came were hardly politically influential in head-to-head competition with the Pentagon or even with middle-class taxpayers seeking more funds for suburban schools.

Sociologist Dario Melossi offers a theory of the means by which punitive crime policies emerge in times of economic stress. Using a class-based analysis of conflict, he contends that, as more working families find themselves in a state of economic uncertainty, power elites perceive this situation as an impending crisis. Potential labor insubordination is then interpreted as a "general moral malaise of society," which leads to a cultural redefinition of a variety of social conditions, including a harshening of punishment policies.[17]

By the 1980s, the impact of the Reagan budget cuts and stepped-up military spending reduced the fiscal capacity for a broad-based activist government response to social problems. This in turn helped to lay the groundwork for an ideological and policy sea change that emphasized "social defense" through the military and crime control apparatus at the expense of social investments in communities. "Getting tough" on crime was now the order of the day.

4

Crime as Politics

> [Former President Jimmy] Carter cited inequities in the criminal justice system that often penalize blacks and other minority groups more than whites. He said that as a young Governor of Georgia, he and contemporaries like Reubin Askew in Florida and Dale Bumpers in Arkansas had "an intense competition" over who had the smallest prison population.
>
> "Now it's totally opposite," Mr. Carter said. "Now the governors brag on how many prisons they've built and how many people they can keep in jail and for how long."
>
> —*The New York Times,* April 28, 1997

In 1973, the year-end national federal and state prison population totaled 204,000, 4 percent higher than the year before. Few observations were made about this rise, relatively modest as it was. It was unusual in that it followed a 10 percent decline in the inmate population over the previous decade, but it was certainly not heralded as the inauguration of a new era in the policy of imprisonment.

In 1973, the "get tough" movement had not yet won the day. As previously noted, advocates for a moratorium on prison construction were becoming organized and gaining notable support from key professionals in the field; political calls for tougher sentencing policies were likewise finding receptive ears.

But the initial rise in prison populations in the 1970s was not itself a result of newly implemented "get tough" policies. In

1973, sentencing policies remained as they had been for many years; the population increase primarily resulted from the rise in crime rates.

Confronted with more arrests, convictions, and prison sentences, prison officials began to project the need for more space in which to house the growing number of offenders coming into the system. At the same time, changes in sentencing policy reflected the growing consensus about the desirability of a more determinate system.

It soon became clear that the form these determinate sentencing policies would take was likely to be that of the harsh, fixed terms promoted by the "tough on crime" partisans. In 1973, the New York state legislature passed the so-called Rockefeller Drug Laws after the drug issue was given a high profile by Governor Nelson Rockefeller. At the time, these laws were the harshest in the nation, calling for mandatory prison terms for various narcotics offenses along with limits on plea bargaining. They have been described as policies that "set the stage in nearly every state for legislation in the following decades for new presumptive sentencing laws for drug crimes."[1]

Other states would adopt mandatory sentencing policies as well, generally for gun and drug offenses. In 1975, Massachusetts passed the Bartley-Fox Amendment, calling for a one-year mandatory prison term for unlawful carrying, but not necessarily use of, an unlicensed firearm. Michigan followed with the 1977 Felony Firearms Statute, which required a two-year mandatory prison sentence for use of a firearm in the course of committing a felony. Under the catchy slogan of "One with gun gets you two," billboard notices and other public announcements trumpeted the new law and its consequences.

Within just a few years of their adoption, each of these mandatory sentencing statutes were evaluated and found to be wanting, both in terms of their impact on crime control and in the distortions they produced within the criminal justice system. In New York, the Rockefeller Drug Laws led to fewer felony drug arrests and convictions but a greater likelihood of a prison term, and a longer one, for those who were convicted. The explanation for these patterns is that judges and prosecutors who felt that the mandatory terms were too harsh in some cases either declined to prosecute or found a means of convicting offenders under lesser statutes. For those offenders who were convicted, though, the mandatories ensured harsher sentences than prior to the law's adoption.

Similar findings were obtained in the evaluations of the Massachusetts gun law and the Michigan firearms statute. Practitioners used the discretion available to them to avoid having to impose overly harsh sanctions; in addition, in many cases trial rates and concomitant court time increased substantially among defendants hoping to avoid imposition of the mandatory term. In New York, for example, between 1973 and 1976 there was a tripling of drug felony dispositions resulting from trials.[2] These findings were well known in the field but, given the political nature of crime control measures, had little impact on future policy development.

While these mandatory sentencing laws were being adopted, other movements toward determinate sentencing were apace as well. An influential 1972 book by Judge Marvin Frankel called for the establishment of sentencing commissions as administrative agencies that would set general policy and guidelines on sentencing, with at least some distance from direct political concerns.[3] By 1979, Utah had adopted voluntary sentencing guidelines, and the following year Minnesota adopted guidelines with the explicit purpose of controlling the growth of the prison population through sentencing "trade-offs." That is, if the guidelines commission wished to increase sentences for certain categories of violent offenses, it would also have to lower prison terms for some nonviolent offenders so as to not inexorably contribute to prison expansion. Other states

rejected this approach and promulgated guidelines that have failed to have any impact on slowing the growth of the prison population.

At the national level, efforts were inaugurated in the late 1970s to change the nature of federal sentencing policy. This movement resulted from a variety of concerns. The federal criminal code was in many respects an outdated document: parts of it were inconsistent or irrelevant to modern circumstances. The movement was also influenced, though, by the growing interest in determinate sentencing and the new idea of a sentencing commission.

As a result, the unlikely partnership of Senators Ted Kennedy and Strom Thurmond, normally polar opposites in Congress, came together to co-sponsor a series of federal sentencing reform bills. An early version of the legislation, Senate Bill 1, contained a host of threats to civil liberties and labor rights. After much opposition developed, these were eventually scuttled, but the liberal–conservative coalescence of forces continued to pursue the goal of determinate sentencing.

Ultimately, this led to passage of the 1984 Sentencing Reform Act and its establishment of a federal sentencing commission. The guidelines developed by the commission went into effect in 1987, carrying a heavy presumption of imprisonment for most offenders and giving little regard for any mitigating circumstances involved in an offense. Within a few years of their adoption, the guidelines provoked widespread criticism and dissent from those charged with implementing them, leading sentencing scholar Michael Tonry to describe them as "the most controversial and disliked sentencing reform in U.S. history."[4] While the Supreme Court ultimately found the guidelines unconstitutional in 2005 and granted judges greater discretion in sentencing, the ruling was based on an issue relating to the jury's role in fact-finding, not the overall severity of the penalties.

While the sentencing policy changes of the 1970s were developing, the national political climate continued to shift to the right, which was reflected in increased public support for "tough on crime" policies. Finally, by 1980, the election of Ronald Reagan solidified this change of direction.

THE REAGAN/BUSH YEARS

The eight-year reign of Ronald Reagan was notable for its success in "re-inventing" the role of government, or lack thereof, in regard to social problems. Within the realm of justice policy, the change began at the top, with conservative Supreme Court appointments including Antonin Scalia and William Rehnquist as Chief Justice, and a consequent growing hostility to grievances brought by defendants and prisoners. At least as important, though, were the ideological shifts on crime policy promoted by the administration. With the complicity of Democrats in Congress, the Reagan administration succeeded in consolidating the "get tough" approach to crime control and institutionalizing a set of approaches that continue to shape the national response to crime.

The philosophical shift on crime policy promoted by the administration was in keeping with the administration's contention that "big government" was not the solution to societal problems, since individuals were responsible for their own destiny in this land of opportunity. In a 1982 speech on crime policy, Reagan contended that the American people

> utterly reject . . . utopian presumptions about human nature that see man as primarily a creature of his material environment. By changing this environment through expensive social programs, this philosophy holds that government can permanently change man and usher in an era of prosperity and virtue. In much the same way, individual wrongdoing is seen

> as the result of poor socioeconomic conditions or an underprivileged background. This philosophy suggests in short that there is crime or wrongdoing, and that society, not the individual, is to blame.[5]

In order to combat problems, therefore, punishment of the offender, rather than efforts to prevent the emergence of new offenders or to reform those who were apprehended, became the policy of choice.

Defining an appropriate role for the federal government to play in crime control, though, was a bit of a challenge for the Reagan administration. Most crime, after all, is locally based and prosecuted; fewer than 10 percent of all offenses fall under federal jurisdiction. Historically, the federal role in crime control has emphasized providing technical assistance to state and local governments, using the resources of agencies such as the FBI and the Drug Enforcement Administration, and prosecuting uniquely federal offenses, such as immigration and tax law violations.

One means of expanding the federal role in crime policy was by taking on the drug problem, thus offering intriguing political possibilities for an administration seeking to send a moral message and wanting to take visible action. If the administration wanted to deploy a "strong federal law enforcement capacity" in a "highly popular" manner, recommended Attorney General William French Smith, a federal war on drugs would fit the bill.[6]

The strategy of the new war on drugs involved several components. At the rhetorical level, it was led by first lady Nancy Reagan's "Just Say No" campaign designed to discourage youngsters from experimenting with drugs. Despite its lack of sophistication or relationship to any research in the field, as "sound bite" politics, the slogan clearly grabbed attention.

At the policy level, the inception of the drug war involved

providing more resources to federal drug agencies and a greatly enhanced role for the federal court system in prosecuting drug offenses. Thus, in 1982, the administration and Congress authorized $125 million to establish twelve new regional drug task forces staffed by more than a thousand new FBI and DEA agents and federal prosecutors.

At the same time, the number of federal drug prosecutions began to increase dramatically. While federal prosecutions for all nondrug offenses increased by less than 4 percent from 1982 to 1988, drug prosecutions rose by 99 percent during this period.

Unlike street crimes such as burglary, robbery, or murder, which are almost always prosecuted at the local level, there is a great deal of discretion involved in how drug cases are charged. A drug offense may involve a violation of either federal or state law, and may or may not be of sufficient seriousness that it is deemed worthy of prosecution. Traditionally, federal prosecutors have taken on the prosecution of more complex and high-level offenses, under the assumption that the resources available to them are generally more abundant than those available to local prosecutors. The scale of the increase in drug prosecutions during the 1980s, though, was far greater than any actual rise in drug offenses; it reflected instead political directives to enhance these activities.

The primary elements of the drug war were in place by the early 1980s, but it was not until 1986 that the war would begin to explode in dramatic fashion. Beginning in 1984 and 1985, a new form of cocaine began to be seen in inner-city neighborhoods in Los Angeles, Miami, and New York; this mixture of cocaine powder, water, and baking soda, "crack," was sold in small, inexpensive units, and so it initially became a means of marketing a form of the more expensive powder cocaine to a low-income clientele.

As we shall see later, a media frenzy regarding the new drug

developed by 1986, with much of the hysteria fueled by reports and information that later proved to be inaccurate. Then in June 1986, University of Maryland basketball star Len Bias died of a drug overdose, reportedly crack. Though the U.S. Sentencing Commission later concluded that there was no evidence that Bias in fact had been using crack, the Bias tragedy at the time became an instant national headline. The young and very talented athlete had just been drafted by the Boston Celtics of the NBA, home of House Speaker Tip O'Neill, and was virtually certain to have a very promising career ahead of him. Congress responded to this tragedy as it often does, by passing laws. Although there were virtually no hearings held or experts consulted, Congress moved to adopt a series of mandatory sentencing laws prescribing stiff mandatory prison terms for a variety of drug offenses. Ironically, the bipartisan legislation was passed just a year before the major overhaul of the federal sentencing system crafted by the United States Sentencing Commission was due to be implemented. The commission's guidelines, though criticized by many from a variety of perspectives, were at least an attempt by an independent body to establish a graduated scale of punishments for federal offenses. Now, without any acknowledgment of the impending guidelines, Congress superseded the work of the commission it had created.

By 1988, the Reagan administration and Congress continued the push to "get tough" on drugs. The vehicle this time was "The Anti-drug Abuse Act of 1988," which contained yet more mandatory sentencing laws among its hundreds of provisions. The Act also declared that it would be national policy to "create a Drug-Free America by 1995."[7] Needless to say, by 1995 there were few celebrations of a drug-free America or even evaluations of why this "national policy" had failed to achieve its goals.

However, the Reagan administration had succeeded in

stoking the ideological fires for "tougher" crime policy, and this success would carry over into the administration of George Bush. In the final year of the Reagan presidency, Assistant Attorney General William Bradford Reynolds sent a memorandum to key leaders within the Justice Department, "A Strategy for the Remaining Months"; the memorandum proposed that the administration attempt to "polarize the debate" on a variety of public health and safety issues—drugs, AIDS, obscenity, prisons, and other issues.[8] Reynolds suggested that "we must not seek 'consensus,' we must confront . . . in ways designed to win the debate and further our agenda."

On the issue of prisons, Reynolds feared that while the demand for prison space would rise due to overcrowding, "so will the voices of those who say we need fewer prisons and more 'alternatives' to incarceration." This would clearly be unacceptable, and so in order "to polarize the issue we must attack those by name (such as Sen. Paul Simon) who take the other approach. . . . Overall, of course, we must make the case that public safety demands more prisons."

These themes clearly resonated with the managers of George Bush's 1988 election campaign. Although riding on the heels of Ronald Reagan's popularity, the campaign needed to boost the fortunes of a candidate who was hardly a great charismatic figure. As we now know, the late Lee Atwater convened his infamous focus groups to develop a "wedge" issue with which to confront candidate Michael Dukakis. The hapless and somewhat unstable Willie Horton, a convicted murderer who had committed a particularly vicious rape and attack after being released on a prison furlough, proved to be the perfect focal point of such a strategy. Aided by an inept Dukakis response on the issue of the death penalty in their nationally televised debate, Bush went on to claim victory as the image of this black killer flooded the airwaves.

Bush inherited a Justice Department intent on ensuring that

the federal government play a leading role in promoting ever-harsher punitive policies on crime. This coordinated strategy employed various funding, research, and policy-making arms of the department in the service of a full-scale public relations campaign on behalf of enhanced prison construction. Such a campaign was admittedly not an easy task in some regards, since leading researchers in the field had doubted the wisdom of continued prison expansion for some time. Several national commissions composed of noted academics and practitioners had concluded that incarceration generally had modest impacts on deterring and incapacitating offenders.[9]

Indeed, back in 1983 the Reagan Justice Department had published a research briefing paper summarizing the state of knowledge about the crime control impact of a strategy of "collective incapacitation"—that is, punishing all offenders convicted of a certain offense with the same prison sentence. Under such a system, all second-time robbers might receive a five-year prison sentence. The paper concluded that "the most striking finding is that incapacitation does not appear to achieve large reductions in crime,"[10] but that these policies "can cause enormous increases in prison populations."[11]

The Justice Department was not to be deterred by these awkward findings, though. One of their own researchers, Edwin Zedlewski, a career statistician with the department, conducted an examination of the economic value of prison. In a 1987 report published by the department, "Making Confinement Decisions," Zedlewski calculated that incarcerating a single offender saved the taxpayers a staggering $405,000.[12] This finding, if accurate, would have represented a truly remarkable public policy success, one that should have encouraged state policymakers to proceed swiftly to build and fill prisons. Unfortunately, the study was probably one of the most flawed pieces of government-produced research ever published.

Zedlewski's statistical miscalculations were numerous, but the most significant was his estimate of the crime-reducing potential of incarceration. In order to derive his estimates in this regard, Zedlewski relied upon a survey of prison inmates in three states that had been conducted by the RAND Corporation, a Santa Monica-based research organization.[13] For incarcerated felony offenders, RAND researchers had calculated that the *average* offender had committed between 187 and 287 crimes in the year prior to his incarceration. This average, though, reflected crimes committed by a small number of very high-rate offenders. The median offending rate was a much more modest total of fifteen crimes per year.

Zedlewski's estimate of the potential reduction in crime relied upon the average offending rate, and not the median, thereby vastly inflating the potential for lowering crime through incapacitation. Since the high-rate offenders are more likely to have been apprehended and incarcerated in most states, it is far more likely that expanding the prison population will result in the incarceration of offenders whose offending rates are much closer to the median. These and other errors were widely critiqued by a range of leading criminologists, including Franklin Zimring and Gordon Hawkins, who described the analysis as a case study of "compound catastrophic error."[14] Zimring and Hawkins, publishing in *Crime and Delinquency,* one of the leading journals in the field, demonstrated how, using Zedlewski's assumptions, the 237,000 increase in the number of prison inmates from 1977 to 1986 should have completely eliminated crime in the United States.

Within a year of its publication, the Zedlewski research had been roundly attacked by a host of leading academics and others. As early as January 1988, The Sentencing Project published a critical briefing paper that was reported on by one of the widely circulated professional newsletters in the field. By the

fall of 1988, critiques by highly regarded scholars had appeared in other professional journals that were well known within the Justice Department.

These questioning voices were of little concern to the ideologues in the Justice Department, though. In July 1988, the Justice Department formally released the study to the news media, contending that "prisons appear to be good investments for reducing crime."[15] Since the report had been published a year earlier, one can only conclude that its "official" release in 1988 was a component of a strategy of a department that was attempting to "polarize the debate."

The report and its conclusions were then broadly disseminated under the leadership of Richard Abell, head of the Office of Justice Programs. This included publishing an article in *Policy Review,* the journal of the Heritage Foundation,[16] delivering a keynote address to a national symposium organized by the National Association of Counties, and sending a "Dear colleague" letter to criminal justice leaders nationally, with the admonition, "the choices are not easy—either build prisons or let convicted offenders back into our communities."[17]

As a campaign designed to use discredited research to deliver an ideological message, the department's efforts were quite successful. For years afterward, the familiar refrain of "saving $405,000 for every offender who is incarcerated" became a staple opening line for many members of Congress and state legislators describing their approach to the problem. Frustrated academics and criminal justice professionals bemoaned the deception and dishonesty of the campaign, but their limited resources were little match for the federal government and its conservative allies.

The department was clearly on an ideological roll, but it had barely begun to reach its potential until the resignation of Attorney General Richard Thornburgh in 1991. His replacement, William Barr, Deputy Attorney General in the Justice Department, was determined to "hit the ground running" and leave his mark on public policy.

Barr quickly coined a sound bite to describe his approach to the crime problem—"more prisons or more crime." As a sound bite, it met all the criteria for a compelling call to arms. Short, catchy, and intuitively obvious to the layperson, the slogan served to draw in all but the most hardened ACLU supporter to the pro-prison camp. As a sound bite, of course, the chant hardly permitted any subtlety in the discussion. Thus, there was little regard for whether policy approaches other than building prisons might affect the crime rate, nor any discussion concerning whether there was *any* upper limit beyond which prison might prove ineffective, let alone inhumane.

Barr set out to make his mark quickly and provocatively. In his travels around the country, he compellingly laid out his agenda for harsher crime policies, augmenting this with publications and conferences. His 1992 publication, "Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice," became a popular document among the "get tough" crowd. Among its recommended policies were enhanced mandatory minimum penalties, building more prisons (the "morally right thing to do," as well as being cost-effective), "tough juvenile sanctions," and other measures.[18]

In April 1992, Barr's Justice Department organized a high-profile Washington event, the "Attorney General's Summit on Corrections: Expanding Capacity for Serious Offenders." Such summit meetings in Washington are hardly nonpartisan events in general, although this one pursued its ideological agenda with particular zeal. The invitation-only even attracted 300 state and local officials, many of whom left the meeting very critical of the limited room for discussion of policy options. The Nebraska Director of Corrections described the conference as "well-rehearsed and orchestrated," while Connecticut's Corrections Commissioner concluded that "this is a tired old mes-

sage, with no recognition that it has already bankrupted the states."[19]

By the time of Barr's leaving office early in 1993 after just over a year as attorney general, he could be quite proud of his accomplishments. The "get tough" movement had benefitted from the largesse of the federal government through research, publications, and command of the political agenda, and the voices of dissent among practitioners or reformers had been suppressed or marginalized. The "war on drugs" was raging in full force: drug arrests nationally exceeded one million a year, and harsher sentencing policies were being adopted across the country. The political and fiscal agenda of the Reagan and Bush administrations had been quite successful: between 1980 and 1993, federal spending on employment and training programs had been cut nearly in half, while corrections spending had increased by 521 percent.[20] If "getting tough" was the goal of these policies, the campaign was a great success. If cutting crime or investing tax dollars wisely was the goal, though, it would be difficult to point to much in the way of results. Given the political manipulation of the issues, though, it is unlikely that the higher reaches of the administration wasted much time in assessing the effectiveness of these policies on producing public safety.

THE CLINTON YEARS

> And finally, and perhaps most importantly, we must do more to prevent crime through measures like community-based policing, the Police Corps, drug treatment, education, and job training.
>
> —Presidential candidate Bill Clinton, October 1992[21]

> The most important accomplishment in every district is the passage of "three strikes and you're out" . . . No other accomplishment even comes close, suggesting that the agenda message should give a more central place to crime. Indeed, crime is an opportunity for Democrats.
>
> —White House pollster Stanley Greenberg advising Democratic candidates, August 1994[22]

In 1992, candidate Bill Clinton reviewed the history of recent Democratic national campaigns. As a "new" Democrat, he calculated that traditional Democratic appeals to working people and the poor would be poorly received, given the importance of middle-class suburban voters. For this reason an approach to crime policy was a "no-brainer." Looking at the debacle of the Dukakis campaign, Clinton and his strategists concluded that no Democratic candidate should ever permit a Republican to be perceived as "tougher" on crime.

Thus, in early 1992, just weeks before the critical New Hampshire primary, candidate Clinton chose to fly home to Arkansas to oversee the execution of Ricky Ray Rector, a mentally impaired black man who had so little conception of what was about to happen to him that he asked that the dessert from his last meal be saved for him until the morning. After the execution, Clinton remarked, "I can be nicked on a lot, but no one can say I'm soft on crime.[23]

To be fair, candidate Clinton's policy prescriptions advocated a mixed approach to crime policy, one that did not exclusively focus on incarceration and the death penalty. His campaign speeches frequently described the need for drug treatment, along with his call for 100,000 new police to implement community policing.

The climate for such proposals was receptive in many regards. Despite the ideological zeal of the Reagan and Bush administrations in promoting expanded incarceration, significant changes were taking place in the field of criminal justice and

opposition to the "lock 'em up" mentality was growing in some quarters. In the 1980s, spurred in part by John Hinckley's attack on Ronald Reagan, many law enforcement leaders nationally became convinced of the logic of gun control legislation and used their credibility and visibility to raise substantial political and public support for the Brady gun control bill. Among other criminal justice professionals, increasing calls were heard for a slowdown in prison growth and the need for a more balanced approach to crime control. The argument that "we can't build our way out of the prison overcrowding crisis," once the exclusive call of reformers, had become standard fare in the speeches of many corrections officials and even some state legislators as they came to recognize that the size of a given prison system was related at least as much to public policy choices as it was to crime rates. By 1992, over 600 criminal justice and elected officials nationally had come together to support the newly formed Campaign for an Effective Crime Policy in its "Call for a Rational Debate on Crime and Punishment."

The early 1990s also witnessed growing support for a variety of alternatives to incarceration. Having begun as modest efforts in the 1970s to divert primarily non-violent offenders from a prison term, these programs had now blossomed to the point where they were an integral part of many court systems. While many of these programs could not necessarily document their impact on prison populations, their presence in many communities helped to create a more receptive climate for consideration of a range of sentencing options other than incarceration.

Finally, the period was one in which growing attention was paid to the dramatic racial disparities within the criminal justice system. Several studies documenting the high rate of criminal justice control for young African American males had gained national attention. Bar groups, including the American Bar Association and a number of state court systems, established commissions to examine the causes and remedies for

racial disparity in the criminal justice system. Congressional hearings on the issue further served to document the problem and to raise the level of public attention.

Elected as a centrist Democrat, Bill Clinton might not have raised significant expectations regarding the prospects for criminal justice reform had it not been for his bad luck with political appointments. Upon taking office, Clinton's first two nominees for Attorney General, Zoe Baird and Kimba Wood, were forced to withdraw due to public concerns over their hiring of illegal aliens as child-care providers. Neither of these candidates were necessarily expected to promote any dramatic shifts in criminal justice policy. Finally, Clinton gained Senate acceptance for his third choice, Miami prosecutor Janet Reno.

Reno's initial months in office were rather startling in terms of her public discussion of crime control. In contrast with her predecessor, William Barr, Reno quickly began delivering high-profile speeches around the country that consistently preached the message that "prenatal care is more important than prisons" in controlling crime. Whether or not this theme was developed in consultation with the White House (there are few indications that it was), the message and the messenger rapidly became very popular. Reno was portrayed as an honest, down-to-earth leader who cared about people. She was featured on the cover of *Time* magazine and quickly became one of the most popular figures in the administration. Rejecting conventional political wisdom on crime, Reno pursued her strong pro-prevention message. Far from being condemned as "soft on crime," public response to her message was very supportive.

On the policy front, Reno personally opposed the death penalty and also joined in with those criminal justice leaders who questioned the wisdom of mandatory sentencing. While not condemning it outright, she made clear in a number of statements that she was far from convinced that mandatory

sentencing policies were fair or appropriate, and even left room for consideration of repeal.

Thus, the early months of 1993 represented a time of cautious optimism for criminal justice reform. After twenty years of prison-building frenzy, perhaps some policy initiatives designed to slow down the pace of growth and invest in a broader-based approach might finally find some appeal and political support. Less than a year later, though, this optimistic scenario had been transformed into a repressive criminal justice climate rivaling that of any time during the preceding twenty years.

No single factor explains the dramatic reversal of fortune for the forces of criminal justice reform. What occurred was the creation of a vicious cycle of reaction composed of political grandstanding, media sensationalism, and organized advocacy by "law and order" proponents. As each sector raised the level of attention devoted to harsh crime policies, others joined in and collectively raised the ante.

Electoral "messages" were a principal element in the changed climate. Several of the off-year 1993 elections were quickly interpreted by media and politicians as important "get tough" statements by the electorate. These included the victory of George Allen in the Virginia gubernatorial race, after campaigning on a pledge to abolish parole, and the defeat of New York City Mayor David Dinkins by former prosecutor Rudolph Giuliani, despite the fact that crime had declined under the Dinkins administration. Even though some of these races were decided by a margin of only several percentage points, political pundits defined them as important statements by the electorate on crime policy. On the West Coast, by a three-to-one margin voters in Washington state approved the nation's first "three strikes and you're out" proposal requiring life without parole for three violent felonies, aided in part by a

contribution of $60,000 by the National Rifle Association to the initiative's proponents.

Media sensationalism accelerated the solidification of Clinton's "tough on crime" stance. Several high-profile crimes in 1993 contributed to public concern about crime and violence. These included, most notably, the abduction and murder of twelve-year-old Polly Klaas in Petaluma, California, the random shootings by a gunman on a Long Island Railroad commuter train, and the murder of the father of basketball star Michael Jordan. What these crimes had in common was that they were random in nature and had victims who were not beleaguered residents of the inner city. Regardless of the almost-infinitesimal odds of these occurrences, the message they communicated to middle-class suburbanites was that they, too, could be victimized by such violence.

Accompanying these atypical crimes was a surge of media reporting about crime. A study conducted by the Center for Media and Public Affairs found that television coverage of crime more than doubled from 1992 to 1993, while murder coverage tripled during the period, despite the fact that crime rates were essentially unchanged.[24]

The organized conservative movement contributed to the hostile climate toward reform during this time, as a host of rightwing think tanks and advocacy groups carried on the themes and arguments pursued by the Bush administration. Former Attorney General William Barr founded the First Freedom Coalition, a small operation but one that served to provide convenient sound bites for journalists interested in "the other side" of the crime debate. Barr's report for the Justice Department, "Combating Violent Crime," was reprinted and distributed by the Heritage Foundation to state and local officials.

Other allies included the American Legislative Exchange

Council, the "free-market" legislative alliance that began issuing "scorecards" on state criminal justice policies—essentially mail-merge reports on state crime and incarceration rates that promoted virtually identical policy recommendations regardless of a particular state's conditions.

The conservative climate was aided as well by new initiatives from the NRA. Concerned about growing public sentiment for gun control and the Brady bill in particular, the NRA made a major investment in a diversion strategy by forming the lobbying group CrimeStrike, around the slogan that "criminals cause crime."[25] Without any evidence, they promoted the idea that dramatic reductions in crime had been achieved as a result of the two-decade-long rise in incarceration.

Given this context, the Clinton administration was faced with a major decision on how to formulate crime policy. While candidate Clinton's campaign rhetoric had endorsed expanded drug treatment and community policing, he had also advocated a variety of punitive approaches, including support for the death penalty, boot camps, and other measures. As president, he still had to determine how to position the administration on this issue as interest was developing in Congress for some type of federal crime legislation.

Much of the decision-making in this area was the responsibility of Attorney General Reno. Despite criticism from some quarters, Reno's stock generally rose after the federal assault on the Branch Davidians at Waco in April 1993. Reno was viewed by many as both decisive and willing to accept responsibility, even though there was a tragic loss of lives. But in the months following, Reno's stature began to decline, as she faced criticism regarding her managerial skills. Major articles in the *New York Times* and the *Wall Street Journal* portrayed the Justice Department as adrift because of Reno's inability to delegate authority or make decisions.

In developing a crime bill strategy, the White House ordinarily might have relied on the attorney general—after all, this was her area of expertise, and her early months in office had demonstrated that she could rally public support for her ideas. Such a strategy could have permitted Reno to develop a crime policy that, if it had followed her earlier formulations, would have emphasized prevention, drug treatment, and other alternative approaches.

Whether due to concern over Reno's public image or her orientation on crime policy, the White House turned away from the Attorney General. Trying to "take the crime issue" away from Republicans, the administration eventually focused its attention on funding for more police, "three strikes," gun control, and increased spending on prisons and boot camps.

The retreat to traditional anticrime policies can be seen most clearly in the case of mandatory sentencing policies. For several years, an increasing drumbeat of criticism had been developing against federal mandatory minimum sentences in particular. A major study issued by the U.S. Sentencing Commission in 1991 documented the disparities and injustices caused by these policies, and assessed the widespread criticism of them by criminal justice personnel.[26] The federal judiciary, normally a fairly cautious body, developed a very vocal position on the issue: for example, all twelve judicial circuits issued statements opposing mandatory sentencing, and several prominent judges either resigned or refused to hear cases involving mandatory drug charges.

Early in her tenure, Janet Reno had expressed concern about mandatory sentencing, and subsequently formed a Justice Department working group to undertake a study designed to document the impact of federal mandatory sentences, particularly regarding low-level drug offenders. The study itself revealed disturbing evidence about the impact of public policy in this area. It found that more than a third (36 percent) of all incarcerated drug offenders were low-level offenders, characterized by

limited criminal histories, the absence of violence in their offenses, and minimal roles in the drug trade.[27] This group of inmates constituted a fifth of the entire federal prison population, representing a substantial financial investment.

The report had been completed in August 1993, but was not released until February 1994. Had this study been issued in a timely manner, it could have played an important role in the national debate on the crime bill. Instead, the White House clearly made efforts to dilute any impact it might have had. According to the *New York Times,* Attorney General Reno "soon learned the White House game plan: never expose Clinton's right flank on crime."[28] After Deputy Attorney General Philip Heymann resigned in early 1994, he described how the report had been held up by the administration because it couldn't determine the proper "spin" to place on it. Media coverage of Heymann's remarks forced the administration to release the report, yet it did so in a manner designed to minimize any impact it might have—late on a Friday afternoon, thus guaranteeing that at most it would receive Saturday media coverage, the least significant news day of the week. While the report contained some potentially damaging information on mandatory sentencing, it was unattractively designed and, most significantly, contained no recommendations to Congress regarding action that could be taken.

By this time, of course, most of the damage had already been done. Nothing remotely resembling mandatory sentencing repeal was contained in the leading Democratic and Republican crime bills. Several versions of a "safety valve" designed to ameliorate the impact of mandatory sentences on a relatively modest number of low-level drug offenders had been incorporated into the House and Senate crime proposals, even as new additional mandatories were added to the Senate bill. On the critical issue of whether the safety valve should apply retroactively to inmates already serving a prison term, the Justice Department took the position that doing so would involve an inordinate amount of paperwork and was therefore unfeasible.

Reno's apparent "softness" on crime led the White House to seek assurance that the Justice Department would stay in line with the administration's crime policy; in the words of a senior White House official, "to pull things together and get the department to be real."[29] Early in 1994, therefore, the White House recommended the appointment of Ron Klain as counselor to Reno, with an initial responsibility of coordinating the effort to pass the crime bill. Klain was a logical choice for a pragmatic administration; he had drafted much of the crime bill while serving as chief counsel to the Senate Judiciary Committee, and subsequently serving in the White House counsel's office.

In addition to such policy choices as deciding that the administration should be "aggressively neutral" in its position on the Racial Justice Act (which would have challenged racial disparity in the imposition of the death penalty), Klain's biggest accomplishment was recruitment of Reno for the administration's approach. Reno didn't favor the Clinton proposal for 100,000 new police, said Klain, "until we sent her out on a crime bill trip . . . and she came back saying, 'You know what? Community policing works!' " He added: "You look at her speeches since the crime bill—they're all about the crime bill. And the crime bill reflects her whole agenda."[30]

Once the stage was set for a crime bill that echoed the themes coming out of the White House, it was politics as usual. The Clinton administration, attempting to show that it too could be "tough," quickly endorsed the idea of a federal "three strikes and you're out" law after its passage by voters in Washington state in November 1993. The proposal was even incorporated into the president's 1994 State of the Union address, where it was greeted enthusiastically on both sides of the aisle.

In an effort to respond to concerns about the proposal being

too broad in scope, the administration presented a relatively narrow bill, primarily covering violent offenses. In the heated political climate in Congress, though, conservatives were hardly appeased by such a modest proposal. Congressional committees quickly broadened the proposal by incorporating drug offenses.

Congress ultimately passed a six-year $30 billion legislative package heavily weighted toward law enforcement and incarceration. Almost $8 billion of the total funding was directed toward prison construction, accompanied by incentives for states to toughen penalty structures in order to qualify for funding. Another $1.8 billion was allocated to the incarceration of illegal aliens, and $8.8 billion for policing. In addition to the funding provisions, the legislation expanded the federal death penalty, eliminated the awarding of Pell grants for higher education to prisoners, and created fiscal incentives for states to increase prison terms through its "truth in sentencing" provisions.

Former Deputy Attorney General Philip Heymann described the Clinton approach as "the most careful political calculation, with absolutely sublime indifference to the real nature of the problem."[31] In regard to the popular policing initiative, Heymann noted that violent crime was not a growing problem in most parts of the country, but that granting funding for more police was popular in all congressional districts. Violence, Heymann noted, "is a problem that is concentrated within very clearly defined geographic boundaries. And the president is going to spread cops into every suburb in the country."

The final legislation included $7 billion in funding for a range of prevention programs as well, enabling congressional leaders to tout the bill's balanced approach. What went unsaid, though, was the critical role played by the Congressional Black Caucus in this regard. Initially faced with Democratic and Republican crime bills that contained few funds for prevention, the caucus developed its own crime legislation, emphasizing

prevention and treatment, along with proposals to ensure racial fairness in the justice system. The bill received favorable commentary from the *Washington Post* and was the subject of two days of hearings in the House Judiciary Subcommittee on Crime.

In order to win over the substantial block of Democratic votes in the House represented by the caucus, legislative leaders incorporated many of the funding recommendations of the caucus into the final bill. Even with these additions, the caucus ultimately split on support for the bill, with about half its members voting against the legislation due to its imbalance in funding and failure to incorporate provisions of the Racial Justice Act, which would have broadened the scope of permissible challenges regarding racial bias in imposition of the death penalty.

As an overall strategy, the White House and its Democratic allies in Congress had argued that what was needed in crime policy was a mixture of punishment and prevention. This is hard to quarrel with in the abstract, but the problem with this strategy is that by 1994, there was *not* in fact an equal need to expand both punishment and prevention. Twenty years of "get tough" policies along with declining support for social welfare programs had created a bloated prison system and contributed to a decaying urban economy and community. By failing to directly challenge the tendency toward prison construction or to face down the assumptions upon which it was based, the advocacy of punishment mixed with prevention actually assisted the further establishment of the "tough on crime" strategy. Whether the Clinton administration could have successfully provided an alternative crime control strategy and succeeded politically is not clear; it is clear, though, that the administration never even tried.

Once the crime bill was in place, funding flowed freely to the states to hire police and build prisons, along with encourag-

ing harsher sentencing policies. By 1997, twenty-seven states had passed "truth in sentencing" laws designed to hold offenders in prison for longer periods of time. An analysis by the General Accounting Office found that fifteen of these states reported that the financial incentives of the crime bill were either a partial or key factor in their adoption of the legislation.

During this period, some reform initiatives advanced with the support of Attorney General Reno. The prisoner reentry movement, based on a newfound recognition that the 600,000 people leaving prison each year required skills and transitional services to increase their prospects of a successful transition back to the community, was launched under the leadership of National Institute of Justice director Jeremy Travis, and grew in scope under the Bush administration as well.

But from the Clinton White House, there was little indication of any support for reform until the waning moments of the administration, when reacting to growing momentum for attention to the cases of low-level federal drug offenders sentenced to federal prison, Clinton granted 176 pardons and commutations just before leaving office. The most attention, and disdain, was directed to his pardon of Marc Rich, a billionaire and convicted tax evader and fugitive whose ex-wife had been a substantial contributor to the Democratic Party, as well as the Clinton Presidential Library. But among those receiving commutations in the president's final weeks in office were two dozen drug offenders as well. They included Kemba Smith, a college student from a middle-class African American family. Smith had become involved with a boyfriend who was a major drug seller, and aided his transactions in very modest ways. In the course of his drug business, the boyfriend was killed. Federal prosecutors then charged Smith, who had no prior criminal record, with responsibility for the entire drug operation. She was convicted and sentenced to a mandatory twenty-four years in prison. After a national campaign was mounted, the president reduced Smith's sentence to the six years she had already served in prison. Clinton's drug commutations represented a mere handful of the many similar cases that could have received such treatment, but they were significant nonetheless.

Just a week before leaving office, Clinton published a remarkable op-ed article in the *New York Times*. Writing on racism in American society, Clinton announced that he was sending a message to Congress outlining "the unfinished business of building one America."[32] Among the key provisions of this agenda were calls to reexamine mandatory minimum sentences for non-violent offenders and "immediately reduce the disparity between crack and powder-cocaine sentences." Nowhere in the message was there any acknowledgment that over a period of eight years the administration had actively supported the expansion of mandatory sentences and resisted efforts to scale back the crack/cocaine sentencing disparities. The words were encouraging, but served only to illustrate the vast gap between political rhetoric and political reality.

THE GEORGE W. BUSH YEARS

> So many of the problems we worry about go back to how we raise our children. We either build our children or we build more jails. Time to stop building jails.
>
> —General Colin Powell, Address to the 2000 Republican National Convention[33]

The inauguration of George W. Bush as president following the hotly disputed 2000 election brought with it much speculation about the new administration's approach to criminal justice policy. Certainly, the new president's policies as governor of Texas, particularly in the realm of criminal justice and the death penalty, were cause for grave concern among advocates

of reform. Campaigning for governor in 1994, Bush faced incumbent Ann Richards, who, like many Democrats, had embraced a "get tough" policy and embarked on a massive prison-building program. Despite this, and a falling crime rate, Bush's campaign consultant Karl Rove chose a campaign theme that emphasized harsh punishments and warned of a new "generation of juvenile criminals."[34]

In his six-year tenure as governor, Bush presided over the execution of 152 people, far more than any governor in the past half-century. The manner in which conviction in these cases were obtained and sentences passed is itself rather shocking, even by the low standards of justice presiding in many parts of the country. Attorneys representing death row clients included Joe Frank Cannon, a Houston lawyer with ten clients sentenced to death, who boasted that he hurried through trials "like greased lightning."[35] This was confirmed by the past president of the Harris County criminal lawyers association, who noted that it was generally understood that Cannon received capital appointments "because he delivers on his promises to move the courts' dockets." A study released by the State Bar of Texas in 1993 concluded that "Texas has already reached the crisis stage in capital representation and the problem is substantially worse than that faced by any other state with the death penalty."[36]

As became clear some years later, the process by which Governor Bush signed off on executions was also exceedingly cursory. While serving as counsel to the governor, future Attorney General Alberto Gonzales played the role of what Alan Berlow writing in the *Washington Post* described as "an expediter of his boss's preordained conclusion."[37] Gonzales, who was charged with presenting the condemned person's full case to the governor, presented prosecutorial briefs that repeatedly failed to disclose salient evidence of mitigation, including but not limited to actual evidence of innocence. Not once did Gonzales send

the governor an actual clemency petition, laying out the best case for a reprieve.[38]

As governor, Bush also presided over one of the nation's largest prison systems and signed into law policies that called for increased imprisonment for low-level cocaine offenders. During his tenure, three-fourths of people imprisoned for drug offenses were black or Latino. Yet on the campaign trail for president and just prior to taking office in 2001, Bush sounded themes of "compassionate conservatism." Speaking on CNN about the sentencing disparity between crack and powder cocaine, the incoming president stated that "that ought to be addressed by making sure the powdered cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory." And on drug sentencing generally, Bush noted that "a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that."[39]

Despite this early rhetoric, however, the president's key appointments in the justice arena could not have exemplified the punitive approach with any more clarity. A devoutly religious person who believed in "an eye for an eye," John Ashcroft, Bush's choice for U.S. attorney general, had a distinguished tenure as a hardliner while serving successively as Missouri attorney general and governor of Missouri, and then as U.S. senator. As state Attorney General, Ashcroft fought hard to reinstate the death penalty, and as governor he more than doubled the prison budget in just eight years. He advocated for classification of second-time marijuana possession as a felony and sponsored legislation designed to try more juveniles as adults.

Perhaps Ashcroft's most high profile engagement came in 1999, as he was looking ahead to defending his Senate seat the following year, when he denounced the nomination of

Missouri supreme court justice Ronnie White to the federal judiciary. In a particularly sensationalist manner, Ashcroft decried White, the state's first black supreme court justice, as "pro-criminal" and "anti-death penalty." Ashcroft based much of his testimony on White's votes to overturn selected death sentences, despite the fact that White had upheld 70 percent of the death cases he heard, only marginally below the 75–80 percent averages for Ashcroft appointees to the bench. Nevertheless, the campaign was successful and White's nomination was defeated.

For the director ("drug czar") of the Office of National Drug Control Policy (ONDCP), Bush selected John Walters, a longtime fixture in Washington's right-wing think tank community and previously a deputy director of ONDCP under William Bennett. Walters had co-authored *Body Count,* a book predicting (incorrectly) the rise of a coming generation of "superpredators" and assigning blame for the crime problem to "moral poverty." He also had recently published an editorial commentary in the *Weekly Standard* arguing that there were three "great urban myths of our time" in regard to law enforcement: too many people were imprisoned for drug possession; drug sentences were too harsh; and the criminal justice system was unjustly punishing young black men.[40] While such commentary was still fashionable in some right-wing circles, the validity of these "urban myths" had in fact long been well-documented by researchers and was gaining increasing support among policymakers. Walters, then, was clearly an outlier, a rather provocative choice for a position whose recent occupants had moved to articulate a more balanced approach to substance abuse.

Despite these hardline nominees, the Bush administration assumed office in a changed climate on crime policy. Most significantly, crime had been declining steadily since the early 1990s. As we shall see later, the explanation for this decline is

complex, but for political purposes it meant that "the crime issue" had lost much of its political resonance. Indeed, the 2000 presidential campaign, in contrast to preceding ones, featured little discussion of competing crime policies. Further, a decade's worth of drug court development and other sentencing options had softened the edges around the tough-on-crime movement, so that public perceptions of crime policy were not nearly as uniformly punitive as many political leaders had previously taken for granted.

Given this changed environment, and the president's professed support for family issues and faith-based approaches to social problems, the administration's emphasis on family, community, and restoration came through much more clearly than in the several previous administrations. In calling attention to the plight of "children who have to go through a prison gate to be hugged by their mom or dad" in the 2003 State of the Union address, the president called for a $450 million initiative to provide mentors to disadvantaged junior high students and children of prisoners.[41] The following year, his address highlighted the 600,000 inmates who would be released from prison, noting that "We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison."[42] To respond to this problem, the president called for a four-year $300 million initiative for prisoner reentry that would expand job training and placement services, and provide transitional housing and mentoring services.

The focus on prisoner reentry—originally an initiative of the Clinton administration—picked up considerable bipartisan support. At the direction of the White House, legislation calling for a range of reentry programs and services was sponsored by conservative Republicans Rob Portman in the House and Sam Brownback in the Senate, subsequently joined by Rep. Danny Davis, a liberal black Democrat and longtime

champion of these approaches. Perhaps more remarkably, Attorney General Ashcroft echoed the Republican support for reentry as well. Speaking at a Justice Department reentry conference, Ashcroft noted that "A strong and successful reentry program presents the best opportunity for inmates to become solid citizens upon release."[43]

Administration leaders also voiced support for prevention and treatment services. Even hardline drug czar John Walters became a convert to the value of drug treatment. With 1,600 drug courts established by 2005, Walters noted that such treatment approaches could reduce recidivism and that "The good news for the individual who is arrested and referred to a drug court is the possibility of avoiding prison entirely, and possibly having his or her record expunged after the fact."[44]

While the Bush administration's attention to issues of prisoner families and reentry proved a welcome change from much of the political rhetoric of recent years, its practical impact remained exceedingly limited. The amount of actual funds appropriated for the president's key policy initiatives fell well short of promised allocations. Of the $450 million promised for mentoring children of prisoners, the president's budget in fact allocated $150 million. Along with cuts in other programs for this population, this essentially resulted in a *reduction* of $39 million.[45] And of the $300 million proposed for the four-year reentry program, Congress appropriated only $30 million for the 2004–05 fiscal year, less than half of the annual amount outlined in the State of the Union address. Arguably, budget appropriations represent the outcome of competing proposals by the president and Congress. Yet even a former high-ranking official in the White House Office of Faith-Based and Community Initiatives concluded that "the White House gets what the White House really wants. It never *really* wanted the 'poor people stuff.' "[46] Even had the proposed annual budget of $75 million for reentry been allocated, it would have translated into

only about $125 in programming for each of the 600,000 offenders released from prison each year.

The administration's overall approach to crime continued to be punitive, particularly regarding sentencing and incarceration. Early in his tenure Attorney General Ashcroft established that criminal justice decision-making would be highly centralized, in contrast to the practice of previous administrations, which permitted a good deal of autonomy for federal prosecutors. In the realm of death penalty policy, Ashcroft increased prospects for use of the federal death penalty through two changes in Justice Department guidelines. First, he overturned an internal department policy enacted in the Clinton era permitting federal prosecutors in capital cases to accept plea agreements ruling out a death sentence. Under the new policy, all such cases needed to be approved by the attorney general. Ashcroft also ended a rule prohibiting prosecutors from seeking the death penalty if the sole reason for doing so was that the offense was committed in a state without the death penalty. The rationale for the rule had been to discourage federal prosecutors from intervening in cases in which a death sentence could not otherwise be imposed.

During Ashcroft's tenure, from 2001–2005, he overruled prosecutors who had recommended non-capital prosecutions in nearly a third (42 of 135) of all federal death penalty cases. In just eight cases did he reject a request for a capital prosecution. Perhaps most striking in this regard is that the 93 U.S. attorneys—the federal prosecutors who oversee each jurisdiction nationally—are appointed by the president, and therefore presumably reflect the views of the administration in office. The rationale offered by the Justice Department in these cases was that it sought a more uniform application of the death penalty, one that was not dependent on geographic and other concerns. Thus, ironically, a disproportionate share of the department overrides came from cases in New York and Connecticut,

states where support for capital punishment is far less prevalent than in other areas. The attorney general's approach to ensuring uniformity was aggressively to seek the death penalty in *more* cases, rather than to reduce the scope of death penalty prosecutions in the more punitive jurisdictions.

This logic led to the highly politicized decision-making in the case of the Washington area snipers, John Muhammad and Lee Boyd Malvo. After the arrest of the two defendants, who had terrorized the Washington metropolitan area in 2002, prosecutors had to decide whether to prosecute for murders committed in Maryland or Virginia. Maryland appeared to be the logical choice, since it had suffered the greatest number of fatalities, but in the attorney general's view it contained one major defect: it did not permit the execution of juveniles, ruling out the possibility of a death sentence for the seventeen-year-old Malvo. Announcing Virginia as the site of the first prosecutions, Ashcroft opined that "It is appropriate—it is imperative—that the ultimate sanction be available for those convicted of these crimes."[47]

While leery of what it perceived to be overly lenient prosecutors or state policies, the Bush administration reserved its harshest scrutiny for federal judges. Still playing on a thirty-year theme of "soft" federal judges, the administration articulated the need to rein in judges who might stray from expected harsh sentencing practices. The logic behind this was nearly as flawed as that regarding the need to second-guess prosecutors. Federal judges are also presidential appointees, and while they are granted lifetime tenure, they presumably reflect the judicial philosophy of the administration in office at the time of their appointment. In fact, at the beginning of the first Bush term, nearly half of the active federal judges were Republican appointees from various administrations, so it would have been unlikely that they had been chosen because of any "soft" views.

Nevertheless, distressed by what it perceived as federal

judges departing from the rigid federal sentencing guidelines structure, the Justice Department enacted two policies designed to rein in the judiciary. First, it secured the adoption of the "Feeney amendment" in 2003 as a provision in a politically popular anti-child-kidnapping bill. Under the legislation, the U.S. Sentencing Commission was directed to adopt policies to ensure that the number of downward departures from the sentencing guidelines be substantially reduced. The guidelines, the most rigid such structure in the nation, had severely constrained judicial discretion, but permitted judges to sentence above or below the applicable sentencing range when circumstances warranted. Notably, the Feeney amendment was silent on the issue of restricting judges from sentencing *above* the guidelines range.

This action was followed by a memorandum from the attorney general to all federal prosecutors directing them to "acquiesce" to departures only in rare occurrences, and to report any non-sanctioned judicial departures to the attorney general's office. The combined policies essentially made an already rigid system even more punitive and raised the specter of a blacklist for dissenting judges. Even Supreme Court Chief Justice William Rehnquist warned that the new policies "could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."[48]

The Bush administration's harsh approach to sentencing policy could be seen whenever reform efforts surfaced. A notable issue that had been debated for some years was the federal crack/cocaine sentencing disparity, a legacy of the 1980s harsh "war on drugs" provisions that produced an extreme disproportionate effect on African Americans. After the failure to achieve reform in 1995, there had been little organized activity, but several efforts for change coalesced in 2002. Intriguingly, one key development was led to by two high-profile Republi-

can senators, Orrin Hatch of Utah and Jeff Sessions of Alabama. Hatch and Sessions had strong conservative credentials, but had been moved to offer a compromise bill on crack/cocaine. Whereas many reform advocates called for parity in the 100:1 drug quantity ratio, the Hatch/Sessions bill offered a 20:1 ratio, achieving this by raising the drug quantity necessary to trigger the mandatory minimum for crack cocaine and lowering it for powder cocaine. The result of such a policy would have been to reduce the number of crack offenders receiving the mandatory sentence but increase the number of powder cocaine offenders sentenced under its provisions. So, while the legislation was viewed with mixed emotion by many advocates, given its sponsors it was symbolically important as a signal of change.

Given the credentials of the senators supporting the proposal, ordinarily one might have expected some deference to their leadership from the White House. And the issue gained momentum when the U.S. Sentencing Commission convened high-level hearings in 2002, during which not only civil rights organizations, but prosecutors and the American Bar Association offered testimony supportive of reform. But the hearing concluded with a response from a Justice Department representative, Deputy Attorney General Larry Thompson, who recited a number of arguments that had been clearly refuted over the years by the Sentencing Commission among others, and stated that "lowering crack penalties will signal a retreat from the battle against drug abuse."[49] Although the Sentencing Commission subsequently issued a comprehensive report calling for reform and Senate hearings were held later that year, the department's opposition to any type of reform effectively killed the issue.

Such a posture was maintained throughout the Bush era whenever the subject of sentencing and incarceration policy was raised. In 2005, following an important Supreme Court decision striking down the federal sentencing guidelines, much discussion ensued about whether Congress should enact new, potentially harsher, sentencing policies, or instead permit federal judges to use their newly granted sentencing discretion. In an echo of previous hardline administrations, the department's spokesperson on these issues, Assistant Attorney General Christopher Wray, made the claim that "the results are clear and undeniable: tough sentencing means less crime."[50] Wray and others in the Justice Department repeatedly made the assertion that 91 percent of prison inmates were either violent offenders or recidivists. The figure sounds ominous at first, until one realizes that such a statement lumps together a mass murderer (violent offender) with a two-time drug offender (recidivist). In fact, in the federal prison system at the time, only 13 percent of inmates were serving a sentence for a violent offense, and nearly three-fourths (72 percent) were non-violent offenders with no history of violence.

Overall, the impact of the administration's policies in this area can be seen in the size of the federal prison population, the end result of a combination of law enforcement, prosecution, and sentencing policies. In this regard, the national policy remained consistent with that of the preceding decades. In contrast with state prison systems, which were generally experiencing lower rates of growth in the early years of the twenty-first century, the federal prison population rose at three times the rate of the state systems. The rhetoric on crime had changed somewhat, but this was of little consolation to the more than two million Americans behind bars.