

Tenth Edition

THE RICH GET RICHER AND THE POOR GET PRISON

IDEOLOGY, CLASS, AND CRIMINAL JUSTICE

Jeffrey Reiman

American University

Paul Leighton

Eastern Michigan University

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Text Font: Palatino LT Std

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Library of Congress Cataloging-in-Publication Data

Reiman, Jeffrey H.

The rich get richer and the poor get prison : ideology, class, and criminal justice / Jeffrey Reiman, Paul Leighton. — 10th ed.

p. cm.

Includes index.

ISBN-13: 978-0-205-13772-5

ISBN-10: 0-205-13772-5

1. Criminal justice, Administration of—United States. 2. Social classes—United States.
3. United States—Social policy. I. Leighton, Paul, 1964– II. Title.
HV9950.R46 2013
364.973—dc23

2012029887

*For Sue
and
For Satoko, Sala, and Aiko*

10 9 8 7 6 5 4 3 2 1

PEARSON

ISBN 10: 0-205-13772-5
ISBN 13: 978-0-205-13772-5

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235. According to Nicos Poulantzas,

*Now, for Foucault, the power relation never has any other basis than itself: it becomes a pure 'situation' in which power is always immanent; and the question what power and power to do what appears as a mere obstacle. This leads Foucault into a particular logical impasse from which there is no possible escape. ... For if power is always already there, if every power situation is immanent in itself, why should there ever be resistance? From where would resistance come, and how would it be even possible? (Nicos Poulantzas, *State, Power, Socialism*, trans. P. Camiller [London: NLB, 1978], p. 149)*

236. According to David Garland,

*Foucault's vision of power may be a positive conception in the sense that power moulds, trains, builds up, and creates subjects, but it also involves a thoroughly negative evaluation. Foucault writes as someone who is absolutely 'against' power. His critique is not of one form of power in favour of another but is rather an attack upon power itself. ... [However, t]here is an important sense in which discipline can create freedom as well as control. As Foucault's own subsequent work shows, discipline is necessary to the development of self-control. (Garland, *Punishment and Modern Society*, p. 174)*

CHAPTER 2

A Crime by Any Other Name ...

If one individual inflicts a bodily injury upon another which leads to the death of the person attacked we call it manslaughter; on the other hand, if the attacker knows beforehand that the blow will be fatal we call it murder. Murder has also been committed if society places hundreds of workers in such a position that they inevitably come to premature and unnatural ends. Their death is as violent as if they had been stabbed or shot. ... Murder has been committed if society knows perfectly well that thousands of workers cannot avoid being sacrificed so long as these conditions are allowed to continue. Murder of this sort is just as culpable as the murder committed by an individual.

—FREDERICK ENGELS, *The Condition of the Working Class in England*

Based on an examination of the various ways that Americans are harmed, this chapter shows that some of the greatest dangers that we face come from acts that are not labeled crimes. Readers are asked to compare the harms produced by crimes with the harms of noncriminal behavior as a step toward determining if the harsh treatment of those who impose criminal harms, and the gentle treatment of those who impose noncriminal harms, represent intelligent policy. As the response to the Defenders of the Present Legal Order shows, the acts that lead to these noncriminal harms share many elements of criminal conduct—they are harmful acts done knowingly or recklessly. However, they tend to be ignored or minimized by the criminal justice system. The inclusion of certain harmful acts within the criminal law, and the exclusion of other harmful acts, show that the criminal law does not reflect an objective reality about “dangerous crime.” The criminal justice system acts as a carnival mirror that distorts reality by magnifying the threat of street crime while minimizing other harmful behaviors. Could it be that the criminal justice system is focusing on the dangerous acts of the poor, and leaving us unprotected against the dangerous acts of the rich?

WHAT'S IN A NAME?

If it takes you an hour to read this chapter, by the time you reach the last page, two of your fellow citizens will have been murdered. *During that same time, more than six Americans will die as a result of unhealthy or unsafe conditions in the workplace!* Although these work-related deaths were due to human actions, they are not called murders. Why not? Doesn't a crime by any other name still cause misery and suffering? What's in a name?

The fact is that the label "crime" is not used in America to name all or the worst of the actions that cause misery and suffering to Americans. It is reserved primarily for the dangerous actions of the poor.

In 1993, an article appeared in the *New York Times* with the headline "Company in Mine Deaths Set to Pay Big Fine." It reported an agreement by the owners of a Kentucky mine to pay a fine for safety misconduct that may have led to "the worst American mining accident in nearly a decade." Ten workers died in a methane explosion, and the company pleaded guilty to "a pattern of safety misconduct" that included falsifying reports of methane levels and requiring miners to work under unsupported roofs. The company was fined \$3.75 million. The acting foreman at the mine was the only individual charged by the federal government, and for his cooperation with the investigation, the prosecutors recommended that he receive the minimum sentence: probation to six months in prison. The company's president expressed regret for the tragedy that occurred, and the U.S. attorney said he hoped the case "sent a clear message that violations of Federal safety and health regulations that endanger the lives of our citizens will not be tolerated."¹ Compare this with the story of Colin Ferguson, who prompted an editorial in the *New York Times* that same year, with the headline "Mass Murder on the 5:33."² Colin had boarded a commuter train at Pennsylvania Station, and methodically shot passengers with a 9-mm pistol, killing 6 and wounding 19. Colin Ferguson was surely a murderer, maybe a mass murderer. Our question is, why wasn't the death of the miners also murder? Why weren't those responsible for subjecting 10 miners to deadly conditions also "mass murderers"? Why do 10 dead miners amount to an "accident" and a "tragedy," and 6 dead commuters a "mass murder"? "Murder" suggests a murderer, whereas "accident" and "tragedy" suggest the work of impersonal forces. But the charge against the company that owned the mine said that they "repeatedly exposed the mine's work crews to danger and that such conditions were frequently concealed from Federal inspectors responsible for enforcing the Mine Safety Act." And the acting foreman admitted to falsifying records of methane levels only two months before the fatal blast. Someone was responsible for the conditions that led to the death of 10 miners. Is that person not a murderer, perhaps even a *mass murderer*?

These questions are at this point rhetorical. Our aim is not to discuss this case, but rather to point to the blinders we wear when we look at such an "accident." While the question is rhetorical, the answer matters greatly for justice and the lives of hard-working Americans. And the question continues

to haunt us. In the 2010 Upper Big Branch mine "disaster" in West Virginia, an explosion killed 29 miners. A Department of Labor report notes that the explosion at the mine was "preventable," and that "unlawful policies and practices implemented by [mine owner] PCC/Massey were the root cause of this tragedy." The investigation uncovered "multiple examples of systematic, intentional, and aggressive efforts by PCC/Massey to avoid compliance with safety and health standards, and to thwart detection of that non-compliance by federal and state regulators."³ The company paid a \$209 million settlement, and one person was convicted of lying to federal investigators and destroying records. No criminal charges were filed against top officials, and a *New York Times* editorial said: "The way to end safety abuses in this dangerous industry is to make management face felony penalties for gross violations instead of allowing executives to pay fines with the company checkbook."⁴ Why isn't this happening?

In each case, there was an investigation and one person was held responsible for wrongdoing about record-keeping. The company was fined. But no one was tried for *murder*. No one was thought of as a murderer. *Why not?* Would miners not be safer if such people were treated as murderers? Might the miners at Big Branch not still be alive if executives were being charged as criminals for acts like this? Didn't those miners have a right to be protected by the criminal justice system against the violence that took their lives? *And if not, why not?*

Will a president of the United States address the Yale Law School and recommend mandatory prison sentences for such people? Will he mean these people when he says,

These relatively few, persistent criminals who cause so much misery and fear are really the core of the problem. The rest of the American people have a right to protection from their violence.⁵

Once we are ready to ask this question seriously, we are in a position to see that the reality of crime—that is, the acts we label crime, the acts we think of as crime, and the actors and actions we treat as criminal—is *created*: It is a reality shaped by decisions as to *what* will be called crime and *who* will be treated as a criminal.

THE CARNIVAL MIRROR

It is sometimes coyly observed that the quickest and cheapest way to eliminate crime would be to throw out all the criminal laws. There is a sliver of truth to this view. Without criminal laws, there would indeed be no "crimes." There would, however, still be dangerous acts. This is why we cannot solve our crime problem quite so simply. The criminal law *labels* some acts "crimes." In doing this, it identifies those acts as so dangerous that we must use the extreme methods of criminal justice to protect ourselves against them. This does not mean that criminal law *creates* crime—it simply "mirrors" real dangers

that threaten us. What is true of the criminal law is true of the whole justice system. If police did not arrest or prosecutors charge or juries convict, there would be no "criminals." This does not mean that police or prosecutors or juries create criminals, any more than legislators do. They *react* to real dangers in society. The criminal justice system—from lawmakers to law enforcers—is just a mirror of the real dangers that lurk in our midst. *Or so we are told.*

How accurate is this mirror? We need to answer this in order to know whether or how well the criminal justice system is protecting us against the real threats to our well-being. The more accurate a mirror is, the more the image it shows is created by the reality it reflects. The more misshapen a mirror is, the more the distorted image it shows is created by the mirror, not by the reality reflected. It is in this sense that we will argue that the image of crime is *created*: The American criminal justice system is a mirror that shows a distorted image of the dangers that threaten us—an image created more by the shape of the mirror than by the reality reflected. What do we see when we look in the criminal justice mirror?

In 1975, the *Washington Post* carried an article headlined "Arrest Data Reveal Profile of a Suspect." The article reported the results of a study of crime in Prince George's County, a suburb of Washington, D.C. It read in part as follows:

The typical suspect in serious crime in Prince George's County is a black male, aged 14 to 19, who lives in the area inside the Capital Beltway where more than half of the county's 64,371 reported crimes were committed in 1974. [The study] presents a picture of persons, basically youths, committing a crime once every eight minutes in Prince George's County.⁶

This report is hardly a surprise. The portrait it paints of "the typical suspect in serious crime" is probably a pretty good rendering of the image lurking in the back of the minds of most Americans who fear crime. The portrait generally fits the national picture presented in the FBI's *Uniform Crime Reports* (UCR) for the same year. In Prince George's County, "youths between the ages of 14 and 19 were accused of committing nearly half [45.5 percent] of all 1974 crimes."⁷ For the nation in 1974, the FBI reported that persons in this age group accounted for 39.5 percent of arrests for the FBI Index crimes (criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft).⁸ These youths were male and disproportionately black. In Prince George's County, males "represented three of every four serious crime defendants."⁹ In the nation in 1974 more than 80 percent were males.¹⁰ In Prince George's County, where blacks made up approximately 25 percent of the population, "blacks were accused of 58 percent of all serious crimes."¹¹ In the nation, where blacks made up 11.4 percent of the population in 1974, they accounted for 34.2 percent of arrests for Index crimes.¹²

This was the *Typical Criminal* in 1974; but little has changed since. Let us look more closely at the face in today's criminal justice mirror, and we shall see much the same Typical Criminal.

The person is, first of all, a *he*. Of 13.1 million persons arrested for crimes in 2010, 75 percent were males. Of persons arrested for violent crimes, 81 percent were men. Second, he is *young*. Nearly half (42 percent) of men arrested for all crimes were under the age of 25; and the same is true of violent crimes. Third, he is predominantly *urban*. Cities with populations over 250,000 had a rate of 275 arrests for violent crimes per 100,000 inhabitants, while cities with populations under 10,000 had 146 such arrests per 100,000 inhabitants.¹³ "Half of all homicides occur in the 63 largest cities, which house only 16 percent of the population."¹⁴ Fourth, he is disproportionately *black*: Blacks are arrested for violent crimes at a rate more than three times that of their percentage in the national population. In 2010, with blacks representing 13 percent of the nation's population, they made up 38 percent of violent crime arrests and 29 percent of all crime arrests.¹⁵ Finally, he is *poor*. Almost one-third (29 percent) of 2002 jail inmates were unemployed (without full- or part-time work) prior to being arrested, an unemployment rate considerably higher than that of adults in the general population, and almost half (45 percent) reported pre-arrest incomes below \$7,200 a year.¹⁶ As the President's Commission reported nearly 40 years ago, "The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country."¹⁷

This is the Typical Criminal feared by most law-abiding Americans. Poor, young, urban, (disproportionately) black males make up the core of the enemy forces in the crime war. They are seen as a vicious, unorganized guerrilla army, threatening the lives, limbs, and possessions of the law-abiding members of society, necessitating recourse to the ultimate weapons of force and detention in our common defense. This picture is widely shared. In his book, *How to Stop Crime*, retired Police Chief Anthony Bouza writes, "Street crime is mostly a black and poor young man's game."¹⁸ Listen to the sad words of the Reverend Jesse Jackson: "There is nothing more painful to me at this stage of my life than to walk down the street and hear footsteps and start thinking about robbery—and then look around and see someone white and feel relieved."¹⁹ In 2005, William Bennett, President Reagan's secretary of education (1985–88) and the first President Bush's "drug czar" (1989–90), commented, "I do know that it's true that if you wanted to reduce crime, you could—if that were your sole purpose—you could abort every black baby in this country, and your crime rate would go down."²⁰ In *The Color of Crime*, Kathryn Russell speaks of the "criminalblackman" to highlight the close connection between these words in popular culture.²¹ Marjorie Zatz characterizes this notion as follows: "The 'criminalblackman' is a composite of white fears of black men's criminality. It may become so strong and so widespread that it allows for racial hoaxes, in which a white offender blames an African American, usually male, for the offense in question and is readily believed by criminal justice agents and/or the general public."²²

Where do we get this picture? How do we know who the criminals are who so seriously endanger us that we must stop them with force and lock them in prisons? "From the arrest records, probation reports, and prison statistics," the President's Commission on Law Enforcement and Administration

of Justice, authors of *The Challenge of Crime in a Free Society*, tells us, the “‘portrait’ of the offender emerges.”²³ *These sources are not merely objective readings taken at different stages in the criminal justice process: Each of them represents human decisions.* “Prison statistics” and “probation reports” reflect decisions of juries on who gets convicted and decisions of judges on who gets probation or prison and for how long. “Arrest records” reflect decisions about which crimes to investigate and which suspects to take into custody. All these decisions rest on the most fundamental of all decisions: The decisions of legislators as to which acts shall be labeled “crimes” in the first place.

In short, our picture of crime reflects a reality—criminal acts, arrests, convictions, imprisonment, and so on—but this reality of crime is not a simple objective threat to which the criminal justice system reacts: *It is a reality that takes shape as it is filtered through a series of human decisions running the full gamut of the criminal justice system—from the lawmakers who determine what behavior shall be in the province of criminal justice to the law enforcers who decide which individuals will be brought within that province.* And it doesn’t end with the criminal justice system as such, because the media—television, newspapers, and the Internet—contribute as well to the image that people have of crime in our society.²⁴ Here, too, human decisions are fundamental. The news media do not simply report the facts. There are too many facts out there. A selection must be made. People working in the news media must choose which facts are *news*, and they must choose how to represent those facts.

Note that by emphasizing the role of “human decisions,” we do not mean to suggest that the reality of crime is voluntarily and intentionally “created” by individual “decision makers.” Their decisions are themselves shaped by the social system, much as a child’s decision to become an engineer rather than a samurai warrior is shaped by the social system in which he or she grows up. Thus, to have a full explanation of how the reality of crime is created, we have to understand how our society is structured in a way that leads people to make the decisions they do. In other words, these decisions are part of the social phenomena to be explained, they are not the explanation.

The present discussion, however, emphasizes the role of the decisions themselves for the following reasons: First, they are conspicuous points in the social process, relatively easy to spot and verify empirically. Second, because they are decisions aimed at protecting us from the dangers in our midst, we can compare the decisions with the real dangers and determine whether they are accurately responding to the real dangers. Third, because the reality of crime—the real actions labeled crimes, the real individuals identified as criminals, and the real faces we watch in the news as they travel from arrest to court to prison—results from these decisions, we can determine whether that reality corresponds to the real dangers in our society. Where that reality does correspond to the real dangers, we can say that the reality of crime simply reflects the real dangers in society. Where the reality of crime does not correspond to the real dangers, we can say that it is a reality *created* by those decisions. Then we can investigate the role played by the social system in encouraging, reinforcing, and otherwise shaping those decisions.

To capture this way of looking at the relation between the reality of crime and the real dangers “out there” in society, we refer to the criminal justice system as a “mirror.” Whom and what we see in this mirror are functions of the decisions about who and what is criminal. Our poor, young, urban, black male, who is so well represented in arrest records and prison populations, appears not simply because of the threat he poses to the rest of society. As dangerous as he may be, he would not appear in the criminal justice mirror *if it had not been decided that the acts he performs should be labeled “crimes,” if it had not been decided that he should be arrested for those crimes, if he had had access to a lawyer who could persuade a jury to acquit him and a judge to expunge his arrest record, and if it had not been decided that he is the type of individual and his is the type of crime that warrant imprisonment.* *The shape of the reality we see in the criminal justice mirror is the outcome of all these decisions.* We want to know how accurately the reality we see in this mirror reflects the real dangers that threaten us in society.

This reality is not created out of nothing. The mugger, the rapist, the murderer, the burglar, and the robber all pose a definite threat to our well-being, and they ought to be dealt with in ways that effectively reduce that threat to the minimum level possible (without making the criminal justice system itself a threat to our lives and liberties). Of central importance, however, is that the threat posed by the Typical Criminal is not the greatest threat to which we are exposed. The acts of the Typical Criminal are not the only acts that endanger us, nor are they the acts that endanger us the most. As this chapter demonstrates, we have a great and sometimes even a greater chance of being killed or disabled by an occupational injury or disease, by unnecessary surgery, or by shoddy medical services, than by aggravated assault or even homicide! Yet even though these threats to our well-being are graver than that posed by our poor young criminals, they do not show up in the FBI’s UCR as serious crimes. The individuals responsible for them do not turn up in arrest records or prison statistics. *They never become part of the reality reflected in the criminal justice mirror, although the danger they pose is at least as great as, and often greater than, the danger posed by those who do!*

Similarly, the general public loses more money *by far* (as shown in Chapter 3) from tax cheating and fraud and from consumer deception and embezzlement than from all the property crimes reported by the FBI. Yet these far more costly acts are either not criminal, or if technically criminal, not prosecuted, or if prosecuted, not punished, or if punished, only mildly. In any event, although the individuals responsible for these acts take more money out of the ordinary citizen’s pocket than our Typical Criminal, they rarely show up in arrest statistics and almost never in prison populations. *Their faces rarely appear in the criminal justice mirror, although the danger they pose is at least as great as, and often greater than, that of those who do.*

The inescapable conclusion is that the criminal justice system does not simply *reflect* the reality of crime; it has a hand in *creating* the reality we see.

It magnifies the real threat of street crime while minimizing the real harms of corporate misbehavior.

The criminal justice system is like a mirror in which society can see the face of the evil in its midst. Because the system deals with some evils and not with others, because it treats some minor evils as grave and treats some of the gravest evils as minor, the image it throws back is distorted, like the image in a carnival mirror. Thus, the image cast back is false, not because it is invented out of thin air, but because the proportions of the real are distorted: Large becomes small, and small large; grave becomes minor, and minor grave. Like a carnival mirror, although nothing is reflected that does not exist in the world, the image is more a creation of the mirror than a picture of the world.

If criminal justice really gives us a carnival-mirror image of "crime," we are doubly deceived. First, we are led to believe that the criminal justice system is protecting us against the gravest threats to our well-being when, in fact, the system is protecting us against only some threats and not necessarily the gravest ones. We are deceived about how much protection we are receiving, and thus are left vulnerable. The second deception is just the other side of this one. If people believe that the carnival mirror is a true mirror—that is, if they believe the criminal justice system simply reacts to the gravest threats to their well-being—they come to believe that whatever is the target of the criminal justice system must be the greatest threat to their well-being. In other words, if people believe that the most drastic of society's weapons are wielded by the criminal justice system *in reaction to* the gravest dangers to society, they will believe the reverse as well: that those actions that call forth the most drastic of society's weapons *must be* those that pose the gravest dangers to society.

A strange alchemy takes place when people accept uncritically the legitimacy of their institutions: What *needs* justification becomes *proof* of justification. People come to believe that prisoners must be criminals *because* they are in prison and that the inmates of insane asylums must be *crazy* because they are in insane asylums.²⁵ The criminal justice system's use of extreme measures—such as force and imprisonment—is thought to be justified by the extreme gravity of the dangers it combats. By this alchemy, these extreme measures become *proof* of the extreme gravity of those dangers, and the first deception, which merely misleads the public about how much protection the criminal justice system is actually providing, is transformed into the second, which deceives the public into believing that the acts and actors that are the targets of the criminal justice system pose the gravest threats to its well-being. Thus, the system may not only fail to protect us from dangers as great as or greater than those listed in the FBI's UCR; it may also do still greater damage by creating the false security of the belief that only the acts treated as serious in the FBI's UCR really threaten us and require control.

The following discussion describes how and why the criminal justice carnival mirror distorts the image it creates.

CRIMINAL JUSTICE AS CREATIVE ART

The Pyrrhic defeat explanation for the "failure" of criminal justice in America holds that criminal justice *fails* (that is, it does little to reduce our high crime rates) in order to project a particular *image* of crime. Chapter 1 described the failure to adopt policies that could eliminate our high crime rates. It is the task of this chapter and the next to prove that the reality of crime is *created* and that it is created in a way that promotes a particular *image* of crime: *The image that serious crime—and, therefore, the greatest danger to society—is the work of the poor.*

The notion that the reality of crime is created is derived from Richard Quinney's theory of the *social reality of crime*.²⁶ Here as elsewhere, however, an idea that contributes to the Pyrrhic defeat theory is transformed along the way, so it will help in presenting our view to compare it with Quinney's.

Quinney maintains that crime has a "social reality" rather than an objective reality. What he means can be explained with an example. Wherein lies the reality of money? Certainly not in the "objective" characteristics of green printed paper. It exists rather in the "social" meaning attributed to that paper and the pattern of "social" behavior that is a consequence of that meaning. If people did not act as if that green printed paper had value, it would be just green paper, not real money.²⁷ The reality of a crime as *a crime* does not lie simply in the objective characteristics of an action. It lies in the "social" meaning attached to that action and the pattern of "social" behavior—particularly the behavior of criminal justice officials—that is a product of that meaning. Quinney is right in this. When we speak of the reality of crime, we are referring to much more than physical actions, such as stabbing or shooting. We mean as well the reality that a society gives those physical actions by labeling them and treating them as criminal.

Quinney further maintains that this reality of crime is *created*. By this, he means that crime is a definition of behavior applied by lawmakers and other criminal justice decision makers. "Crime," Quinney writes,

is a definition of behavior that is conferred on some persons by others. Agents of the law (legislators, police, prosecutors, and judges), representing segments of a politically organized society, are responsible for formulating and administering criminal laws. Persons and behaviors, therefore, become criminal because of the formulation and application of criminal definitions. Thus, crime is created.²⁸

This is *not* what we have in mind when we say that the reality of crime is created. Quinney's position amounts to this: Crimes are established by the criminal law, and the criminal law is a human creation; therefore, crime is created. This is true, but it does not take us very far. After all, who can deny that crime is created *in this sense*? Only someone who has been hypnotized into forgetting that law books are written by human beings could deny that "crime" is a label that human beings apply to certain actions.

What is controversial, however, is whether the label is applied appropriately. "Crime," after all, is not merely a sound—it is a word with a generally

accepted meaning. Speaking generally, it means at least "an intentional action that is harmful to society." Of course, "crime" also has a narrower technical definition, namely, "an act prohibited by a criminal law." The point of prohibiting an act by the criminal law is to protect society from an injurious or dangerous act. Thus, though any act prohibited by criminal law is a crime in the narrow technical sense, not every act so prohibited is rightly prohibited, and thus not every act labeled "crime" is labeled appropriately. To determine whether the label "crime" is applied appropriately, we must use the more general definition. The label of crime is applied appropriately when it is used to identify all, or at least the worst, acts that are harmful to society. The label is applied inappropriately when it is attached to harmless acts or when it is not attached to seriously harmful acts. When we argue that the reality of crime is created, we point to the ways in which the label "crime" has not been applied appropriately. It is, of course, appropriate to label muggings and rapes as crimes. What is inappropriate is to fail to label equally or even more harmful intentional acts as crimes. What is inappropriate is to use the criminal justice system to convey the image that the greatest danger we face lies in the harmful acts of the poor.

One might ask why the inappropriate use of the label "crime" is a reason for saying that crime is created. The answer is this: By calling something *created*, we call attention to the fact that human actors are responsible for it. Calling crime created points to human actors *rather than objective dangers* as determining the shape that the reality of crime takes in our society. If the label "crime" is applied consistently to the most dangerous or harmful acts, then it is misleading to point to the fact that human decision makers are responsible for how the label is applied because their decisions are dictated by compelling objective reasons. Rather than creating a reality, their decisions trace a reality that already exists. On the other hand, if the label is not applied appropriately, it is sensible to assume that it is applied for reasons that lie with the decision makers and not in the realm of objective dangers. This means that when the label "crime" is applied inappropriately, it is essential to call attention to the fact that human actors are responsible for it. Thus, it is precisely when the label "crime" is applied inappropriately that it is important to point out that the reality of crime is *created*.

By calling crime created, we want to emphasize the human responsibility for the shape of crime, not in the trivial sense that humans write the criminal law, but rather to call attention to the fact that decisions as to what to label and treat as crime are not compelled by objective dangers, and thus that, to understand the reality of crime, we must look to the social processes that shape those decisions.

By calling crime created, we suggest that our picture of crime—the portrait that emerges from arrest statistics, prison populations, politicians' speeches, news media, and fictionalized presentations, the portrait that in turn influences lawmakers and criminal justice policy makers—is not a photograph of the real dangers that threaten us. Its features are not simply traced from the real dangers in the social world. Instead, it is a piece of creative art. It is a picture in which some dangers are portrayed, and others omitted. Because

it cannot be explained as a straight reflection of real dangers, we must look elsewhere to understand the shape it takes.

This argument, which will occupy us in this chapter and the next, leads to *five hypotheses* about the way in which the public's image of crime is created. That image reflects a reality to be sure; but that reality is itself created by the decisions made at critical points in the criminal justice process. To demonstrate that the reality of crime is created, and that the criminal justice system is a carnival mirror that shows us a distorted image of the dangers that threaten us, we will try to prove that, at each of the crucial decision-making points in criminal justice, the decisions made do not appropriately reflect the real and most serious dangers we face. The five hypotheses are as follows.

1. *Of the decisions of legislators:* The definitions of crime in the criminal law do not reflect the only or the most dangerous of antisocial behaviors
2. *Of the decisions of police and prosecutors:* The decisions on whom to arrest or charge do not reflect the only or the most dangerous behaviors legally defined as "criminal"
3. *Of the decisions of juries and judges:* Criminal convictions do not reflect the only or the most dangerous individuals among those arrested and charged
4. *Of the decisions of sentencing judges:* Sentencing decisions do not reflect the goal of protecting society from only or the most dangerous of those convicted by meting out punishments proportionate to the harmfulness of the crime committed
5. *Of all these decisions taken together:* What criminal justice policy decisions (in hypotheses 1 through 4) do reflect is the implicit identification of crime with the dangerous acts of the poor, an identification amplified by media representations of crime

The Pyrrhic defeat theory is composed of these five hypotheses, *plus* the proposition that the criminal justice system is failing in avoidable ways to eliminate our high crime rates (argued in Chapter 1), *plus* the *historical inertia* explanation of how this failure is generated and left uncorrected because of the ideological benefits it produces (argued in Chapter 4). Note that the fifth hypothesis goes beyond the criminal justice system to point to the role of the media. That is, while the structure of criminal justice practice enables it to create an image of crime as the work of the poor, the media serve as the conveyor of that image to the wider public. Moreover, this conveyor adds a twist of its own, not merely conveying an accurate picture of the whole of criminal justice practice with its biases, but actually magnifying those biases. So, we shall see that the media portray crime—in reality and in fiction—in ways that overrepresent the *types* of crimes committed by poor people (even when committed by rich folks on TV), and that obscure the social factors that lead to crime in reality (argued in this chapter and in Chapter 4). Finally, we tie this theory of how and why the criminal justice system functions as it does together with the *historical inertia* explanation. That is, we will try to show how the decisions that create the biased image of crime reflect a traditional

understanding of crime and are left unchanged because the particular distribution of costs and benefits to which those decisions give rise serves to make the system self-reinforcing.

A CRIME BY ANY OTHER NAME ...

Think of a crime, any crime. Picture the first crime that comes into your mind. What do you see? The odds are you are not imagining a mining company executive sitting at his desk, calculating the costs of proper safety precautions, and deciding not to invest in them. Probably what you do see with your mind's eye is one person attacking another physically or robbing something from another via the threat of physical attack. Look more closely. What does the attacker look like? It's a safe bet he (and it is a *he*, of course) is not wearing a suit and tie. In fact, you—like us, like almost anyone else in America—picture a young, tough, lower-class male when the thought of crime first pops into your head. You (we) picture someone like the Typical Criminal described earlier. The crime itself is one in which the Typical Criminal sets out to attack or rob some specific person.

This last point is important. It indicates that we have a mental image not only of the Typical Criminal, but also of the *Typical Crime*. If the Typical Criminal is a young, lower-class male, the Typical Crime is *one-on-one harm*—where “harm” means physical injury, loss of something valuable, or both. If you have any doubts that this is the Typical Crime, look at any random sample of police or private eye shows on television. How often do you see the officers on the TV show *COPS* investigate consumer fraud or failure to remove occupational hazards? When *Law & Order* detectives happen to track down a well-heeled criminal, it is almost always for violent crimes such as murder. A study of TV crime shows indicated that, while the fictional criminals portrayed on television are on average both older and wealthier than the real criminals who figure in the FBI's *UCR*, “TV crimes are almost 12 times as likely to be violent as crimes committed in the real world.”²⁹ A review of several decades of research confirms that violent crimes are overrepresented on TV news and fictional crime shows, and that “young people, black people, and people of low socioeconomic status are underrepresented as offenders or victims in television programs”—exactly opposite from the real world, in which nonviolent property crimes far outnumber violent crimes, and young, poor, and black folks predominate as offenders and victims.³⁰

Notice, then, that TV crime shows focus on the crimes typically committed by poor people, but they do not present these as uniquely committed by poor people. Rather than contradict the Pyrrhic defeat theory, this combination confirms it in a powerful way. The result of this combination is that TV crime shows broadcast the double-edged message that the one-on-one crimes of the poor are the typical crimes that rich and poor criminals alike commit—thus, they are not caused uniquely by the pressures of poverty; and that the criminal justice system pursues both rich and poor criminals—thus, when the

criminal justice system happens mainly to pounce on the poor in real life, it is not from any class bias.³¹ In other words, what is most important about the televised portrayals of crime is the *kinds* of crimes that are shown, not *who* is typically shown to be guilty. By overrepresenting violent one-on-one crimes, television confirms the commonsense view that these are the crimes that threaten us. Then, since in the real world those crimes are disproportionately committed by poor people, it is enough to create the image that it is the poor who pose the greatest danger to law-abiding Americans.

In addition to the steady diet of fictionalized TV violence and crime, there has been an increase in the graphic display of crime on many TV news programs. Crimes reported on TV news are also far more frequently violent than real crimes are.³² An article in the *Washingtonian* says that the word around two prominent local TV news programs is “If it bleeds, it leads.”³³ The Center for Media and Public Affairs reports a dramatic increase in homicide coverage on evening news programs starting in 1993, just as homicide rates were falling significantly. Other researchers found that news programs were highly selective in the homicides they reported. The murders that were chosen for coverage tended to be committed by strangers in neighborhoods where average household income was over \$25,000 a year, while we know that most murders occur between people known to each other and take place in low-income neighborhoods. The effect is to magnify the risk of lower-class crime to middle-class individuals. Is it any wonder that fear of crime has persisted even as crime rates have gone down?³⁴

What's more, a new breed of nonfictional “tabloid” TV show has appeared in which viewers are shown films of actual violent crimes—blood, screams, and all—or reenactments of actual violent crimes, sometimes using the actual victims playing themselves! Among these are *COPS* and *America's Most Wanted*. The *Wall Street Journal*, reporting on the phenomenon of tabloid TV, informs us, “Television has gone tabloid. The seamy underside of life is being bared in a new rash of true-crime ... shows.”³⁵ Here, too, the focus is on crimes of one-on-one violence.

It is important to identify this model of the Typical Crime because it functions like a set of blinders. It keeps us from calling a mine “disaster” a mass murder even if 10 men are killed, even if someone is responsible for the unsafe conditions in which they worked and died. One study of newspaper reporting of a food-processing plant fire, in which 25 workers were killed and criminal charges were ultimately brought, concludes that “the newspapers showed little consciousness that corporate violence might be seen as a crime.”³⁶ More recently, the *Washington Post* reported that the Peanut Corporation of America “knowingly shipped out contaminated peanut butter 12 times in the past two years.” The company's salmonella-tainted peanuts were linked to 9 deaths and over 700 cases of illness, many requiring hospitalization.³⁷ Media covered the recall of more than four thousand peanut-based products, but made no mention of “mass-murder” or even “crime,” although federal law makes it a felony to place adulterated food into commerce. A press conference, at which the victims called for criminal charges, received no attention from mainstream

media.³⁸ This is due to our fixation on the model of the Typical Crime. This particular piece of mental furniture so blocks our view that it keeps us from using the criminal justice system to protect ourselves from the greatest threats to our bodies and possessions.

What keeps a mine "disaster" from being a mass murder in our eyes is that it is not a one-on-one harm. What is important in one-on-one harm is not the numbers, but the *desire of someone (or ones) to harm someone (or ones) else*. An attack by a gang on one or more persons or an attack by one individual on several, fits the model of one-on-one harm; that is, for each person harmed, there is at least one individual who wanted to harm that person. Once he selects his victim, the rapist, the mugger, or the murderer all want that person to suffer. A mine executive, on the other hand, does not want his employees to be harmed. He would truly prefer that there be no accident, and no injured or dead miners. What he does want is something legitimate. It is what he has been hired to get: maximum profits at minimum costs. If he cuts corners to save a buck, he is just doing his job. If 10 or 29 men die because he cut corners on safety, we may think him crude or callous, but not a murderer. He is, at most, responsible for *indirect harm*, not one-on-one harm. For this, he may even be criminally indictable for violating safety regulations, but not for murder. The men are dead as an unwanted consequence of his (perhaps overzealous or undercautious) pursuit of a legitimate goal. So, unlike the Typical Criminal, he has not committed the Typical Crime, or so we generally believe. As a result, men are dead who might be alive now if cutting corners of the kind that leads to loss of life, whether suffering is specifically aimed at or not, were treated as murder.

This is our point. Because we accept the belief—encouraged by our politicians' statements about crime and by the media's portrayal of crime—that the model for crime is one person specifically and directly trying to harm another, we accept a legal system that leaves us unprotected against much greater dangers to our lives and well-being than those threatened by the Typical Criminal. Before developing this point further, let us anticipate and deal with some likely objections. Defenders of the present legal order are likely to respond to our argument at this point with irritation. Because this will surely turn to outrage in a few pages, let's talk to them now, while the possibility of rational communication still exists.

The "Defenders of the Present Legal Order" (we'll call them "the Defenders" for short) are neither foolish nor evil people. They are not racists, nor are they oblivious to the need for reform in the criminal justice system to make it more even-handed, and for reform in the larger society to make equal opportunity a reality for all Americans. Their response to our argument at this point is that the criminal justice system *should* occupy itself with one-on-one harm. Harms of the sort exemplified in the "mine tragedy" are really *not* murders and are better dealt with through stricter government enforcement of safety regulations. The Defenders admit that this enforcement has been rather lax and recommend that it be improved. Basically, though, they think this division of labor is right because it fits our ordinary moral sensibilities.

The Defenders maintain that, according to our common moral notions, someone who tries to do another harm is really more evil than someone who jeopardizes others while pursuing legitimate goals but doesn't aim to harm anyone. The one who jeopardizes others in this way doesn't want to hurt them. He or she doesn't have the goal of hurting someone in the way that a mugger or a rapist does. Moreover, being directly and purposely harmed by another person, the Defenders believe, is terrifying in a way that being harmed indirectly and impersonally, say, by a safety hazard, is not, even if the resultant injury is the same in both cases. And we should be tolerant of the one responsible for lax safety measures because he or she is pursuing a legitimate goal—that is, his or her dangerous action occurs as part of a productive activity, something that ultimately adds to social wealth and thus benefits everyone—whereas doers of one-on-one harm benefit no one but themselves. Thus, the latter are rightfully in the province of the criminal justice system with its drastic weapons, and the former are appropriately dealt with by the milder forms of regulation (or, perhaps, treated legally as responsible for civil *torts*, rather than for criminal acts).³⁹ Further, the Defenders insist, the crimes targeted by the criminal justice system are imposed on their victims totally against their will, whereas the victims of occupational hazards chose to accept their risky jobs and thus have, in some degree, consented to subject themselves to the dangers. Where dangers are consented to, the appropriate response is not blame but improved safety, and this is most efficiently done by regulation rather than with the guilt-seeking methods of criminal justice.

In sum, the Defenders make four objections: (1) Someone who purposely tries to harm another is really more evil than someone who harms another without aiming to, even if the degree of harm is the same; (2) being harmed directly by another person is more terrifying than being harmed indirectly and impersonally, as by a safety hazard, even if the degree of harm is the same; (3) someone who harms another in the course of an illegitimate and purely self-interested action is more evil than someone who harms another as a consequence of a legitimate and socially productive endeavor; (4) the harms of typical crimes are imposed on their victims against their wills, whereas harms such as those due to occupational hazards are consented to by workers when they agree to a job.

All four of these objections are said to reflect our common moral beliefs, which are a fair standard for a legal system to match. Together they are said to show that the Typical Criminal does something worse than the one responsible for an occupational hazard and thus deserves the special treatment provided by the criminal justice system. Some or all of these objections may have already occurred to the reader. Thus, it is important to respond to the Defenders. In doing so, we will show that neither our common moral beliefs nor our traditional legal notions justify treating indirect harms as regulatory matters rather than serious crimes.

1. DEFENDERS' FIRST OBJECTION Someone who purposely tries to harm another is really more evil than someone who harms another without aiming to, even if the degree of harm is the same. Thus, the Typical Criminal is rightly

subject to criminal justice, while the cost-cutting executive who endangers his workers is rightly subject to noncriminal safety regulations.

Response. The Defenders' first objection confuses intention with aim or purpose, and it is intention that brings us properly within the reach of the criminal law. It is true that a mugger aims to harm his victim in a way that a corporate executive who maintains an unsafe workplace does not. But the corporate executive acts knowingly, recklessly, or negligently nonetheless, and these are all ways of acting *intentionally*—which makes his actions appropriately subject to criminal law. What we intend is not just what we want to make happen, but what we do on purpose knowing what is likely to happen as the normal result of what we have done. As criminal law theorist Hyman Gross points out, "What really matters here is whether conduct of a particular degree of dangerousness was done intentionally."⁴⁰ Whether the actor wants or aims for that conduct to harm someone is a different matter, which is relevant to the actor's *degree* of culpability (not to whether he or she is culpable at all).

Here's an example (adapted from one given by Gross) to help understand the legally recognized degrees of culpability: Suppose a construction worker digs a trench in a neighborhood where children regularly play, and leaves the trench uncovered. One rainy day, children are killed while playing in the trench when its walls cave in on them. If the construction worker dug the trench and left it uncovered in order to kill the children, then their deaths were caused *purposely*. But suppose that the trench was dug and left uncovered not in order to harm the children, but merely knowing that children played in the area. Then, their deaths were brought about *knowingly*. If digging the ditch and leaving it uncovered were done without knowledge that children played in the area, but without making sure that they did not, then their deaths were brought about *recklessly*. Finally, if the trench was dug and left uncovered without knowledge that children played in the area and some, but inadequate, precautions were taken to make sure no children were there, then their deaths were brought about *negligently*.⁴¹

What's important here is that all these ways of causing death count for the law as intentional, and thus as criminally culpable. The difference between purposely, knowingly, recklessly, or negligently causing death is a difference within the range of intentional action. Second, culpability decreases as we go from purposely to knowingly to recklessly to negligently killing because, according to Gross, the outcome is increasingly due to chance and not to the actor; that is, the one who kills on purpose leaves less to chance than the killing will occur than the one who kills knowingly (the one who kills on purpose will take precautions against the failure of his killing, while the one who kills knowingly won't), and likewise the one who kills recklessly leaves wholly to chance whether there is a victim at all. The one who kills negligently reduces this chance, but insufficiently.

The kernel of truth in the Defenders' first objection is that the common street mugger harms on purpose, while the executive harms only knowingly or recklessly or negligently. But both act intentionally. We have criminal laws

against reckless or negligent harming. Thus, refusal to treat those responsible for occupational hazards and the like as criminals is not justified by our ordinary moral sensibilities, as the Defenders claim. Moreover, don't be confused into thinking that, because all workplaces have some safety measures, all workplace deaths are at most due to negligence. To the extent that precautions are not taken against particular dangers (such as leaking methane), deaths due to those dangers are—by Gross's standard—caused recklessly or even knowingly (because the executive knows that potential victims are in harm's way from the danger he fails to reduce). More than 70 percent of the Occupational Safety and Health Administration's (OSHA) citations are for violations they deem "serious," that is, where "there is a substantial probability that death or serious physical harm could result and the employer knew, or should have known, of the hazard."⁴² Nancy Frank concludes from a review of state homicide statutes that "a large number of states recognize unintended deaths caused by extreme recklessness as murder."⁴³

There is more to be said. Remember that Gross attributes the difference in degrees of culpability to the greater role left to chance as we descend from purposely to knowingly to recklessly to negligently harming. In this light, it is important to note that the executive (say, the mine owner) imposes danger on a larger number of individuals than the Typical Criminal typically does. So, while the Typical Criminal purposely harms a particular individual, the executive knowingly subjects a large number of workers to a risk of harm. As the risk becomes greater and the number of workers increases, it becomes increasingly likely that one or more workers will be harmed. This means that the gap between the executive and the Typical Criminal shrinks. By not harming workers purposely, the executive leaves more to chance; but by subjecting large numbers to risk, he leaves it less and less to chance that *someone* will be harmed, and, thus, he rolls back his moral advantage over the Typical Criminal. If you keep your workers in mines or factories with high levels of toxic gases or chemicals, you start to approach 100 percent likelihood that at least one of them will be harmed as a result. That means that the culpability of the executive approaches that of the Typical Criminal.

A different way to make the Defenders' first objection is to say that the executive has failed to protect his workers, while the Typical Criminal has acted positively to harm his victim. In general, people think it is worse to harm someone than to fail to prevent their being harmed (perhaps you should feed starving people on the other side of town or of the world, but few people will think you are a murderer if you don't and the starving die). But people are normally held responsible for the effects of inaction when they have a special obligation to aid people. This applies to the parent who causes his child's death by failing to feed him, the doctor who causes her patient's death by failing to care for her, and the coal mine owner who causes his employees' death by failing to take legally mandated safety precautions. It may also cover the society that fails to rectify harm-producing injustices in its midst. This is another way in which the moral difference between the safety-cutting executive and the Typical Criminal shrinks away.

Further, the Defenders overestimate the importance of specifically trying to do evil in our moral estimate of people. The mugger who aims to hurt someone is no doubt an ugly character, but so too is the well-heeled executive who calmly and callously chooses to put others at risk. Most murders, we know, are committed in the heat of some passion, such as rage or jealousy, and/or under the influence of drugs or alcohol. Two lovers or neighbors or relatives find themselves in a heated argument. One (often it is a matter of chance *which* one) picks up a weapon and strikes the other a fatal blow. Such a person is clearly a murderer and rightly subject to punishment by the criminal justice system. Is this person more evil than the executive who, knowing the risks, calmly makes a calculation that profits for owners are more important than mandated safety equipment for workers?

The one who kills in a heated argument kills from passion. What she does she probably would not do in a moment of calm. She is likely to feel "she was not herself." The one she killed was someone she knew, a specific person who at the time seemed to her to be the embodiment of all that frustrated her, someone whose very existence made life unbearable. We do not suggest that this is true of all killers, although there is reason to believe that it is true of many. Nor do we suggest that such a state of mind justifies murder. What it does do, however, is suggest that the killer's action, arising out of anger at a particular individual, does not show general disdain for the lives of others. Here is where she is different from our mine executive. Our mine executive wanted to harm no one in particular, but *he knew his acts were likely to harm someone*. Once someone is harmed, the victim is someone in particular. Nor can our executive claim that "he was not himself." His act is done not out of passion, but out of cool reckoning. It is here that his evil shows. In his willingness to jeopardize the lives of unspecified others (workers, consumers, neighboring communities) who pose him no real threat, in order to make a few dollars, he shows his general disdain for all his fellow human beings. Can it really be said that he is less evil than one who kills from passion? The Model Penal Code includes within the definition of murder any death caused by "extreme indifference to human life."⁴⁴ Is our executive not a murderer by this definition?

It's worth noting that, in answering the Defenders here, we have portrayed harms from occupational hazards in their best light. They are not, however, all just matters of well-intentioned, but excessive risk taking. Consider, for example, the Manville (formerly Johns Manville) asbestos case. It is predicted that 240,000 Americans working now or who previously worked with asbestos will die from asbestos-related cancer over a period of 30 years. But documents made public during congressional hearings in 1979 show "that Manville and other companies within the asbestos industry covered up and failed to warn millions of Americans of the dangers associated with the fire-proof, indestructible insulating fiber."⁴⁵ An article in the *American Journal of Public Health* attributes thousands of deaths to the cover-up.⁴⁶ Later in this chapter we document similar intentional cover-ups, such as the falsification of reports on coal-dust levels in mines, which leads to crippling and often fatal

black lung disease. Surely someone who knowingly subjects others to risks and tries to hide those risks from them is culpable in a high degree.

2. DEFENDERS' SECOND OBJECTION Being harmed directly by another person is more terrifying than being harmed indirectly and impersonally, as by a safety hazard, even if the degree of harm is the same.

Response. The Defenders are largely right in believing that direct personal assault is terrifying in a way that indirect impersonal harm is not. We say "largely right" here because deaths from some occupational hazards—slowly suffocating to death in a collapsed mine, or living in fear of an occupational cancer's spreading and becoming fatal—may well be as or more terrifying than some direct personal assaults. Nonetheless, even granting the Defenders their general point that direct assault is usually more terrifying than indirect harm, it does not follow that indirect harms should be treated as noncriminal regulatory matters. This difference in terrifyingness is no stranger to the criminal justice system. Prosecutors, judges, and juries constantly have to consider how terrifying an attack is in determining what to charge and what to convict offenders for. This is why we allow gradations in charges of homicide or assault and allow particularly grave sentences for particularly grave attacks. In short, the difference the Defenders are pointing to here might justify treating a one-on-one murder as graver than murder due to lax safety measures, but it doesn't justify treating one as a grave crime and the other as a mere regulatory (or very minor criminal) matter. After all, although it is worse to be injured with terror than without, it is still the injury that constitutes the worst part of violent crime. If that is so, then the worst part of violent crime is still shared by the indirect harms that the Defenders would relegate to regulation.

As with the first objection, we should keep in mind that indirect harms can have a large number of victims. Pollution, unsafe work places, hazardous products, and tainted food can have a widespread impact. The financial fraud of Enron and other companies (discussed in Chapter 3) affected tens of thousands of people who lost more money than they would have in a mugging. Judge Miles Lord noted this issue in a speech from the bench to executives of the A.H. Robbins Company, which made a birth control device called the Dalkon Shield. The device was not just ineffective, but its design caused many women to get pelvic infections, which led to 18 deaths and 350,000 claims of injury. Judge Lord said, "If one poor young man were, by some act of his—without authority or consent—to inflict such damage upon one woman, he would be jailed for a good portion of the rest of his life. And yet your company without warning to women invaded their bodies by the millions and caused them injuries by the thousands."⁴⁷

3. DEFENDERS' THIRD OBJECTION Someone who harms another in the course of an illegitimate and purely self-interested action is more evil than someone who harms another as a consequence of a legitimate and socially productive endeavor.

Response. There is also something to the Defenders' claim that indirect harms, such as ones that result from lax safety measures, are part of legitimate productive activities, whereas one-on-one crimes generally are not. No doubt, we must tolerate the risks that are necessary ingredients of productive activity (unless those risks are so great as to outweigh the gains of the productive activity). But this doesn't imply we shouldn't identify the risks that are excessive and use the law to protect innocent people from them. If those risks are great enough, the fact that they may further a productive or otherwise legitimate activity is no reason against making them crimes if that's what's necessary to protect workers, consumers, and communities. A person can commit a crime to further an otherwise legitimate endeavor and it is still a crime. If a manager threatens to assault his workers if they don't work faster, the fact that getting them to work faster is a legitimate goal for a manager doesn't make the manager's act any less criminal. Using child labor may help legitimate businesses reap higher profits, but the law wisely prohibits this exploitation. By the same logic, the fact that leaving mine roofs unsupported, or failing to monitor explosive gasses in the mine, may serve the legitimate purpose of cutting costs, but it is no reason against treating such dangerous acts as crimes. If acts that endanger others ought to be crimes, then the fact that the acts are means to legitimate aims doesn't change the fact that they ought to be crimes.

4. DEFENDERS' FOURTH OBJECTION The harms of typical crimes are imposed on their victims against their wills, whereas harms such as those due to occupational hazards are consented to by workers when they agree to a job.

Response. Cases like the Manville asbestos show that the Defenders overestimate the reality of the "free consent" with which workers take on the risks of their jobs. You can consent to a risk only if you know about it, and often the risks are concealed. Moreover, the Defenders overestimate generally the degree to which workers freely consent to the conditions of their jobs. Managers at Upper Big Branch threatened miners with being fired if they complained about safety risks.⁴⁸ More generally, although no one is forced at gunpoint to accept a particular job, virtually everyone is forced by the requirements of necessity to take some job. Moreover, workers can choose jobs only where there are openings, which means they cannot simply pick their place of employment at will. At best, workers can choose among the dangers present at various worksites, but rarely can they choose to face no danger at all.

For nonwhites and women, the choices are further narrowed by discriminatory hiring and long-standing occupational segregation (funneling women into nursing or food-processing jobs and blacks into janitorial and other menial occupations), not to mention subtle and not-so-subtle practices that keep nonwhites and women from advancing within their occupations. Consequently, for all intents and purposes, most workers *must* face the dangers of the jobs that are available to them. What's more, remember that, while here we have been focusing on harms due to occupational hazards, much of the indirect harm that we shall document in what follows is done not to workers

but, for example, to hospital patients (subjected to careless medical care), to neighbors of industrial sites (breathing dangerous concentrations of pollutants), and to consumers of unsafe food and dangerous products. And these victims surely don't consent to these risks.

Finally, recall that the basis of all of the Defenders' objections is that the idea that one-on-one harms are more evil than indirect harms is part of our common moral beliefs. Though it is fair to judge criminal justice practices in light of ordinary moral beliefs, it is also important not to overlook the role of legal institutions in shaping our ordinary moral beliefs about right and wrong. The great historian of English law, Sir James Fitzjames Stephens, held that a

great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment wherever crime is proved.⁴⁹

One cannot simply appeal to ordinary moral beliefs to defend the criminal law because the criminal law has already had a hand in shaping ordinary moral beliefs. At least one observer has argued that making narcotics use a crime at the beginning of the twentieth century *caused* a change in the public's ordinary moral notions about drug addiction, which prior to that time had been viewed as a medical problem.⁵⁰ It is probably safe to say that, in our own time, antidiscrimination legislation has sharpened the public's moral condemnation of racial and gender discrimination. Hence, we might speculate that if the criminal justice system began to prosecute—and if the media began to portray—those who inflict *indirect harm* as serious criminals, our ordinary moral notions would change on this point as well.

We are left with the conclusion that there is no moral basis for treating *one-on-one harm* as criminal and *indirect harm* as merely a regulatory affair (or only as a tort). What matters, then, is whether the purpose of the criminal justice system will be served by including, in the category of serious crime, actions that are predictably likely to produce serious harm, yet that are done in pursuit of otherwise legitimate goals and without the desire to harm anyone.

What is the purpose of the criminal justice system? No esoteric answer is required. Norval Morris and Gordon Hawkins write that "the prime function of the criminal law is to protect our persons and our property."⁵¹ *The Challenge of Crime in a Free Society*, the report of the President's Commission on Law Enforcement and Administration of Justice, tells us that "any criminal justice system is an apparatus society uses to enforce the standards of conduct necessary to protect individuals and the community."⁵² Whatever else we think a criminal justice system should accomplish, we doubt if anyone would deny that its central purpose is to protect us against the most serious threats to our well-being. *This purpose is seriously undermined by taking one-on-one harm as the model of crime.* It prevents the criminal justice system from protecting our persons and our property from dangers at least as great as those posed by one-on-one harm. This is so because, as we will show, a large number of actions

that are not labeled *criminal* lead to loss of life, limb, and possessions on a scale comparable to those actions that are represented in the FBI Crime Index. A crime by any other name still causes misery and suffering.

The remainder of this chapter identifies some acts that are *crimes by other names*: acts that cause harm and suffering comparable to that caused by acts called crimes. Our purpose is to confirm the first hypothesis: that the definitions of crime in the criminal law do not reflect the only or the most dangerous behaviors in our society. To do this, we will need some measure of the harm and suffering caused by crimes with which we can compare the harm and suffering caused by noncrimes. Our measure need not be too refined because the point can be made by showing that there are some acts that we do not treat as crimes, but that cause harm *roughly comparable* to that caused by acts we do treat as crimes. Because the harms caused by noncriminal acts fall into the categories of death, bodily injury (including the disabling effects of disease), and property loss, we will compare the harms done by noncriminal acts with the injuries caused by the crimes of murder, aggravated assault, and theft. In order to compare the harms produced by both criminal and noncriminal acts, we will generally use the most recent year for which there are ample statistics from both categories.

According to the FBI's *UCR*, in 2010 there were 14,748 murders and non-negligent manslaughters and 778,901 aggravated assaults. "Murder and non-negligent manslaughter" includes all "willful (nonnegligent) killing of one human being by another." "Aggravated assault" is defined as an "attack by one person on another for the purpose of inflicting severe or aggravated bodily injury."⁵³ Thus, as measures of the harm done by crimes in 2010, we can say that serious crimes led to roughly 14,700 deaths and 780,000 instances of serious bodily injury short of death that year. As a measure of monetary loss due to property crime, we can use \$15.7 billion, the figure the FBI estimates to be the total loss due to property crime in 2010.⁵⁴ Whatever the shortcomings of these reported crime statistics, they are the statistics on which public policy has traditionally been based.⁵⁵ Thus, we will consider any actions that lead to loss of life, physical harm, and property loss, comparable to the figures in the FBI's *UCR*, as actions that pose grave dangers to the community comparable to the threats posed by crimes. They are surely precisely the kinds of harmful actions from which a criminal justice system whose purpose is to protect our persons and property ought to protect us. *They are crimes by other names.*

In making this case, the following sections review a number of research reports, both historical and contemporary. The continued inclusion of older reports—sometimes seen as "outdated"—is meant to underscore that these harms are neither new nor recently discovered. The harms are not transient, but ongoing, and the inclusion of findings reported over several decades should bolster confidence in the validity of sometimes scarce contemporary research.

Work May Be Dangerous to Your Health

When the *President's Report on Occupational Safety and Health*⁵⁶ was published in 1972, the government estimated the number of job-related illnesses at

390,000 per year and the number of annual deaths from industrial disease at 100,000. Since that time, numerous studies have documented the alarmingly high incidence of disease, injury, and death due to hazards in the workplace and the fact that much or most of this carnage is the consequence of the refusal of management to pay for safety measures, of government to enforce safety standards, and sometimes of management's willful defiance of existing law.⁵⁷

For 2010, the U.S. Department of Labor's Bureau of Labor Statistics (BLS) reports 3.1 million workplace injuries and illnesses, about half of which (1.6 million) resulted in lost workdays, job transfer or restricted duties at work. BLS also reports 212,800 cases of nonfatal occupational illness.⁵⁸ BLS notes that "some conditions (for example, long-term latent illnesses caused by exposure to carcinogens) often are difficult to relate to the workplace and are not adequately recognized and reported. These long-term latent illnesses are believed to be understated in the survey's illness measures."⁵⁹

Complete data are also difficult to come by because of disincentives that discourage workers from reporting and employers from recording illnesses and injuries. A General Accounting Office report notes that

workers may not report a work-related injury or illness because they fear job loss or other disciplinary action, or fear jeopardizing rewards based on having low injury and illness rates. In addition, employers may not record injuries or illnesses because they are afraid of increasing their workers' compensation costs or jeopardizing their chances of winning contract bids for new work.⁶⁰

A study by the National Institute for Occupational Safety and Health concludes that "there may be several thousand more workplace deaths each year than employers report."⁶¹ In spite of these known problems, OSHA made several changes that worsened the problem of underreporting. In 1995, OSHA changed its data collection system so that companies are now under an "honor system" to report accurate injury and death numbers to the government. Several public health researchers noted "that the cessation of on-site data collection appears to have exacerbated the underreporting by employers." In 2002, OSHA changed the record keeping standard so "fewer injuries and illnesses were required to be recorded."⁶²

For these reasons, we must look elsewhere for accurate figures. In his testimony before the Senate Committee on Labor and Human Resources, Dr. Philip Landrigan, director of the Division of Environmental and Occupational Medicine at the Mount Sinai School of Medicine in New York City, stated,

data indicate that occupationally related exposures are responsible each year in New York State for 5,000 to 7,000 deaths and for 35,000 new cases of illness (not including work-related injuries). These deaths due to occupational disease include 3,700 deaths from cancer. ...

Crude national estimates of the burden of occupational disease in the United States may be developed by multiplying the New York State data by a factor of 10. New York State contains slightly less than 10 percent of the nation's workforce and it in-

cludes a broad mix of employment in the manufacturing, service and agricultural sectors. Thus, it may be calculated that occupational disease is responsible each year in the United States for 50,000 to 70,000 deaths, and for approximately 350,000 new cases of illness.⁶³

Landrigan's estimates of deaths from occupational disease are corroborated by a National Safe Workplace Institute study, which estimates that the number of occupational disease deaths is between 47,377 and 95,479. Mark Cullen, director of the occupational medicine program at the Yale University School of Medicine, praised this study as "a very balanced, very comprehensive overview of occupational health."⁶⁴ In a 1997 article in the American Medical Association (AMA) journal *Archives of Internal Medicine*, researchers at San Jose State University in California aggregated many national and large regional data sets and came up with an estimate, for 1992, of 60,300 deaths from occupational illness.⁶⁵

Dr. Samuel Epstein, professor emeritus of environmental and occupational medicine at the University of Illinois School of Public Health, and then-chairman of the Cancer Prevention Coalition, states, "Over 10 percent of adult cancer deaths result from occupational exposures, which are also a recognized cause of cancer in children: parents exposed to carcinogens on the job often expose their unborn children to the same cancer-causing chemicals."⁶⁶ With current estimates of annual cancer deaths running above 570,000, this translates into approximately 57,000 adult deaths a year from occupationally caused cancer alone. A 1999 report estimates approximately 55,000 annual deaths from occupational disease, though noting that the number may be as high as 94,000.⁶⁷

In light of these various estimates, we can hardly be overestimating the actual death toll if we take the conservative route and set it at 50,000 deaths a year resulting from occupational disease.

As for nonfatal occupational illness, BLS reports 212,800 cases for 2010, and the San Jose State University researchers estimate 862,200 cases (based on data from 1992). These illnesses are of varying severity. Because we want to compare these occupational harms with those resulting from aggravated assault, we shall stay on the conservative side here, too, as with deaths from occupational diseases, and say that there are annually, in the United States, approximately 200,000 job-related serious illnesses. This is a conservative figure in light of the San Jose State University researchers' estimate of 862,200 cases, as well as the likelihood of underreporting. Note also that these figures don't include the effects of workers' exposure to occupational illnesses on the health of their families.⁶⁸ Taken together with 50,000 deaths from occupational diseases, how does this compare with the threat posed by crime?

Before jumping to any conclusions, note that the risk of occupational disease and death falls only on members of the labor force, whereas the risk of crime falls on the whole population, from infants to the elderly. Because the

civilian labor force is about half of the total population (154 million in 2009 out of a total civilian population of 307 million),⁶⁹ to get a true picture of the relative threat posed by occupational diseases compared with that posed by crimes, we should multiply the crime statistics by half (0.5) when comparing them with the figures for occupational disease and death. Using the crime figures for 2010 (cited earlier in this chapter), we note that the comparable figures would be:

	Occupational Disease	Crime (x 0.5)
Death	50,000	7,350
Other physical harm	200,000	390,000

Those who believe that this paints an inaccurate picture because so many crimes go unreported, should consider that homicides are by far the most completely reported of crimes. For obvious reasons, the general underreporting of crimes is not equal. It is easier to avoid reporting a rape or a mugging than a corpse. Second, although not the best, aggravated assaults are among the better-reported crimes. Estimates from the Justice Department's National Crime Victimization Survey indicate that 62 percent of aggravated assaults were reported to the police in 2008, compared with 34 percent of thefts.⁷⁰ On the other hand, we should expect more, not less, underreporting of industrial than criminal victims because diseases and deaths are likely to cost firms money in the form of workdays lost and insurance premiums raised; occupational diseases are frequently first seen by company physicians who have an incentive to diagnose complaints as either malingering or not job related, and many occupationally caused diseases do not show symptoms or lead to death until after the employee has left the job. Most independent contractors and self-employed workers are not included in BLS reports.

In sum, both occupational and criminal harms are underreported, though there is reason to believe that the underreporting is worse for occupational than for criminal harms. Bear in mind, also, that we have accepted the statistics on criminal harms as reported, while we have reduced substantially the reported estimates for occupational harms. However one may quibble with figures presented here, it is fair to say that, if anything, they understate the extent of occupational harm compared with criminal harm.

Note further that the estimates in the last chart are *only* for occupational diseases and deaths from those diseases. They do not include death and disability from work-related injuries. Here, too, the statistics are gruesome. BLS's *National Census of Fatal Occupational Injuries* reports 4,041 workplace fatalities in 2010 (not counting work-related homicides).⁷¹ Added to the previous figure, this brings the number of occupation-related deaths to 54,041 a year.

The BLS reported that, in 2010, there were 3.1 million recordable cases of nonfatal injuries and illnesses. A recordable case involves days away from work, medical treatment other than first aid, loss of consciousness, restriction

of work or motion, transfer to another job, or "cancer, chronic irreversible disease, a fracture or cracked bone, or a punctured eardrum."⁷² Of these, BLS says that 1.6 million entailed days away from work, restricted activity or job transfer. To make sure that we are counting more serious harms, we will use this figure of 1.6 million. Note that this figure includes physical harms from both disease and injury. Thus, it replaces our previous figure of 200,000. This is an especially conservative estimate given that another national database of occupational injuries and illnesses that result in treatment in an *emergency* department of a hospital recorded 3.4 million visits for 2003, a level fairly constant since 1982.⁷³

If, on the basis of these additional figures, we recalculated our table comparing occupational harms from both disease and injury with criminal harms, it would look like this:

	Occupational Disease and Injury	Crime (x 0.5)
Death	54,041	7,350
Other physical harm	1,600,000	390,000

Can there be any doubt that workers are more likely to stay alive and healthy in the face of the danger from the underworld than from the work world? Secretary of Labor Hilda Solis noted:

Every day in America, 12 people go to work and never come home. Every year in America, 3.3 million people suffer a workplace injury from which they may never recover. These are preventable tragedies that disable our workers, devastate our families, and damage our economy.⁷⁴

To say that some of these workers died from accidents due to their own carelessness is about as helpful as saying that some of those who died at the hands of murderers deserved it. It overlooks the fact that when workers are careless, it is not because they love to live dangerously. They have production quotas to meet, quotas that they themselves do not set. If quotas were set with an eye to keeping work at a safe pace rather than keeping the production-to-wages ratio as high as possible, it might be more reasonable to expect workers to take the time to be careful. Beyond this, we should bear in mind that the vast majority of occupational deaths result from disease, not accident, and disease is generally a function of conditions outside a worker's control.

Examples of such conditions are:

- *the level of coal dust in the air*: "260,000 miners receive benefits for [black lung] disease, and perhaps as many as 4,000 retired miners die from the illness or its complications each year"; about 10,000 working miners "have X-ray evidence of the beginnings of the crippling and often fatal disease."⁷⁵

- *textile dust*: some 100,000 American cotton textile workers suffer breathing impairments caused by acute byssinosis, or brown lung, and another 35,000 former mill workers are totally disabled with chronic brown lung.⁷⁶
- *asbestos fibers*: it has been estimated that, under the lenient asbestos standard promulgated by OSHA in 1972, anywhere from 18,400 and 598,000 deaths from lung cancer would result from exposure to asbestos.⁷⁷
- *coal tars*: "workers who had been employed five or more years in the coke ovens died of lung cancer at a rate three and a half times that for all steelworkers"; coke oven workers develop cancer of the scrotum at a rate five times that of the general population.⁷⁸
- *repetitive motion*: according to the National Academy of Sciences, there are more than 1 million repetitive motion injuries annually.⁷⁹ Repetitive strain disease reportedly afflicts "keyboard operators, assembly-line workers, meat processors, grocery check-out clerks, secretaries and other employees everyday. ... OSHA officials argue that ... carpal tunnel problems lead the list in average time lost from work (at a median of 30 days per case), well above amputations (24 days) and fractures (20)."⁸⁰

To blame the workers for occupational disabilities and deaths is to ignore the history of governmental attempts to compel industrial firms to meet safety standards that would keep dangers (such as chemicals or fibers or dust particles in the air), that are outside the worker's control, down to a safe level. This has been a continual struggle, with firms using everything from their own "independent" research institutes to more direct and often questionable forms of political pressure to influence government in the direction of loose standards and lax enforcement. So far, industry has been winning because OSHA has been given neither the personnel nor the mandate to fulfill its purpose. Between 1990 and 2007, the number of OSHA inspectors declined from 1,300 to 1,100 and "it is estimated that OSHA actively regulates [the work conditions of] only about 20% of the American workforce."⁸¹ Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, noted that federal OSHA has 1,200 inspectors and "state plans have around the same, so there are less than 2,500 inspectors to cover 7.5 million workplaces employing more than 130 million workers."⁸²

The problem does not lie with OSHA alone, but starts with the legislators who decided in 1970 that causing the death of an employee by willfully violating safety laws was a misdemeanor. As noted by a *New York Times* investigation: "The maximum sentence, six months in jail, is half the maximum for harassing a wild burro on federal lands." Although Congress has rarely voted down tougher sentences for street crime, it has rejected every attempt to get tougher with those who willfully (and sometimes repeatedly) violate safety laws, in spite of evidence that stricter laws could save lives. On top of lax laws, OSHA discourages prosecutions and criminal referrals to such an extent that a 1988 congressional report noted, "A company official who willfully and recklessly violates federal OSHA laws stands a greater chance of winning a state lottery than being criminally charged."⁸³

Likewise, the level of fines was increased only once (in 1990) from the levels set in 1970, and thus have not kept pace with inflation. In Congressional testimony on the Protecting America's Workers Act (which did not become law), Assistant Secretary Michaels noted how the current penalties do not provide deterrence: "Currently, serious violations—those that pose a substantial probability of death or serious physical harm to workers—are subject to a maximum civil penalty of only \$7,000." Further, "Willful and repeated violations carry a maximum penalty of only \$70,000." Worse still, those are maximum penalties and in 2007, the median initial penalty for cases involving the death of a worker was \$5,900; the median final penalty after settlement was \$3,675.⁸⁴ Elsewhere, Michaels noted that in 2010, the average penalty for a serious violation was \$1,000, and that was after some administrative adjustments to the schedule of fines to make it tougher.⁸⁵

Is a person who kills another in a bar brawl a greater threat to society than a business executive who refuses to cut into his profits to make his plant a safe place to work? By any measure of death and suffering, the latter is by far a greater danger than the former. However, because he wishes his workers no harm, and because he is only indirectly responsible for death and disability while pursuing legitimate economic goals, his acts are not labeled "crimes." Once we free our imagination from the blinders of the one-on-one model of crime, can there be any doubt that the criminal justice system does *not* protect us from the gravest threats to life and limb? It seeks to protect us when danger comes from a young, lower-class male in the inner city. When a threat comes from an upper-class business executive in an office, the criminal justice system looks the other way. This is in the face of growing evidence that for every American citizen murdered by thugs, more than three American workers are killed by the recklessness of their bosses and the indifference of their government.

Health Care May Be Dangerous to Your Health

An article in the *Journal of the American Medical Association (JAMA)* estimates that there are 225,000 deaths a year due to medical treatment, making it "the third leading cause of death in the United States, after deaths from heart disease and cancer."⁸⁶ Between 1.7 and 2 million people in the United States acquired health-care-associated infections, which resulted in 88,000 to 100,000 deaths according to the Centers for Disease Control and other studies published in *JAMA*.⁸⁷ This is more than five times the number of deaths due to homicides, and they are deaths that could have been prevented by following established hygiene protocols.⁸⁸ And this is only the beginning.

On July 15, 1975, Dr. Sidney Wolfe, of Ralph Nader's Public Interest Health Research Group, testified before the House Commerce Oversight and Investigations Subcommittee that there "were 3.2 million cases of unnecessary surgery performed each year in the United States." These unneeded operations, Wolfe added, "cost close to \$5 billion a year and kill as many as 16,000 Americans."⁸⁹ Wolfe's estimates of unnecessary surgery were based on studies comparing the operations performed and surgery recommended

by doctors who are paid for the operations they do with those performed and recommended by salaried doctors who receive no extra income from surgery.

The figure accepted by Dr. George A. Silver, professor of public health at the Yale University School of Medicine, is 15,000 deaths a year "attributable to unnecessary surgery."⁹⁰ Silver places the annual cost of excess surgery at \$4.8 billion.⁹¹ In an article on an experimental program by Blue Cross and Blue Shield aimed at curbing unnecessary surgery, *Newsweek* reported that

a Congressional committee earlier this year [1976] estimated that more than 2 million of the elective operations performed in 1974 were not only unnecessary—but also killed about 12,000 patients and cost nearly \$4 billion.⁹²

Because the number of surgical operations performed in the United States rose from 16.7 million in 1975 to 28.7 million in 2008,⁹³ there is reason to believe that at least somewhere between (the congressional committee's estimate of) 12,000 and (Dr. Wolfe's estimate of) 16,000 people a year still die from unnecessary surgery. In 2010, the FBI reported that 1,704 murders (in which the weapon is known) were committed with a "cutting or stabbing instrument."⁹⁴ Obviously, the FBI does not include the scalpel as a cutting or stabbing instrument. If it did, it would have had to report that between 13,704 and 17,704 persons were killed by "cutting or stabbing" in 2010, depending on whether you take Congress's figure or Wolfe's. No matter how you slice it, the scalpel is more dangerous than the switchblade.

This is only a fraction of the problem. A report issued in 1999 by the National Academy of Sciences' Institute of Medicine (IOM) stated that up to "98,000 hospitalized Americans die every year and 1 million more are injured as a result of preventable medical errors that cost the nation an estimated \$29 billion a year."⁹⁵ (Bear in mind as well that "[t]he IOM considered only errors committed in hospitals, and not in other medical settings where they undoubtedly abound: clinics, outpatient surgery centers and doctors' offices.")⁹⁶ The report goes on to predict that, if a "centralized system for keeping tabs on medical errors" were put in place, "the number of deaths from medical mistakes could be cut in half within five years."⁹⁷ However, due to resistance by doctors and hospitals to mandatory reporting of errors and to other recommendations in the IOM report, no significant progress has been made. "As a result, experts contend, it's doubtful that patients checking into most of America's 5,200 hospitals [in 2002] are any less likely to be killed or injured than they were on November 29, 1999, when the report was issued."⁹⁸ Indeed, things may be worse. "Operations on the wrong body part or the wrong patient have increased according to the Joint Commission on the Accreditation of Healthcare Organizations, which inspects hospitals."⁹⁹

A report in *JAMA*, titled "Five Years After *To Err is Human*: What Have We Learned?" asserts that efforts to reduce errors "are affecting safety at the margin, [but] their overall impact is hard to see in national statistics." The article notes many barriers, including an insurance system that rewards hospitals for errors by paying additional sums for the treatment of problems caused

by mistakes. The IOM called for reducing preventable injuries by 90 percent, and the authors write that "such a commitment has yet to emerge; indeed, it is not in sight."¹⁰⁰ The article lists a number of interventions that dramatically reduce adverse events, including those proposed by Dr. Peter Pronovost of Johns Hopkins, who has created medical safety checklists and works on ways to enforce their use. When implemented to reduce infection in a number of Intensive Care Units in Michigan, in the "first eighteen months, the hospitals saved ... more than fifteen hundred lives. The successes have been sustained for almost four years—all because of a stupid little checklist."¹⁰¹

The results of large-scale research published in 2010 by the *New England Journal of Medicine* confirm that little progress has occurred. A review of the research appeared in the *New York Times* under the headline, "Study Finds No Progress in Safety at Hospitals." It noted that "about 18 percent of patients were harmed by medical care, some more than once, and 63.1 percent of the injuries were judged to be preventable." In almost 3 percent of the cases patients suffered a permanent injury, and another 2.4 percent of the injuries caused or contributed to the death of a patient. "[M]any of the problems were caused by the hospitals' failure to use measures that had been proved to avert mistakes."¹⁰²

Recall the example of digging a trench: "Suppose that the trench was dug and left uncovered, knowing that children played in the area. Then, their deaths were brought about *knowingly*." *Knowingly* was the second degree of culpability, right below *purposely*—and is more culpable than *recklessly* or *negligently*. Suppose that preventable and deadly potential hospital errors were identified but left unprevented, knowing that vulnerable patients would be in the area. Didn't the doctors and hospital officials who resisted correcting previously identified dangerous practices bring about 98,000 deaths *knowingly*?

The FBI also should add the hypodermic needle and the prescription drug to the list of potential murder weapons. Silver points out that these are also death-dealing instruments:

Of the 6 billion doses of antibiotic medicines administered each year by injection or prescription, it is estimated that 22 percent are unnecessary. Of the doses given, 10,000 result in fatal or near-fatal reactions. Somewhere between 2,000 and 10,000 deaths probably would not have occurred if the drugs, meant for the patient's benefit, had not been given.¹⁰³

These estimates are supported by the Harvard Medical Practice Study. Its authors write that, of the 1.3 million medical injuries (which they estimated on the basis of hospital records for 1984), 19 percent (247,000) were related to medications, and 14 percent of these (34,580) resulted in permanent injury or death.¹⁰⁴ Another report estimates that, in part due to faulty warning labels on prescription drugs, "100,000 hospital patients die [annually] of adverse reactions to medication and 2.2 million are injured."¹⁰⁵ Further, "experts have estimated that more than one million serious drug errors occur annually in hospitals alone."

TABLE 2.1 How Americans Are Murdered, 2010

Total Murders Where Weapon Is Known	Firearms	Knife or Other Cutting Instrument	Other Weapon: Blunt Objects, Arson, Strangulation, Poison, etc.	Personal Weapons: Hands, Fists, etc.
12,996*	8,775	1,704	1,772	745

*This figure is lower than the number of murders and nonnegligent manslaughters used elsewhere in the text, due to the fact that the FBI lacks data on the weapons used in roughly one-sixth of the homicides it reports. "Other Weapon" represents all the other categories that are not reported separately here, including the category "Other Weapon/Not Stated."

Source: UCR-2010, Expanded Homicide Data Table 8.

If someone had the temerity to publish a UCR that really portrayed the way Americans are murdered, the FBI's statistics on the *type* of weapon used in murder would have to be changed from those shown in Table 2.1 to something like those shown in Table 2.2. The figures shown in Table 2.2 would give American citizens a much more honest picture of what threatens them. Nonetheless, we are not likely to see such a table published by the criminal justice system, perhaps because it would also give American citizens a more honest picture of *who* threatens them.

Finally, aside from the other losses it imposes, unnecessary surgery was estimated to have cost between \$4 and \$5 billion in 1974. The price of medical care has increased about eightfold between 1974 and 2010. Thus, assuming that the same number of unneeded operations was performed in 2010, the cost of unnecessary surgery would be between \$32 and \$40 billion. To this we

TABLE 2.2 How Americans Are Really Murdered, 2010

Total Murders Where Weapon Is Known	Occupational Hazard or Disease	Firearms	Knife or Other Cutting Instrument, Including Scalpel	Other Weapon: Blunt Objects, Poison, Strangulation, Prescription Drug, Other Medical Treatment, etc.	Personal Weapons: Hands, Fists, etc.
168,320*	55,324	8,775	13,704	89,772	745

*The figures in this row represent the relevant figures in Table 2.1 plus the most conservative figures for the relevant categories discussed in the text. Note in particular that, under the category "Other Weapon," we have included the low estimate of the number of people who die from unnecessary prescription drugs (2,000) according to Dr. Silver, plus 86,000 (the 98,000 hospital deaths due to error that the IOM predicted could have been prevented within five years of their report minus 12,000, the lower estimate of deaths due to unnecessary surgery).

should add the unnecessary 22 percent of the 6 billion doses of medication administered. Even at an extremely conservative estimate of \$3 a dose, this adds about \$4 billion.¹⁰⁶ In short, assuming that earlier trends have continued, there is reason to believe that unnecessary surgery and medication cost the public between \$36 and \$44 billion annually, far outstripping the \$16 billion taken by the thieves that concern the FBI.¹⁰⁷ This gives us yet another way in which we are robbed of more money by practices that are not treated as criminal than by practices that are.

Waging Chemical Warfare Against America

Nearly half of Americans can expect to contract cancer during their lifetimes. The American Cancer Society (ACS) estimated that 420,000 Americans would die of cancer in 1981. The Society's estimate for 2011 was 571,950 deaths from cancer, with more than 1.6 million new cases diagnosed.¹⁰⁸ A recent report from the President's Cancer Panel stated that "approximately 41 percent of people in the U.S. will be diagnosed with cancer at some point in their lives, and about 21 percent of Americans will die from cancer."¹⁰⁹ While scientific discoveries about cells and genes grab the headlines, "a 1978 report issued by the President's Council on Environmental Quality unequivocally states that 'most researchers agree that 70 to 90 percent of cancers are caused by environmental influences and are hence theoretically preventable'."¹¹⁰ An editorial in the *New England Journal of Medicine* in 2000 notes a "widely accepted estimate that 80 to 90 percent of human cancer is due to environmental factors."¹¹¹

This means that a concerted national effort could result in saving 400,000 or more lives a year and reducing each individual's chances of getting cancer in his or her lifetime from nearly 1 in 2 to 1 in 12, or less. If you think this would require a massive effort in terms of money and personnel, you are right. How much of an effort, though, would the nation make to stop a foreign invader who was killing 1,500 people a day and bent on slaughtering one-fifth of the present population? And how has the "cancer establishment"—the publicly funded National Cancer Institute (NCI) and the private ACS—responded? The President's Cancer Panel indicates that in 2008 "no more than 14 percent of NCI's nearly \$4.83 billion budget" went to occupational and environmental cancer issues; and that year the ACS spent less than \$4 million on environmental cancer.¹¹² An earlier group of experts stated that NCI spent 2.5 percent of its budget on prevention and ASC spent 0.1 percent of revenue on environmental research. "The cancer establishment's funding for primary prevention is trivial," they wrote, adding that there is "minimal research on avoidable exposures to a wide range of occupational and environmental industrial carcinogens, including nationwide cancer clusters in the vicinity of nuclear power plants, petrochemical industries, and Superfund hazardous waste sites that are disproportionately located in ethnic and low-socioeconomic communities."¹¹³

Not only are we losing the chemical war on all fronts, but it also looks as if we do not even have the will to fight. A 2002 article in the *Washington*

Post reports that "the Bush administration has begun a broad restructuring of the scientific advisory committees that guide federal policy in areas such as patient rights and public health, eliminating some committees that were coming to conclusions at odds with the president's views." One committee, "which had been assessing the effects of environmental chemicals on human health[,] has been told that nearly all of its members will be replaced—in several instances by people with links to the industries that make those chemicals. One new member is a California scientist who helped defend Pacific Gas and Electric Co. against the real-life Erin Brockovitch."¹¹⁴

While the Bush administration may have been a low point, the enduring problem is noted by the President's Cancer Panel: "With nearly 80,000 chemicals on the market in the United States, many of which are used by millions of Americans in their daily lives and are un- or understudied and largely unregulated, exposure to potential environmental carcinogens is widespread."¹¹⁵ The main legislation in this area is the 1976 Toxic Substances Control Act (TSCA), which does not require industry or government to confirm the safety of new chemicals. In fact, because chemical companies are required to report information about known health hazards caused by their products, they generally do not conduct tests that might reveal such problems.¹¹⁶ A bill to update and fix the TSCA, the Kid Safe Chemicals Act of 2008, died in the 110th Congress, and has not been reintroduced even though an American Public Health Association policy statement notes that a large number of independent studies "have concluded that TSCA has fallen short of its objectives and has not served as an effective vehicle for the public, industry, or government to assess the hazards of chemicals in commerce or control those of greatest concern."¹¹⁷

Chemical warfare is being waged against us on three fronts:

- pollution
- cigarette smoking
- food additives

Pollution includes air pollution, toxic waste and environmental pollution from chemicals. The World Health Organization estimates suggest that in the U.S., 13 percent of preventable deaths and preventable disability-adjusted life years (years of life lost due to premature death) were caused by these forms of pollution.¹¹⁸ In a study published in *Environmental Health Perspectives* in 2002, five medical experts on children's health estimated the total economic costs of four childhood diseases and disabilities caused by environmental pollution. Included in this total are increased costs of medical care as well as the costs of decreased productivity and lifetime earnings due to sickness and decreased I.Q. The authors "estimate that the annual costs of environmentally attributable diseases in American children total \$54.9 billion ..."¹¹⁹ A study published in 2005 estimates the cost in economic productivity due to lowered intelligence caused by exposure of fetuses to methyl mercury of American origin at \$3.1 billion annually. This study was published two months after the U.S. Environmental Protection Agency (EPA) issued a rule reversing "strict controls on emissions of mercury from coal-fired power plants."¹²⁰

The evidence linking *air pollution* and cancer, as well as other serious and often fatal diseases, has been accumulating rapidly in recent years. In 1993, *JAMA* reported research that found “robust” associations between premature mortality and air pollution levels.¹²¹ A later study published in *JAMA* states that “air pollution accounts for the majority (60%) of mortality related to toxic agents,” and causes 22,000 to 52,000 deaths a year.¹²² That estimate is consistent with the 40,600 deaths in the U.S. that the World Health Organization attributes to outdoor air pollution, and is lower than an EPA estimate of 63,000 to 88,000.¹²³ In 2002, *JAMA* published a study that concludes “that people living in the most heavily polluted metropolitan areas have a 12 percent higher risk of dying of lung cancer than people in the least polluted areas.”¹²⁴

Another study by two NCI researchers found that in *all* U.S. counties with smelters, the incidence of lung cancer is above the national average. “The researchers found high lung cancer death rates not only in men—who are often exposed to arsenic on their jobs inside smelters—but also among women, who generally never went inside smelters and were not previously believed to have been exposed to arsenic.” Explanation: “neighborhood air pollution from industrial sources of inorganic arsenic.”¹²⁵ New Jersey, however, took the prize for having the highest cancer death rate in the nation. NCI investigators found that “19 of New Jersey’s 21 counties rank in the top 10 percent of all counties in the nation for cancer death rates.” Salem County, home of E. I. Du Pont de Nemours and Company’s Chambers Works, which has been manufacturing chemicals since 1919, “has the highest bladder cancer death rate in the nation—8.7 deaths per 100,000 persons.”¹²⁶ During 1975, the epidemiological branch of the NCI did a massive county-by-county analysis of cancer in the United States, mapping the “cancer hotspots” in the nation. The result was summed up by Dr. Glenn Paulson, Assistant Commissioner of Science in the New Jersey Department of Environmental Protection: “If you know where the chemical industry is, you know where the cancer hotspots are.”¹²⁷ What distinguishes these findings from the material on occupational hazards discussed above is that NCI investigators found higher death rates for all those living in the cancer hotspots, not just the workers in the offending plants.

NCI has identified as carcinogens, or suspected carcinogens, 23 of the chemicals commonly found in our drinking water.¹²⁸ Moreover, according to one observer, we are now facing a “new plague—toxic exposure.” Of the extent of contamination, he says that

this country generates between 255 million and 275 million metric tons of hazardous waste annually, of which as much as 90 percent is improperly disposed of. ... The Office of Technology Assessment estimates that there are some 600,000 contaminated sites in the country, of which 888 sites have been designated or proposed by the Environmental Protection Agency for priority cleanup under the Superfund program.¹²⁹

Studies have borne out the correlation between nearness to toxic wastes and above-average cancer mortality rates, as well as the positive correlation

between residential poverty and nearness to toxic wastes.¹³⁰ Other studies indicate that race is an even more important determinant of the location of toxic waste dumps. Writes Robert Bullard,

Toxic time bombs are not randomly scattered across the urban landscape. ... The Commission for Racial Justice’s landmark study, *Toxic Wastes and Race in the United States*, found race to be the most important factor (i.e., more important than income, home ownership rate, and property values) in the location of abandoned toxic waste sites. ... [T]hree out of five African Americans live in communities with abandoned toxic waste sites.¹³¹

As it did with OSHA, the Reagan administration instituted a general slowing down of enforcement of EPA regulations. Reagan tried to cut the EPA’s enforcement budget by 45 percent during his first two years in office.¹³² President Bush Sr. followed suit. The EPA’s research and development staff, whose work provides the scientific basis for such regulations, was reduced by nearly 25 percent between 1981 and 1992.¹³³ The EPA Superfund spearheads cleanups of large-scale toxic waste with money collected from polluters and from taxes on certain businesses. But increasingly, companies that have toxic waste responsibilities use bankruptcy to escape them, and the “polluters pay”-based taxes expired in 1995.¹³⁴ In addition, the EPA recently *lowered* the value it places on each life when doing cost-benefit analysis of regulations. The *Washington Post* notes this could set a “scary precedent, making it seem that lifesaving pollution reductions are not worth the cost.”¹³⁵

So the chemical war goes on. No one can deny that we know the enemy. No one can deny that we know the toll it is taking. Indeed, we can compute the number of deaths that result every day that we refuse to mount an offensive. Yet we still refuse. Thus, for the time being, the only advice we can offer someone who values his or her life is “if you must breathe our air, don’t inhale.”

The evidence linking *cigarette smoking* and cancer is overwhelming and need not be repeated here. The ACS simply notes, “Smoking remains the most preventable cause of death in our society.”¹³⁶ Cigarettes are widely estimated to cause 30 percent of all cancer deaths, and 87 percent of lung cancers, which translates into “an estimated 443,000 premature deaths each year between 2000 and 2004. In addition, an estimated 8.6 million people suffer from chronic conditions related to smoking.”¹³⁷ These deaths and conditions result in medical expenses over \$80 billion, and productivity loss estimated at nearly \$97 billion.¹³⁸ According to the NCI, current and former smokers are responsible over their lifetimes for half a trillion dollars in excess health care costs. Tobacco use costs Medicare \$10 billion annually and Medicaid about \$13 billion.¹³⁹

This is enough to expose the hypocrisy of running a full-scale war against marijuana and heroin (which produce no degenerative disease), while allowing cigarette sales and advertising to flourish. It also should be enough to underscore the point that, once again, there are threats to our

lives much greater than criminal homicide. Indeed, not only does our government fail to protect us against this threat, but it also promotes it! The government provided a price-support program for the tobacco industry (making up the difference when market price fell below a target price) from 1933 to 1982, and in 1986 it wrote off \$1.1 billion in loans that it had made to tobacco farmers.¹⁴⁰ The U.S. Congress has turned down more than 1,000 proposed tobacco control bills since 1964, the year of the first Surgeon General's Report on the dangers of tobacco. This may be related to the enormous generosity of the tobacco industry. Common Cause reports that, from 1995 to 2000, "tobacco interests have given more than \$32 million in political donations to state and federal candidates and political parties." The Phillip Morris Companies alone gave over \$10,000,000 between 1995 and 2000. Common Cause adds, "analysis of recent tobacco-related votes in Congress shows a strong correlation between the amount that Members received and how they voted."¹⁴¹

If you think that tobacco harms only people who knowingly decide to take the risk, consider the following. In 1995, *JAMA* devoted a special issue to several thousand pages of internal documents from the Brown and Williamson Tobacco Corporation and BAT Industries (formerly British American Tobacco Company). Brown and Williamson (B&W) is the third-largest cigarette maker in the United States and a wholly owned subsidiary of BAT, the world's second-largest private producer of cigarettes. An editorial in this issue states that "[t]he documents show ... that executives at B&W knew early on that tobacco use was harmful and that nicotine was addictive ... that the industry decided to conceal the truth from the public ... that despite their knowledge to the contrary, the industry's public position was (and continues to be) that the link between smoking and ill health was not proven ... and that nicotine was not addictive." The editorial concludes that "the evidence is unequivocal—the U.S. public has been duped by the tobacco industry."¹⁴²

Moreover, the cigarette industry intentionally targets young people—who are not always capable of assessing the consequences of their choices—with its ads, and it is successful. Some 2.6 million youngsters between the ages of 12 and 18 are smokers.¹⁴³

In addition, the EPA has released data on the dangers of "secondhand" tobacco smoke (which nonsmokers breathe when smoking is going on around them). They report that each year, secondhand smoke causes 3,000 lung cancer deaths, contributes to 150,000 to 300,000 respiratory infections in babies, exacerbates the asthmatic symptoms of 400,000 to 1,000,000 children with the disease, and triggers 8,000 to 26,000 new cases of asthma in children who don't yet have the disease.¹⁴⁴ A 1993 issue of *JAMA* reported that tobacco contributes to 10 percent of infant deaths.¹⁴⁵

Let's be clear: We do not advocate making cigarette smoking illegal on the model of our failed attempts to make drugs like heroin illegal. Restrictions on advertising aimed at youngsters, more substantial and pointed warnings on tobacco packaging, measures to protect nonsmokers from secondhand

smoke, and perhaps higher insurance premiums for those who choose to smoke, seem reasonable.

Research from the early 1980s found that the average American consumes *one pound* of chemical food additives per year.¹⁴⁶ Speaking on the floor of the U.S. Senate in 1972, Senator Gaylord Nelson said,

People are finally waking up to the fact that the average American daily diet is substantially adulterated with unnecessary and poisonous chemicals and frequently filled with neutral, nonnutritious substances. We are being chemically medicated against our will and cheated of food value by low nutrition foods.¹⁴⁷

A hard look at the chemicals we eat and at the federal agency empowered to protect us against eating dangerous chemicals reveals the recklessness with which we are being "medicated against our will." Thirty years ago, Beatrice Hunter wrote *The Mirage of Safety*, a catalog of the dangers in the foods people ate. It also described how the Food and Drug Administration, through a combination of lax enforcement and uncritical acceptance of the results of the food industry's own "scientific" research, had allowed the American public to be a guinea pig for nearly 3,000 food additives. As a result, we were—and are—subjected to chemicals strongly suspected of producing cancer, gallbladder ailments, hyperkinesis (now called attention deficit and hyperactivity) in children; in others they "may adversely affect the rate of DNA, RNA, and protein synthesis"; and to still others suspected of causing birth defects.¹⁴⁸

Today, the problem is worse. Americans consume more than 15 million pounds of artificial food dyes. There is enough research linking certain petroleum-derived food dyes with hyperactivity that "the British government told the food and restaurant industries to eliminate the dyes" in 2009, and the European Union requires foods and beverages containing any of six dyes to carry "a warning on the label that the colour 'may have effects on activity and attention in children'."¹⁴⁹ Because of this warning, many multinational corporations reformulate food to be dye free for Europe while leaving them for U.S. consumers. For example, in England, McDonald's strawberry sundaes use no artificial dye; but in the U.S., artificial dye Red 40 is used in the product.

The food additives are, of course, only some of the dangerous chemicals that we eat. During the late 1990s, American farmers applied about 1.1 billion pounds of more than 600 different types of pesticide.¹⁵⁰ Dr. Landrigan of the Mount Sinai School of Medicine, in a 1992 issue of the *American Journal of Public Health*, points to

recent data from the US Environmental Protection Agency (EPA) showing that infants and young children are permitted to have dietary exposures to potentially carcinogenic and neurotoxic pesticides that exceed published standards by a factor of more than 1000.¹⁵¹

Landrigan also estimates that between 3 and 4 million American preschool children have dangerously elevated blood-lead levels, which could result in long-term neuropsychological impairment.

To call government and industry practices reckless is mild in view of the fact that, in spite of the growth in knowledge about the prevention and cure of cancer, the number of American who contract and die from cancer continues to rise. Based on the knowledge we have, there can be no doubt that air pollution, tobacco, and food additives amount to a chemical war that makes the crime wave look like a football scrimmage. Even with the most conservative estimates, it is clear that *the death toll in this war is far higher than the number of people killed by criminal homicide!*

Poverty Kills

We are long past the day when we could believe that poverty was caused by forces outside human control. Poverty is "caused" by lack of money, which means that once a society reaches a level of prosperity at which many enjoy a relatively high standard of living, then poverty can be eliminated or at least reduced significantly by transferring some of what the "haves" have to the "have-nots." In other words, regardless of what caused poverty in the past, what causes it to continue in the present is the refusal of those who have more to share with those who have less. Now you may think these remarks as trite or naïve. They are not offered as an argument for redistribution of income, although we believe that such redistribution is long overdue. These remarks are presented to make a much simpler point, which is that poverty exists in a wealthy society like ours *because we allow it to exist*. Therefore, we¹⁵² share responsibility for poverty and for its consequences.

The poverty for which we are responsible "remains," in the words of *Business Week* in 1992, "stubbornly high."¹⁵³ The problem has persisted and was made worse by financial crisis of 2008. Moreover, it has particularly nasty features. For example, it affects blacks and children at a rate higher than the national average. In 2010, 9.9 percent of white (non-Hispanic) Americans and 27.4 percent of black Americans were below the poverty level.¹⁵⁴ Among children, in 2009, about 17 percent of white children and about 35 percent of black children lived in poverty.¹⁵⁵ A study published by the Urban Institute ranked the United States highest in child poverty among the eight industrialized nations studied. Moreover, the Urban Institute estimates that 2.3 million Americans experience homelessness each year, including 1 million children who are also exposed to interruptions in, or lack of, education each year.¹⁵⁶ Of the homeless, some 29 to 46 percent work, which means that at least half a million working Americans cannot afford shelter.¹⁵⁷

We are prone to think that the consequences of poverty are fairly straightforward: Less money means fewer things. So poor people have fewer clothes or cars or appliances, go to the theater less often, and live in smaller homes with less or cheaper furniture. This is true and sad, but perhaps not intolerable. In addition, however, one of the things poor people have less of is *good health*. Less money means less nutritious food, less heat in winter, worse air quality in summer, less distance from other sick people or from unhealthy work or toxic waste dumping sites, less knowledge about illness or medicine,

fewer doctor visits and childhood immunizations, fewer dental visits, less preventive health care, and (in the United States at least) less first-quality medical attention when all these other deprivations take their toll and a poor person finds him- or herself seriously ill. The result is that the poor suffer more from poor health and die earlier than those who are well-off. Poverty robs them of their days while they are alive and kills them before their time. A prosperous society that allows poverty in its midst is a party to murder.

A review of more than 30 historical and contemporary studies of the relationship of economic class to life expectancy affirms the conclusion that "class influences one's chances of staying alive. Almost without exception, the evidence shows that classes differ on mortality rates."¹⁵⁸ An article in *JAMA* in 1993 confirms the existence of this cost of poverty:

People who are poor have higher mortality rates for heart disease, diabetes mellitus, high blood pressure, lung cancer, neural tube defects, injuries, and low birth weight, as well as lower survival rates from breast cancer and heart attacks.¹⁵⁹

A 1998 news release from the U.S. Department of Health and Human Services confirms the continued "strong relationship between socioeconomic status and health in the United States for every race and ethnic group studied."¹⁶⁰ A 2005 *Washington Post* article headlined "Race Gap Persists in Health Care, Three Studies Say" reports on a study by a Harvard School of Public Health researcher published in the *New England Journal of Medicine*. The researcher is quoted as commenting, "We have known for 20 years that we have a problem in our health care system: blacks and whites do not receive equal care. We hoped all the attention paid to this topic would result in some improvement. What we found is that we have not made much progress."¹⁶¹

An article in a 2011 issue of the *American Journal of Public Health* reported the results of an analysis of 50 studies of deaths attributable to "social factors." The authors found that in 2000, 133,000 deaths were attributable to individual-level poverty, 119,000 to income inequality, and 39,000 to area-level poverty—and another 176,000 to racial segregation. Their results are consistent with the findings of earlier studies done with different methodologies.¹⁶² For example, a 2004 study found that almost 900,000 deaths could have been prevented during the decade of the 1990s, if African Americans received the same care as whites did.¹⁶³ Numerous other studies have suggested that allocation of health services is marked by racial bias.¹⁶⁴

A comparison of the health and mortality of blacks and whites in America yields further insight into the relationship of health and mortality to economic class. In 2010, one of every four blacks lived below the poverty line, as compared with one of every 10 whites. In 2007, black infant mortality (during the first year of life) was 13.2 per 1,000 live births, compared with 5.6 per 1,000 for whites.¹⁶⁵ In short, black mothers lost their babies within the first year of life more than twice as often as white mothers did. In the face of this persistent disparity, the Reagan administration reduced funding for maternal

and child health programs by more than 25 percent and attempted to reduce support for immunization programs for American children.¹⁶⁶

Cancer survival statistics show a similar picture. Between 2001 and 2007, 59.4 percent of blacks diagnosed with cancer were still alive five years after the diagnosis, compared with 68.6 percent of whites.¹⁶⁷ This disparity has been noted since at least the early 1970s. One important cause of this difference is that "white patients tended to have higher percentages of cancers diagnosed while localized,"¹⁶⁸ that is, earlier in their development. This means, at a minimum, that at least some of the difference turns out to be due to such things as better access to medical care, higher levels of education about the early-warning signs of cancer, and so on, all of which correlate strongly with higher income levels. Data reported in the journal *Science* suggest that "blacks get more cancer not because they're black, but because they're poor."¹⁶⁹ A study of the stage at which women had breast cancer diagnosed, found that white and black women living in areas characterized by lower average income and educational attainment were diagnosed later than those in areas marked by higher income and educational attainment. Within the same areas, black women were diagnosed later than whites, except in the areas of highest income and education, where the black disadvantage disappeared.¹⁷⁰ "And while black women show a lower incidence of breast cancer than white women, they nevertheless die from it more often."¹⁷¹

Life expectancy figures paint the most tragic picture of all. For 2007, life expectancy among blacks born that year was 73.6 years, whereas among whites it was 78.4 years.¹⁷² That this difference cannot be attributed wholly to genetic factors is borne out by a "study of the relative contribution of various risk factors and income levels to mortality among blacks" reported in *JAMA*. The study "estimated that 38 percent of excess [of black over white] mortality could be accounted for by family income."¹⁷³ A stronger conclusion is reached by a study reported in a 1992 issue of the *American Journal of Public Health*, whose authors concluded, "In no instance were Black-White differences in all-cause or coronary mortality significantly different when socioeconomic status was controlled."¹⁷⁴

A report from the Pew Environmental Health Commission says: "Our analysis shows that the burden of asthma falls most heavily on those below the poverty line. ... This is most likely due to higher risks among those in poverty for poor indoor air quality, air pollution, infections, poor nutrition, lack of breast feeding of babies, and other factors known to be associated with asthma development and/or exacerbation. This gap has been constant for at least 20 years."¹⁷⁵

The number of poor Americans continues to grow each year. By 2010 it was 46.2 million, up from 30.1 million in 1990 and from 25.2 million in 1980.¹⁷⁶ In 2010, the Census Department records 49.9 million people without health insurance coverage (and that doesn't include those who are inadequately covered).¹⁷⁷ The percentage of the poor covered by Medicaid has gone from 65 percent to less than 40 percent. Hardest hit have been poor women and their children, many of whom have been removed from Medicaid coverage because

income eligibility rules have not kept up with inflation. "In 1986, the average state income cutoff for Medicaid was 48 percent of the federal poverty level, compared to 71 percent in 1975."¹⁷⁸ Estimates indicate that only one-third of those who lose Medicaid benefits get private insurance; the rest do without. Moreover, the percent of nonelderly Americans doing without has grown in the past decade: It was 14.8 percent of the population in 1987 and 17.2 percent in 2005.¹⁷⁹ According to the National Academy of Sciences, lack of health insurance results in some 18,000 premature deaths a year because people without insurance don't get the health care they need.¹⁸⁰ Sadly, inadequate health insurance also often leads to poverty because "the leading cause of personal bankruptcy in the United States is unpaid medical bills."¹⁸¹

The World Health Organization and various human rights statutes recognize a right to health that is fundamental to enjoying other rights. Not every disease is a violation of human rights, but public health researchers note a category of health inequities that raise ethical concerns because they are avoidable and associated with social disadvantage and discrimination.¹⁸² Such inequities are identified by comparing the health levels of the socially disadvantaged with those of the most privileged groups. Those levels are clearly attainable and provide "minimum standards for what should be possible for everyone in that society."¹⁸³ Needless to say, we are nowhere near providing these levels of health to poor Americans.

In short, *poverty hurts, injures, and kills—just like crime*. A society that could remedy its poverty but does not is an accomplice in crime.

Summary

The criminal justice system does not protect us against the gravest threats to life, limb, or possessions. Its definitions of crime are not simply a reflection of the objective dangers that threaten us. The workplace, the medical profession, the air we breathe, and the poverty we refuse to rectify lead to far more human suffering, result in far more death and disability, and take far more dollars from our pockets than the murders, aggravated assaults, and thefts reported annually by the FBI. What is more, this human suffering is preventable. The government could treat many of these harmful behaviors as criminal, and turn the massive powers of the state against their perpetrators in the way that they are turned against the perpetrators of the so-called common crimes. But it does not. A government really intent on protecting us would strengthen and enforce work safety regulations, police the medical profession, require that clean-air standards be met, be more attentive to the massive chemical exposure faced by the public, and devote sufficient resources to the poor to alleviate the major disabilities of poverty. But it does not. Instead we hear a lot of cant about law and order and a lot of rant about crime in the streets. It is as if our leaders were not only refusing to protect us from the major threats to our well-being, but also trying to cover up this refusal by diverting our attention to crime, as if it were the only real threat.

As we have seen, the criminal justice system is a carnival mirror that presents a distorted image of what threatens us. The distortions do not end with the definitions of crime. As we will see in what follows, new distortions enter at every level of the system, so that, in the end, when we look in our prisons to see who really threatens us, virtually all we see are poor people. By that time, most of the well-to-do people who endanger us have been discreetly weeded out of the system. As we watch this process unfold in the next chapter, bear in mind the conclusion of the present chapter: All the mechanisms by which the criminal justice system comes down more frequently and more harshly on the poor criminal than on the well-off criminal take place *after most of the dangerous acts of the well-to-do have been excluded from the definition of crime itself*. The bias against the poor within the criminal justice system is all the more striking when we recognize that the door to that system is shaped in a way that excludes in advance the most dangerous acts of the well-to-do. Demonstrating this has been the purpose of the present chapter.

Note that the question of what should be defined as crimes is a philosophical question that requires us to reflect on the proper aims of a criminal justice system. In this chapter, we have pointed out the important consequences for criminal justice and public well-being of how “crime” is defined. In Appendix II, Jeffrey Reiman argues that the social science of criminology needs a similar philosophical reflection on the proper definition of crime “in order to establish its intellectual independence of the state, which ... is equivalent to declaring its status as a social science rather than an agency of social control, as critical rather than servile, as illumination rather than propaganda.”

Study Questions

1. What should be our definition of the term “crime”? Why does it matter what we call things? Should there be an overlap between the acts we label crimes and the acts we think are morally wrong?
2. Quickly—without thinking about it—picture to yourself a criminal. Describe what you see. Where did this picture come from? Are there people in our society who pose a greater danger to you than the individual you pictured? Why or why not?
3. What is meant by likening the criminal justice system to a “carnival mirror”?
4. Do you believe the criminal law as it stands is correct in what it labels as a crime? In answering, be sure to review the objections made by the Defenders of the Present Legal Order, and the authors’ responses.
5. Do you think a business executive who refuses to invest in safety precautions with the result that several workers die is morally better than, equal to, or worse than a mugger who kills his victim after robbing him? What if the executive knowingly violated a safety regulation? What if the mugger was high on drugs? Explain your response.
6. What is meant by speaking of criminal justice as “creative art”? How does the view presented here differ from that of Quinney?
7. Give examples of social practices that are more dangerous to your well-being than common crime. How should these practices be dealt with?

Additional Resources

Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and Poor Get Prison: A Reader* (Boston: Pearson, 2010). This volume is a collection of accessible articles that were either used as reference material for *The Rich Get Richer* or provide lively complementary examples or analysis. The reader is divided into sections that parallel the chapters of *The Rich Get Richer*, and each section of the reader opens with a substantial introduction, written by the editors, that provides article summaries, context, and linkages to *The Rich Get Richer*.

The authors also maintain a companion website to the text at <http://www.paulsjusticepage.com/reiman.htm>

Notes

1. “Company in Mine Deaths Set to Pay Big Fine,” *The New York Times*, February 21, 1993, p. A19.
2. “Mass Murder on the 5:33,” *The New York Times*, December 10, 1993, p. A34.
3. Alvin Brown. No date. Fatal Underground Mine Explosion April 5, 2010: Upper Big Branch Mine-South, Performance Coal Company Montcoal, Raleigh County, West Virginia, ID No. 46-08436, p. 2. Washington, D.C.: U.S. Department of Labor, Mine Safety and Health Administration. <http://www.msha.gov/Fatals/2010/UBB/PerformanceCoalUBB.asp>.
4. Editorial. 2011. “Unsettled Justice at Upper Big Branch,” *New York Times*, Dec 7. <http://www.nytimes.com/2011/12/08/opinion/unsettled-justice-at-upper-big-branch.html>?
5. Gerald R. Ford, “To Insure Domestic Tranquility: Mandatory Sentence for Convicted Felons,” speech delivered at the Yale Law School Sesquicentennial Convocation, New Haven, CT, April 25, 1975, in *Vital Speeches of the Day* 41, no. 15 (May 15, 1975): 451.
6. “Arrest Data Reveal Profile of Suspect,” *The Washington Post*, September 16, 1975, p. C1.
7. Ibid.; see also Maryland–National Capital Parks and Planning Commission, *Crime Analysis 1975: Prince George’s County* (August 1975), p. 86.
8. *UCR–1974*, p. 186.
9. Maryland–National Capital Parks and Planning Commission, *Crime Analysis 1975*, p. 3.
10. See *UCR–1974*, p. 190.
11. “Arrest Data Reveal Profile of Suspect,” p. C1; and Maryland–National Capital Parks and Planning Commission, *Crime Analysis 1975*, p. 86.
12. *UCR–1974*, p. 190.
13. *UCR–2010*, Table 31 and 42.
14. Lawrence W. Sherman, “Reducing Gun Violence: What Works, What Doesn’t, What’s Promising,” NIJ, *Perspectives on Crime and Justice: 1999–2000 Lecture Series*, March 2001, NCJ 184245, p. 75.
15. *UCR–2010*, Table 43A; and calculations from *StatAbst–2011*, Table 6, p. 10. New census procedures allow for counting of multiple races, so those who identify as black only are 12.9 percent (39,641,000 out of a total population of 299,398,000); those who identify as black and some other race are 13.6 percent (41,804,000 out of a total population of 299,398,000).

16. BJS, *Profile of Jail Inmates 2002*, July 2004, NCJ 201932.
17. *Challenge*, p. 44; see also p. 160.
18. Anthony Bouza, *How to Stop Crime* (New York: Plenum, 1993), p. 57.
19. Quoted in George Will, "A Measure of Morality," *The Washington Post*, December 16, 1993, p. A25.
20. Brian Faler, "Bennett under Fire for Remark on Crime and Black Abortions," *The Washington Post*, September 30, 2005, A05.
21. Kathryn Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* (New York: New York University Press, 1998), p. 3; cited in Marjorie S. Zatz, "The Convergence of Ethnicity, Gender, and Class on Court Decisionmaking: Looking toward the 21st Century," in NIJ, *Criminal Justice 2000, volume 3: Policies, Processes, and Decisions of the Criminal Justice System*, NCJ 182410, p. 507.
22. Zatz, "The Convergence of Ethnicity, Gender, and Class on Court Decisionmaking," p. 509.
23. *Ibid.*
24. "Mass news representations in the 'information age' have become the most significant communication by which the average person comes to know the world outside his or her immediate experience"; Gregg Barak, *Media, Process and the Social Construction of Crime* (New York: Garland, 1994), p. 3.
25. This transformation has been noted by Erving Goffman in his sensitive description of total institutions, *Asylums* (Garden City, N.Y.: Doubleday, 1961):

The interpretative scheme of the total institution automatically begins to operate as soon as the inmate enters, the staff having the notion that entrance is prima facie evidence that one must be the kind of person the institution was set up to handle. A man in a political prison must be traitorous; a man in a prison must be a law-breaker; a man in a mental hospital must be sick. If not traitorous, criminal, or sick, why else would he be here? (p. 84)

- So, too, a person who calls forth the society's most drastic weapons of defense must pose the gravest danger to its well-being. Why else the reaction? The point is put well and tersely by D. Chapman: "There is a circular pattern in thinking: we are hostile to wicked people, wicked people are punished, punished people are wicked, we are hostile to punished people because they are wicked." ("The Stereotype of the Criminal and the Social Consequences," *International Journal of Criminology and Penology* 1 [1973]: 16).
26. Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown, 1970). In his later work, for example, *Critique of Legal Order: Crime Control in Capitalist Society* (Boston: Little, Brown, 1973), and *Class, State & Crime* (New York: McKay, 1977), Quinney moves clearly into a Marxist problematic and his conclusions dovetail with many in this book. In our view, however, Quinney has not yet accomplished a satisfactory synthesis between the "social reality" theory and his later Marxism. Elsewhere, Reiman has examined Quinney's theory from the standpoint of moral philosophy. See Jeffrey H. Reiman, "Doing Justice to Criminology: Reflections on the Implications for Criminology of Recent Developments in the Philosophy of Justice," in Marc Riedel and Duncan Chappell (ed.) *Issues in Criminal Justice: Planning and Evaluation* (New York: Praeger, 1976), pp. 134-42.
 27. Discussions of monetary policy often use the term "fiat currency" to convey that dollars do not have value because they are linked to a gold standard or other extrinsic source of value. Fiat currencies have value because the government

- declares them to have value and people then believe and behave as if the paper and coins have value.
28. Quinney, *The Social Reality of Crime*, p. 15.
 29. *The Washington Post*, January 11, 1983, p. C10.
 30. Lydia Voigt et al., *Criminology and Justice* (New York: McGraw-Hill, 1994), pp. 11-15; the quotation is on p. 15.
 31. This answers Graeme Newman, who observes that most criminals on TV are white and wonders what the "ruling class" or conservatives "have to gain by denying the criminality of Blacks." Graeme R. Newman, "Popular Culture and Criminal Justice: A Preliminary Analysis," *Journal of Criminal Justice* 18 (1990): 261-74.
 32. Newman, "Popular Culture and Criminal Justice," pp. 263-64.
 33. Barbara Matusow, "If It Bleeds, It Leads," *Washingtonian*, January 1988, p. 102.
 34. Victor Kappeler, Mark Blumberg, and Gary Potter, *Mythology of Crime and Criminal Justice*, 3rd ed. (Prospect Heights, IL: Waveland, 2000), pp. 41-42.
 35. "Titillating Channels: TV Is Going Tabloid as Shows Seek Sleaze and Find Profits, Too," *The Wall Street Journal* (May 18, 1988): 1.
 36. John P. Wright, Francis T. Cullen, and Michael B. Blankenship, "The Social Construction of Corporate Violence: Media Coverage of the Imperial Food Products Fire," *Crime & Delinquency* 41, no. 1 (January 1995): 32. We discuss this case in Chapter 3.
 37. Lyndsey Layton, "Peanut Processor Ignored Salmonella Tests, Knowingly Sold Tainted Products," *Washington Post*, January 28, 2009. <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/27/AR2009012702992.html?hpid=topnews>.
 38. See Government Accountability Project. 2011. Salmonella victims to call for criminal charges against former peanut corp. CEO. <http://www.whistleblower.org/press/press-release-archive/2011/989-salmonella-victims-to-call-for-criminal-charges-against-former-peanut-corp-ceo>. A Google search for "peanut corporation salmonella victims" turned up no hits for coverage of the news conference in the first 50 results.
 39. Another way to put the Defenders' claim here is that one-on-one harms are appropriately "crimes," while indirect harms are appropriately "torts." Torts are noncriminal harms that justify civil suits for damages, but not criminal prosecution and punishment. Since our dispute with the Defenders is about whether indirect harms *should* be crimes, these legal labels cannot resolve our dispute. They may, however, give readers familiar with legal terminology a different way of understanding what is at stake: The Defenders think that indirect harms are rightly treated as torts, while we think that many of them should count as crimes, and serious ones at that.
 40. Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), p. 78. See generally Chapter 3, "Culpability, Intention, Motive," which we have drawn on in making the argument of this and the following two paragraphs.
 41. We owe this example, modeled on one by Hyman Gross, to Andrew W. Austin of the University of Wisconsin-Green Bay.
 42. Occupational Safety and Health Administration, OSHA Facts, August 2007, <http://www.bls.gov/iff/>.
 43. Nancy Frank, "Unintended Murder and Corporate Risk-Taking: Defining the Concept of Justifiability," *Journal of Criminal Justice* 16 (1988): 18.
 44. *Model Penal Code*, final draft (Philadelphia: American Law Institute, 1962).

45. Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of Public Trust* (San Francisco: Sierra Club, 1988), pp. 278, 285.
46. David E. Lilienfeld, "The Silence: The Asbestos Industry and Early Occupational Cancer Research—A Case Study," *American Journal of Public Health* 81, no. 6 (June 1991): 791. This article shows how early the industry knew of the link between asbestos and cancer and how hard they tried to suppress this information. See also Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985).
47. Morton Mintz, "A Crime Against Women: A. H. Robbins and the Dalkon Shield," *Multinational Monitor* 7, no. 1 (January 15, 1986), <http://multinational-monitor.org/hyper/issues/1986/0115/index.html>.
48. Editorial, "Unsettled Justice at Upper Big Branch," *New York Times*.
49. Sir James Fitzjames Stephen, from his *History of the Criminal Law of England* 2 (1883), excerpted in *Crime, Law and Society*, eds. Abraham S. Goldstein and Joseph Goldstein (New York: Free Press, 1971), p. 21.
50. Troy Duster, *The Legislation of Morality: Law, Drugs and Moral Judgment* (New York: Free Press, 1970), pp. 3–76.
51. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1970), p. 2.
52. *Challenge*, p. 7.
53. UCR–2010, Table 1; definitions available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/murdermain> and <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/aggravatedassaultmain>.
54. UCR–2010, Property Crime Overview.
55. See Willard Oliver, "The Power to Persuade: Presidential Influence over Congress on Crime Control Policy," *Criminal Justice Review* 28, no. 1 (2003). The author finds UCR reported crime "to have the most impact on congressional committees and subcommittees initiating hearings on crime and drugs" (p. 125), and this factor remains significant across several variations in model specifications.
56. White House, *President's Report on Occupational Safety and Health* (Washington, D.C.: U.S. Government Printing Office, 1972).
57. "James Messerschmidt, in a comprehensive review of research studies on job-related accidents, determined that somewhere between 35 and 57 percent of those accidents occurred because of direct safety violations by the employer. Laura Shill Schraeger and James Short Jr. found 30 percent of industrial accidents resulted from safety violations and another 20 percent resulted from unsafe working conditions." Kappler et al., *Mythology of Crime and Criminal Justice*, p. 104. See James Messerschmidt, *Capitalism, Patriarchy, and Crime: Toward a Socialist Feminist Criminology* (Totowa, NJ: Rowman & Littlefield, 1986); and Laura Shill Schraeger and James Short, "Toward a Sociology of Organizational Crime," *Social Problems* 25 (April 1978): 407–19. See also Joseph A. Page and Mary-Win O'Brien, *Bitter Wages: Ralph Nader's Study Group Report on Disease and Injury on the Job* (New York: Grossman, 1973); Rachel Scott, *Muscle and Blood* (New York: Dutton, 1974); Jeanne M. Stellman and Susan M. Daum, *Work Is Dangerous to Your Health* (New York: Vintage, 1973); and Joel Swartz, "Silent Killers at Work," *Crime and Social Justice* 3 (Summer 1975): 15–20.
58. BLS, "Workplace Injury and Illness–2010" October 20, 2010, pp. 1, 2, and Table 6A, Updated information is available from <http://www.bls.gov/news.release/pdf/osh.pdf>. Note that this survey "excludes farms with fewer than 11 employees."

59. BLS "Workplace Injury and Illness in 2006," October 16, 2007, p. 6.
60. General Accounting Office, "Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data," 2009, p. 1. GAO-10-10. <http://www.gao.gov/new.items/d1010.pdf>.
61. "Is OSHA Falling Down on the Job?" *The New York Times*, August 2, 1987, pp. A1, A6.
62. Lee Friedman and Linda Forst, "The Impact of OSHA Recordkeeping Regulation Changes on Occupational Injury and Illness Trends in the US," *Occupational and Environmental Medicine* 64 (2007): 454–60; quote from p. 459.
63. Philip Landrigan, testimony before the Senate Committee on Labor and Human Resources, April 18, 1988, p. 2. For cancer deaths, see *StatAbst–1988*, Table 117, p. 77 and Table 120, p. 80.
64. "Safety Group Cites Fatalities Linked to Work," *The Wall Street Journal* (August 31, 1990): B8; and Sally Squires, "Study Traces More Deaths to Working than Driving," *The Washington Post*, August 31, 1990, p. A7.
65. J. P. Leigh, S. B. Markowitz, M. Fahs, C. Shin, and P. J. Landrigan, "Occupational Injury and Illness in the United States: Estimates of Costs, and Morbidity, and Mortality," *Archives of Internal Medicine* 157, no. 14 (July 1997): 1557–68.
66. Cancer Prevention Coalition, "U.S. National Cancer Institute," www.preventcancer.com/losing/nci/why_prevent.htm.
67. J. Paul Leigh and John Robbins, "Occupational Disease and Workers, Compensation: Coverage, Costs and Consequences," *The Milbank Quarterly* 82, no. 4 (2004): 694.
68. NIOSH, "Worker Health Chartbook, 2000: Nonfatal Illness," April 2002. See also NIOSH, "Protecting Workers' Families: A Research Agenda," May 2002.
69. *StatAbst–2011*, Table 2, p. 8, Table 584, p. 377.
70. *Sourcebook Online*, Table 3.33.2008 (figures rounded to nearest whole percentage point).
71. BLS, "Fatal Workplace Injuries in 2010 (Preliminary Results)," <http://www.bls.gov/news.release/pdf/cfoi.pdf>. (BLS reports a total of 4,547 workplace fatalities, of which 506 are homicides.)
72. BJS, "Occupational Health and Safety Definitions," <http://www.bls.gov/iif/oshdef.htm>.
73. Friedman and Forst, p. 459, citing the National Electronic Injury Surveillance System.
74. Hilda Solis, "One Is Too Many," 2011. <http://social.dol.gov/blog/one-is-too-many/>
75. Philip J. Hilts, "U.S. Fines Mine Companies for False Air Tests," *The New York Times*, April 5, 1991, p. A12. The fines, by the way, amounted to a total of \$5 million distributed among 500 mining companies found to have tampered with the coal-dust samples used to test for the risk of black lung disease.
76. Joan Claybrook and the Staff of Public Citizen, *Retreat from Safety: Reagan's Attack on America's Health* (New York: Pantheon, 1984), p. 83. Chronic brown lung is a severely disabling occupational respiratory disease. See also Page and O'Brien, *Bitter Wages*, p. 18.
77. Claybrook, *Retreat from Safety*, p. 97. See also Page and O'Brien, *Bitter Wages*, p. 23; and Scott, *Muscle and Blood*, p. 196.
78. Scott, *Muscle and Blood*, pp. 45–46; cf. Page and O'Brien, *Bitter Wages*, p. 25.
79. Cindy Skrzycki, "Alarm over a Sheepish Non-rule," *The Washington Post*, October 29, 2002, p. E1.

80. Curt Suplee, "House to Consider 'Ergo Rider' Restraints on OSHA," *The Washington Post*, July 11, 1996, p. A4. In 2010, carpal tunnel required a median of 27 days to recuperate. BLS, "Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work," 2010. <http://www.bls.gov/news.release/osh2.nr0.htm>.
81. Friedman and Forst, p. 459.
82. David Michaels, Speech to Public Citizen, January 18, 2011. http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2380.
83. David Barstow, "When Workers Die: U.S. Rarely Seeks Charges for Deaths in Workplace," *The New York Times*, December 22, 2003, p. A1, <http://www.nytimes.com/2003/12/22/national/22OSHA.html>. Barstow found 1,242 cases of deaths related to willful violations between 1982 and 2002, but OSHA declined prosecution in 93 percent of the cases. Recently, "OSHA began to accede to employer demands that it replace the word 'willful' with 'unclassified' in citations involving workplace deaths."
84. David Michaels, Testimony before the Subcommittee On Workforce Protections, Committee On Education and Labor, U.S. House Of Representatives, March 16, 2010. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1062; AFL-CIO. 2011. *Death on the Job*. http://www.aflcio.org/issues/safety/memorial/upload/dotj_2011.pdf, p. 21 (citing an April 2008 report on OSHA enforcement in fatality cases prepared by the majority staff of the Senate Committee on Health, Education, Labor and Pensions). Protecting America's Workers Act proposed to increase penalties for cases involving willful or repeat violations that result in a fatality to \$250,000—"the level where they will have the same value, accounting for inflation, as they had in 1990." PAWA died in Congress and has not even been reintroduced.
85. David Michaels, Testimony before the Committee On Education and The Workforce, Subcommittee On Workforce Protections, U.S. House Of Representatives, October 5, 2011. http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1482.
86. Barbara Starfield, MD, MPH, "Is US Health Really the Best in the World?" *Journal of the American Medical Association* 284, no. 4 p. 483 (July 26, 2000), <http://jama.jamanetwork.com/article.aspx?articleid=192908>.
87. Centers for Disease Control and Prevention, "Estimating Health Care-Associated Infections and Deaths in U.S. Hospitals, 2002," http://www.cdc.gov/ncidod/dhqp/pdf/hicpac/infections_deaths.pdf; D. Diekema and M. Climo, "Preventing MRSA Infections: Finding it is Not Enough," *JAMA* 299, no. 10 (2008): 1190-92; and "Publication of Guidance on Public Reporting of Healthcare-Associated Infections," *JAMA* 294 (2005): 896, <http://jama.ama-assn.org/cgi/content/full/294/8/896>. See also <http://hospitalinfectionrates.org>; and "Coming Clean," *The New York Times*, June 6, 2005, p. A19.
88. See, for example, the work of Dr. Peter Pronovost discussed in the text accompanying note 104.
89. *The Washington Post*, July 16, 1975, p. A3.
90. George A. Silver, "The Medical Insurance Disease," *Nation* 222, no. 12 (March 27, 1976): 369.
91. *Ibid.*, p. 371.
92. *Newsweek*, March 29, 1976, p. 67. Lest anyone think this is a new problem, compare this passage written in a popular magazine over 40 years ago:

Unnecessary operations on women, stemming from the combination of a trusting patient and a split fee, have been so deplored by honest doctors that the phrase "rape of the pelvis"

has been used to describe them. The American College of Surgeons, impassioned foe of fee-splitting, has denounced unnecessary hysterectomies, uterine suspensions, Caesarian sections. (Howard Whitman, "Why Some Doctors Should Be in Jail," Colliers [October 30, 1953]: 24).

93. *StatAbst-2011*, Table 171, p. 118.
94. *UCR-2010*, Expanded Homicide Data Table 8.
95. Sandra G. Boodman, "No End to Errors," *The Washington Post Health*, December 3, 2002, p. F1. The original report was L. Kohn, J. Corrigan, and M. Donaldson, eds., *To Err Is Human: Building a Safer Health System* (Washington, D.C.: National Academy Press, 1999).
96. *Ibid.*, p. F6.
97. Rick Weiss, "Medical Errors Blamed for Many Deaths: As Many as 98,000 a Year in U.S. Linked to Mistakes," *The Washington Post*, November 30, 1999, p. A1.
98. Boodman, "No End to Errors," p. F1.
99. *Ibid.*, p. F6.
100. Lucien Leape and Donald Berwick, "Five Years After *To Err Is Human*: What Have We Learned?" *Journal of the American Medical Association* 293, no. 19 (2005): 2384-90.
101. Atul Gawande, "The Checklist," *The New Yorker*, December 10, 2007, http://www.newyorker.com/reporting/2007/12/10/071210fa_fact_gawande. See also Peter Pronovost et al., "An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU," *New England Journal of Medicine* 356, no. 25 (2007): 2660, <http://www.nejm.org/doi/pdf/10.1056/NEJMoa061115>. An interview with Pronovost discusses the larger implications, including the problem of getting his projects funded, <http://histalk2.com/2008/02/11/histalk-interviews-peter-pronovost-md-phd-johns-hopkins-university/>.
102. Denise Grady, "Study Finds No Progress in Safety at Hospitals," *New York Times*, November 24, 2010. http://www.nytimes.com/2010/11/25/health/research/25patient.html?_r=1&hpw.
103. Silver, "The Medical Insurance Disease," p. 369. Silver's estimates are extremely conservative. Some studies suggest that between 30,000 and 160,000 individuals die as a result of drugs prescribed by their doctors. See Boyce Rensberger, "Thousands a Year Killed by Faulty Prescriptions," *The New York Times*, January 28, 1976, pp. A1, A17. If we assume with Silver that at least 20 percent are unnecessary, this puts the annual death toll from unnecessary prescriptions at between 6,000 and 32,000 persons. For an in-depth look at the recklessness with which prescription drugs are put on the market and the laxness with which the Food and Drug Administration exercises its mandate to protect the public, see the series of eight articles by Morton Mintz, "The Medicine Business," *The Washington Post*, June 27-30, July 1-4, 1976.
104. Paul Weiler, Howard Hiatt, Joseph Newhouse, William Johnson, Troyen Brennan, and Lucien Leape, *A Measure of Malpractice: Medical Injury, Malpractice Litigation and Patient Compensation* (Cambridge, MA: Harvard University Press, 1993), p. 54. The data given here come from the Harvard Medical Practice Study. See also Christine Russell, "Human Error: Avoidable Mistakes Kill 100,000 Patients a Year," *The Washington Post Health*, February 18, 1992, p. 7.
105. Sheryl Gay Stohlberg, "Faulty Warning Labels Add to Risk in Prescription Drugs," *The New York Times*, June 4, 1999, p. A27.
106. In 2009, total prescription drug expenditures were \$250 billion. A conservative estimate that 10 percent of the dollars expended were unnecessary would be \$25 billion. *StatAbst-2011*, Table 141, p. 104.

107. The rate of increase of medical costs is calculated from *StatAbst*—1995, Table 167, p. 117, which lists the medical care index at 47.5 for 1975 and *StatAbst*—2011, Table 142, p. 105, which lists the index at 388.4. Note that the assumption that the number of unnecessary operations and prescriptions has remained the same between 1974 and 2003 is a conservative assumption in that it effectively assumes that the rate of these practices relative to the population has declined because population has increased in the period.
108. American Cancer Society, "Cancer Facts & Figures 2011," p. 1. <http://www.cancer.org/Research/CancerFactsFigures/CancerFactsFigures/cancer-facts-figures-2011>.
109. President's Cancer Panel. 2010. *Reducing Environmental Cancer* (2008–2009 Annual Report). Washington, D.C.: U.S. Department of Health and Human Services, p. 1. <http://deainfo.nci.nih.gov/advisory/pcp/annualReports/index.htm>.
110. Lewis Regenstein, *America the Poisoned* (Washington, D.C.: Acropolis Books, 1982), pp. 246–47.
111. Editorial, "Cancer—Nature, Nurture, or Both," *New England Journal of Medicine* 343, no. 2 (July 13, 2000): 135.
112. President's Cancer Panel. 2010, pp. 5–6.
113. Samuel S. Epstein, Nicholas A. Ashford, Brent Blackwelder, Barry Castleman, Gary Cohen, Edward Goldsmith, Anthony Mazzocchi, and Quentin D. Young, "The Crisis in U.S. and International Cancer Policy," *International Journal of Health Services* 32, no. 4 (2002): 693.
114. Rick Weiss, "HHS Seeks Science Advice to Match Bush Views," *The Washington Post*, September 17, 2002, p. A1. Erin Brokovitch sued the utility company PG&E for the contamination of a community's drinking water and won \$300 million in 1993. A story that was later made into a popular Hollywood film, *Erin Brokovitch*.
115. President's Cancer Panel. *Reducing Environmental Cancer*, transmittal letter (page not numbered).
116. President's Cancer Panel. *Reducing Environmental Cancer*, p. 19.
117. American Public Health Association. 2007. "Calling on the US Congress to Restructure the Toxic Substances Control Act of 1976," <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1350>. The groups include the National Academy of Sciences, the US General Accounting Office, the Congressional Office of Technology Assessment, Environmental Defense, the US Environmental Protection Agency (EPA), former EPA officials, the US Government Accountability Office, and the University of California. Citations and links are available from the URL above.
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123. Weinhold, Assessing the Global Composite Impact of Chemicals on Health.
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127. Quoted in Stuart Auerbach, "N.J.'s Chemical Belt Takes Its Toll: \$4 Billion Industry Tied to Nation's Highest Cancer Death Rate," *The Washington Post*, February 8, 1976, p. A1.
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130. Jay M. Gould, *Quality of Life in American Neighborhoods: Levels of Affluence, Toxic Waste, and Cancer Mortality in Residential Zip Code Areas* (Boulder, CO: Westview Press, 1986), pp. 22, 28.
131. Robert Bullard, "Environmental Justice for All," in Robert Bullard (ed.) *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club Books, 1994), p. 17.
132. Joan Claybrook, *Retreat from Safety*, pp. 117–29.
133. Walter A. Rosenbaum, "The Clenched Fist and the Open Hand: Into the 1990s at EPA," in N. Vig and M. Kraft (ed.) *Environmental Policy in the 1990s: Toward a New Agenda* (Washington, D.C.: CQ Press, a division of Congressional Quarterly Inc., 1994), p. 132.
134. Juliet Eilperin, "Lack of Funds Delaying Toxic Waste Cleanups," *The Washington Post*, July 28, 2004, p. A6.
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136. American Cancer Society, "Cancer Facts and Figures 2005," p. 40.
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- 2001, pp. 1, 2, www.commoncause.org. The report is no longer available but updated information is available at <http://tobaccofreeaction.org/contributions/>.
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 145. J.M. McGinnis and W.H. Foege, "Actual Causes of Death in the United States," p. 2208. *Journal of the American Medical Association*, 1993 Nov 10; 270(18): 2207-12.
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 147. Quoted in *ibid.*, p. 2.
 148. Hunter, *The Mirage of Safety*.
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