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Disinfecting the Criminal Legal System of Punitive Deterrence

Joseph Dole

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**DISINFECTING THE CRIMINAL LEGAL SYSTEM OF PUNITIVE
DETERRENCE**

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ABSTRACT

In order to truly deal with mass incarceration, it is necessary to deconstruct some of the myths it is built upon. One of the main ones being that excruciatingly long prison sentences are necessary to, or even effective in, deterring crime.

It is increasingly being recognized that the main driver of mass incarceration is not the imprisonment of people for "nonviolent" and drug crimes, but rather the over-sentencing of people for serious and violent crimes.² More people are coming around to the fact that we cannot address mass incarceration without addressing long-term sentences. For instance, Nazgol Ghandnoosh, Ph. D. and his colleagues note that the "growing 'lifer' population both illustrates and contributes to the persistence of mass incarceration,"³ and that "the United States cannot end mass incarceration as long as an exclusively punitive approach dominates for individuals convicted of serious and violent offenses."⁴

Moreover, as Marie Gottschalk points out, "people convicted of violent crimes accounted for almost two-thirds of the overall growth in state prisons from 1994 to 2006."⁵ Considering that over the past dozen years there were fewer incarcerations for drug offenses and other non-violent crimes, it follows that the percentage of people serving time for serious and violent crimes also continues to grow.

Mass incarceration is a mistake. Acknowledging that the main driver of mass incarceration is long sentences for violent and serious crimes and that the theory of deterrence greatly contributes to the criminal justice system's ability to

² Leigh Courtney et al., *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons*, The Urban Institute, 9 (July 2017); John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, 11 (2017); Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 167 (2015).

³ Nazgol Ghandnoosh, *Delaying a Second Chance: the Declining Prospects for Parole on Life Sentences*, SENT'G PROJECT 11 (Jan. 31, 2017), [Delaying-a-Second-Chance.pdf](https://www.sentencingproject.org/) (sentencingproject.org).

⁴ *Id.* at 11. See also Marc Mauer & David Cole, *How to Lock up Fewer People*, N.Y. TIMES, May 23, 2015, <https://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html>; John Pfaff, *For true penal reform, focus on the violent offenders*, WASH. POST, Jul. 26, 2015, https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html; *The moral failures of America's prison industrial complex*, ECONOMIST, Jul. 20, 2015, <https://www.economist.com/democracy-in-america/2015/07/20/the-moral-failures-of-americas-prison-industrial-complex>.

⁵ MARIE GOTTSCHALK, *No way out? life sentences and the politics of penal reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 237 (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012).

hand down these long sentences, then the need for corrective action becomes obvious. A fact that never gets mentioned, but makes the need for corrective action even more dire, is the fact that it is a myth that increasing prison sentences deter crime. Thus, on a daily basis people are being over-incarcerated based on a myth.

Society recognizes four justifications for imprisoning people: rehabilitation, retribution, incapacitation, and deterrence.⁶ Of these four, the three with the greatest impact upon our current system of mass incarceration are retribution, incapacitation, and deterrence. This paper mainly concerns the latter justification - deterrence.

⁶ Michelle Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000).

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INTRODUCTION - "PUNITIVE DETERRENCE"

The popular theory of deterrence - i.e., punitive deterrence - sounds logical. One would think that if you threaten someone with a severe enough punishment, it will deter him from committing a crime. Unfortunately, this is rarely ever the case. Nevertheless, this remains the rationale behind the United States' extraordinarily long prison sentences and the inhumane treatment of people in our prisons. The theory of deterrence is usually divided into two subcategories - specific deterrence and general deterrence.⁷ Daniel Nagin notes that the first deals with experiencing punishment while the second deals with the threat of punishment.⁸

Nagin explains that "specific deterrence is grounded in the idea that if the experience of imprisonment is sufficiently distasteful, some of the punished may conclude that it is an experience not to be repeated."⁹ Prisons have now largely become warehouses with few privileges.¹⁰ Specific deterrence theory has largely been shown to be ineffective, however, which is evidenced by the astronomical recidivism rates we see around the country.¹¹

⁷ Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANNU. REV. ECON. 83, 95 (2013).

⁸ *Id.*

⁹ *Id.* at 96.

¹⁰ Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 331 (2013). See also Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. PROBATION 35, 35-44 (1996); Shelley Johnson Listwan et al., *The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism*, 30 JUST. Q. 144, 144-68 (2013).

¹¹ See e.g., MARIEL ALPER ET AL., U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

Calling for the harsh treatment of people while in prison also helped usher out rehabilitation. Without being rehabilitated, and then both being treated poorly while in prison, and discriminated against once back in the job market, it's little wonder that people are not able to desist from crime upon release and that specific deterrence does not work.

Nor is general deterrence effective. In her book *Incarceration Nations*, Baz Dreisinger, citing "studies in probability theory and psychology" calls deterrence an "illusion."¹² In 2018, Craig Findley, Chairman of the Illinois Prisoner Review Board, reported to the Illinois' Judiciary Criminal Committee and Restorative Justice Committee that, in light of interviewing over 25,000 incarcerated men and women, he learned that "long sentences are not a deterrent to crime."¹³ Criminologist Walter S. DeKeseredy, similarly concluded that "capital punishment, long-term prison sentences and other harsh sanctions are not making US streets, homes, and intimate relationships safer. In fact, extreme harshness is a conservative social experiment that has clearly failed."¹⁴

The reason general deterrence, or more specifically, increasing sentencing lengths to scare people out of committing crime - what for our purposes here we'll lump together under the term "punitive deterrence" - is ineffective is mostly due

¹² BAZ DREISINGER, *INCARCERATION NATIONS: A JOURNEY TO JUSTICE IN PRISONS AROUND THE WORLD* 293 (2016).

¹³ Craig Findley, Chairman, Illinois Prison Review Board, Remarks at Subject Matter Only Hearing On Parole, (Nov. 8, 2018).

¹⁴ WALTER S. DEKESEREDY, *CONTEMPORARY CRIMINOLOGY* 43 (Routledge 2011).

to three important prerequisites that are usually absent. For punitive deterrence to work, first the person to be deterred must first have knowledge of the penalty; second, he or she must believe that they will be caught and face those consequences; and third, he or she must be a "rational actor."¹⁵

I. WHY PUNITIVE DETERRENCE DOESN'T WORK

A) *Ignorance of penalty*

Let's start by considering the defect of our first prerequisite - knowledge of possible sanctions for breaking the law. There is an oft-repeated maxim in this country that people are charged with knowing the laws. In reality, however, most people "are not familiar with relevant legal penalties."¹⁶ The maxim is only ever applied to those who break the law,¹⁷ and "penalties cannot act as deterrents since these are unknown until after a person has committed a crime or become[s] [incarcerated]."¹⁸

Hardly anyone other than prosecutors, lawyers, and judges are familiar with our criminal laws and sentencing statutes. This point was highlighted in 2019 at a debate on parole attended by 10% of the Illinois General Assembly inside Stateville Correctional Center. More than half of the legislators in attendance were unaware

¹⁵ See e.g., PAUL H. ROBINSON, Life without Parole Under Modern Theories of Punishment, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 140 (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1202-03 (2015).

¹⁶ Ghandnoosh et al., *supra* note 2, at 11.

¹⁷ In other words, judges won't excuse you for breaking the law if you didn't know that what you were doing was illegal.

¹⁸ PERCEPTION IN CRIMINOLOGY 74, 78 (Richard L. Henshel & Robert A. Silverman eds., 1975).

that Illinois abolished parole in 1978 and that people today cannot earn discretionary parole. They were also clueless as to the extent of the State's accountability laws and the fact that one in every seven people currently in Illinois prisons are sentenced to die there.¹⁹

Studies also show that while long sentences do not deter crime, the certainty of being caught does.²⁰ Thus, if a police officer is in the vicinity of where a crime is about to occur it may deter the would-be perpetrator. This is the aim behind "hot spots policing."²¹

People are also unaware of their chances of getting caught and successfully prosecuted for a crime. Although, that may be a good thing. If the certainty of being caught for murder can deter it, then what about the certainty of not being caught; would that encourage murder? If everyone in Chicago knew that they had a 74% chance of getting away with murder, what effect would that have?²²

¹⁹ Joseph Dole (author) gave a speech on prosecutorial bias prior to the debate which took place on March 15, 2018, and spoke with many of the legislators one-on-one thereafter.

²⁰ Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, 42 CRIME & JUST. 199, 207 (2013).

²¹ Nat'l Inst. of Just., *Five Things About Deterrence* (Jun. 6, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence#addenda>.

²² The Chicago Police Department's homicide clearance rate hovered around 26% before creative record keeping increased it to 53%. See Frank Main, *Writing Off More Murder Cases with No Arrests Boosted CPD's Big Turnaround in Homicide Clearances*, CHI. SUN -TIMES (Feb. 7, 2020, 7:38 PM), <https://chicago.suntimes.com/2020/2/7/21126939/chicago-police-department-homicide-clearance-improvement-turnaround-analysis-ccx>.

B) Lack of belief that they will be caught

Which brings us to the defect of our second prerequisite of punitive deterrence theory - the vast majority of people who commit a crime do not believe they will ever be caught and charged for it, let alone convicted and sentenced. Thus, they are not deterred by whatever the penalty may be because they do not believe they will ever have to pay that penalty.²³

C) People who commit crimes are rarely rational actors

Which brings us to the failure of our final prerequisite of punitive deterrence - the majority of people who commit crimes are not rational actors.²⁴ Related to the above prerequisites, in order for a severe sanction to deter someone from committing a crime, he or she must be able to rationally calculate that the risks of being penalized for breaking the law outweigh any benefit received.²⁵

Violent crimes of passion, such as many murders, assaults, batteries, etc., are often committed spontaneously by enraged people who are unable to stop and calculate consequences.²⁶ Similarly, drug addicts cannot control their craving for the drug, thus, any calculation is doomed to fail because no risk will outweigh the benefit of obtaining their "fix". These facts help to explain why "drug addiction,

²³ ROBINSON, *supra* note 14, at 140; Ghandnoosh, *supra* note 2, at 11.

²⁴ Ghandnoosh et al., *supra* note 2, at 11.

²⁵ ROBINSON, *supra* note, 14 at 140.

²⁶ ALEX THIO, ET AL., *DEVIANT BEHAVIOR* 82 (Pearson Education, Inc. 2013); STEVEN BARKAN & GEORGE J. BRYJAK, *FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW* 447 (Jones & Bartlett Learning 2011).

like murder, is relatively unaffected by the threat or imposition of punishment."²⁷

In fact, most people who commit crimes are mentally ill, under the influence of drugs or alcohol at the time and thus inebriated,²⁸ or are juveniles or young adults whose brains have yet to fully develop. In each case, they lack the full faculties to make rational decisions.

Being inebriated lowers one's inhibitions.²⁹ (i.e., impairs one's ability to rationally analyze consequences). Inebriation basically strips the person of the "brakes" that an adult's properly functioning brain possesses. Those brakes would normally allow someone to think rationally about the consequences of their actions and stop themselves from committing a crime or acting irresponsibly.

We now know that the brains of young people also lack proper functioning "braking systems" until their brain's prefrontal cortex fully matures.³⁰ Until that happens, young people rely on an area of the brain - the amygdala - that is ill-equipped for rationally analyzing risk, long-term consequences, etc.³¹

²⁷ William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, WIS. L. REV. 703, 708 (1967).

²⁸ William R. Kelly, *Why Punishment Doesn't Reduce Crime: Evidence Demonstrates Why Punishment Does Not Change Criminal Offending*, PSYCH. TODAY (Apr. 25, 2018), <https://www.psychologytoday.com/us/blog/crime-and-punishment/201804/why-punishment-doesnt-reduce-crime>.

²⁹ See, e.g., David P. Bryden & Sonja Lengnick, *Rape In The Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1350 (1997) ("Alcohol reduces men's inhibitions against violence, including sexual violence") (citing Charlene L. Muehlenhard & Melaney A. Linton, *Date Rape and Sexual Aggression in Dating Situations: Incidence and Risk Factors*, 34 J. COUNSELING PSYCH. 186, 187 (1987)).

³⁰ Dylan Raymond, *25 Is the New 18: Extending Juvenile Jurisdiction and Closing Its Exceptions*, 2023 UTAH L. REV. 727,731 (2023).

³¹ Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 60-61 (2007).

In 2005, in the case *Roper v. Simmons*, the United States Supreme Court received an extensive education in the brain maturation process and how it relates to young people's ability to weigh risks and consequences and think long-term. The Justices learned that cognitive abilities in young people are severely diminished, especially in emotionally charged situations.³²

Roper v. Simmons put the first chink in the armor of punitive deterrence theory in the courts. The Roper Court ruled the death penalty unconstitutional for juveniles because of this new understanding. The Court reasoned, *inter alia*, that “[h]ere [in regard to juveniles] however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”³³

In 2010, the Court expanded on this concept in *Graham v. Florida*, a case concerning the sentencing of juveniles to life without the possibility of parole (LWOP) for non-homicide crimes.³⁴ Kelsey B. Shust explains how "the Court further teased out [the reasoning of *Roper*] stating that young people's immaturity and impetuosity make them less likely to consider possible punishment when they make decisions, especially when that punishment [(LWOP)] is rarely

³² *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing Brief for Human Rights Committee of the Bar of England and Wales, et al. as *Amici Curiae* 10-11).

³³ *Id.* at 571.

³⁴ See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

imposed."³⁵ This is also especially true when sentencing ranges aren't taught in schools, and the average youth is clueless as to whether their state has the death penalty or LWOP, let alone what the penalty for individual crimes are.

The Court would again rule that deterrence is not a legitimate penological goal for juveniles in 2012 in the case of *Miller v. Alabama*,³⁶ and again in 2016 in *Montgomery v. Louisiana*.³⁷ Unfortunately, the myth of deterrence is so ingrained in our criminal legal system that lower court judges continue to increase sentences for juveniles to deter others. For instance, on September 27, 2016, in *United States v. Grant*,³⁸ after the case was sent back for resentencing under *Miller*,³⁹ the judge justified a *de facto* life sentence⁴⁰ by stating:

I try to decide what is an appropriate punishment under the circumstances taking into consideration ... what kind of sentence can I issue that is going to promote respect for the law, that is going to provide just punishment, that is going to provide deterrence not only to Mr. Grant when he comes out of jail, but also to others like him who may want to get involved in this kind of activity, and sentences that not only promote respect for the law, but also protect the public.⁴¹

³⁵ Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 694 (2014) (citing *Graham v. Florida*, 130 S. Ct. 2011, 2038-39 (2010)).

³⁶ *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

³⁷ *Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 733 (2016).

³⁸ See Transcript of Proceedings in District Court, *United States v. Grant*, 9 F.4th 186 (2021) (No. 16-3820).

³⁹ *United States v. Grant*, 887 F.3d 131, 135 (2018) (Due to Grant having been a juvenile at the time of the crime and sentenced to LWOP).

⁴⁰ *Id.* The Court sentenced Grant to 65 years, a sentence that is practically indistinguishable from a LWOP sentence as it is almost assured that Grant will not survive 65 years in prison in order to see release.

⁴¹ Brief of Defendant-Appellant Corey Grant and Appendix Volume 1 of 3 at 5, *United States v. Grant*, 887 F.3d 131 (3d Cir.), reh'g en banc granted, vacated, 905 F.3d 285 (3d Cir. 2018) (No. 16-3820), 2017 WL 2266122.

Therefore, while the U.S. Supreme Court has ruled out deterrence as a reason to incarcerate juveniles for life, many courts around the country are taking little heed to that fact, and its business as usual.

Moreover, while a few courts are beginning to recognize deterrence is a fallacy for juveniles, almost none are recognizing it is a fallacy in general. Instead, they are leaving it up to legislatures.⁴² This is especially troublesome when we consider that: A) legislatures have been driven by tough-on-crime rhetoric for decades; and B) the U.S. Supreme Court's reasoning in *Roper*, *Graham*, *Miller*, and *Montgomery* was based on neuroscience and social science that show that people's brains do not fully mature in the prefrontal cortex until around age twenty-five.⁴³ Thus, as Shust notes, "this logic is hardly limited to offenders under eighteen. The same characteristics that make those under eighteen less likely to consider possible punishment when they act can also be present in those aged eighteen to twenty-five."⁴⁴

"Nearly 40 percent of people serving the longest prison terms were incarcerated before age 25."⁴⁵ That's because 5.5% of all crimes are committed by juveniles seventeen and under,⁴⁶ and 19.5% are committed by eighteen to twenty-

⁴² See, e.g., *People v. Green-Hosey*, 2019 IL App (2d) 170110-U, ¶¶ 28, 61.

⁴³ Raymond, *supra* note 29, at 727-28; Zoe Jordan, *The Roper Extension: A California Perspective*, 71 HASTINGS L. J. 197, 207 (2019).

⁴⁴ Shust, *supra* note 34, at 694.

⁴⁵ Courtney et al., *supra* note 1, at 11.

⁴⁶ Charles Puzzanchera, Office of Juvenile Justice & Delinquency Prevention, *Trends in Youth Arrests for Violent Crimes*, at 2. (2022), <https://ojjdp.ojp.gov/publications/trends-in->

four year-olds.⁴⁷ Thus, we can see 25% of people committing crimes and 40% of people serving long sentences likely lacked the mental faculties to be "rational actors" who could have been deterred by long prison sentences. When you add in people who also fail the "rational actor" prerequisite - those with mental illness,⁴⁸ traumatic brain injuries,⁴⁹ and/or who were inebriated⁵⁰ during the crime - the percentage continues to grow to the point that the vast majority of people committing crimes are not "rational actors," making the theory of punitive deterrence a fairy tale.

When we consider how rare it is that the other two prerequisites will also be fulfilled,⁵¹ we realize how far-fetched an idea it is that handing out long sentences will deter crime.

II. CONFLATING DETERRENCE WITH INCAPACITATION

In response to the lack of evidence suggesting that harsh sentences deter crime, a common retort that proponents of deterrence theory make is: "well, it will deter them while they are in prison." This, however, conflates deterrence with incapacitation.⁵² Moreover, it too is largely a fallacy. Being in prison does not

youtharrests.pdf#:~:text=The%20number%20of%20violent%20crime%20arrests%20involving%20youth,arrests%20of%20youth%20outpaced%20the%20decline%20for%20adult.

⁴⁷ *Id.*

⁴⁸ Kelly, *supra* note 27. 60% "have a mental illness."

⁴⁹ *Id.* 50%-60% "have had at least one traumatic brain injury."

⁵⁰ *Id.* 80% "have a substance use disorder."

⁵¹ See ROBINSON, *supra* note 14, at 140.

⁵² Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 201 (2004).

prevent anyone from committing crime. It simply defines the location, relegating them to committing crimes within prison walls for the duration of their sentence. Lifers especially won't be deterred by long sentences. For people forced to remain in prison unto death, threatening them with "additional" prison time will have zero deterrent effect.

Rather than deter further crime, long sentences may actually increase crime. Even those convicted who serve long sentences and then are released may be forced to return to crime to survive economically. Upon release they will encounter employment discrimination due to being a "felon,"⁵³ will likely encounter age discrimination,⁵⁴ and will likely lack relevant skills or experience for the current job market.⁵⁵ The latter is especially true where prisons have lately become impediments to rehabilitation.

III. PUNITIVE DETERRENCE THEORY IS ACTUALLY COUNTERPRODUCTIVE

There are also generational effects. The more time people with children remain in prison, the longer they are away from their children. Without any parental supervision, support, or protection, the children's likelihood of committing crimes

⁵³ Katherine Beckett & Allison Goldberg, *The Effects of Imprisonment in a Time of Mass Incarceration*, 51 CRIME & JUS. 349, 360, 362-66 (2022).

⁵⁴ Howard Eglit, *Age Bias in the American Workplace - An Overview*, 3 J. INT'L AGING L. & POL'Y 99, 126 (2009).

⁵⁵ Beckett & Goldberg, *supra* note 52, at 361 (citing Keri Blakinger, *Some Prison Labor Programs Lose Money Even When Prisoners Work for Pennies*, MARSHALL PROJECT (Sept. 2, 2021, 4:00 AM).

and winding up in prison themselves increases significantly.⁵⁶ Long prison sentences, therefore, definitely are not deterring the children of people in prison from committing crimes. Instead, the longer sentences have the perverse effect of increasing the likelihood that those kids will commit crimes themselves.

Also, when sentences increase to the point that people are left with nothing to lose, it may actually encourage murder. William Tucker noted that "[t]hree-strikes-you're-out will only turn more victims of violent crime into murder victims. Dead men tell no tales."⁵⁷ This is true even for non-three-strikes situations. Neal Kumar Katyal gives the following example:

The rapist, who is determined to rape a particular woman and is not deterred by a high penalty for rape, may go out and commit other crimes. He may first rape the woman, then kill her, and finally assault unrelated others, because the cost of future criminal activity is negligible.⁵⁸

Thus, rather than deter crime, severe sanctions handed out in the name of deterrence can actually have the opposite effect.

IV. PUNITIVE DETERRENCE'S PERVASIVENESS IN SENTENCING

Punitive deterrence increases sentences through two compounding avenues - legislative and judicial. Around the country, politicians have sold tough-on-crime policies by promoting their alleged deterrent effect on would-be "criminals". This

⁵⁶ *A Nation of Jailbirds: Far Too Many Americans Are Behind Bars*, ECONOMIST (Apr. 2, 2009), <https://www.economist.com/united-states/2009/04/02/a-nation-of-jailbirds>.

⁵⁷ William Tucker, *Three Strikes and You're Dead*, AM. SPECTATOR 22, 26 (Mar. 1994).

⁵⁸ Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2394 (Aug. 1997).

has resulted in the passage of thousands of laws like "Three-Strikes", "Truth-In-Sentencing", "Habitual Criminal Acts", gun enhancements, etc.

Each of these legislative changes either increased sentencing ranges or required a person to spend a higher percentage of their sentence in prison prior to release. Often the changes resulted in people having to remain in prison for life. Legislators passed these laws with almost no opposition, consistently claiming that they would deter crime.⁵⁹

The judicial avenue, on the other hand, occurs at an individual's sentencing hearing. Some states allow judges to increase a person's sentence within those already expanded ranges if the judge believes the sentence will deter others from committing similar crimes. This is not a rare occurrence either. As Marc Mauer of The Sentencing Project notes "[o]n the day of sentencing, judges frequently tell a convicted defendant that they are being sentenced to 'send a message' that their criminal behavior will not be tolerated."⁶⁰

Thus, someone convicted of a crime can be twice penalized "to deter others" - first legislatively, then judicially - even though an increased sentence will not actually deter anyone else.

⁵⁹ MICHAEL TONRY, SENTENCING MATTERS 3 (Oxford Univ. Press 1996). ("Every state since 1980 has enacted laws mandating minimum prison sentences based on the premise that harsher penalties will reduce crimes").

⁶⁰ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 123 (2018).

V. ILLINOIS A CASE STUDY

To better understand how this compounding effect plays out in practice on an entire system, let's use Illinois as an example. In 1974, Illinois' prisons contained a total of 6,323 people.⁶¹ It also had a parole system where even those sentenced to "life" could be considered for release after 11 years and 3 months.⁶² The death penalty had been ruled unconstitutional two years before⁶³, so no one was facing execution at the time either.

Marc Mauer explains that thereafter "legislative bodies in some states reacted to this perceived gap in harsh sentencing by creating life sentences without the option of parole."⁶⁴ Two years later, the U.S. Supreme Court would reverse course and restore capital punishment, convinced that it was necessary to deter murder.⁶⁵ Illinois quickly reinstated the death penalty as a result.⁶⁶

However, as DeKeseredy and Schwartz noted in 1996, "the scientific community, including virtually all scientists working on the subject for the government, have concluded that there is no deterrent effect from executions."⁶⁷ In

⁶¹ Nichole Jerrick, *Addressing Illinois' Recidivism Rate: The Newly Reformed Texas Correctional System and the Need for Expansion to Illinois*, 52 UIC L. REV. 835, 836 (2019).

⁶² Gregory W. O'Reilly, *Truth-in-Sentencing: Illinois Adds Yet Another Layer of Reform to Its Complicated Code of Corrections*, 27 LOY. U. CHI. L.J. 985, 990 (1996).

⁶³ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶⁴ MARC MAUER, *The Growth and Politicization of Life Imprisonment*, in AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY 19 (2015).

⁶⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶⁶ Illinois reinstated the death penalty in 1977.

⁶⁷ WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, *CONTEMPORARY CRIMINOLOGY*, 172 (Wadsworth Publishing Co., 1996).

1978, and again in 2012, the National Research Council likewise, after reviewing all the available studies concluded there was no evidence that capital punishment has any deterrent effect.⁶⁸ Nonetheless, Illinois maintained its death penalty for nearly three decades before it was abolished due to the fact that there were more innocent people on death row than had been executed since reinstatement.⁶⁹

In 1978, the Illinois legislature passed Public Act 80-1099 which abolished the parole system, redefined life sentences to mean life without the possibility of parole (LWOP), and created the category of "habitual criminal" requiring a LWOP sentence for anyone convicted for a third or subsequent forcible offense.⁷⁰ Thereafter, anyone sentenced to serve time in prison received a day of goodtime for every day served, so they were only required to serve 50% of their prison sentence (or less if they received additional goodtime for working, going to school, etc.).⁷¹

Illinois pioneered the juvenile justice system in 1899 under the theory that

⁶⁸ DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES, NAT'L. ACAD. SCI. (Alfred Blumstein et al. eds., 1978); DETERRENCE AND THE DEATH PENALTY, NAT'L. ACAD. SCI. (Daniel S. Nagin and John V. Pepper eds., 2012).

⁶⁹ Emily S. Munro, *Globe Newspaper Co. v. Commonwealth: An Examination of the Media's "Right" to Retest Postconviction DNA Evidence*, 10 RICH. J.L. & TECH 1 (2003), citing *Illinois Suspends Death Penalty*, CNN, Jan. 31, 2000, <http://cnn.com/2000/US/01/31/illinois.executions.02/>. (Gov. Ryan, when putting a moratorium on the death penalty, is quoted as saying "We have now freed more people than we have put to death under our system - 13 people have been exonerated and 12 have been put to death."). Gov. Quinn would later repeal the death penalty statute in Public Act 96-1543 in 2011(725 ILCS 5/119-1(a)).

⁷⁰ Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3308 (codified at ILL. REV. STAT. ch. 38, § 1005-8-1(a)(2) (1983)).

⁷¹ David E. Olson et al., *The Impact of Illinois' Truth-In-Sentencing Law on Sentence Lengths, Time to Serve, and Disciplinary Incidents of Convicted Murderers and Sex Offenders*, ICJIA 3, 8 (2009), <https://archive.icjiaapi.cloud/files/icjia/criminal%20justice%20reform%20commission/pdf/Olson%20-%20Impact%20of%20TIS%20Report.pdf>.

juveniles should be treated less severely than adults because they are less culpable, and thus shouldn't be tried in adult courts.⁷² Nevertheless, by 1982, with the aid of rhetoric about "detering" juvenile crime and the demonization of juveniles as "superpredators," Illinois passed its first law that automatically transferred many juvenile defendants to adult criminal court. This law denied them the protections of the juvenile justice system, subjecting them to lengthier adult prison sentences.⁷³

The coming wave of superpredators turned out to be an even bigger myth than punitive deterrence theory.⁷⁴ Which, as noted earlier, is especially ineffective on youth who lack the capacity to properly consider consequences, etc. Studies also show that juvenile transfer laws not only fail to deter juveniles from committing crime,⁷⁵ but giving juveniles adult sentences and keeping them in prison longer is counterproductive. It results in higher recidivism rates than if they had remained in the juvenile justice system.⁷⁶ Illinois, however, continues to transfer juveniles to adult courts and hand down adult sentences.⁷⁷

Five years later, in 1987, again with the aid of deterrence rhetoric, the

⁷² ILL. COALITION FOR THE FAIR SENTENCING OF CHILDREN, CATEGORICALLY LESS CULPABLE: CHILDREN SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE IN ILLINOIS 31 (2008).

⁷³ *Id.* at 33.

⁷⁴ Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address 'Alternative Facts' in the Legislative Process*, 73 VAND. L. REV. 425, 441 (2020).

⁷⁵ See, e.g., Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent To Delinquency?* JUV. JUST. BULL. 8, Jun. 1, 2010, <https://www.ojp.gov/pdffiles1/ojdp/220595.pdf>

⁷⁶ JAMES GARBARINO, *LISTENING TO KILLERS: LESSONS LEARNED FROM MY 20 YEARS AS A PSYCHOLOGICAL EXPERT WITNESS IN MURDER CASES* 175-176 (2015); Maya Bell, *A Child, A Crime - An Adult Punishment*, Orlando Sentinel, (Oct. 21, 1999, 4:00 AM), <https://www.orlandosentinel.com/1999/10/21/a-child-a-crime-an-adult-punishment/>.

⁷⁷ 705 ILCS 405/5-130.

Illinois legislature increased the sentencing range for murder from twenty to forty years to twenty to sixty years.⁷⁸ Additionally, the range for extended terms (handed down for extenuating circumstances like when the murder is exceptionally brutal and heinous) was increased to 80-100 years.⁷⁹

In the mid-nineties, Illinois debated enacting its own Truth-In-Sentencing law. One of the arguments being made was that it would simplify the State's sentencing laws. Remember, a prerequisite of punitive deterrence theory is that the average person knows the penalty for committing a crime. Gregory O'Reilly joined the debate with a law journal article explaining how "Illinois' sentencing system, built up by the unsystematic accretion of sentencing policies and enhancements, has become so complicated and confusing that few lawyers - not to mention the public or the accused - can understand what specific legal consequences flow from specific criminal conduct."⁸⁰

O'Reilly went on to argue that, rather than simplify things, Truth-In-Sentencing would just add another layer of confusion.⁸¹ O'Reilly was correct. Unfortunately, few people listened, and Illinois continued to add layers of confusion to the criminal code. Each one increasing the amount of time people spend in prison.

⁷⁸ 2003 Statistical Presentation, Illinois Department of Corrections, August 30, 2004, p.126.

⁷⁹ *Id.*

⁸⁰ O'Reilly, *supra* note 61, at 1022.

⁸¹ *Id.*

Illinois passed its own Truth-In-Sentencing law shortly thereafter, requiring people to serve 85% to 100% of their sentences for violent crimes, as opposed to 50%.⁸² Illinois enacted TIS, in large part, to secure the federal funds dangled in front of states who passed such laws.⁸³ TIS was sold to the public by claims it would deter crime and incapacitate "criminals" for longer.⁸⁴

According to *Building a Safer Chicago*, between 2000 and 2016, Illinois "increased penalties for firearm possession six times, instituting new mandatory minimum sentences."⁸⁵ Each was done in the name of deterrence. This seemingly had little deterrent effect, however, as "arrests remained flat".⁸⁶ In both 2013 and 2018, the Illinois Appellate Court noted that the "legislature enacted the firearm enhancement statute" so that it "will deter the use of firearms in the commission of felonies".⁸⁷ However, a 2003 study on the effect of such enhancements in deterring

⁸² Illinois first passed TIS in 1995, but the manner in which the legislature did so violated the single subject rule of the Illinois Constitution. *See* *People v. Reedy*, 229 Ill. App. 3d 34, 36 (1998), and *People v. Reedy*, 186 Ill. 2d 1, 4 (1999). Thus, the legislature preemptively repassed it as stand-alone legislation in 1998.

⁸³ Nancy G. LaVigne et al., *A Portrait of Prisoner Reentry in Illinois*, Urb. Inst. Just. Pol'y Ctr. 1, 9 (2003).

⁸⁴ Cecilia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 449 (2012) (truth to victims); James E. Doyle, *Wisconsin Needs 'Truth In Sentencing'*, 20 WIS. BAR. CRIM. L. NEWS, 18 (1997) ("truth in sentencing also creates deterrence"); O'Reilly, *supra* note 61, at 986. (1996) (Incapacitation).

⁸⁵ *Building a Safer Chicago: Calling for a Comprehensive Plan*, NW. PRITZKER SCH. L. (Nov. 3, 2016), <https://www.law.northwestern.edu/legalclinic/cfjc/documents/Building%20a%20Safe%20Chicago%20Report.pdf>

⁸⁶ *Id.*

⁸⁷ *People v. Rodriguez*, 2018 IL App (1st) 141379-B ¶80 (citing *People v. Butler*, 2013 IL App (1st) 120923 ¶ 36)

crime found them to have no effect at all.⁸⁸

It is truly the rare politician who will admit the folly of our ways when those ways have been key to getting elected for so long. At that same subject matter only hearing on parole in Chicago, Illinois, House of Representative Rita Mayfield made the following remarks:

Well, I can tell you as a legislator what's happened in those eight years [since Illinois abolished the death penalty in 2010] 'cause I've been here, and what we've had is one enhancement after another. Longer and longer sentencing, we're taking these positions, we're going to be tough on crime, we're locking everybody up for life, and it's just not right. We're not really looking at what is best for the individual, what's best for the victims. Those sentence enhancements are mailers. That's what they boil down to is political mailers for individuals in certain areas to say I'm tough on crime.⁸⁹

These are just a few examples of how punitive deterrence theory has aided the Illinois legislature in enacting one law after another which results in extending sentencing ranges, for violent and serious crimes. Additionally, "detering crime" was a significant part of the sales pitch to enact the state's accountability and felony murder laws.⁹⁰

⁸⁸ Jens Ludwig & Philip J. Cook, *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE*, 251-86 (2003).

⁸⁹ Rita Mayfield, Ill. State Representative District 60, Remarks at Subject Matter Only Hearing On Parole (Nov. 8, 2018).

⁹⁰ *See e.g.*, *People v. Cooper*, 194 Ill. 2d 419, 427 (2000) ("accountability ... seeks to deter persons from intentionally aiding or encouraging the commission of offenses" quoting *People v. Dennis*, 181 Ill. 2d 87, 105 (1998); and *People v. Smith*, 2021 IL App (4th) 190050-U ¶ 35 (Jan. 11, 2012)) ("Felony murder seeks to deter persons from committing foreseeable felonies by holding them responsible for murder if a death results." quoting *People v. Jones*, 376 Ill. App. 3d 372, 387 (2007).

When all of these laws proved ineffective in deterring crime, however, there was never any reckoning, nor any reduction back to previous, lower sentencing ranges. Instead, the call constantly went out to continuously increase sentences under the guise that people weren't deterred because the newly increased sentences still weren't severe enough. DeKeseredy and Schwartz explain this idea stating:

One nice thing about claiming that the system is not harsh enough is that, no matter how harsh it becomes, there is no way of proving that it isn't harsh "enough." If getting harsher does not seem to have any important effect on crime, there is always room for people to argue that we need to get harsher still.⁹¹

In his book *Listening to Killers*, James Garbarino quotes Albert Einstein as saying: “[i]nsanity is doing the same thing over and over again and expecting different results.”⁹² We, the people of Illinois, must clearly be insane at this point.

When examining the judicial system, the Illinois legislature likewise authorized State judges to increase each individual sentence, by including deterrence as an allowable aggravating factor if they feel it will deter others from committing such crime. Illinois law requires that “[t]he following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence.”⁹³

All but one of the dozens of factors that the statute lists are based on the

⁹¹ DEKESEREDY & SCHWARTZ, *supra* note 66, at 268; *See also* DEKESEREDY *supra* note 15, at 43.

⁹² GARBARINO, *supra* note 75, at 175.

⁹³ 730 ILCS 5/5-5-3.2(a).

defendant's own actions or characteristics, the personal characteristics of the victim (being a child, elderly person, police officer, etc.), or the location of the crime (near a school, park, etc.). Moreover, all but one are based on fact. The outlier is factor 7, which allows a judge to increase a person's prison sentence if "the sentence is necessary to deter others from committing the same crime."⁹⁴ This allows the court to increase someone's sentence based on the court's own assumption of whether it will deter others.

The frequency in which Illinois' judges justify severe sentences with this aggravating factor cannot be overstated.⁹⁵ It is rare to find a case where a prosecutor does not argue for a severe sentence to deter crime and/or the judge does not claim one is necessary to deter crime. One would think that since any prison sentence is supposed to deter crime, and the sentencing ranges themselves had already been extended in the name of deterrence, increasing one's sentence again in the name of deterrence would constitute an unlawful double enhancement.⁹⁶ The courts have yet to rule in such manner, regardless of the fact that punitive deterrence is a myth.⁹⁷

⁹⁴ 730 ILCS 5/5-5-3.2(a)(7).

⁹⁵ See, e.g., *People v. Morris*, 2017 IL App (1st) 141117, ¶ 33 (2017) ("And the trial court believed that this [100-year) sentence will deter others"); *People v. Saulsberry*, No. 05 CF 2791 (August 6, 2009)(I think a [55-year) sentence is necessary to deter others").

⁹⁶ A double enhancement occurs when (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed or (2) the same factor is used twice to elevate the severity of the offense itself. *People v. Phelps*, 211 Ill.2d 1, 11-13 (2004).

⁹⁷ Lauren Terrell, *The Myth of Tough Sanctions and Crime Deterrence*. JUS. GAP (October 12, 2022, 8:36 AM), <https://www.thejusticegap.com/the-myth-of-tough-sanctions-and-crime-deterrence/> accessed November 11, 2023.

One would also think that using a myth as an aggravating factor in sentencing would violate one's constitutional right to due process. "A statute is unconstitutionally vague if the terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts."⁹⁸ Illinois aggravating factor number 7 seems to fit the bill, as it rests on the opinion of the judge as to whether they believe in the fallacy of punitive deterrence.

Just as it is rare to find a legislator who will speak the truth about deterrence, it is also rare to find a judge who will admit that deterrence is ineffective. Cook County Circuit Court Judge Leo E. Holt, Jr., however, pulled no punches for deterrence when he sentenced William Lang to 7 years for aggravated unlawful use of a weapon by a felon:

I don't understand what I or society gains by putting you in prison for possession of a weapon. If I thought it was going to deter you or anybody else, it might make sense. But I'm fully aware that what I do to you is going to be zero effect on anyone else out there carrying a weapon.⁹⁹

It is much more common to find judges who erroneously believe punitive deterrence work, like Cook County Circuit Court Judge Anna Helen Demacopolous, who said: "[t]he biggest factor in the Court's decision [to sentence 18-year-old Deshawn Branch to 40 years for attempted murder] is the deterrent

⁹⁸ People v. Pembrock, 62 Ill. 2d 317, 322 (1976).

⁹⁹ People. v. Lang, 366 Ill. App. 3d 588, 900 (2006).

factor."¹⁰⁰ According to the United States Sentencing Commission anything higher than 39.2 years is a *de facto* life sentence.¹⁰¹ When judges serving in the same county can possess such diametrically opposed beliefs regarding the efficacy of punitive deterrence theory, a defendant is left to the mercy of a judge's own opinion.

The courts have yet to rule that aggravating factor number 7 is unconstitutionally vague, however, what they have ruled, and unconscionably so, is that aggravating factor number 7 can be used to increase a sentence for even "nondeterrable" crimes such as involuntary manslaughter and second-degree murder.¹⁰²

So, what is the effect that all this misplaced faith in punitive deterrence theory is having on Illinois? For one, it greatly contributes to Illinois' system of mass incarceration. In 1974 Illinois had zero people required to die in prison, and only had 6,323 people in its entire Department of Corrections. In September 2018, Illinois had as many people who are sentenced to die in prison (5,664), as the entire prison population in the early 1970s (5,600),¹⁰³ and more than five times as many

¹⁰⁰ *People v. Branch*, 2018 IL App. (1st) 150026, ¶¶ 21, 43 (2018).

¹⁰¹ The U.S. Sentencing Commission defines the cut off for a *de facto* life sentence at 470 months. See Sarah W. Craun & Alyssa Purdy, *Life Sentences in the Federal System*, United States Sentencing Commission 16 (July 26, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Life.pdf.

¹⁰² *People v. Black*, 223 Ill.App.3d 630, 635 (2 Dist.1992).

¹⁰³ Illinois Department of Corrections, *Prisoner data set as of September 30, 2018*, ILL. DEP'T OF CORR., <https://idoc.illinois.gov/reportsandstatistics/prison-population-data-sets.html>. listed 1,594 prisoners in Illinois serving life sentences, 152 serving sentences over 100 years, and 3,918

people in prison (30,000).¹⁰⁴ Illinois also spent \$1.7 billion just to operate its prison system in 2022,¹⁰⁵ compared to around \$90 million in 1979,¹⁰⁶ and is currently draining funds away from much needed social services.

VI. THE INHUMANITY OF PUNITIVE DETERRENCE

What is never mentioned when arguing for more severe sentences to deter crime, is the inhumanity of the practice itself. Those in power are literally inflicting more punishment than someone deserves, or what is penologically justifiable, under the guise that it will prevent someone else from committing a crime. Thus, each person who has their prison sentence increased (and their life, as well as the lives of their family, increasingly destroyed) to attempt to deter others, is irrationally being held accountable for the potential future crimes of people he or she doesn't even know.¹⁰⁷ To increase the pain and suffering of one individual to coerce the behavior of others is morally repugnant.

Writing in *The Nation* magazine, Patricia Williams stated, "[i]t is manifestly barbarous that children who by definition are immature and unformed, should be tossed away for life, with no chance for rehabilitation or recognition of the

serving sentences of 40 to 100 years; BEN AUSTEN, CORRECTION: PAROLE, PRISON, AND THE POSSIBILITY OF CHANGE 37 (2023).

¹⁰⁴ Population as of March 2023 was 29,670. See *Illinois Department of Corrections Prisoner Data Set as of March 31, 2023*, ILL. DEP'T OF CORR., <https://idoc.illinois.gov/reportsandstatistics/prison-population-data-sets.html>.

¹⁰⁵ Grace Asiegbu & Adriana Martinez-Smilely, *Homecoming*, INJUSTICE WATCH (Feb. 13, 2023), <https://www.injusticewatch.org/news/2023/reentry-illinois-first-hand-solutions/#>.

¹⁰⁶ Symposium, *Alternatives to Current Sentencing and Traditional Parole*, 23 S. ILL. U. L.J. 319, 332 (1999).

¹⁰⁷ Kahal, *supra* note 57, at n.94 (citing IMMANUEL KANT, PHILOSOPHY OF LAW 195 (1796)).

possibility of change."¹⁰⁸ What is more barbarous is that it is often being done based on false ideologies that are inapplicable whether one is a child or adult.

Mauer notes both that "[t]he excessively lengthy incarceration of offenders - yes, even for violent crimes - is counterproductive, costly, and inhumane[,]" and that "[l]ife sentences ruin families and tear apart communities; they deprive the person of the chance to turn his or her life around."¹⁰⁹ This exemplifies state violence at its worst--the increased imprisonment and oppression of people for no true penological purpose.

If you are wondering how society can permit such an injustice to occur so regularly and on such a massive scale, the answer is easy - it can only occur due to the ostracization, and dehumanization of people convicted of crimes. Once people are reduced to the category of "other" anything goes. Society becomes completely indifferent to their plight, making injustices perpetrated upon them a given. Societal hatred of "criminals" facilitates the indifference needed to illogically increase the destruction of thousands of people's lives under the guise of protecting society.

The societal marginalization of people who commit crimes ensures two things. That it is much easier to use a fallacy to pass laws to increase the lengths of sentences, and much harder to pass ameliorative legislation to reduce sentence

¹⁰⁸ Patricia J. Williams, *Absolutely No Excuse*, THE NATION (Nov. 19, 2009), <https://www.thenation.com/article/archive/absolutely-no-excuse/>.

¹⁰⁹ Marc Mauer, *A 20-Year Maximum for Prison Sentences*, 39 DEMOCRACY J. (2016), <https://democracyjournal.org/magazine/39/a-20-year-maximum-for-prison-sentences/>.

lengths when we go too far.

The same year that *Roper v. Simmons* put the first judicial nick in punitive deterrence theory, John Irwin cogently wrote in his book *The Warehouse Prison*, stating "we must recognize that too much punishment does more harm than good. We should accept the principle of restraint and deliver enough punishment to accomplish the deterrence that is possible, but not so much that it backfires and degrades or corrupts our humanity."¹¹⁰

We aren't deterring any more crime today with more punitive sentences than we were in the 1970s when we had parole and good time was aplenty. We could easily return to 1970s levels of incarceration and still achieve the "deterrence that is possible" without over punishing people in a knowingly vain attempt to obtain the deterrence that we know is not possible.

Most people naturally age out of crime.¹¹¹ Others rehabilitate much faster and can be safely released before they would otherwise "age out" of crime. Once either occurs, any further incapacitation only increases retribution unnecessarily and thus corrupts our humanity.

VII. PREEMPTIVE DETERRENCE

The sad, and deadly, irony is that there are effective ways to deter crime. Unfortunately, we largely refuse to invest in them. They involve investing in youth

¹¹⁰ JOHN IRWIN, *THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS* 257 (2005).

¹¹¹ See Mauer, *supra* note 107.

mentoring, cognitive-behavioral programs, substance abuse treatment, mental health interventions, after school programs, education, trauma recovery, rehabilitation of incarcerated people, and reducing poverty, illiteracy, unemployment, and income inequality. Income inequality - is the greatest predictor of murder rates.¹¹² These are usually referred to as crime prevention strategies, but criminologists refer to such social programs as "preemptive deterrence."

Critical criminologists DeKeseredy and Schwartz explain that preemptive deterrence:

involves working in a neighborhood to try to prevent crime from happening, rather than coming in with a massive police presence after the fact. [Critical criminologists who identify as left realists] believe in "demarginalization" or moves to eliminate the problem of large numbers of young men who feel that they are not part of society and have nothing to lose by committing crime.¹¹³

We, as a society, shortsightedly put all of our eggs in the punitive basket. We spent decades reducing our investments in education and social programs, and largely abandoned the rehabilitative ideal in our prisons. Resources such as unemployment benefits and welfare were severely restricted and the people needing

¹¹² Maia Szalavitz, *Income Inequality's Most Disturbing Side Effect: Homicide*, SCI. AM. (Nov. 1, 2018), <https://www.scientificamerican.com/article/income-inequalitys-most-disturbing-side-effect-homicide/>.

¹¹³ DEKESEREDY & SCHWARTZ, *supra* note 66, at 249.

them are often deemed as “deadbeats” and “welfare queens.”¹¹⁴ Regarding the criminal legal system, tough-on-crime rhetoric and punitive deterrence theory ushered in programs like boot camps and meeting a “prisoner” where youth are screamed at, disrespected, and dehumanized. This was done under the theory that you can shock people out of their criminal ways if you treat them poorly enough to scare them “straight.”¹¹⁵ Education, addiction therapy, and vocational programs in prison were erroneously seen as ineffective.¹¹⁶

In reality, social programs reduce crime much more effectively than dehumanization and long prison sentences. In 1994, Irwin and Austin pointed out that:

Reducing crime means addressing those factors that are more directly related to crime. This means reducing teenage pregnancies, high school dropout rates, unemployment, drug abuse, and lack of meaningful job opportunities. Although many will differ in how to address these factors, the first step is to acknowledge that these forces have far more to do with reducing crime than escalating the use of imprisonment.¹¹⁷

¹¹⁴ Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 BOSTON COLL. J.L. & SOC. JUST. 233-265 (2014), <https://www.law.cuny.edu/wp-content/uploads/page-assets/faculty/pedagogy/ACammett-SSRN-id2457225-Deadbeat-Dads-Welfare-Queen.pdf>.

¹¹⁵ Anthony Petrosino et al., *Scared Straight and Other Juvenile Awareness Programs for Preventing Juvenile Delinquency*, 12 CRIME PREVENTION RSCH. REV. 18 (2014), <https://portal.cops.usdoj.gov/resourcecenter/tric/Publications/cops-p288-pub.pdf>.

¹¹⁶ See Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22, at 25-28, 48-50 (1974); Cullen, *supra* note 9, at 299, 326-30, 357.

¹¹⁷ JOHN IRWIN & JAMES AUSTIN, *IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE* (Belmont, CA: Wadsworth, 1994) as quoted in DEKESEREDY & SCHWARTZ, *supra* note 66, at 87.

Additionally, social programs are much more cost-effective and are void of any unintended crime-producing consequences. After reviewing several studies on intervening early in disadvantaged children's lives, Heckman and Masterov concluded that:

Indeed, if proven early intervention programs are adopted, schools will be more effective, firms will have better workers to employ and train, and the prison population will decline. At lower cost to society, bolstered families will produce better educated students, more trained workers and better citizens. Enriched environments reduce crime. Impoverished environments promote crime.¹¹⁸

They note that "a 1% increase in the high school graduation rate would yield \$1.8 billion dollars in social benefits in 2004. This increase would reduce the number of crimes by more than 94,000 each year."¹¹⁹

While studies on punitive deterrence show little to no effectiveness, preemptive deterrence has proven incredibly effective, even when implemented alongside misguided punitive deterrence measures. A study of two different strategies - one with preemptive measures, one without - demonstrates this clearly. In 2018, Edward K. Chung looked at the two models of Project Safe

¹¹⁸ James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. AGRI. ECON. 446, 448 (2007),

https://jenni.uchicago.edu/papers/Heckman_Masterov_RAE_2007_v29_n3.pdf

¹¹⁹ *Id.* at 454-60 (citing Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155-189 (2004)).

Neighborhoods.¹²⁰

One model, Project Exile, focused exclusively on trying to deter crime by scaring the target population "straight" through media and billboards informing them that prison sentences would be severely increased for people convicted of gun crimes; and then carrying out that threat in court. The other model, the Boston Gun Project, used what they called "focused deterrence". While it also involved a "scared straight" element, it additionally offered the target population social services, job training, and counseling to assist them in desisting from committing crime.

Chung notes that the first model claimed to have reduced homicides by 16-22%,¹²¹ but that this conclusion was highly skeptical. He quotes Stephen Rafael and Jens Ludwig as concluding that "the reduction in Richmond's gun homicide rates surrounding the implementation of Project Exile was not unusual and that almost all of the observed decrease probably would have occurred even in the absence of the program."¹²² The skepticism is also supported by numerous studies that show that "scared straight" programs, shock incarceration, and intensive supervision programs are ineffective in deterring crime.¹²³

¹²⁰ Edward K. Chung, *Project Safe Neighborhoods: A Targeted and Comprehensive Approach*, 30 FED. SENT'G REP. 192 (2018).

¹²¹ *Id.* at 193.

¹²² *Id.* (quoting Steven Rafael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE*, 251-286 (Jens Ludwig, S. Phillip, J. Cook, Eds. 2003)).

¹²³ Cullen, *supra* note 9, at 299-376 (citing MARK LIPSEY & DAVID B. WILSON, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in *SERIOUS & VIOLENT*

On the other hand, results from the Boston Gun Project, with its preemptive deterrence characteristics, were significant. It saw Boston's youth homicide rate drop by 63%.¹²⁴ James Garbarino notes similar results in Chicago where "a program that invested in jobs, monitoring, and anger management programs for youths identified as high risk for becoming killers, resulted in a 43 percent reduction in the number of shootings and a 77 percent drop in the number of assaults."¹²⁵

Despite these facts, the plan of the U.S. Department of Justice under the Trump Administration illogically focused on expanding the ineffective rather than the effective model; pushing punitive rather than preemptive deterrence.¹²⁶

If we truly wish to reduce crime, we should be pursuing policies that are effective in doing so. Instead, we pursue policies that promote a fallacy – punitive deterrence. This ensures not only that we won't reduce crime, but that we'll have crime occurring that could have been prevented. As Marc Mauer notes, "given that

JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 313, 314 (Rolf Loeber & David P. Farrington eds., 1998); FRANCIS T. CULLEN ET AL., *Control in the Community: The Limits of Reform?* in CHOOSING CORRECTIONAL INTERVENTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY 69-116 (Alan T. Harland, ed., 1996); FRANCIS T. CULLEN ET AL., *Dangerous Liaison? RATIONAL CHOICE THEORY AS THE BASIS FOR CORRECTIONAL INTERVENTION*, in RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGE (Alex R. Piquero & Stephen G. Tibbets eds., 2006); DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS* 333 (2006). D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (4th Ed. 2006).

¹²⁴ See Chung, *supra* note 119.

¹²⁵ GARBARINO, *supra* note 75, at 245.

¹²⁶ See Chung, *supra* note 119, at n.2 (citing Press Release, U.S. Dept. of Justice, *Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce the Rising Tide of Violent Crime* (Oct. 5, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other>).

public-safety resources are finite, incarcerating aging prisoners inevitably diverts resources from preschool programs, substance abuse treatments, and health interventions that all produce demonstrated and substantial crime-reduction benefits."¹²⁷

CONCLUSION

The bottom line is that long prison sentences, especially life sentences, don't deter crime.¹²⁸ Moreover, as we have seen, punitive deterrence (which does not prevent crime) lives on, while preemptive deterrence (which does deter crime) remains largely ignored. This dichotomy not only ignores logic but helps to prop up mass incarceration. Moreover, these excessive sentences unnecessarily increase the suffering of millions of people in our prisons as well as their family members who remain in society.

For all of the above reasons, punitive deterrence should no longer be considered a legitimate penological justification to increase prison sentences. It should be considered an improper sentencing factor, because it is based on unreliable evidence and is sheer speculation which has been largely disproven. Its meaning rests on the whims of the trier of fact in violation of people's due process

¹²⁷ Marc Mauer, *supra* note 108.

¹²⁸ Pfaff, *supra* note 1, at 190; James Kilgore, *THE LONG-TERM: RESISTING LIFE SENTENCES: WORKING TOWARD FREEDOM* 99 (Alice Kim, et al. eds. Haymarket Books, 2018); Marc Mauer, *supra* note 59, at 123-24; NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES, EXPLORING CAUSES AND CONSEQUENCES* 68 (Jeremy Travis et al. eds., 2014).

rights. Moreover, since there is no way to measure the deterrent effect on others, it is easily abused by judges to increase sentences.

Abbie Smith notes that

"[o]ur system of justice emphasizes proof, not truth, because of the value we place on individual liberty and our abiding skepticism of state power. Convictions are wrongful even if the convicted person is guilty when there is demonstrable unfairness. Imprisonment is wrongful if the person is serving a sentence disproportionate to the circumstances of the crime or who the person is or has become."¹²⁹

Virtually everyone currently serving time in prison for serious and/or violent crimes are therefore wrongfully imprisoned for a portion of their sentence, because had we not increased the sentencing ranges, abolished parole, etc., those sentences would have been far shorter and their ability to obtain early release would have been much greater.

Society's erroneous confidence in the myth of punitive deterrence has infested our criminal legal system for many decades. Therefore, it will take a plethora of corrective measures to purge it of deterrence's corrosive influence. These include, but are not limited to, all of the following:

- First, bar prosecutors from arguing that a court should increase a

¹²⁹ Steve Horn, *Conviction Integrity Units, Innocence Commissions Tackle Wrongful Convictions, Prosecutorial Misconduct*, CRIM. LEGAL NEWS (Oct. 15, 2018), <https://www.criminallegalnews.org/news/2018/oct/25/conviction-integrity-units-innocence-commissions-tackle-wrongful-convictions-prosecutorial-misconduct/>.

person's prison sentence to deter other people from committing similar crimes.

- Second, prohibit judges from increasing a person's prison sentence under the guise that it will deter others from committing similar crimes and repeal all state and federal statutes that allow deterrence to be used as an aggravating factor.
- Third, enact retroactive state and federal legislation that provides a new sentencing hearing for anyone whose prison sentence was increased by the court using deterrence as a factor.
- Fourth, establish state and federal boards made up of scientific advisers and criminologists that have the statutory authority to rule that a punitive law is based on a fallacy (e.g., that punitive deterrence works, or that people can be deemed permanently incorrigible at the time they commit their crimes) which is positively disproven by new scientific findings. When such a board makes such a determination, the legislature, by law, would then have no more than one year from that date to amend or repeal it. If the law is ruled to be based on a fallacy any corrective measure would be applied retroactively. Also, if the legislature fails to repeal or amend such fallacious law within one year it would become *void ab initio*, and the courts would be required to consider it as such.

- Fifth, create a legislative committee in each state and the federal government to immediately begin work on passing retroactive ameliorative laws to reduce sentencing ranges for all serious and violent crimes to cure our sentencing laws of the fallacy of punitive deterrence theory. These would include not only reducing sentencing ranges for all violent and serious classes of felonies, but also reduce or repeal extended terms, enhancements, Three-Strikes, Habitual Criminal Acts, Truth-In-Sentencing percentages, etc. It would also include enacting fair and inclusive parole systems in each state as a safety valve.
- Finally, support true preemptive deterrence strategies. In other words, fully fund programs that prevent crime, including ensuring free college and trade school tuition for all, and rehabilitation programs in prisons. (These can be accomplished, in part, through "justice reinvestment" of the billions of dollars currently wasted on mass incarceration.)

The above measures should be implemented with all haste, as any delay will only increase: a) unnecessary suffering; b) the waste of limited resources; and c) the number of crimes that could have been prevented through preemptive deterrence measures. As Peter Wagner of the Prison Policy Initiative noted, "[m]ass incarceration grew at breakneck speed, year after year. Our reforms need to be

equally ambitious."¹³⁰

It is morally and ethically imperative that we act now to mitigate the devastating effect the punitive deterrence theory is having on people's lives. The longer we wait to properly reflect these findings in our sentencing laws, the more serious the consequences for over-sentenced citizens.

¹³⁰ Peter Wagner, *Incremental declines can't erase mass incarceration Prison Policy Initiative* (Jun. 5, 2018), <https://www.prisonpolicy.org/blog/2018/06/05/annualchanges/>.