American Exceptionalism in Crime and Punishment
Kevin R. Reitz, ed.
Forthcoming, Oxford University Press, 2017

Chapter 1

In the mid and late 20th century, the U.S. diverged markedly from other Western nations first in its high rates of serious violent crime, and soon after in the severity of its governmental responses. In the words of historian Randolph Roth, “Since World War II, the United States has stood out from the rest of the affluent world in its violence and in the punitive nature of its criminal justice system” (Roth 2017). This has left an appalling legacy of American exceptionalism in crime and punishment (“AECP”) for the new century.

When the U.S. is compared with other Western countries, and criticized for its exceptionalism in criminal justice, the conversation usually narrows to two subjects: (1) high incarceration rates; and (2) the nation’s continued use of the death penalty. With respect to both, the U.S. is seen as operating on an entirely different scale of punitive severity than other developed societies. Adding to the indictment, it has long been known that America’s uses of prisons, jails, and the death penalty are racially disproportionate (e.g., Furman v. Georgia, 408 U.S. 238 (1972); Blumstein 1982; Ayers 1984; McCleskey v. Kemp, 481 U.S. 279 (1987); Blumstein 1993; Kennedy 1997; Alexander 2010; Tonry 2011).

One goal of this book is to broaden the scope of AECP inquiry to include sanctions beyond incarceration and the death penalty. From what we know, it is reasonable to hypothesize that the U.S. imposes and administers probation, parole, economic sanctions, and collateral consequences of conviction with a heavier hand than other developed democracies (Rhine and Taxman 2017; van Zyl Smit and Corda 2017; Demleitner 2017). Although the inquiries in this book are preliminary, they raise the possibility that AECP extends across many landscapes of criminal punishment—and beyond, to the widespread social exclusion and civil disabilities imposed on people with a conviction on their record (Jacobs 2015; Love, Roberts, and Klingele 2016).

In addition, the book insists that any discussion of AECP should focus on U.S. crime rates along with U.S. penal severity.1 More often than not, American crime is discounted in the academic literature as having little or no causal influence on American criminal punishment (Miller 2017). This is a mistake for many reasons, but is especially unfortunate because it truncates causation analyses that should reach back to gun ownership rates, income inequality, conditions in America’s

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1 See Lacey and Soskice (2017); Lappi-Seppälä (2017); Miller (2017); Gallo, Lacey, and Soskice (2017).
most disadvantaged neighborhoods, and possibilities of joint or reciprocal causation in the production of U.S. crime rates and punitive severity.²

This chapter is divided into three segments. First, it includes a brief tour of the conventional AECP subject areas of incarceration and the death penalty. Second, it will introduce claims that a wider menu of sanction types should be included in AECP analyses.³ Third, it will speak to the importance of late-twentieth-century crime rates to U.S. punitive expansionism.

The Usual Suspects

Incarceration

The subject of mass incarceration entered America’s consciousness in a big way when the nation cemented its status as world leader in per capita incarceration—a watershed that occurred in 2000,⁴ following a neck-and-neck race with Russia through the 1990s (Sentencing Project 2001: 1; Tkachuk and Walmesley 2001: 15; Kuhn 1995: 56; Mauer 1994; Associated Press 1991).⁵ Since then, U.S. prison and jail confinement rates have come under increasing public scrutiny, and have been widely impugned as “mass incarceration” (e.g., Blumstein et al. 2000; Garland 2001; Simon 2012). After several decades of tough-on-crime politics and public sentiment, there has been a profound shift in the way Americans talk about prison policy. By 2010—illustrated by the appearance of a new conservative organization called “Right on Crime”—the view that U.S.

² See Lacey and Soskice (2017); Lappi-Seppälä (2017); Miller (2017); Gallo, Lacey, and Soskice (2017).

³ This is not offered as a full accounting, but is broader than the usual, and explores relationships between sanctioning policies that may otherwise be missed.

⁴ Criticism that America’s incarceration rates were too high dates back at least to the 1960s and 1970s, but was limited to law-reformers and academics, some of whom assumed the nation was on a natural and enlightened course to dramatically cut back in the use of prisons and jails (Challenge of Crime; American Friends Services; National Comm’n 1973; Frankel 1973; NCCD). Before the 2000s, concern over incarceration rates had virtually no resonance in public or political discourse—or, if it did, it was in the form of stout calls for the greater use of imprisonment to reduce crime rates (Wilson 1975; Bennett, Dilulio, and Walters 1996).

⁵ Technically, America’s incarceration rates are not so distinctive if we count countries with populations no larger than a small city. For instance, the World Prison Brief listed Seychelles—an island nation off the coast of East Africa—with a 2014 incarceration rate of 799 (735 prisoners). At the time, Seychelles had an estimated general population of only 92,000. Another diminutive country within striking distance of world leadership is St. Kitts and Nevis, a Caribbean Island nation reported to have 334 prisoners and a prison rate of 607 per 100,000 in 2014—which places it in third position worldwide for that year (World Prison Brief 2016).

It is doubtful the U.S. is the world’s all-time carceral leader by historic standards. Scholars have documented a higher incarceration rate for Stalinist Russia, at least twice the peak U.S. rate (Belova and Gregory 2009: 465-66) (estimating, depending on whom you count, an incarceration rate of 1,558 or 2,605 per 100,000).
incarceration rates had spiraled out of control had achieved a solid footing in both major political parties (Gingrich and Nolan 2011; Savage 2011; Dagan and Teles 2016).6

The basic facts of mass incarceration will be assumed knowledge throughout this book:

After 35 years of continuous prison growth, U.S. incarceration rates (counting both prisons and jails7) topped out in 2007 and 2008 at 760 per 100,000 general population—a quintupling of 1972 rates—and have since entered a period of modest decline (Kaebel, Glaze, Tsoutis, and Minton 2015: 3 table 2). Near the peak, the Pew Charitable Trusts calculated that “One in 100” American adults were in prison or jail at yearend 2006—or “one in 54” adult males (Pew Center on the States 2008: 5, table A-6).

As of this writing, America’s per capita confinement has inched downward for six consecutive years, but the reductions have been modest. Overall the nation has returned to the confinement rates of the early 2000s—when the term “mass incarceration” was coined—so the punitive era can hardly be declared over. By the U.S. Justice Department’s counts, America’s combined prison-plus-jail rates in 2014 (477 and 234 respectively) added up to a total incarceration rate of 711 per 100,000. In raw numbers that translates into 2.3 million prison and jail inmates on any one day in 2014 (Carson 2015; Minton and Zeng 2015).

Few nations have ever made it to the “700 Club” (700 or more prisoners per 100,000). Indeed, in contemporary Western Europe, there are no nation-states at all in the 200 Club, and half cannot even claim membership in the 100 Club (Lappi-Seppälä 2017: figure 1.1; World Prison Brief 2016). By the standards of other developed democracies, the scale of incarceration in America is astounding. Our 2014 incarceration rate was more than seven times the average in Western Europe, six times the Canadian rate, more than 4.5 times that in Australia, and almost 3.5 times New Zealand’s rate.8 As of 2014, the U.S. had left its formal rival far behind, exceeding the Russian incarceration rate by 53 percent (World Prison Brief 2016).9 For comparisons between the U.S.

6 High profile members of Right on Crime have included Bob Barr, William J. Bennett, Jeb Bush, Chuck Colson, Monica Crowley, John J. Dilulio, Jr., Newt Gingrich, Asa Hutchinson, George Kelling, Edwin Meese, III, Pat Nolan, Grover Norquist, Rick Perry (Right on Crime 2011, 2016).

7 The U.S. “imprisonment rate” captures only inmates in state and federal prisons; more than 30 percent of inmates are held in local jails on any given day (Minton and Zeng 2015; Carson 2015). In American discourse, “incarceration rates” are defined as the sum of prison plus jail confinement rates. In other countries, “incarceration rates” and “imprisonment rates” tend to be synonymous terms; other jurisdictions do not follow America’s idiosyncratic division of confinement populations into prisons and jails, or do not bifurcate their reporting of statistics.

8 New Zealand is the Western nation with the highest incarceration rate after the U.S. (World Prison Brief 2016).

9 Russia has significantly decreased its prison populations and rates in the past 15 to 20 years. From 1999 to 2001 alone, the Russian incarceration rate fell from 730 per 100,000 to 644 due in part to mass amnesties (Sentencing Project 2001: 1). By 2016, the Russian rate had fallen to 453 per 100,000 (World Prison Brief 2016).
and Western European states, Figure 1 displays changes in incarceration rates from 2000 to 2016 (or the latest available year) in 10 countries.

[Insert Figure 1 here]

It is useful to assess what it would take for the U.S. to rejoin the mainstream of the Western world in its incarceration practices. Regression toward the mean is usually not a stirring goal, but in this case it is nearly quixotic. For instance, in order to downsize to the same incarceration rate as England and Wales—one of Western Europe’s leaders in per capita imprisonment—the U.S. would have to release more than 1.8 million inmates out of a total 2.3 million, leaving 473,000 inmates in the prisons and jails for the entire country. Immense social and political movements would be required to effect such a change.

Compounding the problems of sheer scale of U.S. incarceration are enormous breakdowns in distributive justice: The African American imprisonment rate is nearly 6 times that for whites, the Latino rate more than 2.5 times the white rate, and the rate for Native Americans—although not regularly reported—has been about 2.5 times the white rate (Carson 2015: 15 table 10; Ruth and Reitz 2003). Pew’s “One in 100” report observed that roughly “one in 9” (not a misprint) black men aged 20-34 were in prison or jail on any given day in 2007 (Pew Center on the States 2008: 6).

The Justice Department estimated that a black male child born in 2001 had a 32.2 percent chance of going to prison during his lifetime. (The much greater lifetime probabilities of spending time in jail were not calculable.) For a white male child born the same year, the lifetime probability of imprisonment was 5.9 percent (Bonczar 2003: 8). These statistics are even more startling when interpreted with class in mind. For middle-class blacks, lifetime risk of incarceration is not dramatically different than for middle-class whites. Therefore, for the most disadvantaged black men, chances of going to prison during adulthood are much higher than one-in-three. For example, Steven Raphael estimated that, in California “at the end of the 1990s, over 90 percent of black male high-school dropouts ... have served prison time in the state” (Raphael and Stoll 2009: 10; see also Pettit and Western 2004).

Before leaving the subject of incarceration and racial disparities, I want to point out an acute policy dilemma that is likely to arise if the U.S. truly enters a prison-downsizing era: Will we think it more important to reduce the “disparity ratio” between black and white incarceration rates, or to reduce absolute levels of incarceration? In some foreseeable scenarios, it would be impossible to

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10 England and Wales’ total incarceration rate was 146 in 2016 (World Prison Brief 2016). The most recently reported US prison plus jail rates in 2014 add up to 711 per 100,000, and a total of 2,305,908 incarcerated people on any one day (Carson 2015; Minton and Zeng 2015).

11 This estimate was based on the national prison rate in 2001 which, by coincidence, was nearly identical to the national rate in 2014 (see Bonczar 2003: 8; Carson 2015: 8 table 6).
Figure 1. Incarceration Rates, Western Europe & U.S., 2000-2016 or most recent
have both. Imagine a hypothetical reform (such as the introduction of actuarial risk assessment at sentencing as a prison diversion tool)\(^\text{12}\) that is projected to reduce incarceration rates nationwide by 20 percent, but the measure would reduce white incarceration rates by 25 percent and black incarcerations rates by 15 percent.\(^\text{13}\) In other words, the probability of a white defendant benefiting from the measure is 66 percent greater than the probability a black defendant will benefit. From a disparity-ratio perspective, this would be a disaster. There’s a fair chance it would even be unconstitutional.

Despite the ratio effects, however, the measure would reduce black incarceration rates substantially compared to the status quo. If we forgo the measure on disparity grounds, roughly 150,000 black people would be incarcerated in the U.S. on any given day, extending into the foreseeable future, who would no longer have been incarcerated if we had adopted the measure.\(^\text{14}\) Every year, this would add up to 150,000 *person-years* of confinement for black defendants that could have been avoided. In a mere seven years, the failure to adopt the racially-disparate reform would yield more than 1 million additional person-years of black incarceration.

The problem is that the same reform that would buy 1,050,000 fewer person-years of incarceration for black defendants in seven years would yield 1,750,000 fewer incarceration-years for white defendants. What ethical calculus applies?

*Capital Punishment*

Mass incarceration is a new kid on the block when it comes to comparative embarrassments in American criminal justice policy. As Europe and the Anglosphere abandoned capital punishment in the decades following World War II, the failure of nationwide abolition in the U.S. became a leading symbol of American regressivism (e.g., Sellin 1959; Bedau 1964; *Furman v. Georgia*, 408 U.S. 238 (1972); Black 1974; Zimring and Hawkins 1986; Steiker 2002: 100; Zimring 2003; Garland 2010).


\(^{13}\) In fact, one of the most common concerns about the use of risk assessment instruments as prison diversion tools is that they will benefit whites more than blacks (Nelken?). The ethical dilemma is far worse if risk assessment technology is used to increase the severity of prison sentences compared to the status quo (Harcourt 2014; Starr 2014). On the other hand, concerns about racial bias in actuarial risk assessment have not often been tested with empirical rigor, and the best study to date indicates that those fears may be exaggerated. Skeem and Lowenkam (forthcoming) studied the Post Conviction Risk Assessment (PCRA) currently used in the federal system, and concluded:

> These results indicate that risk assessment is not “race assessment.” First there is little evidence of test bias for the PCRA. The instrument strongly predicts re-arrest for both Black and White offenders. Regardless of group membership, a PCRA score has essentially the same meaning, i.e., same probability of recidivism.

\(^{14}\) Figures are based on current incarcerated populations.
As a purported example of AECP, however, capital punishment in the U.S. is not in the same league as mass incarceration (Garland 2017; Zimring 2017). America stands alone in the Western world for its retention of capital punishment, but it is far from the planet’s leader.15 While a deeply significant moral issue, the death penalty in America is applied to a vanishingly small percentage of the population, e.g., 28 total executions in 2015 (Death Penalty Information Center 2016a). In the same year, there were 2.59 million deaths from all causes, so the capital-punishment mortality rate doesn’t register (Centers for Disease Control and Prevention 2016). Other comparisons make the same point: Less than one percent of all offenders convicted of homicide have been executed since 1976 (Zimring 2003). For 2015, the risk of execution was less than one-tenth the risk of being struck by lightning.16

In short, unlike mass incarceration (and most other instances of AECP), capital punishment in America is not exceptional because of its scale.

Moreover, capital punishment in America is a highly localized phenomenon. Most of the U.S. can be classified as abolition or non-executing territory, in common with all other Western democracies (Zimring 2003; Garland 2010). In any recent year, the majority of U.S. states have held zero executions, including abolition states and death-penalty states that rarely carry out the sentence. For example, in 2013, only 9 states held executions (a total of 39 executions overall for that year) (Snell 2014b: 1).17 Even within executing states, a relatively small number of counties are historically where most of a state’s death sentences have been imposed and where most executions originate, such as Harris and Dallas Counties in Texas (Death Penalty Information Center 2016e; Texas Department of Criminal Justice 2016).18 From 1976 to 2013, two percent of all counties in America had produced 56 percent of all death sentences and 52 percent of all executions (Dieter 2013: 6). In contrast, from 1967 to 2013, 85 percent of all counties in the U.S. had produced no executions at all (id.: 1).

15 With 28 executions in 2015, America fell in the top five for raw numbers of executions (Amnesty International 2016: 36-37), but several other countries had much higher rates of execution per capita.

16 From 2006 to 2015, the National Weather Service reported that an average of 31 people per year have been killed by lightning strikes, and an average of 310 people have been injured or killed each year (National Weather Service 2016).

17 The most executions in the past 70 years occurred in 1999 (98 executions), but still only 19 states participated—and 9 of these states held only a single execution (Sourcebook of Criminal Justice Statistics 2012: table 6.85.2012).

18 Stephen Bright (2008: 374) reported that “[m]ore people sentenced to death in Harris County [Texas] have been executed than from any state except Texas itself.” For reports from other states, see Rosenberg (1995: 22) (Pennsylvania), Willing and Fields (1999: A1) (Ohio), and Paternoster (2005: A19) (Maryland).
If racial disproportionality in the use of a criminal punishment is considered an element of AECP, the death penalty qualifies. Racial disparities in the use of the death penalty have been an American disgrace for more than 200 years, especially if one counts vigilante lynchings as a form of capital punishment (Stampp 1956; Wolfgang and Riedel 1973; Higginbotham 1978; Ayers 1984; Kennedy 1997; Cole 1999; Zimring 2003: chapter 5). In the modern era of American capital punishment (post-Gregg v. Georgia, 428 U.S. 153 (1976)), large disparities by race of defendant continue to exist—more so in some jurisdictions than others. Nationally, African Americans are 13 percent of the U.S. population yet make up 35 percent of all people executed in the last 40 years—a racial disparity of 3.4 to one when compared with the rate of execution for whites (Death Penalty Information Center 2016f; Baldus 1998; Eberhardt et al. 2006; Taback 2010).

Starting in the 1980s, a growing body of empirical research has shown that the race of the victim is a strong predictor of use of the death penalty in individual cases. The most famous study was conducted by David Baldus, who examined thousands of potentially-capital murder cases in Georgia during the early 1980s. Baldus found that, holding other factors constant, a black defendant who killed a white victim was 4.3 times more likely to be sentenced to death than a black defendant who killed a black victim (McCleskey v. Kemp, 481 U.S. 279 (1987); see also Phillips 2006; Baldus et al. 2009; Baumgartner, Grigg, and Mastro 2015). Somewhat, even while accepting the validity of the Baldus study, the U.S. Supreme Court held in McCleskey that the race-of-victim finding did not demonstrate enough of a “constitutional risk” of racially-discriminatory administration to invalidate Georgia’s death penalty scheme.

Returning to the issue of AECP and the death penalty’s scale, the non-Western world includes many other executing jurisdictions (including Israel and Japan). While a world leader in confinement, it is less commonly asked where the U.S. scores in the actual use of capital punishment. To facilitate cross-jurisdictional comparisons, I will invent the measure of “executions per 100 million.” (You need a big denominator to get American execution rates into the single digits.) Corrected for population, the U.S. execution rate in 2015 was 8.7 per 100 million. Since the 1940s, the peak execution year in the U.S. was 1999, when there were 98 executions total, or 36 per 100 million.

Little comparable research has been done for noncapital cases, in part because race-of-victim data are rarely included in official records. A handful of studies suggest that the devaluation of black victims relative to whites also occurs in cases of violent and sexual assaults not resulting in death (Spohn and Spears 1996; Walsh 1987; LaFree 1998).

McCleskey was a 5-4 decision. Justice Lewis Powell, the swing vote and author of the majority opinion, later told his biographer that he regretted his vote in McCleskey, and would change it if he could (Jeffries xxxx).

Japan held 3 executions in 2015, for a rate of 2.7 per 100 million. The 2015 U.S. rate without Texas and Missouri was a “Japan-like” 3.1.
More usefully, American execution rates may be calculated for individual states: In the last four decades, the most executions carried out by any state in one year was Texas in 2000, with 40 executions—or 191 per 100 million population (Death Penalty Information Center 2016d; Bureau of Census). In 2015, Missouri was the nation’s leader in per capita executions at 100 per 100 million (6 total). In second place, Texas’s 2015 execution rate was down to 47 executions per 100 million (13 total). Subtracting Missouri and Texas, the 2015 execution rate for the remaining 48 states was 3.1 per 100 million. For 44 states in 2015, the rate was zero.

Unlike its incarceration rates, America’s execution rates are far from the highest in the world. Iran, lately the most vigorous death-penalty jurisdiction, conducted 1,084 executions in 2015, or 1364 per 100 million (Kredo 2016; Statista 2016). As recently as 2002, China was estimated to have executed 12,000 people (Dui Ha Foundation 2016), suggesting an “Iran-like” execution rate of 937 per 100 million for that year. The number of executions in China has been falling rapidly in the 2000s, however. The Chinese government executed 2,400 people in 2015, as estimated by the Death Penalty Information Center (Death Penalty Information Center 2016c). If the estimate is correct, China’s rate in 2015 was “only” 178 executions per 100 million population—still 20 times the U.S. rate for the same year, but lower than Texas in the year 2000.

What would it take for America to rejoin the mainstream of other Western democracies in the abolition of state-sponsored executions? The task is far less ambitious than an unwinding of mass incarceration. David Garland argues that the U.S. is already on a course toward death penalty abolition—in common with other Western nations; the only qualification is that some American states are moving more slowly (Garland 2013, 2017). Indeed, some U.S. states abolished capital punishment well ahead of the post-World War II European wave, so the entire nation is not “behind” (Zimring 2003).

In addition, capital punishment in the U.S. could end with a single stroke via a Supreme Court ruling. The country came close to constitutionally-mandated abolition in 1972 and again in 1987 (Furman v. Georgia and McCleskey v. Kemp). No similar heroic remedy is available for mass incarceration, or for any of the other species of AEC examined in this book.

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22 Further down the rankings in 2015 were Saudi Arabia (406 per 100 million; 128 total) and Pakistan (170 per 100 million; 326 total).
Probation used to be considered an instrument of lenity, not severity. In the not-too-distant past, many people thought that making greater and more imaginative use of probation was the best way to reduce incarceration rates (Morris and Tonry 1990; Byrne, Lurigio, and Petersilia 1992; Difilio 1997). Probation has often been billed as an “alternative” to prison, implying that, if managed correctly, imprisonment should decline as probation goes up (e.g., Cavanaugh and Kleiman 1990; Sigler and Lamb 1997; Anderson 1998).

The history of the last 50 years does not fit the expected program. Instead of acting as a replacement for prison beds, probation supervision rates have exploded alongside incarceration23—and high probation populations have been important feeders of prison and jail populations through the revocation process (Klingele 2013).24 Very recently, the literature has begun to speak of “mass probation” or “mass supervision”—not just mass incarceration (Phelps 2014; McNeil and Beyens 2014). On any one day in 2014, nearly 4 million people were serving probation sentences across America (Kaeble, Maruschak, and Bonczar 2015: 1).25

The current scale of probation in the U.S. is considerably larger than in Eastern and Western Europe. As the Robina Institute of Criminal Law and Criminal Justice reported, the average 2013 probation supervision rate across all 50 states was more than five times the average among European countries (Alper, van Corda, and Reitz 2016).26 See Figure 2 below. On this measure,

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23 In 1965, the number of probationers in the U.S. was estimated to be about 432,000, which translated into a probation supervision rate of 222 per 100,000 general population (Ruth and Reitz 2003: 24 figure 1.4; Cahalan 1986: 181 table 7-9A). By 2014, the total number had grown to 3,864,100, or a rate of 1212 per 100,000—more than a fivefold increase in per capita supervision (Kaeble, Maruschak, and Bonczar 2015: 1). This is uncannily similar to the per capita increase in incarceration over the last several decades.

24 “Revocation,” in U.S. terminology, occurs when a probationer is found to have violated one or more of the conditions of his probation sentence, and on this ground is sent to prison or jail (see Mitchell et al. 2014).

25 American probation populations are racially disparate, but not to the same degree as those in prisons and jails. While about 13 percent of the U.S. population, African Americans made up 36 percent of all prisoners in 2014, 35 percent of all jail inmates, and 30 percent of probationers. Similarly, Hispanics accounted for 22 percent of all prisoners, 15 percent of all jail inmates, and 13 percent of probationers. In contrast, whites are more heavily represented among probationers. Whites made up 54 percent of U.S. probation populations in 2014, 34 percent of state prisoners, and 47 percent of jail inmates (Carson 2015; Minton and Zeng 2015; Kaeble, Maruschak, and Bonczar 2015). In other words, as the severity of sanction type increases, so does the relative share of people of color exposed to that sanction, while the exposure of whites declines. [Move this?]

26 This finding is based on statistics from 39 reporting European countries, compiled by the Council of Europe for 2013 (Aebi and Chopin 2015). Depending on how one interprets the Council of Europe data, the ratio between U.S. and European probation rates is probably closer to 10:1 (van Zyl Smit and Corda 2017). The Robina report was based the most conservative possible calculations of U.S. versus European rates—i.e., it counted several ambiguous categories of European offenders who might not meet the U.S. Department of Justice definition of being “on
America’s “exceptional” status in probation is even more dramatic than in its use of prisons and jails. The ratio of U.S. prison rates to Europe is about 3.5:1 when counting both Eastern and Western European countries (van Zyl Smit and Corda 2017: figure 1).

Further, the day-to-day experience of being on probation is more difficult than commonly understood (Corbett 2015), and is especially painful in the U.S. when compared with other countries. Rhine and Taxman (2017) posit that, more than in other advanced democracies, the philosophy of probation supervision in the U.S. has shifted away from a social-work model toward an orientation of surveillance and control. One expression of this is the imposition of numerous and intrusive conditions that even a high-functioning law-abiding citizen would have difficulty satisfying (Corbett 2015). Making things worse, the focus of probation providers in some American jurisdictions is to collect supervision and program fees from their clientele (ACLU on private providers). Across Texas, for example, county probation offices depend on fees from probationers for 50 to 75 percent of their operating budgets (Bell County report; Wharton County report). This conflict of interest detracts further from probation’s original mission of rehabilitation, and appears to be a problem peculiar to the U.S. (Rhine and Taxman 2017).

What would it take for the U.S. to rejoin the Western mainstream in its approaches to probation supervision? In order to approximate European supervision rates, the total U.S. probation population would have to drop from roughly 4 million to 800,000—or a differential of 3.2 million probation terms. Large reductions in the number of people placed on probation in the first place would probably be necessary, which would require that lesser penalties somehow become acceptable to courts, prosecutors, victims, politicians, and the public. Across-the-board efforts would be needed to shorten the average lengths of probation terms—especially in some states, which are horrendously longer than those in Europe. There is almost no point to a probation sentence longer than two or three years, yet many states mete out probation by the decades, and “lifetime supervision” has become a popular idea for the punishment of sex offenders.

Compared with prison down-sizing, large changes in probation strategies across the country should encounter opposition from fewer institutional or economic interest groups. If we monetize probation, it is a much smaller business than incarceration. Probation agencies tend to run on a shoestring, with modest expenditures per client. We do not hear of community corrections unions as major players in state elections, for example, nor does the placement of probation offices drive local economies.

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27 In some states, it is not unusual for defendants to decline the offer of a probation sentence and opt to serve out their prison time as the easier route to a clean slate. Likewise, some probationers volunteer for revocation in order to “max out” their prison sentence and bypass the difficulties of community supervision (Robina Institute forthcoming).
American Exceptionalism in Probation Supervision
Probation Supervision Rates in the United States and Europe, 2013 Rates per 100,000 Adult Residents

In 2013, the probation supervision rate for the United States was more than five times the rate for European countries included in this chart.

Notes:
1. This chart makes use of Council of Europe (CoE) statistics on “community sanctions and measures (CSM)” and attempts to combine all CSM categories that would be classified as “on probation” under Bureau of Justice Statistics (BJS) counting rules. Difficulty occasionally arises in aligning CoE and BJS data. Some CoE populations cannot definitively be classified as “on probation” or “not on probation” in BJS terms. For example, a handful of CoE categories include forms of full or partial prison release that would likely be counted as “parole” by the BJS. In addition, some groups arguably on probation in CoE data might be excluded as “off” by the BJS. To resolve such disputes, we have erred in the direction of including all ambiguous CSM classifications in our estimates of European probation populations. Accordingly, the chart may overstate rates of probation supervision in some European countries compared to rates as reported in the U.S. For the chart’s message is not undermined. If anything, the chart understates American Exceptionalism in probation supervision as compared with Europe.
2. The three yellow bars on the chart indicate weighted averages for the entire U.S. probation supervision population (including federal probation), all 50 U.S. states (without federal probation), and all included European countries. Average rates are calculated per total U.S. adult population and the total adult population of all reporting European countries.
3. European countries were excluded when adult population counts were not available or when community supervision data were not reported by CoE or were incomplete. The countries for which adult population counts were not available were Andorra, Liechtenstein, Monaco, and San Marino. The additional countries for which adequate community supervision counts were not available were Bosnia-Herzegovina, Ireland, Montenegro, and Slovak Republic.
4. The U.S. State of Georgia is not included in the chart. Georgia reports dramatically higher probation rates to BJS than any other state. We believe this is because Georgia reports numbers of probation “cases” rather than the number of individuals actually on supervision, and therefore its reporting is incompatible with that of other states.
5. The 2013 probation population for Oklahoma was not available from BJS. The average rate of 2012 and 2014 was used.

Sources:

Citation: Mariel Alper, Alessandro Corda, and Kevin R. Reitz, American Exceptionalism in Probation Supervision (Robina Institute of Criminal Law and Justice 2016).
The weight of the available evidence suggests that parole as administered in the U.S. is an instance of AECP, at least when compared with arrangements in other Western democracies for prison release, supervision of releasees, and revocations back to prison.

For most people—even criminal justice professionals and academics—this will come as a surprise. Within the U.S., parole has had a durable reputation of shortening otherwise harsh prison sentences. Discretionary parole release, because it occurs before a maximum prison term has been served, is often called “early release,” and the law considers it a “privilege” or “act of mercy” when a prisoner is allowed to serve the balance of his prison sentence in the community rather than behind bars (e.g., *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998)). From the public and media perspectives, parole release has been associated with the premature release of dangerous criminals, and *res ipsa loquitur* negligent disregard for public safety.

Signals of exceptional severity in American parole practices begin with the raw numbers. At yearend 2014, 856,900 individuals were serving sentences of parole supervision across the U.S., which translated into 269 per 100,000 general population. (Kaeble, Maruschak, and Bonczar 2015: 1; Bureau of Census 2016). As with prison and probation, there was a quintupling of the parole supervision rate in the late 20th and early 21st centuries. There were 102,036 parolees under supervision in 1965, or 53 per 100,000 general population (Cahalan 1986: 181 table 7-9A).

As with incarceration and probation, the sheer number of people serving sentences of post-prison-release supervision in America is much greater, correcting for population, than the average among reporting nations in Europe. One recent study concluded that parole supervision rates across the U.S. in 2013 were at least five times the European average (Corda, Alper, and Reitz 2016). Some of the 5:1 ratio is a direct product of unusually high incarceration rates in the U.S., of course. Spectacularly high American parole supervision rates might thus be seen as a direct and unsurprising consequence of AECP in imprisonment. Even if this simple explanation is correct, post-release supervision rates have not been included in the usual accountings of AECP. They are a substantial addition to the descriptive balance sheet.

The experience of parole supervision is no picnic. Compared with probationers, prison releasees are a high-risk population; they are generally managed with tighter surveillance, more restrictive conditions, and more of a sense that they “deserve” the pains of supervision. The distinctive American toughness in community supervision is especially present in parole. As summarized by van Zyl Smit and Corda:

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28 As with the comparative probation study, the calculation of a 5:1 ratio is conservative. All ambiguous categories of offenders in Council of Europe data were “credited” to European post-prison supervision rates if there was any doubt that those offenders would meet a definition of parole supervision comparable to that used in the American Bureau of Justice Statistics counts (Corda, Alper, and Reitz 2016: xx).
While in Europe [parole supervision] is mostly structured as a rehabilitative tool aimed at facilitating the re-entry and resettlement of the offender in the community, in the U.S. parole tilts more heavily toward a punitive and managerial intervention, weakening or supplanting a commitment to the ideal of reintegrating parolees into society. … In comparison to Europe two distinctive characteristics of U.S. parole are (1) longer terms of supervision, and (2) more, and more intrusive, conditions of supervision. The latter add greatly to the burden placed on American parolees (2017: xx).

Parole revocation rates also appear to be high in the U.S. compared with reporting European countries. For the U.S. as a whole, 26 percent of all prison admissions in 2014 were due to parole violations (Carson 2015: 10 table 7). Probation revocations are not tracked separately in U.S. national statistics but, filling in a reasonable estimate of prison entries from probation failures, at least 50 percent of American prison admissions are probably attributable to community supervision revocations of all kinds. In contrast, among reporting European countries in 2012, combined revocations (or “recalls”) from parole and probation amounted to only 7.4 percent of all prison admissions (Aebi and Delgrande 2015: Table 8).

The legal architecture of parole release discretion in the U.S. is all by itself a form AECP. The degree of indeterminacy in U.S. systems is greater than most or all other countries (Reitz 2015). Prison release agencies adjudicate a greater share of the maximum prison term than elsewhere—and the number of prisoners serving sentences with extremely long maximum terms is larger in the U.S. than elsewhere.

To illustrate the high degree of indeterminacy in many American jurisdictions: In New Jersey, a maximum 10-year prison sentence yields first release eligibility after 23 months. The parole board decides one way or another on more than 80 percent of the possible prison term (New Jersey State Parole Board 2010: 35). In Colorado, many lower-level sex offenses carry prison sentences of one year to life (or 2 years to life, or 4 years); the percentage of the possible prison term controlled by the parole board is incalculable (Colo. Rev. Stat. §§ 18-1.3-1004; 18-1.3-401). At the extreme, in six states the parole board is empowered for most offenses to release prisoners the

29 Probationers are at lower risk of failure than parolees, but there are four times as many probationers. When records are compiled at the state level, it is common to find that over 50 percent of prison admissions stem from parole and probation revocations combined.

30 The compatibility of European and American statistics on this point is open to question. The American figures do not include jail admissions or the numbers of probationers admitted to jails due to sentence violations.

31 This may have been due to excessive American optimism, in the Progressive era, about the prospects for the rehabilitation of prisoners, and about the ability of parole boards to detect when rehabilitation had occurred in individual cases (see Webster and Doob 2017).
same day they are admitted to prison—or keep them for their full maximum terms.\textsuperscript{32} In this type of system, the courts decide who will be incarcerated and who will not, but the parole board is 100 percent in charge of prison-sentence lengths.

As far as I know, such stunning delegations of power to prison-release decision makers have not occurred in other countries.

Just as telling as quantification of discretionary-release authority, however, is the looseness with which prison-release agencies exercise that power in practice. In the U.S., parole release decisions are unpredictable and patterns of decisions are highly changeable over time.\textsuperscript{33} There is no substantive or procedural regularity to speak of. Decision criteria are open-ended, usually allowing the board to readjudicate all the factors originally considered by the sentencing court, plus more—like the infamously vague factor of “readiness for release.”

Decisional instruments and parole guidelines, where they exist, are advisory and unenforceable, and the boards’ decisions are effectively unreviewable. Indeed, important decision tools such as guidelines or risk assessments are rarely shared with prisoners, who have no meaningful ability to contest the evidence or evaluations in their dossiers. Victim input to parole boards, which research has shown to make denials of release more likely, is generally held confidential, too. In many states, release decisions are made by one or two board members without consultation with each other or with the board as a whole, and it is common knowledge that individual board members have dramatically different approaches when performing their jobs (Rhine, Petersilia, and Reitz 2016; Reitz 2015; Roberts 2012; American Law Institute 2011: Appendix B).

American parole boards are supremely powerful institutions. In the most recent count, 347 individuals served as members of paroling agencies across the U.S. as a whole (Paparozzi and Caplan 2009). On the whole, this small group wields greater power over the duration of prison terms than legislators, judges, prosecutors, corrections officials, or anyone else in the criminal justice system.\textsuperscript{34} The long-term prison policy of indeterminate states is thus (and has been)

\textsuperscript{32} See Ruhland, Rhine, Robey, Mitchell (2016:13-15) (in national survey, paroling authorities in six states reported that they held discretion to set minimum terms for violent, property, sex, and public order crimes; parole boards in eight states reported having such power in drug offense cases).

\textsuperscript{33} One famous study found that parole release rates declined during state election cycles as the next election approached (cited in Travis 20xx). Another study found that parole boards’ generosity in granting release dropped significantly as the amount of time since members’ last meal increased (cited in Kahneman).

\textsuperscript{34} In addition to their releasing powers, parole boards preside over revocation decisions (returns to prison for violations of parole). Parole revocations accounted for 28 percent of all prison admissions in 2015, and a much larger percentage of prison admissions in the 1990s and 2000s (Carter 2015; Jacobson 20xx). Unique among American criminal justice players, parole boards hold both “in-out” discretion and “out-in” discretion.
dominated by parole-release decision making—a fact that has gone almost totally unremarked in the “mass incarceration” literature.\textsuperscript{35}

At the same time, parole boards are exceedingly weak agencies in terms of status, self-preservation, political insulation, and members’ job security. Most boards are made up of gubernatorial appointments, and members are easily removed by the governor. One member of the Arkansas parole board explained the “most obvious” reality of this setup: “If the governor likes you, you might get to keep your job” (Web Special 2005). In the vast majority of states, there are no statutory requirements for appointment to the parole board (Ruhland, Rhine, Robey, Mitchell 2016), so members lack the professional standing of other key decision makers.\textsuperscript{36} Turnover rates are high, even among chairs. Members or entire boards have been forced to resign after a single high-profile crime committed by a released prisoner. In the wake of episodes like these, firings or no, release rates plummet (Schwartzapfel 2015).\textsuperscript{37}

The combination of great discretion to make prison policy and minimal institutional clout has been a formula for disaster. The parole release decision point across America is dominated by risk aversion, which I sometimes visualize as an oppressive cloud of humidity in every hearing room. A parole board member never takes a personal risk by voting to deny release, and always takes a chance when letting someone out. While this is a long-recognized problem (e.g., Morris 1974), it has gotten worse over the past several decades. In a 2015 national survey, parole board chairs nominated political vulnerability and pressure toward minimization of all risk as one of the most important problems confronting the field today (Robina Institute forthcoming). Even in states with good-quality decisional and risk-assessment instruments, parole board members depart from recommendations to release far more often than from recommendations to deny release (e.g., Colorado Division of Criminal Justice and Colorado State Board of Parole 2013).

Contrary to the romanticized vision of U.S. parole systems as “giving breaks” to large numbers of offenders, actual practices have run a different course. Indeed, one major cause of mass incarceration was a nationwide shift among discretionary prison-release agencies toward lower release rates. From the late 20\textsuperscript{th} century, most paroling states have been high-incarceration jurisdictions when compared with “determinate” states that have done away with discretionary release. Nine out of ten states with the highest prison populations at the peak of the prison boom were paroling states and not determinate states. The indeterminate states also had the greatest

\textsuperscript{35} If anything, the literature tends to blame the abolition of parole-release discretion in some states as a major factor contributing to prison growth (Reitz 2006).

\textsuperscript{36} While the best European systems vest prison-release discretion in judicial officers, such an arrangement is extremely rare in the U.S. (When to Release, van Zyl Smit ch.)

\textsuperscript{37} Episodes like this have occurred in Pennsylvania, Massachusetts, and Connecticut. For example, in Massachusetts in 2010, following the killing of a police officer by a parolee, the chair, board members who voted on his release, and the executive director resigned (Reitz 2015; Clear and Frost 2014; American Law Institute 2011).
increments of prison growth dating back two or three decades (American Law Institute 2011). An ALI report compared the total amount of prison growth experienced by all 50 states from 1980 to 2009, according to the type of sentencing system in each state, as displayed in Figure 3.

[Insert Figure 3 here]

The case of American parole systems as an instance of AECM is largely the story of the etiology of mass incarceration, albeit from a set of legal and institutional arrangements that are peculiarly American.

What would it take for the U.S. to rejoin the mainstream in parole practices? The task would be much easier than for probation because parole release and revocation decisions are concentrated in single agencies with only five to nine board members per state. They provide a ready focal point for system change. Outright abolition of discretionary parole release has already been pursued by more than one-third of the states—an option that has been endorsed by the American Bar Association (1994) and the American Law Institute (2011). Retention of state parole boards with significant reform is also possible, but has never been tried. For a comprehensive plan, see Rhine, Petersilia, and Reitz (2016).

**Economic Sanctions**

Although little noticed, the use and severity of economic criminal penalties in the U.S. have rocketed upward in the last few decades along with most other forms of criminal punishments. This is a badly under-researched and under-theorized area of American penality. There is no readily-available statistic, like an incarceration rate, that indicates the aggregate severity of economic penalties across different states and countries, or changes in severity over time. And in order to estimate the practical severity of fines, forfeitures, restitution, costs, and fees we would have to know a great deal more about defendants’ means to pay, and whether they can pay while still living at a reasonable subsistence level (see American Law Institute 2014: § 6.04(6) and Comment).

Despite a shortage of statistics, there is much suggestive evidence that AECM extends to financial sanctions.

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38 Things may be changing. America’s “mass fines” practices gained prominence post-Ferguson, where the police shooting scandal was supplemented with a report revealing “soaking the poor” and “debtors’ prison” scandals. The same has been uncovered in more and more jurisdictions (Harris 2016; U.S. Department of Justice 2015; American Civil Liberties Union 2010; Bannon et al. 2010). In 2014, National Public Radio reported on a yearlong investigation into user fees imposed by courts and corrections agencies in a series of broadcasts called “Guilty and Charged.”
Figure 3. Per Capita Prison Growth by Sentencing System Type, 1980 to 2009
First, we know that economic penalties have been rapidly expanding in the U.S. since the 1980s, albeit with large variations across states and counties. There has been a sustained uptick in fine amounts, asset forfeitures, and a congeries of costs, fees, and assessments levied against criminal offenders. In all 50 states, there has been a wave of enactment of constitutional and statutory provisions that mandate or authorize victim restitution as part of criminal sentences (Tobolowsky et al. 2010: 155-57). Efforts at collection and enforcement have also intensified, including the piling on of interest and late fees (Bannon et al. 2010).

The ballooning of economic penalties has overlapped with decades of growing income inequality in America. If we imagine a growth curve for the cumulative effect of all these obligations, and their real impact on the already-poor, the slope would be upward with a vengeance for the past three decades or so. And as illustrated in the Department of Justice’s Ferguson Report (2015), disadvantaged minority communities have been hit the hardest. So much fits the AECP pattern.

With caution, we can also posit that other countries do not tax offenders as exuberantly as the U.S. While some European countries have boosted their use of fines over the last 30 years, this has been a part of efforts to reduce the use of short prison terms. Low probation supervision rates in Europe may also owe something to the use of fines as default punishments for low level offenses. Scandinavian countries have developed “day fine” systems that assess proportionate financial penalties according to the wealth and earning power of each defendant. At least in some legal

39 For an excellent compilation and analysis of economic sanctions in Pennsylvania, which come in xxxx varieties, with average amounts wildly different from county to county, see Ruback and Clark (2011).

40 On the growing number, use, and amounts of financial sanctions in the U.S., see Beckett and Harris (2011: 512); Bannon et al. (2010: 1); Corbett (2015: xx); Ruback & Clark (2011: 752–53). On costs, fees, and assessments, see American Law Institute (2014: § 6.04D) (recommending their abolition); Ruback 2015 (same).

41 On the rarity of the imposition of criminal justice costs and fees outside the United States, see O’Malley (2011: 547–48) (“Fees . . . are much less prominent outside the United States, almost never being levied for imprisonment and only in recent years being levied in some jurisdictions for victim compensation and costs of fine enforcement.”).

42 In present-day American culture, economic sanctions do not have much “utility” as retributive punishments. That is to say, a judge’s pronouncement of a large fine delivers little in retributive satisfaction to the American ear. Because of this low retributive valuation, American legal systems have not found it possible to use economic penalties as substitutes for jail or prison terms—and it is likely they do not function as substitutes for probationary sentences either. Instead, in American legal culture, fines, restitution, fees, and surcharges are “add-ons,” rarely viewed as adequate sentences in themselves.

43 See [German] Federal Ministry of Justice (2007: 81) (“In 2004, the sanctions given to 94% of all persons convicted under general criminal law were either fines (80.6%) or suspended prison sentences (13.7%).”); Morris and Tonry (1990: 143–44) (discussing the use of day fines in Scandinavia).
systems, therefore, the application of monetary sanctions shows greater sensitivity to defendants’ means than is commonly true in the U.S.

If America is distinctive in the ways described above, it does not add up to a good program. Offenders under the jurisdiction of criminal courts may be the worst of all candidates to be designated as special taxpayers, no matter how great the need to make up shortfalls in funding for police, the courts, defense services, and correctional programming. Convicted offenders by and large come from the lowest rungs of the economic ladder and are struggling with the stark employment-market disadvantages that come with criminal convictions. Politically, offenders may be attractive targets for special taxation because they are unpopular, tainted by a finding of guilt, and disenfranchised, but American tax policy is distorted when they are exploited or driven into financial hopelessness. Heavy economic sanctions are regressive taxation taken to an extreme.

Nor does any of this serve traditional criminal justice priorities. Revenue generation is not a legitimate purpose of the criminal law, and it is a goal that is antagonistic to the usual concerns of criminal sentencing. Certainly, rehabilitation and offender reintegration do not play major roles in the creation and administration of financial penalties in the U.S.

Several bodies of research into desistance from crime suggest that economic sanctions, when overdone, are criminogenic. Falling behind in payments often leads to further sanctions that deepen the hole for offenders, including suspension of driver’s licenses, lengthened periods of community supervision, arrest warrants, and sentence revocations. Unrealistic or heavy financial obligations interfere with offenders’ abilities to obtain credit, pay for transportation (often essential to employment), and pursue educational opportunities. Damaged credit can make it hard to find housing or land a job. Processes for the collection of criminal justice debt can also disrupt employment relationships—as when garnishment of wages is used—or may simply reduce the incentives of ex-offenders to earn in the legitimate economy. Also, if the burdens of criminal justice debt make it impossible for a husband or father to contribute his share to household

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44 A large percentage are also in arrears in child support payments.

45 No one thinks about the proportionality of economic sanctions in the U.S., standing alone or in combination with other penalties (American Law Institute 2014: § 6.04 and Comment). In part this is because system actors assume that most offenders will never be able to pay their economic sentence amounts in full, so “pronounced” sentences are regarded as flimsy and of doubtful weight in proportionality analysis.

46 Under the law, probationers in most states may be revoked to prison for nonpayment (Mitchell et al. 2014), and the threat of revocation is used as a powerful collections tool. Ethnographic and interview data show that some probationers abscond, and go “on the run,” when they fall hopelessly behind in their fees. At least some others turn to the criminal economy to meet their financial debts to the justice system (see Goffman 2014; Robina Institute forthcoming). Needless to say, these are not outcomes the criminal law should be abetting.
expenses, or even his own living expenses, the sentencing system places strain on the bonds of stable family life (Eaglin 2015; Brennan Center).  

The bulk of social science research indicates that decent housing, strong families, and satisfying work are among the most important protective factors associated with desistance from crime. Criminal justice policies that block or dilute these protective factors are profoundly misconceived.  

A long list of changes would be needed for the U.S. to reform its use of economic penalties. Financial sanctions add up to big money for the police, courts, corrections agencies, and private corrections providers. Police and prosecutors will go to the mat to defend asset forfeitures, for example, which are among the worst abuses. Victims’ rights groups are powerful, and restitution is the most broadly-accepted part of their agenda. Expect huge resistance—and who politically will stand for criminal offenders, overwhelmingly poor, who are caught in the system?  

One large step forward would be to create an enforceable standard of means testing at sentencing, with an across-the-board rule that no economic penalty of any kind may be imposed unless, after payment (of the total amount or scheduled installments), the defendant would still have sufficient economic resources to provide reasonable support for himself and his family. This rule was adopted as part of the new Model Penal Code’s recommendations to state legislatures nationwide (American Law Institute 2014: § 6.04(6) and Comment). If implemented, it would

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47 In addition, when unrealistic economic penalties are visited on offenders, they can inspire feelings of despair or futility, or perceptions of courts’ sentences as illegitimate. None of these are desirable outcomes.

48 Strong work ties and job stability correlate with lower rates of reoffending (Sampson and Laub 1993: 140-41). The acquisition of a “satisfying job,” not just any job, may have an even greater correlation with desistance (Shover 1996: 127). One study found the employment effect greatest for men over the age of 27, with no measurable effect for younger participants (Uggen 2000: 529). On housing, see National Research Council (2007: 54-55) (“Released prisoners who do not have stable housing arrangements are more likely to return to prison.”). One widely-cited study found that being married was associated with a thirty-five percent reduction in risk of reoffending (Sampson 2006: 465). Other research has discovered similar but smaller effects (Horney et al. 1995: 665; Piquero et al. 2002: 654). On the importance of family ties more generally, see National Research Council (2007: 44) (“Greater contact with family during incarceration (by mail, phone, or in-person visits) is associated with lower recidivism rates. Prisoners with close family ties have lower recidivism rates than those without such attachments.”).

49 A frequent objection, or reason given for pessimism, is that most courts have no reliable way to find out how much money a defendant has or can be expected to earn (Eaglin 2015). For myself, I would accept the sworn testimony of the defendant on this point unless the government produces evidence to the contrary. As information systems within and across state governments improve, it will be easier to access defendants’ tax records, social welfare records, and the like. Further, because the criminal defendant population is overwhelmingly poor, it makes sense to “slant” the process in the direction of presuming poverty, with the burden of persuasion on the government to rebut a defendant’s testimony.

50 The new Code includes a comprehensive slate of recommendations to reform economic sanctions law across the U.S.
be significantly more muscular than the weak “ability-to-pay” protection in constitutional law.\textsuperscript{51} Given the financial standing of most defendants in state criminal courts, a “reasonable subsistence” standard would drastically cut back on imposition of financial penalties in the aggregate, and would foreclose the worst abuses in states’ and local governments’ current practices.

\textit{Collateral Consequences of Conviction}

Across the U.S., the number of civil legal consequences of conviction had dwindled to historic lows in the 1960s,\textsuperscript{52} but soon began to grow by leaps and bounds (Klingele, Roberts, and Love 2013). Today, “[p]eople convicted of crimes are not subject to just one collateral consequence, or even a handful. Instead, hundreds and sometimes thousands of such consequences apply under federal and state constitutional provisions, statutes, administrative regulations, and ordinances.” (Chin 2012). As summarized by the American Law Institute (2014: § 6x.01, Comment a):

[I]n 1962, the primary consequence of conviction was a fine, probation, or a period of incarceration. Collateral consequences were limited in most cases to a temporary loss of the right to vote, hold public office, serve on a jury, and testify in court. Since then collateral consequences have proliferated, and now include mandatory deportation, inclusion on a public registry, loss of access to public housing and benefits, financial aid ineligibility, and occupational licensing restrictions. Some of these consequences last for the duration of the convicted individual’s life.

Professor Michael Pinard has said that, “Given the breadth and permanence of collateral consequences, [convicted] individuals are perhaps more burdened and marginalized by a criminal

\textsuperscript{51} \textit{Bearden v. Georgia}, 461 U.S. 660, 672, 674 (1983) (offenders may not be incarcerated for failure to pay a fine or restitution unless they “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay”; there is an exception, however: offenders without ability to pay may be incarcerated for non-payment “if alternative measures are not adequate to meet the State’s interests in punishment and deterrence”). By many accounts, the \textit{Bearden} principle has not been applied conscientiously by many courts. See American Civil Liberties Union (2011: 5) (“Today, courts across the United States routinely disregard the protections and principles the Supreme Court established in \textit{Bearden v. Georgia} over twenty years ago. . . . [D]ay after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them.”). See also Bannon et al. (2010: 20); Beckett and Harris (2011: 524–25); Katzenstein and Nagrecha 2011: 565).

\textsuperscript{52} Civil consequences of criminal conviction have deep historical roots in Roman and Germanic law (Demleitner 2017). In England and early America, convicted felons were subject to “civil death,” and lost most of their legal and civil rights, including the ability to sue another person in court. The severity of these civil consequences was mitigated, however, by the relative frequency of pardons in those times. Also, recordkeeping and information systems were primitive, allowing people to slip between the cracks relatively easily, and civil death applied only in the state in which a person was convicted (Chin 2012).
record today than at any point in U.S. history” (2010a: 1219). Nonetheless these sanctions fly below radar because the individual unit of punishment appears minor; they are far from the stuff of television drama.

The vast majority of these collateral sanctions are technically classified as “civil” and “regulatory” measures rather than “criminal punishments”—but they must be included in an overall accounting of the harshness with which Americans are treated after the conviction of a criminal offense. They are laws that make it harder, and often more humiliating, to live—and they persist long after criminal sentences expire. Margaret Love (2012: 250) has observed that, “[a]s a practical matter, … collateral consequences have become more important to many criminal defendants than any penalty likely to be imposed by the court.”

Not only have collateral consequences increased in their effects on individual offenders, but their societal effects have been doubly magnified because the number of people carrying criminal convictions has itself exploded. While something approaching seven million people are serving a criminal sentence on any given day in the U.S., it is estimated that ten times that number have a record of prior criminal conviction (Jacobs 2015; Rodriguez and Emsellem 2011). We are obviously not targeting the hardest-core criminals. The majority of people who suffer under collateral consequences have never been to prison—a conviction followed by a probationary or suspended sentence also triggers the cascade of sanctions (Chin 2012).

Stated as a hypothesis rather than a conclusion, collateral consequences of conviction in the U.S. appear to exhibit the hallmarks of AECP: they greatly expanded in the U.S. the late decades of the 20th century, in parallel with prison and jail populations, probation, parole, and economic penalties. They are racially disparate in their effects, and hit the poorest and most disadvantaged ex-offenders the hardest (Alexander 2010; Pinard 2010b). If they reflect a criminal justice philosophy, it is one of punishment and incapacitation, with little regard for net effects on recidivism rates and public safety. Less charitably, they may simply be policies of exclusion and segregation.

While the number of comparative policy analyses is small, they have concluded that America has earned exceptional status in the domain of collateral consequences when compared with other Western democracies (Pinard 2010b; Demleitner 2017). As Nora Demleitner puts it:

53 Jacobs points out that informal discrimination against people with criminal histories is more robust in the U.S. than in many other societies because the U.S. makes arrest and conviction records more widely available to the public. Jacobs calls this “U.S. criminal record exceptionalism” (2015: 159) (“In Europe, individual criminal history records created and held by the police are not available to non-police agencies, much less the media and general public.”).

54 More than this, the number and severity of collateral consequences may be increased long after the dates of offenders’ convictions, or after they have completed their criminal sentences. There is no ex post facto prohibition on increased punishment in this context, because the vast majority of collateral sanctions are deemed civil and regulatory rather than criminal (Chin 2012: 1811; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).
The starkest differences between collateral sanctions in Europe and the U.S. are the breadth, automaticity, and often the lengths of the consequences that befall offenders in the U.S. even after they have served a criminal justice sentence. … Even though sanctions generally have also become harsher in Europe in recent decades, collateral sanctions remain more narrowly targeted, less comprehensive, usually imposed directly and publicly, not retroactive, and time limited.” (2017: xx).

Moreover, legally-instantiated collateral consequences float in the community alongside powerful social and economic forces of exclusion that unfold privately, without legal mandate or encouragement, as when an employer turns down a job applicant, a parolee cannot rent an apartment, or a person with an arrest or conviction on their record cannot find a college willing to admit them. All of these informal disabilities are especially enabled by American laws, however, which make criminal-record information freely available to the public, including private vendors who gather and maintain databases that cannot practicably be corrected (when wrong) or expunged when outdated.

Taken as a broad category, collateral consequences affect more lives in America on a daily basis than any other repercussion of a criminal conviction. If the death penalty is the small-numbers phenomenon of AECP—a relative drop in the bucket—then collateral effects are a sea. Indeed, they add credence to a theory that the greatest social impacts of an overgrown criminal justice system tend to be low on the scale of punitiveness of intervention. Racially stilted stop-and-frisk and traffic stops (“walking” and “driving” while black), fines and fees extracted overwhelmingly from the poor, extraordinarily high community supervision rates with decreasing emphasis on services—these are all low-level uses of force when compared with capital punishment and imprisonment, yet they touch millions of lives and are in general oblivious to their own criminogenic properties or any assessment of proportionality in their cumulative use.

While collateral consequences have been on the American criminal law reform agenda for two decades, the comparative perspective (which gives the term “mass incarceration” so much of its meaning) has not been fully exploited. It would be useful to know if any other democratic society approaches the U.S. in the disabilities it imposes on ex-offenders, or the degree to which it facilitates private discrimination. If you ask around, at international conferences or when working abroad, the usual answer is “no,” but a more precise documentation of America’s outlier status would be helpful. Many in the U.S. see only the range of possibilities in their own jurisdictions—and true alternative models are not found in domestic law.

It would be a staggering job to limit or repeal the thousands of statutes, across state and federal codes, that make up the confusing jumble of collateral consequences now in force. The ABA undertook merely to compile the relevant laws in state and federal codes, and it proved an endless task (American Bar Association 2016). Any program of direct reconsideration of these provisions, one at a time, would make a good entry in the legal dictionary under “piecemeal reform.”
A more sweeping approach could be to give sentencing judges the power to grant relief from collateral consequences, either at sentencing or at a designated later time—but this is a responsibility most judges do not want or feel qualified to discharge. In fact, at the root of this particular outcropping of AECP, no one is at the wheel. There is still great uncertainty about who should be professionally responsible for comprehending this subfield of criminal punishment, let alone administering it in a prosocial way.

**AECP in Broader Focus: Serious Violent Crime**

America has long been an outlier among developed democracies for its high rates of homicide and serious violent offending more generally (Roth 2017; Lappi-Seppälä 2017). This is not true for all crimes across the board. Zimring and Hawkins (1997) drew a distinction between “crime in general” and the small percentage of all criminal acts that are lethal or near-lethal in their effects. The U.S. does not have more “general” crime than other Western societies when corrected for population—but it has considerably more homicides, near-homicides, and serious woundings.

American serious violent crime rates surged from the early 1960s through the early 1970s, and then remained at very high levels for two decades—a 20-year period one might call the “high-crime plateau” (Wilson 1996). After 1993 and through 2014, American crime rates dropped or remained stable—the “crime drop” period—returning the U.S. to low volumes of crime not seen since the 1960s. Even today, however, American homicide rates remain high by Western standards. To illustrate, Figure 4 depicts the crime drop in homicide for seven English-speaking countries from 1994-2014. Even after 20 years of remarkable decline, the 2014 homicide rate in the U.S. remained about three-to-four times that of Australia, Canada, England, Ireland, New Zealand, and Scotland.\(^5\)

[U.S. homicide rates were also more than four times the rates in most of Western Europe, including Austria, England, France, Germany, Italy, the Netherlands, Portugal, Spain, and Switzerland (Institute of Criminology and Legal Policy, University of Helsinki 2016).](#)
Figure 4. Homicide Rates, 7 English-Speaking Countries During "Crime Drop" Decades, 1994-2014 or most recent
standardized to 100. While homicide increased by a factor of 2.1 over the period, the reported robbery rate increased by much more (3.5X), while rape (2.75X), and aggravated assault (2.4X) also outstripped the homicide increase.\textsuperscript{56}

[Insert Figure 5 here]

No other Western nation had a comparable experience. Figure 6 tells the story of homicide rates in seven English-speaking countries from 1962 to 1972. Correcting for population, the annual number of additional homicides in the U.S. from 1962 to 1972 was 4.5 per 100,000 population. Among the other countries in Figure 5, the average increment of change was 0.x; the largest was in Canada: 0.9 per 100,000.

[Insert Figure 6 here]

In an ill-fated juxtaposition, the frightening crime spike of the 1960s coincided with a time of wide-ranging liberalization in the nation’s criminal justice policies. As surveyed by Ruth and Reitz (2003), major markers of this advancement included the following:

- 1960 through 1972 was one of the rare periods since the invention of American penitentiaries in which the nation’s imprisonment rate declined substantially.
- Through the 1960s, the U.S. Supreme Court issued a remarkable series of decisions that asserted federal power over state criminal justice systems and placed new federal constitutional limits upon state criminal courts, juvenile courts, and police activities nationwide.
- The lower federal courts became significantly involved in overturning state court convictions through federal habeas corpus review.
- The use of capital punishment in the U.S. dwindled through the 1960s and early 1970s, partly due to Supreme Court intervention, falling to zero executions from 1968 to 1976. Compared with any prior decade in the 20\textsuperscript{th} century, the 1960s saw the flowering of a death-penalty-abolition movement.
- The liberalization of criminal justice policies was strongly associated with the Civil Rights movement, which itself moved ahead with particular momentum in the 1960s. Charges of racial discrimination in policing, prosecution, and sentencing were broadly voiced and were taken seriously by large segments of the American public.
- The gun control movement in America became more visible and assertive than ever before in the nation’s history.

\textsuperscript{56} The Uniform Crime Reports of this era probably exaggerated the actual increases in robbery, rape, and aggravated assault, but an informed estimate is that rates of all four crimes actually doubled from 1962-1974—very close to the curve of the homicide spike (see Ruth and Reitz 2003: xx).
Figure 5. Crime Spike: Four Serious Violent Crimes, 1962-1974, (Standardized to 100 in 1962)
Figure 6. Homicide Rates, Seven English-Speaking Countries, 1962-1972
• In the early 1970s, the federal courts became active—sometimes to the point of micromanagement—in regulating conditions of confinement in prisons and jails at federal, state, and local levels.

• Laws against drug possession, public drunkenness, and public order offenses were relaxed in the 1960s and early 1970s, as was the enforcement of those laws. Some were declared unconstitutional by the federal courts.

• Legal changes in case processing and courtroom procedure during the 1960s focused almost exclusively on the rights of criminal defendants, and either ignored or worked against the interests of crime victims.

• The 1960s and early 1970s were marked by broad-based enthusiasm, among policy makers and criminological experts, in favor of programs for the rehabilitation of criminals and social welfare programs aimed at poor and crime-ridden communities. A Presidential Crime Commission declared that “Warring on poverty, inadequate housing and unemployment, is warring on crime. A civil rights law is a law against crime. Money for schools is money against crime. Medical, psychiatric, and family-counseling services are services against crime. More broadly and most importantly every effort to improve life in America’s ‘inner cities’ is an effort against crime.”

Of course, the upheavals of the 1960s reached far beyond criminal justice. Many destabilizing forces reared up during this turbulent decade—including many that invited a conservative backlash.

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57 President’s Commission on Law Enforcement and Criminal Justice (1967: 6).

58 This chapter can’t even sketch a history of the 1960s in America, but here is a list of some of the most memorable disruptions: Urban riots across major cities, the assassinations of a president, a national civil rights leader, and a presidential candidate. The Vietnam War and the rise of student protests across universities, the Cold War, the threat of nuclear holocaust (which was still novel enough to provoke all sorts of irrational behavior). The rise of youth culture and the sexual revolution. The rise of a militant black protest movement. The unraveling of the 1950s “Leave It to Beaver” model of the stable nuclear family with low divorce rates and stay-at-home mothers. For a rich description, see Garland (2001).

59 Including every part of Lyndon Johnson’s “Great Society,” federal Civil Rights legislation, and voting rights legislation.
Unique in America, however, was the collision between an especially horrific violent crime spike and a robust liberal revolution in criminal justice law and policy. Virtually every element of the leftist reform agenda was actually moving forward—but the seeming effects were awful.\(^6\)

Figure 7 gives one graphic illustration of the train wreck. It displays the crisscrossing of prison rates and homicide on the \(y\) axes. We could draw a similar picture over and over again using other serious violent crimes and alternative indicia of the increasing “softness” of American crime policies.

[Insert Figure 7 here]

By the mid-1970s, the pillars of liberal criminal justice ideology collapsed with unceremonial abruptness. Robert Martinson’s 1974 meta-analysis of rehabilitative programs concluded that most did not work or had only small effects, and some programs made criminals worse. The study made a tremendous splash, and spawned the “Nothing Works” outlook that towered over the field for the next 20 or 30 years. In 1975, James Q. Wilson’s *Thinking About Crime* repudiated every major tenet of the liberal criminal justice philosophy of the 1960s. The book became the most influential academic work in the history of American crime policy, and served as an intellectual blueprint for conservative reaction. Wilson skewered rehabilitation, promoted deterrence and incapacitation, and argued that his program was firmly on the moral high ground. The book concluded (at 209) with the following summation:

> Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cue to what they might profitably do. We have trifled with the wicked, made sport of the innocent, and encouraged the calculators. Justice suffers, and so do we all.

Sentiments like these granted permission to conservative leaders and a frightened public to see criminals as unchangeable and evil, or venal and calculating, fully deserving of harsh treatment when necessary to protect society.

What made everything worse was that, after serious violent crime rates had shot up so precipitously through the early 1970s, they then remained at those elevated levels for the next 20 years. See Figure 8. Persistently high crime rates are in some ways more conducive of outrage and despair than spiking rates, because they suggest permanency. As the crime spike settled into the crime “plateau,” America’s self-image became one of a “high-crime society” (Garland 2001). In major cities, perceptions of disorder and personal danger were ingrained in daily life. By the early 1990s, there had been no stretch of time in the past 30 years that did not feature sharply increasing crime rates or rates that were “stuck” at peak levels.

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\(^6\) I do not personally believe that liberalization of crime policy in the 1960s contributed very much to the upsurge in crime—but I am here mostly concerned with appearances and understandable public perceptions at the time.
Figure 7. Scissors Effect: U.S. Homicide and Prison Rates, 1962-1972
After three decades in the making, it took awhile for the high-crime mentality to ease in Americans’ psyches. When the crime drop began in 1993, it was the most unanticipated societal transformation since the crime spike, and it did not achieve credibility as a sustained phenomenon for 10 years or so. (This is about the same period of delay as between the beginning of the crime spike in the early 1960s and the solidification of the get-tough orientation in the early 1970s.)

Indeed, even as the U.S. crime drop was gaining steam, respected national leaders and criminologists were warning the nation to expect a “blood bath” through the 1990s and into the 2000s as a large demographic of “juvenile super-predators” aged into the prime of their criminal careers (DiIulio 1995; James Alan Fox 1995; Bennett, DiIulio, and Walters 1996; Haberman 2014). Newsweek (1995) reported that, “Criminologists are already warning that the United States can expect another wave of violent crime in the coming decade, and some say it will be much worse than the one that is now subsiding.” James Q. Wilson, by then the nation’s preeminent political scientist and an adviser of Presidents, urged the public to “Get ready.” (1995: xx).

By the early 00s, however, serious people were taking serious notice of the crime drop. The search for explanations became an academic specialty—including, most famously, the theory that the establishment of women’s right to an abortion was the most significant factor (Donohue and Levitt 2001; see also Blumstein and Wallman 2000).

If American exceptionalism in crime was one proximate cause of the country’s long season of punitive expansionism, then an era of lower crime rates should create room in political dialogue and public opinion for a loosening those policies. This is not likely to happen in year-by-year correspondence with drops in homicide and other serious violent offenses, but as the culture gradually assimilates new expectations about criminality and the vulnerability of the average citizen.

Over time, one would expect to see a tentative slowing, stopping, and reversal of the growth in prison, probation, and parole populations, and conversation about more of the same. One would expect a nascent awareness of the burdens on the already-impoverished when economic sanctions and collateral consequences of conviction push them further into hopelessness. One would expect a return to the days when the excesses of the criminal justice system were prominently linked in the public mind with issues of racial injustice. One would expect greater and more successful political activism from the inner cities, as the majority culture evinces somewhat more willingness to listen. If any of the above things were to happen, they would be good signs.

For those who would advocate major changes, however, a serious problem will the difficulty of ground-level, unglamorous implementation. So far there has been an unmistakable change in the rhetoric of criminal justice reform in the U.S., but it is mostly talk. Because of our crazy-quilt

61 As Wilson is so quotable, here is the entire passage: [book in office]
The Homicide "Plateau" in the U.S. 1972-1993
Contrasted with Homicide Spike, 1962-72
federal system, and our peculiar empowerment of local governments, there are uncounted efforts to be launched—each requiring calibrated adjustments for local circumstances—and hordes of people to persuade in the micro-cultural pockets throughout America. And local governments may be particularly hard targets, if Lacey and Soskice (2017) are right that political realities at the local level lean naturally toward policies that drive crime rates and punitive severity upward at the same time. Even with the crime drop fueling changes in politics and public attitudes, the problems of logistics in trying to access so many different fiefdoms should not be underestimated. It is nearly impossible to overestimate them.

In addition, pinning reformist optimism to a new “low plateau” of American crime rates is not a wholly defensible way to plan for the future. Just because the nation experienced a historic crime drop from 1993 to 2014 does not mean that we can count on crime to continue going down, or even stay where it is. The newest FBI reports for 2015, for example, show homicide rates rising quickly in many major cities, including Chicago, Saint Louis, and Baltimore, with a ten percent increase in homicide nationwide from 2014-2015 (Federal Bureau of Investigation 2016). What is the plan if we enter a new crime spike? The optimist must hope that Americans will have learned something from the societal catastrophes of the past 40 years. Constructive strategies to fight crime in the coming years will deserve greater attention than they received during the last panic over rising crime rates (e.g., policing reform, gun control, early childhood care for those who can’t afford it, reinvestment in public schools, renovation of social welfare programs). The 1960s sentiment that “warring on poverty is warring on crime” may deserve more of a genuine test drive than it received in the 20th century—and now we have reason to believe that successful efforts to “war on crime” can reinforce a “war on mass punishment.”

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