

## INTRODUCTION

In 2019, the United States locked up almost 2 million people. And there is no simple explanation for what is going on. There were 196,300 people imprisoned for homicides and another 176,300 people in prison for drug offenses. Each of those numbers is close to three times the entire prison population of countries like France (75,000) or Germany (60,000), and each number rivals the United States' total prison population in the early 1970s (200,000). Add in all the people incarcerated for other crimes, and those awaiting trial in jail, and you get 2 million – a number that would have been incomprehensible fifty years ago.<sup>1</sup>

In 2020, America's prison population declined 15 percent in the wake of a global pandemic that slowed court operations and pushed officials to ease the crowding of correctional facilities. But with law enforcement operations returning to normal and a growing perception of rising crime, this welcome decline is already showing signs of reversal.<sup>2</sup>

This book answers the increasingly important and surprisingly complex questions of how we got here – and what needs to change. These are questions that I have thought about for decades both as an academic researcher who studies Mass Incarceration and also as a participant in the phenomenon. In the early 2000s, as Mass Incarceration took hold across America, I worked in one of the country's largest law enforcement offices, the US Attorney's Office for the District of Columbia. I was "Jeffrey Bellin for the United States," prosecuting crimes ranging from drug sales to murder.

When I joined the US Attorney's Office, D.C. was trying to shed its reputation as the nation's "murder capital." Viewed through one lens, my office could have been the backdrop for any of the crime dramas

that saturate American television, *Law and Order: District of Columbia*. In 1991, D.C. hosted almost 500 murders – a record high. By 2000, the number was down to 239, but that’s still a lot for a small city. Overwhelmed D.C. police solved only about a third of murders, and our office tried to obtain convictions in those cases.<sup>3</sup>

Barely a year out of law school, I found my caseload included seven murder appeals. Each case told a different terrible story. Here’s one of the worst. There had been a triple murder at a Starbucks. A civic-minded drug user thought the folks in a local drug house knew who did it. He contacted the police and offered to go undercover. The undercover operation was a complete failure. As police handlers waited outside in a squad car, a group of people stomped the informant to death in an alley behind the house. Under intense media scrutiny and facing a lawsuit from the informant’s family, the police tracked down a guy nicknamed “Bruiser” who, witnesses claimed, was responsible for the worst of the stomping. A jury convicted and the judge sentenced him to the “maximum sentence,” twenty years to life in prison. As I worked on the appeal in my windowless office, I got a surprise visit from *the* United States attorney – “don’t screw this up kid.” I didn’t. Bruiser is one of the 2 million people that make up Mass Incarceration.<sup>4</sup>

That’s one sliver of American criminal law enforcement, and the part that best fits the traditional label, “the criminal justice system.” People are accused of grave offenses and the government seeks to hold them accountable. And increasingly over the past decades that meant that people who committed serious violent crimes served long prison terms. But there are lots of other parts of the criminal law landscape that look very different.

After the Appeals section, I moved to the first of my trial rotations: Misdemeanors. Here, most of the cases were small. Formal intervention seemed pointless: a packet of drugs in the console of a car; minor assaults; soliciting prostitution. There was a police officer who would leave a convertible filled with stereo equipment in busy areas of the city. When someone grabbed the stuff, the officer swooped in to make an arrest.

Few misdemeanor cases could be framed as quests for justice. That didn’t change as much as you’d think when I graduated to felonies. The Felony Trial section included some cases where justice played a

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role. But most of the cases concerned car thefts, gun possession, and lots and lots of drug sales. In college, I had written a column for the student paper arguing that drugs should be decriminalized. A few years later, I was prosecuting drug cases. I rationalized that the legislature had the power to pass criminal laws (even ones I didn't like) and prosecutors (or at least line prosecutors like me) had to apply them. Still, these weren't cases that anyone in the office got excited about. We told ourselves we were just enforcing the law.

Years later, I was teaching a class about a 2009 Supreme Court case on car searches. Buried in the case is testimony from a Tucson (Arizona) police officer about why he searched a car leading to the discovery of a bag of cocaine and a gun. You'd expect the answer to focus on the reasons he expected to find this contraband. Instead, the officer said he searched the car "because the law says we can do it."<sup>5</sup> That answer struck me as expressing a larger truth about what the system had become. As Mass Incarceration spread across the nation, government officials increasingly locked people up because the law said they could. This wasn't about justice. Criminal laws had become, at best, a policy tool that politicians used to discourage behaviors, like drug use or drunk driving or possessing weapons. At worst, these laws were toxic vectors for bias and discrimination. Whichever characterization you prefer, the criminal **justice** system was becoming a criminal **legal** system. Criminal courts were moving away from their core purpose: as a forum where citizens went to obtain justice. Courts were increasingly a place where the government went to enforce the law.

As I worked on this book, I began to see that a lot of the disagreements about American criminal law stem from conflating two distinct systems: (1) a criminal justice system where the public seeks justice in response to crimes like murder and rape and (2) a criminal legal system where the government enforces a variety of laws ostensibly to achieve certain policy goals, like reducing drug abuse or gun violence or illegal immigration. As I will explain in the pages that follow, both of these systems became more punitive during the rise of Mass Incarceration, but it is necessary to analyze them separately for the overall phenomenon to make sense.

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It all starts, counterintuitively, with a police force that catches only a fraction of the people who commit even serious crimes. The crime most likely to be solved in this country is murder, with about 60 percent of homicides leading to an arrest. The arrest rate plummets for other crimes. About 35 percent of reported rapes lead to an arrest; 30 percent of robberies; 20 percent of arsons; 13 percent of burglaries; 13 percent of car thefts. That’s *reported* crimes. Only about a third of rapes are ever reported to police.<sup>6</sup> The probability of getting arrested for crimes like drug dealing or tax cheating or theft is probably less than 1 percent.

Things don’t improve much after an arrest. For example, in 2000, my office filed almost 23,000 criminal cases. We resolved about 15,000 over the course of the year. The most common resolution? Dismissed. There were 811 guilty verdicts after trial, 381 acquittals, 6,505 guilty pleas, and almost 8,000 **dismissals**.<sup>7</sup>

Hard to believe? Here’s a chart for the D.C. Office that I found buried deep in the Department of Justice’s 2000 annual report (Tables I.1 and I.2).

Table I.1 *Washington, D.C., case outcomes: Dispositions*

Case Dispositions		
	Number of Guilty Pleas	Number of Dismissals
Felony	2,723	1,931
Misdemeanor	3,782	5,864
Total	6,505	7,795

Table I.2 *Washington, D.C., case outcomes: Convictions*

Convictions		
	Number of Convictions	Conviction Rate (%)
Felony	2,951	58.7
Misdemeanor	4,365	41.6
Total	7,316	47.1

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Note the 41.6 percent conviction rate for misdemeanors. Things improved for felonies, but not much (convictions in 58.7 percent of filed felony cases). This isn't the kind of thing prosecutors advertise. Dismissals rarely make the news. I wouldn't have believed it if I hadn't experienced it myself.

When my friends asked me what I did as a prosecutor, I'd joke that I dismissed cases. The police thought the same thing. If the D.C. police wrote the introductory segment to *Law and Order*, the show's famous slogan would be very different: "In the criminal justice system, the people are represented by two separate yet equally important groups. The police who investigate crime and the district attorneys who dismiss their cases."

But this was only part of a larger truth. With thousands of cases pouring into the system, the stars frequently aligned. The officers showed up, the drug analysis came back on time, the witnesses and the defendant came to court, the jury convicted or the defendant pled guilty, and the conviction held up on appeal. Even with all those dismissals, there were thousands of convictions: thousands of people in D.C. and across the country rotating in and out of jails and prisons.

Low arrest rates and frequent dismissals seem out of place in a discussion of Mass Incarceration. But they are critical to understanding the phenomenon. American penal severity expanded through a series of policy choices, like longer sentences and a war on drugs. But the government officials across the political spectrum who made those choices weren't trying to fill prisons. At least, that's not how they sold these policies to the public. Politicians claimed to be trying to solve the problem of crime. The critical flaw in the last fifty years of "tough on crime" policies is that this never works.

Deterrence – preventing crime through punishment – works when people expect to be caught. That's not the system we've built. In a free society with large, sprawling cities and some semblance of individual rights, it is hard to detect crimes and even harder to convict those we suspect are guilty. Increasing criminal punishments is like increasing a lottery prize from \$1 million to \$50 million. It's a big deal for the winner, but for most people nothing changes. Increasing the penalties for crime in this country didn't end crime. Crime continued to ebb and flow as it had for centuries. Our "tough on crime" policies filled

prisons with a small percentage but growing number of unlucky “criminals.” And once they got locked up, tougher laws and tougher officials made sure they stayed locked up. In D.C., I saw this all firsthand. We were punishing a handful of serious crimes severely, a smaller percentage of moderate crimes moderately, and throwing a tiny fraction of minor offenders in jail. This system may seem sensible when you look at an individual case. But when you step back and take in the big picture, it becomes clear that, as a country, we lost our way.

What went wrong? In the early 1970s, the US incarceration rate was low and unremarkable. Then, spurred by a temporary spike in crime, everyone discovered something they wanted to punish more severely. From liberal Senator Ted Kennedy to conservative evangelist Pat Robertson, the details (and motives) differed, but the broad themes were consistent: Americans wanted tougher laws, tougher cops, tougher prosecutors, and tougher judges. We got our wish. The changes spread through the system in two distinct but overlapping waves. In the 1970s and 1980s, additional police and harsher laws targeted the crimes that were spiking: homicides, robberies, rapes, burglaries. When those crimes fell in the 1990s, however, arrest numbers continued at around the same level, and convictions actually increased. These numbers stayed high even as crime dropped because the system pivoted to commonly occurring, easily detected, and readily provable offenses where arrests were driven by law enforcement resource allocations (like drugs) or whose characterization often hinged on subjective assessments (like assault). And because this second wave of aggressive law enforcement had more to do with policy choices than crime, it predictably fell on the easiest targets – which in this country often means the poor and minorities.

Now it seems like the punitive consensus is crumbling, but the new consensus may not be that different from the old. When crime goes down, as it has now for decades, prison populations decrease. But, for the reasons explored in the pages that follow, that will only push on the margins. And those gains are easily reversed with increases in crime and the shiny new laws that follow in the wake of each new tragedy. It may be comforting to think of Mass Incarceration as a temporary problem created by a few familiar villains – and that’s how typical treatments of the topic are framed. But the villains in this story aren’t

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(only) racist Southerners or Richard Nixon or the drafters of the Thirteenth Amendment. The villains aren't just police or prosecutors or politicians. The villains include us, the American public, and we are the ones who need to turn things around.

A precise diagnosis of the causes of Mass Incarceration is vital because it highlights a promising pathway to the phenomenon's demise. Simply put, we can look at what changed between the 1970s and today and, with respect to incarceration, change things back to the way they were. The country has made great progress in the past fifty years, but one area where we went backward is criminal law enforcement. Invoking the rhetoric of justice, we ratcheted up severity and then, with little thought, applied the increased severity to an expanding catalog of crimes that had little to do with justice. For the offenses where it played a role, "justice" increasingly meant more prison time. For the vast bulk of offenses, however, justice played no role at all; the criminal courts became just another local bureaucracy processing an endless flow of cases in what could, at best, be characterized as a myopic effort to "enforce the law."

This book fills out the sketch offered above, laying out, step by step, what changed after the 1970s and how those changes led to Mass Incarceration. It begins with an explanation of why this matters. Part I offers a snapshot of where we are today, stuck on a plateau of historically unprecedented incarceration rates, exceeding those of any country in the world. These rates can be found across the nation, not just in one region or a handful of States. And while there has been some progress in recent years, the big picture has not changed. It is the scope and persistence of American Mass Incarceration that makes the phenomenon so important, so difficult to understand, and so remarkable.

Part II travels fifty years into the past to explore how we went from long-standing, unremarkable incarceration rates to Mass Incarceration. It highlights a crime surge that increased the popular appeal of new criminal laws and spawned "tough on crime" rhetoric and attitudes that continue to haunt our public discourse. These laws and attitudes emerged as a response to violent crimes but steadily expanded to encompass all forms of criminal law enforcement, from drug offenses to drunk driving to violations of conditions of release (parole and probation).

Part III turns to the mechanics of Mass Incarceration, the police, prosecutors, judges, and parole-probation officers who enforce the criminal laws. This part presents an essential supplement to the standard narrative about the “tough on crime” laws that gave rise to Mass Incarceration. Increased severity always requires two components: harsher laws and harsher enforcement. After the 1970s, a new consensus emerged with all of the law enforcement actors gravitating toward the same punitive methods. With everyone on the same page, the system’s expanding focus and increased severity collided with ongoing crime to fill prisons and jails. Finally, Part IV lays out the long road to recovery. This Part reframes the preceding discussion as a road map for reform. The clearest solution to the problem of Mass Incarceration is to identify the things that changed since the 1970s with respect to incarceration and change them back.

A note on methodology. Wherever possible in the pages that follow, I test my arguments against the historical data and lay out that data for readers to draw their own conclusions. To enhance the transparency of the presentation and allow skeptics to check my claims, I rely as much as possible on the most widely accepted, official, public data sources.

I often highlight 2019 data even when more recent data is available because the most recent data is skewed by the impact of Covid-19. For example, the Bureau of Justice Statistics flags the “40% decrease in admissions to state and federal prison from 2019” to 2020 as a temporary anomaly, stating: “The COVID-19 pandemic was largely responsible for the decline in prisoners under state and federal correctional authority” because “[c]ourts significantly altered operations for part or all of 2020, leading to delays in trials and/or sentencing of persons.”<sup>8</sup> That said, Covid-19’s impact may mask the results of budding reforms and could spur policy makers to turn temporary reductions into permanent ones. This book offers support for doing just that.