



Written Testimony to the Little Hoover Commission

Peggy McGarry
Director, Center on Sentencing and Corrections

Vera Institute of Justice
June 25, 2013

Introduction

I have attended several meetings and symposia over the last 12 months in which speakers have noted that comprehensive sentencing reform in the United States is in the midst of a “renaissance” (that from former Attorney General Edwin Meese) or has arrived at “moment of opportunity.” The federal government and the states are reexamining expensive and ineffective policies and practices that have helped push states toward insolvency and done little to make our streets safer.

The seeds of change have begun to show promise in a number of states, but much more needs to be done if this time of opportunity is to be realized.

Before we consider what might be done to change our current sentencing and incarceration trajectory, it is helpful to understand how the U.S. got to the situation it’s in as well as to review some more current developments.

This testimony reviews:

- The current state of incarceration in the U.S.
- The history and trends that have brought us to this point.
- A brief overview of the research on recidivism and incarceration.
- A review of some of the approaches taken by other Western, developed nations.
- What the future might look like.

The Current State of Incarceration in the U.S.

In the last 40 years, the number of people incarcerated in the U.S. increased by 705 percent. In 1925, there were 85,239 state prisoners. This figure rose to 174,379 in 1972. By 2009, the number of state prisoners had skyrocketed to 1,407,002; and more than 1 in 100 Americans were behind bars.

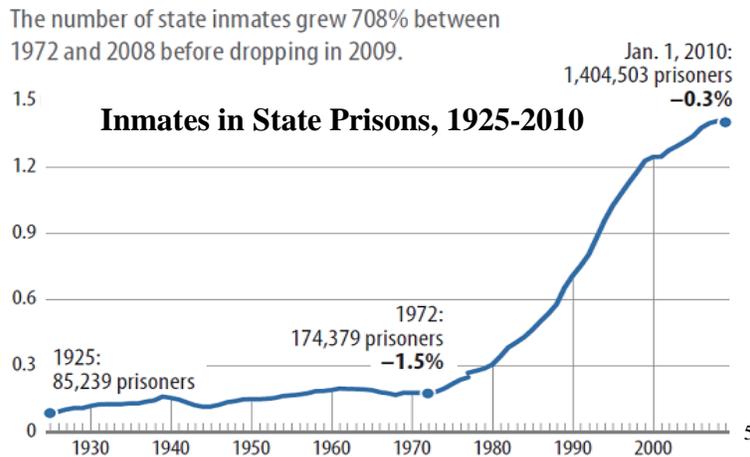
Two thousand and ten marked the beginning of change: For first time in 38 years, the number of state prisoners decreased: A 0.3 percent decrease resulted in 4,777 fewer state prisoners. Despite this dip, however, the overall number of prisoners in America rose, as the number of those incarcerated by the federal government increased by 3.4 percent.¹ The trend

¹ The Pew Center on the States. *Prison Count 2010*. (Washington, DC: 2010).

continued with a 1.5 percent decrease in state prisoners from 2010 to 2011.² From 2006 to 2011, 29 states lowered their imprisonment rate. California led with the biggest drop—17 percent.³ (Though, according to the state’s May 2013 report to the federal court, California’s numbers have begun to rise again.)

Year	Number of State Prisoners in U.S.
2011	1,382,418
2008	1,407,002
2000	1,248,815
1972	174,379
1925	85,239

This 705 percent increase in prison populations has been accompanied by comparable increases in the costs of building and running prisons: Between 1985 and 2009, annual correctional expenditures from state general funds increased from \$6.7 billion to more than \$47 billion.⁴



² E. Ann Caron and William J Sabol. *Prisoners in 2011*. (Washington, DC: 2012).

³ The Pew Charitable Trusts. *More Than Half of States Cut Imprisonment Rates Infographic*. (Washington, DC: 2013).

⁴ Compare figures noted in National Association of State Budget Officers, *The State Expenditure Report* (Washington, DC: 1987) 8, table 2 and National Association of State Budget Officers, *The State Expenditure Report* 54 (Washington, DC: 2009) 54.

⁵ *Prison Count 2010*.

The Factors Driving the Prison Population:

The numbers of people in prison on any given day are a combination of the number of people admitted and how long they stay.

Prison admissions can come from three different sources:

- a straightforward criminal sentence for the commission of a crime;
- the revocation to prison of those on probation or parole who have committed an infraction of the rules or conditions of supervision—so called “technical violations”—and who have been ordered by the paroling authority or the court to prison to serve either a portion or the balance of their sentence; or
- the revocation to prison of those on probation or parole who have committed a new offense; the revocation may be in lieu of prosecution on the new offense (especially if it is a weak case or low-level crime) or may be in lieu of jail pending adjudication.

Recent Reform Efforts

Recent high-profile national efforts to reduce prison populations, like the Justice Reinvestment Initiative (JRI)⁶ or the Second Chance Act⁷, have focused heavily on the middle group: those revoked for technical violations of probation and parole. State recidivism rates ranging from 23 to 60 percent, with a national average of 44percent⁸, forced many state and federal policymakers to acknowledge the lack of success criminal sentencing was having in deterring people from crime and to focus instead on better preparing inmates prior to release and those on probation and parole to live crime-free in the community. (Prior to the passage of SB 678 in 2009, California led the nation with revocations at 70 percent of prison admissions.)

⁶ The Justice Reinvestment Initiative (JRI), a project cosponsored by the U.S. Department of Justice’s Bureau of Justice Assistance (BJA) and The Pew Charitable Trusts, applies a data-driven approach to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and strengthen neighborhoods. Participating states and localities receive technical assistance and financial support to collect and analyze data on factors that increase corrections populations and costs, identify and implement changes that address costs and achieve better outcomes, and measure the fiscal and public safety impact of those changes.

⁷ The Second Chance Act is federal legislation designed to ensure the safe and successful return of prisoners to the community. It provides grants to local governments and organizations to help provide literacy classes, job training, education programs, and substance abuse and rehabilitation programs for offenders.

⁸ Pew Center on the States, *States of Recidivism: The Revolving Door of America’s Prisons* (Washington, DC: The Pew Charitable Trusts, April 2011).

The population analyses conducted in JRI states to understand the dynamics of their prison populations revealed that virtually every state was suffering from very high rates of revocations for technical violations. Inadequate understanding of offender behavior, inadequate resources to respond to infractions with appropriate interventions or changes in supervision, and fear of liability on the part of supervision agencies and their officers combined to fuel the growth of these revocations. The subsequent impact on prison populations was substantial.

These national efforts have focused on supporting better training and education of supervision officers and their supervisors to make success in the community more likely⁹; on legislation to offer incentives to both prisoners and those on supervision to participate and complete appropriate programming and treatment¹⁰; on legislation that directs programming dollars to research-proven approaches¹¹; and the creation of intermediate responses to technical violations that protect officers from liability if they don't revoke¹². And building on California's success with SB 678, states like Illinois and Kentucky have also implemented performance-incentive funding for local agencies.¹³

The incentives for program completion passed in many states are not changes in sentence length, but changes to how a portion of the sentence is served: early release to the community or early discharge from supervision. Participants, however, remain subject to their original sentence if they are involved in a new crime or a major incident.

In short, these initiatives have attacked the prison population problem in two ways: by reducing the numbers coming in based on pre-existing convictions, and by allowing prisoners to reduce their time in prison through the completion of programs that make life after prison more likely to be successful.

⁹ For examples. see Arkansas SB 570 (2011) and South Carolina S1154 (2010).

¹⁰ For examples. see Delaware SB 226 (2012), Oregon SB 1007 (2010), Mississippi SB 2039 (2009) and HB 1136 (2010).

¹¹ For example. see Georgia HB 1176 (2012), North Carolina HB 642 (2011), and New Hampshire SB 500 (2010),

¹² For examples. see Missouri HB 1525 (2012), Kentucky HB 463 (2011), and Louisiana HB 415 (2011).

¹³ Vera Institute of Justice, *Performance Incentive Funding: Aligning Fiscal and Operational Responsibility to Produce More Safety at Less Cost* (New York: Vera Institute of Justice, 2012).

There have also been some sentencing changes in states like Colorado, Kentucky and Louisiana, primarily to the categorization of and sentences for drug offenses.

The Factors Making This a “Moment of Opportunity”

What has made this such a “moment of opportunity”? The impact of thirty years of sentencing policy changes, primarily in the elimination of discretion for judges; the growing costs of building and operating prisons at the expense of funding for community supervision and treatment; the steadily declining crime rates; and the growing recognition of the long-term consequences of incarceration on the offender as well as his or her family and community at large (such as effects on jobs and earnings, children’s future likelihood of being incarcerated, the separation of families from restrictions on where ex-offenders can live) have united liberals and conservatives – albeit for very different reasons. The impetus for change comes from four primary sources:

- religious beliefs;
- the existence of an ever-growing body of research on recidivism reduction strategies;
- the costs of prison and the toll on taxpayers and other parts of public budgets; and
- recent publicity about the outsized impact of incarceration on communities of color.

For some, both liberals and conservatives, religious convictions about the possibilities of redemption and second chances are powerful. The frequency of revocations for failing to do what the system has not helped offenders to do or in many cases made impossible – from finding a job to overcoming persistent addictions – has caused many to raise the issue of the government’s obligation to help those who have done their time and “paid their punishment debt” to now have a chance at success. This has prompted a reexamination of “collateral consequences”— the myriad laws and regulations that keep ex-offenders out of public housing, from qualifying for education assistance, and from obtaining many types of employment. For example, with support from the U.S. Department of Justice (USDOJ), the American Bar Association is creating an interactive map that allows the viewer to click on a state and see a list of all its regulations and laws that limit an ex-offender’s participation in society; and Ohio, after

discovering more than 800 such regulations and laws on its books, passed legislation last year to repeal many of them. These efforts have been accompanied by a push, under the rubric of “reentry,” to provide the active assistance that prisoners and parolees need to succeed: assistance like mental health and substance abuse treatment, temporary housing, mentoring, transitional jobs, and so forth.

Early efforts at sentencing reform (1978 – 1990) were often predicated on the belief that there were no effective interventions, treatments, or programming that could significantly alter an individual’s inclination to commit crime. However, in the early 1990s, the Canadian researchers Don Andrews, James Bonta, and Paul Gendreau began to publish the findings of their research with offenders in Canada which demonstrated that, with careful, objective assessments of individual risks and needs, targeted interventions do work. The USDOJ, through its National Institute of Corrections and Bureau of Justice Assistance, has made the work of these researchers and its subsequent validation by American researchers widely available and now requires evidence of its use in much of its grant funding. Many policymakers have embraced these findings – which directly undercut the premise that all we know how to do with offenders is punish them.

Many conservative legislators and governors have recognized that the huge increases in the prison population are not dictated by rising crime but by policy decisions that can be changed. And those past decisions are proving costly: state correctional costs nationally are estimated at 52 billion annually; in nine states the budget for prisons is well over \$1 billion.¹⁴ At a time of fiscal crisis, this diversion of tax dollars for prisons has meant fewer dollars for things like education, economic development, and infrastructure improvements; and has caused a greater drain on other public services as ex-offenders cannot find jobs and they and their families need services like homeless shelters, food stamps, and housing assistance.

For many liberal policymakers, for whom the issue of crime and punishment has been an Achilles heel for decades, the appalling impact of incarceration policies on communities of color

¹⁴ The Pew Center on the States, *State of Recidivism: The Revolving Door of America’s Prisons* (Washington, DC: 2011); Christian Henrichson and Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (New York, NY: Vera Institute of Justice, 2012).

and the widespread attention given to Michelle Alexander's *The New Jim Crow* have made incarceration difficult to ignore. (Men of color disproportionately make up our prison population. In 2008, one in 106 adult White males was behind bars versus one out of 15 Black men; among women there is similar disparity: one in 355 White women ages 35-39 was behind bars, while this figure was one in 100 for Black women.¹⁵) This disproportionate impact of earlier policies, combined with their concerns about budget cuts to education, public housing, health and mental health care, and other programs have encouraged liberals to make common cause with conservatives on making changes.

The Growth in Prison Populations Since 1970

The huge growth in the U.S. prison population, now the highest per capita in the world, is the result of a number of policy choices made at the state and federal levels over forty years. While I am not a historian or researcher, I have lived through and worked in this field for most of the years in question and these are my observations of some of the seminal research, writing, and legislation that drove the situation with which we are now dealing.

Three factors stand out:

- early research, beliefs, and assumptions
- sentencing law changes
- incentives to build new prisons

Early Research, Beliefs, and Assumptions

Before the 1970s, virtually all states had indeterminate sentencing schemes that gave judges wide latitude to set a range of punishments and time for most offenses. They also gave authority to parole boards to take note of and reward personal change while in prison with discretionary release onto parole within the time frame established by the judge (the minimum and maximum sentence). The political and racial unrest of the 1960s brought new attention to many aspects of our criminal justice system, including the behavior of its decision makers. Two works captured the thinking of the time and had enormous influence on subsequent discussions:

¹⁵ The Pew Center on the States. *One in 100: Behind Bars in America 2008*. (Washington, DC: 2008).

- In 1971, a committee of the American Friends Service Committee, the social action and social service arm of the Philadelphia Yearly Meeting of Friends (Quakers), released *Struggle for Justice*, the result of their observations of the parole process. Their conclusion was that indeterminate sentencing and the great discretion afforded to parole boards produced arbitrary decisions and racial discrimination.
- In 1973, Judge Marvin Frankel published *Criminal Sentences: Law without Order* which made a similar argument: that sentencing had come to reflect the bias of judges rather than the rule of law. Judge Frankel called for the creation of sentencing councils or commissions to standardize sentences and eliminate bias.

Within the context of these discussions about bias in sentencing and parole release decisions came the publication in 1975 of Robert Martinson et al's: *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*. This study argued that rehabilitative programming provided in prisons and to parolees was of little use in preventing recidivism. It became widely and commonly known as the “nothing works” document, and, without knowing much about its methodology or the nuances of its conclusions, many took up the slogan that “nothing works anyway.” Although the study’s methodology—as well as its conclusions—was roundly criticized by many researchers in the ensuing years, the slogan proved to have staying power.¹⁶

These three documents had tremendous influence over policymaking in the late 1970s and early 1980s and their impact was enhanced by another study, done by the Rand Corporation and published in 1982, *Selective Incapacitation*. This research, based primarily on in-person interviews done in prisons, concluded that for every crime that a person, particularly a young man, was convicted, he had likely committed many more crimes for which he was never caught.

¹⁶ Paul Gendreau and Bob Ross, “Effective Correctional Treatment: Bibliotherapy for Cynics,” *Crime & Delinquency* 25, no. 4 (1979): 463-489; Paul Gendreau, “Treatment in Corrections: Martinson was Wrong,” *Canadian Psychology* 22, no. 4 (1981): 332-338; James McGuire and Philip Priestley, *Offending Behavior: Skills and Stratagems for Going Straight* (Pennsylvania: Batsford Academic and Educational, 1985); David Thornton, “Treatment Effects on Recidivism: A Reappraisal of the ‘Nothing Works’ Doctrine,” in *Applying Psychology to Imprisonment: Theory and Practice*, edited by Barry McGurk and David Thornton (London, England: Her Majesty’s Stationary Office Books, 1987); David Farabee, “Reexamining Martinson’s Critique: A Cautionary Note for Evaluators,” *Crime & Delinquency* 48 (2002): 189-192.

Accordingly, the best crime prevention strategy – especially given that “nothing works” in rehabilitative programming – was to lock up young men convicted of certain crimes until they had “aged out” of their maximum criminality: selective incapacitation.

Sentencing Law Changes

These studies and publications had a huge impact on policymakers for many years. Convinced that discretion in sentencing and release decisions had resulted in biased and unscientific outcomes, and that rehabilitation was an unachievable goal in corrections (despite its name!), the federal government and the states began to establish sentencing commissions (from Judge Frankel’s recommendation) and adopt determinate sentencing. Both were intended to reduce disparity and bias, enable victims and offenders to know exactly how long the time in prison would be, and base sentencing on the severity of the crime and the individual’s criminal history – having punishment that fit the crime rather than tailored to an individual.

Minnesota in 1978 was the first state to adopt a sentencing commission and eventually sentencing guidelines that accounted for crime severity and criminal history and provided a date certain for prison length of stay. By 1994, 17 states and the federal government had adopted sentencing guidelines. These and other changes, like mandatory minimum sentences and three-strikes laws, were predicated on two assumptions:

- That the primary purpose of sentencing is to punish; and
- That the only recourse available to prevent crime was to incapacitate those already convicted by sending them to prison.

Below is a brief timeline:

- 1978: Minnesota Sentencing Commission established. Guidelines adopted in 1980.
- 1980: Washington adopts guidelines and many other states move to eliminate parole and create determinate sentencing and mandatory minimum prison sentences.
- 1984: Federal Omnibus Crime Bill establishes a federal sentencing commission.

- 1986: Anti-Drug Abuse Law (the Len Bias Law); 100-1 sentencing ratio for crack versus powder cocaine; created mandatory minimum prison sentences for drug offenders in the federal system.
- 1994: Violent Crime Control and Law Enforcement Act; it established:
 - Truth-in-sentencing law which required states to commit to creating new laws that mandated “violent” offenders serve 85% of their full sentence in prison in return for federal funds to build (but not operate) new prisons. States were allowed to adopt their own definition of “violent.”
 - Federal three-strikes law for violent crimes and drug trafficking;
 - \$7.9 billion for prison building vs. \$318 million for drug treatment; and
 - Sex offender registration requirements.
- 1994: California Three Strikes Law

The early concerns about consistency, fairness, equity, and proper punishment in sentencing, embodied in early guidelines, very quickly gave way in many states to a series of yearly enhancements, new mandatory minimums, the creation of new crimes in statute (car-jacking, for example), and three-strikes laws that soon left states with a hodge-podge, once again, of criminal sentencing statutes. There are arguments about the causes of this very dramatic increase in the length of criminal sentences in such a short time — from the politics of the 1988 presidential race (Willie Horton ads) and the rise of crack cocaine to a racial backlash. What is inarguable is that, as these laws were copied and recopied across the country, we saw the prison populations rise to the levels present today.

Incentives to Build New Prisons

The surge of new laws and enhanced criminal penalties were not the sole cause, however. There were new inducements proffered to build new prisons in the 1980s and 1990s. In 1983, the Corrections Corporation of America (CCA) was founded and soon after made their first offer (to the state of Tennessee) to build and operate a private prison. This avenue offered quick capital and construction without the need for public bonds or their approval process, and promised a better, cheaper product than the public-sector service. In 1994, with the passage of the Federal Violent Crime Control and Law Enforcement Act, \$7.9 billion in total was made available to any

state willing to adopt “truth in sentencing” – commonly known as the 85% rule – to build new institutions. Many states availed themselves of that option – and, of course, CCA has been joined by several other companies, like GEO, Inc., and private prisons are no longer a novelty.

The Research on Sentence Length and Recidivism

The research from Canada, cited above, later duplicated and refined by both American and Canadian researchers, has had great and growing influence over sentencing policy. Corrections practitioners in many states adopted the approach—often called “evidence-based practices” — long before their legislatures grew interested in mandating it, and they have had impressive results to share with their policymakers. In states like Kansas and Michigan, returns to prison have been cut dramatically. The impact of the findings of the Washington State Institute for Public Policy, which ranks correctional interventions and sentencing options like drug courts for a combination of their effectiveness and return on investment (in public safety dollars saved), also cannot be overstated. These developments have led to a wholesale change in the conversation: If we now know that we can influence and impact behavioral outcomes for most offenders with appropriate assessments and targeted interventions, why would we continue to create or maintain sentencing policies that are based on a “punishment only” model and spend huge amounts of money on sending so many people to prison and keeping them there for long periods of time? The conversation has changed from “how much can we punish” to “what are we doing that promotes public safety and fewer victims.”

As this emphasis from punishment to safety has changed – albeit slowly and around the edges – we need also look at the research regarding the impact of incarceration length on recidivism. Vera has looked at this issue and found very little evidence that length of stay influences recidivism outcomes. Several studies have failed to find a relationship between length of custodial sentence and likelihood of recidivism upon release. In a 1976 study of 1,546 federal prisoners, researchers¹⁷ followed them for two years post-release. The researchers controlled for a number of factors related to risk but found that there was no significant relationship between

¹⁷ Beck, J.L. and Hoffman, P.B. (1976). ‘Time Served and Release Performance: A Research Note.’ Journal of Research in Crime and Delinquency. 13(2): 127-132.

length of time served and recidivism. Another, rigorously controlled study in 2009,¹⁸ of serious adolescent offenders in Maricopa County, AZ, and Philadelphia County, PA found that placement in custody rather than a community-based sanction had no impact on subsequent recidivism rates. Among those in custody, longer sentences again had no relationship with recidivism. Other studies, looking at 20 year recidivism rates of offenders convicted of felonies in Essex County, NJ, in 1976 and 1977, found that neither the type of sentence (custodial or non-custodial) nor the length of sentence for those who were incarcerated had any impact on the likelihood of recidivism.¹⁹ Reviews of multiple studies have tended to show that length of stay has no impact on recidivism or, when an effect is found, it is small and complex (most likely offender-specific).²⁰

Sentencing and Corrections in Europe

The Vera Institute recently had the privilege of taking groups of corrections officials, judges, and legislators from Colorado, Georgia, and Pennsylvania to tour prisons and meet with counterparts in Germany and the Netherlands. I would like to share a few lessons that my colleagues learned from their meetings.

Incarceration

In the United States, in 2011, there were nearly 2.4 million people in the U.S. being held in prison, putting the incarceration rate at 716 out of every 100,000 people. No other country in the world incarcerates as many people as the United States. When compared with Germany and the Netherlands, the United States' high incarceration rate becomes all the more striking: as of September 2012, only 80 per 100,000 people in Germany and 82 per 100,000 people in the Netherlands were incarcerated.²¹

¹⁸ Loughran, T.A., Mulvey, E.P., Schubert, C.A., Fagan, J., Piquero, A.R., and Losoya, S.H. (2009). 'Estimating a dose-response relationship between length of stay and future recidivism in serious juvenile offenders.' *Criminology*, 47(3), 699-740.

¹⁹ Gottfredson, D. (1999). Effects of judges' sentencing decisions on criminal careers. *Research in Brief, National Institute of Justice, US Department of Justice, Washington, DC.*

²⁰ Song, L., with Lieb, R. (1993). *Recidivism: The effect of incarceration and length of time served*. Olympia, WA: WSIPP

²¹ International Centre for Prison Studies, "World Prison Brief," <http://www.prisonstudies.org/info/worldbrief/> (accessed June 20, 2013).

Sentencing Practices

A number of key factors contribute to lower rates of imprisonment in Germany and the Netherlands. In both countries far fewer persons convicted of crimes receive custodial sentences: approximately 5 percent of offenders in Germany and 6 percent of offenders in the Netherlands receive an unsuspended prison sentence compared to 70 percent in the U.S.²² In most cases—even for relatively serious crimes such as burglary, aggravated assault, or other crimes considered to be felonies in the United States—prosecutors often divert offenders away from prosecution or use a variety of non-custodial sanctions such as fines, suspended sentences or community service. In both the Netherlands and Germany for example, fines are used extensively—in 40-60 percent of cases, depending on year. In 2006, fines were used in approximately 80 percent of cases in the former West Germany and Berlin.

Length of Stay

Lower sentencing tariffs are another contributing factor why there are fewer people in prison in Western Europe than in the United States. Germany and the Netherlands, for example, make extensive use of short sentences. In Germany, 75 percent of prison sentences are for 12 months or less and 92 percent of sentences are for two years or less. On top of this, Germany suspends the vast majority of prison sentences that are under two years—about 75 percent of cases.

Similarly, in the Netherlands, the vast majority of sentences (91 percent) are for one year or less, rising to 95 percent sentences of two years or less are included. This all may be a result of statutory maximum sentences for particular crimes which are lower than in the United States, a lower “going rate” for particular offences, and/or a different approach to sentencing. In addition, mandatory minimum sentences are much less in evidence and many judges are accorded much greater discretion than in the United States.

Some Thoughts for the Future

Probably the single most important reason to hope for change—in California and elsewhere—is the growing recognition on the part of so many stakeholders that the mission of

²² See Finding Direction: Expanding Criminal Justice Options By Considering Policies of Other Nations (Justice Policy Institute), April 2011 (percentage of convicted adults sentenced to prison from 1995-2000; average sentence length in 2006).

the criminal justice system is no longer to catch and punish lawbreakers but rather to use our growing knowledge of the underpinnings of human behavior to focus on producing more public safety and fewer victims: in policing, in prosecution, the courts, and corrections. The expectation should be – and is in many quarters – that we already knowhow , and are learning more every day, to prevent more crime than we currently do, and that we should view most of those who come in contact with the system as capable of change. That requires asking change of the system as well as change of offenders.

Research spanning 40 years has led to new insights on crime, crime prevention, and the best way to address these – both in terms of primary and tertiary prevention. That research continues to inform the development of new tools to predict risk, identify changeable risk factors, and evaluate the effectiveness of programs designed to address risk factors. Continued investments in information systems that allow quick and sophisticated analyses of crime and system trends as well as offender behavior can add dramatically to the speed and specificity at which this research is conducted. As the field’s knowledge base grows, policymakers should expect that research to play a key role in every facet of the criminal justice system, including the many decisions from pretrial release through sentencing and supervision.