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ON THE UNLIKELY PROSPECT OF REDUCING CRIME RATES BY INCREASING THE SEVERITY OF PRISON SENTENCES

*John M. Darley**

INTRODUCTION

For the last several decades, criminal justice practitioners in the United States have sought to reduce crime rates and deter crime by mandating increases in the severity of punishments imposed on those who commit crimes. Section I of this article will review the ways in which increased sentences and other criminal justice practices have led to a remarkable increase in the number of people held in prisons. Since the standard punishment for crime is a prison sentence, severity is increased by increasing the duration of the prison sentence. Section II will briefly summarize the evidence that provides the basis for increased duration sentences and will suggest that increases in sentences have rarely, if ever, produced the desired reduction in crime rates—a conclusion that is now widely shared among criminal justice system researchers. Section III will employ a novel approach that draws on psychological research to explain why severity-increasing deterrence measures are ineffective. Further, it argues that it is not the case that further escalations of sentence length will eventually produce deterrent effects. Section IV discusses the circumstances in which deterrence can be achieved successfully. Empirically, it appears to be possible when the perceived probability that a particular crime will be

* Warren Professor of Psychology and Public Affairs at Princeton University. The author is grateful to Paul Robinson, who has educated him in many aspects of the criminal justice system, and with whom the author has explored the tensions between the system and citizens' sense of justice.

detected is high. Section V turns in a new direction, asking whether citizens actually demand increased sentence severity. This section will review evidence suggesting that citizens' perspectives on criminal justice do not create political demand for severe sentences and would allow for a criminal justice system that does not impose such sentences.

I. THE INCARCERATION STATISTICS

A. *The Number of People Incarcerated*

The number of citizens incarcerated in prisons and jails in the United States has increased at a startling rate. One frequently quoted statistic tells us that there were fewer than 200,000 inmates in our national prisons in 1971, and now there are over 2,000,000, more than a ten-fold increase in the course of about three decades.¹ What accounts for this result? Some of the increase, but not much, can be attributed to population growth. From the end of World War II to the early 1970s, the number of prison inmates per 100,000 people in the population fluctuated in what Professor Elliot Curry refers to as a "narrow band" of between 93 and 119; by 1996, this number reached 427 per 100,000 citizens.² Thus, in the United States, we are incarcerating about four times as many persons (corrected for population growth) as we previously were. Second, we have approximately tripled the length of the prison sentence for various crimes, so we are keeping the average convict in prison for a considerably longer duration. Third, in the United States, we have expanded criminal definitions. The past three decades witnessed "the war on drugs," which resulted in the criminalization of conduct that previously had not been defined as criminal. For instance, in our attempts to "stamp out drug dealing" in the United

¹ Lauren E. Glaze & Seri Palla, Bureau of Justice Statistics, U.S. Dep't of Justice, Probation and Parole in the United States, 2003 (Bureau of Justice Statistics, Washington, D.C., July 2004), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/ppus03.htm>. This series of publications is widely used as a source for statistics on incarcerated individuals.

² ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 12-13 (1998).

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States, we imputed an intent to sell drugs to persons in possession of rather minor quantities of drugs and gave these “dealers” lengthier sentences.

Many would identify these three factors as major causes of the dramatic rise in incarceration, but a fourth factor may also have a contributing influence. Perhaps influenced by the “law and economics movement” and its focus on human motivation, we look on criminal laws as largely designed to deter conduct that the state wishes to deter. Thus, if conduct falls into this category, it is often defined as criminal. This is a much more expansive definition of crime than the alternate one, which is the commission of an act that society regards as morally wrong. As Professor John Coffee notes, this more expansive definition has led to the criminalization of many activities that were previously only considered regulatory offenses.³ How many of these newly defined “crimes” are punished by prison terms rather than by fines remains to be determined, but the number may contribute to the increase in the prison population.

*B. The Social Costs**1. Dollar Costs*

The most obvious cost of an increase in the prison population is the dollar cost of housing prisoners in moderately secure prisons and staffing prisons with the custodial and other personnel needed to provide the rather minimal conditions that we allow prisoners. The cost of a year in prison has been accurately estimated to be quite close to a year in college. The funds for prisons come mainly from discretionary state budgets and, thus, they compete with other possible draws on these budgets, such as medical and educational payments for citizens. One notices the irony of, for instance, decreasing funds to community colleges—institutions that

³ John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 201-8 (1991).

contribute to citizens obtaining decent jobs—while increasing funds for the incarceration of citizens who turn to illegal activities because they lack the qualifications for decent jobs.

2. Creating Constituencies

Other consequences of increasing prison terms have social science implications. One consequence is that, particularly during periods of high structural unemployment, large prison construction programs create communities that actually compete to house new prison construction. Such projects not only create construction jobs, but also long-term jobs for prison guards and prison staffs that can tip a small community toward survival. In an era of privatization, large companies have divisions that specialize in running private, for-profit prisons. This creates certain dangers that, while not inevitable, are undoubtedly serious.

For instance, regardless of whether the prisons are public or private, it is likely that the majority of prison personnel will come to adopt a social control ideology, which regards any acts of violence that guards inflict on prisoners as required for the control of dangerously deviant prisoners. To control these abusive practices, states must establish a regime of surveillance and supervision over guard behavior that is costly if done well, and conducive to bad treatment of prisoners if done poorly or sporadically. Thus, although a new prison might be welcome in a struggling community, it will present some subtle, long-term problems for the community as community members are socialized into the criminal control ideology.

DETERRENCE AND SENTENCE SEVERITY 193*3. Prisonization.*⁴

Spending significant time in prison changes a person in several ways, generally not for the better. Even with long sentences, most prisoners eventually return to society, bringing with them the dangers associated with prisonization. One of the most obvious dangers is the public health threat caused by the increased likelihood of the prisoner having contracted AIDS or drug-resistant tuberculosis and transmitting these diseases to the general population. It is also the case that a person in prison for a longer period of time loses job skills. That, coupled with the stigma of being a criminal, makes finding a job upon release less likely. Additionally, one often finds ties to family and friends weakened, replaced by a reliance on associations with past prisoners for friendship. All of these factors impose costs on society that extend beyond the criminal's prison term.⁵

II. THE EFFICACY OF DETERRENCE: EMPIRICAL REVIEWS

In the recent past and continuing through the present, crime prevention policy in the United States has been driven by attempts to produce deterrence by providing increasingly severe prison sentences for crimes.⁶ Evidence is emerging that, apart from being extremely costly, the lengthening of sentences is also ineffective. This article does not refute the notion that citizens' knowledge of

⁴ In 1940, Donald Clemmer brought the study of assimilation of norms to the prison setting. Drawing on the scholarly tradition that was at the forefront of American Sociology during the early 20th century, he was the first scholar to write about the prison as a functional whole. Clemmer's intensive study was based on his experiences as a correctional officer at Menard Penitentiary, a 2,300 person prison for men in Illinois. Clemmer described the unique ways that inmates assimilate to the social world of the prison. He termed this process "prisonization." DONALD CLEMMER, *THE PRISON COMMUNITY* (Rinehart & Company 1958) (1940).

⁵ Richard Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 L. & POL'Y 17, 28-29 (2002).

⁶ Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 949-1000, Section II 956-76.

the array of penalties the criminal justice system has at its disposal serves as a general deterrent force on those contemplating crime. Nor does this article deny that certain manipulations relevant to the threat of prison, such as an active and publicized police presence, can sharply reduce criminal conduct. It does assert, however, that increasing the duration of the mandated prison sentence for a type of crime generally will not result in a decrease in the rate of that crime.

The studies considered here are called “aggregated effect studies.” These studies are generally termed “naturally occurring experiments,” in which some reduction or, more commonly, increase in the severity of sentence for a particular crime occurs in one state, but not in an adjacent state. If severity of sentence matters, then the decrease or increase in severity in the state that changed severity should cause a new increase or decrease in the rate of that crime following the implementation of the change. The current rate of the crime in a comparable state provides an estimate of what the rate of crime in the observed state “should have been” in the time period in question. A variant of this design compares the rate of crime in the one state both before and after the severity change. In this model, however, the analysis is complicated by changes in crime rates that are linked to variables such as changes in the economy in the years in question. Inevitably, these studies are difficult to perform and the results produced are always open to alternative explanations.

Two recent reviews analyze the findings of these aggregated effect studies. The chronologically earlier one⁷ is a commissioned report that is quite circumspect in its conclusions, asserting only that “none of the associations [between severity and rate] is of sufficient magnitude to achieve statistical significance,” a sort of Scottish “not proven” verdict. The later report⁸ is blunter. It reviews a number of sentence severity and crime rate studies,

⁷ ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 26 (1999) (discussing the methodological problems of aggregated effect studies).

⁸ Anthony Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH, 143-95 (Michael Tonry ed., 2003).

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including ones made possible by “three strikes” laws, and subjects them to careful methodological scrutiny. The report asserts that we should accept the fact that there are no general demonstrations of crime rate reductions achieved by alterations in sentence severity that are “within the [severity] limits that are plausible in [w]estern [s]ocieties.”⁹ Given the remarkable increases in sentence severity found “plausible” in the United States in the past decade, it is unlikely that the changes in severity have been too anemic to produce rate reduction effects. Pending new studies that overturn this conclusion, it seems that increasing the severity of sentences is not reducing the rate of crimes.

III. PSYCHOLOGICAL REASONS FOR THE LACK OF DETERRENT EFFECT

Those who support increasing the severity of sentences do so in order to attempt to affect the actions of individuals contemplating the commission of crimes. Influenced by discoveries in the field of judgment and decision making, psychologists have increasingly accepted the conclusion that people do not make decisions based on elements that are objectively relevant to their decisions. Instead, they form mental representations of those elements, which constitute the inputs to their decisions. Since these mental representations are often seriously incongruent with the true state of affairs, the resulting decisions are often similarly incongruent with what one thinks of as rational.

A. Are Future Possibilities of Punishment Represented at All in the Criminal's Decision?

This question may seem surprising, but those who have had experience with criminals actually raise it.¹⁰ One well-supported theory of criminal behavior holds that many crimes are committed by persons with somewhat disordered personalities who are

⁹ *Id.* at 195.

¹⁰ MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

characterized by a predilection for impulsive behavior. Their prototypic crime is to rob a house after kicking in the door on their way home from someplace where they have been for unrelated reasons. These are the sorts of crimes that become semi-humorous reports in newspapers. Like the bank robber who passes his demand for money on material that reveals his identity, prison inmates report that they were not thinking of the possibility of prison when they committed their offense.¹¹ Professor Anderson, who conducted interviews of prison inmates, concluded:

The findings suggest that 76 percent of active criminals and 89 percent of the most violent criminals either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes.¹²

If this is so, the sentence for a particular crime does not act as a deterrent in the mind of the potential criminal.

1. Impairment by Drugs and Alcohol

Impulsive crimes are often committed by persons on their way home from a bar or a drug den. Thus, many crimes are committed by those under the influence of some substance that reduces the impact of long-term consequences on decision making. Hence, the decisionmaker is more likely to act impulsively.

The Center on Addiction and Substance Abuse estimated the role of alcohol and drugs in the commission of crimes.¹³ According to its report, substance abuse and addiction have shaped the criminal histories of 80 percent of prisoners today: eighty-one percent of the 1,076,625 state inmates, 80 percent of the 105,544 federal inmates and 77 percent of the 518,492 local jail inmates who violated drug or alcohol laws, were high at the time they committed their crimes, stole property to buy drugs, or have a history of drug and alcohol abuse and addiction—or share some

¹¹ David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 302-4 (2002).

¹² *Id.*

¹³ THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION* (Jan. 1998).

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combination of these characteristics.¹⁴

Included in these startlingly high percentages are some offenders who cannot be assumed to have been under the influence of drugs when they violated drug laws by, for instance, selling illegal drugs to drug users while not being users themselves. Others also might not have been under the influence of drugs or alcohol at the time they decided to commit a crime, even though they have a “history of alcohol abuse and addiction.” Still, the degree to which drugs, alcohol, and crime are intertwined is obviously great.

2. Gangs of Young Men

Deterrence calculations are particularly unlikely to be made by a young man whose peers exert a bad influence on him. Gangs often exert pressure on their members to assume the role of a daring doer of adventurous bad deeds. In this social surrounding, ordinarily sensible individuals accept this role and do things they would rarely choose to do in other surroundings. A recently developed theory in social psychology, social identity theory,¹⁵ asserts that individuals in groups with which they identify become the prototypical group member. Hence, they willingly become violent or commit crimes if that is the prevailing pattern of the group. When the interests of the gang dominate a member’s state of mind, considerations of prison sentences in the distant future are not likely to have much influence in shaping decisions.

In a recent thesis entitled “In With a Bad Crowd: An Analysis of Criminal Decision Making in Small Groups,” Professor Hochstetler reports the results of his numerous interviews with incarcerated criminals.¹⁶ He describes the way in which vague suggestions of possible crimes quickly escalate in crime-prone

¹⁴ *Id.* at 1-2.

¹⁵ SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES 1-2 (Dominic Abrams & Michael A. Hogg eds., 1990).

¹⁶ Andrew Lee Hochstetler, *In With a Bad Crowd: An Analysis of Criminal Decision Making in Small Groups* (1999) (unpublished Ph.D. dissertation Department of Sociology, University of Tennessee, Knoxville) (on file with author).

groups of men who hang out together. In one case, a jailed interviewee reported that he actually disagreed with the robbery plans, but “one thing lead to another until there we was.”¹⁷ The move toward the commission of the crime is thus best described as a “group process,” rather than the product of an individual, separate decision.

Not surprisingly, alcohol and drugs often contribute to short-sighted thinking that results in spontaneous and generally ill-conceived criminal activities. One interviewee recounted a scenario that occurred while he was driving around with others:

They were talking about robbing a place and we were high on crack. We wanted another rock. We pulled into a number of places [to rob] and nobody would do it . . . I finally said ‘alright by god pull in the next place you see.’¹⁸

The group subsequently pulled in and he completed the robbery.¹⁹

One drunken group even set out to “do” a crime, but left some of its members behind. The members left behind admitted that the only reason they did not participate in the crime committed by their peers was that they had been too drunk to “make it to the car.”²⁰

In summary, for many crimes, a prevention strategy that relies on potential perpetrators to mentally weigh the consequences of conviction and punishment simply does not comport with the evidence of the actual “thought” process of convicted criminals. This is not to suggest, however, that the image of the impulse-driven, drunk, or drugged, young male actor fits all crimes, although, given the statistics cited above, it does fit many of them. Indeed, some crimes, such as embezzlement or white-collar crimes, seem to imply a much more deliberative thought process on the part of potential perpetrators. It is hoped that the existence of severe prison sanctions will exert a real deterrent effect on potential perpetrators of these crimes.

¹⁷ *Id.* at 175.

¹⁸ *Id.* at 178.

¹⁹ *Id.* at 178.

²⁰ *Id.* at 155.

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Examining the types of crimes that are "deliberately committed" provides an opportunity to re-examine the questions with which this article began: How are deterrence considerations mentally represented for potential criminals and how do these considerations influence the decision to commit a crime?

1. The Unnoticed Transition into Crime

An individual who commits a crime often does not psychologically understand his first actions to be criminal. This is especially true for perpetrators of corporate crimes. In the case of an organization that commits what is called "improper revenue recognition," the criminal activity often begins with a sympathetic interpretation of a complex rule about exactly when a transaction is sufficiently complete to be counted as revenue in a particular quarter. The interpretation is "sympathetic" in that it enables the organization to declare revenue in order to meet earning targets. At this point, no crime has been committed, but a problem and a pattern now exist. The problem is twofold. First, next quarter's profits have been "robbed" to pad this quarter. Second, the organization might be in even greater need of recognizing increased revenue in three months. The organization has also established a pattern of rule bending that makes it harder to resist bending the rules in the future. In one case, for example, a company that manufactured hard drives booked as sales shipments of bricks that were kept in a warehouse that the company had rented for that purpose. Not surprisingly, this action had been preceded by a long series of marginally ethical end-of-quarter actions.

This is a psychologically interesting process. It is not quite the case that the decision to commit a crime was deliberative. Rather, the person or group acted impulsively in a way that, at the time, did not appear to be wrong. In retrospect, however, those initial questionable actions set off a chain of conduct that ultimately crossed the line into criminal behavior.

2. *Ethical Fading*

Increasingly, psychologists believe that people make decisions that conventional wisdom suggests have ethical components without representing those components in their thinking. Individuals often are not aware of the ethical components of the decisions they make, in part because they think of themselves as inherently ethical actors. According to Professors Tenbrunsel and Messick, “[i]ndividuals do not ‘see’ the moral components of an ethical decision, not so much because they are morally uneducated, but because psychological processes *fade* the ‘ethics’ from an ethical dilemma.”²¹ “Ethical fading” is their term for the process “by which the moral colors of an ethical decision fade into the bleached hues that are void of moral implications.”²²

3. *Hyperbolic Discounting*

Finally, suppose that some concept of the abstract possibility of punishment is represented in the mental processing of an individual. As Jeremy Bentham noted, the deterrent weight of punishment is a complex function of the severity of the punishment, the probability of receiving the punishment, and, finally, the anticipated delay between the act and the receipt of the punishment. Psychological research in the last decades has demonstrated that the anticipation of rewards and punishments in the future has startlingly little effect on human behavior when compared to rewards and punishments in the present. To a drug addict, the threat of a future prison sentence is less of a concern when compared to the desire for the “rock” of cocaine that the robbery will pay for. Other governmental regimes, realizing this, have traded off due process concerns for regimes of summary punishment—immediate executions of those caught in the process of (what might or might not be) a crime. It is to the credit of our legislatures that they generally have not chosen this option. But the

²¹ Ann E. Tenbrunsel & David M. Messick, *Ethical Fading and the Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224 (2004).

²² *Id.*

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cost of that choice is this: the threat of punishment is greatly attenuated by being mentally represented as taking place far in the future.²³

C. Amplifying Severity by Word of Mouth Effects

Once they are released from prison, criminals often return to the communities from which they came. These communities are often poor and inhabited by minorities, and are those from which new criminals are “expected” to emerge. The hope of some policymakers may be that returning criminals will convey the punitive severity of long prison sentences to their communities, thus motivating potential criminals to avoid beginning their criminal careers. Psychologists are skeptical about whether this indirect effect of long duration sentences is plausible for two related reasons.

First, hedonic adaptation, which is the general tendency for an experience that is sustained over time to decline in its hedonic intensity, lessens the effect of a longer sentence. Experiences that are in some sense objectively constant in intensity are registered by the individuals experiencing them as less intense over time. For example, moving to California is initially experienced as producing the pleasure that California’s fine climate generates, but, over time, the pleasure produced by yet another beautiful day palls. The same is true of negatively experienced states. Researchers have pointed out a pattern of hedonic adaptation by prisoners during their sentences. Even if the day-to-day circumstances of prison are equally bad, one adapts to them and experiences them as less negative. The prisoner’s day-to-day circumstances may actually improve in quality, for instance, if he receives a prison “job” that provides some amenities or graduates to a regime of lowered security and confinement.²⁴

²³ Marjon van der Pol & John Cairns, *A Comparison of the Discounted Utility Model and Hyperbolic Discounting Models in the Case of Social and Private Intertemporal Preferences for Health*, 49 J. ECON. BEHAV. & ORG. 79, 93 (2002).

²⁴ Shane Frederick & George Loewenstein, *Hedonic Discounting*, in WELL BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 303-29 (Daniel

The second startling reason why word of mouth does not produce deterrent effects is the phenomenon of “duration neglect.” With regard to the aversiveness of an event that persists over time, the duration of the event creates only a very weak representation of the experience in the person’s memory. The recollection is determined by the “peaks” in aversiveness, for example, the sharpest pains experienced by the individual as well as the pain experienced at the end of the experience. This phenomenon is unsettling for those who seek to manipulate aversiveness by increasing sentence duration. Duration neglect suggests that sentence duration is an ineffective means of increasing the recollected aversiveness of a prison sentence. The peak end rule, coupled with hedonic adaptation causing the aversiveness experienced at the end of the sentence to be low, suggests that longer sentences may be experienced as less aversive than shorter ones, in which less adaptation takes place.

One purpose of increasing sentence durations is to deter the person serving the sentence from ever again taking the risk of committing a crime because of the long misery of his prison term. But if the research reviewed above is correct, duration increases will not have this effect because they do not do much to increase the aversiveness of remembered prison experience. The second possible goal of long prison sentences is one of general deterrence brought about by ex-prisoners who return to their communities and communicate the aversiveness of long prison sentences. While this premise requires verification by empirical studies, current research suggests that ex-convicts are not conveying this message.

IV. SUCCESSFUL DETERRENCE

The previous discussion has challenged the possibility of reducing crime rates by increasing the severity of punishment—one of the three “levers” that the Benthamite formulation of deterrence calculus makes available to policymakers. The second “lever”—the perceived delay between committing the offense and receiving the (highly uncertain) punishment for the offense—is

Kahneman et al. eds., 1999).

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perceived as being less relevant in our adversarial system. There is reason to believe, however, that the third “lever”—the probability that the offense will be detected—can be used to produce considerable progress toward incremental deterrence. Put plainly, drunk driver campaigns work to stop drunk driving. When publicized police campaigns to catch drunk drivers are put in place, the threat of arrest, broadcast widely by news clips of inebriated drivers, results in a decrease in drunk driving.

The probability that an offense will be detected is not perceived as a continuously varying probability, but as a dichotomous state. State one is triggered when external events do not remind the potential offender of the possibility of apprehension when committing the offense. This is the normal state for many potential offenders. State two is triggered when the possibility of being apprehended is brought to mind, provoked by some stimulus, such as the sighting of a police car.

One factor that may radically alter the individual’s calculation of the odds of apprehension is the sudden induction of what is called the “objective,” or “outside observer’s,” perspective on the individual’s own actions and thinking. For example, the sight of a police car on the side of the road causes a driver to assume an observer’s perspective (specifically, that of the police) with respect to the speed at which he is driving. The probability that an offense will be detected is one determinant of the deterrence calculus, but it may not be the case that a potential offender has a stable, continuously accessible estimate of his chances of being caught. Instead, events in the external world may provoke, for some interval, a heightened estimate of the chances of getting caught. This may explain the frequent occurrence of deterrence campaigns that work by publicizing large increases in police surveillance of areas in which the targeted crime is to be deterred. Drunk driving campaigns, with television news reports of police checkpoints at which people leaving bars are likely to pass, are one such example. The psychological process is this: triggered by a television report or by seeing an actual checkpoint, persons otherwise prone to drink and drive are made vividly aware of the possibility of being caught. This is likely not represented as a probability, but rather as a chance weighing of the probability of punishment, the severity of

punishment, and the expected delay before the punishment, against the expected gains of committing the crime. If the possibility of being caught is called to the potential offender's attention, the crime is not committed. On this account, if the chances of being caught for committing an offense are made vivid, lessening the severity of the punishment for that offense should not increase the rate of the crime in question.

Some evidence supports this claim. Campaigns in which police conduct well-publicized efforts to target a certain offense and make the police presence apparent often succeed.²⁵ These campaigns have often been "crackdowns on drunk driving" campaigns, in which the police presence near places where alcohol is consumed, often on nights when heavy drinking is expected, is conspicuously present.²⁶

Thus, in contrast to attempts to reduce crime rates by increasing the severity of the sentence for the crime, campaigns that make salient in the mind of the public the possibility of being caught for committing the offense are often successful. The salience-raising account also predicts what is often observed, which is that, as the detection campaign ends, the specific instantiation of the deterrent presence tends to fade in the memory of individuals and crime rates return to previous levels.

In summary, the monetary and social costs of long duration prison sentences are high. Examining the deterrence effectiveness of those sentences causes skepticism about their utility: many who commit crimes show no evidence of thinking at all about the future punishments that might await them. For others, thought processes are sufficiently impaired by alcohol or drugs, such that they are also unlikely to be daunted by the vague possibility of punishment inflicted far in the future. Others, even corporate criminals, become enmeshed in criminal actions in ways that make them not contemplate the possibility of punishment for actions that they do not consider criminal. Recent research on the punitive weight of long duration sentences suggests that these sentences are less

²⁵ H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* 69-72 (Yale University Press 1992).

²⁶ *Id.* at 24.

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punitive than advocates of long duration sentences consider them to be. These are likely to be among the reasons that sentencing duration increases generally show no reduction in crime rates when aggregated effect studies are done.

V. WHAT CITIZENS SEEK FROM THE CRIMINAL JUSTICE SYSTEM

The stereotype of the moment is that citizens want “to be tough on crime,” and this is generally interpreted as a desire for long duration prison sentences in prisons that “are not country clubs.” In fact, this may be a perception that politicians encourage citizens to hold when they confront citizens with prototypes of criminals who commit vicious, cold-blooded crimes. There is also anecdotal evidence, however, that citizens express other perceptions when they are presented with cases of other types of crimes. As an example, Californians were surprised when they learned that the three strikes law had resulted in a life sentence for a petty thief who had stolen a few slices of pizza. To these observers, this sentence seemed to be too severe and not what they had in mind when supporting the three strikes law. As this example suggests, citizens have a concept of an appropriate sentence and feel that some sentences are far too strict to be appropriate.

Together with Professors Paul Robinson and Kevin Carlsmith, I have conducted a number of studies designed to determine the sentences that citizens deem appropriate for various crimes and, more importantly, to determine what citizens consider to be the relevant purposes of those sentences. Our evidence supports what the example above suggests—that people seek to impose a sentence that comports with what the offender justly deserves for the crime committed. To determine the sentence, people seek out information about the “moral weight” of the offense. For example, did the person embezzle money? Then they seek to know the use to which the embezzled money was put. Was it used to continue a life of debauchery? If so, then they are morally outraged and conclude that the sentence imposed should be severe. If, however, the money was used to afford a child a life-saving operation, their outrage is much reduced and so is the sentence. After seeking a good deal of information relevant to just deserts, the participants in

our studies sought information relevant to whether the offender was likely to recidivate, and adjusted sentences accordingly. Thus, once the first goal of appropriately punishing the offender was satisfied, the participants had a second goal of incapacitating potential repeat offenders. The participants did not seek information relevant to the question of whether a sentence would serve the purpose of general deterrence.²⁷

A conceptually similar set of experiments was conducted in which a person was given the task of reading a scenario about a crime that an offender committed and assigning a prison sentence to that offender. The scenario contained some details that would be informative to a person contemplating just deserts considerations as well as details that would be informative to a person holding a deterrence or incapacitation perspective. The experimental question was, "Which details actually influenced the sentencing decision?" Participants in one study used the just deserts information to determine appropriate sentences and made no discernable use of the incapacitation information.²⁸ In the other study, participants also used the just deserts information, but did not use the deterrence-relevant information.²⁹

Based on these studies, we suggest that people generally employ a just deserts perspective when determining the sentence they would give to a specific offender for a described crime. Stated a bit more narrowly, the task of determining the punishment justly deserved by an offender is one that draws heavily on just deserts considerations, relatively little on incapacitative considerations, and, as far as we can tell, not at all on deterrence considerations. This does not mean that if we inform persons that some serious crime has a rapidly rising rate of occurrence they will not conclude

²⁷ Kevin Merrill Carlsmith, *Why do we Punish? Retribution, Deterrence, and Incapacitation as Motives for Punishment* (2001) (unpublished Ph.D. dissertation, Department of Psychology, Princeton University) (on file with author).

²⁸ J.M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 676 (2000).

²⁹ Kevin M. Carlsmith et al., *Why do we Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 292, 295 (2002).

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that the sentence for the crime should be increased. Nor does it mean that if we ask citizens about whether they would like their legislators to vote in favor of a “three strikes law” they will say “no.” What these studies do suggest is that respondents will react negatively if they hear about a specific sentence that they consider too strict. For example, if they are told about a case in which some poor misfit is sentenced to life after a third crime involving the receipt of \$127 under false pretenses, respondents will think that the sentence is inappropriate.³⁰

CONCLUSION

During the past several decades, there has been a remarkable increase in prison sentences for most existing crimes. Particularly in the area of “drug-related” crimes, there has been a shift toward converting minor “possession” offenses into more serious crimes. As a result, the population of people in prison has greatly increased. The goal of those mandating increases in sentence severity has been to deter potential offenders from committing crimes. But a review of the evidence on the effectiveness of these crime prevention practices reveals that they are not producing their desired effects. Accepting this conclusion, which continues to gain support, we asked why, from a psychological perspective, severity increases were not effectively reducing crime rates. We then considered whether deterrence could ever serve as an effective crime control strategy. We concluded that deterrence could be effective if the probabilities of detection and apprehension were greater in the mind of the potential offender at the time he felt the impulse to commit the offense. We then addressed the question of whether the public has demanded the policy of increasing sentence severity.

Our research suggests that it is not the case that citizens’

³⁰ For a narrative of the history of the three strikes law in California, with stories of citizens who have come to oppose the law because of its tendency to assign what are essentially life sentences for the third commission of a rather minor offense by a desperate person, see JOE DOMANICK, *CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN AMERICA’S GOLDEN STATE* (University of California Press 2004).

implacable demands for ever-increasing prison sentences create an impassable barrier to considering alternative ways of dealing with criminal offenders. While it lies beyond the scope of this article to suggest what those alternatives might be, thoughtful observers³¹ of our criminal justice system have made several proposals, a number of which have been adopted in Europe with some evidence of success.

³¹ See MICHAEL TONRY, *THINKING ABOUT A CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (Oxford University Press 2004); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (Oxford University Press 2003); ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA: WHY THE SOLUTIONS TO AMERICA'S MOST STUBBORN SOCIAL CRISIS HAVE NOT WORKED—AND WHAT WILL* (Henry Holt and Company 1998).