

Chapter One

Becoming our own Jailers

It's time for systemwide change.

We live in a strange world. When an institution doesn't work, we prop it up over and over instead of fixing it, never seeing the dysfunctional patterns that imprison us. This strangeness encompasses many areas of endeavor, such as politics, religion, militarism, business, and finance. The U.S. criminal justice system is a prime example. After addressing crime by perpetually locking more people up, the United States now surpasses China, Russia, Iran, and South Africa in the proportion of our citizens behind bars.

More than one in every one hundred adults in America is in jail or prison.² In this land of liberty, our tax dollars pay to incarcerate one in every fifty-three of our young people in their twenties, at enormous cost to our citizens and loss to society. At the same time, college tuition is rising so fast, fewer and fewer young people can afford to attend. All the while, the rate of crime continues to increase or decrease, independent of how this system is used to control it.

When the costs are added up, every year an inmate spends in jail or prison costs us about the equivalent of one teacher's salary. We now have over 2.3 million people locked up on any given day, approximately the same number as China and Russia combined. That means a lot of teachers' salaries are being spent not on teaching kids but on locking up those kids' dads, moms, sisters, and brothers—and too often the kids themselves.

With 5 percent of the world's population, the United States now has more than 25 percent of the world's prisoners. This incarceration binge³ is destroying the fabric of our communities, some more than others. One in every fifteen African American men lives in a prison or jail cell. If you are an African American male between the ages of twenty and thirty-four, the ratio is one in nine. Doing time is now so prevalent among young black men that, for many, it has become a rite of passage into manhood. One young man, the only male in his family who has not been to prison, told me he is chided for this failure.

Hispanics are disproportionately affected as well. As of 2006, one in thirty-six Hispanic adults was behind bars.⁴ The resulting racial disparity affects our political process. Few states bar convicted felons from ever voting, but many mandate a period of years after release from jail or prison before reinstating voting rights. Kentucky, a state where the bar is permanent, prohibited almost 25 percent of its African American males from voting in 2008.

Men are roughly thirteen times more likely to be incarcerated than women, but the female inmate population is mushrooming. For black women in their mid to late thirties, the incarceration rate is one in 100. For white women, it is one in 355. Who is caring for the children of these women? What lessons is life teaching these kids, and how many teachers' salaries will those lessons cost us?

My husband shook his head. "This surely isn't true," he said, as we listened to these statistics recited on the evening news on February 28, 2008. *One in 100: Behind Bars in America 2008*, a report compiled by the Pew Center on the States, had just been released. Its sad findings also hit the front page of many papers and whirled around the Internet.

Why do I care? After all, many systems are in breakdown—the economy, education, and health care, to name a few. Perhaps it is because, as a trial attorney, I saw the problems in the legal system firsthand. I didn't handle criminal cases, but for twenty-eight years I tried civil cases where money, not freedom, was usually at stake. When I went to court to represent my clients, I often waited in the courtroom while the criminal docket was heard. There I got a glimpse of some of the inequities at play on the criminal law side. The judges were cordial enough to the defendants. "Sir, do you have

money to hire an attorney?” they would ask penniless defendants, who were most often black. When the defendant said no, he would be assigned a court-appointed attorney.

Court-appointed attorneys, also called public defenders, are known for their work in ensuring that poor people get a fair shake in our complex criminal court system. Sometimes these attorneys work even when they are uncompensated for their time. In most cases, however, for the low fees they are paid, it is difficult to take all the measures needed to ensure their clients get the same degree of due process the wealthy can afford.

Before ever being judged guilty, many people held in jail (not prison) are awaiting trial. Those who can afford to post bail are generally released pending trial. Those who can't post bail remain locked up in what amounts to a modern debtor's prison. In 2006, more than 60 percent of those who spent time in jail were not convicted, a number that continues to grow.⁵ Imagine the impact this has on their lives. Do they lose their jobs? What happens to their property? This not only impacts the lives of each of those individuals and their families, but it also unnecessarily increases the tax burden you and I must pay.

Politicians not only tout the criminal law system as the answer to crime, they also tell us it is the answer to a myriad of social problems, including homelessness, begging, truancy, runaways, and vandalism. It costs about eighty dollars per inmate per day to lock up people accused of things like turnstile jumping, Fish and Game violations, and dog leash violations.⁶ If a person is cited for jaywalking and can't pay the fine, the penalty for nonpayment may well be a stint in jail. Some officials even demand zero tolerance to deal with behavioral problems in our schools, giving our children an early taste of how readily our culture uses punishment to secure compliance, foregoing other options.

Seeing retribution and greater vengeance as the solution, more acts have been classified as crimes, many prison sentences have become mandatory, as well as longer, and early release for good conduct has been all but eliminated. Judges are generally prevented from being lenient, even when the circumstances warrant it. This has led some defense attorneys to advise their clients to plead guilty to crimes they didn't commit, reasoning that a short sentence for a lesser crime is better than risking decades behind bars that would be mandated if convicted of a more serious offense.

Rehabilitation programs, education, and training are targeted as soft on crime, scorned as treating the incarcerated better than those not involved in crime. At best, these safety nets are minimal.

In this strange world, prisons have taken up the slack for the state and county hospitals that released millions of mental patients between the 1950s and 1980s.⁷ We were told that decentralized, neighborhood-based care was a better solution, especially since many more drugs had become available to aid treatment. The cheaper and more humane mental health and housing programs that were promised were never delivered. One reason was that we didn't want mentally ill people in our neighborhoods. Because the majority of people behind bars in the United States have some type of mental illness, our prisons and jails are our “new asylums.”⁸ In an effort to maintain control of systems gone haywire, some prisons now have mental wards.

When drugs and drug addiction escalated in the 1980s, we didn't examine the whole and assess the cause. Instead, the high-profile death of athlete Len Bias from a cocaine overdose in 1986, along with the growing use of crack cocaine, sent lawmakers on a spree to seek more retribution. They promised more punishment would finally produce compliance, but it hasn't.

The new laws dramatically increased the probability that a drug-related offense would result in a prison sentence rather than jail or probation. Prison sentences were made longer, especially for offenses involving crack cocaine, the cheaper version of cocaine which was prevalent in many black neighborhoods. Beginning in 1986, distribution of just five grams of crack carried a minimum five-year federal prison sentence. It took the distribution of five hundred grams of

powder cocaine, one hundred times the quantity of crack cocaine, to get a five-year sentence. Before those mandatory minimums for crack went into effect, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, it was 49 percent higher.⁹ The law has been changed, removing the sentencing disparity, but that is only a bandage.

As life sentences and sentences that span decades are now common, we have an expensive elderly prison population whose numbers are growing. Although criminal activity generally decreases dramatically with age, between 1992 and 2001, the number of state and federal inmates aged fifty or older almost doubled.¹⁰ The elderly in prison can be easy prey for younger, stronger inmates. Hearing and visual impairments, incontinence, dietary intolerance, depression, and the early onset of chronic diseases like Alzheimer's, diabetes, or heart disease complicate the management of older inmates. The cost of keeping an older prisoner locked up is around seventy thousand dollars¹¹ a year or more—not one but two teachers' salaries.

Not everyone in the system is locked up for a long time. When you add up all the people who go in and out, about ten million cycle through our jails and prisons every year. They bring the lessons they've learned, the diseases they've contracted, and the trauma they've experienced back to our communities. While we like to think former inmates are the "other"—different and somehow separated from us—there is no wall between us and them. We are all in this together.

How much is this incarceration binge costing us? Nationally, our prison industrial complex, as it is now called, is a sixty-billion dollar-a-year industry and surging.¹² Twenty years ago, all the states together (excluding federal expenditures) spent a total of 10.6 billion dollars on corrections. In 2007, they spent more than forty-four billion dollars—four times more in just one generation. During the same twenty-year period, inflation-adjusted spending on corrections rose 127 percent. In comparison, what we spend on higher education rose by only 21 percent.¹³

The increasing incarceration rate far exceeds increases in the rate of crime. During the newscast of the Pew Report, there was an interview with Kentucky governor Steve Beshear. He stated that in the last thirty years, his state's crime rate had increased about 3 percent, but its inmate population had increased by 600 percent. This is what our get-tough-on-crime policies have produced. Even our governors are trying to get our attention, letting us know that high crime is not the cause of our incarceration binge. These are the politicians who used to say, "Lock 'em all up," but not anymore.

Few people seem to consider what moral principles are driving these punitive policies, or their effect on the greater whole. The more money we spend on jails and prisons, the less we have for education, health care, and roads. If we fixed the criminal law system, we could save enough money to send young people to college for free, or at least at a low cost. This would be especially uplifting for those who otherwise could not afford it. Rather than saddle our youth with student loan debt, we would provide them with a bright future. So why doesn't this happen?

There are some who still contend that skyrocketing incarceration rates are responsible for keeping crime in check, but the evidence contradicts them. What's referred to as the New York Miracle—a sharp drop in homicides and violent crime rates in that city between 1992 and 1997—occurred when New York State had the nation's second-slowest rate of prison growth and when the city's jail system downsized.¹⁴ San Diego is a city that reduced crime by nearly 37 percent between 1990 and 1995, and many attribute the reduction to the implementation of a neighborhood policing approach. The police began to share responsibility for identifying and solving crimes with the citizens and, simultaneously, the incidents of crime fell.¹⁵

Some countries that incarcerate prisoners for shorter terms have lower rates of crime. For the same crimes, American prisoners are locked up twice as long as English prisoners, three times as long as prisoners in Canada, four times as long as Dutch inmates, five to ten times as long as French prisoners, and five times as long as those in Sweden. These countries all have lower rates of violent crime than we do, and their rates of property crime are comparable to ours.¹⁶

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The argument that more punishment means less crime does not hold water. There are many factors that cause crime to rise and fall and, as we will see, punishment is not the only tool in our crime-reducing tool kit.

It's true, there are periods of escalating crime, and assuring the safety of our communities requires that some offenders—murderers, serial killers, psychopaths—be kept behind bars for long periods of time and perhaps for life. We have lost sight of the fact that these types of offenders are the exception.

Some states have applied bandages of various sorts to stem the tide of our broken criminal law system. Some hold lower-risk offenders accountable in less costly settings and use intermediate sanctions for parolees and probationers who violate the conditions of their release. Others use a mix of community-based programs, such as day reporting centers, treatment facilities, electronic monitoring systems, and community service. A few have even reduced prison terms for inmates who complete programs like substance abuse treatment, designed to cut their recidivism risk.¹⁷ While these are helpful, they are not the systemic change that will lead to a solution.

When all is said and done, do we think we are safer? Decidedly not. Many of us still live in gated communities, arm our houses with security alarms, or sleep with a weapon nearby. Safety, security, and freedom have become increasingly rare commodities. We have become a nation of jailers, not only of petty offenders and serious criminals, but also of ourselves.

Who are they?

Who are the people at the center of this misery, the ones behind bars? Each has a story that reflects our diversity and the entangled events of life. I got to know one of them, Daudi Beverly, when his mother called me for advice. She was desperately trying to find ways to help her son who was being swallowed up in a criminal system that she didn't understand but which she knew could destroy him. I didn't handle criminal cases, but her plea was one I couldn't refuse. I offered to walk with her through this process and, as I did, I saw firsthand how interwoven and complex the misery has become. Daudi has a lot to teach us about the depth of our systemic failure.

Daudi falls into that category of the one in nine black men between the ages of twenty and thirty-four whom we too easily forget. He is also one of the millions of the mentally ill, many released from state and county facilities in the 1950s–1980s, who represent the majority of people now behind bars in the United States.

According to Mary, Daudi's mother, he was a premature baby, born somewhat developmentally disabled. Mary is a strong woman with shiny dreadlocks down to her waist, the central pillar of her extensive family. Two of her children have master's degrees, and one is a teller in my local bank. Mary raised them well.

When Daudi was ten, his father was beaten to death during a weekend when Caribbean immigrants and drugs were targeted by the Washington, D.C., police. Mary was told that certain officers called such weekends a Caribbean cruise. She describes her former husband as deeply spiritual, a health-conscious vegetarian, and law abiding, just like she is. He wore dreadlocks as a symbol of wisdom and honor, to feel connected to his roots. He was not an immigrant and did not do drugs. But he was black, and his dreadlocks signaled to the police a questionable profile, based on common stereotypes. Mary reports that Daudi's dad and two other black men were beaten to death that weekend.

Daudi had been close to his father. He turned inward and refused to speak of his father's death. Within a few years, having lost the most important anchor and role model in his life, Daudi dropped out of school.

At age eighteen, Daudi was sexually assaulted by a leader of an African American church during a weekend outing. Mary was devastated. She had hoped the trip would be good for her son. Angry, hurt, and dealing with complex issues beyond his comprehension, Daudi threw a burning wooden penis into the leader's house. Though reacting as a

traumatized child crying out for help, he was convicted of arson and joined the league of young black men with criminal records.

A year after the sexual assault, Daudi had his first psychotic episode and was hospitalized in a mental ward. Unable to afford private treatment, he received public mental health services and thereafter was repeatedly institutionalized by order of the officials.

As he struggled with life among the mentally ill, being retarded, and easily influenced by misguided peers, Daudi got into trouble. He was convicted of minor offenses such as trespassing, smoking marijuana, stealing a CD and potato chips, and car theft when the kids who had stolen the car left him alone in the vehicle.

Medications are critical to managing Daudi's illness, but many have negative side effects. It was several years before his treatment finally allowed him to at least perform yard work. Even then, Daudi found it difficult to remember directions or scheduled appointments with his therapist. Mary called repeatedly to help keep him on track. She says this seemed to annoy the mental health agency staff. Someone told her that because Daudi was an adult, she had no right to his medical information, so she should stop calling. Although he had been institutionalized in mental wards seven times, no one advised Mary that she could be named her son's legal guardian, and thus have a say in his treatment and care.

The system we set up to help people like Daudi continued to fail. After he missed several appointments, the agency closed Daudi's file for noncompliance, which cut off his medications. Daudi began to have psychotic spells.

On his twenty-fifth birthday, after he had been off his medications for months, Daudi was doing yard work for an elderly white woman. When she denied she owed him for his second day of work, saying she'd agreed to pay him for the overall job, not for each day, he reacted with anger. Feeling cheated, Daudi later returned to her house and demanded another day's pay. They argued. When he entered her house, she picked up a stick or a cane and hit him. He took the stick and beat her severely.

It was a traumatic and terrifying event for this old woman. Daudi was guilty and readily admitted he beat her up and took seventy-five dollars from her purse, which he felt was due him. His victim claimed he also took a diamond ring, but Daudi didn't mention a ring, causing Mary to wonder at the validity of the old woman's claim. This made a big difference in the criminal charges, because the value of the diamond made the robbery a felony instead of a misdemeanor.

Daudi was plagued by severe emotional problems and attempted suicide while he was being held in jail pending trial. The jail staff assumed Daudi was faking his distress and denied him access to mental health care or medication, despite the fact that the psychiatrist who examined Daudi found he was not mentally competent to stand trial.

After numerous episodes in jail, Mary pleaded that Daudi be seen by a doctor. He was put on medication, and his behavior became normal. He was then reexamined by the psychiatrist and found to be competent enough to be tried, although it appeared to Mary that no tests were administered.

Daudi's trial did not go well. He was represented by a court-appointed attorney who was paid about as much for the entire case as some private attorneys are paid for an hour or two of their time. I sat next to Mary during Daudi's trial, as a silent witness to the depth of her pain. Daudi pleaded guilty to two crimes: breaking and entering and robbery. He pleaded not guilty to the additional charge of aggravated malicious wounding on the basis that he had only committed the lesser crime of malicious wounding, not the aggravated version. This meant the prosecutor had to prove the more serious charge.

The prosecutor called the elderly woman's son to testify about the terrible beating his mother had suffered. Large blowups of her injuries were shown to the judge. Mary cringed at these and told me not a day had passed since the crime that she had not prayed for the woman Daudi had harmed.

Whether Daudi had committed aggravated malicious wounding or not was critical. The judge's decision hinged on the size of a scar on the woman's arm. I gathered from the testimony that, as a result of the attack, she could no longer live alone in her home. Yet it was the scar that would determine the more serious conviction. The woman's loss of independence was given little, if any, consideration. A criminal case is not about how best to heal the victim's wounds. It is about the state seeking retribution for its law having been broken, and there was no charge involving the woman's diminished quality of life.

No one testified on Daudi's behalf, not even the forensic psychiatrist who had found Daudi incompetent to stand trial and then reversed his position. That psychiatrist's testimony would have given the judge insight into Daudi's fragile mental condition.

I was upset by the failure of Daudi's attorney to present evidence regarding Daudi's lengthy mental history. His lack of access to medication at the time of the crime wasn't even mentioned.

After the trial, the police investigator who had handled Daudi's case approached Mary in the hall outside the courtroom. He told her that Daudi had always been courteous and was forthright about what had happened. She could be proud of her son, he said, apparently wanting to affirm that Daudi was not a ruthless criminal, as he had been portrayed.

Mary desperately wanted to tell the elderly white woman and her family how sorry she was that this tragic event had occurred. She wanted to apologize for the serious injuries her son had inflicted and for her inability to keep him on medication. Daudi also wanted to say he was sorry, but his attorney advised both of them to initiate no contact with the victim. Daudi's attorney probably feared a possible admission against interest—that his client would admit the truth and his own words would be used against him. In this adversarial format, if Mary reached out, that could easily be construed as harassment. Our punitive justice system rewards a skillful attack, but often stands in the way of attempts to reconcile. When it was time for Daudi to be sentenced, the prosecutor asked that he be given twenty years due to the heinous nature of his crime, five more years than the maximum cited in the sentencing guidelines. Instead, the judge sentenced him to ninety years: fifty for the robbery and twenty each for the other two offenses, then suspended all but twenty-five. Since we have abolished parole, Daudi will serve twenty-five years at society's cost of one teacher's salary per year. Actually, inmates like Daudi who have mental disorders can cost more than that; in Daudi's case, the cost was contained by keeping him in isolation twenty-three hours a day.

After Daudi's conviction, I assisted Mary in being named Daudi's legal guardian, a civil matter I could handle. This enables the prison administrators to speak to her about his health care and, if he is ever released, she can see that he receives treatment. After being presented a summary of his medical history, the same judge who sentenced Daudi to what perhaps amounts to a life sentence, without hesitation, signed the order that said Daudi was not competent to manage his own affairs.

Some will see Daudi as solely responsible for his actions, saying this is just another black-on-white crime. But this is a story about all of us—our failure to care for one another, our desire for quick fixes and easy answers, and our silent acceptance of a seriously flawed system that extracts an enormous price. We pay financially, and we also pay with our humanity.

And yet, according to our complex system of criminal laws, "justice" was done. Daudi had his day in court: the state paid for his representation by counsel, the judge followed the rules of due process, and the victim got her say. But was

justice satisfied in this case? Or does justice require more substance? In Daudi's case, and in the cases of many among the other 2.3 million like him who are behind bars, few people ask those questions.

Our dysfunctional patterns continue for decades, defended with the argument that we could do worse. The more meaningful question is, why aren't we doing better?

²Pew Center on the States, *One in 100: Behind Bars in America 2008*, February 28, 2008, 3, http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. Unless otherwise stated, all incarceration statistics in this chapter are from this report.

³The term *incarceration binge* may have been coined by James Austin et al., "Unlocking America: Why and How to Reduce America's Prison Population," The JFA Institute (2007), <http://www.pretrial.org/Docs/Documents/UnlockingAmerica.pdf>. That is the first place I read it.

⁴Adam Liptak, "1 in 100 U.S. Adults Behind Bars, New Study Says," *New York Times*, February 28, 2008, http://www.nytimes.com/2008/02/28/us/28cnd-prison.html?_r=1&hp=&oref=slogin&pagewanted=print.

⁵Amanda Petteruti and Nastassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, Justice Policy Institute (April 2008), 3, http://www.justicepolicy.org/images/upload/0804_REP_JailingCommunities_AC.pdf.

⁶Pew Center on the States, *One in 31: The Long Reach of American Corrections* (March 2009), 12, http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

⁷Michael Wines, "Ideas and Trends: After 30 Years; Mental Institutions May Be as Empty as They'll Ever Be," *New York Times*, September 4, 1988, <http://query.nytimes.com/gst/fullpage.html?res=940DEEDD1F3AF937A3575AC0A96E948260&sec=&spon=&pagewanted=1>.

⁸Petteruti and Walsh, 9. See also PBS *Frontline*, www.pbs.org/wgbh/pages/frontline/shows/asylums.

⁹Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, American Civil Liberties Union (October 2006), ii. A few weeks after Bias's death, Congress passed the Anti-Drug Abuse Act of 1986. This established mandatory minimum sentences for specific quantities of cocaine.

¹⁰Pew Center on the States, *One in 100*, 12.

¹¹Pew Center on the States, *One in 100*, 12–13.

¹²James Austin and Tony Fabelo, "The Diminishing Returns of Increased Incarceration," JFA Institute (2004), 2, <http://www.jfa-associates.com/BlueprintFinal.pdf>.

¹³Pew Center on the States, "Pew Report Finds More Than One in 100 Adults Are Behind Bars," press release, February 28, 2008, http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912.

¹⁴Justice Policy Institute, *The Punishing Decade: Prison and Jail Estimates at the Millennium* (May 2000), 4, http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_AC.pdf.

¹⁵Petteruti and Walsh, 8.

¹⁶Austin et al., "Unlocking America," 4.

¹⁷Pew Center on the States, "Pew Report."