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## Introduction

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For all our imperfections, current and past, our country has been, and remains, a land of the free, a beacon and a champion of freedom in an often-hostile world. And yet, in a terrible paradox, ours is also a land of the prison and the prisoner. To be sure, the United States both believes in and truly practices the rule of law. Those who are accused of offenses are entitled to and receive due process of law. This sets us apart from many other countries in the world, which pay only lip service to the rule of law and due process. But, with this important qualification, the United States is nevertheless the leader in a most unfortunate competition. We imprison more individuals than virtually any other country in the world and more than any other advanced country. This is true both in absolute terms and in relation to the size of our population. The relevant statistics, which I detail later, are simply stunning.

The United States suffers from more crime than some other countries, particularly more violent crime. But when we examine the data on crime and imprisonment in recent decades we find that crime has decreased considerably over this period, and yet the rate at which individuals are sent to prison in our society has not dropped in equal measure. Far from it. What we discover, I believe, is an over-reliance upon imprisonment as the response to criminal activity. We imprison too many and for too long. Among the various purposes that underlie the penal laws of our country, we have emphasized retribution too heavily while unwisely and shortsightedly giving too little weight to the goal of rehabilitation. We devote too many resources to the infrastructure of imprisonment—the prisons, corrections officers, and the rest—and we shortchange alternatives to prison and the mechanisms that might promote the rehabilitation of former offenders.

Through this harsh approach, we do, to be sure, achieve a certain amount of public safety. We incapacitate individuals and prevent them from committing crime during the term of their imprisonment. We also give notice to society at large by our heavy reliance upon imprisonment that others who offend can expect a similar fate, which no doubt has a deterrent effect. But many incarcerated offenders will, in time, return to the streets and to ordinary life, and what awaits them there? By focusing so much attention, energy, and resources on the prison, we skimp in providing the resources, supports, and mechanisms that can assist former offenders to live life after prison in conformity with the law. Further, we know that the prison is not a good place to teach the skills and provide the means that will deter offenders from a return to crime. By emphasizing retribution and

de-emphasizing rehabilitation, we have incarcerated some individuals, perhaps many, who might, with an alternative approach, have been better able to address their deficits and absorb seriously the principles and values of society. We do not sufficiently use alternatives to prison and mechanisms and programs that provide treatment, training, education, and preparation for a law-abiding life after the sentence is completed. In some instances, no doubt, prison has turned individuals who might have turned away from crime into hardened, recalcitrant offenders.

The shortcomings of our emphasis upon retribution and imprisonment are not merely theoretical. They are evident in the data and, if you will, on the ground. Despite this emphasis on punishment, we find that prison is not good at deterring offenders from further criminal activity after release. Despite the prevalence of incarceration and its effect as a deterrent, we have not reaped commensurate benefits in reduction in future crime. Rates of recidivism—of return to crime after prison or the end of other sentences—have long been very high in our country and remain so today. Our heavy reliance upon imprisonment has not purchased improved public safety through a satisfactory level of reduction in future crimes. This punitive approach has lost many who might have been salvaged.

The situation that faces us now and in which we have found ourselves for some time can fairly be described as a crisis—a crisis of incarceration.<sup>1</sup> This crisis is a matter of immense importance for several reasons. First, the safety of the public is directly affected by these practices and by the persistence of high rates of recidivism. Recidivism is obviously not simply a datum, for in every crime that might have been avoided there are a victim and a victim's family.

Second, incarceration of large numbers of persons is extremely expensive and the costs involved fall upon the taxpayer.<sup>2</sup> These costs are not merely a burden upon taxpayers, of course, but also a diversion of resources from more productive uses. The money spent to build and staff a prison is money that cannot be spent on the search for a cure to cancer. Alternatives to imprisonment might benefit our citizens by reducing the crime from which they suffer while also reducing the costs they would otherwise bear.

Furthermore, even though costs rise when prisons are built to accommodate offenders who are jailed in vast numbers, the tax receipts required often prove insufficient to meet the demand. And so, prisoners instead are jammed into spaces intended for many fewer. This jeopardizes public safety and the well-being of prison staff. It is also often inhumane to the offenders.

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<sup>1</sup> Some have described recent years as a time of “mass incarceration.”

<sup>2</sup> See, e.g., Jason Furman & Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. TIMES, April 21, 2016, at A29. The authors note that the average annual cost of incarcerating an adult is \$30,000 and that the budget of the federal Bureau of Prisons grew 1,700 percent from 1980 to 2010, until it now represents over 25 percent of the entire budget of the Department of Justice.

While criminal offenders lose their full claim upon public sympathy through their actions, no one can be satisfied with the waste of human talent and energy that occurs when human beings are incarcerated. If some offenders can be rehabilitated and their lives salvaged through methods other than long prison terms, surely we should attempt to achieve that. We must remember, too, that the pain of incarceration is not felt by the offender alone, but also by his or her spouse, family, and children. The sins of the parent really ought not to be visited upon the children.

In this book, I explore the crisis of incarceration and how it came into being. In the first chapter, I describe the nature and dimensions of this crisis. I analyze the dramatic turn several decades ago toward a punitive approach to crime and away from the ideal of rehabilitation. Among the actions taken toward this end were increases in criminal penalties, a general increase in the harshness of the law, and, at the same time, a reduction in the discretion of the judge, especially the federal judge, at sentencing. The law became more rigorous and the judge was deprived of discretion to depart from or ameliorate the effects of the law where the facts of a case called for it. Criminal statutes were revised to add mandatory minimum sentences for various offenses at both the national and state levels. The reduction in the judge's discretion is a complex tale, but an important one that I recount in Chapter 1. In time, there came about a restoration at the federal level of judicial discretion due to decisions of the United States Supreme Court. That change opened up possibilities for greater attention to rehabilitation as a proper goal of criminal sentencing and sentencing alternatives and supplements to the term of imprisonment. I try to make the case that a resolution to the crisis of incarceration lies in part with the exercise by the trial judge of discretion along these lines in cases suited to such outcomes. I also suggest that as a society we would be well advised to reflect on the crisis of incarceration and to examine whether there are not steps—such as elimination or reduction of mandatory minimum sentences, reduction in the harshness of some criminal penalties, and increased financial and other support for alternative approaches—that we should take to reduce prison populations and promote rehabilitation while protecting public safety.

There is another important dimension to the crisis of incarceration that is only dimly understood outside the judicial chambers. The general public thinks of the penalties visited upon criminal defendants purely in terms of imprisonment, probation, and the like. Technically, the criminal sentence imposed upon a defendant follows from the dictates of the penal law and consists of a sentence prescribed, more or less, by the particular penal statute the defendant has violated—imprisonment, probation, and so forth. “If you do the crime, you do the time.” In practical terms, however, the pain that the convicted defendant feels or will feel in time as a result of the conviction is much greater than the

statutory penalty alone. That is because laws other than the penal statute the offender has violated impose other adverse effects upon the offender due to the conviction. These effects are commonly referred to as the collateral consequences of a criminal conviction. They are collateral because they are not a part of the formal sentence of the judge. But they are real consequences because they happen by operation of law as a result of the conviction and can matter greatly. And this collateral pain or disadvantage can be felt in many instances not just by the offender, but also by the family of the offender, including his or her children.

In Chapter 2, I describe in detail some of the important collateral consequences that are imposed on criminal defendants after conviction, such as licensing restrictions, and limitations on access to funds for education, housing, and social welfare. This information helps us place in sharper relief the plight of the ex-offender wishing to turn his or her life around and whom we wish to persuade in that direction. For instance, a person who makes a mistake in judgment by participating as a low-level courier in a drug transaction at a young age and who therefore is deserving of some punishment may find that he or she has in addition to that just punishment lost all chance at the career he or she may have hoped for and has embarked instead on a life of instability and frequent unemployment. It also helps us understand fully the consequences for public safety from an approach of retribution toward the offender leaving prison. The chances of achieving a turn away from crime are impaired by collateral consequences or at least many of them. Use of collateral consequences in many cases does not advance the long-term interest of society if those consequences so weigh down the ex-offender and his or her family that they are unable to lift themselves out of the hole into which the criminal offense put them.

In Chapter 3, I describe a different and, as I believe it to be, a better approach to sentencing than the punitive one that has been so influential over the course of recent decades. Underlying this discussion is this question—what can the sentencing judge do when framing a penalty in compliance with governing law to produce a sentence that will be more productive for society, public safety, and the offender and his or her family? Related to this, of course, is the issue of what can our legal system do to make penal laws fair, effective, but less draconian than they have been. How can we promote a reasonable approach to the matter of rehabilitation of offenders? It is not a wise answer to the real problem of crime to lock everyone up for as long as possible.

In this chapter I talk about alternatives and supplements. The former are forms of punishment that can be used in lieu of any imprisonment for some offenders, or in lieu of a sentence consisting entirely of imprisonment for other offenders. Examples are probation, diversion from the prison track to a treatment court, and supervised release. Here the offender is punished in ways that

protect public safety, but attention is given at the same time to the reclamation of the offender. A central element to the alternative sentence may be an obligation on the offender to take part in treatment, education, and so forth. The system looks not just at punishment now, but also at what might be done to induce the offender to turn away from crime definitively after the current sentence comes to an end, including providing the offender with the tools needed to make that turn.

Supplements are requirements of various sorts that the sentencing judge can impose or advocate that will help the offender to address weaknesses or deficits that may have contributed to his or her criminal activity and that may constitute an obstacle to reform in the future. Educational or job training programs in prison or during probation are examples. Programs of this sort have been provided in the past, but we need to do a better job in this area.

One of the sentencing reforms I advocate in Chapter 3 is the re-entry court. Courts of this sort have emerged in the past decade or so and have had success in helping offenders to re-integrate into society upon release from prison. This transition is critical to the offender's future and so to society's hopes for reductions in the rate of recidivism. Historically, with limited exceptions, the role of the court ended when the sentencing judge imposed the judgment of the court. It was thereafter up to corrections officials to handle the prisoner, supervise him or her, and provide whatever education or training might be available during the prisoner's term of incarceration. The parole board, not the sentencing judge, would decide when the offender would actually be released. After release, it would be up to a probation officer, typically greatly overworked, to supervise and assist the ex-offender make the transition to civilian society and its norms and rules. The sentencing court played no role in this transition. The re-entry court tries to improve on this dynamic.

The re-entry court is presided over by a judge, who, with the support of the defense and prosecution, the help of experts, and the judicious use of "carrots and sticks" (including, if necessary, an order returning the offender to prison or depriving him or her of a reduction in the sentence), attempts to help the offender make the transition. The court works with staff and the offender to provide treatment for drug problems, find employment, and meet the other difficult challenges of re-entry. The court's re-entry process may take a year or more, during which the judge is directly involved and deals in person with the offender.

I served as the presiding judge of the first re-entry court of the United States District Court for the Southern District of New York. That experience proved very enlightening and encouraging. I recount the lessons from that experience in Chapter 4.

Despite the strength of the case for an approach to penal practice that places greater emphasis upon rehabilitation and less on retribution, there are limitations upon what can be achieved now and probably for the near future. The resources

that are needed are not available and, in view of budgetary problems, are not likely to be so for some time. Therefore, choices have to be made. Resources have to be concentrated where they can be most effective. The sentencing judge needs to identify the offenders most likely to benefit from treatment programs and other forms of alternative sentence and who represent the best prospects for a definitive turn away from a life of crime upon release. Furthermore, apart from the question of resources, there are some offenders whose offenses are too serious, who are hardened or violent, who are poor or very poor prospects for reformation and rehabilitation. The court needs to be able to choose which offenders can and should be offered a chance at an alternative path toward rehabilitation without unreasonable risk to public safety.

The choice is not an easy one, but it is one where social science has something to offer. Over decades, social science has developed measurements of the risk of recidivism on the part of offenders. Some of these standards or tools have long been used by probation officers and corrections officials in assigning offenders within prisons and in other administrative contexts. It is my view that modern, fully tested, and validated risk assessment tools can help the sentencing judge to determine which offenders are likely to benefit from alternative measures to prison. The tools should not serve to determine the proper sentence for offenders, but rather to help the court decide which of the offenders who are otherwise destined for incarceration might be diverted from the normal prison path without unreasonable danger to the public. The tools can help the judge decide how best to use the scarce resources that are available to salvage the lives of those who are open to reclamation and to protect the public against crime in the future. In Chapter 5 I make this case.

The chapters that follow are not, of course, the last word on penal reform, nor do they purport to cover every inch of important ground. There is much area for public debate, and possibly legislative action. I do believe, however, that the ideas presented here can help in our country's struggle with the crisis of incarceration, as we seek ways to achieve public safety and punish criminal offenders but without excessive, even at times counterproductive, reliance upon imprisonment, as we strive more to rehabilitate offenders and reduce the impulses, tendencies, and incentives that contribute to recidivism on the part of offenders. One of our goals should surely be to make the sentencing of criminal defendants both more fair and more productive. I hope that what follows can contribute to our achieving this.