add that I neither expect nor advocate a return to a completely rehabilitative model of discretionary sentencing. I favor guided discretion. I think the claims even of modern chastened rehabilitationism remain unproven. I suspect that historically high rates of incarceration may be a regrettably necessary mechanism of social control in this massive, chaotic, polyglot society of ours. However, we need not be as punitive as we have been. We can be smart and merciful, as well as tough, on crime. Many groups and forces are slowly coalescing in this direction. I suggest only that the path to meaningful reform, state and federal, may run through pulpits as well as through legislatures, sentencing commissions, and academic convocations. Those who seek a more moderate and nuanced approach to criminal sentencing policy need to begin speaking, or at least not resisting, the language of faith. Comprehensive sentencing reform may happen at last only when people of faith are convinced that it is what Jesus (and Moses and Mohammed and the Buddha) would do.

73. See generally PRISON FELLOWSHIP MINISTRIES, at http://www.pfm.org/AM/Template.cfm?Pfm_home (last visited Apr. 13, 2005).

74. George W. Bush, 2004 State of the Union Address; George W. Bush, Remarks at Talbert House (June 22, 2004), in CINCINNATI ENQUIRER, available at http://www.enquirer.com/midday/06/06222004_News_mday_bush22remarks.html.

