

The Ethics of Punishment

Ethics
Matters

Lectures in
Applied Ethics

Lawrence M. Hinman, Ph.D.
Professor of Philosophy
Co-Director,
Center for Ethics in Science & Technology
University of San Diego
Larry@EthicsMatters.net

April 1, 2009

Introduction

Increasingly, we hear calls to “get tough” about punishment. United States already has one of the very highest percentages of its population in prison

Issues:

- Number of people in prison
- Uniform sentencing across states (Pew Report)
- Level of crime
- Life without parole to minors
- Reintegration into the community
- Private prisons

A Disturbing Picture

No other country has as many people in prisons and jails.

One in 100 Adults Behind Bars (Pew Report)

National prison population tripled from 1987 to 2007

Currently 2.3 million Americans in prisons and jails

Cost of prisoner: \$25K per year; \$65K investment per bed

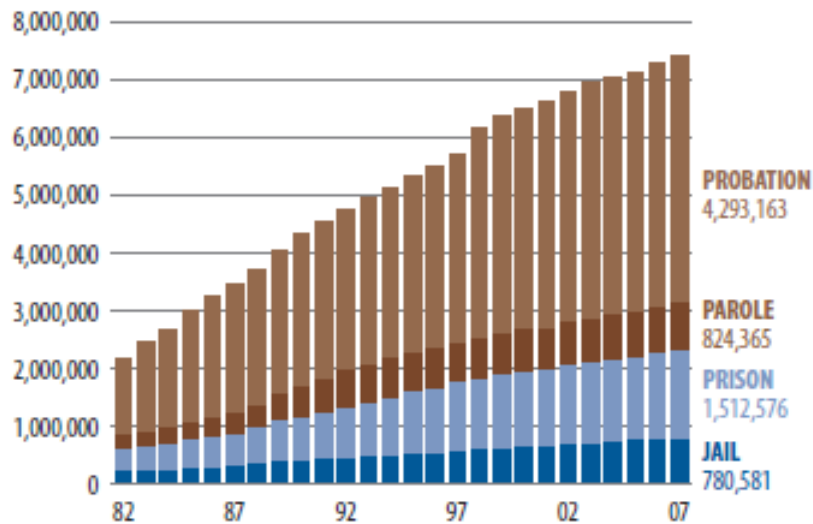
- About 1 in every 15 persons will serve time in prison during their lifetime.
- Almost 1/3 of African Americans will serve time in prison during their lifetimes; 17% of Hispanic males, 5.9% of white males.
- Men are ten times more likely to go to prison than women.

Source: <http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime>

A Disturbing Picture, 2

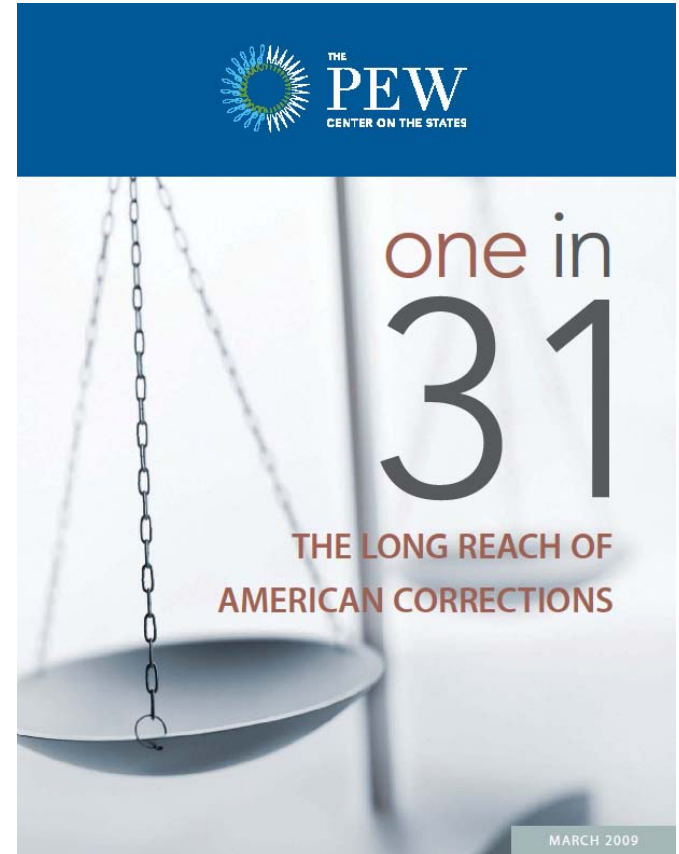
7 MILLION AND COUNTING

Led by probation, the correctional population has tripled in 25 years.



SOURCE: Bureau of Justice Statistics Correctional Surveys available at <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>.

NOTE: Due to offenders with dual status, the sum of these four correctional categories slightly overstates the total correctional population.



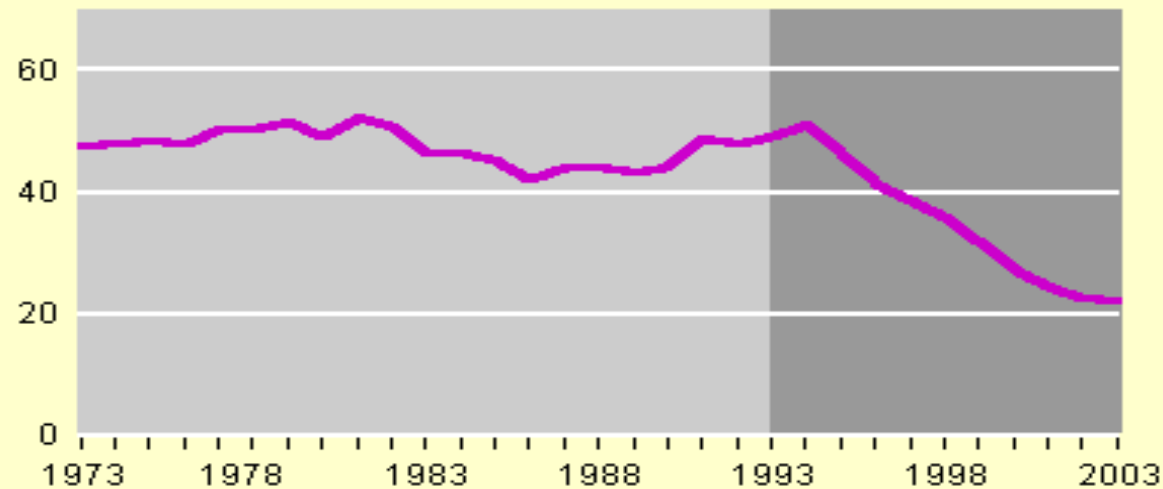
A Disturbing Picture, 4

Violent crime rates have declined since 1994, reaching the lowest level ever recorded in 2003

Source: Department of Justice
<http://www.ojp.usdoj.gov/bjs/glance/viort.htm>

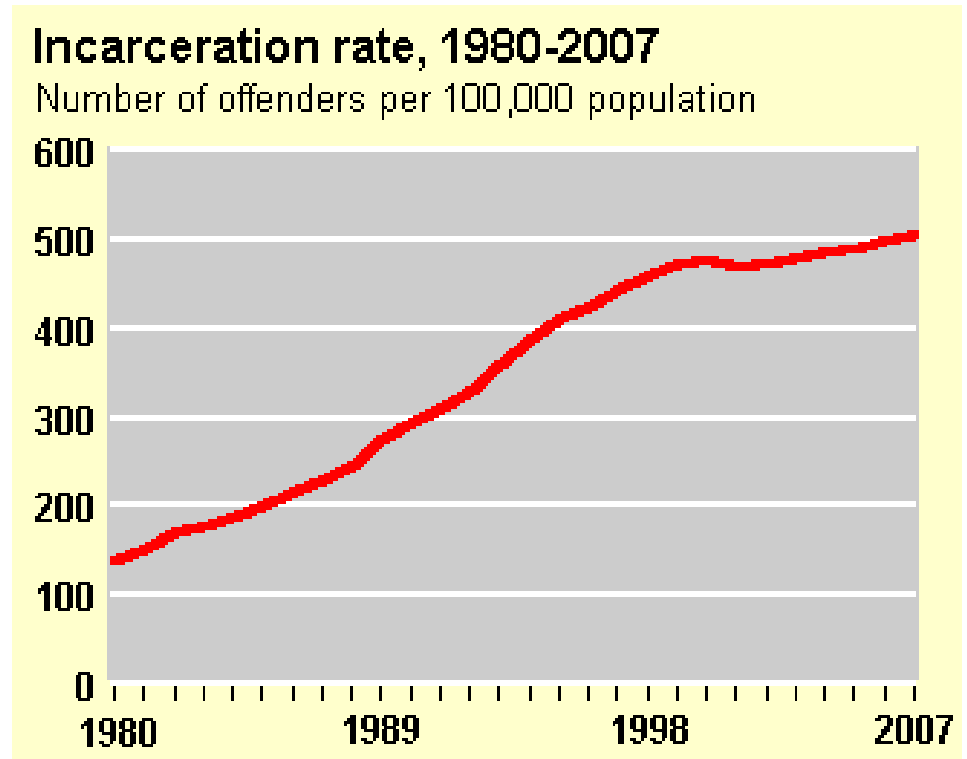
Violent crime rates

Adjusted victimization rate per 1,000 persons age 12 and over

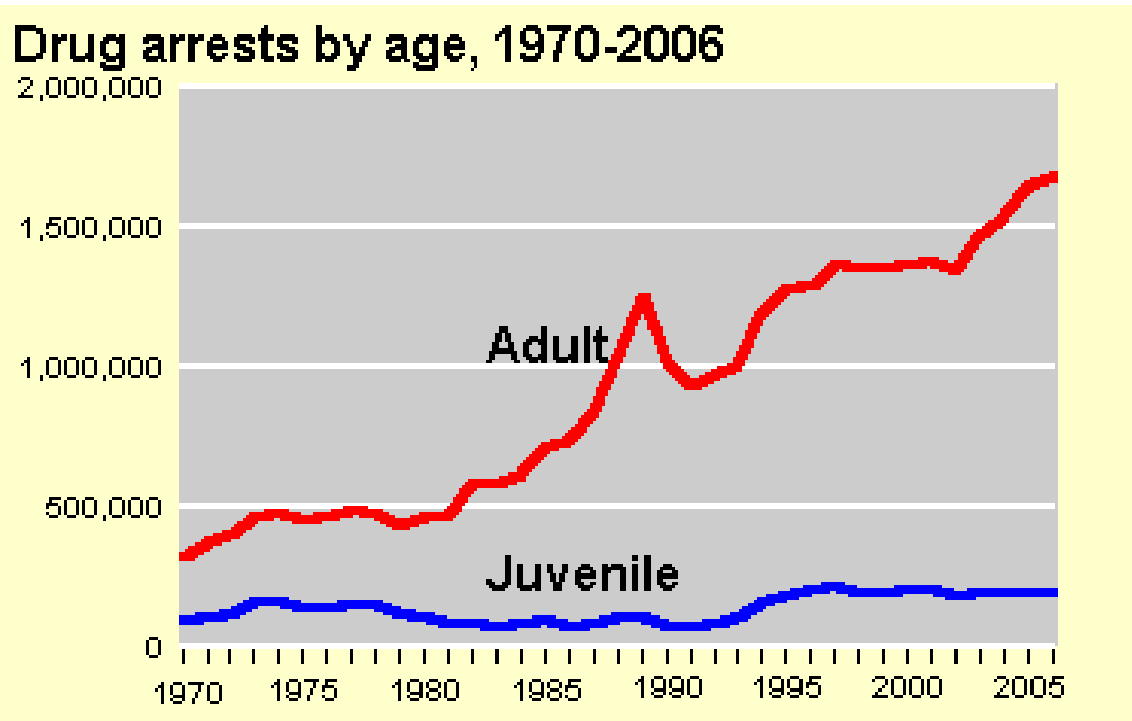


Increasing Incarceration Rate

Incarceration rates have soared during the past three decades.

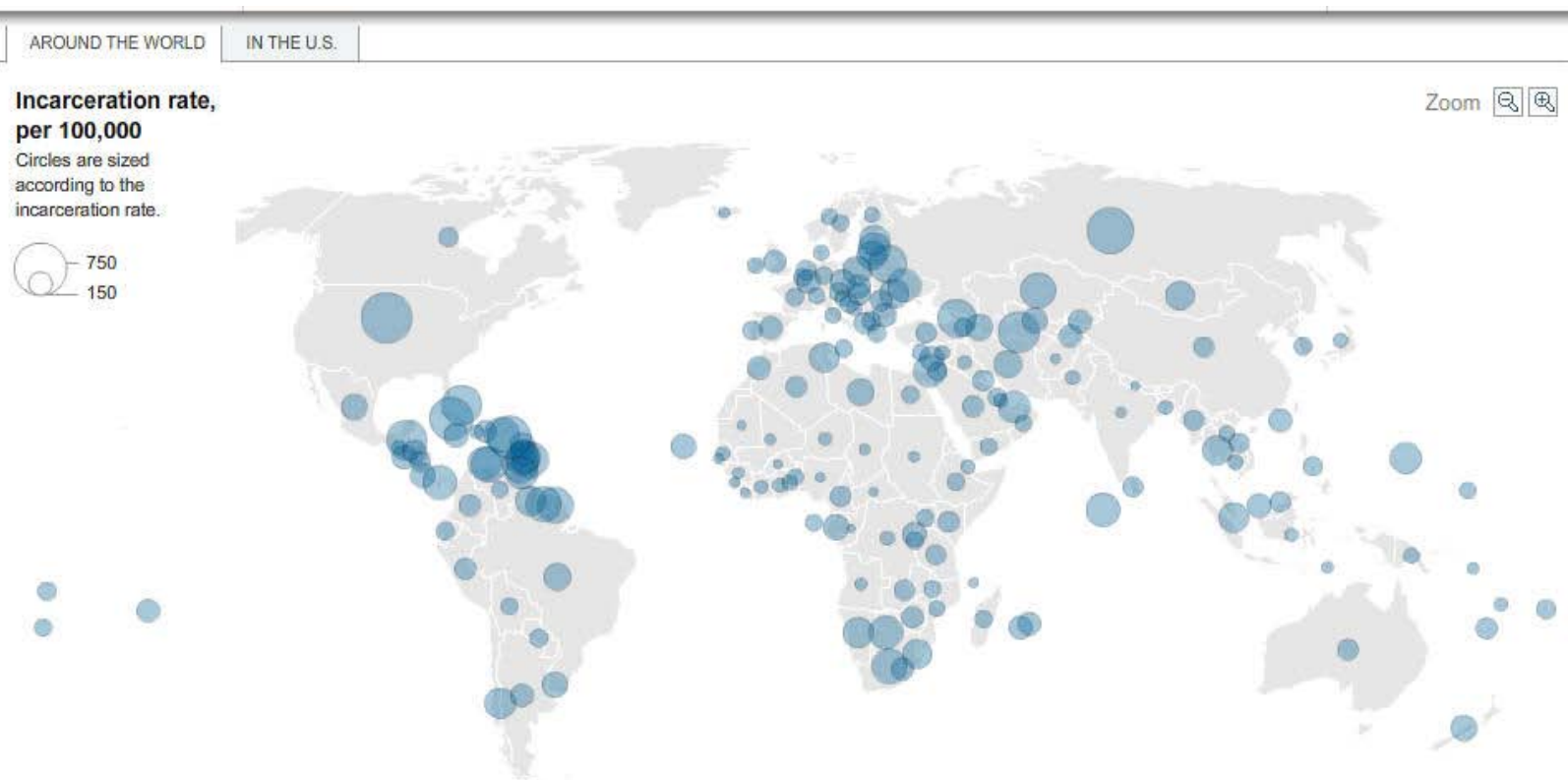


Increased Drug Arrests



The War on Drugs has resulted in increased arrests for drug-related activity and for increased numbers of drug offenders in prison.

World Incarceration Rates



United States Exceptionalism

Adam Liktak has an excellent series in the New York Times on how the United States is different in its criminal justice system from much of the rest of the world:

- Highest inmate count: 5% of the world's population, almost 25% of its prisoners;
- Punitive Damages: usually not awarded in foreign civil courts;
- Bail for profit;
- Serving Life for Providing Car to Killers'
- Sentencing adolescents as adults and sentencing them to life;
- Using partisan expert witnesses;
- Rejecting all evidence if police err;
- Freedom for offensive speech;
- Electing judges.

Justifications of Punishment

Backward-looking

- Retributive

Forward-looking

- Deterrence
- Rehabilitation
- Reconciliation

Types of Justification

Justification of punishment

- As an institution
- In individual cases

These two levels of justification may be different

Retributivism

Lex talionis, “an eye for an eye,” “a tooth for a tooth”

Core concept: the offender should suffer at least equally to the victim

Is Retributivism Just Revenge?

Critics of retributivism have argued that it is just revenge dressed up in nice clothing.

Replies:

- Yes, it is revenge, but that's ok
- No, retribution is about something more than revenge: about balancing the scales of justice, about safeguarding the rights of victims, and about changing perpetrators.

The Scales of Justice



Fundamental metaphor: an underlying balance which must, if upset, be put back in order

Punishment is seen as resetting the moral balance by punishing the offense

Punishment of elderly Nazis

The Rights of Victims

Victims, some retributivists argue, have a right to see the perpetrators suffer their just desserts

- Example: families of victims at executions



The Effects on Perpetrators

Some retributivists, especially in the Kantian tradition, argue that punishment should have certain effects on the perpetrators, including

- insight into their crime, including compassion for victim
- will “wipe the slate clean”

Criticisms of Retributivism

Does it really *justify* punishment?

Lex talionis offers little guidance in specific cases of punishment

Can lead in particular cases to punishments that are cruel and that have no morally good effects

Deterrence

Many justify punishment as an institution by its deterrent effect

- Deters the convicted criminal from committing the same crime again
- Deters others from committing that crime

Normative and Empirical Considerations

The deterrence argument has two premises:

Empirical Premise: Punishment deters crime.

Normative Premise: Reducing crime is good.

Conclusion: Punishment is good.

Empirical Premise: Punishment deters crime.

Uncontroversially true in general sense, but does it deter those who are worst criminals?

Are other means of deterrence better?

Punishment and Prevention

Overall goal: Prevent crime before it happens

Punishment is often a last-ditch effort, after everything else has failed

Preventive approaches

Objections to Prevention

May be costly

May involve violations of individual rights

May be disproportionate to the offense

- Singapore example of Michael Fay being flogged

No justification for punishment where there is no chance of recurrence

May justify punishing the innocent

Rehabilitation

Some have objected that prisons are training schools for prisoners

May conflict with demands of retribution

May result in longer sentences in some cases, much shorter in others

May be very costly to administer

Reconciliation and Healing

How, after a rupture in society, do we reestablish harmony?

- Nazi war crimes trials
- Peace and Reconciliation Commission in South Africa
- Truth commissions in Latin American countries such as Chile after overthrowing dictators

Mixed Justifications: Rawls, 1

Justification of punishment as an institution: consequentialist

- consequentialist theories are certainly correct in saying that the overall justification for punishing at all is that it has good effects for society as a whole, especially in terms of deterrence
- retributivist justifications of the *institution* of punishment are weak and open to the charge that punishment is simply revenge dressed up in legal clothing

Mixed Justifications: Rawls, 2

Justification of particular types of punishment: retributivist

- Retributivism contains a doctrine of proportionality that seems appropriate in determining the nature and severity of particular punishments
- Deterrence-based accounts may be too severe

The Limits of Punishment

Public Notice of Offenses

Authority to Punish

Guilt

Reasonable Certitude

Equitable Administration

Proportionality

Not “cruel and unusual”

Punishment and Social Conditions

Many theorists are concerned that too great a concentration on punishment detracts from solving the social conditions—such as poverty--that give rise to crime.

In the United States, we have a disproportionately large percentage of people in prison

Punishment and Imagination

Consider punishment other than prison so that the offender

- May gain insight into the pain and suffering caused by the crime
 - Drunk drivers going to accident scenes
- May be more effectively rehabilitated
 - Avoids prison as a school for criminals

The Social Construction of Punishment

What counts as a crime depends on societal choices. Some of these appear to vary from one society to another.

- Drug use
- Sexual orientation and practices
- See Michael Foucault, *Discipline and Punish*

Continuing Issues of Punishment

Punishment of the young

Chronic offenders

Privatization of punishment

Hard time and stun technology

Race and punishment

The Punishment of the Young

In many places in the United States, children had been tried as adults even though they are less than 18.

- In Florida, a 14 year old boy was given a sentence of life without parole for killing a 6 year old girl when he was 12 years old.

On March 1, 2005 the Supreme Court abolished the death penalty for crimes committed when the offender was less than 18 years old in Roper v. Simmons. This affected 72 persons on death row:

- Texas: 29
- Alabama: 14
- Mississippi: 5
- Ariz., La., N.C.: 4 each
- Fla., S.C.: 3 each
- Ga., Pa.: 2 each
- Nev., Va.: 1

The younger the perpetrator, the greater the reason for trying to rehabilitate rather than simply punish.

Chronic Offenders, 1

DOJ data on recidivism of prisoners released in 1994:

- Released prisoners with the highest rearrest rates were robbers (70.2%), burglars (74.0%), larcenists (74.6%), motor vehicle thieves (78.8%), those in prison for possessing or selling stolen property (77.4%), and those in prison for possessing, using, or selling illegal weapons (70.2%).
- Within 3 years, 2.5% of released rapists were arrested for another rape, and 1.2% of those who had served time for homicide were arrested for homicide.
- <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>

Chronic Offenders, 2

How do we deal with chronic offenders who will very probably commit further crimes as soon as they are released?

- Three strikes law
- Megan's law
- Chemical castration
 - Approved by California legislature in 1996 for chronic sex offenders on parole, also in Montana
- Indefinite sentences
 - Confine to mental institutions after sentence is served—ok'd by supreme Court in 1997 in *Kansas v. Hendricks*

Privatization of Punishment

Punishment is a major growth industry in the United States. More and more prisons are being built by private firms. Private high security prisons may create need for labeling some prisoners as high risk.

Hard Time and Stun Technology

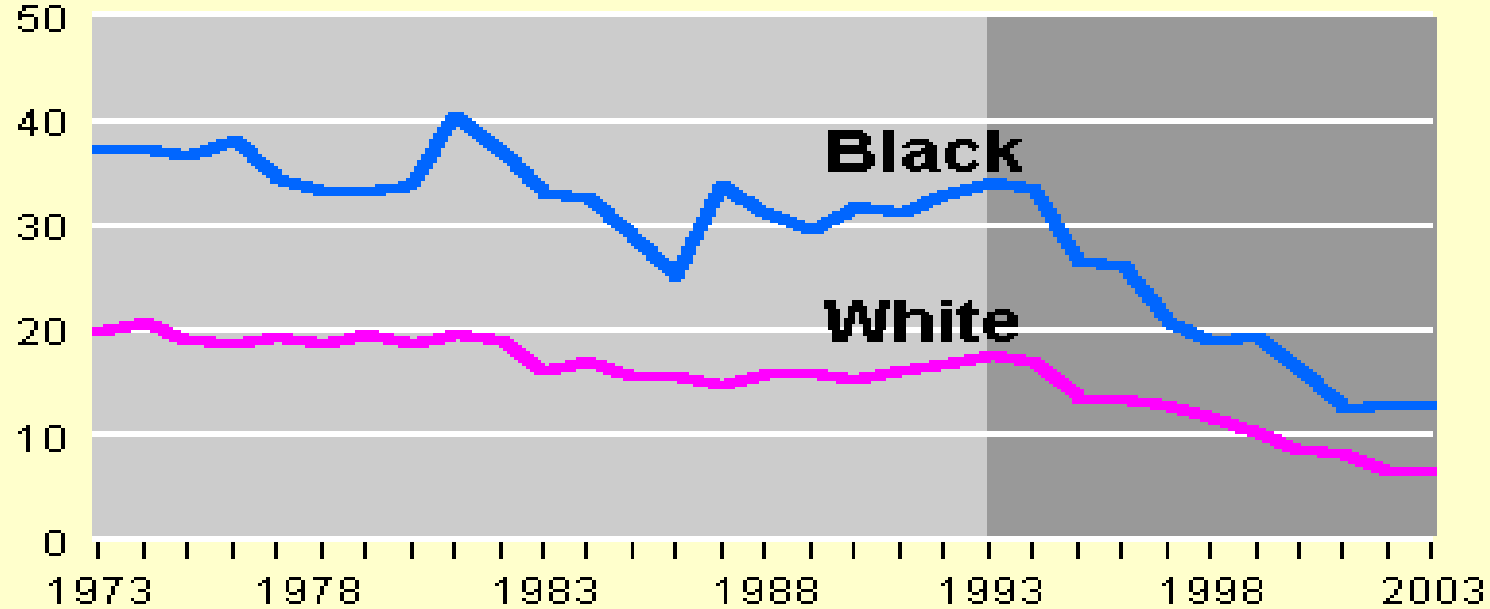
Can judges sentence prisoners to hard time? Any limits?
Can prison populations be controlled by stun belts?

Race and Punishment, 1

Violent crime rates by race of victim

Adjusted victimization rate
per 1,000 persons age 12 and over

Blacks are more
victimized than
Whites are
Bureau of Justice



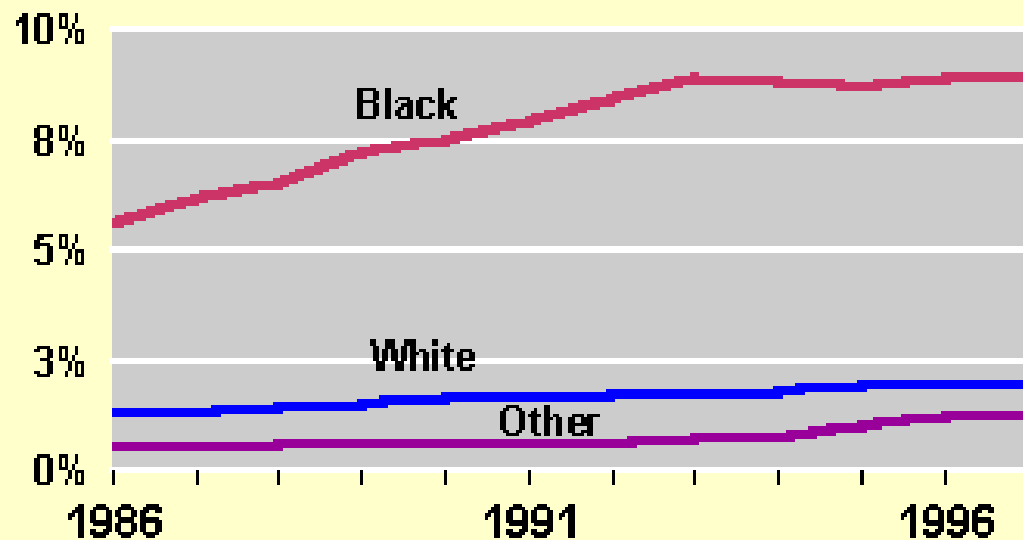
Race and Punishment, 2

In 1997, 9% of the black population in the U.S. was under some form of correctional supervision compared to 2% of the white population and over 1% of other races.

Bureau of Justice
Statistics

Adults under correctional supervision by race, 1986-97

Percent of adults



Punishment, Torture & Solitary Confinement

Is solitary confinement a form of torture? See Atul Gawande's discussion of this issue in *The New Yorker*, April 6, 2009.



THE NEW YORKER

ARTS & CULTURE | HUMOR | FICTION & POETRY | THE TALK OF THE TOWN | ONLINE

ANNALS OF HUMAN RIGHTS

HELLHOLE

The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?

by Atul Gawande

MARCH 30, 2009

TEXT SIZE: A | A | A |
PRINT | E-MAIL | FEEDS | SINGLE PAGE

Human beings are social creatures. We are social not just in the trivial sense that we like company, and not just in the obvious sense that we each depend on others. We are social in a more elemental way, simply to

