

## Article

# Zimring on Mass Incarceration: Empirical Pessimism and Cautious Reformist Optimism

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### INTRODUCTION

There have been two dramatic criminal justice phenomena in recent decades that have occupied most of Professor Franklin Zimring's attention. The current occasion, of course, is his effort to address mass incarceration—which is the tremendous increase in national imprisonment after 1970.<sup>1</sup> This effort was foreshadowed in 1991 when Professor Zimring and Gordon Hawkins wrote their magisterial book *The Scale of Imprisonment*.<sup>2</sup> But between that book and this new one came a pair of books by Professor Zimring that addressed the equally anomalous phenomenon of the great crime decline in the 1990s—an ironic end-of-twentieth-century parallel. My goal here is to compare the ways by which Professor Zimring has contemplated these events. My premise is that doing so helps capture some of the intellectual history of American academic thought about criminal justice. And also, that it might serve to justify Professor Zimring's work as a model of how we *should* conduct our thinking of what philosophical stance we should adopt as we face the most challenging questions about crime and punishment. I draw from Professor Zimring a kind of tragic wisdom about crime and justice that can enable idealistic reform by curing us of hubris and naiveté.

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1. FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (on file with author).

2. See generally FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

I suggest here that the core overlap of Professor Zimring's approaches to these phenomena is that he views the measurable conditions of crime, and the measurable operations of and changes in criminal justice, as to some extent irreducibly mysterious. This sense of mystery rests on a studied belief that the proliferation of statistical data and technical innovations in our analysis of the data tempts us into an ill-founded confidence in our ability to understand why things happen in crime and justice, to predict what will happen next, and to guide us in sustaining good things and stopping or reversing bad things. The mysteries he uncovers are frustrating and yet alluringly fascinating, depressing, and oddly reassuring. Professor Zimring is a worried skeptic—indeed often a pessimist—about what we can ultimately know or understand about trends in crime and imprisonment. But he is sometimes a cautiously hedge-betting optimist about the possibilities for salutary change in American social behavior and even in the capacity of government to induce positive change. Ironically, he reconciles these predispositions by suggesting that we should have some faith that good things can happen even if the limits of cognition make it hard for us to know why or how they will. So here I hope to show the different ways these features of Professor Zimring's thinking play out on these two subjects.

### I. THE CRIME DECLINE AND THE MOOD SWINGS OF CRIMINOLOGY

In his 2007 book *The Great American Crime Decline*, Professor Zimring acknowledged “the ‘natural appetite’ for explanations” and the desire for a bottom line.<sup>3</sup> Yet, he bluntly disavowed offering any bottom line for reasons, again, that are both encouraging and discouraging. In the 1990s, the American crime rate dropped precipitously<sup>4</sup> and shortly after 2000, commentators began to offer surmises or supposed statistical proofs about the causes—ranging from population changes to changes in drug

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3. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 195 (2007).

4. Of course, the degree of the decline is a function of choices of crimes to measure and data to rely on, but a good very reliable indicator is homicide. The homicide rate in the United States doubled in the decade after 1964, and then the decline after 1993 was equal to 70 percent of the earlier increase—bringing homicides almost down to the level before that earlier rise. *Id.* at 6. And a conservative estimate for the decline in major common crimes generally is 35 percent. *Id.* at 196.

appetites to legalization of abortion to various innovations in policing.<sup>5</sup> For Professor Zimring, the discouraging news was that none of these notions held up very well. He found “no short list of leading indicators” consistent with the decline, but no distinct explanatory cause.<sup>6</sup> He ascribed the lack of clarity to the limits of what social scientists can know, the parochialism of practitioners of various disciplines, and the impossibility of creating controlled experiments.<sup>7</sup> In his review of the flourishing of supposed explanations, Professor Zimring performed the traditional task of criticizing studies for failing to address confounding variables, but he also noted that some of the things being credited for the decline of the 1990s had actually begun in the 1980s, when crime rates were still rising.<sup>8</sup> And most notably, he cast radical doubt on the most-touted causal factors by simply referring us to Canada—the nation closest to us along dimensions of demographics, economics, and government—reminding us that Canada experienced a similar crime decline without any of those factors offered to explain the American decline.<sup>9</sup> Professor Zimring clearly intended the Canada comparison to serve as a sobriety-inducing admonition to others—as it clearly was for him.

While Professor Zimring nodded in the direction of more sophisticated policing as an explanation, his best guess was that the decline was a phenomenon of multiple causation or confluence. Although there is a tone of lament about our epistemological limitations, he does draw some happy news. We know a lot of plausible causes, and this is good if we do not expect too much precision on percentage contribution but are open to experiments in reinforcing any of those factors. In addition, the most dramatic site of the crime decline—New York City—exhibited no changes in the various social and economic conditions or demographic distributions that we often look to when we assess crime rates, so we can take comfort that change is possible even if inexplicable. The sheer mystery is kind of positive—miracles do happen, and maybe we can make a side bet on the foreseeability of the human species even if we cannot understand it. At least we know that high crime rates are not hard-wired or inertial.

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5. *E.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163 (2004).

6. ZIMRING, *supra* note 3, at 195.

7. *Id.* at 202–05.

8. *Id.* at 81.

9. *Id.* at 107–35, 197–234.

Six years later in his follow-up book, *The City that Became Safe*, Professor Zimring returned to this subject and in particular to New York, site of the most dramatic instance of the great decline.<sup>10</sup> In this book, he was more willing to draw lessons from factors he saw as at least strong correlates, even if not susceptible to formal proof. These were mainly certain types of policing (although he presciently discounted one policing factor—the high-volume use of stop-and-frisk tactics).<sup>11</sup> Ultimately Professor Zimring has suggested that we need to rely on what he calls “triangulation of proof”—that is, in effect, crowd-sourcing of imperfect methods hoping they are additive rather than quixotically seeking the right method.<sup>12</sup> But pervading the book is a continuing sense of delighted surprise at the mystery of the magnitude of the change—a sign of social redemption.

## II. THE CHALLENGES OF UNDERSTANDING THE PRISON BOOM

So then we turn to prisons—and here I suggest that Professor Zimring’s approach shows both symmetries and asymmetries with his approach to the crime decline. The 1991 Zimring-Hawkins book showed Professor Zimring’s radical skepticism.<sup>13</sup> The authors concluded that historians and criminologists had been unable to develop—indeed the modern ones had barely bothered to try to develop—any plausible explanations of why certain societies at certain times had their manifest imprisonment rates.<sup>14</sup> Forget about causation—there were not even meaningful correlations.

And so now the post-1970 prison boom is a mystery. How was it that the per capita number of prison inmates grew by 400% from 1972 to 2007?<sup>15</sup> But before we move on to Professor Zimring’s examination of causes, note that for him the relevant boom is in prison admissions, not static rate population ratios, in part because Professor Zimring associates himself with the

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10. See generally FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* (2012).

11. *Id.* at 100–50.

12. ZIMRING, *supra* note 3, at 203.

13. ZIMRING & HAWKINS, *supra* note 2.

14. For a thoughtful essay on this book and an argument that it was greatly underappreciated, see generally Kevin R. Reitz, *Zimring, Hawkins, and the Macro Problems of Imprisonment*, 87 J. CRIM. L. & CRIMINOLOGY 604 (1997).

15. ZIMRING, *supra* note 1 (manuscript ch. 1 at 8).

normative view that much of the harm of imprisonment lies in collateral consequences for the inmate and others.<sup>16</sup>

Now on to his assessment of causes, and its parallel to his view of crime rates. The venerable tropes about the uniqueness of America's crime and punishment—the frontier mentality, the Revolution-rooted libertarian spirit—may be good for static international comparisons but useless in telling us about historical comparisons across time in the United States.<sup>17</sup> We are reminded of course that the national figure is the sum of fifty-one figures from diverse jurisdictions and that the diversity of criminal justice systems and social conditions should produce a bell-shaped curve with low tails.<sup>18</sup> But here is the true anomaly: every data point on a 1970s bell-shaped curve of state and federal prison rates went up sharply at a roughly similar proportion of the base, regardless of where a jurisdiction sat on the continuum of punitiveness.<sup>19</sup> Thus, none of the state-specific approaches to imprisonment can explain the boom.

As with crime rates, intuitively appealing explanations do not explain. First, crime rates cannot do the work. The fluctuations in reported crimes, and the downward trajectory during the latter phase of the prison boom, belie any simple notion that more crime caused more imprisonment, or even that there was enough crime to spur an exaggerated fear of crime that might, in turn, explain the prison boom.<sup>20</sup> Nor can arrest rates serve to explain.<sup>21</sup> Arrests may even be an example of reverse causality because an increase in imprisonment leads to more parole which leads, depending on jurisdictional rules, to more arrests for violations of parole conditions.<sup>22</sup> Professor Zimring disdains arrest rates, not only because their trajectory does not match well with the prison admissions boom, but also because prosecutors have so much unguided (and rarely measured) discretion in choosing

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16. See *id.* (manuscript ch. 1).

17. Professor Zimring attributes some of these notions about American exceptionalism to our love of citing de Tocqueville. *Id.* (manuscript ch. 1 at 7).

18. A separate question is whether the rise in the imprisonment rate is what caused the lowered crime rate. This is a much-studied subject, with a consensus of academics concluding that only a small portion of the crime drop can be attributed to the incapacitative or deterrent effect of increased imprisonment. *E.g.*, RYAN KING ET AL., *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* (2005).

19. ZIMRING, *supra* note 1 (manuscript ch. 1).

20. *Id.* (manuscript ch. 2 at 13–14).

21. *Id.* (manuscript ch. 2 at 15–22).

22. *Id.* (manuscript ch. 2 at 22).

which arrestees to charge at all and which to charge with prison-eligible crimes.<sup>23</sup> Indeed, Professor Zimring assigns so much weight to prosecutors' discretion that he disdains the view that harsher and more formulaic penal legislation in the "determinate sentencing" era can explain the prison boom.<sup>24</sup> For Professor Zimring, prosecutors can render even mandatory sentences non-mandatory.<sup>25</sup>

Nor does Professor Zimring credit new policies with respect to particular crimes for the increase in prison admissions. For the crimes that produce the most frequent and longest prison sentences per case—homicide and other violent crimes—the rates of incidence and arrests somewhat rose at times after 1970 but not in any way that strongly correlates with the prison boom.<sup>26</sup> Rather, for Professor Zimring, the salient fact—and the vexing mystery—is that after 1970, pretty much regardless of the category of crime or criminal or the available menu of charges, the penalty was a prison sentence.<sup>27</sup>

Professor Zimring acknowledges that his doubts that social policy concerning distinct social harms that merit imprisonment can explain the prison boom finds an exception for drugs.<sup>28</sup> Professor Zimring somewhat finesses the drug contribution by ascribing much of it to the arguably exogenous factor of federal prosecution or to that factor's own root cause in vast explanation of the federal regulatory bureaucracy and DEA resources—an example of redundant jurisdiction.<sup>29</sup> But while he acknowledges that the War on Drugs must have somewhat contributed to the prison boom, his skepticism applies to even this low-hanging empirical fruit, and his focus on drugs also leads back to his more general skepticism about the arrest rate/imprisonment rate linkage.<sup>30</sup> As Professor Zimring shows, drug arrests fluctuated erratically through the 1950s, then exploded from 1959 to 1973, but then fluctuated again in the next two decades.<sup>31</sup> Hence "[t]he lack of fit between patterns of drug arrests and prison population

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23. *Id.* (manuscript ch. 2 at 39).

24. *Id.*

25. *Id.* (manuscript ch. 2 at 39, ch. 8 at 2).

26. *Id.* (manuscript ch. 1).

27. *See id.* (manuscript ch. 1 at 17–18).

28. *Id.* (manuscript ch. 4 at 7–11).

29. *Id.*

30. *Id.* (manuscript ch. 1).

31. *Id.* (manuscript ch. 2 at 19–20).

is startling.”<sup>32</sup> Consider Professor Zimring’s treatment of this knotty question: “To the extent that a relatively fixed expansion of imprisonment might be either desired or tolerated in the years after 1972, the crimes or sentence lengths that are added to reach that level may not be an overwhelmingly important influence on the motivation or tolerance for prison growth.”<sup>33</sup>

Here, in a sentence worthy of former Federal Reserve Chair Alan Greenspan for its syntactical caution, Professor Zimring shows his agnosticism about how the most intuitively plausible inputs—governmental policy focus on particular crimes or longer sentences due to legislative, prosecutorial, or judicial choice—can work as explanations of the prison rate boom. Rather, if there was some general tropism toward using prison as the proper penalty for crimes, that tropism operated on its own inherent force, as demonstrated by this key statement about drugs:

To the extent, then, that the relatively constant growth of imprisonment before and after the peak emphasis on the war on drugs indicates that drug offenders simply crowded out marginal property offenders or restrained longer prison sentences for street criminals when they took priority in the late 1980s, the drug panic may not have been itself a primary cause of change in the growth rate of imprisonment.<sup>34</sup>

Thus, Professor Zimring argues the drug war of the mid-1980s was less a cause of the prison expansion of even the twenty years thereafter than a result of the monopoly of prison as the only policy choice considered at this time. “The questions varied from robbery and homicide to repeat offenders, to child molesters, to crack users and dealers. Yet whatever the question of the day, the answer was always prison.”<sup>35</sup>

### III. THE DISTRESSED DIALECTIC ON CAUSE

Throughout his new book, Professor Zimring emphasizes that most of the leverage for prison admissions is at the local level, because that is where the true power lies and also where general social attitudes in favor of punitiveness have their most directly visceral effect.<sup>36</sup> And the major actor in this situation is obviously the county district attorney (DA). In this regard, Professor Zimring would not necessarily disagree with Professor

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32. *Id.* (manuscript ch. 2 at 21).

33. *Id.* (manuscript ch. 1 at 31).

34. *Id.*

35. *Id.* (manuscript ch. 1 at 32).

36. *Id.* (manuscript ch. 2 at 2–3).

John Pfaff's thesis that the key lever in the increase in imprisonment rates after 1970 was the prosecutorial decision to seek prison over probation (as opposed to legislation of longer sentences).<sup>37</sup> Professor Zimring would concede that prosecutors were properly positioned to effect the shift to prison sentences if they wanted to do so, but, his question is why that change in prosecutorial practice occurred when it did.<sup>38</sup> If nothing important changed in the institutional situation or power of prosecutors after 1970, the dominant role of the local prosecutor cannot tell us anything about why the prison boom happened. So Professor Zimring ardently searches for evidence of some new independent factor that motivated prosecutors to deploy their inherent leverage to favor prison much more than they had earlier.<sup>39</sup>

As he undertakes this search, Professor Zimring posits three key candidates. One is the possibility of a political phenomenon—increased salience of public concern about crime, with its fairly direct effect on prosecutorial behavior.<sup>40</sup> He separates the salience of the crime issue in terms of voter priorities—and the hostility toward government leniency—from the more reactive subjective fear of crime.<sup>41</sup> And he underscores that the former can exist independent of the latter.<sup>42</sup> Ironically, he cites this factor as one explanation for such harsh penal legislation as the Three Strikes law,<sup>43</sup> even though he elsewhere disdains harsh new penal legislation as an empirically sound candidate as a causal factor for the prison boom.<sup>44</sup> So he is damning this candidate with his faint praise. In any event, he seems wary of making much of this factor, perhaps fearing that it is too close to a tempting but vague or even tautological notion that voters in the 1970s

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37. JOHN PFAFF, *LOCKED IN*, 128–36 (2016).

38. ZIMRING, *supra* note 1 (manuscript ch. 2).

39. Recall that Professor Zimring has already cast doubt on whether post-1970 harsher and more formulaic sentencing laws can explain the boom, despite the common—indeed clichéd—view that mandatory minimums and other rigid laws transferred power from judges to prosecutors. For Professor Zimring, that legislation may have changed the tools in the prosecutors' toolkit, but he believes that prosecutors' charging discretion always gave them quite sufficient devices to get the penalties they preferred. The question is why the preference changed.

40. *Id.* (manuscript ch. 2).

41. *Id.*

42. *Id.*

43. *Id.* (manuscript ch. 2 at 15).

44. *Id.* (manuscript ch. 3).

waxed punitive to express their disdain for the social permissiveness we associate with the 1960s.

Another candidate is what Professor Zimring describes as the greater intensity of adversarial dynamics in response to the Warren Court's re-reading of the Bill of Rights to favor criminal defendants.<sup>45</sup> Here, Professor Zimring properly cites the famous thesis of Professor William Stuntz about how the Warren Court emphasized procedural rights under the Fourth, Fifth, and Sixth Amendments as opposed to the possibility of using the Eighth Amendment to limit the power of states to legislate harsh crime definitions and sentences.<sup>46</sup> Presumably, the point would be this: the Warren Court empowered defense lawyers to fight prosecutors through all manner of pretrial motions involving limitations on police searches and interrogations and new rules regarding jury selection, thus raising the cost of criminal litigation to prosecutors and creating new arenas where lawyer-against-lawyer warfare intensified. And then, prosecutors presumably fought back with higher-sentence charges or sentencing recommendations. Professor Zimring essentially just mentions this as a plausible factor—and then he drops it.<sup>47</sup>

A third candidate is that something was undeniably a new factor at the level of local prosecution: the widespread adoption of modern management science methods to promote efficiency and enable more objective evaluation criteria and processes in district attorney offices.<sup>48</sup> The very concreteness of this factor and the lesser likelihood with this candidate (than the other two) that it is endogenous seems to lead Professor Zimring to initially give greater credence to it.<sup>49</sup> But it turns out that his treatment of this factor only underscores his agnosticism about causality more generally. The intrusion of business-school-type supervisory and accountability protocols—long after they had become common in other professions or businesses—might well have led prosecutors to focus on a high ratio of imprisonment outcomes as a key measure by which line DAs could prove their worth. Professor Zimring observes that the Law Enforcement Assistance Administration stepped in with financial incentives for local prosecutors to join its Prosecutor's Management Information

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45. *Id.* (manuscript ch. 3 at 16–20).

46. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 196–243 (2011).

47. ZIMRING, *supra* note 1 (manuscript ch. 3 at 16–20).

48. *Id.* (manuscript ch. 3 at 20–25).

49. *Id.*

System (PROMIS), and prosecutors became computer literate in the new world of criminal justice sabermetrics.<sup>50</sup> But did this intervention really change prison admissions? Professor Zimring seems to lose heart in this possible insight after a brief moment of analytic excitement: “[T]he history of the period is too crowded with other adversarial pressures to test a wholly independent measurement effect.”<sup>51</sup>

But let me add another aspect of Professor Zimring’s vexation. He observes that the management explanation is a brutally ironic version of unintended consequences.<sup>52</sup> Nothing in the premises of the accountability and evaluation schemes developed by management experts would require or necessarily promote more prison admissions as a marker, much less the key marker, of greater prosecutorial efficiency.<sup>53</sup> But Professor Zimring does stress that the favoring of prison was *foreseeable*—as if the purveyors of business-school protocols should have anticipated this effect.<sup>54</sup> Not to get into inapt reliance on mens rea principles, but that these purveyors and their clients were negligent in essentially enabling the prison admissions boom bespeaks Professor Zimring’s ambivalent reluctance to leave mystery as mystery.

So after trying hard to identify a distinct time-specific and independent causal factor, Professor Zimring concludes that the best evidence that we have from the multiple causes is that a variety of doctrinal and systemic changes jointly produced such prosecutorial emphasis on prison for a wide variety of crimes.<sup>55</sup> Further, for Professor Zimring, the boom was consistent with prosecutorial ambitions that cut across all crimes and criminals. And even assuming the force of these factors, what Professor Zimring calls their “modest intensity,”<sup>56</sup> falls short of explaining their huge arguable effect on the system.

Professor Zimring describes all of these as “metaphorical references” to causation.<sup>57</sup> Elsewhere, in skeptically reviewing various hopeful predictions of recommendations for lowering prison rates, he says: “So analogies and metaphors are pressed

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50. *Id.* (manuscript ch. 3 at 22–24).

51. *Id.* (manuscript ch. 3 at 23).

52. *Id.* (manuscript ch. 3 at 24).

53. *Id.*

54. *Id.* (manuscript ch. 3 at 24–25).

55. *Id.* (manuscript ch. 3).

56. *Id.* (manuscript ch. 3 at 24).

57. *Id.* (manuscript ch. 3 at 20).

into service where the known history of imprisonment cannot instruct."<sup>58</sup> As he reviews the variety of inputs into the American prison rate, he laments that "it is . . . impossible to assess how important each factor individually or all of them collectively have been in contributing to the actual size of the prison expansion of the post-1970 era."<sup>59</sup> One peculiarity of the American situation, he observes:

[I]s how loosely linked the characteristics of U.S. government and crime policy are to social and demographic factors that might be discussed when searching for the causes of variations in crime. Variations in crime rates over time have played a relatively minor role in explaining variations in imprisonment, so a detailed search for changes in the population and the economy that might influence crime rates are not high on the agenda of things which might have major impact on rates of imprisonment. Of course, very large shifts upward or downward in rates of serious crime should have some influence on resulting prison populations, but there have been no projections of demography or economic futures over the past half-century that powerfully predicted major variations in levels of crime. Just as changes in the age structure in the population and of economic trends have had little influence on crime rates or imprisonment, there is no reason to expect this loose linkage will abate in the foreseeable future.<sup>60</sup>

#### IV. REVERSING THE BOOM—CAN HOPE TRIUMPH OVER EXPERIENCE?

To return to my notion of comparing Professor Zimring's treatments of the two major criminological events at the end of the last century, the asymmetry between this new book and those on the crime decline has to do with a new layer of pessimism. On both subjects Professor Zimring has exhibited anxiety and downright pessimism about our intellectual capacities to understand the past.<sup>61</sup> But on the subject of the prison boom, we see a deep pessimism about whether we can know or control what will come next.<sup>62</sup> There is no logical inconsistency in this mood difference about the futures of the two phenomena, but the striking difference in tone in these two phases of Professor Zimring's work merits examination.

To set up this examination here, I diverge into a very speculative thought experiment about the basis for this asymmetry.

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58. *Id.* (manuscript ch. 5 at 4).

59. *Id.* (manuscript ch. 4 at 21).

60. *Id.* (manuscript ch. 4 at 24–25) (citation omitted).

61. *Id.* (manuscript ch. 5).

62. *Id.*

My excuse for doing so is that it is inspired by the very generative speculations that pervade Professor Zimring's new book.

With respect to the great crime decline, we might infer from Professor Zimring's 2006 and 2012 books that he is mildly optimistic that the rates can remain low.<sup>63</sup> To be more precise, even if they show a tendency to go up again, we now have demonstrated our capacity to constrain them again, whether as policy-makers or as a behaviorally resilient species. But if prediction to some extent must rest on historical observation, what would the basis be for this optimism, given Professor Zimring's difficulty in sorting out the multiple possible causes of the decline? Might the multiple causation itself justify optimism? This is a tricky question that can go off in a number of uncharted tangents. If, hypothetically, there were five causes of the decline and their confluence was the key, would the disappearance of one or two as weak links undo the good work? Or would the continued presence or force of some of them be sufficient to sustain the low rate?

And what about inertia? What is the inherent sustainability of low crime rates? Consider some possibilities: might a reduction in the public salience of crime that results from the crime decline lead to more permissive social attitudes that in turn would lead to more crime? Or to the extent that one believes that the experiences of being arrested and convicted and imprisoned are themselves criminogenic, would the low crime rate indeed be self-sustaining? On the other hand, concerning the decarcerative policies demanded by those who decry mass incarceration—in part because so many believe that the lower crime rates disprove the need for high imprisonment rates—could these policies themselves become criminogenic because the wrong people, or too many people, will be released or never imprisoned?<sup>64</sup> Perhaps we

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63. ZIMRING, *supra* note 3; ZIMRING, *supra* note 10.

64. Recent California history may be informative. The state's 2011 Realignment law (discussed by Professor Zimring at chapter 5) shifted much of the responsibility of incarceration from state prisons to county jails—with the added design and effect that those placed in jails would likely have shorter sentences and be “out on the streets” more quickly. Critics of the new law identified various indicia of a post-2011 crime rise they attributed to the new law. See Press Release, Criminal Justice Legal Found., More Evidence of Rising Crime Under Realignment (Feb. 8, 2013), <https://www.cjlf.org/releases/13-03.htm> [<https://perma.cc/SVT9-VQZA>]. Empiricists responded with studies refuting the linkage, except for a spike in one category—auto thefts—which they could not confidently disconnect from the new law. See MAGNUS LOFSTROM & STEVEN RAPHAEL, PUBLIC POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT AND CRIME

must look to the history of the crime rise in the 1960s and 1970s and ask how the fabled low crime rates of the 1950s did not sustain themselves. Alas, the causes of that rise are themselves heavily contested and perhaps unknowable, save for the sheer rise in the proportion of young people in the population as a result of the post-World War II Baby Boom,<sup>65</sup> and some amorphous and perhaps tautological attributions to the permissiveness of the counterculture. Or, finally, if we believe that the key factor in the crime decline was better policing, is there any reason to fear that policing will worsen again?

In any event, maybe it is the simplistic fact that the crime decline is a good thing that gives it more inertia than a bad thing would have. There might be more social consensus behind policies to curtail the inertia with prison rates than with the policies that created mass imprisonment. Or maybe it is the apparent fact that the good thing is more a manifestation of the plasticity of human behavior and less attributable to controversial governmental policy than the prison boom. By contrast, maybe high prison rates are more prone to stick or even increase because of either the continuation or worsening of bad government policies or exogenous effects (like new gang structures or new entries on the drug market).<sup>66</sup> Or will it be easier to change a bad thing that is (maybe) clearly due to government policies?

However we address these speculative problems, Professor Zimring's expectations about our ability to reverse mass incarceration seem quite opposite to his optimism about crime rates. Simply put, he is awed and indeed intimidated by the magnitude of the prison boom and by our inability to have predicted it or even to understand it, and as a result he feels overwhelmed by the challenge of imagining how to correct it.<sup>67</sup> Given how unnat-

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RATES IN CALIFORNIA (2013), [https://www.ppic.org/content/pubs/report/R\\_1213MLR.pdf](https://www.ppic.org/content/pubs/report/R_1213MLR.pdf) [<https://perma.cc/DL64-T2UY>].

65. *E.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 58–59 (1974) (using the metaphor of a barbarian invasion to describe the demographic change).

66. The intrusion of crack cocaine was blamed for a crime spike in the 1990s (and the curtailment of crack consumption partly credited for the crime decline). *See* Levitt, *supra* note 5, at 163–64. In an interesting twist, Professor Zimring sees the new national panic over opioid abuse not as a sign of an increase in perceived crime that would spark an increase in punishment, but rather a rethinking about whether the criminal justice system is the right instrument for dealing with an epidemic of this vast scale, especially when this is largely a white person's epidemic. ZIMRING, *supra* note 1 (manuscript ch. 6).

67. ZIMRING, *supra* note 1 (manuscript ch. 5).

ural that event was, a modestly optimistic person might conclude, or at least make a bet, that normalizing forces in society will be able to reverse it. But Professor Zimring is not that optimist. He states: “A return to 100 prisoners per 100,000 citizens would in some respects be a more radical alteration of institutional operations and expectations than the radical expansion that preceded 2007.”<sup>68</sup> Professor Zimring exhibits an existential sense that the boom was a kind of late-historical original sin committed by American society, which is now destined to suffer the consequences of that sin for a long time.

The middle parts of the book contain a number of reasons for his worry. He notes the embeddedness of the jurisdictional redundancy caused by the federal role in drug prosecution, citing danger signs in the continued and even increased allocation of federal resources to regulatory and law enforcement agencies dealing with drugs.<sup>69</sup> He fears that the post-1970 voluminous prison construction will haunt us because the past investment and the high rate of fixed costs mean that marginal costs of new prison admissions will not provide much of a deterrent to the states.<sup>70</sup> He cautions that despite the empirical evidence to the contrary, functionaries with an occupational stake in the prison boom will convince much of the public to attribute the happy new low crime rates to the boom.<sup>71</sup>

He is skeptical about the ostensibly pragmatic belief that there is “a [l]aw of [p]enal [g]ravity,”<sup>72</sup> a colorful term for a belief in regression to the mean by which the anomaly of the great prison boom will correct itself. For one, he has lost faith, if he ever had it, in even short- and middle-range predictions of future levels of imprisonment, so he regards the gravity idea as mainly a wish—or another metaphor.<sup>73</sup> For Professor Zimring, it is very hard to conceive that any law of gravity has survived the state and federal trends that have led to this impasse.<sup>74</sup> To admirably mimic Professor Zimring’s style of verbal irony, if there were ever a law of penal gravity, the prison boom repealed it. Professor Zimring also disdains reformist campaigns that manifest a kind of golden ageism by naively assuming that if there were

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68. *Id.* (manuscript ch. 5 at 5).

69. *Id.* (manuscript ch. 4).

70. *Id.*

71. *Id.*

72. *Id.* (manuscript ch. 5 at 4–6).

73. *Id.*

74. *Id.*

once social conditions and governmental policies that enabled the once low prison rates, there must be a way to restore them.<sup>75</sup>

True, the prison admission rate has flattened since 2007,<sup>76</sup> but Professor Zimring waffles on what to make of it. On the one hand, he notes that even in those states that showed increases in imprisonment after 2007, those increases were very small compared to the boom years.<sup>77</sup> On the other hand, he cautions that much of the flattening can be ascribed to the anomalous case of California, whose sheer size ensures that its numbers will distort the national picture and whose big prison drop was contingent on distinct, and perhaps unique, legal circumstances.<sup>78</sup>

Among all the possible predictions for the next era of prison admissions, Professor Zimring suggests that as a cautious default we should assume there will be business as usual, with the relevant “usual” being the policies that have allowed for the flattening of the prison boom in the last few years.<sup>79</sup> But that usual business is associated with 600,000 prison admissions in 2017, a fifth lower than the 2006 peak, but more than we saw in 1998.<sup>80</sup> If so, Professor Zimring calculates that continuing that business will mean we will not get back to our pre-boom levels for many years.<sup>81</sup> Put differently, after 2007, we saw an 34% national decrease in prison admissions, but Professor Zimring warns:

Were this 34% national rate decrease in 10 years maintained consistently for 36 years—or one year longer than the 35 years that caused the 400% increase—the rate of imprisonment in the United States in 2043 would be 326 per 100,000, so that well over half of the gains registered during 1972 to 2007 would have been retained four decades later.<sup>82</sup>

So the post-2007 pattern that remains, for him, is as much a worrisome admonition as it is a reassurance. We must have done something good in the last nine years. We can give ourselves credit for that but must also accept the possibility that this is the best we can do with the monstrosity we created.

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75. *Id.* (manuscript ch. 5).

76. *Id.* (manuscript ch. 5 at 10 fig. 2).

77. *Id.* (manuscript ch. 5).

78. Most obviously, as confirmed by the Supreme Court in *Brown v. Plata*, the medical and mental health care treatment of inmates in the California prisons, traceable to illegal overcrowding, required a drastic reduction in the prison population. 563 U.S. 493 (2011); ZIMRING, *supra* note 1 (manuscript ch. 5).

79. ZIMRING, *supra* note 1 (manuscript ch. 5).

80. *Id.* (manuscript ch. 5 at 11).

81. *Id.* (manuscript ch. 5).

82. *Id.* (manuscript ch. 5 at 11).

Professor Zimring makes a few gestures in the direction of specific legislative reforms, allowing that some cutbacks in severe drug sentences for possession (or for small-time sales done merely to support one's habit) are likely to happen and will lower prison rates.<sup>83</sup> He speculates (though unconvincingly) that recognizing many crimes classified as sexual assault are non-rape offenses committed intra-family, may prove more amenable to such alternative measures as restorative justice.<sup>84</sup> He speculates that we might rethink the severity of harm ascribed to possession of child pornography.<sup>85</sup> But, however likely he believes these changes are, he does not indicate any great faith that they can substantially mitigate our original sin. And Professor Zimring adds a further admonition still. As with these possible legislative changes, he indicates some hope that while we will never well understand what caused the boom, jurisdictions can at least experiment with various means of achieving decarceration.<sup>86</sup> Indeed he seems to favor eclectic experimentation rather than putting all hope in some singular plan and then not having any Plan B or Plan C.<sup>87</sup> But then as a statistical matter he alerts us that diversity of efforts will produce a bell-shaped curve of decarceration outcomes that will moderate the national degree of mitigation.<sup>88</sup> It is as if he wants a unitary approach to reverse a unitary trend, but there is no way to do so. "Just as the rare unanimity of increases during the high growth era magnified the increases, a return to diversity will probably moderate the level of decline."<sup>89</sup>

#### CONCLUSION—AND FINAL CAUTIOUS OPTIMISM

Although, as I have suggested, Professor Zimring does not show much passion about various concrete legal changes that he says might alleviate our prison crisis, toward the end of the new book he sketches out some ideas about changes sufficiently foundational to belie his sober doubts about big reform.

He does of course try to draw some political science lessons from the California experience, but they are mainly about how

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83. *Id.* (manuscript ch. 6).

84. *Id.* (manuscript ch. 7).

85. *Id.*

86. *Id.*

87. *Id.* (manuscript ch. 5).

88. *Id.* (manuscript ch. 4).

89. *Id.* (manuscript ch. 4 at 25).

California accidentally demonstrated the variety of political, economic, and legal levers that might lead to decreases in prison rates—the base of his very cautious ultimate recommendations about top-down policy change.<sup>90</sup>

One, alas, is a bit of a throwaway. Acknowledging that the most powerful actors over sentencing outcomes are prosecutors, he imagines that changing the way they conceive their jobs would logically move the needle on decarceration.<sup>91</sup> But, as elaborated in Professor John Pfaff's essay in this volume,<sup>92</sup> Professor Zimring rather abruptly dismisses any hope for change along these lines.<sup>93</sup> He presumably does so because he believes that the predispositions and attitudes of prosecutors are so substantially determined by their institutional powers that they will never have much incentive to act very differently unless forced to by higher authorities or a radical restructuring of where they sit in the system.

But Professor Zimring places tentative bets on two other ideas—ideas that might indeed fundamentally change the way prosecutors act without any expectation of redeeming or changing their hearts and minds.

The first is, in a sense, constitutional. Throughout the book, Professor Zimring emphasizes that the bottom line of sentencing outcomes in any jurisdiction results from compromises among—and often uncoordinated overlapping decisions by—numerous agencies of government, with most taking on sentencing in individual cases.<sup>94</sup> Professor Zimring is confident that the big moves needed to reverse the boom require reallocating power upward to authorities that think of sentencing in deliberately macro-level terms.<sup>95</sup> This might suggest pushing power to the legislature or the top of the executive branch. But this reallocation can be at a somewhat lower level so long as those higher authorities allocate the powers of general sentencing policy to the right kind of entity. And for Professor Zimring, that entity can be a sentencing commission.<sup>96</sup> Professor Zimring briefly sketches the types of commissions we have now, and the variety of powers that they

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90. *Id.* (manuscript ch. 8 at 272).

91. *Id.* (manuscript ch. 8).

92. John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673 (2020).

93. ZIMRING, *supra* note 1 (manuscript ch. 8).

94. *Id.* (manuscript ch. 4).

95. *Id.*

96. *Id.*

have.<sup>97</sup> The good news is that Professor Zimring's vision of the possible role of a sentencing commission accords with the kind of ambition (dare I say optimistic ambition?) for fundamental change that reversing mass incarceration will require. If a sentencing commission can commit government to rational cost-benefit analysis of sentencing, and constrain the bureaucratic tendencies of governmental actors and the demagoguery of electoral politics, then it might be up to the task. Perhaps the bad, but tempering, news is that sentencing commissions have been around for quite a while, and despite advocates touting their promise,<sup>98</sup> they have not been a major factor in national efforts to reduce imprisonment.<sup>99</sup> Perhaps they could be, but to give them the leverage Professor Zimring desires, their promoters would have to overcome the great resistance they face from those (often prosecutors!) who raise constitutional objections to ceding to an administrative agency the power to constrain sentences handed out on the ground. A tough realist like Professor Zimring is hardly naïve about the hard political work needed to grant commissions the powers he would allocate to them. But quite understandably, his new expression of hope in commissions at the end of this book is hardly the occasion to write a manual for that work.

The other big idea has to do with what Professor Zimring likes to call the "correctional free lunch."<sup>100</sup> As developed at great length and with great empirical grounding by Professor David Ball,<sup>101</sup> the idea is that the local authorities who determine sentences operate by imposing a huge negative externality on other parts of government—most obviously the state governments that pay for the prisons to which the locals send their convicted offenders.<sup>102</sup> Professor Zimring underscores the value of using financial incentives and disincentives to internalize the costs of imprisonment with those who have the power to sentence.<sup>103</sup> For

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97. *Id.* (manuscript ch. 7).

98. *E.g.*, Robert Weisberg, *How Sentencing Commissions Turned Out To Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

99. *See* Campbell Robinson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> [<https://perma.cc/6QMC-6J8M>].

100. ZIMRING, *supra* note 1 (manuscript ch. 3 at 14).

101. *See* W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060 (2014).

102. ZIMRING *supra* note 1 (manuscript ch. 3).

103. *Id.*

example, the county board of supervisors that must triage limited funds among the many competing demands from its agencies and constituents will ensure that the local prosecutors are properly parsimonious in their charging decisions and sentencing recommendations.<sup>104</sup> Again, this is a laudable idea, and if reformers could find a way of substantially curing government of all these perverse incentives and externalization problems, then reversing the prison boom would seem more imaginable. The opportunity for reformers is there; the programmatic blueprint has not been drafted yet.

So there is more prose than poetry in these recommendations, but that does not surprise, nor should it disappoint. Just as Professor Zimring has disavowed any promise of empirical bottom lines, so does he implicitly disavow any passion-eliciting revolutionary programs to extricate ourselves from the predicament we have trapped ourselves in with these decades of hyperincarceration. But he never discourages us from the hard and uncertain work of reconfiguring the structures of government that were at least complicit in, if perhaps not the cause of, the predicament. His side bet on human resiliency is still on the table.

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104. See Ball, *supra* note 101.

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