

Counting Casualties in the War on Prisoners

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OVER THE LAST SEVERAL DECADES, numerous prisons in the United States have operated in a state of crisis.¹ The sheer number of persons incarcerated during these years overwhelmed the capacity to safely and humanely house and administer to the prisoners placed under correctional control. Policies of mass incarceration that were pursued over these decades created drastic shortages of space and resources. Unwieldy numbers of prisoners were largely warehoused with little to do. Although some states took meaningful steps designed to address the causes of their overcrowding crisis, others—such as California—did not. As a result, prisoners have continued to be released back into many communities with a range of unmet needs and, in some instances, a host of serious problems that remained unaddressed

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1. Analysts have referred to a national prison “crisis” for decades now. For example, in a representative observation made in the mid-1980s, one commentator wrote that “[t]he doubling of prison populations from approximately 230,000 in 1974 to over 500,000 in 1986 [] created an unprecedented crisis in American corrections.” Marvin Zalman, *Sentencing in a Free Society: The Failure of the President’s Crime Commission to Influence Sentencing Policy*, 4 JUST. Q. 545, 553 (1987). Similarly another reviewer in the mid-1990s observed, “[f]or over a decade, virtually every contemporary commentary on corrections in the United States has reminded us that the system is in crisis.” Francis Cullen, *Assessing the Penal Harm Movement*, 32 J. RES. CRIME & DELINQ. 338, 338 (1995). In certain states, such as California, the overcrowding crisis began somewhat later than it had in some other parts of the country. It also took politicians and correctional administrators in California longer to formally acknowledge the magnitude of the problem. They have yet to develop realistic plans with which to address it. For example, a recent editorial stated that although “the mass imprisonment philosophy that has packed prisons and sent corrections costs through the roof around the country has hit especially hard in California,” the state’s lawmakers, “some of whom are fearful of being seen as soft on crime, have failed to make perfectly reasonable sentencing modifications and other changes that the prisons desperately need.” Editorial, *The California Prison Disaster*, N.Y. TIMES, Oct. 25, 2008, at A18, available at http://www.nytimes.com/2008/10/25/opinion/25sat1.html?_r=1&scp=1&sq=Editorial%20%20California%20prisons&st=cse&oref=login.

and often had worsened. Already slim chances for successful post-prison adjustment have been further jeopardized.

In this Article I will suggest that what started out as a “War on Crime”² soon devolved into a “War on Drugs”³ that, over time, became nothing so much as a “War on Prisoners” inside many of the nation’s correctional institutions. The first salvos in this war were fired in the early 1970s, as politicians began to publicly rethink the overarching purpose of prison and the extent to which it should be deployed. Full-scale hostilities had broken out by the late 1970s, and the battles raged in earnest well into the 1980s and 1990s. An increasingly “get tough” approach to crime control was adopted that incarcerated unprecedented numbers of persons for unheard of lengths of time inside the nation’s increasingly overcrowded prisons.

During these decades—what has been termed the “mean season” of corrections in the United States⁴—the nation’s criminal justice system was devoted to little more than dispensing punishment—inlicting pain—as a matter of policy (that is, by design rather than inadvertence). We pursued these punitive policies with little regard for their broader consequences—policies that affected not only a vast number of prisoners but also an even larger group of people who were directly and indirectly connected to them. The scale of imprisonment grew so large that entire communities were transformed by it. Although many economic stakeholders in what has been described as a modern “prison industrial complex”⁵ have benefited enormously from the unprecedented expansion of the nation’s prison system, it is

2. For critical discussions of the “War on Crime,” see: WILLIAM J. CHAMBLISS, *POWER, POLITICS AND CRIME* (1999); JOSEPH DILLON DAVEY, *THE POLITICS OF PRISON EXPANSION: WINNING ELECTIONS BY WAGING WAR ON CRIME* (1998); *THE REAL WAR ON CRIME: REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* (Steven Donziger ed., 1996); and Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 *CRIME & DELINQ.* 475 (1994).

3. For critical discussions of the “War on Drugs,” see: DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996); JAMES INCIARDI, *THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY* (1986); CHRISTINA JOHNS, *POWER, IDEOLOGY, AND THE WAR ON DRUGS: NOTHING SUCCEEDS LIKE FAILURE* (1992); ALFRED MCCOY & ALAN BLOCK, *WAR ON DRUGS: STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY* (1992); and MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

4. As penologist Francis Cullen characterized it, this mean season largely consisted of an increased commitment to devising “creative strategies to make offenders suffer.” Cullen, *supra* note 1, at 340.

5. The term “prison industrial complex” was coined in the 1980s to describe a phenomenon that has grown considerably since. Indeed, the cover story of the *Multinational Monitor* described the expansion of the prison industrial complex as one of the “new growth industries” in the modern multinational economy. Eric Lotke, *The Prison-Industrial*

not clear who else has.⁶ The resulting crisis has social, legal, and even moral dimensions.

The War on Prisoners has proven extremely expensive. In fact, I believe that we have reached the upper limit of the psychological, social, economic, and even cultural costs that our society can afford to incur in the name of this commitment to inflicting penal pain. Many of the prison policies and practices that have evolved over this period have crossed the line from inflicting pain to doing real harm—at a societal as well as individual level. Until relatively recently, much of that harm has gone unnoticed (or at least unacknowledged) by politicians and the media. Nonetheless, it has impacted the nation in profound and often unexpected ways.

The sheer number of people who have been touched by the experience of imprisonment is enormous. They are the direct and collateral casualties of the War on Prisoners that we have waged. For example, there are over one million people who come out of our prisons and jails each year, as a slightly larger number enters them.⁷ They all bear—in some manner and degree—the signs or symptoms of the War's problematic effects. In fact, the depth of the pain that has been incurred by certain groups in our society threatens to create a permanent and particular underclass in the United States, comprised of persons who have been effectively marginalized by the most serious direct and indirect consequences of imprisonment. Beyond the social and

Complex, MULTINATIONAL MONITOR, Nov. 1996, at 18, 18, available at <http://www.multinationalmonitor.org/hyper/mm1196.06.html>.

6. The issue of whether and how much society at large has benefited from this unprecedented prison expansion is much debated. However, I know of no one who has studied this issue carefully and concluded that the reductions in crime that some have attributed to increased imprisonment were remotely commensurate with the economic resources expended to accomplish it. Instead, as one commentator put it, “[m]ost of the responsibility for the crime drop rests with improvements in the economy, changes in the age structure [of the population], or other social factors.” William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97, 125 (Alfred Blumstein & Joel Wallman eds., 2002). Moreover, when opportunity costs—the more effective crime control policies that were not pursued because of the prison-centered approach that was—are figured into the equation, the net gains seem even more questionable. Moreover there are less tangible costs—the social and cultural consequences of such a wholehearted commitment to punitiveness—that further complicate and compromise the balance sheet.

7. According to U.S. Department of Justice data on prisons alone: “[A]dmissions increased at a faster rate than releases, resulting in prison population growth. During calendar year 2005 (the most recent data available), State and Federal correctional authorities admitted 733,009 prisoners and released 698,459.” WILLIAM SABOL ET AL., U.S. DEP’T OF JUSTICE, *PRISON AND JAIL INMATES AT MIDYEAR 2006*, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

economic marginalization to which imprisonment contributes, there are those who will be functionally disabled by its worst effects.

In addition to the enormous number of people who go in and out of our prisons each year, and the unprecedented number that languish for long sentences inside, there are numerous relatives and loved ones—including many children—who are directly impacted by their incarceration. They, too, struggle with the financial, familial, and interpersonal instability brought about by the incarceration of persons close to them. Personal, social, and economic resources are stretched thin as families, government agencies, and community organizations struggle to fill the void created by incarceration and to absorb the consequences of prisoners' eventual transition back into the neighborhoods where they once lived.

Finally, I will argue more broadly that the massive scale of imprisonment and the intense attention devoted to issues of crime and punishment over the last several decades have negatively affected our collective ethos and quality of life. The received wisdom among penologists and social theorists has long been to regard prisons as a rough reflection of the societies that create and maintain them—that is, that nations get the prison systems they want or deserve.⁸ Thus, the nature of prison policy and scale of imprisonment in a particular time and place were thought to result from the operation of larger social forces—a combination of powerful sociopolitical and economic infrastructure as well as larger societal norms and values. But this seemingly one-directional cause-and-effect relationship has gotten more complicated in recent decades.

Indeed, prison systems and the prison-related socio-economic and political interests that service them have now grown so enormous in scale in the United States that they are forces to be reckoned with in their own right. That is, the nation's prison system is no longer merely the creation of the larger set of social, economic, and political forces that shape our society; it has itself become one of those causal or shaping forces. This system is now powerful enough to have its own direct effects on surrounding social and economic conditions and

8. Some of this wisdom is reflected in Winston Churchill's observation nearly a century ago that the "mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." WINIFRED A. ELKIN, *THE ENGLISH PENAL SYSTEM* 277 (1957) (quoting Winston Churchill in a speech before the House of Commons). Much later, the United States Supreme Court endorsed a similar sentiment, writing that "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge v. United States*, 369 U.S. 438, 449 (1962).

broader societal norms, and those direct effects are beginning to accumulate in highly deleterious ways.

Because there were a number of *other* ways we could have responded to the threat that the social problem of crime represented, the War on Prisoners can fairly be characterized as a war of choice, not necessity. Like many such wars, this one was precipitated more by political rhetoric than honest debate. There was little in the way of hard data or accurate “intelligence estimates” to guide decision makers. Certainly no social scientific analysis—or even any encouraging correctional precedents—suggested that we were likely to ever “win” such a war (and not even a clear definition of what “winning” actually might mean). Policymakers also failed to fully anticipate the War’s human and economic costs, and they paid little attention to the range of negative consequences that were bound to mount in the course of what proved to be a very protracted struggle.

Moreover, policymakers appeared to have no real exit strategy in mind for this War, and no plan for humanely or effectively managing its aftermath. But they declared and fought it nonetheless, and it is now entering its fourth decade. Frank political and correctional discussions of the War’s wrong-headedness and harmful consequences are only now beginning to appear, as decision makers struggle over how to bring this increasingly unpopular conflict to a close.⁹ A brief

9. There are a number of indications that decision makers are beginning to reconsider the wisdom of continuing to wage the War on Prisoners and are exploring ways to create a lasting and meaningful peace. For example, in a speech before the American Bar Association in 2003, United States Supreme Court Justice Anthony Kennedy declared that “[the nation’s] resources are being misspent, our punishments too severe and sentences too long.” Anthony M. Kennedy, Associate Justice, United States Supreme Court, Address at the American Bar Association Annual Meeting (Aug. 9 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html. He urged the Association to carefully examine the human and economic costs incurred during the era of continued mass incarceration, and to reexamine the purposes being pursued by our criminal justice system. *Id.* Kennedy’s speech led the ABA to establish the “Justice Kennedy Commission,” which made a series of reform-oriented recommendations in 2004. JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004), *available at* http://meetings.banet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf. If implemented in total, the recommendations would significantly change the national correctional agenda. By June 2005, the Christian Science Monitor was reporting that “[f]rom Massachusetts to Michigan, states are placing greater emphasis on rehabilitation—establishing reentry programs to help prisoners transition back to society, shortening sentences, and diverting abuse offenders to treatment instead of jail.” Sara Miller, *California Prison Boom Ends, Signaling a Shift in Priorities*, CHRISTIAN SCI. MONITOR, June 20, 2005, *available at* <http://www.csmonitor.com/2005/0620/p03s02-usju.html>. Even more recently, two scholars argued that the combination of the high cost of incarceration and the widespread economic downturn in the United States had resulted in the increasing recognition among politi-

summary of the casualties we have incurred in the War on Prisoners should underscore the urgent need to pursue a different course of action as well as the magnitude of the challenges we will face in trying to do so.

I. Gathering Storm: From the “Age of Rehabilitation” to the “Mean Season of Corrections”

Imprisonment has always been primarily about punishment. For more than a century, however, the political justification and publicly stated rationale for putting people in prison in the United States revolved around the notion that prisoners should emerge from the experience different from, and in some sense better than, when they entered. In Erving Goffman’s memorable phrase, prisons generally were thought of as “forcing houses for the changing of persons”¹⁰ and the use of imprisonment to produce positive change in prisoners represented a “rehabilitative” ideal or goal that was especially important to prison policy in the United States.¹¹

Thus, throughout most of the nineteenth century, people were sent to prison in the vague hope that certain things about them—presumably those things that had led to their criminal behavior—would be changed or fixed. In the latter half of that century and into the early years of the next, this hope was increasingly formalized and widely shared. By the 1920s, a reasonably coherent body of knowledge existed to serve as the basis for what could be termed “rehabilitation.”

cians and members of the public that the punitive policies of the past had “become the problem.” Sara Steen and Rachel Bandy, *When the Policy Becomes the Problem*, 9 PUNISHMENT & SOC’Y 5 (2007). They argued that subtle shifts in political rhetoric and the tenor of public conversations were now being translated into more progressive criminal justice policies in a number of states. *Id.* However, despite the recent emergence of a less bellicose approach to crime control, many jurisdictions still have not declared a ceasefire. Thus, a 2006 report that was based in part on a series of fact-finding hearings by the bipartisan Commission on Safety and Abuse in America’s Prisons noted: “The majority of prisons and many jails hold more [prisoners] than they can deal with safely and effectively, creating a degree of disorder and tension almost certain to erupt into violence. Similarly, few conditions compromise safety more than idleness.” JOHN GIBBONS & NICHOLAS KATZENBACH, COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 12 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf. Accordingly, the Commission’s first recommendation aimed at improving badly deteriorated conditions of confinement and “eliminating the crowded conditions” that exist in correctional facilities throughout the country. *Id.*

10. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 12 (1961).

11. See, e.g., FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

It was mastered by enough credentialed experts to allow for seemingly legitimate claims to be made about prison “treatment” and programming. For much of the next fifty years—in what could be called the “age of rehabilitation”—that knowledge was applied in prison-based efforts to reduce crime by changing prisoners. In mid-century, for example, conservative Supreme Court Justice Hugo Black summed up what seemed to be the consensus view: “Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”¹²

As Francis Allen succinctly summarized, the rehabilitative ideal sought to insure that prison was used primarily “to effect changes in the characters, attitudes, and behavior of convicted offenders.”¹³ Obviously, the pursuit of this ideal was intended to control or reduce crime—in Allen’s words, “to strengthen the social defense against unwanted behavior.”¹⁴ Rehabilitation was supposed to accomplish this desired effect by ensuring that persons released from prison were less predisposed to engage in crime and more likely to become productive members of society.

Despite the noble rhetoric that often surrounded the rehabilitative ideal, it is important to acknowledge that very few prisons anywhere in the United States ever really functioned as full-fledged treatment or program-oriented facilities—even during the period I have characterized as the age of rehabilitation. The mandate for rehabilitation was virtually always subjugated to what were perceived as more fundamental custodial needs. In most prisons during most periods, institutional convenience and loosely defined “security concerns” consistently trumped the mandate for rehabilitation.

Yet, there were instances in which well-trained and well-intentioned program and treatment staff helped to address the needs of prisoners and assisted them in making positive changes. *If* prisoners were released into supportive environments where they could apply the skills they managed to acquire in prison, those gains had at least some chance of persisting. Moreover, even if the mandate for rehabilitation was honored more often in the breach, it brought prisoner-centered perspectives indirectly to bear on correctional decision-making. Thus, for example, through the 1960s and into the early 1970s, the California Penal Code charged the Director of the Department of

12. *Williams v. New York*, 337 U.S. 241, 248 (1949).

13. ALLEN, *supra* note 11, at 2.

14. *Id.*

Corrections with maintaining a psychiatric and diagnostic clinic and specified that “[t]he work of the clinic shall include a scientific study of each prisoner, his career and life history, the cause of his criminal acts and recommendations for his care, training and employment with a view to his reformation and to the protection of society”¹⁵

Similarly, treatment and programming staff in many prison systems provided regular reports to parole boards and other agencies that, in turn, decided whether and when prisoners would be released. The decisions themselves were supposed to be made on the basis of the progress of the individual prisoner. For example, the California Supreme Court in the late 1960s described the way that the parole authority—operating under an indeterminate sentencing scheme of the sort that had been devised in the late nineteenth century—was supposed to decide how long a prisoner should remain in prison: “The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual, analyzed as a human composite of intellectual, emotional, and genetic factors.”¹⁶ Although this too was a highly idealized version of how the process actually operated, it is clear that individualized prisoner-centered concerns were *supposed* to be taken into account or considered during each annual parole review.¹⁷

Prison rehabilitation also represented an intrinsically individualistic approach to crime reduction, one that increasingly depended on psychological or therapeutic concepts for its shape and direction. As prison historian Paul Keve noted: “During the 1960s, many of the country’s correctional systems instituted special treatment programs, in an optimistic hope that the behavioral sciences could diagnose individual criminal cases and devise corrective strategies. It was a time of

15. CAL. PENAL CODE § 5097 (West 2008).

16. *People v. Morse*, 388 P.2d 33, 39–40 (Cal. 1964).

17. The significant disparity between what was supposed to happen and what did happen has been well documented. *See, e.g.*, Christina Maslach & Robert Garber, *Decision-Making Processes in Parole Hearings*, in *THE CRIMINAL JUSTICE SYSTEM: A SOCIAL PSYCHOLOGICAL ANALYSIS* 337 (V.J. Konecni & E. B. Ebbesen eds., 1982); Robert Garber & Christina Maslach, *The Parole Hearing: Decision or Justification?*, 1 *L. & HUM. BEHAV.* 261, 278–80 (1977). Maslach and Garber found that parole hearings amounted to “a relatively short, diagnostic interview session which plac[ed] a heavy emphasis on psychological assessment,” but one in which very little information was shared by prisoners. Maslach & Garber, *Decision Making Processes in Parole Hearings*, *supra*, at 274. In addition, the authors noted that hearing officers lacked the knowledge or training to make the diagnostic judgments they nonetheless rendered. Indeed, “[a]lthough hearing officers have no demonstrated skills in making psychological evaluations, such evaluations underlie their decisions to grant or deny parole.” *Id.* at 279.

widespread creative experimenting in corrections.”¹⁸ Thus, well into the 1960s, many jurisdictions placed an especially heavy emphasis on counseling or therapy as a tool of rehabilitation. For example, one study conducted in California during the late 1960s noted that the state prison system recommended group counseling “for virtually *all* offenders of *all* ages and educational levels in *all* types of institutions”¹⁹ In addition to group counseling, the authors noted that California prison classification committees “also generally recommend to all inmates that they enroll in vocational training, academic education, religious and recreational programs”²⁰

Thus, by the late 1960s and very early 1970s, rehabilitation certainly was still regarded as a long-established and widely accepted goal to which most correctional systems aspired, at least in theory. The penal policy of this era was consistent with the dominant social welfare state and the political rhetoric that supported it. That is, government was supposed to act on behalf of those in need. To the extent to which prisoners could be seen in these terms—and they often were—then sending people to prisons so that they could be “improved” by the experience was seen as a socially and politically acceptable rationale.

At the same time, unfortunately, this meant that prison rehabilitation programs were very much limited by the therapeutic individualism on which they were based. For one, prisons took custody of individual prisoners, not their communities or the larger social structural forces that had helped shape them. If criminal behavior was pro-

18. PAUL KEVE, *PRISON AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS* 216 (1991). The “experimenting” that took place in the name of rehabilitation was certainly not always benign. For some of the most egregious examples, see JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS* (Alfred A. Knopf ed., 1973) (discussing some of the worst extremes to which prison “treatment” was taken).

19. GENE KASSENBAUM ET AL., *PRISON TREATMENT AND PAROLE SURVIVAL* 8 (1971) (emphasis added). Not surprisingly, the rehabilitative reality rarely matched this rhetoric. Indeed, one commentator described the limits of rehabilitation at one California maximum security prison this way:

Prisoners were promised expert help with their problems. They were told they would receive an education, learn a trade, and get psychological help. Teams of correctional counselors, psychiatrists, educators, chaplains, and even surgeons were at their service at the prison, they were told, waiting to help them. In reality, San Quentin’s ratio of treatment staff to custody staff remained low and counselors had impossibly large caseloads, so the guards were still the ones whose reports were most important to the [parole board].

ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* 15–16 (1994).

20. KASSENBAUM ET AL., *supra* note 19, at 8.

duced much more by social than individual pathology, then the heavy emphasis on therapy and psychological counseling was misplaced for many prisoners. However, despite this fundamental limitation, the rehabilitative ideal nonetheless ostensibly required a degree of concern for the prisoner's well-being. That is, there was *supposed* to be a humane logic (or at least a set of humane limits) to the terms—the length and conditions—of imprisonment, and a corresponding metric of accountability. If prisons fell short of achieving the goal of making sure that prisoners left better off than they entered—and often they did—then this recognized shortcoming was to be corrected, at least in theory. And evidence that prisoners were actually being harmed by the prison experience provided an even clearer mandate for urging reform (and perhaps a basis to pursue legal recourse).

Consistent with the rehabilitative ideal and the commitment to minimizing the harm done to prisoners while they were incarcerated, the President's Commission on Law Enforcement and Administration of Justice filed a lengthy report in 1968 that focused on the "challenge of crime in a free society."²¹ In fact, it not only embraced the nation's longstanding commitment to rehabilitation but also reflected a much broader, less individualistic vision of the causes of crime than the one embodied in the traditional view. The Commission's primary message was clear: crime needed to be addressed by rebuilding the cities, eliminating slum conditions, and transforming lingering racial segregation to improve the lives of poor and minority citizens. These recommendations were generally well received, even though they were issued in the midst of rising crime rates. As one respected academic commentator noted at the time, "the crime problem would improve greatly if only the Crime Commission's recommendations for a broad set of social programs "would ever get under way."²²

The broad preventive programs of social reconstruction designed to reduce poverty and racial inequality were just one component in

21. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter *CRIME COMM'N REPORT*]. This Crime Commission Report was sometimes referred to as the "Katzenbach Report," after Nicholas Katzenbach, the Commission's chair. The other Commission members reflected such a broad cross section of professional expertise and different political perspectives that its report was criticized as a "compromise" even before it was issued. See John P. McKenzie, *The Compromise Report on Crime*, *NEW REPUBLIC*, Feb. 4, 1967, at 15; see also ROBERT W. WINSLOW, *CRIME IN A FREE SOCIETY: SELECTIONS FROM THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE* (Robert W. Winslow ed., 2d ed. 1973).

22. Lloyd Ohlin, *The Effect of Social Change on Crime and Law Enforcement*, 43 *NOTRE DAME L.* 811 (1968), reprinted in *THE CHALLENGE OF CRIME IN A FREE SOCIETY: PERSPECTIVES ON THE REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT* 24, 36 (1971).

the Commission's two-pronged approach to crime control. There also was growing recognition that social conditions mattered as much *inside* prison as outside, and that harsh institutional conditions actually might compromise attempts to reduce crime. Thus, the Crime Commission set as its second objective, after crime prevention, "the development of a far broader range of *alternatives* for dealing with offenders" ²³ The Commission acknowledged that there were some people who needed to be in prison, but also worried that "there are many instances in which segregation [from society] does more harm than good." The report recommended the creation of "an entirely new kind of correctional institution" in the form of small, community-based facilities, extensive work and educational furlough programs (where prisoners returned to their facilities only at night), and "more effective treatment" for all offenders. ²⁴

Other groups—even ones comprised mainly of correctional officials and prison policymakers—embraced many of these same views. For example, the final report of a California Department of Corrections taskforce (that included correctional officials, the head of the state's juvenile justice system, and the chairman of the state parole board), began their proposal for "coordinated correctional institutions" in the state by endorsing the "value of community-based programs," and conceding that institutionalization was a last resort to be used only when the system had met the burden of showing that it was necessary. ²⁵ The task force emphasized the continuing focus on the community outside prison:

[T]here exists a burden upon the system to return the offender to the community at the earliest time possible, consistent with public

23. CRIME COMM'N REPORT, *supra* note 21, at 42 (emphasis added). James Vorenberg, who served as the Executive Director of the Commission, described the logic of these recommendations:

[T]he Commission urged a shift from the use of prisons to community treatment of offenders. Its reasoning can be simply summarized: if we take a person whose criminal conduct shows he cannot manage his life, lock him up with others like himself, increase his frustrations and anger, and take away from him any responsibility for planning his life, he is almost certain to be more dangerous when he gets out than when he went in. On this basis, the Commission urged that only the very dangerous should be held in prison. It called for the development of halfway houses, programs to send offenders home under intensive supervision, special school and employment programs, and other forms of non-prison treatment.

James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY, May 1972, available at <http://www.theatlantic.com/politics/crime/crimewar.htm>.

24. CRIME COMM'N REPORT, *supra* note 21, at 43–44. Chapter six of the report also contained various recommendations concerning corrections-related issues.

25. CAL. BD. OF CORR., COORDINATED CALIFORNIA CORRECTIONS V (1971).

safety. In order to accomplish this mission, it is deemed imperative that institutional programs be community-oriented, and that they be equipped to effect smooth transition into the community-at-large.²⁶

In the late 1960s and early 1970s, an increasing number of scholars, politicians, and members of the public also had begun to question whether prison conditions were too harsh, whether correctional institutions were doing enough to adequately rehabilitate prisoners, and whether there were alternatives to incarceration that would better serve the nation's correctional needs and interests. For example, criminologist Marvin Wolfgang announced in 1973 that the National Council on Crime and Delinquency ("NCCD"), which he then chaired, had reached the conclusion that "our prisons simply have not worked."²⁷ Indeed, the NCCD had become convinced that the nation's prisons had turned into "breeding grounds for crime" and therefore recommended that "no more large scale prisons should be built."²⁸ Citizens' groups and many state legislatures joined in the debate over the relative virtues of imprisonment versus less intrusive alternatives that involved placement in community-based programs.²⁹

Midway through the 1970s, however, all of this began to change. The reversals occurred rapidly and their long-term consequences were profound. Proposals to create a fairer and more effective crime control policy through large-scale social reconstruction rather than increased incarceration were abandoned. The poverty programs that had been initiated at the end of the previous decade—part of the larger framework from which many of the new crime-control measures had been derived—were already in the process of being dismantled by a new political administration. In fact, political objections to these programs had gone so far as to blame the poverty programs for the inner-city violence of the late 1960s.³⁰ Psychological insights about

26. *Id.* at V.

27. THE FUTURE SOCIETY: ASPECTS OF AMERICA IN THE YEAR 2000 (Marvin E. Wolfgang ed., 1973).

28. *Id.*

29. See *Programs to Keep Criminals Free*, S.F. CHRON., Sept. 21, 1973, at 5. One way to keep convicted persons in the community rather than inside prisons was through the use of so-called "diversion" programs. *Id.* These programs remained an attractive alternative to traditional criminal justice processing throughout much of the 1970s. For example, in the middle of that decade, two scholars noted: "One of the major current fads in criminal and juvenile justice programming is diversion of offenders from the justice systems." Don Gibbons & Gerald Blake, *Evaluating the Impact of Juvenile Diversion Programs*, 22 CRIME & DELINQ. 411, 411 (1976).

30. As early as the presidential campaign of 1968, Richard Nixon had begun to marshal arguments against these programs, criticizing them as part of the problem, not the

the adverse impact of harsh institutional conditions that led many persons to advocate for the creation of community-based programs to address the needs of prisoners were soon brushed aside.

Indeed, the goal of rehabilitation itself met a similar fate. Writing about the period that led to this radical change in policy, Franklin Zimring and Gordon Hawkins accurately observed that “[i]t would be difficult to overstate the degree to which the concepts and vocabulary of rehabilitation [had] dominated discourse about the purposes and functions of imprisonment in modern American history.”³¹ In the same vein, it would be difficult to overstate the speed and totality with which these concepts and vocabulary were *abandoned* in the 1970s. By the end of the decade, scholars and policymakers alike routinely rejected or ignored rehabilitation as an accepted purpose of imprisonment and substituted several other goals in its place.³²

This shift in correctional thinking was codified by many state legislatures, which moved quickly to embrace and establish a much more punitive approach. Thus, when a determinate sentencing law was passed in California in the mid-1970s, the penal code itself included a statement to the effect that the Legislature now “finds and declares that the purpose of imprisonment for crime is punishment.”³³ By the mid-1990s, positions had continued to harden, moving prison policymakers even farther away from the once primary goal of rehabilitation. Soon there appeared to be near unanimity over the proposition that people should be sent to prison for punishment—that is, to cause them pain.³⁴ The mean season of corrections had arrived.

solution to violence and unrest. Nixon remarked, “[f]or the past five years we have been deluged by government programs for the unemployed, programs for the cities, programs for the poor, and we have reaped from these programs an ugly harvest of frustration, violence, and failure across the land.” SHARON HARLAN ET AL., *JOB TRAINING FOR WOMEN: THE PROMISE AND LIMITS OF PUBLIC POLICIES* 60 (Sharon Harlan & Ronnie Steinberg eds. 1989) (quoting Nixon).

31. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 6 (1995).

32. As one commentator described this dramatic turnaround, “[i]n less than two decades, almost everyone involved in the criminal justice system has rejected the rehabilitative ideal, described less than twenty years ago as the predominant justification of punishment.” Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1035 (1991) (footnotes omitted).

33. CAL. PENAL CODE § 1170(a)(1) (West 2008).

34. For example, Attorney General Dan Lungren, California’s chief law enforcement officer in the 1990s, gave these justifications for sending lawbreakers to prison: “The first point is, frankly, retribution. Second point is strict, straight out punishment. Third point is incarceration; while they’re in that setting they cannot do harm to others. And the final point, just as important as the others, is deterrence.” *60 Minutes: Crime & Punishment* (CBS television broadcast Dec. 26, 1993). Rehabilitation was not even on the list.

The new meanness brought about a number of changes in the way we thought about prisons and prisoners. Among other things, as Jonathan Willens summarized, because prisoners were increasingly depicted as “brutal, hardened criminals,” it was possible to ignore their inhumane treatment and minimize the long-term consequences of their harsh confinement.³⁵ Moreover, as prison itself came to be defined as an “inherently dangerous and violent” place, one without any mandate to provide positive programming intended to benefit prisoners, almost anything could be done there, including practices “which are themselves dangerous and violent,”³⁶ as long as it could be justified by the prisoners’ presumably violent and dangerous natures. As Willens stated, the “new legal prison” emerged, which “legitimizes attacks on the prisoners, attacks on his space, his property, his body, and his pride.”³⁷ Widespread stereotypes that cast prisoners in sub-human terms implied that they did not warrant the same minimal considerations—deserve the same limits to the pain and harm to which they were subjected—as other persons.

This shift in consciousness was an important development in the War on Prisoners because it made the direct targeting of prisoners more politically and publicly palatable. It also softened the impact of potentially troubling and troublesome news coming from the War’s front lines. Few politicians or members of the public showed much interest in what was going on inside the nation’s increasingly overcrowded, tension-filled prisons and fewer still seemed concerned about the long-term consequences for prisoners. Among other things, the fact that there was no longer a mandate for rehabilitation relaxed the limits on what were considered acceptable conditions of confinement. Without these radical changes in the nation’s collective conception of who was going to prison and for what purpose, the policies of

35. Jonathan Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962–1987*, 37 AM. U. L. REV. 41, 133 (1987). Other writers have also made the obvious connections between prevailing conceptions of criminality and the kind of imprisonment that citizens think is appropriate or acceptable. For example, one article suggested that metaphoric descriptions of criminals as “scum” and “slime” not only contribute to the view of criminals as diseased and contagious, and make acceptable the increased use of segregation and quarantine, but also “may cause authorities to imprison criminals in places that are conceived as suitable filthy and malodorous.” Martha G. Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 729 (1994). Indeed, according to Duncan, since “criminals are commonly associated with slime, darkness, and foul odors” in public and political discourse, “their places of punishment must likewise reflect these qualities.” *Id.* at 755.

36. Willens, *supra* note 35, at 133.

37. *Id.*

mass incarceration that were undertaken over this thirty-year period would have been difficult to pursue. However, once the public revised its view of who prisoners were—hardened and threatening “enemies”—and why they were being incarcerated—to receive pain rather than to make progress—there were few “war stories” about how badly they were being treated that could truly shock the conscience.

In one sense, then, the first casualty in the War on Prisoners was a humanistic aspiration: the notion that all citizens—even ones who had committed crimes and represented threats to the larger society—deserved a government that operated on their behalf by intervening to improve their lots in life and help them address their most pressing needs. Instead, we set ourselves against certain of them, in full combat mode, targeting the increasingly outcast “criminal others” as domestic enemies to be handled with policies that were explicitly designed to hurt rather than help them. Armed with this new view of the purpose of prisons, the nation then went about filling them with unprecedented numbers of people.

II. Contested Terrain: The Overcrowded Prison Battleground

The impact of these new policies on the American prison system was swift and severe. Whatever else the War on Prisoners eventually brought about, it rapidly produced dramatic increases in the numbers of persons imprisoned throughout the United States. As early as the 1970s, when policies of mass imprisonment first began to be implemented, an occasional corrections expert or other commentator expressed concerns about the “unprecedented” levels of prison crowding. Although they continued to be voiced over the next several decades—sometimes with an increasing sense of urgency—overcrowding intensified and prison conditions worsened in many places. The warnings were largely ignored and the policies that produced the rapid prison growth persisted.

As the War on Prisoners dragged on, the absolute numbers of people incarcerated in the United States doubled.³⁸ Then, by the end of this three-decade period of consistently unprecedented growth, it more than doubled one more time.³⁹ The dramatic increase in the total population of prisoners was matched by an extraordinary change

38. See CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* 61–64 (2006) (describing the nature and magnitude of the increased rates of incarceration).

39. *Id.*

in the *rate* of incarceration, a rate that had hardly budged during the preceding fifty years. That is, starting from the period when such statistics were first reliably calculated in the mid-1920s and continuing until the mid-1970s, the incarceration rate in the United States hovered at around 100 persons imprisoned per 100,000.⁴⁰ Note that there were major historical events, important social transformations, and wrenching economic dislocations that occurred over this fifty-year period without producing *any* corresponding change in the rate at which the nation imprisoned its citizens. These events included the Roaring Twenties, the Great Depression, the run up to World War II, World War II itself, its aftermath, the Korean War, the civil rights movement, the tumultuous 1960s, and the Vietnam War. But in the mid-1970s everything began to change. Thus, after a half century of near-perfect stability, the rate of incarceration began its unprecedented and unremitting climb. Over the next twenty-five years alone, from the mid-1970s until 2000, a previously stable rate increased more than fivefold.⁴¹

In fact, the United States eventually became the modern world's undisputed leader in the percent of its population housed behind bars. Beginning in the 1990s and continuing to the present day, the only two countries that gave the United States even nominal international competition for the dubious honor of being the world's most prolific jailer were Russia and South Africa.⁴² Of course, both nations underwent profound upheavals in their political and economic infrastructure over the last several decades. The United States, however, did not. Simply put, we declared this War on Prisoners as a matter of political choice or preference, not necessity.⁴³

In any event, once the major offensives were launched, the immediate battlegrounds where the conflicts were being directly fought—cellblocks inside the nation's increasingly overcrowded prisons—were significantly transformed. Consider just one aspect of this transforma-

40. *Id.*

41. *Id.*

42. Reliable data on international rates of incarceration are kept by the International Centre for Prison Studies. For more information, see International Centre for Prison Studies, King's College London, <http://www.kcl.ac.uk/schools/law/research/icps> (last visited Nov. 10, 2008).

43. It is worth noting that the declaration of the War on Prisoners was *not* forced by dramatic increases in crime rates in the mid-1970s or the years thereafter. In fact, crime did not increase dramatically between the 1970s and 1990s, leading one prominent analyst to conclude that it was "very unlikely that the growth in the prison population was a consequence of growing crime rates." Alfred Blumstein, *Prisons: A Policy Challenge*, in CRIME 387, 391 (James Q. Wilson & Joan Petersilia eds., 1995).

tion: Until the War on Prisoners was declared in the early 1970s, the average prisoner in the United States lived in an approximately sixty-square-foot cell—an area slightly larger than the size of a king-sized bed or small bathroom. The cells typically contained a bunk, sink, toilet, often a small shelf or desk, and a locker or open space where the prisoner stored all of his worldly possessions while incarcerated. As a result of the unprecedented mass imprisonment that began to take place in the mid-1970s, however, most prisoners in the United States soon had something else with which to contend inside their cells—at least one other prisoner.⁴⁴

Indeed, in response to overwhelming population pressures, prison systems across the country rapidly began “double-celling”—housing two people inside cells that were barely adequate for one. This occurred despite a clear consensus that the practice was ill-advised. Well into the 1970s, prison officials acknowledged the serious problems that were likely to arise if two prisoners were housed inside a single cell that had been designed to hold only one. Even in jurisdictions that had been forced to double-cell from time to time, prison staff saw it as a temporary, problematic “quick fix” to unexpected overcrowding. For example, in California, a 1979 correctional task force—one that included a number of high ranking prison officials—explained:

According to legislative and departmental policy, the Department of Corrections does not sanction double-celling inmates. This task force agrees with the basic premise that *double-celling violates basic standards of decent housing, health, and institutional security*; however, at present, there is no viable alternative to double-celling inmates as population projections are realized. Thus, while concurring that *double-celling is totally undesirable*, the task force must recommend this, and has attempted to propose gradual population increments and associated staffing to lessen the impact of overpopulation.⁴⁵

44. For a realistic description of conditions inside maximum security prisons at roughly the midpoint of this three-decade transformation of American corrections, see LYNN S. BRANHAM, *THE USE OF INCARCERATION IN THE UNITED STATES* 20–21 (1992). By the mid-1980s, available Bureau of Justice Statistics data indicated that only about one-third of prisoners in the United States were single-celled. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *POPULATION DENSITY IN STATE PRISONS 1* (1986). By the mid-1990s, states such as California were considering laws to codify the widespread double-celling that prison overcrowding had forced them to undertake. Gary Webb, *2-to-a-Cell May Become Prison Policy*, SAN JOSE MERCURY NEWS, Apr. 29, 1994, at 3B.

45. HOUSING INVENTORY & POPULATION IMPACT TASK FORCE, CAL. DEP'T OF CORR., *PRISON OVERCROWDING: A PLAN FOR HOUSING FELONS THROUGH FY 1986/87*, at iv (1979) (emphasis added).

Eventually, however, this “totally undesirable” practice became the national norm. In fact, as the influx of new prisoners continued, even this problematic norm was regularly violated. Prisoners in some jurisdictions were housed with several others in the same cell, and in some states they ended up with no cells at all. Indeed, in the worst places large numbers were forced into crowded dorms or made to live on bunks or mattresses that were situated in converted gymnasiums, dayrooms, or hallway floors in “makeshift” housing that was hastily arranged because there literally was no other space left into which prisoners could be crammed. Even today, in those systems that remain chronically and severely overcrowded—such as California—there are thousands of prisoners who live this way and have for many years.⁴⁶

Moreover, prison overcrowding proceeded with the United States Supreme Court’s implicit blessing, which was given in an important case—*Rhodes v. Chapman*—decided at the outset of the 1980s.⁴⁷ Although the Court addressed a number of prison-related questions in the opinion, the key issue was overcrowding—specifically, the constitutionality of “double-celling” in a prison that had been designed to house one prisoner per cell. In the aftermath of *Chapman*, prison litigators in the early 1980s hoped that its implications could be limited, and that prisoner plaintiffs could still regularly prevail in constitutional challenges to the cruel and unusual aspects of prison life by relying on expert testimony to show that the cumulative effects of overcrowding threatened the “physical, mental, and emotional health

46. See Press Release, Cal. Dep’t of Corr. & Rehab., CDCR Signs Contracts to House Inmates Out-of-State (Oct. 20, 2006), available at http://www.cdcr.ca.gov/News/2006_Press_Releases/press20061020.html. According to CDCR: “With a total of more than 172,000 inmates, overcrowding in California prisons is so severe that CDCR has been forced to house more than 17,000 inmates in areas not designed for living space, including gymnasiums and dayrooms. Nearly 1,500 of those inmates are living in triple bunks.” *Id.*

47. *Rhodes v. Chapman*, 452 U.S. 337 (1981). Many of the nation’s most overcrowded prison systems had already been forced to implement double-celling or worse. Once the Court ruled that the practice was constitutional, however, it not only became more widespread, but was also increasingly regarded as unproblematic. It is worth noting that, although the *Chapman* court refused to prohibit double-celling, none of the Justices expressly suggested that the practice was desirable, and Justice Powell’s majority opinion acknowledged that the court’s holding was “made necessary by the unanticipated increase in prison population.” *Id.* at 348. Indeed, Justice Marshall was entirely correct when he wrote in dissent that “absolutely no one—certainly not the ‘state legislatures’ or ‘prison officials’ to whom the majority suggests . . . that we defer in analyzing constitutional questions—had suggested that forcing long-term inmates to share tiny cells designed to hold only one individual might be a good thing.” *Id.* at 370 (Marshall, J., dissenting). But it did not matter; in short order, double-celling became the rule rather than the exception.

and well-being of the inmates” subjected to it.⁴⁸ Their optimism proved in some ways to be misplaced.

In large part because the Court was unwilling to fully acknowledge and meaningfully address the real consequences of overcrowding, the ensuing population pressures proceeded to dwarf many of the attempts to ensure humane treatment inside many of the nation’s prisons. Well into the 1990s, commentators and correctional officials recognized that “[p]rison overcrowding is clearly the leading problem currently confronting American correctional systems,”⁴⁹ but few people—including many lower courts that presumably oversaw the constitutionality of prevailing conditions of confinement—seemed able to do much about it.⁵⁰

In fact, far from limiting the growth in prison populations in the 1990s, correctional norms and governmental spending priorities shifted to accommodate to the new prison realities.⁵¹ Among other things, officials began to subtly shift their definitions of prison overcrowding. Until this period of unprecedented population growth, cor-

48. Steven Ney, *Prison Overcrowding After Rhodes v. Chapman*, 2 J. PRISON & JAIL HEALTH 4, 12 (1982) (quoting Justice Brennan’s concurring opinion in *Chapman*). As Ney noted at the time *Chapman* was decided, “all of the contemporary standards in the fields of corrections and the allied health professions proscribed double celling and/or called for a minimum of sixty square feet per prisoner.” *Id.* at 10. The decision in the case appeared to turn more on practical realities—the severe overcrowding that was beginning to plague prisons throughout the country—than professional judgment.

49. Michael Vaughn, *Listening to the Experts: A National Study of Correctional Administrators’ Responses to Prison Overcrowding*, 18 CRIM. JUST. REV. 12, 12 (1993).

50. *Chapman* was certainly not the only legal impediment to prison reform efforts aimed at limiting overcrowding and alleviating harsh conditions of confinement. In April 1996, the United States Congress passed the Prison Litigation Reform Act (“PLRA”), which significantly limited the ability of the federal courts to monitor and remedy constitutional violations in detention facilities throughout the country. See Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended at 18 U.S.C. §§ 3624(b), 3626 (2000) and in scattered sections of 28 and 42 U.S.C.). Among other things, the PLRA placed substantive and procedural limits on injunctions and consent decrees designed to improve prison conditions; further limited the appointment of “special masters” to oversee prison systems’ compliance with court orders; and forbade the filing of an action by a prisoner for mental or emotional injury without a prior showing of physical injury. See James Robertson, *The Jurisprudence of the PLRA: Inmates as “Outsiders” and the Countermajoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 187-209 (2001); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly,” Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000).

51. See, e.g., Fox Butterfield, *New Prisons Cast Shadow over Higher Education*, N.Y. TIMES, Apr. 12, 1995, at A21; Hallye Jordan, *‘96 Budget Favors Prison Over Colleges*, SAN JOSE MERCURY NEWS, Jul. 8, 1995, at 1A. As William Chambliss summarized: “For the first time in history, state and municipal governments are spending more money on criminal justice than education.” William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177, 183 (1994).

rectional facilities that were *nearly* filled to capacity were regarded as “overcrowded.” This was in part because of the high levels of idleness that resulted and the fact that officials lacked the flexibility to move or separate prisoners in response to conflict or other unanticipated problems. However, in the face of this massive influx of new prisoners in the 1980s and 1990s, prison administrators were forced to somehow oversee and control facilities that were filled to *well above* their design limits.

In 1979, for example, California prison officials worried about a 96% overall occupancy rate in their correctional system and struggled to manage a total inmate population of just over 18,000.⁵² Twenty years later, the system was operating at nearly 170% of capacity and housed nearly ten times the number of inmates it had in 1980.⁵³ These kinds of previously unheard of levels of overcrowding changed the working definitions of what legislators and prison administrators deemed “tolerable,” despite the fact that no changes had taken place in what prison researchers and experts regarded as the adverse consequences of prison overcrowding.

For example, in the early 1980s, as double-celling was beginning in earnest in California, a trio of state senators attempted to introduce a Senate Constitutional Amendment that legitimized the previously controversial practice of double-celling. It read in part:

This measure, if adopted by the voters, would provide that the practice of double-celling shall not be deemed to be, or constitute, the infliction of cruel and unusual punishment. The measure would also provide that Department of Corrections regulations providing for double-celling are not invalid on the basis that they provide for double-celling of prisoners.⁵⁴

Even more dramatic shifts in thinking—again, driven by the realities of overcrowding rather than sound correctional practice—are reflected in a recent series of California Department of Corrections and Rehabilitation Master Plans. In the 1995–1998 Master Plan, the Department designated as “allowable” dormitory housing units that were 120% of design capacity and celled housing that was 130% of its de-

52. HOUS. INVENTORY & POPULATION IMPACT TASK FORCE, CAL. DEP’T OF CORR., PRISON OVERCROWDING, at iv (1979).

53. JAMES STEPHAN, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at app. tbl.4 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf05.pdf> (showing the California prison system operating at 167% of design capacity in the year 2000).

54. S. Res. 41, 1983 Reg. Sess. (Cal. 1983) (Constitutional Amendment introduced by Senators Boatwright, Davis, and Presley).

sign limits.⁵⁵ By the time the 1998–2003 Master Plan was issued, after the intractability of overcrowding in the California system had become clear, and population excesses had worsened, the Department revised its “allowable” overcrowding tolerance levels to 190% in both dormitory and celled housing.⁵⁶ It is worth noting that even these unheard of levels of “tolerable overcrowding” have often been exceeded in California prisons. Among other things, the War on Prisoners had radically transformed the nature of the terrain on which it was being fought.

III. On the Front Lines: Psychic Scars From the Pains of Imprisonment

Nearly twenty years after the abandonment of the rehabilitative ideal and the implementation of policies of mass incarceration, historian Lawrence Friedman assessed the state of the nation’s prisons this way: “We [now] throw people into prison at an astonishing rate. There has never been anything like it in American history. Penology is overwhelmed by the sheer pressure of bodies.”⁵⁷ Of course, the persons on the front lines—the prisoners who made up “the sheer pressure of bodies”—bore the brunt of these policies and incurred the greatest number of casualties in the hostilities that ensued.

From a psychological perspective, the prison overcrowding is particularly pernicious because it occurs in an already harsh and deprived environment. Most prison experts would agree with Hans Toch and Kenneth Adams that the stressfulness of prison life “cannot be overestimated”⁵⁸—even under the best of circumstances. Under the worst of circumstances, unfortunately, prison can become intolerable and destructive. Good, normal people can be led to do bad, sadistic things under the right—or wrong—conditions, and people who are subjected to extreme forms of imprisonment can be psychologically harmed—sometimes irreparably so—by the experience. Moreover, most prisoners cannot leave the psychic scars of these experiences miraculously behind them upon release, just as most people cannot simply chose to set aside the aftereffects of damaging, traumatic events.

55. See Receiver’s Report Re Overcrowding at 11, *Plata v. Schwarzenegger*. No. C-01-1352 TEH (N.D. Cal. May 15, 2007), available at <http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0037.pdf>.

56. *Id.*

57. LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 316 (1993).

58. HANS TOCH & KENNETH ADAMS, *ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT* 230 (2002).

Prisons are also physically dangerous places in which to live. For example, one study reported six-month inmate-on-inmate physical victimization rates of 21% for both female and male inmates—a rate ten times higher than the overall victimization rate in the community.⁵⁹

Sociologists have used the term “institutionalization” to describe ways in which inmates are shaped and transformed by the institutional environments in which they live.⁶⁰ Sometimes called “prisonization” when it occurs in correctional settings,⁶¹ the process has a number of important psychological components. Although all of these adaptations represent natural and normal responses that prisoners must make to the unnatural and abnormal conditions of prison life, they can take a severe psychological toll.

Prison researcher Edward Zamble has described the “considerable psychological discomfort” that prisoners often feel at the outset of their prison experience and the typically “slow and gradual amelioration” that can follow.⁶² But the degree of discomfort and the extent of

59. Nancy Wolff et al., *Physical Violence Inside Prison: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 588–99 (2007).

60. George Herbert Mead once noted that “a person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct.” GEORGE HERBERT MEAD, SOCIAL PSYCHOLOGY OF GEORGE HERBERT MEAD 239 (Anselm L. Strauss ed., 1956). If this is so, then a prisoner’s personality is shaped by the institutional contingencies to which the prison community requires him to adapt.

61. In his classic formulation, sociologist Donald Clemmer defined “prisonization” as “the taking on in greater or less [sic] degree of the folkways, mores, customs, and general culture of the penitentiary.” DONALD CLEMMER, THE PRISON COMMUNITY 299 (Rinehart & Co. 1958) (1940); see also Peter G. Garabedian, *Social Role and Processes of Socialization in the Prison Community*, 11 SOC. PROBS. 140 (1963); John Gibbs, *The First Cut Is the Deepest: Psychological Breakdown and Survival in the Detention Setting*, in THE PAINS OF IMPRISONMENT 97, 99–101 (Robert Johnson & Hans Toch eds., 1982); Lynne Goodstein, *Inmate Adjustment to Prison and the Transition to Community Life*, 16 J. RES. CRIME & DELINQ. 246 (1979); Robert J. Homant, *Employment of Ex-Offenders: The Role of Prisonization and Self-Esteem*, J. OFFENDER COUNSELING, SERVICES & REHABILITATION, Spring 1984, at 5, 5; J. K. Irwin, *Sociological Studies of the Impact of Long-Term Confinement*, in CONFINEMENT IN MAXIMUM CUSTODY 49 (D. Ward & K. Schoen eds., 1981); Sheldon R. Olson, *Patterns of Infractions and Official Reactions to Institutional Regulations*, 54 SOC. SCI. Q. 815 (1973); Barbara J. Peat & L. Thomas Winfree, Jr., *Reducing the Intra-Institutional Effects of “Prisonization”: A Study of a Therapeutic Community for Drug-Using Inmates*, 19 CRIM. JUST. & BEHAV. 206 (1992); Charles W. Thomas, David M. Peterson & Robin J. Cage, *A Comparative Organizational Analysis of Prisonization*, 6 CRIM. JUST. REV. 36 (1981). Institutionalization is by no means limited to prisoners. See, e.g., ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961) (examining the process as it occurs in mental patients); D. Jansson, *Return to Society: Problematic Features of the Re-Entry Process*, 13 PSYCHIATRIC CARE 136 (1975) (describing similar changes that took place in Peace Corps volunteers who encountered much difficulty reintegrating back into society).

62. Edward Zamble, *Behavior and Adaptation in Longterm Prison Inmates: Descriptive Longitudinal Results*, 19 CRIM. JUST. & BEHAV. 409, 420 (1992).

this amelioration are very much affected by the nature of the environment in which prisoners live and to which they must adjust. The longer the duration, and, especially, the more intensely stressful the conditions, the greater the negative psychological consequences.⁶³

Because it affects virtually every aspect of a prisoner's day-to-day existence, overcrowding greatly amplifies the stressfulness of contemporary prison life. Not surprisingly, a large literature on overcrowding has documented a range of adverse effects that occur when prisons have been filled to near capacity and beyond. As a group of prison researchers concluded in the 1980s, as the scope of the problem was just becoming apparent, "crowding in prisons is a major source of administrative problems and adversely affects inmate health, behavior, and morale."⁶⁴ Two other early commentators concluded their review of the literature in much the same way, namely, that "[w]ith few exceptions, the empirical studies indicate that prison overcrowding has a number of serious negative consequences."⁶⁵

63. For example, Alison Liebling and her colleagues found that the measured levels of distress in the prisons they studied were "extraordinarily high." Alison Liebling et al., *Revisiting Prison Suicide: The Role of Fairness and Distress*, in *THE EFFECTS OF IMPRISONMENT* 209, 216 (Alison Liebling & Shadd Maruna eds., 2005). In fact, in eleven of the twelve facilities the authors studied, the mean distress score recorded among prisoners was above the threshold that ordinarily triggers an inquiry into whether a patient is suffering from a treatable emotional or psychological illness. *Id.* Furthermore, the levels of distress varied in predictable ways, in part as a function of the quality of life in the prison environment (or the prisoners' experience of it). *Id.* Thus, prisons whose "moral performance" was poor, or lowly rated on social climate and other measures, also produced higher levels of distress among prisoners. *Id.* Consistent with Liebling and her colleagues, other researchers have found that context-related factors help to account for emotional distress and even suicide in prison settings. *See, e.g.*, Colin Cooper & Sinead Berwick, *Factors Affecting Psychological Well-Being of Three Groups of Suicide-Prone Prisoners*, 20 *CURRENT PSYCHOL.* 169, 180 (2001). Although Cooper and Berwick reported that there were individual factors and background characteristics that helped to predict suicide in different groups of incarcerated male prisoners, institutional factors, such as the severity of environmental stresses, also played a significant role in determining their levels of anxiety, depression, and suicidality. *Id.* Claudia Kesterman reached similar conclusions in her analysis of the correlates of depressive symptoms among male prisoners in the correctional systems of several Baltic countries, which was presented at the European Conference on Psychology and Law in Vilnius, Lithuania in July 2005. *See* Claudia Kesterman, *Prison Life: Factors Affecting Health and Rehabilitation* (July 1, 2005) (unpublished manuscript, on file with author). Poor relations with staff and other prisoners, the presence of environmental stress factors, the experience of victimization, the lack of respect by staff, and the absence of home and/or work release at the facility were all significant predictors of whether prisoners manifested depression. *Id.*

64. Vernon Cox et al., *Prison Crowding Research*, 39 *AM. PSYCHOL.* 1148, 1159 (1984); *see also* Gerald Gaes, *The Effects of Overcrowding in Prison*, in *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 95 (Michael Tonry & Norval Morris eds., 1985); PAUL PAULUS, *PRISON CROWDING: A PSYCHOLOGICAL PERSPECTIVE* (1988).

65. Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effect*, 35 *HASTINGS L.J.* 313, 351 (1983). Overcrowding

Overcrowding directly affects prisoners' mental and physical health by increasing the level of uncertainty with which they regularly must cope. One useful psychological model of the negative effects of overcrowding emphasizes the way in which being confined in a space that is occupied by too many people increases the sheer number of social interactions persons have that involve "high levels of uncertainty, goal interference, and cognitive load . . ."⁶⁶ Indeed, crowded conditions heighten the level of cognitive strain that persons experience by introducing social complexity, turnover, and interpersonal instability into an already dangerous prison world in which interpersonal mistakes or errors in social judgments can be fatal. Of course, overcrowding also raises collective frustration levels inside prisons by generally decreasing the amount of resources that are available to the prisoners confined there. The sheer number of things prisoners do or accomplish on a day-to-day basis is compromised by the number of people in between them and their goals and destinations.

Despite an occasional study that yields an inconclusive finding,⁶⁷ it is widely understood that crowding can significantly worsen the quality of institutional life and increase the destructive potential of imprisonment. Among other things, we know that prison overcrowding increases negative affect among prisoners,⁶⁸ elevates their blood pressure,⁶⁹ and leads to greater numbers of prisoner illness complaints.⁷⁰ Exposure to "long-term, intense, inescapable crowding" of the sort that characterizes many prison environments results in high

studies at women's prisons showed similar effects. *See, e.g.*, Barry Ruback & Timoth Carr, *Crowding in a Woman's Prison: Attitudinal and Behavioral Effects*, 14 J. APPLIED SOC. PSYCHOL. 57, 59-61 (1984).

66. *See, e.g.*, Vernon Cox et al., *supra* note 64, at 1159. For another brief review of prison overcrowding issues, see Edward Sieh, *Prison Overcrowding: The Case of New Jersey*, 53 FED. PROBATION 41 (1989). For a discussion of the health risks of prison and jail overcrowding, see Bailus Walker & Theodore Gordon, *Health Risks and High Density Confinement in Jails and Prisons*, 44 FED. PROBATION 53 (1980).

67. *See, e.g.*, Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125 (1989).

68. *See, e.g.*, Paul Paulus et al., *Some Effects of Crowding in a Prison Environment*, 5 J. APPLIED SOC. PSYCHOL. 86, 90 (1975) ("The present study indicates that living under relatively crowded housing conditions in a prison produces both negative affect and a lower criterion of what constitutes overcrowding.").

69. *See, e.g.*, David A. D'Atri, *Psychophysiological Responses to Crowding*, 7 ENV'T & BEHAV. 237, 247 (1975) ("[T]he major hypothesis that there would be an association between degree of crowding and blood pressure, systolic and diastolic, was strongly supported.").

70. *See, e.g.*, Garvin McCain et al., *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T & BEHAV. 283, 288 (1976).

levels of stress that “can lead to physical and psychological impairment.”⁷¹

More recently, British researchers found that high levels of perceived crowding in prison were related to increased arousal and stress and decreased psychological well-being.⁷² Moreover, the prisoners in this study who experienced prison conditions as crowded were more likely to interpret the behavior of other prisoners as aggressive and violent. Other researchers found that an individual-level factor—the degree of prior street drug use—interacted with the level of prison crowding to explain in-prison drug use. Specifically, “inmates who reported a history of using drugs on the streets prior to incarceration are especially likely to engage in drug abuse inside crowded prisons.”⁷³ Studies also have shown that “overcrowding is a critical feature of prison environments that dramatically raises the risk of prison suicide.”⁷⁴ More specifically, “the reduced risk of suicide found in much prior research to be evident in minimum security facilities”—presumably because of the lower levels of deprivation there—“is in fact voided by the deleterious effects of high overcrowding.”⁷⁵ Other researchers have found that overcrowding may lead to higher numbers of prison suicides because it decreases the level of “purposeful activity” in which prisoners are able to engage.⁷⁶

The stress of prison overcrowding likely interacts with and amplifies the pre-existing problems that prisoners may bring into the prison setting. For example, we know the risk factors and various forms of trauma that predispose persons to a range of psychological problems (including substance abuse, criminality, and violence), are prevalent in the *pre-prison* lives of incarcerated men and women.⁷⁷ In a related

71. Paul Paulus et al., *Death Rates, Psychiatric Commitments, Blood Pressure, and Perceived Crowding as a Function of Institutional Crowding*, 3 J. NONVERBAL BEHAV. 107, 115 (1978); see also ADRIAN M. OSTFELD ET AL., STRESS, CROWDING, AND BLOOD PRESSURE IN PRISON (1987).

72. Claire Lawrence & Kathryn Andrews, *The Influence of Perceived Prison Crowding on Male Inmates' Perception of Aggressive Events*, 30 AGGRESSIVE BEHAV. 272 (2004).

73. Wayne Gillespie, *A Multilevel Model of Drug Abuse Inside Prison*, 85 PRISON J. 223, 240 (2005).

74. Meredith Huey & Thomas McNulty, *Institutional Conditions and Prison Suicide: Conditional Effects of Deprivation and Overcrowding*, 85 PRISON J. 490, 507 (2005).

75. *Id.*

76. Morven Lease et al., *An Ecological Study of Factors Associated with Rates of Self-Inflicted Death in Prisons in England and Wales*, 29 INT'L J.L. & PSYCHIATRY 355, 359 (2006); see also John Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 CRIM. JUST. & BEHAV. 235 (1999) (documenting the positive mental health effects of program participation).

77. See, e.g., Susan Greene, Craig Haney & Aida Hurtado, *Cycles of Pain: Risk Factors in the Lives of Incarcerated Women and Their Children*, 80 PRISON J. 3 (2000); Dorothy S. McClellan et al., *Early Victimization, Drug Use, and Criminality: A Comparison of Male and Female Pris-*

vein, reviews of the literature on the prevalence of post traumatic stress disorder (“PTSD”) in prisoner populations suggest that it could be as much as ten times higher there than in the general population.⁷⁸ Moreover, there is evidence that pre-prison events—particularly, prior exposure to trauma and to violence—predict victimization in prison. In turn, prison victimization can lead to higher levels of distress in prison and symptoms of post-traumatic stress disorder and depression following release.

The long-term implications of these findings are clear: prison treatment and other programming that takes into account and addresses these risk factors and trauma histories should be made widely available to prisoners.⁷⁹ For example:

The significant effect of preprison trauma on [subsequent] symptoms suggests that trauma before incarceration shapes inmate well-being directly and indirectly. This finding speaks to the importance of dealing with inmates’ problems and classifying them into safe treatment facilities on entry. Rehabilitative efforts should help inmates recover from trauma occurring inside and outside prison.⁸⁰

However, rather than responding appropriately to these new insights into the mental health needs of prisoners, overcrowded prison systems have been forced to react to the press of numbers by *de-emphasizing* the screening, monitoring, and managing of vulnerable or problematic cases. They do so in part because there now are too many of such prisoners to easily keep track of and also because seriously overcrowded prison systems lack the capacity to adequately address their special needs anyway. As a team of clinical researchers conceded in the mid-1990s: “Unfortunately, the prospect of screening inmates for mental disorder and treating those in need of mental health services

oners, 24 CRIM. JUST. & BEHAV. 455 (1997); Janet L. Mullings et al., *Exploring the Relationship Between Alcohol Use, Childhood Maltreatment, and Treatment Needs Among Female Prisoners*, 39 SUBSTANCE USE & MISUSE 277 (2004). Prison researchers have observed that a number of “men in prison have a need to present themselves a ‘super-masculine’ and do not wish to portray themselves as having been vulnerable or potentially remaining so within the prison setting.” Ashley Goff et al., *Does PTSD Occur in Sentenced Prison Populations? A Systematic Literature Review*, 17 CRIM. BEHAV. & MENTAL HEALTH 152, 156 (2007). This, in turn, suggests that an in-prison trauma, such as a sexual assault carried out by another prisoner, might be especially likely to go unreported, yet nonetheless result in post-traumatic stress disorder.

78. See, e.g., Goff et al., *supra* note 77, at 155.

79. See, e.g., Mullings et al., *supra* note 77, at 284 (“Due to the potentially wide-reaching, long-term negative effects of childhood maltreatment, female inmates are in need of prison-based treatment programs that address the myriad problems that may be associated with past maltreatment (i.e., depression), in addition to substance misuse.”).

80. Andy Hochstetler et al., *Damaged Goods: Exploring Predictors of Distress in Prison Inmates*, 50 CRIME & DELINQ. 437, 452 (2004).

has become a daunting and nearly impossible task in the present explosion of prison growth.”⁸¹ Unidentified and untreated mentally ill prisoners in mainline prison populations not only are more likely to deteriorate themselves, but also to have a significant adverse effect on the prisoners with whom they must live and interact. This is just one of the ways in which overcrowding worsens objective prison conditions and then compromises the prison system’s ability to administer to the negative psychological reactions that come about as a result.

In addition to overtaking prison mental health services, overcrowding has drastically increased the levels of idleness that plague prisons around the country. By the start of the 1990s, the Bureau of Justice Statistics reported that nearly 40% of the nation’s prisoners had no prison work assignments at all, and that another 40% were assigned to what were termed “facility support services” that included primarily laundry, kitchen, and building maintenance jobs.⁸² Only 7% were involved in prison industry programs where their job experiences and skill development were likely to be transferable to the free world.⁸³ In addition, many prison systems failed to address even the most basic educational needs of their prisoners during this period of intense overcrowding. Surveys of literacy levels in prisons throughout the United States have documented the magnitude of the problem. For example, one national study concluded that about seven out of ten prisoners were either illiterate or functionally illiterate in 1992.⁸⁴

A decade later, a number of large, overcrowded prison systems were still reporting the same levels of idleness or worse. Even in prison systems where per inmate expenditures were high, overcrowding ensured that there was little to do. In essence, they warehoused large numbers of prisoners for long periods of unproductive time, and made little or no effort to address their pre-existing needs. For exam-

81. Frank DiCataldo et al., *Screening Prison Inmates for Mental Disorder: An Examination of the Relationship Between Mental Disorder and Prison Adjustment*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 573, 574 (1995).

82. KATHLEEN MCGUIRE & ANN PASTORE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1992, at 634 (1993).

83. *Id.* In a related 1991 study, the Bureau of Justice Statistics indicated that two-thirds of state prison inmates had received no vocational training at all while in prison, and nearly a third of them had no work assignments. ALLEN BECK ET AL., U.S. DEP’T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991, at 27 (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sospi91.pdf>. Of those who were assigned to prison jobs, the overwhelming majority worked in janitorial, kitchen, grounds or road maintenance, or laundry jobs that involved the kind of menial labor that is essential to operate the prison itself but that does not provide prisoners with particularly marketable skills upon release. *Id.*

84. KARL C. HAIGLER ET AL., NAT’L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND PRISON WALLS (1994), available at <http://nces.ed.gov/pubs94/94102.pdf>.

ple, a study of the California prisoner population in the mid-1990s found that some 20.8% of inmates read at below the third grade level, and another 30% were only “marginally literate” by accepted educational standards.⁸⁵ But little was done to address the problem. By 2002, the California prison system housed over 150,000 prisoners, some two-thirds of whom had been incarcerated before. Yet, according to the Department of Corrections, those prisoners on average *still* read at no more than a seventh-grade level.⁸⁶

Indeed, prisoners around the country continued to leave prison—and too often return—still lacking not only basic literacy skills but also without any meaningful job training or prison work experience of any kind. In 2002, for example, only a little more than half of all prisoners in California were employed in prison jobs of any kind.⁸⁷ By 2006, the situation had gotten worse rather than better: approximately 50% of California prisoners were released from prison that year without having participated in a single rehabilitation or job training program or having had even one work assignment throughout their entire prison sentence.⁸⁸ In December 2007, a group of corrections experts convened by the governor concluded that “Of the \$43,300 spent per prisoner annually, just \$2,053 (5%) is spent on rehabilitation programs. The correctional culture is now focused mostly on custody concerns rather than rehabilitation. Because of overcrowding, prisoners now sleep in space previously used for teaching, vocational education, and drug treatment programs.”⁸⁹

In addition to compromising post-prison employment opportunities, chronic idleness produces negative psychological and behavioral effects in prison. As far back as the 1980s, when trends toward overcrowding and the lack of prison programming had just begun, the U.S. Government Accounting Office noted: “Corrections officials be-

85. GARY SUTHERLAND, CAL. STATE UNIV. SACRAMENTO, *READING PROFICIENCY OF INMATES IN CALIFORNIA CORRECTIONAL INSTITUTIONS* (1997).

86. See California Department of Corrections and Rehabilitation, <http://www.cdcr.ca.gov> (last visited Nov. 10, 2008).

87. Specifically, only 53.6% of the more than 150,000 California prisoners were employed in any type of work assignment at the end of the year 2002. California Department of Corrections Facts, Second Quarter 2002, <http://web.archive.org/web/20020612144314/www.cdc.state.ca.us/Factsht.htm> (last visited Nov. 10, 2008).

88. EXPERT PANEL ON ADULT OFFENDER REENTRY & RECIDIVISM REDUCTION PROGRAMS, CAL. DEP'T OF CORR. & REHAB, *A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 7* (2007), available at <http://www.cdcr.ca.gov/news/ExpertPanel.html> [hereinafter EXPERT PANEL REPORT].

89. JOAN PETERSILIA ET AL., *MEETING THE CHALLENGES OF REHABILITATION IN CALIFORNIA'S PRISON AND PAROLE SYSTEM 10* (2007), available at <http://ucicorrections.seweb.uci.edu/files/Rehabilitation%20Strike%20Team%20Report.pdf>.

lieve that extensive inmate idleness can lead to destructive behavior and increase violence within institutions. Moreover, idleness does little to prepare inmates for reentry into society.”⁹⁰ But this warning was largely ignored as the trends toward higher rates of incarceration intensified and the decreased commitment to rehabilitation continued over the next several decades.⁹¹

Idleness-related frustration also can increase the probability of interpersonal conflicts and assaults in prison. Overcrowding simultaneously reduces the opportunities for staff to effectively monitor prisoner behavior and drastically limits the options to reduce animosities between prisoners by separating them or sending them to different facilities. Thus, there is less for prisoners to do, fewer outlets to release the resulting tension, a decreased staff capacity to identify prisoner problems, and fewer options to solve the problems they do identify. The increased threat of victimization often results. For example, one prison researcher has noted that “[i]n less well-regulated institutions in which prisoners have little recourse to protection or in which there may be collusion between dominant prisoners and staff to maintain the peace, sexual violence tends to be greater.”⁹² Other commentators have noted that overcrowded conditions in which prisoners have much idle time contributed to a higher level of prison rapes.⁹³

Not surprisingly, overcrowding also has often been associated with higher rates of disciplinary infractions. For example, one study concluded that in prisons “where crowded conditions are chronic

90. WILLIAM J. ANDERSON, U.S. GOV'T ACCOUNTABILITY OFFICE, *IMPROVED PRISON WORK PROGRAMS WILL BENEFIT CORRECTIONAL INSTITUTIONS AND INMATES 2* (1982). Other commentators agreed, noting that “[l]ess than 20 percent of the national prison population works,” and one expressed concern that most inmates just “sit around, becoming bored, restless and, sometimes, violent.” Gordon Mehler, *Prisoners Need Jobs, and We Can't Afford to Let Them Sit Idle*, DAILY J. (Los Angeles), July, 23 1984, at 12. Mehler argued that the best way to keep the costs of incarceration low and the potential for rehabilitation high is to “give inmates a job.” *Id.* at 12. For a recent overview of the importance of work to psychological health in general, see David Bluestein, *The Role of Work in Psychological Health and Well-Being: A Conceptual, Historical, and Public Policy Perspective*, 63 AM. PSYCHOL. 228 (2008).

91. For example, one study found that the overall percentage of prisoners who participated in vocational training or educational programs by the time of their release from prison actually decreased between 1991 and 1997: from 31% to 27% for vocational training, and from 43% to 35% for educational programs. JAMES LYNCH & WILLIAM SABOL, URBAN INST., *PRISONER REENTRY IN PERSPECTIVE 11* (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.PDF.

92. Michael B. King, *Behind Locked Doors: Sexual Assault of Men in Custodial Environments*, in MALE VICTIMS OF SEXUAL ASSAULT 79 (Gillian C. Mezey & Michael B. King eds., 1992).

93. Phil Gunby, *Sexual Behavior in an Abnormal Situation*, in 245 J. AM. MED. ASS'N 215 (1981).

rather than temporary and where people prone to antisocial behavior are gathered together, there is a clear association between restrictions on personal space and the occurrence of disciplinary violations.”⁹⁴ Overcrowding appears to have especially adverse effects on the institutional behavior of younger inmates. Thus, one study of the Texas prison system found that: “The greater the proportion of young prisoners housed in the institution, the greater the infraction and assault rates. There is some evidence for an interaction effect between age and prison size. Younger inmates may be more susceptible to the problems and control structures in large prisons than older inmates.”⁹⁵ Another study obtained similar results, with overall correlations that revealed “a significant association between density and total assaults and assaults on inmates” such that the greater the density the more frequent the assaults.⁹⁶ The relationship between crowding and violence also was “strongest in the institutions housing young offenders.”⁹⁷

Age-related crowding effects can be explained in part by the fact that younger prisoners tend to be more volatile, sensitive to their surroundings and generally more likely to react aggressively to the tensions and conflicts that crowded conditions of confinement generate. However, prison officials and staff members typically respond to these crowding-related infractions by punishing prisoners, often by placing them in disciplinary segregation units. The heightened reactivity of younger prisoners to the context of crowded living conditions means that greater numbers of them will be exposed to even harsher conditions in the segregated or isolated housing units where they will be confined.

A number of adverse and presumably unintended long-term consequences are likely to follow from this scenario. Prison officials typically use an inmate’s disciplinary segregation status to bar him from participation in educational or vocational programming. Moreover, time spent in segregation simultaneously places prisoners at risk for

94. Edwin I. Megargee, *The Association of Population Density, Reduced Space, and Uncomfortable Temperature with Misconduct in a Prison Community*, 5 AM. J. COMMUNITY PSYCHOL. 289, 295 (1977).

95. Sheldon Ekland-Olson et al., *Prison Overcrowding and Disciplinary Problems: An Analysis of the Texas Prison System*, 19 J. APPLIED BEHAV. SCI. 163, 174 (1983); see also Gerald Gaes & William McGuire, *Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates*, 22 J. RES. CRIME & DELINQ. 41 (1985).

96. Peter L. Nacci et al., *Population Density and Inmate Misconduct Rates in the Federal Prison System*, 41 FED. PROBATION 26, 29 (1977).

97. *Id.*

developing a host of adverse psychological reactions that are associated with long-term isolation.⁹⁸ The lack of even minimal forms of programming and exposure to potentially disabling solitary confinement jeopardizes subsequent adjustment in the mainline prison population as well as in the free world.

And, if and when these prisoners are released and, later, are returned to prison, they may find that their prior disciplinary status leads readily (even automatically) to their subsequent classification as a present security risk, making them prime candidates for assignment to a segregation unit once again. It is not difficult to foresee the long-term consequences of these extended tours in isolated confinement—a subset of prisoners who may be so permanently disabled by years in segregation that they cannot effectively reintegrate or find gainful employment in the intensely social world outside prison.⁹⁹ Thus, the way officials respond to a structurally caused behavioral problem that they may be powerless to control—by punishing crowding-related disciplinary infractions—can jeopardize the long-term well being of prisoners in ways that may indirectly increase crime.

In summary, many prisoners who were incarcerated during the height of the War on Prisoners found themselves inside tense, dangerous environments. Prison systems that were overwhelmed with the influx of new inmates were unable to deliver even minimally adequate services and afforded prisoners few if any opportunities to participate in basic programming or meaningful activity. As a result, time spent at the front line in the War on Prisoners meant serving long sentences under conditions of chronic idleness, and enduring years of empty, painful imprisonment. In addition to the way that the lack of prison programming compromised employment opportunities for prisoners

98. See, e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49 (1986); Craig Haney, *Infamous Punishment: The Psychological Effects of Isolation*, NAT'L PRISON PROJECT J., 1993, at 3; Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

99. This scenario is likely to be applied differentially along racial and ethnic lines. The tension and conflict that overcrowding brings about may be manifested through intergroup hostilities and related gang violence. In addition, the assignment of prisoners to supermax prisons exclusively on the basis of their alleged racial and ethnic gang affiliations also contributes to their overrepresentation there. Scott Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115 (1995).

once they were released, some of them returned home frustrated and resentful over their poor treatment at the hands of prison authorities.

IV. Coming Home: The Aftermath of War on Veterans, Families, and Communities

The deepest psychic scars incurred in wartime often become apparent only in the aftermath of battle, when combatants return home and attempt to reconnect with the families and communities they left behind.¹⁰⁰ The War on Prisoners is no exception. Ex-convicts returning from the front lines represent some of the War's hidden casualties, along with the families and communities that also suffered in their absence.

Evidence that high levels of distress and trauma experienced in prison battlegrounds can translate into lasting problems for ex-convicts comes from a variety of sources. For example, when Adrian Grounds and Ruth Jamieson conducted psychiatric assessments of a group on long-term prisoners who had been subsequently released, they found that the most serious psychological problems many prisoners faced were only manifested *after* they reentered free society.¹⁰¹ Indeed, they uncovered a pattern of disabling symptoms and severe psychological problems that paralleled findings from the trauma literature in psychology and psychiatry. Grounds and Jamieson concluded that the "psychological consequences of imprisonment for these men and their families were complex and profound."¹⁰²

100. Along with other adjustment problems that returning veterans often face, post-traumatic stress disorder is also manifested after wartime traumas have occurred, especially when soldiers try to reenter civilian life. See Herbert Hendin & Ann Pollinger Haas, *Wounds of War: The Aftermath of Combat in Vietnam*, in *LIVING WITH TERROR, WORKING WITH TRAUMA* 55 (Danielle Knafo ed., 2004); Derrick Silove, Zachary Steel xx, M. Hammett, Cheryl Roberts, & Adrian Bauman, *Mass Psychological Trauma and PTSD: Epidemic or Cultural Illusion?*, in *CROSS CULTURAL ASSESSMENT OF PSYCHOLOGICAL TRAUMA AND PTSD* 319 (John P. Wilson & Catherine So-kum Tang eds., 2007); EDWARD TICK, *WAR AND THE SOUL: HEALING OUR VETERANS FROM POST-TRAUMATIC STRESS DISORDER* (2005); Darrell Wheeler & Martha Bragin, *Bringing All Back Home: Social Work and the Challenge of Returning Veterans*, 32 *HEALTH & SOC. WORK* 297 (2007). In addition, sociologists Dane Archer and Rosemary Gartner have shown that there are broader ramifications for societies that have large numbers of citizens returning to non-military life in the aftermath of a war, including elevated rates of crime and violence. See generally DANE ARCHER & ROSEMARY GARTNER, *VIOLENCE AND CRIME IN CROSS-NATIONAL PERSPECTIVE* (1987).

101. Adrian Grounds & Ruth Jamieson, *No Sense of an Ending: Researching the Experience of Imprisonment and Release Among Republican Ex-Prisoners*, 7 *THEORETICAL CRIMINOLOGY* 347 (2003).

102. *Id.* at 358. Grounds conducted an additional study of persons who had been exonerated and subsequently released. See Adrian Grounds, *Understanding the Effects of Wrongful Imprisonment*, in 32 *CRIME & JUSTICE* 1 (2005). He found many of the same psychiatric

There appear to be medical consequences as well. One study analyzed the ways in which the experience of imprisonment increased the post-prison health risks for prisoners, representing “yet further barriers to the successful reintegration of ex-offenders.”¹⁰³ Among other things, “[e]ven short prison sentences may provide ample exposure to infectious disease,” the negative “medical consequences of contact with the penal system” are significant.¹⁰⁴ Yet unprecedented numbers of prisoners have been subjected to these risks over the last several decades, without remotely corresponding increases in the quality or amount of health care they are afforded during, and especially, after incarceration.

Some of the enormous medical and psychological challenges that ex-convicts face in the transition from prison to free society are reflected in their dramatically elevated mortality rates. One study reported that within two years of their release, former prison inmates suffered mortality rates that were three and a half times that of the general population.¹⁰⁵ In fact, within the first two weeks immediately following their release, their mortality rates were over twelve times the rate in the population at large. Drug overdose, cardiovascular disease, homicide, and suicide were the leading causes of death.

In addition, the overcrowded conditions and lack of commitment to rehabilitation that characterized the last several decades in American corrections have increased the obstacles that ex-convicts must overcome following incarceration. Sociologist John Irwin summarized the state of mind of many long-term prisoners preparing to leave the medium-security California prison that he studied:

For long-termers, the new situation of doing time, enduring years of suspension, being deprived of material conditions, living in

problems and difficulties reintegrating into society occurred, concluding that the “extent of the suffering was profound.” *Id.* at 15. Grounds found “evidence of personality change and adjustment difficulties in this group similar to those described in clinical studies of others who have experienced chronic psychological trauma.” *Id.* This includes “marked features of estrangement, loss of capacity for intimacy, moodiness, inability to settle, loss of a sense of purpose and direction, [] a pervasive attitude of mistrust toward the world,” being “withdrawn, unable to relate to the world,” manifesting the diagnostic criteria for post-traumatic stress disorder, suffering depressive disorders, and encountering a whole range of serious problems with family contact, social adjustment, and employment. *Id.* at 21–41.

103. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 *LAW & SOC’Y REV.* 275, 295 (2008).

104. *Id.* at 296.

105. Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 *NEW ENG. J. MED.* 157 (2007); see also Theodore M. Hammett, Cheryl Roberts & Sofia Kennedy, *Health-Related Issues in Prisoner Reentry*, 47 *CRIME & DELINQ.* 390 (2001).

crowded conditions without privacy, with reduced options, arbitrary control, disrespect, and economic exploitation is excruciatingly frustrating and aggravating. Anger, frustration, and a burning sense of injustice, coupled with the crippling processing inherent in imprisonment, significantly reduce the likelihood [that prisoners can] pursue a viable, relatively conventional, non-criminal life after release.¹⁰⁶

Not surprisingly, a number of studies done in the course of the War on Prisoners have associated overcrowded prison conditions with increased recidivism. For example, at the start of the 1980s, David Farrington and his colleagues found a strong relationship between overcrowding and prison ineffectiveness in England—prisoners released from overcrowded prisons were more likely to be recommitted for subsequent criminal infractions.¹⁰⁷ The relationship could not be explained away by other variables, leading Farrington to recommend a reduction in prison overcrowding in order to improve the ability of prisons to reduce crime. By sending fewer people to prison, or by reducing the effective lengths of prison sentences, he argued, the effectiveness of prison might be enhanced.

Similarly, several years after Farrington's English study, Canadian researchers concluded that placing low-risk offenders in often overcrowded high-security facilities resulted in high rates of reincarceration.¹⁰⁸ The rates were significantly higher than those of comparable low-risk offenders who had been placed in halfway houses. The researchers concluded that the failure to properly divert low-risk offenders from high- to low-security facilities—something that overcrowded prison systems often lack the capacity to do—"may actually increase the risk of future recidivism."¹⁰⁹

Of course, many factors can affect the rates at which persons are returned to prison, and increased recidivism during times of prison overcrowding may have a number of possible causes. Yet, the data from certain jurisdictions in the United States where prison overcrowding continues to represent an especially serious problem are

106. JOHN IRWIN, *THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS* 168 (2005); see also JOAN PETERSILA, *WHEN PRISONERS COME HOME* 53 (2003) (observing that present-day veterans of the War on Prisoners will not only come home having served longer prison sentences than in the past, but also are "more disconnected from family and friends, have a higher prevalence of substance abuse and mental illness, and [are] less educated and less employable than those in prior prison release cohorts").

107. David Farrington & Christopher Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 230 (1980).

108. James Bonta & Laurence L. Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 311-12 (1987).

109. *Id.* at 312.

suggestive. For example, in 1977, when California prisons operated at more or less the capacity for which they were designed, the one-year recidivism rate (excluding parole violators who were being re-released) was about 20%, and the rate after two years was about 25%. By the late 1980s, however, after the War on Prisoners had begun in earnest, the state's prison population skyrocketed, its prisons began operating at well over capacity, and the Department of Corrections had long since abandoned any commitment to rehabilitation. Correspondingly, the two-year recidivism rate in California had jumped to well over 60%—a more than a twofold increase. By 2004, as the prison population began to stabilize, many California prisons were still operating at nearly 200% of capacity. The state's one-year recidivism rate stood at about 40% and the two-year rate was over 50%—both figures that were roughly double the comparable rates when the system had operated “only” at capacity.¹¹⁰

More generally, Paul Gendreau and his colleagues have conducted a comprehensive meta-analytic study of the relationship between incarceration, length of confinement, and recidivism.¹¹¹ They concluded that doing time in prison actually had a “criminogenic”—crime-producing—effect. In fact, not only did going to prison increase the chances of re-offending but also, the more time served, the more likely subsequent offending became. Although the overall effects were modest in size, Gendreau and his colleagues concluded that “the enormous costs accruing from the excessive use of prison may not be defensible.”¹¹² Indeed, they noted that the long-term cost—in terms of increased amounts of crime produced by more people going to prison for longer amounts of time—was particularly problematic “given the high incarceration rates currently in vogue in North America.”¹¹³

110. EXPERT PANEL REPORT, *supra* note 88, at 3.

111. Paula Smith et al., *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (2004) (unpublished report, on file with author).

112. *Id.* at 20.

113. *Id.* Other research suggests that in addition to the length of imprisonment, the harshness of the conditions of confinement may have an adverse impact on the amount and nature of recidivism. See Keith Chen & Jesse Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, *LAW & ECON. REV.*, 2007, at 1. Specifically, Chen and Shapiro concluded that incarceration under harsh conditions of confinement may increase the likelihood that persons will engage in criminal behavior following their release from prison, and that these effects “appear large enough to outweigh deterrence and drive a net increase in crime should prison conditions worsen.” *Id.* at 23. They also concluded that the size of this effect may be stronger “for inmates housed for a longer period.” *Id.* at 21.

Imprisonment may elevate recidivism rates in a number of ways, only some of which are related to the psychological effects of incarceration.¹¹⁴ For example, in addition to the direct negative effects of imprisonment on prisoners themselves, there is much evidence that prison adversely affects subsequent employment opportunities. Incarceration removes prisoners from the job market for long periods of time during which they obtain few if any marketable skills. Not surprisingly, then, ex-convicts have higher rates of unemployment and earn lower wages when they do find jobs.¹¹⁵ In addition, the stigma that employers attach to the fact that a job applicant has done prison time contributes to these negative employment effects. In fact, economists have characterized imprisonment as “an illegitimate timeout that confers enduring stigma.”¹¹⁶ As they point out, this stigma deters many employers from considering ex-convicts for even low wage jobs, and a prison record is a formal legal barrier to work in certain skilled and licensed occupations.

Of course, unprecedented numbers of persons were returned to free society over the last several decades. As veterans of the War on Prisoners, they confronted significant obstacles blocking the path to becoming self sustaining and gainfully employed. In addition to their compromised status in the labor market, many ex-convicts were also handicapped by a host of official, legally enforced barriers that include things like exclusion from aid programs and public housing.¹¹⁷ In a number of jurisdictions in the United States, ex-convicts continued to suffer a form of “civil death” in the form of felon disenfranchisement that distanced them from the political life of the communities in which they lived.¹¹⁸

114. See Haney, *supra* note 38; see also Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33 (Jeremy Travis & Michelle Waul eds., 2003), available at <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf> (reviewing some of the psychological effects in detail) [hereinafter Haney, *The Psychological Impact of Incarceration*].

115. For more discussion, see Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 J. RES. CRIME & DELINQ. 410 (2001).

116. Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 155 (2004).

117. See generally MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2008); ANTHONY THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES* (2008).

118. See, e.g., ELIZABETH HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* (2006); JEFFREY MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); Alec Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchise-*

Policies of mass imprisonment that placed unprecedented numbers of persons in prison also eventually placed unprecedented numbers of them on parole. As a result, parole agencies that once sought to facilitate the reintegration of ex-convicts back into free society and monitor their post-prison adjustment underwent a significant transformation.¹¹⁹ For example, in California in the 1970s—before a policy of mass imprisonment was implemented in the state—parole agents were expected to supervise an average caseload of approximately forty-five parolees. By the late 1990s, that figure had increased to an average of eighty parolees per agent.¹²⁰ Not surprisingly, the state's parole authority concluded that this increased caseload had “significantly diminished the quality of parole supervision, as evidenced by the reduced number of monthly contacts between agents and parolees.”¹²¹

Yet the reduction in the amount and quality of parole supervision and assistance occurred at precisely the time when many ex-convicts needed it most. Thus, a group of correctional experts convened in California to advise the governor on how best to address the state's correctional crisis was blunt about the challenges that returning veterans from the War on Prisoners faced. Citing the results of an earlier study, the panel noted that:

[F]ully 50% of all exiting CA prisoners did not participate in any rehabilitation or work program, nor did they have a work assignment, during their entire prison term. They didn't get the help they needed on parole either: the [study] reported that 56% of parolees didn't participate in any formal (i.e., non-volunteer) program while under parole supervision. Bottom line: most prisoners and parolees leave [the California prison system] with their literacy, substance abuse, and employment needs unmet. In other words, they are unprepared for success.¹²²

Acknowledging the consequences of the chronic failure to adequately prepare prisoners for release and to properly assist parolees once they

ment Law in the United States, 5 WIS. L. REV. 1045 (2002); Michael Gottlieb, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002).

119. The changes brought about in the system of parole were broad and deep. In large part, they occurred in response to the extraordinary increases in the number of parolees that the system had to process, in an environment where rehabilitation was no longer a mandated goal. See also JONATHAN SIMON, *POOR DISCIPLINE: THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* (1993).

120. LEGISLATIVE ANALYST'S OFFICE, *REFORMING CALIFORNIA'S ADULT PAROLE SYSTEM* 6 (1999), available at http://www.lao.ca.gov/analysis_1998/crim_justice_crosscutting_an198.html#_1_1.

121. *Id.*

122. Petersilia, *supra* note 89, at 76.

had left prison, the panel noted that “[t]wo-thirds of all California parolees . . . will be back in prison within three years, twice the national average.¹²³

Because “the concentration of incarceration affects the community capacity of those who are left behind,”¹²⁴ the War on Prisoners also has created a myriad of hardships for families, neighborhoods, and communities. Indeed, it has disrupted social relationships and networks in ways that, in turn, have increased family and neighborhood instability and undermined community norms. Among other things, marriage rates decline during the years men are incarcerated and the risk of divorce significantly increases.¹²⁵ Family members and others who were economically dependent on persons who were sent to prison are placed in financial jeopardy and many are forced to rely on already scarce governmental resources and social services.

Moreover, half of state and federal prisoners have a child under the age of eighteen.¹²⁶ Of course, the absence of prisoner-parents from the day-to-day lives of their children will have adverse, long-term consequences for many of them. Indeed, when prison harms prisoners, it is likely to hurt their children. Thus, the War on Prisoners has adversely affected many hundreds of thousands of children by forcing them to cope with absent, disrupted, or strained parental relations during their parent’s incarceration and even in its aftermath. And, when families struggle under these kinds of additional psychological, social, and economic stressors, children are put at increased risk of being placed in foster care or juvenile justice institutions.¹²⁷

123. *Id.*

124. Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 181, 182 (Marc Mauer & Meda Chesney-Lind eds., 2002); *see also* TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

125. For a discussion of some of the adverse effects of incarceration on marriage, *see* Leonard Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 *J. MARRIAGE & FAM.* 721 (2005).

126. CHRISTOPHER MUMOLA, U.S. DEP’T OF JUSTICE, *INCARCERATED PARENTS AND THEIR CHILDREN* (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (reporting that 55% of state prisoners and 63% of federal prisoners have children under the age of eighteen).

127. There is a large literature on the effect that parental imprisonment has on children. *See, e.g.*, *CHILDREN OF INCARCERATED PARENTS* (Katherine Gabel & Denise Johnston eds., 1995); *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY* (Othello Harris & R. Robin Miller eds., 2003); Kate Philbrick, *Imprisonment: The Impact on Children*, *ISSUES IN FORENSIC PSYCHOL.*, (2002), at 72; Haney, *The Psychological Impact of Incarceration*, *supra* note 114; REBECCA YAFFE & LONNIE HOADE, *WHEN A PARENT GOES TO JAIL: A COMPREHENSIVE GUIDE TO COUNSELING CHILDREN OF INCARCERATED PARENTS* (2000).

The War on Prisoners has drained state and local budgets as governments struggle to maintain the massive correctional systems that were built to wage it.¹²⁸ The opportunity costs incurred in this protracted struggle are becoming more obvious, as the capacity to provide other badly needed governmental services such as higher education—including programs that are likely to produce more long-term crime control benefits—is increasingly compromised.¹²⁹

The increased pains of imprisonment and their disabling psychological, social, and economic effects have consigned many citizens to the legal margins of our society. In addition, the sheer scale of incarceration has spread disorganization and disadvantage in many communities where a predominate number of those citizens live. Moreover, the nation's single-minded devotion to harsh punishment during the War on Prisoners has fostered a corresponding callousness within many governmental agencies toward the War's returning veterans. The compounding of these factors and trends has changed the atmosphere and way of life in some communities. As criminologist Todd Clear observed, ironically, at a certain high level of incarceration, the mounting, concentrated negative effects on the larger community reach a "tipping point" at which "the most basic underpinnings of informal social control are damaged . . . reproduc[ing] the very dynamics that sustain crime."¹³⁰

It is important to note in this context that the extraordinary increases in the rate of incarceration that occurred in the United States

128. A recent editorial provided some perspective on just one aspect of this problem in California: "If you think a \$15 billion state budget deficit is going to hurt, imagine what social services in California are going to look like if our leadership's thumb-twiddling on the prison health care crisis causes it to hit \$22 billion. Unless Gov. Arnold Schwarzenegger and the Legislature come up with \$7 billion . . . for our broken prison health care system, that's what's going to happen." Editorial, *Jailed by a Prison Crisis*, S.F. CHRON., June 25, 2008, at B10; see also HEATHER AHN-REDDING, *THE "MILLION DOLLAR INMATE": THE FINANCIAL AND SOCIAL BURDEN OF NONVIOLENT OFFENDERS* (2007) (assessing the broad costs of the War on Prisoners).

129. This problem is particularly acute in California, where corrections and higher education compete directly for state budgetary funds. The state's expensive prison system is plagued by unprecedented levels of overcrowding that have reduced medical and mental health care to below constitutional minima, problems that will require even greater fiscal outlays to solve. See, e.g., James Sterngold, *Prisons' Budget to Trump Colleges*, S.F. CHRON., May 21, 2007, at A1, A8, noting that "California has all but guaranteed that prisons will eat up an increasingly large share of taxpayer money because of chronic failures in a system the state is now planning to expand . . . [A]ll money that will not be available for higher education or other state priorities . . ." *Id.* at A1; see also *id.* at A1, A8 (quoting criminal justice experts to the effect that "[t]he shame of it is that California could have improved crime rates and [had] a better funded higher education system if they ran things better").

130. Todd R. Clear, *supra* note 124, at 193.

over the last three decades were not distributed evenly across all racial and ethnic groups. Like most wars, this one took many of its casualties from those segments of the population that could least afford to absorb the losses. For example, by 2006, African American men in the United States were being imprisoned at an astonishing rate of 3042 per 100,000, more than six times the rate of white men.¹³¹ African American children now are nine times more likely than whites to have at least one parent in prison.¹³² These facts have added a geographical as well as racial dimension to the War on Prisoners and its aftermath. As Dorothy Roberts put it, “Because poor black men and women tend to live in racially and economically segregated neighborhoods, these neighborhoods feel the brunt of the staggering prison figures.”¹³³ Indeed, because the concentration of the harmful effects of incarceration has been so pronounced in black communities, it will have long-term—perhaps generational—consequences. Thus, Roberts argued: “Mass incarceration is the most effective institution for inscribing [racial] barriers in contemporary community life and transferring racial disadvantage to the next generation.”¹³⁴

There is another potentially important but often overlooked racial dimension to the War on Prisoners and the policies of mass imprisonment that it has entailed. The incarceration of so many people over the last several decades ensured that unprecedented numbers of persons from all parts of the country were exposed to the pervasive and pernicious racism that exists inside many of our nation’s prisons. Although not everyone succumbs to the virulent racism that plagues these facilities, many persons who live and work in prison are directly touched by it. Indeed, there is probably no other place in our society where racial tensions run so deep and racial conflicts erupt so often and with such dire and potentially deadly consequences as prison.

131. WILLIAM SABOL, HEATHER COUTURE, & PAIGE HARRISON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2006, at 8 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf>; see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 384 (2002) (stating that racial disproportions in drug-related rates of imprisonment led many legal commentators to suggest that the War on Drugs was largely a war on African Americans).

132. Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665, 672 (2003); see also Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275–76 (2004). Roberts noted that “[t]he criminal justice system works with the child welfare system to take custody of an inordinate number of black children, especially in neighborhoods where both systems are concentrated.” *Id.* at 1285.

133. Roberts, *supra* note 132, at 1275–76.

134. *Id.* at 1300.

Numerous factors contribute to the high levels of racial tension behind bars. To be sure, some prisoners and staff members bring racist beliefs with them to prison (which, in the case of some prisoners, may have been originated in their earlier experiences in racially charged juvenile justice institutions). But there are powerful forces at work in the immediate context of adult prison as well. Incarceration forces persons of different races and ethnicities into closer, more intimate daily contact than is typical in the free world. Those who harbor dormant or suppressed racist feelings and beliefs may resist or resent this forced closeness, and previously hidden or implicit racial animosities may come to the fore. In addition, racial characteristics act as convenient “markers” in the dangerous environment of prison, allowing people to categorize one another quickly, on the basis of minimal information. Overt characteristics substitute for real knowledge about others and—no matter how imperfectly—they allow prisoners to infer commonalities and shared values, whether they are present or not. The pervasive scarcities and assaults on individual self-esteem that characterize prison life also provide fertile ground for the development of group-based competition and hostilities. Racial pride and solidarity are especially important in environments where there may be little else on which to rely for a sense of self and connectedness to others.

Moreover, there are few if any other places in our society where public officials regularly and explicitly use racial classifications in their decision-making. For example, by overtly keeping close track of the racial makeup of housing units, or designating some exercise yards as accessible to prisoners of only certain racial groups, officials explicitly introduce race into their record keeping. Many prisons routinely list race or ethnicity on inmate rosters, in some places they even color code inmate identities according to their racial or ethnic group, and prison staff members often use racialized language in their everyday workplace communications. Thus, practices that are routinely implemented inside prisons afford institutional legitimacy to racial divisions and give credence to the notion that racial animosities cannot be overcome other than by segregating or separating different racial and ethnic groups. Unfortunately, few prison systems proactively pursue strategies of racial integration and cooperation that are designed to acknowledge and overcome the racial tension and conflict that exist there. Prison officials generally do very little to break down the institutionally sanctioned racial barriers that exist inside many correctional

facilities; to the contrary, they are often responsible for having created and maintained them.¹³⁵

As a result, many prisons have become cauldrons of racial hatred where prisoners learn to stereotype, and where the stereotypes have powerful institutional backing. Because hundreds of thousands of ex-convicts are released back into the free world each year,¹³⁶ having spent years housed in the racially toxic and often hate-filled environment of prison, prison racism may now be exacerbating racism in the larger society. Indeed, the fact that some two million people are locked for long periods of time inside these racialized and often racist places at any given time, and that large numbers of prisoners regularly cycle out of the prison system and onto the streets, suggests that the War on Prisoners may have contributed directly to the apparent increase of racialized gang-related violence outside prison. These, too, are potential “prison effects”—long-term, societal-level changes brought about by a War on Prisoners that has gone on too long and created far too many direct and collateral casualties.

V. Lasting “Mentalities of War”: The Emerging Carceral Consciousness

When nations remain at war for extended periods of time their citizens often become accustomed to the norms of battle. Wartime attitudes and routines can begin to seem commonplace and—depending on how long the conflict lasts—generations may grow up viewing them as part of the natural order of things.¹³⁷ Hostility toward

135. See Hans Toch & James R. Acker, *Racial Segregation as a Prison Initiation Experience*, CRIM. L. BULL., 2004, at 2 (providing thoughtful approaches to reducing and reforming those prison policies that permit or tacitly encourage segregation).

136. For example, according to the Bureau of Justice Statistics, by the end of the 1990s well over 500,000 people per year were being released into the community after serving state prison terms. TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990–2000, at 4 tbl.3 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf>.

137. Some historians have argued that the “mentalities of war”—mindsets that are forged in wartime conditions, filtered through unique national histories, structures, and ambitions—can shape national identities in ways that may persist for generations. See, e.g., Ulf Hedetoft, *National Identity and Mentalities of War*, 30 J. PEACE RES. 281, 296 (1993). Others have argued that the persistence of bellicose beliefs and attitudes varies as a function of closeness to the military. See, e.g., Nancy Phillips, *Militarism and Grass-Roots Involvement in the Military-Industrial Complex*, 17 CARDOZO J. CONFLICT RESOL. 625 (1973). In addition, there is a large body of literature on the difficulties of peace building and democracy promotion in post-civil war societies, in part because of the persistence of war-related animosities and mindsets. See, e.g., RONALD PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICTS (2004); Page Fortna, *Does Peacekeeping Keep Peace? International Intervention*

“the enemy” tends to become ingrained habit, along with other ways of thinking and acting that are difficult to relinquish in the war’s aftermath. Prolonged wars can change the manner in which societies function, affect how people think about themselves in relation to derogated enemy-others, and what they come to regard as their wartime civic duties.

The decades-long War on Prisoners has produced many of these effects. Citizens have learned to view prisoners as domestic enemies with whom the nation is fiercely embattled. They have come to expect that politicians will (and should) respond to crime with increased punishment. Elected officials are rarely if ever encouraged to consider (or rewarded at the ballot box for implementing) alternative approaches. Indeed, with each passing year, from the mid-1970s on, the political climate has become increasingly bellicose and punishment oriented. Lawmakers are still far more focused on delivering prison pain than on proposing crime control policies that target the social and economic causes of crime—policies that were under active discussion just before the War on Prisoners was declared, but rarely since.¹³⁸

and the Duration of Peace After Civil War, 48 INT’L STUD. Q. 269 (2004); Courtney Jung, Ellen Lust-Oklar & Ian Shapiro, *Problems and Prospects for Democratic Settlements: South Africa as a Model for the Middle East and Northern Ireland?*, 33 POL. & SOC’Y 277 (2005). Some researchers have even suggested that the remnants of Civil War animosities help to explain the buying habits of contemporary Americans. See Terence Shimp et al., *Remnants of the U.S. Civil War on Modern Consumer Behavior*, PSYCHOL. & MARKETING, 2003, at 75.

138. In addition to the President’s Commission on Law Enforcement and Administration of Justice that I discussed earlier in this Article, see *supra* note 21 and accompanying text, there were two other presidential commissions assembled in the late 1960s that also addressed a wide range of crime-related issues with a fundamentally different perspective from the one embodied in the War on Prisoners. Specifically, all three commissions reached the conclusion that crime needed to be addressed through a sustained effort to improve the social and economic plight of the nation’s disadvantaged. As I noted earlier, the President’s Commission on Law Enforcement and Administration of Justice had analyzed the “challenge of crime in a free society,” and recommended “eliminating social conditions closely associated with crime.” CRIME COMM’N REPORT, *supra* note 21, at 40. The second commission focused on the causes of civil unrest—primarily the so-called “race riots”—with which policymakers were concerned. It emphasized the role of persistent race-based disadvantage and discrimination, the decay of the inner cities, and the racially insensitive and at times provocative policies of the criminal justice system, and especially the police. See OTTO KERNER, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (1968). The third and final commission, the National Commission on the Causes and Prevention of Violence, began its report by noting that “the way in which we can make the greatest progress toward reducing violence in America is by taking the actions necessary to improve the conditions of family and community life for all who live in our cities, and especially for the poor who are concentrated in the ghetto slums.” U.S. NAT’L COMM’N ON THE CAUSES & PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, at xxi (1969). Yet these interrelated and entirely consistent sets of recommenda-

Instead, the politically inspired, punishment-oriented approach that characterized the War on Prisoners brought about the increased incarceration rates and prison overcrowding described earlier in this Article. It has also helped to socialize citizens and accustom them to increasingly hostile and aggressive criminal justice practices and beliefs. Thus, at a deeper level, the War on Prisoners altered the value system that many citizens use to judge how prisoners—as the “enemy” in this protracted domestic conflict—should be treated. Striking out at prisoners has become reflexive, and treating them with the utmost harshness seemingly second nature. Correspondingly, prevailing views about whether and how to limit the severity of state-sanctioned prison pain have been distorted by the wartime mentality that surrounds them. Marc Mauer and Meda Chesney-Lind have cautioned that: “[U]ltimately, a society in which mass imprisonment has become the norm is one in which questions of justice, fairness, and access to resources are being altered in ways hitherto unknown.”¹³⁹ In the final section of this Article, I suggest what some of those alterations appear to have been.

Arguably, the rapid and unprecedented expansion of the prison system in the United States, the massive increase in prison-related industries, and the corresponding growth of correctional influence in political arenas both reflect and have helped effect the larger transformation in the deep structure of American society that I acknowledged earlier: A new social order has been created in which we have moved from a largely social welfare-oriented state to one that is more clearly premised on the central task of social control. This kind of significant transformation does not occur without fundamental changes to the habits of thinking, feeling, and acting that characterize people’s day-to-day existence. Indeed, a criminal justice mindset—or what might be termed a “carceral consciousness”—has been insinuated into the way many people think about themselves and others.

This emerging consciousness incorporates many of the norms and practices of prison, ones that have been elevated in importance by the War on Prisoners. They have begun to influence the larger society’s collective beliefs as well as citizens’ interpersonal interactions in both public and private spaces. Indeed, many people have started to participate more actively—vicariously or even directly—in the crime

tions, along with the larger agenda of social reform and reconstruction they envisioned, were abandoned as the War on Prisoners was declared just a few years later.

139. INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 124, at 2.

and punishment process. This mindset—a triumph of correctional thinking—threatens to transform social relations and contemporary ways of being as increasing numbers of people turn naturally to the control of others through punishment and exclusion.

The many examples are varied and come from seemingly disparate sectors or our society. They range from the increased use of metal detectors in inner-city schools,¹⁴⁰ to teachers who are authorized to carry concealed weapons in the classroom as their “best security option,”¹⁴¹ to the increased militarization of the police in communities around the country,¹⁴² to the popularity of online maps that provide neighborhood residents with the addresses of sex offenders living in their communities,¹⁴³ to the so-called “Taser party” fad in which suburban housewives gather in living rooms to watch sales representatives demonstrate the newest and chicest personal security devices,¹⁴⁴ to the remarkable longevity of a “reality” television show that gives viewers such a realistic “cop’s eye view” of law enforcement that “[d]ipping into a dozen episodes [of ‘COPS’] can teach viewers various ways to spot a suspect, subdue the inebriated and quell mayhem before some-

140. See Carl Malmquist, *School Violence*, in *TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT* 537–53 (Robert Simon & Kenneth Tardiff eds., 2008). For a critical discussion of this practice, see John Devine, *Can Metal Detectors Replace the Panopticon?*, in *10 CULTURAL ANTHROPOLOGY* 171 (1995).

141. Angela Brown, *Gun-Toting Teachers in Texas*, *S.F. CHRON.*, Aug. 26, 2008, at A2.

142. See, e.g., Timothy Egan, *Soldiers of the Drug War Remain on Duty*, *N.Y. TIMES*, Mar. 1, 1999, at A1, A16 (“Special weapons and tactics squads, once used exclusively for the rare urban terrorist incident or shootout, transformed themselves through the crack years into everyday parts of city life.”).

143. While touting the benefits of a “nationwide sex offender mapping” service, television news reporter Angela Salscheider told viewers, “By just typing in your address, the [w]eb site can map out your surrounding community and mark where registered sex offenders live. It will provide a picture, the offender’s address and what type of offense they committed.” *WSAW News: Are There Sex Offenders in Your Community?* (CBS television broadcast Dec. 28, 2005), available at <http://www.wsaw.com/news/headlines/2127987.html>; see also *Nationwide Sex Offender Mapping*, www.mapsexoffenders.com (last visited Nov. 10, 2008). For a review of sex offender legislation that includes these and other “public notification” requirements, see Michelle Cohen & Elizabeth Jeglic, *Sex Offender Legislation in the United States: What Do We Know?*, 51 *INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 369 (2007).

144. Dana Sharfman, the Arizona woman who is credited with helping popularize the Taser parties in her state, reported: “[M]any of my women customers love that the [new personal Taser] is small enough to fit in their purses, and that it comes in a variety of colors. When it comes to choosing weapons, [] a lot of women want them in pink.” *Forget Tupperware; It’s Taser Party Time*, *ASSOCIATED PRESS*, Jan. 4, 2008, available at <http://www.msnbc.msn.com/id/22507292/>. Sharfman continued, “[i]t’s a girl power kind of thing.” *Id.*

one gets hurt,”¹⁴⁵ to national news magazines whose cover stories instruct readers on “how to spot a troubled kid” in order to prevent future outbursts of school violence,¹⁴⁶ to the fact that the “eighth-longest-running prime time network show ever” is devoted entirely to active audience participation in crime fighting, operates an online and a telephone “tipster” hotline, and keeps a website with a running tab of how many fugitives “you have helped to catch to date,”¹⁴⁷ to a cable television network sponsoring what it advertised as a “Memorial Day Marathon” that invited viewers to “Grab a hot dog and settle down for a marathon of classic ‘Lockup’ episodes” that would take them inside some of the nation’s most notorious prisons,¹⁴⁸ to the website of television’s highest rated prime time series—“CSI: Crime Scene Investigation”—providing visitors with a way to participate in an “interactive crime lab,” “take advantage of [CSI] Online Training,” and “test your skills against other [CSIs],”¹⁴⁹ to the opening of a “National Museum of Crime and Punishment” in Washington, D.C., that was advertised to potential visitors as so much fun “it should be illegal” and described by reviewers as a “must see for [CSI] fans” in part because it provided “an interactive experience like no other museum [in Washington, D.C.]” and allowed “visitors to step into the shoes of those who enforce the country’s laws.”¹⁵⁰ In these and myriad other

145. Ned Martel, *Perp Nation: “Cops” and Its Steady Run of Bad Boys*, N.Y. TIMES, Nov. 10, 2007, at A15. Martel also added that Saturday night television viewers “often answer the siren call of ‘Cops,’ watching arrest after arrest in a series that reinforces the notion that order can always be restored.” *Id.*; see also Michael Hallett, *Guns and Roses on “Cops,”* 7 PEACE REV. 233–36 (1995); Michael Hallett & Dennis Powell, *Backstage with “COPS”: The Dramaturgical Reification of Police Subculture in American Crime “Info-Tainment,”* 24 AM. J. POLICE 101, 101–29 (1995); Jon Katz, *Covering the Cops: A TV Show Moves in Where Journalists Fear to Tread*, 31 COLUM. JOURNALISM REV. 25, 25–30 (1993) (providing other analyses of the Cops phenomenon). “Cops,” as one television commentator put it, “has spawned many imitators, but is still the king. This show’s conception and ongoing run says all you need to know about America and television.” Tim Goodman, *Going, Going, Gone—And Not a Bit Too Soon*, SANTA CRUZ SENT., May 1, 1999, at D5.

146. See Nancy Gibbs, *How to Spot a Troubled Teen*, TIME MAG., May 31, 1999, available at <http://www.time.com/time/covers/0,16641,19990531,00.html> (displaying the cover of the issue, which shows a tiny gun appearing in the eye of the teenage boy).

147. The show—“America’s Most Wanted”—recently finished 20 seasons on television. America’s Most Wanted, Frequently Asked Questions, http://www.amw.com/about_amw/faq.cfm#facts (last visited Nov. 10, 2008).

148. See Memorial Day Doc Block marathon, <http://www.msnbc.msn.com/id/24792326> (May 23, 2008).

149. See CSI: Crime Scene Investigation, <http://www.cbs.com/primetime/csi/>.

150. National Museum of Crime and Punishment, Reviews, <http://www.crimemuseum.org/reviews.html> (last visited Nov. 10, 2008). The Museum also announced that “monthly workshops will convene in the museum’s mock crime-scene lab, where graduate students from George Washington University will demonstrate fingerprint-

ways, a transformation in popular culture is underway in the United States that the War on Prisoners both reflects and has helped to amplify and accelerate, one in which punitive, carceral norms and practices have become increasingly merged with the everyday life of the larger society.

Indeed, the ubiquitous mass media portrays criminal justice norms, values, and perspectives as entirely “mainstream.” Audiences are conditioned to regard the carceral world view as normative, its practices as not only legitimate but even aspirational.¹⁵¹ The new media formats have not only made the criminal justice system highly commercialized and broadly accessible but also intensely participatory. As I noted above, many members of the viewing public have been persuaded to do more than sit by and idly watch.

To be sure, these shifts reflect matters of degree, the markers are discrete and seemingly disconnected, and the progressive nature of the changes they have brought about do not form a simple or precise pattern. Yet the sheer size of the prison industrial complex, its infusion into and influence over the political system, and the mass media’s obsession with crime and punishment-related issues appear to have combined to produce this carceral consciousness, one in which increasing numbers of persons now embrace elements of a correctional mindset that affects their everyday social relations.

Among other things, this process has altered the norms of punishment and radically transformed the status of proportionality as a limit to punitive excess. As Michael Tonry accurately stated, “[w]e live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also are enthusiastically supported by public officials, policy intellectuals, and much of the general public.”¹⁵² The War on Prisoners has placed the critically important balance between the need for public safety and standards of humane treatment in serious jeopardy.

There is another way that the correctional mindset was broadly normalized and the mandate to incarcerate made routine in the course of the War on Prisoners. As Dorothy Roberts observed, the

ing, evidence collection, identification via dental records and other [crime-scene investigator] skills.” Jayne Clark, *Learn the tricks of ‘CSI’ Trade*, USA TODAY, Oct. 17, 2008, at 1D.

151. For an insightful analysis of the many ways in which the line separating popular culture and the law is increasingly blurred in contemporary American society, see RICHARD SHERWIN, *WHEN THE LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

152. Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752 (1999).

“normalization of prison in community life” is an indicator that “mass incarceration affects social norms more broadly.”¹⁵³ She noted that prison had become “a key social institution in many black neighborhoods” and correctional facilities were now “part of the socialization process” for many black children.¹⁵⁴ In a less direct way, imprisonment—its reality, underlying ethic, and status as the preferred approach for controlling troublesome others—has been broadly normalized in other communities as well. Many citizens who are unlikely to be touched directly by the experience of incarceration are accustomed to participating vicariously in criminal justice functions and identifying with law enforcement personnel, norms, and practices.

The rise of carceral consciousness has been hastened by the sheer proliferation of prisons in the course of the War on Prisoners and the frequency with which citizens now physically encounter them. An Urban Institute study early in the twenty-first century documented extraordinary growth in the actual number of correctional institutions and their geographical dispersion throughout the United States.¹⁵⁵ In the ten states that experienced the largest amount of prison growth in the United States over the last two decades of the twentieth century, “[t]he share of counties . . . that were home to at least one prison increased from 13% of counties in 1979 to 31% of counties in 2000.”¹⁵⁶ In three of the most populous states in the nation—California, Florida, and New York—over *half* of the counties had a least one prison located in them.¹⁵⁷

In this mundane way, explosive prison growth has increased the pervasiveness of prison and multiplied the number of persons who have daily contact with prisons and, even more often, with prison employees and those who have loved ones confined in them. As these day-to-day prison contacts increase, more and more people have become accustomed and desensitized to the core mission of the prison industry itself. Keeping large numbers of fellow citizens separated, deprived, and confined for the sole purpose of punishing them has become increasingly matter of fact and unproblematic. The War on Prisoners also has expanded the number of communities whose econ-

153. Roberts, *supra* note 132, at 1288.

154. *Id.*

155. SARAH LAWRENCE & JEREMY TRAVIS, URBAN INST., THE NEW LANDSCAPE OF IMPRISONMENT (2004), available at http://www.urban.org/UploadedPDF/410994_mapping_prisons.pdf.

156. *Id.* at v.

157. *Id.* at 14 fig.8.

omies are highly dependent on punishment-related goods and services. Many of these towns now rely on prison for their economic well-being and their residents have a vested interest in ensuring that punishment continues to be a “growth industry.” The punitive enterprise per se has not only been normalized and made to seem routine but also has become economically essential (independent of its effects on crime).

In addition, as American society’s commitment to social welfare (providing social and economic safety nets and enhanced opportunities for those who need them) shifted to outright social control (maintaining order and protection in the course of the War on Prisoners), the nature of “civic duty” was subtly changed as well. To the extent that citizens are expected to operate to some degree as extensions of the state, their obligations have moved from caring to carceral—to increasingly scrutinizing, categorizing, and judging each other’s behavior along largely legalistic or, more accurately, “correctional” dimensions.

An intellectual justification for this aspect of the carceral consciousness was offered in the later stages of the War on Prisoners, as part of a movement to essentially “democratize” the punishment process that arose in the last several decades of the twentieth century. Conservative criminologist John DiIulio, an enthusiastic supporter of this War during the 1980s and 1990s,¹⁵⁸ contributed directly to the trend. In a policy paper written for the U.S. Department of Justice in the early 1990s, DiIulio spoke eloquently of his vision of citizens as “co-producers of justice,” by which he meant that all citizens had not only “the right and the responsibility to participate” in the criminal justice system, but also that *citizens* (“not judges, prosecutors, law enforcement officers, or corrections officials”) should become the ones “primarily responsible for . . . the prevalence and severity of crime within” their communities.¹⁵⁹

158. See, e.g., John J. DiIulio, *Let 'Em Rot*, WALL ST. J., Jan. 26, 1994, at A14 (arguing that long prison sentences are the best strategy for controlling juvenile and adult crime and that “[g]et tough politics is good crime policy”). In fact, DiIulio argued that the tough sentencing laws passed in the 1980s, which increased the average lengths of prison terms and contributed to the increased incarceration rates and overcrowding problems of the last several decades, were nowhere near tough enough. Remarkably, he claimed the laws were “filled with get-out-of-jail loopholes” that made the United States a place full of “crime without punishment.” *Id.*

159. John J. DiIulio, Jr., *Rethinking the Criminal Justice System: Toward a New Paradigm*, in PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 1, 8–9 (1993), available at http://www.jrsa.org/evaluationwebsite/guide/documents/rethinking_the_criminal_justice_.htm.

Of course, a divisive and repressive carceral mindset incorporates an internal logic that can be highly resistant to change. Once citizens have been conditioned to react to deviance and threat through war-like policies of aggressive social control, they may become entrenched in these beliefs. The “mentalities of war” may lead them to resist and reject increased calls for tolerance and understanding toward those previously seen as the enemy. New policies that encourage rehabilitation, redemption, reconciliation, and reintegration of those persons the public has been taught to fear and despise are likely to face real obstacles before they eventually garner widespread support.¹⁶⁰ This too is a problematic consequence of the War on Prisoners: deep-seated beliefs that have been forged in the course of a long-running battle and that now represent impediments to change and barriers to the eventual cessation of conflict.

VI. Conclusion

The War on Prisoners produced unprecedented increases in the sheer number of persons incarcerated in the United States. The nation has suffered many casualties—both direct and collateral—in the course of this War. Millions of persons were subjected to the pains of imprisonment, and many were placed at risk of serious harm. The direct casualties of the War suffered psychic wounds that were often inflicted by hopelessly overcrowded prison systems whose only ostensible official purpose was to punish them, typically without any regard for the long-term consequences.

Moreover, the predictably adverse effects of these punitive policies continued to be concentrated within precisely those communities that could least afford to incur them. Some of these effects were so extreme and so localized that they have threatened to create a permanent criminal class, paradoxically brought about by the very system that was charged with reducing and controlling crime itself. In the course of these changes, the prison system and associated prison industrial complex grew so large and pervasive that they have effected

160. The “*Post-War on Prisoners*” era of peace building will need to include all of these strategies. For arguments in favor of these new approaches and discussions of how best to implement them, see generally CRAIG HANEY, *supra* note 38; SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* (2001); RESTORATIVE JUSTICE (Declan Roche ed., 2004); *AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION* (Shadd Maruna & Russ Immarigeon eds., 2004); and *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES*, *supra* note 114.

broader and deeper changes in the structure, ethos, and even the day-to-day atmosphere of American society and the mindset of its citizens.

This expanding system of punishment and control targeted disproportionate numbers of minority and, especially, African American citizens and kept many of the most destructive personal and social costs of the War on Prisoners concentrated in certain communities. It, in turn, masked many of the War's most devastating effects and ensured that its worst damage was initially well hidden from the broader public. In addition, because so many people are now exposed to the racially charged atmosphere of prison and the explicit race-based policies by which many prison environments operate, there is an inevitable carryover to the larger society. Hundreds of thousands of people have reentered the free world having been saturated by the racism of prison life. Just as with many of the other adverse consequences of incarceration, these pernicious effects are likely to persist.

In addition, the rapid expansion in the size and scope of the criminal justice system has reached such enormous proportions that prison-related interests now wield unprecedented influence in the society at large. Prisons not only require vast economic resources to build and maintain but are also now connected to broad corporate interests that seek the constant expansion of the demand for their goods and services in order to remain profitable. The private sector components of the prison industrial complex are positioned to advance their own agendas over other public sector principles and values. This has translated into the kind of political clout that affords the punishment industry an important voice in shaping governmental decisions and policymaking.

As the nation moved from its social welfare premises to one increasingly devoted to social control, cultural norms and interpersonal relations began to be transformed as well. We have inched closer to becoming a nation of criminal justice operatives who not only participate vicariously in crime and punishment through the media, but also have begun to take increasingly active roles in identifying, judging, and punishing difference and otherness on their own.

The War on Prisoners has incurred profound costs and countless casualties at many levels and in many sectors of our society. However, its high price and marginal returns have finally begun to register with at least some of the politicians who declared this War and certain members of the public who helped them wage it. It seems increasingly clear that the time has come—indeed, it is arguably long past—to de-

clare an end to these hostilities and pursue a fundamentally different course of action.