

I

Introduction

Few nations – and no democracies – punish lawbreakers as energetically as the United States.

James A. Morone (2009, p. 921)

On November 4, 1995, Leandro Andrade walked into a Southern California Kmart. Andrade – who had several past criminal convictions – was about to commit a crime that would lead to a prison sentence of twenty-five years to life. Two weeks later, still a free man, Andrade struck again. This time, the target was a Kmart just three miles to the west of his previous crime. His plan was identical and would result in another sentence of twenty-five years to life. In two weeks, Andrade had attempted to steal nine VHS tapes: *The Fox and the Hound*, *The Pebble and the Penguin*, *Snow White*, *Casper*, *Batman Forever*, *Free Willy 2*, *Little Women*, *The Santa Clause*, and *Cinderella*. The total cost of the movies was \$153.54. The actual cost to Andrade was fifty years to life.

Two years earlier, Andrade's actions would not have been noteworthy. At both Kmart stores he was caught in the act by a store security guard – the videos never left the store. Considering his criminal record, in 1993 Andrade would have faced a maximum possible sentence of three years and eight months.¹ More likely, the punishment would have been less. However, under California's 1994 Three Strikes law, two counts of petty theft with a prior carried consecutive sentences of twenty-five years to life. The Three Strikes law, which had been overwhelmingly endorsed by 72 percent of California voters, increased the maximum sentence from under four years to an indeterminate life sentence with no possibility of parole for fifty years.

¹ California Penal Code §1170.1(a) (1999). See Chemerinsky (2003) for a detailed overview of Andrade's legal case.

Gary Ewing also found the high cost of shoplifting with a prior in California. Ewing walked out of a golf pro shop with three clubs concealed in his pants. The “limp” these clubs caused was a clear giveaway. Like Andrade, Ewing was caught in the act. Also like Andrade, Ewing faced California’s Three Strikes law. Because this was his third strike, the punishment for stealing three golf clubs was a life sentence with no possibility of parole for twenty-five years.²

Although these are extreme examples of the punitive nature of California’s Three Strikes law, they are not without comparison. In 2010, 32,392 individuals were imprisoned in California with their second strike. Another 8,764 were incarcerated with their third strike. Of the second strikers, 883 were in for petty theft. And like Andrade and Ewing, an additional 341 individuals faced a potential life sentence for stealing items valued at \$950 or less.³

Of course, California is not the only state to legislate harsh sentences. After police found half a kilogram of cocaine hidden in the attic of her Florida home, Stephanie George was sentenced to *life without parole*. George claimed that she was unaware that her former boyfriend had hidden the drugs in her home. Her former boyfriend testified that he had paid her to store the cocaine. The judge concluded that his hands were tied. He told Ms. George, “your role has basically been as a girlfriend and bag holder and money holder but not actively involved in the drug dealing, so certainly in my judgement it does not warrant a life sentence.” Yet life without parole was the sentence he was required to deliver. The judge later recounted, “The punishment is supposed to fit the crime, but when a legislative body says this is going to be the sentence no matter what other factors there are, that’s draconian in every sense of the word” (Tierney 2012a, p. A1).

The judge in Robert Riley’s case also expressed reservations about the severity of the punishment he was required to hand down. The judge wrote, “It gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life” (Zlotnick 2008, pp. 49–50). Robert Riley had two felony drug convictions that stemmed from arrests outside Grateful Dead shows. His third conviction occurred in Iowa for conspiring to distribute LSD. The amount of LSD was minuscule. But the blotter paper it was on weighed more than 10 grams. This weight and the previous convictions meant a mandatory life sentence without parole (Tierney 2012b, Zlotnick 2008).

Of course, these four individuals represent just a tiny fraction of the 7 million people under the supervision of the US justice system (Glaze 2011). Yet their stories help illustrate an important fact: by almost any measure, the US legal system is one of the most punitive in the world. Controlling for the crime rate

² See Beale (2013) for a detailed discussion of Ewing’s case.

³ In 2012, Californians voted to revise the Three Strikes law so that a life sentence can be imposed only when the new felony conviction is “serious or violent.” See Domanick (2004) for a history of California’s Three Strikes law. The California incarceration data come from “Second and Third Striker Felons in the Adult Population,” March 31, 2011. Department of Corrections and Rehabilitation, State of California, Data Analysis Unit, Estimates and Statistical Analysis Section, Offender Information Services Branch.

Introduction

3

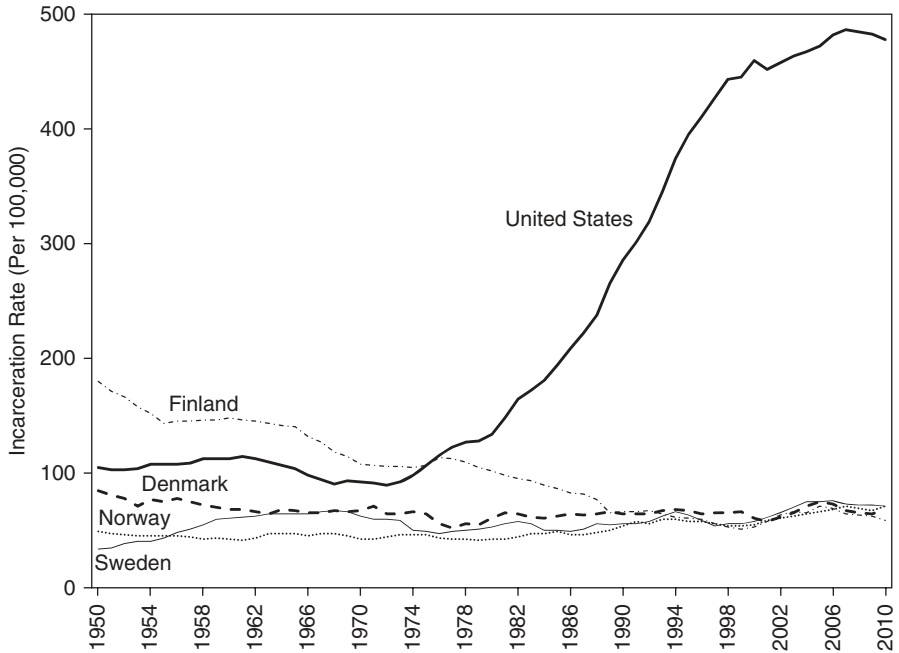


FIGURE 1.1. The annual incarceration rate for the United States, Finland, Norway, Denmark, and Sweden from 1950 to 2010.

Source: Nordic Criminal Statistics 1950 to 2010, Stockholms universitet, Table 15; United States: Sourcebook of Criminal Justice Statistics Online, Table 6.28.2010.

and the population size, the United States hands down longer sentences, spends more money on prisons, and executes more of its citizens than every other advanced industrial democracy (Amnesty International 2012, Blumstein, Tonry, and Van Ness 2005, Cowen 2010, Farrell and Clark 2004).⁴ Furthermore, the difference between the United States and comparable countries is substantial. Per capita, the United States spends almost twice as much on prisons as England or Canada (Farrell and Clark 2004). More shocking, the proportion of individuals serving life without parole in the United States is approximately 180 times greater than in England. Canada's Criminal Code (Section 745) does not allow life sentences without parole.

It is equally important, however, to remember that the US prison system has not always been such an outlier. In fact, during the 1950s and 1960s, the US incarceration rate was not especially remarkable. Consider Figure 1.1, which

⁴ In 2011, the United States ranked fifth in the world in the number of executions, behind China, Iran, Saudi Arabia, and Iraq. Of the thirty member countries of the Organization of Economic Cooperation and Development (OECD), Japan and South Korea are the only other two countries that allow the death penalty, and South Korea has not executed anyone in more than ten years (Amnesty International 2012).

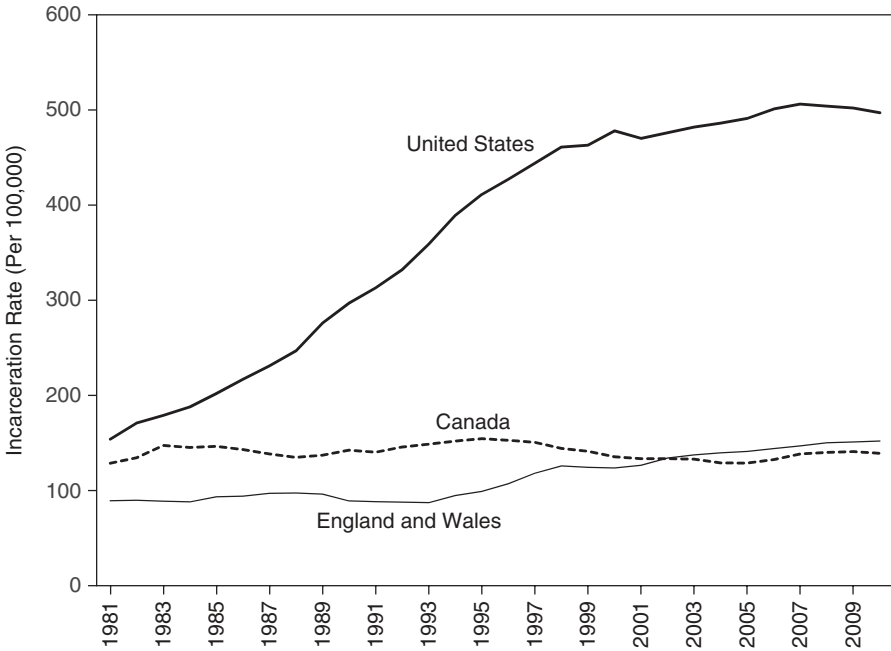


FIGURE 1.2. The annual incarceration rate for the United States, Canada, and England and Wales from 1981 to 2010.

Source: Canada: Statistics Canada, Canadian Centre for Justice Statistics, Corrections Key Indicator Report for Adults; England and Wales: Offender Management Caseload Statistics 2009 and 2012, Ministry of Justice Statistics Bulletin, Table 7.5; United States: Sourcebook of Criminal Justice Statistics Online, Table 6.28.2010.

reports the annual incarceration rate for the United States, Finland, Norway, Denmark, and Sweden from 1950 to 2010. Given the extensive scope of their social welfare policies, these Scandinavian countries are rarely grouped with the United States (Arts and Gelissen 2002). Yet, during the early years shown in the figure, the US incarceration rate was roughly on par with these countries, falling between Denmark and Finland. The US incarceration rate did not begin to pull away until the 1970s. Today the differences in incarceration rates are massive.⁵

Figure 1.2 compares the US incarceration rate with the incarceration rates of Canada and England and Wales from 1981 to 2010. Despite similarities in their

⁵ The US incarceration data in Figures 1.1 and 1.2 represent the incarceration rate for those sentenced to more than one year. While this offers the closest comparison to the data from other countries, we must remember that the series understates the overall incarceration rate, which includes individuals in jail with shorter sentences.

1.1 *The high costs of mass incarceration*

5

economies and social welfare policies (Esping-Anderson 1990, Hall and Gingerich 2009, Korpi and Palme 1998), only the United States has experienced a dramatic rise in its incarceration rate during the past three decades. In the early 1980s, the US incarceration rate already exceeded that of Canada and England, but not dramatically.⁶ However, by 2005, the US incarceration rate was almost five times the rate in these countries. The growth of the US carceral state is without comparison. The United States now incarcerates a higher proportion of its population than any other country in the world (Walmsley 2009).

This book aims to understand the unparalleled expansion of the US prison system. We will see that objective conditions, such as the crime rate, matter. But the most important factor will turn out to be growing public support for “tough-on-crime” policies. In short, the public’s increasing punitiveness – and the criminal justice system’s responsiveness to this punitiveness – is critical to understanding mass incarceration in the United States. Thus, this book’s title, *Incarceration Nation*, does not just refer to the fact that the United States incarcerates more vigorously than any other country. We are the *Incarceration Nation* because the public has been a catalyst for this outcome. Before this chapter ends, I will detail the many ways public opinion can influence criminal justice policy – and the incarceration rate in particular. However, prior to theorizing the relationship between public opinion and mass incarceration, the next section discusses the staggering social, economic, and political consequences of maintaining the world’s most prolific prison system. In addition to illustrating the broad implications of mass incarceration, this discussion highlights the puzzling aspects of US prison expansion.

1.1 THE HIGH COSTS OF MASS INCARCERATION

Perhaps not surprisingly, it costs a lot to keep one out of every thirty-three adults under the supervision of the criminal justice system (Glaze 2011). The Bureau of Justice Statistics estimates that in 2008, federal, state, and local governments spent almost \$250 billion for police, corrections, and judicial activities.⁷ To put this value in perspective, in 2008, this amount represented about 40 percent of the total US national defense budget, about five-and-a-half times what the federal government spent on unemployment compensation, and more than seventeen times what the government spent on foreign aid.⁸

State and local governments foot most of this bill. Furthermore, because most state constitutions require balanced budgets, the rise of the carceral state has replaced spending in other areas. California Governor Arnold

⁶ The incarceration rate for Canada in Figure 1.2 is slightly inflated relative to the other countries because these values are based on the adult population as opposed to the total population.

⁷ Criminal Justice Expenditure and Employment Extracts Program (CJEE), Table 1 (cjee08fno1.csv). The actual estimated amount was \$246.7 billion.

⁸ Historical Tables: Budget of the US Government, Fiscal Year 2012, p. 71. Foreign aid refers to international development and humanitarian assistance.

Schwarzenegger drew attention to this pattern in his 2010 State of the State Address. The governor explained:

The priorities have become out of whack over the years. I mean, think about it. Thirty years ago 10 percent of the general fund went to higher education and 3 percent went to prisons. Today, almost 11 percent goes to prisons and only 7.5 percent goes to higher education.⁹

Governor Schwarzenegger's comments imply that in order for the state to maintain its incarceration rate – which had more than quadrupled in the previous three decades – Californians were compromising other government programs and services. This tradeoff is not unique to California. During the past three decades, almost every state increased the proportion of its budget devoted to corrections and decreased the proportion dedicated to higher education.¹⁰

Of course, the costs of mass incarceration extend far beyond government expenditures. Scholars have repeatedly documented the significant social costs to those incarcerated, their families, and their communities (e.g., Clear 2007, Travis, Western, and Redburn 2014). Perhaps most obviously, incarceration can have a devastating effect on individuals' ability to earn a living. Upon leaving prison, the obstacles to employment are substantial. Most of those incarcerated have low education levels when they enter prison. Minimal to no job training opportunities in prison means that the formerly incarcerated typically reenter society even less equipped to meet the expectations of employers. The stigma many potential employers attach to prison and the fact that many jobs do not hire individuals with a prior conviction further reduce employment options.¹¹ Additionally, because of their criminal records, many former inmates are ineligible for health and welfare benefits, food stamps, public housing, and student loans (Forman 2012). The challenges of reentering society with few employment opportunities and limited access to public services are often further exacerbated by debt that has accrued while in prison. It is increasingly common for former inmates to be greeted by thousands of dollars in child support and legal fees from their time behind bars (Beckett and Harris 2011, Katzenstein and Nagrecha 2011).¹² Importantly, these financial concerns do not just affect those who have been convicted and sentenced. The fiscal strains that these individuals face weigh heavily on their families and communities.

Rising incarceration rates have also corresponded with substantial health costs. Those who have been incarcerated are significantly more likely to suffer

⁹ www.govspeech.org/pdf/19694d.pdf

¹⁰ Data from the Tax Policy Center State and Local Finance Data Query System.

¹¹ See, for example, Pager (2003, 2005, 2007), Pettit and Western (2004), Raphael (2014), Wakefield and Uggen (2010), Western, Kling, and Weiman (2002), and Uggen (2008). Uggen et al. (2014) show that even an arrest for a low-level crime that does *not* lead to a charge or conviction affects employment prospects.

¹² See Katzenstein and Waller (2015) for an important overview of the many exorbitant fees, including fees for telephone calls, medical services, and food, that inmates often must pay.

1.1 *The high costs of mass incarceration*

7

from mental *and* physical health problems.¹³ Because of the increased risk of exposure to infectious disease, the American Red Cross will not accept blood from an individual who spent more than seventy-two consecutive hours during the previous year “detained or incarcerated in a facility (juvenile detention, lockup, jail, or prison).”¹⁴ Of course, as with financial strains, those incarcerated are not the only ones affected by the health risks associated with incarceration. As Massoglia (2008a, p. 66) concludes, “Given the detrimental impact of incarceration on health and the high number of inmates released yearly, the penal system may have a transformative effect on aggregate health and the health care system.” Perhaps less well known, correctional officers also face increased physical and mental health risks. Research consistently finds evidence of elevated levels of stress, burnout, depression, and PTSD due to the challenging work environments that correctional officers face, and correctional officers (as well as police and sheriff patrol officers) are among the professionals with the highest occupational injury rates. Thus, we must remember that those who work in the criminal justice system also experience its consequences.¹⁵

The high costs of incarceration are also borne by the children of those who are incarcerated. Not surprisingly, the research shows that it is hard on kids when they have a parent in prison. Haskins (2014), for example, finds a direct negative relationship between paternal incarceration and children’s educational preparedness. Research also shows that children with an incarcerated parent are more likely to experience homelessness and foster care (Berstein 2005, Foster and Hagan 2007). Notably, as the US incarceration rate increased through the 1970s, 1980s, 1990s, and 2000s, more and more children have had to face the many challenges that stem from having an incarcerated parent.¹⁶

Punitive policies also carry political consequences. Some of these consequences are automatic. In forty-eight states, for example, convicted felons lose the right to vote.¹⁷ In eleven states, the loss of vote is permanent. That is, even after completing their prison sentences and after completing parole or probation, ex-felons never regain the right to vote (Uggen, Shannon, and Manza 2012). This disenfranchisement holds real electoral consequences, and these

¹³ See, for example, Liebling and Maruna (2011), Massoglia (2008a,b), Schnittker and John (2007), and Schnittker, Massoglia, and Uggen (2012).

¹⁴ www.redcrossblood.org/donating-blood/eligibility-requirements/eligibility-criteria-topic#lifestyle

¹⁵ Highlighting the scope of mental health concerns, in 2009, the New Jersey Governor’s Task Force on Police Suicide found that between 2003 and 2007 the suicide rate among male corrections officers was two-and-a-half times greater than that of the same-aged men in the population (also see Stack and Tsoudis 1997). The same report found that the suicide rate for other law enforcement officers was 1.1 times the same-aged men in the population. Also see The Bureau of Labor Statistics (2013), Finn (2000), and Rogers (2002).

¹⁶ For additional research on the substantial negative effects of parental incarceration on children, see Johnson and Waldfogel (2002), Wakefield and Wildeman (2011, 2013), Wildeman, Haskins, and Muller (2013), and Wildeman, Wakefield, and Turney (2012).

¹⁷ Maine and Vermont do not take away the right to vote from convicted felons.

consequences have increased as the incarceration rate has expanded (Manza and Uggen 2006). For example, using the most conservative estimates of voter turnout, Manza and Uggen (2004) conclude that if Florida allowed ex-felons to vote in 2000, Al Gore would have won Florida – and thus the presidential election – by more than sixty thousand votes. In addition to the effects of these voter laws, recent research finds broader effects of the criminal justice system on political behavior. As the incarceration rate has grown, police stops, arrests, court appearances, and other interactions with the criminal justice system have become the most salient contact with government for an increasingly large segment of the population. Weaver and Lerman (2010) have shown that these interactions have a profound influence on individuals. In particular, they find that contact with the criminal justice system – even contact that does not result in jail or prison time – leads to significantly lower levels of voting, participation in civic groups, and trust in government (also see Burch 2013 and Lerman and Weaver 2014a).

Another important cost associated with the expansion of the prison system is the increased probability of incarcerating innocent people. The National Registry of Exonerations at the University of Michigan Law School has identified 1,621 individuals who have been exonerated since 1989.¹⁸ Astonishingly, 520 of these exonerated individuals had been sentenced to death or to life in prison.¹⁹ Equally concerning, the majority of wrongful convictions do *not* result in exoneration. Thus, these numbers are likely to vastly understate the actual number of wrongful convictions. Recognizing this growing concern, fifteen district attorney offices have established wrongful conviction units tasked with reviewing convictions of those imprisoned.²⁰

In sum, whether we consider the *economic*, *social*, or *political* costs, maintaining the world's highest incarceration rate carries important consequences. These consequences include tradeoffs in the services offered by local, state, and federal governments, diminished economic and health conditions among the incarcerated, their families, and their communities, wrongful convictions, and changes to some election outcomes. Just as important, we must remember that the social and political consequences of mass incarceration are *not* borne equally by all segments of society. Those with low incomes or low education levels face the highest probability of incarceration. Additionally, although millions of white Americans have been imprisoned in recent decades, racial minorities are the most likely to be imprisoned. African Americans represent 12 percent of the adult population and Hispanics represent 13 percent of the population. Yet these two groups constitute 60 percent of the incarcerated

¹⁸ www.law.umich.edu/special/exoneration/Pages/about.aspx

¹⁹ www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7&SortField=Sentence&SortDir=Desc

²⁰ See, for example, Gerber (2015).

1.1 *The high costs of mass incarceration*

9

population (39 and 21 percent, respectively).²¹ In addition to (and perhaps because of) being disproportionately represented in prison, every cost described earlier – such as limited employment, greater health risks, and political alienation – has been shown to be more dramatic for racial minorities.²² It is easy to see why Michelle Alexander refers to mass incarceration as *The New Jim Crow*.

Just as striking as the dramatic costs and unequal consequences of the current criminal justice system, most scholars conclude that the benefits of rising incarceration rates for crime reduction have been limited, at best. There is broad consensus that the rising incarceration rate reduced the crime rate to some extent. At a minimum, the fact that large numbers were incapacitated behind bars meant that there were fewer people who could commit a crime. In his extensive analysis of the relationship between incarceration and crime rates, Western (2006) estimates that the prison boom reduced the rate of serious crime by 2–5 percent in the 1990s. Levitt's (2004) analysis, by contrast, suggests that the growth of the carceral state accounted for about a third of the reduction in crime during this period. Most estimates fall somewhere between these two values (e.g., Donohue 2009). Interestingly, although Levitt's (2004) estimates of the crime-reducing effect of incarceration are among the highest, from a cost-benefit perspective, he provides three reasons for why incarceration is *not* the most efficient way to reduce crime. First, Levitt estimates that dollar for dollar, spending on police yields a greater crime reduction than spending on prisons. Second, he highlights some of the social costs discussed earlier. Finally, he points out that the marginal benefit of crime reduction likely decreases as more people are incarcerated because the most violent and active criminals are likely to be among the first who are imprisoned. Indeed, Johnson and Raphael (2012) estimate the crime reduction effects of incarceration between 1991 and 2004 to be less than a third of the size of the effects between 1978 and 1990 (see also Useem and Piehl 2008). Thus, the general consensus is that rising incarceration rates have had some influence on crime rates, but even the most favorable estimates suggest that the incarceration rate exceeds the optimal crime reduction level.

Another perspective argues that current incarceration rates may *increase* criminal activity. The concern is that incarceration can have a criminogenic effect, socializing inmates toward heightened criminal activity. To study this possibility, Gaes and Camp (2009) took advantage of a change in how the California Department of Corrections and Rehabilitation assigned inmates

²¹ Adult population estimates based on the US Census Bureau (www.census.gov/compendia/statab/cats/population.html). Incarceration data based on the *Sourcebook of Criminal Justice Statistics* (www.albany.edu/sourcebook/pdf/t6332008.pdf).

²² See, for example, Clear (2009), Johnson and Raphael (2009), Lee et al. (2015), Mauer (2011), Pager (2005, 2007), Schnittker, Massoglia, and Uggen (2011), Wakefield and Uggen (2010), Western (2006).

to high (level III) or low (level I) security facilities. Between November 1998 and April 1999, adult male inmates in California were classified under both a proposed new classification system and the old classification system. Furthermore, after receiving both classifications, a random process was used to determine whether the inmates would be placed under the old or the new systems. The randomization is consequential because among those classified during this time period, a subset of individuals were classified differently by the old and new system. Thus, Gaes and Camp (2009) were able to compare the recidivism rates of those randomly assigned to a level I security facility and those randomly assigned to a level III security facility.²³ Because the assignment to either a high or a low security prison was random, on average, the inmates that Gaes and Camp (2009) studied were identical in every other way. Any difference in recidivism can be attributed to assignment to a particular type of prison. Consistent with the criminogenic hypothesis, they found those randomly assigned to the level III facility were more likely to recidivate, and the average time to recidivism was shorter (see also Chen and Shapiro 2007, Lerman 2009, 2013). This research suggests that in addition to being an inefficient way to reduce crime, the current rate of imprisonment may actually encourage criminal behavior.

Because punishment is a complex issue, reasonable people can (and will) disagree about how to deal with lawbreakers. However, regardless of one's personal views about criminal justice policy, I hope three conclusions stand out from the foregoing discussion. First, the United States has not always been the world's incarceration leader – the expansion of the US carceral state exceeds that of all other countries. Second, mass incarceration carries real consequences and these consequences are unevenly distributed. Finally, the growth of the US carceral state has not translated into an equivalent reduction in crime. These conclusions lead to an important puzzle. If the costs are substantial and the benefits for crime reduction unclear, why did the United States become the world's most prolific imprisoner? The following section discusses two accounts for why the United States embarked on this path.

1.2 WHY DID THE UNITED STATES BECOME THE WORLD'S INCARCERATION LEADER?

Scholars have long debated the reasons for the United States' punitive turn. The crime rate offers one potential explanation. A rising crime rate, after all, would be expected to correspond with more arrests and incarcerations. An over-time analysis of the ratio of the number of people incarcerated relative to the number

²³ Level I prisons are open dormitory facilities with low security perimeters. Level III prisons, by contrast, have cells adjacent to exterior walls and a secure perimeter with armed coverage (Grattet et al. 2011, p. 16).