The Social Benefits of Confining Habitual Criminals

by Kent Scheidegger & Michael Rushford
Criminal Justice Legal Foundation

The short history of American criminal justice policy can be compared to a series of mood swings based largely upon the crime rate and to a lesser extent on the political and cultural fashion of the time. The cyclical nature of rising and dropping crime rates appears to correspond to the level of public and political resolve to aggressively capture and incapacitate criminal offenders. In periods when crime rates and public concern about crime have been relatively low, the premium on aggressive law enforcement appears to diminish, while programs attempting to socialize rather than punish offenders enjoy popularity in political and academic circles. Later, as crime rates and public concern about crime increase, such increases are accompanied by political pressure for a return to aggressive law enforcement and the incapacitation of criminals.

The simple truth is that imprisonment works. Locking up more criminals for longer periods reduces the level of crime. The benefits of doing so far offset the costs.

I. THE CURRENT CYCLE

The national reduction in crime over the past eight years (1990-1998)[1] is rooted in a crime policy cycle which began in the mid-1970s as the public responded to a doubling of the rate of serious crimes between 1965 and 1975.[2] The initial indicators in California, which played a leading role in this cycle, included a ballot initiative to reinstate capital punishment in 1972,[3] the Legislature's adoption of the "Use a Gun, Go to Prison" law in 1975,[4] the override of the Governor's veto of another death penalty law in 1977,[5] and the adoption of strict sentencing increases for habitual criminals as part of the "Victims' Bill of Rights" initiative in 1982.[6]

The sentence increases in the 1982 initiative represented a major statewide policy shift toward lengthened incarceration of habitual felons. In accordance with the new law, a California judge could sentence a convicted felon to an additional five years in prison for each prior felony conviction. A 1995 study led by Berkeley law professor Franklin Zimring, a well-known opponent of tough sentencing, credited increased incarceration with a marked drop in burglary and larceny crimes between 1980 and 1991, but found the evidence more ambiguous for violent offenses.[7]

This ambiguity may be explained, at least in part, by a statistical anomaly the Zimring group appears to have overlooked. In 1986, right in the middle of the study period, a change in the law on reporting domestic violence[8] caused a dramatic jump in the number of aggravated assaults reported.[9] The Zimring study's conclusions on assault are thus suspect. For robbery, the one method in the study with the strongest facial validity (*i.e.*, the one that does not depend on dubious year-to-year projection methods) shows a strong negative correlation between increases in imprisonment and robbery rates.[10] That leaves only homicide and rape with credible data showing no increase in

incapacitation.[11] But these offenses were severely punished even at the beginning of the study period, so a sentence increase would be expected to have less of an effect.[12] Another possible explanation is that the study's premise that there were no "major social dislocation or changes" in the study period[13] is partially false. The "crack epidemic" of the late 1980s is widely believed to have caused a temporary bump in the rates of homicide and robbery.[14] The most credible portions of this study are consistent with the view that imprisonment is effective in reducing crime.

In the early 1990s several states began to adopt sentence increases for habitual criminals. Washington state's adoption of Initiative 593 in November of 1993,[15] which mandated life in prison without parole upon conviction of a third violent felony, set a standard duplicated in some form by several other states. California's "Three Strikes and You're Out" law (Three Strikes) modified this approach by providing increased sentences for all repeat felons and a top term of 25 years to life for those convicted of any felony who had two prior convictions for violent or serious felonies.[16] While California's earlier sentencing and procedural reforms corresponded with a 10 percent reduction in the crime rate between 1991 and 1994,[17] after adoption of the Three Strikes in 1994 the crime rate plummeted over 21 percent during the next 3 years.[18]

The political debate over adoption of the Three Strikes and the "Victims' Bill of Rights" initiative 12 years earlier included predictions that the prison population would rise at an extraordinary rate requiring huge outlays of funds for prisons at the expense of "education for our children"[19] and other funding needed to address the "root causes of crime."[20] Critics argued that such funds would be better spent addressing the "root causes of crime."   At the beginning of the current decade, the public was also warned that the influx of crime-prone young male offspring of the baby boom generation would bring an increase in crime rates.[21]

Neither of these predictions has come true. The tougher sentencing policies have increased the rate of adults sent to prison but not at the alarming levels predicted. In 1981, before the "Victims' Bill of Rights" was adopted, California kept 114 persons per 100,000 population in state prison. Six years later, as the sentencing law took effect, the rate rose to 231. Three years following adoption of the Three Strikes (1997) the rate was 475.[22] During the 15-year period between 1982 and 1997, as the state more than tripled its prison commitment rate with a focus on incarcerating habitual felons,[23] the number of California victims of serious crime dropped from 4,777.1 per 100,000 in 1982 to 2,381.4 per 100,000 in 1997, less than half the previous figure.[24] Over this same period, state revenues for K-12 education, measured in inflation-adjusted dollars per pupil, did not shrink as predicted, but grew.[25] The increase of young males in the population may well have contributed to the growth in the rate of incarceration, especially over the past 7 years, but it appears that the correct criminal justice policies were in place to prevent the predicted rise in crime.

II. COMMON SENSE AND EMPIRICAL EVIDENCE

The idea that increased incarceration of criminals will reduce the rate of crime has two bases in common sense. First, incentives matter. When the incentives to engage in or refrain from a particular behavior change, the number of people who choose to engage in that behavior changes. This principle is the basis of much of behavioral psychology and all of economics. In criminology, this effect is called deterrence.[26] Second, the crime rate is determined by the number of criminals,

not by the availability of victims, and removing a criminal from the street to prison prevents him from committing crimes against the general public.[27] Reducing crime by direct restraint is called incapacitation.

The anti-incarceration hypothesis that neither effect is significant, *i.e.*, that prison neither deters nor incapacitates, is extremely difficult to swallow. There will always be some people who cannot be deterred because they act without thinking. There will always be some who do not need to be deterred because their character and conscience would prevent them from committing crimes even if they could do so with impunity. Between the wild beasts and the saints, though, there will always be a large segment of the population that refrains from crime out of fear of the consequences, *i.e.*, that is deterrable, and the size of that segment naturally depends on the severity of the consequences. For incapacitation, the often-heard notion that if we incarcerate one criminal another will take his place[28] assumes that there are a fixed number of places. This assumption makes no sense. As high as the rates of burglary and robbery are, there are still far more targets than crimes each year.[29]

The anti-incarceration hypothesis is so strongly contrary to basic principles that it would take powerful empirical evidence to support it. In fact, there is substantial empirical reason to believe that imprisonment works.

For an initial, admittedly simplistic overview, Figure 1 plots incarceration versus crime. The solid line represents the FBI crime index per 100,000 population.[30] The dotted line represents prisoners in custody per 1,000 index crimes.[31] As imprisonment fell sharply in the 1960s, the crime rate more than doubled. As imprisonment remained low in the 1970s, the crime rate continued its rise. As imprisonment rose in the 1980s, the crime rate fluctuated, dropping in the early part of the decade then rising during the crack epidemic of 1985-1990. Finally, as imprisonment rose sharply in the 1990s, the crime rate went steadily down, although the rate still remains far above where it was in 1960.

Figure 1.
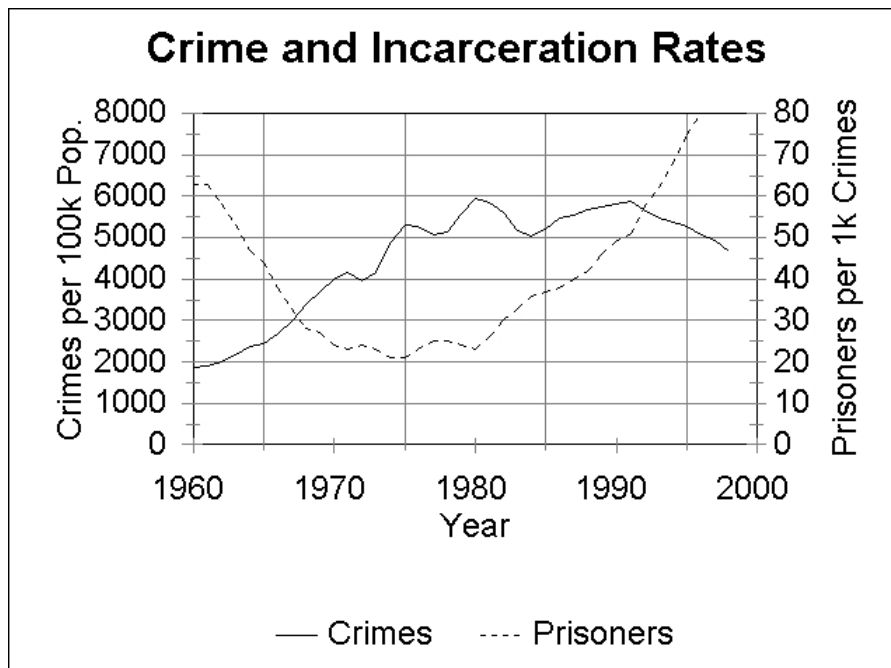
These time-line data provide an indication, but not proof. There is a possibility that other changes occurring in society could account for the crime rate changes. The claim is often made, for example, that the sharp increase in crime in the 1960s was due primarily, if not entirely, to the young males of the "baby boom" reaching their peak crime-prone years.[32] There can be no doubt that punishment is only one of many factors affecting crime rates. The simple time-line data need to be confirmed by other methods that control, at least partially, for these other variables.

The Bureau of Justice Statistics recently published an interesting comparison of American and English crime statistics.[33] Comparing trends in the United States with those of another country with a similar heritage and government and with its own postwar "baby boom" shores up the conclusions from the simple time-line data. The study shows that the risk of criminal punishment has been rising in the United States but falling in England.[34] Crime rates have risen in England but fallen in the United States.[35] Rates of robbery, assault, burglary, and auto theft are now higher in England than in the United States.[36]

A more sophisticated cross-jurisdictional comparison was done by University of Chicago economist Steven Levitt.[37] Levitt grappled with the problem of separating cause from effect in the connection between crime rates and incarceration rates. "Increased incarceration is likely to reduce the amount of crime, but there is also little question that increases in crime will translate into larger prison populations."[38] This creates a measurement problem called "simultaneity bias."[39] To control this effect, Levitt compared states where statewide prison overcrowding litigation had capped the use of incarceration with states not subject to such caps.

Levitt found that an adverse decision in prison overcrowding litigation slowed the growth of the prison population by 13.7-19.7 percent. This caused an increase in violent crime of 7.9-8.3 percent, and an increase in property crime of 5.7-6.2 percent.[40] Applying the rates derived from this study to the 272 percent increase in per capita incarceration in the United States from 1971 to 1993, Levitt concluded that violent crime would be 70 percent higher and property crime would be 50 percent higher without that increase.[41] Thus, in 1993 *alone*, over 1.3 million people were spared from aggravated assault, robbery, rape, and murder by the increase in incarceration.[42]

III. COSTS AND BENEFITS

Is the benefit of reducing crime through tough sentencing worth the cost? The answer, we believe, is quite clearly yes. In 1994, during the debate over Three Strikes, RAND Corporation produced a study predicting a 22-34 percent reduction in crime at a cost of $4.5-6.5 billion.[43] The law appears to have a much lower cost than predicted.

RAND's cost figures were based on prison population projections showing, for example, about 250,000 prisoners by 1999 under Three Strikes, compared with about 120,000 under prior law.[44] The actual prison population at present is 159,706, closer to RAND's "prior law" figure than its Three Strikes figure.[45] In part, the lower cost is the result of court decisions implementing Three Strikes less severely than RAND anticipated.[46] It also appears likely, though, that tougher sentencing is simply more effective than anticipated at bringing down the crime rate and thus reducing the number

of repeat felons who need to be imprisoned. RAND's projections were based on an assumption of zero deterrent effect,[47] a highly doubtful assumption.

Levitt estimated the social benefit of reduced crime, in 1992 dollars, of $53,900 per prisoner per year.[48] Compared to an incarceration cost of $20,758, even in 1999 dollars,[49] this is a "bargain" in purely dollar terms. But the cost of crime, and the benefit of preventing it, cannot really be reduced to dollars. Murder, rape, and household burglary inflict injuries beyond monetary compensation.[50]

Opponents of strong sentencing call for spending the dollars instead on government programs to address "root causes."[51] The simple answer is that there is no consensus on what the root causes are or that government spending can do much about them. Indeed, there is a substantial body of opinion that Great Society programs that were supposed to be the answer are instead a major part of the problem.[52]

Tough sentencing is effective and economically efficient. We can and should investigate crime prevention and operate pilot programs to find out what works on the front end of criminal careers. We should not, however, turn career criminals loose on the streets to prey upon innocent people.

NOTES

1. *See* Figure 1 and notes 29 & 30, *infra*, and accompanying text.

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 261 (Kathleen Maguire & Ann L. Pastore eds., 1998) (FBI Crime Index was 2,449.0 in 1965, and 5,298.5 in 1975).

3. CAL. CONST. art. I, § 27; Proposition 17, 1972 General Election.

4. CAL. PENAL CODE § 1203.06.

5. 1977 Cal. Stat. ch. 316, at 1255-1266, *amending* CAL. PENAL CODE §§ 190-190.3 and *enacting* CAL. PENAL CODE §§ 190.4-190.6.

6. CAL. PENAL CODE § 667, subd. (a).

7. FRANKLIN E. ZIMRING ET AL., 7 C.P.S. BRIEF NO. 10, ESTIMATING THE EFFECT OF INCREASED INCARCERATION ON CRIME IN CALIFORNIA, 11 (Cal. Policy Seminar July 1995).

8. *See* CAL. PENAL CODE § 13730 (requiring, by Jan. 1, 1986, recording of all calls, written incident report, and monthly reports).

9. BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES, CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 1980-1989, at 12 (1990). The National Crime Survey, which is not affected by reporting rates, showed a decrease in aggravated assaults nationwide the same year. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-88 TRENDS 31 (1991).

10. ZIMRING, *supra* note 7, at 8, Table 6 (r = -0.66).

11. *Id.*

12.	For example, a five-year enhancement for a prior felony conviction under the Victims' Bill of Rights would be expected to have a greater impact on a burglar whose base term is four years, *see* CAL. PENAL CODE § 461(1) (Deering 1999), than it would on a murderer who would otherwise be sentenced to 25-to-life, *see* CAL. PENAL CODE § 190(a) (Deering 1999).

13.	ZIMRING, *supra* note 7, at 1.

14.	*See*, *e.g.*, Fox Butterfield, *Decline of Violent Crimes Is Linked to Crack Market*, N.Y. TIMES, Dec. 28, 1998, at A18.

15.	1994 Wash. Laws, ch. 1 § 1. *See* WASH. REV. CODE §§ 9.94A.120(4), 9.94A.392.

16.	CAL. PENAL CODE § 667(e)(2)(A)(ii) (Deering 1999).

17.	CRIMINAL JUSTICE STATISTICS CENTER, CAL. DEP'T OF JUSTICE, CALIFORNIA CRIMINAL JUSTICE PROFILE 1998, Table 1. (FBI Crime Index per 100,000 population in California was 6,776.6 in 1991 and 6,094.8 in 1994).

18.	*Id*. (4,807.6 in 1997).

19.	Ballot Pamp., Gen. Elec. (Nov. 18, 1994), argument against Proposition 184, p. 37 (Mark Klaas, Terrence Starr, Mary Bergan).

20.	PETER W. GREENWOOD, ET AL., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW 32-34 (1994); Paul Feldman, *'3 Strikes' Should Spare Youths, Marchers Say*, L.A. TIMES, Aug. 4, 1994, at B3.

21.	Demographic studies predicted the fraction of young men (ages 10-24) in California to rise from 1 in 8 in 1995 to 1 in 7.5 in 2000. "We expect the highest crime rates in the year 2000 . . . ." Candace McCoy, *From Sociological Trends of 1992 to the Criminal Courts of 2020*, 66 S. CAL. L. REV. 1967, 1975 (1993). A very abrupt reversal of trends would be required for that prediction to come true.

22.	SOURCEBOOK, *supra* note 2, at 491.

23.	*Id*.

24.	BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES, CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 1982, at 7 (1983); CRIMINAL JUSTICE STATISTICS CENTER, CAL. DEP'T OF JUSTICE, CALIFORNIA CRIMINAL JUSTICE PROFILE 1997, at 5 (1999).

25.	In fiscal year 1982-83, California school districts had revenues of $11,379,419,943. CAL. STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING SCHOOL DISTRICTS AND COMMUNITY COLLEGE DISTRICTS OF CALIFORNIA, FISCAL YEAR 1982-1983 xii. Average daily attendance was 4,170,237, *id*., at xiii, yielding $2729/pupil. Fourteen years later, school district revenue was $33,288,819,000 and average daily attendance was 5,458,537, CAL. STATE CONTROLLER, SCHOOL DISTRICTS ANNUAL REPORT, FISCAL YEAR 1996-97, at v (1998), or $6098/pupil. The Consumer Price Index for the beginning of each fiscal year (July) was 97.5 for 1982 and 157.0 for 1996. Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (Aug. 17, 1999) <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt>. Adjusting the 1996 number to 1982 dollars yields $3787/pupil, a 39% increase in inflation-adjusted, per-pupil revenue over 1982.

26.	*See*, *e.g.*, 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §1.5(a)(4), at 33-34 (1986).

27.	*See* JAMES Q. WILSON, THINKING ABOUT CRIME 145-146 (2d ed. 1983). There are, of course, many crimes committed within prison. Even so, the vast majority of people are protected from those criminals safely locked away.

28.   *See*, *e.g.*, ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 54 (1975) ("by and large crime rates will be independent of incapacitation . . . of any number of easily replaceable offenders").

29.   For example, in 1993 there were 60 residential burglaries per 1,000 households, LISA BASTIAN, BUREAU OF JUSTICE STATISTICS, NCJ-151658, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1993, at 2 (1995), so 940 residences per 1,000 were not burglarized. *See* WILSON, *supra* note 27, at 146. The argument does have facial validity for consensual crimes with a market, such as drug dealing and prostitution, but not for crimes against specific, unwilling victims, such as burglary or robbery.

30.   SOURCEBOOK, *supra* note 2, at 261 (1960-1996 data); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1997, at 5 (1998) (1997 data). The 1998 figure is from preliminary data indicating the percentage drop from 1997. *See* Federal Bureau of Investigation, Preliminary Statistics 1998 Press Release (May 16, 1999) <http://www.fbi.gov/pressrm/pressrel/prls4-98.htm>.

31.   SOURCEBOOK, *supra* note 2, at 502.

32.   *See*, *e.g.*, Ted Gest, *A crime rise that stumps the experts*, U.S. NEWS & WORLD REPORT, May 5, 1986, at 24.

33.   BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME AND JUSTICE IN THE UNITED STATES AND IN ENGLAND AND WALES 1981-96 (Patrick A. Langan & David P. Farrington eds., 1998).

34.   *Id*. at iv, 36-37. For example, total incarceration risk (chance of capture and conviction times length of punishment) for burglary increased by two-thirds in the United States between 1981 and the mid-1990s but dropped over two-thirds in England. *Id*. at 37.

35.   *Id*. at iii, 1-6. For example, burglary increased 54 percent in England from 1981 to 1996 and decreased 43 percent in the United States in the same period.

36.   *Id*. at iii.

37.   Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 109 Q. J. ECON. 319 (1996).

38.   *Id*. at 322.

39.   *Id*.

40.   *Id*. at 335.

41.   *Id*. at 337-38.

42.   See SOURCEBOOK, *supra* note 2, at 261 (1,926,020 violent crimes in 1993).

43.   PETER W. GREENWOOD ET AL., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW xii (1994).

44.   *Id*. at 25. These numbers are taken off a graph. RAND did not publish data tables for these numbers in its report.

45.   Cal. Dep't of Corrections, *CDC Facts* (visited Feb. 1, 1999) <http://www.cdc.state.ca.us/factsht.htm>.

46.   *See*, *e.g.*, People v. Superior Court (Romero), 13 Cal.4th 497, 504, 917 P.2d 628, 629-630 (1996) (court has discretion to strike a prior conviction for purposes of Three Strikes sentencing).

47.   GREENWOOD, *supra* note 43, at 16.

48.   Levitt, *supra* note 37, at 345.

49.   *CDC Facts*, *supra* note 45.

50.   *See* Mike Maguire, *The Impact of Burglary Upon Victims*, 20 BRIT. J. CRIMINOLOGY 261 (1980) (psychological impact of burglary). We trust this statement is self-evident for murder and rape.

51.   *See* GREENWOOD, *supra* note 43; American Civil Liberties Union, Briefing Paper, No. 2, Crime and Civil Liberties (1997) ("A serious anti-crime strategy must deal, first and foremost, with the root causes of crime—persistent poverty, lack of educational and employment opportunities, racial discrimination and social alienation"). Although not using the term, the "root cause" philosophy was exemplified by the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) and RAMSEY CLARK, CRIME IN AMERICA 67 (1970) (arguing for "programs that attack the major underlying causes of crime"). The President's Commission argued that attacking housing problems was attacking crime. THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 6. In other words, the building of the now-infamous, crime-ridden government housing projects was originally promoted by the "root cause" movement as a crime *prevention* measure.

52.   *See, e.g., Contract with America—Welfare Reform: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong., Ser. 104-44, at 826 (1995)(testimony of Penny Young).