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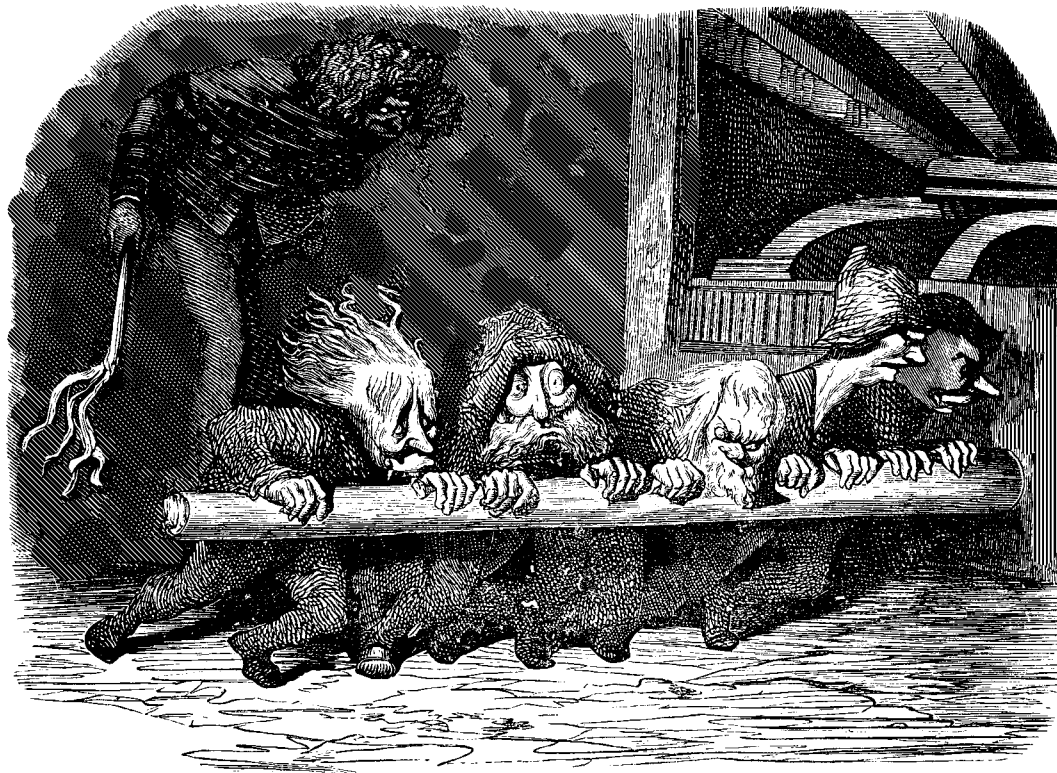
Book Review by Joseph M. Bessette

LET THE PUNISHMENT FIT THE CRIME

What's Prison For?: Punishment and Rehabilitation in the Age of Mass Incarceration, by Bill Keller.
Columbia Global Reports, 160 pages, \$16 (paper)

Criminal (In)Justice: What the Push for Decarceration and Depolicing Gets Wrong and Who it Hurts Most, by Rafael A. Mangual.
Center Street, 256 pages, \$29 (cloth), \$18.99 (paper)

The Myth of Overpunishment: A Defense of the American Justice System and a Proposal to Reduce Incarceration While Protecting the Public,
by Barry Latzer. Republic Book Publishers, 208 pages, \$24.95



Engraving by Gustave Doré

“THIS COUNTRY,” WRITES BILL KELLER in *What's Prison For?: Punishment and Rehabilitation in the Age of Mass Incarceration*, “imprisons more people more copiously than almost any other place on earth.” This reality has led to “a growing consensus that we lock up too many people for too long.” Keller is a former executive editor of *The New York Times* and the founding editor-in-chief of the Marshall Project, a non-profit news organization that covers criminal justice in the United States. His slim, readable volume is one of the latest additions to the burgeoning literature decrying “mass incarceration” in the United States.

The author wastes no time in telling the reader what should be done about this state of affairs: decriminalize such minor crimes as “low-level drug offenses”; divert some criminals to “mental health and addiction programs, or probation or community service”; “abolish

mandatory minimum sentences and encourage prosecutors and judges to apply the least severe punishment appropriate under the circumstances”; “raise the age at which accused youngsters are subject to adult punishment”; “give compassionate release to old and infirm inmates”; and “reduce the use of cash bail.” The evidence of recent years, he claims, demonstrates that states “can cut prison populations without jeopardizing safety.” There is an urgent need to “muster the political will” to reform, if not abolish, “[t]he American way of incarceration,” which “is a shameful waste of lives and money, feeding a pathological cycle of poverty, community dysfunction, crime, and hopelessness.” Perhaps the most formidable barrier to the necessary reform is the “punitive streak”—“the yearning for retribution”—that runs through the history of American criminal justice. “But a humane society,” he holds, “cannot be driven solely by anger.”

KELLER DESCRIBES HIS BOOK AS “A work of journalism, not social science or political advocacy, but I have searched both science and politics for credible evidence of what works.” If by “political advocacy” Keller means advocating for one political party over the other, then, yes, he avoids advocacy of that sort. Indeed, he spends considerable time describing and praising the growing opposition to the nation’s incarceration policies among conservatives. But there is no denying that *What's Prison For?* is a work of advocacy. The whole point of the book, which focuses on rehabilitation programs in prisons, is to advocate for treating prisoners differently than we now do, for constructing prisons that would look more like college campuses, for plowing more resources into rehabilitation programs, and for looking to Europe, especially Germany and Norway, for models to guide us.

Keller canvasses the four main purposes of prisons and finds all but rehabilitation wanting. The first, *retribution*—or “punishment... [as] an end in itself”—assumes the offender’s free will. Yet, research has shown that the propensity to commit crimes “begins in the first years of life,” and no one is responsible for how they were raised. Besides, while a lengthy prison sentence for a serious violent crime may seem just, “the scales tip toward injustice when you add in all the collateral suffering common in prison,” such as the strong tormenting the weak, separation from families, the loneliness of solitary confinement, and the risk of disease.

KELLER DISPLAYS HIS OPPOSITION TO retribution, or what is sometimes called “just deserts” (a term he does not use), when he discusses Norway’s most notorious prison inmate: Anders Breivik, who murdered 77 individuals (mostly teenagers and young adults) in 2011 when he was 32 years old. He received the maximum sentence of 21 years, putting him on the path to release at age 53. A special provision of Norwegian law allows continued detention if a judge every five years determines that Breivik remains a threat to society. Although Breivik is isolated from other inmates, “this is isolation Norway-style.” He has a living room, a study room, and an exercise room. According to the deputy warden at the facility, he “has staff around him all day. He has access to counselors, religious services.... He’s a student at the university.... He votes when there’s an election, like everybody else.” The original *New York Times* article, from which Keller draws, adds that Breivik also has a television and a laptop, though not internet access.

Keller endorses Norway’s rejection of retribution, even in such extreme cases, but he does not tell us whether he would endorse Breivik’s release at age 53 if the authorities were convinced that he was no longer a threat to society. And if not, why not? Once you have removed justice as the ground for punishment, why keep anyone in prison, no matter how horrendous their offense(s), if you are convinced that they are no longer a threat to society? It seems likely that Norwegian authorities will find a way to keep Breivik in prison for the rest of his life, or close to it. But is this because he will always be dangerous, or because granting him ten, 20, or 30 years of freedom would be an affront to the moral order? Certainly, to most Americans even life in prison under the conditions in which Breivik lives would violate any common-sense view of just punishment for his deeds.

ALTHOUGH KELLER DOES NOT SUMMARILY reject prison’s second and third main purposes, *incapacitation* and *deterrence*, he believes that the crime reduction effects of each have been greatly exaggerated by “tough-on-crime enthusiasts.” He insists that incapacitation—which seems to be “the most practical justification for locking people up”—doesn’t have nearly the economic or public safety benefits that many believe. He approvingly cites one policy expert who holds that “the crime problem can never be substantially reduced through incapacitation alone.” It is hard to know what to make of this. There are a finite number of dangerous repeat offenders in American society. If you put a significant fraction of them behind bars, crime will, in fact, be substantially reduced over what it otherwise would have been.

Deterrence gets even less respect from Keller, for it assumes that the potential offender “consider[s] the risks versus the gains of her crime.” Keller holds instead that “much criminal behavior is spontaneous, or nearly so,” and that when offenders do weigh risks, “the risk that looms largest by far is the chance of being caught” rather than the subsequent punishment. Yet fully two fifths of those serving time in federal or state prisons in the United States are in for robbery (taking someone’s property through the use or threat of force), for a property crime such as burglary, or for drug trafficking—all crimes committed for financial gain. Perform a simple thought experiment. Imagine that an American state announced that from now on it would no longer send robbers or burglars to prison, no matter how big the financial gain, how many were victimized, or how often the crimes were repeated. Is it conceivable that robberies and burglaries wouldn’t increase?

This leaves *rehabilitation*. Keller rightly notes that nearly everyone now in prison will eventually be released, and that sky-high recidivism rates—two thirds or more of released inmates are arrested for a new crime within three years and four fifths within ten years—demonstrate that our prisons do not now do a very good job of rehabilitating criminals. To his credit, Keller recognizes that “[i]t is not easy to change people who do not want to change.” Perhaps the distinctive contribution of *What’s Prison For?* is Keller’s portrayal of the many dedicated individuals (including some former inmates) who have devoted themselves to turning around the lives of prisoners, either while they are serving time or after they are released. In his final chapter Keller recounts his own contribution as a teacher of a college-level class on journalism

to inmates at Sing-Sing Correctional Facility, north of New York City.

AS IS EVIDENT FROM THEIR TITLES, both Rafael Mangual’s *Criminal (In)Justice: What the Push for Decarceration and Depolicing Gets Wrong and Who it Hurts Most* and Barry Latzer’s *The Myth of Overpunishment: A Defense of the American Justice System and a Proposal to Reduce Incarceration While Protecting the Public* push back hard against the over-incarceration narrative. While dozens of books advance the narrative, these challenge it head-on.

By criminal “(in)justice” Mangual means the failure of the criminal justice system “to incapacitate repeat offenders” who perpetrate “heinous and serious crimes” when they should have been “behind bars at the time.” The problem we face is not excessive punitiveness but “misguided leniency.” A senior fellow at the Manhattan Institute who describes himself as “a journalist formally trained in law,” he draws on a wealth of criminal justice data and research to make his case.

One of Mangual’s recurring themes is how “hyper-concentrated” serious violent crime is in the United States—“both geographically (in small slices of metro areas) and demographically (among young, disproportionately Black and Latino males).” Although this is not news, the data are startling. In 2019, for example, the city of Chicago had a murder rate of 18.2 per 100,000 residents, more than three times the national rate of 5.0. But *within* Chicago, where the author moved for law school in 2012, the ten most violent communities, in which about a sixth of the city’s residents lived, had a murder rate of 61.7, *over twelve times* the national average. In one of these, the murder rate was a staggering 131.9. (This community, with 17,433 residents, had 23 murders—only two fewer that year than in the entire country of Norway with its population of 5.3 million.) Yet in this same city, 17 neighborhoods saw not a single murder and another eleven had only one each. Collectively, these 28 communities, with about a quarter of the city’s population, had a murder rate of just 1.6—less than 10% of the citywide murder rate, and only a third of the national rate. Thus, about a quarter of Chicagoans, living in a city infamous for its violent crime problem, reside in communities that, at least by the homicide measure, are much safer than the nation as a whole, while a sixth of the city’s residents reside in communities that are vastly more dangerous.

Mangual asks the reader to imagine being “randomly dropped over a point in the United States.” The likelihood is quite high that you



will land in a place where there are few, if any, murders. But if 10,000 others participate in the exercise, an “unlucky few” will find themselves dropping into “some of the most dangerous places on earth.” Given the enormous variation in crime rates, aggregate national data are not particularly meaningful and it makes little sense “to suggest a general direction *the nation* ought to take as to criminal justice questions” (emphasis in the original). Practically speaking, what this means is that the so-called “reform” efforts of recent years—decarceration and constraining police—will put in jeopardy not the vast majority of Americans who live in safe communities but rather the minorities and the poor who live where serious violent crime is a daily occurrence. Those ten most dangerous communities in Chicago, for example, are each at least 90% black and Hispanic—eight of them, 95%.

MANGUAL BRINGS TO BEAR AN IMPRESSIVE array of data to demonstrate that America’s prisons are filled with “violent and/or repeat offenders that are highly likely to reoffend once released.” Drawing primarily on studies from the Department of Justice’s Bureau of Justice Statistics, he reports that: (a) state prisoners released in recent years had compiled an average of 10-12 arrests and 5-6 convictions prior to their most recent admission to prison; (b) that more than three fifths of state prisoners are serving time for a violent crime or a weapons offense; (c) that only 14% of state prisoners are in for a drug offense, and the vast majority of these for drug trafficking; (d) that about half of state prison inmates serve 15 months or less, with 42% serving less than a year; and (e) that within 9-10 years of release, more than four fifths of former inmates are rearrested, averaging about five new arrests each.

He cautions that even inmates serving time for nonviolent offenses can be dangerous after release, for “[c]riminals don’t really specialize.” Recidivism studies show that more than a third of those in prison for a drug offense and two fifths for a property crime “were rearrested for at least one violent post-release offense.” To send fewer dangerous criminals to prison in the first place or to reduce their time behind bars is a sure recipe for increasing the criminal victimization of minorities in high-crime neighborhoods.

Mangual is equally critical of proposals to radically “reform” policing in the United States by, for example, defunding the police, ending qualified immunity when police officers use force, and diverting many calls for service from police to mental health professionals. He evaluates these and related recom-

mendations against one key criterion: whether the proposal would “significantly reduce police uses of force and do so without significantly harming the public’s safety.” Though Mangual concedes that “every year there are many documented instances of excessive police force,” these are not “actually representative of a larger pattern.” Here, he shows just how rarely police use force in carrying out their duties. Each year police discharge firearms about 3,000 times, but this is for almost 700,000 full-time police officers making over 10 million arrests during more than 60 million contacts with the American public. Although about a third of the shootings by police result in death, 93% of the suspects were armed. The numbers simply don’t match the overheated rhetoric of celebrities like LeBron James, who said in 2020 that black people feel the police are “hunting” them. In the end, “there isn’t a whole lot of room for a massive reduction in police violence.” It is important

Imagine that an American state announced that from now on it would no longer send robbers or burglars to prison. Is it conceivable that robberies and burglaries wouldn’t increase?

to be “sober and realistic about just how much we can expect to reduce an already exceedingly rare occurrence.”

IT IS IMPOSSIBLE TO DESCRIBE HERE ALL the useful information and arguments Mangual brings to the debate over punishment in the United States. I will add only one more example. Opponents of incarceration frequently chastise the criminal justice system for “tearing families apart.” This complaint has made headway with conservatives like Utah senator Mike Lee, who in 2015 criticized a “penitentiary approach to punishment” for “sever[ing] the offenders’ ties to their family.” Mangual asks a hard question about the assumption behind this criticism: do the kinds of people who end up in prison make “good parents—that is, reliable sources of economic and emotional support whose presence in a child’s life produces benefits that outweigh the costs of that parent’s absence”? The evidence he reviews supports the conclu-

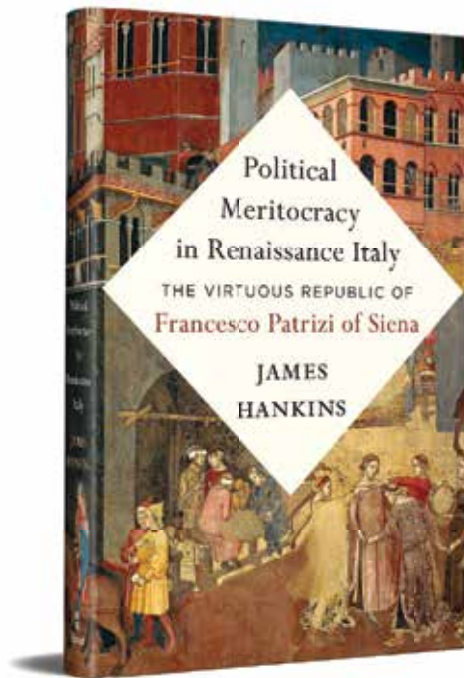
sion that “[e]xposure to highly antisocial parents...makes it more likely that a child will develop serious behavior problems” and that “[s]uch exposure seems to also be criminogenic for children.” Mangual cites a 2021 paper in the *American Economic Review* that found that “parental incarceration has beneficial effects on children, reducing their likelihood of incarceration by 4.9 percentage points and improving their adult socioeconomic status.” Failing to incarcerate a large number of serious violent offenders or accelerating their return from prison to their homes may harm the very children that the proponents of decarceration claim their policies would help.

IN *THE MYTH OF OVERPUNISHMENT*, BARRY Latzer, an emeritus professor at the John Jay College of Criminal Justice, presents some of the same compelling data about prison inmates and their propensity to reoffend. Before he gets to the current state of affairs, he devotes the first third of his book to “A Short History of Punishment in America,” in which he covers the use of corporal punishment and public shaming in colonial America, the harsh conditions of the first penitentiaries in the early 1800s (though introduced as more humane than corporal punishment), the brutality of the Southern practice after the Civil War of leasing convict labor to private corporations and later replacing this with prison farms and chain gangs, and the decline in the use of the death penalty. Compared to how we treated criminals in the past, “[t]he punishments we impose today are less harsh, less racist, and more lenient than they ever have been. By historical standards there is no case for overpunishment.”

In the 20th century the trend toward greater leniency accelerated, particularly “from the 1930s to the late 1960s.” One major factor was the drive toward “community corrections,” which called for greater use of (a) probation instead of prison for convicted offenders and (b) parole release from prison before offenders had served their full sentence. The reform movement came “to a screeching halt” during “the great crime tsunami, perhaps the biggest violent crime wave in American history, which ran from the end of the 1960s to the middle of the 1990s.” Latzer holds that although one cannot prove that the “flabby justice system” of the mid-20th century “encouraged more crime,” the connection “seems intuitively obvious.” Other factors were also at play, such as “the size of the young male population, the strength of police forces, [and] the availability of drugs and guns.”

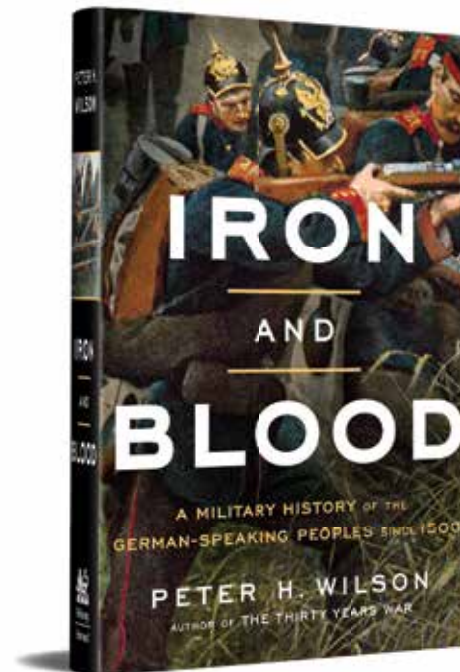
Though the response to the “crime tsunami” did not come right away—the nation’s impris-

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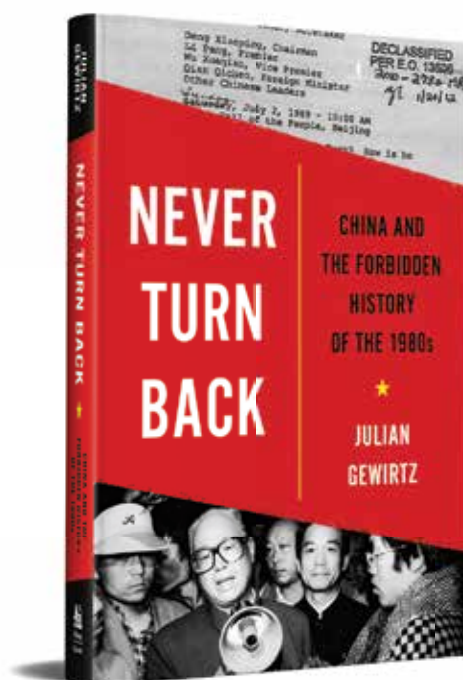
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onment rate actually fell between 1960 and the early 1970s despite a huge increase in serious and violent crimes during these years—the response did come: “Gradually, but steadily, the criminal justice system was strengthened and more criminals were apprehended and punished.... More and more offenders were being incarcerated, and many of them were kept behind bars longer.” Eventually, crime peaked in the early ’90s and then dropped dramatically in the subsequent decades. Latzer holds that just as punishing *less* leads to more crime, punishing *more* makes for less crime. He cites the prominent economist Steven Levitt, whose research found that “the increase in the prison population was the most significant factor in the crime decline of the 1990s.” Research by two other economists led them to conclude: “more prison, less crime.”

IN HIS PENULTIMATE CHAPTER, LATZER dismisses various proposals to drastically reduce prison populations. Some on the Left “seek full-fledged abolition—an end to prisons altogether.” This would come hand in hand with a radical reshaping of American society, in order to eliminate what they see as the very fountainheads of crime, such as “racism, poverty, homelessness, and...lack of opportunity.” But, Latzer asks, “if crime will not be abolished or sharply diminished in the near future, what will replace incarceration?”

Some propose “restorative justice” as an alternative for at least some incarceration. According to the Restorative Justice Exchange of Prison Fellowship International, the Christian organization founded by former Richard Nixon aide Charles Colson, the “core elements of restorative justice are the interconnected concepts of Encounter, Repair, and Transform.” Typically, the offender and the victim meet together with a trained facilitator to engage in “a journey toward well-being and wholeness that victims, offenders, and community members can experience. Encounter leads to repair, and repair leads to transformation.”

Latzer believes that restorative justice programs may be effective for minor crimes—that is, for offenders unlikely to go to prison in the first place. But for serious and violent offenders, such programs can be useful only as a supplement, not an alternative, to incarceration. This is for two reasons. First, to protect the community dangerous criminals must be incapacitated, and a community-based restorative justice program will not do that. Second, and equally important, “the public’s sense of justice requires punishment. Retribution may be out of favor with progressives, but it is an essential ingredient in every criminal justice

system.” Justice requires that the punishment fit the crime. In some broad sense, the harm that the state causes to the criminal by denying him his liberty for some months or years must be commensurate with, or proportionate to, the harm that the criminal perpetrated upon the victim.

LATZER THEN EXAMINES, AND REJECTS, proposals by organizations such as the Brennan Center for Justice to reduce the nation’s prison population by two fifths. One of the Center’s two principal recommendations is to reduce sentence length for the most serious offenses by 25%. According to its 2016 report, covered offenses would include “aggravated assault, murder, nonviolent weapons offense, robbery, serious burglary, and serious drug trafficking.” The Center reports that these “six major crimes...make up the bulk of the current prison population.” Latzer notes that for unstated reasons rape is not listed among the crimes eligible for major sentencing reductions. He speculates that the authors may have feared “backlash from feminists and Progressives for proposing the early release of rapists.” (Currently, those convicted of rape or sexual assault constitute fully 12%, or about one in eight, of all state prison inmates.) For Latzer the incapacitative effects of prison, especially given high recidivism rates, are enough to reject a 25% reduction in time served for our most dangerous offenders.

The Brennan Center’s other proposal is to eliminate prison altogether for what it calls “lower-level crimes.” These include, as Latzer lists them, “drug possession and ‘minor’ drug trafficking, ‘lesser’ burglary, simple assault, and fraud, forgery, or theft of property valued at up to \$10,000.” He predicts that these proposals, if enacted, “would help spur a new crime wave and would almost certainly set off a public revolt.” Indeed, “some of these crimes may not be low-level in fact.” Because of plea bargaining, “the incident that actually occurred may have been much more serious than the plea suggests.” (Note also that in the vast majority of these cases judges had the discretion to send the offender to prison or not. Relying on the details of the instant offense and the full criminal history of the offender, a judge decided that prison was the appropriate punishment. Isn’t this the kind of individualized justice extolled by critics of mandatory sentences?) Latzer also predicts that a “\$10,000 cap on thefts would create open season for car theft or expensive bicycle larcenies.” (Some shoplifters in California carefully track the value of their thefts in any one incident so as not to exceed \$950, the point at which the crime becomes a felony. You could do quite

a bit more shoplifting with a \$10,000 cap.) Latzer does not believe that “the public would stand for this.” Proposals like those advanced by the Brennan Center, he concludes, show that such groups are “totally out of touch with the American people.”

THERE SEEMS TO BE NO BRIDGING THE gap between the progressives (and their conservative allies) who call for vast reductions in prison populations and those like Rafael Mangual and Barry Latzer who defend the crime-reduction benefits of current incarceration policies. Yet in his final chapter, titled “E-carceration,” Latzer offers a provocative proposal for making a dent in incarceration rates without jeopardizing public safety. He reports that as of 2015, about 125,000 people in the United States (in all 50 states and the District of Columbia) were being monitored by GPS tracking devices typically attached as ankle bracelets. He argues for improving and expanding electronic monitoring to most, perhaps all, of those on probation or parole in the United States (nearly 4 million Americans as of 2020). The system can be programmed to set off an alarm at the monitoring agency if the offender goes somewhere he is not allowed—such as outside his residence if he has been sentenced to home confinement. Also, by tracking all the offender’s movements, the system can aid criminal investigations by showing whether the person being tracked was present at the scene of a crime.

Latzer presents evidence that close electronic monitoring of this sort (“full-time, 24/7”) reduces recidivism during the time the offender is being tracked. It is, after all, “intrusive and restricts individual freedom”—though it is not, of course, as restrictive as incarceration. He notes that it will take a major infusion of personnel “to monitor the software as it reports violations,” but if it reduces incarceration, it will still save money. He acknowledges, though, that, unlike prisons, electronic monitoring doesn’t actually prevent offenders from committing new crimes. Nothing incapacitates repeat offenders as effectively as confinement in a secure facility.

Perhaps the key limitation of “[p]resent-day technology” is that it “cannot determine when the subject is committing a crime.” It turns out, however, that new technology may make it possible not just to track an offender’s location but also to monitor his behavior: “If true, this could be a game-changer for penology.” This would be something like the body cameras that police wear. The offender would wear a “body sensor harness” that would capture audio and video and communicate these



to monitors. “The harness would have to operate and be worn at all times, 24/7, which would,” Latzer acknowledges, “create some difficulties.” Though activities like swimming or bathing may not be compatible with current technology, this problem could be solved by making sensors “smaller and more water-resistant.” Advocates of using such technology to track location, audio, and video claim that sophisticated new software may make it possible for the system to “inform the monitoring agents or the police when the subject was violating the law.”

Some propose one additional element: the ability to administer an electronic shock (like that from a taser) through the ankle bracelet to incapacitate the offender until police arrived whenever the monitored individual violated geographic restrictions, “commit[ted] harmful acts,” or tried to “disable or remove their ankle bracelets.” The shock would be administered either automatically, as dictated by the software program, or by the officials monitoring the system.

Would American courts allow such intrusive monitoring? Latzer, who also has a law degree and previously worked as both a prosecutor and defense attorney, is, of course, aware of the issue. He shows that not all courts have upheld even GPS monitoring of an offender’s location. It is very much an open question whether new types of more intrusive monitoring would pass scrutiny in state and federal courts. Proponents would likely argue, not unreasonably, that such monitoring will never pose as great a constraint on the of-

fender’s freedom as serving time in a medium or maximum security prison.

SO, WHAT’S THE PAYOUT IN TERMS OF incarceration? Though Latzer does not try to quantify just how much “e-carceration” might reduce prison populations, he does note that each year about 294,000 probationers and 111,000 parolees violate the conditions of their supervision and are sent (probationers) or returned (parolees) to prison. If expanded electronic monitoring could reduce these numbers by deterring at least some from reoffending, the effects on prison populations would not be trivial. (At the end of 2021, state prisons in the United States housed 1,047,008 criminals, and federal prisons another 157,314.)

Latzer reports that some advocates of the new “[t]echnological incarceration” promise that it will virtually replace prisons altogether by reducing the incarcerated population by as much as 95%. These proponents would reserve prison for those who commit the most heinous murders and those who violate the conditions of electronic supervision. Consequently, all those who rape, rob, and assault their fellow human beings, as well as most murderers, would never see the inside of a prison cell if they behaved while being electronically monitored.

In evaluating e-carceration’s practicality and public-safety impact, the key divide seems to be between (a) using enhanced electronic monitoring to do a better job of supervising offenders already in the community, and (b)

using it as a straight-out alternative to traditional incarceration. While Latzer embraces the former, he is not as certain about the latter. As he rightly notes, electronic monitoring, no matter how advanced, “cannot meet the punitive or retributive aims of the criminal justice system. And retribution—justice—will always be at the heart of any criminal justice system.” Moreover, it is hard to see, based on Latzer’s defense of incarceration earlier in the book, that it could ever incapacitate or deter as effectively as imprisonment.

Recent spikes in violent crime, especially in our cities, have raised the specter of another “crime tsunami” of the sort that swept the nation from the 1960s into the early ’90s. The subsequent decades of falling crime rates made us complacent, but the debate about crime and punishment is now renewed. The stakes are extraordinarily high for those who live in the neighborhoods where, as Mangual shows, serious and violent crime is hyperconcentrated. You might have thought that the clear lesson of the past half-century—punish less and crime will increase; punish more and it will decrease—would have been indelibly imprinted on the minds of the nation’s political elites and criminal justice policymakers. But apparently this vital lesson has to be taught, and learned, all over again.

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