

## Introduction

There are too many Americans in jails and prisons. Mass incarceration must end, but it is hard to know where reform should begin. This book explores possible starting points for reforming the criminal justice system. This book is introductory in nature for those who have read a few things or watched documentaries and are focusing their attention on how to bring about effective solutions. There are many books that rant against overcriminalization and mass incarceration, and now is the time to mobilize and direct our efforts to a few areas that need immediate attention. The explosion of prison populations in America happened for a reason, and direct action can be taken to end the problem. Our task, of course, lies in sorting out the right causal mechanisms and variables, implementing realistic solutions, and properly going through the process of scaling down the numbers of incarcerated people. Criminal justice is an area that needs consistent advocacy for modernization. There are inherent complexities to the subject, which allow problems to last longer than they need to. Normal law-abiding citizens do not always feel the need to engage with an issue such as handling those that were not able to follow the rules. It is this disparity of human connection that is the first obstacle to overcome in our journey toward bringing down the incarcerated population.

This book is the direct result of assigning and reading the work of five legal scholars in a course I offered at The King's College on mass incarceration and overcriminalization; those five legal scholars are Michelle Alexander, Douglas Husak, John Pfaff, James Forman, Jr., and Stephanos Bibas.<sup>1</sup> After reading Michelle

<sup>1</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, NY: New Press, 2010); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York, NY: Oxford University Press, 2008); John F. Pfaff, "The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options." *Harvard Journal on Legislation* 52, no. 1 (2015): 173–220; James Forman, Jr., "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow." *New York University Law Review* 87,

Alexander's book *The New Jim Crow* in the course, my eyes were opened to a problem that I had previously overlooked: we have an incarceration problem in the United States. Alexander's basic premise is that the War on Drugs drives America's prison explosion. Additionally, her thesis presses the point further that the increased focus on locking up low-level drug offenders disproportionately, and maybe intentionally, landed thousands of black men and women under the control of the criminal justice system. Alexander's thesis made complete sense to me. I was ignorant of the data, and the way she connected the dots seemed plausible. I then joined the national resistance to "do something" about changing drug laws so that we can reduce prison numbers. Then I stumbled upon Pfaff, Forman, and Bibas, and discovered that Alexander got the narrative wrong. I even enrolled in a criminal justice master's degree program at the John Jay College of Criminal Justice in New York City to make sure I was getting the story straight. When I looked at the data it quickly became clear that our "mass incarceration" problem could not be reduced by the so-called War on Drugs. For me this meant that neither Alexander's thesis nor the Netflix documentary *13th* was pointing in a direction that would lead to real progress at dismantling America's exploding prison population.<sup>2</sup> That is, we could legalize all drugs and release everyone from prison incarcerated for a drug-related charge and America would still have a mass incarceration and overcriminalization problem. In fact, the problem with our overly punitive criminal justice system is much worse. We overpunish in the United States and it is neither because of drug offense nor as a proxy conspiracy against people of color. America got into this mess for several other reasons. Our prisons exploded largely because of anthropological reasons. As Elizabeth Hinton suggests, it is better for us to frame our current crisis as a "war on crime" rather than a consequence of the War on Drugs.<sup>3</sup> America has declared war against "criminals," and that label is assigned to a class of persons in ways that redefine the humanity of the offenders and create the context for being overly punitive. This book is about those other anthropological, systemic, legal, social, and political reasons. Legal scholars like Pfaff and Forman encourage us to ask deeper and broader questions about our prison crisis.

According to John Pfaff, drug offenders make up only about 16 percent of a state prison population and explain only about 20 percent of prison growth since

no. 1 (2012): 21–69; Stephanos Bibas, "Prisoners without Prisons." *National Review* 67, no. 17 (September 21, 2015): 27–30.

<sup>2</sup> In fairness, what Alexander and the New Jim Crow theorists get right is that our drug laws are overly punitive toward disadvantaged minorities, but the data does not support this as the primary causal story of how our prison populations exploded after the 1960s. Again, the War on Drugs and racial bias exacerbate a systemic problem and make the negative externalities even worse.

<sup>3</sup> Elizabeth Kai Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2017), 25.

1980 during the much-demonized Reagan era.<sup>4</sup> Pfaff highlights the following data points that begin to question Alexander's telling of the story:

First, the sharp relative rise in drug offenders begins about five to ten years after the slow, steady rise in incarceration began. Second, the relative peak of drug incarcerations, in 1990, approximately 22 percent of all inmates were drug offenders – or, phrased more starkly, over three-quarters of all state prisoners were serving time primarily for non-drug offenses. And third, since about 1990, even as prison populations continued to rise, the share of drug inmates has actually slowly declined, hitting about 17 percent by 2010.<sup>5</sup>

What was responsible for America's prison boom? Property crime and violent crime tell the actual story. These offenders contributed more than two-thirds of America's prison growth. On the race issue, Pfaff presses the point even further. If we were to release every inmate serving time for a drug offense in 2010, the total prison population would fall from 1,362,028 to 1,125,028, and the percentages of the white/black/Hispanic population would change from 34.4 percent/38.1 percent/21.2 percent to 35.5 percent/36.7 percent/21.5 percent. In other words, observes Pfaff, "[T]he percent of the prison population that is black would fall by only 1.4 percentage points (from 38.1 percent to 36.7 percent), and the white–black gap would narrow only slightly, from 3.8 percentage points (34.3 percent vs. 38.1 percent) to 1.2 percentage points (35.5 percent vs. 36.7 percent)."<sup>6</sup>

James Forman, Jr. observes that Alexander's thesis is flawed largely by what it obscures. In addition to getting the narrative wrong about drug-related incarceration, Alexander obscures the black community's support for tougher law and increased law enforcement in predominantly black neighborhoods, especially in black majority jurisdictions, and it obscures that "mass incarceration" avoided the black middle class.<sup>7</sup> In *Locking Up Our Own*, James Forman highlights that black people are in the criminal justice system as police officers, prosecutors, judges, correction office, probation and parole officers, and "tough on crime" community activists.<sup>8</sup> The Nixon Era in the early 1970s was largely focused on decriminalizing marijuana, and it was black church leaders who stopped it and called for more punitive drug laws.<sup>9</sup> It was black political leaders like Detroit's first black mayor Coleman Young who fought against gun control proposals in Michigan.<sup>10</sup> Major US cities and districts like New York, Washington, DC, Atlanta, Chicago, and Detroit had a very

<sup>4</sup> John F. Pfaff, *Locked In: The True Causes of Mass Incarceration – and How to Achieve Real Reform* (New York, NY: Basic Books, 2017), 35; Pfaff, "The War on Drugs," 176.

<sup>5</sup> *Ibid.*, 180.

<sup>6</sup> *Ibid.*, 184.

<sup>7</sup> Forman, "Racial Critiques," 115.

<sup>8</sup> James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York, NY: Farrar, Straus and Giroux, 2017), 10.

<sup>9</sup> *Ibid.*, 43–46.

<sup>10</sup> *Ibid.*, 65.

high percentage of black police officers during the “mass incarceration” boom. During the 1980s, it was black leaders who also fought for tougher drug laws, stiffer penalties in sentencing, and mandatory minimums, and tried to do something about “black-on-black” crime.<sup>11</sup> During the crack epidemic, it was cities with top black law enforcement officials and political leaders that clamped down hard on drug offenders. Forman writes that by 1990, “there were 130 black police chiefs nationwide, including the top cops in D.C., New York, Philadelphia, Baltimore, Detroit, Chicago, and Houston” and “more than three hundred African American mayors” in cities like Washington, DC, New York, Los Angeles, Philadelphia, Detroit, Baltimore, Atlanta, and Oakland.<sup>12</sup> Moreover, if one reads the history of how the black middle class, living in large metropolitan areas, perceived the black underclass, the racialized drug war narrative painted by Alexander and others is significantly undermined. In other words, the drug war narrative about mass incarceration, according to the data, gets the larger story wrong. The causes of mass incarceration are much more complex and differentiated. Unfortunately, the racialized drug war narrative will not lead us to solutions that will actually begin to make a difference and dismantle our overly punitive criminal justice system. While it is most certainly the case that drug crime enforcement policies disproportionately impact people of color in disadvantaged communities, it is not the case that solving for that variable will do a whole lot to change the overcriminalizing outcomes of a criminal justice system that is systemically dysfunctional. That is, if the war on drugs had never happened we would likely still be the most incarcerated nation in the developed world.

There is much to do beside changing laws. This book contributes to criminal justice reform by examining moral obligations we have as a collective in making logical civic decisions. Ending mass incarceration has a very practical and simple rationale that anyone can come to logically, and this individual logic must be applied to updating and upgrading our criminal justice system.

Civil society institutions hold a crucial role in the fabric of our society. Typically, the discourse about criminal justice reform revolves around the pursuit of what policy changes need to be made in order to reduce the number of youth, women, and men in America’s jails and prisons. Unfortunately, policy alone cannot solve this problem. This book argues that right policies can only bring about criminal justice reform if they work in concert with the other institutions in society that shape human life. The mass incarceration crisis is really a crisis of human dignity. In the criminal justice system, those who break the law are given new labels like “deviant,” “offender,” “ex-con,” and so on. These labels come to define the entire identity of the criminal, and he or she is treated accordingly in

<sup>11</sup> Ibid., 126–143.

<sup>12</sup> Ibid., 165.

the system – forever. Criminal justice reform will only be successful if we change it from the person up rather than simply from policy outward.

There are two main concepts which characterize the arc of this book. The first relates to the true meaning of a civil society; the second is that of personalism. The London School of Economics defines civil society in the following terms:

Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.<sup>13</sup>

Civil society institutions fill in the gaps where public policy is not designed well, or where the expertise or equipment is lacking to meet the differentiated needs of criminal justice reform.<sup>14</sup> For those that are considered offenders or ex-offenders, the flourishing of these civil institutions are vital for the enabling of all criminal justice stakeholders. What tends to be lacking in the criminal justice reform conversation is the necessary role of civil society, or mediating institutions, to do the work of human formation at the level of the individual human person, which public policy is ill-equipped to fulfill. The second concept governing this book is the philosophy school on personalism, which will require a more robust explanation.

The perspective in this book draws heavily on personalism as used in the work by Christian Smith, Thomas Rourke, and Rosita Chazarreta Rourke, as well as the philosophical framework of overcriminalization by Douglas Husak.<sup>15</sup> As such, this book argues in favor of decentralizing the dominant political and economic institutions of criminal justice and reorganizing criminal justice reform with the person as the center of focus.<sup>16</sup> Criminal justice reform should be centered on what is good for the person as the integrating principle of the common good and the

<sup>13</sup> "Civil Society," T. Romana College, [www.trcollege.net/faculty/directory/teaching-staff/46-staff-directory/29-mawia](http://www.trcollege.net/faculty/directory/teaching-staff/46-staff-directory/29-mawia) (accessed July 15, 2011).

<sup>14</sup> Anthony B. Bradley, *The Political Economy of Liberation: Thomas Sowell and James Cone on the Black Experience*, vol. 12, Martin Luther King, Jr. Memorial Studies in Religion, Culture, and Social Development (New York, NY: Peter Lang, 2012), 135–136.

<sup>15</sup> Christian Smith, *To Flourish or Destruct: A Personalist Theory of Human Goods, Motivations, Failure, and Evil* (Chicago, IL: University of Chicago Press, 2015), 1; Christian Smith, *What Is a Person? Rethinking Humanity, Social Life, and the Moral Good from the Person Up* (Chicago, IL: University of Chicago Press, 2010); Thomas R. Rourke and Rosita A. Chazarreta Rourke, *A Theory of Personalism* (Lanham, MD: Lexington Books, 2005); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008).

<sup>16</sup> Rourke and Chazarreta Rourke, *Personalism*, xi.

entire social order. As the criminal justice system became more centralized, criminal law evolved into a depersonalized process, with a focus on the abstractions of criminal law procedure, rather than the costs to human persons (victims and offenders) and local communities.<sup>17</sup> By keeping the person at the center, perhaps we can arrive at a criminal justice reform framework that reduces criminal activity and dismantles recidivism. Incarceration should be the last resort for keeping communities safe, rather than a knee-jerk response to violations of the social contract.

What is personalism? There are both religious and nonreligious conceptions of personalism that developed in the West during the twentieth century that could be useful for the various contours of criminal justice. For the purpose of this book I am drawing heavily from nonreligious sociological and political accounts of personhood as a way to create space for a common entry point into the discourse from various and diverse perspectives. Rourke and Chazarreta Rourke explain that immediately after World War I, personalism caught on as a movement intellectually led by philosopher Emmanuel Mounier.<sup>18</sup> Personalism arose to challenge the depersonalizations and dehumanization of war and a social order that was becoming more and more urbanized, mechanized, and industrialized. A person had become a means to an economic and political end rather than an individual. Rourke explains, “for Mounier, a person was a living center of creative activity, communication, and commitment who comes to know himself across the bridge of action. Free, creative, and acting persons were to unite with others to create in which the structures, customs, and institutions are rooted in and revolve around the person as the center.”<sup>19</sup>

This is a realist view of a person that assumes human action, motivations, intentions, and ontology matter for conceptions of justice and human flourishing. Smith argues that human flourishing must orient its discourse around three central questions: What are the interests and motivations that drive human action? What are true human goods? What can account for the existence of evil?<sup>20</sup> According to Smith, when conceptualizing human flourishing, much of sociological thought is unconcerned with human motivations or the “microfoundations” of human social interaction beyond a “rational-choice perspective.”<sup>21</sup> Smith highlights the importance of human motivations, saying that if humans lack motivations, “then their status as particular objects is diminished. People become mere subjects.”<sup>22</sup> The issue of motivation has direct consequences for how humans are treated in society.

<sup>17</sup> William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), 287–312.

<sup>18</sup> Rourke and Chazarreta Rourke, *Personalism*, 7.

<sup>19</sup> *Ibid.*

<sup>20</sup> Smith, *Flourish*, 1.

<sup>21</sup> *Ibid.*, 2.

<sup>22</sup> *Ibid.*, 3.

Furthermore, Smith explains the need to address human goods and determine what human needs are in the interpretation of what is good for the person and for society. He critiques the Western displacement of good with right, arguing that true human interests must be understood in order to actually prefer liberal values over antiliberal values. The fact stands that there are set human values that must be explored and pursued. Finally, Smith insists that sociological accounts must address the reality of evil and human failure. Theories that fail to address the problem of evil must either embrace moral relativism or skepticism.<sup>23</sup> As such, from a personalist perspective, criminal justice reform must keep the person at the center while considering the interests and motivations that drive human action, the true “good” nature of humans, and what can account for the existence of evil.

Personalism understands humans to be “natural-goods-seeking persons.”<sup>24</sup> We need to therefore understand what it means to be a person that wants to make radical progress with criminal justice reform because offenders are persons before they are anything else. Smith correctly observes that only by understanding the personhood of human beings will we adequately be able to understand and explain people and their social relations, because humans cannot be properly understood apart from their personhood.<sup>25</sup> Personalism demands an account of who persons are and that account will necessarily have profound moral, political, and social implications.<sup>26</sup> Furthermore, personalism advances a theory of human good and happiness that draws on ancient accounts of human flourishing. Smith argues that there are “multiple, basic human motivations for action,” and these motivations inform the teleology of the person.<sup>27</sup> These motivations are important to consider because they shape how we come to understand deviance. Understanding these motivations will allow us to create realistic goals for offenders in the criminal justice system during and after incarceration ends. Personalism believes that people, by extension, do have an ontology.<sup>28</sup>

Human beings depend on their social lives for their existential development but are ontologically dependent on no one for their personal being. Smith observes, personalism recognizes that “all persons are radically dependent upon the social for their existential development and flourishing, but persons are not dependent on the social for their ontological personal being.”<sup>29</sup> Essentially, humans do not need anything from society to be persons, but they do need society’s help to flourish and to fully self-actualize. This distinction requires an understanding of the differences “between being and becoming, ontology and existence, the real and the

<sup>23</sup> Ibid., 4.

<sup>24</sup> Ibid., 8.

<sup>25</sup> Ibid., 9.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., 10.

<sup>28</sup> Rourke and Chazarreta Rourke, *Personalism*, 27.

<sup>29</sup> Smith, *Flourish*, 10.

actual, full potential and variable realization.”<sup>30</sup> Human action and practices are driven, then, by “real motivations and interests that are grounded in the nature of reality”<sup>31</sup> and a necessity to identify and understand if we wish to comprehend and explain social life, social structures, and how we need to reform the criminal justice system. Furthermore, personalism reintroduces morality into social science, and “it rejects the modern divorce of *is* from *ought*, fact from value. It recognizes that many descriptive claims entail concepts and ideas that raise . . . normative claims.”<sup>32</sup> Finally, personalism revives the tension between the good and evil elements of human existence and reconciles the increasing divide between modern optimistic and pessimistic accounts of social life. The very ideas and judgments about why society must reform the criminal justice system presuppose some notion of what is good and right for offenders, in relation to which “other things are judged to be exploitative and oppressive.”<sup>33</sup> These matters demand that we know something about human nature and under what circumstances we thrive, as well as those circumstances that undermine human flourishing. These questions provide a map for the kinds of policies we need to legislate, and a map for seriously considering the expertise and limitations of various spheres in civil society with respect to what realistic role they can play at preventing crime and reforming offenders who violate the social contract and cause harm to their neighbors. These questions do not necessarily translate into specific public policies, but rather they appeal to the need of prudential judgment that investigates whether or not our criminal justice reform proposals take human motivations, the nature of good, and the reality of evil seriously as a lens through which we determine if a policy or program is best, given the ontology of the human person.<sup>9</sup> Personalism helps us consider criminal justice reform on an individual level as well as the level of reciprocity found among members of a community.

The notion that men, women, and youth are potentially being exploited or oppressed by the criminal justice system presupposes notions of what is good and right with human beings, what it means to be human, what is beneficial for humans, what is harmful to humans, and so on.<sup>34</sup> Again for Smith and others in the personalist tradition, ontology, by extension, cannot be dismissed. Every theory about human flourishing presupposes some ontology about people; however, what matters is whether or not those presuppositions are explicitly articulated at the outset. Criminal justice reform will not make much progress moving forward unless all interested parties are willing to bring their ontological assumptions about the personhood of offenders and victims out into the open and test them openly with what human persons are actually like. Following Smith, this book takes a critical

<sup>30</sup> Ibid., 10.

<sup>31</sup> Ibid., 12.

<sup>32</sup> Ibid., 13.

<sup>33</sup> Ibid., 24.

<sup>34</sup> Ibid., 17.



realist approach to criminal justice reform. Critical realism believes that much of reality exists and operates independent of human experience, that human knowledge about this reality is always historically and socially situated and conceptually mediated.<sup>35</sup> Therefore, says Smith, “we must inquire into matters such as what human beings are, ontologically, what causes their actions, and what is in fact good and bad for humans to the limits of our ability to understand such concerns.”<sup>36</sup> Personalism, then, is driven by a realist account of what persons are ontologically, what persons are capable of causally, how finite persons are limited in their causal capacities, and what personhood entails as genuine goods to pursue teleologically. In personalism, the natural character, capacities, tendencies, interests, and ends of humans, and the constructed cultural and institutional outcomes to which those naturally give rise, are what organize and shape how personalism describes and explains human life. The cultures and the social, economic, and political institutions and structures, or processes that people develop and pass on, are first and ultimately made sense of by the nature, capacities, goods, and limits of human persons.<sup>37</sup>

Personalism, then, rejects any individualistic account of human life. Individualism reduces the notion of our common human flourishing as mere means of attaining an individualistic, if not a narcissistic, pursuit of what is good.<sup>38</sup> Moreover, individualism in both economic and political theory states that the good of the whole is defined by what is good for individuals disconnected from the good of others combined with the false notions that humans are autonomous and can thrive as independent individuals free from the active participation of others.<sup>39</sup> It must be understood and accepted that humans are not merely individuals. Humans are ontological persons who are dependent on others for their social fulfillment, which leads to individual flourishing. Rourke and Chazarreta Rourke argue that “as a social being, the human person requires a civil life within which he realizes his proper nature as oriented to community. The person needs to live well, not simply in his capacity as a private individual but precisely as member of the community.”<sup>40</sup> The community has a need to thrive and flourish in solidarity with all of its members. Criminal law, and criminal justice reform by extension, should direct the offender, as a person, to realizing his or her place as a contributing member to the community. It is the emphasis on community that is required of our civic institutions. Reforming criminal procedure statutes and adjudication processes alone are inadequate for properly recognizing the full humanity of those who receive the interventions of crime prevention as well the reform proposals of ex-offenders. The

<sup>35</sup> Ibid., 13.

<sup>36</sup> Ibid., 13.

<sup>37</sup> Ibid., 30.

<sup>38</sup> Rourke and Chazarreta Rourke, *Personalism*, 55.

<sup>39</sup> Ibid., 55.

<sup>40</sup> Ibid., 67.

criminal justice system cannot address the ontological and teleological needs of the human alone. A primary presupposition of this book, based on personalism, is that persons are free centers of responsible activity and can be intrinsically interested in helping others in the community flourish as well.<sup>41</sup>

What is a person? The definition of what it means to be human is central to criminal justice reform if those reforms point us to what is best for people integrally interconnected with others in the community. This book uses Smith's definition of what it means to be human as its operational anthropology. For Smith:

By person I mean a conscious, self-transcending center of subjective experience, durable identity, moral, commitment, and social communication who – as the efficient cause of his or her own responsible actions and interactions – exercises complex capacities for agency and intersubjectivity in order to develop and sustain his or her own incommunicable self in loving relationships with other personal selves and with the nonpersonal world.<sup>42</sup>

It is beyond the scope of this book to unpack the details of Smith's account of this definition, but for the purposes of this book I want readers to understand that when I talk about human persons I mean something specific. This book presupposed that human beings have certain capacities and are, by definition, dependently social creatures "steeped in personal social relationships as a good end in itself, because that is what any normal, thriving person is and does."<sup>43</sup> The purpose of our humanity is to develop and unfold our personhood that move us toward, argues Smith, "personal excellence, thriving, flourishing."<sup>44</sup> In our uniqueness, particularity, and historical situatedness, we are "unrepeatable and inalienable."<sup>45</sup> The dignity of persons demands, I argue following Smith, that reducing prison population numbers is not enough, nor is it a good goal. Criminal justice reform is but one variable in the equation of what is necessary for human flourishing because persons are dependent members of a community. Our imagination for reforming the system must begin with human dignity, which will include policy changes but also many other considerations that require the expertise of the institutions of civil society because humans are inherently social creatures, according to the definition I am using in this book.

Why does anthropology matter? Anthropology matters because our criminal justice devolved into a labeling system that redefined the humanity of people who broke the law. Once new labels were assigned to criminal deviants, they then became much more complacent about using the law to control "criminals" to keep our communities safe. Once offenders lost labels associated with human dignity,

<sup>41</sup> Ibid., 68.

<sup>42</sup> Smith, *What Is a Person?*, 61.

<sup>43</sup> Smith, *Flourish*, 47.

<sup>44</sup> Ibid., 52.

<sup>45</sup> Ibid., 53.

social decision-makers, lawmakers, and voters at-large became increasing agnostic and disinterested, following the social turbulence of the 1960s, about the quality of our criminal justice system. The level of contempt and disdain for offenders has a long history in American society. As a society, we have very little patience for deviance and people who make unwise decisions, so if criminals end up in a dysfunctional and oppressive criminal justice system, “well, so be it,” as some might argue. “Criminals are getting what they deserve.” Jails and prisons, then, are places where we lock up the “rabble.” The “rabble” are the deviants in our society. John Irwin famously categorized them as people who are detached and held in disrepute.<sup>46</sup> Criminal deviants are detached from and not well-integrated into the prosocial norms of conventional society, and they are disputable because they are evil, disgraceful, inhumane, offensive, dangerous, threatening, untrustworthy, rabble-rousing, unruly, treacherous, destroyers of the common good, and so on. And we must do whatever we can to keep our communities free of them and our children as far away from them as possible. Therefore, we lock up the rabble as we have always done in America since the nation open prisons first established by Christians.<sup>47</sup>

## OUTLINE OF THE BOOK

The book is divided into two parts. The Part I explores the policy challenges many have suggested are a necessary part of criminal justice reform that need immediate attention. The first of the book is introductory in nature and serves to provide the larger historical context that others have highlighted consolidated into a single location. Chapter 1 opens the book by stating the problem and challenges with overcriminalization. The chapter includes a discussion of the expansion of the definition of “crime” without exacting requirements of intentionality, and the power of state and federal agencies to send someone to prison for infractions that would not constitute individual crimes. Chapter 2 offers a discussion about the role of prosecutorial discretion in the juvenile and adult criminal justice systems. The chapter highlights, among other things, that prosecutorial overreach disproportionality affects those living in rural and urban settings. Chapter 3 addresses the role of judicial discretion. The chapter wrestles with the question: “Do our punishments fit their crimes?” Across this country defendants are condemned to years, decades, or even life in prison for minor infractions because of minimum sentencing statutes. Giving judges more discretion in sentence can alleviate the burdens of mass incarceration among other things. Chapter 4 explores the disparities in the quality of criminal defense, especially for the criminals who are economically challenged.

<sup>46</sup> John Irwin, *The Jail: Managing the Underclass in American Society* (Berkeley, CA: University of California Press: 2013), 2.

<sup>47</sup> Harry Elmer Barnes, “Historical Origin of the Prison System in America.” *Journal of the American Institute of Criminal Law and Criminology* 12 (1921): 45–50; Irwin, *The Jail*, 3–8.

Defendants who are on the lower end of the socioeconomic scale find themselves at the mercy of public defenders who are swamped with cases and are often disinterested and unqualified. Research shows that even before mass incarceration accelerated in the 1980s, overburdened systems of indigent defense struggled to meet the Sixth Amendment constitutional mandate. States are unable to fund adequate indigent defense systems or provide sufficient resources for oversight, training, and management of cases.

Part II of the book expands the discussion beyond the issues related to the adjudication process to include the role of civil society institutions like education, the family, nonprofit organizations, and models of reform that are working well in some states. Chapter 5 explores the connection between education outcomes as a predictor of deviance, especially in low-income communities. Nationally, on any given night, approximately 81,000 youth are confined to juvenile facilities and 10,000 children are held in adult jails and prisons. Approximately one in ten young male high school dropouts is incarcerated or in juvenile detention. For African Americans, that number is one in four. Increasingly, school districts are arresting children for behavior problems that are not criminal. For example, research shows that just over 2 million youth under the age of eighteen were arrested in 2008. Of these 2 million, about 95 percent had not been accused of violent crimes. In 2010, of the nearly 100,000 youth under the age of eighteen who were serving time in a juvenile residential placement facility, 26 percent had been convicted of property crimes only, such as burglary, arson, or theft. Chapter 6 highlights an often-missed variable in the reform discourse, namely the social, moral, and economic costs of overcriminalization and mass incarceration. This chapter explores how overcriminalization significantly undermines human flourishing and social well-being by harming the family, social networks, social citizenship, and removes capable men and women from using their creative capacities in the marketplace. Chapter 7 profiles a number of states that are moving in helpful directions. Since nearly 90 percent of all prisoners in the United States are in state facilities, the work that states are doing to reduce their prison populations is the foundation to reform. This chapter highlights a few effective reform initiatives from a number of states across the country. Chapter 8 provides examples of the role that nonprofits are playing in keeping people out of the criminal justice and, once in, keep offenders from reoffending and trapped in cycles of offending, incarceration, probation, and parole. This chapter highlights a number of the most progressive civil-society and nonprofit solutions to overcriminalization that are making a real difference. These are the types of programs that need to be replicated throughout the country.

The problem of overcriminalization will be solved through a thorough examination of the nexus of individual and societal interests and concerns. Trends of industrialization within the criminal justice system must be offset by a new and enlightened evolution of the role of civil society in implementing both civil systems and government policies which intersect to define our modern civilization.

We often celebrate the successes of our society in technology advancement, competitive endeavors, cultural wonders and international dominance in military and economic affairs. Bringing down the jail and prison population is possible, immediately necessary, and a responsibility for all of us to understand and support. Analysis of each major component of the criminal justice reform issue provide excellent strategies for taking apart the system that is casting a shadow on the potential of some of our most dynamic populations of citizens.