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Introduction: Out-of-Control Criminal Justice

Criminal justice has turned into a burgeoning, out-of-control industry. Prison, parole, and probation populations and the supporting apparatus – law enforcement and the courts – have dramatically expanded since the 1980s. This expansion has obligated large amounts of resources and tax dollars, with little evidence of benefit.¹ Worse, investments in criminal justice consistently ignore the “systems” nature of both crime and justice. In so doing, they almost guarantee that investments will be wasteful, will fail to improve outcomes, and may even worsen them. The problem stems in part from insufficient research infrastructure at federal, state, and local levels. Such infrastructure is necessary to systematically understand the causes of crime in particular places and how criminal justice can be configured to achieve greater public safety and justice. The problem also stems from a failure to carefully couple policymaking and research. Ideally, policymaking – including the design and implementation of various programs and practices as well as the day-to-day decision-making that occurs throughout the criminal justice system – would be informed by research. Ideally, too, research would accommodate and address the real-world constraints and challenges that confront lawmakers and those who work in criminal justice. These ideals have not been met. Indeed, they cannot be met without an institutionalized basis for doing so. The end result? Less government accountability, less cost-efficiency, and missed opportunities to reduce crime and to achieve more justice.

This book seeks to chart a better path. To this end, it proposes a “Systems Improvement Solution,” or “Systems Solution” for short. Briefly, the solution consists of a continuous interplay between, on the one hand, research, and, on the other hand, a policy process focused on

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designing, implementing, and improving policy. “Policy” here refers to a wide array of laws, rules, programs, and practices, as well as decisions made by policymakers and criminal justice administrators and practitioners. The research component of the Systems Solution consists of continuously applying the evaluation research hierarchy *and* systems analysis to all parts of the criminal justice system and its subsystems. This hierarchy entails *needs* evaluations that assess whether a given policy is needed; *theory* evaluations to assess the integrity and credibility of a policy’s design; *implementation* evaluations to assess how well and completely a policy is implemented; *impact* evaluations to assess how well a policy contributes to intended outcomes while minimizing harmful unintended outcomes; and *cost-efficiency* (or simply “efficiency”) evaluations to assess the relative benefits as compared to the costs of a policy, especially in comparison to other policy options.² *Systems analysis*, by contrast, involves identifying the structures and dynamics that influence one another and contribute to or inhibit achievement of the target or “end” outcomes that we want for a given system. It serves, in particular, to assess how changes in one part of a system may affect other parts and, more broadly, to raise awareness about the ways in which crime and justice occur within and are affected by a systems context.

Research that occurs in a vacuum, however, will do little to provide relevant insight into crime and justice (or how to improve it). Policymakers and the stakeholders who work within or are affected by criminal justice must be involved. However, involvement without understanding – without good and relevant information – will not achieve much. It is for this reason that the emergence in recent decades of policymaker calls for evidence-based policy has been a positive occurrence.³ As Brandon Welsh and colleagues have emphasized, “There is a growing consensus among scholars, practitioners, and policymakers that crime prevention and criminal justice programs and policies should be rooted as much as possible in scientific research.”⁴ This idea can be seen across many social policy arenas, as reflected in the enactment by Congress of the bipartisan Evidence-Based Policymaking Commission Act of 2016.⁵

The consensus amounts to a paradigm shift in discussions about what should guide criminal justice policy and practice. However, policymakers, administrators, and practitioners ultimately must be able to understand research if they are to know what constitutes “evidence-based” policy. That does not mean that individuals in these roles have to be researchers. But they *do* need to be able to evaluate the credibility and relevance of research. They need to be able to understand the systems nature of crime

and justice. And then they need to ask for and use research. The only alternative is recourse to assumptions and ideology.

At the same time, researchers must be involved in policy design and improvement. Otherwise, they must guess at policymakers' intentions and the challenges that they, as well as administrators and practitioners, face. Researchers who are not part of efforts to design and improve policy typically lack the requisite access to the types of data that would allow for credible and timely analyses that could be used to improve policy deliberations.

Accordingly, the Systems Improvement Solution entails a multi-stakeholder policy *process*. This process brings together lawmakers, criminal justice administrators, front-line personnel who have on-the-ground experience with, and a "stake" in, the day-to-day implementation of policy, and, not least, researchers. In addition, it involves the "clients" served by the criminal justice system, including victims, affected communities, defendants, and offenders.

A lynchpin to the Systems Improvement Solution centers on the implementation of policies that are based on empirical evidence and that are driven by a multi-stakeholder policy process. It centers on continuous attention to evaluating implementation, impacts, and efficiency. It centers, too, on improving all aspects of the criminal justice system. Core priorities that guide the process include the following: Improve the system; focus on goals; avoid big mistakes (which by itself can create substantial returns for society); prioritize high-bet, low-risk minor changes or "tweaks" (if they do not work out, we have not lost much); maximize positive feedback loops and minimize negative feedback loops that create a vicious cycle and lock government into ineffective and inefficient investments; and continuously reevaluate and improve policies.

The Solution calls, too, for adherence to core principles to ensure the integrity and effectiveness of the process. For example, the process must be institutionalized into everyday decision-making and policy discussions. It must be non-partisan, deliberative, and research-informed. Stakeholders from throughout the system or who shape or are affected by it must be included, and discussions should be guided by research. Insights from those on the "ground floor," such as officers, community residents, public defenders, and so on, should be included, as should knowledge from scientists who study criminal justice. Insights from theory, data analysis, and new data are critical as well. In an era of "big data," numerous opportunities exist to identify patterns in crime and justice that can be leveraged to produce understanding about system operations

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and changes that could improve safety, justice, and other outcomes. At the same time, advances in data collection and analysis have created the ability to generate information that can be used to gain insights that go beyond what existing data permit. Not least, information from the Systems Solution process should be disseminated widely and frequently. Doing so helps to ensure that stakeholders and the public share a common understanding about crime and justice. In turn, it creates a foundation for identifying evidence-based policies that best reduce crime and improve justice, accountability, and efficiency.

I. I OUT-OF-CONTROL CRIMINAL JUSTICE

A starting point for understanding the need for a sea-change in how America addresses crime and justice begins with a short litany of the dramatic failures of criminal justice policy in recent decades. There assuredly are many bright spots on the policy landscape, and these will be discussed. The bar, however, should not be a landscape pockmarked by failure and a few offsetting bright spots. Rather, it should be a systematic focus on minimizing failures and maximizing success. At the least, it should entail limiting avoidable mistakes that fail to reduce crime and that potentially increase it, worsen justice, and leave taxpayers the poorer for it. Although not all scholars, and certainly not all policymakers, would agree with the list that follows, it consists of examples that many members of each group have identified as failures. Some examples, such as high recidivism rates, can be seen as end outcomes of failed policies. Others, such as racial profiling, can be seen as intrinsically problematic policies that, as a “bonus,” may also worsen crime and perpetuate injustice. In many instances, the failures – such as an investment in an ineffective policy and a concomitant disinvestment in an effective one – compound one another. Here, then, is a small sample of criminal justice failures:

- *Increased crime rates in the 1980s and 1990s, followed by crime rates that, because of ineffective policies, did not decline as quickly as they otherwise might have.*⁶ Both problems could and should have been avoided.
- *Failure to invest in effective crime prevention strategies and punishments.* Instead, during the punitive era of the past four decades, ineffective tough-on-crime laws and various examples of “correctional quackery”⁷ were implemented that lacked, and continue to lack, credible social scientific support.⁸

- *Large-scale investment in “get tough” policies throughout the criminal justice system.* A prominent illustration: states have built expensive supermax facilities to house the “worst of the worst” inmates, yet have done so with little credible theoretical or empirical evidence that the facilities were needed, effective, or cost-efficient.⁹
- *Excessive use of incarceration, or what has come to be termed, “mass incarceration.”*¹⁰ No question, incarceration serves a clear purpose or, more precisely, multiple purposes, such as retribution and public safety. However, the lack of credible empirical research that documents consistent and large recidivism benefits, coupled with evidence that prisons may worsen offending and harm families and communities, indicates that incarceration should be used carefully.¹¹ The sheer expense of incarceration would seem to dictate a need for caution. Yet, precisely the opposite has occurred since the 1970s.

Under the *best-case* scenario, this effort may have dramatically reduced crime, prevented some individuals from spiraling into a lifetime of offending, and helped families and crime-ridden communities. A few studies suggest in fact that mass incarceration may have contributed to upward of 25 percent of the crime reduction that occurred from the mid-1990s to the early 2000s.¹² These studies, however, are few in number and considerable disagreement exists about their credibility. At the same time, an emerging literature suggests that incarceration does little to reduce recidivism.¹³

Under the *worst-case* scenario, mass incarceration has failed to appreciably reduce crime, may even have increased it in some places, increased recidivism, damaged the children and families of the individuals sent to prison, poorly served victims of crime, and harmed communities.¹⁴ And it will have done so at considerable taxpayer expense.

- *Extraordinarily high recidivism rates.* It is estimated that over three-fourths of prisoners are rearrested within five years of release.¹⁵ Were an accurate measure of actual offending used, we would see that the recidivism rate is much higher.
- *Persistent evidence of racial profiling and racial and ethnic disparities and discrimination in policing, court processing and sentencing, and correctional system (mis)treatment.*¹⁶ Evidence of disparities and discrimination has accumulated annually. Little evidence exists that criminal justice processing has been is being

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reformed in ways that will appreciably and measurably reduce these problems.

- *Intensive investment in a wide range of tough-on-crime sentencing laws that “bet the farm” on specific and general deterrent effects and ignored the social and financial costs of incarceration.* This investment occurred alongside of limited attention to addressing the many different causes of offending among those punished and among those who might offend. Not least, it ignored the many different, cheaper, and more balanced approaches to reducing recidivism and crime rates in communities that exist.¹⁷
- *Criminalization of drug use rather than treatment of it as a public health problem.*¹⁸ Illegal drug use creates many problems. The simple but big question is how best to reduce demand and supply of it. Little credible evidence exists to suggest that incarceration substantially reduces national drug abuse or drug-related offending.
- *Harm to communities through “top down” approaches to policing, inattention to the causes of crime in high-crime communities, the removal of large numbers of individuals from these communities and their placement in prison, and the return of these individuals to these same areas.*¹⁹ Instead of a careful assessment of the causes of crime and other problems in a given area and then systematic attention to them, the predominant approach has been a “get tough” one, in the hope that doing so would serve as a “silver bullet” solution to crime. It is not.
- *Enactment of wide-ranging reforms that sought to criminalize juvenile justice.*²⁰ The end result was expansion of probation, incarceration, and transfer of youth to the criminal justice system. That occurred alongside of little credible research to suggest that reductions in juvenile crime resulted or that the “best interests” of youth – the reason for having a separate system of justice for adolescents – were advanced.
- *Inattention to systematically monitoring and addressing the innumerable opportunities for abuse and mistakes in criminal justice decision-making.*²¹ Criminal justice and corrections is a machinery, one that is rife with the potential for abuse and error. Harm and mistakes occur. Yet, their occurrence and causes are largely ignored, except when media accounts profile extreme cases. In the meantime, both good decision-making and poor decision-making throughout criminal justice systems go unacknowledged.

- *Public dissatisfaction with criminal justice.* Policymakers introduced tough-on-crime policies and dramatically increased criminal justice system expenditures, and did so based on the notion that they were being responsive to the public. Yet, public views did not call for extreme, narrowly focused responses to crime. They called for balanced approaches. Not surprisingly, public dissatisfaction with the criminal justice system was a persistent theme during the era of tough-on-crime lawmaking and remains so.²²
- *No institutionalized apparatus for government accountability exists, despite persistent calls for greater accountability and reliance on “evidence-based” practice.*²³ The result? More such calls, no evidence of accountability, and no foundation for creating it.

Such critiques barely scratch the surface. Again, many bright spots exist. One can point, for example, to efforts that cities have undertaken to implement crime analysis, hot-spots policing, programs, and practices that have been well-evaluated, and so on. However, the unifying thread by and large is one of failure to plan systematically through the use of credible research, meaningful inclusion of diverse stakeholder groups, and a commitment to improvement. Another unifying thread is the adoption of well-intentioned policies that are undertaken based on personal beliefs and ideology rather than careful empirical assessment about the scope and nature of a particular problem, its causes, or the diverse options for addressing these causes.

Still another unifying thread is the vast disjuncture between policy and research. Policymakers and criminal justice administrators frequently reside in a universe far removed from the nuts-and-bolts realities of offenders, victims, and the communities and families from which these offenders and victims come. All too often, they also do not understand research. They do not know how to ask better research questions or how to consume study findings. Researchers are complicit; they, too, typically reside far from the realities of offenders and victims. Just as problematic, they rarely interact with policymakers and criminal justice administrators.

In defense of these different groups, however, lies a simple fact: No institutionalized arrangement exists that requires policymakers and administrators to interact with the targets of their policies or with researchers. At the same time, researchers cannot willy-nilly insert themselves into policymaking processes or criminal justice administrators' decisions, nor can they whole-cloth create data that address spur-of-the-moment crises in a timely, credible manner.

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The failure of criminal justice policy – viewed here as encompassing criminal justice and corrections as well as the laws, programs, practices, and day-to-day decision-making of system actors – does not lie with any one group, organization, or agency. It results from multiple systems failures. There is a failure to require a systems-based approach to understanding and addressing crime and justice. There is a failure to require sustained and ongoing involvement of diverse stakeholders in guiding both policy and research. Not least, there is a failure to institutionalize continuous policy evaluation, reevaluation, and improvement.

I.2 HOW SAFETY, JUSTICE, ACCOUNTABILITY, AND
EFFICIENCY ARE SYSTEMS PROBLEMS

Safety (Crime)

Criminal justice exists in large part to improve public safety and to do so by reducing crime. That is well and fine. Fortunately, many tools exist to combat crime. These include crime prevention efforts, policing, a variety of sanctioning options, rehabilitative programs, and so on. An effective and efficient approach to promoting public safety would be one that sought to use these tools when and where they are most helpful and least costly.

However, in America, crime has been conceptualized in recent decades as something to which government must respond primarily through punishment. The belief, if implicit, has been that a lack of punishment constitutes the most important cause of crime. Consider, for example, that few if any states or jurisdictions have a “Department of Public Safety” that systematically targets the causes of crime. Instead, criminal justice agencies almost uniformly center their efforts on policing and punishment, not a broad spectrum of activities that might improve public safety. To be sure, policing and punishment may reduce crime. They may introduce a general deterrent effect, for example. But they do not typically address the many different factors that give rise to crime among individuals, families, schools, or communities.

The fact that crime largely results from societal conditions does not absolve individuals from responsibility for their behavior and it does not mean that punishment should not feature prominently in our crime-fighting efforts. It also does not mean that individual characteristics, such as low self-control or criminogenic thinking, do not contribute to offending. It simply means that on an “aggregate,” societal level, the

volume of crime stems primarily from societal conditions. For example, a country that does not ensure that children are well parented will have a greater number of children who develop low self-control, which in turn will contribute to higher levels of crime relative to countries where children are well parented. Is the state supposed to be a parent? No. Should it usurp parental authority? No. At the same time, a country that, for whatever reason, allows high rates of poor parenting to occur likely will have more children with low self-control. Similarly, a country that fails to take steps to reduce criminogenic – that is, crime-causing – conditions will have higher crime rates, no matter the characteristics of its citizens. For example, all else equal, a country with fewer well-lit streets and communities where neighbors look out for one another will likely have more crime.

When individuals commit crime, they should be punished. There also should be interventions aimed at reducing their offending. However, the effectiveness of any such individual-focused punishments or interventions will pale in comparison to efforts that reduce *aggregate* rates of crime. That idea is not novel. To the contrary, policy-makers almost annually proclaim that efforts should be targeted toward reducing crime in society.

The seemingly systematic inattention to the causes of crime is itself a cause of crime. A piecemeal approach may work here and there. Crime of one type or another may go down for a while in an area. Sustained reductions in crime, however, almost necessarily require a more careful and calibrated approach that targets *crime-causing factors*.²⁴ Here, I do not mean the causes of crime in general. For that, criminologists conveniently have identified a long list of possibilities. Instead, I mean the causes of crime in *particular* areas.

How can these causes be identified? There is no shortcut: Research must be regularly undertaken in these areas. To echo a theme that will reverberate through this book, we have here another indicator of an entrenched problem. Few states or jurisdictions invest sufficiently in research to arrive at an accurate assessment of the prevalence or causes of their local crime. Policymakers and administrators then go with their instincts, beliefs, and research from this or that study, and hope that a piecemeal approach will work in these places. In so doing, they enable criminogenic conditions to persist or worsen. When crime goes up (or fails to go down fast enough), they simply call for more punishment. Does punishment have a role to play? Yes. But it does not address the myriad factors that cause crime in general or in specific places.

Sustained inattention to the causes of crime in specific areas and overemphasis on sanctions and interventions that lack credible scientific evidence constitutes a systems problem. It amounts to the institutionalization of failure. Consider, for example, if individuals who would never commit crime again are placed in well-intentioned diversion programs, a mainstay of the juvenile justice system; here, we clearly are wasting resources.²⁵ The problem is worse, though. These same youth, by dint of being diverted, now are supervised by whoever runs the diversion program. Any misbehavior then will be more likely to be noticed. The youth may be no more delinquent than any other youth, but nonetheless they get caught, labeled as delinquent, and sentenced more harshly. Why more harshly? Because now the court sees a youth who seemingly has squandered an opportunity and needs a lesson. Here we have the juvenile justice system spending money on an intervention that may not be needed and whose effectiveness typically has never been established.²⁶ At the same time, that money is not being spent in more effective ways. Not least, the youth may suffer academically and socially. Once the youth penetrate deeper into the juvenile justice system, these problems reverberate even more strongly.²⁷

This situation arises from a system of justice that allows diversion to occur without a careful empirical assessment of the risk that these youth present, the distribution and causes of crime in an area, the estimated costs and benefits of different policies, and so on.²⁸ It arises, too, from a system that can be easily pushed by a charismatic policymaker or judge who champions a special program or by a courtroom culture that thinks that certain “types” of youth should be diverted and others not.²⁹ Perhaps not surprisingly, those who promote special programs envision only that the interventions help. Frequently, however, the interventions do not. And to the extent that they divert resources from efforts that could address the root causes of crime, they contribute to more of the very problem that they were designed to address.

When, on a state or national level, we impose a sanction that may be criminogenic, we contribute to higher crime rates. Such likely is the case with mass incarceration. We have squandered opportunities to address root causes of crime and to impose sanctions that could be more effective at less cost. We continue to do so by relying heavily on incarceration and lengthy terms of incarceration, even though we have no empirically based foundation on which to justify specific uses or amounts of time in prison to reduce crime or recidivism or to achieve a satisfactory level of retribution.³⁰ Perhaps for that reason we have dramatic variation in