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THE JOURNAL OF THE INSTITUTE OF JUSTICE & INTERNATIONAL STUDIES
is a multi-disciplinary, peer-reviewed journal devoted to the dissemination of information regarding a wide variety of social issues, both national and international, and a wide variety of research and presentation techniques.

MANUSCRIPTS
Manuscripts are typically the outcome of a presentation by the author at the academic conference hosted by the Institute each year. These manuscripts should be submitted via email to cjinst@ucmo.edu. Only original, unpublished manuscripts not under consideration by other journals will be considered. Submissions should follow the style from either the Publication Manual of the American Psychological Association or the Uniform System of Citation.
PREFACE

With the highest incarceration rate of any country, the United States (U.S.) may be described as the most punitive nation in the world. This incarceration rate reflects a public policy choice, not higher crime rates. The massive use of incarceration impacts all of society. A range of social problems has been reconceptualized to fit within a public policy that responds with punishment.

The overall aim of the April 6, 2011, Culture and Politics of Incarceration Symposium was to investigate the breadth of cultural and policy issues underscoring the massive use of imprisonment as a means to control crime in the U.S. The current economic difficulties confronting state and federal corrections budgets present not only challenges but also opportunities for rethinking the use of incarceration on the scale to which it has been used over the past few decades.

The investigation of these issues was accomplished at the Symposium by hosting presentations by several experts on the various issues underlying the large theme of this event. Further, a call for manuscripts was distributed among the academic community requesting contributions for an issue of this Journal that would cover this theme of incarceration and its consequences. Through an external, peer-review process we have selected ten articles for this issue. The Symposium speakers have made contributions to this special issue of the Journal based upon their presentations at the event. These contributions are published here in the order of the speakers’ presentations at the Symposium.

This issue opens with the edited presentation made by Mr. George Lombardi, the Director of the Missouri Department of Corrections, who opened the Symposium with an outline of the recent history of corrections in Missouri and a discussion of present challenges. Prof. Marie Gottschalk of the University of Pennsylvania in her contribution to this issue provides the Symposium presentation where she discussed her research on the prominent use of life sentences in the U.S. and the difficulties for reforming this aspect of corrections that makes the U.S. unique in the world. Michael Barrett recently moved to Missouri from New York where he served as the Deputy Commissioner for Criminal Justice Programs for New York State, and shares in this issue his perspectives on the potential for systemic reforms in corrections that the current public sector economic crisis presents. Kenneth Wooden provided at the Symposium his experienced perspectives of the impact of the use of juvenile incarceration, his remarks made at the event are presented here. The Symposium closed with a presentation on the impact of drug courts on the traditional use of corrections for drug offenders by the Honorable Ray Price, Jr., Chief Justice of the Supreme Court of Missouri.

Following these articles authored by the Symposium speakers, this issue presents the manuscripts selected for this special issue of the Journal. These peer-reviewed articles underscore several of the themes addressed in the presentations made by the speakers at the Symposium and discuss many other concerns embraced by the policies and consequences of mass incarceration. A history of the development of large-scale imprisonment at the federal level is recounted by Ed Bowman’s article, which focuses on the pivotal decade of the 1980s. Beth Caldwell and Ellen Caldwell undertake an examination of the use of imagery in the campaigns that led to
California’s punishment response to the public’s fear of dangerous criminals. The impact of mass incarceration policies on the local community is investigated in research presented in the article by John Klofas and Judy Porter. Connecting to the opportunities for policy changes presented by the economic crisis, William Stone and Peter Sharf discuss the technologies that could save significant costs for a prison system.

Two perspectives are presented in these articles on the disproportionate imprisonment of African Americans in the U.S. A.E. Raza draws the links from the practice of convict-leasing to the current prison industrial complex. Arthur Garrison presents an extensive overview of the history of race policies in the U.S. and what impact they might have on the incarceration of African Americans in the 21st century.

Three articles discuss the growing numbers of incarcerated women. Cathy McDaniels-Wilson and Judson Jeffries report their research on the sexual abuse histories of women inmates from Ohio. The implications of prison crowding for violence among women inmates and the prison code are addressed in the article by M. Dyan McGuire. To underscore that these issues of justice, stemming from policies of incarceration, are not confined to the U.S., Paloma Verduzco and co-authors, Hazel Millanes, Nadia Gutiérrez, Alfredo Cruz, and Ernesto Cisneros, present their research on the conceptualization of personal belongings for female inmates at a correctional facilities in Mexico.

A further contrast to the implications of detention for corrections in the U.S. is the article by David Claborn and Bernard McCarthy where they examine the development of the police power justification, which underscores the use of incarceration for punishment purposes, to the preventive detention for public health reasons.

This special Symposium issue of the Journal has presented an indication of the breadth of the cultural and political issues of mass incarceration. This investigation has been greatly enhanced by authorship of significant policy-makers and well-established observers of the process. Hopefully the reader of this special issue of the Journal will come away with an improved understanding and a greater appreciation of the scope and depth of the concerns of the phenomenon of the public policy of punishment that comes in the shape of mass incarceration and its implications for the justice system and society at large.

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Director  
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AUTHOR INFORMATION

Symposium Presenters:

**Michael Barrett** has a B.A. in Political Science from the University of North Carolina at Charlotte where he was President of the Pre-Law Society. He went on to graduate from the U.S. Defense Language Institute in Monterey, California with a degree in Arabic and later from the U.S. Interrogation School in Sierra Vista, Arizona. He received a law degree from Southern Illinois University where he was Commentary Editor in Chief of the Journal of Legal Medicine.

Mr. Barrett began his legal career as a defense attorney and drug court counsel in New York and later became a criminal justice counsel and advisor to the New York State Legislature. His primary roles were drafting and negotiating criminal justice and health care legislation. He also served for four years as a Deputy Commissioner and Counsel under two New York State Governors with oversight of several statewide programs including re-entry of the formerly incarcerated and juvenile justice.

He was appointed to the Governor's Advisory Council on Interactive Media and Youth Violence and also served on the Governor's Economic Recovery and Revitalization Cabinet, responsible for administering $67 million in stimulus funding to enhance public safety and improve the justice system. And, for two years, he served as counsel to the New York State Commission on Sentencing Reform.

Prior to becoming an attorney, Mr. Barrett was a foreign language interrogator for the Department of Defense and worked counterdrug operations for the FBI in Chicago and Puerto Rico. He is published in the fields of criminal justice and health care law, and he is also the author of a suspense novel, The Keeler Principle.

**Marie Gottschalk** specializes in American politics, with a focus on criminal justice, health policy, the U.S. political economy, organized labor, the welfare state, and the comparative politics of public policy. She is the author of, among other works, The Prison and the Gallows: The Politics of Mass Incarceration in America (Cambridge, 2006), which won the 2007 Ellis W. Hawley Prize from the Organization of American Historians, and The Shadow Welfare State: Labor, Business, and the Politics of Health Care in the United States (Cornell, 2000). She is a former editor and journalist and was a university lecturer for two years in the People’s Republic of China. In 2001-02 she was a visiting scholar at the Russell Sage Foundation in New York, and in 2009 she was a named a Distinguished Lecturer in Japan by the Fulbright Program.

Prof. Gottschalk currently serves on the American Academy of Arts and Sciences national task force on the challenge of mass incarceration. She has a B.A. in history from Cornell University, an M.P.A. from Princeton University’s Woodrow Wilson School of Public and International Affairs, and an M.A. and Ph.D. in political science from Yale University. She is currently working on a book-length study, Locked In? Penal Policy and the Future of Mass Incarceration, which examines the political possibilities for significantly reducing the incarceration rate in light of the current economic crisis and mounting fiscal pressures.
George Lombardi on January 29, 2009, became the sixth Director to lead the Department since Corrections became its own cabinet-level state agency in 1981. Mr. Lombardi is a 35-year veteran of the Missouri Department of Corrections having served previously as the Director of the Division of Adult Institutions for 18 years, Assistant Director of that division for three years and a Warden for seven years. As Director of Corrections he is responsible for the 20 adult correctional facilities, seven community supervision centers, two community release centers and 54 parole offices across the State of Missouri. This includes approximately 11,500 staff, 75,000 probation and parolees and 30,000 inmates.

During his retirement from the Missouri Department of Corrections in 2005, he was Senior Consultant of the Missouri Youth Services Institute and for two years worked closely with the Washington, D.C., Youth Services Division at the facility for committed youth. He served on the Board of Directors and as Chairman of the Criminal Justice Task Force for the Missouri Association of Social Welfare. He is a past President of the Missouri Corrections Association and has served as an auditor for the Commission of Accreditation for Corrections. He has lectured on criminal justice matters at the American Corrections Association, Academy of Criminal Justice Sciences, colleges and universities and civic organizations. He has also co-authored two articles.

Mr. Lombardi organized the first annual National Conference on Prisoner Reentry with the University of Central Missouri. He was recognized at the December, 2002 Commencement at the University of Central Missouri with a Distinguished Alumnus Award. Mr. Lombardi has a B.S. and M.S. in psychology from the University of Central Missouri.

William Ray Price, Jr. serves as a Justice of the Supreme Court of Missouri. He was appointed to the Supreme Court on April 7, 1992. He was retained in office at the November 1994 general election for a 12-year term expiring December 31, 2006, and subsequently in the November 2006 general election for a 12-year term expiring December 31, 2018. Previously he served as Chief Justice of the Supreme Court of Missouri from July 1, 1999 to June 30, 2001, and only recently completed a two-year term as Chief Justice from July 1, 2009 to June 30, 2011. He graduated Phi Beta Kappa and Kappa Sigma from the University of Iowa, attended Yale Divinity School, where he was a Rockefeller Fellow, and received his law degree from Washington and Lee University School of Law in 1978.

Justice Price was in private practice with the Lathrop Norquist law firm, Kansas City from 1978 to 1992, where he served as a director of Truman Medical Center and president of the Kansas City Board of Police Commissioners. His many roles of public service include being the Chair of the National Association of Drug Court Professionals (NADCP) for 2009 to 2011 and presently serving with the Missouri Drug Court Commission. Since 2008 he has been on the Judicial Advisory Board of the Searle Civil Justice Institute. He was appointed a Board Member of ASTAR (Advanced Science and Technology Adjudication Resource Center) in 2009.

Justice Price was awarded the Claire McCaskill Award from the Missouri Association of Drug Court Professionals in 2006, the Roosevelt Award from the Greene County Drug Court in 2002, and the Robert Walston Chubb Award from the Legal Services of Eastern Missouri, 2001.
Kenneth Wooden’s life’s work has been dedicated to the human rights of children. His ground-breaking research and published works on juvenile incarceration, institutional corruption, and child sexual abuse and exploitation in America have made significant differences in policies and prevention education. A Doctor of Humanities, and recipient of numerous recognitions including Kenneth David Kaunda Award for Humanism (United Nations), Distinguished Contributions to the Cause of Child Advocacy (American Psychological Assoc), Public Spirit Award (American Legion Auxiliary) and A Touch of Life Citation (Nat’l Foster Parent Association), Wooden was recently nominated for a 2010 Pulitzer Prize Life Time Achievement Special Award/Citation.

During his tenure as an educator, Dr. Wooden served on the New Jersey Prison Reform Commission in 1972. His article for *The New York Times* Op/Ed page entitled “Jersey and the Prisoners of Ignorance,” arose from his concern over the high rates of illiteracy among the incarcerated. His exposé and educational ideas led to the creation of an independent school district within the New Jersey prison system to address illiteracy among young inmates. His first book, *Weeping in the Playtime of Others*, documented the corruption and abuse within the institutional child care and treatment industry in 32 states and was nominated for a Pulitzer Prize. Translated in Russian and published in the USSR in 1981 and reprinted in the US in 2000, this best-seller continues to be used as a textbook in juvenile justice studies at the college level. Wooden also developed and co-authored the manual, *Inspecting Children’s Institutions*.

Ken Wooden currently serves as President-Emeritus of the national organization he founded: Child Lures Prevention/Teen Lures Prevention, whose mission is to promote child personal safety through awareness and education.

Authors Of Articles For This Special Issue:

Edward Bowman is a former practitioner in the criminal justice system. During his 16 year career, Professor Bowman worked in both adult and juvenile community and institutional corrections at the federal, state and local level. He began his career working for the Virginia Department of Corrections, later working as a Correctional Treatment Specialist for the Federal Prison System, and finally holding an administrative position in program development at a regional juvenile detention center in Virginia. Professor Bowman received his Master of Science Degree in the Administration of Justice and his Doctor of Philosophy in Public Policy and Administration from Virginia Commonwealth University. He also earned a Master of Education in Social Foundations at the University of Virginia. Professor Bowman is currently an Assistant Professor in the Criminal Justice Department at Lock Haven University of Pennsylvania, where he teaches courses in; Corrections, Research Methodology, American Gangs, and Juvenile Justice.

Beth Caldwell earned a Masters in Social Welfare and a Juris Doctor from UCLA in 2002. She practices criminal and juvenile delinquency law and is an adjunct professor in the Social Work Department at California State University, Dominguez Hills. Other publications include “Latinas’ Experiences in Relation to Gangs” in the Georgetown Journal of Modern Critical Race Perspectives, 2010 and “Criminalizing
Ellen Caldwell earned her B.A. from Santa Clara University and her M.A. in art history from University of California, Santa Barbara. She has taught at both UCSB and Pepperdine University and is currently an academic researcher. She is an independent editor and writer and is currently a contributor to New American Paintings.

Ernesto Cisneros is a Psychology professor with a Professional Degree in Psychology. He works as a teacher of Research Methodology in Social Psychology at ITESO. His graduate thesis dealt with urban practices that redefine the city's daily life. Currently he teaches Professional Intervention Projects at the Social Psychology Department, has been teacher of the penitentiary intervention project for three years. His main research interest areas cover a range of issues relating to incarceration, violence, and institutions in México. His M.A. in Culture Sociology project at Universidad Nacional San Martín addressed a sense disclosure in the narratives of organized crime related to violent acts. He is affiliated to the Permanent Seminar on Social Psychology at ITESO’s University in Mexico.

David Claborn is an assistant professor of Homeland Security and Public Health at Missouri State University. He holds a Doctor of Public Health degree (DrPH) from of the Uniformed Services University of the Health Sciences, where his dissertation dealt with temperate malaria along the demilitarized zone of the Korean peninsula. He has published on several public health issues associated with disasters and epidemics, from the effects of invasive species on the health of communities to the natural mimics of chemical warfare agents. Prior to his arrival at MSU, Dr. Claborn was a commissioned officer with the U.S. Navy from which he retired at the rank of commander in 2008. During his military career he worked extensively with disaster relief for epidemics, earthquakes and hurricanes. He is a veteran of Desert Storm where he was stationed with the First Marine Expeditionary Force in Al Jubayl, Saudi Arabia. Dr. Claborn lives in Springfield, Missouri with his wife and daughter.

Alfredo Cruz serves as a Psychology Professor with a professional degree in computer science and a master’s degree in science communication and sociocultural studies. Currently he teaches Professional Intervention Projects at the Social Psychology Department, has been teacher of the penitentiary intervention project for two years. He leads the Library and Information Science Laboratory at ITESO’s library, his current research addresses incarceration, reading, cognition, metaphors, and information technology. He is affiliated with the Permanent Seminar on Social Psychology at ITESO’s University in Mexico.

Dr. Arthur Garrison is an Assistant Professor of Criminal Justice at Kutztown University of Pennsylvania and the author of Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War (2011) and over 25 law review and criminal justice articles.

Nadia Gutiérrez participated for one year at the “Women’s Penitentiary Intervention Project.” She also worked in drug prevention programs at elementary schools in Guadalajara. She specializes on crisis intervention programs and narrative therapy. She recently participated on the biofeedback and psychometric laboratory at ITESO. She is affiliated with the Permanent Seminar on Social Psychology at ITESO’s University in Mexico.
Judson L. Jeffries earned his Ph.D. in political science at the University of Southern California in 1997. He earned a master’s degree in public policy at SUNY-Binghamton and a B.A. in political science at Old Dominion University. Presently he is Professor of African American and African Studies at The Ohio State University and Director of OSU’s Community Extension Center, located in the historic African American community of Mount Vernon. Prior to going to OSU Jeffries was an associate professor of political science and homeland security studies at Purdue University. Jeffries has published widely in the area of police-community relations, resistance and violence, electoral politics and radical formations of the 1960s.

John Klofas serves as Professor in the Department of Criminal Justice at the Rochester Institute of Technology (RIT). He earned a Ph.D. in criminal justice from SUNY Albany. Prof. Klofas teaches in the areas of corrections, management, crime & violence and law & social control. He also teaches a course called “Crime and Justice in the Community.” This course reflects Dr. Klofas’ growing interest in community level analyses as well as his work with the organization Metropolitan Forum, which promotes metropolitan perspectives in the analysis and solution of community problems. Research interests include management, corrections, and jails. Most recently, his research focus has been on community structure and crime related issues. He also serves as Director for the Center for Public Safety Initiatives at RIT.

Bernard (Bernie) McCarthy, Ph.D., is a Professor of Criminology and directs the Center for Homeland Security at Missouri State University. He is also serving as Principal Investigator and Project Director for an Emergency Management Planning Grant for Higher Education. He received his Ph.D. in Criminology from the Florida State University and a Master’s in Criminal Justice from the State University of New York in Albany. He is a co-author with Michael Braswell and Belinda McCarthy of Justice, Crime and Ethics. Sixth Edition. For the past three years he has been involved with the Naval Post Graduate School in developing graduate certificate programs for professionals working in the field of Homeland Security. Missouri State was selected as a partner with the Naval Post Graduate School in offering this certificate program to the Missouri National Guard.

Cathy McDaniel-Wilson is an Assistant Professor in the Psychology Department at Xavier University in Cincinnati, Ohio. Prior to joining the faculty at Xavier University she has held positions at the Yale New Haven Hospital, Veterans Administration Medical Center in West Haven, CT and the Columbus Area Community Mental Health Center in Columbus, Ohio, to name a few. McDaniel-Wilson earned her Ph.D. at the University of Cincinnati in 1998 in Clinical Psychology. McDaniel-Wilson’s specialty is violence and sexual abuse of women. In addition to being a professor she has been in private practice since 1998.

M. Dyan McGuire is an Assistant Professor with the Department of Sociology and Criminal Justice at Saint Louis University. Dr. McGuire earned a Ph.D. in Criminology and Criminal Justice from the University of Missouri at St Louis and a J.D. from the Georgetown University Law Center. Her research interests include race and gender bias in the criminal justice system; formal and informal dispute resolution mechanisms; law and the legal system; juvenile justice; and, violence among female inmates.

Hazel Millanes participated for one year at the “Women’s Penitentiary Intervention Project.” She also worked in an intervention project at elementary schools, which aimed to detect and work psychosocial problems of children using
cognitive-behavioral exercises. Currently she works on the Pain Management and Palliative Care Program at the Securities and Social Services Institute for State Workers as health staff counselor for patients with chronic degenerative diseases in advanced or terminal stages. She has participated in several seminars such as “Crisis Intervention,” “Psychological Support for the Terminal Patient” and “Pain management and Palliative Medicine.” She is affiliated with the Permanent Seminar on Social Psychology at ITESO’s University in Mexico.

**Dr. Judy Porter** is an Assistant Professor at the Rochester Institute of Technology where she also serves as Undergraduate Coordinator for the Department of Criminal Justice. Dr. Porter received her Ph.D. in Criminal Justice from the University of Nebraska at Omaha, her Masters in Sociology from New Mexico State University, and her Bachelors in Sociology with an English Minor and a Criminal Justice emphasis from the University of Northern Colorado. Her research has included public housing concerns, elderly, and correctional programs.

**A.E. Raza** received an M.S. in Justice Studies where she focused on issues of economic justice, specifically the role of alternative economic and financial systems. She is currently a doctoral student in the department of Ethnic Studies at University of California-Riverside. Her research examines international human rights discourse and its intersection with racism and settler colonialism. Her works seeks to bridge the fields of international law and ethnic studies.

**Dr. Peter Scharf** is a Research Professor of Public Health and Tropical Medicine at Tulane University. He has both correctional experience and an extensive academic career. His dissertation and subsequent publications have dealt with a broad array of criminal justice ethical issues and include, Towards a Just Correctional System. He has directed major Office of Justice Programs projects including, Performance Measures for JIS Projects, and Managing Law Enforcement Integrity and Managing Criminal Justice Technologies.

**Dr. William Stone** is a Professor of Criminal Justice at Texas State University. He has both professional experience in the field of corrections and an academic career that spans over thirty years. He has numerous publications and national presentations to his credit. He has been active in many areas of correctional research including: suicide prevention, population projections, inmate classification systems and prison rape reduction (PREA).

**Paloma Verduzco** participated for one year at the “Women’s Penitentiary Intervention Project.” She also worked for one year in Gerontology Psychology Clinic as counselor, therapist, and teacher; worked on an intervention project with children in marginalized zones of Guadalajara. She formed part of a multidisciplinary project as social psychologist, which proposed the urban policies for public spaces and social mobility towards the Pan-American games Guadalajara 2011. She is affiliated with the Permanent Seminar on Social Psychology at ITESO’s University in Mexico.
In this discussion of the recent development and direction of corrections in Missouri, I will be focusing on my experience with the Department of Corrections. Although its history goes back to 1836 when the system in Missouri was started. The Missouri State Penitentiary was the oldest prison west of the Mississippi until we built and moved into a new facility in 2004. The older facility had become so antiquated; it really had nothing there for modern penal practices that were helpful, in fact, it was hurtful.

When I arrived to work at the Penitentiary in 1972 it was a dangerous place. People were being stabbed and killed on a somewhat regular basis. There was no classification system to speak of, so there were people, young people in there for two-year sentences for marijuana, along with all but the most violent prisoners in the state mixed in. There was much exploitation of the younger, more vulnerable people. There seemed to be a stabbing about every night. There was a murder about every month or less, including the horrible murder of a lieutenant, who was stabbed some 17 times to death.

But the interesting thing back then is that the laws were much different. For a person who committed first-degree murder, one could get parole. I saw some of these people being paroled after serving seven years of their sentences, some ten, at the outside twelve. There were many fewer laws at the time so the population was around 3,000 offenders in about seven prisons when I started in the system and today there are 30,500 people incarcerated in Missouri. At the time there were between 15,000 and 20,000 people on probation or parole and today that number has increased to 75,000 probationers and parolees.

Causes of Growth in Corrections

Corrections in Missouri has grown dramatically since 1972. So what occurred during that period of time to make that growth happen? It was a variety of things.

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Please send your correspondence to author at the Missouri Department of Corrections, Jefferson City, Missouri.
Harsher Sentencing
The tolerance for crime dropped dramatically. This was a national phenomenon of course, not unique to just a Missouri. It took a criminal incident or two for legislators to increase penalties for criminal laws that already existed. For instance, if a crime at an earlier point carried a two- to five-year sentence, it now may carry a seven- to ten-year sentence. Thus, people, for the same behavior, are now receiving a longer period of time of incarceration.

Parole Guidelines
The parole board began reflecting this conservative attitude, so its guidelines for getting parole became tougher, which started growing the population as well. When I began in corrections, for a prisoner “doing your time” or “flattening out your time,” actually meant doing seven months for each year of a sentence, which allowed for the parole of a prisoner will before the end of a sentence. This has changed dramatically as well. It became eight-twelfths of a sentence then changed to nine-twelfths, where it is today.

Deinstitutionalization
Another factor that occurred during the beginning of my career, in the early 1970s and 1980s, was the deinstitutionalization of mental health facilities. This occurred in this state and in many states due to the publicity of the conditions and the horrendous way people were being treated in some mental health facilities. Deinstitutionalization resulted in the release of these people, however the problem was there were not many alternative programs for them. Out on the street they drifted into the criminal justice system with the result that corrections has become the de facto mental health institution for this state. For many other states the same phenomenon has occurred.

The problem was that corrections in Missouri did not have extensive experience in handling individuals that would have gone to mental health facilities. Though corrections has been dealing with people like that to a certain degree, we did not have the personnel or treatment available that the mental health system had. In 1972, when I was a psychologist and I had only my master’s degree from the University of Central Missouri, I was one of two in the whole state of Missouri for the state corrections system. Deinstitutionalization resulted in the arrival of individuals who had all major mental health problems, including very violent people. Consequently many were merely injected with Prolixin and they walked around like automatons. That is how they were cared for, because there was not anything else. They could not be allowed in the population because they stirred up so much that they would either kill or be killed. That was the only way the system knew how to deal with it. Then like every other system in the country, the federal government stepped in and filed successful lawsuits. As a result, corrections across the country now provides a fairly sophisticated psychological service system for offenders.

Mandatory Minimums
The advent of mandatory minimum sentences has had a large impact. It does not matter how well a prisoner serves the sentence, a minimum sentence must be served and the parole board is not empowered to release the prisoner any earlier than that. Even when the prisoner reaches the mandatory minimum this does not mean that
getting parole is automatic. This is still up to the discretion of the parole board. So mandatory minimum sentencing has exacerbated the population significantly.

**Abolition of Death Row**

At the beginning of my career people with convictions for murder in the first degree could still get parole. This was switched to a limited choice between life with no parole and the death penalty. The death penalty was reinstated in the state and there was a death row over at the old penitentiary, in the basement of that facility. The conditions were awful. As a result of a lawsuit, which cost the state millions of dollars, we had to do a myriad of things to make sure that these inmates got all the rights that the Constitution said should be afforded them. We had to build a recreation area, to make a classification system within the death row population, and to ensure their access to the courts. To satisfy these requirements was difficult to accomplish and it cost the state substantial sums of money. It was not until we opened up and moved to another maximum-security prison at Potosi that we were able to get out of the death row unit in the old penitentiary at Jefferson City, and move the inmates to a brand-new state-of-the-art facility. With this move, Missouri became one of the only states in the United States that has integrated capital punishment inmates into the general population of a prison. So actually there are no death row inmates as such. A person under a sentence of death now can progress within the confines of that prison as far as they want. They can have jobs. They can have roommates. They can have visits. That was done in the 1980s, which today is still revolutionary, where most states that have death penalties still have a death row. But this innovative development cost the state of Missouri much money.

**Improved Law Enforcement**

Today there are better law enforcement techniques. Law enforcement has become much more sophisticated in its ability to capture more criminals. Even in the rural areas in Missouri, where in the past a major crime may have never been solved, there are squads of officers that come from various jurisdictions to provide assistance with investigations.

**Drugs**

Another factor for increased growth in corrections has been drugs. In the 1970s and 1980s there were more drugs, more drug crimes, and more violence associated with drugs. Clearly this is one of the things that I think has impacted our growth.

**Increased Prison Capacity**

We have kept growing prisons. We have kept putting in prisoners. This is a really interesting phenomenon. When we built the prison at Pacific, Missouri, people were on the hillside shooting down at the construction workers because nobody wanted that prison in that area. A few years later we had people coming to the capital with flags and so forth; they wanted a prison in their community because it was the savior of their community, to keep the young people there with decent jobs. Thus, for many places where we have prisons, we are the best employer, not only by numbers, but also by salary. The political acceptance of building prisons made a large difference as to how and where they would be built. With the increase in the number of prisons there was an accompanying increase in prisoners. This may fit into the
perception that in certain jurisdictions knowing there is available prison space will be a factor in determining whether the person gets a person sentence.

**Today’s Mission**

This discussion brings us to where we are today. Shortly after being asked in 2009 to be the Missouri Director of Corrections, the Governor called all the cabinet members in together. I am very grateful that I have been in the system before. I felt very fortunate that I know so many of the staff and my executive team consists of individuals who each have almost 30 years of experience in the field. I felt very comfortable at going into my job. At this first cabinet meeting, the Governor asked me about my goal, my mission for corrections in Missouri. My response was that the mission is to completely close down a prison. I explained that what I meant was that with the successful diversion of probationers and the proper reentry of parolees when they went they left the prison walls, we would be so successful with those individuals and that—commensurate with the safety of the community—we would turn people around so that we would not need a prison at some particular point. I didn’t mean this would happen immediately and that we would suddenly drop 2,000 people on a single community. Rather as the prison population would start to drop and there becomes some confidence that it would stay at least at that level if not continue to go lower, I could close down the housing until we get to the point where we can in fact shut down a prison. I think that is entirely possible and should always be our mission.

**Today’s Opportunities**

Corrections is first public safety. We know that everything must be commensurate with public safety. There is an interesting phenomenon that is happening at both ends of the political spectrum. People on the left side of the political spectrum (those who worry about the humanitarian aspect, the unfairness of people being incarcerated so long) believe that we ought to be not spending so much money on prisons, but rather we should release this person provided that the prisoner’s needs are met. People on the right side of the spectrum, who see an annual corrections budget of over $600,000,000, are saying this kind of money could be better spent in these tough times. But, tough times get people thinking in new creative directions. From both sides of the spectrum these people do not want to spend so much money in this way anymore. It is now considered that some of those sentencing policies that were legislated years ago need to be re-examined. Maybe we ought to look at these prisoners as individuals and maybe the parole board has expertise and can judge whether or not a prisoner is a good prospect for being released and so forth. I anticipate at some point some of those laws may get undone.

Further, I believe that that will happen with the increased use of drug courts and alternative courts. A leading advocate of alternative courts is the Missouri Supreme Court Chief Justice, appointed by then Governor John Ashcroft, who has bipartisan support in the legislature. If we can save people while they are on probation from getting on the treadmill of coming in and out of prison all the time, if we can make a difference with them, then that is a wise investment. This will let me do what I want to do, which is to close down a prison, commensurate with the safety of the public.
Another thing I am seeing is the increased acceptance by the law enforcement community for the concept of prisoner reentry. Law enforcement beginning to see, that successful reentry for an offender who is coming out of prison adds to public safety, that this guy is not going to commit another crime. We have very enlightened chiefs of police in our two major cities in Missouri. In St. Louis we have a unique program where a beat officer and a parole officer together go out on the street in one of the roughest neighborhoods in the city and work with the probationers and parolees and the families and the citizens of that neighborhood. They have developed a citizens council where the offenders must talk to their neighbors. This has dropped the crime rate in that area. So with successful reentry and bringing communities together, our parole staff and our probation staff are doing an effective job with this.

Thinking about the needs of that inmate, whether it is substance abuse, education, and, of course, jobs, it amazes me that we are able to keep the population in our prisons fairly steady so that it has not gained much during these tough economic times. When we get to turn this economy around and people can start getting jobs a lot easier, this can make a tremendous difference. Just maybe, that lofty mission I spoke about can be reached.

**Tomorrow’s Long-Term Investment**

I want to speak a little bit about what I consider my passion beyond corrections. A few years ago I joined in some intriguing efforts being lead Mark Steward after he had retired from his position as Missouri Director of Youth Services. Mark was the architect of the Missouri Model, where he revolutionized the juvenile system here in this state. In fact, under his guidance, Youth Services terminated its use of the Chillicothe women's/girl’s facility and the Boonville facility for the young men, both now are used in the Department of Corrections. Under the Missouri Model, the “small is beautiful” concept was started where Mark developed small residential units, taught his people about how to bring back the childhood of these individuals and work with them and their backgrounds, which of course in many cases consist of abuse and neglect. As a result of that, I really believe that even though we have 20 prisons today in Missouri, we might have had to have 22 prisons, because Mark has kept a lot of those people safe and they are doing well in life.

Since his retirement, Mark has started an organization called Missouri Youth Services Institutes. With assistance from the Annie E. Casey Foundation he has brought this model to Louisiana and Washington, D.C. I went to Washington, being asked by Mark to work at a youth services facility, Oak Hill, where there were young people who had committed very terrible crimes. They were 14- year-olds, 15-, 16-years of age, out on the street in the District of Columbia. When at five years of age, typically their fathers are imprisoned and their mothers are engaged in prostitution. There should be no surprises that they are now in the criminal justice system. Further, it should be no surprise, when I had the opportunity to take a group out on Chesapeake Bay for fishing, and I am the one putting the worms on their hooks and these guys are just shaking with anticipation, it would strike me that these kids have had their childhoods stolen from them. They had had no childhood, and a lot of it had to do with the abuse and neglect they had suffered as kids. This experience served to reinforce my views of having opened 1,000 files through my career of adult offenders and knowing that that background is in their file.
I am thinking that though we are doing everything we can do with diversion and with reentry, we need to go way back into early childhood education, even preschool, and that is where we really need to capture people, capture those kids, build a moral fiber in them, and developed an ethical way of doing things. I think it is so critical and that a long-term investment is demanded that will turn the criminal justice system around. If we can do it correctly, because the longitudinal data show that for children at risk, especially if they get quality early childhood education, their chances of having contact with the criminal justice system later in life are significantly less. If that is the case, we ought to be looking at that as an important place where the state needs to put money. There would be nothing better than to take some of the money that the Department of Corrections will no longer need some day and put it in that direction to make a long-term investment. It could make all the difference in the world.

Frederick Douglas had a saying: It is easier to build strong children than to repair broken men. There is much truth in this for corrections in Missouri. At this point I will stop here and I thank you.
LIFE SENTENCES
AND THE CHALLENGES TO MASS INCARCERATION

Marie Gottschalk
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Address to the Culture & Politics of Incarceration Symposium:
April 6, 2011

I want to talk today about people who are doing long time in prison for very serious—and not so very serious—crimes. And I want to talk about the political and legal obstacles to reducing the number of lifers and other long-time offenders in U.S. prisons.

The Great Recession has been a catalyst to reexamine many penal policies. Policy-makers are talking about reentry, about drug courts, about diversion. But the political obstacles to seriously reconsidering the widespread use of life sentences remain formidable. In some ways those obstacles are becoming larger rather than smaller. Despite mounting evidence that lengthy sentences do not reduce crime and do not enhance public safety, the United States remains deeply attached to what some people call “the other death penalty.”

Look at the latest issue of Criminology & Public Policy.\(^1\) In this issue, more than a dozen experts on crime generally agreed that deterrence, in the form of lengthy sentences, does not significantly reduce crime. In fact, keeping some people in prison for too long or sending some of them to prison in the first place may actually make them more criminogenic. Amidst all the current excitement about reentry, it is important to remember that the very best reentry programs may at most only succeed in “rehabilitating” someone back to the place he or she was before being sent to prison. So the basic question becomes, “Why should we be sending them to prison in the first place?”

Today I will be discussing what I see as five key obstacles to reducing the lifer population. The first to be addressed is why the judiciary is not going to solve this problem. In short, why the courts are not likely to be the Promised Land to reduce the lifer population in the United States. The second obstacle concerns how the recent victories in the war against the “war on drugs” may actually be making the prospects worse for offenders serving life sentences. The next obstacle involves the vast heterogeneity of the lifer population or long-timer population, which includes a wide range of people—from offenders who stole two pieces of pizza to serial murders. The fourth obstacle involves the demise of executive clemency, commutations, and pardons. The final obstacle concerns the long shadow that capital punishment continues to cast over penal policy more broadly.

You might be asking yourself, why even talk about lifers? With all the other pressing penal problems, why discuss lifers? After all, about 2.4 million peoples are sitting in U.S. prison and jails today, and only about 141,000 of them are lifers. But

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\(^1\) Criminology & Public Policy February 2011, Volume 10, Issue 1.
these numbers need to be put in perspective. The lifer population has grown exponentially, more than the general prison population. It may be hard to believe, but as recently as the 1970s there really were very few lifers in the United States.

Today the number of lifers in U.S. prison is more than twice the size of Japan’s entire prison population. The U.S. incarceration rate for lifers is about 50 per 100,000 people. That is nearly comparable to the Scandinavian countries’ total incarceration rate. Countries like Norway and Sweden incarcerate people at the rate of about 70 per 100,000. For much of the 20th century, the U.S. imprisonment rate hovered around 120 per 100,000. So the U.S. lifer population in terms of rate is approaching about half of what our entire imprisonment rate was until the prison boom began in the 1970s. And these figures do not include the virtual lifers. These are the people in prison who are serving what we call “basketball” sentences of 100, 200, or even 800 years. The figures I gave you only included people sentenced specifically to life. But as we know, many of the virtual lifers will likely die in prison.

The other aspect to consider is that this issue has important racial implications. The disproportionate number of African-Americans who are in our lifer population is much larger than the disproportionate number in our prison population generally. This number is well over 50% compared to about 38% in our general prison population.

The explosion of the lifer population represents a dramatic change in public policy. We used to let murderers walk among us. Someone who committed murder was not necessarily considered to be a murderer forever. They were someone who had committed murder but who had a reasonable expectation of being released. Even in a very hard-line state like Louisiana, the 10-6 law from the Progressive Era remained on the books until the 1970s. It said that if a life-sentenced prisoner had a good record and the warden’s blessing, he would likely be released after serving ten years and six months. In 1972, Louisiana had only about 143 people serving life sentences. Today, Louisiana has about 4,300 lifers, and life means life in Louisiana. There is no parole in Louisiana for lifers. It is one of six states, including my own state of Pennsylvania, where life means life.

Now consider the obstacles to a careful re-examination of the question of whether the United States should be sentencing so many people to die in prison. Some of my colleagues at law schools are modestly optimistic that the judiciary will provide the means to challenge these life-sentence policies. The courts may, in their view, provide a way out of the political impasse rooted in legislators’ reluctance to champion this issue for fear of being called “soft on crime.” Legal scholars point to the 2010 Graham vs. Florida2 decision, in which the U.S. Supreme Court ruled that it is unconstitutional to sentence juveniles convicted of non-homicidal crimes to life without the possibility of parole (LWOP). This ruling has bolstered their faith that the courts will begin to chip away at and further undermine life sentences in the United States.

However, the Graham decision was a very narrow ruling that applied to only about 130 juvenile lifers in Florida and other states at the time. Furthermore, the Supreme Court has an extremely unsatisfactory and disappointing record when it comes to defining and limiting disproportionate sentences. It is highly unlikely that the Supreme Court is going to declare life without the possibility of parole unconstitutional. In the past it has affirmed that LWOP is constitutional. It also has

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ruled that LWOP sentences do not require the same due process protections that death penalty sentences do. The Court also has declared that life sentences without the possibility of parole are quite acceptable for a whole range of crimes. The Court has been persistently reluctant or downright hostile to setting real proportionality limitations not only on life sentences but also on other lesser sentences. Several years ago when California’s three-strikes law came before the Court, the justices affirmed a sentence of 25 years to life for a man who stole $153 dollars worth of videotapes intended as Christmas gifts for his nieces. It also sanctioned a 25-years-to-life sentence for the theft of three golf clubs. So judicial efforts are unlikely to reduce the lifer population significantly.

Fundamental challenges to the laws permitting life sentences will need to come from legislatures and the wider public. But here the political obstacles are formidable despite the formidable consensus that life sentences and long sentences do not enhance public safety and do not reduce crime; that people age out of crime; that the most criminogenic years are the late teens and early adulthood; that many first-time offenders are what they call “one, then done” (they have committed a murder and then they are done); and that people convicted of homicide tend to have the lowest recidivism rates. Despite all this evidence that life sentences do not enhance public safety greatly, there has been no fundamental rethinking of life sentences and virtual life sentences.

Another impediment to reconsidering life sentences is the war on the “war on drugs.” The growing movement against the war on drugs has spurred a wider questioning of the rationale for the war on drugs. It has helped popularize the idea that we can readily distinguish the nonviolent drug offenders from the “really bad guys” and that the real problem with our penal policies is that we have not been doing a good job sorting out these two groups. This distinction between the nonviolent drug offender and the really bad guy is not always so easy to draw, however. As many police officers, prosecutors, criminal justice students, and fans of The Wire know, it can be difficult to win a conviction on a violent crime charge, which often is highly dependent on witness testimony. It is far easier to just pursue a charge for drug possession or drug trafficking.

When it comes to reforming the country’s drug policies, a quid pro quo is emerging in public policy, perhaps to the detriment of people convicted of other crimes. Some legislators are agreeing to lighten up on the nonviolent drug offenders while throwing the book even harder at the “really bad guys.” For example, South Carolina recently enacted a number of laudable penal reforms, including equalizing the penalty for crack and powder cocaine offenses, diverting more first-time offenders from prison, and enhancing drug courts. But at the same time, the bipartisan consensus behind this set of comprehensive reforms also significantly increased the number of crimes classified as violent and thus subject to stiffer sentences. It also expanded the number of crimes that qualified for LWOP.

There is a growing misperception that the drug war is the major feeder of mass incarceration in the United States today. This misperception has important public policy implications. What we have to be clear about is that different factors have fueled the prison boom at various points in its four-decade long history. If the

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aim is to reduce the prison population without seriously jeopardizing public safety, we need to be clear about which specific factors fueled prison growth in a given period and which ones are fueling it today. In the 1970s, it was the lengthening of sentences for a wide range of criminal offenses. In the late 1980s and early 1990s, drug crimes were the main engine of prison growth. But more recently, as a 2010 analysis by William Sabol of the Bureau of Justice Statistics tells us, two-thirds of the latest growth in the prison population can be attributed to people receiving long sentences for violent crimes. This is what is sustaining the prison population today. The war on drugs still adds its share of new prisoners—more so in some states than in others, and certainly more at the federal level than at the state level—but it is no longer the main driver of prison growth. So if we put all of our efforts into ending the war on drugs, and if we succeed, we still may be left with an expansive penal system that does not enhance public safety and that pilfers dollars from education, reentry, and other social programs.

The third impediment to devising a successful reform strategy to reduce the lifer population concerns the extremely heterogeneous nature of those sentenced to life. The lifer population includes aging serial killers, third-strike pizza thieves in California, the lookout guy in an armed robbery gone awry at a convenience store, and the middle-aged man incarcerated decades ago for killing his teen-age girlfriend in a jealous rage. Many of the people who were sent away for life committed heinous crimes, but a number of them were sent away for less serious infractions. And even the people who committed truly terrible crimes years ago are not necessarily terrible people today.

This raises difficult questions for any would-be penal reformer concerned about the plight of lifers that are similar to those that the anti-death penalty movement has faced periodically: Should a call to abolish life in prison without the possibility of parole be a cornerstone of any movement centered on the plight of lifers? Is LWOP a fundamental violation of human rights? Should every offender at least have the opportunity to be considered for parole—even though some may never be granted parole? Or should the primary focus be on securing the release of certain subgroups of lifers, that is, those long-time offenders who appear least culpable?

Four subgroups of lifers highlight the problems posed by this issue. The first is those convicted of felony murder. The United States is exceptional in that we still have felony murder laws on the books in many states. These laws are part of our common-law inheritance from Britain, which, notably, abolished felony murder in 1957. Many other common-law countries subsequently did as well. The United States has largely retained felony murder. In many states, when a person is involved in a felony, such as burglary or robbery, and someone unintentionally gets killed, the accomplices are considered as responsible as the person who pulled the trigger. This makes them eligible to receive a life sentence in many states. So the question becomes, should penal reformers focus on the plight of people who were convicted of felony murder and are facing life behind bars? Are they significantly less culpable and more deserving than the triggerman?

The second group consists of juvenile lifers. How about the guy, who in a heat of passion, kills his girlfriend when he is fifteen years old? Decades later, even the deceased girl’s parents are saying, “You know what? He should get out.” We have cases like that in my state of Pennsylvania. Should the main focus be on securing the right to a parole hearing for these juvenile lifers after they have served a certain number of years or reach a certain age? The United States presently has about 2,500
juvenile lifers; about 415 of them are in my state of Pennsylvania, which has the largest number of juvenile lifers in the world. Virtually no other country sanctions juvenile life sentences, which violate many human rights agreements and human rights norms. Yet the United States regularly imposes juvenile life sentences (JLWOP). At least nine states in recent years have been reconsidering their LWOP laws in the case of juvenile offenders. A couple of them, including surprisingly Texas, have banned LWOP for juveniles or restricted its use.

One of the most persuasive arguments against JLWOP both in the legislatures and in the courts is that juvenile brains are somehow different. As parents of teenagers have known for eons, adolescents are less mature than adults, have greater difficulty controlling their impulses, and are more susceptible to peer pressure. All of which makes them more susceptible to engaging in foolish and sometimes criminal behavior. New developments in brain science, notably comparing the MRIs of juveniles and adults, are affirming this. The powerful argument that if the juvenile brain is not fully developed, the juvenile is not fully responsible has propelled the cause of abolishing life sentences for people convicted of crimes committed before they were adults. But those gains for juvenile lifers in the short term may hurt other lifers in the long term. The same argument that benefits the teenager aggravates the situation for defendants who committed their crimes when they were adults. Since their brains are fully developed, the argument goes, they are considered fully responsible for their actions. All this feeds into the biological approach to explaining criminality that is ascendant in criminology and the wider public today.

The third group in this heterogeneous population of lifers is the three-strikers. We have dozens of three-strike laws across the country. The most draconian one is in California, which has the largest number of lifers. About 20% of the people in California’s state prisons are serving life. This is about a quarter of the nation’s total and about triple what it was in 1992 before California enacted its three-strikes law. California’s law is draconian in several respects. First, the third strike does not have to be for a violent or serious crime. All it has to be for is a felony. And California has an extremely permissive idea of which offenses should constitute a felony. Furthermore, prosecutors in California, like those elsewhere, have great leeway when it comes to whether to charge a certain offense as either a misdemeanor or a felony. If the defendant already has two prior convictions for serious crimes, and the third strike is a felony, then this individual can be put away for 25 years to life if the prosecutor decides to invoke the three-strikes law. Furthermore, a first-time offender who commits a single burglary on a single day could fall under the three-strikes provision. This is due to creative accounting by prosecutors, who may use their wide discretion to determine that the defendant committed three strikes during that one criminal incident. Therefore the person can be deemed a habitual offender and eligible for a 25 years-to-life sentence. Less well-known but of equal or even more serious concern is that California’s three-strikes law also includes a two-strikes provision. Commit a second strike and your sentence doubles. People currently sentenced under California’s three-strikes law are costing the state an estimated $19 billion in excess costs due to the passage of this one piece of legislation.

In California’s prisons we have people like Charles Manson serving a lifetime as well as people like Jerry Wayne Williams, who was sent away for life for stealing pizza from some children. Under its three-strikes law, California even sent someone away for 25 years to life for stealing a dollar in change from a parked car. That is how draconian California’s law is. So the question becomes, should reformers focus on the
pizza thieves and the spare change thieves or should they focus as well on people who are serving life for more serious crimes but who no longer pose a significant threat to public safety? Any time the question comes up of revising California’s three-strikes law through a ballot initiative to make it less draconian, the California Correctional Peace Officers Association (the state’s powerful prison guards union), many of the state’s prosecutors, and leading politicians, including former Governor Arnold Schwarzenegger and his successor Jerry Brown, have misleadingly charged that the proposed changes would result in the release of thousands of rapists and murderers. Their powerful images of career criminals on the prowl have upstaged the plight of the many “habitual” lifers who have not committed serious crimes. Also left out of the discussion are the other lifers who committed serious crimes but have become changed people behind bars and are no longer a threat to public safety as they have aged out of crime.

In this context I would like to address the issue of the need for retribution. This is where the rubber meets the road, not just on life sentences but also on all discussions of criminal policy. Mere mention of Charles Manson, Ted Bundy, or Jeffery Dahmer often stops any serious discussion of abolishing all life sentences. The concern is raised that some crimes are so awful, so terrible, that the perpetrator should burn in hell forever and that there should be no end point to retribution. Some legal scholars have challenged taking an abolitionist stance on life sentences, arguing that retribution is a fundamental principle of our criminal justice system. In their view, some crimes are so heinous that they render abolishing life sentences untenable. They reject the contention that every offender should be eligible to be considered for parole. In their view, this is tantamount to dismissing retribution, a cornerstone of the U.S. criminal justice system.

I would like to turn that perspective around. I would imagine that the audience here today is probably representative of wider public sentiment with respect to capital punishment. That is, many of the people sitting in this room believe that, for certain crimes, capital punishment is well deserved. But even for those of you who believe serial murderers—or more garden-variety murderers—should be executed, I would wager that most of you would not feel comfortable about publicly torturing this offender, mutilating his body, then dissecting it, and then letting his remains lie out in the center of the campus quad for two weeks. I think most of us would agree that this would not be acceptable. But two centuries ago, that was the standard practice for capital punishment. This was quite an acceptable retributive punishment to show society’s strong disapproval, often for crimes far less deadly than serial murder. So when we talk about retribution in the case of capital punishment or life sentences or indeed any other punishment, we need to remember that these punishments are culturally and politically constructed.

In the case of life sentences, can we really argue that an abolitionist stance means relinquishing our commitment to retribution as a key principle of punishment? Go back to the case of California, where Charles Manson comes up for a parole hearing every two years. He is not going to get it, but he comes up every two years. Sirhan Sirhan, who assassinated Senator Robert F. Kennedy in 1968, also comes up for a parole hearing every two years. Both of them have been coming up for parole consideration for decades. In the years since they committed their crimes, California’s prison population has increased by 800%. It is hard to make the argument that just because Manson and Sirhan Sirhan are entitled to a parole hearing every
couple of years that somehow California has gone soft on crime or that somehow the principle of retribution is being undermined in that state.

The fourth challenge to reducing the lifer population concerns executive clemency. It was once common practice for governors, parole boards, and pardon boards to take the political risk and release people from prison who were serving life or other lengthy sentences. Executive clemency served as a means to correct miscarriages of justice, such as convictions of the factually innocent, or in instances where the defendant received poor legal advice. Executive clemency also was used, however, to express mercy. It was not just about correcting miscarriages of justice, but it was also about tapping into something else to say, “People can change.” Acts of executive clemency also served to make a statement about broader penal policy. In the early twentieth century, the governor of Alabama had been fighting for years to abolish the cruelly exploitative and mortally dangerous convict-leasing system in his state but could not get the legislature to enact necessary reforms. In the heyday of public lynchings and at the height of the Jim Crow era, this clearly was not a popular position. But, on a Christmas Day, he released 300 African-American convicts. Many of them were children. He gave them a talk about responsibility and sent them back home. This governor was willing to take that political risk.

But, over the past few decades, executive clemency has atrophied. In my own state, where governors used to release hundreds of lifers during their tenure, Governor Ed Rendell, who left office in early 2011, released only five lifers in his eight years in office. And three of those were granted clemency just about three weeks before he left office. Executive clemency used to be a normal valve to get people back into society. The interesting thing about mass incarceration is that we have all kinds of different sentencing regimes in this country. There is determinate sentencing and indeterminate sentencing. There are advisory guidelines and guidelines that are mandatory. Yet all states have moved in lockstep fashion towards increasing their incarceration rates. So it is not just about changing sentencing regimes. It is also about changing the gestalt. This is not an easy thing to talk about in politics because it cannot be easily measured. More public officials need to be willing to revitalize executive clemency and parole boards and to run the political risks that come with releasing long-time prisoners.

The final obstacle or challenge I would like to talk about concerns the impact of the death penalty abolitionist movement on the fate of life-sentenced offenders. For all the gains of this movement, it does have a downside. The anti-death penalty movement has in some ways helped to legitimize long-term sentences in the United States. Many leading abolitionists have accepted LWOP uncritically as an alternative to capital punishment. In doing so, they have helped to legitimize a sentence that has many features in common with capital punishment. Life sentences often go to the poorest people with the worst lawyers. As a group, lifers are disproportionately African-American. Life sentences only look light compared to a death sentence, but they are an exceptionally unusual sentence everywhere else in the developed world except in the United States. In many European countries, a life sentence typically means twelve or fifteen years unless there is a well-founded reason to believe that the prisoner will, upon release, kill or seriously hurt someone again. And even in that case, the offender is generally entitled to regular hearings to determine whether or not to retain him or her in prison.

So where do I end up in this discussion? I think the prospects are bleak for rethinking or reevaluating the lifer issue and more broadly the issue of long-term
sentences in the United States. This political quiescence is remarkable given how huge
our lifer population is and given how extraordinary it is compared to that of other
countries. It is striking that there is so much political and legal ferment around the
death penalty compared to the lifer issue. Currently about 3,300 people are under
sentence of death in the United States. But most of these individuals will die in prison
either of suicide or natural causes, not from lethal injection. Meanwhile, we have been
nonchalantly condemning tens of thousands of people to the other death penalty with
barely a legal or political whimper.

In conclusion, I presume that some of you in this audience might be thinking
that this discussion has been far too idealistic. You may be thinking that, realistically,
nobody is going to touch the lifer issue, even though the economic crisis has helped
bring us to the brink of considering all kinds of reforms to reduce the penal
population, some of which were shunned in the recent past. In response, I would like
to end here by quoting a well-known criminologist, Hugo Adam Bedau:

It is not the task of penal reform to present the public whatever it will accept.
The task rather is to argue for punitive policy that is humane, feasible, and
effective, whatever the crime and whatever the offender, and regardless of the
current climate of public opinion.

Thank you.
DON’T LET A GOOD ECONOMIC CRISIS GO TO WASTE: AN OPPORTUNITY FOR WHOLESALE CORRECTIONS REFORM

Michael Barrett*
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Article Based on Address at the
Culture & Politics of Incarceration Symposium: April 6, 2011

Times change and so does the palatability of previously unaccepted ideas. In other words, policies are seldom good or bad as much as they are timely or untimely. Indeed what was once considered impractical or ill-advised can very well become tomorrow’s panacea to bridge a budget gap or provide a corrective response to an emerging negative trend. Conversely, long-held policies believed to be inextricably linked to a desired result can erode over time in the face of undeniable truths to the contrary, the availability of more effective and less costly alternatives, or simply an inability to afford the status quo. And, in the rarest of circumstances, each of these causes can exist at once, creating a perfect-storm-like justification for reform. Such is the case with respect to the policies of mass incarceration.

I. The Politics and Economics of Incarceration

To point out that state governments from coast to coast are coping with historical budget gaps and grim revenue projections would be to take another whack at the proverbial dead horse. As of June 2011, 42 states and the District of Columbia have closed or are working to close $103 billion in deficits for fiscal year 2012. And some two-dozen states have already projected shortfalls totaling $46 billion for 2013.¹ To make matters worse, these dire straits come on the heels of the sobering shortfalls dealt with in 2009 through 2011 ($430 billion in total), creating a multi-year economic span that has been accurately and disdainfully described as “the worst in our lifetime” and “not since the Great Depression.”²

For states, there is no easy approach to regaining stable fiscal footing. Unlike the dubious luxury enjoyed by Congress, the laws of all but one state (Vermont) require their respective legislatures to pass a balanced budget to ensure that spending

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¹ McNichol, Elizabeth et al., States Continue to Feel Recession’s Impact. CENTER ON BUDGET AND POLICY PRIORITIES, March 9, 2011 (updated June 17, 2011).

² Id.
occurs within annual revenue limits. And while budget analysts are adept at making even significant adjustments from year to year to compensate for unexpected declines, the current disparities between existing commitments and projected revenues are so dramatic that even some of the most protected programs, traditionally immune from the occasional cut, now present the best opportunity to balance a state budget.

And after Medicaid and education, corrections is quite often a state’s largest expenditure. For instance, when it comes to state operations, the Department of Correctional Services is New York’s largest executive agency with an annual budget of more than $2.5 billion. The State of Florida has the third largest corrections system in the country, also with an annual budget of around $2.4 billion. And California, plagued with a $25 billion budget deficit, has a corrections’ budget of more than $9 billion. But even more staggering than the size of these budgets is the rate at which they have continued to grow, even during the last decade. One study revealed that prison spending has outpaced all other sectors with the exception of only Medicaid.

With budget reductions all but inevitable, corrections officials find themselves in the unenviable position of deciding how cuts should be apportioned. Two possible approaches come to mind, each in stark contrast to the other. The first is to simply decrease existing efforts to whatever degree needed to accommodate the amount of the specific cut, leaving the existing operational framework and programmatic policies in place. This strategy evinces a continued belief that the current system is achieving optimal results, colloquially getting the most “bang for the buck,” and that prays for better days ahead that will permit full restoration of current policies.

The more courageous approach is to recognize that the present economy, struggling to limp out of a debilitating recession, might well present a unique opportunity to abandon traditional criminal justice policies for a more data-driven and resource-conscience methodology. That while the system may be without much in the way of financial resources, perhaps the state of things can generate a currency with even greater purchasing power - political cover; id est, justification that allows one to seriously contemplate ideas once considered taboo in criminal justice circles.

No one capitalized on this dynamic better than Franklin Delano Roosevelt. The thirty-second President of the United States came into office in the throes of the Great Depression and immediately used the country’s rampant financial despair to

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3 Some states are required to pass only balanced budgets by their constitution, others by statute and some by way of judicial decision. Thirteen states, however, are permitted to carry unavoidable deficits into the next fiscal year for resolution. See National Conference of State Legislatures, State Balanced Budget Requirements, April 12, 1999, available at http://www.ncsl.org/default.aspx?tabid=12660; see also Ronald K. Snell, State Balanced Budget Requirements: Provisions and Practice, NATIONAL CONFERENCE OF STATE LEGISLATURES (1996).


5 Testimony of Brian Fischer, Commissioner, New York State Department of Correctional Services, Before the Joint Legislative Fiscal Committee, January 27, 2009; Florida Department of Corrections website, available at http://www.dc.state.fl.us/about.html; see California Department of Corrections and Rehabilitation website, available at http://www.cdcr.ca.gov/Budget/index.html.


7 The Great Depression began in 1929 and lasted throughout the 1930s. Unemployment in the United States rose to 25%, President Roosevelt argued that a restructuring of the economy was required to prevent another depression.
urge a series of large-scale social and economic measures. Fifteen bills in total were sent to Congress in the first one-hundred days of his Presidency, each substantial enough to require a long-term political fight under normal circumstances, but Congress passed them all with only faint objection in what became known as The New Deal.\(^8\)

For far too long, criminal justice policy has, by contrast, been guided by other than economic concerns, relying instead on the political prompting of human emotions into a collective belief that incarceration on a grand scale will lead to safe streets. In this regard, most honor Senator Barry Goldwater as the father of the “tough on crime” movement, the first to embrace rhetoric calculated to exploit the growing lawlessness and anti-government sentiment that emerged during the 1960s in order to conjure fear into middle-class voters.\(^9\) Richard Nixon latched on to the theme during the 1968 presidential campaign and, from then on, “tough on crime”-speak has been a staple for campaigns at every level.

So-called “tough on crime” pledges resonate well with voters and for good reason. Protecting the public is quite possibly the greatest obligation government has to its citizenry. And there have been some serious crime problems for which few seemed to have a solution; one of the most significant being the urban crack epidemic of the 1980s and the associated violence that stems from drug sales. Plainly, people did not feel safe and they desperately wanted answers. Elected officials were, in turn, feeling the pressure. Their response: Build prisons.

For many legislators and governors, building prisons was a well-intentioned approach to improve public safety. While prisons are expensive, so are crime and the negative economic impact it has on communities. For others, building prisons was a must. Take Mario Cuomo, Governor of New York from 1983 to 1994. Mario Cuomo was a liberal Democrat who inherited the harshest drug laws in the country from Governor Nelson Rockefeller.\(^10\) Enacted in 1973, the Rockefeller Drug laws provided mandatory minimum sentences of 15 to life for anyone possessing 4 ounces or more of an illegal narcotic or selling 2 ounces or more.\(^11\)

Governor Cuomo was against mandatory minimums, but with the country captivated by President Reagan’s “war on drugs” and New York City’s rising crime rate, the politics of the day would hardly permit a softening of the drug laws. This left Governor Cuomo without much in the way of alternatives for dealing with the now doubled prison population that followed passage of the Rockefeller Drug Laws. But

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\(^8\) New Deal programs were aimed at stimulating demand and creating jobs through government spending and financial reforms. Many of these policies/programs remain today, including the Federal Depositors Insurance Corporation, which provided depositor insurance of up to $250,000 and the Security, and Exchange Commission, which regulates Wall Street.


\(^10\) Nelson A. Rockefeller served as New York Governor from 1959 to 1973 and later as the 41\(^{st}\) Vice President of the United States from 1974-1977.

\(^11\) Two major set of reforms followed that lessened the harshness of these laws, one under Republic Governor George Pataki (Drug Law Reform Act, 2004 N.Y. Laws Ch. 738) and later by Democrat Governor David Paterson (2009 N.Y. Laws Ch. 56.). In his first State of the State address in 2009, Governor Paterson said: “I can’t think of a criminal justice strategy that has been more unsuccessful than the Rockefeller drug laws.”
more than being against mandatory minimums, Governor Cuomo was anti-death penalty and calculated that building prisons might shield him from accusations of being "weak on crime." During the course of his tenure Mario Cuomo ended up creating more prison beds than all of his predecessors combined, at a cost of $7 billion. Later he called it "stupid" and "a waste."\(^\text{12}\)

Adding fuel to the fire of the increasing prison population was the onslaught of three-strike laws. From 1993 to 1996, 23 states passed laws that provided mandatory and lengthy prison sentences for individuals with three felony convictions, often crafted so that little effort was made to distinguish among offenders and the severity of their felony offenses.\(^\text{13}\) Collectively, mandatory sentencing statutes helped grow the prison population 13 times faster than the general population. In the 1990s alone, the number of people in prison increased by more than half a million. There are now more than 2.2 million Americans behind bars, generating costs of more than $68 billion annually - 300% more than 25 years ago.\(^\text{14}\)

Some will argue that it worked, that incarcerating to such levels is what led to the decrease in crime. In his book *Why Crime Rates Fell*, John Conklin concluded that up to half of the overall crime reduction was due to more people in prison. "When lawmakers responded to the crime wave by building prisons and mandating tough sentences," he argued, "the number of prisoners increased and the number of crimes fell."\(^\text{15}\) Some data, however, indicate otherwise; while crime fell in most states during the past decade, some states with the largest crime reductions have also experienced significant reductions in prison population as well. During the past seven years, Florida’s incarceration rate increased 16% while New York’s decreased 16%; yet crime in New York fell twice that in Florida.\(^\text{16}\)

There is no question that incarceration to such an extent will have at least some positive impact on public safety. But to argue this point to the extreme would be to point out its flaw – that the more people get locked up, the fewer there are to pay for it. And this is the direction that the system has been headed for the past few decades, until recently when it became widely apparent that the current policies are unsustainable.

A more telling inquiry is whether mass incarceration is the most effective way to lower the crime rate; perhaps not, considering that in most states, more than 50% of inmates are returned within two to three years following their release. A study of former inmates released from state prisons in 1994 found that 67% committed at least

16 Newt Gingrich, supra.
one new crime within the following three years.\textsuperscript{17} Such poor recidivism rates might suggest that prison does not prevent crime as much as it merely delays it. And while this “delay effect” has benefit, particularly for those who accept the “aging out” principle of criminal behavior, it may not be sufficient on its own to justify the cost of the system.

The remaining justification for prison is both straightforward and easily understood. Removing someone from society, for however long, prevents him or her from victimizing again for that period of time. Then there are the relative virtues of delivering an offender’s just desserts for his crime along with the hope of deterring future bad conduct.

But the ramifications of incarceration should also be acknowledged and fully considered before determining whether it is appropriate in any given case. For one, prison removes whatever positive factors might exist in a person’s life, however limited they may be, including family, church, school, \textit{et cetera}. Instead, the individual is placed in an environment where they are entirely surrounded by the criminal element for a period of years, forced to become a citizen of a “criminal community” where individuals become more violent, teach each other skills of the trade, and come to entirely disassociate themselves from society’s rules and expectations.

With a failure rate of more than half, one cannot help but conclude that a great many of these offenders may have been better dealt with through community corrections but have been nonetheless incarcerated and made much worse as a result. As Roger Graef put it: “[i]f they go in for modest offenses, and emerge angrier and better skilled both at heavier crimes and avoiding detection, prison will not have ‘worked for the rest of us’.”\textsuperscript{18} With this in mind, prison must be viewed as an unfortunate necessity for those who cannot benefit from an alternative, as well as in cases where incarceration is essential to protect public safety. Sentencing authorities must therefore keep in mind that a more judicious use of this expensive resource will not only generate cost savings, it will improve public safety outcomes by avoiding the inadvertent criminal education of low to moderate-risk offenders.

\section*{II. Leveraging Fiscal Concerns to Improve the System}

Alternative strategies have been surfacing in the last half-decade in the ordinary course, but during the last several years these ideas have been propelled into the fore as a result of the staggering economy, even in some of the more conservative states traditionally opposed to corrections reform. What has made these ideas particularly viable is the promise that they will not only help address state deficits but also have the added potential to produce better public safety outcomes at the same time. As Sue Urahn, Managing Director for the Pew Center on the States, put it: "[c]orrections is one area [states] can cut and still have good or better outcomes … ."\textsuperscript{19}


\textsuperscript{18} Roger Graef, \textit{Prison does not work. We know that. So why do we send more and more there?} GUARDIAN OF LONDON, February 2, 2001.

\textsuperscript{19} Solomon Moore, \textit{supra}.
The following examines several of these strategies; a package of reforms that, if implemented, can achieve better results and reduce costs.

**A. Rewrite the Criminal Code**

For states looking to drive down costs by more effectively utilizing incarceration, a worthwhile (and cost free) first step is to rewrite the criminal code.

Whenever someone moves into a new home, begins putting things away for the first time in the cupboard or a bedroom closet, efforts tend to be both focused and deliberate. Items are not hung randomly or set down in haste; rather, there is a rationale to it. Organization is valued, as is efficiency; shirts on the left, pants on the right, and so on. But, over time something happens. Days pass, new items are purchased, old ones are put away in a rush or even tossed on the floor. And then one day, almost unexpectedly, the state of things has become a mess. Such is often the case with respect to a state’s criminal code.

At the time the penal laws were first drafted, there was a scheme, regardless of what it was; there was a coherency to it, a structure; meaningful gradations, an appreciation for proportionality. But year after year of amendment upon legislative amendment, together with subdivisions of exceptions followed by an exception to those very same exceptions a year or so later, has turned some penal codes into a hodge-podge set of laws and procedures.

Often what precipitates a change to the criminal law is the occurrence of some horrific event that prompts an area legislator to conclude that either there is a loophole in current law or that the existing punishment for a particular offense is not severe enough. In any event, a bill is then drafted covering the specific fact scenario that transpired and, quite regularly, much more. On its face, the legislation may be a logical response to particular conduct, but drafted in a vacuum without paying mind to the overall schematic may further erode whatever coherency remains. And since penal law amendments typically come in the form of harsher penalties rather than more lenient ones, each additional enactment has the added effect of raising the penalty bar by which all future criminal legislation will come to be measured.

Statutory housecleaning presents an opportunity both to remove certain crimes that no longer require criminal enforcement and to reevaluate the existing penalties for certain other offenses, based on present-day standards and priorities. Several states have initiated efforts toward this end, often through the work of a temporary or permanent sentencing commission. In other instances, pleas to revise a state's criminal laws have been prompted by economic woes. The Commissioner of the New Hampshire Department of Corrections faced with imminent and significant budget cuts, asked lawmakers to examine which crimes really deserve time behind bars. He argued: "[o]ur theft statutes, the threshold dollar amount for going from a misdemeanor to a felony crime is $500. That was set 31 years ago. What $500 was 31 years ago is a lot different from what it would equate to today."20

Such issues are hardly unique to New Hampshire. In Washington State, suspended-driver-license crimes constitute as much as “one third of the total misdemeanor caseload” with more than 100,000 prosecutions every year.21

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20 Ari Shapiro, *States Seek to Save by Avoiding Jail Time*. NATIONAL PUBLIC RADIO, March 19, 2009, quoting William Wren, the commissioner of the New Hampshire Department of Corrections.

21 *Id.* quoting Bob Boruchowitz, visiting law professor at Seattle University.
concern, the vigorous prosecution of those who drive with a suspended license may be a failed prioritization of prosecutorial and correctional resources. And while prosecutors are only fulfilling their responsibility, relieving them from that obligation may be a wise investment. If certain offenses are reduced to a level where they no longer carry incarceration as a potential penalty, it significantly reduces the economic burden on the system, to include the need to appoint defense counsel at the expense of the taxpayers. And much like any thorough cleansing, code revisers might be surprised to learn what is to be discovered. Even in the progressive State of New York, the maximum penalty for speeding remains at 15 days in jail and adultery still carries a potential punishment of six months incarceration.22

Indeed, it is time to revise or even rewrite the criminal laws as a strategy to reduce costs and provide for a more judicious use of the prison system. A thoughtful and comprehensive revision of the criminal code will also provide an opportunity to implement a new theme, one based on a modern paradigm that prioritizes resources and leverages what has been learned in criminal justice since the time the penal law was first drafted.

B. An Informed and Empowered Judiciary

The role of a learned judge is to thoughtfully utilize discretion within the bounds of the law to effectuate the proper administration of justice. At odds with meeting this obligation is an uninformed judiciary whose discretion is further curtailed each year by well-intended legislation that often falls short of its mark.

To reverse course, two controlling principles should be incorporated throughout any revised criminal code: one, ensure that judges are equipped with the full extent of information needed to reach appropriate sentencing decisions for any given offender and, two, provide the latitude needed to impose such decisions. In so doing, it should be stressed that prison is a costly resource that is best reserved for those who pose an actual danger. Retributive and punitive principles should be tempered, particularly for non-violent and low-risk offenders, with the importance of requiring the least intrusive sentence that will protect public safety and avoid further criminal behavior. These are indeed competing interests, a difficult balance to achieve, but one that Lord Lane CJ summed up quite nicely:

[S]entencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal.23

Imagine if everyone who went to see a physician was then admitted to a hospital. Without question, hospitals would be terribly over-crowded, health care costs would be unfathomable, and the general population would not be any healthier as result. What is more, those in desperate need of round-the-clock care would have a decreased chance for survival because hospital personnel would be forced to also care for those who should never have been admitted. Such a model would be inconceivable, preposterous even in the medical construct, where economic controls

22 See N.Y. VEH. & Traf. LAW § 1800(b); NY Penal LAW § 255.17.
seek to maximize costly and limited resources so that the level of care provided is precisely what is needed to achieve patient health and safety.

With safety and other protective objectives shared by both medicine and criminal justice, should not the judge be as informed as the physician who is guided by a patient’s family health history (i.e., criminal history), a present-day health assessment (substance abuse and mental health assessment), the current condition (instant offense), the likelihood of compliance with a recommended treatment plan (pre-sentence report) and the symptoms presented (risk and needs assessment). In other words, to achieve optimal results, judges should be provided with the tools needed to respond to the offender, not simply the crime, and the discretion to prescribe an appropriate sentence as if it were the means to treat the offender.

So then, what is unique about public safety that has led to such a divergent model? There are a few notable distinctions. Unlike a plea offer made by an elected prosecutor or a sentence ordered by a judge in a high-profile case, a physician's course of treatment on a patient is rarely subjected to outside scrutiny. And public perception does not dictate a physician's ability to retain his or her position every four or so years. Rather, they are permitted to operate as professionals, guided by a keen knowledge of their field, appropriate pressures to “do no harm,” and restrictions to protect against wasting valuable resources.

Conversely, judges might very well know from their daily experience with criminal charges and defendants of all varieties what the appropriate outcome should be in a given case, but may not be free to act on it. Instead they are curtailed by limitations at every turn, legislative mandates that require prison solely based on the crime of conviction. While a judge may wish to entertain a less severe and costly sentence after considering factors such as employment, age, and other mitigating circumstances including the level of involvement in the crime (i.e., accessory or primary actor), the judge is instead left to choose the least offensive of the remaining alternatives.

This medical system analogy, while growing tiresome, should not be taken to mean that incarceration is not a useful option, one that is no doubt preferable in many cases and necessary in others. To the contrary, facilitating a comprehensive view of any given offender might justify significant incarceration, even beyond what a judge or prosecutor might have otherwise been inclined to require. That said, if courts are needlessly forced to incarcerate non-violent, low-risk individuals because of mandatory sentencing laws, it will take away from the very resources needed to effectively program and house those inmates who are most in need of lengthy incarceration.

Equipping judges with the information and discretion enjoyed by their physician analogs will provide the most effective model for right-sizing prison populations, reducing costs and achieving greater public safety outcomes. Toward this end, legislatures should provide statewide guidance to judges by defining, in statute, the information that should be considered before imposing a sentence (e.g., criminal history, mental health and risk assessments), as opposed to legislating a narrow scope of sentencing options.

C. The Benefits of Early Release Statutes

In cases where an offender receives incarceration as part of a sentence, either by a judge or through the plea bargaining process, a more challenging determination is then required: how much incarceration is appropriate to punish the offender and to
meaningfully decrease the likelihood that the inmate will reoffend upon release? While the aforementioned factors provide a valuable guide, it may be impossible to sentence with any regular degree of precision. Would five years be adequate? Or is five-and-a-half years needed? It is difficult to tell. What is certain is that a system predominately inclined to favor the additional six months will cost the state millions without a correlative increase in public safety. Conversely, opting for a somewhat shorter sentence in enough cases could yield significant cost savings that may be re-appropriated toward efforts with proven public safety benefits.

But how would a judge know whether a particular offender requires just the five years or whether the extra six months is needed? While the judge may know a good deal about the offender's past, how the offender performs during incarceration remains very much unknown. A more prudent approach would be to hold the decision on the extra six months, or however long, in abeyance in order to get a better sense of how the inmate behaves while under custody.

In this regard, many states, to one degree or another, allow for early release for “good time.” While the amount of time that can be reduced from one’s sentence varies by state, “good time” generally does not require an inmate to be exceptional; it is merely earned by not acquiring a substantial disciplinary record. In other words, credit is typically given for compliance rather than achievement.24

While incentivizing compliance is commendable, particularly for someone incarcerated as a result of his or her bad conduct, there is something more to be said for whatever affirmative steps can be taken to improve an inmate’s achievement quotient. Whether it is through earning a general equivalency diploma, learning a trade or fulfilling a long-term commitment to aid terminally ill inmates, a growing number of states provide for additional time off of either the minimum or maximum sentence for merit-based achievement of objective criteria. Not only do such statutes provide incentives to earn early release, they also improve inmate compliance because a significant disciplinary record may render an inmate ineligible for a merit program.

Moreover, successful completion of educational and vocational programs increases the likelihood that individuals will succeed once they are released. Such programs make the formerly incarcerated more employable, and they enhance an offender's ability to remain employed because they have learned how to take direction and complete a task. Merit-time credit toward early release also can be given for completion of required programming targeted at the very deficiencies that may have precipitated the criminal conduct in the first instance (e.g., anger management, financial education, etc); as such, early release programs, if appropriately assigned, carry the potential to reduce criminal behavior.

One of the primary obstacles to enacting and then utilizing early release statutes are the political realities that are at play. Because of the number of offenders who could potentially benefit from early release, there will always be circumstances where an inmate is released early but then commits some form of egregious crime soon after. In early 2011, Brandon Johnson, age 24, shot and killed Jeremiah Johnson, 17, when he otherwise should have still been in prison if not but for New Jersey's

24 In many states, “good time” provides for an automatic reduction in sentence when the inmate is not otherwise being disciplined for violating prison rules. Most often, “good time” exists under determinate sentencing schemes.
early release statute. When this occurs, it should come as little surprise that opponents of early release statutes, both new and old, began calling for their repeal. For many, such statutes are already perceived as "pro-inmate" legislation. And while they are to a degree, the larger beneficiary is calculated to be the public, which benefits from inmates who are, by and large, better prepared to return as a law-abiding, and ultimately tax-paying, citizens.

Of course, it is difficult to prove whether an offender would commit the same or similar offense six months later had they remained in prison. Regardless, it is understandable when legislators, upon learning of such an event, take whatever steps they can so that it does not occur again. A less myopic approach, however, is to remain committed to systematic improvements designed to enhance public safety outcomes statewide. Notwithstanding, the New Jersey early release law was repealed by Governor Chris Christie despite the fact that only 22 of the 363 prisoners released under the program (6%) were later arrested for new crimes. To achieve overall gains, horrific yet isolated occurrences will need to be endured without acting upon the impulse to repeal whichever statute or policy was perceived to be the cause.

But there is still room to be prudent. For those states that have merit-type programs, efforts should be made to examine the failure rate for those who participated and earned early release. The return rate for these offenders should be compared to a control group. If the program is showing equal or better outcomes, consideration should be given to expand either the eligibility of the program (e.g., to certain violent or repeat offenders) or the criteria that would give rise to early release (e.g., additional educational or vocational achievement). For those states that do not yet authorize reduced sentences beyond "good time," a narrowly crafted merit time statute may be a good first step. And for those states that are not achieving overall success with an existing early release statute, a study should be undertaken to identify the characteristics of those offenders who did not fare well so that they are excluded from eligibility going forward or so that other adjustments can be made.

D. Partnering With Community Organizations

The old saying is true: when the only tool you have is a hammer, every problem tends to look like a nail. For too long, it has been about arrest and incarceration, simply because law enforcement and prisons were, by and large, the only tools available.

One of the reasons New York State (particularly New York City) was able to steadily reduce its crime rate while also decreasing its prison population was because, to borrow a financial term, it diversified. Without question, law enforcement

26 Id.
27 See Federal Bureau of Investigation, Uniform Crime Report for 2009, May 24, 2010, available at: http://www2.fbi.gov/ucr/cius2009/index.html. Murders in New York City went from 2,245 in 1990 to just 466 in 2009 (with an increase in population). In New York City, there was a near 40% drop in violent crime. Overall, there were 136,619 fewer index crimes reported in New York State in 2009 than 10 years earlier (the eight crimes the FBI uses to produce its annual crime index: willful homicide; forcible rape; robbery; burglary; aggravated assault; larceny; motor vehicle theft and arson). And during the last 10 years, New York also consistently decreased its prison population by almost 20%. In 1999, the prison population was at 71,500 and, by 2010, the prison population had fallen to 58,000.
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strategies such as ComSTAT\textsuperscript{28} played a critical role; that being said, steps were also taken to supplement traditional law enforcement efforts by increasing the availability and use of drug courts and building a robust network of community organizations that provide services to those involved in the criminal justice system. These services include vocational training, substance abuse treatment, job placement, educational services, anger management, parenting and financial classes, as well as helping individuals apply for Medicaid so they can get the medicine needed to cope with schizophrenia or other health or mental health concerns. While assisting offenders meet their underlying needs is humane, doing so also reduces their likelihood of re-offending.

One example of how law enforcement can partner with a community non-profit is in the re-entry context. Consider this: The first six months after someone is released from prison is the riskiest period in terms of the likelihood that someone will commit another offense,\textsuperscript{29} a time that requires the most intense supervision. But, the reality for many, if not most states is that parole is an overworked agency with high caseloads, declining budgets and tremendous responsibility. Parole makes great effort to conduct targeted home visits, and also meets with parolees as much as once a week or sometimes as little as once a month. While this is meaningful, it hardly rises to the level of what the ordinary person perceives when they hear that someone is “under supervision.” In other words, it is not as if parolees are being followed by their parole officer throughout the day.

And this is precisely how a community provider can play a supportive role, whether it is through an educational program or a transitional employment program. While nobody considers providing transitional employment a law enforcement responsibility, despite the fact that it can have meaningful public safety gains,\textsuperscript{30} parole can certainly make a referral to an organization that does. In fact, criminal justice dollars can be used to subsidize an employer’s costs for hiring someone with a criminal record. Once a parolee is placed on a transitional job, instead of simply checking in with his parole officer once every week or so, the individual is actually being supervised for eight hours a day by someone who knows that the participant is on parole. A carefully crafted partnership would require the organization to contact parole in the event the parolee does not show or behaves poorly at work. Not only can such programs assist participating parolees develop skills and learn to be self-sufficient, but also keeping the offender occupied for sustained periods of time on a positive task and maintaining open lines of communication with parole will facilitate an effective prioritization of critical supervision resources. This is a strategy that can yield improved re-entry outcomes.

\textsuperscript{28} CompStat (or COMPuter STATistics) is the New York City Police Department’s dynamic approach to crime reduction that uses Geographic Information Systems as well as timely and reliable crime data to effectively deploy personnel and other resources.

\textsuperscript{29} The Bureau of Justice Statistics studied 272,111 inmates from 15 states for a period of 3 years from and found that individuals recidivated at greater rates during the first six months following release.

\textsuperscript{30} One analysis of Illinois data collected in 2001 and 2002 found that 43% of those who violated the conditions of their supervision were unemployed at the time of the violation; see Council on State Governments’ Justice Center, \textit{Understanding Why Released Prisoners are Reoffending: Recommendation D}, \textit{ReENTRY POLICY COUNCIL}, June 25, 2011, available at: http://reentrpolicy.org/Report/PartI/ChapterI-A/POLICYSTATEMENT2/Recommendation2-D.
To be sure, the deplorable failure rate for those released from prison has been the primary catalyst for the re-entry movement of the early 2000s. After all, reoffending means greater victimization. Not all crime, but the vast majority of offenses typically involves one person victimizing another in some form. Then there is cost – generally between twenty and forty-thousand dollars annually to incarcerate each inmate.\(^{31}\) In California, costs are even higher (more than $47,000 annually per inmate).\(^{32}\) Taking these two factors together, the high cost and the high failure rate, it is not surprising that many states have placed as many eggs as they can in the re-entry basket in order to reduce crime.

And for a number of states, this age of re-entry has entered a period of anxiety and desperation. Much like prison, re-entry efforts are costly and resource-intensive, and funding entities have paid close attention to make sure that outcomes are being achieved. And the patience that once existed, providing time to develop effective strategies and collaborate amongst stakeholders, is waning. In states that have not attained their respective one-, two- or even three-year goals, skeptics and budget analysts are beginning to vocalize their discontent. Regrettably, poor results coupled with a continued perception by some that re-entry is something other than a core public safety function, may result in large-scale re-entry efforts fading in the rearview mirror.

Perhaps the greatest obstacle to better results is not one that can be overcome by even the most well-funded re-entry program. With approximately 650,000 individuals released from prison each year (more than seven million from local jails), there are simply too many individuals to be concerned about.\(^{33}\) This number is, quite candidly, unmanageable. While re-entry efforts and strategies are important, critically important, in order to realize any significant reduction in the return rates, the number of individuals who require re-entry services must be considerably reduced. This can be achieved by taking the re-entry paradigm, which is administered on the back end following release, and apply it to the front end to avoid having to make the release.

With a bi-partisan embrace of re-entry efforts now several years old, it is hardly the most cutting-edge strategy for changing the politics of incarceration. Replacing it should be a call for no-entry, or efforts made to avoid incarcerating offenders who can be appropriately addressed through community corrections. While this is a logical next step, it requires policy-makers to abandon the desire to incarcerate in so many cases.

Much like re-entry, however, front-end strategies require effective partnerships between probation departments and local non-profits that operate alternative to incarceration (ATI) programs. Though these programs have many similarities (they both provide many of the same services and have similar goals), the key difference is that the former seeks to avoid a return to incarceration and the latter aims to prevent incarceration in the first instance.

Consider the following scenario as an example of how an ATI program can partner with probation to adequately respond to an offender in the community: when

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someone is arraigned on a drug charge, the judge has to make a preliminary but critical determination - whether to release the defendant on his own recognizance until his next court date, to remand without bail to county lockup, or to set bail and, if so, at what amount. In many instances, the judge finds herself, not surprisingly, on the proverbial fence. Because it is a non-violent charge, the judge may first be inclined to release the individual. However, since it is a drug charge, the judge may be concerned that the individual might be addicted and, if released, may use again and/or sell to support his habit. Therefore, no one would blame the judge if she errs on the side of caution and decides to remand and set bail.

One factor that may tip the scales in the other direction is if an ATI provider is present in court and offers to accept the defendant. The program representative might assure the judge that he will return with the defendant at the next court date and, in the interim, will regularly update the probation authority as to how the defendant is doing in treatment, if/when he has relapsed, as well as any other relevant information such as outstanding child support payments and the efforts being made in that regard. With these protective measures in place, a judge may be inclined to avoid pre-disposition incarceration. More important, however, is when it comes time for sentencing following a conviction. If the individual is making progress with the ATI and is moving toward self-sufficiency and recovery, a judge may not want to reverse on these successes; instead of ordering a sentence of jail or prison, she may require probation and continued participation in the programming (with a threat of incarceration following failure to incentivize success). This demonstrates how a local non-profit can make the difference between addressing the underlying problem precipitating criminal conduct and a sentence of incarceration.

In order to reserve finite law enforcement and corrections resources for those who most require them, traditional public safety organizations must increasingly welcome the support of community providers both in terms of reducing an offender’s likelihood of re-offense following release from prison and avoiding incarceration altogether. Again, this is not about a need to stop incarcerating or that all efforts should be made to keep offenders in the community. Rather, if local non-profits can effectively partner with probation and parole to address needs and reduce risk, more intensive efforts can be targeted on those who pose the greatest danger.

E. Implementing a Comprehensive System of Graduated Responses

Earlier mention of the abhorrent recidivism rates requires some nuance. For those who are returned to prison following their release, not all do so on account of having committed a new crime. In New York, for example, where recidivism rates are somewhat lower (approximately 40% of individuals are re-incarcerated within three years of their release), only about 10% return for committing a new felony. The remaining 30% are returned for violating a condition of their parole supervision.34 Therefore, one of the greatest opportunities to reduce the prison population is how the parole system responds to a parolee who violates the conditions of their supervision.

Not only can this strategy bring about considerable savings and better results, it does not require legislation or considerable economic investment.

When someone leaves prison and is placed on parole, there are two ways the parolee can be returned to prison: being convicted of a new crime or violating one of the conditions of parole. Conditions vary from state to state but generally come in one of two forms: general conditions – rules that apply to all parolees, such as staying drug free, obtaining employment, not fraternizing with other felons, maintaining a curfew, and making all scheduled meetings with their parole officer to name several. Then there are special conditions – rules that pertain to specific parolees based on individual circumstances (e.g., paying child support).

If a parolee violates one or more conditions of his or her parole, the parole officer is predominately faced with two options: do nothing in response to the technical violation under a theory that the conduct is, in and of itself, insufficient to warrant a return to prison, or violate and return. The first approach risks the parolee continuing to view the conditions of supervision as optional and unimportant to the transition from prison to the community. The latter, however, fails to appreciate any gains made in this regard, including obtaining employment or family reunification. A return to prison for violating only the “technical” conditions of parole may be, although not always, a non-judicious use of prison resources.

In light of this, what is needed is a comprehensive system of graduated responses; proportional steps taken by a parole officer following certain conduct by the parolee. This can involve enhanced supervision following a curfew violation, requiring the parolee to visit his parole officer twice a week instead of just the once. Or it can mean more frequent drug tests following a missed treatment appointment. Regardless, the response should take into consideration the specific condition violated as well as the circumstances of individual parolee (e.g., risk).

Any such system could be deployed through a simple chart that has both an “x” and “y” axis. One axis will be the individual’s risk level – whether they are low, medium, or high risk. The other should be the condition that was violated (i.e., each condition should be assigned a severity level which is then plotted on the chart). Where these two axes intersect should suggest the appropriate response. The chart should also take into consideration the length of time someone has been on parole (which can be incorporated into the “risk” axis), under the theory that if someone is three months from the end of their parole supervision, they should not be returned for a relatively minor violation; whereas, a medium-risk individual who has only been on parole a few months and tests positive for drugs after refusing to attend treatment should receive a more severe response.

However the system is administered, it is important that it not be called “graduated sanctions” as some are prone to do, simply because it is not always about bad behavior. Too often it is all about punishment in the face of bad behavior and never about rewards when there is sufficient good behavior. Rewards, which can be even more effective than punishment in certain circumstances, can take the form of increasing a parolee’s curfew from nine to ten p.m. following six months of compliance with all conditions, or being allowed to travel outside the county to visit relatives following sustained employment for a given period of time.

Many parole officers may respond by saying, “well, I already do these things.” While that may be the case, not many states utilize a standardized system for administering these responses. Rather, intermediate sanctions tend to vary from office to office and even officer to officer, creating erratic return rates throughout the state.
Moreover, officers tend to rely on one or two preferred sanctions rather than utilizing a host of responses that are carefully aligned with an individual’s risk level. While this is a logical approach to reducing the number of returns for technical violations, there are challenges to implementing such a system that have to do with both the culture and politics of parole. Parole officers may view any newly developed system as replacing their discretion; that the chart is being used instead of relying on the judgment of someone who has been supervising felons for seven, 10 or maybe even 20 years. Not so. Many parole officers are expert in preventing serious crimes by parolees simply because they acted on certain intangible factors that exist with respect to a given parolee; factors that cannot be placed on some chart. As such, a parole officer’s experience should not be ignored. Toward that end, the chart would be the general rule. If other factors are present that indicate to the parole officer that something other than the suggested response is required, so be it. But in order to promote uniformity and further scrutinize the use of incarceration, any deviations from the chart should be approved by a supervisor.

Then there are the politics. A progressive but thoughtful state parole director may be inclined to implement a graduated response system, but might also be mindful of the following scenario: a parole officer follows the chart and makes the decision not to re-incarcerate a parolee following a violation; however, that parolee then commits a violent or other significant offense. This type of incident is enough to cause the entire graduated response system to be called into question (and the parole director may very well be looking for other employment).

In order to effectively implement a sustainable graduated response system, policy-makers should take great strides to communicate the goals that are trying to be accomplished with the necessary stakeholders. This includes elected officials, law enforcement, and representatives from the victim community to name but a few. It should be a frank discussion that makes clear that this process is not an exact science, but rather a tool designed to improve overall public safety by effectively utilizing resources and promoting the transition of offenders back into society. Officials need to have a certain level of comfort with the initiative so that the policy is judged on the whole and a few anomalies do not result in a reversal of course.

**III. Conclusion**

In the past few years, many traditionally “tough on crime” states have adopted new correctional policies as a way to address budget gaps, and have experienced better outcomes as a result.

In 2005, research showed that Texas prisons were being overwhelmed by offenders who could have received an alternative treatment to incarceration. The state legislature was faced with a decision to either spend half a billion to house 17,000 new prisoners or spend less than half that amount to reduce the prison population through treatment programs. They wisely decided to set aside 10,000 beds for substance abuse and mental health programs for probationers, parolees and prisoners. Not only is the prison population decreasing as a result, major crimes have decreased 3% and overall crime has dropped 10% from 2004, reaching its lowest rate since 1973. And, with respect to parole violations, Texas has seen a 25% drop in the
number of people returned to prison while on parole. Moreover, these reforms are forecast to save $2 billion in prison costs over five years.\footnote{Cindy Horswell, Texas Cuts Costs Amid Prison Reform: New Treatment Programs Credited as Prison Population Slows, HOUSTON CHRONICLE, December 15, 2009; see also Newt Gingrich, supra.}

South Carolina also began to make efforts to reserve prison for violent criminals by punishing low-risk offenders through community corrections. As a result, the state is expected to save $175 million in prison construction in just one year and $60 million in operating costs over the next several years.\footnote{Id.} Whatever the motivation – whether it is fiscal, a belief in rehabilitation, or a combination of the two – the emerging bipartisan perspective is that the policy of mass incarceration is unsustainable and requires significant change. With states facing significant budget gaps with little relief in sight, elected officials of every persuasion are demonstrating a willingness to get “smart on crime” rather than be “tough on crime.”

In the last year, conservative Newt Gingrich and Pat Nolan, together with like-minded others,\footnote{Id. Signatories also included former Attorney General Ed Meese, former drug czar Asa Hutchinson, David Keene of the American Conservative Union, John Dilulio of the University of Pennsylvania, Grover Norquist of Americans for Tax Reform and Richard Viguerie of ConservativeHQ.com.} sent a letter to Republican lawmakers across the country communicating the belief that “we can keep the public safe, while spending fewer tax dollars, if we spend them more effectively.” Echoing this notion, Former Arkansas Governor and one-time Republican candidate for President Mike Huckabee said that we have to “stop locking up those we are mad at and start locking up those we're afraid of”\footnote{2007 GOP Presidential Forum at Morgan State University. September 27, 2007.} – if for no other reason than to close some budget deficits.
THE POLITICS OF SILENCE:
A VAST GLOBAL RESERVOIR OF SEXUAL ABUSE

Kenneth Wooden*
Founder & President Emeritus, Child Lures Prevention

Address to the Culture & Politics of Incarceration Symposium:
April 6, 2011

Let me tell you about my claim to fame in law enforcement. I came back from Korea. I wanted to go to college. I was inspired by soldiers, who were graduates of major universities. But I missed the G.I. Bill and had to wait a year. I worked in a steel mill and was laid off. But I was in the Army Reserves, the criminal investigation detachment. My commanding officer was the commanding officer of the New Jersey State police and he told me: “Wooden, you’d be good to take an exam to become a fingerprint classifier.” I became number one in the state where my work on classifying fingerprints resulted in the capture of Willy Porter, an escaped murderer. What really led me to what I do today was that I classified fingerprints every Thursday afternoon on applicants who wanted to drive school buses in the state of New Jersey. My efforts led to the capture of up to a dozen child molesters who had applied to drive school busses. This sparked a keen interest in the subject of sexual offenders. Then being married and having three daughters I became very interested in protecting my children. So this is the background to a serious passion.

I made a commitment when I wrote Weeping in the Playtime of Others¹ that I would have no loyalty to any political institution or to any politician. I would have no loyalty except to the kids on whom I was going to report. I reaffirmed that pledge in a hangar in Dover Air Force Base when they brought the 276 children that I emotionally adopted who were murdered by the Rev. Jim Jones in Guyana in 1978. Standing before 276 wooden crates I knew how the political system from the White House to the statehouse to Hollywood kept those kids in that jungle, even though there were warnings from the State Department. It is hard to get their pictures out of my mind because a colleague of mine at NBC who was killed down there recorded their faces the night before they were murdered.

The politics of silence.

I got in the see the head of the FBI. He thought it was a public relations thing. No, I wanted them to show me the pictures of those dead children so that we with the NBC film could identify their bodies and give them a burial. Give them back to their loved ones. Instead they are buried in a mass grave in Oakland California. The FBI could have provided the pictures. Silence to this day.

When I started investigating kids and institutions I did it with a little emotion because I was a certified juvenile delinquent. I stole cars. I was arrested at gunpoint.

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My IQ was listed as 78. I saw it in print. My wife thinks it's still accurate from time to time and a little inflated. What would you do with a guy who threw a brick through a school window? What would you do with a guy who with his gang collected Christmas trees hundreds and hundreds of them and torched them near a used chemical plant? What would you do with a guy who broke and entered hotels and machine shops? But I want you to remember that brick that I threw through my school window because I will speak about some solutions for kids who are in institutions at the end of this presentation.

So with that as the introduction, let us discuss the politics of science. I want to challenge you. When I was a teacher I used to say to my kids, “Separate facts from opinions.” I will share some opinions to challenge you and some facts. And I am very fond of lawyers, I like the one who said to me, “Facts are ornery little critters, but with facts we can change.” What I want to change is the number of kids going into institutions.

I became a history student. I loved Gen. MacArthur, although I didn't like his politics. But he had a military strategy. Instead of using young people to charge in a frontal attack and then to end up in body bags, his goal was to cut off the supplies and let the enemy rot. Compared to other generals, he had fewer casualties. What I want to do is to end the supply to the institutions of non-criminal children.

I'm no softy, but I am an advocate for kids who have committed no crimes when my book was published in Russia, a doctor of law wrote me that it's amazing in America; kids can be locked up for acting out but not adults. Wouldn’t it be interesting if we would start locking up adults for acting out? I know three governors, a former president, members of Congress, the Senate who could be accused of acting out. But, the kids go to prison.

The premise of my work is it is a vast economic industry. I said when I wrote my book that it is an industry, making a lot of money, and I was criticized for that: “Sensationalism!” I love that word now, because for me the interpretation of that word is “denial.” Was it sensational back then when I testified before the Congress in 1977 and the Champus committee and we saved the American taxpayers hundreds of millions of dollars from facilities that were set up to “treat” kids?

In 2009 two judges, Mark Ciavarella and Michael T. Conahan, of Pennsylvania, set up a private facility with a buddy that grossed in kickbacks $2.6 million. They named their yacht in Florida “Reel Justice.” I'm happy to report they are now in prison, but the Pennsylvania Supreme Court will not clean the records for thousands of the affected kids.

Aleksandr Solzhenitsyn, is one of my heroes. He came to Vermont after Russia told him to leave after he received the Nobel Prize for literature. He wrote in the Gulag Archipelago that the simple psychological methods to break the will and character of a prisoner are foul language, humiliation, sound, light, and punishment in solitary confinement. Of all the evils that Dr. Karl Menninger identified he underlined solitary confinement. All these noncriminal kids who were placed in solitary confinement for acting out are subject to awful punishment. But it leaves no marks on their bodies.

There is a little boy who committed no criminal acts but who served more time in Florida juvenile facilities than any other youngster. His mom was a patient in a mental institution she got pregnant and Leo Boatman was born. When he got out of prison with a rifle he went to a state park and killed two college students, one a
combat veteran from Afghanistan and the other a young lady who just won a scholarship to Europe to study medicine. He murdered both of them in cold blood. There were no marks on his body—the evil of solitary confinement. The crime reminded me of what Charles Manson wrote me, “You have seen me in the eyes of 10-year-olds, I was just an early warning.” Leo was just a sexual doormat for several of the volunteers who took care of him. He said he was a spittoon for the sex perverts.

There was a young man, in Florida born to a mom who was mentally challenged and had too many boyfriends. One boyfriend was a convicted felon who carried a Magnum 357 with him wherever he went. The young man as a little boy was active he would get up and run around the apartment. So with nylon fish line the boyfriend tied the boy’s penis to a chair so he would not run around. But, we “saved” him. Before he left the guy he got the boyfriend’s cat and put the cat toolbox and closed it. Here were early signs of aggression. But there was an alternative. His grandparents at age 60 decided they were going to raise him, through tough love. They required that he rigorously pursue his school studies and he was recognized as the most outstanding student in his class in a large school district in Florida. Not only that but the superintendent read a letter to the boy, “Congratulations. Your excellence in education is what this country needs. I salute you.” This letter was signed by Barack Obama, President of the United States.

These are two stories.

In cutting the supply route, I discovered that many of these kids in institutions were victims of sex abuse. It is there; it has been there for years. So when I was working for 60 Minutes I came across a newsletter by pedophiles, “The Lure of the Month.” They were exchanging lures with one another on how to lure kids, such as soap crayons where the kids will undress themselves. So I had this idea. My friend George Gallup and I were in the White House, presenting to President Reagan's deputy chief of staff and members of the Justice Department. So I make a presentation on addressing the lure of the month and was rejected because it sounded like I what I wanted was money so that I could interview perverts in jails. So I came home, I told my wife that they thought it was a lousy idea. She said, “No if they think it is a lousy idea it must be brilliant!” Thus, without any large federal grant and thanks to college students I traveled this country from Slippery Rock to Notre Dame to Michigan to state colleges, little community colleges and I funded a program called Child Lures. When I was at the colleges I would take time to go to the prisons and I interviewed thousands of inmates about the lures. After doing my research I provided a program for 20/20.

In an interview with a pedophile he told me how he seduced a little boy, videotaped the boy, sent the pictures out to businessmen, and pimped the kid for 400 bucks. He told me about picking up a businessman from Dearborn Michigan from a major automobile company, and how he took the guy into a motel bedroom, where sat a little boy forced to be there watching cartoons. The guy put his arm around the little boy and the little boy said, “I wished my daddy would do that more often.” If the daddy had done that, that would have been prevention.

After the program on 20/20 now the Secret Service and the State Department wanted the information. I gave it to them. After the passage of several years I am invited back to the White House, I am invited back to speak. I shared two comments. If predators are using the lures should not we be teaching our kids the lures and secondly, we should not nickel and dime prevention. Following this I received a
beautiful document from the White House excerpting my remarks but they censored
something. They had removed my request to not nickel and dime prevention.

We need to talk about an epidemic. This is not my word, but from the
American Medical Association in 1995 describing an epidemic of sexual assault
against women and children. To give you some idea of numbers there are 728,435
registered sex offenders that we know. Again, I want to cut the supply to institutions.
In their lifetime the average offender has 144 victims. With the advent of drugs for
erectile dysfunction, the lifetime has increased. For example, recently an 89-year-old
guy was arrested on his way to the Philippines with $6,000 in cash, sex toys, the
names of little girls in that country, and a hundred pounds of chocolate. So the
numbers are high.

No one knew about now deceased Dr. George Reardon in Connecticut, a
prominent individual. Somebody was remodeling his house a few months ago. In the
playroom were found slides of over 50,000 children that he ripped off. He said he
was doing a medical experiment. But now those kids are coming out and are suing the
hospital and others.

There is a vast reservoir of victims but they will be not talking about it. I
could stretch the imagination of Hollywood screenwriters on the horror in this country
by telling you what I know and what I have seen. I can make Hollywood look lame.
Do you know why little boys were not placed in the Mann Act? Fifty years had to go
by before the Congress decided to place little boys in the law. It took me a year from
1977 to 1978 to get Congress to do it. I thought it had been an oversight. But, no,
Mr. Hoover, along with high powerful members of Congress, did not want to include
boys in the Mann Act. Consider the silence of keeping boys out of the Mann Act.
How many victims, how much anger is in those victims?

Then there are family members of the victims and of the offenders who are
not talking about it. But, they add up to a huge number. I will give you the
ramifications. Why the silence? It is obvious, shame, fear, financial, denial, political,
and unwarranted guilt of the victims.

Now it’s beginning to surface. When MIT comes out with an editorial on
sexual assault awareness, stating that we should talk about the elephant in the room,
this is starting to surface. When Doonesbury comes out with a cartoon on sexual
assault in the military, you know it’s starting to surface. Doonesbury is using a
cartoon to educate the public.

In South Africa 25%, of all men say they have raped women. In India 53%,
children have experience some type of sexual abuse.

It is in the paper all the time now. I did not even bother to collect the articles
of sex abuse in group homes in New York City and upstate New York. I didn’t bother
to bring the articles on sex abuse in federally funded juvenile facilities around this
country. This evidence is in the paper day in and day out.

When I did the program on child lures for 20/20 they did not believe it was an
issue. I went to newspapers in rural America, suburban America, and urban America
and brought back clip files. The thickest clip file on issues was the one on the sexual
exploitation and rape of children and young teenagers. Our website\(^2\) has all the
research on how sex abuse affects mental health, teen pregnancies, runaways, alcohol
abuse, prostitution, suicide, among others. It is there.

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Now the recognition of human trafficking is becoming big in this country. But, it's always been there—kids running away from abusive situations at home are picked up and exploited by pimps. There is a huge industry of pimps in this country that live off runaway kids. But, the pimp is sacred; in all those prisons and with all those people filling the prisons, I have never seen a pimp in prison during my entire career. This is amazing.

Do we have a national policy? Is there a national policy dealing with the sexual abuse of children and its prevention? When I asked this question of members of Congress and various policy think tanks I was met with silence.

The current politics sees both sides rejecting the issue of a national policy. The lef t sees this as a right-wing issue and a challenge to the First Amendment. The right sees this as a state-level issue where the federal government should not get involved. So you have a Catch-22 and no national policy.

Cut the supply line to institutions. Cut the supply line to mental health facilities. Cut the supply line to teen suicide prevention.

In considering the power of the public survey, I offered to George Gallup that we want to use the Gallup poll like a crowbar. In the political world a poll gives you leverage. Right now they have discovered that almost 20% of women have been sexually assaulted in the Air Force. This finding blew the Air Force Chief of Staff away. It's amazing what we find. Gallup did a private survey for me called a tag poll. A tag poll is one that couples a question or two in a survey that is otherwise used to gauge public opinion on a national public figure. A few years ago there was a tag question on whether the survey respondent has been sexually abused. The finding was 1.3 million stating yes.

Back in 1992 I discovered that the Catholic Church was losing some large lawsuits that were not appealed. Since 1992 there has been a perfect storm in liability; there has been $7 billion in payments and more will be paid. But, I'll say this about the Catholic Church, right now, of all the institutions in America, it's the safest place for a kid to be because they have initiated a charter protect to kids. They have article 9 in that charter for outside auditors to come around to check to make sure they are doing prevention.

From my perspective prevention is a vaccine. It is like the cure for polio developed by Dr. Salk. He took a piece of the virus and created a vaccine that was injected in the body. Here it went to our immune system allowing the body to recognize the virus and to build a defense. In this simplified analogy, if we don't teach children how to recognize those that are grooming them, setting them up, and attacking them, then the polio of sexual abuse will be horrendous.

We always start off our program with kids and the parents with the statement of Louis Armstrong, “I'm here in the service of happiness.” I believe in this, with all the horror that I touched upon, I believe if we can protect the kids they can be happy. They should not have to live like Leo Boatman. We need alternatives that are credible.

I will give you a solution. When I was doing my research I went to a reform school of state New York called Industry and it was rape, pillage, and crime, the kids were out of control. So I went up there and I asked the teacher to look at their poetry. The teacher stated that they do not write poetry but they wrote letters to Santa Claus, hundreds and hundreds of letters to Santa Claus. Of course they wanted beer they wanted group sex they wanted pot. But they also wanted somebody within their family that they knew cared about them. And they wanted a trade.
I told you how I threw a brick through my high school window because that blackboard was an embarrassment to me. Before I went into the Army I was a laborer and I was taught how to lay bricks. I was taught how to lay cinderblock how to carry buckets of cement up a 40-foot ladder. Before I was drafted I built foundations, brick walls, and chimneys. My daughter wanted to do a biography on Dad. I took her to my hometown. I took her to the high school window where I threw the brick. I took her to the streetlight where I was arrested at gunpoint. I took her to the Catholic Church where I siphoned gas from Father Miller's Cadillac. And I took her to those buildings that I laid a foundation. I took her to those chimneys; I am proud of my bricklaying ability. Those chimneys are still standing 50 years later; the cement hasn't fallen out. If I get the Pulitzer Award, that would be wonderful. But, there is a pride in building something. You can't outsource good bricklayers, good carpenters. I think if we invest money in the solid trades, which we all need, there will be a pride. And instead of an institution, get a good uncle or grandparent.

I like Russian folk wisdom, there was a saying going around after Solzhenitsyn was forced to leave, “A hundred years from now people will ask, ‘who was Leonid Brezhnev?’ The answer will be, ‘Oh, he was some politician during the time of Solzhenitsyn.’” A hundred years from now I hope your name will be in that folk wisdom. I hope you take on the politics of silence.

I leave you with some Irish poetry, learned from my Mother who taught us this verse by O'Shaughnessy: “We are the music-makers, And we are the dreamers of dreams, Wandering by lone sea-breakers, And sitting by desolate streams. World-losers and world-forsakers for whom the pale moon gleams. Yet we are the movers and shakers, of the world forever, it seems. For each age is a dream that is dying, or one that is coming to birth.”

May your age have a dream that is coming to birth. Kill that silence and be a mover and shaker. I thank you.
THE IMPACT OF DRUG COURTS ON INCARCERATION

The Hon. Ray Price, Jr.,
Chief Justice of the Missouri Supreme Court

Address to the Culture & Politics of Incarceration Symposium:
April 6, 2011

Here's the problem, since 1980 we have attempted to incarcerate our way out of illegal drug use and crime in America. We have done this in two ways: first of all, we have increased the amount of law enforcement directed at drug policy and we have increased sentencing for drug abuse. Secondly we have adopted a series of sentencing priorities that focus on locking up repeat offenders for longer and longer terms.

We have heard the promises that our politicians have made, “You do the crime, you do the time. Three strikes and you’re out.” There have been a number of these types of promises and to a great extent these promises have been kept with some profound results. The total corrections population has increased roughly three times from 1982 to present. The total population behind bars has increased almost as much. This dramatic increase in the number of people we incarcerate comes at a great cost. In 1988 we spent $11.7 billion nationally on state corrections, in 2008 $47.3 billion was spent. This is a lot of money, but if the number of people being incarcerated is raised by a factor of three to four, there should likely be a similar increase in the amount being spent on corrections. Now if this worked, would that be a problem? Maybe not, maybe this would be a wonderful expenditure. But we must address the question: Did it work?

The number of people being incarcerated has gone essentially straight up from the 1980s to the present. But the population of the United States has risen only slightly by comparison. With crime rates, though there was a bit of an increase in the late 1980s to the mid-1990s. Then crime comes down a bit from the mid-1990s to today, but relative to the number of incarcerations and relative to the expense, there has been no noticeable effect upon crime rates. Certainly not any kind of effect one would want to be commensurate with that amount of people being incarcerated.

Stanford law professor Joan Petersilia framed this issue this way:

What we are seeing today is a growing recognition that our approach to dealing with convicted criminals is simply too costly. Not only is the price too high, but also the benefits are too low. The states now spend an estimated $50 billion on corrections annually, and the growth of these outlays over the past 20 years has outpaced budget increases for nearly all other essential government services, including transportation, higher education, and public assistance.1

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We can examine where these people come from by their arrests. The numbers of violent offenses in 1982 and 2008 (1,322,390 and 1,382,012, respectively) were relatively flat. The number of property offenses has actually slightly decreased for these years (11,652,000 in 1982 to 9,768,000 in 2008). But, there are roughly three times as many people arrested for drug offenses today compared to nearly thirty years ago (676,000 in 1982 to 1,841,200 in 2007). Another way to look at this is to compare drug arrests and prison population growth from 1980 to 2007; these numbers coincide in their increases.

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<thead>
<tr>
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<th>Drug Arrests</th>
<th>Prison Population</th>
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<tr>
<td>1980</td>
<td>580,900</td>
<td>612,000</td>
</tr>
<tr>
<td>2007</td>
<td>1,841,200</td>
<td>2,304,000</td>
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Drug Arrests As Percentage of All Arrests:

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<tr>
<th>Year</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>1980</td>
<td>5.5%</td>
</tr>
<tr>
<td>2006</td>
<td>13.14%</td>
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What we have been trying to do is incarcerate ourselves out of the drug problem and it has not worked.

The key measure in determining how we are doing in our corrections programs is recidivism. Recidivism is the number of people who are returned to the institution after they have been released. There are a number of ways one can count recidivism, such as with those who are rearrested. Another way is people who are reconvicted, and a third way is with those who are returned to the institution. Reports of recidivism vary by the length of time or the different number of years being examined after release from prison. With recidivism numbers though they are counted in varying ways, they are still tremendously high. For measures of recidivism at the national level we see that 67.5% of released individuals are rearrested within three years, 46.9% are reconvicted within three years. For drug offenders the re-arrest rate has increased from 1983 to 1994 from 50.4% to 66.7% respectively. Similarly this is the case for the reconviction rate, moving from 35.3% to 47%. These offenders are getting worse by being placed in jail.

In examining the Missouri numbers, this state has followed the same trend as the nation on this. In 1982, Missouri had almost 6,000 people incarcerated. By 2009 there were just over 30,000 people incarcerated, roughly a five-fold increase. Violent and nonviolent offenses grew pretty much hand-in-hand, half being violent, the other half non-violent. The nonviolent figures rose from 3,000 to 14,000 incarcerated offenders, imprisoned at great expense. In 1982 the state spent $55 million on the Department of Corrections budget. In 2010 the budget rose to around $665 million, representing a problem that has a huge price tag. In Missouri it costs approximately $16,800 per prisoner per year, thus the state is spending $233 million per year to incarcerate nonviolent offenders. This $16,800 number for Missouri is the marginal

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cost of incarceration; this does not include the cost of the penitentiary itself, i.e. the bricks and mortar.

In Missouri for new felony sentences in Missouri, in 1985 there were 9,467. This has increased to 27,431 in 2008. Felony sentences for drug offenses have increased in this time frame from 1,409 to 9,134. This represents a 548% increase compared to a 127% increase for non-drug sentences (8,058 in 1985 to 18,297 in 2008). Drug users are the people who are filling the Missouri penitentiary system, 13% of people in the Missouri penitentiaries are there for a direct drug conviction, 20% are there because of a probation violation for drugs, and 41% had active substance abuse when they showed up for incarceration. Thus, 74% of the people in Missouri prisons are there because of a drug related condition. This is not unique. The national studies run from 60 to 80% of the people in the prisons are there with a drug problem.

There is some good news about how to address such an increase in prison population and especially the numbers of drug offenders. What has been found in the research is that drug court participation results in lower recidivism rates at substantially lower costs. For this segment of the criminal population, which constitutes a huge segment, a better job can be done through drug courts. Consider the $16,800 marginal cost figure used for incarceration for a year in prisons and compare that to the cost of from $3,000 to $5,000 of direct expenditure per person for drug courts. If all the associated overhead for a drug court is added this becomes $7,000 to $8,000 per person. But, for a prison sentence the total overhead figure for the cost of incarceration is going to be in the $25,000 to $40,000 range per person. The use of drug courts then is substantially less expensive, largely because the offender is not inside an expensive penitentiary. The problem with penitentiaries is a huge facility that is very expensive, with personnel and energy costs along with the necessary food and health care for the prisoners. If one can deal with the offender outside of the expensive penitentiary it will be multiple times less expensive.

When there is an arrest of a drug offender or a person with a drug problem who is offending other criminal laws, they do not become invisible, something must be done with them. Yet, there have not been many options. One is option is to put them in prison; another is to place the offender on probation. We did a study in St. Louis. The St. Louis City Adult Felony Drug Court was trying to look at the cost of drug courts relative to probation. The drug court administrator in St. Louis a number of years ago called me saying he wanted to do a study and these studies are very expensive. But to obtain government financing there must be proof that these drug court programs work. Specifically he wanted to do a study on the cost of drug courts compared to probation, since in St. Louis those arrested for drugs or drug-related crimes likely received probation. This individual does not go to jail in St. Louis, but this is not what happens to most people in the rest of the state of Missouri. In Missouri there is disparity in sentencing among counties, for these crimes.

The study in St. Louis examined the difference between drug court and probation. For drug court there is still the cost of probation, with the cost of drug treatment layered on top, which costs a couple of thousand dollars. So, it should cost a couple of thousand dollars more per year for drug courts than for straight probation. But, the study found that in two years there was a $2,615 net savings per person going
through as opposed to the person placed on probation drug court, in four years there was a $7,707 net savings. For every dollar spent the state saved $6.32 for people who went to drug court. In determining these numbers, the study took into account the social security benefits for those who went through probation and for those who went through drug court and ran the numbers for government expenditures. Essentially where the savings came out was that the people who went to probation, without treatment, reoffended and were subsequently arrested and sent to prison. So, in one sense it is correct to say that the choice is still between treatment and incarceration. With probation the issue becomes whether the person is incarcerated immediately or after a couple of years, following unsuccessful results at probation. The bottom line is that if a person is not treated, that person does not kick the habit, and if the person does not kick the habit, that person goes to jail.

Considering recidivism in Missouri for non-violent offenders in Missouri, it is seen that 42% of nonviolent offenders are reincarcerated within two years of release; 52% of nonviolent offenders are reincarcerated within three years of release; and 58.5% of nonviolent offenders are reincarcerated within five years of release. More than one half of the people released from our penitentiaries are returned within five years. Is this the kind of success rate that society can live with? What that ultimately means is if someone is sentenced for more than three years they will probably be back in jail for the rest of their lifetime on an installment plan and the state will be paying $16,000 to $25,000 a year for the rest of their life.

For drug court graduates the rough figure is a 10% recidivism rate. There is a new computerized tracking system showing that for these drug court graduates are doing much better, in the 5% recidivism rate range for the first 18 months. As the numbers are extended for a longer period of time, the rate will be worse, but the rate will never get up to the rates for incarcerated non-violent offenders. Even for those who are terminated from drug court and do not graduate their recidivism rate is much lower at 15.2% than for the 21% recidivism rate for probationers within two years of completing probation and the 42% recidivism rate within two years for non-violent offenders who are sentenced to prison.

What is going on is clear. Treatment helps. Treatment might not be successful the first time. It might take two or three times through for treatment. But for offenders who are addicted to drugs if they cannot get off drugs that they will be a criminal justice problem forever.

So the bottom line is this, all criminals are not the same. What really is going on in the criminal justice system is a number of different populations of offenders, of different people with different problems. Here, one size does not fit all. For those offenders who are introduced to the justice system because of illegal drug use, the key thing to do is to treat them and that is the cheapest and most effective alternative. All other offenders need to have their characteristics assessed at the time they come into the system. A determination has to be made on the cheapest, most effective treatment for them and then treat accordingly. What is needed is a focused system of rehabilitation, treatment, and punishment for criminal offenders, and not a simplistic

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3 A Cost-Benefit Analysis of the St. Louis City Adult Felony Drug Court, Executive Summary provided to the St. Louis City Adult Felony Drug Court City of St. Louis 22nd Judicial Circuit. Institute of Applied Research St. Louis, Missouri (2004). http://www.iarstl.org/papers/SLFDCcostbenefitExecSum.pdf
concept, where the length of sentence alone is held to equate with justice and good
criminal justice policy.

In Missouri, recall that there are about 15,000 non-violent people in the prison
system, in drug court there are about 3,000 people a year. A prison holds around
1,500 to 2,000 people. So we have one-and-a-half to two prisons worth of people in
drug court. If the cost of a prison per year is eliminated, this saves a gross of $30
million. If they were imprisoned, there is roughly $45 million worth of people in drug
courts. The amount drug courts receive for this is about $5.7 million. Some of the
costs are absorbed by the probation and parole services of the Department of
Corrections. These costs will bring the total costs of drug courts to about $10 million.
So with even closing one penitentiary there is a net savings of $20 million for the
state.

We think we are servicing about half the population that would be able to be
treated by drug courts better than by incarceration, although we do not really know.
At some point as we go more deeply into this eligible population these numbers may
start to deteriorate. However, this has not yet happened, so the thought is that there is
a good way to go still into the drug court eligible population that we could expand the
court and have a cheaper, better result that would lead to a safer Missouri.

Some explanation of what drug courts do is warranted here. This is not a
complicated system. The offender is arrested. The prosecutor and defense attorney
decide that this person would be suitable for drug court because of the person’s
background, they approach the judge, and the judge may agree. The person is
assessed as to the conditions that have driven the individual into criminal difficulties.
It is determined what type of treatment the person needs. They start out on one of two
options, either go to residential or non-residential treatment, where every night they
have to go to individual or group counseling. They have to come to court once a
week. They will have two to three random drug tests a week. They will have trackers
who will come to their homes on a random basis, maybe once a week. This will
continue until they complete the first phase, which occurs when they are off drugs. In
the time of the first phase there will be reuse of drugs. This is just accepted. This is
not considered a relapse for the individual, because the person has not gotten off drugs
yet. When there is a reuse and they come to the judge with a dirty urine report,
generally they will be incarcerated for a night to two as a very quick and immediate
sanction. But they are not removed from the community and they continue with the
program. After a period of time the person transcends to phase two. The time they
must revisit court but less frequently. They do not have to go to the same level of
counseling. This will continue for about a year. The single greatest predictor of
success in drug courts is the length of time and treatment. It takes about a year to 18
months for a person to overcome their addictive activities. Generally this breaks
down into about six months to get clean and another six months to develop strategies
to avoid drug use for the rest of their life. That’s what drug courts do.

The same concept is starting to be applied now in DWI courts. The idea there is
the entry mechanism is a drinking while driving arrest. The entry is generally at the
third DWI, this is when it is a felony and the sentence is prison. Until an individual is
facing the prospect of incarceration, there tends not to be enough incentive for the
defendant to want to go through the DWI court and treatment.
This is a very hard experience for the addicted person, whether it is for drugs or for alcohol, to go through. One of the problems with drugs is the longer a person has used drugs, this physiologically increases the need for more and more drugs to stimulate the pleasure centers of the brain. Ultimately only drugs and more drugs will provide the addict the pleasure that normal experiences of life have provided. The individual’s pleasure path has been burned out with drugs, so when drugs are taken away during treatment these people essentially will be without pleasure for a period of time. This makes it difficult to get off drugs; nothing will make the addict happy except drugs. With treatment, when the former addict begins to sense pleasure from the activities in normal life, these people catch on to this as a wonderful thing. But it is very hard for the addict to go through treatment and entering into a regimented lifestyle.

Another variant of drug courts is family drug courts. With the family drug court instead of a criminal act bringing the person to the justice system, this may involve a parent whose child will be taken away from them because of the parent’s drug use. Instead of taking the child away permanently, the parents are given an option of going to drug court to clean themselves up and be able to keep the child. It is primarily for mothers who have children born with drugs in their system.

The same concept also applies to veterans coming home. The veterans court idea is a little broader than drug court because veteran’s problems are not only drugs. They can have other things that stem from the mental abuse and difficulties that the veterans had and came home with from their time in service.

There are two other kinds of courts that function along the same idea that we are working with in Missouri. One, are mental health courts, which are focusing not on the drug addiction but on a mental health problem. It is almost the opposite of drug courts. Though we get a lot of these people in drug courts what is found are those taking drugs to self-medicate for an underlying mental health problem. So as soon as they get off the drugs one finds that here is a real core problem that is a mental health problem that must also be dealt with. The other group are people who do not have drug problems but whose behavior is influenced by mental illness and what they do not do is stay on the medicines. If they stay on their medicines they can cope with society. If they stop taking their medicines they cannot. The course of involvement is to get that person into a situation where one can make sure they stay on their medications.

In the last kind of court I want talk about today are re-entry or reintegration courts. Here is the problem; the system puts somebody in prison, which presents a high risk of recidivism. Frequently what is going on is that they are not ready to be in society when they are released from prison. We have been spending all our money putting them in an expensive facility, so that we did not have the money to give them really effective drug treatment, education, job training skills, and paths of re-entry. What we really need to do is focus on these people as they are released from prison and allow them to come back to society and succeed. One of the problems is that for people who have alcohol or drug abuse, if they have not had treatment, just abstinence for the time they are in prison, this will not work. For example, we had a situation in St. Joseph, Missouri, for a 35-year-old man who was arrested for drunk driving just three hours after he was let out of prison. If a person has been let out of prison and
that individual has had a drinking or drug problem, where no treatment was provided, the minute the person is let out they want go out and party. So the idea of the reentry courts is if we spent a little more money when we let these people out, there will be a chance of avoiding the very high recidivism rates we have been experiencing.

Texas is one of the leading states in this effort to reform criminal sentencing. The Governor of Texas, Rick Perry, has this to say:

I believe we can take an approach that is both tough and smart ... [T]here are thousands of non-violent offenders in the system whose future we cannot ignore. Let’s focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again.\(^4\)

So the real chore for us is to understand that if 95 to 97% of the people we send to prison come out of prison, we should be concerned on what we want them to be like when they come out. Do we want them to be the same as they went in or do we want them to be better? If we want them to be better, then our focus needs to be on rehabilitating them instead of sending them to prison and spending all of our money keeping them in a very expensive facility.

Thank you.

Articles Selected for this Special Issue:
Beginning in 1980, the Federal Prison System would experience several isolated crises that would institutionalize its organizational culture and determine the identity of the organization. Unlike other historical events that are seen as external to the organization, these events would test the internal resolve of the organization’s leaders and staff, and would institutionalize correctional practices and cultural knowledge. Specifically, the historical sub-narrative of the Federal Prison Systems is interpreted and manifest in the organization’s struggle for identity. Cultural creation is indicated by marker events that begin in the 1980s and evolve the organization’s culture through a retro-organization lens, that is, the Mariel Boatlift, the events at USP Marion and sentencing reform emerge as events forming the argument, thesis and story of organizational (and cultural) self-creation.

It is common among scholars to view the institutional culture of corrections concomitant with changes in the politics of crime and sentencing, social change, and the unintended consequences of public policy (Austin & Krisbery, 1985; Caplow & Simon, 1999). From an institutional perspective, the culture of corrections reflects the convergence of transformations in the mechanisms of social control, and the dynamics of punishment and harshness within an evolving organizational field. More specifically, sociologists working in the tradition of institutional theory, explain the expansion of corrections as a result of its organization within a field of informal social controls that are “embedded in the everyday activities and interactions of civil society” (Garland, 2001, p.5). The culture of corrections is then interpreted as a unique American experience following the traditions of “penal welfarism” (Garland, 2001, p. 34) and status degradation (Whitman, 2003, p. 25).

Penal experts (Bennett, Dululio & Walters 1996; DiIulio & Piehl, 1991; Ruth & Reitz, 2003) also equate the emergent culture of corrections with an institutional response to perceived increases in crime, social outrage, and crime control aspirations. Viewed as problems of “external adaptation” (Schein, 2004, p. 17) or in terms of variables affecting homogenization of formal organizational structure, the institutionalization of correctional culture reveals the relationship between organizations and their environments and the expanding infrastructure of crime prevention and community safety (see DiMaggio and Powell, 1991 & Garland, 2002). For example, the imprisonment surge, according to Caplow and Simon (1999) is reflected in the “institutional organization” (p. 70) of the prison system in response to reflexivity in the justice system or the lack of effective brakes on its growth. Reflexivity described herein as “the tendency of institutions to be mobilized by the collateral consequences of their own purposeful actions” (Caplow & Simon, 1999, p. 97). The carceral expansion that began in the 1970’s is sufficiently documented and will continue to exert a powerful influence on corrections into the future. The formal organizations that emerged during that period, those currently populating the organizational field are similarly dependent on past and present cultural expectations

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within society and owe their legitimacy to adoption of similar organizational structure, rules, and procedures.

External variables notwithstanding, what appears to be missing from explanations of correctional culture is an historical narrative that re-creates the institutional dramas that imbue corrections with its organizational identity. An organizational identity narrative implicates organizations as the carrier and transmitter of ideas and practices producing a type of “sedimented knowledge” (Berger & Luckmann, 1967, p. 67) infusing the organization with value, purpose, and meaning. Such a narrative should seek to identify, establish, and interpret what Edgar Schein refers to as “originating” or “marker events,” or events that cause a group to come together for the purposes of cultural creation (2004, p. 64).

What follows is an organizational identity narrative of the Federal Prison System based on events beginning in the 1980s. It is the creative re-telling of the organizational dramas that shape the current character and content of the organization, and it is a narrative manifest in events that originate within the organization; events integrated into the organization’s cultural (i.e. events that are identity or world producing). Specifically, inmates received following the Mariel Boatlift, the routine violence at USP Marion, and the consequences of Federal sentencing reform are interpreted as events leading to the creation of the organization’s symbolic universe and institutional character. The individual character of the organization is, as Czarniawska (1997, p. 48) would suggest, plotted against the organization’s own life history. The formal organizational history of the Federal Prison System throughout the 1980s highlights processes of organizational expansion, evolving methods of correctional management, modernization of the prison system, and the development and evolution of inmate programs (see Roberts, 1994). The 1980s also marks the institutionalization of cultural for the Federal Prison System. It is a time when individual leadership and shared experiences would combine to solve the problems of “external adaptation and internal integration” (Schein, 2004, p. 225) giving the federal prison system its unique character and identity. Specific events have been chosen (dramatized) as catalysts in the organizational sense-making process and offer a tacit explanation for emergence of the institution’s self-evident knowledge and character.

In corrections, organizations are institutionalized to the extent that they produce homogenous and formal organizational structure and practices, contain rules and procedures for their operation and, have organizations populating the field that serve a legitimate social purpose and are recognized as serving such (see DiMaggio & Powell, 1991). Conversely, there is an organizational history which operates in the background and reflects the accumulated wisdom of practices that define the organization’s culture in terms of mission, purpose and identity. It is a history requiring us to “peer under the rim and look at what lies there, under the edge of an organizational reality which we are told is often clean, inviting and natural” (Burrell, 1997, p. 47). According to Edgar Schien “the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious” (p.8). Similarly, Barbara Czarniawska asserts an organization’s culture is revealed in “subnarratives” (1997, p. 46) in which organizational identity is created through

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1 According to Berger and Luckmann (1960, p. 96-97), the symbolic universe is an historical and social creation wherein institutional processes are integrated and social meaning is objectified. One might think of the events of the 1980s as the creation of the Federal Prison Systems symbolic character or biography.
narration. Organizational dramas, according to Czarniawska, create issues of topic and discussion that unmask an organization’s historical attempts at sense-making. These organizations are, according to Czarniawska, engaged in a quest for meaning in their life.

In the background, an organizational history tells us how the organization learns, produces strategies, accommodates change, adapts and responds as self-creator. The organization shapes the world and human lives, and organizing is seen as activity requiring justification, accountability, and knowledge. In a sense, organizations are a product of human action, discretion, and decision making; they are cognitive constructions and “collective sedimentations” (Berger & Luckmann, 1967, p. 69).

The following history is neither a full (re)telling of the Federal Prison System during the 1980s nor does it elaborate on all of the changes taking place during that time. Instead, events are isolated to provide the historical markers and the content for an organizational drama and re-creation of a narrative that reveals the modern identify of the institution (itself) beyond a collection of interrelated rules and routines, structures and procedures. In doing so I am mindful of Edward Hallet Carr’s provocation: “What is history?...it is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past.” (Carr, 1961, p. 35)

1980: Approaching Storms

Historically, the Bureau of Prisons has attempted to anticipate the direction in which the courts were moving and to modify its programs and operations accordingly. This enabled the organization to be proactive in many areas, such as inmate discipline, rather than waiting for the courts to tell us what to do.

Interview with Norman A. Carlson, Director
Bureau of Prisons
November 30, 1989

It is not clear nor could it be known for certain whether, upon accepting the position of fourth director for the Bureau of Prisons in 1970, Norman A. Carlson could have predicted the events of the 1980s. At the time of his appointment, the Bureau of Prisons was a system of 30 correctional facilities, 20,000 inmates, four regional offices, and a central office in Washington, D.C. In terms of bureaucratic longevity and identity, the organization was nascent having been formed by legislation enacted in 1936. From the time of his succession in 1987, during a period of 17 years, the Bureau of Prisons would expand to 55 facilities and over 44,000 inmates. Numbers alone do not represent the external challenges faced by a federal agency that had no other option but to repeatedly absorb an influx of federal offenders. Beginning in the 1980s, Blumstein and Beck (1999,) identified a combination of arrest rates (38%) and time served per commitment (44%) as the significant factors contributing to a yearly average increase of 9.6% in the federal prison population. Growth the authors claim invalidates the “basic thesis” that

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2 I have used the Federal Prison System and Bureau of Prisons interchangeably depending on the source material.
societies maintain a stable incarceration rate. The challenges confronting the Bureau of Prisons in the 1980s would not only measure the system’s tolerance for overcrowded facilities, it would also test the resolve of traditionally held theories of punishment, inmate behavior, and crisis management. The historical sub-narrative of the 1980s would also provide a chronology of events establishing and justifying the preventive detention of “excludables” and non-citizens, institutionalization of control units, and justification for the perpetual crisis of penal modernism. Perhaps more importantly, the decade beginning in the 1980s marks the beginning of an interpretative drama that transformed and shaped the currently recognized self-evident character of the organization and established its institutional identity.

Marielitos

The Mariel Cuban Boatlift officially began April 15, 1980 and ended October 31, 1980, with the arrival of over 125,000 Cubans to Southern Florida from the Port of Mariel in Cuba. More than 23,000 of the arriving Mariel Cubans revealed to INS officials previous criminal convictions. Many of those convictions were for offenses that would not ordinarily warrant detention, and the majority of Mariel Cubans were granted parole and released shortly after their arrival in the United States.

Program Statement No. 5111.03
(Federal Bureau of Prisons, 1999, p. 2)

In 1971, Federal Bureau of Prisons Director Norman Carlson appeared before a Senate Sub-Committee on National Penitentiaries to discuss the future role of the Bureau of Prisons. At the time, Carlson focused on increasing correctional programs for offenders, enhancing training for correctional staff, facilities improvement, and expanding community involvement in correctional programs, effectively pledging to “establish a comprehensive correctional program that would serve as a model for the nation” (“Future Role of the U.S. Bureau of Prisons,” 1971, p. 2). The years preceding 1970 had been a period of “stable growth” in prison populations. According to Roberts (1997, p. 6); “from the early 1940’s ... the inmate population in the BOP’s 25 to 30 facilities fluctuated within a narrow range of 17,000 to 25,000.” As the hearing concluded, Carlson remarked on the future of corrections: “As we enter the decade of the seventies, I believe the future never looked brighter. ... The progress that has been made is impressive ... [and] the public is becoming aware of the pressing requirement for correctional progress.” (“Future Role of U.S. Bureau of Prisons,” 1971, p.168).

By 1980, Carlson would recognize new variables affecting the stability and size of the federal prison population. Notably, Carlson recognized new judgeships created by Congress and implementation of the Speedy Trial Act as variables affecting an increase in the federal prison population. Nevertheless, Carlson appeared

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3 Cited in Blumstein and Beck (1999), the basic thesis is that societies maintain a stable incarceration rate, balancing the tolerance of marginal crimes against the fiscal and political cost associated with too large an incarceration rate.

4 Cited in the Washington Post (“Excludables,” 1987), the term ‘excludables’ was applied to Mariel Cuban immigrants who, because of prior criminal convictions, would not have been admitted to the United States under normal conditions. By 1987 it was estimated that approximately 4,000 ‘excludable’ Cuban aliens were in custody for crimes ranging from “fraud to drug trafficking and murder” (1987).

5 Immigration and Naturalization Service.
optimistic regarding the Bureau’s future and requested “no funds to initiate construction of new institutions or major modifications of existing institutions” (“Bureau of Prisons Fiscal Year 1980 Authorization,” 1979, p. 7). Carlson’s fiscal year appropriation requests (or rather lack of request) came in March 1980 approximately one month before the first flotilla of Mariel Cubans arrived in South Florida.

At first measure, the New York Times would report a “healthy cross section of émigrés” (“Healthy Cross Section of émigrés,” 1980, p. A14) arriving in South Florida. “Despite fears that the Cuban Government is sending its worst elements to the United States on the refugee flotilla to Key West, a screening of the 50,000 refugees who have landed shows a generally healthy and potentially productive cross-section of Cuban society.” (1980, p. A14) With initial fears of a transfer of Cuban prisoners to the United States allayed, the Bureau of Prisons could focus on its incremental goals to improve efficiency by developing alternatives to secure detention (i.e. half-way houses and prison camps), reducing recidivism through enhanced rehabilitation programs, and implementing a new system of inmate classification and designation.

As the decade of the 1980s progressed it became increasingly clear that the Cuban problem would represent the worst crisis in management the Bureau of Prisons would experience. By 1986, the number of Mariel Cubans indefinitely imprisoned in federal facilities was exacting a growing toll on the Government and on the prisoners, representing a potentially explosive situation for prison authorities. The most difficult situation to emerge, one that would erupt in violence and rioting, was at the United States Penitentiary in Atlanta where in 1986, 1,860 Mariel Cubans were reportedly being kept “like animals in cages” (Schmidt, 1986, p.A11). Earlier reports that the flotilla from the Port of Mariel contained a benign even productive cross-section of Cuban society gave way to frightening assessments describing Cuban detainees as “a group of dangerous criminals and mentally incompetent people” (Schmidt, 1986, p.A11). Between 1980 and 1986 the flood of Cuban immigrants had outpaced the ability of the Immigration and Naturalization Service (INS) to house them during processing. In 1981, the Bureau of Prisons would begin incarcerating undocumented Cubans at several of its facilities while paroling others. Complicating matters, new programs and procedures developed by the Bureau of Prisons could not be applied to Cuban inmates whose fates were unresolved. Perhaps the most difficult aspect was managing the Cuban detainees, a problem not anticipated by INS or the Bureau of Prisons. At any one time between 2,500 and 3,000 Cubans, having records of violence and mental instability, would remain incarcerated in federal prisons.

By 1984 the Reagan administration had identified 2,746 “excludables” (see “Excludables,”, 1987) it wanted to send home. Negotiation with the Castro government, while initially resulting in the repatriation of 201 Cubans hit a stalemate in May of 1985 and the remaining Cuban’s were “stuck” in federal prisons. The majority of Cubans were held at the Federal Detention Center in Oakdale, Louisiana, and the United States Penitentiary in Atlanta (see “Federal Prison Policy,” 1987). By 1987, the Washington Post reported the number of “excludables” exceeded 3,700 whose crimes ranged from fraud to drug trafficking to murder.

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6 According to various historical sources, approximately 210 of the most dangerous Cuban has been held in custody since their arrival in the United States. The majority of “excludables” where released (at some point in time) and were convicted of new crimes. After serving their sentences, they would have been deported, however, due to political issues with the Castro government these inmates remained in custody in a state of legal limbo. While exact numbers are not available (or could not be located), the
Trouble started on November 20, 1987. According to a Department of Justice spokesperson, Associate Attorney Stephen S. Trott, Cuban detainees learned on this date of the State Department’s agreement with the Cuban Government to reinstate deportation. (cited in McFadden, 1987, A.23) On Saturday morning, November 21, 1987, the day after the agreement was announced Cuban detainees at the Federal Detention Center in Oakdale began a disturbance in the cafeteria which quickly spread to the prison yard (“A Cuban Explosion,” 1987, p. 38). Cuban inmates began setting fires to out-buildings and seized 28 correctional officers and other employees as hostages. The following Monday morning (November 23), 2,400 Cuban inmates seized the United States Penitentiary in Atlanta, taking 94 hostages. The stand-off would last for eleven days.

There would be more than one crisis on J. Michael Quinlan’s agenda when he took over directorship of the Bureau of Prisons in the summer of 1987. Reportedly, Quinlan was hand-picked by Carlson who remarked about his successor: “He’s unflappable. He has a very good analytical mind and a very deliberate style of management. His hallmark is fairness.” (cited in Greenhouse, 1987, p. B9). Before Quinlan had been on the job five months, the twin uprisings of Cuban detainees in Oakdale and Atlanta would make all other issues secondary. Quinlan recognized that the problems in Oakdale and Atlanta were not the Bureau of Prisons making rather they reflected the consequences of policies set by the State Department and INS. Bureau facilities had simply become human warehouses operating at 50% over their design capacity and providing a location for the preventive detention of the fearful and desperate Cuban detainees.

Commenting on the Cuban problem in 1987 Director Carlson would express his exasperation with the Cuban detainees: “ … [as] the most difficult inmate population that I have encountered during my 30 year career in the field of correctional administration” (“Federal Prison Policy,” 1987, p. 4). Thirty years after the first flotilla of Cuban émigrés arrived from the Port of Mariel in south Florida, the federal government has yet to decide the fate of Mariel Cuban detainees residing in federal prisons (see Browning, 2005). In response to the lessons learned in Oakdale and Atlanta, the Bureau of Prisons developed crisis response policies and classification policies for housing Cuban and other offenders. Currently, the Bureau of Prisons limits the number of Mariel Cubans held at any one facility and the number of Cuban inmates held in a single housing unit (see Federal Bureau of Prisons, 2006; Federal Bureau of Prisons, 1999). The Federal Prison System also emerged not only as a location for containing criminality but would now be used to contain perceived threats to national security, the removal and exile of “excludables” from society, and as a symbol for the sovereign role of the federal government to initiate pre-emptive action against involuntary immigrants. Preventive detention, as it would turn out, would also become symbolic of the stultifera navis or the exclusion and exile of groups identified in risk assessments as threats to the social body.

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3,700 “excludables” mentioned by the Washington Post (“Excludables,” 1987) must have included a majority of released and re-admitted offenders.

7 Reference to the stultifera navis or ship of madmen (alternatively ship of fools) is taken from Michel Foucault’s first chapter of Madness and Civilization (1965). According to Foucault, the ship of fools symbolized the exclusion and enclosure of madness for purposes of both social utility and security (p. 11).
Marion

“Terrible Tom” Silverstein was accused of committing four grisly murders, all in federal prisons. One of the inmates he killed was Raymond “Cadillac” Smith, at the time the most powerful D.C. Black in prison. That killing alone had made Silverstein, a member of the Aryan Brotherhood, into a celebrity among white gang members. But it was the savage stabbing of a guard, Merle E. Clutts, at Marion in 1983 that so infuriated the Bureau that they put Silverstein under what was known as “no human contact,” the harshest conditions permitted by law.

The Hot House
(Earley, 1993, p. 121)

In 1980 the guards at the United States Penitentiary in Marion were losing control. USP Marion, which opened in 1964 approximately three months after the closing of Alcatraz, would define a new model for maximum security prisons identified in almost every article and television news segment as “the New Alcatraz.” Marion was characterized as: “History’s Most Dangerous Prison,” “The Toughest Prison in America” or “The House of Pain” (cited in Ward, 1994, p. 90). According to the Bureau of Prisons:

Between February 1980 and October 1983, there were 14 escape attempts, 10 group disturbances, 57 serious inmate-on-inmate assaults, 33 inmate assaults against staff, and 9 inmate murders at Marion. On October 22, 1983, two Marion officers were killed and two others seriously injured. A few days later an inmate was murdered, and a riot occurred in which five staff members were beaten. (DiIulio, 1990, p. 15)

While Marion created a public image of extreme punishment, the methods used to manage the Bureau’s most violent offenders did not involve any physical punishment.

Situated in rural Illinois, USP Marion was chosen as the site for the Bureau of Prisons new maximum security prison at the direction of then Director Myrl Alexander. In considering the site, Alexander emphasized the existence of a community environment for staff, the presence and interest of a major university (Southern Illinois University at Carbondale), the availability of federal land on the Crab Tree Orchard site, and economic need in the area. Belying the bucolic setting, Marion’s administrative design would differ from other penitentiaries and take over the mantel of change from Alcatraz Federal Prison. Accordingly USP Marion established its identity, purpose and mission in providing long term segregation within a highly controlled setting for inmates. Control unit administrative policies developed at Marion would eventually diffuse throughout the federal system. At issue was a balance between correctional programs, staff and inmate safety, civil liberties, inmate management, and the administration of a control unit.⁸

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⁸ The term “control unit” was first coined at United States Penitentiary (USP) at Marion, Illinois in 1972 and has come to designate a prison or part of a prison that operates under a “super-maximum security.” Control units may differ from each other in some details but all share certain defining features:

1. Prisoners in a control unit are kept in individual confinement between twenty-two and twenty-three hours a day with one period of exercise offered each day (up to five hours per
Prior to October 1983, USP Marion had operated with both a general population and control unit. However, on October 28, 1983, USP Marion would be placed on “lockdown,” the longest lockdown in Bureau of Prisons’ history in which the warden would institute control unit policies throughout the institution. A review of USP Marion’s policies and procedures occurred in 1984 by the House Judiciary Committee concerned with litigation initiated by prisoner rights advocates. In a forward to the report prepared by Chairman Peter W. Rodino, correctional management at USP Marion was described as involving competing interests:

USP Marion officials have claimed that the lockdown was and continues to be necessary to maintain order and to ensure the safety of staff and inmates...others have claimed that the lockdown has been unnecessarily harsh and that inmates have been denied access to religious services, to legal and necessary personal materials, to family and friends, and to minimal medical care. (“The United States Penitentiary Marion, Illinois,” 1984, Foreword p. iii).

Consultant David Ward was appointed by the Committee to report on the conditions at USP Marion. Ward documented a number of staff and inmate murders beginning in late September 1983 that reached critical mass on October 22, when three officers moving control unit inmate Thomas Silverstein from the shower to his cell, were attacked. With the help of another inmate Silverstein was able to remove his cuffs and obtain a “shiv,” stabbing Officer Merle Clutts 40 times. Four days later, inmate Jack Callison was stabbed to death and Warden Harold Miller placed all of the inmates at USP Marion on lockdown status.

After October 1983 USP Marion was converted to an “administrative” facility with control unit policies operating throughout the prison. According to a December 31, 1984, report prepared by Consultant Ward, “the United States Penitentiary at Marion, Illinois...[has] from October 27, 1983, and continuing to the present...been operated with most inmates locked in their cells approximately 23 hours each day. Reporting to the Committee on the Judiciary in the U.S. House of Representatives, Ward would summarize the history of Marion leading up to the facility lockdown in 1983.

According to Ward, in 1973 the Bureau of Prison returned to the policy of concentrating the most disruptive inmates not in one prison but in a special unit, a control unit at Marion:

In 1979, Marion became the Bureau’s only ‘level 6 penitentiary’ ...[and after 1983] converted the prison from an institution with only one control unit with other inmates congregating and moving in large groups to a ‘close, tightly-controlled, unitized’ institution for all inmates. (“The United States Penitentiary, Marion Illinois,” 1985, p. 2)
Responding to a congressional inquiry in the spring of 1987, Director Carlson would justify the existence of Marion: “[W]hile Marion is an atypical institution within the Federal Prison System, I am convinced that it fills an indispensable role. While conditions of confinement are admittedly more restrictive than at any other Federal institution, I am confident that those conditions are well within the boundaries of all applicable laws and court decisions and are necessary to insure the safety of inmates and staff.” (“Federal Prison Policy,” 1987, p. 8-9).

USP Marion represented a change, if not outright departure, from traditional methods of correctional management based on prisoner profiles. Ward reported on the changing demographics of inmates confined at USP Marion. The Marion prisoners, wrote Ward:

… are more assaultive toward staff than the Alcatraz inmates and why they are more likely to kill other inmates lies in a complex set of factors that related to changes ... in the character of crime, the emergence of powerful white, black and Hispanic gangs organized within prisons ... the dramatic growth of the drug trade and other changes in American society. (The United States Penitentiary Marion Illinois,” 1985, p. 33)

A year after the murder of two correctional officers, Ward recommended that prison officials attempt to normalize operations; “the Bureau of Prisons should not accept life in Marion as it is in the Fall, 1984, or as it has been during the past year but to try in as many areas as possible to find ways to improve the quality of life for inmates and working conditions for staff.” (p. 33) Prison officials expressed different concerns and viewed the emerging “control unit” policies and procedures at USP Marion as necessary and inevitable. Testifying before Congress, Director Carlson would summarize the Bureau of Prisons position at USP Marion: “In my opinion, Marion continues to operate as an effective institution that serves a critically important role in the Federal prisons system by housing the 350 most dangerous and predatory offenders of the nearly 42,000 total inmates we confine. ... I am convinced, based on experience in recent years, that Marion serves a disincentive for inmates in other intuitions who otherwise might engage in aggressive or predatory behavior.” (“Federal Prison Policy,” 1987, p. 4)

In the years after heightened security procedures went into effect at USP Marion, inmates filed a class action suit naming Director Norman A. Carlson as the defendant (Bruscino v. Carlson, 1987). They claimed that conditions at Marion violated the Eighth Amendment’s prohibition of cruel and unusual punishment. In a decision issued on February 24, 1987, the Federal District Court of Southern Illinois found that “the controls are a unitary and integrated system for dealing with the nation’s least corrigible inmates; piecemeal dismantling would destroy the system’s rationale and impair its efficacy.” In an endorsement of the Bruscino decision, the U.S. District Court of Appeals for the Seventh Circuit stated: “the plaintiffs described as cruel and unusual punishments ... procedures which were protecting them from murders and attacks by fellow prisoners.” While correctional experts debated the necessity of “control units” for managing aggressive, assaultive, and predatory inmates, the Bureau of Prisons’ experience at USP Marion would not be discarded but would become the rationale for expanding control unit policies to all Bureau of Prisons facilities. It was in terms of expansion and not retreat that the Bureau opened
ADX Florence in November 1994, passing the mantle of this status from USP Marion to the Bureau of Prisons first super-maximum facility.

Since its operational date in November 1994 ADX Florence has been known as the Alcatraz of the Rockies. The architectural design and administration of special housing units in the federal system has been modified based on the control unit model developed at USP Marion. Current classification procedures typically do not result in designation to an administrative control unit, however exceptions are made.

**Sentencing Reform**

In October 1980, the federal prison inmate population was 24,162 (about half its current size) and was less than 1 percent over capacity. In May 1989, the federal prison system had 48,017 prisoners confined in 70 federally operated facilities that were designed to house about 30,860. This means that federal prisons were operating at 56 percent over capacity.

GAO Report 1989
(“Prison Crowding,” 1989, p. 2)

Throughout the early 1980s, the American public was presented with a litany of stories and distortions about the rise in violent crime. The public became obsessed with crime and perceived it to be a major problem facing society. Specifically, the public became increasingly frustrated with high crime rates fueled by drug trafficking and violence, the failure of rehabilitation programs, and unfettered judicial discretion and sentencing variation9 (Donziger, 1996; Negel, 1990). At the time, public opinion polls ranked crime as the most important problem facing the country, leading both the economy and health care. No element had more impact on crime than the influx of drugs and much of the concern about crime related to the escalating drug crisis and to proliferation of drug-trafficking violence. No distinction was made between the growing fear of crime and actual crime rates. The public’s perception of rising crime rates was more a response to the media reporting on crime and the role of government and private industry stoking citizen fear than a response to actual crime rates. The growing fear of violent crime and criminal victimization had important policy implications. In a 1984 public opinion poll, 73% of the American people believed that crime had risen nationwide, when in fact it had declined by three percentage points (Donziger, 1996).

On October 12, 1984, the most broadly reaching reform of federal sentencing in this century became law with the passage of the Comprehensive Crime Control Act10 and establishment of the United States Sentencing Commission. The purpose of the Act was to “attack the tripartite problems of disparity, dishonesty, and for some offenses, excessive leniency, all seemingly made worse by a system of unfettered discretion” (Nagel, 1990, p. 883). Secondarily, support for sentence reform implied a connection between the perception of crime and defining a priority attributed to the

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9 Robert Martinson and Judge Marvin Frankel are identified by historians as leading proponents for sentencing reform. In 1974, Lipton, Martinson and Wilks, using meta-analysis, assessed evaluations of criminal rehabilitation programs between 1945 and 1967 in concluding: “With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism” (cited in Negal, 1990, p. 869). Judge Marvin Frankel was described as “an outspoken litigator and legal scholar whose views helped to establish sentencing guidelines for the federal courts” (Greenhouse, 2002, p.C15).

10 Public Law 98-473.
philosophy of penal reason. Consequently, deterrence in the form of mandatory minimum sentences was imposed for federal offenses. “The original Commission recognized ... that proportionate punishment can control crime through a deterrent effect” (“Introduction to the Sentencing Reform Act,” 2004, p. 13) and mandatory minimum sentences. Under the guidelines established by the Sentencing Commission, “parole will be abolished and sentenced offenders will serve their entire sentences.”

Appearing before the Judiciary Committee in 1979, Director Carlson commented on the progress the Bureau of Prison was making on reducing overcrowding. “At the present time,” Carlson reported, “we have eight new institutions under construction or design. These institutions have been funded by the Congress, and the majority of the projects have actually begun ... when the eight institutions under construction are completed and these two additional camps [Big Springs, Texas and Boron, California] are fully operational, the problem of overcrowding will be virtually eliminated.” (“Bureau of Prisons Fiscal Year 1980 Authorization,” 1979, p. 6) By 1987 however, it would become clear that the federal prison system did not have time to “absorb the shock” (“Prison Policy,” 1987, p. 1) of unintended and at times inconsistent changes in the federal prison population resulting from “prosecution policies” and “mandatory sentencing provisions” (1987, p.1). Delivering a prepared statement before the Committee on the Judiciary approximately 6 years after proclaiming a virtual end to overcrowding, Director Carlson would acknowledge the current challenges facing the Federal Bureau of Prisons. “Without question, the single most important issue we face in the Federal Bureau of Prisons today is the rapid increase in the inmate population and, the overcrowding that has come about as a result of the growth in population” (cited in “Prison Policy,” 1987, p. 3). The trend of increasing prison populations across both state and federal institutions would continue unabated throughout the 1980s (see table 1).

Table 1: Change in the State and Federal Prison and Local Jail Populations, 1980-1990

<table>
<thead>
<tr>
<th>Year</th>
<th>Federal &amp; State Prisons</th>
<th>Jails</th>
<th>Total</th>
<th>Annual % Change</th>
<th>% Change Since 1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>329,821</td>
<td>163,994</td>
<td>493,815</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1981</td>
<td>369,930</td>
<td>195,085</td>
<td>565,015</td>
<td>14.4</td>
<td>14.4</td>
</tr>
<tr>
<td>1982</td>
<td>413,806</td>
<td>209,582</td>
<td>623,388</td>
<td>10.3</td>
<td>26.2</td>
</tr>
<tr>
<td>1983</td>
<td>436,855</td>
<td>223,551</td>
<td>660,406</td>
<td>5.9</td>
<td>33.7</td>
</tr>
<tr>
<td>1984</td>
<td>462,002</td>
<td>234,500</td>
<td>696,502</td>
<td>5.5</td>
<td>41.0</td>
</tr>
<tr>
<td>1985</td>
<td>502,507</td>
<td>256,615</td>
<td>759,122</td>
<td>9.0</td>
<td>53.7</td>
</tr>
<tr>
<td>1986</td>
<td>544,972</td>
<td>274,444</td>
<td>819,416</td>
<td>7.9</td>
<td>65.9</td>
</tr>
<tr>
<td>1987</td>
<td>585,084</td>
<td>295,873</td>
<td>880,957</td>
<td>7.5</td>
<td>78.4</td>
</tr>
<tr>
<td>1988</td>
<td>627,600</td>
<td>343,569</td>
<td>971,169</td>
<td>10.2</td>
<td>96.7</td>
</tr>
<tr>
<td>1989</td>
<td>712,364</td>
<td>395,533</td>
<td>1,107,917</td>
<td>14.1</td>
<td>124.4</td>
</tr>
<tr>
<td>1990</td>
<td>773,919</td>
<td>405,320</td>
<td>1,179,239</td>
<td>6.4</td>
<td>138.8</td>
</tr>
</tbody>
</table>

U.S. Department of Justice, Bureau of Justice Statistics, 1994

In the fiscal year 1988, Congress allocated $165.4 million to the U.S. prison system with more to come. By 1989 the Bureau of Prisons reported expansion to 64,400 prison spaces at a cost of $1.8 billion or an average cost of $51,340 for each bed space. (“GAO Report,” 1989, p. 3) Director Quinlan commented on issues of overcrowding:
In federal prisons, overcrowding has meant a doubling up of prisoners at lower security facilities throughout the country and a conversion to television rooms into sleeping areas. The Bureau was [also] trying to take over abandoned military barracks, schools and mental hospitals to turn them into prisons. (Kerr, 1987, p. A1)

A number of descriptive indicators can be used to summarize the unprecedented expansion of the prison system during the 1980s. Of particular interest is the growth of the federal prison population compared with the rated capacity of prison facilities. In 1980, the federal prison population was 24,252. The Bureau of Prisons operated 48 facilities with a rated capacity of 24,678. As the prison population continued to expand throughout the 1980s, the Bureau of Prisons ability to maintain its rated capacity suffered. For example, between 1980 and 1990, the federal prison population increased from 24,252 to 54,613 or 55%. At the same time, the rated capacity for the Bureau of Prisons during the same time period increased from 24,678 to 33,646 or 26.6%. Discrepancy between the federal prison population and the rated capacity of its facilities, despite increased prison construction and conversion of military bases to prisons, worsened during the 1980s (see figure 1).\footnote{Data for Figure 1 was obtained from the U.S. Department of Justice Facilities Report (1990) and from Sourcebook of Criminal Justice Statistics (http://www.albany.edu/sourcebook/pdf/sb1999/sb1999-section6.pdf). The data represents inmates housed in Federal Bureau of Prisons facilities, excluding contract facilities. All data are for facility counts conducted on September 30th.}

![Population and Rated Capacity](image)

**Figure 1.** Bureau of Prisons inmate population growth during the decade beginning in 1980, and population growth compared with rated capacity of Bureau of Prisons facility during the same time period. Rated capacity represents the number of inmates that should be confined in permanent housing units.

Growth continued to define the criminal justice system through the 1980s. Growth occurred not only in the number of inmates, but in infrastructure and staff as well. The rapid growth in prison populations placed extreme pressure on the Federal Prison System as administrators sought Congressional relief from overcrowding. Among the recommendations were the use of diversion programs and new models for
infrastructure expansion. The explosion in the prison population, although not anticipated by Director Carlson in 1979, taxed the staff and facilities beyond intended limits, and placed inmates in less than desirable living conditions. With more offenders serving longer sentences, the Bureau of Prisons embarked on a number of management strategies to ameliorate overcrowding. Included in these efforts were improvements in the Bureau’s classification system, increasing bed space in pre-trial detention facilities, improving efficiencies in prisoner transportation systems, increasing the quality of inmate programs, expanding the use of information management systems, fostering strategic planning processes, exploring the use of military property expansion and expanding through a complex of new facilities. As the decade of the 1990’s approached, the Bureau of Prisons continued to pursue innovative programs to improve conditions for inmates and staff. Additionally, the Bureau of Prisons would address the image of corrections during its site selection and architecture for modern correctional facilities.

The Bureau of Prisons’ Federal Transfer Center (FTC) in Oklahoma City provides an example of the lessons learned during the 1980s and the converging trends on organizational efficiency, corrections management and intergovernmental relations. The Federal Transfer Center opened in March 1995 at a cost of $65 million and serves as the national hub for prisoners being transported to (and from) federal prisons by the Marshalls Service. FTC Oklahoma operates its own airfield where B-727’s carry in excess of 100 prisoners per day for court appearances, medical care, and designation to Bureau of Prisons facilities. The project manager for HTB Inc. of Oklahoma City commented on the building’s exterior: “It was very important to the Bureau that they be thought of as good neighbors. They wanted the building to be attractive to the community.” (cited in Parrott, 1995, p. A1)

Identity

In a sense, writes Gibson Burrell (1997, p.52) “organization studies tends to be kitsch because it ignores or, worse still, consciously hides that which is thought to be unacceptable in polite company.” Conversely, scholars emphasizing narrative approaches to organizational studies might look at what lies underneath the formal controls of modern organizations; they might look for the foundation of organizational knowledge, culture and self creation in stories that provide the organization with its ingrained dispositions and working ideologies. Beginning in 1980, the Federal Prison System would respond to external threats and internal challenges that would result in the accumulation of a social stock of knowledge objectifying its biographical and historical character (see Berger & Luckmann, 1967). Let’s be clear, the crises involving the Mariel Cubans, USP Marion, and sentencing reform were quite real and meaningful. These events provided a type of empirical knowledge about the organization and provided legitimacy to its formal organizational structure. Few might question the legitimate need for a control unit, risk reduction through the use of preventive detention or the punishment objectives of retribution and incapacitation. While we might be content with a “polite” understanding of organizational culture and self-creation, this narrative should be understood in terms of self-consciousness (organizational self-consciousness). The events of the 1980s provide a narrative map of how social knowledge and self-consciousness are integrated and how isolated events are translated into institutional knowledge and organizational identity. Returning to a theme introduced by Berger and Luckmann (1967), the events describe
here are organizational experiences requiring understanding and integration, and they
are events providing special access to the organizations world and institutional
processes. By exposing or interpreting these events as a narrative of cultural self-
creation, we might re-visit in critical fashion how we have come to understand
correctional organization.

In his seminal work, *Discipline and Punish*, Michel Foucault wrote about the
history of the modern prison system from the perspective of the body—the social
body. Punishment, according to Foucault required among other things a “closer penal
mapping of the social body” (1977, p. 78). The events of the 1980s meet the
requirements of a more precise mapping of criminality; the identification of
excludables, an economy of power found in the institutionalization of control unit
policies and procedures, and modification of correctional infrastructure to
accommodate an ever-growing inmate population. The events of the 1980s introduced
what Czarniawska referred to as an “institutional thought structure” (1997, p. 68) or
the mutual reinforcement that occurs between certain kinds of problems, the
organization, and procedures for addressing them. Accordingly, the events of the
1980s are cosmological and ontological in nature; that is, they implicate the
organization as both the creator and transmitter of culture. More specifically, the
events of the 1980s are perhaps more important than a formal organizational history
because they indicate self-creation and world-creation; they are instances defining the
process of self-knowledge and justification, instances when accountability and
meaning are bestowed on actions taken and, instances distinguishing the creation of
the organization’s modern identity.

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15.


“SUPERPREDATORS” AND “ANIMALS” – IMAGES AND CALIFORNIA’S “GET TOUGH ON CRIME” INITIATIVES

Beth Caldwell and Ellen C. Caldwell*

California is a trendsetter for criminal justice policy in the United States and incarcerates over 170,000 people in its prisons each year. The state’s initiative process, which allows citizens to vote directly on proposed changes to state law, has created policies that have expanded the state’s incarceration rates. California’s Three Strikes law, for example, was passed by California voters in 1994 and is the most punitive three strikes law in the country. Initiatives such as Three Strikes gained popular support through media campaigns that relied upon images and rhetoric to demonize “criminals” and to obscure the actual content of the proposed legal reforms. Images play a powerful role in shaping popular culture and political beliefs. This article explores the impact of images on California voters’ perceptions of criminals, and the resulting support of “get tough on crime” propositions within the state. Specific imagery that permeated the public sphere through magazines, campaign commercials, and local news broadcasts are analyzed in the relation to the original Three Strikes initiative, a proposed amendment to the Three Strikes initiative, and a juvenile crime act in order to highlight the influence of images on popular culture and on pop culture’s subsequent influence on criminal justice policy in California.

Images in the media shape popular culture and permeate the collective conscious such that political opinions and decisions are silently yet profoundly impacted by these images. Criminal justice policy in California, which leads the nation in incarceration trends (Abramsky, 2002; Christie, 2001; Gilmore, 2007), has been heavily influenced by popularized misconceptions which are widely believed despite contradictory, objective evidence. Representations of juvenile offenders and “criminals” as “superpredators” and “animals” have created a political climate in which the public almost blindly supports any “get tough on crime” legislation (Mauer, 1999). In the words of journalist Sasha Abramsky (2002), “[m]ass incarceration was born out of the popular will and has continued through popular demand” (p. xiv).

The influence of popular culture on politics is particularly apparent in California’s initiative process, which allows people to vote directly on proposed changes to state law. Originally championed by progressives as a mechanism for putting more power in the hands of voters, the initiative process has been criticized for its susceptibility to manipulation by campaigns that pour resources into advertising in order to pass laws that reflect the narrow interests of particular pressure groups. The initiative process has resulted in dramatic changes to California law that have fueled mass incarceration in the state.

This article explores the connections between images in the media and changes in the law that contribute to patterns of mass incarceration by analyzing three California propositions focused on criminal justice policy: California’s Three Strikes Law of 1994, the Gang Violence and Juvenile Crime Prevention Act of 2000, and a

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proposed amendment to the Three Strikes Law that was defeated in 2004. The results of these propositions have substantially increased California’s prison population.\(^1\)

Images subtly yet profoundly influence people’s world views. They are imprinted in people’s memories and, thus, impact beliefs and thought processes in a more powerful way than words.\(^2\) In a book about the influence of art on political conceptions, political scientist Murray Edelman (1995) explores the myriad of ways in which art impacts politics, noting that “together, art, the mind, and the situations in which they are applied construct and transform beliefs about the social world, defining problems and solutions, hopes and fears ... but for the most part they do so in a masked fashion, leaving the impression that these beliefs rest upon observation” (p. 5). Despite the important role of images in shaping popular beliefs, most people are unaware of their influence, especially when it comes to politics. This lack of awareness renders images even more powerful as they invisibly shape people’s beliefs. An analysis of images and the law highlights the fundamental relationship between the impact of images on popular culture and the influence of popular culture on criminal justice policy.

Specifically, this article focuses on how particular images have participated in popularizing a belief in false or misleading facts about issues relating to crime in California. These beliefs have, in turn, impacted voters’ decisions regarding initiatives that have had profound effects on the state’s prison population. The authors approach this topic from distinct perspectives, one rooted in art history and the other in law. The detailed analysis of the types of images that have shaped popular culture through the media is unique and adds an additional layer to the work of other academics who have analyzed the impact of rhetoric on criminal justice initiatives in California.\(^3\)

The imagery used to portray “victims” and “offenders” reinforces the portrayal of criminals as “others” and victims as “us.” History demonstrates that

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\(^1\)Twenty-five percent of California prisoners are serving enhanced sentences as a result of the Three Strikes Law, for example (Romano, 2010.). Although a statistical analysis of the impacts of Proposition 21 on the prison population in California is beyond the scope of this article, several provisions of the proposition allowed for more people to be sentenced to state prison population, and for longer sentences. For instance, the initiative added sentencing enhancements of up to ten years for gang related crimes, defined vandalism causing damages of over $400 as a felony punishable by up to three years in prison rather than a misdemeanor punishable by a maximum of one year in the County jail, allowed juvenile cases to be used as strikes for the purpose of sentencing enhancements in adult court, and broadened the circumstances under which juveniles are prosecuted as adults and thereafter are incarcerated in adult prisons.

\(^2\)Art historian Jonathan Gilmore (2002) discusses the unique influence of images in “Censorship, Autonomy, and Artistic Form,” using the example of the French Minister of Justice who, in 1835, “declared that Frenchmen have the right to circulate their opinions in published form, but insisted that “when opinions are converted into acts by the...exhibit of drawing, one addresses people brought together, one speaks to their eyes. That is more than the expression of an opinion: that is a deed, an action, a behavior.” …Here it is precisely the legibility of caricature, the transparency of its content to any untutored spectator’s eye, in which the danger inheres.” (p. 116). Gilmore quotes Le Moniteur Universel, 5 August 1835 (emphasis in the original). Cited in David S. Kerr, (2000). Caricature and French Political Caricature: 1830-1848, Oxford: Oxford University Press, p. 122.

\(^3\)Victor Rios (2008) analyzed the rhetoric surrounding the campaign for Proposition 21 in California, concluding that the words employed by campaign supporters used code words for race that constructed Black and Latino youth as juvenile offenders and tapped in to the public’s fear of crime. As this article will discuss, images that were prevalent in the local news at the time of Proposition 21 made the rhetoric even more powerful.
constructing this type of division contributes to the development of inhumane practices towards the group that has been defined as “other.” This depiction appeals to the public’s desire to neatly categorize people into “good” or “bad,” and to develop simple solutions to complex problems such as crime. This has led to bad public policy that is rooted in fear rather than facts (Glassner, 2009). It has also contributed to a crisis of prison overcrowding in the state of California that is wreaking havoc on the state’s economy, as well as upon the lives of hundreds of thousands of California residents.

**California’s Initiative Process**

California’s initiative process allows individuals to vote directly on ballot initiatives that propose changes to state law and is thus particularly susceptible to the influence of popular culture (Espiritu, 2005). In order to make informed decisions regarding these propositions, voters must read through complicated legal codes that are difficult for people unfamiliar with “legalese” to understand. Many do not take the time to do this. Even those who dedicate time to learning about the ballot initiatives are often still confused on voting day. California voters are thus particularly influenced by media images and campaigns when making decisions regarding propositions. The ballot itself generally includes a one-sentence summary of the proposed legislation. Often, decisions are made based upon this broad statement. Unconscious beliefs shaped by media representations factor strongly into this type of decision-making process. The influence of the media is heightened because politicians and powerful interest groups pour resources into media campaigns, as in the case of Proposition 187, which aimed to eliminate public services to undocumented immigrants in California and was supported by Governor Pete Wilson, who contributed $2 million towards the advertising campaign (Beckett, 1997; Chavez, 1998, 2; Ono & Sloop, 2002). Such media campaigns rely heavily upon images to shape people’s opinions and to frame their position regarding the issue on the ballot.

**California’s Three Strikes Law**

The history of the enactment of California’s Three Strikes Law highlights the way in which a group of powerful politicians and interest groups utilized images to gain popular support for their proposed legislation. In her book about law and order politics, Katherine Beckett (1997) explains that “[p]olitical outcomes such as three strikes legislation are thus best understood as a product of symbolic struggles in which actors disseminate favored ways of framing social problems and compete to have these versions of reality accepted as truth” (p. 6). Images played a powerful role in creating a misguided popular cultural understanding of the content of the proposed Three Strikes law.

Rhetoric and images combined to depict the policy as one that targeted habitual, violent offenders (King & Mauer, 2001). The text of California’s Three Strikes law, however, applies to a much broader range of criminal convictions,

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4In Nazi Germany, for instance, propaganda influenced public attitudes towards Jewish people. Within the United States, African American slaves were referred to as non-people in legal discourse. David Berreby (2005) dissects the way in which stigmatizing, or marking, a group of people delineates two opposing teams: us and them.
including nonviolent crimes. The law imposes a mandatory twenty-five years to life prison sentence on those convicted of any felony who have previously been convicted of two offenses that constitute “serious or violent” felonies as defined in the Penal Code. California’s Three Strikes policy is widely agreed to be the most punitive Three Strikes law in the country, due in large part to the fact that one can be convicted of a third strike for any felony offense, including seemingly minor offenses such as drug possession, theft, or vandalism (Gilmore, 2007; King & Mauer, 2001; Romano, 2010; Zimring, 1996).

Two identical versions of the Three Strikes law were passed in California in 1994 (Abramsky, 2002; Zimring, 1996). The Legislature enacted the law, and California voters also voted for a separate yet identical piece of legislation as a ballot initiative (id.). Support for the Three Strikes Initiative was highly influenced by politics, and the law was quickly pushed through the Legislature as a political effort to minimize the issue of crime in California’s impending gubernatorial election (Zimring, 1996, p. 247). California Governor Pete Wilson spearheaded the campaign for Three Strikes, relying heavily on the tragic kidnapping, sexual assault, and murder of a child, Polly Klaas, to garner popular support for the initiative (Abramsky, 2002).

The media campaign in favor of Three Strikes focused on Polly Klaas, whose tragic kidnapping and murder represented every parent’s worst nightmare. Images of this young girl, representing the girl next door or, in the words of People Magazine, “America’s Child,” were juxtaposed against images of her murderer (Podolsky, Huzinec, Harrison, & Burleigh, 1993, p. 84-85), at the time a recent parolee who had been previously convicted of kidnapping and robbery (Abramsky, 2002, p. 60). An analysis of the magazine’s photographic layout of images from an art history perspective focuses on visual cues that impact a viewer’s perception, thus giving insight into the effect of a particular image on a viewer. In this particular People Magazine article, readers are faced with a full-page image of 12-year-old Klaas, shown wearing a youthful denim jumper over a boxy white t-shirt (Podolsky et al., 1993, p. 85). Her body takes up about three quarters of the frame, with a blurry background behind her and a focused painting in the foreground in front of her. The viewer is first drawn to her smiling face, framed by her short wavy hair and accentuated by her adult teeth which, as with most pre-teens, are just finding a home in her teenage face. She smiles as she looks down at the painting she is working on and she paints what looks to be an abstract and child-like image with large looping squiggly lines and circles. Following her gaze to her paintbrush, the viewer sees that she has just completed a heart in the very center of the image. Compositionally, viewers are drawn in a triangular cycle from her smiling face to the heart she completes in her painting, to her other hand that holds the paper, back up to her face. The viewer’s gaze circles the photograph cyclically, which reinforces and secures the image of Klaas as the typical childlike, innocent, and all American pre-teen girl next door.

Juxtaposed next to this large, full-page image of Klaas, are four images: two of Klaas’ parents in desperation and frustration on the phone and two of Klaas’ murderer (Podolsky et al., 1993, p.84-85). In the photos of her parents, the reader would assume they are either receiving the tragic news about their daughter or are living through some frustration in trying to find her. Either way though, the story is clear -- they are in grief and sorrow over their missing daughter. Below their images are two images of Klaas’ kidnapper, rapist, and killer, Richard Davis. The left image shows him in a menacing photo, presumably from court, where he faces the camera
slightly angled, with a furrowed brow and somber expression. To the right of this image is the graphite police sketch of Polly’s abductor. The abductor in the sketch faces the camera directly, with slight frown and intent gaze ahead. Combined, the two images of Klaas’ murderer are compositionally very similar to criminal mug shots. Just as with mug shots, these photographs of Davis consist of “two neutral, standardized views of the face of the accused” (Phillips, 1997, p. 20). Here, the history of criminal mug shots is key in reading the images in People Magazine and other similar feature stories about the Klaas case that were prevalent during the campaign for California’s Three Strikes law.

In widespread use by most police departments by the late 1880s, the criminal mug shot is one of the most classic uses of photography in constructing an image of “the other” -- or in layman’s terms, defining quite simply and categorically what well-behaved society is not. Police departments have strict rules in composing these photographs: the images of the accused zoom in on the subject’s somber face which must look straight ahead without a smile (Phillips, 1997). In this sense, mug shots focus on and create a stereotypical criminal gaze, so that whether innocent or guilty, a mug shot actually creates an image of the convicted that appears guilty before proven innocent. As photographic historian Sandra S. Phillips (1997) explains, “we need criminals because they are not us.” (p. 11). The importance of these images juxtaposed with the childlike image of Klaas is not to be underestimated. Her innocent figure looms in a lighter background, next to distraught images of her parents and scary, guilty images of her predator. This imagery furthered the campaign’s efforts to construct criminals as “others,” as reflected in the words of Mike Reynolds, one of the leaders of the Three Strikes movement: “‘They’re little more than animals. They look like people, but they’re not. And the unfortunate thing is they’re preying on us’” (Abramsky, 2002, p. 112). French researcher David Berreby discusses the long history of how marginalized groups have been compared to animals. He argues that words are not enough to make the “wrong people” seem like animals, so instead, images of these groups as animalistic, other, and barbaric are elicited with words and further, even created in pictures (Berreby, 2005, p. 237). These pictures become symbols that manifest in the mind and take on a silent, yet active role in the voting and decision-making process.5

By using the narrative of Polly Klaas’ tragic story, and by using visual and rhetorical techniques that emphasized the inhuman, animal nature of criminals, supporters of Three Strikes framed the public discourse in a manner that obscured the broad reach of the actual proposed law. Voters and politicians who were informed by this narrative, for example, likely believed that the Three Strikes law would apply to offenders who had been previously convicted of multiple violent offenses, and who were convicted of a third strike for a violent felony offense such as kidnapping, rape, or murder, as in the Polly Klaas case. In reality, the law would impact a much broader segment of criminal offenders. The representations of victims as “good” and offenders as “bad” obscured the tragic circumstances in many offender’s life histories and fueled popular support for a law that offered no mercy for third strike offenders. As with the People Magazine spread, widespread pairings of images in the media,

5 Edelman (1964) argued that “[t]he symbol-making function is one of man’s primary activities, like eating, looking or moving about. It is the fundamental process of his mind, and it goes on all the time” (p.178). Political images and pejorative stereotypes, then, become symbols and this symbolization process is not just something reflexive and familiar to man, but also “fundamental.”
where the image of an innocent, undeserving victim is contrasted with the image of a criminal predator, came to typify the campaign for Three Strikes and appealed to people’s inherent desire to protect themselves and their families from violent criminals. This led to widespread support for Three Strikes even though the reach of the written law was far more expansive than the public believed.

Motivated out of a concern that his daughter’s death was being used to manipulate public perceptions, Polly Klaas’ father became a vocal opponent of the proposed legislation (Abramsky, 2002). Polly’s father Marc disagreed with using his daughter’s narrative to promote a law that imposed such a severe sentence upon nonviolent offenders, as well as on violent offenders (Abramsky). Under California’s Three Strikes law, an individual who has never committed a single violent offense can receive a sentence of 25 years to life in prison. In contrast to the popular perception that Three Strikes applies to habitual offenders who have engaged in a pattern of criminal behavior over time, an individual may receive two strikes in the course of one criminal incident, thus facing a life sentence for any future felony. The law also provides that a conviction of a second strike results in one’s prison sentence being doubled. The criminal activity of most people who have been sentenced to 25 years to life for third strikes in California is much less serious and predatory than the images presented to the public. In reality, only 43% of people convicted of third strikes were convicted of a violent third strike offense. (A voice for the forsaken, 2009) The majority of prisoners serving life sentences under Three Strikes were convicted of non-violent third strike offenses such as drug possession, petty theft, and car theft.

Three Strikes has had an undeniable impact on California’s growing prison population. Forty thousand inmates are serving increased prison sentences as a result of the law, constituting 25% of California’s prison population (Romano, 2010). The expanding population of aging third strikers will likely result in tremendous expenditures to the state as the need for medical care increases with age (King & Mauer, 2001). A study published by the RAND Corporation in 1994 warned of such problems (RAND Corporation, 1994). In the words of Polly Klaas’s father, “I don’t think anyone wants to put these small-time crooks away for life. We intended for the law to nail the Richard Allen Davises, that type of character” (Franklin, 1994). Nonetheless, the law passed with widespread support, in large part due to political considerations and popularized misperceptions.

Proposition 21: The Gang Violence and Juvenile Crime Prevention Act

Influenced by exaggerated media reports about rising gang violence and the popularized image of juvenile “superpredators,” California voters approved the Gang Violence and Juvenile Crime Prevention Act (“Proposition 21”) in 2000 that made the state’s juvenile justice system markedly more punitive, greatly expanding the power of the prosecution to file charges against juveniles in adult court, allowing juvenile petitions to be used as strikes in future adult cases, and adding sentencing enhancements of up to ten years in prison for gang-related crimes committed by an individual who has never committed a single violent offense can receive a sentence of 25 years to life in prison. The law defines “serious” or “violent” offenses as strikes for the purposes of a first or second strike. Non-violent crimes that are nonetheless “serious,” such as residential burglary, qualify as strike offenses. A third strike may be any felony offense.

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6 A review of media reports and literature indicates that Polly’s father Marc Klaas has publicly expressed opinions both in favor of and against Three Strikes. The information presented here was derived from interviews conducted by journalist Sasha Abramsky, as reported in his book Hard Time Blues.

7 The law defines “serious” or “violent” offenses as strikes for the purposes of a first or second strike. Non-violent crimes that are nonetheless “serious,” such as residential burglary, qualify as strike offenses. A third strike may be any felony offense.
juveniles or adults (Beres & Griffith, 2001; Espiritu, 2005). The proposition addressed a wide range of legal issues and resulted in changes to multiple sections of the California Penal Code. It is unlikely that voters understood the depth of the changes this initiative proposed. Nonetheless, over 60% of California voters approved the initiative, and it became law.

Analyses of California’s Proposition 21 link the demonization of youth and the popularized conception of youth as superpredators to the passage of Proposition 21 by California voters (Beres & Griffith, 2001). At a time when juvenile crime rates were dropping, the public perception was that juvenile crime was increasing (Glassner, 2009). This misperception was actively promoted by both written and visual cues in the media. Framing youth as “superpredators” rather than children promoted punitive criminal justice policies designed for “other people’s children.” Research into the discourse surrounding Proposition 21 indicates that supporters of the proposition conflated minor delinquency with serious crime and relied heavily on using latent references to race to play into “public anxieties about race and crime” (Rios, 2008). The proposition explicitly tapped into public fear of these juvenile “superpredators,” stating that “[d]ramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence” (Beres & Griffith, p. 750).

Support for the initiative was influenced by popular misconceptions regarding juvenile crime, shaped in large part by skewed media depictions of youth and gangs. Sixty-two percent of Americans, for instance, believed that youth crime was increasing at the time of the election; in reality, youth crime was decreasing (Espiritu, 2005). A 1996 poll in California indicated that 60% of respondents believed that youth were responsible for most violent crime (Dorfman & Schiraldi, 2001). This belief stands in stark contrast to the reality that youth were responsible for approximately 13% of violent crime at that time (Dorfman & Schiraldi, 2001). In 1997, a few years before California’s Proposition 21 election, Bill Clinton tapped into the public’s fear of juvenile crime, stating, “‘We know we’ve got about six years to turn this juvenile crime thing around or our country is going to be living with chaos’” (Glassner, 2009, xxii). At the same time, Clinton acknowledged that the rate for youth violent crime had actually fallen 9.2% the year before (Glassner, 2009, xxii).

Widespread misconceptions regarding the threat of youth crime in the late 1990s were influenced by media coverage that disproportionately emphasized violent youth crime. A study by the Berkeley Media Studies Group found that 68% of stories regarding violence on local news broadcasts in California involved youth while FBI data indicated that less than 20% of arrests for violence involve youth (Mauer, 1999, p. 173). Similarly, in 1993, 53% of California news reports regarding children and youth involved violence, while only 2% of the state’s children or youth were victims or perpetrators of violence (Dorfman & Schiraldi, 2001).

The majority of reporting regarding crime occurs on local television news (Yanich, 2005), and popular beliefs regarding juvenile crime and gangs have been shaped by such news broadcasts. Local news reports tend to feature people of color as gang members or juvenile offenders. This media attention on youth crime has selectively focused on cases where the victims are white and the perpetrators are youth (Dorfman & Schiraldi, 2001), thus furthering the popularized distinction between victims, who are “us,” and offenders, who are “other,” and overtly adding race into the equation. A review of local newscasts from the time period leading up to
and surrounding the Proposition 21 election reveals images that further reinforce the public fear of gang members, and which contributed to the social construction of youth of color as gang members or superpredators. Imagery from a 1995 broadcast for CNN Evening News featured the headline “Compton CA Gang Violence” and showcased repetitious images of young, alleged gang members being frisked and loaded into police cars (Meserve, 1995). The opening sequence of the broadcast featured reporter Jim Hill’s voice saying, “Police have put more officers on the streets after a controversial call for a state of emergency by Compton's mayor.” Here, fear tactics again reign supreme. Young minority alleged gang members face their backs to the news cameras and television viewers, as they are patted down against the police cars. The broadcast renders these young men faceless and as such they are more threatening because of their anonymity and air of danger that is bolstered by both the voiceover and headline referring to California’s state of emergency and gang violence. During the rise of such imagery on the nightly news, photographic historian Sandra S. Phillips (1997) argued that “the criminal, outcast, and outsider are in vogue again in art and media culture. This comes at a moment when the country seems obsessed with punishing the criminal, a tendency that has a distinctly racial and class element” (p. 29). Such images permeated the public sphere and influenced people’s understandings regarding juvenile crime, from the media frenzy surrounding Three Strikes in 1994 all the way to 2000, during the time leading up to the election regarding Proposition 21.

Former Princeton professor and first director of the White House Office of Faith-Based and Community Initiatives under President George W. Bush, John Dilulio is widely credited with popularizing the perception of youth as “superpredators” and encouraging public fear of an emerging group of violent, urban youth. A widely circulated article he authored in 1995, for example, cultivated a moral panic by explaining:

On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior -- sex, drugs, money -- are their own immediate rewards. Nothing else matters to them. So far as long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high (Dilulio, 1995).

The imagery of youth as “superpredators” is undeniably racialized (Mauer, 1999, p. 126), and images used in local news stories further reinforced the racialized discourse regarding gangs and juvenile crime.

Proposition 21 was passed by 62% of California voters, resulting in thirty-two changes to laws governing juvenile and gang-related crime (Raymond, 2010, p. 233). It was approved by the majority of California voters despite the fact that supporters of the initiative did not invest in an advertising campaign (Thompson, 2000). The initiative passed despite this lack of advertising because media reports in the years
leading up to the election had already instilled a widespread fear of rising juvenile crime in the minds of California voters. According to one report, supporters Proposition 21 did not need to invest in advertising because “[t]he press has spent a decade selling the notion that Armageddon, teen style, is just around the corner” (Thompson, 2000). Since the passage of Proposition 21, youth as young as 14-years-old can be imprisoned in California for the rest of their lives. Youth who have committed a wide range of offenses no longer qualify to have their juvenile records sealed, and crimes committed when an individual was a juvenile can be used as strikes in adult court, resulting in greatly enhanced prison sentences.

**Proposition 66: Defeated by Commercials**

Proposition 66 appeared on the California ballot in 2004, proposing to change the portion of the Three Strikes Law that allowed for any felony to be a third strike. This aspect of the law had been unsuccessfully challenged in the courts. The constitutionality of imposing a sentence of 25 years to life for a crime such as petty theft was addressed by the U.S. Supreme Court in 2003 in the cases of *Ewing v. California* (2003) and *Lockyer v. Andrade* (2003). In these cases, the Supreme Court determined that imposing a sentence of 25 years to life for stealing three golf clubs or four videotapes did not constitute cruel and unusual punishment and therefore did not violate the Constitution. Opponents of California’s Three Strikes law thus returned to the voters to attempt to change the portion of the law that categorized even nonviolent felonies as third strike offenses. The initiative was ahead in the polls until Governor Arnold Schwarzenegger invested heavily in an advertising campaign featuring words and images that appealed to people’s fear of violent crime and obscured the actual meaning of the reforms proposed in the proposition (Martin, 2004). The defeat of this initiative is widely attributed to this last-minute advertising campaign, which took over all available airtime on network television in the days before the election (Mathews, 2004). An estimated $6 million funded this advertising blitz, dramatically changing public opinion regarding the ballot initiative (Mathews, 2004).

Governor Schwarzenegger’s commercial begins with close-ups of overlapping black and white images of scary and menacing male mug shots (Criminals, 2004). The viewer hears the Governor’s voice before seeing him as he labels the images, “Murderers, rapists, child Molesters ….” He then comes into the screen in front of these mug shots saying, “26,000 dangerous criminals will be released from prison under Proposition 66. Keep them off the streets and out of your neighborhood. Vote no on 66.” Here, the composite images of the mug shots appears yet again, as images of jail bars cover their pictures and visually lock them behind bars, while the Governor adds, “Keep them behind bars.” Juxtaposed to the black and white mug shots, Schwarzenegger is dressed in a pressed black suit with a white shirt and red tie. His tanned skin and bright colored tie offer a stark contrast to the black and white images of men behind him, carefully chosen to have disturbingly piercing eyes and predatory glances. Schwarzenegger’s commercial utilizes images of the criminal through controlled mug shots which seek to separate and “other” the criminals, here depicted as predators. Again, the history of photography and the longstanding misconceived notion that it documents, records, and reports an unbiased and “absolute” truth is key.

Early photography was utilized and popularized during a time when anthropology and archaeology were silently impacting many fields by emphasizing
the importance of categorizing empirical information into flow charts and comprehensive diagrams. The belief in pseudo-sciences of phrenology and physiognomy, or the placement and structure of one’s face and head, to systematically deduce what kind of inner psychological characteristics the sitter contained was still on the rise and photography was used as a means of empirically “proving” it (Gould, 1983; Phillips, 1997; Sekula, 1986, p.11-16). These studies helped to develop the idea that criminal characteristics or signs of mental illness could be distinguished by purely physical evidence and facial features (Rosenblum, 1984, p.77). Often the ruler lines used to measure someone’s face and body in early anthropological photographs were similar to those depicted behind the accused in traditional mug shots. In the later 1800s and early 1900s, this need for “hierarchical grids” was partly a justification system for Europe’s brutal colonial endeavors abroad and their attitudes towards immigrants at home (Pultz, 1995, p. 20-26; Sekula, 1986, p. 5-7). If they could scientifically justify that the people in their colonies and the lower class immigrants belonged to another race and species, not just a lower class, then the aristocratic class in Europe felt no moral obligations to help or improve the situations of others. Although the documentation of colonial citizens, patients from mental facilities, and accused criminals were highly forced, premeditated, and composed, the general public did not see them as such (Phillips, 1997, p. 12; Pultz, 1995, p. 13-35; Sekula, 1986, p. 3-5). And because photography was thought to document the absolute truth, these constructed and biased images were particularly harmful. In his formative work “The body and the archive,” Allan Sekula (1986) asserts the necessary backdrop against which the criminal archive, comprised of documented collections of mug shots, measurements, and fingerprints could exist: “[I]t was only on the basis of mutual comparison, on the basis of the tentative construction of a larger, ‘universal’ archive, that zones of deviance and respectability could be clearly demarcated” (p. 14). In this sense, the criminal archive, the colonial archive, and the psychiatric archive all functioned the same way: by defining a universal “us” with which to compare a deviant “them.” And such forced images positioned everyone in a social system and network of class, gender, and race.

It is with this background that images such as the mug shots used in Schwarzenegger’s anti-Prop 66 commercial were so heavy and harmful. The Governor preyed on a growing fear about the projected exponential rise and unstoppable nature of juvenile crime. Another No-on-66 advertisement also featured a slew of mug shots (He Raped Me, 2004). The commercial starts with a close up of a middle aged white woman with blond hair saying, “He had a knife at my throat and said he was going to kill me. Then he raped me.” She goes on to explain, “He killed two women, now Prop 66 will set him free.” Then an eerily familiar and foreboding piano composition comes on reminiscent of the telltale “Nightmare on Elm Street” theme music, while three rows of somber and threatening images of male mug shots start circling the screen. A baritone male voice explains, “Prop 66 creates a loophole that will release 26,000 dangerous felons …. ” The commercial ends with the same three reels of mug shots circling through the screen like sideways slot machine bars while the voiceover says, “Protect your family. No on 66.” In many ways, this video exactly duplicates the pairing discussed with regards to images of Klaas and her murderer. Half of the commercial featured a close up of what appears to be an

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8 In Nazi Germany and apartheid South Africa, similar justification tactics were also used (Lauren, 1988; Phillips, 1997).
average white American female, who was also the innocent rape victim. In contrast, hundreds of criminal male predators rush by during the second half of the advertisement. The scare tactics used in both anti-Prop 66 ads played into an American fear factor, constantly fueled by the media. These two commercials almost certainly played off one another in securing the need to lock up these dangerous “murderers, rapists, and child molesters” (Criminals, 2004).

Prior to the advertising campaign, the proposition led in the polls by 62% (Mathews, 2004). The initiative lost, with 53.2% of voters against it (Mathews, 2004). The message and imagery of the campaign commercials were so powerful that they even impacted the votes of the family members of a man serving twenty-five years to life for a non-violent offense, convincing them that the proposition did not apply to cases where an individual was convicted of a non-violent third strike (Medina, 2011). Sociologist Vanessa Barker (2009) found that the campaign against Proposition 66 “tapped into the public’s fear of random violence” with an emphasis on the “unworthiness of criminal offenders, deemed ‘hardcore criminals who’ve worked hard to be in prison’” (p. 82). The true content of the initiative – which would have only amended three strikes as it applied to people with nonviolent third strikes – was obscured by the advertising campaign that claimed the proposition would “‘flood our streets with thousands of dangerous felons, including rapists, child molesters, and murderers’” (Barker, 2009, p. 82). Polly Klaas’ grandfather even became a spokesperson for the initiative, saying “there was a flaw in the law” that was passed in response to his family’s tragic loss. Nonetheless, his appeal to reason was overshadowed by the opposition campaign’s appeal to people’s fear of crime, which was bolstered by the use of predatory images that imprinted themselves in people’s minds.

Conclusion

*If we are to change our world view, images have to change. The artist now has a very important job to do. He’s not a little peripheral figure entertaining rich people, he’s really needed.*

-Vaclav Havel

Although California is a trendsetter for criminal justice policy in the United States, its initiative process has created policies that have expanded the state’s incarceration rates to jail over 170,000 people in its prisons each year. Images that fueled initiatives such as California’s Three Strikes law quietly demonized “criminals” and obscured the actual content of the proposed legal reforms. As argued, specific imagery that permeated the public sphere through magazines, campaign commercials, and local news broadcasts heavily influenced and impacted the original Three Strikes initiative, a proposed amendment to the Three Strikes initiative, and a juvenile crime act.

California’s reliance on mass incarceration is problematic for several reasons. There is a moral problem with the state purposefully inflicting pain upon people by incarcerating them, as discussed in greater detail in the work of prison abolitionist Nils Christie (2001). In addition, California’s use of incarceration is not effective in accomplishing its stated goals, as evidenced by consistently high recidivism rates. California prisons are so overcrowded that the state is unable to adequately ensure that prisoners are treated humanely and in accordance with basic human rights principles,
as the recent California Supreme Court case *Brown v. Plata* (09-1233) affirmed.\(^9\) Further, California spends so much money on its prisons that the state budget is in crisis, and cuts are being made to education and other necessary social programs. Research consistently shows that alternatives to incarceration are more effective than prisons in reducing crime. However, such research does not translate into policy choices due to widespread popular support for “get tough on crime” legislation.

Given the powerful role of images, popular opinion regarding crime policy may shift if alternative images were more prevalent in the public discourse surrounding crime and punishment. As the last Czechoslovakian President and human rights activist Vaclav Havel said, “If we are to change our world view, images have to change.” This idea of changing our images is indeed a tall order, not just to the media, but also to artists. Art plays a powerful role in shaping people’s understandings of issues and in constructing alternative ways of looking at the world. There are artists who are tackling this challenge, as exemplified by the work of Suzanne Lacy in Oakland, California. In “The Roof is on Fire,” a large-scale performance art event, hundreds of youth were featured in a documentary where they represent themselves on film, rather than being represented by the media. The project set out to challenge stereotypical representations of youth on the evening news and was widely broadcast on local news stations as well as CNN as an alternative representation of youth (Suzanne Lacy Artist Resource Site, 2011). In this sense, Havel’s call can be seen as one not just to image-makers in both the media and art world, but also to the average citizen or youth who have been stigmatized and marginalized. It is a call of self-representation. And to voters, it is also a call of self-awareness.

Sandra S. Phillips (1997) asks us, “[c]an we assure ourselves that we are not making identity photographs for the purposes of exclusion, for defining who criminals are, so that we can keep them on the outskirts of society?” (p. 29). In order to “assure ourselves” and answer Phillips’ question, voters must heighten their awareness of the images surrounding an initiative or campaign and research the truth about the actual content of the proposed legal reforms. Shifting popular images so that the complexities of crime come to light will, over time, impact the decisions of politicians regarding criminal justice policy. Further, challenging popular misconceptions and images regarding youth, crime rates, and related policies may engender greater public awareness of the truth. This, in turn, may counter the widespread support for policies that favor mass incarceration which are fueled by a culture of fear, popular media, misinformation, and binary images that create an us-versus-them opposition.

\(^9\) On May 23, 2011, the U.S. Supreme Court ruled that overcrowding in California's prisons results in cruel and unusual punishment and violates the Eighth Amendment to the U.S. Constitution. This ruling means that within the next two years, California must reduce its prison population by more than 30,000 prisoners.
References


INCARCERATION AND ISOLATION OF THE INNOCENT FOR REASONS OF PUBLIC HEALTH

David Claborn and Bernard McCarthy

The "police powers" of the public health authority give unique capabilities to government officials tasked with providing for the health of human populations. This paper reviews the application of terms such as "incarceration," "isolation," "quarantine," and "social distancing" in the context of public health. Historical examples are provided to demonstrate how incarceration continues as a component of programs to control multi-drug resistant tuberculosis and other infectious diseases. The expanding authority of the federal government to incarcerate the innocent is also discussed.

Introduction

If a man or a woman has a sore on the head or the beard, then the priest shall look at the sore; and indeed if it appears deeper than the skin, and there is in it thin yellow hair, then the priest shall pronounce him unclean. It is a scall, a leprosy of the head or beard…

But if the scall should at all spread over the skin after his cleansing, then the priest shall look at him; and indeed if the scall has spread over the skin, the priest need not seek for yellow hair. He is unclean…. The priest shall surely pronounce him unclean; his sore is on his head. Now the leper on whom the sore is, his clothes shall be torn and his head bare; and he shall cover his mustache, and cry, “Unclean! Unclean!”.

He shall be unclean. All the days he has the sore he shall be unclean. He is unclean, and he shall dwell alone; his habitation shall be outside the camp.

Excerpts from Leviticus 13, King James Translation.

The passage above is an early account of isolation being used to stop the transmission of infectious disease. Perceptions of disease etiology at the time of the writing were certainly different from modern concepts of the germ theory of disease because ancient views on the relevance of sin and the state of being unclean were complex and often inconsistent with current thought. For instance, a similar isolation was required for menstruating women. Nevertheless, the writer obviously had some understanding of isolation as a method of interrupting disease transmission or contamination in a susceptible population. Isolation has also been used as punishment, which is a different concept. The punishment response in the form of banishment and exile was a key element of the Adam and Eve story, but has also had historical importance with Socrates, Napoleon, and Roger Williams. For instance, when given the option of banishment or death by drinking hemlock, Socrates chose the latter. Punishment is directed at the person who has supposedly done wrong, but the goal of isolation and incarceration for issues of public health is to protect populations. These differing concepts still play a role in modern public health and they extend beyond simple isolation to the more restrictive acts of quarantine, detention, social distancing and incarceration. This article will review the use of
incarceration of the innocent, but diseased, individual in order to protect the health of the public. The focus will be on the use of such incarceration in the United States, but international examples will also be provided. The paper will also include a discussion of changes in governmental regulations concerning this issue that are a result of the terrorist attacks of 2001. The issues in this article provide a basis for further discussion of governmental initiatives that lead to incarceration of the individual, though innocent of wrongdoing, and the ethical issues that authorities must consider prior to such incarceration.

The Criminal Justice Response and its Application to Public Health

The use of imprisonment in criminal justice and the use of isolation and quarantine in public health share common roots. Both were designed to protect society by removing and isolating threats to society. In the criminal justice system, punishment is imposed upon persons who have been convicted of violations of criminal law; their guilt is determined through a judicial process with due process protections embedded throughout the process. For the most serious offender, the punishment is removal from society by placing them in a confinement facility or by permanent removal through the death penalty. The origins of this practice can be traced to the early years of the Republic when the correctional institution was viewed as a correctional reform. In the United States, the use of confinement as a punishment took hold after the American Revolution and was embraced by reformers. Both the Pennsylvania and Auburn systems of punishment developed as society's primary punishment response (Rothman, 1971). In the 1800s, the search for new forms of social control led to the increased use of isolation and confinement in institutions. Separation, obedience, and labor were viewed as a solution to criminal behavior. Today, the use of imprisonment has expanded to a massive policy of collective incarceration for those deemed serious threats to society. Accompanying the serious consequences involving the deprivation of liberty, for each stage of the process, the removal and confinement of citizens follows prescribed due process requirements.

The original goal of isolation and incarceration for issues of public health was to protect populations from contagious diseases. Despite modern medicine, public health authorities still find it necessary to resort to incarceration or other restrictions to protect the public from the risk of infectious disease. For example, leprosy continued as a cause of mandatory and extreme isolation until very recently. Recent Canadian history provides a particularly poignant example. In British Columbia during the late 1800’s, five Chinese immigrants were identified with leprosy. The city of Victoria forcibly removed the lepers to D’Arcy Island, about 25 km away. The lepers were provided with housing and were visited by a medical officer about every three months, but were isolated and alone on the island. They had a garden and an orchard, with plenty of food, fuel, and clothing as well as free opium, but the lack of an effective treatment required very strict isolation---in this case, a form of exiled incarceration. As the men became sicker, they also became progressively less able to take care of themselves. Other lepers joined them, but the growing mental depression and worsening health of the island’s occupants led to the decision by British Columbia to take responsibility for D’Arcy Island and its occupants. The original five lepers were eventually deported back to Canton where a Presbyterian Missionary Hospital took care of them for the rest of their lives. British Columbia placed a guardian and an interpreter on the island to oversee the remainder of the colony, which existed until
1957 when the last occupant died (Johnson, 1995). The D’Arcy Island episode demonstrates how restrictive policies can be very unfair, in this case because they were directed exclusively at the vulnerable population of Chinese immigrants. However, the extreme physical effects of leprosy and other diseases can also result in the expulsion and ruin of the wealthy and powerful. Jacob and Paredes (2008) noted that in India, the initial response to the diagnosis of leprosy was the expulsion of the victim from society, even if that victim was a king. The British Administration of India passed the Leprosy Act of 1898, which provided for mandatory isolation of lepers by gender to prevent reproduction of infected individuals. The act was repealed only after effective treatment for the disease was finally discovered.

**Defining Key Terms**

These examples demonstrate the need for a common vocabulary for addressing issues of quarantine and incarceration as they are used for protection of the public from infectious disease. Several terms, including preventive detention, incarceration, isolation, quarantine, and social distancing must be specifically defined. According to West’s Encyclopedia of American Law “preventive detention is the confinement in a secure facility of a person who has not been found guilty of a crime.” Although this definition appears to be restricted to cases in which the detainee is not a convicted criminal, preventive detention can also be used to retain dangerous criminals, such as violent sex offenders, who have served their time or who have not yet been convicted (McSherry, 2010). The definition above, however, is descriptive of the situation involving the lepers in Canada. The unfortunate men had committed no crime, yet were confined to a small island of only 180 hectares. State and federal laws also authorize the detention of others, who have not been accused of crimes, for the safety of society, for example, the dangerous mentally ill.

The term “incarceration” in this context is a broader concept involving confinement or imprisonment as done by law enforcement or the judicial system. “Isolation,” “quarantine,” and “social distancing” are more specifically terms from the field of public health. As defined by the Centers for Disease Control and Prevention (CDC), “isolation” is used to separate ill persons who have a communicable disease from those who are healthy” (CDC, 2010). This definition also describes the situation involving leprosy in Canada, though isolation can become much more technical in a hospital setting, requiring the use of masks, gowns, gloves, decontamination procedures and negative-pressure rooms. Conversely, “quarantine is used to separate or restrict the movement of well persons who may have been exposed to a communicable person to see if they become ill” (CDC, 2010). The word is derived from *quaranta giorni*, Italian for “40 days” and reflects the requirement that Italian ports in the 14th century made on ships arriving in harbor to make sure that the sailors were not carriers of plague. In the United States, the Public Health Service is responsible for quarantine to prevent the importation of human disease into the nation. Quarantine is specifically used when there is a possibility that a person has been exposed to one of the diseases in Table 1.
Table 1. Diseases for which quarantine may be mandated to reduce risk of transmission as identified by the President of the United States and authorized by the Public Health Service Act. (Fidler, et al., 2007).

<table>
<thead>
<tr>
<th>Disease</th>
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<tbody>
<tr>
<td>Cholera</td>
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<tr>
<td>Diphtheria</td>
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<tr>
<td>Infectious tuberculosis</td>
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<tr>
<td>Smallpox</td>
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<tr>
<td>Yellow fever</td>
</tr>
<tr>
<td>Plague</td>
</tr>
<tr>
<td>Sudden acute respiratory syndrome (SARS)</td>
</tr>
<tr>
<td>Influenza that has the potential to cause a pandemic</td>
</tr>
<tr>
<td>Viral hemorrhagic fevers (such as Ebola)</td>
</tr>
</tbody>
</table>

A final term, “social distancing,” does not involve any form of incarceration, but does limit movement and interpersonal contact. It involves executive orders to reduce human contact during epidemics of highly infectious disease such as influenza. During the Spanish influenza epidemic of 1918, some American cities canceled school and church services, and limited the use of theaters and other venues where large crowds gathered in small areas. These efforts may be effective in certain situations but do not involve mandatory isolation or incarceration (WHO Writing Group, 2006).

Involuntary incarceration and other enforced isolation intended to prevent transmission of infectious disease are direct results of society's right to protect itself from unnecessary exposure to disease agents. Even libertarian political philosophers would accept this authority of society:

One very simple principle [justifies state coercion]. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interference with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. (John Stuart Mill, 1859)

A Brief History of Quarantine in the United States

During the early days of the republic the power to quarantine resided with local and state government. This authority was generally used to control outbreaks of contagious diseases such as smallpox, yellow fever and cholera. In 1879, the US Congress created a National Board of Health that attempted to establish a national quarantine policy that would create a set of consistent policies across the United States. This attempt at standardizing practice was unsuccessful and the Board went out of existence in 1883. However the idea behind the Board did not die and in 1893, the US Congress approved a National Quarantine Act that created a national system of quarantine and set standards for the medical and health inspection of immigrants and cargo entering the United States (Institute for Bioethics, 2003).
During the next fifty years, various locales experimented with different forms of quarantine and isolation for diseased persons. These efforts included isolating tuberculosis patients, children inflicted with polio, and prostitutes with venereal disease. Leprosy was an exception and two facilities were set up to handle persons suspected of having leprosy, one was in Hawaii, the other in Louisiana.

In 1944, the Public Health Service Act was enacted into law and provided the Secretary of the Department of Health, Education and Welfare (later the Department of Health and Human Services) with the power and authority to make and enforce policies and procedures to prevent the introduction and transmission of communicable diseases from foreign countries or between states.

In 1967, responsibility for quarantine authority was transferred from the Department of Health, Education and Welfare to the CDC. In 2001, after the terrorist attacks of September 11 and the anthrax attacks which began weeks later, the CDC issued a draft set of policies designed to provide states with increased power to quarantine citizens in the event of a terrorist attack involving biological agents. The draft was called the "Model State Emergency Health Powers Act." Sections 604 and 605 of the model act contained specific language regarding quarantine and isolation. As of 2006, 38 states had adopted versions of the model act, thus granting specific emergency powers to state and local government officials.

The Public Health Powers

Much of the states' authority to limit an individual's freedom as a result of infectious disease risk is a result of an early legal case that addressed mandatory vaccination for smallpox. In *Jacobson v. Massachusetts* (1905), the court's finding upheld the state's authority to require smallpox vaccination, despite significant risk from the vaccine. This case occurred in 1905 and was later used to address detention of infected individuals.

The government's authority to confine someone who is a threat to the public but has not committed a crime is based on the "police power" of the public health authority. According to Richards (2002), the term "police powers" (p. 1157) is used with the meaning of "to clean up." The public health authority can order the isolation, even incarceration, of someone who is a public health threat, and law enforcement can be tasked to carry out the order (Brooks, 1996). The police powers give a unique authority to government. When functioning under the police powers, public health officials are not required to have probable cause for search and seizure, and may not have to wait on court hearings for enforcement proceedings (Richards, 2002). Variation in authority is due to different state laws involving the police powers. In general, however, the public health authority functions, that is the police powers exist, under the standard of "more probable than not." The public health authority can order an individual to "cease and desist" a behavior that is considered risky to the public's health, and can compel individuals to submit to a medical examination and to treatment (Fidler et al., 2007). Although the police power seems very broad and susceptible to abuse, the focus of enforcement is restricted to preventing harm, not punishing an individual for his condition or prior bad behavior. In one instance, courts supported the temporary detention of prostitutes until they could be examined and treated for gonorrhea (Fidler et al., 2007). Because the prostitutes were known factors in the spread of the disease and the health of the public was considered at risk, the detention was considered legal (Richards, 1989).
The police powers, however, cannot be used to circumvent criminal law protections (Richards, 1989). The closer an action approaches being criminal rather than threatening to public health, the more legal protection the perpetrator obtains. Thus, due process requirements are less exacting for the public health authorities, who base their decisions on expert opinion as opposed to legal standards of guilt. Public health officials can generally take action first, with judicial review available later. This situation demonstrates a tension between public health laws and guarantees of liberty such as the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution (Jacobs, 2011). The Supreme Court has, in general, provided what it has denoted as "enhanced public health scrutiny" (p. 113) to uphold public health legislation written to protect an inchoate class of people from disease and injury, even if that class is not readily identifiable (Jacobs, 2011).

Jacobson vs. Massachusetts (1905) solidified the authority of the states as the center of the public health authority’s police powers. At the time of the decision, the role of the federal government in detention for public health was limited primarily to preventing the spread of yellow fever in maritime shipping. The police powers of the public health authority are still concentrated primarily in state and local government. The federal government has focused more on the protection of individual rights and the limitation of state power (Mariner et al., 2005). However, the Andrew Speaker case of 2007, in which a man who had been diagnosed with drug resistant and active tuberculosis traveled both nationally and internationally, demonstrated that the federal government does retain legal authority to order detention for public health reasons. In that case, the CDC served a provisional federal order of detention for the first time since 1963. Andrew Speaker was isolated on a secure ward, but while under the isolation order, left the hospital and traveled from New York to Georgia (Fidler et al., 2007). Obviously, Speaker was isolated without being incarcerated. Determining which level of government should address issues of quarantine and isolation depends on the origin and extent of the threat. If the pathogen crosses state or international borders, then federal law applies. Otherwise, state and local laws are applicable (Fidler et al., 2007).

Jacobson v. Massachusetts (1905) was based on the aphorism sic utere tuo ut alienum non laeda or "so use your own that you do not injure another man's property" (Mariner et al., 2005). At one point this maxim was used in the U.S. to justify the eugenic sterilization of "mental defectives," but these actions ceased due to public disgust over Nazi excesses during World War II. During the early stages of the HIV/AIDS epidemic, Jacobson vs. Massachusetts (1905) was reviewed to see if it could be used to justify the isolation of infected persons. The courts found that mere infection did not justify detention or quarantine; however, some individuals were detained due to threats of intentional infection with HIV that they had made to others. In the 1980s and 1990s, there was some curtailment of the police powers due to perceived risks of abuse during the HIV/AIDS epidemic. For the most part, however, public health officials held that the use of isolation for those infected with HIV was inappropriate because transmission requires intimate contact, unlike highly infectious diseases like tuberculosis and influenza, which may be transmitted during the essential task of breathing. Isolation was also considered impractical because it would have required isolation of millions of individuals without reprieve because there was no cure for the disease (Gostin and Curran, 1987).

Incarceration of the innocent to prevent the transmission of disease is not common, and in recent years has been used primarily to prevent the spread of
infectious tuberculosis, as in the Andrew Speaker case of 2007. This re-emerging
disease has taken on increasing public health importance for two reasons:

(1) It is an opportunistic disease associated with AIDS and the two diseases
have spread together;
(2) Some strains of the disease agent, a mycobacterium, have become resistant
to multiple drugs, making treatment very difficult. Normally, TB is
treatable with first-line drugs, but multi-drug resistant TB (MDR-TB) is
resistant to these drugs. A relatively new classification of the disease,
extensively drug-resistant TB (XDR-TB) is also resistant to at least one of
the second line drugs. Andrew Speaker was diagnosed with the latter, so
his decision to travel both nationally and internationally placed many
people at risk of acquiring a deadly disease with limited treatment options
(Fidler et al., 2007; p. 617).

Incarceration for management of drug-resistant TB is considered to be a
measure of last resort, but it does occur. The Denver Metropolitan Tuberculosis
Clinic reviewed the records of 424 patients treated for the disease between 1984 and
1994. Of those 424 persons, 20 (4.7%) were incarcerated due to non-compliance; a
similar number (21)(5.0%) were lost to follow up, that is they dropped out of the
program and could not be found. "Non-compliance" in the area of tuberculosis
treatment refers to treatment default or early cessation of recommended treatment.
Treatment usually consists of frequent oral medication and may be stopped for a
variety of reasons. For instance, an impoverished patient may sell the drugs. Non-
compliance with tuberculosis treatment is an international issue (Rakotonirian et al.,
2009; Duffy, 2009) and has been associated with factors of travel distance from
medical care, younger age and male gender in the developing world. In the U.S., drug
and alcohol abuse are more important as contributing factors (Burman et al., 1997).
Inconsistent treatment leads to treatment failure, which in turn often leads to drug
resistance, so clinics often utilize the Directly Observed Therapy (DOT) technique in
which observers must see the patients take their drugs appropriately. Incarceration to
ensure DOT in Denver was associated with homelessness and alcohol abuse (Burman
et al., 1997). Numbers similar to those of the Denver study were noted in Tarrant
County, Texas, where 6.7% of TB patients were either hospitalized or incarcerated
due to non-compliance (Weis et al., 1994). It is worth noting that in Tarrant County,
housing was provided to those in need, so incarceration was not made a substitute for
lack of housing. Burman, et al. (1997) acknowledged public concern about the rights
of those incarcerated for treatment non-compliance, and were particularly cognizant
that those incarcerated were predominantly from the vulnerable homeless population.
However, they also noted that the people most likely to be exposed to the infectious,
non-compliant patients were other homeless and alcoholic persons. These authors
concluded that the homeless population has a right to protection from TB just like
other components of the population. In other words, homeless alcoholics are
protected by incarceration of the non-compliant. They also suggested that effective
TB treatment programs should emphasize early detection of non-compliant patients,
and should be willing to use quarantine and even incarceration when these procedures
are appropriate.

Other countries use similar laws and procedures to address non-compliance
with TB treatment. For instance, between 1999 and 2004, ten patients were reportedly
incarcerated for non-compliance in Australia (Senanayake and Ferson, 2004). Australian law states that forced detention must be used as a last resort and must be used in a way that is "legitimate, legal and least restrictive. (p. 573). It must be preceded by counseling and education. If these measures are still not successful, a psychosocial assessment is recommended to help identify barriers to treatment. A warning letter is mailed to the patient and this measure is usually effective. If the patient is still unwilling to comply, the Chief Health Officer can issue a detention order for up to 28 days. This order does not require a hearing. The detention can be extended, but only after a legal hearing. In Australia, detention for non-compliance with TB treatment was associated with cocaine use, homelessness, previous incarceration, alcohol abuse, and injecting drug use.

In 2007, the World Health Organization (WHO) issued its "WHO Guidance on Human Rights and Involuntary Detention of EXR-TB Control". These guidelines state that detention should be seen as a last resort and that it is justified only after all voluntary measures to isolate the patient have failed. The WHO emphasizes the use of the Siracusa Principles, which describe justifications for limiting the liberty of individuals. The Principles as applied to public health state that:

1. Any restriction must be done in accordance with existing law.
2. The restriction must be done in the interest of a legitimate objective that is of general interest.
3. The restriction must be necessary "in a democratic society."
4. The restriction must be done in the least restrictive manner required to reach the stated objective.
5. The restriction must be based on scientific evidence and not imposed in a discriminatory manner. (WHO, 2007).

The criminal justice system and the civil system of justice can both incarcerate convicted and non-convicted individuals. Public health issues are not the only ones that can lead to incarceration of the innocent, the non-convicted, or those who have completed their legal sentences. Other driving forces may include pre-trial detention based on dangerousness of the defendant, civil commitment of the mentally ill, and involuntary civil commitment of sexual offenders (Lovell and Mayfield, 2007). Mandatory sentencing ("Three Strikes, You're Out") laws may also serve to increase incarceration rates for minor offenses that would otherwise illicit much lighter penalties. Such laws remove judicial discretion that would otherwise allow lighter penalties for minor offences. Finally, waiving juvenile offenders into the adult courts and prison system can also result in increased incarceration rates of those who would otherwise receive much lighter sentences or none at all.

**Disease Risk in Incarcerated Populations**

Incarceration also comes with an increased risk of acquiring infectious disease, especially TB. The high levels of TB in prisons are usually attributed to the disproportionate representation of populations that are already at high risk: illicit drug users, the homeless, the mentally ill, and illegal immigrants (Baussano et al., 2010). Other factors such as overcrowding, late case detection, inadequate treatment, high turnover of the prison population, and inadequate control measures can turn a prison into a reservoir for disease transmission to the general public and to all of the
incarcerated population, convicted and non-convicted alike. The international situation is even worse; prisons in sub-Saharan Africa are estimated to house populations with TB rates up to 30 times higher than that of the national populations (Todrys et al., 2011). Obviously, the decision to incarcerate anyone who is considered to be a danger to society must be balanced with an understanding of the risk that person will be exposed to during incarceration, as well as the degree to which that person may contribute to disease risk to both incarcerated and non-incarcerated populations. Exposing an innocent person to the risks inherent to incarceration raises yet another ethical issue that is difficult to address. Authorities must balance the risk to society with the increased risk of harm to the incarcerated, but innocent, individual.

**Post 9/11 Expansion of Public Health Powers**

The terrorist attacks of 2001 prompted the federal government to assess its vulnerabilities in a number of areas, including the threat posed by infectious diseases. The 2002 National Strategy for Homeland Security raised the issue of preparing for worst case scenarios involving biological agents and called for the state and federal government to review and assess their public health powers, including the use of quarantine and isolation as preventive measures to stop the spread of potentially catastrophic diseases. The CDC also supported these efforts and called upon states to review their existing authority in this area. A Model State Emergency Health Powers Act was developed for states to consider in revising their public health laws and powers. Accelerating the policy interests in this area was the appearance of a pandemic in 2003 (Severe Acute Respiratory Syndrome (SARS)) which led to the quarantine of over 150,000 persons in Taiwan (Hsieh et al., 2005). The U.S. government subsequently developed a national strategy for pandemic influenza (Homeland Security Counsel, 2007). A number of policy guidelines and legislative initiatives were presented including the expansion of powers to use quarantine and isolation as tools for public health authorities to stop the spread of contagious diseases. The strategy had three strategic goals: (1) stop, slow, or limit the spread of disease; (2) mitigate disease, suffering, and death; and (3) sustain infrastructure and mitigate impact to the economy and the functioning of society. President George W. Bush directed a coordinated federal effort to prepare and respond to the prospect of a serious outbreak of pandemic influenza. A number of federal resources were put into place to assist state and local jurisdictions, including:

1. The Emergency Federal Law Enforcement Assistance Act provided states with federal law enforcement assistance upon request by a governor (42 U.S. C 10501).
2. The Robert T. Stafford Disaster Relief and Emergency Assistance Act provided for federal agency assistance to state and local jurisdictions for support of public health initiatives (42 U.S. C. 5170, 5192-5193, 5195a).
3. The Insurrection Act, 10 USC 331-335, authorized the President of the United States to use the armed forces to assist local government (states) in situations where locals and state law enforcement are unable to control or suppress violence or insurrection in their jurisdictions. The governor of the state legislature must formally request this assistance. The president may also use the armed forces to enforce federal law. This statutory
authority is an exception to the *Posse Comitatus* Act which otherwise limits the use of federal military personnel in law enforcement actions.

(4) The Military Support for Civilian Law Enforcement Agencies Act states that the Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the DoD to any federal, state, or local civilian law enforcement official for law enforcement purposes (10 U.S. C 372(1)).

These acts significantly expanded the power of the state to respond in a comprehensive and coordinated fashion to the threats posed by disease. However, they also raised concerns over how they restrict civil liberties. The American Civil Liberties Union (ACLU) characterized the cumulative effect of these policies as trading "liberty for security." The ACLU also stated "American history contains vivid reminders that grafting the values of law enforcement and national security onto public health is both ineffective and dangerous" (Annas et al., 2008). Nevertheless, many epidemiologists acknowledge the necessity of isolation, quarantine, and even incarceration, especially in the modern environment of rapid international travel and increasingly crowded cities where epidemics are both fast growing and probable (Sampathkumar, 2007; Burman et al., 1997). These seemingly opposing positions place different emphases on ethical issues such as "respect for persons" and "justice." The ACLU position with its emphasis on respect for persons (particularly autonomy) and personal liberty, is somewhat reflective of the federal government's historical emphasis on protecting the rights of the individual. The position of those who advocate for increased use of incarceration to protect the health of the larger society is similar to the focus that many states have taken historically, utilizing the police powers to ensure public health. The emphasis for the latter is the greatest good for the greatest number of people. Public health authorities must balance these apparently conflicting ethical viewpoints when dealing with the issue of incarceration as part of programs to protect the health of populations.

**Conclusion**

The state's power to incarcerate and to deprive individuals of their liberty has continued to expand, influenced in part by the terrorist attacks of September 11, 2001. Some see the Defense Authorization Bill for FY 2007, P.L. 109-364, 1076 and other related legislation as a dangerous expansion of the federal government's power to restrict liberty unnecessarily. The public health, homeland security, and criminal justice systems have overlapping powers with regard to the issues of quarantine and incarceration for protection of the public; however, only the criminal justice system requires due process of law. The other two systems have limited due process protections that the Supreme Court has said requires enhanced scrutiny. However, in the event of a major threat, the courts have given wide latitude to public health authorities to take immediate action, including incarceration, to protect society.

In developing policy options for the use of enhanced police powers for public health authorities it would behoove us to keep in mind some advice given by one of the founding fathers of our democracy, Benjamin Franklin: "Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one." Accordingly, the recommendation of this paper is that the protections built into the
criminal justice system should be used as a model for the public health system in balancing the rights of the individual versus the powers of the state. Due process protections, involving judicial review and the assistance of legal counsel must be built into the system to ensure citizen’s rights against unjust deprivation of freedom/liberty.

References


The incarceration of African Americans is not a phenomenon that occurred post civil rights era but has been a practical fact of criminal justice administration since data on incarceration have been kept. Before crack cocaine and three strikes; before the rise of the federal sentencing guidelines and get tough on crime movement; before the 100:1 crack to powder cocaine ratio in federal sentencing; before the war on drugs; before the war on poverty and the welfare state; before the increase in African American children born out of wedlock and the rise of single female head of households; before the world wars; and even before the revolutionary war -- African Americans have been disproportionately incarcerated in the United States. The achievement of an African American President and an African American Chairman of the National Republican Party does not overshadow the fact that before and after these two historical events African Americans have been and still are disproportionally represented in America’s prisons. This paper will review the intransigent fact of the disproportionate incarceration of African Americans in prisons, the historical nature of the disproportionate incarceration, and will provide a summary of research/policy solutions to the problem.

Prologue

A story is told of a new judge who received some advice during his first assignment. As a new judge he was assigned to night court and after a few weeks at his new job he was enjoying coffee and donuts with a 20-year police veteran who was assigned to his court. The story goes that after pleasant conversation the police officer looked up at the rookie judge and remarked with all seriousness “judge I’ve been watching you and I like you. But, the sooner you realize that it’s our job to protect the rich, watch over the middle class, and incarcerate the poor, the better we will be.”

Introduction

This article seeks to address the issue of disproportionate incarceration of African Americans in a historical context as well as provide a summary of the policy options and research addressing both explanations for the disproportionate incarceration and how it can be reduced. This article is divided in three parts. Part one reviews the incarceration of African Americans in the first decade of the 21st century, establishing the problem of disproportionate incarceration. Part one also places these statistics in a historical context and shows the problem dates back long before the 1980s and crack cocaine and long before the 1960s and birth of the great society legislation which some assert fostered a dependence on society and a rise of irresponsible social behavior on the part of African Americans which led to criminal activity and incarceration. Part two reviews the range of theories and explanations for the disproportionate incarceration.

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These explanations include a review of structural explanations that focus on how the criminal justice system operates and how its operations produce disparate impact on African Americans. Part three concludes with a summary of policy initiatives that have been implemented and / or are recommended to reduce disproportionate incarceration of African Americans. Part three concludes with this author’s policy recommendations. How these recommendations should be implemented or how they could in fact reduce disproportionate incarceration is not evaluated in great detail, such a review would be an article all to itself. The purpose of part three of this article is to provide the reader with a summary of what the research on this subject has concluded and the policy and administrative proposals that the research has produced.

Part One: The Current National Problem

In 2001, the former Director of the National Institute of Justice reported on the rate of imprisonment in the United States.

The rate of imprisonment (for a year or more) in the United States is now 476 persons per 100,000. This rate varies dramatically by race. In 1999, one in every 29 African American males was sentenced to at least a year’s confinement, compared with one in every 75 Hispanic males, and one in every 240 white males. In more than a dozen states, a convicted felon loses the right to vote – for life. Thirty-two states prohibit offenders on probation or parole from voting. As a result, nearly 4 million Americans, one in fifty adults, is barred from voting. Of these, 1.4 million are African American, accounting for 13 percent of the black male population.¹

In 2002 African Americans accounted for 47% and whites accounted for 51% of people convicted of drug trafficking on the state level. In 2003 African Americans accounted for 29.6% and whites accounted for 67.7% of people convicted of drug offenses on the federal level, but African Americans accounted for 44.5% and whites accounted for 53.9% of people in Federal prison for drug offenses.² A 2001 study reviewed arrest data for 37 states and found that the arrest rate for murder and manslaughter was 26 per 100,000 for African Americans while it was only 4 per 100,000 for whites and the arrest rate for possession or sale of drugs was 1,450 per 100,000 for African Americans while only 379 per 100,000 for whites.³ The same disparities were found for property crimes (1,595 vs. 512 per 100,000) and for assault (1,723 vs. 481 per 100,000).⁴ The study concluded, “if the rate of imprisonment per arrest were the same for blacks and whites in all offense categories, the black imprisonment rate would be about half of what it is.”⁵

⁴ Id.
⁵ Id.
The U.S. Department of Justice, Bureau of Justice Statistics (BJS) reported in 2003 that at the end of the first year of the twenty-first century (2001), there were 1,319,000 adults confined in state and federal prisons with an estimated 4,299,000 former prisoners living in the United States. A total of 5,618,000 U.S. adult residents, or about 1 in every 37 U.S. adults, had spent time in prison. The report concluded that if rates of first incarceration remain unchanged, 6.6% of all persons born in the United States in 2001 will go to State or Federal prison during their lifetime, up from 5.2% in 1991 and 1.9% in 1974. If this rate continues, about 1 in 3 black males (32.2%), 1 in 6 Hispanic males (17.2%), and 1 in 7 white males (5.9%) born in 2001 are expected to go to prison during their lifetimes.

Six years into the new century, according to the Prison Inmates 2006 report, the incarceration rate for prisoners sentenced to more than 1 year was 501 per 100,000 U.S. residents. This rate equaled about 1 in every 200 U.S. residents serving a prison term of more than 1 year on December 31, 2006.

By year end 2008, according to the BJS Prisoners in 2008 report, federal and state prisons held 1,610,446 people which represented an increase of 12,201 people over 2007, which represented “the smallest annual increase since 2000. The 0.8% growth during 2008 was the second year of decline in the rate of growth and the slowest growth in eight years.” At year end 2008 blacks accounted for 38% of the total prison population while whites accounted for 34% and Hispanics accounted for 20%. In 2008 black males were imprisoned at a rate of 6.5 times higher than whites. The decline in the growth rate of the prison population between 2000 and 2008 was associated with the decrease in the black population and the increase in the white and Hispanic population.

The number of imprisoned blacks has declined by about 18,400 since yearend 2000, reducing the total number of blacks in prison to about 591,900 at yearend 2008 .... Conversely, the numbers of sentenced white and Hispanic offenders have increased since 2000. The number of...

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7 *Id* at 1.
8 *Id* (emphasis added).
9 *Id* at 1 and 8. The lifetime chances of females born in 2001 going to prison is about 1 in 19 (5.6%) for black females (almost as high as white males), about 2.2% for Hispanic females and 1 in 118 (0.9%) for white females. *Id* at 8.
11 "Between 2000 and 2008 the imprisonment rate for black men decreased from 3,457 per 100,000 in the U.S. resident population to 3,161, and the imprisonment rate for black women declined from 205 per 100,000 in the U.S. resident population to 149. For Hispanic men the imprisonment rate remained relatively steady at about 1,200 per 100,000 in the U.S. resident population during this period. For white men the imprisonment rate increased from 449 per 100,000 in the U.S. resident population in 2000 to 487 per 100,000 in 2008.

The decline in the black imprisonment rate since 2000 means that an estimated 61,000 fewer blacks were in state or federal prisons than expected at yearend 2008 if the imprisonment rate for blacks had remained at its 2000 level (not shown in table). In contrast, the increase in the imprisonment rate for whites resulted in about 54,000 more sentenced white prisoners at yearend 2008 than expected if their rate of imprisonment had remained unchanged since 2000. The number of imprisoned Hispanics and the Hispanic U.S. resident population experienced about the same rates of growth from 2000 to 2008. Consequently, there was relatively little difference (3,600) between the number of sentenced Hispanics who would have been in prison in 2008 if the Hispanic imprisonment rate had remained at its 2000 level." *Id* at 5
imprisoned whites has risen by 57,200 since 2000 to reach 528,200 at yearend 2008. The total number of imprisoned Hispanics rose by 96,200 to reach 313,100 during this period.\textsuperscript{12}

The report concluded that the same variable that drove the increase in the black prison population in the 1980s and 1990s was responsible for the decrease in the black population in 2008. “The number of sentenced blacks in state prisons fell to 508,700 in 2006, declining by 53,300 prisoners since 2000. More than half of this decline (56%) was made up of 29,600 fewer blacks imprisoned for drug offenses.”\textsuperscript{13} The overall number in prisoners for drug offenses increased between 2000 and 2006 in state prisons was the result of the increase in white and Hispanic sentences, which compensated for the decrease in black sentences.\textsuperscript{14}

As the first decade of the twenty-first century came to its end, according to the BJS \textit{Prisoners in 2009} report, the trend of an increasing prison population in the United States continued in 2009 with “state and federal correctional authorities [maintaining] jurisdiction over 1,613,740 prisoners, an increase of 3,981 prisoners from yearend 2008.”\textsuperscript{15} The United States at the end of 2009 had an imprisonment rate of 502 prisoners per 100,000 residents.\textsuperscript{16} In 2009 the population in federal prisons increased by 3.4% and the state prison population decreased by 0.2% in 2009 compared to 2008.\textsuperscript{17} According to the same report, by year end 2009:

Black non-Hispanic males had an imprisonment rate (3,119 per 100,000 U.S. residents) that was more than 6 times higher than white non-Hispanic males (487 per 100,000), and almost 3 times higher than Hispanic males (1,193 per 100,000). One in 703 black females was imprisoned compared to about 1 in 1,987 white females and 1 in 1,356 Hispanic females.\textsuperscript{18}

Blacks maintained the 38% of the total U.S. prison population (federal and state) in 2009 with a total of 591,700 Blacks in the total U.S. prison population with a modest decrease of 200 Blacks from 2008.\textsuperscript{19} Black females had an imprisonment rate of 142 per 100,000 U.S. residents while white females had a rate of 50 per 100,000.\textsuperscript{20} At year-end 2008, the majority of Blacks were incarcerated for violent offenses (54.1%) 21.9% of the incarceration was for drug offenses, and while the majority of whites were also incarcerated for violent offenses (49.8%) they had a much lower incarceration rate for

\textsuperscript{12} \textit{Supra} note 6 at 4.
\textsuperscript{13} \textit{Id.} at 6.
\textsuperscript{14} “The number of sentenced blacks in state prisons fell to 508,700 in 2006, declining by 53,300 prisoners since 2000. More than half of this decline (56%) was made up of 29,600 fewer blacks imprisoned for drug offenses. The number of sentenced white and Hispanic prisoners convicted of a drug offense increased from 2000 to 2006, offsetting the decline in the number of imprisoned black drug offenders. Imprisoned white drug offenders increased by 13,800 prisoners during this period; the number of Hispanic drug offenders increased by 10,800. Consequently, the overall number of sentenced drug offenders in state prison increased by 14,700 prisoners.” \textit{Id.}

\textsuperscript{16} \textit{Id} at 3.
\textsuperscript{17} \textit{Id} at 1.
\textsuperscript{18} \textit{Id} at 9.
\textsuperscript{19} \textit{Id} at 27.
\textsuperscript{20} \textit{Id} at 28.
drug offenses (14.1%) and a higher rate for property (24.4%) and public order offenses (10.6%) than Blacks. Thus, while it is clear that the majority of the offender population regardless of race are imprisoned for violent offenses (all inmates 52.4%), drug offenses are disproportionately the cause of Black incarceration.

**Overrepresentation of African Americans and Other Minorities: What History Has to Offer**

To give all of these statistics some additional historical perspective, in “1930, 77 percent of the people admitted to U.S. prisons were white, 22 percent were African American and one percent were other racial and ethnic minorities. That ratio was virtually reversed by 2000, with African Americans and Latinos accounting for 62.6 percent of all Federal and State prisoners.”

Since 1850, when the first reports were published, the combined percentage of foreign-born persons, blacks, and other minority groups incarcerated by the criminal justice system has ranged between 40 and 50 percent of all inmates present. As the percentage of foreign born in our jails and prisons has declined, the proportion of blacks and Spanish-speaking inmates has increased. In 1960, 39 percent of inmates incarcerated in state prisons under felony commitments were reported as nonwhite; by 1974, it was reported that 47 percent of the total were black and 2 percent ‘other’ races.

The consistent and increasing disproportionate incarceration of African American males is not new.

The overrepresentation of the federal and state prison system was not always by African Americans and other racial minorities. The first minorities that filled American prisons were European immigrants with only a small number being African American. Before the end of the Civil War there were very few Africans in the developing American prison system because they were under that peculiar institution of slavery. During the late 19th and early 20th centuries African Americans began to increase in numbers within the prison system. In the South they were placed in plantation prisons or “farmed out” to companies to perform “honest” or “hard” labor. African Americans were subjected to chain gangs in the South and to industrial prisons in the North.

F. The ratio of African Americans to whites incarcerated since the 1920s has consistently been higher for African Americans. The ratio of incarceration of African Americans to whites is 8 to 1, or put it in a different perspective “on any given day, more African American males are likely to be in prison or jail than in college.”

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21 *Id* at 32.
22 *Id*.
26 Supra note 7 at 28.
As shown by Chart One between 1926 and 1986, although the percentage of whites in state and federal prisons was higher than African Americans there was a steady decline in the percentage of whites and a steady increase in the percentage of African Americans in federal and state prisons. Thus, the “blackening” of the prison population in America has been a sixty-year process.

The “Get tough” on Crime movement and the War on Drugs

Although the disproportionate incarceration of African Americans predates the war on drugs, the war on drugs increased the disparities and drastically increased the disproportionate representation of African Americans in federal and state prisons which culminated in a 17-year period in which African Americans accounted for the plurality if not the majority of individuals incarcerated in the United States while only accounting for 12% of the total U.S. population.  

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5 at 5.

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During the early days of the Republic the population of blacks was much higher:
- Between 1790 and 1810 the population ranged between 19.3 and 19.0%
- Between 1820 and 1830 the population ranged between 18.4 and 18.1%
- Between 1840 and 1860 the population ranged between 16.8 and 14.1%
- Between 1870 and 1890 the population ranged between 12.7 and 11.9%
- Between 1890 and 2000 the population ranged between 11.9 and 12.3%
- Between 2000 and 2010 the population ranged between 12.3 and 12.3%
As shown in Chart Two, the 1987-1997 decade, the “get tough” on crime political movement, and the rise of mandatory federal sentencing guidelines with the increase in sentencing for drug possession legislation were all instrumental in the increase in the percentage prison population and the overrepresentation of Blacks in U.S. Prisons. As shown in Chart Three, the majority of the first decade of the twenty-first century maintained the plurality of Black imprisonment.

In the political aftermath of the Len Bias cocaine overdose in 1986, rising violent crime and open air drug markets in the inner cities due to the rise of the “crack epidemic” with “violent crack selling gangs” and violent street dealers, and the fear of a growing population of “crack babies” Congress passed the Anti-Drug Abuse Act of 1986 (P.L. 99-570) which instituted distinctions in the minimum sentencing between offenders who possessed powder cocaine and those who possessed crack cocaine. The 1986 Act changed the sentences for powder and crack cocaine to make a 1 to 100 distinction between the two. Thus, “50 grams of crack, instead of 5,000 grams of powder cocaine, merited a ten-year minimum sentence, and 5 grams of crack, rather than 500 grams of powder, triggered a five-year sentence. Trafficking in 50 grams of powder cocaine carried no mandatory sentence.”

The significance of the 1 to 100 ratio was that crack cocaine was the version of cocaine used in the inner cities and by African American drug offenders. The effect of the guidelines was a significant increase in the number of mandatory ten-year sentences imposed on African Americans possessing crack with the corresponding reduction of sentencing of white Americans for possessing of powder cocaine. On April 10, 1995, the Commission proposed amendments to the Federal Sentencing Guidelines reducing the penalty levels for offenses involving crack cocaine to the same levels applicable to powder cocaine offenses. The action was opposed by Janet Reno and the Clinton Administration and legislation was signed on October 30, 1995, that reversed the Sentencing Commission change. In 1996, the Supreme Court upheld the constitutionality of the 1 to 100 crack to powder cocaine sentencing ratio in Armstrong v. United States.

The 1988 Anti-Drug Abuse Amendment Act (P.L. 100-690) increased minimum mandatory penalties for conspiracy to engage in drug trafficking and widened the net for mandatory imprisonment for street dealers and addicts through the establishment of a five year minimum sentence for first time possession of 5 or more grams of crack cocaine. To put this in perspective, in terms of weight, five grams of crack is equal to

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29 For an interesting review of the “politics” of the early drug war and the creation of the 1:100 ratio for crack and powder cocaine see, “Len Bias - the death that ushered in two decades of destruction” http://www.drugwarrant.com/articles/len-bias-two-decades-of-destruction/
34 The U.S.S.C. wrote in its report to Congress that:
Congress further underscored its concern about drugs generally, and crack cocaine specifically, in the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The most far-reaching change of the Anti-Drug Abuse Act of 1988 applied the same mandatory minimum penalties to drug trafficking conspiracies and attempts that previously were applicable only to substantive, completed drug trafficking offenses. Furthermore, with respect to crack cocaine, the Act amended 21 U.S.C. 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession. The Act made possession of more than five grams of a mixture or substance containing cocaine base punishable by at least five years in prison. The five-year mandatory minimum penalty also applies to possession of more than three grams of
about fifteen tablets of aspirin.\textsuperscript{35} The Crime Control Act of 1990 (P. L. 101-647) codified a Crime Victims’ Bill of Rights in the federal justice system, provided federal funding to joint federal and local anti-drug task forces, and directed the Commission to amend certain non-drug related sentencing guidelines. The Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) increased the number of federal crimes punishable by death, established federal “three strikes” provisions requiring life imprisonment, instituted the COPS program which provided funding for communities to hire 100,000 more police officers, and permitted the prosecution as adults of juvenile offenders (13 years of age and older) who committed federal crimes of violence or federal crimes involving a firearm, and instituted the ban on assault rifles.

But the “get tough on crime” politics of the late 1980s and 1990s subsided by the end of the 20th century and the tide of politics shifted towards changing the disparities of powder and crack cocaine during the first decade of the 21st century. The mandatory authority of the federal sentencing guidelines on the federal judiciary was reversed in 2005 when the Supreme Court held in \textit{United States v Booker} that the mandatory provision of the guidelines violated the Sixth Amendment.\textsuperscript{36} On December 10, 2007, the Supreme Court held in \textit{Kimbrough v United States} that the disparities in the sentencing guidelines between the two drugs were not mandatory upon the federal courts.\textsuperscript{37} More significantly, on November 1, 2007, the Commission lowered the penalties for possession of crack cocaine and on December 11, 2007, voted to apply the reductions retroactively.\textsuperscript{38} Unlike the Clinton Administration more than a decade

\textsuperscript{35} 1 tablet of aspirin = .325 grams. (5 ÷ .325) = 15.39, thus 15 tablets = 5 grams of crack.

\textsuperscript{36} \textit{United States v Booker} 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).


That was indeed the point of \textit{Kimbrough}: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case. …

As a logical matter, of course, rejection of the 100:1 ratio, explicitly approved by \textit{Kimbrough}, necessarily implies adoption of some other ratio to govern the mine-run case. A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant’s sentence necessarily permits adoption of a replacement ratio.

To the extent the above quoted language [by the Eighth Circuit] has obscured \textit{Kimbrough}’s holding, we now clarify that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.

\textit{But see, Dillon v. United States}, 560 U.S. ____, 130 S. Ct. 2683 (2010) (\textit{Booker} does not make Commission policy §1B1.10, which prohibits federal courts from reducing a sentence below the minimum when the minimum sentence is changed by the Commission and made retroactive, non binding.).

before, the Obama Administration supported a change in the 1 to 100 ratio and on August 3, 2010 President Obama signed the *Fair Sentencing Act of 2010* which ended the statutorily created 1 to 100 ratio between crack and powder cocaine.\(^{39}\) Specifically, the Act amended the *Controlled Substances Act* 21 U.S.C. 841(b)(1) subparagraph (A)(iii) from “50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;” to “280 grams” which carried a sentence of “a term of imprisonment which may not be less than 10 years or more than life” and if death occurred it carries a sentence of a minimum of 20 years, and subparagraph (B)(iii) from “5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;” to “28 grams” which carried a sentence of “a term of imprisonment which may not be less than 5 years and not more than 40 years,” and if death occurred it carries a sentence of a minimum of 20 years to life. The Act made identical changes to the *Controlled Substances Import and Export Act* 21 U.S.C. 960(b) paragraphs (1)(C) and (2)(C). More importantly the Act repealed\(^{40}\) the *1988 Anti-Drug Abuse Amendment Act*\(^{41}\) which had amended the *Controlled Substances Act* 21 U.S.C. 844(a). The Fair Sentencing Act also provided that proof of a defendant’s minor involvement and planning in drug trafficking would be a mitigating factor for sentencing purposes.\(^{42}\) The end result of the *Fair Sentencing Act of 2010* is that:

The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. The new mandatory minimum quantity threshold levels for crack cocaine offenses are consistent with the Commission’s 2007 report to Congress, *Cocaine and Federal Sentencing Policy*, in which the Commission, based on available information, defined crack cocaine offenders who deal in quantities of one ounce (approximately 28 grams) or more in a single transaction as wholesalers.\(^{43}\)

As a consequence, first-time trafficking offenses involving less than 28 grams of crack cocaine are subject to a statutory penalty range of zero to 20 years of imprisonment. First-time trafficking offenses involving between 28 and 280 grams of crack cocaine are subject to a statutory

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40 “Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning ‘Notwithstanding the preceding sentence …’."
41 “Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram.”

The *Controlled Substances Act* (21 U.S.C. 844(a)).
42 See, *Fair Sentencing Act of 2010 Section 7: Increased Emphasis on Defendant’s Role and Certain Mitigating Factors.*
penalty range of five to 40 years of imprisonment. A first-time trafficking offense involving 280 or more grams of crack cocaine is subject to a statutory penalty range of 10 years to life imprisonment.\(^{44}\)

The statutory changes went into effect on November 1, 2010.\(^{45}\)

The Commission estimated that “approximately 63 percent of crack cocaine offenders sentenced after November 1, 2011, will receive a lower sentence as a result of the change to the Drug Quantity Table, with an average sentence decrease of approximately 26 percent.”\(^{46}\) Although it is too early to assess the full impact of the change in the guidelines regarding African American incarceration, since 2009 incarceration data show that 22% of African Americans are incarcerated for drug offenses and the majority of the drug offenses are crack related, the change in sentencing guidelines should produce a positive decrease in the overall incarceration rate. The Commission has completed the process of soliciting public comment on making the guidelines retroactive (June 2011). The Commission is considering retroactively applying the new guidelines to sentences involving first time offenders with crack cocaine possession involving 28 grams or more incarcerated as of October 1, 2010.\(^{47}\) The Commission proposed policy would retroactively apply the new guidelines to offenders sentenced in fiscal years 1992 – 2009 (October 1, 1991, and September 30, 2009).\(^{48}\) The Commission concluded that 12,835 offenders would be eligible for a reduced sentence\(^{49}\) of which 85% would be African American (N=10,884).\(^{50}\)

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\(^{46}\) Id. at 22.

\(^{47}\) Commission memo at 9.

\(^{48}\) Id. at 10.

\(^{49}\) See id. at 11-14 on determination of eligibility for reduced sentences.

\(^{50}\) Id. at 19. The Commission is considering two policy options. The first, (“New Crack Amendment BOL 26”), proposes to “amend the drug quantity thresholds in the Drug Quantity Table so as to provide base offense levels corresponding to guideline ranges that are above the statutory mandatory minimum penalties.” Specifically:

- to assign offenses involving 28 grams or more of crack cocaine a base offense level of 26, corresponding to a guideline range of 63 to 78 months for a defendant in Criminal History Category I. Offenses involving 280 grams or more of crack cocaine would be assigned a base offense level of 32, corresponding to a guideline range of 121 to 151 months for a defendant in Criminal History I. This first approach is consistent with how the guidelines incorporated the statutory mandatory minimum penalties for crack cocaine offenses prior to the 2007 Crack Cocaine Guideline Amendment. (Id. at 9. The projected impact being more than 10,000 African Americans would be eligible for sentence reduction. The second policy option (“New Crack Amendment BOL 24”), proposes to “amend the drug quantity thresholds in the Drug Quantity Table so as to provide base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties.” Specifically:

- to assign offenses involving 28 grams or more of crack cocaine a base offense level of 24, corresponding to a guideline range of 51 to 63 months for a defendant in Criminal History Category I. Offenses involving 280 grams or more of crack cocaine would be assigned a base offense level of 30, corresponding to a guideline range of 97 to 121 months for a defendant in Criminal History I. This second approach is consistent with how the guidelines incorporated the statutory mandatory minimum penalties for crack cocaine offenses as a result of the 2007 Crack Cocaine Guideline Amendment. (Id. at 9-10. The projected impact of the second option is that 15,227 offenders would be eligible for
Part Two: Overrepresentation of African Americans and Other Minorities: Explanations and Theories

Although there are multivariate and consequential explanations for the overrepresentation of African Americans in the criminal justice system, any assessment of why this disproportionate minority confinement occurs must take into account that the overrepresentation of African Americans in American prisons is decades older than the “war on drugs” policies of the 1970s; the arrival of “crack” cocaine and its concomitant violence in the early 1980s; the “get tough on crime” policies of the mid 1980s through the mid 1990s; the advent of mandatory sentencing policies of middle 1980s; and the rise of “three strikes” in the 1990s. As Calhan observed, since 1850 Blacks and other non-native whites accounted for 40-50 percent of the incarceration rate in the United States and the research by Moehling and Piehl concluded that in 1904 blacks had an incarceration rate of 1,647 per 100,000 compared to 663 per 100,000 native born whites. By 1930 the rate had increased to 4,545 per 100,000 for blacks and 1,923 per 100,000 for native born-whites.

There is no dearth of research, explanations, or theories on reasons for the overrepresentation of African Americans within the American criminal justice system. The disparities in sentencing are classically described as the result of differential involvement (African Americans’ disproportionate commission of crime) vs. differential selection (African Americans are disproportionately treated within the criminal justice system and disproportionately targeted by policy operations or a combination of both based on race apart from actual criminal activity). Oliver proposed three socio-economic factors as contributory to the racial disparities of prison admissions:

1. The white imprisonment rate:
States that imprison more whites also imprison more blacks.
2. The percentage of the population that is black:
In general, the smaller the percentage, the higher the imprisonment rate of blacks.
3. The ratio of the black poverty rate to the white poverty rate.

It appears that blacks are more likely to be imprisoned where they are a smaller, politically weaker, and economically marginalized population.

In a 2002 evaluation of the disproportionate minority confinement initiative in Multnomah, Oregon, the following observation was made regarding disproportionate minority confinement and African American population ratios to the white population nationwide:

reduction in sentences of which 85% would be African American (N=12,939). The dates for eligibility for the second option are the same as those for the first. Id. at 36, 45.

51 Supra note 24.
53 Id.
By 1997, in 30 of the 50 states (which contain 83% of the U.S. population) minority youth represented the majority of youth in detention. Even in states with tiny ethnic and racial minority populations, (like Minnesota, where the general population is 90% white, and Pennsylvania, where the general population is 85% white) more than half of the detention population are youth of color. In 1997, OJJDP found that in every state of the country (with the exception of Vermont), the majority population of detained youth exceeded their population in the general population.

Myers explained the relationship between population growth of African Americans, economics, and social control (prison incarceration) as follows:

As minorities comprise a larger proportion of the population, social control efforts intensify, presumably because minorities threaten the existing distribution of economic rewards and political power. To the extent that minority group members are linked with greater criminality, as is the case of black Americans, they presumably threaten public safety, increasing fear of crime and efforts to control it.

In a 2003 report published by the Youngstown State University, the authors proposed that the disproportionate incarceration of black males is directly related to the economic conditions of many urban communities.

A common thread that runs through these findings is that the incarcerated Black males are a criminalized urban underclass who tends to be poor, uneducated, unskilled and therefore unemployed or underemployed. Those who worked at the time of arrest worked in dead-end jobs with incomes that were below the poverty line. In order to eke out a living by any means fair or foul, the majority of the young incarcerated Black males studied resorted to an underground economy associated with drug trafficking. By implication, the social and economic impacts of their incarceration have produced incalculable collateral damages on themselves in particular, their families, and the Black communities in general.

The impact of prior criminal activity on future economic viability is significant because research has shown that those with criminal records have a significantly more difficult time in finding “honest” work that pays a living wage. The result of having a criminal record has direct racial implications when it is observed that African Americans have a

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disproportionate rate in criminal conviction and/or accepting criminal plea agreements resulting in felony records.

The historical and national problem of disproportionate minority confinement being a settled fact, the debate on the issue lay in explaining the problem. The range of explanations range from one extreme that asserts that the disproportionate rate is the result of pure institutional racism and the vestiges of slavery to the other that asserts that African Americans commit a disproportionate amount of crime and the incarceration rate is simply the result of more criminality by African Americans. The American Society of Criminology in its draft 2000 report summarized the research on the problem as follows:

In summary, African Americans and Hispanics are grossly over represented in the prisoner population, and that this over representation has increased over the past two decades. The degree of over representation in prisons varies greatly from state to state. One reason for this level of over representation is the higher rate of arrests for crimes one can be sentenced for to prison. However, there is a growing body of research suggesting that arrest practices in certain jurisdictions are based, in part, on race. There is also evidence that discrimination occurs in the pretrial detention, prosecution, sentencing and release decision-making.

On June 23, 2004, the American Bar Association Justice Kennedy Commission issued its report on disproportionate confinement and warned that “the debate between those who claim discrimination (whether intentional or unintentional) and those who allege over-offending as the cause of racial disparity not only oversimplifies the problem, but it sets forth a false dichotomy.”

Both the ASC and the Kennedy Commission reports are correct. Although it is true that to assert racism is the lead, if not the primary, factor explaining racial disparities throughout the criminal justice system is not the answer – it is also true that racial discrimination on the part of the police, the gatekeepers of the system, is no small factor in the resulting disproportionate minority arrests and incarceration rates. Research has shown that various social factors and structures are involved in the problem including: (1) impact of race and class and the criminalization of drug addiction, (2) the “get tough on crime” and the “war on drugs” social policies of the 1970s and 1980s, (3) poverty and the lack of education centered programming and services in minority communities which fosters and support underground economic activity and “open air” criminal activity which in turn activates and/or enhances more law enforcement attention, (4) societal glorification of violence which has a more detrimental affect on poorer African American communities, (5) the criminal justice system has inherent features that result in disparate impact on the poor, who in America are disproportionately African American (that race is masking poverty, which is what is actually overrepresented), (6) the placement of a “black face” on violent crime (Willie

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63 Id. See also, supra note 25.
Horton for example),\(^{64}\) (7) the perception that violent crime is committed by African American males rather than white males, which leads to more serious criminal penalties, (8) media focus on crimes with African American perpetrators further supporting the perception that crime is a “black problem” to be solved by the courts and prisons, (9) the use of discretionary powers by those who operate the criminal justice system disparately affect African Americans than whites, and (10) a combination of all or some of the above.

The Commission in 2004 issued a report\(^{65}\) reviewing the impact of federal sentencing guidelines on African Americans and other minorities. The Commission approached the issue of disparate impact by explaining that if “a sentencing rule has a disproportionate impact on a particular demographic group, however unintentional, it raises special concerns about whether the rule is a necessary and effective means to achieve the purpose of sentencing.”\(^{66}\) According to the report, the gap between white and minority offenders was relatively small in the pre-guidelines era compared to the post-guidelines era, which also corresponded with the imposition of mandatory minimum drug sentences.\(^{67}\) “While the majority of federal offenders in the pre-guidelines era were white, minorities dominate the federal criminal docket today.”\(^{68}\)

To the question of why this gap occurs, The Commission proposed the following:

[M]ost of any gap between majority and minority offenders reflects, to a great extent, legally relevant differences among individual group members in the types of crimes committed and in criminal records. No careful student of sentencing research seriously disputes this finding. A great deal of controversy remains, however, over how much, if any, of the gap remains after accounting for the effects of legally relevant factors, and whether any of this gap is due to discrimination on the part of judges.

… three possible explanations for the gap [are:]

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\(^{64}\) In the 1988 Presidential campaign, supporters of George H.W. Bush (Republican candidate) aired a commercial attacking Michael Dukakis (Democratic candidate) portraying him as “soft” on crime. The commercial (aired in September 2008) was significant because it focused on a furlough program in Massachusetts, when Dukakis was the Governor, that granted Willie Horton (an African American convict sentenced to life without the possibility of parole) a weekend release from prison. Soon after release he committed murder and rape of a white couple. The commercial showed the face of Horton and was perceived as racist because it showed an African American as a mindless murderer and rapist while the majority of those who commit murder and rape are white men. The Willie Horton commercial sparked a political firestorm regarding the use of race in the discussion of violent crime (not to mention white victimhood of black violent crime) and the implication that violent crime was caused by African American men – thus these men need to be controlled. This commercial was aired with another commercial made by the Bush Campaign attacking the furlough program showing prisoners (said to be murderers and rapists) walking through a revolving door. When the only African American prisoner walked through the revolving door he looked up into the camera, the only prisoner to do so. All of the other prisoners walked through but kept their heads down. The subtle implication was that the African American prisoner was the one to be feared. These two commercials were credited with helping to defeat Dukakis in the fall 2008 election.


\(^{66}\) Id. at 113.

\(^{67}\) Id. at 115.

\(^{68}\) Id. at 114.
Fair differentiation: offenders receive different treatment based on legally relevant characteristics needed to achieve the purpose of sentencing

Discrimination: offenders receive different treatment based on their race, ethnicity, gender, or other forbidden factors

Unsupportable adverse impact: offenders receive different treatment based on sentencing rules that are not clearly needed to achieve the purposes of sentencing.

The Commission concluded that most “of the gap … results from fair differentiation among individual offenders [and d]iscrimination on the part of judges contributes little, if any, to the gap among racial and ethnic groups.” In summary, the Commission wrote:

A significant amount of the gap between Black and other offenders can, however, be attributed to the adverse impact of current cocaine sentencing laws. In addition, other changes in sentencing policies over the past fifteen years, particularly the harsher treatment of drug trafficking, firearm, and repeat offenses, have widened the gap among demographic groups. Whether these new policies contribute to crime control or to fair and proportionate sentencing sufficiently to outweigh their adverse impact on minority groups should be carefully considered by policymakers.

The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System report concluded, “after controlling for legally proscribed factors and mode of conviction, the study found that the defendant status characteristics of race, ethnicity, gender, and age definitely affect sentencing outcomes of all kinds.” The report made the following findings:

1. Courts rely primarily on the legally prescribed factors, i.e., the type and seriousness of offenses and the defendant’s prior criminal record, in determining sentences for defendants.
2. In sentencing, the mode of conviction matters. Defendants who were convicted following a trial – especially a jury trial – were substantially more likely to be incarcerated and received substantially longer prison terms than those who entered guilty pleas.
3. Race affects sentencing outcomes. Overall, African Americans are slightly more likely to be incarcerated than Whites and received slightly higher sentences. African Americans had a 1.2 percent greater probability of incarceration and received sentences that were, on

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69 Id. at 116.
70 Id.
71 Id.
72 Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003).
73 Id. at 129.
74 Id. at 130.
average, 1.3 months longer than Whites. Young African American males, age 18-29, had a 4.8 percent greater probability of incarceration and received sentences that were, on average, 4.3 months longer than Whites. Older African American males, ages 30 and over, had a 4.1 percent greater probability of incarceration and received sentences that were, on average, 3 months longer than Whites.

Although the report did not make specific recommendations to these specific findings, the observation that the courts “rely primarily on the legally prescribed factors, i.e., the type and seriousness of the offenses and the defendant’s prior criminal record, in determining sentences for defendants” is important in understanding how legally acceptable distinguishing factors can have a disparate impact. For as more African Americans, especially African American men, are more likely to be arrested and come into the system and thus develop more numerous criminal histories (through pleas agreements); they are more likely to be incarcerated and for longer periods of times than whites. Thus although racial bias may not be driving the incarceration it is subtly impacting incarceration by disparately developing the very factors that result in the overrepresentation of African American males at the sentencing stage. If more African Americans are taking pleas, in part, because “defendants who [are] convicted following a trial – especially a jury trial – [are] substantially more likely to be incarcerated and receive[] substantially longer prison terms than those who entered guilty pleas” the result of more developed criminal histories through plea agreements impacts later sentencing decisions, disparately impacting African Americans.

**Part Three: A Summary List of Policy and Research Conclusions on Both Explanations and Solutions to the Disproportionate Incarceration of African Americans**

Research on the causes and impact of African American overrepresentation throughout the criminal justice system have been conducted for more than twenty years and has been summarized as follows:

1. The causes of disparity are varied and include differing levels of criminal activity, law enforcement emphasis on particular communities, legislative policies, and decision making by criminal justice practitioners who exercise broad discretion in the criminal justice process.
2. The problem of racial disparity is one which builds at each stage of the criminal justice continuum of arrest through parole, rather than

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the result of the actions of any single agency or point along the
continuum.
3. Strategies are required to tackle the problem at each stage of the
criminal justice system in a coordinated way.
4. Each decision point and component of the system requires unique
strategies depending on the degree of disparity of that component.
5. When looking at arrest rates it is important to remember the context
in which arrests are made. Arrest rates are essentially an indicator of
police activity in clearing crimes reported to them and crimes they
observe themselves. Arrest rates are not indicators of crime or
criminal behavior *per se*.
6. Issues of both race and class impact the likelihood of involvement
with the criminal justice system and treatment within the system.
Poor people generally are overrepresented at every stage of criminal
justice system and people of color are also disproportionately poor.
7. The fact that official statistics consistently show poor and minority
persons to be overrepresented among those arrested and convicted by
the system must be tempered by the realization that these groups are
the ones most lacking in the resources needed to avoid arrest and
criminal justice punishment.
8. Another factor that explains rates of incarceration is the criminal
history of an offender. The more serious a prior criminal record, the
greater the likelihood of receiving a prison term for a new offense.
Whether one acquires a criminal record is clearly in part related to
the level of criminal activity, but is also a function of race,
geographic location and other factors.
9. Another factor in disparity is law enforcement resources heavily
focused in poor neighborhoods and public safety strategy being
limited to arrest and prosecution.
10. Bail and pretrial release screening policies and decisions are biased
in favor of middle class values and resources which add to disparate
impact on members of poorer communities.
11. A defendant who comes to court for sentencing directly from lock-up
may be disheveled or angry, and viewed as a prisoner. Another
defendant who has the resources to avoid pretrial detention will
arrive well dressed and may be able to show a record of seeking
treatment or other services prior to trial. These differences can lead
to post-conviction disparities, where the “prisoner” remains in
prison, and the “free” defendant remains free.
12. Given the nature of the crack versus cocaine marketing system, it is
obvious that enforcement efforts would concentrate on the former
rather than the latter, and crack markets are more visible and
vulnerable in the neighborhoods of the minority poor.
13. Each decision point of the criminal justice system: arrest by law
enforcement; arraignment, release, and pre-adjudicatory hearings;
pre-trial jail and prison custody; adjudication and sentencing;
probation and community supervision; and parole decisions are all
exercised with various levels of discretion and subject to covert,
 overt, and unconscious biases.
Research has also demonstrated that delinquent and criminal behavior can be influenced by environmental factors such as the level of lead found in the environment and higher levels of lead have been found in the blood levels of offenders.77 Other factors include prior criminogenic experience with family disruption, dysfunction, and physical / emotional / sexual abuse and neglect;78 and the lack of educational attainment and / or entrepreneurial opportunities.79 Environmental criminology provides explanations including life course80 and population density. “Unemployment has been found to bear a significant, positive relation to prison rates in the United States … [For example, as] unemployment in 1923 fell to an unusually low rate of 3 percent … , the early 1920s brought a general easing of punitiveness … in contrast to the increased severity to follow in the late 1920s and 1930s.”81 The presence of war is also a factor in the prison rate as a whole. During the American involvement in the Second World War (1941 – 1945) the American prison population decreased 23.7% and during the height of the Vietnam War era (1961 – 1968) the American prison population decreased 15% “as most of the pool of potential offenders [were] drafted.”82 While the war reduced the percentage of those in prison, the percentages of white and black prisoners remained the same.

In its report,83 Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers, the Sentencing Project provided various recommendations on how to reduce disproportionate minority confinement; some of which are summarized as follows:

1. Throughout the criminal justice system conduct ongoing assessments of the impact of the system on disproportionate minority representation on each part of the system. Research has shown that overrepresentation is no longer caused by a system of wide discrimination, but rather by cumulative affects of each part of the system as the system progresses from initial police contact through sentencing.
   a. Conduct ongoing assessment of pretrial decisions, policies and procedures and their impact on minority groups as well as make sure policies and procedures are race neutral.
   b. Conduct ongoing assessment of prosecution strategies, policies and procedures.

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78 Id. at 54.
83 *Supra* note 72.
Past research does not provide evidence that current criminal justice operations are not producing disproportionate affects on minority groups.

2. Support the implementation of community policing.
3. Monitor traffic and pedestrian stops (which impact the number of contacts between minority groups and the police which in turn can lead to arrest and entrance into the criminal justice system).
4. Develop alternatives to arrests.
5. Implement community policing.
6. Create and collaborate on creation of neighborhood problem-solving strategies and programs.
7. Advocate for appropriate pretrial release services and programs.
8. Develop non-incarceration strategies and programs.
9. Expand the range of available bail and sentencing options.
10. Increase the use of community based and probation services.
11. Develop and utilize race neutral risk management assessments.

I would add the following recommendations:

1. Develop various types of re-entry programs to meet the various needs of returning offenders.
2. Support community based prevention and intervention programs geared specifically to youth between 13 and 16 years of age.
3. Support youth educational, employment, and entrepreneurial programs.
4. Develop programs specifically for youth who come into contact with child mental health and child protective agencies. Research has shown that a significant number of youth who are under some level of juvenile justice supervision have child mental health and / or child protective service agency histories.\textsuperscript{84}
5. Develop more cooperation and collaboration with the faith community in programs to meet the needs of youth, returning offenders, and the communities to which these offenders will be released.
6. Develop practical strategies at the various decision and entry points within the criminal justice system – from pre-arrest police policies and community interaction – through sentencing, length of incarceration, rehabilitation during incarceration, and practical re-entry programs.\textsuperscript{85}
7. Increase societal sophistication of understanding the problem through education and political discourse. Resist the easy and simple explanations by both political extremes and focus on the cost of crime victimization as well as the overuse of prison to solve social problems and conditions.
8. Resist the media and cultural glorification of the “thug” image and the belief that criminal behavior and having a criminal record is reflective of being authentically African American. In other words, refute the idea that being ignorant and criminal is “keeping it real” and being authentically


\textsuperscript{85} For example, see The Sentencing Project (2008). \textit{Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policy Makers}.
black, and only those who engage in such conduct can understand and speak of being black in America.

9. Focus on truancy and academic failure in the middle and early high school levels. Rates of truancy increase during the transition between elementary and middle school and between middle school and high school. Research has shown that truancy is the gateway to more serious delinquent behavior which leads to adult criminal activity. Put simply, address the school to prison pipeline.

10. Implement teen court and community court diversion programs for non-violent youthful offenders based on the classical theory of delinquent behavior that youth are better deterred from subsequent crime when sanctions are applied close in time to the delinquent act. In other words, of the three concepts of deterrence - swiftness, severity, and surety - swiftness is most significant in the deterrence of non-violent youth from returning to the juvenile and criminal justice systems.

Conclusion

The incarceration rate of African Americans has been a systemic and historical problem within the United States. Both academic research and policy / program evaluations over the past thirty years have settled that the problem, on a macro-level, is not systemic and intentional racism within the criminal justice system as a whole, but a combination of social, political, systematic operations within society and how the criminal justice system operates.

The disproportionate arrest and incarceration of African American youth and adults involves various social and political factors. These include poverty, educational

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86 Arthur H. Garrison (2006) “‘I Missed the Bus’: School grade transition, the Wilmington Truancy Center and reasons youth don’t go to school” 4(2) Youth Violence and Juvenile Justice: An Interdisciplinary Journal 204.

87 The school to prison pipeline describes how the lack of academic achievement in elementary and middle school leads to disruptive behavior in school or truancy which leads to minor delinquency which leads to more serious delinquency which leads to adult criminal activity which leads to prison. The school to prison pipeline does not propose a causal relationship between school failure and adult criminal activity but proposes that there is a developmental and logical association between failure in school and adult crime. Thus the theory proposes that increased attention to the early grades and early academic success, especially in reading and math – 1st through 5th grades, will increase later academic success leading to completion of high school and attending college. Both of which reduces the possibility of engaging in delinquent and criminal activity.


90 Classical rational choice theory assumes that people choose to commit crimes based on the level of their belief that they will be caught and punished and that criminal behavior is the result of the weighing of the benefit of the criminal act vs. the severity of the sanction. The theory further asserts that as the time between the criminal act and imposition of sanction increases the impact of a sanction on future behavior will decrease. Teen court and community court programs decrease the length of time between act and sanction, thus increases the impact of the sanction and makes more relevant that weighing of the severity of the sanction to the benefit of the criminal act in the mind of the youthful offender.
failure, lack of economic opportunity, single female head of households, the fall of the importance and significance of the black male within the black family, prior criminal history, use of prisons as a method of addressing social inequalities, inequality in criminal sanctions of crimes committed by African Americans, police crime suppression and neighborhood patrol operations, historical overt racism, and in some cases modern covert racism. All of these social and political factors have all been positively correlated with disproportionate African American incarceration. Research has also shown that higher educational attainment, stable employment, and traditional family structure have also been positively correlated with reducing incarceration. The policy and research problem that still persists is the question of whether race is a proxy for the social factors of poverty and social inequality in society, and in the 21st century, has race been superseded by the factor of class inequality? Are African Americans being disproportionately incarcerated or are the poor and uneducated being disproportionately African American?

The history of race in America is a very complicated and evolving subject. The same nation that was built on the idea that all men are created equal also embraced

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92 See *Dred Scott v Sandford*, 60 U.S. 393, 407-408 (1857):

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

> He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

> And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people, ....

> The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

Taney is correct that slavery, from the beginning of the founding, was an institution well established within the legal, social, economic, and constitutional structure of America. As Professor Paul Finkelman observed:

> [T]he *Dred Scott* case was “a reasonable decision given the moment.” The historical fact is that in “1857 as it had been since 1788 . . . the United States was a slave holder’s republic.” Dred Scott correctly concluded that blacks as a group had no rights which the white man was bound to respect and were deemed inferior to whites because “if you look at the laws of the United States, whether in 1788, 1789, or 1857 you find for vast majority of African Americans that was their legal status.”

Paul Finkelman panelist on “*Dred Scott v Sandford*” session in the Pepperdine Law School Symposium *Supreme Mistakes: Exploring the Most Maligned Decisions in Supreme Court History* April 1, 2011.
slavery based on race. That same nation endured a civil war at the cost of more than 600,000 lives to settle the question of whether slavery was, as Senator John Calhoun of South Carolina asserted (on the floor of the U.S. Senate) on January 10, 1838, a “great institution [and was] the most safe and stable basis for free institutions in the world.”

The 1838 speech was in support of a document, *The Importance of Domestic Slavery: The Calhoun Resolutions*, with six resolutions on states rights and limited powers of the national government that Calhoun submitted to the U.S. Senate. The document asserted that the federal government was one of limited powers, that it was formed by the states, not “We the people.” that it was the abolition of slavery that was evil, and that the federal government should seek to protect, not interfere, with the southern and western states implementation of slavery.

In support of the six resolutions Calhoun asserted that the issue of slavery was more than an issue of master and slave, but was an issue of the plan of God and nature of how free men govern themselves under the Constitution:

> He saw (said Mr. C.) in the question before us the fate of the South. It was a higher than the mere naked question of master and slave. It involved a great political institution, essential to the peace and existence of one-half of this Union. A mysterious Providence had brought together two races, from different portions of the globe, and placed them together in nearly equal numbers in the Southern portion of this Union. They were there inseparably united, beyond the possibility of separation. Experience had shown that the existing relation between them secured the peace and happiness of both. Each had improved; the inferior greatly; so much so, that it had attained a degree of civilization never before attained by the black race in any age or country. Under no other relation could they coexist together. To destroy it was to involve a whole region in laughter, carnage, and desolation; and, come what will, we must defend and preserve it.

This agitation has produced one happy effect at least; it has compelled us to the South to look into the nature and character of this great institution, and to correct many false impressions that even e had entertained in relation to it. Many in the South once believed that it was a moral and political evil; that folly and delusion are gone; we see it now in its true light, and regard it as the most safe and stable basis for free institutions in the world.

The Claremont Institute, Founding.com www.founding.com/founders_library/pageID.2283/default.asp.

In his February 6, 1837 *Slavery a Positive Good* speech on the floor of the U.S. Senate Calhoun defended the economic, social, political, and natural order of life regarding slavery in the South.

> But I take a higher ground. I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good, a positive good. I feel myself called upon to speak freely upon the subject where the honor and interests of those I represent are involved. I hold then, that there never has yet existed a wealthy and civilized society in which one portion of the community did not, in point of fact, live on the labor of the other. Broad and general as is this assertion, it is fully borne out by history. … But I will not dwell on this aspect of the question; I turn to the political; and here I fearlessly assert that the existing relation between the two races in the South, against which these blind fanatics are waging war, forms the most solid and durable foundation on which to rear free and stable political institutions. It is useless to disguise the fact. There is and always has been in an advanced stage of wealth and civilization, a conflict between labor and capital. The condition of society in the South exempts us from the disorders and dangers resulting from this conflict; and which explains why it is that the political condition of the slaveholding States has been so much more stable and quiet than that of the North. … Surrounded as the slaveholding States are with such imminent perils, I rejoice to think that our means of defense are ample, if we shall prove to have the intelligence and spirit to see and apply them before it is too late. All we want is concert, to lay aside all party differences and unite with zeal and energy in repelling approaching dangers. Let there be concert of action, and we shall find ample means of security without resorting to secession or disunion.

(Emphasis added). See generally, Thomas G. West (1997), *Vindicating the Founders: Race, Sex, Class, and
Confederate Vice-President Alexander Stephens in the *Corner-Stone Speech* on March 21, 1861 echoed the views of Calhoun, one score and three years before, on the Founder’s false proposition that all men are created equal and that slavery was evil:

> Our new government is founded upon exactly the opposite idea; its corner-stone, rests upon the great truth, that the negro is not equal to the white man; that slavery – subordination to the superior race – is his natural and normal condition.

> This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.\(^94\)

*Justice in the Origins of America* for the proposition that the Founders, specifically Jefferson, recognized slavery as an evil but admitted that it was an evil that could not be separated from the good in forming the United States under the Constitution or for that matter forming the alliance among the colonies to fight for independence from Great Britain.

See also, *Speech On The Introduction Of His Resolutions On The Slave Question* by Calhoun on February 19, 1847 in which he complained that the northern policy of requiring new states to enter the union as free states and the limiting of the spread of slavery into the western territories threatened to make the slave owning states of the South a minority in the Senate. A result he warned would not be tolerated by the South, asserting “let me say to the gentlemen from the non-slaveholding States: to them. Sir, the day that the balance between the two sections of the country—the slaveholding States and the non-slaveholding States—is destroyed, is a day that will not be far removed from political revolution, anarchy, civil war, and widespread disaster.” But more importantly, he asserted that

> Ours is a Federal Constitution. The States are its constituents, and not the people. The twenty-eight States—the twenty-nine States (including Iowa)—stand under this Government as twenty-nine individuals . . . it was so formed that every State, as a constituent member of this Union of ours, should enjoy all its advantages, natural and acquired, with greater security, and enjoy them more perfectly. The whole system is based on justice and equality—perfect equality between the members of this republic.

Thus freedom, justice, and equality was acknowledged by the South to be values to be protected by the national government, but these values were to be protected as they related to the states not to the individual people. Such is the intellectual history of states rights.

\(^94\) Stephens made clear that the Confederacy was built upon the rejection of various principles and beliefs of the founding generation – both in constitutional structure and regarding slavery. Stephens explained:

> But not to be tedious in enumerating the numerous changes for the better, allow me to allude to one other though last, not least. The new constitution has put at rest, forever, all the agitating questions relating to our peculiar institution African slavery as it exists amongst us the proper status of the negro in our form of civilization. This was the immediate cause of the late rupture and present revolution. Jefferson in his forecast, had anticipated this, as the “rock upon which the old Union would split.” He was right. What was conjecture with him, is now a realized fact. But whether he fully comprehended the great truth upon which that rock stood and stands, may be doubted. The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the constitution, was the prevailing idea at that time. The constitution, it is true, secured every essential guarantee to the institution while it should last, and hence no argument can be justly urged against the constitutional guarantees thus secured, because of the common sentiment of the day. Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the government built upon it fell when the “storm came and the wind blew.” (Emphasis added).
The first and only President of the Confederacy came to the same conclusion as his future Vice-President when he resigned from the U.S. Senate after Mississippi seceded from the Union. In his speech, Jefferson Davis, asserted that the states had a right to secede from the union when the North did not relent from seeking to end the social and political institution of slavery. He agreed with Calhoun and Stephens that the issue of the conflict was whether the founding generation in the Declaration of Independence and the Constitution meant to include African Americans within the idea that all men are created equal. He asked rhetorically:

[H]ow happened it that among the items of arraignment made against George III was that he endeavored to do just what the North has been endeavoring of late to do--to stir up insurrection among our slaves? Had the Declaration announced that the negroes were free and equal, how was the Prince to be arraigned for stirring up insurrection among them? And how was this to be enumerated among the high crimes which caused the colonies to sever their connection with the mother country? When our Constitution was formed, the same idea was rendered more palpable, for there we find provision made for that very class of persons as property; they were not put upon the footing of equality with white men--not even upon that of paupers and convicts; but, so far as representation was concerned, were discriminated against as a lower caste, only to be represented in the numerical proportion of three fifths.95

95 Jefferson Davis, Farewell Address to the U.S. Senate (January 21, 1861). Such was the logic in Dred Scott v. Sandford, 60 US 393, 403, 404-405 in which the Supreme Court ruled on March 6, 1857:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution... Whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves. ...

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether [those who are African slaves and decedents of African slaves] are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

(Emphasis added). Such was the law until the fall of slavery and the rise of the Fourteenth Amendment in 1868.
Yet the same nation that produced Calhoun, Stephens, and Davis also produced Abraham Lincoln. Lincoln said, America would not remain half slave and half free.\textsuperscript{96} He answered the South with the assertion that the results of a fair election in a nation of free men “there can be no successful appeal from the ballot to the bullet and that they who take such appeal are sure to lose their case, and pay the cost.”\textsuperscript{97} But the battles of Antietam (September 17, 1862) and Gettysburg (July 1–3, 1863) and general carnage of the war brought Lincoln to understand that the war was not simply a war over his election but the settlement of fundamental debate, was America a republic based on the idea of freedom, liberty, and equality for all or was it a slave owners republic in which freedom and liberty was for only the white race. At Gettysburg he said, of the American system of government based on liberty and that all men are created equal, “we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure.” In answering his own question Lincoln asserted “that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth.” After four years of war Lincoln answered Stephens and Calhoun, regarding the moral validity of slavery, that under the judgment of a just and righteous God on the nation that indulged in slavery, the civil war would continue “until every drop of blood drawn with the lash, shall be paid by another drawn with the sword……”\textsuperscript{98}

Exactly one hundred years to the month after the Emancipation Proclamation, America produced a Governor, who asserted before a praising crowd, as Calhoun and Stephens did before him:

> Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny. And I say segregation today, segregation tomorrow, segregation forever.\textsuperscript{100}

But the same nation that produced George Wallace also produced John F. Kennedy. In June 1963 Wallace asserted that he would not comply with a court order admitting two African American students to the University of Alabama. He made clear that he would stand in the door of the admissions office and block the admission with all of the political and military power of his office. One hundred years before, Lincoln in his

\textsuperscript{96} Abraham Lincoln, \textit{House Divided Speech} (June 1858).


\textsuperscript{98} Abraham Lincoln, \textit{Second Inaugural Address} (March 4, 1865).

\textsuperscript{99} “And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons …. And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.” (January 1, 1863)

\textsuperscript{100} George C. Wallace, \textit{Governor of Alabama Inaugural Address} (January 14, 1963) (Emphasis added).
Emancipation Proclamation promised that “the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of” the now freed slaves. One hundred years later, as Eisenhower did in 1957, President Kennedy fulfilled Lincoln’s promise in 1963 by facing down Wallace on the door step of the University of Alabama with the force of the Alabama National Guard to admit those two students. President Kennedy then answered Wallace’s segregation today, segregation tomorrow, segregation forever. The President said

[This nation] was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened….

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free. …

Now the time has come for this Nation to fulfill its promise.101

The judiciary was not without a voice in the history of race. Calhoun, Stephens, and the South found support from the Supreme Court when it held in Dred Scott (1857) that African Americans as a group had no rights which the white man was bound to respect and was deemed inferior to whites. In Plessy v Ferguson (1896) the South, having lost the war and the debate on whether African Americans were citizens and had the right to sue before the bar of justice, found support for their social separation when the Court ruled regarding the Fourteenth Amendment:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. …

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.102

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101 John F. Kennedy, Civil Rights Address (June 11, 1963).
102 Plessy v Ferguson, 163 US 537, 544, 551 (1898) (emphasis added). The Court went on to make an interesting and very familiar argument regarding the difference between political and social equality. The argument also assumes that social prejudices may be overcome by legislation, and
Justice Brown’s view that separation by law had nothing to do with enforced views of inferiority prevailed until Thurgood Marshall challenged the assertion in *Brown v. Board of Education* (1954) in which Chief Justice Warren held the *separate but equal* had no place in American education. Justice Harlan’s dissent in *Plessy* found affirmation and Justice Brown’s cavalier discounting of the social results of the public policy of forced segregation found abandonment when Chief Justice Warren affirmed the view that forced social separation was based on the idea that one race was too inferior to be allowed to sit with another in the same classroom. Such was the beginning of the modern civil rights movement.

The point of this brief account of the history of race in America is that the same nation that fought a civil war to end slavery and settle if African Americans were included in all men are born equal; and the same nation that asserted that African Americans were too inferior to be on the same level as whites in social matters of society; and the same nation that fought in Congress, the courts, and in the streets of the South to end segregation and overt institutional racism down to the level of eating at lunch counters and the use of bathrooms (resulting in the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965), is the same nation that cheered the election of the first African American President of the United States only fifty four years after *Brown*. Put another way, only fifty one years after President Eisenhower (1957) was forced to dispatch the 82nd Airborne to make sure nine black children could walk into a

that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. … Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

*Id.* at 551-552. To which Justice Harlan answered in his lone dissent:

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. …

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.

*Id.* at 560, 562.


The Court approvingly cited the District Court in Kansas and its conclusion that:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.* at 494.
high school without getting killed by a mob and only forty six years after President Kennedy (1962) was forced to send in combat troops and the military police to reinforce a detachment of U.S. Marshalls protecting one African American student from an armed lynch mob on the campus of University of Mississippi – an African American man stood before the capital and took the same oath of office taken by the slave owning President Washington, later by the great emancipator President Lincoln, and every subsequent man who has held the office of President of the United States.

Such is the tapestry of American history that forms the backdrop to the disproportionate incarceration of African Americans.

The explanation for the disproportionate incarceration has ranged from historical and systematic racism to the natural result of disproportionate criminality of African Americans to legal discriminatory factors within the decision making process of the criminal justice system. Despite the victories of Lincoln over Stephens; Kennedy over Wallace; Warren over Taney; and the achievements Barack Obama, Michael Steele, and Eric Holder and before them Colin Powel and Condoleezza Rice, African American males are represented in prison more than in college. The problem of race and crime and the debate on the why and how still plagues America. The criminal justice system has not settled this question either as reflected by popular culture in the epilogue of this article.

Epilogue

In an episode of the TV series *Law and Order*, a mother kills her drug addicted daughter in a state of desperation over the fall of her daughter due to drug use. The family tried to frame the man who turned their daughter into a drug addict for the murder. The plan failed, but it was the African American prosecutor, Paul Robinette, who pushed for the prosecution of the mother for the murder asserting that although the family had suffered, the law required prosecution. He asserted that it would be sanctioning infanticide of black children if they did not prosecute. At the end of the episode Robinette is confronted by the husband of the mother:

Fred Bryant: Where’d they raise you, Mr. Robinette? Scarsdale?
Paul Robinette: Harlem.
Fred Bryant: Never would have guessed.
Paul Robinette: You may not believe this, but I’m truly sorry for what happened to your family. But you want us to bend the law. And we both know what it’s like when there’s one law for black and another for white. It was no good 50 years ago, it’s no good now.
Fred Bryant: You think the system’s gonna change? You think we’re gonna be equal? Call me when your kids grow up. Tell me how they’re doing. The system’s been against us for a long time. Maybe right now, it’s gotta bend the other way.\(^\text{106}\)

\(^{105}\) The first African American elected President of the United States, the first African American elected Chairman of the National Republican Party, the first African American appointed to the position of U.S. Attorney General, the first African American appointed to the position of Secretary of State (and Chairman of the Joint Chief of Staff), and the first African American female appointed to the position of Secretary of State respectively.

It has been said that life imitates art. But art has its own mirror. In 1990 *Law and Order* aired a parody of the Tawana Brawley case of 1987, in which an African American teenager claimed she was gang raped by three white police officers. The *Law and Order* episode created the character of Congressman Ronald Eaton – a parody composite character of Rev. Al Sharpton, and attorneys Alton H. Maddox and C. Vernon Mason – who used the Brawley like character to stir up racial animosity full well knowing that the girl had not been raped, but faked the assault, to hide the fact that she was pregnant, by her teenage boyfriend, out of fear of her abusive father. The episode ends with a confrontation between Assistant District Attorney Paul Robinette and Congressman Eaton. Both are sitting in a diner and Robinette tells Eaton that the Brawley character and her family have admitted that there was no rape and that the deception was over; the perjury of the family will not be prosecuted, the record of the deceit will be sealed, the case will be closed, and there will be peace:

**Ronald Eaton**: Another zombified soul casts his vote for order rather than justice. Negative peace over positive peace.

**Paul Robinette**: Paraphrasing Martin Luther King’s thoughts won’t lend credence to yours. King! walked with the angels...you’d slide in slime on your belly to get what you want.

Eaton protests that his actions were not about his own political agenda but about bringing the fact of racist police officers and the injustices of the criminal justice system regarding African Americans to national public prominence. The confrontation ends with this exchange:

**Ronald Eaton**: You look me in the eye and you tell me this system is just. This system is equal.

**Paul Robinette**: At times the system stinks, Eaton. I know that as well as you do. But don’t for one damn minute tell me that your self-aggrandizing polarization is going to solve the problem. Don’t tell me that tearing down a 200-year old justice system, no matter how flawed, is going to alter the consciousness of a society. Now, we’re past the separate drinking-fountain stage. We’re past legal discrimination. We’re at the hearts and minds stage. And believe me, there’s no quick fix.\(^{107}\)

Whether the disproportionate incarceration of African Americans is the result of racism or institutional inertia, the result is the same and its well entrenched. Mr. Bryant and Mr. Robinette are correct, the system has been against African Americans for a long time and there’s no quick fix.

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CORRECTIONS AND SUSTAINABLE COMMUNITIES: 
THE IMPACT ON LOCAL POPULATIONS

John M. Klofas and Judy L. Porter

The concept of sustainable communities has provided a context for policy analysis in a wide variety of areas. It has not, however, found wide application in criminal justice. This paper will examine corrections, including imprisonment, from the perspective of community sustainability. An analysis of incarceration levels and the concentration of parolees and probationers in a northeastern city is used to examine this idea. Data reveal high concentrations of corrections populations in high crime neighborhoods. Census data also show declines in populations of young men and over all declines in parenting aged adults in the same neighborhoods. The data suggest that corrections policy and incarceration in particular has been harmful to sustainability in urban poor neighborhoods. The patterns found are inconsistent with contemporary views on desirable social structure and neighborhood efficacy. With growing interest in areas such as reentry and mass incarceration, sustainability may provide a useful context for analyses in criminal justice.

Scholars interested in sustainability warn against what they describe as “the ever narrowing focus of researchers” (Daly & Cobb, 1994, p. 363), and call for attention to broad questions regarding sustainability and for the greater use of complex multidisciplinary models. The United Kingdom has expanded its definition of sustainability in urban planning to include concerns for crime and safety for the last decade (Raco, 2007). The concept of sustainability has found application across a wide range of fields but its potential utility has received little attention in criminal justice. In early discussions of sustainability the inclusion of the social sciences was largely limited to the view that the policy process needed to be understood and considered by those studying the environment. As it has been extended, those interested in sustainable development and sustainable communities have come to understand that a broad set of social factors and their underlying policies have implications for the environment. Thus, ecological sustainability could not be independent from social sustainability. Income distribution, democracy, and human rights have become part of a legitimate discourse on sustainability. Perhaps in its most advanced form of that argument some have suggested that concern with sustainability has spawned a global humanitarian movement which is restoring grace, justice and beauty to the world (Hawken, 2007). That may go further than many analysts are comfortable with, but general concern for social factors has been widely embraced. Community justice is embodied in sustainability. In Clear’s (2007) view of community justice offenders would be held responsible for their actions while

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being reintegrated into the community, preferably without recourse to incarceration. Tonry (2004) mentions restorative justice, problem solving courts, and rehabilitation programs as part of community justice. Raco (2007) implies that community justice is embodied in a community that provides needed space and opportunities for its residents. The chart below, adapted from Raco (2007) identifies one set of variables associated with sustainable communities and provides examples of positive and negative contributions to that end.

Features of Sustainable and Unsustainable Communities

<table>
<thead>
<tr>
<th>Criteria</th>
<th>A Sustainable Community</th>
<th>An Unsustainable Community</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic Growth</td>
<td>A strong stable economic base and a broad range of workers</td>
<td>Domination by dependent forms of development, few employment opportunities, insecure, short term jobs, vulnerable, divisive</td>
</tr>
<tr>
<td>Citizenship</td>
<td>Strong social capital as evinced by active residents and communities, politically engaged, volunteerism</td>
<td>Passive dependent citizens and communities, low community engagement and ownership, low volunteerism and/or social capital</td>
</tr>
<tr>
<td>Governance</td>
<td>Representative and accountable governance as evinced by a balance of top-down visionary politics and bottom-up emphasis on inclusion and participation</td>
<td>Closed, unaccountable government, passive, lack of visionary politics, parochialism</td>
</tr>
<tr>
<td>Community Characteristics</td>
<td>An ethnically and socially balanced community with a range of skills in the workforce, well-populated neighborhoods</td>
<td>Few skills in workforce, separation and segregation, lack of diversity, high levels of physical separation between groups, formal and informal segregation</td>
</tr>
<tr>
<td>Urban Design</td>
<td>Self-contained communities that are able to cater to a range of needs, with accessible public spaces, broad range of amenities, diverse architecture</td>
<td>Uniform architecture, closed, absence of community facilities, sprawling, no sense of community in design, slumlords, vacant buildings, disrepair</td>
</tr>
<tr>
<td>Environmental Dimensions</td>
<td>Reuse of brownfield sites, good public transport with minimized transport times to work and shopping</td>
<td>Expansion into greenfield sites, car dependence, long transport to work and shopping, inadequate public transport</td>
</tr>
<tr>
<td>Quality of Life</td>
<td>A strong pull for a range of social groups via attractive environments, high quality of life, good public spaces</td>
<td>Low quality of life, lack of attractive environments and few social groups, poor public spaces</td>
</tr>
<tr>
<td>Identify, belonging and safety</td>
<td>A sense of community identity and belonging, tolerance and respect between diverse groups, low levels of antisocial behavior and crime</td>
<td>Lack of local culture or development of anti-social subculture, no ownership of public spaces, intolerance between groups, divided local politics, high levels of crime, disorder and fear</td>
</tr>
</tbody>
</table>

(adapted from Raco, 2007, p. 307)
This paper will explore the value of the concept of sustainability for understanding and discussing the implications of corrections policy. This study seeks to broaden the concept of sustainability to encompass not only ecologically sensible practices but socially sensible practices as well. This is a vital extension of the sustainability at the community level when we have communities that have been fundamentally reshaped by crime policies that incarcerate many of the residents while providing limited resources to either prevent criminal behavior or assist residents who are returning from jail or prison to successfully reintegrate into their communities as responsible contributing members. To accomplish this we will provide an example in an analysis of one community affected by issues of corrections and prisoner reentry.

In 2009, over 7.2 million in the United States people were under some form of correctional supervision including probation, parole, and incarceration in a jail or correctional facility (Glaze, 2010). This nation has the highest incarceration rate of its citizens of any country in the world at 737 per 100,000 with 2.2 million citizens incarcerated as of 2005. China, more heavily populated than the U.S., is a distant second with 1.5 million incarcerated (Sheldon, Brown, Miller, & Fritzler, 2006). At the community level, the rates of incarceration may be much higher given the concentration of poverty in geographical areas and the higher rates of incarceration for poor people and racial minorities, who are more likely due to structural and historical inequality to be concentrated in poorer areas (Clear, 2007).

In terms of criminology and criminal justice, attention to sustainability would certainly mean focusing on the implications of crime and crime policy for the health of geographically and demographically defined communities. In that context the impact of corrections is undoubtedly germane, yet there is only a small volume of research which directly addresses questions of community sustainability and corrections. Few criminology and criminal justice researchers have tried to measure the impact of corrections practices on communities and still fewer have addressed the possibility that some practices may have negative consequences at the community level. The vast body of work on deterrence, incapacitation, and treatment has focused primarily on impacts on individuals. Rarer have been critical appraisals of the effects of corrections practice at other levels.

Only recently have imprisonment and the related topic of prisoner reentry become areas in which significant research has examined the impact of corrections policy on communities. Much of that seems to have been spawned by a 1995 conference held by the Vera Institute to bring together a range of people including academics, private sector funders, legislators, and criminal justice professionals to “initiate a conversation … on how increasing rates of incarceration may affect individuals … families and communities (Taylor, 1996, p. I.).” In papers for the conference, Todd Clear (1996) examined the ways in which imprisonment may actually increase crime in neighborhoods. John Hagan (1996) considered the impact on children of prisoners. Carl Taylor (1996) addressed incarcerated children and Nightengale and Watts (1996) reviewed the economic impact of incarceration. Since the conference at least eight books have been published which address the impact of imprisonment and use the term “mass incarceration” in their title (Alexander, 2009; Clear, 2007; Drucker, 2006; Gottschalk, 2006; Herivel & Wright, 2009; Jacobson, 2005; Pager, 2009; Useem & Piel, 2008; Weiman, 2004). The American Academy of Arts and Sciences (2009) also lists “The Challenge of Mass Incarceration in America” as one of its current social policy projects.
The link between crime and incarceration continues to receive attention. Clear’s essay was based on earlier research which showed that imprisonment, through coercive mobility, increased social disorganization in high incarceration communities (Clear, Rose, Waring & Scully, 2003). Further study has indicated that moderate levels of incarceration can lead to reductions in violent crime but that high neighborhood incarceration rates are related to increased violence (Renauer, Cunningham, Feyerherm, O’Connor & Bellatty, 2006). Clear (2007) brought together much of the research on the impact of prison and provided an analysis of the impact on crime as well as on individuals, families, neighborhoods and communities. His book ended with a call to action in favor of a developing model of community justice.

The recent research on the impact of incarceration has covered a broad range of topics. Among them has been concern with the impact on communities. The studies thus provide some illustration of concern with how communities are influenced by criminal justice policies. Although they do not explicitly adopt the language of sustainability they do pursue many of the questions that the concept would prompt. An inquiry more directly focused on sustainability also might address the impact of different levels of correctional control and supervision on community outcome variables. Research, for example, could focus on how offender populations influence community solidarity and community efficacy or at what point community resources are overwhelmed by the removal of prisoners from communities, their reentry, and by the supervision of offenders in the community.

**Corrections and Sustainable Communities: An Illustration**

In this section we will explore the impact of crime and crime policy on neighborhoods in one northeastern city which we will call, “Central City.” This is a city of over 200,000 people occupying 35 square miles in a metropolitan area of over 1,000,000 people. Over a combined period of more than 30 years the authors have studied a variety of issues and have used a wide range of methods in the study of crime and justice in this community. Here we will focus on corrections and prisoner reentry as the means of investigating what attention to questions of sustainability might add to our understanding of local issues.

In Central City, population statistics show that prisons have become the leading source of immigration into the community. It is a condition apparently not uncommon in small and medium sized northeastern cities. In 2008 an average 1530 parolees a month called home Central City’s county. Central City is the largest community in its county. Eighty Nine percent of local parolees reside in the City. But the migration patterns are not uniform across the community. The map below (Figure 1) illustrates the concentration of these parolees in a limited number of City neighborhoods. This is also true for probationers whose residences are mapped in the second figure (Figure 2).
Crime and corrections data make it clear that that section of the community, which has become known as the Crescent, that forms a semi-circle around the center of town to the north, northwest, northeast, and southwest, holds the greatest concentrations of crime, probationers, and parolees. This overlap is, of course, not surprising. The city contains the highest crime neighborhoods in the county and those neighborhoods also house the highest number of offenders under supervision. The city itself and its poor and high-minority neighborhoods also provide the locations for the relevant social services including the offices of probation and parole, the most affordable housing and treatment facilities for mental health, substance abuse and interrelated services as well as other front-line not-for profit service providers. In ecological terms the neighborhoods present an attractive niche for offenders released from incarceration.

Table 1 extends our analysis with the addition of the number of jail inmates and state prisoners from the high parolee zip codes in the Central City. The data below include the total rate per 10,000 of combined correctional populations, the rate for men age 20 to 49 and the ratio showing the number of these men in the population for every one that is under correctional control of one form or another. In the highest zip code 1 of every 3.2 males age 20-49 is under some form of correctional control (this does not include pretrial release).

<table>
<thead>
<tr>
<th>Zip Code</th>
<th>Parolees</th>
<th>Probationers</th>
<th>Prisoners</th>
<th>Jail Inmates</th>
<th>Total Rate /10,000</th>
<th>Total young males rate (age 20-49)</th>
<th>Young men in corrections as a proportion of all young males in area</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>128</td>
<td>314</td>
<td>251</td>
<td>62</td>
<td>524</td>
<td>3135</td>
<td>1/3.2</td>
</tr>
<tr>
<td>2</td>
<td>233</td>
<td>766</td>
<td>452</td>
<td>156</td>
<td>447</td>
<td>2538</td>
<td>1/3.9</td>
</tr>
</tbody>
</table>

(Prison and jail data by zip codes are estimated based on actual confined populations and distributed based on parole and probation distributions. New York State Parole Data, Monroe Crime Analysis Center, 2010).

Census data for these high corrections areas also support other reports that have addressed the impact of imprisonment on the gender distributions in neighborhoods. The combined effect of crime and crime policy, particularly violence and incarceration, can significantly alter the population sex ratio in these areas. Here we will examine this point with U. S. Census data for 2000. We will use 1990 census data to consider changes over time. Relevant data from the 2010 Census are not scheduled to be released until 2012.

Chart 1 illustrated the smaller number of young men compared with young women in the highest parole zip code. The 2000 census data indicate that there were 140 female residents age 20-49 for every 100 similarly aged males. Males are underrepresented by a count of nearly 1000 in the zip code area. That means that, other things being equal the probability of women in these ages finding a similar aged
There is one more view of the data which appears to be relevant to understanding the impact of imprisonment and parole on these neighborhoods. Examining the age distribution in the neighborhoods is revealing in the series of three charts below. Chart 2 represents a suburban, low parolee neighborhood while charts 3 and 4 represent the high parolee neighborhoods described above. Focusing analysis on the 2000 census data, Chart 2 indicates that this zip code has a significant number of young children in it. Those numbers then drop off, presumably as young adults have gone to college or moved elsewhere for work. The numbers increase for the ages of likely parents and then drop off as the population gets older. As noted above the data also show that the number of males and females stays roughly similar until the tendency for women to outlive men is noticeable beyond about age 70. This overall pattern, which seems consistent with traditional family structures, was repeated in all suburban and wealthy urban residential zip code areas in the county.
The high parolee areas present a very different picture. In these high crimes, high imprisonment and high parolee areas there are large numbers of young children. At the same time there seem to be comparatively few adults of parenting age to supervise them. The zip codes reveal very different population distributions across the low and high parolee areas. Whether gender differences are considered or the distribution of the whole population of the zip codes is examined, the high parolee areas differ significantly from other areas of the metropolitan community.
Data from the 1990 census can provide some opportunity to consider the impact of time on these neighborhoods when compared with the data from 2000. For the low parole area the 1990 census (Chart 2) show that the pattern of moderate numbers of young children, declining numbers through early adulthood and then increases in the common parental ages, is largely unchanged across the decades. In Chart 3 the 1990 census data for the high parole area show some similarity to the overall pattern for the low parole zip code as seen in Chart 2. But, the same level of stability is not present for the populations of the high parolee zip codes by 2000. The increases in the parental ages are not as evident as in the low parolee area, and they diminish across the census years. This offers some suggestion that the traditional family neighborhood distributions seen in the low parolee area may have been present to a greater degree in the high parolee areas in the past. Chart 4, with its focus on the other high parolee neighborhood also lends some support to the hypothesis. These data are at least suggestive about change and the impact of crime and criminal justice practice on neighborhoods, particularly since the great increases in incarceration occurred beginning in the late 1970s. Significant changes in the demographic and age structure of these neighborhoods did coincide with growth in the use of incarceration.

It is easy to see that the differences noted above will have vast implications for the nature and quality of life in the various neighborhoods. The comparative absence of marriage age and eligible males can be expected to affect gender roles. The large numbers of children relative to those in parenting age groups can also contribute to crime problems and will not afford the protections that have been attributed to strong communities under such contemporary theoretical concepts as collective efficacy (Morenoff & Sampson, 1997). In fact, it is quite easy to conclude that these high parolee neighborhoods have been significantly affected in clearly negative ways by population changes that are at least partially attributable to some combination of crime and crime policy, particularly incarceration and reentry (see Moore 1996). Considered in the context of sustainability, the data raise important questions as to the health and even long term viability of communities that experience declines in the male population and subsequent distortions in the gender ratio, and whose overall population distribution shows large increases in youth and decreases in the resources for supervision provided by older residents. The data do raise the question about whether the end result of both high volumes of crime, and our response to those crimes, result in a structure within neighborhoods that can continue to be considered healthy and sustainable.

Discussion

There has been relatively little research on crime or criminal justice that has directly invoked the concept of sustainability, a concept which appears to have found utility in other areas including within the social sciences. The analysis suggests, however, that there may be some value in applying this concept in this field. Just as energy policy has incorporated the development of energy sources and concern with the consequences of the choices we make, the idea of sustainability does call our attention to the effects of both crime and criminal justice practice particularly at the neighborhood or community level. In fact, real value may lie in the way in which sustainability encourages analysis of the combined effects of crime and crime policy.
For some purposes, the sorting out of the effects of crime and policy may be unnecessary and even undesirable. Efforts to minimize negative influences in neighborhoods might even benefit from the simultaneous consideration of both. Thus, sustainability analysts suggest the importance of the task of exploring how these combined effects might be minimized at the community level. It is possible that support for innovations such as community justice, problem-solving courts, and restorative justice can be found in such analyses, and might even be found independent of traditional ideological considerations. That is, sustainability may lead to productive consideration of the unintended harms associated with some policy choices including our use of incarceration.

The potential to distinguish analysis from ideology, or to at least limit the most caustic effects of their interaction, suggests a second potential contribution of sustainability analysis to the field of criminal justice. In this field, ideology and interest group politics have often been seen as playing a central role in the policy making process to an extent even greater than in many other areas (Stoltz, 2002). Some have argued that crime and justice involve fundamental societal principles and thus policy making in the area involves important symbolic content that appeals to ideological and moral elements (see Ismali, 2006). The result can be high levels of interest group balkanization (Nownes, 2000) which is often heavily influenced by the media (Cavender, 2004). “Sustainability” may offer some prospect for mitigating policy consequences such as this balkanization.

As the focus of sustainability has expanded in the social sciences the potential value of the concept for structuring discourse has continued to be of interest. Some authors have argued that sustainability analysis provides a means of opening discussion and engaging ideological and political differences (Choucri, 1999). Others have characterized the subject as a “contested discursive field which allows for the articulation of political and economic differences … and introduces to environmental issues a concern with social justice and political participation” (Becker, Jahn, & Stiess. 1999, p. 1). The concept of sustainability may discourage easy characterization along political dimensions and it may encourage broad discourse which accommodates differing perspectives, even on mass incarceration. It seems unlikely that even those with different ideological perspectives on this subject will not see that the neighborhoods under study have experienced harm as a result of corrections policy. The precise cause or degree of that harm may be subject to debate but the idea of sustainability should facilitate rather than inhibit that discussion.

Our poorest communities have been hardest hit with the overuse of incarceration and other harsh penal policies. These communities suffer from lack of resources, high crime, poor education, substandard housing, high unemployment, and public spaces that are in disarray or are coopted by undesirable elements such as drug dealing, gangs, prostitution, and violent crime. Sustainability for such communities is inextricably tied to crime control policies and such policies influence community justice. Neighborhood social organization is more important to community safety than is the use of incarceration for offenders (Sheldon, 2010). In doing something about crime, policy makers need to think deeply about the consequences of policies and how to mitigate negative consequences. The use of special courts, peace circles, restorative justice, community oriented police, and other community-based options are important to sustainability and to community justice.

Social science views of sustainability do not translate easily into quantifiable indices of disaster. We have no equivalent of 350 parts per million of carbon dioxide
in the atmosphere— the now widely accepted threshold for global warming. In fact it may be the lack of precision and general ambiguity of the concept of sustainability from a social science perspective, and the absence of doomsday criteria for communities that are useful in promoting discussion across seemingly impermeable ideological boundaries. One need not accept a cynical view that ideological differences will prohibit all legitimate discourse. It seems possible that analyses that engage the concept of sustainability may indeed contribute to real progress in the discussion and formulation of penal policy.

References


WOMEN BEHIND BARS:
AN ILLUMINATING PORTRAIT

Cathy McDaniels-Wilson and Judson L. Jeffries*

Mass incarceration, as a major social ill has garnered significant attention among academics, however the surge in the number of women prisoners in the U.S., has been given comparatively short shrift by the literature, which tends to focus on male inmates. By focusing on incarcerated females in the state of Ohio this paper seeks to help fill that void. This article also presents the reader with a sense of women’s sexual abuse history across race. The number of women inmates in Ohio who were sexually violated before entering prison is staggering. Moreover, the data show that the problem transcends race and age. This article makes a call for understanding the potential far-reaching consequences of this history of sexual abuse and the complex needs of a steadily increasing prison population.

The United States has the highest documented incarceration rate in the world (Pager, 2007). As of year-end 2007 the rate was 743 people incarcerated per 100,000 people; compared to 600 people incarcerated per 100,000 in Russia, 100 people incarcerated per 100,000 in Europe and 80 people incarcerated per 100,000 in Japan (Walmsley, 2009; Human Development Report, 2007/2008). Ninety three percent of prisoners in the U.S. were males, hence the reason why when many Americans think of prisoners they tend to think of males, albeit, in many cases, Black males. Since 1980 the Black male population has grown exponentially, mainly as a result of mandatory sentencing that came about during the “war on drugs” (Alexander, 2010; Parenti, 2000). In fact, over the past twenty years, the Black male prison population has rivaled the Black male college student population (Alexander, 2010; Boothe, 2010; Robinson, 2008; Parenti, 2000). This may explain why the bulk of the literature about prisons has focused on African American males.

What many do not realize is that while the number of Black male inmates has spiraled out of control so has the number of female inmates. Unfortunately, little attention has been paid to female incarceration. A cursory look at the numbers shows that the incarceration of females is increasing at a staggering rate. According to the Bureau of Justice Statistics, there were more than 2,297,400 inmates in federal, state, and local prisons and jails in 2010 (Minton, 2011). Of that number 201, 200 were women. The number of women imprisoned since the mid-1980s has grown steadily. In fact between 1980 and 2006 the number of women entering prison in the U.S. rose 400%, double the rate of men over that same period (Kerness, 2006). A report by the Bureau of Justice Statistics (2010) also showed that by midyear of 2009, female

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1 The words Black and African American are used interchangeably throughout this paper according to sound and context.

2 The words female and women are used interchangeably throughout this paper according to sound and context.
incarceration rates varied sharply by race. In 2009, the likelihood of being in prison or jail for Black females (with an incarceration rate of 333 per 100,000) was twice that of Hispanic females (142 per 100,000) and over 3.6 times that of White females (91 per 100,000) (Minton, 2011). Of women in prison 92,100 were White, 64,800 were Black and 32,300 were Latina.

Mass incarceration, as a major social phenomenon has garnered significant attention among academics, thus it is not surprising that the number of books and journal articles on the subject is in no short supply. However, the majority of these works focus on the disproportionate incarceration rates of African American males (Alexander, 2010; Thompson, 2010; Robinson, 2008; Pager, 2007). By contrast the surge in the number of women prisoners in the U.S., however, has been given short shrift. By focusing on the histories of sexual abuse that females bring with them to their prison terms in the state of Ohio this paper seeks to help fill that void.

A review of the literature will show, that no one has systematically studied the lives of women inmates to the degree that this work does. In doing so, we explore the degree to which females inmates were sexually abused prior to entering prison. Over the years, some have claimed that women inmates often have an extensive history of sexual abuse. Using Ohio as our case study we set out to test this hypothesis. This work delved into the lives of more than 1,500 women in all of the correctional facilities in the state of Ohio where women are admitted. This article also presents the reader with a sense of women’s sexual abuse history across race. Because very little diversity exists within the female prison population in Ohio this study focuses primarily on Black and White women prisoners.

Female Inmates in Ohio: A Brief Portrait

The numbers of female prisoners in Ohio may not be as sobering as those nationally, but the numbers are still cause for concern. According to the Ohio Department of Rehabilitation and Corrections (2010), in the state of Ohio, in 2001, of the 45,259 total inmates, 2,788 were female; consisting of 6.16% of the total prison population. Nearly ten years later, in 2010, there were a total of 50,880 people incarcerated, 3,911 of which were females, comprising 7.7% of the total population. As far as the racial demographic goes, of the current 3,911 female offenders, 31.4% identified themselves as Black/African American, 67.0% European American, 0.1% Hispanic, 0.05% Native American, 0.31% Asian, and 0.08% identified as Other. In terms of age, 36% of the women incarcerated were between the ages of 15-29, 31.2% were 30-39, and 22.9% were 40-49; 8.2% were 50-59 and 1.48% were age 60 years and older. The highest represented age group in prison; was the 25-29 age cohorts while the average age of a female inmate was thirty-five (Ohio Department of Rehabilitation and Corrections, 2010).

The proliferation of the female prison population suggests a striking trend in female criminal activity. The most serious offenses as reported by the Ohio Research Office of Policy and Offender Reentry summary reveal that even among those, there is a significant amount of variability ranging from forgery to aggravated murder. On the whole, the sample evaluated by the Research Office of Policy and Offender Reentry had committed more crimes against actual persons (such as aggravated robbery, felonious assault, and involuntary manslaughter), followed by drug offenses, as well as offenses against justice/public administration, and property offenses.
Going Behind the Walls of Ohio’s Prisons

In the early to mid-1990s, the first author had an opportunity to teach at the Franklin pre-release center for women in Columbus, Ohio. Unlike some other institutions, the Franklin pre-release center offered an array of professional development endeavors, including the opportunity to earn a college degree in the social sciences. The first author taught two psychology courses over a period of several years. The first author’s foray into the prison system in 1993, involved teaching an introductory course in Psychology. Although the experience was gratifying, the first author found “The Psychology of Women” course, which was taught in 1996, to be most enlightening. In this course the biological, sociological, and cultural influences of the psychology of women were examined. Topics included gender socialization, sex roles; the impact of gender on personality and achievement and mental health. While teaching this particular course the first author was struck by the stories that women voluntarily shared regarding the events that they believed led to their incarceration. There seemed to be an underlying theme of victimization across the board. This observation does not negate, however, the horrific and in some cases heinous crimes, that were committed by some of her students. Intrigued by this unanticipated discovery, she decided to explore the issue further.

Based on the author’s clinical experiences with non-incarcerated women and men who have reported histories of abuse, it was believed that the pathway perspective on offending would be especially helpful in studying women inmates and the prevalence of sexual abuse.\(^3\) According to Belknap (2007) the pathway perspective views traumatic and other troubling antecedent events as significant risk factors in girls’ subsequent deviance and offending behaviors. Indeed, there is a body of research that appears to rely heavily on this approach (Belknap, Winter, & Cady, 2003; Chesney-Lind & Rodriguez, 1983; Belknap & Holsinger, 1996; James & Meyerding, 1977; Silbert & Pines 1981). Grounded in this literature, we set out to systematically explore the extent and complexities of sexual abuse in the lives of women inmates in Ohio.

Significance of Research

This research is significant for several reasons. First, this research provides an in-depth look into the often complicated and intricate lives of a prison population that has often been overlooked by scholars and others. Second, this research enables the reader to see the degree to which the sexual abuse histories of Black and White women prisoners are similar or different. Third, this work shows how widespread the histories of sexual abuse are among women inmates prior to being imprisoned. Fourth, this research spotlights an issue that is increasingly becoming a major societal problem, but not given the attention it deserves, especially by those who are well-positioned to address it. Fifth, some women inmates have deep psychological scarring and/or suffer from pervasive mental health disorders that stem from incidents of sexual abuse. Tragically, instead of receiving treatment or being hospitalized, they are oftentimes imprisoned and forgotten.

\(^3\) The author to whom this sentence refers is Cathy McDaniels-Wilson.
Literature Review

There is a small, but growing body of literature that examines the history of sexual abuse in the lives of incarcerated women. A portion of the literature only minimally assessed the sexual abuse experiences of the participants, oftentimes only asking a single question, such as “Have you ever been abused?”, does not make for a rich data set (Belknap, Holsinger & Dunn, 1997). Moreover, a fair amount of the work studies sexual abuse of female inmates while in prison (The Sexual Abuse of Female Inmates, 2003). It is well-documented that women are sometimes violated once in prison, but unfortunately, many female inmates are the victims of sexual abuse long before entering prison. Some have even argued that the horrific experience of being sexually abused, oftentimes, leads to a life of criminal activity that eventually results in imprisonment.

The majority of the work on female inmates, however, is in the area of female criminality as distinct from male criminality. A fair amount of it is theory-based, with little to no supporting empirical evidence (Chesny-Lind, 1986). Moreover, it is important to be mindful that previous attempts to analyze data gleaned from women’s histories’ of abuse have relied heavily on male-generated paradigms as an overlay to the challenges women face, which has, to a large degree, resulted in a superficial analysis and/or misinterpretation of the facts (see Belknap, 2007; Chesney-Lind & Rodriguez, 1983; Smart, 1976). There has been, however, over the past decade, an increase in both the amount and quality of work in the area of female criminality.

This recent body of work has helped us better understand the role of violence in the lives of incarcerated women. More specifically, we now know that criminal offending and subsequent incarceration is one of the aftereffects of female sexual abuse history (Belknap & Holsinger, 2006; Gaarder & Belknap, 2002; Browne et al., 1999; Girshick, 1999). One of the most frequently cited socio-cultural explanations of violence against women and girls is rooted in feminist theory, which suggests that violence against women generally, emanates from potent socializing messages from the media, music, peer groups, the families, the legal system and other American institutions; all of which leads to widespread acceptance and normalization of gender-based violence. This holds special significance for African American women (Wyatt, 1992; 1990). Scholars who have studied the prevalence and types of abuse across race have produced a body of work that, to a large degree is both contradictory and inconclusive. Some of the weaknesses of those studies include an underdeveloped theoretical thrust, flaws in methodological approach, sample bias, and the like (Comack, 1996; Richie, 1996; Priest, 1992). Given these shortcomings, it is not surprising, that few differences between Black and White women have been found.

A brief review of the research on childhood sexual abuse and its impact across race and ethnicity is crucial to our understanding of women’s survival, health, and resiliency. It has been well-documented that a history of childhood sexual abuse is an important factor in the onset of delinquent behavior (Belknap, Holslinger & Dunn, 1997). Ramos, Carlson, and McNutt (2004) examined lifetime abuse, and the resultant effects on the mental health of Black women. One of their more interesting findings indicated that Black women who experienced childhood abuse were more likely to report adult partner abuse than those who were victimized as adults, but not as children. Overall, though, the authors found more similarities than differences when it came to types of childhood abuse and adult abuse between Black and White women. Similarly, in a more recent study, Amonde et. al (2006) found no significant racial
differences in the nature, severity, or aftereffects of childhood sexual abuse between these two groups. What they did find, however, was that in terms of age of onset, White women were more likely to experience abuse before the age of seven than Black women (Amonde et. al, 2006). In their sample White women were two and a half times more likely to experience abuse before age seven than were Black women. African American women, however, were more likely to report abuse that occurred during adolescence. Black women also reported a higher incidence of perpetrators living within the household, suggesting that there may be differences in family structure between Black and White women.

Method

In 1996, research participants were solicited from three separate penal institutions in the state of Ohio. They were: the Ohio Reformatory for Women (ORW) in Marysville, Ohio, housing minimum-, medium-, and maximum-security prisoners, opened in 1916, is the oldest prison for adult women in Ohio and the reception site for all incoming offenders; the Franklin Pre-Release Center (FPRC) in Columbus, Ohio, opened in 1988, houses minimum- and medium-security women prisoners who serve the majority of their sentences at FPRC; and the Northeast Pre-Release Center (NPRC), also opened in 1988, is a minimum-security women’s prison in Cleveland, Ohio. At the time, these three correctional facilities were the only prisons in Ohio that housed women. Of the three facilities, only the Ohio Reformatory for Women is located in a rural area. The prison was once a functioning farm, complete with dairy cattle, hogs, and grain, which the inmates ran. The FPRC and the NPRC are located in the largest (Columbus) and second largest (Cleveland) cities in the state of Ohio. Although ORW no longer operates as a farm, it is still commonly known as “the farm.”

A call for participation was sent to the inmates in all three correctional facilities; hence every inmate was given the opportunity to participate in the study. Eight hundred and eighty five women out of a total of 2,903 inmates (which produced a response rate of 44.1%) participated in the 1996 study. All participants had to be at least 18 years old. Each participant was asked to complete the two surveys. Also ten inmates [from each site] were randomly selected for a face-to-face interview with the examiner.

A comprehensive set of questions was developed in order to assess several factors. Some of the questions inquired about the age of onset, the relationship of victim to offender, and whether the acts of violence were intrusive or nonintrusive. The first measure used for the women’s sexual abuse history is a modified version of the Koss and Oros (1982) Sexual Experiences Survey. The original version consisted of 13 closed-ended (yes or no) questions that gave inmates an opportunity to identify behaviors that were not only unusual, but unsettling, and males the opportunity to identify behaviors that could be characterized as aggressive and violating. The SES that was designed for this study consisted of 15 items ranging from “someone misinterpreting the level of sexual intimacy you desire,” to more intrusive, violent, sexually aggressive or assaultive behaviors. In the modified SES, participants who reported experiencing a violation were asked (a) the number of times they experienced an encounter and (b) the gender of the abuser(s). Even with these modifications, it was determined that an additional survey was needed, as it was important to document the
Victim-Offender Relationship (VOR) as well as the victim’s age at the time the violation or abuse occurred.

A decision was made to develop the Sexual Abuse Checklist Survey (SACS) to document a more detailed account of the types of sexual violations and abuses that occurred. The SACS specifically identified the following potential VORs: father, stepfather, grandfather, mother, grandmother, uncle, aunt, brother, sister, male cousin, female cousin, male neighbor, female neighbor, male lover or boyfriend, female lover or girlfriend, male date, female date, husband, male counselor, female counselor, male minister or clergy, female minister or clergy, male teacher, female teacher, male stranger, and female stranger. For VORs not indicated on the list, blank spaces were provided so that respondents could describe the relationship, type of abuse and their age(s) at the time of the violation. Adjacent to each potential abuser, the following potential abuses were listed, and the respondents were asked to circle as many as were applicable: nudity, disrobing, genital exposure, being observed (i.e., showering, dressing, toileting), kissing, fondling, masturbation, finger penetration of vagina, finger penetration of anus, oral sex on the victim, oral sex on the abuser, penile penetration of vagina, and penile penetration of anus. A comment section was included at the bottom of this survey for additional thoughts or reflections. Both the modified SES and the SACS were pilot-tested at a nearby counseling center on the campus of a major research university, in several introductory to psychology classes, as well as several local halfway houses. What follows is a rather detailed account of the levels and types of sexual violations and sexual abuses experienced by these women.

**Results**

Nearly all of the women in this study admitted being sexually abused at some point in their lives. Even more disturbing is that the overwhelming majority (70%) of the participants identified multiple acts of abuse, and at least one would meet the legal definition of rape in most states, which is non-consensual sexual intercourse that is committed by physical force, threat of injury, or other duress. Additionally, under a variation known as “statutory rape,” some states make it unlawful for an adult to engage in sexual intercourse with a person who has not reached the age of consent (usually 18 years of age). Of the reported incidents of multiple abuses, more than half reported childhood sexual abuse. The most frequent perpetrators were male strangers, lover/boyfriends, uncles, husbands, and brothers.

Additional descriptions of the sample include the following: 45% of the participants were White women and 53% were Black women. Of these, only 28% graduated from high school, while 15% reported having taken some college courses. An examination of family structure revealed that the overwhelming majority (85%) of the inmates were parents with an average of 2.4 children per participant. The majority had been employed before incarceration, was single, and had a positive history of polysubstance use. The frequency with which Black women inmates reported a history of polysubstance abuse (a combination of both drugs and alcohol abuse and dependence) was noticeably higher (56.1%) than that of White women (43.5%) in the sample study.

Information regarding their prior arrests and convictions for each offender was obtained from two sources at the time of this investigation: the Bureau of Criminal Investigations, a nationwide reporting agency, and the National Criminal
Information Center, a reporting agency via the Federal Bureau of Investigations. More than half (56.3%) of the inmates had a prior history of juvenile arrests while 43.7% had a prior adult arrest history. The most serious offenses committed by this sample were categorized into three groups: crimes against people, drug offenses, and property offenses. A significant number of offenders were indicted for crimes against people (43.8%), about one-fourth for drug offenses (22.6%), and one-fourth for property offenses (19.8%).

An area that was of particular interest to the authors was the differences and variations in sexual violations across race. In this study, “sexual violations” are defined as sexual experiences that are rarely prosecuted. Many individuals do not view them as sexual abuse, but some scholars have identified them as exploitative and troubling (e.g., Basile, 1999; Kelly, 1988; Russell, 1984). Examples include acquiescing to sex in response to verbal threats to end the relationship and/or succumbing to various types of verbal coercion or pressure. We defined “sexual abuses,” on the other hand, as sexual experiences that are usually considered both criminal and culturally unacceptable, such as rape and molestation. However, the traditional definition of “rape” can vary across jurisdictions, over time, and across studies (McDaniels Wilson & Belknap, 2008).

On the Sexual Experience Survey, White females reported significantly higher rates of sexual violations than did Black women. For example, when asked if someone ever misinterpreted one’s level of sexual interest, 63% of White women responded affirmatively compared to 48% of Black women who answered yes. To the question “Have you ever kissed, pet, fondled under verbal pressure” 54% of White women said yes, compared to 40% of Black women who reported in the affirmative. In response to the question “Did you ever experience penetration as a result of verbal pressure,” 54% of White women and 38% of Black women indicated that they had. Additional responses to questions that addressed issues of abuse revealed a similar pattern. When asked, “Has someone used their position of authority to force penetration?” 24% of White women said yes while 15% of Black women responded affirmatively. Finally when asked, “Has anyone used alcohol and or drugs to penetrate?” 44% of White women and 34% of Black women indicated yes. An additional question on this measure was designed to assess how the victim conceptualized her abusive experiences. Clinicians often encounter women who experience a sexual violation or an abusive act, but fail to conceptualize or define their experience as a violation or abusive act. To better assess this phenomenon, the participants were asked to respond to the following question “Have you ever been raped or gang raped?” Of the White women, 15% reported that they had been gang raped, while on 7.9% of the Black women affirmed the same experience. Still, it is possible that some women were unwilling to admit to someone whom they did not know that they had either been raped or gang raped. It is also possible that some women were in denial and/or wholly unwilling to acknowledge being the victims of such a heinous crime.

Findings from the Sexual Abuse checklist, which identified the relationship between the victim and the perpetrator also revealed noticeable differences for White and Black women. For many years, researchers have attempted to examine whether there are identifiable factors within family systems that may place some children at greater risk of experiencing sexual violations or abuse within their own families. One school of thought that attempts to explain why some children may be at greater risk than others focuses on the concept of the extended family. For example, the African
American family is often extended and multigenerational, which creates a communal and collective family structure (Wilson et al., 1995). Belgrave and Allison (2010) state that included within this family network are immediate family members, extended members, (i.e., aunts, uncles, cousins, etc.) friends, neighbors, fictive kin (individuals who are not biologically related but are considered family. They are often referred to as cousin, uncle, aunt and the like) and church members. This extended family situation sometimes places children in the presence and/or care of individuals who may be less repulsed by the idea of sexually abusing a child than would someone who may be related to the child. This is not to say that children are not abused by those who are biologically related to them, because they are. The point is, the stronger the biological link between the potential abuser and the abused; the less likely [seemingly] he or she would be to commit such a horrific act. For example, a father may be more hesitant to sexually abuse his own daughter than he would his niece. Similarly, a brother may be more hesitant to sexually abuse his own sister than he would a cousin. The same argument can be made regarding biological vis-à-vis non-biological family members. Simply put, biological relatives may be less likely to sexually abuse children with whom they share the same blood line than they would children who are considered family, but are not related, biologically. Again this is not to say that such things do not occur, only that the stronger the link the more repulsed the potential abuser might be, making it more difficult for the potential abuser to engage in such behavior, not only because of the penalties associated with the crime, but the resultant heavy burden that one would carry on his/her conscience.

When differences among victim-offender relations by race are examined, one sees striking disparities between Black and White women. White women reported higher incidents of abuse by each of the following five perpetrators: male cousins, husbands, male dates, male lovers, and male strangers (see Table 1).

<table>
<thead>
<tr>
<th>Perpetrators of Abuse</th>
<th>vs. White women</th>
<th>vs. Black women</th>
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</thead>
<tbody>
<tr>
<td>Male cousins</td>
<td>15%</td>
<td>6.4%</td>
</tr>
<tr>
<td>Husbands</td>
<td>24.9%</td>
<td>5.9%</td>
</tr>
<tr>
<td>Male dates</td>
<td>21%</td>
<td>11.4%</td>
</tr>
<tr>
<td>Male lovers</td>
<td>21%</td>
<td>11.9%</td>
</tr>
<tr>
<td>Male strangers</td>
<td>32.3%</td>
<td>22.3%</td>
</tr>
</tbody>
</table>

Additional information on this measure also shows that White women experienced a significantly higher level of both non-intrusive (disrobing, genital exposure, verbal inappropriateness) and intrusive (oral, anal vaginal intercourse, or oral sexual) acts by their perpetrators than did Black women. Sexually abusive behavior, victim-offender relations, and age of onset were also analyzed. The data were also analyzed from two different developmental spectra, by defining children as up through age 12 and adolescents starting at age 13. Examining the types of experiences both groups of females reported between the ages of 0-12 by race, we see that White females report experiencing more abuse by family members and acquaintances at this age than do Black females and that Black females report experiencing more abuse by a stranger between the ages of 13-17 than do White females. Below are excerpts extrapolated from face-to-face interviews with three of the inmates:
“I just would like to say, once one person does it to you, it’s almost normal to allow others to do it. I learned how to zone out.”

“I was raped at least 3 times by the time I was 20.”

“I have been abused from birth, throughout my life. Never having no one to talk to, or haven’t reported this before. Still it’s very painful in many ways. Not being able to ever talk about this even in prison, they only want to punish me, but no one ever asks why I become an addict, or why I did the things I did.”

These findings were both revealing and unsettling. The levels of abuse reported by both Black and White women speak to the magnitude of abuse that many women experience even at an early age, at the hands of people who, historically, are expected to assume the role of protector and nurturer. So disturbed were we by what we uncovered, a decision was made to revisit this issue; to assess whether the abuse that female inmates experience had changed over time. In 2010, we questioned, whether or not Black women, White women, Latinas, Asian American, or Native American women experienced more or less sexual abuse and/or sexual violations than occurred fifteen years earlier. Moreover, we set out to ascertain what role those charged with the responsibility of protecting and nurturing these women might have played in that abuse.

The Follow-up: December 2010

A follow-up assessment of sexual abuse and violations was conducted in December 2010. Out of a total of 4,920 inmates from the four Ohio prisons that housed women, 760 incarcerated women participated in the study. Again, a call for participation was sent out to all four facilities, thus giving each inmate the opportunity to participate. The correctional facilities were: The Ohio Reformatory for Women which housed 2,865 women, the Franklin Pre-Release Center, which comprised of 470 women and the North Pre-release center, which admitted 522 women. A fourth prison, the Trumbull Correctional Institute, which opened in 1992 and houses 1,073 inmates was added in 2010, as it was believed that doing so would result in an even richer data set. Moreover, at the time of the first study, Trumbull, a small rural/suburban town of 2,200 residents, located in Leavittsburg, Ohio, was an all-male correctional facility. That changed, in 2005, when women started being admitted.

None of the women in the 2010 study were in the 1996 cohort, yet the 2010 follow-up produced few surprises; therefore presenting the data here would not be the best use of space and/or time. Sadly, much of what we encountered in terms of misery and circumstance mirrored the 1996 cohort. The racial demographics were similar as were the crimes committed against and by the female inmates. What was confirmed for us is that many women commit crimes not necessarily for the sake of committing crime itself, or for the thrill of eluding the law, but as a response to the social and psychological reality of their lives. More frightening than anything, however, is the fact that, many women inmates continue to suffer from multiple bouts of abuse by multiple perpetrators, which leads to feelings of hopelessness, low self-worth, drug abuse and criminal activity. If there was an appreciable difference, between the two
cohorts, it was the gripping discursive comments offered by the 2010 cohort. The comments were gleaned from answers given to a number of open-ended questions that were asked. The open-ended questions encouraged a full, meaningful answer that allowed the subject to use her own knowledge and/or feelings to think about a person and/or event that affected her.

One important aspect of this research is the opportunity for participants to tell their own story, unfiltered. These discursive narratives allow subjects to paint a more vivid portrait of their sexual abuse experiences than do the open-ended/close ended questions that appear on a standardized questionnaire/survey. Moreover, these personal narratives afford participants an opportunity to delve into their oftentimes complex and nuanced life story, which for some, is cathartic. Many of the inmates had heretofore never taken the time to jot down their feelings. Once this was done, some inmates found it easier to analyze certain events that they perhaps had refused to deal with, deliberately blocked out or were unwilling to acknowledge. Finally, these discursive comments, add to the study a rich human dimension that cannot be captured by quantitative data alone.

Below are several compelling and emotional excerpts from interviews conducted with both Black and White females from the 2010 sample. These personal vignettes provide the reader with a sense of the depth and scope of the abuse, experienced by some of the study’s participants.

“It happened from about the age of 7 or eight, to about the age of 15, and I didn’t tell anyone until I was 18 years old.”

“I don’t trust anyone. I don’t. ‘Cause it was a family member that did it, and a family friend that did it, and because of that, I have a really hard time letting people in. I don’t – I’m not an emotional person, I don’t like being touched at all. I like my personal space a lot. I like my privacy a lot.”

“The first time I had mentioned it was to my mother, and I love my mother, but it was kind of brushed under the rug. No-nonsense-type stuff. “Go home and we’ll get a 12-pack and everything will be all right”-type situation. I was raped when I was 14, I reported it. I had the support of my family when I reported it. After I reported it; during the court procedures, everybody turned their back on me and I had no support, so I stepped down and they dropped it from rape to “conduct with a minor” and he got 18 months. So after that, I didn’t talk anymore.”

“I had two different sexual abuses. One was when I was very young. It was my brother. I didn’t tell anybody about that until my twenties. I told my psychologist, and up until that point, for years and years and years, I felt very guilty. So when I shared it with my psychologist, he told me that playing around with your family members is fairly common. He reduced my guilt tremendously. And I don’t know why it took me so long to tell him, either, because it weighed on me for many, many, many
years. Now, when I was abused by a neighbor’s grandfather, my parents told me they didn’t believe me and not to talk about it. Obviously that didn’t sit well. And the last time I was abused was from an acquaintance, male, and I believe he raped me, and I called the police at the hospital and gave them a report, and that felt good.”

Fifteen years has passed since the initial investigation into the sexual abuse histories of incarcerated women, yet as one can see from the disturbing narratives above, similar themes surfaced among the 2010 cohort. Given the horror of sexual abuse, it is not altogether surprising that many women might seek solace or attempt to escape reality by engaging in some thrill seeking criminal activity; that if caught, would result in imprisonment.

Discussion

Until recently, the study of female incarceration was virtually ignored, principally because there was a perception that prison was for men (Kerness, 2006). By 2004, U.S. legislators and others recognized that women were entering prison at a higher rate than men (Austin, 2006). The findings of this study suggest the notion that many female inmates have experienced some type of sexual abuse prior to entering prison is not without merit. Moreover, the perpetrators of this abuse range from male friends and lovers to uncles, husbands and brothers. For some, the thought of a female/women being raped by her brother may seem particularly repulsive, yet it occurs more often than one might imagine.

This research also demonstrates that there are clear differences between the lived experiences of Black and White women. For example, 56.1% of Black women inmates reported a history of polysubstance abuse compared to 43.5% of White female inmates. One possible explanation is that unlike White women, Black women suffer from what some refer to as a triple disadvantage. In other words, Black women are not only the victims of racial discrimination, but sexism and classism as well. Consequently, the stress brought on by this level of oppression may be sometimes overwhelming, leading Black women to turn to a combination of legal and illegal substances in order to help them cope with the daily grind. Another possible explanation is that drugs are perhaps both more plentiful and accessible in inner city Columbus where there is a higher density of people of color than in the outlying areas where the population is predominantly White. In urban areas there are often more liquor stores [per capita and per square mile] and/or stores where alcohol can be purchased than there are in non urban areas (Roberts, 2003). In their article Health Risk and Inequitable distribution of liquor stores in African American neighborhoods LaVeist and Wallace (2000) found that liquor stores are disproportionately located in predominantly Black neighborhoods, even after controlling for socioeconomic status. Moreover, researchers have long argued that the large number of liquor stores in Black communities, influence the heavy use of alcohol among African Americans (Clucas & Clark, 1992). In many African American communities, for example, liquor stores often outnumber Black churches (Roberts, 2003; William & Gorski, 1997). The cities of Columbus and Cleveland are no exception.

For years, scholars have debated whether or not there were differences between the abuse experiences, the prevalence, and the disclosure patterns between
Black and White women. Some believe that there are no major differences in the prevalence of sexual abuse. Gail Wyatt (1990) conducted a ten-year comparison of prevalence rates between Black and White women who were the victims of sexual abuse and found that 29% of Black women and 39% of White women reported childhood sexual abuse. Further analysis compared the responses of White women to Black women, which revealed that overall, White women reported higher rates or sexual violations than Black women (Wyatt, 1990).

The feminist literature lays out a trajectory or pathway that leads women toward criminal involvement. Belknap (2010) explains that the feminist pathway perspective starting in the late 1970s identifies the impact that traumatic life experiences have on both delinquent girls and incarcerated women. The feminist pathways perspective emphasizes how deeply social life is patterned on the basis of gender, and thus, how variables such as trauma can take on different meanings not only for females, but males as well. Moreover, the pathways approach seeks to understand and explain how the broader intersections of gender, race, and economic inequities impact an individual’s life experiences, opportunities and choices. This perspective helps us understand problem behaviors displayed by adolescents and adults who have been abused. The findings from our studies support the work of Chesney-Lind (1986), Daly (1992) & Ritchie (1996). Each have suggested that the examination and inclusion of gender and gender related elements as they relate to criminal activity is central to any theory that attempts to explain why sexually abused women tend to lead lives that result in incarceration.

Based on the experiences of the majority of women currently or previously incarcerated in the state of Ohio, many met the diagnostic criteria for post-traumatic stress disorder, depression, and anxiety in particular. Given the emotional trauma that sexual abuse induces one can only imagine the mental state of many female inmates. According to the State of Ohio Office of Criminal Justice Services (2006), female prisoners and jail inmates had higher rates of mental health problems than did male inmates. White inmates were more likely than African Americans or Latinas to have mental health problems, and those inmates who were 24 years of age or younger tended to have the highest rates of substance abuse problems. Based on the experiences and symptoms reported in this study, many of the participants would meet the diagnosis of “severe mentally ill.” To compound matters, those with severe mental illnesses are especially vulnerable in spaces such as prisons where the possibility of being segregated from others is highly likely. Research suggests that prolonged periods of isolation, via lock down or seclusion, where there is decreased contact from others, or even a lack of natural lighting, can increase the symptomatology of those with severe mental illness (National Commission on Correctional Health Care, 2002).

It deserves mentioning that the number of first-time inmates with mental illnesses is increasing, so much so, that there is a growing concern among some about the number of such inmates flooding the criminal justice system and whether or not their emotional or mental health needs are being met (National Commission on Correctional Health Care, 2002). A recent three-year study conducted by the National

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4 In addition to being a professor the first author is also a licensed psychologist with a private practice. Given her unique position in the area of mental health she is well equipped to make this diagnosis.

5 Ibid.
Commission on Correctional Health Care and other expert groups delivered a final report to Congress in 2002 that read:

Prisons and jails offer a unique opportunity to establish better disease control in the community by providing improved health care to inmates before they are released. The report established conclusively that thousands of inmates are being released into the community every year with undiagnosed and/or untreated mental illness. Over all these reports show that a more cost-effective and therapeutic outcome (both for mentally ill individuals and the greater community) could be achieved through adequately providing treatment to these individuals while they are incarcerated. (p. 3)

Over the years, prison officials have become increasingly aware of the extent of mental illness within the penal system; however, in the case of women with extensive abuse histories, specific knowledge about these experiences has often been lacking. The criminal justice system has been designed and managed, based on policies, procedures, and practices consistent for the management of male offenders. The heartfelt comments from one of the study’s participants is a testament to the need for change within the criminal justice system and how it is presently ill-equipped to deal with women and the many issues with which they face. Said this inmate,

“I sincerely hope you are able to effect change. Given my own history, I find it extremely difficult to gain any sense of empowerment with male correctional officers yanking open the door to my cell at any time. I feel it’s harmful to be subjected to the constant supervision of male officers - many of whom are younger and not particularly educated. Their screaming, shouting, and firm fisted approach to maintaining security often causes me to have post traumatic episodes or flashbacks”.

**Conclusion**

It is no surprise that programs for female offenders are often either lacking in substance or absent altogether. Indeed, it is well documented that the needs of female offenders have historically been both underserved and in some cases, trivialized (Austin, 2006). Movement toward creating gender-based programs would entail giving proper consideration to the gendered nature of offending. Given the preponderance of abuse in the lives of women inmates, it is imperative that a system be created to address women’s needs in a way that would take into consideration the various pathway dimensions that often lead to their incarceration, their behavior while incarcerated, and needs that are specific to women while incarcerated.

Certain considerations need also be taken into account where women of color are concerned. The issue of rape and sexual assault experiences for many women of color is complex and unique. Black women have historically been stereotyped as wild, uncontrollable, and even criminal (Davis, 1985). In her paper, “Constituting American: Black Women, Sexual Assault, and the Law,” Irving (2007) examined a number of rapes cases in the Philadelphia area from 1995-2000 and found that sexual assault cases involving Black women were often dismissed despite strong supporting
evidence to the contrary. Based on this Irving maintained that the justice system discriminates based on race and class, thus leaving many women of color, especially Black women without proper legal protection against sexual abuse (Irving, 2007). Wyatt goes even further, arguing that the inattention to sexually abused Black women can be traced back to the history of sexual exploitation of slaves more than 250 years ago (Wyatt, 1992). Women held as slaves were regularly forced to comply with the sexual advances of their masters. If they resisted, they were beaten, sometimes brutally. There was, of course, little recourse for women held as slaves. Consequently, an enormous number of female slaves became concubines for their masters. It is not a far-fetched idea, that for Black women, America’s long history of slavery may have a lingering effect on their attitudes about rape and their right to be protected. As Wyatt asserts, due to this context, African American women’s help-seeking behaviors are likely to be atypical. In her 1992 study addressing the “Sociocultural Context of Rape,” Wyatt suggested that nearly 65% of her sample of African American women failed to disclose their experience with sexual abuse until well in adulthood (Wyatt, 1992). Thus, understanding the nature of disclosure patterns is an important treatment consideration. Outcome measures are also important when assessing the variation in life experiences, adaptive styles, and modes of recovery among all women, especially Black women.

The number of women inmates in Ohio who were sexually violated before entering prison is staggering. Moreover, the data show that the problem transcends race and age. Research such as this should sound an alarm among those who are well positioned to address the issue. Too often, sexual abuse is not taken as seriously as other crimes especially when it occurs within the home or a marriage. Consequently, there is a lack of urgency or interest in identifying the kinds of resources needed to combat the problem and the ramifications of sexual abuse. Indeed, understanding the potential far-reaching consequences of this horrific crime would go a long way in helping prison officials and others meet the unique and complex needs of a steadily increasing prison population.

References


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DOING THE LIFE:
AN EXPLORATION OF THE CONNECTION
BETWEEN THE INMATE CODE AND VIOLENCE
AMONG FEMALE INMATES

M. Dyan McGuire

While the “inmate code” among male inmates has been of interest to criminologists for quite some time, comparatively little research has focused on the norms common to incarcerated women. This exploratory study, based upon semi-structured interviews with 52 incarcerated women, investigates the extent to which the behavior of female inmates conforms to an inmate code. It also explores how violating the inmate code can contribute to violence among female inmates. The results suggest that snitching, gossiping, commenting on other people’s time and failing to maintain standards of cleanliness are all unacceptable behaviors that are likely to be sanctioned violently by other female inmates. The policy implications of these findings are discussed.

All cultures create values and norms, which are culturally defined and often distinctive (Benedict, 1934; Curra, 2000). As a result, there is considerable variation across time and space regarding what constitutes acceptable behavior (Black, 1983; Curra, 2000). Sociologists have long known that isolated populations can develop unique cultural identities, complete with distinct norms and values, which vary from their referent group’s mainstream culture (see Goffman, 1961). In modern societies, prisoners represent one such isolated group and have long been known to operate in a social milieu dominated by norms and values distinct from those of mainstream society (see Clemmer, 1940; Sykes, 1958).

The distinct set of norms associated with prison society is often referred to as the “inmate code” or the “convict code.” Criminologists disagree about the origins of the inmate code. People like Gresham Sykes (1958) argue that the inmate code is a reaction to the social realities of prison life. Other criminologists argue that the inmate code is the result of the importation of underclass values and experiences into the prison environment due to the almost-exclusive use of incarceration against members of that particular class (Irwin & Cresssey, 1962; Irwin, 1970). Although sociologists doing prison ethnography in the early years often disagreed about the precise origin and content of the inmate code, they all implicitly agreed that male inmates were the inmate population of concern.

As a result, all of the older work and most of the contemporary work concerning the inmate code focuses on male prisoners (see e.g., Devasia & Devasia, 1986; Faulkner & Faulkner, 1997; Silberman, 1995; Sykes, 1958; Wieder, 1978; Wilson & Snodgrass, 1969; Winfree, Newbold & Tubb, 2002). Research on the inmate code among male inmates tends to stress solidarity among prisoners, or at least those prisoners with whom one associates, and antagonism toward staff. For example, studies have found evidence that the code as actualized among male prisoners
discourages snitching and exploitation or dishonesty toward fellow prisoners and encourages noncooperation and defiance toward staff and administrators (Sykes, 1958; Tittle, 1969; Wieder, 1978; Winfree, Newbold & Tubb, 2002). Some newer studies suggest that there is a “new code” among male inmates that emphasizes toughness, respect, and racial or ethnic cohesion and condones sexual aggression and exploitation of weak inmates and inmates of different ethnicities (Silberman, 1995:34-37). The influx of hard drugs like heroin into the prisons may be partially responsible for contemporary changes in the inmate code (Crewe, 2005a).

Of course, adherence to the code is neither universal nor constant (Crewe, 2005b). Clearly, at least some male prisoners forgo the code in favor of pursuing their individual self-interest. For example, inmates turn informant and testify against fellow prisoners, even those they were “friends” with, on a fairly regular basis (see e.g., State v. Molasky, 1989). This is to be expected, as perfect normative compliance and a complete absence of deviance exists in no known society (see e.g., Erikson, 2005).

As is typical in criminology, comparatively little research has focused on the existence and content of a code among female inmates (Kruttschnitt, 1983). Much of the research that has examined the normative dimensions of the social world of female inmates has tended to allow work focusing on males to set the agenda (see e.g., Heffernan, 1972; Ward & Kassebaum, 1965) and has tended to look at “the code” or norms among women as a foil for or in comparison with males rather than placing women in the center of the analysis and attempting to discern what, if any, norms guide the actions of incarcerated women (see e.g., Tittle, 1969). Nevertheless, some significant insights about the social world of imprisoned women has been gained from past research.

Ward and Kassebaum’s work suggests that the social world of female inmates revolves around small group attachments (“pseudo-families”) and that as a consequence prisoner solidarity is of less importance and informing and snitching are, therefore, more tolerated (1965). Giallombardo also noted that women formed themselves into family structures using traditional feminine roles like wife or mother with some inmates taking on masculine roles by simulating a masculine appearance and taking on masculine behaviors (1966). These imaginary kinship groups and butch/femme dyads dominated not only social but also economic life in women’s prisons (Williams & Fish, 1974).

Heffernan created the now-familiar “the square,” “the life,” and “the cool” typology to explain various adaptations to prison life based largely on pre-prison identities (1972). Heffernan noted that inmates involved in “the life” were more apt to be involved in violence (1972). Kruttschnitt found that most of the women she studied failed to endorse an inmate code of ethics and noted that there was little evidence that a normative system guided women’s behavior behind bars (1981). Hartnagel and Gillan, on the other hand, found that adherence to the inmate code was fairly strong among younger women with a prior history of incarceration (1980).

In a more recent study of women prisoners, Barbara Owen (1998) found that the social world of the women’s prison she studied was intensely relational. Emotionally intimate but non-sexual “play families” and intimate dyads characterized by intense emotional relationships were common (Owen, 1998). Owen’s work suggests that the cultural life of female inmates revolves around the focal concerns of privacy and maintaining relationships with those on the outside, especially children (1998).
From these focal concerns emerge a number of informal “rules” which guided inmate interaction and behavior. The privacy-based rules included: do not gossip or repeat confidences, mind your own business, do not snitch, do not invade another inmates’ space or touch their things without permission, and do not ask about another inmate’s offense (Owen, 1998). The rules related to the importance of outside relationships included shunning/sanctioning those convicted of hurting a child or parent and a prohibition against commenting on the length of a “lifer’s” sentence (Owen, 1998). Other rules based on the close proximity inherent in an overcrowded prison environment included rules about cleaning the room and personal hygiene (Owen, 1998).

Although Owen concluded that the code was less important to women than men, she nevertheless found that there was a female version of the code and that respect among fellow inmates was predicated, at least in part, on adhering to that code (Owen, 1998). Other research suggests that male and female inmates follow the same or a similar code and that their levels of adherence on most dimensions of this code are comparable (Wilson 1986). Evidence that men and women differ in their level of commitment to various dimensions of the inmate code may be an indication that incarcerated women and men subscribe to somewhat different codes.

While tantalizing glimpses of a normative code among female inmates are discernable in the literature, it is not possible to flesh out the content of the code among female inmates until more work focusing exclusively on women is conducted. In particular, it is necessary to conduct qualitative work which allows women to freely discuss the normative environment within which they operate without regard to the paradigms and expectations generated by the prevailing male-centered prison sociology literature. This study seeks to help begin to fill this void.

Importance of the Current Research for Theory and Practice

Exploration of an inmate code among female inmates is currently a particularly important area for research because of the growing number of incarcerated women. Women’s imprisonment is at an historic high (Kruttschnitt & Gartner, 2003). Women are the fastest growing segment of the prison population (Harrison & Beck, 2005). As women’s numbers behind bars grow, the management of female inmates becomes a more pressing problem for prison administrators and the correction system generally.

One of the biggest concerns of administrators is maintaining a safe, violence-free prison environment. While it has historically been assumed that female inmates were non-violent, recent empirical research documenting the existence of significant violence among female inmates makes continued belief in such assumptions untenable (see Easteal, 2001; Hensley, Castle & Tewksbury, 2003; Isaac, Lockhart & Williams, 2001; Kruttschnitt & Krmpotich, 1990; McGuire, 2005; Pogrebin & Dodge, 2001). The existing research suggests that violence among female inmates is associated with age (Fox, 1984), homosexual relationships (McGuire, 2006), race (Kruttschnitt & Krmpotich, 1990), and having been raised in a two-parent family (Kruttschnitt &

1 Snitching had a somewhat ambiguous status among the women Owen studied. While snitching was condemned in theory it apparently occurred sometimes in practice and did not usually result in death or other violent retribution as is apparently common among men (Owen, 1998:74, 85, 111-112, 177-78).
The connection between the inmate code and violence among female inmates, however, has not been thoroughly explored. This omission is unfortunate given evidence from other contexts that suggests that violence can be associated with normative codes of behavior (see Curra, 2000). Norms can be associated with violence in a number of ways. For example, violence can be meted out as informal social control (Black, 1983). Donald Black maintains that there are five elementary forms of conflict management: self-help, avoidance, negotiation, settlement and tolerance (1998; 1989). “Self-help is the handling of a grievance by unilateral aggression. It ranges from quick and simple gestures of disapproval, such as a glares or frowns, to massive assaults resulting in numerous deaths” (Black, 1998:74).

Black argues that self-help should be the most prevalent form of conflict resolution among inmates in correctional institutions (1998). He also argues that prisoners are more likely to use the more extreme and violent type of self-help, which he terms vengeance, when resolving disputes between themselves (Black, 1998). The impetus to use violent self-help comes from the inherent immobility in prison life, which has the effect of freezing inmates in physical space, often with people who are relationally and culturally distant (Black, 1998). With little opportunity to meaningfully access formal dispute resolution mechanisms like the courts, violent self-help becomes the preferred means of dispute resolution (Black, 1998).

Other theorists contend that violence might be normatively endorsed as appropriate or honorable in certain situations and that in certain social milieu crime might be normal, learned behavior (see Miller, 1958). For example, Edward Sutherland’s differential association theory suggests that for some people violence is learned, normative behavior (Sutherland & Cressey, 1978). Wolfgang and Ferracuti’s “subculture of violence” specifically addresses the cultural aspects of violence. This theory posits that members of the lower class are normatively inclined to react violently to what mainstream culture regards as trivial slights because of the heightened value the lower class places on honor and the diminished value they place on human life (Wolfgang & Ferracuti, 1981). As with most criminological theories, self-help and subcultural theories emerged from analysis of research, which focused primarily on males. Thus, it may be that new theories will need to be developed to explain the connection between held norms and violent behavior among women.

Methodology

The Missouri Department of Corrections operates two correctional facilities for women convicted of criminal offense in the State of Missouri. The older facility is the Chillicothe Correctional Center (“CCC”), located in Chillicothe, Missouri and the newer and larger facility is the Women’s Eastern Reception, Diagnostic and Correctional Center (“WERDCC”) located in Vandalia, Missouri. Access to inmates residing in these facilities was granted by the Missouri Department of Corrections in response to a written proposal.

The Missouri Department of Corrections not only gave permission for the research to occur but also facilitated sample identification by drawing a random sample.

Without the Missouri Department of Corrections and most especially the women who took the time to speak with me about their experiences, this research never could have occurred. The author wishes to gratefully acknowledge the debt she owes to each of the participants and the Department. Thanks for your help!
sample from among inmates who were at least 18 years of age and who had served at least 12 months of their current sentence as of the day the sample was drawn. These inclusion criteria were meant to screen out juveniles and to assure that interviewees would have a substantial period of incarceration to draw upon in answering questions concerning violence among inmates.

Of the 80 randomly selected inmates, 52 ultimately gave their permission to be interviewed. Interviews occurred between August and December of 2002 and took between 1 and 3 hours depending upon how much the woman had to say. A semi-structured interview format was used. Rather than asking inmates whether they subscribed to the various dimensions of a pre-defined code, inmates were simply asked to describe instances of violence between inmates that they had actually seen or participated in directly. It was hoped that such open inquiry would afford women the chance to discuss an inmate code if it existed without suggesting any particular content to that code and to shed light on whether that code was associated with violence.

For purposes of this study, violence was limited to incidents of actual physical battery. Actual physical battery was defined as encompassing hitting, kicking, punching, pushing, sexual assault, and other instances where one inmate deliberately engaged in nonconsensual bodily contact with another inmate, including nonconsensual contact accomplished through the means of an instrumentality of some kind such as a knife, club, chair etc. Emotional and mental abuse, unaccompanied by nonconsensual physical contact, were expressly excluded. This definition of violence is consistent with the definition of violence employed by other researchers who have examined violence in prison (see e.g., Walters, 1998). All names used in this article are fictitious and were created by either the interviewee or the author.

Results

As women described particular instances of violence, they were asked to explain why the violent incident occurred. In analyzing their accounts of why various violent altercations occurred, it became clear that in a substantial portion of the incidents described, the violence was retaliatory rather than predatory in nature. While a variety of instances of retaliatory violence were discussed, there emerged across the series of interviews consistent reference to certain norms that were associated with violence. The norms most consistently associated with violence were those concerning respect, snitching, maintaining another person’s privacy, the exchange of goods, messing with someone else’s time, and punishing those incarcerated for victimizing a child.

Respect was a frequently mentioned and complex construct that appeared to be related to violence in numerous ways. Retaliation for disrespect and the instrumental use of violence to establish and maintain respect were both frequently noted as causes of violence by both observers and participants alike. Siobhan suggested that aside from violence associated with homosexual relationships which was widely cited as the primary cause of violence at both prisons, “disrespect, invading somebody’s space, saying disrespectful things” was the primary cause of violence and that many fights she had seen were the result of someone “just getting up

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3 The women are quoted throughout exactly without editing in order to give them voice in their own mode of speech which sometimes departs from standard American English.
in somebody’s face, saying disrespectful things, or, going in somebody’s area when you’re not supposed to be there.” Miranda, who self-identified as the aggressor in a number of violent altercations, concurred: “I’ll fight, if they disrespect me.” Marsha also admitted that she assaulted another woman but felt justified in doing so because the other inmate “disrespected me. In here, its survival of the strong, you have to check people, I can’t get a rep as a pushover, I’ve got too much time to do.”

LaToya explained how a remark she made in jest was perceived as disrespectful and resulted in violence. “I was walking back from school, and there was a friend [Jan] standing on the front porch here on Three House and I made a joke to her. I said, ya’ know what, one day you’ll make somebody a good wife.” Jan became enraged by the remark. She “just kept going on and on and ranting and raving and saying that I was calling her a lesbian and a gay person and she don’t have no gay intentions and she’s a Christian and she hasn’t had gay intentions in years, and she just got crazy about it.” Jan then attacked LaToya by spraying her in the eyes with a cleaning solution used to clean the toilets. “When she did that I couldn’t see nothing, so I just grabbed her hair and we started fighting, ‘cuz I couldn’t see nothing.”

Goddess and Debra Ann independently related an incident involving a thin white woman and a heavysset black woman. Goddess said “the white girl was giving her heck about her eating all the time. I don’t really know, but all we heard the black girl say was, I can eat what I wanna’ eat.” Then “we hear this thump, thump, thump on the wall like somebody’s head is coming through our wall, [so we went next door and] the black girl was on top of the white girl and so they were fighting.” Debra Ann said “the white girl peed in her pants the black girl beat her so bad.”

Suzy Q related a complicated story involving her then-roommate, Ramona, who had been placed on a spend limit because of a disciplinary infraction and was, therefore, unable to buy items from the prison canteen. Ramona told other inmates she had borrowed money from that her family had placed money on Suzy Q’s books and that Suzy Q was refusing to use the money to buy items to satisfy Ramona’s various debts. When Suzy Q found out that Ramona had been lying about her, she confronted her in the yard and “was ready to retaliate … because at that point in time, I didn’t care about hitting her in the head, either. I was gonna’ do what I had to do, because it was a respect thing then.”

Special K echoed the importance of respect. “Sometimes you gotta’ establish yourself, sometimes you need some smacking and shit to establish respect amongst each other.” The social nature of violence associated with acquiring and maintaining respect was clearly articulated by Jessie when she said “I’m more likely to actually fight you if we get into an argument if there’s a bunch of people watching and I think I have to earn my respect. More so than if we’re one on one. If I’m one on one and nobody’s around, I’m much less likely to fight you than if there’s somebody watching … because I don’t want them people to think I’m a punk by backing down away from you.”

Respect is associated with fighting but not necessarily winning because respect can be preserved or gained even after a decisive physical defeat. Hope reported that a large and intimidating woman had been verbally harassing her and one day threatened to beat her. She said “I could have avoided the whole thing, but I also would have been known then that I just let her talk to me any way she wanted to and I couldn’t allow that, because like I said, you do have to have some respect up in here.”

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4 Check or checking refers to physically punishing another inmate for a perceived transgression.
Although clearly the loser of the fight, Hope reported that “when it was all over, I did gain respect. I gained her respect, ‘cuz I stood my ground [and] I didn’t tell when it was all said and done, so that gave me respect, because that means something.”

Telling the authorities about another inmate’s misconduct, colloquially referred to as “snitching,” not only caused a loss of respect, it was also an activity frequently cited as the instigator of violence. Janice Joplin, for example, cited snitching as the primary cause of fights between inmates after violence associated with homosexual relationships. She reported that if someone snitches, the person snitched on or her friends will usually beat the person who snitched. Jesse confirmed that the person snitched on has an affirmative obligation to physically retaliate against or “check” the snitch. If Susie Smith snitched on me “then I have to go and check Susie Smith for telling on me.”

While pronouncements against snitching were often phrased in absolute terms, snitching apparently did occur with some frequency. Janice Joplin stated that “everybody hates a snitch” but later said “more than half the people do it, but the rest of us, you don’t tell on people for any reason.” Lady T’s comments reflected similar ambiguity: “That’s just how it is. No one snitches.” But later she noted that when two inmates fight “the only thing they worry about is other people that’s gonna’ tell.”

Despite the fact that snitching apparently occurred fairly regularly, many women expressed fear about being labeled a snitch. For example, when Melissa was asked if inmates ever sought assistance from correctional officers to resolve a dispute the following exchange occurred:

**Melissa:** “If they do, they’re labeled a snitch real quick.”

**Author:** “So, what would that mean, being labeled a snitch?”

**Melissa:** “It just depends. It could go anywhere from just vocally saying something to ‘em. ‘Oh, you snitch, had to run to the cops’, or whatever, all the way up to maybe getting into a fight at a later point.”

Special K was even more definite about what happens to you if you are labeled a snitch: “You’ll probably more than likely get your ass whooped.”

Women also reported concrete examples of situations where they refrained from telling the authorities about their own or another’s victimization out of fear of violent retribution. Lorna, for example, reported that she used to have a roommate who threatened and harassed her but said “I didn’t want to provoke it to the point of being a snitch then, and really have someone attack me for snitching her out, but they [prison staff] knew there was something going on.” Cindy agreed that telling the authorities was dangerous. When asked if she reported an assault she witnessed she said “why get myself in a situation that I wouldn’t be in and might come back on me … Because I could be victimized as well for telling.”

Their fear did not appear to be unfounded, as some of the violence associated with snitching seemed pretty severe. Bambi, for example, proudly described an incident where she kicked another inmate “three times in her liver and she already had cirrhosis and they had to watch her for awhile, ‘cuz it caused more swelling.” Bambi justified her actions in part because the other inmate was a “snitch and a cell burglar.” Diane related an incident where several women jumped an inmate named Marilyn and beat her in the head with locks, which were placed inside of socks. Marilyn “had welts all over her head … She went to the hospital and I believe she had stitches,
because I know some parts of her head were shaved where they hurt her pretty bad in the back.” When asked why Marilyn was the subject of such a vicious attack, Diane said “She was like a snitch and she liked to be in the middle of what I call the he say, she say. She likes to tell one person one thing and then go behind their back and say something. She likes to instigate and start trouble between people.”

As indicated by Diane’s comment, gossiping about other inmates, getting involved in their business or otherwise compromising their privacy was viewed as unacceptable. Jennifer felt that “people running their mouths,” which encompassed invasions of privacy including gossiping about others, failing to maintain confidences or otherwise getting involved in other people’s affairs, was the number one cause of physical violence at her prison. Takisha echoed Jennifer’s sentiments. “People getting up in other people’s business [is a big cause of physical violence].” “You’ll be talking and somebody just jump into your conversation and a lot of people don’t like that, so it starts the fighting … Or, [if people] go off and tell something that they heard them say, or maybe you might in the room be talking amongst your roommates and one of ‘em take it out in the yard, something that you didn’t want out in the yard. Something that was personal … it’s gonna’ be a big fight over it.” Mila reported that she witnessed 20 or 25 fights a year caused by “someone sticking their nose where it don’t belong.”

Tammy reported that she was assaulted by another inmate who thought she had revealed a confidence. “She came into my room and I told her I didn’t tell nobody anything [but she did not believe me so she] swung on me and grabbed me by my shirt, pulled me into her room and I just started fighting her, because I didn’t know what she had in the other hand, even though she didn’t have anything, but I didn’t know that.” Jennifer saw Jane get “jumped by two girls and they had her up in the corner and they was socking on her head and the officers was trying to get in, but the inmates wouldn’t let them.” Jane was assaulted because “she was saying all kinds of stuff out on the yard that wasn’t true and getting in their business and it was none of hers.” Bambi justified her attempt to murder another inmate by claiming that the other inmate was getting into her business by trying to sell Bambi’s story to True Detective magazine. Rebecca and several other inmates reported that “minding your own business” was essential to avoiding violent victimization.

Failure to adhere to rules concerning the exchange of goods was also commonly cited as a cause of violence. Stealing, for example, was regarded as warranting violent retribution. Melissa reported that she saw Sharon confront Amelia because Amelia had stolen Sharon’s shirt. “She [Sharon] told her [Amelia] to go in and get the shirt and she [Amelia] didn’t go get the shirt, so she [Sharon] beat her [Amelia] down on the basketball court, and she [Sharon] told her when she [Sharon] come out of the hole it was gonna’ happen again.” Similarly, Katrina reported that Nicki stole some clothing from Candy and when she refused to return the items a fist fight ensued. Tammy also witnessed a fight over an appropriated shirt. “Another girl, because a girl wouldn’t give her back her shirt that she let her wear, so she just started whooping on her.”

Failure to pay for drugs bought on credit also frequently resulted in violence. Maria, who admitted that she used to be heavily involved in drug trafficking inside her prison, said that she believed that failure to pay for drugs was the primary cause of violence in her prison aside from violence associated with homosexual relationships. Suzy Q agreed that “girlfriends and dope” were the most common causes of violence noting that “they’re supposed to pay for it [drugs], but they don’t, so they get their ass
kicked. Money issues, whether it’s borrowing or so and so owes somebody some money and they don’t pay up, so they end up fighting.” Candy also said that an inmate who fails to pay for dope will “get her ass kicked.”

Reneging on even a minor debt, such as failing to replace borrowed cigarettes, soup or a soda also precipitated violence. As Lecresha said: “Someone will borrow something from someone and in here they say two for one. So, if I was to give a pack of cigarettes to you today, then when you go to the store, you would owe me two packs. Well, come store day, if your money ain’t there, you can’t pay me, so therefore that’s when an altercation come in.” Takisha agreed, “loaning and borrowing causes fights, lots of fights. … You’ll get hurt over some cigarettes … somebody give you cigarettes, they want two packs back and if you don’t pay ‘em back, if they don’t fight you, they’ll put some of them little young ones, I call ‘em Thunder Cats, on you to fight you and they’ll pay ‘em to go to the hole.”

Karen and several other inmates reported that quite a few women only got “State pay” of $7.50 per month to cover toiletries and cleaning supplies because they did not have a “premium pay” job at the prison and “their people” (i.e. their family and friends on the outside) did not put money on their prison account. State pay was apparently insufficient to cover necessities. As a result, these women were constantly having to borrow items from other inmates and given their desperate financial circumstances were often unable to re-pay the loans, which resulted in violent assaults.

“Messing with somebody’s time” was also regularly mentioned as a source of violence. “Messing with someone’s time” meant commenting on how long a sentence she still had to serve before she could go home. When a soon-to-be-released short-timer “messed” with a long-timer’s time, violence was particularly likely to erupt. Hope, a long-timer, put it like this: “We don’t want to hear every day I’m going home in 12 days, ya’ know and they throw that up in your face. … To a lot of the long-timers talking about their time will get you hurt. It will get you hurt.” Isuha agreed with Hope. Short-timer “just make it worse on the rest that have to stay longer, and it’s intentional. They’ll tell ya’ I got my date, I got my date to the point where you’ll say, if you’re not alive you won’t have a date. You have to take ‘em to that extreme.”

Special K and her friend Shelly assaulted Pat when the three of them were incarcerated in a county jail together because Pat said Shelly deserved her lengthy sentence. In Special K’s words: “Pat was playing on somebody else’s time. When somebody gets a big chunk, a double digit of time … you don’t make fun of it. I just got served with 10 years. My friend [Shelly] just got served with … we’re talking double digits, big numbers. So, I proceeded to get in an argument with Pat and dragged her somewhere close to the stairs and Shelly came down the stairs and stabbed her in the face.” Special K justified dragging Pat over to the stairs knowing that Shelly would attack her because “we [Shelly and Special K] had just gotten sentenced on harsh sentences … we were kind of tripping on our time and reality was kicking in and we had just got off the phone with our families and it was a pretty emotional time. She [Pat] should’ve just kept her mouth shut.”

Katrina also acknowledged that she assaulted a woman who messed with her time. Josephine “threw up the fact I was probably never gonna see my kids … We got into an argument. I really don’t know word-for-word what we said to each other, but the thing that stands out in my mind is that about my kids. That I would never go home and see my kids, … So, I figured I had had enough, so I turned around and I smacked her in the body. I went to the hole” for that for 10 days.”
Finally, some inmates apparently felt entitled to punish women who were incarcerated for victimizing children. Taffy was convicted in connection with her boyfriend’s rape of their daughter. She said “it’s very dangerous to be here for why I am here. The other prisoners are real bad about it, they hate me, put me down, if they could catch me alone no telling what they’d do.” She is convinced that “one of these days something will happen” to her. Taffy went on to report that a woman incarcerated for a crime similar to her own had boiling sugar water thrown on her. Taffy said “everyday I worry, is this the day.”

Takisha boasted about being involved in persecuting a fellow inmate because of her crime. She said she deliberately made Alley’s life miserable “talking about her really bad, calling her names like “baby killer.” Just whatever I could.” Takisha felt entitled to behave this way because Alley was in prison for throwing “her baby down an incinerator because she wanted to go to a party and I hated her for that.” According to Takisha, Alley finally had enough and threw a baseball at her and hit her in the jaw. In response, Takisha had a friend of hers, who worked in the kitchen, make Alley a hamburger with broken glass in it.

While violence associated with disrespect, snitching, compromising another person’s privacy, borrowing/stealing possessions, messing with someone’s time and punishing child-victimizers were the most commonly mentioned causes of violence that appeared to be associated with norms, there were other types as well. For example, there were scattered references to violent incidents sparked by a failure in personal hygiene. Failing to do a fair share of the cleaning or failing to maintain the cell in a clean and tidy manner were also mentioned as a source of violence. Also, cutting in line to gain access to the phone, the microwave, or the laundry facilities were also occasionally mentioned as the cause of a fight.

**Discussion and Conclusion**

In the last several decades, incapacitation and retribution have clearly become the guiding philosophies behind the American criminal justice system. Such philosophies naturally produce Spartan correctional institutions because where incapacitation and retribution are most important, money is primarily spent to assure security and heighten the punitive nature of the prison experience. After all, an institution whose purpose is to warehouse society’s “trash” and to punish its miscreants is *supposed* to be bleak, harsh, and unpleasant.

Scarcity of material resources, degradation of the person and an almost complete deprivation of privacy are inherent in this sort of penological approach. It is, therefore, not surprising that incarcerated women have developed norms that are particularly sensitive to encroachments on their material possessions, dignity, and privacy. Overcrowding in recent years has only exacerbated the situation by making resources, dignity and privacy even scarcer commodities. The continued mass incarceration of women promises to make the situation even more volatile in the future.

While not all of the women interviewed mentioned norms regarding disrespect, snitching, compromising another person’s privacy, borrowing/stealing possessions, messing with someone’s time or victimizing a child as causes of violence in their interviews, these themes were nevertheless consistently mentioned by a substantial portion of those interviewed. Moreover, it is interesting to note that none of the women interviewed expressed allegiance to inconsistent norms or in other ways
indicated that they did not subscribe to the foregoing norms. For example, no one said that talking about another inmate’s personal business out in the yard was an acceptable way to pass the time. More significantly, aside from snitching, women consistently described behavior that was inconsistent with these norms in unfavorable terms. For example, whenever reference was made to someone commenting on someone else’s time, the speaker was always disapproving of that behavior.

Even with snitching, which seemed to be regarded somewhat ambiguously, whenever women reported an incident where someone went to the authorities, involving the authorities was either condemned as snitching or regarded as a necessary evil. Involving the authorities was never endorsed as proper or appropriate. Interestingly, in describing incidents where telling the authorities was regarded as a necessary evil, the term snitching was not used. For example, in discussing the aftermath of a gang rape where the victim was vaginally violated with a variety of instruments, Janice Joplin, who was one of the most ardent critics of snitches and went so far as to equate snitches with child molesters reported that “they hurt her so bad that she had to tell. She was too afraid to tell. And, uh, she had to go tell the white shirts because she was bleeding [from the vagina].” Dropping the pejorative term “snitching” in favor of a neutral term like “telling” may signal that among women the prohibition against “snitching” is more nuanced and complex than among male inmates.

The absence of expressions of support for conflicting norms may indicate that beliefs regarding disrespect, snitching, compromising another person’s privacy, borrowing/stealing possessions, messing with someone’s time and victimizing a child are reasonably widely held among the prison communities studied. However, further research testing how widespread adherence to an inmate code is among women will have to wait until sufficient work focused on women has been conducted to allow the contours of such a code to be reliably discerned.

In addition, further work is necessary to explain why the inmate code is associated with violence among women. Certainly, as suggested by Donald Black’s self-help theory, some of the reported instances of violence appear to have been attempts at asserting informal social control. Instances where inmates were beat up for failing to comply with the “payback two” rule when they borrowed items is one example of violence being used to punish those who violated accepted norms. Evidence that violence was associated with disrespect tends to support Wolfgang and Ferracuti’s subculture of violence theory. Additional research aimed at explicit theory testing is needed to draw conclusions about the causes of violence among female inmates.

Although definitive conclusions about a women’s inmate code and the extent to which this code is causally related to violence will have to await another day, the results of this study nonetheless suggest that certain norms are associated with violence in women’s prisons. Evidence that this code may be enforced violently by other prisoners is important enough that administrators should consider how they can use this information to make their prisons safer. Most prisons segregate new prisoners when they first arrive for purposes of providing some sort of an orientation program. It would be relatively easy for administrators to incorporate training

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5 White shirts are individuals who supervise front-line correctional officers. Their uniform shirt is white and is the source of their slang name.
regarding prison norms and the dangers associated with breaching those norms as part of the new prisoner orientation process.

While advising new prisoners of the dangers of borrowing from other inmates, gossiping about other inmates, disrespect, commenting on the brevity of their sentence or the length of someone else’s sentence or sharing their criminal history with anyone if it involves the victimization of children is straightforward and unlikely to have an adverse influence on other aspects of prison safety and security, advising inmates regarding the dangers of snitching is more problematic. Obviously, the prison does not want to discourage ‘snitching’ as inmate intelligence is vital to maintaining a safe environment. However, administrators and staff at women’s prisons need to be more cognizant of the danger that a snitch label implies for cooperating inmates and be vigilant in establishing secure and confidential channels through which reports can be made.

One problem in maintaining confidentiality is, unfortunately, staff. Inmates at both prisons reported that allegedly confidential reporting procedures that were in place at their prisons were routinely compromised by correctional officers who shared the identity of informants with inmates with whom they were friendly. The belief that other inmates would eventually find out who the snitch was from a correctional officer was frequently cited by the women interviewed as the reason why snitching was dangerous. It is essential that front-line personnel be schooled in the importance of confidentiality and maintaining professional boundaries with all inmates. Unprofessional employees and those who compromise a cooperating prisoner’s confidentiality should be seriously sanctioned.

Training both staff and inmates about the inmate code and alerting them to the potential for violence if the code is violated can help to make a prison a safer place. Informed inmates are less likely to inadvertently say or do something provocative. Trained and informed staff are less likely cause an incident through an unprofessional breach of confidentiality.

Another remedial step to make women’s prisons safer suggested by this research is to provide a more reasonable stipend to all prisoners. Equalizing access to resources like snack food and toiletries beyond the reportedly grim bare-bones necessities provided by the prison could go a long way toward easing stress, jealously and the motivation to steal or borrow from other inmates. By reducing inmates’ need to borrow or steal, violence associated with those activities could be diminished. Unfortunately, in a corrections climate dominated by incapacitation and retribution, money for prisoners’ ‘luxuries’ like laundry detergent, deodorant and palatable foods may be very hard to come by.

According to many of the prisoners, the State provided only a bar of soap, toothpaste and a toothbrush. These items were alleged to be of inferior quality and all other toiletries apparently had to be purchased by the inmates at the prison’s store (aka the canteen). Stories of poor quality and even tainted foods being served to the inmates abounded. Several inmates reported that they had not eaten in the dining hall in years but had subsisted on food from the canteen, a claim that was informally substantiated by a correctional officer.
References


*State v. Molasky*, 765 S.W.2d 597 (Mo. 1989).


LEGACIES OF THE RACIALIZATION OF INCARCERATION: FROM CONVICT-LEASE TO THE PRISON INDUSTRIAL COMPLEX

A.E. Raza

This essay examines the current state of the U.S. prison system by historicizing it within the post-emancipation South. By concentrating on the history of the post-emancipation South and its prison system as it relates to African Americans, this essay aims to show how anti-black racism has been re-instituted in the current era of incarceration. I do this by emphasizing the racial dimension of the prison system, focusing on the State of Georgia, which historically has subjugated African Americans via slavery, Black codes, and Jim Crow laws. Moreover, I argue that Georgia’s post-emancipation criminal justice system, exemplified by the convict-lease system, contributes to its current state of incarceration, and should be understood as part of the legacies of the social and economic functions of slavery.

The Civil War brought an end to the institutionalized enslavement of African Americans, yet through the 13th Amendment to the U.S. Constitution and various legal practices the current prison system has manifested itself into an institution of forced labor, which is increasingly being comprised of people of color. As such, this essay examines the material conditions that existed during the post-emancipation era in order to expose the racialized historical continuities of the prison system thereby demonstrating the way in which laws have in fact helped to create a racially unequal criminal justice system. By concentrating on the history of the post-emancipation South and its prison system as it relates to African Americans, this essay aims to illuminate how anti-black racism is central to the current era of incarceration. I do this by emphasizing the racial dimension of the prison system, focusing on the state of Georgia, which historically has subjugated African Americans via slavery, Black codes, and Jim Crow laws. Moreover, I argue that Georgia’s post-emancipation criminal justice system contributes to its current state of incarceration, and should be understood as part of the legacies of the social and economic functions of slavery.

The paper is divided into three sections. The first section discusses the current state of the prison system, specifically the conditions in the state of Georgia. The second section traces the historical development of the racialized prison system by examining the 13th Amendment and the ambiguous definition of criminality. I then delineate the rise of the prison system in post-emancipation Georgia, paying particular attention to the convict-lease system and Black Codes specific to the state. In the third...
section I discuss the increasing imprisonment of women of color, and how that, too, is in fact a legacy of slavery, with its shared dimensions of sexual domination and oppression. I conclude with a discussion of the rise of the prison industrial complex.

**Contemporary Georgia and its Prison System**

The current figures associated with incarceration in the United States in general, and Georgia in particular, reveals that race plays a central role in imprisonment, which stems from a racialized system of enslavement that characterized both the antebellum and post-antebellum South. While slavery officially ended in the United States in 1865, the consequences of racialized enslavement are found today. To begin, African Americans represent 12.8% of the U.S. population, yet make up 42% of the federal and state prison populations (Hoover Institute, 2006). In 2008 the total population of those held in custody at the federal, state, and local prisons and jails totaled approximately 2,311,2000 peoples (West, 2009). Among that total an estimated 913,800 were African Americans (West, 2009). These statistics reveal that on average African Americans are disproportionally imprisoned in the U.S., questioning the modern day assumption of a colorblind legal and criminal justice system.

The disproportionality discussed above is even more apparent when examining the state of Georgia’s general population to the prison population. In 2008 the U.S. Census Bureau estimated the total population of Georgia at 9,685,7444 with whites accounting for 65% of the population followed by African Americans with 30% (US Census Bureau, 2008). At the same time, the total prison population of Georgia was 54,016 with African Americans comprising over half of the inmate population with 33,114. When compounded with the other non-white inmates, 62% of the inmate population of Georgia consists of people of color (Georgia Department of Correction [GDC], 2008b). Additionally, out of the 150,000 parolees in the state, African Americans account for 72,358. The most common offenses held by parolees are property offenses (51,378), and drug offenses (54,250) (GDC, 2008b, p.17). It is significant that property offenses constitute the majority of probationary offenses, since, as will be discussed, the implementation of property laws was one of the most effective ways that the post-emancipation South was able to imprison the newly freed population.

The Georgia Department of Corrections’ annual report for 2008 notes the budget history for the past six years showing an increase from $905,854,482 in 2004

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1 The legal definition of slavery in the United States is difficult to come by. In 1858 Thomas R. R. Cobb, examining U.S. slavery, defines it as “applied to all involuntary servitude, which is not inflicted as a punishment for crime” (p.3-4). In his understanding of slavery Cobb references the civil code of Louisiana that defines a slave as “one who is in the power of a master, to whom he belongs” (Cobb, 1968, p.4). Additionally, slavery is referenced in many court decisions and reports of the 1800’s as involuntary servitude. For example see *Strader v. Graham* (1850). Additionally, Kevin Bales (2004) presents all the current definitions of slavery from the Convention of Slavery in 1926, to the 2003 UN Convention on Transnational Organized Crime, all of which similarly conclude that forced labor is the main characteristic of slavery (p. 102). Hence, based on this authority this paper defines enslavement as involuntary servitude.

2 The figures from the 2010 U.S. Census reveals the total population of Georgia to be 9,687,653. Among that total 59.7% are reported to be White, and 30.5% African American (US Census Bureau, 2011).

3 This figure includes 65 reported Indians and 63 Asians.
to a projected annual budget of over one billion dollars for 2009 in order to keep correctional facilities operational (GDC, 2008b). There are over 100 facilities covered by the GDC including local jails and county prisons, employing 15,000 people. In 2008, the GDC entered into a contract with the private company, Bone Safety Signs, which would allow the company to operate a production plant within the state prison in Reidsville, Georgia. Under the contract Bone Safety Signs uses inmate labor, which is paid a wage that in turn goes to paying the cost of their imprisonment (GDC, 2008a). At the same time the State also partnered with Western Union and ARAMARK. In addition to these contracts the GDC runs and operates a public corporation named Georgia Correctional Industries. This corporation began as a labor-based program established in 1960, which manufactures products such as office furniture, institutional furniture, road signs, janitorial chemicals, and print services to government agencies such as schools (Georgia Correctional Industries, n.d.). These private contracts and state-led manufacturing are very similar to the private contracts of the earlier prison management system embraced in the convict-lease system.

The consequences of imprisonment is complex and beyond the scope of this paper, yet as can be seen from the data on Georgia it is apparent that the large inmate population coupled with the private contracts and convict labor is in line with the concept of the prison industrial complex. The prison industrial complex (PIC) can be understood as “a multifaceted system, maintained through cooperation between government and industry that designates prisons as a solution to social, political, and economic problems” (Herzing & Burch, 2003, para. 3). Economically speaking, the PIC relies on the proliferation of prisons and supporting industries to create profits for corporations. Communication companies such as AT &T and Sprint provide telecommunications systems, while other corporations like American Express invest in prison constructions (Evans & Goldberg, 2009). Politically, the increase of prison populations and ex-felons creates a system that disenfranchises a large segment of the population. Felony disenfranchisement is, as Moore (2008) contends, a “holdover from exclusionary Jim Crow era laws like poll taxes and ballot box literacy tests [and] affects about 5.3 million former and current felons in the United States, according to voting rights groups” (para.5). Likewise, Franklin (2000) argues that felony convictions and exclusionary citizenship laws explicitly function to prevent African Americans from the political process.

The reality of the PIC can be found today in Georgia where we observe the economic and political functions of prisons, such as corporate partnerships and the high rate of ex-convicts and parolees who are mainly people of color. The current state of imprisonment can be situated in the post-emancipation period which set the foundations for the PIC; economically situated within the convict-lease system, and socially in the anti-black racism of the time, both of which worked in unison to politically and economically disenfranchise African Americans.

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4 The GDC reports that under this partnership inmates will be paid minimum wage. This minimum is far above other reports which have found that federal inmates were being paid anywhere between 5 cents and $1.65 an hour for work. See Egelko (2007, March 22).

5 Angela Davis (2003) notes that the term “prison industrial complex” was introduced by activist and scholars to challenge prevailing beliefs that an increased level of crime was the cause of rising prison population. Rather, Davis argues that prison construction, driven by ideologies of racism and profits, caused the increase (p. 84).
Forced Labor after Emancipation

In 1865 Congress ratified the 13th Amendment to the U.S. Constitution, which states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

What is central to this Amendment is the fact that while slavery and all other form of involuntary servitude were abolished it was found to be an appropriate method of punishment for criminals. Yet the definition of crime worthy of the punishment of slavery was never discussed within the Amendment, which allowed individual states to define crime in their own terms. In effect it allowed for the criminalization and re-enslavement of African Americans. As Angela Davis (2003) maintains, “in the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves” (p. 29). In many ways Black codes served to define criminality in terms of race, and shared many commonalities with the prior slave codes. This re-articulation of slave codes into Black codes “tended to racialize penalty and link[ed] it closely with previous regimes of slavery” (Davis, 2003, p. 31). This being said, the rise of the Black codes in Georgia supports the idea of recycling slave codes into legalized social control methods legitimized by the 13th Amendment’s lack of a threshold definition for the qualifying criminality that could subject one to involuntary servitude.

Black Codes

Originally intended to outline and secure the legal rights of newly freed blacks, Black codes focused on property, contractual, judicial, and labor rights (Foner, 1983). After the radical Republicans took control over Southern state governments beginning in 1867, Black codes were usurped and became a primary form to implement control over African Americans. Black code legislation was reformulated to include vagrancy laws, labor contract laws, travel restrictions, and employment laws (Hartman, 1997; Foner, 1983). This is supported by Wilson’s (1965) study on post-emancipation Black Codes, which he argues, resulted from social beliefs such as blacks being regarded as ‘lazy’ and unwilling to work “without physical compulsion” and their “propensity for stealing” (p 44 and 49). In essence, these Black codes paternalistically sought to make newly freed slaves fit within the framework of the larger society by placing them into a subjugated position- one that was eerily similar to their position as slaves. Lichtenstein (1996), Mayers (1990, 1998), and Davis (2003) argue that while Black codes had economic implications, social control was an additional reason for their implementation. Mayers (1990) argues that black populations posed threats to both economic and political white hegemony, particularly black males due to their voting rights. While there are multiple reasons for the rise of

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6 Wilson (1965) provides as evidence of these social beliefs, the view of one Georgian plantation overseer who in the fall of 1865 stated: “[M]onk and austin come back and stol two of the horses from the place” and “it seems that they want to Destroy everything you have” (Wilson, 1965, p. 50). This quote is originally from Sen. Exec. Docs., No. 2, 39th Congress, 1st session, p. 16.
Black codes, racism and white supremacy were major ideological factors that had real economic, political, and social results in the South. Historically, Georgia’s laws were less overtly racist compared to other Southern states, such as South Carolina. This was concluded by scholars such as Bryant (1994) from the evidence that Georgia’s legislature did not create Black codes formally, rather, they instituted laws that were more “subtle” in order to avoid northern criticism (p. 18). Additionally, Wilson (1965) found that Georgia’s vagrancy law made no “apparent racial discrimination,” yet blacks were primarily targeted as violating the vagrancy law. In 1866 the Georgia Assembly passed trespassing laws, which imposed fines of imprisonment for those convicted of entering enclosed land. At the same time they also passed laws prohibiting “squatting or settling upon enclosed or unenclosed land of another whether public or private” (Hahn, 1982, p. 45). In that same year, Foner (1983) writes that Georgia “outlawed hunting on Sundays in counties with large black populations, and forbade taking […] anything of “any value whatever” from private property, whether or not fenced” (p. 66). And so, while these laws were not formally written as Black codes they functioned to control the newly freed population.

In addition to the creation of laws targeting blacks, Georgia legislature increased penalties for convictions. Among the ways they did so, was by making crimes that were previously misdemeanors into felonies. For instance in 1875 Georgia made stealing hogs a felony; within two years of the implementation of this law the convict population more than tripled from 432 to 1,441 (Adamson 1983, p. 562). The legislature also increased penalties for felony convictions. Wilson (1965) found that “instead of the former maximum penalty of between fourteen and twenty years imprisonment, the new laws prescribed death for the offenses of burglary in the night, arson, when the building was occupied, horse and mule stealing, rape, and insurrection” (p. 105). The trend of racially implicit laws and the changes in penalties led to an increase in the penitentiary population, raising the question regarding the function of the prison system.

Convict-Lease System

W.E.B. Du Bois wrote in his 1901 essay, “Spawn of Slavery: The Convict-Lease System in the South,” that prior to emancipation the criminal justice system was almost “exclusive to whites” (Du Bois, 2007, p.117). Furthermore, Du Bois contends that the emancipation of African Americans caused a transformation of the southern criminal justice system which took on many of the same functions of slavery, including forced labor, as embodied in the convict-lease system. The convict-lease system was one of many prison management systems, although it is infamously associated with the post-Civil War South. This system was derived from earlier prison systems that began in the North, specifically the public accounts system and the contract system (Cable, 1969, p. 123). The former placed prisoners under the charge of the State and forced them to work in labor-intensive industries housed within the prison, while the latter system placed prisoners under official private contractors who

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7 According to Fredrickson (1981), white supremacy is defined as referring “to the attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over “nonwhite” populations” (xi).

8 Wilson (1965) notes that Georgia’s vagrancy laws defined a vagrant person as someone able to work but choosing not to, or choosing to partake in illicit activities.
were obliged by the state to follow specific guidelines. While these two systems were also used in the South prior to emancipation, the transition to the convict-lease system can be understood as both an economic and social consequence of Southern Reconstruction.

The convict-lease system resulted due to many reasons, one of which was for the prison system to achieve self-sustainability. Mayers (1998) argues that the economic depression and weakened infrastructure affecting the South after the Civil War allowed for this particular system to emerge. Georgia, for example, was in debt after the Civil War and by the end of the 1860s found itself with a $6.54 million debt (Mayers, 1998, p. 8). In addition, property values were falling, reconstruction failed to redistribute land causing intense poverty for freed blacks, and raising taxes for prisons was met with opposition. Consequently, the depressive situation in the South was exasperated by the lack of an industrial sector and limited flows of capital investment (Norrell, 1991). Cable (1969) claims that the system sprang from the realization that the State had in its power a population that could be used in any manner it chose. The states in the South found that they could profit from their convict population, “allowing the possibility of waiving taxes while profiting the State’s treasury” (Cable, 1969, p. 126). The industrialists and capitalists who went into lease agreements with the State paid a fee for the convicts as well as maintained the costs of “housing, feeding, clothing, and guarding all convicts” (Mayer, 1998, p. 9).

Economically, the convict-lease system provided an ample supply of cheap labor and the possibility to maximize profits. It also played an increasing role in preserving the Antebellum South’s social and racial order. Adamson (1983) maintains that while convict-leasing provided “fiscal utility [...] in a real sense, the convict lease system was a functional replacement for slavery; it provided an economic source of cheap labor and a means to re-establish white supremacy in the South” (p. 556). This is apparent in the way in which the previous slave codes and public displays of punishment became embodied in laws that targeted newly freed blacks like the Black codes, Jim Crow laws, and the way in which prisoners were publicly displayed through the convict-lease system and chain gangs.9

Georgia led the South in embracing the penitentiary management of the convict-lease system between 1868 and 1908 by promoting it as a panacea for economic and social problems (Mayers, 1998). Additionally, Mayers and Massey (1991) argue that its popularity was a result of it being seen as a way to “solve the dual problem of labor and capital scarcity” that Georgia found itself in after the Civil War (p. 269). Consequently, the convict-lease system in Georgia was justified as a solution to the States’ problems, but it was not justified in its treatment of convicts, or the conditions under which they existed. In 1880, there were approximately 1,185 convicts consigned to three penitentiaries in three counties in eleven camps. According to Cable (1969) many of these camps did not maintain a hospital, physician, or chaplain, as required by law (p. 155). Du Bois (2007), in his study of Georgia prisons, noted that there was insufficient shelter for the convicts, and found one Georgia camp in 1895 extremely appalling, stating that “sixty-one men slept in one room, seventeen by nineteen feet, and seven feet high. Sanitary conditions were wretched, there was little to no medical attendance, and almost no care of the sick” (p. 119). While the leasing of convicts to private companies was the original idea behind the system, convict labor was chiefly extracted by the State in order to carry out

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9 For example, note the similarities in imagery and symbolism of the chain gang to the coffle.
public work projects, such as building roads. The Georgia Road Congress supported the use of felons to build roads and by 1895 expanded this harsh punishment to non-violent felons and those with at least five-year sentences (Mayers & Massey, 1991). This is very much in line with today’s GDC correctional industries where convicts, the majority of which are non-violent offenders, are employed by the State.

**Incarceration and Gender**

Of particular importance is the way gender was constructed in the convict-lease system. Much like slavery, the convict-lease system did not discriminate between genders. This was true in Georgia where, in 1870, guards testified in Congress regarding the treatment of women convicts working on the railroads who, much like the men, were beaten by guards (Mayers & Massey, 1991). Additionally, Du Bois (2007) found that:

> [...] [W]omen were mingled indiscriminately with men, both working and sleeping, and dressed often in men’s clothes. A young girl at Camp Hardmont, Georgia, in 1895, was repeatedly outraged by several of her guards, and finally died in childbirth while in camp. (p. 119)

Furthermore Davis (2003) maintains that “black women endured the cruelties of the convict-lease system unmitigated by the feminization of punishment; neither their sentences nor the labor they were compelled to do were lessened by virtue of their gender” (p. 72). This can be contrasted to white women convicts who, at the same time, were sent to domestication training rather than forced labor (Davis, 2003).

In 2003 the female prison population in the U.S. reached over 100,000 for the first time, comprised of mainly women of color (Harrison & Beck, 2004). Although they do not face the same type conditions as exemplified in the convict-lease system, they continue to suffer from sexual abuse in the current prison system. For example, Human Rights Watch (HRW) reported that female prisoners live in constant fear of sexual abuse by guards, where “grievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, administratively or criminally” (HRW, 1996, p. 13). The experiences of these women are even more disturbing when discussing the health care, prenatal care, and childcare denied or limited to them. For example, in the same HRW report it was found that “in some countries, women prisoners are shackled during childbirth,” reporting this to be the case in the U.S. “where women who go into labor while imprisoned are chained with leg irons and belly chains during labor” (HRW, 1996, p. 13).

The state of women in prison share many similarities to the sub-human conditions of slavery and has faced criticism and evaluations from outside organization such as the UN, HRW, and the Friends World Committee for Consultations. These conditions exemplify some of the shared logic between

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10 Mayers and Massey (1991) quote Zimmerman who wrote in 1947 that these guards “testified before a legislative committee in Georgia that women convicts who worked on the railroads were “whipped on their bare rumps in the presence of men” (p. 100).

11 The Friends World Committee for Consultation is part of the larger Quaker United Nations Office and is a non-governmental organization that seeks to “abolish war and promote peaceful resolution of
slavery and prisons, and have found similar criticism and opposition to end this form of punishment. The UN Commission on Human Right (UNCHR) found U.S. prisons, particularly California prisons, as unsafe reporting, “[i]t was also alleged that women in the units live in constant fear of rape” (UNCHR, 2001, para.99). Recently the Friends World Committee for Consultation released a 2008 report examining the treatment of women in prison and the UN Minimum Rules for the Treatment of Prisoners. This report corroborates the earlier findings of mistreatment and lack of resources in female prisons, but also concludes that race and ethnicity are unjustly linked to imprisonment. It found that internationally, indigenous women disproportionately represent the prison population, noting that in New South Wales, Australia, “Aboriginal women constitute 2% of the female population but 32% of the women’s prison population” (Bastick & Townhead, 2008, p. 106). In the United States, women of color are also over-represented: “African American women are eight times more likely, and Latina women three times more likely, to be imprisoned than white women […] two thirds of women in state and federal prisons are African American or Latina” (Bastick, & Townhead, 2008, p. 106).

From Convict-Lease to PIC

The transitions from previous systems of imprisonment to the convict-lease system coincided with the abolition of slavery and emancipation of slaves. In the South this system of imprisonment functioned not only to mitigate the economic depression it found itself in, but also to reestablish white supremacy through indirect means, primarily through harsh laws and penalties targeted against blacks. In many ways the 13th Amendment and the Black codes that followed Emancipation recreated involuntary servitude by justifying criminality to be punishable by slavery. This coupled with the post-Civil War depression in the South, and the new social dimension, allowed racism, laws, and the convict-lease system to emerge as a solution to the economic, social, and political threats posed by a free black population. Much like slavery the convict-lease system allowed for labor exploitation, mistreatment, and violence against blacks, with the similar sexual abuse of women. Moreover, the convict-lease system set up the foundation for government and private companies to extract labor and profits from inmates.

During this same period the U.S. was beginning to establish itself as a color-blind society, insisting that institutional racism was being eliminated. This idea of color-blindness before the law was cemented during the Civil Rights era of the 1960s yet was short-lived. As discussed by Lipstiz (1998) the economic restructuring taking place in the United States, characterized by deindustrialization and massive unemployment, negatively impacted working class and communities of color.12 This was coupled with cutbacks in social services, creating a condition where people of color were unable to secure jobs or state aid. As a response to this paradox, the state,
through racialized laws and policies, was able to imprison this surplus labor, thereby alleviating the economic consequences of structural adjustments, while at the same time securing a social hierarchy. 13 This is supported by Ruth Wilson-Gilmore’s (2007) study where she found that the prison population in California grew 500% between 1982 and 2000, arguing that this growth can be attributed to the displacement of workers caused by the structural adjustment of the 1970s (p.11). Similarly, Gilmore (2009) argues that most of those who found themselves imprisoned “were criminalized for crimes stemming from unemployment” (Gilmore, 2009, p.1).

And so in this context of unemployment and social and economic instability we find the rise of the PIC. Recall that the PIC as an economic system involves both the State and private corporations working in collaboration to profit by imprisonment: The State secures employment for communities where prisons are held; private corporations profit from the construction and maintenance of prisons; and both profit from extracted prison labor. Integral to the success of this prison system are the prisoners themselves. The PIC is essentially an updated version of the convict-lease system, where not only are inmates used as labor, such as in Georgia, but they themselves are the raw materials facilitating the profitability and expansion of the PIC. Both the convict-lease and the PIC systems arose in the contexts of economic and social changes, emancipation and economic depression in the former and civil rights gains and economic restructuring in the latter. These similarities are important in developing an understanding, not only the current era of incarceration, but also the logic behind policies such as mandatory minimum sentencing.

As we enter the 21st century, the U.S. has the largest prison population in the world and is increasing due to the prison industrial complex, which much like the convict-lease system partners the State with corporations in order to profitably create a prison system that exploits inmates while expanding prison-led industries. While this paper attempted to expose the ways in which today’s prison system can be understood as rooted in the racialized convict-lease system, it is imperative to note the similarities between the racist targeting of blacks in the South, Chinese in the West, and Mexicans in the Southwest during the late 19th century to today’s prison population, which primarily consists of people of color. Furthermore, the legalized practice of racial profiling along the U.S.-Mexico border, and the War on Terrorism, can be seen as giving rise to new forms of “Black codes” targeting people of color.14 This current situation shows the contradiction within the criminal justice system, which assumes the foundations of equality and colorblindness before the law, while in

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13 During the Reagan administration the war on drugs was enacted in order to obfuscate the economic crisis resulting from the new economic order (Wilson-Gilmore,1997). This ‘war’ was implemented as a response to the drug epidemic of the 1980s in urban black communities, and was presented to the public as a ‘law and order’ policy. Under the drug war, mandatory minimum sentencing was required, leading to the mass imprisonment of people of color. For example, at the federal level, the Anti-Drug Abuse Act of 1986 and 1988 required a five year minimum imprisonment for conviction of crack-cocaine possession (Mauer, 2001, p.6). Furthermore, Mauer (2001) argues that the impact of drug-related sentencing led to the tripling of the national prison population between 1988 and 1996.

14 Nguyen (2005) historicizes the current Arizona border situations of vigilantes and border policies to the mid-1800s and the end of the Mexican American war, when lynching of Mexicans was practiced along the border (p. 94). She also writes of the post 9/11 confluences of immigrants and the US-Mexico border to terrorism (p. 103). While Rubio-Goldsmith, Romero, Rubio-Goldsmith, Escobedo, and Khoury (2009) relate the historic structural violence committed to Mexicans along the US Mexico border to the current practices of racial profiling.
practice, functions differently. For this reason it is necessary to return to the historical moments that have led to this current situation. While this paper was limited in scope by focusing on the State of Georgia, it nonetheless provides evidence that the legacy of slavery in the post-emancipation criminal justice system can be found in today’s prison system.

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EXAMINING THE CORRECTIONAL TECHNOLOGY PARADOX:
CAN CORRECTIONAL TECHNOLOGIES SAVE AGGREGATE CORRECTIONAL COSTS?

William E. Stone* & Peter Scharf

Current economic realities and collapsing correctional budgets are forcing the corrections profession to consider a reversal of the four-fold expansion of correctional populations since the mid-1980s. Prison costs represent one of the biggest single line items in many state budgets, in part because of the expansion in prison population and expense. This article offers an examination of the potential for correctional technologies to reduce costs and the constraints limiting this strategic approach to controlling operational expenses. Correctional policy recommendations are proposed, designed to increase the use of correctional technologies to reduce correctional expenses.

What is the potential for correctional technologies to save meaningful aggregate operational correctional costs? How does the operation of the correctional technology marketplace impede the actualization of these savings? What needs to happen in order for correctional technologies to achieve the potential savings that many of its proponents have argued are possible?

Since the Wall Street financial crisis of Fall 2008 and its governmental fiscal aftermath, there is growing evidence that the cycle of increasing correctional obligations may have reversed. In many state correctional systems fiscal cut-backs have forced curtailment of programming and in some cases the release of offenders. Also, new disruptive (market changing) technologies have emerged with the potential to both save costs and potentially improve day-to-day correctional operations (Bower & Christensen, 1995). These technologies may if proven effective, represent an alternative to programming or population reductions as a means of reducing correctional fiscal obligations. While to date, these technologies may not have been deployed broadly enough to have a meaningful impact upon correctional practice, the potential of correctional technologies to reduce correctional costs is an important issue for researchers to examine.

Observations of traditional correctional administrative practices reveal a certain professional obliviousness to the cost implications of correctional policies. Between 1982 and 2006, the national cost of direct expenditures on corrections has risen 660% with little serious discussion of cost containment (Kyckelhahn, 2010). Recently, this trend of fiscal oblivion has reversed. In many states, recognition of a “cost crisis” is increasingly obvious as part of an overall budget shortfall.

The question of the fiscal burden of prison costs is an issue that has been debated for more than 200 years. The nineteenth century debates about the superiority of the Pennsylvania vs. Auburn style penitentiaries would often center on each models fiscal impact (Delisi & Conis, 2010). In the writings of Jeremy Bentham, his design of the Panopticon prison was at least partially created to allow total observation at a

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reasonable cost (Foucault, 1995). Throughout the twentieth century during periods of financial stress, the issue of correctional costs would surface. During the Great Depression when faced with rising welfare costs, Governor Franklyn Roosevelt of New York State, suggested the possibility of saving almost $2,000,000 on the care of prisoners through the readjustment of criminal statutes, particularly those affecting fixed minimum sentences (New York Times, 1932).

Currently, the cost containment debate does not primarily involve improved correctional methods or sentencing reforms, but what some regard as a radical dismemberment of traditional correctional practice. Facing both state fiscal deficits and intense prison union pressures, California is confronted with a federal court order to reduce its overcrowded inmate population.\(^1\) This order is based on the state’s inability to meet mandated prison standards as the result of inadequate funding allocation (Halper & Bailey, 2009; Sanders, 2009). For three decades Michigan’s state and local governments have built and filled jails and prisons to make good on promises to get tough on crime. Now faced with a reduced tax base and declining industries, the state is approaching crisis. Recession economic realities and collapsing budgets in many states are forcing public officials to consider the costs of large correctional populations. Prison costs represent one of the biggest single line items in many state budgets, in part, because nearly five times as many people are now behind bars than were there in the 1970s. Following expenditure categories like education and Medicaid, the National Association of State Budget Officers (NASBO) indicates that corrections consumes 7.2% of state operating budgets (NASBO, 2010a). Total correctional expenditures from state funds were approximately 51 billion dollars in fiscal year 2009 according to the most recent NASBO report. From California to New York, state officials are now suggesting the closure of some correctional facilities and the release of inmates prior to the completion of their mandated sentences (Fields, 2009).

What role, if properly deployed, might emerging correctional technologies play in controlling or even moderating these trends? This article enters the debate with a focus on the paradoxical potential for new correctional technologies to help control the burdensome and increasing costs of corrections while actually having minimal impact upon cost containment. Given the rising concerns regarding the level of expenditure for correctional services, why has correctional technology not been more broadly employed to improve services and reduce costs? To address this issue, we must first clarify what is meant by correctional technology and how it might be applied to reducing costs, as well as how correctional technologies are purchased or funded and how these factors impact the ability to save aggregate correctional costs.

Correctional technology advocates tend to make broad claims as to how correctional technologies of different types can fundamentally change operations. Defining, other than by example, the boundaries and precise nature of correctional technology and its potential savings to corrections is very difficult. Where do we draw the “technology” line in defining the boundary of correctional technologies? Narrow function tools like body armor may be termed “technology” but they are unlikely to significantly affect the correctional environment or its cost of operations. More significant correctional technologies might include “tools” which increase the observational capabilities of the staff, for example, video or motion surveillance technology. Improved observation technology has an obvious “force multiplier” or

\(^1\) Affirmed by the U.S. Supreme Court, Brown v. Plata, (May 23, 2011, No. 09–1233).
labor savings potential. Bentham’s early focus on the observational contributions of the Panopticon is a testament to the importance of prison officials knowing what inmates are doing at all times. The amount of labor committed to observational function is a very significant cost investment and explains the early adoption of video technology in corrections.

During the past 50 years, widespread use of technology in correctional facilities has been somewhat atypical. Beginning in the early 1970s, prisons and jails were already employing a smattering of cameras, but it was rare for observation functions to be significantly automated. This pattern changed somewhat in the mid- to late-1990s fueled by both technological innovation and federal funding. Surveillance cameras, for instance, became significantly less costly, more capable, and required less maintenance. However, the ability to capitalize on these trends is limited by correctional practices or standards that still require “face to face” or “must see flesh” inmate-staff observation contact rules. Older, less sophisticated technology made it easier for inmates to deceive staff during observation checks. Newer technology can reduce this deception problem, but without policy changes it is unlikely to result in a meaningful correctional cost savings (Goodale, et al. 2005).

To objectively decide if a technological innovation will result in meaningful force multiplier impact or “cost saving,” the correctional administrator must first consider the true cost of a correctional technology and how to measure its potential for saving operational costs (Upchurch 2009). For example, what is to be included as a technology expense in terms of maintenance and implementation expenses? What labor or operational costs are actually reduced? If the technology is addressing or providing a new service or function, it cannot normally be considered a savings unless the new function was necessary for correctional operations and savings are actually measurable.

Different types of correctional technologies may also be understood in terms of their technological maturity level and the functions they serve (administration, security, inmate support, etc.). What function they serve is extremely important because it will partially dictate what sources of funding might be available for the technology in addition to the savings that the adoption of this technology might yield. This is also an important variable in any estimate of the cost savings provided by technology. Not surprisingly, correctional technologies do not always fit cleanly into these proposed categories. The following classification may be useful in thinking about this issue.

Mature Market Technologies have an implementation history of at least 10 years. This, coupled with their strong presence within correctional agencies, has yielded evidence of their ability to achieve cost savings over time. Examples include: Computerized Commissary Management Systems (Administration), Inmate Trust/Banking Management (Inmate Support), Video Surveillance Systems (Security), and Video Visitation or Conferencing Systems (Security/Hybrid). All of these systems have demonstrated their functionality in the field even though their ability to produce savings varies significantly.

Emerging Correctional Technologies have strong “pilot” bases in corrections with some adoptions by major correctional institutions and some initial impact assessments upon cost benefit rationality. Examples include: Integrated Criminal Justice Information Systems (Administration), Banking/Commissary Kiosks (Inmate Support), Integrated Perimeters System (Security), and GPS Community Correctional
Care Monitoring (Security/Hybrid) (Reza, 2004; Davis & Jackson, 2005; Upchurch, 2009).

New disruptive technologies have the potential to radically change correctional practices and, on occasion, dramatically reduce costs. Such technologies include: Bio-Identification Technologies (Administration/Security), Drug and Alcohol Community Monitoring (Security), and Inmate/Staff Radio-frequency Identification (RFID) Monitoring (Security). These are more likely to be focused in the security service areas because of the greater potential for savings in overall correctional costs.

A preliminary taxonomy (see table 1) is suggested below to organize the major types of correctional technologies in terms of technological maturity and utility for corrections:

<table>
<thead>
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<th>Table 1: Technology Taxonomy</th>
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<tr>
<td>TAXONOMY OF CORRECTIONAL TECHNOLOGIES BY MATURITY AND FUNCTION</td>
</tr>
<tr>
<td>Administration</td>
</tr>
<tr>
<td>Mature Technologies</td>
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<td>Emerging Technologies</td>
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This typology might be best utilized to help in understanding why some types of technology have been developed and deployed more broadly than others. For technology to develop and find professional acceptance, there must be sufficient need and a viable market to make the cost of development and sales economically feasible. The “Security” column in the taxonomy chart represents the largest service area in terms of potential cost impact. Correctional technologies that fall in this category will generally have the greatest overall need and potential for decreasing aggregate correctional costs.

To understand why correctional technologies have not been widely adopted to reduce costs, it is important to analyze some of the impediments to technology deployment in corrections. This requires an awareness of the correctional marketplace and how technology is distributed and purchased. To understand this environment it is necessary to examine the number of institutions, how many inmates they contain, and how much is spent on correctional technology. There are approximately 1,821 state and federal correctional facilities and 3,400 jails housing about 2.3 million adults (Sabol, et al. 2007; Sabol & West, 2010; Stephan, 2008). Forty-five correctional systems in the U.S. collectively reported $37,315,576,903 as their departmental budgets for 2006-2007 (PEW Center on the States, 2008). These figures do not include some of the newly evolving types of facilities, such as the privately-operated pre-release centers and illegal immigration detention centers that represent a marketplace very much like traditional corrections.
While some states report a flattening of growth or even a decline, the national incarceration trend remains on the rise. According to the Pew study, prison growth is not primarily driven by a parallel increase in crime or a corresponding surge in the population at large. It flows principally from a wave of policy choices that are sending more lawbreakers to prison and keeping them there for longer periods (PEW Center on the States, 2008). Also, more than half of the released offenders are back in prison within three years, either for a new crime or for violating the terms of their parole. The average population increase identified by the 39 reporting state systems was 8.2%. The population increases resulted in the addition of 17,122 new staff, nine new facilities, an estimated 10,639 additional beds and 14 new programs (PEW Center on the States, 2008).

Prisons and jails are “24/7” operations which require large, highly trained staffs. Their inhabitants are troubled, aging, and generally less healthy than those outside prison walls. Total state spending on corrections, including bonds and federal contributions, topped $49 billion in 2008. Studies show that by 2011, continued prison growth is expected to cost states an additional $25 billion (PEW Center on the States, 2008). This is especially significant in light of the fact that State revenues decreased in fiscal years 2009 and 2010. 2011’s fiscal projection shows a slight improvement over 2010 but is still well below the pre-2008 income levels, with most states still forecasting considerable financial stress. Additionally, in 2012 a significant amount of state funding made available by the American Recovery and Reinvestment Act of 2009 will no longer be available. The withdrawal of this support will result in a continuation of extremely tight fiscal conditions for states and could lead to further state spending cuts (NASBO, 2010b).

While it is difficult to generalize about correctional budgets because of different definitions and fiscal reporting systems, the data for the 45 reporting correctional systems indicated that the largest expense categories are: custody/security costs (41.7%), inmate healthcare costs (14.2%), and administration costs (7.2%). Other categories were institutional services, physical operations, community programs, correctional industries, parole, probation, and construction (NASBO, 2007).

While these population statistics and budget predictions seem to represent a very large potential market for correctional technology deployment, it is also true that efforts to deploy these technologies face numerous obstacles. Efforts to reduce costs are limited by the reality that corrections is fragmented into many relatively small jurisdictions and agencies. There is not a unitary “correctional market place.” There are, instead, thousands of individual marketplaces, in which correctional technologies are provided to jails, prisons, and community correctional customers.

The current “austere” correctional economic environment would appear to be primed for the introduction of new cost saving technologies. The tasks of monitoring inmates in addition to providing health care, educational instruction, and release planning are personnel intensive activities achieved at high fiscal costs. Technology theoretically offers opportunities for improving these functions and saving money. Motives for correctional administrators to use technology maybe powerful, but there are many obstacles to the effective deployment of new cost control technologies. Common obstacles would be the pressures to use union member labor rather than technology, the inability to transfer savings achieved through technology implementation, and the political decision-making involved in the technology acquisition processes (Upchurch, 2009).
Change to reduce the cost of corrections is difficult because it requires not only the investment of resources, time, people, and money, but also a change in organizational cultures. (Box & Renfrow, 2005). In addition to organizational or cultural resistance, technology implementation is influenced by the nature of funding for such purchases. Correctional technologies are funded from at least three source types which include: agency funds, grants (state, federal and private) and funds from inmates and their families.

While there is no definitive way to determine the total amount of actual correctional technology expenditures, it is possible to make some reasonable estimates of the current spending amounts. One approach to estimating the overall size of technology spending by agencies is to take a fixed percentage of the total national correctional budget. Given this approach and a review of a half dozen state budgets, which indicate technology spending at 1.5 to 2.5% of the total budget, national “state agency” spending may be estimated at roughly $500 million to $900 million (NASBO, 2010b). These technology spending numbers may seem large, but most of the spending is dedicated to mature technologies like computer information systems and telephone services. Very little is spent on the newer force multiplier or disruptive technologies which are likely to achieve savings in correctional budgets.

The effective deployment of correctional technology is further hindered by factors within the corrections technology market. Most correctional technology investments are not “off the rack” types of purchases. Systems must frequently be tailored to the agencies’ needs. There is also the problem of joint agency funding for some technologies, such as video arraignment, which requires budgeting agreement between several different entities each with their own budgets (Brown et al. 2007).

Determining the potential cost savings of technological innovations involve a myriad of variables. For example, the cost of video surveillance cameras has fallen by over 40 percent in recent years while improvements in data storage have permitted greater recording and archiving of surveillance information. Maintenance of next generation video surveillance technology has also improved (Goodale, et al. 2005). Savings are minimal, however, if one simply replaces the old video technology with the new. While the benefits of enhanced function and durability are evident, it involves approximately the same amount of savings in labor costs as the system it replaced. The primary way to achieve direct cost savings must come from replacing labor with technology.

In addition to direct cost savings, technology may have indirect benefits. Video surveillance, tele-courts, and tele-medicine, for example, can limit prison liability, reduce the likelihood of escape, and temper violence among inmates and between inmates and staff. This results in the subsequent savings of medical care and social costs to victims of violence and their families (Gailiun, 1997).

Documenting a high level of return on an investment in regards to outcome or efficiency should be done through well-designed performance measures. Those suggested below are now in the initial stage of being adopted by practitioners integrating new correctional technologies (Geerken & Peters , 2005; Geerken, 2008). These performance measures include detailed output, outcome, and efficiency measures. Output measures are usually indicators of the volume of work accomplished. An example would be, the number of correctional officers attending training as opposed to the intended results of their training like the reduction of injuries. Outcome measures focus on what the project makes happen rather than what it does and are closely related to agency goals and missions. These include the
reduction of escapes, officer injuries, PREA incidents, and so on. (La Vigne et al. 2009). These are measures of intended results, not the process of achieving them. Efficiency measures indicate the effect of the project on a correctional agency’s use of resources like correctional cost, time, and personnel.

There are several considerations that must be examined in determining the value of a correctional technology. Are there research assessments with demonstrated cost savings from the technology? Does the correctional technology address a large service area in terms of manpower? What liability and other outcome measures does the technology seek to impact and is there a technology funding and deployment infrastructures available? When correctional technology can meet these expectations, there is a significant potential for deployment. Any technology that cannot meet these basic tests should be considered as speculative at best.

This performance-based purchasing discipline is often the exception rather than the norm in technology purchasing. In the current public correctional technology markets, technology fad is often a major contributor to technology purchases. New technology can often be sold to agencies who have minimal real need for the new features offered, but who are convinced that it is in vogue to have the new features. Correctional officials in a more rational performance metric market focus on reliability, durability and savings to be attained in their purchases rather than faddish or technological features.

The ability of a new correctional technology to affect aggregate correctional costs depends largely upon its funding source and purpose. While there is some potential for new technology deployment in the inmate support areas, savings attained as result of the adoption of the new technology may yield only marginal results. Funding from inmates and their families that is utilized to secure technology purchases presents specific complications that must be addressed, most importantly using “The Stewardship Rule.” The stewardship rule has been in place in corrections since the late 1800s. In some states it is specifically codified in statutes, but most commonly, it exists as a tradition, which is almost universally followed (Potts, 1978). The stewardship rule asserts that correctional administrators must treat the assets of the inmates as if they were their own.

To allow an external company, like a telephone service provider, to exploit inmates by reaping excessive profits would be considered dereliction of duty. While many correctional administrators have clearly violated this rule with impunity, many have also lost their careers to the charge of allowing inmates to be exploited. This rule is why any proceeds that a correctional system might obtain from providing services purchased by inmates or their families are normally dedicated to an inmate welfare fund and never spent for system needs or purposes.

The largest technology implementation markets where funding is reasonably available are the state level correctional systems and the larger municipal correctional systems (jails). In most states, individual wardens/superintendents retain a great deal of independence and system wide centralized purchasing functions are very limited, making a centralized strategic focus upon cutting costs problematic. Only with a consistent funding source and market access will technology implementation occur with the sufficient strength to achieve a measurable impact upon aggregate correctional costs.
An Example of a Promising New Technology to Reduce Costs – RFID

Of the many new emerging technologies, some are clearly more promising than others. Using the principles described previously, an examination will be presented of what is believed to be one of the more promising new technologies, RFID inmate tracking systems (see figure 1). By conducting a similar examination, any of the new or old correctional technologies could be easily evaluated by individuals familiar with the institutional environment and the capability of the technologies.

Figure 1 RFID Technology Example

Source: Calculations based on staffing patterns of two medium sized facilities and RFID cost data from TSI PRISM (see text for details).
The cost data for figure 1 was created by obtaining rough cost estimates for the RFID from Alanco Technologies on their TSI PRISM™ systems. The labor savings were calculated using the staffing patterns of two medium-sized adult prisons, one in Kentucky and the second in Pennsylvania, and applying the Alanco recommended guidelines to the facilities (Alanco Technologies Inc. 2008). Figure 1 was then created using the average estimated personnel savings for the two facilities. Two institutions were used because physical design can significantly affect some types of labor cost such a perimeter and internal security patrols. The authors realized that the savings guidelines were the product of a commercial vendor who had a vested interest, so a very conservative calculation of the savings was made.

**Products Established Utility** – RFID technology has established itself in terms of traditional material inventory capability. The significant question is whether the technology can be effectively adapted to the inventory of inmates in an institutional setting. While there have been a few problems encountered, most of the research to date indicates that the technology will work. Tamper resistant bracelets have been developed and tested as well as the required sensor systems to make the system operational. Signal units for staff can also incorporate alarm buttons to summon assistance as needed (La Vigne et al., 2009; Selamat & Majlis, 2006).

**Cost Effectiveness** – Correctional intuitions conduct periodic “counts” to ensure that no inmates have escaped. To conduct a count, all intuitional activity must be frozen and the staff checks for the presence of each individual inmate. In a typical medium security institution, counts occur six times a day and take about 30 minutes each. During this time the effective productivity of almost all employees is frozen. This would represent a daily lost personnel cost of about $1,800 and an annual cost of about $657,000 for a medium sized institution. RFID systems can count every few seconds with no disruption to the institutional functions. RFID can also; reduce perimeter security costs (an approximate savings of 2% in staff time), internal patrol needs (3% savings in staff time), and increase documentation of staff productivity with improved inmate and staff safety. Staff timesaving cannot be converted fully into actual savings because the newly available time may not be used productively. With quality management, however, a significant portion should be convertible and as new staff needs occur, the available time can be allocated into new functions without increasing staff. While the cost of RFID systems vary, based on their capability and deployment environment, systems for under a million dollars are currently available for medium-sized facilities (Alanco, 2008). It is also reasonable to expect that the cost of RFID will continue to drop in the future (see figure 1 step 2).

**Fiscal Purchasing Impediments** – The cost of RFID systems is substantial enough that such purchases would normally be incorporated into the bi-annual budgeting process of the correctional system. While the purchase would probably involve legislative oversight and justification, the purchase should be easily defended. The justification can incorporate increased public safety (escape reduction), increased staff safety, increased staff productivity and reduced future staffing needs.

Funding for RFID technology purchases might come from two of the three available funding categories (State and Municipal Agency Funded RFID Purchases and Special Funding in figure 2).
Figure 2 Funding Sources for RFID Purchases

The primary and most consistent funding source would be the appropriated budgets of state correctional systems and larger municipal jails. Agency budgets might be supplemented from funding through federal and private grants (NASBO, 2008). The final consideration in assessing RFID technology’s potential to reduce costs is the question of sourcing RFID purchases. Is there a large enough market and is that market accessible enough to support the development and marketing costs of the technology? While RFID technology could be purchased by a wide range of users, it best fits the needs of large local jails and state correctional systems as seen in figure 3.
These two market areas are probably large enough to make the development and deployment efforts profitable for a company. Without a profitable market, technology will simply not be developed and deployed.

In summary, RFID technology represents an emerging but reasonably established technology that has the potential for significant cost savings through the replacement of labor. It is intended for use in a broad range of markets that can be reasonably accessed without extreme efforts. Additionally, its potential funding source is reasonably stable even if delays in budgeting and bidding have to be anticipated. All of the indicators are positive that it will be a successful technology.

**Conclusions: The Future of Correctional Technology**

Correctional technologies have the potential to reduce aggregate correctional costs assuming that the technologies deployed are able to reduce direct labor costs for correctional clients. In some instances, however, uncertainties may outweigh known truths in terms of potential cost savings. There is little doubt that there will be some
growth in the adoption of new technologies but the fundamental issue facing corrections remains. Will technology adoption be sufficient to significantly impact the field in terms of reducing aggregate costs? Some of the next generation technologies on the horizon may fail because of a variety of factors (poor vendor business strategy, technology development failure, legal, ethical, and political factors or implementation problems) while others may emerge as standard equipment with strong adoption within the field.

In thinking about the future of correctional technologies, it is clear to the authors that the application of technology in corrections should be driven by concerns related to the management of correctional costs. The criminal justice system as a whole is one of the most labor intensive and least automated industries. Corrections (both incarceration facilities and community supervision) are arguably the most labor intensive and least automated component of the justice system. The fundamental concept of incarceration or community supervision based on human presence and observation has changed little since these institutions were established over 200 years ago. The tax-based funding for corrections is the most difficult to sustain because of its low visibility and public support. With states anticipating significant deficits in the next few years, the political pressures for cost reduction makes the funding of new capital expenditures extremely difficult. Even more problematic, the research and development needed to document the cost-effectiveness of the technology is not well funded at any level of government.

These realities lead to the conclusion that while technology has a significant potential for automating many processes within corrections, the application of correctional technology will only increase after the proper demonstration of its labor-saving economic benefits. Unfortunately, governments have a difficult time allocating funds to the application of technology in corrections where substantial expenditure is necessary to prove its potential investment return. The ultimate paradox is that promising new correctional technologies aimed at reducing staff needs are evolving in a time of high unemployment. Trying to market and deploy new correctional technology designed to reduce jobs may compete with a number of political interests. In spite of problems like funding constraints and the difficulty of purchasing, some corrections officials are very receptive to the introduction of technological innovation targeted at reducing correctional costs. At a recent Corrections Technology Association meeting, the general consensus was that officials were eager to explore such technology alternatives.

What could be done to improve the future of technology designed to enhancing correctional efficiency? The need for new technology is obvious, what is missing is the effective evaluation and practical demonstration of these technologies and improved ways to get these resources from the vendor to the points of correctional service. To achieve these ends, the authors recommend increasing federal and state financial support for technology evaluation research designed to document aggregate correctional cost, increasing funding support (e.g., loans) for technology purchases, and increasing public education to generate the political buy-in for use of correctional technology to reduce costs.

The move to displace labor with technology will be politically difficult, especially in times of high unemployment. It will be necessary to educate the public about the nature of the jobs displaced and any safety enhancements that technology may bring to the table. The public and political perception of the “Orwellian” nature of some correctional technology must also be clearly addressed to prevent additional
negative political repercussions. The parallel between the RIFD tag in your dog’s ear and using RFID on inmates is inevitable. When new technology is deployed, people must understand it to be able to accept it.

References


TACTICS FOR ENDURING IMPRISONMENT: PERSONAL BELONGINGS IN A WOMEN’S CORRECTIONAL FACILITY

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The present work analyzes the role that personal belongings play in the everyday life within a women’s penitentiary in Mexico. The sense of personal belongings was noted through discussion groups held at a prison workshop that lasted for nearly a year. Personal belongings are recognized inside prisons as an important part of the adaptation that takes place on the overall incarceration process as it plays a fundamental role between the institution and the prison subculture. Notions of possessions, self-conception, relationships, and spaces as well as other concepts surround the construct of personal belongings. Finally, notions related to ‘having’ and ‘not having’ personal belongings while being incarcerated, are discussed.

The current research was the outcome of a workshop that took place inside a women’s penitentiary in Mexico, in collaboration between a university and a correctional institution. The overall purpose was to elaborate from the inmate’s perspective the everyday life that takes place inside prisons, particularly for the place that ‘personal belongings’ have within these institutions.

In the early stages of this research personal belongings were considered only as physical objects; however, once the workshop progressed our conception of personal belongings was redefined in order to reflect richer notions. Our first approach to understanding personal belongings was founded on Goffman’s (2007) notion of possessions. Through discussions with various inmates our attention was drawn to the prisoner’s acquisition of a particular aspect, whenever there was less chance of acquiring possessions, a richer sense regarding personal belongings was found. Hence, working, listening to music, the utilizing of select spaces in certain ways, and, even situations like gazing into the stars, involve this wider sense of personal belongings in the common goal of enduring prison.

The present paper reflects the inmate’s conception discussed through the workshop, enhancing the role of possessions, considering personal belongings as possessions proper of a prison subculture that is present in the everyday life of inmates as ways of tactically ameliorating a hostile environment that tends to erode personality (thus the personal notion). First, the literature review elaborates on the conception of possessions within institutions, contrasted with notions of how inmates organize the everyday life within penitentiary institutions. The second section explains the purpose and methodology of the workshop and establishes how the inmate’s conception about possessions was acquainted. In the third section the evidence found within the workshop is presented, grouped by types of personal belongings discussed by the inmates: clothing, music players, work, spaces such as dorms, rooms, beds, and the Institution. Finally, the discussion section considers possessions as tactical behaviors that oppose

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institutional measures that seek to reinforce institutional strategies, as ways of tactically subvert the established order from within the inmate’s subculture.

1. Literature Review

Marc and Picard (1992) define an institution as a form of social organization that through a “structured set of values, norms, roles, ways of behaving and of relating” (p. 91) regulates the interactions of the individuals who constitute it. Regarding the life inside penitentiaries and other institutions where groups of individuals are isolated or contained, a total institution features certain characteristics that set it apart, according to Goffman (2007). In total institutions all aspects of life are conducted in the same place under the same central authority in company of others that are treated alike and required to do the same thing together. Daily activities are tightly scheduled and imposed by a system of explicit formal rulings enforced by a body of officials conformed into a single rational plan which reflects the official aims of the institution.

A women’s prison—a total institution—deprives the newcomer of her identity through “abasements, degradations, humiliations and profanations” (Goffman, 2007, p. 31), understood as institutionalized procedures or mortifications of the self. Initially people arrive to total institutions with their own possessions, their own lifestyle, or their own presenting culture which will be eventually modified or taken away by a series of institutionalized rituals with the purpose of producing at large, an inmate.

Foucault (1976) posed the following question: “How has it come about that the power to punish is accepted, or simply that those punished put up with it?” (p. 310). Total institutions rely on mechanisms—such the erosion of self and individuality— as disciplinary technologies, in this sense their purpose must not be considered solely as negative or punitive, instead it should be understood prior to other objectives as a generalized way of granting compliment to an institutionalized, absolute order.

Total institutions adapt and mold inmates to the norms, through primary adjustments whenever “the individual cooperates, providing the required activity under the required conditions” (Goffman, 2007, p. 190). Inmates have a limited capability of adjusting the environment through secondary adjustments, “techniques which do not directly challenge staff management but which allow inmates to obtain allowed satisfactions by disallowed means” (p. 64), distinguished by “not being openly claimed or openly discussed” (p. 192).

Conviction sets in motion a primary adjustment:

The admission procedure could be characterized as a farewell and a start, with the midpoint marked by physical nakedness. Leaving off of course entails property dispossession, important because persons invest self feelings in their possessions (Goffman, 2007, p. 31).

Dispossession enforces rules through personality’s raw material, possessions, that are either physical objects, “periodic searches and confiscations of accumulated personal property reinforce property dispossession” (p. 31); or immaterial, “perhaps the most significant of these possessions is not physical at all, one’s full name; whatever one is thereafter called, loss of one’s name can be a great mortification of the self” (p. 31).
There is an interesting inquiry related to the importance of secondary adjustments. Pérez (2000) through his research in several correctional facilities in Latin America found out that there is an alternate structure run by inmates, which is parallel to the prison authorities, founded on the informality that in some cases rules the life within prisons. He defines this alternate structure as a *prison subculture*:

An informal organization run exclusively by the inmates that, in accordance with social and cultural parameters from outside the prison, takes precedence over the formal organization in the flow of everyday prison life …, reproducing more or less spontaneously an already existing organizational structure (Pérez, 2000: p.41, 43).

The subculture is founded on common principles; the inmates inside a prison share the same norms, the same criteria of morality, the same language, and socializations that are grounded within normative parameters, but shift the official rules. Prison subcultures have the ability to organize and regulate themselves recognizing an institutional order, but establishing an informal structure that has its own rules, demarked by the amalgamation with institutional deficiencies and nurtured by social problems that tend to reproduce asymmetric conditions from the exterior, where we continue to find “the elite, the middle class and the lower class” (Pérez, 2000.p.57).

Such parallel orders are better appreciated through informal practices, such as black markets that are fostered by overpopulation and tolerated because of institutional problems. According to a study in which a group of inmates of both genders from Mexican prisons was surveyed, it was found that:

The problem of overcrowding in the prisons that we studied was evident and particularly severe in the dormitories … half of the inmate population … slept in spaces that were overpopulated, in some cases housing over twice as many inmates as they were designed for. (Azaola, 2007. p. 90).

Personal items constitute a problem when to a large extent families are expected to provide supplies for basic needs, “items that the institution has stopped providing” (Azaola, 2007, p. 91). The lack of institutional supplies has reached alarming proportions in Mexican prisons, “98 per cent of inmates … indicated that the institution did not supply them with items for their personal hygiene” (Azaola, 2007, p. 91). This condition associated with the economic problems of the inmate’s family, contrasted to others who maintain an economic status and are capable of providing, produces a differentiated capability of having personal items within. Asymmetries reflect worsening conditions, where problems such as resentments or robberies are quite common; over 50 per cent of the inmates stated that “at least on one occasion their belongings had been stolen” (Azaola, 2007. p. 94).

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1 At the time this research was done, Mexico was undergoing a critical social situation, with increases in the rates of violence and criminal behavior. The center, designed for a maximum population of 200 inmates, was housing nearly 500.

2 The sample was made up of 1615 inmates for the first survey, and 1264 for a subsequent survey.

3 This situation was recurrent in our research, specifically the stealing of clothes.
Inmates within female penitentiaries are subjected to stigmatization regarding the social role of women on Mexican culture. Zayas and Pilat (2008) asserted that the family occupies a privileged place as the primary unit of Latin American culture, in the case of women, the socialization process, beginning in childhood emphasizes preparation for motherhood. Consequent to this idea, Marchiori (1989) suggested that the separation from household obligations contributes to the stigmatization of female inmates and “admission to the penitentiary tends to cause greater anxiety in women than in men, especially due to the family situation and because they must leave their children and their home behind” (p. 389).

Although it is important to consider gender, Sánchez (2004) remarked that apart from biology few studies examine into women’s criminal behavior.

Explanatory theories of deviation have been late in turning their attention to female criminality … the organic differences between men and women are also expressed in a ‘natural’ lesser proclivity toward aggressive behavior … thereby underlying the idea that the criminal man is ‘made’ while the criminal woman is ‘born’ (pp. 242-243).

Accordingly, Lipovestky (1999) proposed analyzing the woman’s role beyond the biological dimension, which however constitutes a powerful undercurrent “being a woman is never just about the natural order, but at the same time, about the symbolic order” (p.97).

An interesting study that takes such symbolic order into account was made in a Mexican female penitentiary by Makowski (1998). Although prisons normatively take into account differences between male and female inmates (for example maternity pavilions) conditions regarding the overall order and functioning of prison, could be expected to be the same. However, this is not the situation according to Makowski:

Distinctively to what occurs in men’s prisons where the paradigmatic figures of resistance are visible violent actions (mutinies, breakouts, group confrontations), the forms of resistance that prevail in the case of female inmates are less visible, less noisy and not as violent. One recurrent feature of these resistances is their everyday nature: they emerge on the life world realm, they structure around daily demands and utilize everyday strategies, silent and obscure in their nature (1998, p.2).

Contrasting to the highly restrictive and ritualized abstract place of prison that imposes rules, prohibitions, and limits; “a suspicion arises, underneath that abstract space underlies a silent layer that operates according to certain codes and registries which escape the disciplinary logic” (Makowski, 1998, p.3). The fact that these rather passive resistances are grounded on everyday life gives them a special place:

[T]he everyday nature of rebellion can be more destabilizing for an institution than expected forms of the openly violent … the fact that female actions occur on the silent time of everyday life, generally allows them to escape the control of authorities (Makowski, 1998, p.3).
Quiet resistances allow different styles of action with an informality confronting “the normative space of prison, transforming it in differentiated space that can be appropriated” (Makowksi, 1998, p.4) by inmates. This differentiated capability of appropriation and action through silence and discretion, allows women to confer personal meaning to each space, in a constant struggle with its institutional use.

Certeau (1996) explained that these silent resistances and other apparent submissions to totalized orders where ‘putting up’ and ‘tolerating’ imply richer notions:

If it is true that the grid of ‘discipline’ is everywhere becoming clearer and more extensive, it is all the more urgent to discover how an entire society resists being reduced to it, what popular procedures … manipulate the mechanisms of discipline and conform to them only in order to evade them (Certeau, 1996, p. XLIV).

He also proposed two useful concepts, contrasted to primary and secondary adjustments, through strategies and tactics:

I call a "strategy" the calculus of force-relationships which becomes possible when a subject of will and power … can be isolated … and assumes a place that can be circumscribed as proper … thus serving as the basis for generating relations with an outside of goals or of threats (Certeau, 1996, p.42).

On the other hand, tactics do not have their own place; they are inscribed in strategies and take advantage of occasions, setting themselves up as ancient intelligence that formulates “rules that organize cunning plays and constitute … a memory of layouts for action, that articulate ways out of every occasion” (Certeau, 1996, p.27). Strategies involve their own proper places, actions that are instituted from a position of power; tactics, on the other hand, operate on the backs of strategies, and make an art of seizing the occasion from a position that cannot constitute its own place.

Concluding this review, it has been pointed out that within female penitentiaries inmates face institutional adjustments that utilize procedures targeted to erode individuality (in order to submit to the rules) such as dispossession, while they try to adjust adverse conditions worsened by social problems, inside a subculture that tends to reproduce social asymmetries. However, through silence, discretion, and tactical schemes that take place in the symbolic order, inmates are allowed to adjust, while playing an active role in the everyday life and (emphasizing possessions) it is through symbolic connotations within the subculture, manifested on physical objects and immaterial possessions (such as names and places) that inmates position within social categories, within a morality constructed and accepted by them and it is on the basis of this non-official socialization inside the subculture stated that inmates give voice to the way they see and interpret their everyday life.
2. Purpose and Methodology

This research was performed parallel to a workshop coordinated and executed by the research team within a penitentiary, from August 2009 until May 2010. There were many outcomes, however personal belongings, which were observed and referred to in particular situations came to the attention of the research team because of their relevance in prison life. This research is qualitative, and its purpose is to inquire on personal belongings per se, but also on the meaning of personal belongings within a penitentiary, aiming at “reconstructing reality as the actors themselves see it” (Hernández, Fernández & Baptista, 2003, p.5), where it was essential “to know the subjective interpretation that people make of situations if we want to understand their behavior” (Ibáñez, 2004, p. 78).

Five researchers were involved in this work, four on the field and one as support at the university. While one researcher was in charge of coordinating a particular session, the rest of the team observed and registered the session in field diaries. Sessions occurred twice a week and each one lasted an hour and a half with a total of 24 sessions. The workshop emphasized everyday problems where different topics were discussed while performing activities such as writing poems and stories, painting, sculpting, etc., there were activities grounded on kinetics, defined by Joyce and Weil (2002) as “the opportunity to come out with new ways of seeing things, expressing oneself and addressing problems” (p. 256), which encouraged creative thinking through analogies, critical thinking, interacting with others and developing alternative conflict-solving techniques that start with expression.

All sessions were held in the meeting room inside the Health and Social Services area, it was a closed space (once the doors were closed there were no exterior noises and only occasional interruptions) with a chalkboard and piled chairs (approximately 10-15) that were disposed as a circle during the workshop. The health and services area is no different from other prisons; there is an infirmary, a meeting room and offices (about 6) where social workers, doctors, and psychologists gave consultation. Access to the meeting room was controlled from a front desk and a female guard is in charge of controlling who can go in and out of the health area, it was normal to see a line of women holding outside under the sun.

The population is divided in two groups of separate dorms: Dorm A for those inmates arriving to the center; and, Dorms B, C and D for those who have already passed through Dorm A. This second group of dorms is known as the Village, and the inmates taken into them share common spaces like hallways, gardens, and a cafeteria; on the other hand, recently arrived inmates taken to Dorm A are strictly isolated from the rest of the population. No explicit policy determines how long Dorm A inmates remain there before being sent to Dorm B although it is known that this transition takes place when there is available space in Dorm B or when inmates have been sentenced.

The construction of the sampling frame was subject to permission granted by authorities of the institution with the following criteria for the inmates: residence in one of the dormitories belonging to the Village, schedule availability and voluntary participation. In return of their participation they would receive a certificate recognized by parole officers. The sample covered the inmates residing in the Village in the specific time the research was made. From the outset it was
agreed that no other persons would be present during the sessions beside inmates and investigators, allowing a small space of intimacy for the discussion.

It is known that selecting research subjects in total institutions is plagued with methodological limitations and that one of the biggest concerns is to get cooperative subjects (Lundström, 1987). This situation coupled with the limitations set by the institution pushed the sample selection to the only viable way of procedure, signs were posted in the dormitories promoting the workshop and pointing out that participation was voluntary. Approximately eight inmates participated, but the group varied from one session to the next; only three were steady participants. These three individuals permitted continuity between sessions and helped to maintain the confidence and confidentiality of the workshop.

3. Findings

“Personal belongings” is a term commonly used within the penitentiary by inmates and authorities. Our initial suspicion was that physical objects would reflect this personal meaning; however, spaces were constantly mentioned while discussing personal belongings, as well as practices (considering work as a belonging was recurrent). While the sessions advanced, we realized that the personal sense, particularly within a subculture, shares common principles, and reflected a silent order, full of rules and meanings, noticeable not only in physical objects or spaces, but in important practices recognized by the institution and the inmates.

Personal belongings were fundamental elements of imprisonment, related to objects, practices, and spaces that take place within the subculture, symbolically constituted, and part of a complex process of mortification-resistance. The meaning of a belonging is not inherent to the object the practice or the space; it is constructed within the subculture, and has a potent symbolic connotation that allows it to appropriate intangible objects, as explained by one inmate:

*I like to write and I like to see the sky. I stare at a star that is always there, and that gives me a sense of satisfaction, more than talking to people.*

Cases like this one were recurrent. One inmate from whom a ring was taken explained that its value was not primarily monetary; rather, it reminded her of a family tie with her brother. Another lamented the loss of her camera because it meant losing a reminder of her loved one’s affection for her.

Ibáñez (2004) explains that “human beings do not interact so much with the supposedly objective characteristics of the objects they encounter, as with the basis of the meaning that they attribute to these objects” (p. 78), within a total institution, a great deal of meaning is fond of personality and possessions both physical and immaterial.

a. Clothing

New inmates are assigned a prison gown that they will use while they are in the new arrivals’ dormitory. One inmate observed:

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4 The quoting refers to dialogues of the workshop participants.
When you get there, the prison gown is like a stigma, like a mark. You have to wear it all the time.

Once the inmates are sent to the general quarters, the prison gown is used only for contacts with the ‘outside,’ the visitor’s area, a trip to a medical appointment or to court. This distinction carries deep meaning. Inmates explain that in the prison gown “you’re classified, you’re a criminal,” not wearing the prison gown is perceived as being “free,” and this distinction brings out a sensation of becoming the person “they always were.”

The prison gown later gives way to white or beige clothes, which seem like a step up at the time, but still convey discredit:

Neither the prison gown nor the colored clothes, the day I get out I’m never wearing a dress that color.

These clothes are provided by the institution, and have been previously used by other inmates. Later, depending on each inmate’s social position, they may wear other garments, receive them from relatives and friends, or earn them by working.

Clothes give rise to a whole series of situations within the prison subculture; when clothes are appropriated by the inmates, the institution is divested of control over them and their meaning. For example, an inmate referred to the theft of clothes:

The warden doesn’t want us to have anything inside the living quarters, but outside, clothes get stolen. It’s a big problem. I don’t report it anymore. What I do is pay someone to wash my clothes and she looks after them. That way you’re not always worrying. If someone steals my clothes from her, I don’t pay her.

Cruz, Gómez, Gualda, and Ruiz (2001) state that among inmates there is a “kind of ‘agreed-to’ behavior, a sort of code and hierarchy of roles, completely informal and created by the nature of the relations themselves” (p. 104), and this ‘agreement’ is used as a means of defense against outside pressure. The imposition of a partial institutional measure, which the individual does not entirely appropriate and which gives rise to theft within the subculture, calls for an alternative in ‘personal behavior’ that resets the balance in the system.

b. Music Players

Two objects that take on inordinate importance are books and music players. The latter are a strategic privilege given as a reward for good behavior and maintaining order.

Not many inmates have access to music players, but those who do are said to devote their money to buying batteries and enjoying their favorite CD’s, which they lend or give as gifts to other inmates. Another way to listen to music is in the kitchen, for those who work there, or on the terrace when there are special events.

For inmates, the meaning of music is freedom – conditioned – that allows them to escape the penitentiary in their imagination, to relive memories, to create

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5 Books as belongings, along with reading and writing, take on a special meaning in the center. This is a topic that merits further research, but is not addressed in this paper.
new places in their mind, to relax, to entertain themselves, and to keep up with the outside world when they listen to the news, which is ‘forbidden’ in the center. Therefore music players are highly valued, a privilege to be earned, but also a tactical opportunity to ‘escape’ and to maintain a channel of information and contact with the world outside.

c. Work

Work takes place in different settings, through different activities, some recognized formally (kitchen, piecework for outside firms, tortilla-making, groundskeeping), others not. Work is a chance to recover some of one’s lost autonomy and to make money to buy personal hygiene items, shoes, or gifts for children and visitors:

When they come I have their presents ready for them. It’s my way of showing them that I love them, and I tell them that I’m working to make myself a better future.

Kitchen work provides a way to eat better, bigger portions, preparing food to one’s taste, and eating forbidden food; one kitchen worker recounted that on Christmas a family sent a cake with strawberries—prohibited—so they ate the fruit before sending in the cake.

The tortilla shop is the only area that works 24 hours a day. It is a highly coveted job because of the pay and for one other reason; the night shift offers relief from the chronic overcrowding. It also allows workers to indulge in otherwise forbidden behavior with no fear of consequences, since they move about the institution at irregular hours, from the dormitory to their work—a fleeting moment of freedom.

Grounds keeping allows for reflection. The center provides the tools, and the inmates provide the poetry. As one inmate reflected:

The flowers grow more and more beautiful because they are watered with our tears.

One activity that gives rise to many other activities is the prison store. The stores are run and staffed by inmates, and sell basic products and materials such as thread, ribbons, fabric, and other supplies for informal work. The main store is run by an inmate and is more expensive than the others because it has the privilege of operating on the terrace. This is the space set aside for outside recreation, used for an endless variety of activities, such as special events, visits, and spreading rumors. Sometimes the terrace functions as a ‘bank’ where money is loaned by the store. And it is here where complaints, disputes, and requests are resolved with all the inmates as witnesses.

Within the penitentiary there are a number of unofficial jobs and services (cleaning the dormitories, washing clothes, writing), or handcrafts (knitting, bracelets, necklaces, paper flowers and other items for sale). Informal jobs often find their outlet in the occupational workshops, which include repoussé, literature, theater, sewing, music, aerobics, and support groups, among others, some offered by the institution, others run by interns.
Work schedules vary depending on the activity. In the case of informal activities, the inmates themselves decide how much time to spend on them. Good behavior is required to get a formal job, and workers are fired if they miss work (due to confinement or illness). Sometimes good behavior on the job can lead to a reduced sentence.

\[d. \text{ Spaces}\]

Space is understood as the complete set of movements that take place within the center. It is a practiced place and there are as many spaces as there are distinct spatial experiences (De Certeau, 1996).

\[e. \text{ Dorms}\]

When it comes to the dormitories, there is a notable difference in meanings. The newcomers’ dormitory, the A dorm, is the most confining in terms of rules. It is a space that is circumscribed between the center and the outside. One inmate commented:

\[I’m \text{ better off in B than in A because there’s more freedom, they don’t have to line us up, and we don’t have to wait for the guard.}\]

Being sent to B dorm does not imply a criminal sentence, because there is still the possibility of being set free on evidence. An inmate can be sent there if her trial has taken a long time, and until the sentence is handed down, there is still a chance of being released. As one inmate put it:

\[I’m \text{ getting out of A. I don’t intend to go to C or D.}\]

In A dormitory there is a certain freedom and hope in the air. Inmates do not have to wear the prison gown, nor are they supervised at all times. The C and D dormitories (for sentenced inmates) represent a somewhat more explicit loss of hope of regaining freedom:

\[Your \text{ greatest fear is of being sentenced; that means that your freedom has been denied. For me, that would be the most painful thing.}\]

In the long term, this reality brings on a change of attitude, a kind of moroseness; the inmates in these dormitories are embittered and cruel:

\[The \text{ girls in E have been in for years, and they’re bitter, they’re not as sensitive as the rest of us … they’re resentful about life, being hard-hearted, aggressive. They don’t cry easily, or smile easily. They don’t think twice about saying something that will hurt you or offend you.}\]

The inmates describe the atmosphere in the dormitories as rough for one reason:

\[In the dormitory things get ugly, everyone’s all crowded.\]
The overcrowding affects everyday life. One inmate mentioned that the television was taken away because there were too many different opinions about what to watch, and fights often broke out. In the dormitories there is the option of listening to music or knitting as a way to escape or avoid these conflicts.

It is a constant battle to keep the dormitory clean and orderly:

*The bathroom was disgusting; people brushed their teeth in the wash basin, left dirty dishes overnight, etc.*

Another inmate commented however:

*My room is the cleanest. The rules are strict, and when a new girl comes, we lay down the rules.*

The institution’s regulations say that no one may give orders in the rooms, but the inmates claim to have their “own rules” based on certain practices such as paying others to clean, wash, or iron.

**f. Rooms and Beds**

The rooms are located on the inside of the dormitories. They house both the inmates and their belongings, and the overcrowding gives rise to different conflicts. One inmate noted that when women have just been sent to general quarters, everything smells bad to them.

Belongings serve as a way to customize and take ownership of space. One inmate explained that she sleeps on the floor and arranges her mattress like a couch and puts cushions on it.

It makes a difference to have a room with a window to look out at the sky or the street, to have a bedspread “with little hearts, the only red you can see there,” that lets you call your room “home” even if it is just for a short while, as one of the inmates said, or to have a CD player that allows you not only to listen to music but also to drown out the sound of the lock when they close the doors at night, as another pointed out.

**g. The Institution**

When the penitentiary must be identified, it is rarely called by its name, or referred to as jail, prison, or even institution, which is only used on official occasions. Among the inmates, the most common way to refer to the penitentiary is as “This place.”

*This place* has as its background a notion that is very important for life in the center, that is time. It is constructed as the days and years pass and at first it allows the inmate to avoid confrontations, as “the past is buried.”

In time, the term takes on a capacity for summing up many frustrations, complaints, injustices, reflections and so many other situations of the inmate’s previous life, the purpose of the confinement and the everyday life within the center:

*I want to leave as a good mother, and I’m very sorry for what happened, but I do what I can to take advantage of the workshops and the work in this place to leave my bad life behind.*
This place erodes life with time and weighs down on the emotions, as it obliterates affective ties:

*People come to visit very frequently at first, but then they forget about us in this place. I tell them I’m still alive.*

It is common to talk about “a long time.” In confinement, time can be an enemy and it must be “killed mercifully” (Goffman 2007, p.77). It can also be a useless time or else “a time of nihilism, of psychic devastation” (Arnanz, 1988 p. 10). Nevertheless, in this subculture, tactical control in daily life tries above all else to resist and alter time.

*I like the tortilla shop because the shifts are at night, so I sleep more during the day and time passes faster.*

The ‘long time’ depends on a choice of whether or not to control the direction of life on the inside, as one inmate commented:

*It depends on you, on how you want to live in this place. Here no one forces you.*

It is by using powerful tools like the imagination that “time goes by,” or with inexhaustible goals like “being a better person” that the time inside can be altered:

*You have time to think, you reflect on things, your mindset gradually changes, you do things you never thought you’d do, you realize you have abilities you never knew about.*

Mortification does not have the last word; there’s a personal and collective battle in “passing time,” present in belongings and in everyday life, for the purpose of resisting:

*I feel more capable of keeping myself from being stepped on, from being made cry. I can be stronger and defend myself.*

Putting up with difficult situations is a virtue, a sign of strength that subverts the experiences of humiliation:

*When they hit you, it makes you stronger.*

As time goes by, resistance and punishment could earn a concession for the inmate; shrewdness for avoiding damage (or choosing the least damage) while ameliorating a hostile environment:

*I haven’t done the exercises the doctor told me to do for my recovery because [the guards] wouldn’t let me take in the material I needed, and if I tell the doctor the reason why I didn’t do the exercises, I make the institution look bad, which brings on consequences. That’s why some things are better left unsaid.*
4. Discussion

From the institutional perspective, allowing possessions represents a control strategy that gives inmates certain autonomy. Throughout the text it has been shown that the appropriation by inmates of certain objects, spaces, and situations becomes a tactical way to take advantage of the occasion within a limited and restricted system, and to recover some of the freedom lost.

When an institution grants certain privileges, or allows possessions, it does it as part of a control strategy that has an impact on the subculture because it puts some inmates in a higher position than others, those that have things that the others do not:

*When they [other inmates] notice that your family brings you a lot of things, they change and start talking to you.*

Dispossession is used as a strategy that reminds the inmates at every step that it is not the institution that takes things away, but rather their own present acts, and the reasons that initially brought them to this place. Nevertheless, looking at dispossession only as an institutional measure overlooks a series of meanings constructed by inmates around a more complex function: *Not having* within the penitentiary. One inmate bore witness to the anxiety that this situation represents:

*When I arrived, I cried the whole day. I arrived without money, without clothes, my family didn’t know where I was and nobody would lend me a [public telephone] card to call them.*

However, she explained that even though the guards in the security booths are rude to them, they have no alternative but to act submissively; otherwise they lose access to certain areas where public phones are located. Thus, they manage to gain a ‘certain control’ over an institutional abasement. Apparent submission to the norms, and the capacity to put up with mistreatment and even humiliation, serve the purpose of holding on to their belongings, caring for what has been earned and accumulated. Another commented:

*Privilege is working so that they give you a bed along the corridor, because behind the door [of the dormitory] you get stepped on when the others get up, and they wake you up when roll is called, and you get the smells from the bathroom.*

*Not having* in the prison subculture is not necessarily a question of economic means or a punitive measure; it is a function of personal and collective meaning that transcends physical objects. It acquires its meaning in everyday interaction, where tactics are developed to reduce the tension of feeling imprisoned, and to value the things that are no longer available, as well as the things that the inmates have managed to accumulate so far:
Outside we never have time to look at the sky, we don’t take time to really observe. Since it’s ours and we see it every day, we don’t give it importance. Here we appreciate those things.

Statements like this one reflect a process of self-adaption, which while not originating in something completely new, will constitute a different reality from the self that existed before entering and the one that will have to leave with them. This possibility inaugurates a beginning; this is how they begin to live and share in community:

*When I got there, what I said was: it’s a good thing there’s air, and sunshine. For me it was the most important thing because in confinement there’s nothing more than a little window.*

Appreciating situations and objects that are overlooked outside of this context defines *not having*; a notion that is potentially important for the beginning of a new assignment of meaning that paradoxically is a possibility of just the opposite, *having*.

Dispossession gives possessions a special meaning within the subculture; they acquire new value through scarcity, founded on the institutional ability of taking away. The acquired meaning is related to what the specific possession practically allows on the everyday, for example for inmates a comb is not only a comb, it is a possibility of looking neat and pretty; a purse is not only a purse, it can be an object where family mail is kept.

Once the possession allows this practical meaning, a new construction of personal belonging is born; it is important because it enables the individual to perform certain practices. Commonly these practices are enriched with personal meanings, like remembering family or friends, “feeling pretty,” “being at home,” or “not feeling here.” However, because the possibility exists that the possession is taken away, the vital sense of the personal belonging is established on what it allows, not in the physical object, space, nor situation. Even though in some cases where the possession is taken away or stolen by other inmates, the practice remains by other means as a resistance to dispossession.

Informal activities like paying someone to wash and take charge of one’s clothes, setting up a parallel order hidden among the official rules, appointing ‘agreement supervisors,’ or even giving an extra food ration to someone who ‘deserves it,’ reflect tactical operations by which the subculture leaks through the institution’s measures, adjusting the institutional rule:

*We’ve adapted, like a system, and when new women come in, they feel stressed out, but they have to adapt because there are rules that must be followed.*

It is here where spaces and belongings play their most important role, inasmuch as they fill this everyday life with meaning and vice versa. In this way, prison life is submerged in an endless network of connections where spaces, belongings, and inmates mutually adapt themselves.

Peteet (2005) makes an analysis of the dominators and the dominated, looking at the conflicts of the Palestinian people. He states that the tactics that the subjects use in a given moment depend on the way they interpret the practices of
power. In the case of practices that suggest the existence of two asymmetrical forces, the interpretations result in distinct and opposite meanings, such as the visions of the institution and the subculture.

And yet, throughout this article, evidence has been given of how these asymmetrical, opposite forces, developed between the formal and the informal, act together in spite of the opposition as a set of tactics and strategies, a “mutual action in reciprocity” (Marc & Picard, 1992, p. 14), or recalling Goffman (2007), a shrewd game that assumes a “somewhat opportunistic combination of secondary adjustments, conversion, colonization, and group loyalty” (p. 73).

The inmates are the locus of the reflection of a society that owns words and interactions, and in this way, the tactics turn the prison not into a place of punishment but into the reproduction of a culture, a reflection of the very society from which they would escape, a subculture with a power that at times manages to surpass the formal organization and structure, allowing the inmates to reconstruct a complex social reality to which they have never stopped belonging.

Or to conclude allowing the last words to a couple of inmates who were talking to each other:

Confinement isn’t so bad, it doesn’t make it any tougher. The problem is the company.

It’s not the prison that imprisons; it’s the people.

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