

Punishing Threats, Imprisoning Millions

by

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Thesis submitted in partial fulfillment of
the requirements for the degree of Master of Arts in the Department of
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This thesis seeks to determine whether the federal criminal law has been used increasingly in the past several decades to punish conduct that poses a general threat to society, rather than conduct that causes a concrete harm to a particular victim. It situates this question within a broader discussion of criminal punishment in the United States, including rising incarceration rates, the theoretical justifications for punishment, and important legal limitations on its exercise.

To determine whether the federal criminal law has been used increasingly to punish threats, this thesis charts the enforcement of twenty main categories of federal crimes over the past forty years. It gathers and organizes data on criminal case filings published yearly by the U.S. Department of Justice and the Administrative Office of the U.S. Courts. After calculating the trend of enforcement for each crime, it groups the twenty crimes into three categories based on whether the prohibited conduct constitutes a concrete harm versus a general threat of harm.

Analyzing the results, the thesis concludes that there has been a strong trend over the past two decades to use the federal criminal law to target conduct which threatens to harm society, rather than conduct that does concrete harm to an identifiable victim. It argues that this trend is problematic for several reasons: it signifies that federal criminal law will be used to further exacerbate already escalated levels of criminal punishment in the nation; the use of criminal law to target conduct which threatens society is weakly justified theoretically; and using the criminal law to target conduct which threatens society weakens important safeguards in the law designed to constrain the use of criminal punishment.

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INTRODUCTION

An enormous number of people are entangled in the criminal justice system across the United States. So many, in fact, that it is hard to put into context the numbers of accused, convicted, and imprisoned persons throughout the country. In 2009, over seven million people stood formally accused or convicted of breaking criminal law.¹ Over two million of these people were held in prison or jail, while the other five million were monitored through conditions of probation or parole.²

Suppose for a minute that these roughly seven million people were gathered in one geographic place, and this group founded the fifty-first state in the union. What would their state look like? For starters, it would be the 13th most populous, ranked right below Virginia, with a population greater than thirty-eight of the other fifty states.³ If its population density matched the nation's average, it would span over eighty-thousand square miles, making it about the size of Kansas or Utah.⁴ Suppose finally that the state's capital city were populated only by those people who were imprisoned in the United States, not those released on probation or parole. The inmates' city, boasting more than 2.2 million inhabitants, would become the fourth largest in America, knocking Houston

¹ Bureau of Justice Statistics, "Number of Persons Under Correctional Supervision," *U.S. Department of Justice* (available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>).

² Ibid. To break down the numbers, in 2009 there were 1,524,513 people in prisons, 760,400 in jails, 819,308 on parole, and 4,203,967 on probation. Ibid. Thus, 2,284,913 people were locked up while 5,023,276 were monitored, for a combined total of 7,225,800. Ibid.

³ See U.S. Census Bureau, "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico (NST-EST2009-01)," *U.S. Department of Commerce*.

⁴ U.S. Census Bureau, "United States Summary: 2000, Population and Housing Counts," *U.S. Department of Commerce*, 29. The average population density in the United States in 2010 was 87.4 people per square mile. U.S. Census Bureau, "2010 Census Data," *U.S. Department of Commerce*, (available at <http://2010.census.gov/2010census/data/>).

out of that spot by a hair.⁵ Only New York City, Los Angeles, and Chicago would have more people in one city.⁶

This illustrates a simple point: an incredible number of people have been swept up in the American criminal justice system. A large share of the population—nearly two and a half percent of all people in the United States—are imprisoned or monitored by authorities.⁷ Just about one out of every 135 people today in America is locked behind bars.⁸ Such a high rate of imprisonment is unique next to other nations; the United States incarcerates a much greater share of its population than does any other nation on earth.⁹

Why does this nation’s criminal justice system reach so many people? Why does the United States imprison so many more people than do other nations? The direct causes may be laws that mandate long prison sentences and an ever-increasing willingness to imprison law-breakers and not focus on rehabilitation.¹⁰ But this thesis discusses a third and less obvious reason why the United States’ criminal justice system ensnarls such a vast swath of people: a shifting focus where the federal criminal law is

⁵ See Bureau of Justice Statistics, *Number of Persons* (showing that in 2009, there were 760,400 people in jails and 1,524,513 people in prisons throughout the United States, for a combined total of 2,284,913); U.S. Census Bureau, *Annual Estimates* (showing that in 2009, Houston TX was the nation’s fourth largest city with a population of 2,257,926).

⁶ U.S. Census Bureau, *Annual Estimates*.

⁷ In 2009, the total population of the United States was 307,006,550, of which 7,225,800 were imprisoned or released on parole or probation. See notes 1–3.

⁸ Bruce Western, *Punishment and Inequality in America* (New York: The Russell Sage Foundation, 2006), 13 (“[S]even-tenths of 1 percent of the U.S. population was locked up by 2003.”); see also *supra* note 2 and accompanying text.

⁹ Glenn C. Loury, *Race, Incarceration, and American Values* (Cambridge: MIT Press, 2008), 4–5 (“Our incarceration rate (714 per 100,000 residents) is almost 40 percent greater than those of our nearest competitors (the Bahamas, Belarus, and Russia).”). See also Table 2 (chap. 1, p. 8)

¹⁰ See Western, *Punishment and Inequality*, 50. See also chap. 1, p. 15–19.

used increasingly to capture and punish persons for *threatening to harm* society. The thesis will argue that this shift in focus has been made within the past two decades, has begun to contribute to the mass application of criminal sanctions in America, and is a use of the criminal law riddled with both theoretical and practical problems.

Thus, this thesis will focus on the United States' federal criminal justice system and not those of the states. This might seem odd, given that in the United States' federal system, prosecution of crime is traditionally viewed as the responsibility of the individual states, not the national government.¹¹ But a focus on the federal criminal justice system makes sense for two reasons. First, during the same period when imprisonment in the United States was skyrocketing, the federal criminal justice system was transforming. The reach of federal criminal law expanded into areas of traditional state concern,¹² and the federal government's use of criminal law as a tool of administrative and regulatory policy "exploded."¹³ Second, the federal government now imprisons more people than

¹¹ See generally Sara Sun Beale, "The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization," *American University Law Review* 54 (2005): 747. Professor Beale writes that traditional view of states as the primary actors in criminal law enforcement "derives both from the historical fact that federal jurisdiction was extremely limited for most of the nation's history and from the structure of the constitutional system." *Ibid.*, 754. While the states possess a general police power over all criminal activity, "the federal government has no general authority over crime." *Ibid.* But over the past several decades, "the federal government's role in combating crime evolved as Congress employed its delegated powers and enacted criminal sanctions as one means of effectuating those powers." *Ibid.*

¹² According to Professor Beale, "[t]he scope of the federal government's criminal authority has expanded significantly in the last quarter of the twentieth century." Sara Sun Beale, "Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction," *Hastings Law Journal* 46 (1995): 979. Increasingly, federal criminal law reaches "offenses that are staples of state criminal law enforcement . . . include[ing] crimes that at first blush seem exclusively local in nature." Beale, *Many Faces*, 761. The types of crimes which were once handled almost exclusively by states, but are now illegal under federal criminal law, include at least some instances of "theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses." Beale, *Too Many*, 997-98.

¹³ John C. Coffee, Jr., "Does 'Unlawful' Mean 'Criminal'?": Reflections on the Disappearing Tort/Crime Distinction in American Law," *Boston University Law Review* 71 (1991): 216 ("Since the mid-1980s,

does any state.¹⁴ These two trends suggest that it is no longer accurate to say the federal government has a minor, secondary role in criminal law enforcement. As the federal criminal justice system changes and expands, it is worth examining what role it is playing in the phenomenon of rising incarceration in America.

This thesis will start in Chapter 1 by discussing the growth in America's prison population over the past 35 years. By mapping-out relevant trends and elaborating on the details of imprisonment in America, it aims to give practical context to the subsequent discussion of criminal punishment. Then, Chapter 2 will analyze the main theoretical justifications for criminal punishment. This will include a discussion of the importance of *mens rea* and affirmative defenses as limitations on the use of punishment. Finally, Chapter 3 will present the thesis' central argument, which is that the federal criminal justice system now focuses increasingly on punishing threats rather than completed, harmful actions. This insight is important for two reasons. First, it shows that the focus of the federal criminal law is out of line with the justifications for punishment and the limitations on its use outlined in Chapter 2. Second, it contributes to an explanation of the phenomenon discussed in Chapter 1; the ever-increasing use of criminal sanctions in America. In sum, the realization that the federal criminal law is being used as a tool to contain general threats to society can help explain rising incarceration, and provides an opportunity to question the wisdom of using criminal law in this changing way.

American law has experienced a little noticed explosion in the use of [criminal regulatory] offenses. By one estimate, there are over 300,000 federal regulations that may be enforced criminally.”).

¹⁴ In 2008, the United States government held 201,280 in federal prisons, 27,610 more people than California, the largest state prisoner. See Table 1 (chap. 1, p.9).

CHAPTER 1 – CONTEXT: THE PRISON BOOM

Something drastic happened to the United States’ prison and jail population in the past thirty-five years. In short, it exploded—increasing about five-hundred percent in just a few decades.¹ This chapter will detail this rise, focusing on three aspects of what is now known as “the prison boom.”² First, *Section A* will examine the general statistics of when the incarceration rate began to rise, by how much it has risen, and where it stands today. *Section B* gives some depth to the numbers by focusing on the demographics of those incarcerated. Finally, *Section C* will take up the question of what factors may have caused the rise in incarceration. It will briefly consider the relationship between incarceration, crime, and changes in the law.

Although this chapter will delve into statistics on incarceration, it is important to reiterate that the focus of the thesis is criminal justice and punishment more generally, not exclusively incarceration. Studying trends in incarceration is useful to get at the broader trends regarding the use of criminal sanctions. Since incarceration is the most severe criminal sanction, it stands to reason that as its rate increases, so too does the wider rate of criminal punishment. Thus, this chapter will discuss trends in incarceration rather than trends in parole, probation, fines, or other forms of punishment, primarily because data on imprisonment is more accurate and more widely available. But the reader should keep in mind that the larger purpose of this discussion is to demonstrate the changing sweep of the criminal justice system in the United States.

¹ Bruce Western, *Punishment and Inequality in America* (New York: The Russell Sage Foundation, 2006), 13.

² See *ibid.*, 11.

A. General Statistics

1. *The Basic Trend.* For half a century before the 1970s, the incarceration rate in the United States remained fairly steady. Although the rate did fluctuate, Figure 1 shows that during most of this period it consistently hovered around 110 people per 100,000.

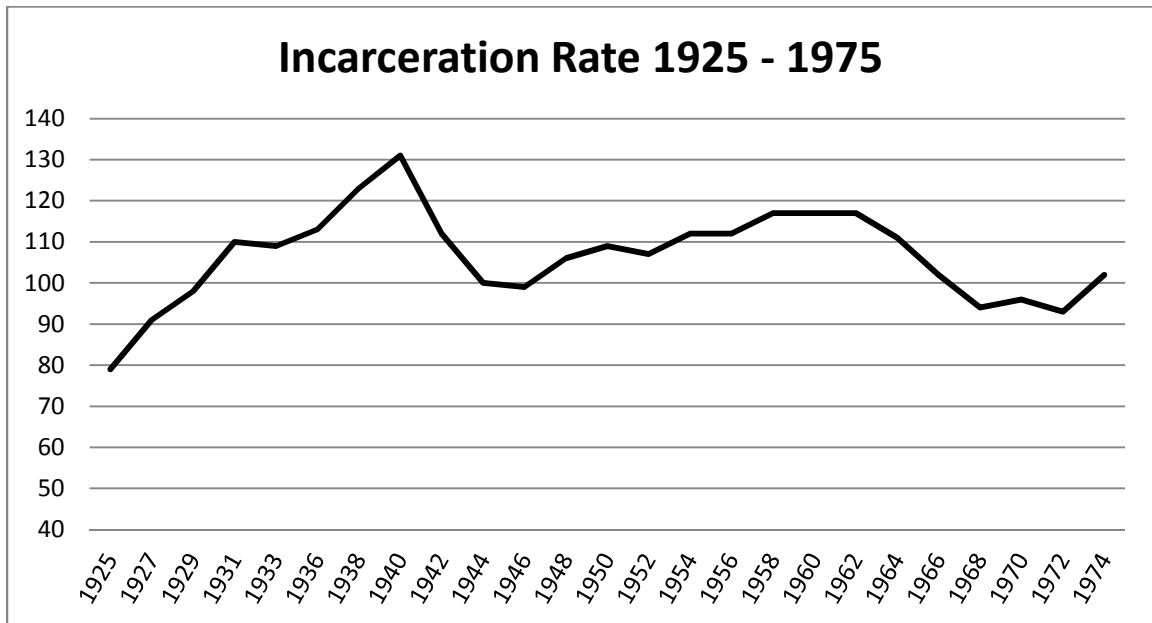


Figure 1 - Incarceration Rate 1925–1974. Source: Kathleen Maguire & Ann L. Pastore, *Sourcebook of Criminal Justice Statistics, 1995* (Washington: U.S. Department of Justice), table 6.21.

But by the time the year 2000 rolled around, “the share of the population in prison had increased every year for twenty-eight years.”³ Throughout the 1970s, 1980s, 1990s, and into the 2000s, an ever increasing proportion of people found themselves in prison or jail in America. Figure 2 depicts this growth. It shows that the historically stable rate of incarceration in the United States—the rate which held fairly steady from the 1920s to the 1970s—jumped from just over 100 people per 100,000 in 1975 to over 500 per 100,000 today. As Figure 2 shows, the absolute number of inmates also shot up after 1975, rising every year from an initial population of about 200,000 to over two million by 2005.

³ Ibid., 13.

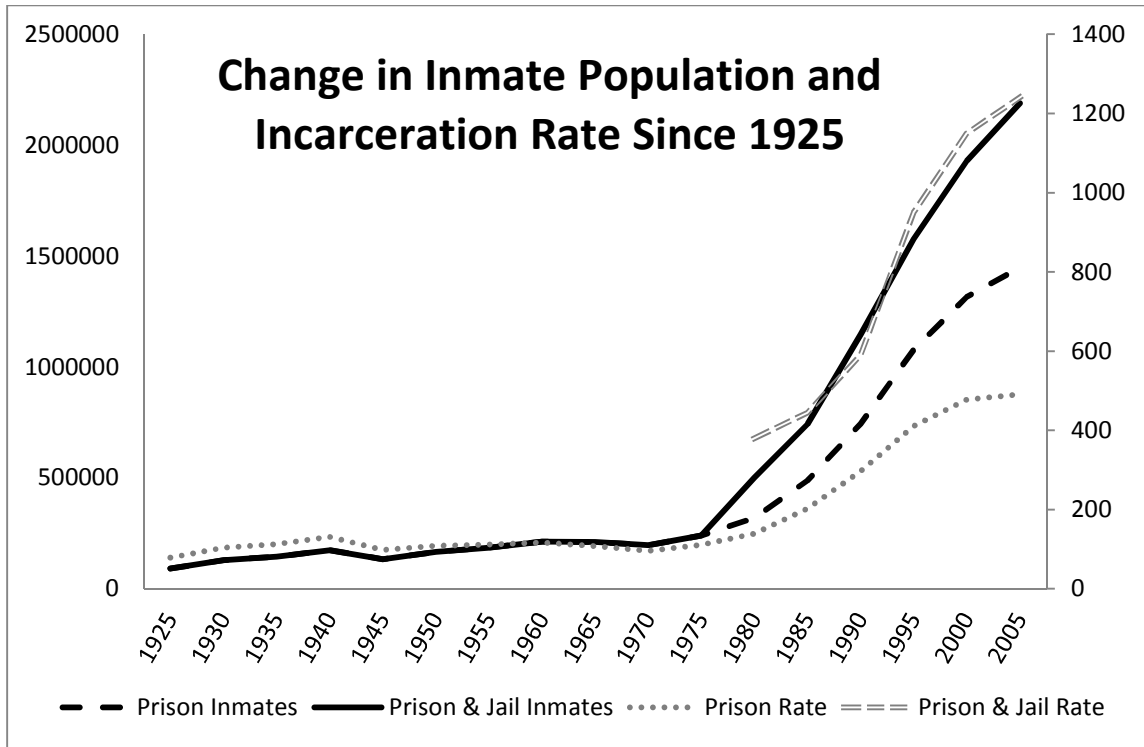


Figure 2 - Change in Inmate Population (Left Axis) and Imprisonment Rate (Right Axis) Since 1925. Source: Allen Beck & Lauren Glaze, *Correctional Populations in the United States, 1980–2003* (Washington: U.S. Department of Justice); Maguire & Pastore, *Sourcebook*; Western, *Punishment and Inequality*, 13. Lauren E. Glaze & Seri Palla, *Probation and Parole in the United States, 2003* (Washington: U.S. Department of Justice).

2. *Statistics by Jurisdiction.* To help draw the picture of incarceration in America today, this subsection establishes that incarceration rates vary sharply within the nation.⁴ Table 1, listing the prison population and incarceration rate for each jurisdiction, shows the variation between states. Just a few states have incarceration rates above the national average; all are regionally clustered in the South or West. In fact, the South is the only region whose overall incarceration rate exceeds the national average.⁵ Conversely, the rate of incarceration in some states is just a small fraction of the national average. As a

⁴ For a more involved discussion of these regional differences, including the argument that they “are the results of different regional historical trajectories,” and that “they are *not* the result of . . . crime rates,” see Sara Mayeux, “Mass Incarceration: Breaking Down the Data by State,” *Prison Law Blog* (available at: <http://prisonlaw.wordpress.com/2010/07/13/mass-incarceration-breaking-down-the-data-by-state/>).

⁵ At 552 per 100,000, the incarceration rate in the American South is about ten percent greater than the national average. William J. Sabol, Heather C. West & Matthew Cooper, “Bulletin: Prisoners in 2008,” Bureau of Justice Statistics, *U.S. Department of Justice*, 30–31 (2009).

region, the Northeast incarcerates just 306 people per 100,000, a rate about 60% of the national average.⁶ Table 1 also includes data on the federal system. It shows that more people are incarcerated by the federal government than by any one state. The federal government holds about 20% more people than does California, the largest state prisoner. But note that the federal incarceration rate is low (about one-tenth of the national average), as the relevant population is that of the entire country.⁷

Table 1 - Number of Inmates and Incarceration Rate by Jurisdiction in United States.

State	Number of Inmates	Incarceration Rate	State	Number of Inmates	Incarceration Rate
Federal System	201,280	60	Montana	3,607	368
Alabama	30,508	634	Nebraska	4,520	247
Alaska	5,014	430	Nevada	12,743	486
Arizona	39,589	567	New Hampshire	2,904	220
Arkansas	14,716	511	New Jersey	25,953	298
California	173,670	467	New Mexico	6,402	316
Colorado	23,274	467	New York	60,347	307
Connecticut	20,661	407	North Carolina	39,482	368
Delaware	6,921	463	North Dakota	1,452	225
Florida	102,388	557	Ohio	51,686	449
Georgia	52,719	540	Oklahoma	25,964	661
Hawaii	5,955	332	Oregon	12,167	371
Idaho	7,290	474	Pennsylvania	50,147	393
Illinois	45,475	351	Rhode Island	4,045	240
Indiana	28,322	442	South Carolina	24,326	519
Iowa	8,766	291	South Dakota	3,342	412
Kansas	8,539	303	Tennessee	27,228	436
Kentucky	21,706	492	Texas	172,506	639
Louisiana	38,301	853	Utah	6,546	232
Maine	2,195	151	Vermont	2,116	260
Maryland	23,324	403	Virginia	38,276	489
Massachusetts	11,408	218	Washington	17,926	272
Michigan	48,738	488	West Virginia	6,059	331
Minnesota	9,406	179	Wisconsin	23,380	374
Mississippi	22,754	735	Wyoming	2,804	387
Missouri	30,186	509	U.S. Total	1,610,446	504

Source: Sabol, West & Cooper, *Bulletin*, 23–24, 30–31.

⁶ *Ibid.*, 30.

⁷ Another reason why the federal government’s incarceration rate is lower than that of any particular state is that crime is ordinarily handled by states, which possess a general “police power” to control crime, while the federal government can only target certain conduct. See Beale, *The Many Faces*, 754 (intro., n. 11). See also Introduction, notes 11–13 and accompanying text.

3. *International Statistics.* At the outset, it needs to be noted that the numbers in this subsection show a higher rate of incarceration in the United States than did the data in the preceding subsection. This is due to unique challenges posed by comparing the incarceration rates of different nations. First, the data in the preceding subsection, unless otherwise indicated, calculated the imprisonment rate based on prison population, totally excluding the jail population.⁸ Other nations do not necessarily divide their incarcerated population the same way when calculating incarceration rate; in fact, divisions between jail and prison populations even vary within the United States.⁹ A second difference in how nations calculate their incarcerated population is their manner of classifying juvenile offenders. Thus, when social scientists seek to compare international incarceration rates, they cannot simply use the United States' incarceration rate as provided by the Bureau of Justice Statistics. They calculate a rate which allows for consistent comparison between this nation's incarcerated population and those in other nations. The take away is that the reader should not be too thrown off by the fact that figures on incarceration in the United States are somewhat higher in this section than they were in the preceding section.

With this in mind, Table 2 provides the data on incarceration rate by nation from 1995. At that time, the contrast between the United States and other nations was clear. Other wealthy democracies, particularly those in Western Europe, had incarceration rates around 100 per 100,000. The incarceration rate in the United States was six times that.

⁸ The distinction is that "prisons" typically hold convicted persons with prison sentences of one year or more, while "jails" hold inmates awaiting trial or sentencing, as well as those sentenced to less than one year of imprisonment. Bureau of Justice Statistics, "What is the Difference Between Jails and Prisons?" *U.S. Department of Justice* (available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=qa&iid=322>).

⁹ *Ibid.* (noting that definitions of jail and prison in the United States "may vary by state").

The United States housed even more prisoners than did far more populous nations, such as India or China. But international data is not entirely reliable; this data shows the United States second in incarceration rate to Russia, with Russia imprisoning 690 people per 100,000 to the United States' rate of 600 per 100,000. By the time the new century came along, the United States seemed to imprison more people than Russia; in 2001 the United States' incarceration rate was 686 per 100,000 while Russia's had fallen to 628 per 100,000.¹⁰ However, even these figures are open to dispute.¹¹ But the larger picture is clear; the United States stands out for its extremely high rate of imprisonment.

Table 2 - Incarceration Rate by Nation in 1995 (Rate per 100,000) (continued on next page).

Nation	Number of Inmates	Incarceration Rate	Nation	Number of Inmates	Incarceration Rate
Austria	6,761	85	Lithuania	13,228	360
Bangladesh	44,111	37	Luxembourg	469	115
Belarus	52,033	505	Malaysia	20,324	104
Belgium	7,401	75	Malta	196	55
Bulgaria	9,684	110	Moldova	10,363	275
Cambodia	2,490	26	Netherlands	10,143	65
Canada	33,882	115	New Zealand	4,553	127
China	1,236,534	103	Norway	2,398	55
Croatia	2,572	55	Philippines	17,843	26
Cyprus	202	30	Poland	65,819	170
Denmark	3,421	65	Portugal	12,150	125
England	51,265	100	Romania	45,309	200
Estonia	4,034	270	Russia	1,017,372	690
Fiji	961	123	Scotland	5,697	110
Finland	3,018	60	Singapore	8,500	287
France	53,697	95	Slovakia	7,979	150
Germany	68,296	85	Slovenia	630	30
Greece	5,897	55	South Africa	110,120	265
Hungary	12,455	120	South Korea	61,019	137
Iceland	113	40	Spain	40,157	105
India	216,402	24	Sweden	5,767	65

¹⁰ Western, *Punishment and Inequality*, 15.

¹¹ Due to the difficulty of obtaining consistent and reliable data from certain nations, authors come to different conclusions about Russia's true rate of incarceration. See, e.g., Loury, *Race*, 4–5 (see intro., n. 9). Loury cited a 2005 report which calculated Russia's incarceration rate at 532, 60% less than the United States. Roy Walmsley, *World Prison Population List*, King's College London International Centre for Prison Studies, 3–5 (available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-population-list-2005.pdf>).

Ireland	2,032	55	Switzerland	5,655	80
Italy	47,323	85	Thailand	106,676	181
Japan	46,622	37	Turkey	49,895	80
Kiribati	91	130	Ukraine	203,988	390
Latvia	9,608	375	United States	1,585,401	600

Source: Marc Mauer, *Race to Incarcerate* (New York: New York Press, 1999), 21–22.

Figure 3 makes this comparison clearer by juxtaposing the incarceration rate from the United States with that of select European nations from 2001 and 1983. It reveals not only that the discrepancy between the United States and Europe is wide, but that it has continued to widen since the early 1980s. In 1983, the United States incarcerated a larger share of its population than did any of these nations, but the difference was far less stark. While most (but not all) of the nations of Western Europe increased their incarceration rates in the relevant time period, nowhere did the incarceration rate skyrocket as it did in the United States.

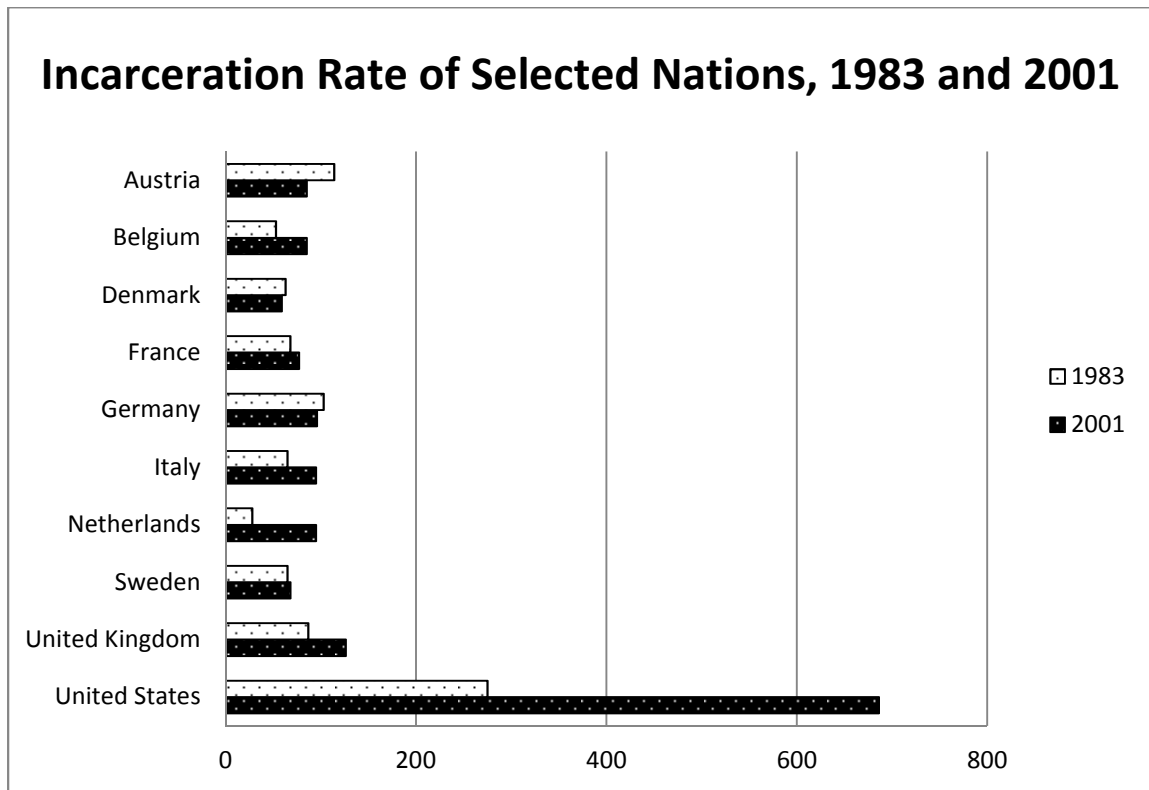


Figure 3 - Incarceration Rate of United States Compared With Western Europe. Source: Western, *Punishment and Inequality*, 14.

B. Demographic Statistics

1. *Relationship Between Race and Risk of Incarceration.* Any discussion of imprisonment in America would be severely lacking without mention of the disparate impact of criminal punishment on people by race. Paul Street summarizes the data by writing that today, African-Americans “are 12.3 percent of the U.S. population, but they comprise fully half of the roughly 2 million Americans currently behind bars. On any given day, 30 percent of African-American males aged 20 to 29 are ‘under correctional supervision’—either in jail or prison or on probation or parole.”¹² Simply put, African-Americans are enormously overrepresented among the correctional population.

The statistics become even more unsettling when one looks at the likelihood of a person entering prison. Figure 4 shows the lifetime chance of a man born in 1991 being imprisoned at some point in the future. While an African-American man has a likelihood nearing 30%, a white man born at the same time has less than a 5% likelihood of facing imprisonment. In other words, an African-American man born in 1991 is roughly 600% more likely to be incarcerated at some point in his life than his white male peer.

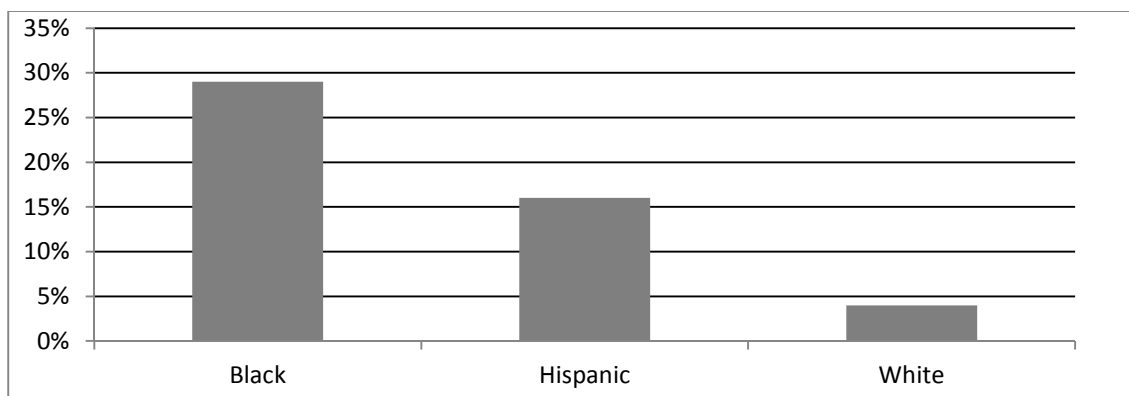


Figure 4 - Lifetime Likelihood of Imprisonment for Males Born in 1991. Source: Marc Mauer, *Race to Incarcerate*, 125.

¹² Paul Street, “Color Blind: Prisons and the New American Racism,” in *Prison Nation* (Cambridge: Cambridge University Press, 2003), 30, 31.

2. *Relationship Between Education and Incarceration.* Education is another demographic variable which has a pronounced correlation with incarceration. Figure 5 shows that a person’s likelihood of incarceration decreases sharply with each stage of education completed. But it also shows the interplay between incarceration, education, and race. Comparing people of similar age groups with similar educational attainment, African-Americans still remain far more likely to face incarceration than whites.

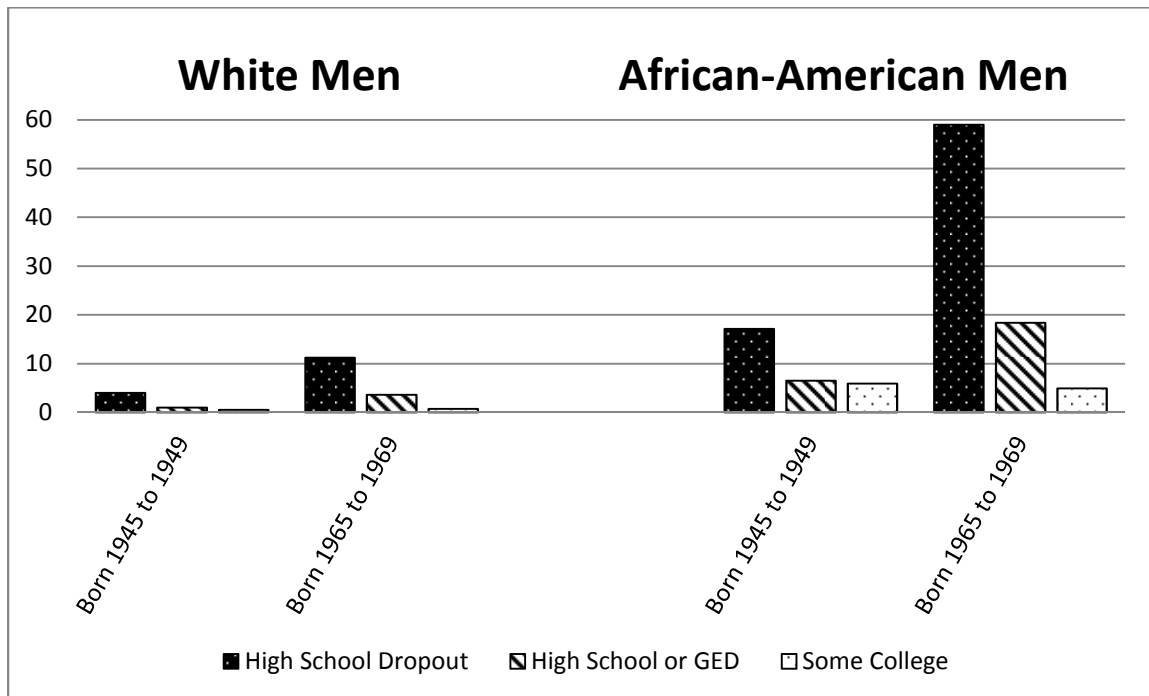


Figure 5 - Risk of Imprisonment by Age 30-34, by Race, Education Attained, and Year of Birth. Source: Western, *Punishment and Inequality*, 27.

3. *Relationship Between Gender and Incarceration.* A final demographic factor with an overwhelming connection to imprisonment rates is gender. As noted, today there are 2,284,913 incarcerated persons in America.¹³ Men constitute 93% of these inmates; their rate of imprisonment is about fifteen times higher than the rate for females.¹⁴

¹³ See intro., n.1–2.

¹⁴ Sabol, West & Cooper, “Bulletin: Prisoners in 2008” (see chap. 1, n. 5).

C. Reasons for the Rise in Incarceration Rate

1. *Connection to Crime.* Perhaps the rise in incarceration in America could be easily explained—crime is rising, so imprisonment is too. However, the data does not support that conclusion. Bruce Western studied the connection between rates of crime and incarceration during the prison boom and concluded that “trends in incarceration haven’t tracked trends in the crime rate.”¹⁵ Figure 6 compares the imprisonment rate to the index crime rate during the period of the prison boom. The index crime rate comes from FBI statistics, which includes “serious crimes reported to the police, including murders, rapes, robberies, aggravated assaults, burglaries, larcenies, motor vehicle thefts, and arsons.”¹⁶ Figure 6 reveals that while crime rose substantially from 1970 to 1990, somewhat on track with rising incarceration, in the decade following 1990 the crime rate sank back to 1970s levels while the rate of imprisonment continued to shoot upwards.

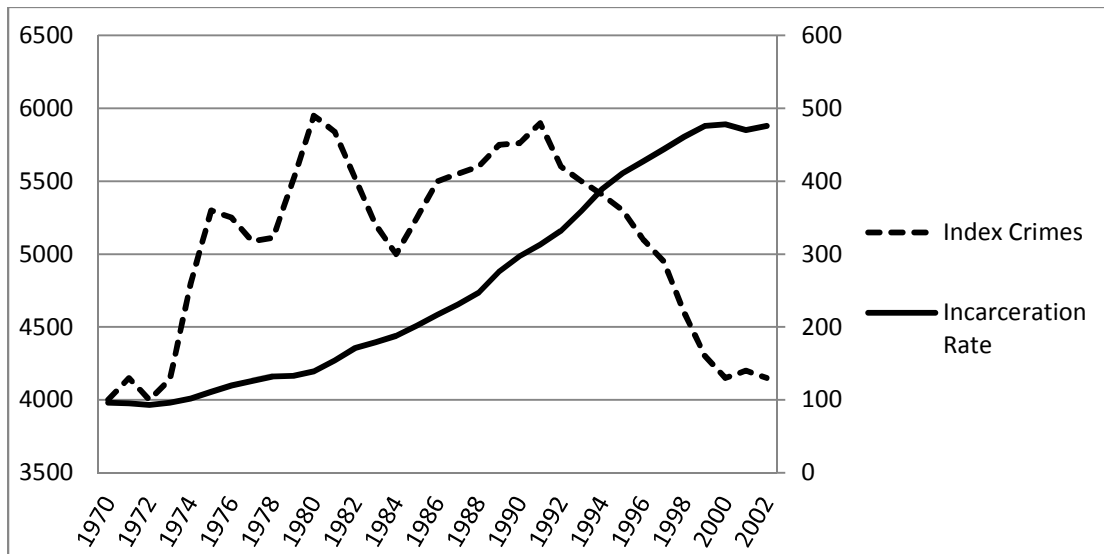


Figure 6 - Index Crime Rate (Left Axis) Compared to Incarceration Rate (Right Axis). Source: Maguire & Pastore, *Sourcebook of Criminal Justice Statistics*, table 6.21; “Incarceration Rate 1980–1999,” *Key Facts at a Glance* (U.S. Department of Justice); Western, *Punishment and Inequality*, 39.

¹⁵ Western, *Punishment and Inequality*, 34.

¹⁶ *Ibid.*, 38.

It is clear enough that the rate of imprisonment has not simply mirrored the crime rate. However, perhaps in the early 1990s, the crime rate began to fall as a *consequence* of the greater levels of incarceration. Perhaps more people who would have broken the law had been arrested, and thus crime decreased. First, it is important to note that this is a different argument from the argument that incarceration rates have risen *because of* rising crime. Regardless of the whether crime sank because of incarceration, Figure 6 provides strong reason to believe that that incarceration has not risen simply because of rising crime. This section is, after all, considering the causes of rising incarceration, not the causes of lower crime rates.

In any case, Bruce Western considered and rejected the possibility that increases in incarceration explain the drop in crime. Western looked at victimization rates to see what that data reveals about the impact of incarceration on crime. He found victimization rates dropped by about 60-70% during the period of the prison boom.¹⁷ Presumably, this drop in victimization could be the consequence of rising incarceration. Western then adjusted these rates to reflect the increase in punishment by assuming that “each person imprisoned would otherwise be responsible for ten crimes.”¹⁸ Western found that after adjusting for the impact of rising imprisonment, the decline in victimization is “still substantial,” a decline of about 60%.¹⁹ This suggests that rising incarceration is not the simple explanation for lowered crime rates.

¹⁷ Ibid., 42.

¹⁸ Ibid., 43.

¹⁹ Ibid.

Thus, after analyzing the data, Western found that during the period of the prison boom, the level of crime fell substantially, and these declines were mirrored by similar declines in victimization rates. Levels of incarceration continued to rise—and rise substantially—after the period when crime rates and victimization rates began to fall sharply. Americans are far less likely to be involved in criminal activity today than in 1980, and far less likely to be a victim of crime. But the rate of incarceration is many times higher than it was thirty years ago. Thus, it is not the case that more people are being incarcerated simply because more people are breaking the law. Something else is behind the rise in incarceration. The next subsection outlines Western’s conclusions about what exactly that something may be.

2. *Proximate Causes of the Prison Boom.*

Finding that the rise in prison population does not straightforwardly track crime, Western went on to consider what factors caused the prison boom. Clearly, this is a complicated question. There were undoubtedly many social, economic, and political factors which ultimately “caused” the prison boom. For example, there are authors who frame incarceration as a tool of social control,²⁰ or as a form of racial oppression.²¹ Aside from this debate, largely the purview of sociologists, there are measurable proximate causes of the prison boom. Western identifies two of them.

²⁰ See, e.g., Noam Chomsky, “Drug Policy as Social Control,” in *Prison Nation* (Cambridge: Cambridge University Press, 2003), 59 (“In a country like the United States, where you can’t really send out the paramilitary forces to murder people, as they do more and more in the Third World, you rely more heavily on techniques of social control. That’s basically what the drug war is all about.”).

²¹ See, e.g., Loury, *Race*, 35 (“Even if the current racial disparity in punishment in our country gave evidence of no overt racial discrimination—and, perhaps needless to say, I view that as a wildly optimistic supposition—it would still be true that powerful forces are at work to perpetuate the consequences of a universally acknowledged wrongful past.”).

First, during the period of the prison boom, the likelihood of a person spending time in prison if he or she were arrested rose starkly. For arrests for violent crime and controlled substance crime, the number prison admissions per arrest doubled in the two decades from 1980 to 2001.²² This suggests an increase in political will to respond to crime with the sanction of imprisonment. Second, during this same period, the length of sentences imprisoned people served increased as well. The average prison time served for violent crime rose from seventy-six months in 1980 to two-hundred and eight months in 2001.²³ The average prison time served for drug crimes increased from fourteen months in 1980 to twenty-four months in 2001.²⁴ Behind this increase in prison sentences were legislatively-enacted sentencing guidelines, creation of “three-strikes” and “truth-in-sentencing” laws, and the elimination of parole in many states.²⁵ This too shows a political trend towards harsher treatment of lawbreakers.

Thus, although the sociological and ultimate reasons for the prison boom may be difficult to measure and controversial to identify, the proximate causes of the prison boom are fairly straightforward. As people were arrested they faced a greater likelihood of spending time in prison for the crime, and the time they would serve once in prison increased as well.

²² Western, *Punishment and Inequality*, 45. In 1980, a person arrested for committing a violent crime had a 13% chance of going to prison and a person arrested for committing a drug crime had an 11% chance of going to prison; by 2001, the likelihood jumped to 28% for violent crimes and 22% for drug crimes. Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid., 65. From 1980 to 2000, the number of states that had: sentencing guidelines jumped from 2 to 17; abolished or limited parole jumped from 17 to 33; “three-strikes” laws jumped from 0 to 24; and “truth-in-sentencing” laws jumped from 3 to 30. Ibid.

This chapter has attempted to paint the picture of imprisonment in America today. It identified the basic trends in incarceration since the 1920s, including the sharp rise which began in 1975. It assessed the incarceration rate as it stands today, both its relation to other nations, and its variation within our nation. It discussed who composes the inmate population, and how race and education influence a person's likelihood of spending time behind bars. And it touched upon some of the political and legal reasons why America imprisons so many people today. The next chapter turns to an important question given the current prevalence of criminal punishment—what are the justifications for its use, and how is its exercise limited?

CHAPTER 2 – JUSTIFICATIONS AND LIMITATIONS ON THE CRIMINAL LAW

With the practical landscape clear in the rearview, this chapter will shift gears, turning to theoretical justifications and limits society has historically placed upon the criminal law system. *Section A* will briefly set up the problem by making the case that a legal system which enables the state to punish offenders requires special justification. Then *Section B* will lay out two possible justifications for punishment, a utilitarian and a retributivist justification. *Section B* will also identify how each theory defines the purposes that criminal punishment ought to serve and what behavior it is designed to prevent. Finally, *Section C* will outline several constraints that our legal system has traditionally imposed on the imposition of criminal punishment.

A. The Uniqueness of Criminal Law

Criminal law—which enables the state to punish transgressors and deprive them of basic freedoms—is an exceptional aspect of any legal system. Law generally exists to regulate conduct between members of society. It seeks to facilitate people’s productive interactions by establishing rules and allowing people to peacefully settle disputes. It can do this in three ways, differentiated by the amount of state involvement.

First, the contours of a rule and its enforcement could be left to private parties, as when contract law simply holds parties to privately crafted agreements. Second, specific rules could be prescribed by the state, but individuals decide when and how to enforce them—as when an injured party seeks compensation for a harm according to set rules of tort or property. And third, rules could be both prescribed and enforced solely by the state. This is the case when the state establishes and enforces rules that target regulated

parties—often commercial entities—through administrative regulations. These typically are designed to protect things which broadly impact general societal wellbeing, such as environmental health, the nation’s financial systems, or food and drug safety.

Criminal law fits within the third category, but it is importantly different. In a uniquely coercive manner, criminal law controls private conduct through threats of severe punishment. Like administrative law, the state alone establishes a rule and decides how and when to enforce it. But administrative rules usually carry civil penalties, targeting specific parties for regulation to prevent industry from causing general harms to society. Criminal law does not target specific parties for regulation or guide behavior through civil penalties. It applies to all people and threatens to deprive offenders of their basic liberties, or in extreme cases, their lives. This punitive element is what sets criminal law apart. The state steps in and inflicts a new harm upon the offender; it does not merely resolve a private dispute by redistributing resources. This infliction of harm by the state is unique, and it requires a unique justification. It is not immediately clear why, as part of a legal system, a state needs the power to inflict punishment on people through criminal law. This chapter will explore two main justifications for such a system of criminal law and punishment.

B. Justification and Purpose of the Criminal Law

Broadly speaking, there are two schools of thought on what can justify criminal punishment: *utilitarian* justifications and *retributivist* justifications. Which justification a person accepts will influence what he or she sees as the purpose that the criminal justice system should serve.

1. *Utilitarianism*. Utilitarian justifications for criminal punishment grow from the general philosophy of moral utilitarianism. A brief account of moral utilitarianism will thus help put into context utilitarian justifications for punishment. Utilitarianism at its core asserts that “the ultimate principle of morality is the principle of utility.”¹ John Stewart Mill described the principle of utility as the principle that “actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”² Formulated as a directive for human behavior, the principle of utility is that “one ought always to act so as to promote the greatest happiness for the greatest number.”³ In this context Mill used “happiness” simply to mean “pleasure and the absence of pain,” and “unhappiness” to mean “pain and the privation of pleasure.”⁴

Therefore, as a moral philosophy, utilitarianism generally holds that the morally proper choice in any given situation is the choice which will yield the most favorable balance of pleasure versus pain. What is most important is that in the philosophy of utilitarianism, a person would judge an action to be right or wrong based on its *outcome*; the action is “right” if it produces a favorable balance of pleasure versus pain, “wrong” if it produces an unfavorable balance.

Applied to a legal system generally, utilitarianism would hold that a “good” legal rule is one which followed the principle of utility by maximizing societal happiness while minimizing pain. So too in regards to the criminal law specifically, utilitarianism would

¹ Andrew Altman, *Arguing About the Law* (Belmont, CA: Wadsworth Publishing Co., 2001), 135.

² John Stewart Mill, “Utilitarianism,” in *Reason & Responsibility* (Belmont, CA: Wadsworth Publishing Co., 2002), 694, 697.

³ Altman, *Arguing About the Law*, 135.

⁴ Mill, *Utilitarianism*, 694, 697.

deem a criminal law to be “good” to the extent that it generated the greatest happiness for the greatest number. Again, utilitarian theory judges any choice (in this case, choice of what law to adopt) as good or bad based on its outcome—a good law is one which would produce a favorable balance of pain versus pleasure.

The way in which a criminal law could strike a favorable balance of pleasure and pain is by reducing the commission of acts which cause pain. In other words, a criminal law is good when it *deters conduct* which would cause more pain than pleasure. Criminal law systems seek to deter conduct by imposing punishment. This is therefore how utilitarian theory justifies punishment. H.L.A. Hart describes the utilitarian claim about criminal punishment as holding that “the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures.”⁵ There are many ways that imposing punishment could secure observance of laws. The offender as an individual may be dissuaded from breaking the law in the future because punishment produced great personal pain which he wants to avoid experiencing again, because he has been reformed and no longer wishes to break the law, or because he is simply incapacitated and unable to commit further crime. Additionally, other members of society may be persuaded to comply with the law if they see the harmful consequences which fall upon those who break it.

However, the situation can become more complicated, because state-imposed punishment directly generates pain and decreases pleasure for the person punished. That those punished suffer real harm is necessary for the theory of deterrence to work. In a

⁵ H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 2008), 5.

vacuum, this is morally bad, because utilitarianism seeks to reduce pain. As a result, a utilitarian theory of criminal punishment would “demand that there be some gain possible that more than makes up for the pain inflicted on the wrongdoer.”⁶ To a utilitarian, a punishment which created no societal happiness but caused the offender pain would be completely unjustifiable. This is because it made society worse off—after the victim experienced pain, the offender would too suffer pain, thus further increasing the prevalence of pain versus pleasure.

In summation, utilitarian philosophy holds that a law—criminal or otherwise—is justified when the law would, if obeyed, increase happiness and decrease pain. Criminal punishment is justified by its ability to secure compliance with such laws, thus allowing the law to operate and increase pleasure while decreasing pain. This justification makes clear the *purposes* of criminal punishment from a utilitarian perspective. The purpose of criminal punishment is simply to secure compliance with law. Of course, the law itself must also be morally good, in that it abides by the principle of utility, increasing happiness and decreasing pain. Criminal punishment is unjustified, and fails to satisfy utilitarian purposes, when it generates pain without increasing pleasure, as when the punishment fails to secure compliance with laws, or when the laws to which punishment secures compliance do not generate more happiness than pain.

2. *Retributivist Theory*. In contrast to utilitarianism, retribution is the theory that criminal punishment is justified according to “the moral desert of the offender.”⁷ While

⁶ Altman, *Arguing About the Law*, 136.

⁷ Robert Audi, *The Cambridge Dictionary of Philosophy* (New York: Cambridge University Press, 1999), 759.

utilitarian thinkers find justification for criminal punishment in the consequences that come from punishing offenders, retributivists simply believe that punishment is “justified because people deserve it.”⁸ H.L.A. Hart states that retributivist theory holds that the “main justification of the practice [of punishment] lies in the fact that when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value.”⁹ It is immaterial whether the punishment secures compliance with laws or produces any social benefit. All that matters is that the offender has done something morally wrong, and it is morally proper to respond to that wrong by inflicting punishment on the offender. Two limitations on this principle, according to Hart, are that “the conduct to be punished must be a species of voluntary moral wrongdoing, and the severity of punishment must be proportionate to the wickedness of the offense.”¹⁰

Regarding the purposes of criminal law and punishment, retributivists argue that the purpose of the criminal law is to punish blameworthy behavior. Simply put, “[t]he retributive motive is the desire of individuals to see wrongdoers punished.”¹¹ Therefore, under retributivist theories, punishment fulfills its purpose when it targets for punishment morally blameworthy behavior—regardless of what benefits or harm may result from the punishment. Punishment is unjustified and not in line with its purpose when the target of

⁸ Kent Greenawalt, “Punishment,” in 4 *Encyclopedia of Crime and Justice* (New York: The Free Press, 1983) 1336.

⁹ Hart, *Punishment and Responsibility*, 8.

¹⁰ *Ibid.*, 235.

¹¹ Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: The Belknap Press of Harvard University Press, 2004), 537.

punishment does not deserve to suffer punishment, as when the act he committed was not morally wrong.

There is a very lively debate surrounding which justification for punishment is the best.¹² Rather than select between these two theories, this thesis will accept both sets of justifications for punishment as legitimate. Elements from each theory have been accepted in our criminal justice system; for instance, the Supreme Court has affirmed that “punishment should serve retributive, educational, deterrent, and incapacitative goals.”¹³ So from the perspective of this thesis, the purposes of the criminal law and punishment are to deter harmful acts and to punish morally blameworthy behavior.

C. Traditional Limits on the Imposition of Criminal Punishment

Section A suggested that a criminal justice system equipped to punish offenders is something exceptional and in need of justification because of how coercive it is, how state-controlled it is, and because infliction of punishment is unique in the law. *Section B* provided two theoretical justifications for the existence and use of criminal punishment and criminal law. This final section will identify two important limitations on the application of punishment. First, the requirement that the offender have acted with a guilty mind, or *mens rea*. Second, the requirement that the offender have available a set of affirmative defenses. These limitations exist because if criminal punishment were to proceed without them, it would not be adequately justified under a utilitarian or retributivist theory.

¹² See generally Hart, *Punishment and Responsibility*.

¹³ *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (describing the Sentencing Reform Act of 1984) (citing 18 U. S. C. § 3553(a)(2)).

1. *The Mens Rea Requirement.* In the American legal system, a person must be “culpable” for conduct before the state, through the criminal justice system, may punish him or her for that conduct.¹⁴ Culpability is generally defined as “the moral value attributed to a defendant’s state of mind during the commission of a crime.”¹⁵ In short, an offender must act with a “culpable mental state” in order to commit a crime.¹⁶ There are many terms used interchangeably to refer to such a mental state, such as “mens rea, criminal intent, guilty mind, or scienter.”¹⁷

The requirement that a person have a guilty mind before the state may inflict punishment is very important to the American legal system, as well as to legal systems around the world. In the United States, moral culpability “historically has been necessary for criminal conviction.”¹⁸ In the case of *Morrisette v. United States*, the Supreme Court engaged a lengthy discussion of the history, universality, and the importance of requiring moral culpability before issuing punishment.¹⁹ The Court wrote that the very concept of crime is “constituted only from concurrence of an evil-meaning mind with an evil-doing

¹⁴ See Model Penal Code § 2.02 (1962) (insisting that “an element of culpability is requisite for any valid criminal conviction”). There is one important exception to this general rule: a person may be punished in the absence of culpability if she violates a “strict liability” offense, such as a traffic law. *Ibid.* (explaining the exception for strict liability offenses and that it is “limited to cases where no severer sentence than a fine may be imposed”).

¹⁵ Stuart P. Green, “Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses,” *Emory Law Journal* 46 (1997): 1547.

¹⁶ *Ibid.*, 1547–48.

¹⁷ *Ibid.*, 1548 (emphasis omitted).

¹⁸ *Ostrosky v. Alaska*, 913 F.2d 590, 594 (9th Cir. 1990).

¹⁹ *Morrisette v. United States*, 342 U.S. 246 (1952).

hand.”²⁰ Regarding the history of the doctrine, the Court wrote that moral culpability has been an essential precondition for criminal punishment since the days of the early English common law.²¹ However, the Court also noted that the Anglo-American legal tradition cannot boast a unique claim to the requirement. Rather, it is “universal and persistent in mature systems of law,” with roots in Biblical, Greek, Roman, and Continental law.²²

The reason why the requirement has been universal and persistent throughout varied legal systems is because the notion that a person should not be punished for an action taken without a guilty mind is very intuitive. The Court wrote that the “relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to.’”²³ Crude vengeance no longer justifies criminal punishment in modern legal systems. Instead, punishment is legitimate today because it deters harmful conduct. The Court attributes the shift from vengeance to deterrence to the practice of requiring moral culpability, writing that the requirement that a defendant be “blameworthy” has “afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.”²⁴

²⁰ Ibid., 251.

²¹ Ibid. (“Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone’s sweeping statement that to constitute any crime there must first be a ‘vicious will.’ Common-law commentators of the Nineteenth Century early pronounced the same principle” (citations omitted)).

²² Ibid., 251 n.4 (citing Max Radin, “Intent, Criminal,” in 8 *Encyclopedia of Social Sciences* (New York: The Macmillan Co., 1932), 126).

²³ Ibid., 251.

²⁴ Ibid. (citations omitted).

Thus, the *mens rea* requirement is centrally important to a just system of criminal law. It is firmly engrained in the Anglo-American legal tradition, and has ancient roots. Should the requirement not be met, it is inappropriate for the state to step in and impose punishment. This makes sense given the varied justifications and purposes of criminal punishment reviewed in *Section B*. Should a person act without the requisite *mens rea*, neither utilitarian nor retributive theory could justify punishment of the person.

First, utilitarian theory would not justify punishment of one who acted without the necessary *mens rea* because punishing that person could not effectively deter the commission of harmful acts. As the Supreme Court noted in *Morissette*, the *mens rea* requirement makes it possible for criminal laws to effectively deter harmful conduct.²⁵ Deterrence would not be possible if the law ignored an offender's state of mind. If a person acted without a guilty mental state—if she did not understand what she was doing or realize that it would produce a prohibited consequence—she could not have been deterred by threats of punishment should her action produce a certain result.

Put another way, deterrence-based utilitarian justifications for punishment assume a type of rational calculus whereby people decide not to engage in prohibited conduct out of fear of punishment. But a person cannot weight the costs and benefits of acting to determine that the costs (punishment) outweigh the benefits (the fruits of the crime) if the person does not understand that her action will produce the prohibited result. Unless the law requires that a person have a guilty mental state (intent to bring about a prohibited result), she cannot possibly be deterred by a law which hangs over her head promising a certain punishment should she produce a specified harm.

²⁵ See note 24 and accompanying text.

Second, retributivist theories too would fail to justify punishment of a person who acted without a guilty mind. The retributivist justification of punishment depends entirely on punishing those who are morally blameworthy, and the entire purpose of *mens rea* is separating those who are morally blameworthy from those who are not. A person cannot deserve moral blame for an act brought about accidentally, or without thought. Clearly, the criminal law would be unable to successfully target morally blameworthy conduct for punishment unless it also successfully identified certain persons as morally blameworthy. Since the *mens rea* requirement helps identify certain people as morally blameworthy, it enables the criminal law to satisfy the goal of punishing those persons.

2. *Affirmative Defenses*. Another essential limitation on the power of the criminal justice system to impose punishment in this nation is the existence of various affirmative defenses. This subsection will briefly catalog the key affirmative defenses. It seeks to illustrate that these defenses are an important aspect of the criminal law, and also that they further demonstrate that criminal punishment is only appropriate where it satisfies utilitarian and retributivist justifications for punishment.

The first set of affirmative defenses traditionally recognized in the criminal law is those of *justification*. These are defenses a criminal defendant may make, arguing that his or her conduct was not actually bad or harmful, but rather was proper. Although a law was broken, it was *good* that the defendant broke it. These defenses include self-defense (including defense of others), protection of property, and choice of the lesser evil (necessity). A retributivist theory of punishment requires that these defenses be recognized. When the proper course of action for a person to take is to ignore a law, he

or she is not morally blameworthy for breaking it. Thus, retributivist theory would not approve of that person being punished. At first, it may seem that a utilitarian theory of punishment could allow punishment, because the threat of criminal sanctions could still have a deterrent affect against a person breaking the law, even where complying with the law would cause harm. But taken a step back, utilitarian theories would not support the exercise of punishment in these cases. Utilitarianism only deems laws proper where they comply with the utility principle, maximizing happiness while minimizing pain. Where it is good for a person to disobey the law, because the person's disobedience would yield more happiness than pain, a utilitarian theory would hold that punishment ought not to exist; deterrence in that case would be harmful.

The second group of affirmative defenses is those that form an *excuse*. Unlike justifications, here the defendant's conduct was not good or proper. The conduct was bad, but the defendant as an individual has an excuse for committing it. He or she should therefore not be subjected to punishment. These affirmative defenses include duress, insanity, and diminished capacity. Here again it is straightforward that a retributivist theory of punishment requires that these defenses be available. A person is not morally blameworthy where insanity, duress, or diminished capacity made it impossible for him or her to comply with the law. Thus the person's conduct is not the type which retributivist theories of punishment seek to target. Also, there is good reason to believe that a person suffering from insanity or diminished capacity, or subject to severe duress, would not be susceptible to deterrence by the threat of criminal punishment. Thus, utilitarian theories of punishment would not support the punishment of a person who

acted with such an excuse. The punishment would add pain to society by harming the offender, but would be incapable of generating happiness in the form of increased compliance with the law.

Finally, it is worth stressing that these affirmative defenses are firmly entrenched in the Anglo-American criminal justice system. It illustrates just how rooted they are that federal judges in the United States may “prescribe the scope or even the existence of defenses” to federal criminal statutes where Congress has not formally recognized them.²⁶ Judge Easterbrook writes that federal judges are empowered to recognize such affirmative defenses because these defenses have existed for “thousands of years,” forming the background legal landscape to which Congress enacts criminal laws.²⁷ The existence of these defenses is an integral aspect of the Anglo-American legal tradition, helping to shape the boundaries of appropriate punishment.

The centrality of the *mens rea* requirement and the endurance of two sets of affirmative defenses demonstrate important limits on the exercise of criminal punishment. Criminal punishment exists to satisfy utilitarian and retributivist goals—to punish morally blameworthy conduct and to deter the commission of crimes. To ensure that the weighty state power to punish is not used where it cannot be justified, our legal system requires the state to prove that an accused person acted with a guilty mind, and allows the accused to argue that his actions were justified under the circumstances, or if not, he should nevertheless be excused from punishment because he was not morally

²⁶ Richard H. Fallon, Jr. et al, *Hart and Wechsler's The Federal Courts and The Federal System* (New York: Foundation Press, 2009), 613.

²⁷ Frank H. Easterbrook, “The Case of the Speluncean Explorers: Revisited,” *Harvard Law Review* 112 (1999): 1913.

blameworthy. The next chapter will turn to trends in the United States' federal criminal law enforcement, to determine whether the United States has been enforcing laws which are out of step with some basic principles and limitations of a just criminal law system.

CHAPTER 3 – PUNISHING THREATS

This final chapter will present this thesis’ argument: federal criminal law in the United States increasingly punishes people for threatening to harm society, a move that is undesirable for three reasons. First, a focus on threats undermines important limitations on the use of punishment. Second, theories of punishment only weakly justify punishing threats. And third, this shift contributes to the rising use of criminal punishment in this nation. For these reasons, the trend toward punishing threats warrants concern. It is questionable whether the United States ought to use criminal law as a tool to regulate activity which threatens to harm society generally, as it contributes to the harm of mass-imprisonment, is not a strongly justified use of punishment, and undercuts limitation on the use of criminal sanctions.

Section A begins by discussing the methodology used to differentiate “threats to harm society” from “harms.” *Section B* then lays out data on federal criminal case filings, showing that over the past twenty-five years, the federal government increasingly punished people for threatening to harm society. Finally, *Section C* argues that for three reasons, using the criminal law as a tool to punish threats is undesirable.

A. Methodology

1. *The Threat/Harm Distinction.* This thesis makes a key distinction between two types of criminal conduct: conduct that threatens society at large (“threat-crimes”) and conduct that concretely harms an identifiable person (“harm-crimes”). The terms are imperfect, because conduct that threatens society may also, in an abstract and indirect way, harm individuals within society. Thus, the contrast of threat-crimes to harm-crimes

does not imply that the former are necessarily “harmless,” but just that they do not inflict a concrete harm on an identifiable victim. This distinction is worth making for one vital reason: the criminal law is much better suited to target harm-crimes than threat-crimes. The reasons for this will be the subject of *Section C*. But first it is important to make the distinction clearer by identifying the federal crimes which this thesis will label threat-crimes and which it will label harm-crimes.

2. *Categorizing Federal Crimes*. For this thesis, I looked at twenty categories of federal crimes. I aimed to figure out which types of crimes have been most prosecuted by the federal government over the past forty years. I divided these twenty types of crimes into three categories: crimes which did not involve harm to an identifiable victim were coded as threat-crimes; crimes which involved harm to an identifiable victim were coded as harm-crimes; and crimes which could not fit neatly into either category were coded as mixed-crimes.

I identified seven categories of crimes as threat-crimes: those crimes involving controlled substances;¹ weapons;² federal regulations;³ immigration laws;⁴ gambling and lotteries; the justice system;⁵ and bribery. What unites these seven categories of crimes is

¹ Controlled substance violations include all violations of federal drug laws, including possession, distribution, manufacture, and trafficking.

² This includes all federal weapons offenses, primary among them being unlawful possession of a firearm.

³ This sweeping category included things like violations of fish and game laws, violations of laws meant to conserve natural resources, reporting of monetary transactions, maritime and shipping laws, and antitrust violations.

⁴ Immigration violations include alien smuggling, fraud and misuse of a visa or permit, and improper entry by an alien. By far the most common violation under this category was improper reentry by an alien.

⁵ The category of “justice system offenses” included perjury, contempt of court, escape from custody, accessory after-the-fact, aiding and abetting, and obstruction of justice.

that none of them involve an identifiable victim who could be concretely harmed by the crime. The prohibited conduct is something that threatens to harm society generally. Perhaps the prohibited conduct increases the risk of actual harm to a person, but itself could not directly or concretely harm another. Regardless of how harmful such conduct is in the abstract, no identifiable person is harmed when an offender possesses a gun or drugs, bribes a person, illegally gambles, ships a prohibited item, or overstays a visa.

It makes the gulf between threat-crimes and harm-crimes clearer to consider the seven categories of crimes I identified as harm-crimes: extortion; sex offenses; civil rights violations; auto theft; larceny and theft; embezzlement; and all violent crimes.⁶ These crimes will necessarily have an identifiable victim because the offender's direct harm of that victim is what defines the criminal act. It is impossible to commit a harm-crime without hurting an identifiable victim in a concrete way.

However, not all crimes split neatly into the categories of harm-crimes and threat-crimes. There are many crimes that may in some cases have an identifiable victim, but this is not *necessary* to commission of the crime. Fraud is a clear example; it could either be a harm-crime or a threat-crime depending on how it was committed. If the offender defrauded a person out of money owed, there is a clearly identifiable victim. But if the offender defrauded the government by dishonestly collecting social security benefits, or by cheating on her taxes, the fraud would be a threat-crime. Six crimes could not be

⁶ During the period examined, the federal government criminalized a greater swath of violent crime which had traditionally been prosecuted solely by state governments. See Beale, *Too Many* (intro., n. 12). By 2010, the category of "violent crime" officially included homicide, robbery, assault, kidnapping, violent racketeering, carjacking, and terrorism.

categorized as harm-crimes or threat-crimes: forgery and counterfeiting;⁷ fraud;⁸ jurisdictional statutes; mail crimes;⁹ racketeering; and conspiracy. For the purposes of charting trends of criminal prosecution, these crimes were grouped in a third category termed mixed-crimes.

3. *Data Collection.* I collected data on federal criminal cases commenced for every year from 1970 through 2010. I gathered this data from two sources: Statistical Reports published by the Department of Justice,¹⁰ and Annual Reports published by the Administrative Office of the United States Courts.¹¹ The Department of Justice began publishing Statistical Reports at the end of each year starting in 1958. Each year's report contains a table which lists the number of criminal cases filed that year, broken down by

⁷ Forging a person's signature may have concrete harms for that person, but the same is not true of counterfeiting currency.

⁸ The broad category of "fraud" includes mail and wire fraud, IRS fraud, fraud against the government, and fraud involving banks and banking.

⁹ "Jurisdictional statutes" and "mail crimes" are curious categories that were particularly difficult to identify as harm-crimes or threat-crimes, because it was not at all clear what conduct was involved. The Department of Justice used the terms to identify crimes in Statistical Reports published prior to 1992, at which point the Department radically changed the way it published data. The Administrative Office of the U.S. Courts' Directors Reports listed no categories similar to "jurisdictional statutes" or "mail crimes." The conduct involved in each category was presumably distributed into other categories in those reports, but with no mention of which ones. Professor Samuel Buell, former Department of Justice attorney and scholar in the field of federal criminal law, informally speculated that "jurisdictional statutes" included crimes which were prosecuted by the federal government only because of an accident of jurisdiction (the conduct would typically be handled by state prosecutors, but the offender happened to commit it on federal ground, such as a national park or military base), and that "mail crimes" could include crimes against the post office, including various types of fraud. It is worth noting that in 1993, when the Directors' Reports contained no category of "mail crimes," the number of federal cases brought for "fraud" jumped by almost the exact number of cases brought for "mail crimes" in 1992 according to the Department of Justice. The year the category of "jurisdictional crimes" disappeared, the number of filings for "violent crime" increased markedly. Nevertheless, these changes do not affect the data or put into question the trends identified in *Section B*, because the shift was mostly isolated within the category of mixed-crimes.

¹⁰ See, e.g., U.S. Department of Justice, *United States Attorneys' Office Statistical Report Fiscal Year 1970*.

¹¹ See, e.g., James C. Duff, "Judicial Business of the United States Courts: 2010 Annual Report of the Director" *Administrative Office of the U.S. Courts* (Washington: U.S. Government Printing Office, 2011).

offense.¹² From 1958 until 1991, each report contained a table listing over one-hundred federal crimes, identifying the number of criminal cases the Department of Justice filed that year charging each crime. I divided the crimes into the twenty categories discussed in the previous subsection. In 1992, the Department of Justice permanently altered the way it identified federal crimes, making the reports a less useful source of data.¹³

The Administrative Office of the United States Courts publishes a yearly report by its Director. These contain highly detailed tables, specifying the number of criminal cases filed by offense each year. The information contained in these reports dates back to 1993. The classification of federal crimes in these tables closely mirrors the twenty categories I have used to divide federal crimes.¹⁴ Figure 7 over the next several pages shows the results of all the data collected from these two sources.

Two final notes need to be made. First, in a few cases, data from the Department of Justice Statistical Report or the Administrative Office of U.S. Courts Directors' Report was missing or incomplete. This was only a serious problem in 1992, during the gap between the older methods of representing data in the Statistical Reports, but before the Directors' Report provided data. Aside from 1992, there were scattered years in which data on a particular crime was for some reason missing. When that occurred, I filled in the number for that offense by averaging the data for that offense from the year before with the data from the year after. I supplied the data in these rare cases so that I could

¹² *U.S. Attorneys' Office Statistical Report Fiscal Year 1970*, 29–30.

¹³ See U.S. Department of Justice, *United States Attorneys' Office Statistical Report Fiscal Year 1992*, 52. The new way of representing data broke all federal criminal crimes into 15 "Program Categories" and 56 specific crimes. This change made it extremely difficult to determine into which categories the conduct reported in previous reports had been divided, and much information was simply omitted.

¹⁴ See Duff, *Judicial Business of the United States Courts*, Appendix, Table D-2.

represent the data visually; if a cell read “zero” for any year due to missing data, a chart would wrongly suggest the level of prosecution for that crime that year dipped to zero.

Second, for the years 1993, 1994, and 1995, the data for “Racketeering” and “Extortion” were derived in a unique way. For those three years, the Directors’ Report combined these two offenses and provided a single number of cases filed. To parse apart that number, I first calculated for all other years how many racketeering cases were filed relative to the number of extortion cases, and then broke down the Directors’ number to proportionally represent my best statistical guess of how many of the cases in this mixed group were for racketeering and how many were for extortion.

Figure 7 below reveals the results of this data analysis. It shows the trends in enforcement for each of the twenty federal crime categories studied. The source of this data was Statistical Reports from 1970–1992 and Directors’ Reports from 1997–2010. The 1997 Director’s Report contained data going back to 1993. Hence, data for 1970–1992 is from Statistical Reports, and data from 1993–2010 is from Directors’ Reports.

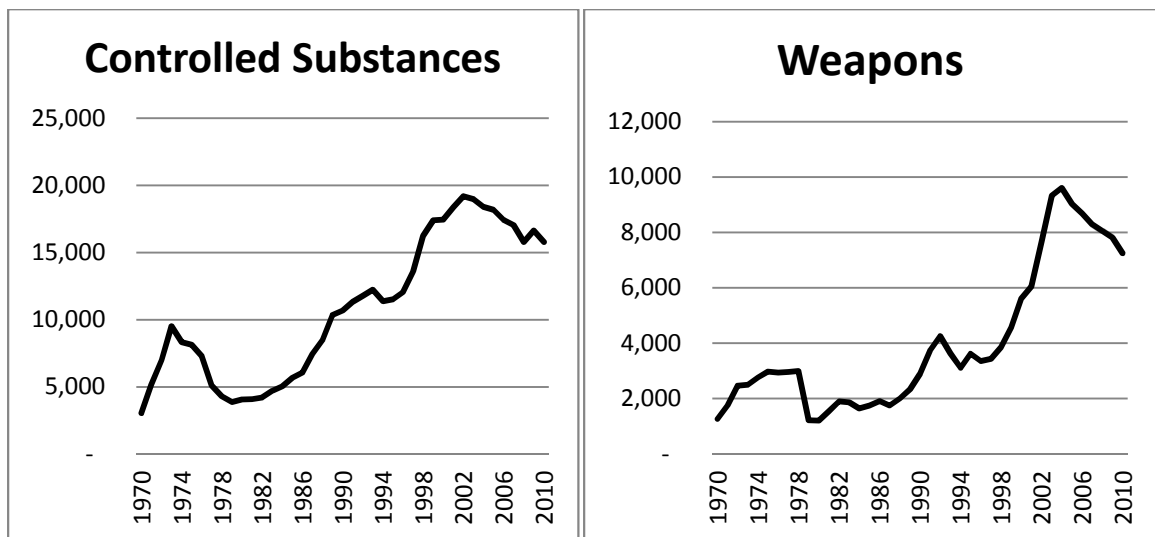


Figure 7 - Prosecution Trends of All Examined Federal Crimes from 1970–2010.

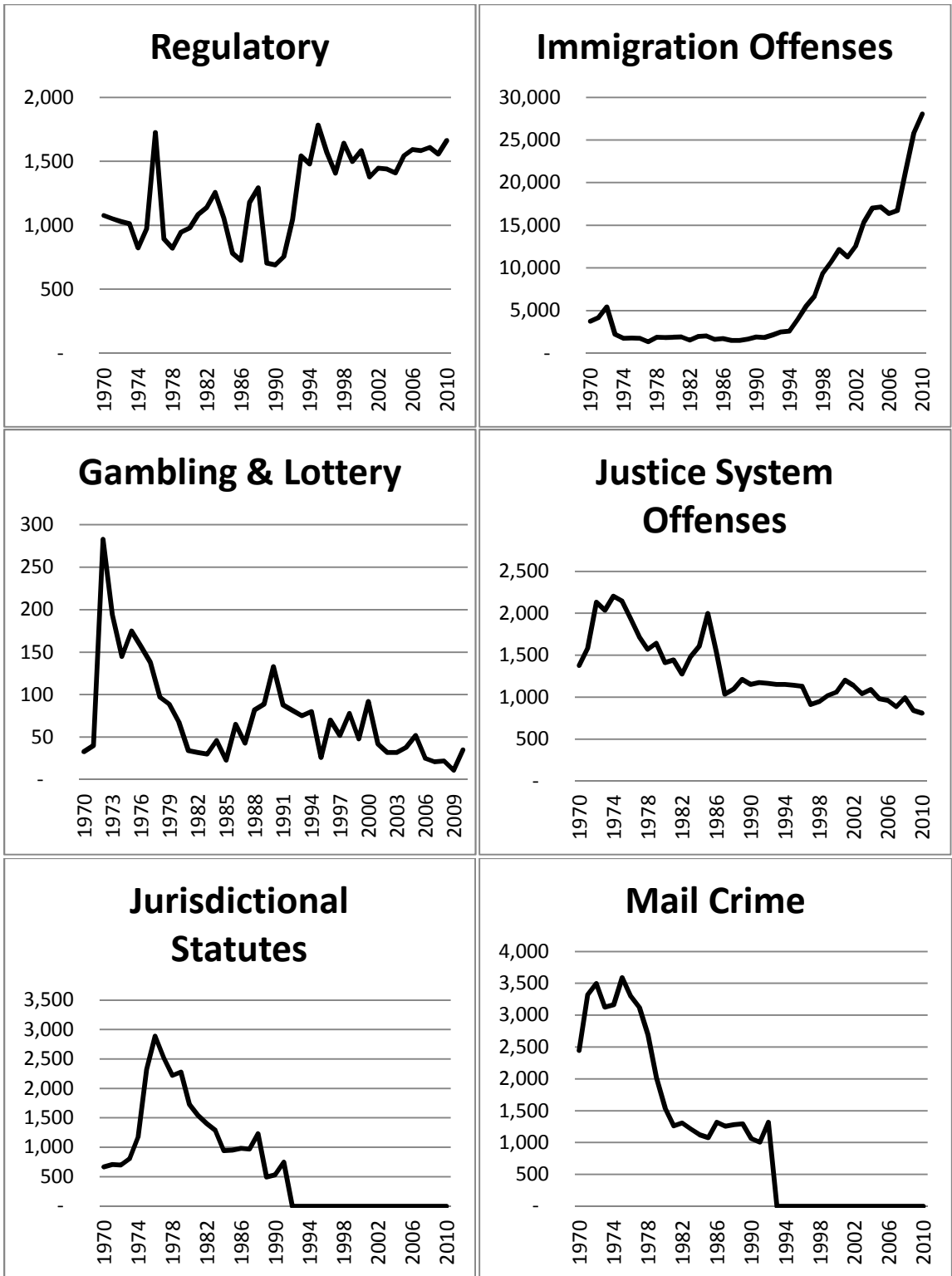


Figure 7 (continued). Note: For an explanation of the apparent disappearance of “Jurisdictional Statutes” “Mail Crime” violations from 1993 to 2010, see page 36, note 9. From 1993 onwards, “Mail Crime” was likely classified as “Fraud,” and “Jurisdictional Statutes” moved into the category of “Violent Crime.”

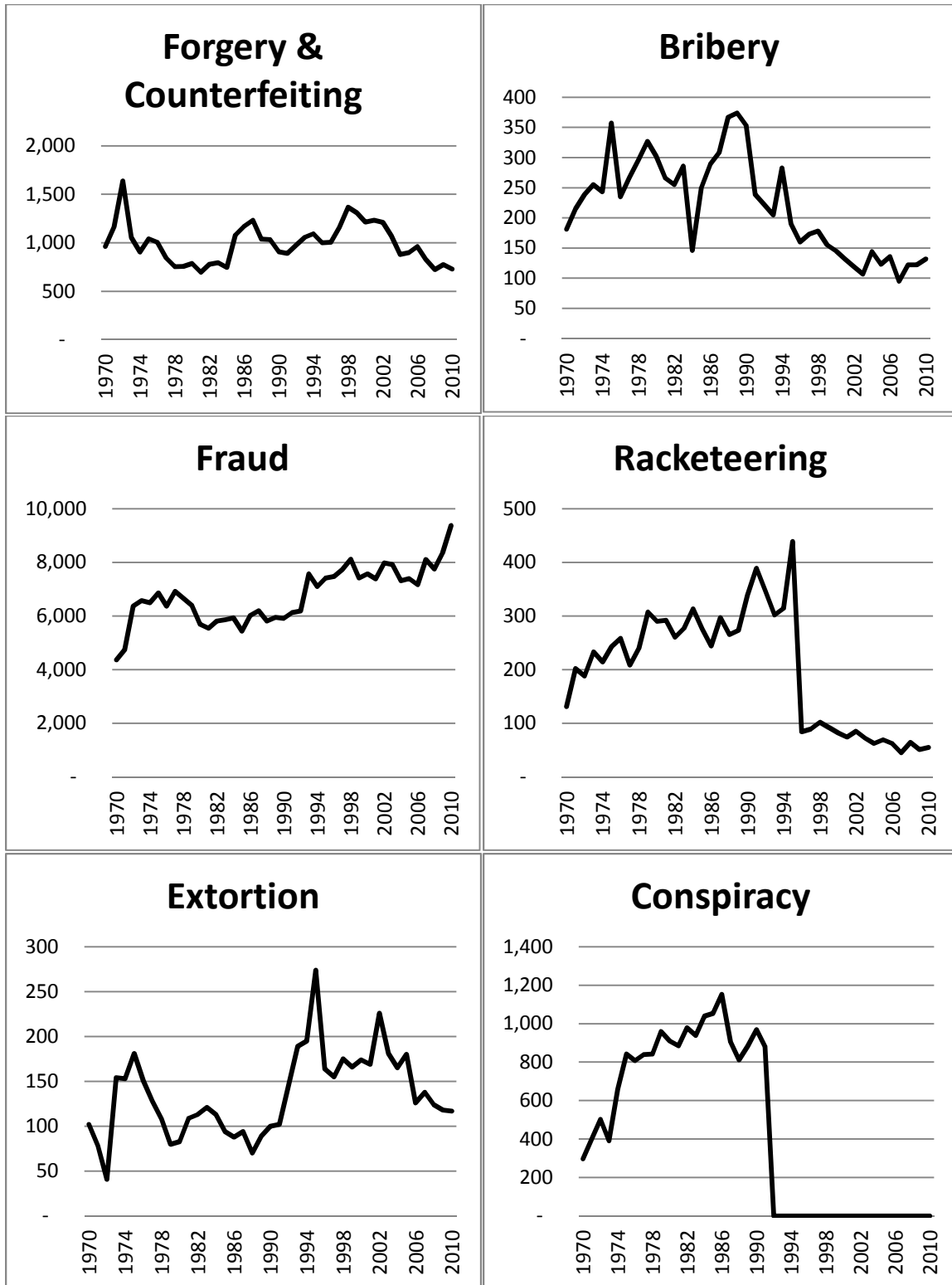


Figure 7 (continued). Note: Beginning in 1992, neither Statistical Reports nor Directors' Reports list "Conspiracy" as its own category. Such violations were likely distributed evenly across categories, such that "conspiracy to commit" a particular crime became classified as a violation of that crime.

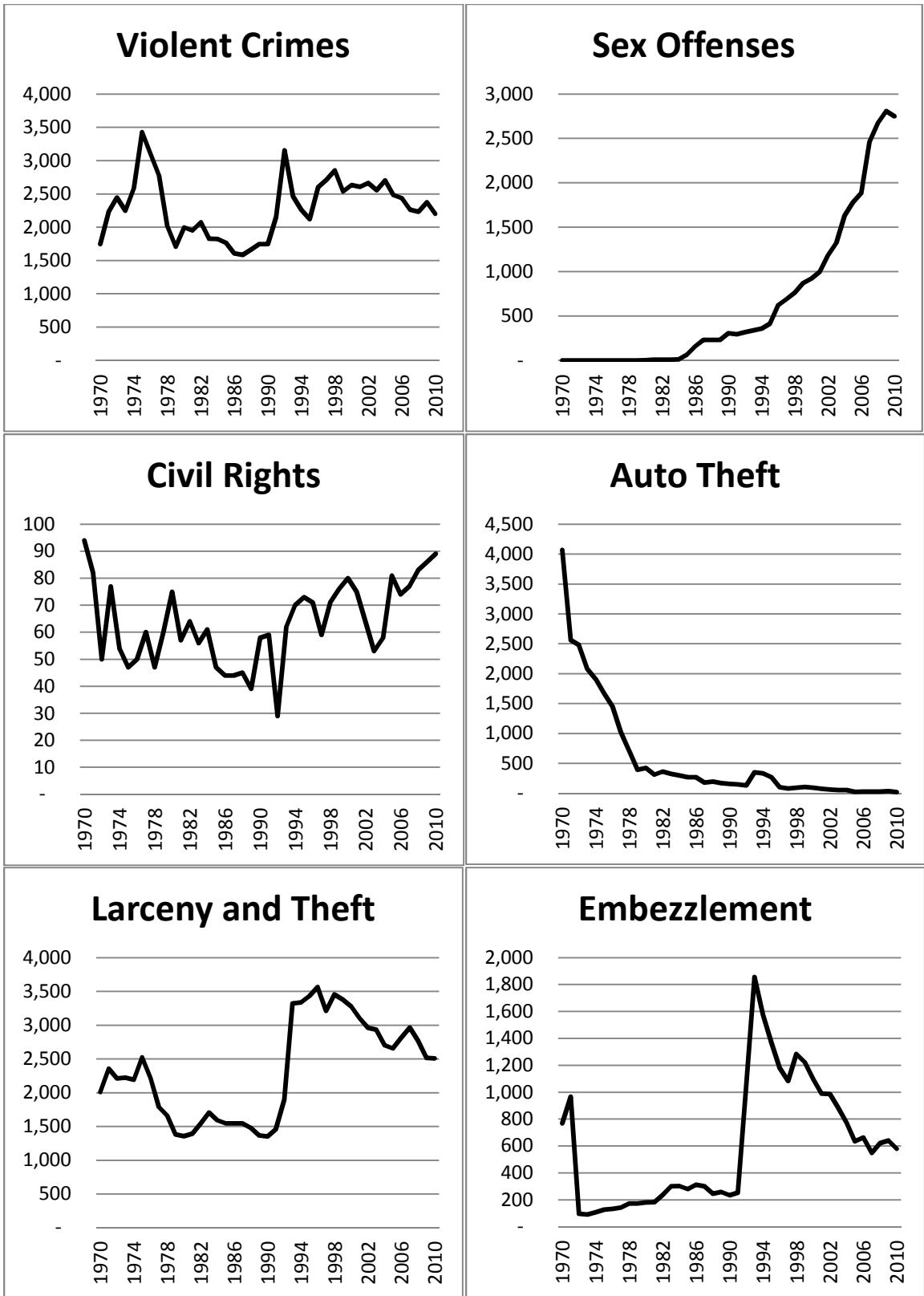


Figure 7 (continued).

B. Trends in Federal Prosecution

1. *General Trend.* This data reveals a number of patterns in federal criminal law enforcement. First, stepping back and viewing the total number of federal criminal cases filed per year over the period of the prison boom, it appears that the number of cases increased somewhat. Figure 8 shows the rise from an average of 35,000 cases per year during the 1970s and 1980s to an average of 70,000 per year in the 2000s. This increase is very different than the increase in incarceration charted in Chapter 1. It is nowhere as sharp; during the same period when the nation’s incarceration rate rose 600%, the number of federal criminal cases merely doubled. The increase in federal cases also fails to take the same general path as the rise in incarceration; instead of staying stable until 1975 and then rising sharply, it dips from 1972 to the 1980, and then begins to climb gradually for thirty years. It seems clear that although application of the federal criminal law has risen during the time of the prison boom, this trend started later and followed a more modest path. If there is an interesting story in rising federal criminal law enforcement, it seems to not be found in the general arch of criminal case filings.

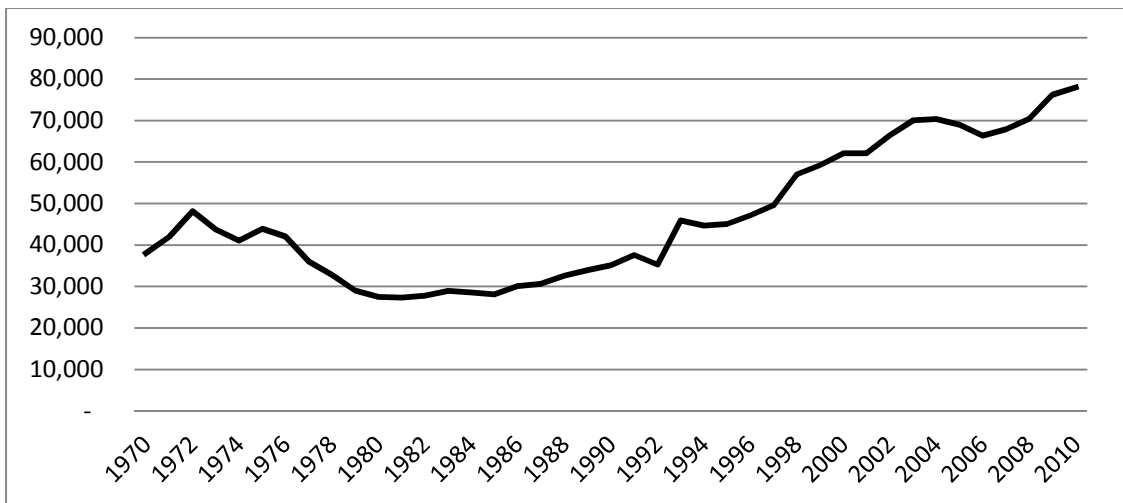


Figure 8 - Federal Criminal Cases Commenced by Year, 1970-2010.

2. *Threat-Crimes versus Harm-Crimes.* However, the story becomes much more interesting when the categories of federal criminal cases are divided into threat-crimes and harm-crimes. Figure 9 shows that over the past forty years, the number of federal criminal cases charging harm-crimes has remained remarkably stable. However, since the mid-1980s, the number of cases brought for threat-crimes spiked dramatically. The number of prosecutions for mixed threat-harm also remained stable since 1970.

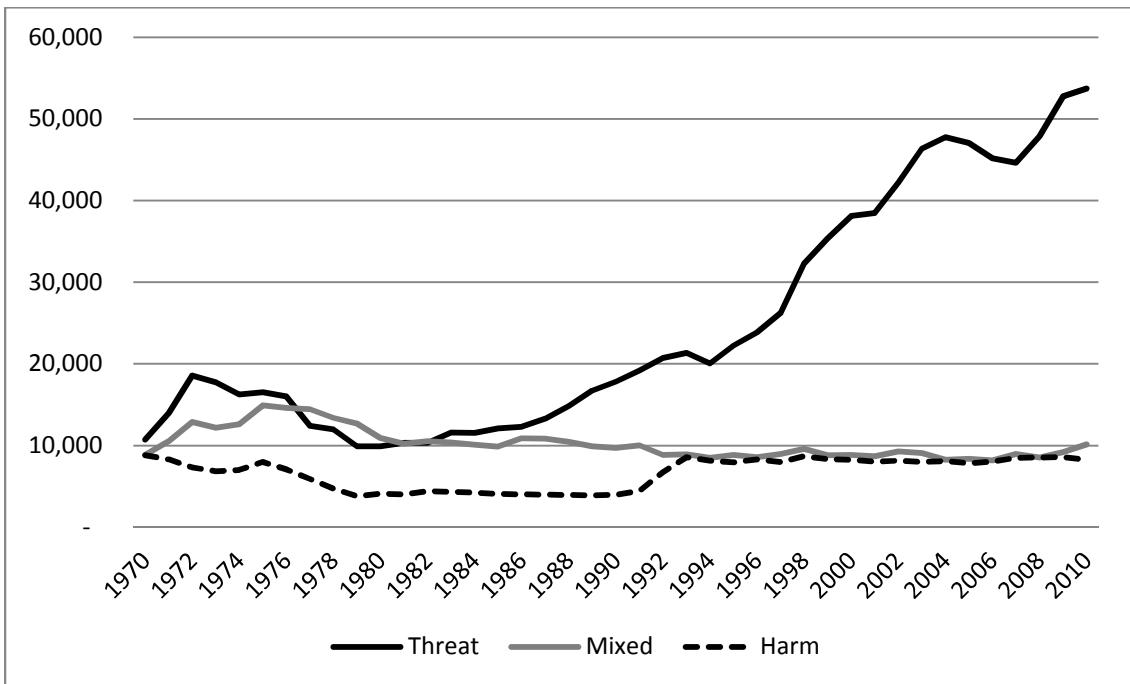


Figure 9 - Federal Criminal Cases Commenced by Type of Crime, 1970-2010.

The trend becomes clearer when one focuses on just the twenty year period from 1990 to 2010, the period Figure 8 shows to contain the largest increase in federal criminal cases. Figure 10 shows that relative to harm-crimes and mixed-crimes, prosecution of threat-crimes exploded over this period. Virtually all of the increase in federal criminal cases witnessed from 1990 to 2010 was due to a more than 300% increase in the prosecution of threat-crimes.

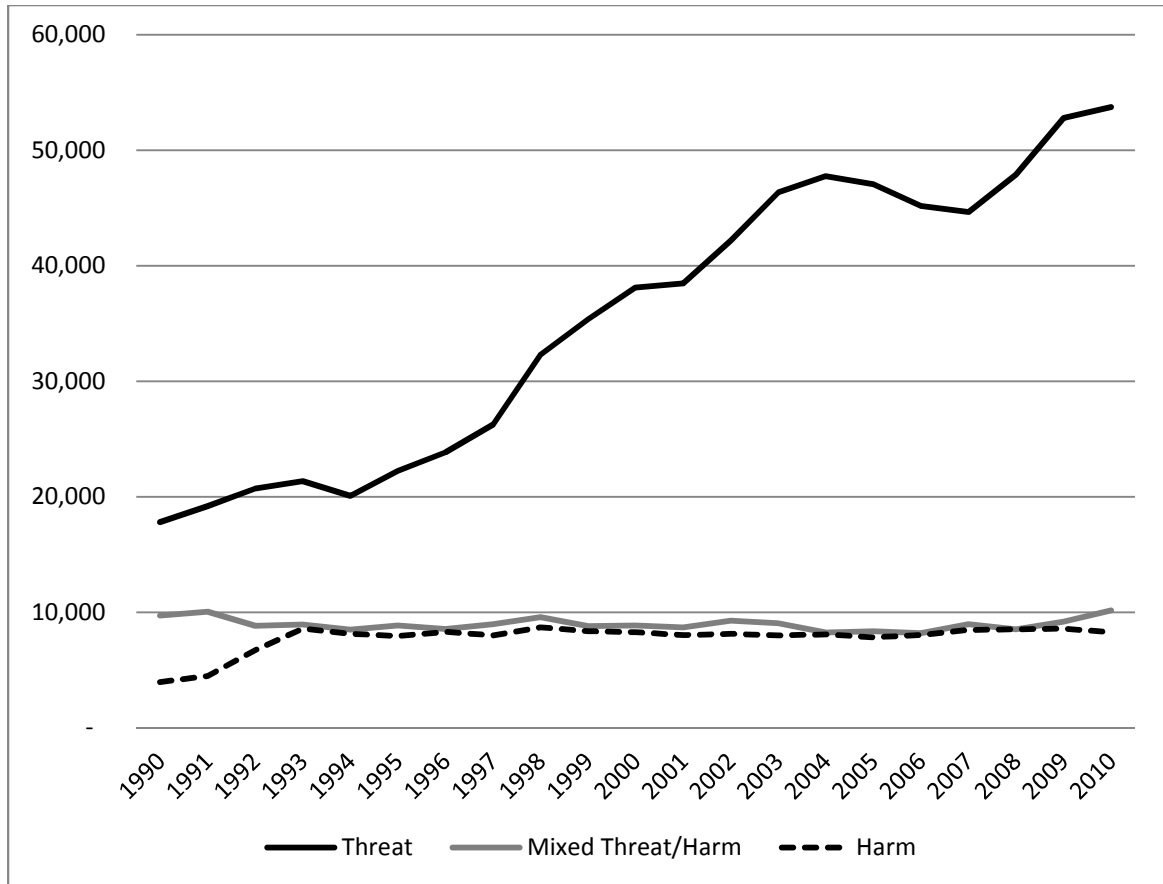


Figure 10 - Federal Criminal Cases Commenced by Type of Crime, 1990-2010.

Beginning in the late 1980s, the United States began to bring more and more cases targeting threat-crimes. The number of cases targeting threat-crimes did not just rise in absolute terms. It also rose relative to the number of cases targeting harm-crimes and mixed-crimes. Figure 11 shows that the relative proportion of each type of case changed radically from 1970 to 2010. In 1970, an even number of cases charged threat-crimes, harm-crimes, and mixed-crimes. Each type of crime made up about a third of the criminal cases filed. However, by 2010, three out of every four criminal cases filed by the United States were for an offense identified as a threat-crime. Mixed-crimes were 14% of the cases filed, while harm-crimes constituted a mere 11% of federal criminal cases brought by the United States.

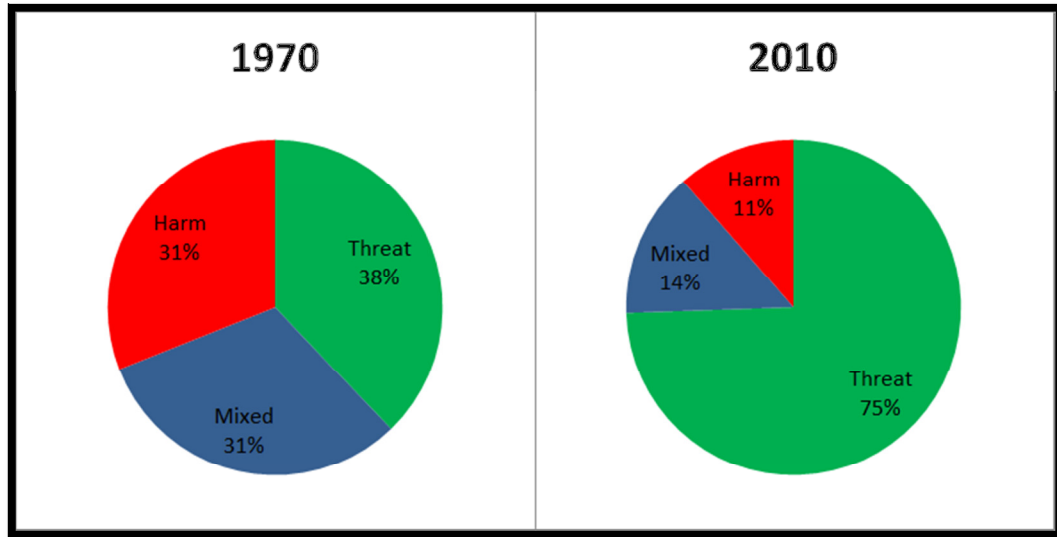


Figure 11 - Proportion of Federal Cases by Type of Crime, 1970 and 2010.

3. *The Rise in Threat-Crime Prosecutions.* Breaking down the numbers a step further, Figure 12 overlays the trends in prosecution of each of the seven types of threat-crimes. It shows that three types of crimes stand out as being prosecuted at much higher rates as the years went by: immigration, controlled substances, and weapons.

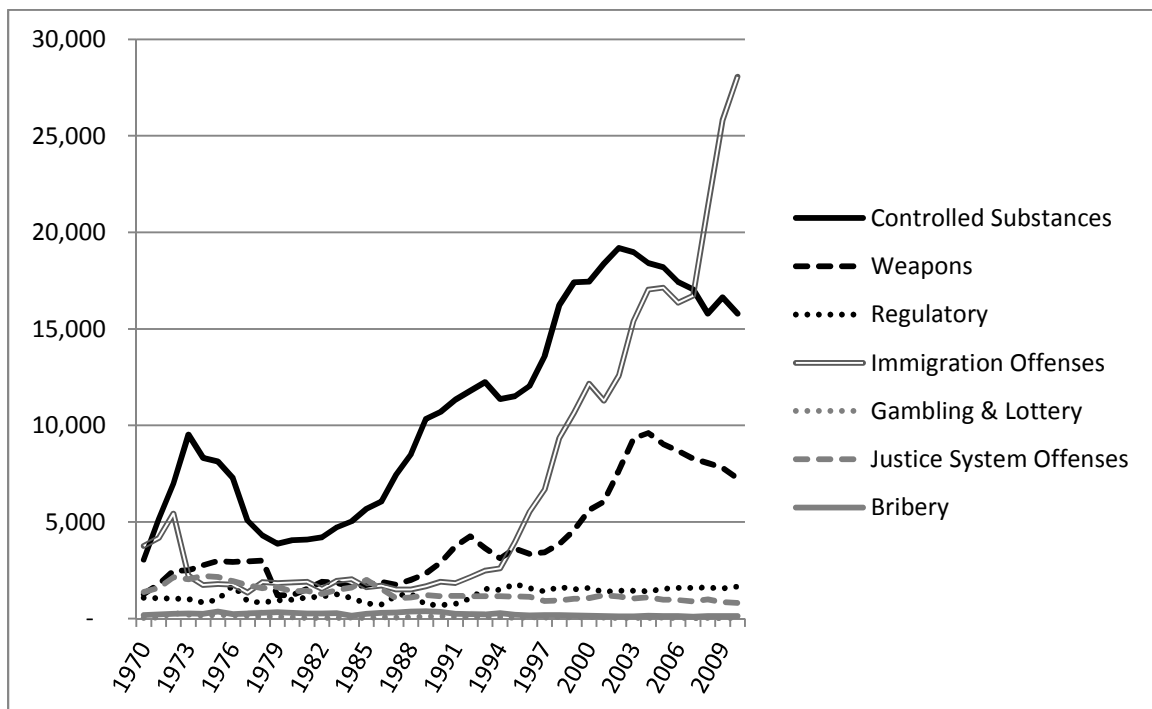


Figure 12 - Federal Criminal Cases Charging a Threat-Crime, 1970-2010.

Therefore, the story of increased enforcement of federal crimes has become clear. Figure 8's doubling of the number of federal criminal cases filed over the past forty years is almost entirely due to extraordinary increases in the prosecution of three categories of crime. From 1980—the year federal criminal case filings first began to rise—to 2010, the United States increased the number of cases it brought for weapons violations by nearly 600%, the number of cases it brought for controlled substance violations by almost 400%, and the number of cases it brought for immigration violations by over 1,700%. The next and final section will argue that the increased use of the criminal law to target these categories of crime has some very undesirable consequences.

C. Implications of Increasing Prosecution of Threats.

It is clear that the federal criminal law is being used more and more as a tool to target conduct which threatens to harm society. This final section provides three reasons why the criminal law is not the right tool for this task. Two of these reasons draw on the discussion from Chapter 2. First, legal limitations on the use of criminal punishment are less effective when the law targets threat-crimes instead of harm-crimes. Threat-crimes tend to punish the offender for possessing a prohibited item or having a prohibited status, and thus the crimes have a lessened *mens rea* requirement compared to harm-crimes, which involve prohibited actions. And because of this lessened *mens rea* requirement, and since threat-crimes do not involve a direct victim, traditional affirmative defenses are often unavailable to offenders accused of committing threat-crimes. Second, both retributivist and utilitarian theoretical bases for punishment are met only weakly when the criminal law targets threat-crimes instead of harm-crimes.

The third reason why the criminal law is an imperfect tool to target threat-crimes is related to the discussion from Chapter 1—the prison boom. That chapter showed that criminal punishment, specifically incarceration, has been on a tremendous upswing in the United States for thirty-five years. The fact that a focus on threat-crimes contributes to this phenomenon gives reason to reconsider whether the criminal law ought to be expanded. At a time when the application of criminal sanctions is on an unprecedented rise, perhaps we as a society should seek other tools for combating threats to society than the already overused tool of criminal punishment.

1. *Weakened Mens Rea Requirement and Affirmative Defenses.* The previous chapter laid out the importance of *mens rea* and affirmative defenses as legal limits on the application of criminal punishment within the United States. The *mens rea* requirement is so central that the very concept of crime is properly understood as only arising from the “concurrency of an evil-meaning mind with an evil-doing hand.”¹⁵ And affirmative defenses are so foundational to the criminal law that federal judges may read them into federal statutes, because they exist in the background legal landscape when Congress legislates.¹⁶ However, many threat-crimes, especially those involving controlled substances, weapons, and immigration—the three categories identified as the most increasingly targeted by the federal law—lack mental elements and thus restrict the availability of affirmative defenses.

¹⁵ *Morrisette v. United States*, 342 U.S. 246, 251 (1952); see also chap. 2, n. 20 and accompanying text.

¹⁶ See chap. 2, n. 26–27 and accompanying text.

For instance, over eighty percent of all cases brought for immigration violations in 2010 were for “improper reentry.”¹⁷ The relevant federal criminal statute makes it illegal for a person who has been denied entry to the United States or has been deported from the country to “enter[], attempt[] to enter, or . . . at any time [be] found in, the United States” without permission from the Attorney General.¹⁸ There is no mental element to this crime; all that is required is that a person who had previously been denied entry to the United States be found inside the United States.¹⁹ Similarly, the most common firearm violation is “possession by prohibited persons.”²⁰ The statute which makes that illegal also lacks a substantive *mens rea* requirement.²¹ It simply renders it illegal for certain persons (such as convicted felons, those addicted to a controlled substance, and persons who have been dishonorably discharged from the military) to possess a firearm which travelled in interstate commerce.²²

That threat-crimes often lack a *mens rea* requirement is not surprising given the difference between threat-crimes and harm-crimes. Since harm-crimes make illegal an *interaction* between the offender and another person, it makes sense why there would be

¹⁷ Duff, *Judicial Business of the United States Courts* (see n.14) (showing that out of a total of 28,046 immigration violations in 2010, 23,149 were for “Improper Reentry by Alien”).

¹⁸ 8 U.S.C. § 1326 (2010).

¹⁹ *United States v. Champegnie*, 925 F.2d 54, 55–56 (2d Cir. 1991) (“The statute contains no language requiring proof of a particular mental state. . . . We read the statute to mean what it says: A previously deported alien who reenters the United States does so at his or her peril, and any subjective belief as to the legality of that act is irrelevant.”).

²⁰ See Duff, *Judicial Business of the U.S. Courts*.

²¹ *United States v. Leahy*, 473 F.3d 401, 408 (1st Cir. 2007) (“The federal felon-in-possession statute requires proof that the defendant *knowingly* possessed a firearm. Beyond that, however, 18 U.S.C. § 922(g) is a strict liability statute, which contains no specific *mens rea* element at all.” (citations omitted)).

²² 18 U.S.C. § 922(g) (2010).

a mental element to the crime. The central focus of *mens rea* is protecting people who did not know that they were *taking some action*, or did not intent to take the *action*. It would therefore matter why the offender took the action. But since there is no interaction at play in many threat-crimes, since there was no identifiable victim with whom the offender interacted, there is less of a need to consider the offender's mental state. A person's mental state is less important if the law is concerned not with an action the person took, but rather with an item the person possessed, or a status that person had. There is simply less of a mental component to possessing an item or a status than there is to taking an action which involves another person.

Partially as a result of the lack of a *mens rea* requirement, and partially because of the lack of an interaction between persons in many threat-crimes, there may also be fewer affirmative defenses available to those accused of a threat-crime. The possibilities of what can transpire in an interaction between people are more varied than the possibilities of what caused a sole person's possession or status. Typically, the law recognizes affirmative defenses such as self-defense, necessity, and duress to enable an accused person to explain, excuse, or justify his or her actions. But where the conduct prohibited is entirely isolated to the offender, these defenses are seldom available.

For instance, since there is no mental element to the crime of illegal reentry, the government does not need to show that the accused acted with specific intent, nor is there a good faith or reasonable mistake defense available to the accused.²³ And since there is no substantive *mens rea* requirement in the felon-in-possession statute, a defendant could

²³ *Champegnie*, 925 F.2d at 55–56.

not readily argue that he should be excused or justified for his possession. The crime “encompasses both the felon who intentionally arms himself to rob a bank and the felon who frustrates the robbery by snatching the gun out of the robber’s hand.”²⁴

The United States Court of Appeals for the First Circuit highlights how the absence of a substantive *mens rea* requirement to the crime of unlawfully possessing a firearm makes it problematic for an accused person to argue that he or she possessed a firearm in self-defense: “while an individual who kills another in self-defense lacks the malice required to support, say, a conviction for first-degree murder, a felon who knowingly takes possession of a firearm thereby satisfies every statutory element of the felon-in-possession offense regardless of whether he was motivated by concern for his own safety.”²⁵ In other words, when a crime lacks a traditional *mens rea* requirement, it matters little why the accused did it—there are simply fewer defenses available.²⁶ The accused has less of an opportunity to explain the behavior and offer an excuse or justification.

²⁴ *Leahy*, 473 F.3d at 408.

²⁵ *Id.*

²⁶ *See United States v. DeWilliams*, 85 Fed.Appx. 154, 159 (10th Cir. 2004). In explaining why a defendant charged with possession of a firearm by a felon did not suffer prejudice when the lower court denied his motion for a continuance, the court wrote:

[T]he charge of possession of a firearm by a convicted felon is not one that calls for highly complex or technical defenses. The charge has only three elements that must be proved: (1) defendant was a felon; (2) the gun or ammunition traveled in interstate commerce; and (3) defendant possessed the gun or ammunition. The first two elements, in particular, seem unlikely to arouse much controversy at trial, or to require extensive investigation by the defense. Thus, even the government's surprise addition on the first day of trial of new witnesses and exhibits, nearly all of which had been added to establish these two elements, does not convince us that DeWilliams needed more time to prepare. Mr. DeWilliams did not explain, nor can we imagine, how additional preparation would have enabled him to raise a reasonable doubt on either of these points.

Id.

This is the first reason to reconsider whether the criminal law is the appropriate tool for combating the conduct at issue in threat-crimes. The criminal justice system in the United States has evolved a number of centrally important protections, including the requirement of *mens rea* and the availability of affirmative defenses. These limit the government's application of criminal punishment, helping to ensure that the sanction is only used where it can properly deter harmful conduct and punish morally blameworthy behavior. But due to the fact that threat-crimes often involve a simple act of possession or prohibited status, they often lack *mens rea* requirements and the accused has less of an opportunity to furnish affirmative defenses. Therefore, these limitations on the use of criminal punishment are undermined when the law targets threat-crimes.

2. *Lessened Retributivist and Utilitarian Justifications.* The next reason why the criminal law is not the best tool for targeting threat-crimes is that punishment is not a strongly justified response to the conduct. Chapter 2 outlined both the utilitarian and retributivist justifications for punishment. While each theory can justify punishment of those who commit threat-crimes, the justifications are substantially weaker than those for the punishment of harm-crimes.

The general retributivist justification for punishment is that the offender, by his conduct, has done something deserving of punishment. Consequences from punishment do not matter, all that matters is that the offender has done something wrong and deserves punishment. Threat-crimes, however, are defined by the fact that they do not cause a direct harm on any person. In any individual case, an offender's crime is not one which seems deserving of a large amount of condemnation. By merely possessing a prohibited

item or status, it is not immediately apparent what the person has done to deserve moral blame. The commission of these acts may raise the risk of future harm, and this perhaps is a wrong for which some punishment is justified. By possessing controlled substances or weapons, offenders may on the aggregate make their communities more dangerous. These offenders may also facilitate violent acts in the future. This certainly deserves blame, but the case for blame is far weaker than in more traditional criminal acts where the offender's conduct causes a clear and direct harm to a victim. In short, retributivist justifications for punishment are far stronger when the object of punishment is someone who committed a harm-crime versus a threat-crime. Since the harm a threat-crime offender causes is more indirect and abstract, the case for moral blameworthiness is comparatively weak.

Utilitarian justifications for punishment of threat-crimes are easier to come by than retributivist justifications. If an offender's crime threatens society at-large, in an indirect manner increasing the overall risk of future bad acts, punishing that offender can potentially prevent future harm. If in the aggregate, people's possession of weapons or controlled substances increases violence or other harm in a country, punishing persons for possessing those items could be readily justified by utilitarian theories of punishment.

Yet, even here, the justification for punishment of threat-crimes is weaker than justification for punishment of harm-crimes. In both cases, part of the happiness sought through punishment is the deterrence of future bad acts. But in the case of harm-crimes, an additional aspect of happiness achieved is the punishment of a person who has already caused a direct harm to a victim. That victim will receive happiness from the fact that the

offender suffers punishment, most likely psychological comfort in feeling that justice has been done and the victim is now safer. This form of happiness achieved through punishment is wholly absent where the person punished never caused harm to an identifiable victim. Thus, the utilitarian justification for punishment is weaker where the criminal law targets a threat-crime versus a harm-crime.

Important to keep in mind, additionally, is that utilitarian theories of punishment see punishment itself as harmful. Utilitarianism aims to overall increase happiness over pain. Thus, punishing those whose behavior threatens society is only justified if the pain experienced through punishment is less than the concrete happiness actualized through that punishment. It is not enough to show that in the aggregate, society would suffer less harm if there were fewer threats to society. It must be the case that punishing those who threaten society *actually* makes society safer and thus increases happiness. Furthermore, this increase must offset the often substantial pain suffered by those punished. This leads into the next and final argument against using criminal law to target threat-crimes: that it contributes to the prison boom.

3. *Contribution to the Prison Boom.* The final reason why the United States ought not to use the federal criminal law to punish those whose conduct threatens to harm society goes back to the discussion in Chapter 1. Over the past thirty-five years, there has been an explosive use of criminal punishment in the nation. More people in the United States today are incarcerated or monitored by correctional authorities than ever before.²⁷

²⁷ See Figure 2 (chap. 1, p. 7).

The country imprisons a greater share of its population than does any other nation on earth, many times more than other wealthy democracies.²⁸

This overall trend began in the early 1970s, a time when the federal criminal law was beginning a ten-year dip in enforcement.²⁹ The factors which led the nation as a whole to imprison more and more people did not initially cause a similar increase to the filing of federal criminal cases. Figure 13 shows how the two trends are out of sync from 1970 until 1985. But in the past twenty-five years, the federal criminal law experienced its own boom, one *Section B* showed focused on a specific kind of conduct. Legislators expanded the federal criminal law into new areas, and prosecutors began to use it in new ways—to contain general threats to society. Figure 13 below shows that from 1985 on, the nation’s rising incarceration rate mirrors the rise in federal criminal case filings.

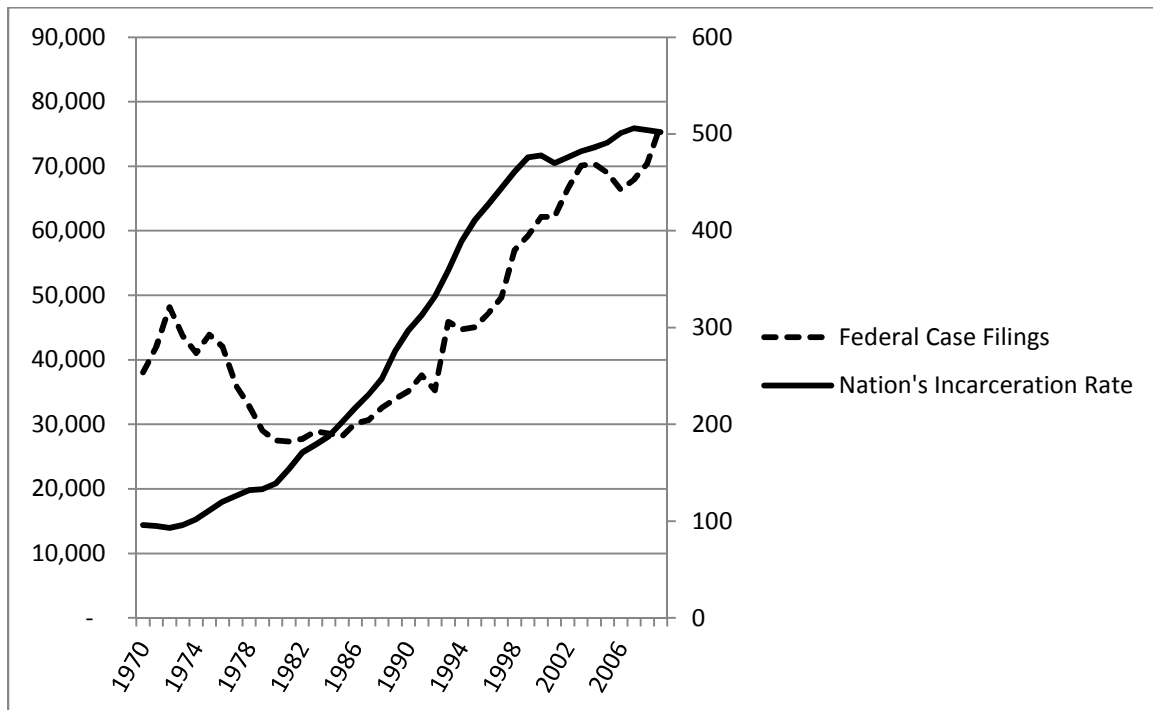


Figure 13 – Number of Federal Case Filings (*Left Axis*) compared to National Incarceration Rate (*Right Axis*).

²⁸ See Table 2 (chap. 1, p.9); Figure 3 (chap. 1, p.10).

²⁹ See Figure 2 (chap. 1, p. 8); Figure 8 (chap. 3, p. 43).

The increase in federal criminal case filings, although it began after the nation's prison boom, took the same basic path. The reasons are straightforward; an increase in federal criminal case filings produced an increase in federal incarceration. Figure 14 depicts this, showing that an increase in the federal incarceration rate follows the increase in federal criminal case filings. Simply put, as the United States brought more federal criminal cases to contain threats, more individuals were incarcerated in federal prisons.

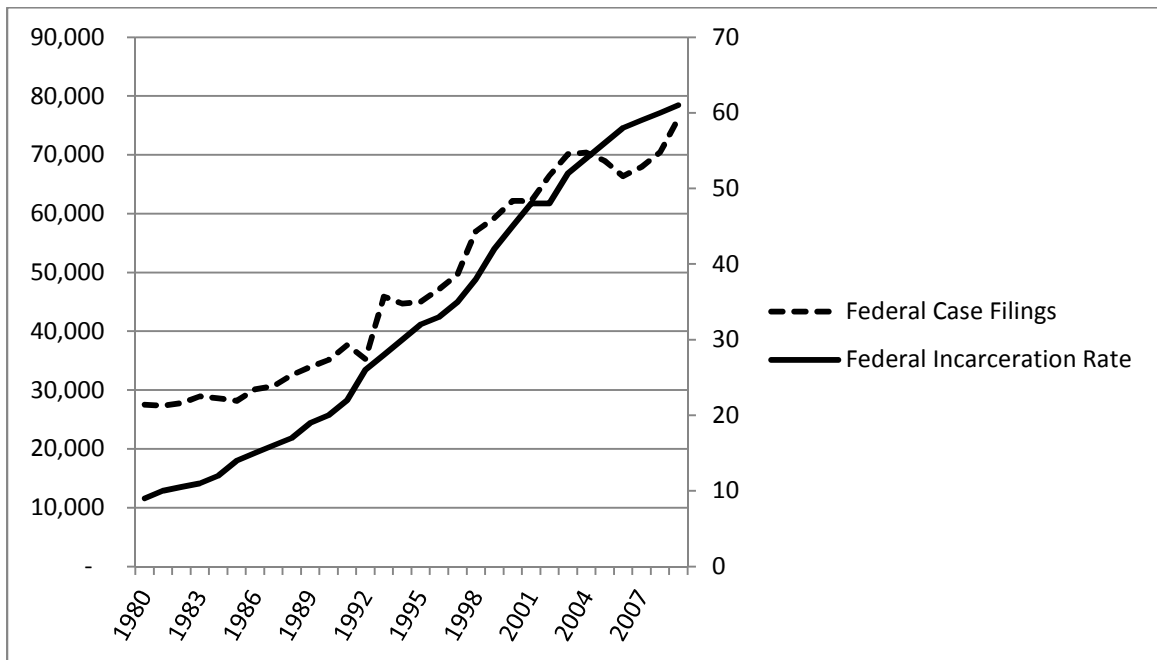


Figure 14 - Number of Federal Case Filings (Left Axis) Compared to Federal Incarceration Rate (Right Axis). Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*, "Rate of Sentenced Prisoners Under Jurisdiction of State and Federal Correctional Authorities on December 31, by Region and Jurisdiction, 1980, 1984-2009" (available at <http://www.albany.edu/sourcebook/pdf/t6292009.pdf>).

At this juncture, it would be a mistake for the federal criminal justice system to continue walking the plank of incessant expansion that incarceration in the nation as a whole has traversed for thirty-five years. The sanction of criminal punishment is already very heavily used in the United States. It would be unwise to absorb new types of conduct into an already overtaxed system, further exacerbating the phenomenon of mass-incarceration. Due to criminal law's overuse, there should be a presumption against

expanding it further when other alternatives exist. It would be prudent to seek other tools to contain generalized threats rather than the overused tool of criminal law.

CONCLUSION

An enormous number of people are entangled in the nation's criminal justice system. This thesis has explored that phenomenon, identified the main justifications for criminal punishment, and highlighted some key legal limitations on its exercise. It then found that the largest issuer of criminal punishment, the federal criminal justice system,¹ has been expanding due to its targeting of a particular type of conduct—that which poses a generalized threat to society. It is with this information that one can step back and consider the wisdom of using the tool of criminal law to address such conduct.

Surely conduct that threatens society at large can be very harmful on a grand scale. But when it is engaged in on a grand scale, the tool of criminal punishment is inappropriate. Harmful too is targeting greater and greater numbers of people for criminal punishment, using criminal punishment in a way that is only weakly justified theoretically, and lessening the safeguards built into the law to constrain the use of criminal punishment. Individual criminal sanctions can capture a remarkable number of people when the conduct has no direct victim, but on the aggregate poses a generalized threat to society. If immigration, weapons, and controlled substances pose a danger to society on the whole, society should seek broader policy changes to address them. These could perhaps take the form of improved international relationships, responsive national security measures, public health initiatives, or improvements to the civil regulatory system. But when use of criminal punishment is at an all-time high, following thirty-five years of sharp increase, it would be unwise to use the criminal law to try and stem general threats to society, ensuring that its application continues to grow unabated.

¹ See Table 1 (chap. 1, p. 9).

The federal criminal law is undergoing a transformation, growing and finding application in areas traditionally left to states or civil regulators.² As it does this, it is worth taking stock and deciding in which direction it would be best for the federal criminal law to go, what conduct it should target, what limitations it should retain, what justifications it should have, and to which problems it should avoid contributing.

² See Beale, *Many Faces* (intro., n. 11–12); Beale, *Too Many* (intro., n. 12); Coffee, *Reflections* (intro., n.13).

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