

Still Tough on Crime? Prospects for Restorative Justice in the United States

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I. INTRODUCTION

In the 1980s and 1990s, the criminal justice system in the United States became increasingly punitive. This Article describes the move toward greater punitiveness and contrasts this development in the United States with the restorative justice movement in Australia and New Zealand. Though punitiveness, rather than restorative justice, has been the dominant theme in American criminal justice policy, there are programs now operating in the United States that fit the restorative justice model.

To date, restorative justice in the United States has operated at the fringes of the criminal justice system with small programs, often run by churches and private agencies, handling a relatively small number of juvenile cases and cases involving minor offenses. By contrast, in many countries restorative justice is now fully in the mainstream, and in some countries restorative justice handles the majority of cases involving adult offenders. What are the prospects for widespread adoption of restorative justice principles and a substantial restructuring of the criminal justice system in the United States to accommodate those principles? Is the American public prepared to turn from punitive policies to restorative justice?

As a background to the issue of the public's receptivity to restorative justice principles and policies, this Article first reviews the punitive policies of the 1980s and 1990s and the dramatic declines in American crime rates during the last decade. The sharply declining crime rate might mean the time is ripe for a switch from punitive to restorative criminal justice policies, and there is some evidence that public anxiety about crime is starting to decrease and that support for punitive policies has declined. There are, however, several significant barriers to the adoption of restorative justice principles, including: (1) the market-driven media, which has an incentive to stress crime stories and frame them in a fashion that supports punitive responses and cues racial attitudes, (2) a political system that rewards the candidates and parties that play the "crime card," and (3) a recent emphasis on sentencing principles that are difficult to square with restorative justice practices.

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II. UNITED STATES: THE PUNITIVE POLICIES OF THE 1980S AND 1990S

In the United States, a movement to restructure the sentencing process and increase sentence severity began in the late 1970s and continued throughout the 1990s as imprisonment rates swelled to unprecedented levels. The rehabilitative ideal, which dominated postwar penal theory and practice in the United States,¹ suffered a "wide and precipitous decline" in the 1970s, attacked by both conservatives and liberals.² As the rehabilitative ideal collapsed, it was replaced by an ideology of "crime prevention through incapacitation"³ and an increasing emphasis on retribution as a goal of criminal sentencing.⁴ The change in penal theory was expressed in legislation that rejected the goal of rehabilitation and in indeterminate sentencing regimes intended to tailor imprisonment to the individual offender's need for rehabilitation. Many jurisdictions adopted mandatory minimum sentencing provisions in the 1980s,⁵ and there was a similar but more comprehensive trend at the federal level involving both mandatory minimum penalty statutes and more severe and rigid federal sentencing guidelines.⁶ In the 1990s, as the new higher sentences took effect, they were supplemented in many states with highly punitive recidivist statutes, many based upon California's "three strikes" law.⁷ Although these statutes vary from

¹See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 4-6 (1981); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 7 (1995) (noting that "[f]or most of the twentieth century, the concept of rehabilitation has dominated penal policy and practice" and "was the law's stated objective in the criminal sentencing system"). For a discussion of the rehabilitative view toward prisons, see Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893-95 (1990).

²ALLEN, *supra* note 1, at 7. Opposition to the rehabilitative ideal crossed ideological lines, including police chiefs, district attorneys, Quakers, the American Civil Liberties Union, and the Prisoners Union. On the one hand, rehabilitation was criticized by groups including radical criminologists and civil libertarians who saw it as a threat to the political values of a free society and who expressed concern that the rehabilitative ideal had, in practice, proven particularly vulnerable to misuse. *Id.* at 39-56. Others argued that, given the limits of scientific knowledge and institutional capabilities, society was incapable of rehabilitating offenders. *Id.* at 57.

³*Id.* at 10.

⁴See, e.g., MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 83 n.1 (1997) (collecting works representing resurgence of retributivism).

⁵By 1983, forty-nine of the fifty states had adopted one or more mandatory minimum sentence provisions. MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, *SENTENCING REFORM IMPACTS* 25 (Issues & Practices in Criminal Justice, 1987).

⁶See U.S. SENTENCING COMM'N, *MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* apps. A-4 to -5 (1991) (describing legislation passed in 1984 and at two-year intervals thereafter).

⁷In California, the Act of March 7, 1994, 1994 Cal. Legis. Serv. ch. 12 (West) (amending CAL. PENAL CODE § 667 (West 1994)), became effective in March 1994 and was later ratified by voters in a referendum. The provisions are called "three strikes" laws based upon a baseball

jurisdiction to jurisdiction, the new recidivist statutes provide that the sentence for a third, or in some cases a second, qualifying offense will be doubled or increased to life without parole.

By the end of the 1990s, the combined effects of the sentencing changes brought about significant increases in the duration of incarceration served by offenders and in the rates of imprisonment in the United States. For example, in the federal courts, the average sentence imposed in 1995 for some crimes was nearly double that imposed in 1980.⁸ Moreover, federal offenders sentenced in 1998 for certain crimes will spend about twice as long in prison, on average, as did offenders sentenced in 1984.⁹ In 2001, it was estimated that the rate of imprisonment in the United States was 699 per 100,000 population, the highest in the world.¹⁰ In comparison, the imprisonment rates for other Western nations fell within the range of forty to 125 per 100,000.¹¹

The shift toward a punitive focus can also be seen in the treatment of juvenile offenders. Beginning in the mid-1990s, a fundamental shift in juvenile justice policy occurred in the United States, and the treatment of serious and violent juvenile offenders experienced a major change. Between 1992 and 1996, forty states adopted or modified laws, making it easier to prosecute juveniles as adults in criminal court, and forty-seven states and the District of Columbia changed their laws targeting juveniles who commit serious or violent crimes.¹² In contrast to the traditional regime, which based dispositions on the needs of the juvenile with the goal of rehabilitation, the states have increasingly shifted to dispositions that are based upon the offense with the goal of punishment.¹³ As a result, more juveniles than ever before are being charged and tried in criminal court, detained

analogy: after three strikes you are "out"—i.e., subject to an enhanced penalty, which in California is a mandatory life sentence. After California and Washington adopted their three strikes laws in 1994, twenty-two states and the federal government adopted new laws enhancing punishments for repeat felony offenders. See generally JOHN CLARK ET AL., U.S. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT: A REVIEW OF STATE LEGISLATION 9–10 (1997), available at <http://www.ncjrs.org/pdffiles/165369.pdf>; Michael G. Turner et al., *Three Strikes and You're Out Legislation: A National Assessment*, FED. PROBATION, Sept. 1995, at 16, 17.

⁸Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENTENCING REP. 12, 17 (1999).

⁹*Id.*

¹⁰THE SENTENCING PROJECT, NEW PRISON POPULATION FIGURES SHOW SLOWING OF GROWTH BUT UNCERTAIN TRENDS 2 (2000) (noting that United States now exceeds Russia in both rate and absolute numbers of those imprisoned and estimating Russian rate of imprisonment at 644 per 100,000 in 2001), available at <http://www.sentencingproject.org/brief/brief.htm>.

¹¹*Id.* at 5 (showing rates ranging from 125 per 100,000 for the United Kingdom, 60 per 100,000 for Sweden, and 40 per 100,000 for Japan, with Canada, Australia, Germany, Spain, France, Italy, Netherlands, and Switzerland falling between the United Kingdom and Sweden).

¹²PATRICIA TORBET ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3, 59 (1996), available at <http://www.ncjrs.org/pdffiles/statresp.pdf>.

¹³*Id.* at xi.

longer, and incarcerated more frequently in adult correctional institutions.¹⁴ This trend continued throughout the 1990s.¹⁵

Another manifestation of the punitive character of the contemporary American criminal justice system is the death penalty, which is authorized in thirty-eight states and in the federal system.¹⁶ There have been more than 800 executions since 1976, when the Supreme Court upheld the validity of a revised Georgia death penalty statute that has become the model for many other state statutes,¹⁷ and 3,692 persons were under death sentences in the United States as of January 1, 2003.¹⁸ Although the expansion of the death row population is due primarily to the cumulative effect of a low ratio of executions to death sentences imposed, the number of death sentences imposed yearly has also increased significantly.¹⁹ Strong support for the death penalty has been manifested in Congress,²⁰ and the pro-death penalty culture seems to have influenced judicial

¹⁴*Id.* at 6.

¹⁵See, e.g., Patricia Torbet & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, JUV. JUST. BULL., Nov. 1998, at 1, 3 (noting that twenty-five states made changes to their statutes permitting transfers of juveniles to adult court between 1996 and 1997), available at <http://www.ncjrs.org/pdffiles/172835.pdf>.

¹⁶See Death Penalty Info. Ctr., *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/firstpage.html> (last visited Mar. 6, 2003) (listing states that authorize death penalty).

¹⁷Death Penalty Info. Ctr., *Executions in the U.S. 2002*, at <http://www.deathpenaltyinfo.org/dpicexec02.html> (last visited Mar. 6, 2003). The number of executions has also increased. There were ninety-eight executions in 1999 and eighty-five in 2000. See *id.*; Death Penalty Info. Ctr., *Executions in the U.S. 2000*, at <http://www.deathpenaltyinfo.org/dpicexec00.html>.

¹⁸DEBORAH FINS, NAACP LEGAL DEFENSE & EDUC. FUND, INC., DEATH ROW U.S.A., Winter 2003, at 1, at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf>.

¹⁹See Death Penalty Info. Ctr., *Death Row*, at <http://www.deathpenaltyinfo.org/DRowInfo.html>.

²⁰For example, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), provides time limits within which any collateral challenge to a capital sentence must be filed, sets time limits for judicial decisions in capital cases, and precludes subsequent challenges. *Id.*, 110 Stat. at 1223-26. The 1994 crime bill, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, authorized the death penalty for many additional crimes, *id.*, 108 Stat. at 1968-81, though there is some disagreement about the number of new death eligible offenses. Compare Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 349-50 (1999) (stating that 1994 Act created more than forty new federal death penalty offenses), with Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994*, 18 U.S.C. §§ 3591-98 (1994): *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1057-58 (1998) (noting that some commentators state Act created sixty new death penalty offenses but concluding that Act created twenty new death eligible offenses and extended federal death penalty to other existing federal offenses).

decisions as well.²¹ As discussed in greater detail in Part IV.A, general public support for the death penalty has dropped slightly since the mid-1990s, but a poll conducted in July 2001 indicated that approximately two-thirds of the public still support it.²²

Public opinion polls in the United States throughout the 1990s demonstrated high levels of anxiety about crime and strong support for more punitive measures. Americans were concerned about crime and wanted harsher measures to deal with it. National polls identified crime as the most important problem facing the nation from 1994 to 1998, and from 1999 to 2001 crime was selected as the second- or third-most important national problem.²³ Most Americans thought—and continue to think—that harsher sentences should be imposed. For twenty years, a random nationwide public opinion poll asked, “In general, do you think the courts in [your] area deal too harshly or not harshly enough with criminals?”²⁴ Every year from 1980 to 1996 more than 78% responded, “Not harshly enough.”²⁵ Although the percentage of respondents who say sentences are not harsh enough fell to 68% in 2000 (the last year for which data is available),²⁶ that is still a very high rate of consensus.

In general, there was widespread public support for the punitive laws and policies noted above. For example, public opinion polls generally showed strong support for the adoption of “three strikes” laws and sexual offenders notification provisions,²⁷ and legislators viewed any opposition to these provisions as akin to political suicide.²⁸ Indeed, Democratic candidates tried to defeat the impression

²¹Indeed, in one case in which the lower courts had granted repeated stays of execution, the Supreme Court took the unprecedented step of ruling that no further stays could be entered in the case without the Court’s permission. *See Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992).

²²BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.2.61 (29th ed. 2001) [hereinafter SOURCEBOOK] (indicating support fell to 67% in 2001), *available at* <http://www.albany.edu/sourcebook>.

²³*See id.* at tbl.2.1 (noting that in 2002, concern about crime fell precipitously, replaced by concern about terrorism, war, and economy).

²⁴*See id.* at tbl.2.54 (reporting public attitudes towards judicial severity between 1984 and 2000); Hofer & Semisch, *supra* note 8, at 17 (reporting same for years 1980 to 1982). From 1980 to 1995 the percentage responding “[n]ot harshly enough” remained between 80% and 86% in every year but 1987, when it slipped to 79%; the proportion responding “[n]ot harshly enough” fell to 78% in 1996, 74% in 1998, and 68% in 2000. SOURCEBOOK, *supra* note 22, at tbl.2.54.

²⁵SOURCEBOOK, *supra* note 22, at tbl.2.54.

²⁶*Id.*

²⁷In an ABC News poll in 2002, 82% of respondents supported mandatory life imprisonment for a violent offender convicted for a third time. *See Public Agenda Online, Most Americans Support Mandatory Life Sentences for People Convicted of a Third Violent Felony, but Few Favor Life Sentences for a Third Non-Violent Crime* (Mar. 2002), at http://www.publicagenda.com/issues/majprop.cfm?issue_type=crime.

²⁸*See Michael Vitiello, Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 412–22 (1997) (discussing how both Democrat-controlled California State Assembly and Republican Governor Pete Wilson refused to temper extremism embodied in

that they were not as tough on crime as Republicans, and candidates and parties often seemed to try to outdo one another with punitive anticrime initiatives. At the federal level, draconian crime bills were passed by wide majorities every two years just before the congressional elections.²⁹

III. THE RESTORATIVE JUSTICE MOVEMENT

Restorative justice has been defined as “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime,” with the goal of restoring victims, offenders, and communities in a way that all stakeholders agree is just.³⁰ The system is based upon the recognition that crime harms individuals (victims) and relationships (the victims’ and offenders’ respective communities).

The restorative justice model is often defined in opposition to the punitive model.³¹ In contrast to the United States justice system, which is designed to establish the culpability of the offender and to exact an appropriate punishment, the aim of restorative justice is to establish accountability for the harm, promote mutual understanding of its causes and effects, and develop a process to make amends.³² In the restorative justice paradigm, the offender is not ordinarily incarcerated, but instead is obligated to apologize and otherwise compensate the victim, ideally receive forgiveness, and be reintegrated into the community.³³

The restorative justice movement has been very influential in Australia, New Zealand, and Canada, particularly in the area of juvenile justice, and it is gradually being extended to more cases involving adults. The movement became more prominent throughout the 1990s, strongly influenced by the indigenous

proposed three strikes legislation because of fear of voter reprisals in upcoming election); *see also* Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 351 (2001) (noting that congressmen believed it was politically impossible to oppose passage of federal Megan’s Law).

²⁹*See* ANTHONY KING, RUNNING SCARED: WHY AMERICA’S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE 138–41 (1997). For a discussion of these bills, *see, e.g.*, Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 99 (1999) (describing sentencing provisions passed in conjunction with federal election cycle in 1986, 1988, and 1990); *see also* Sara Sun Beale, *What’s Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40–44 (1997) (describing political treatment of crime from 1960s to 1990s at federal level); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 538–42 (1996) (describing Republican success with crime issue and Democrat congressional strategy between 1989 and 1992 of trying to take crime issue away from Republicans). These issues are discussed further *infra* Part IV.B.2.

³⁰John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

³¹*See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4 (1999).

³²Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68, 68–70.

³³Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 45 (2000).

practices of the First Nation communities in Canada and the Maori tribes in New Zealand.³⁴ In Canada, native peoples employed "circle sentencing or healing," a process that involved offenders, victims, and their respective families and community supporters in a discussion of the causes, consequences, and remedies for the crime.³⁵ Native circles of healing have addressed serious offenses, including domestic violence, sexual assault, and intrafamily sexual abuse.³⁶ More formal victim-offender mediation programs in several large Canadian cities handle adult and juvenile offenses such as assault and breaking and entering.³⁷ New Zealand adopted legislation in 1989 based on traditional Maori conflict resolution practices that emphasized the direct involvement of the family and community of juvenile offenders in developing a plan to rehabilitate them through "family group conferencing."³⁸ The primary function of family group conferencing was to decide whether to prosecute the offender and to decide about custody arrangements or alternative sanctions.³⁹ Under the new law, diversion of juvenile offenders to family group conferencing reduced the number of cases going to court by approximately 80% and cut juvenile incarceration by half.⁴⁰ After more than a decade of experience with juveniles, family group conferencing is now being extended to adults. Restorative justice programs in Australia are generally based upon the New Zealand conferencing model, except that the police play a more prominent role in the process through an approach called Wagga-Wagga, named for the area where it was developed.⁴¹ As the restorative justice

³⁴Braithwaite, *supra* note 30, at 1743.

³⁵Heather Strang, Restorative Justice Programs in Australia 3 (Mar. 2001), at <http://www.aic.gov.au/crc/reports/strang/index.html>.

³⁶See Marianne O. Nielsen, *A Comparison of Developmental Ideologies: Navajo Nation Peacemaker Courts and Canadian Native Justice Committees*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 207 (Burt Galaway & Joe Hudson eds., 1996) [hereinafter INT'L PERSPECTIVES]; Curt Taylor Griffiths & Ron Hamilton, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, in INT'L PERSPECTIVES, *supra*, at 175.

³⁷See Mark S. Umbreit, *Restorative Justice Through Mediation: The Impact of Programs in Four Canadian Provinces*, in INT'L PERSPECTIVES, *supra* note 36, at 373, 379 (reporting results of programs operating in Calgary, Langley, Ottawa, and Winnipeg: 39% of 4445 cases referred in these four cities between 1991 and 1993 were mediated and 93% of these resulted in successfully negotiated agreements; additionally, more than three-quarters of victims and offenders reported high levels of satisfaction with mediation process and perceived it as fair).

³⁸Strang, *supra* note 35, at 4.

³⁹Mark S. Umbreit et al., *Victim Impact of Restorative Justice Conferencing with Juvenile Offenders: What We Have Learned from Two Decades of Victim-Offender Dialogue Through Mediation and Conferencing* 9 (July 16, 2001), available at <http://ssw.che.umn.edu/rjp/Resources/Documents/VICTIMSA.MON.pdf>.

⁴⁰Ctr. for Restorative Justice and Peacemaking, Univ. of Minn., Fact Sheet: The Impact of Restorative Justice 2 (Jan. 3, 1997) (finding reduction from 10,000 to 13,000 cases before passage to 2587 in 1990, and reduction of incarcerated juveniles from 262 in 1988 to 112 in 1990), available at <http://ssw.che.umn.edu/rjp/Resources/Documents/cumb97a.pdf>.

⁴¹See Strang, *supra* note 35, at 6 (describing original Wagga-Wagga program in New South Wales that led to passage of Young Offenders Act of 1997, which became model for other provinces). The most prominent program not statutorily based is run by the Australian Federal Police in the Australian Capital Territory (ACT) and is undergoing continuous evaluation under the auspices of the Reintegrative Shaming Experiments (RISE) of Australian National University. *Id.*

programs were incorporated into provincial legislation, state juvenile justice institutions largely took over implementation, although police were still involved in referring cases to conferencing and participating as facilitators in the mediation.⁴² Currently Australian restorative justice programs focus mainly on juveniles, although three jurisdictions extend conferencing to adult offenders.⁴³ The most common offenses referred to these programs are robbery, breaking and entering, property damage, disorderly conduct, motor vehicle theft, and assault.⁴⁴

Restorative justice programs are also flourishing in Europe, particularly in Austria, Germany, and Finland. In Austria, victim-offender mediation has been part of the juvenile justice system since the mid-1980s, offering offenders the options of a reconciliation talk, compensation for damage done, or symbolic restitution through community service or payments to a public welfare organization rather than an individual victim.⁴⁵ Mediation is also available for adult offenders on a limited basis.⁴⁶ Under the Criminal Justice Act of 1994 in Germany, mediation was made formally available as an option to adult offenders where the penalty under regular proceedings would be a prison sentence of up to a year or just a fine.⁴⁷ Interestingly, in both Austria and Germany, victim-offender mediation is used for more serious crimes than in other countries. In Germany, about 70% of the cases mediated in 1995 were violent crimes, and in Austria nearly three-quarters of the adult cases mediated involved violent interaction, such as barroom brawls or road rage.⁴⁸ In Finland, despite the fact that victim-offender programs operate outside the formal criminal justice system, they handle as much as 20% of the caseload.⁴⁹

at 23–25.

⁴²*Id.* at 6 (noting that programs in Tasmania, Northern Territory, and ACT use police officers as conferencing facilitators, that in other states and territories police officers assist in mediation as part of conferencing team or have formal role, such as reading out charges against offender, and additionally that police are major source of referrals for cases in almost all states and territories).

⁴³*Id.* at 4, 27–28.

⁴⁴*Id.* at 7.

⁴⁵Marianne Löschnig-Gspandl & Michael Kilchling, *Victim/Offender Mediation and Victim Compensation in Austria and Germany—Stocktaking and Perspectives for Future Research*, 5 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 58, 60–61 (1997).

⁴⁶*See id.* at 69–70 (noting that 2000 adult offender cases were resolved through mediation in 1995 in four major pilot cities, compared to 66,444 adults who were formally convicted nationwide in same year).

⁴⁷*Id.* at 68 (stating that, in theory, more than 95% of criminal cases in Germany would have been eligible for this form of diversionary mediation).

⁴⁸Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 269 (2000); *see also* Löschnig-Gspandl & Kilchling, *supra* note 45, at 72 (describing cases mediated in 1992: 20% situational conflicts, 25% conflicts at work, 14% family conflicts, and 30–40% without personal element).

⁴⁹Kurki, *supra* note 48, at 269 (noting that victim-offender mediation accounted for 6300 offenders in 1993, compared to total of 23,181 offenders sentenced in 1995).

Although there is increasing interest in restorative justice in the United States,⁵⁰ restorative justice principles have been adopted mainly in scattered small-scale programs dealing with minor offenses. The most popular form of restorative justice in the United States is victim-offender mediation. Nearly 300 victim-offender mediation programs now exist throughout the United States.⁵¹ Approximately half of the programs deal exclusively with juveniles,⁵² and most employ victim-offender mediation in cases involving offenses such as vandalism, minor assaults, theft, and burglary.⁵³ More than half of these programs are funded or sponsored by churches or other private community organizations, though they may also receive governmental funding.⁵⁴ Although there are a few very large programs, most are small. The average victim-offender program for juveniles receives 136 referrals per year, and the average program dealing with adults receives seventy-four.⁵⁵ Other restorative justice practices, such as family group counseling, have been adopted in a smaller number of communities.⁵⁶

Reparative probation and other citizen boards are being used to dispose of minor crimes in Vermont and other jurisdictions in the United States. There are adult citizen panels adjudicating nonviolent juvenile offenses in many cities, and reparative citizen boards are now widely used in Vermont.⁵⁷ The Vermont program, unlike other restorative justice initiatives in the United States, was implemented statewide by a government agency pursuant to a law adopted by Vermont voters. By 1998, the Vermont reparative justice citizen boards were handling 1200 cases, a large share of Vermont's relatively small caseload.⁵⁸

⁵⁰See *id.*; Mark S. Umbreit, *The Restorative Justice and Mediation Collection: Executive Summary*, OVC BULL., July 2000, at 1, 1 (stating that increasing number of crime victims are choosing to meet face-to-face with persons who victimized them), available at <http://www.ojp.usdoj.gov/ovc/publications>.

⁵¹MARK S. UMBREIT ET AL., NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 1 (2000) (reporting that 1996 survey identified 289 programs), available at <http://www.ojp.usdoj.gov/ovc/publications>.

⁵²*Id.* at 5-6 (noting that 45% of programs worked exclusively with juveniles, 47% worked with both juveniles and adults, and 9% worked exclusively with adults).

⁵³*Id.* at 7.

⁵⁴*Id.* at 6 (stating that 43% are sponsored by "[p]rivate, community-based agency" and 22% are sponsored by "Church-based organization"). Fifty-seven percent of programs identified the local, state, or federal government as the primary source of their funds. *Id.* (noting that 27% receive their primary funding from local government, 24% from state government, and 6% from federal government).

⁵⁵*Id.* at 7. The largest programs received 1672 referrals. *Id.* Programs in Orange County, California and Portland, Oregon have received grants to divert 1000 or more juvenile cases yearly from overcrowded court systems. *Id.* at 3.

⁵⁶See Kurki, *supra* note 48, at 275-80 (describing police-family group counseling in Bethlehem, Pennsylvania).

⁵⁷Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 1, 4, available at <http://ojjdp.ncjrs.org/pubs/violvict.html>.

⁵⁸Kurki, *supra* note 48, at 283 (noting that 1200 cases handled in 1998 were "more than one-third of the targeted probation caseload").

IV. PROSPECTS FOR WIDESPREAD ADOPTION OF RESTORATIVE JUSTICE IN THE UNITED STATES

United States restorative justice programs have just touched the surface, with the focus on low-level offenses and offenders. What are the prospects for more widespread adoption? Will the United States copy the increasing success and prominence of restorative justice initiatives in other countries? Will these programs become central features of the justice system?

A. *A Window of Opportunity?*

At first glance, it might seem that the time is ripe for the United States to turn to restorative justice. We have taken punitiveness as far—and farther—than any other country. There is not much room to go further down that road, and many reasons point towards pursuing other alternatives. Restorative justice could appeal to conservatives who want to cut state budgets and to liberals who deplore the human costs of incarcerating such a significant part of the population. Moreover, the United States has experienced a record-setting decline in crime rates. Homicide and robbery rates fell to their lowest levels since the late 1960s,⁵⁹ and serious violent crime continued to decline in 2000,⁶⁰ reaching its lowest level in the twenty-seven-year history of the National Crime Victimization Survey.⁶¹ Additionally, property crime, including larceny, burglary, theft in general, and motor vehicle theft, continued a twenty-year decline.⁶²

There is some support for the common sense idea that public anxiety about crime and support for punitive policies are responses to high crime rates. For example, one researcher found that approximately two-thirds of the variation in public support for the death penalty could be explained by variations in the crime rate.⁶³ According to this logic, the current drop in crime rates should correlate with less punitive attitudes, and indeed it appears there has been some softening

⁵⁹Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Crime Facts at a Glance*, at <http://www.ojp.usdoj.gov/bjs/gvc.htm> (last revised Dec. 11, 2002).

⁶⁰Bureau of Justice Statistics, U.S. Dep't of Justice, *Four Measures of Serious Violent Crime*, at <http://www.ojp.usdoj.gov/bjs/glance/cv2.htm> (last revised Oct. 28, 2002).

⁶¹Bureau of Justice Statistics, U.S. Dep't of Justice, *Crime and Victim Statistics*, at <http://www.ojp.usdoj.gov/bjs/cvict.htm> (last revised Jan. 29, 2003). It should be noted that another measure, the FBI's Uniform Crime Reports (UCR), indicated that violent crime in the United States had stabilized in 2000, after several years of decline. *Id.*; see also Michael R. Rand & Callie M. Rennison, *True Crime Stories? Accounting for Differences in Our National Crime Indicators*, CHANCE, Winter 2002, at 47, 47–48 (noting that two measures differ in a number of respects, including fact that UCR rates do not include unreported offenses).

⁶²Bureau of Justice Statistics, *supra* note 61; see also Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millennium*, NAT'L INST. JUST. J., Jan. 2000, at 10, 10–12 (discussing decline in property crimes), available at <http://www.ojp.usdoj.gov/nij/journals/welcome.html>.

⁶³Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR: AMERICA'S DEATH PENALTY 7, 16 (Stephen P. Garvey ed., 2003) (citing work of Katherine Barnes).

in public support for the death penalty, which began dropping in the mid-1990s. Between May 1995 and May 2001, support for the death penalty fell from 77% to 65%.⁶⁴ When respondents were given the choice of life imprisonment with no possibility of parole as an alternative punishment for murder, a national survey conducted in 2000 found that support for the death penalty dropped to 52%.⁶⁵ State surveys found that respondents preferred the option of life without parole plus the payment of restitution from work in prison (LWOP+R) over the death penalty by a significant majority. Sixty-four percent of Nebraskans favored LWOP+R, as did 73% of New Yorkers.⁶⁶

A similar softening may be occurring in connection with attitudes about sentence harshness. In 1994, 85% of respondents reported that local courts were "not harsh enough" in dealing with criminals; that number fell to 74% in 1998 and 68% in 2000.⁶⁷ Similarly, other attitudes related to punitiveness are also starting to show a change. A poll conducted in 2000 found that 68% of the public believed that "attacking social problems" is the best approach to lowering the crime rate, as opposed to 27% who favored more money for additional prisons, police, and judges.⁶⁸ This was a significant change from 1994, when 42% of the public favored more spending for law enforcement and just 51% wanted to attack social causes.⁶⁹ In 2002, Peter Hart published the results from two national telephone surveys and six focus groups, which he argues demonstrate a "significant transformation" and a fundamentally different perspective that rejects purely punitive approaches to criminal justice.⁷⁰ Hart found increased support for prevention rather than punishment and for alternative sentences for nonviolent offenders, especially drug offenders, as well as decreased support for mandatory sentences.⁷¹ He also found significantly increased support for rehabilitation.⁷² These attitudes are fertile ground for restorative justice proposals.

B. Barriers to Acceptance

Although these polls may be harbingers of change, there are significant barriers to the adoption of restorative justice principles in the United States. The first barrier is the potential linkage between punitive policies and lower crime

⁶⁴Compare Gallup Poll on Death Penalty, May 11–14, 1995, with Gallup Poll on Death Penalty, May 10–14, 2001, available at LEXIS, CMPGN library, RPOLL file.

⁶⁵Gallup Poll May 10–14, 2001 (also reporting 43% preferred life imprisonment, 5% no opinion), available at LEXIS, CMPGN library, RPOLL file. This question was first asked August 25 to September 5, 2000. *Id.*

⁶⁶William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 103 (1994).

⁶⁷SOURCEBOOK, *supra* note 22, at tbl.2.54.

⁶⁸*Id.* at tbl.2.46 (reporting Gallup Poll).

⁶⁹*Id.*

⁷⁰PETER D. HART RESEARCH ASSOCS., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM I (2002), available at <http://www.soros.org/crime/CJI-Poll.pdf>.

⁷¹*Id.* at 3–5, 12–13.

⁷²*Id.* at 9, 17–18.

rates. Two other important factors, which operated throughout the 1990s, are the news media's heavy focus on crime and violence, and the political system's rewards for the candidates and parties that have played the "crime card." These factors can increase public fear of crime and strengthen support for punitive measures. Research into the effects of the psychology of cognition and risk assessment provides models that suggest how these effects may be amplified by common cognitive errors. Another element of the equation is the fit between the restorative justice and the sentencing reform movements. Restorative justice may face an uphill battle to the extent that restorative justice proposals seem at odds with the popular sentencing reforms of recent years. Finally, the tragic events of September 11, 2001, and the resulting focus on terrorism, have introduced a new factor that may make it more difficult to focus on reforms not directly linked to public safety.

1. The Perception That Punitive Policies Keep Crime Rates Low

The most obvious barrier to the adoption of restorative justice policies may be the perceived link between the increasingly punitive policies of the last twenty years and the drop in crime rates over the past decade. If harsh policies are necessary to reduce crime, then falling crime rates provide no occasion for taking a new direction.

It is by no means clear that the punitive policies of the 1980s and 1990s are the principal cause of the current reduction in crime (though they have certainly played some role). Many scholars believe that social forces operating independently of punitive legislation, such as an improvement in the economy and changes in the drug culture, are responsible for most of the recent drop in American crime rates.⁷³ This conclusion is in line with the traditional view that altering sentencing policies has relatively little influence on crime rates.⁷⁴ Further,

⁷³See William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97 (Alfred Blumstein & Joel Wallman eds., 2000) (attributing approximately 27% of drop in crime rates to prison expansion and remainder of drop to other social factors); Bruce D. Johnson et al., *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, in *THE CRIME DROP IN AMERICA*, *supra*, at 164 (arguing that drop in violent crime in New York City was caused by shift in drug culture from heroin, cocaine, and crack to marijuana as urban drug of choice); Jeff Grogger, *An Economic Model of Recent Trends*, in *THE CRIME DROP IN AMERICA*, *supra*, at 266 (identifying decline in cocaine trade and growth in wages in low-skill labor market as catalysts for drop in crime rate); see also ZIMRING & HAWKINS, *supra* note 1, at 100-27 (concluding that increases in incarceration in California during 1980s may have resulted in roughly 15% reduction in crime, concentrated in burglary and larceny categories, but finding no substantial incapacitation benefits for homicide, assault, and robbery). *But cf.* Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 159 (2002) (using county by county data to find greater deterrent effect from three strikes legislation, claiming that during first two years it deterred approximately eight murders, 3952 aggravated assaults, 10,672 robberies, and 384,488 burglaries).

⁷⁴Michael Tonry & David P. Farrington, *Strategic Approaches to Crime Prevention*, 19 CRIME & JUST. 1, 6 (1995) (citing President's Commission on Law Enforcement and the Administration of Justice (1967), National Academy of Sciences Panel on Research on Deterrent and Incapacitative

there is evidence that the U.S. has pushed increases in sentencing severity to the point that the marginal returns in crime reduction are quite small, and are more costly than other crime reduction strategies.⁷⁵

Determining the precise relationship between the punitive policies discussed above and crime rates is beyond the scope of this Article, but several related points warrant further discussion here. In considering whether the U.S. will be receptive to restorative justice initiatives, the critical point will be whether the policymakers and the public *think* restorative justice initiatives are likely to increase crime—regardless whether this view is supported by criminal justice scholarship. Moreover, politicians and the media play a critical role in shaping the public's attitudes on criminal justice policy. The impact of the news media and the political process in shaping public opinion is discussed in the sections that follow.

2. *The News Media's Focus on Crime*

Television coverage of crime rose meteorically in the first half of the 1990s, with national television coverage of crime reaching historical levels in 1995.⁷⁶ In that year, the number of crime stories on the three major networks' national evening news shows matched the amount of stories about the first Gulf War and presidential campaign when those events were unfolding.⁷⁷ Similarly, during that period crime and violence were also a staple of local news and the entertainment industry.⁷⁸ Although the number of crime stories on the nightly news fell from the high-water mark in the mid-1990s, by the end of the decade the networks still were airing five times as many crime stories as they were ten years earlier.⁷⁹ Crime was the number one story on local television news throughout the 1990s, though stations varied in their coverage of crime and violence.⁸⁰ Crime accounted

Effects (1978), and National Academy of Sciences Panel on the Understanding and Control of Violent Behavior (1993) in support of conclusion that "[t]here is widespread agreement over time and space that alterations in sentencing policies are unlikely substantially to influence crime rates"). This view, however, is not unanimous. See Beale, *supra* note 29, at 25 n.9 (identifying some criminal justice scholars taking this minority view).

⁷⁵See generally Beale, *supra* note 29, at 26–27 (citing conclusion of panel of National Academy of Sciences that increase in probability of detection would prevent twice as much violent crime as increase in length of incarceration); *id.* at 30 (citing conclusion of RAND Corporation report that preventative measures are significantly more cost effective than longer incarceration); cf. Spelman, *supra* note 73 (noting that \$20 billion spent annually on prison expansion since the early 1990s could provide child care to every family that cannot afford it, college education to every high school graduate, or living wage to every unemployed youth).

⁷⁶Beale, *supra* note 29, at 45.

⁷⁷*Id.* (noting that there were 2574 crime stories on evening news programs in 1995, compared with 2604 stories about Gulf War in 1991 and 2427 stories about presidential campaign in 1992).

⁷⁸*Id.* at 46–47.

⁷⁹Paul Farhi, *Nightly News Blues*, 23 AM. JOURNALISM REV., June 2001, at 33, 36, available at <http://216.167.28.193/archive.asp>.

⁸⁰See JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMMING 245 (1998) (explaining that in November 1993, crime accounted for mean of 29.4% of stories on local channels, ranging from high of 42.4% to low of 17.7%); Sara Sun

for an average of 20% to 30% of the typical local news broadcast, with some channels devoting as much as 42%.⁸¹

Thus, television viewers in the United States were deluged during the 1990s with crime stories on the national and local news. These traditional broadcasts were buttressed with crime news from newer media sources, particularly the networks' proliferating news magazines and the cable news channels. Network news magazines—which viewers see as news programs, though their producers characterize them as entertainment—proliferated in the 1990s and devoted 20% to 40% of their broadcasts to crime stories.⁸² Cable news networks also dove heavily into tabloid-style crime coverage, which could generate large increases in viewership. For example, the heavy tabloid-style coverage of the disappearance of Washington intern Chandra Levy in the summer of 2001 was credited with increasing the viewing audiences of CNN and the Fox News Channel by 44% and 136%, respectively, over the same period the prior year.⁸³

This crime coverage was driven largely by economic and marketing considerations, rather than traditional journalistic considerations. In the case of local news, the nature and extent of crime coverage did not correlate with the crime rates in the viewing area.⁸⁴ Instead, the content and style of local news broadcasts are driven largely by marketing considerations and varied by the perceived tastes of the local audience, as well as the station's attempt to carve out a distinctive niche in its local market.⁸⁵ Similarly, the increase in national prime-time coverage of local crime stories appears to be a response to economic pressures within the television industry.⁸⁶ Certainly it did not correlate with crime rates, which, as noted above, fell precipitously during the 1990s. It should be noted that during the same period the entertainment media also provided viewers with a diet full of crime and violence. For example, one study of television

Beale, *How the News Media Covers Crime: How, Why, and Who Cares?* 12 n.60 (Sept. 30, 2002) (unpublished manuscript, on file with Utah Law Review) (same).

⁸¹HAMILTON, *supra* note 80, at 245.

⁸²See RICHARD L. FOX & ROBERT W. VAN SICKEL, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* 79 tbl.2.10 (2001) (showing that crime segments were included in more than 40% of *48 Hours* broadcasts in 1997 and 1998, and in 29% to 45% of *Dateline* broadcasts between 1994 and 1998).

⁸³E.g., Matt Kempner, *Stories Boost TV Audience*, ATLANTA J. & CONST., Aug. 2, 2001, at 12A; Dusty Saunders, *Fast Times at Headline News*, ROCKY MOUNTAIN NEWS, Aug. 6, 2001, at 2D.

⁸⁴HAMILTON, *supra* note 80, at 239 (describing study of 16,000 local news stories from fifty-seven stations in nineteen different markets which found that emphasis on crime in local news depends not on actual crime in area but on viewer interest in violent programming, and that, controlling for many demographic factors, viewers who report higher consumption of violent entertainment programs are more likely to watch local news with crime emphasis and to follow national or international news stories that involve violence, such as reports on military conflicts).

⁸⁵See generally Beale, *supra* note 80 (discussing effect of media's increased emphasis on violence on public's attitude toward crime and criminal justice policies).

⁸⁶*Id.* at 12.

content in 1998 to 1999 found that there were an average of eighteen serious scenes of violence per hour in both broadcast and cable television.⁸⁷

Crime and violence in the media can affect public opinion either directly, by increasing the fear of crime and perceptions of the frequency of crime, or indirectly, by setting the public's agenda to increase the salience of crime as a political issue.

There is a correlation between an individual's consumption of programming depicting crime and violence and his or her greater fear of crime and more exaggerated perception of crime rates.⁸⁸ Some researchers have concluded that television viewing causes these exaggerated views.⁸⁹ This line of thinking is sometimes called the "cultivation hypothesis," which posits that repeated viewing of violent episodes cultivates the viewer's misleading impression of the frequency of such activity in the real world.⁹⁰ Although the cultivation hypothesis has some common sense appeal, it suffers from an important limitation: correlation does not demonstrate any cause and effect relationship. It may be that those with exaggerated fears of crime select programming that reflects their views. To date, there has been no demonstration that viewing violence causes viewers to have increased fears of crime or to believe that crime is more frequent.⁹¹

Other research, which stands on a firmer footing, establishes that the news media play an important role in setting the public agenda, *i.e.*, determining which issues the public believes to be most important.⁹² This effect is most pronounced when media is viewers' chief source of public information and less significant when the public has a great deal of personal contact and information.⁹³ This agenda-setting research provides an explanation for the continuing salience of the crime issue throughout the 1990s at a time when crime rates were falling to historically low levels. Most people's sense of the seriousness of the crime

⁸⁷S. ROBERT LICHTER ET AL., HOLLYWOOD CLEANS UP ITS ACT: CHANGING RATES OF SEX AND VIOLENCE IN ENTERTAINMENT MEDIA tbl.3 (2002), available at <http://www.cmpa.com/archive/2002popcultreport.htm>.

⁸⁸See generally Beale, *supra* note 29, at 47-49 (discussing research on effect of crime and violence in media).

⁸⁹*Id.*

⁹⁰The cultivation hypothesis is most closely associated with the work of George Gerbner. See, e.g., George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173, 178-79 (1976) (discussing long-range study of trends in television contents and effects). For a discussion of Gerbner's work and its critics, see RICHARD SPARKS, TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE 86-93 (1992); see also Beale, *supra* note 29, at 48 (noting that efforts to demonstrate that high television viewing causes exaggerated fear of crime have been subject to many critiques).

⁹¹Beale, *supra* note 29, at 47.

⁹²For a general discussion of agenda-setting research, see ELIZABETH M. PERSE, MEDIA EFFECTS AND SOCIETY 43-44 (2001); Everett M. Rogers et al., *A Paradigmatic History of Agenda Setting Research*, in DO THE MEDIA GOVERN? 225, 229 (Shanto Iyengar & Richard Reeves eds., 1997).

⁹³See Maxwell McCombs & Sheldon Gilbert, *News Influence on Our Pictures of the World*, in PERSPECTIVES ON MEDIA EFFECTS 1, 11-12 (Jennings Bryant & Dolf Zillmann eds., 1986) (describing Shanto Iyengar et al., *Experimental Demonstration of the "Not So Minimal" Consequences of Television News Programs*, 76 AM. POL. SCI. REV. 848 (1982)).

problem appears to be based upon what they have seen or read in the news, rather than on their personal experience.⁹⁴ For these individuals, the news media's constant focus on crime stories implicitly sends the message that crime is one of the most pressing issues facing our nation. Public opinion polls reflect the fact that many members of the public may have accepted this message,⁹⁵ at least in the absence of more obviously pressing social problems. In that sense, the attacks of September 11, 2001, the wars in Afghanistan and Iraq, and the economic turmoil following the collapse of huge companies like Enron, have demonstrated that real news can force tabloid crime stories off center stage.

3. *The Political Story—Rewards for Playing the Crime Card*

A political focus on crime has supplemented the media's focus. In the last third of the twentieth century, crime became a hot political topic in the United States, and politicians have vied to be the toughest on crime.⁹⁶ After the Republicans deliberately adopted a "tough on crime" strategy in the late 1960s, they won almost every presidential election between 1968 and 1988; the only exception was 1976, on the heels of Richard Nixon's resignation. The crime issue was so successful that Democrats decided to fight fire with fire. Bill Clinton campaigned—and won—on his record as a pro-death penalty governor who would use federal funds to hire more local police.⁹⁷ Congressional Democrats recognized that their traditional emphasis on liberal crime policies had become a major political liability, and they shifted ground to take that issue away from the Republicans.⁹⁸ Within Congress, mammoth crime bills passed with little opposition in the fall before each congressional election, despite the draconian penalties they imposed.⁹⁹ One article concluded that "control of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America."¹⁰⁰

⁹⁴See, e.g., Public Agenda Online, *Crime: People's Chief Concerns* (June 2000), at http://www.publicagenda.com/issues/pcc_detail.cfm?issue_type=crime&list=4 (reporting ABC News Poll's finding that 81% of respondents based their opinion of crime problem's seriousness on what they have seen or read in news).

⁹⁵See *id.* (describing polling data on seriousness of crime issue).

⁹⁶See generally Beale, *supra* note 29, at 40–44 (discussing crime and national political discourse).

⁹⁷See, e.g., Hugo Adam Bedau, *Background and Developments*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 18 (Hugo Adam Bedau ed., 1997) (describing Clinton's campaign actions that appeared to support death penalty); Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429, 1439 (1993) (noting Clinton's support of death penalty during presidential campaign). See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 773 (1995) (discussing role of death penalty in several state and federal elections).

⁹⁸Chernoff et al., *supra* note 29, at 577.

⁹⁹See *supra* note 29 and accompanying text.

¹⁰⁰Chernoff et al., *supra* note 29, at 577.

Much of the recent federal crime legislation can be explained as symbolic politics, which deliberately exploits the public's fear of crime.¹⁰¹ Indeed, a comparative study by Anthony King concluded that various features of the American political system produce extreme electoral vulnerability and thereby create much greater incentives for empty symbolic actions that play on public fears than do the British or German systems. In contrast to their British and German counterparts, King found that American members of Congress devoted a far greater share of their time to consideration of, and participation in, political activities to raise money and support for their next reelection campaign, and far less time to consideration of substantive issues.¹⁰² As a result, more legislative action in the United States is devoted to ensuring reelection than to solving underlying problems. In King's view, this feature of the hyper-democratic American electoral system manifests itself dramatically in criminal justice legislation.¹⁰³

Viewing crime legislation as symbolic politics fits well with interest group models of the political system's function.¹⁰⁴ Powerful special interest groups can demand legislation conferring tangible benefits. In contrast, politicians can placate the general public with legislation or administrative action that provides only empty symbolic gestures.

Moreover, current punitive policies are strongly supported by two key interest groups that have a financial stake in continuing current policies and the increased rates of imprisonment.¹⁰⁵ The individuals and groups that build and staff prisons have a strong financial interest in policies that will maintain or increase the rate of imprisonment and are an increasingly important political force.¹⁰⁶ For example, the union representing correctional workers in California was the largest

¹⁰¹See, e.g., KING, *supra* note 29, at 138–41 (1997) (discussing politicians' fraudulent use of phrase "war on crime" as illustration of symbolic politics); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. Rev. 1227, 1247–53 (2000) (describing federal hate crime statutes as symbolic politics); Brian T. Fitzpatrick, *Congressional Re-election Through Symbolic Politics: The Enhanced Banking Crime Penalties*, 32 AM. CRIM. L. REV. 1, 29 (1994) ("Merely passing a law can make an anxious public feel better."); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 67 (1997) ("Since crime cannot be significantly reduced through legislation, politicians must rely on symbolic policies to convey the message that they are doing something to solve the problem.").

¹⁰²KING, *supra* note 29, at 43–46.

¹⁰³*Id.* at 140–54.

¹⁰⁴For a general introduction to interest group theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991) (discussing political impact of interest groups as viewed from perspective of political science and economics). Interest group theory is discussed in the context of federal crime legislation in Beale, *supra* note 101, at 1248–53.

¹⁰⁵See Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1997, at 11, available at 1997 WL 8866177.

¹⁰⁶*Id.*

contributor to Governor Pete Wilson's 1994 campaign.¹⁰⁷ In general, the victims' rights movement in the United States has also supported a political agenda of vindictiveness and punitiveness, including the death penalty, harsher sentences, and pretrial incarceration.¹⁰⁸ Victims' rights programs are also direct beneficiaries of the current "tough on crime" policies because a large share of their funding comes from fines levied against those convicted of federal crimes and their forfeited assets.¹⁰⁹ There are also direct alliances between some victims' rights groups and other interest groups that support the punitiveness agenda. For example, the Doris Tate Crime Victims' Bureau, which was a driving force behind California's three-strikes legislation, received 78% of its funding from the state prison guards' union.¹¹⁰

Although a survey of comparative political systems is beyond the scope of this Article, one historical fact tends to support the contrast Anthony King drew between the American system and those in which the criminal justice system is less punitive and restorative justice principles are more widely embraced. Death penalty scholars have noted the existence of popular support for the death penalty in other countries at the time of abolition (and often thereafter). Abolition has not been the result of popular demand but of legislative action contrary to public opinion.¹¹¹ For example, when the British Parliament suspended the death penalty in 1965, only 21% of the public favored abolition.¹¹² The vote in Parliament was treated as a vote of conscience.¹¹³ No party discipline was imposed, and most members did not see this as an issue on which to canvas their constituents, but rather one on which they elected to exercise their own judgment. At the time of this action, the majority of the public still favored the death penalty. Lord Windlesham called the decision "one of the most conspicuous, and courageous, ever taken by parliamentarians, irrespective of party, in the knowledge of the widespread extent of disapproval for their actions."¹¹⁴ Although public opinion polls in Great Britain continued to show widespread support for the death

¹⁰⁷*Id.* (noting that California Correctional Peace Officers Association provided 84% of funding for "Crime Victims United" Political Action Committee, which contributed significantly to Wilson's campaign).

¹⁰⁸See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 159–64 (2000) (describing shift from victim needs to victim rights).

¹⁰⁹*Id.* at 161.

¹¹⁰*Id.* at 164.

¹¹¹See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 12–13 (1986) (describing role public opinion plays in progress of abolition movement).

¹¹²Andrew Rutherford, *Abolitionism: A Tale of Two Struggles*, in *CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS* 261, 261–65 (Peter Hodgkinson & Andrew Rutherford eds., 1996); see Peter Hodgkinson, *Europe—A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U. L. REV. 625, 638–40 (2000) (describing United Kingdom's journey to abolition).

¹¹³Hodgkinson, *supra* note 112, at 639.

¹¹⁴Rutherford, *supra* note 112, at 264.

penalty,¹¹⁵ restoration was debated and defeated on at least ten occasions with increasing majorities in Parliament.¹¹⁶ Similarly, when the death penalty was abolished in France, 62% of the public favored retention.¹¹⁷ The death penalty is also popular with the public in other countries that have abolished it.¹¹⁸

Given the recent political history, it is difficult to imagine a majority of an American legislature taking such a position based upon conscience, in the face of strong public opposition. Moreover, it is by no means clear that the personal views of legislators would lead them away from punitive policies and toward restorative justice.

4. *Magnifying the Damage from Media and Politics—Cognitive Errors*

Common cognitive errors also may have played a role in inflating public fear of crime and support for punitive policies in the United States. Several mechanisms that play a role in knowledge acquisition and attitude formation—availability, overgeneralization, (over) confidence, and biased processing of information—may all play a role.

It is easy to see how the twin factors of availability and overgeneralization can affect the public's views on criminal justice policy. Cognitive availability plays a key role. Not all events and occurrences are equally subject to our recall, and the availability heuristic biases judgment because some examples and events stand out and are recalled much more easily than others. In particular, unusual and startling events are much easier to recall (more available) than common ordinary events. Judgments can be biased because some examples and events are more available than others. Thus news reports of horrific crimes (or miscarriages of justice) may be easily recalled when members of the public think about the criminal justice system.

The tendency toward overgeneralization means that people base general views on a few cases or even a single case. Overgeneralization multiplies the effects of availability. For example, a highly publicized series of abductions (and in several cases, murders) of children in 2002 (including Samantha Runnion, Elizabeth Smart, and Danielle Van Dam) may have led the public to believe there

¹¹⁵ZIMRING & HAWKINS, *supra* note 111, at 12 (noting that in 1966, after suspension, 76% favored reintroduction, and support rose to 82% by 1975); Peter Hodgkinson, *The United Kingdom and the European Union*, in CAPITAL PUNISHMENT, *supra* note 112, at 193, 194–95 (noting that in 1992, for first time since 1950s, majority was opposed to restoration of death penalty for murder, with figures at 42% for restoration, 44% against restoration, and 14% undecided).

¹¹⁶Hodgkinson, *supra* note 115, at 195. However, 66% favored restoration of the death penalty for terrorist murders. *Id.* at 196.

¹¹⁷Kristi Tumminello Pinzo, Note, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Toward Its Abolition*, 24 BROOK. J. INT'L L. 855, 887 (1999).

¹¹⁸For example, a 1996 Dutch poll showed 52% of the population supported the death penalty. Thomas Sancton, *A Matter of Life or Death*, TIME (Europe), May 21, 2001, at 28. Despite public support for the death penalty, the Baltic states adopted the Sixth Protocol of the European Convention on Human Rights, regarding abolition of the death penalty, because of their desire to be accepted into the European Union. Hodgkinson, *supra* note 112, at 635–38.

is an epidemic of such cases. In fact, there are 200 to 300 serious child abduction cases per year nationwide, of which fifty to 150 end in the child's murder.¹¹⁹ Experts believe that the number of cases is stable or falling.¹²⁰ Given availability and overgeneralization, however, the media's focus on these cases may lead the public to perceive a crisis that calls for legal reforms.¹²¹

Once the public adopts the view that harsh measures are needed to deal with a crime wave or crisis, it is difficult to dispel this view. Even views based upon minimal information are typically held with great confidence.¹²² Thus, judgments based upon sensational news reports about atypical cases may continue to hold sway, even if the media also reports contrary evidence. Once individuals hold a certain point of view, they process new information in a highly biased fashion consistent with their views.¹²³

These factors converge when public attitudes are founded on a visceral sense of danger, which can operate in an unconscious fashion that prompts us to vigilance. Intuitive responses based upon such cuing are held with great confidence and ordinarily cannot be altered by logical arguments or news reports suggesting a different point of view. Psychologist Howard Margolis argues that members of the lay public who learn of risks or dangers tend to jump to one extreme view or another (*i.e.*, to regard a situation as very serious and requiring action, not at all serious, or one where action might do more harm than good), and to remain locked into that view.¹²⁴ In the context of criminal justice policy, Margolis's analysis provides a good model for understanding how the media's focus on violent sensational crimes tends to promote the visceral sense of danger that prompts many people to jump to the conclusion that more action is needed to ensure public safety.¹²⁵ This has been translated into calls for longer sentences for dangerous criminals. The hot cognition and affective responses that are provoked by violent crimes are especially strong and resistant to persuasion or arguments about the counterproductive effects of punitive proposals or the atypicality of the cases in question.

¹¹⁹Jessica Reaves, *How to Keep Your Child Safe*, TIME (online edition), Aug. 1, 2002, at <http://www.time.com/time/nation/article/0,8599,321889,00.html>.

¹²⁰*See id.* (citing data from U.S. Justice Department and National Center for Missing & Exploited Children).

¹²¹For example, the publicity surrounding Polly Klass's abduction and murder played a key role in the adoption of California's Three Strikes Law. *See generally* Vitiello, *supra* note 28, at 395 (discussing how California's three strikes legislation is emblematic of excesses of U.S. crime prevention policy).

¹²²Beale, *supra* note 29, at 59.

¹²³*Id.* at 59–60.

¹²⁴*See* HOWARD MARGOLIS, DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES 76 (1996) (employing four-cell risk matrix, in which costs of taking precautions are on one axis and costs of doing nothing are on other, to represent and explain public attitudes).

¹²⁵Beale, *supra* note 29, at 60–64.

5. *Compatibility with Contemporary Sentencing Reforms*

Finally, the restorative justice movement seems to be at odds with the sentencing reforms that are one of the hallmarks of the 1980s and 1990s. By 1999, eighteen states and the federal government had developed or implemented some form of sentencing guidelines. The main goals of these guidelines were to curb judicial and prosecutorial discretion, promote more uniform and consistent sentencing, and adjust punishment levels according to different categories of offenses and offenders.¹²⁶ The sentencing guidelines also assisted states in projecting funds needed for correctional facilities.¹²⁷ Depending on the state, sentencing guidelines reflected different philosophies. For example, “just deserts” or retribution was the underlying premise for the sentencing systems in Minnesota, Washington, and Oregon; whereas the Virginia framework reflected an incapacitation rationale.¹²⁸

Almost all the sentencing guidelines reflected core principles that are in conflict with the restorative justice movement, namely, proportionality, uniformity, and transparency. Proportionality speaks to the match between the gravity of the offense and the sanction. Restorative justice does not use a standardized, objective measure of a crime’s severity, but instead focuses on a subjective understanding of the harm done to a specific victim and considers the specific circumstances of the offender.¹²⁹ Uniformity requires that offenders with similar records, or who have committed similar offenses, receive similar punishments. By emphasizing individualized solutions, sentencing under a restorative justice scheme would not have uniform results. Finally, sentencing guidelines were designed to ensure that punishments be imposed in a transparent manner, according to clearly articulated rules. Restorative justice programs, in contrast, feature discretion in deciding punishments, something that the sentencing guidelines were designed to redress.¹³⁰

The sentencing reforms focusing on uniformity and proportionality have their greatest appeal in the cases of the most severe offenses, where the community’s interest in public safety and the offender’s interest in liberty are at their zenith. Despite the apparent conflict between restorative justice and sentencing systems, it has been suggested that there may be an opportunity for “restorative sentencing” for nonviolent, noncareer offenders who have committed minor crimes.¹³¹ A potential model for incorporating restorative justice into

¹²⁶For a general discussion of the sentencing reform movement, see MICHAEL TONRY, SENTENCING MATTERS 6–9, 27–30 (1996); Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENTENCING REP. 123, 123–26 (1993).

¹²⁷Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENTENCING & CORRECTIONS, June 2001, at 2.

¹²⁸*Id.* at 3.

¹²⁹Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 759–60 (2000).

¹³⁰Lubitz & Ross, *supra* note 127, at 4.

¹³¹*Id.* at 5 (proposing that in North Carolina’s structured sentencing bands, those offenders who receive community-based sanction could be guided by restorative justice principles).

sentencing is the Oklahoma Community Sentencing Act of 1999.¹³² This suggestion is consistent with the trend, noted above, to incorporate restorative justice principles mainly in programs dealing with minor offenses.¹³³

V. OVERCOMING THE BARRIERS? NEW FACTORS IN THE EQUATION

Although the barriers to change are substantial, there are new factors in the equation. The presence of new situations and new information can serve as a catalyst for dramatic shifts in public opinion. In other contexts, such as fear of environmental risks, public opinion has been shown to shift dramatically—flip-flopping from one extreme to another—under certain conditions.¹³⁴ Although reasoned arguments cannot ordinarily shift an individual's opinions, an individual confronting striking new events or information may suddenly reassess and adopt a new opinion (now held with equal fervor to the one just abandoned).¹³⁵ Several new factors have appeared in the criminal justice equation that might have such an impact on public opinion.

In the context of the death penalty, such a shift in public opinion may have been occurring before the terrorist attacks of September 11, 2001. Researchers Phoebe Ellsworth and Samuel Gross identified a significant drop in support for the death penalty¹³⁶ and several new factors creating a situation conducive to change in death penalty support: new information, a new script, and a new option. The existing news media "script" of guilty defendants stringing out the legal process through endless appeals based on technicalities¹³⁷ was supplanted by a new "script" of innocent death row inmates as victims of ineffective counsel and/or incompetent, unethical or racist police, who narrowly escaped execution for someone else's crime.¹³⁸ The new information came from scientific evidence, DNA testing, that proved innocence reliably in several highly publicized cases.¹³⁹ A new option, a moratorium, was introduced, creating a middle ground that permitted death penalty supporters to reassess without reversing their position.¹⁴⁰ At the same time, the Democrats' move toward matching the Republicans' punitive crime agenda made crime a less critical issue politically and reduced the

¹³²OKLA. STAT. tit. 22, §§ 988.1–.23 (Supp. 2000). See generally Linda G. Morrissey & Vickie S. Brandt, *Community Sentencing in Oklahoma: Offenders Get a Second Chance To Make a First Impression*, 36 TULSA L. J. 767, 769–70 (2001) (stating that Oklahoma Community Sentencing Act "gives the offender the opportunity to alter behavior, accept responsibility and be rehabilitated").

¹³³See *supra* text accompanying notes 50–58.

¹³⁴MARGOLIS, *supra* note 124, at 121–43.

¹³⁵See Beale, *supra* note 29, at 63–64.

¹³⁶Gross & Ellsworth, *supra* note 63, at 7–12.

¹³⁷In what Gross and Ellsworth describe as the accepted "script," death penalty sentences were repeatedly reexamined during an interminable series of appeals by lawyers searching for "technicalities" to get the defendant off, while the prisoner lived the high life in prison and the victim's family waited in agony for closure. *Id.* at 27–28.

¹³⁸*Id.* at 28–29.

¹³⁹*Id.* at 39.

¹⁴⁰*Id.* at 45–48.

importance of the death penalty as a defining credential for a conservative.¹⁴¹ Thus, several Republicans were leading figures in the moratorium movement.¹⁴² It is not yet possible to determine whether the shift Gross and Ellsworth identified was derailed by the terrorist attacks. As they noted, death penalty attitudes can be strongly influenced by singular events, such as a mass murder,¹⁴³ and polls taken after September 11 show that death penalty support has remained constant or risen slightly.¹⁴⁴ It is too soon to say whether this is a momentary pause or another more permanent settling of public opinion.

In the broader context of criminal justice, state budgetary pressures are now creating pressures to rethink punitive approaches. By the midpoint of 2002, many states were in serious financial difficulty; estimates of the total state budget shortfalls for fiscal year 2002 ranged from \$27 to \$38 billion.¹⁴⁵ One response to the budget shortfalls has been to reduce sentences and to repeal or limit mandatory minimum sentencing laws, which are now perceived as unnecessarily harsh and fiscally onerous. As one state correctional official observed, "budget problems are making people ask fundamental questions about whether we can afford to keep on doing what we've been doing."¹⁴⁶

¹⁴¹*Id.* at 45.

¹⁴²*Id.*

¹⁴³*Id.* at 52.

¹⁴⁴One poll found a significant rise in public support for capital punishment after September 11, 2001. In contrast to pre-September 11 polls, which showed levels of support as low as 65%, a post-September 11 Gallup poll found that 72% supported the death penalty. Gallup Poll, May 6–9, 2002, available at LEXIS, CMPGN library, RPOLL file. Other post-September 11 polls show that death penalty support is rising slightly or holding steady. Polls conducted by the Pew Research Center, ABC News, CBS News, and *The New York Times* found rates of support ranging from 65% to 67% in 2002. Compare Pew Research Center, Feb. 25–Mar. 10, 2002, available at <http://people-press.org/reports/print.php3?PageID=390>. (showing 67% support, 33% strongly favor, 34% favor, 17% oppose, 9% strongly oppose, and 7% don't know), with CBS News/*New York Times*, Apr. 28–May 1, 2002, available at http://www.cbsnews.com/htdocs/c2k/bckcath_050202.pdf (showing 66% favoring death penalty for persons convicted of murder), and ABC News, May 1–5, 2002, available at http://abcnews.go.com/sections/us/DailyNews/deathpenalty_poll020507.html (showing 65% support). Perhaps most noteworthy, support was not falling as it was before September 11.

Polls taken after September 11, 2001 show no change in the support for life with no possibility of parole instead of the death penalty. Several polls have been conducted on this issue; although individual pollsters reported somewhat different rates of support, in each case the individual pollsters' results were consistent before and after September 11. For example, Gallup found that 52% supported the death penalty and 43% supported life without parole in both May 2001 and May 2002. Compare Gallup Poll, May 10–14, 2001, with Gallup Poll, May 6–9, 2002. Both polls are available at LEXIS, CMPGN library, RPOLL file. Similarly, ABC polls in April 2001 and May 2002 both reported that 46% of respondents favored the death penalty over life without parole. Compare ABC News, Apr. 20–24, 2001, with ABC News, May 1–5, 2002.

¹⁴⁵DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, *IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?* 1 (2002), available at http://www.vera.org/publication_pdf/167_263.pdf.

¹⁴⁶Fox Butterfield, *Tight Budgets Force States To Reconsider Crime and Penalties*, N.Y. TIMES, Jan. 21, 2002, at A1.

Thirteen states modified their harsh sentencing laws in 2001 and 2002, and others had similar proposals under consideration.¹⁴⁷ Many of the legislative changes occurred in states led by Republicans,¹⁴⁸ and Republican governors in other states closed prisons as a cost-cutting measure.¹⁴⁹ Some states that once led the way on harsh sentencing laws are now seeking ways to cut their costs by measures that include reducing incarceration. Louisiana, for example, which has the highest per capita incarceration rate in the nation, enacted legislation eliminating mandatory sentences for certain nonviolent crimes.¹⁵⁰ The legislature also limited the application of the state's three strikes law.¹⁵¹ It was estimated that the state will save \$60 million per year in prison operating funds.¹⁵²

California, which passed the toughest three strikes law in the nation,¹⁵³ exemplifies the conflicting currents. Voters have demonstrated support for some nonpunitive approaches, and the state faces the toughest fiscal pressures in the nation, but also counter pressures from key interest groups that favor a continuing emphasis on incarceration. In 2000, California voters approved Proposition 36, an initiative diverting nonviolent drug-possession offenders from prison into probation with court-mandated treatment.¹⁵⁴ It was estimated that the law would save the state \$200 to \$250 million annually, as well as \$450 to \$500 million of decreased prison construction funds.¹⁵⁵ California faced a state budget deficit of \$23.6 billion in 2002,¹⁵⁶ and prison expenditures—which now account for one of every fourteen dollars in the state general fund¹⁵⁷—seem like a logical place to cut costs. But this move would not be popular with a key interest group: prison guards and their union, who have been among Governor Gray Davis's biggest campaign donors.¹⁵⁸ Despite estimates that budget deficit and rising costs would require the state education cuts of \$954 million, the governor continued with plans

¹⁴⁷*Id.* Nineteen states and the District of Columbia have made, or were proposing, sentencing changes in 2002. The states in question are Alabama, California, Colorado, Connecticut, Delaware, Georgia, Iowa, Idaho, Indiana, Louisiana, Michigan, Mississippi, North Dakota, New Mexico, Ohio, Oregon, Texas, Virginia, and Washington. *Id.* at fig.2.

¹⁴⁸Judith Greene & Vincent Schiraldi, *Cutting Prison Costs Is Tempting in Times of Fiscal Crisis*, SAN DIEGO UNION-TRIB., Feb. 27, 2002, at B9, available at 2002 WL 4588031.

¹⁴⁹*Id.* (reporting closings in Ohio, Florida, Michigan, and Illinois).

¹⁵⁰*Id.*

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³In a five-to-four decision involving a defendant who had shoplifted three golf clubs, the United States Supreme Court held that the imposition of a life sentence under California's three strikes law did not violate the cruel and unusual punishment clause of the Eighth Amendment. *Ewing v. California*, 123 S. Ct. 1179 (2003). Under the California three strikes law, the defendant was not eligible for parole until he had served at least twenty-five years.

¹⁵⁴Vincent Schiraldi & Judith Greene, *Law Enforcement: Ripe for Cutting: Prison Budgets*, L.A. TIMES, Feb. 10, 2002, at M2, available at 2002 WL 2452724.

¹⁵⁵RYAN S. KING & MARC MAUER, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 6 (2002), available at <http://www.sentencingproject.org/policy/pub9091.pdf>.

¹⁵⁶Editorial, *Small Fixes, Big Payoffs*, L.A. TIMES, May 22, 2002, at B12, available at 2002 WL 2477414.

¹⁵⁷Schiraldi & Greene, *supra* note 151.

¹⁵⁸*Small Fixes, Big Payoffs*, *supra* note 153.

to spend \$335 million to build a new prison to hold the state's declining prison population.¹⁵⁹ In May 2003, after additional budget cuts the governor vetoed a bill estimated to cut costs by \$70 million annually by enabling nonviolent prisoners to obtain early release dates to participate in work or education programs.¹⁶⁰

VI. CONCLUSION

It is impossible to say at this juncture whether the barriers to change are sufficient to shore up most punitive policies, or whether instead we are at a turning point, when support for punitive policies wanes sufficiently to permit restorative justice to become a major force. Given the conflicting factors noted above—including continuing media emphasis on crime, political benefits for politicians who appeal to the fear of crime, interest groups that benefit from high rates of incarceration, low crime rates, and state budget shortfalls—it would be difficult to predict the direction of public opinion even without the intrusion of several critical events in 2001 and 2002. The terrorist attacks of September 2001 and fear of future attacks are a major source of public anxiety whose implications for the issues discussed here are not yet clear. The public may see domestic acts of terrorism as entirely different from “normal” crime, or they might instead harden their attitudes toward all criminals. Further, the stock market collapse of 2002, accompanied by revelations of widespread corporate wrongdoing and rising unemployment rates will certainly affect public opinion, though again, the implications for penal policy are unknown, beyond the obvious point that penalties for white collar criminals are being increased.¹⁶¹ Finally, there are some indications that the violent crime rate may be starting to rise.¹⁶² Just as falling crime rates may provide a favorable context for progressive criminal justice policies, rising crime rates may reignite calls for tougher measures.

¹⁵⁹CTR. ON JUVENILE & CRIMINAL JUSTICE, PRISON EXPANSION IN A TIME OF AUSTERITY: AN ANALYSIS OF THE GOVERNOR'S PROPOSED NEW PRISON IN DELANO (2002), *available at* http://www.cjcj.org/jpi/ca_brief.html.

¹⁶⁰Editorial, SAN FRANCISCO CHRONICLE, Mar. 23, 2003, at E4.

¹⁶¹For example, the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 802, 805, 116 Stat. 745, 800, 802 (2002), increases the penalties for obstructing justice and shredding documents.

¹⁶²In June 2002, the Federal Bureau of Investigation published preliminary data from 2001 indicating a 2% increase in the nation's Crime Index (compiled by the FBI's Uniform Crime Reporting (UCR) Program and indicating frequency of murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft) from the 2000 figures. See Press Release, Federal Bureau of Investigation (June 24, 2002), *available at* <http://www.fbi.gov>.

