



Dædalus

Journal of the American Academy of Arts & Sciences

Summer 2010

on mass
incarceration

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& Bruce Western

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Inside front cover: Inmates housed in a gymnasium at California State Prison in Los Angeles, August 8, 2006. Decades of tough sentencing laws and a lack of funding for rehabilitative programs have led to acute overcrowding in U.S. prisons. In California, where third-strike offenders face minimum sentences of twenty-five years to life, the state's prisons are among the most crowded in the nation. Photograph © California Department of Corrections & Rehabilitation.

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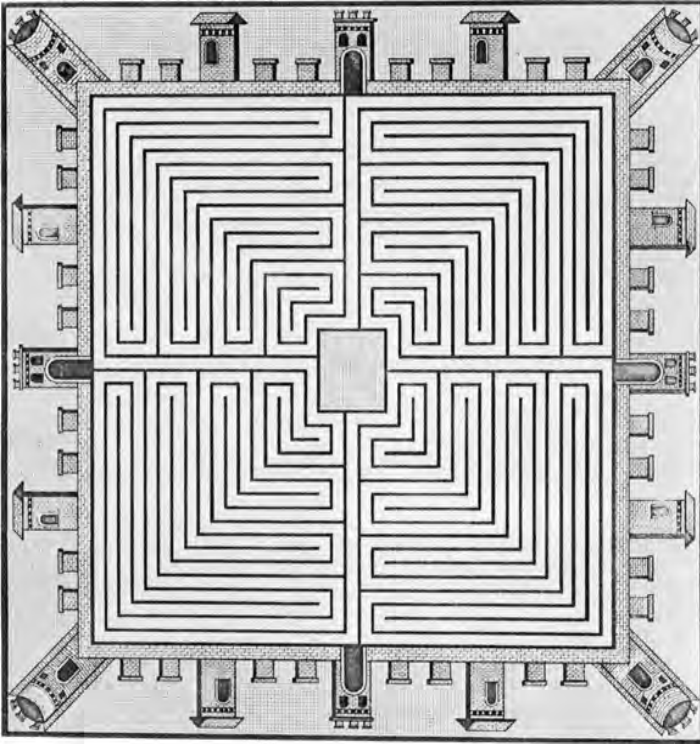
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Nineteenth-century depiction of a Roman mosaic labyrinth, now lost, found in Villa di Diomede, Pompeii

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal's namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

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Glenn C. Loury & Bruce Western

*The challenge of mass
incarceration in America*

The proper role for the social scientist in discussions of social policy is not self-evident because the most challenging policy problems are not merely technical. Nor is policy discourse only *instrumental*; it is also *expressive* and *constitutive*. It sets an agenda for action, frames key moral judgments of a citizenry, marks the boundary between civic and communal responsibility, conveys a narrative of justification, and establishes the significance of a nation's history for its present-day course of public action. Whether intended or not, public debate over the most basic issues (implicitly) answers the question, what manner of people are we Americans? This outcome is surely true for public debate about what may be the preeminent domestic policy issue of our time: that mass incarceration is now, *de facto*, a central element of American social policy.

The essays gathered in this issue of *Dædalus* explore the empirical contours, the political underpinnings, and the prospects for reform of America's incarceration complex. They exemplify the potential for the social sciences to contribute usefully to a crucial public debate. The authors come from varied disciplines –

criminology, sociology, political science, economics, and law – and reflect differing ideological predispositions. However, all hold the common conviction that this newly emergent punishment regime constitutes a formation of fundamental significance for American society; that its roots in the political culture are varied and intricate; and that there is no easy or straightforward path out of the policy fix that we have gotten ourselves into.

The empirical contours of American incarceration are assessed in the four pieces that begin this issue. Bruce Western of Harvard University and Becky Pettit of the University of Washington examine the class and racial dimensions of incarceration and its impact on social inequality. Robert J. Sampson and Charles Loeffler, both of Harvard University, look at data on the spatial concentration of imprisonment in the large American city of Chicago. Two subsequent essays focus on particular subsectors of the prison universe: Candace Kruttschnitt of the University of Toronto surveys the social context of women's imprisonment; Jeffrey Fagan of Columbia University reviews the current state of juvenile incarceration in the United States. Following this assessment of the basic facts, the issue turns to the political underpinnings of America's incarceration policies.

Over the past four decades, the United States has, by any measure, become a vastly more punitive society. This expansion, and transformation, of penal institutions in the United States – which has taken place at every level of government and in all regions of the country – is without historical precedent or international parallel. With roughly 5 percent of the world’s population, the United States currently confines about 25 percent of the world’s prison inmates. The American prison system has grown into a levathan unmatched in human history. This system is not limited to law enforcement and punishment policy. It also extends to social policy writ large, a uniquely American form of social policy at that.

These developments should be deeply troubling to anyone who professes to love liberty. America, with great armies deployed abroad under the figurative banner of “Freedom,” harbors the largest custodial infrastructure for the mass deprivation of liberty on the planet. The financial costs entailed are staggering, and the extent of human suffering endured boggles the mind. No other advanced nation has been willing to tolerate imprisonment on the scale, and of the character, that has become commonplace and that goes virtually unremarked in the United States. The United States consigns nearly as great a fraction of its population to a *lifetime* in prison (more than fifty per one hundred thousand residents) as Sweden or Denmark or Norway finds it necessary to imprison for terms of any duration.

How and why did this extraordinary policy development take place? Why is punishment American-style such an international anomaly? And what effects should we expect the economic crisis – with its over-stretched state budgets and proliferating financial bailouts – to have on the ways policy-makers think about

the incarceration problem? These questions are taken up by the authors of the next set of essays in this issue. Marie Gottschalk of the University of Pennsylvania is skeptical that the present era of economic hardship will fundamentally alter penal policies so as to reduce the long-term incarceration rate. Loïc Wacquant of the University of California, Berkeley, emphasizes the interconnectedness of penal policy (for poor urban minority men) and welfare policy (for poor urban minority women), arguing that both reflect structural changes characteristic of late-capitalist society in relations between socially marginal populations and the state. Jonathan Simon, of UC Berkeley School of Law, develops a set of metaphors to draw analogies between the “troubled assets” of today’s financial sector and the “troubled persons” who are subjected to the prison complex. Nicola Lacey of the London School of Economics discusses American penal policy in international comparative perspective, identifying distinguishing features of the political economy of the United States that may account for its striking penal dissimilarity.

In what sense, one might ask, does this policy development constitute a problem? How do we know that there are too many Americans in prison? A crude analogy will help make this point: If more people were to fall sick, a logical response would be to build hospitals and admit patients. Likewise, if more people commit crimes, then the construction of prisons, with a greater number of criminals being consigned to them, is a natural policy response. The purpose of this comparison is to say that there is no way of specifying a “correct” number of prisoners independent of the extent of the criminal behaviors to which imprisonment is a proper societal response. The

same can be said of racial disparities in punishment. One cannot conclude that “too many” African Americans are held in prisons absent some consideration of the extent to which there are racial differences in criminal behavior. How much, then, should we credit the powerful moral indictment of American social policy that lurks just behind a phrase like “mass incarceration”? Supposing we can be persuaded that reform is, in fact, a moral imperative, what should we do? The next two essays in this issue – by Mark A.R. Kleiman of the University of California, Los Angeles, and by Robert Weisberg and Joan Petersilia, both of Stanford University – address themselves to these basic policy dilemmas. Kleiman argues that it is possible to have both many fewer prisoners behind bars and also much less crime, if we are smart about using new surveillance techniques together with modest, though certain, sanctions for parolees and probationers – a policy he calls “outpatient incarceration.”

Weisberg and Petersilia are skeptical about use of the term “mass incarceration.” They warn against the melodrama and conspiratorial overtones that often accompany popular laments over recent American penal trends. They stress that “no particular measured incarceration rate is inherently unjustified,” so simply citing numbers cannot possibly establish the moral culpability of the system. But they also acknowledge that American incarceration is “an embarrassment” and that the structural effects of imprisonment at this scale are both deleterious and far-reaching. Their concern is that unexpected and undesired consequences may ensue if reformers open the prison gates without first thinking carefully about what programs will be effective at facilitating successful transition into society. Large numbers of persons now in custody, they remind us, suffer the debil-

itating consequences of limited education, drug dependence, and, not least, the stigma of having been incarcerated. They cite a less-than-wholly-successful deinstitutionalization campaign for the mentally ill as a cautionary tale.

In the issue’s concluding piece, Glenn C. Loury of Brown University offers some personal reflections and critical observations on the intersection of crime, inequality, and social justice.

This issue grows out of an Academy project on The Challenge of Mass Incarceration in America, for which we serve as project leaders. We believe that the analysis put forth in this issue, and the ongoing Academy project, will contribute to the national conversation about criminal justice and public safety. In doing so, we hope to generate a broader public understanding of the scale and social consequences of mass incarceration in America.

Bruce Western & Becky Pettit

Incarceration & social inequality

In the last few decades, the institutional contours of American social inequality have been transformed by the rapid growth in the prison and jail population.¹ America's prisons and jails have produced a new social group, a group of social outcasts who are joined by the shared experience of incarceration, crime, poverty, racial minority, and low education. As an outcast group, the men and women in our penal institutions have little access to the social mobility available to the mainstream. Social and economic disadvantage, crystallizing in penal confinement, is sustained over the life course and transmitted from one generation to the next. This is a profound institutionalized inequality that has renewed race and class disadvantage. Yet the scale and empirical details tell a story that is largely unknown.

Though the rate of incarceration is historically high, perhaps the most important social fact is the inequality in penal confinement. This inequality produces extraordinary rates of incarceration among young African American men with no more than a high school education. For these young men, born

since the mid-1970s, serving time in prison has become a normal life event.

The influence of the penal system on social and economic disadvantage can be seen in the economic and family lives of the formerly incarcerated. The social inequality produced by mass incarceration is sizable and enduring for three main reasons: it is invisible, it is cumulative, and it is intergenerational. The inequality is invisible in the sense that institutionalized populations commonly lie outside our official accounts of economic well-being. Prisoners, though drawn from the lowest rungs in society, appear in no measures of poverty or unemployment. As a result, the full extent of the disadvantage of groups with high incarceration rates is underestimated. The inequality is cumulative because the social and economic penalties that flow from incarceration are accrued by those who already have the weakest economic opportunities. Mass incarceration thus deepens disadvantage and forecloses mobility for the most marginal in society. Finally, carceral inequalities are intergenerational, affecting not just those who go to prison and jail but their families and children, too.

The scale of incarceration is measured by a rate that records the fraction of the

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population in prison or jail on an average day. From 1980 to 2008, the U.S. incarceration rate climbed from 221 to 762 per 100,000. In the previous five decades, from the 1920s through the mid-1970s, the scale of punishment in America had been stable at around 100 per 100,000. Though the incarceration rate is now nearly eight times its historic average, the scale of punishment today gains its social force from its unequal distribution.

Like criminal activity, prisons and jails are overwhelmingly a male affair. Men account for 90 percent of the prison population and a similar proportion of those in local jails. The incarceration rate has been growing faster among women in recent decades, but the social impact of mass incarceration lies in the gross asymmetry of community and family attachment. Women remain in their communities raising children, while men confront the possibility of separation through incarceration.² Age intensifies these effects: incarceration rates are highest for those in their twenties and early thirties. These are key years in the life course, when most men are establishing a pathway through adulthood by leaving school, getting a job, and starting a family. These years of early adulthood are important not just for a man's life trajectory, but also for the family and children that he helps support.

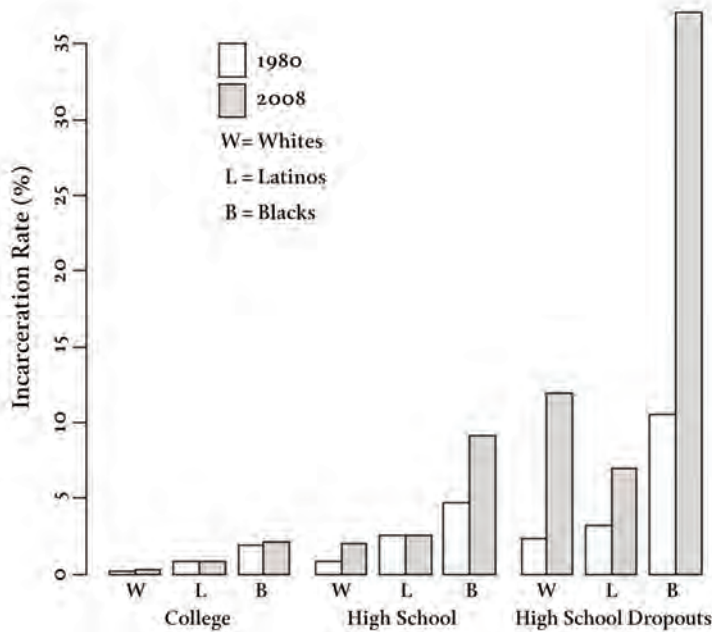
Age and sex are the staples of demographic analysis, and the relative youth of the largely male incarcerated population foreshadows much about the effects of mass incarceration. Still, it is the profound race and class disparities in incarceration that produce the new class of social outsiders. African Americans have always been incarcerated at higher rates than whites, at least since statistics were available from the late nineteenth century.

The extent of racial disparity, however, has varied greatly over the past century, following a roughly inverse relationship to the slow incorporation of African Americans as full citizens in American society. In the late nineteenth century, U.S. Census data show that the incarceration rate among African Americans was roughly twice that of whites. The demographic erosion of Jim Crow through the migration of Southern African Americans to the North increased racial disparity in incarceration through the first half of the twentieth century. (Racial disparities in incarceration have always been higher in the North than the South.) By the late 1960s, at the zenith of civil rights activism, the racial disparity had climbed to its contemporary level, leaving African Americans seven times more likely to be in prison or jail than whites.

Class inequalities in incarceration are reflected in the very low educational level of those in prison and jail. The legitimate labor market opportunities for men with no more than a high school education have deteriorated as the prison population has grown, and prisoners themselves are drawn overwhelmingly from the least educated. State prisoners average just a tenth grade education, and about 70 percent have no high school diploma.³

Disparities of race, class, gender, and age have produced extraordinary rates of incarceration among young African American men with little schooling. Figure 1 shows prison and jail incarceration rates for men under age thirty-five in 1980, at the beginning of the prison boom, and in 2008, after three decades of rising incarceration rates. The figure reports incarceration separately for whites, Latinos, and African Americans and separately for three levels of education. Looking at men with a college edu-

Figure 1 Percentage of Men Aged Twenty to Thirty-Four in Prison or Jail, by Race/Ethnicity and Education, 1980 and 2008



Source: Becky Pettit, Bryan Sykes, and Bruce Western, “Technical Report on Revised Population Estimates and NLSY79 Analysis Tables for the Pew Public Safety and Mobility Project” (Harvard University, 2009).

cation, we see that incarceration rates today have barely increased since 1980. Incarceration rates have increased among African Americans and whites who have completed high school. Among young African American men with high school diplomas, about one in ten is in prison or jail.

Most of the growth in incarceration rates is concentrated at the very bottom, among young men with very low levels of education. In 1980, around 10 percent of young African American men who dropped out of high school were in prison or jail. By 2008, this incarceration rate had climbed to 37 percent, an astonishing level of institutionalization given that the average incarceration rate in the general population was 0.76 of 1 percent.

Even among young white dropouts, the incarceration rate had grown remarkably, with around one in eight behind bars by 2008. The significant growth of incarceration rates among the least educated reflects increasing class inequality in incarceration through the period of the prison boom.

These incarceration rates provide only a snapshot at a point in time. We can also examine the lifetime chance of incarceration – that is, the chance that someone will go to prison at some point in his or her life. This cumulative risk of incarceration is important if serving time in prison confers an enduring status that affects life chances after returning to free society. The lifetime risk of imprisonment describes how many

Table 1
 Cumulative Risk of Imprisonment by Age Thirty to Thirty-Four for Men Born from 1945 to 1949 and 1975 to 1979, by Educational Attainment and Race/Ethnicity

	All	High School Dropouts	High School/ GED*	College
1945 – 1949 cohort				
White	1.4	3.8	1.5	0.4
Black	10.4	14.7	11.0	5.3
Latino	2.8	4.1	2.9	1.1
1975 – 1979 cohort				
White	5.4	28.0	6.2	1.2
Black	26.8	68.0	21.4	6.6
Latino	12.2	19.6	9.2	3.4

*Denotes completed high school or equivalency.

Source: Becky Pettit, Bryan Sykes, and Bruce Western, “Technical Report on Revised Population Estimates and NLSY79 Analysis Tables for the Pew Public Safety and Mobility Project” (Harvard University, 2009).

people are at risk of these diminished life chances.

We calculated the cumulative chance of imprisonment for two birth cohorts, one born just after World War II, from 1945 to 1949, and another born from 1975 to 1979 (Table 1). For each cohort, we calculated the chances of imprisonment, not jail incarceration. Prisons are the deep end of the criminal justice system, now incarcerating people for an average of twenty-eight months for a felony conviction. While there are about ten million admissions to local jails each year – for those awaiting trial or serving short sentences – around seven hundred thousand prisoners are now admitted annually to state and federal facilities.

These cumulative chances of imprisonment are calculated up to age thirty-four. For most of the population, this represents the lifetime likelihood of serving prison time. For the older post-war cohort who reached their mid-thir-

ties at the end of the 1970s, about one in ten African American men served time in prison. For the younger cohort born from 1975 to 1979, the lifetime risk of imprisonment for African American men had increased to one in four. Prison time has become a normal life event for African American men who have dropped out of high school. Fully 68 percent of these men born since the mid-1970s have prison records. The high rate of incarceration has redrawn the pathway through young adulthood. The main sources of upward mobility for African American men – namely, military service and a college degree – are significantly less common than a prison record. For the first generations growing up in the post-civil rights era, the prison now looms as a significant institutional influence on life chances.

The ubiquity of penal confinement in the lives of young African American men

with little schooling is historically novel, emerging only in the last decade. However, this new reality is only half the story of understanding the significance of mass incarceration in America. The other half of the story concerns the effects of incarceration on social and economic inequality. The inequalities produced by contemporary patterns of incarceration have three characteristics: the inequalities associated with incarceration are invisible to our usual accounting of the economic well-being of the population; the inequality is cumulative, deepening the disadvantage of the most marginal men in society; and finally, the inequality is intergenerational, transmitting the penalties of a prison record from one generation to the next. Because the characteristic inequalities produced by the American prison boom are invisible, cumulative, and intergenerational, they are extremely enduring, sustained over lifetimes and passed through families.

Invisible Inequality. The inequality created by incarceration is often invisible to the mainstream of society because incarceration is concentrated and segregative. We have seen that steep racial and class disparities in incarceration have produced a generation of social outliers whose collective experience is wholly different from the rest of American society. The extreme concentration of incarceration rates is compounded by the obviously segregative function of the penal system, which often relocates people to far-flung facilities distant from their communities and families. As a result, people in prison and jail are disconnected from the basic institutions – households and the labor market – that dominate our common understanding and measurement of the population. The segregation and social concentration of incarceration thus help conceal its effects. This fact is particularly impor-

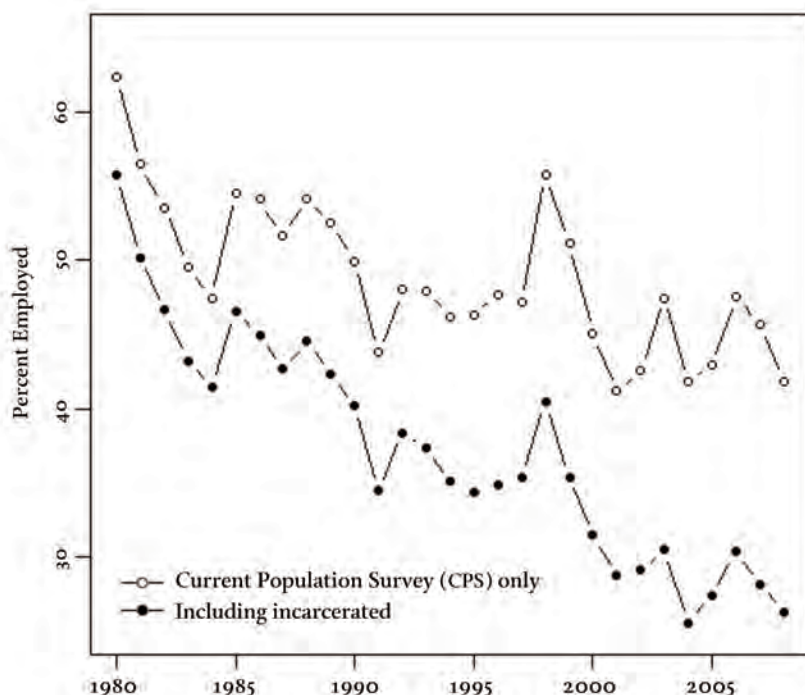
tant for public policy because in assessing the social and economic well-being of the population, the incarcerated fraction is frequently overlooked, and inequality is underestimated as a result.

The idea of invisible inequality is illustrated by considering employment rates as they are conventionally measured by the Current Population Survey, the large monthly labor force survey conducted by the Census Bureau. For groups that are weakly attached to the labor market, like young men with little education, economic status is often measured by the employment-to-population ratio. This figure, more expansive than the unemployment rate, counts as jobless those who have dropped out of the labor market altogether. The Current Population Survey is drawn on a sample of households, so those who are institutionalized are not included in the survey-based description of the population.

Figure 2 shows the employment-to-population ratio for African American men under age thirty-five who have not completed high school. Conventional estimates of the employment rate show that by 2008, around 40 percent of African American male dropouts were employed. These estimates, based on the household survey, fail to count that part of the population in prison or jail. Once prison and jail inmates are included in the population count (and among the jobless), we see that employment among young African American men with little schooling fell to around 25 percent by 2008. Indeed, by 2008 these men were more likely to be locked up than employed.

Cumulative Inequality. Serving time in prison or jail diminishes social and economic opportunities. As we have seen, these diminished opportunities are found among those already most socioeconomically disadvantaged. A

Figure 2
 Employment to Population Ratio, African American Men Aged Twenty to Thirty-Four with Less than Twelve Years of Schooling, 1980 to 2008



Source: Becky Pettit, Bryan Sykes, and Bruce Western, “Technical Report on Revised Population Estimates and NLSY79 Analysis Tables for the Pew Public Safety and Mobility Project” (Harvard University, 2009).

burgeoning research literature examining the economic effects of incarceration finds that incarceration is associated with reduced earnings and employment.⁴

We analyzed panel data from the National Longitudinal Survey of Youth (NLSY), one of the few surveys that follows respondents over a long period of time and that interviews incarcerated respondents in prison. The NLSY began in 1979, when its panel of respondents was aged fourteen to twenty-one; it completed its latest round of interviews in 2006. Matching our population estimates of incarceration, one in five African American male respondents in the NLSY

has been interviewed at some point between 1979 and 2006 while incarcerated, compared to 5 percent of whites and 12 percent of Latino respondents. Analysis of the NLSY showed that serving time in prison was associated with a 40 percent reduction in earnings and with reduced job tenure, reduced hourly wages, and higher unemployment.

The negative effects of incarceration, even among men with very poor economic opportunities to begin with, are related to the strong negative perceptions employers have of job seekers with criminal records. Devah Pager’s experimental research has studied these employer perceptions by sending pairs of

fake job seekers to apply for real jobs.⁵ In each pair, one of the job applicants was randomly assigned a résumé indicating a criminal record (a parole officer is listed as a reference), and the “criminal” applicant was instructed to check the box on the job application indicating he had a criminal record. A criminal record was found to reduce callbacks from prospective employers by around 50 percent, an effect that was larger for African Americans than for whites.

Incarceration may reduce economic opportunities in several ways. The conditions of imprisonment may promote habits and behaviors that are poorly suited to the routines of regular work. Time in prison means time out of the labor force, depleting the work experience of the incarcerated compared to their non-incarcerated counterparts. The stigma of a criminal conviction may also repel employers who prefer job applicants with clean records. Pager’s audit study offers clear evidence for the negative effects of criminal stigma. Employers, fearing legal liability or even just unreliability, are extremely reluctant to hire workers with criminal convictions.

A simple picture of the poor economic opportunities of the formerly incarcerated is given by the earnings mobility of men going to prison compared to other disadvantaged groups. The NLSY data can be used to study earnings mobility over several decades. We calculated the chances that a poor man in the lowest fifth of the earnings distribution in 1986 would move up and out of the lowest fifth by 2006. Among low-income men who are not incarcerated, nearly two-thirds are upwardly mobile by 2006 (Figure 3). Another group in the NLSY has very low levels of cognitive ability, scoring in the bottom quintile of the Armed Forces Qualifying Test, the standardized test used for military service. Among

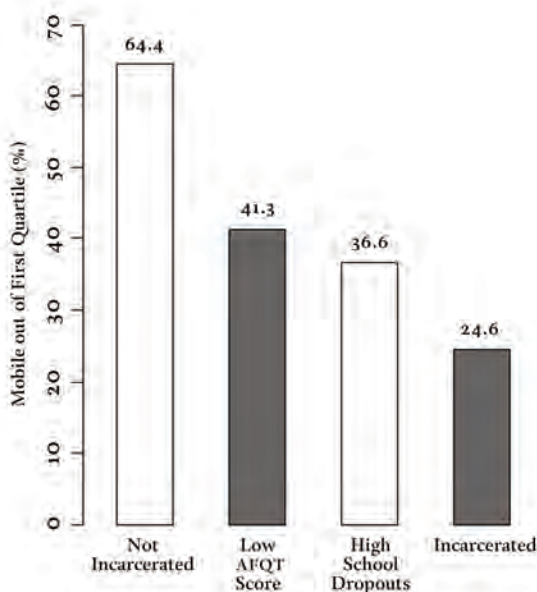
low-income men with low scores on the test, only 41 percent are upwardly mobile. Upward mobility is even less common among low-income high school dropouts. Still, we observe the least mobility of all among men who were incarcerated at some point between 1986 and 2006. For these men, only one in four rises out of the bottom quintile of the earnings distribution.

Intergenerational Inequality. Finally, the effects of the prison boom extend also to the families of those who are incarcerated. Through the prism of research on poverty, scholars find that the family life of the disadvantaged has become dramatically more complex and unstable over the last few decades. Divorce and nonmarital births have contributed significantly to rising rates of single parenthood, and these changes in American family structure are concentrated among low-income mothers. As a consequence, poor children regularly grow up, at least for a time, with a single mother and, at different times, with a variety of adult males in their households.

High rates of parental incarceration likely add to the instability of family life among poor children. Over half of all prisoners have children under the age of eighteen, and about 45 percent of those parents were living with their children at the time they were sent to prison. About two-thirds of prisoners stay in regular contact with their children either by phone, mail, or visitation.⁶ Ethnographer Megan Comfort paints a vivid picture of the effects of men’s incarceration on the women and families in their lives. She quotes a prisoner at San Quentin State Prison in California:

Nine times out of ten it’s the woman [maintaining contact with prisoners]. Why? Because your homeboys, or your

Figure 3
 Twenty-Year Earnings Mobility among Men in the Bottom Quintile of Earnings Distribution in 1986, National Longitudinal Survey of Youth (NLSY) Men



AFQT stands for Armed Forces Qualifying Test.
 Source: Becky Pettit, Bryan Sykes, and Bruce Western, “Technical Report on Revised Population Estimates and NLSY79 Analysis Tables for the Pew Public Safety and Mobility Project” (Harvard University, 2009).

friends, if you’re in that lifestyle, most the time they’re gonna be sittin’ right next to your ass in prison.... The males, they don’t really participate like a lot of females in the lives of the incarcerated.... They don’t deal with it, like first of all they don’t like to bring to reality that you’re in prison; they don’t wanna think about that... Or some of ’em just don’t care. So the male’s kinda like wiped out of there, so that *puts all the burden on the woman*.⁷

Partly because of the burdens of incarceration on women who are left to raise families in free society, incarceration is strongly associated with divorce and separation. In addition to the forced separation of incarceration, the post-release effects on economic opportuni-

ties leave formerly incarcerated parents less equipped to provide financially for their children. New research also shows that the children of incarcerated parents, particularly the boys, are at greater risk of developmental delays and behavioral problems.⁸

Against this evidence for the negative effects of incarceration, we should weigh the gains to public safety obtained by separating violent or otherwise antisocial men from their children and partners. Domestic violence is much more common among the formerly incarcerated compared to other disadvantaged men. Survey data indicate that formerly incarcerated men are about four times more likely to assault their domestic partners than men who have never been incarcerated. Though the relative risk is

very high, around 90 percent of the partners of formerly incarcerated report no domestic violence at all.

The scale of the effects of parental incarceration on children can be revealed simply by statistics showing the number of children with a parent in prison or jail. Among white children in 1980, only 0.4 of 1 percent had an incarcerated parent; by 2008 this figure had increased to 1.75 percent. Rates of parental incarceration are roughly double among Latino children, with 3.5 percent of children having a parent locked up by 2008. Among African American children, 1.2 million, or about 11 percent, had a parent incarcerated by 2008 (Figure 4).

The spectacular growth in the American penal system over the last three decades was concentrated in a small segment of the population, among young minority men with very low levels of education. By the early 2000s, prison time was a common life event for this group, and today more than two-thirds of African American male dropouts are expected to serve time in state or federal prison. These demographic contours of mass imprisonment have created a new class of social outsiders whose relationship to the state and society is wholly different from the rest of the population.

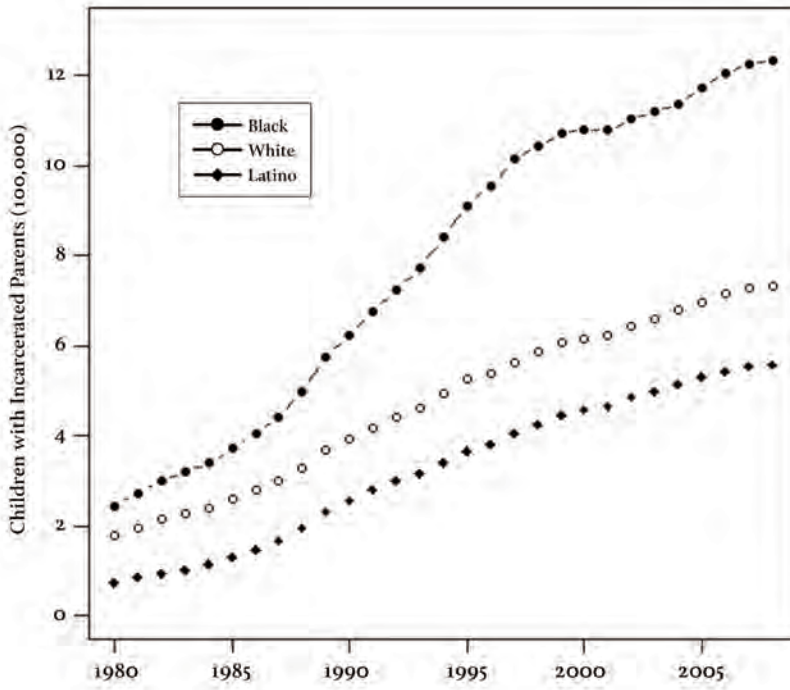
Social marginality is deepened by the inequalities produced by incarceration. Workers with prison records experience significant declines in earnings and employment. Parents in prison are likely to divorce or separate, and through the contagious effects of the institution, their children are in some degree “prisonized,” exposed to the routines of prison life through visitation and the parole supervision of their parents. Yet much of this reality remains hidden from view. In social life, for all but those whose incarceration rates are highest, prisons are exotic

institutions unknown to the social mainstream. Our national data systems, and the social facts they produce, are structured around normative domestic and economic life, systematically excluding prison inmates.

Thus we define carceral inequalities as invisible, cumulative, and intergenerational. Because they are so deeply concentrated in a small disadvantaged fraction of the population, the social and economic effects of incarceration create a discrete social group whose collective experience is so distinctive yet unknown that their disadvantage remains largely beyond the apprehension of public policy or public conversation. The redrawing of American social inequality by mass incarceration amounts to a contraction of citizenship – a contraction of that population that enjoys, in T. H. Marshall’s words, “full membership in society.”⁹ Inequality of this kind threatens to be self-sustaining. Socioeconomic disadvantage, crime, and incarceration in the current generation undermine the stability of family life and material support for children. As adults, these children will be at greater risk of diminished life chances and criminal involvement, and at greater risk of incarceration as a result.

Skeptics will respond that these are false issues of social justice: the prison boom substantially reduced crime, and criminals should forfeit their societal membership in any case. The crime-reducing effects of incarceration are hotly debated, however. Empirical estimates of the effects of incarceration on crime vary widely, and often they turn on assumptions that are difficult to test directly. Researchers have focused on the sharp decline in U.S. crime rates through the 1990s, studying the influence of rising prison populations. Conservative estimates attribute about one-tenth of the 1990s crime decline to the

Figure 4
 Number of Children under Eighteen with a Parent in Prison or Jail, 1980 to 2008



Source: Becky Pettit, Bryan Sykes, and Bruce Western, “Technical Report on Revised Population Estimates and NLSY79 Analysis Tables for the Pew Public Safety and Mobility Project” (Harvard University, 2009).

growth in imprisonment rates.¹⁰ Though the precise impact of incarceration on crime is uncertain, there is broad agreement that additional imprisonment at high rates of incarceration does little to reduce crime. The possibility of improved public safety through increased incarceration is by now exhausted.

Studies of the effects of incarceration on crime also focus only on the short term. Indeed, because of the negative effects of incarceration on economic opportunities and family life, incarceration contributes to crime in the long run by adding to idleness and family breakdown among released prisoners. Scale matters, too. If the negative effects of incarceration were scattered

among a small number of serious criminal offenders, these effects may well be overwhelmed by reduction in crime through incapacitation.

Today, however, clear majorities of the young men in poor communities are going to prison and returning home less employable and more detached from their families. In this situation, the institutions charged with public safety have become vitally implicated in the unemployment and the fragile family structure characteristic of high-crime communities. For poorly educated young men in high-incarceration communities, a prison record now carries little stigma; incentives to commit to the labor market and family life have been seriously weakened.

To say that prison reduces crime (perhaps only in the short run) is a spectacularly modest claim for a system that now costs \$70 billion annually. Claims for the crime-reducing effects of prison, by themselves, provide little guidance for policy because other approaches may be cheaper. Measures to reduce school dropout, increase human capital, and generally increase employment among young men seem especially promising alternatives. Results for programs for very young children are particularly striking. Evaluations of early childhood educational programs show some of their largest benefits decades later in reduced delinquency and crime.¹¹ For adult men now coming out of prison, new evaluations show that jobs programs reduce recidivism and increase employment and earnings.¹² The demographic concentration of incarceration accompanies spatial concentration. If some portion of that \$70 billion in correctional expenditures were spent on improving skills and reducing unemployment in poor neighborhoods, a sustainable and socially integrative public safety may be produced.

Much of the political debate about crime policy ignores the contemporary scale of criminal punishment, its unequal distribution, and its negative social and economic effects. Our analysis of the penal system as an institution of

social stratification, rather than crime control, highlights all these neglected outcomes and leaves us pessimistic that widespread incarceration can sustainably reduce crime. The current system is expensive, and it exacerbates the social problems it is charged with controlling. Our perspective, focused on the social and economic inequalities of American life, suggests that social policy improving opportunity and employment, for young men in particular, holds special promise as an instrument for public safety.

Our perspective on inequality points to a broader view of public safety that is not produced by punishment alone. Robust public safety grows when people have order and predictability in their daily lives. Crime is just one danger, joining unemployment, poor health, and family instability along a spectrum of threats to an orderly life. Public safety is built as much on the everyday routines of work and family as it is on police and prisons. Any retrenchment of the penal system therefore must recognize how deeply the prison boom is embedded in the structure of American social inequality. Ameliorating these inequalities will be necessary to set us on a path away from mass incarceration and toward a robust, socially integrative public safety.

ENDNOTES

¹ We gratefully acknowledge Bryan Sykes, Deirdre Bloome, and Chris Muller, who helped conduct the research reported in this paper. This research was supported in part by a gift from The Elfenworks Foundation.

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Robert J. Sampson & Charles Loeffler

*Punishment's place: the local
concentration of mass incarceration*

American crime policy took an unexpected turn in the latter part of the twenty-first century, entering a new penal regime. From the 1920s to the early 1970s, the incarceration rate in the United States averaged 110 inmates per 100,000 persons. This rate of incarceration varied so little in the United States and internationally that many scholars believed the nation and the world were experiencing a stable equilibrium of punishment.¹ But beginning in the mid-1970s, the U.S. incarceration rate accelerated dramatically, reaching the unprecedented rate of 197 inmates per 100,000 persons in 1990 and the previously unimaginable rate of 504 inmates per 100,000 persons in 2008.² Incarceration in the United States is now so prevalent that it has become a normal life event for many disadvantaged young men, with some segments of the population more likely to end up in prison than attend college.³ Scholars have broadly described this national phenomenon as *mass incarceration*.⁴

Often obscured by national trends are the profound variations in incarceration rates across states, cities, and especially

local communities within cities. Like the geographically concentrated nature of criminal offending by individuals, a small number of communities bear the disproportionate brunt of U.S. crime policy's experiment with mass incarceration.⁵ While the concept of "hot spots" for crime is widely acknowledged, the sources and consequences of incarceration's "hot spots" are not understood as well. Although the inhabitants of such communities experience incarceration as a disturbingly common occurrence, for most other communities and most other Americans incarceration is quite rare. This spatial inequality in punishment helps explain the widespread invisibility of mass incarceration to the average American.

Motivated by this reality, our essay examines the spatial concentration of incarceration, focusing on its geographic manifestations in the quintessentially American city of Chicago. Assembling census data, crime rates, and court records into a common geographic referent, we explore rates of community-level incarceration from 1990 to 2006 to probe three general questions:

1. How does incarceration impact neighborhoods differentially? What is the nature of spatial inequality in imprisonment rates across communities?

2. What is the temporal trend? Have neighborhood patterns changed over time?
3. What are the key correlates? For example, how do community-level features such as the crime rate and the concentration of poverty relate to the intensity of incarceration, across time and neighborhoods?

Overall, we demonstrate that mass incarceration is a phenomenon that is experienced locally and that follows a stable pattern over time. Hot spots for incarceration are hardly random; instead, they are systematically predicted by key social characteristics. In particular, the combination of poverty, unemployment, family disruption, and racial isolation is bound up with high levels of incarceration even when adjusting for the rate of crime that a community experiences. These factors suggest a self-reinforcing cycle that keeps some communities trapped in a negative feedback loop. The stability and place-based nature of incarceration have broad implications for how we think about policy responses.

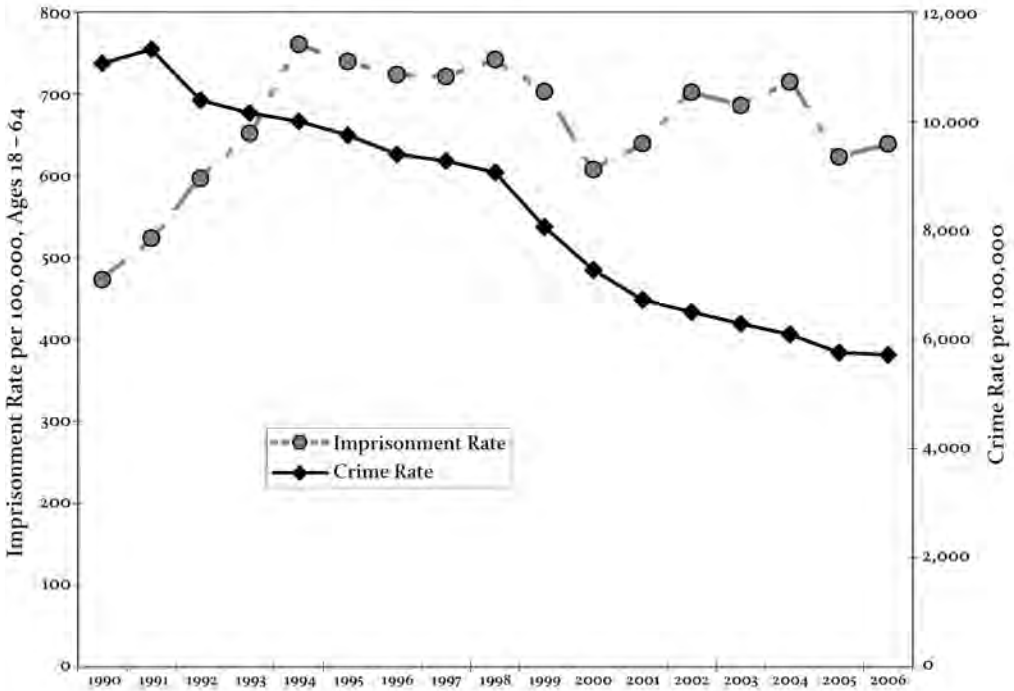
Is Chicago a unique case or does it follow the general pattern of crime and punishment in late-twentieth-century America that has drawn attention from scholars? Figure 1 displays the temporal pattern of imprisonment juxtaposed with the overall crime rate for the period from 1990 to 2006. We measure the imprisonment rate by dividing the number of unique, Chicago-resident felony defendants sentenced to the Illinois Department of Corrections from the Circuit Court of Cook County by the number of Chicago inhabitants aged eighteen to sixty-four according to the Census. We use “at risk” adults in the denominator in order to rule out varia-

tions in the prevalence of children under age eighteen, who are not eligible for prison. Similarly, we exclude older residents because, while society is aging, very few prisoners are over the age of sixty-five. These data were gathered from the electronic records of the Circuit Court of Cook County. The crime rate is measured by the Uniform Crime Reports (UCR) “index” offenses (aggravated assault, forcible rape, murder, robbery, arson, burglary, larceny-theft, and motor vehicle theft) per 100,000 persons in Chicago.

Mirroring national trends, the Chicago crime rate peaked at the beginning of the 1990s (11,320 offenses per 100,000 persons) and then declined throughout the remainder of the 1990s and into the early 2000s.⁶ As of 2006, the crime rate (5,721 offenses per 100,000 persons) in Chicago was the lowest it had been in at least the previous twenty years. Yet the imprisonment rate that began its rise in the 1970s (data not shown) continued to increase even after the crime rate peaked, climbing rapidly after 1990 and peaking in 1994 at 716 prisoners per 100,000 adult inhabitants. In just four years, the rate of imprisonment had increased 60 percent. It subsequently hovered near that all-time high, fluctuating between 600 and 700 prisoners per 100,000 adult inhabitants from 1994 to 2006. These Chicago trends, as depicted in Figure 1, are broadly consistent with trends in crime and incarceration throughout the United States.

Although the aggregate relationship between incarceration and crime is not the main focus of this paper, Figure 1 permits an overall assessment of the temporal connection. On the one hand, year-to-year changes in crime and imprisonment rates are not strongly correlated with each other when considering short temporal lags over the entire period. If mass incarceration functions as

Figure 1
Imprisonment and Crime Trends in Chicago, 1990 – 2006



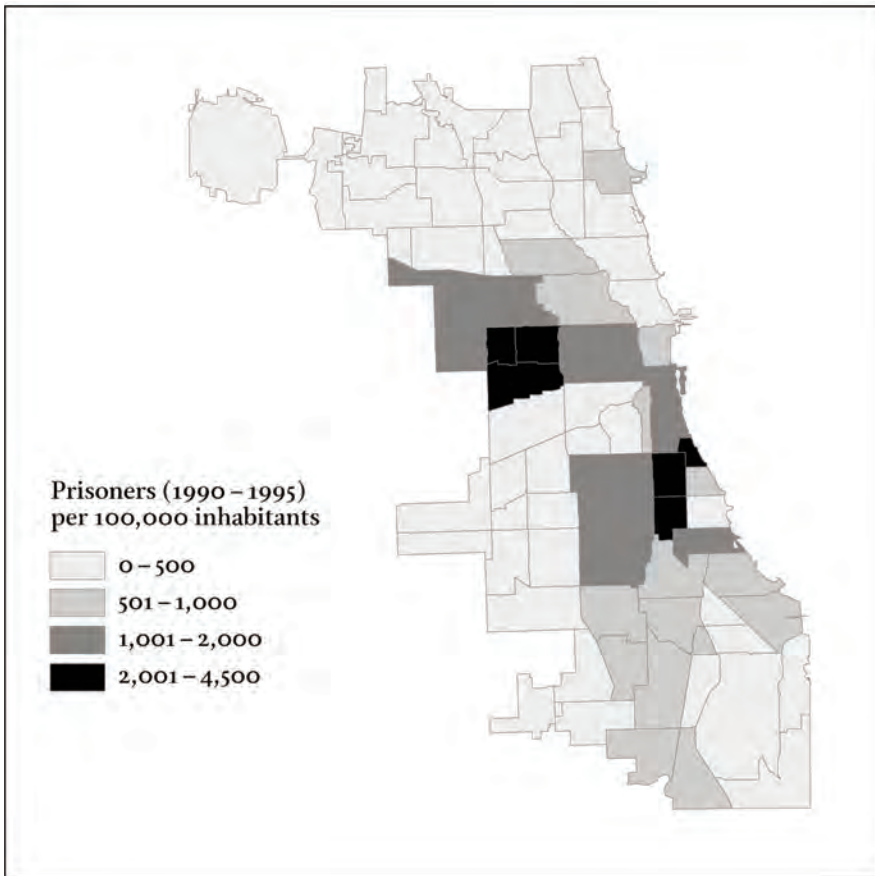
Source: Authors' calculations based on information collected from the Circuit Court of Cook County, the U.S. Census Bureau, and the U.S. Department of Justice.

an effective criminal deterrent or tool of incapacitation, then crime decreases in years greater than t should follow imprisonment increases in year t . Yet the actual pattern observed in Figure 1 suggests that increases or decreases in the imprisonment rate do not always lead to short-term decreases or increases in the crime rate, and vice versa, after about 1994. On the other hand, the beginning of the crime drop in the 1990s corresponds to a rapid rise in incarceration. Although the number of cases is too small to reliably detect significance, the crime rate correlates -0.89 with incarceration from 1990 to 1994. Over the longer term of 1990 to 2006, the pattern yields a negative concurrent relationship ($-0.47, p < 0.10$); crime decreased steadily

ly as the imprisonment rate increased and then maintained, more or less, a high rate. Therefore, the dynamic relationship between imprisonment and crime from 1990 to 2006 is generally negative. However, the pattern is complex, and it is not possible to draw conclusions about cause and effect.

To what extent is mass incarceration concentrated? Unlike the temporal trends for imprisonment, the answer is unambiguous: punishment is distinctly concentrated by place. Figure 2 displays rates of imprisonment per 100,000 persons (aged eighteen to sixty-four) by community areas of Chicago for the period 1990 to 1995. Community areas average populations of approximately

Figure 2
Spatial Concentration of Incarceration in Chicago, 1990 – 1995



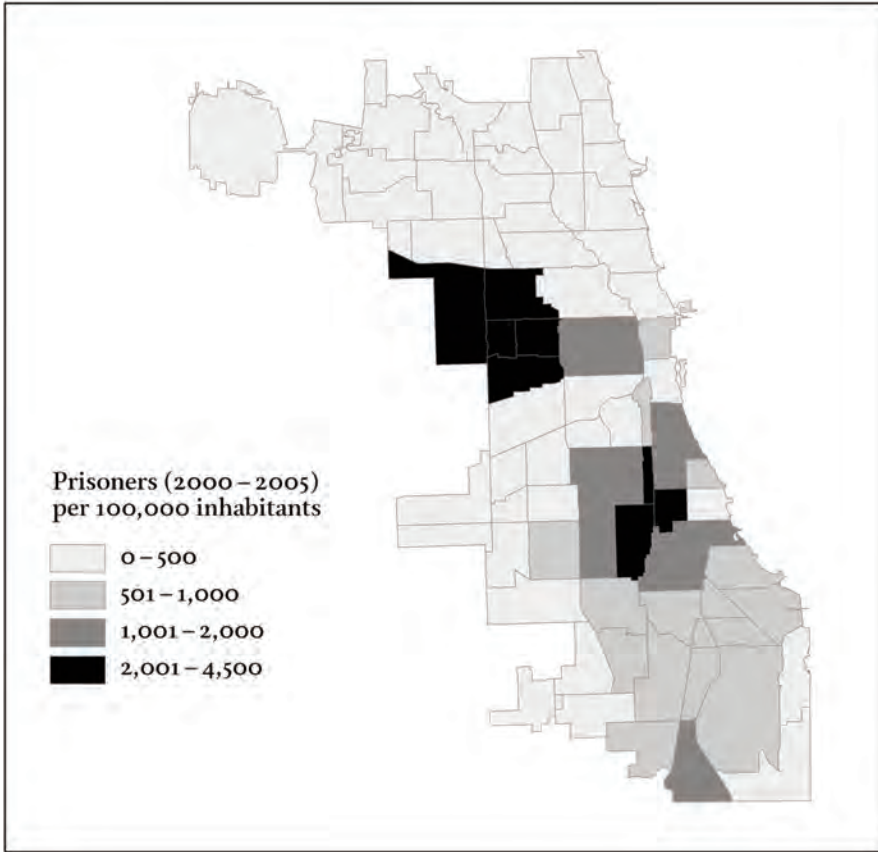
Source: Authors' calculations based on information collected from the Circuit Court of Cook County and the U.S. Census Bureau.

38,000 persons; they are widely recognized by residents and, in most cases, have well-known geographic borders. Census tracts are nested within community areas and are smaller, averaging approximately 4,000 persons. The patterns for tracts (not shown) are nearly identical to community areas.

The basic pattern of concentration is stark. Large swaths of the city, especially in the southwest and northwest, remain relatively untouched by the imprisonment boom. In these areas, the incarcer-

ation rate ranges from nearly zero to less than 500 per 100,000 adult residents. By contrast, there is a dense and spatially contiguous cluster of areas in near-west and south-central Chicago that have rates of incarceration some eight times higher (or more). Note especially the line of communities stretching south from the Loop and west into the suburban boundaries of the city (for example, the community of Austin) that produce a disproportionate share of prisoners.

Figure 3
Spatial Concentration of Incarceration in Chicago, 2000 – 2005



Source: Authors' calculations based on information collected from the Circuit Court of Cook County and the U.S. Census Bureau.

Does this pattern change over time? Despite a leveling-off in the overall intensity of punishment as foretold by Figure 1, there is a great deal of stability in the spatial logic of incarceration. Figure 3 presents imprisonment rates for the most recent period of available data, 2000 to 2005. As in 1990 to 1995, prisoners are primarily from the South and West Sides of Chicago. In fact, at a glance, Figures 2 and 3 reveal very little difference in patterns of incarceration, even with the time gap. The simple cor-

relation between the rates across time is greater than 0.90 for community areas and 0.86 for tracts ($p < 0.01$), an extremely high level of persistence. The Spearman's correlation of rank order is 0.97 and 0.92, respectively, for community areas and tracts.

The main difference between the two time periods is that incarceration intensified its grip on the far West and South Sides of the city. Not surprisingly, some areas that were already at the high end of the crime and incarceration distribu-

tions also saw improvements. Research, and the tendency of many social trends to “regress to the mean,” has shown that the highest-crime neighborhoods in Chicago have experienced the biggest crime drops.⁷ Nonetheless, the communities of Austin, East Garfield Park, and West Garfield Park (on the far West Side) experienced the largest relative increases in imprisonment rates, approximately 50 percent, across the two time periods. By contrast, the areas of Oakland, Grand Boulevard, and Washington Park (on the near- to mid-South Side) each experienced a decline of between 30 and 50 percent. Perhaps not coincidentally, some of these improving areas (especially Oakland and Grand Boulevard) saw large-scale changes or planned interventions that may explain the unexpectedly large declines, such as city investments in mixed-income housing, the demolition of high-rise public housing projects, and the steady immigration of the African American middle class.⁸ Further examination of the consequences of these large-scale changes for the social and spatial organization of Chicago (the displacement of crime or the migration of offenders to other neighborhoods, for example) is beyond the scope of this paper but is currently being pursued in other studies.

Overall, the data in Figures 1–3 paint a picture of patterned stability and change in incarceration. Like the rest of the United States, Chicago has seen a boom in imprisonment, with rates increasing more than 50 percent from 1990 after a period of prior increases. These increases and subsequent temporal variations do not appear to track the crime rate closely, although in a broad sense it is clear that at the end of the twentieth century, crime approached record lows as incarceration hovered around its peak. As noted earlier, whether this occurrence is a causal effect of imprisonment on re-

ducing crime or an artifact we cannot say. We can be certain, however, that against the march of time there is a fundamental inequality in the reach of incarceration across communities. Large areas of Chicago have escaped the brunt of the incarceration regime, while a small band of communities on the West, far West, South, and far South Sides of Chicago are highly affected. This general pattern is stable, with already susceptible communities such as West Garfield Park and Austin on the West Side undergoing dramatic growth beyond preexisting vulnerability. The implication of our finding is that the concept of “mass” incarceration is potentially quite misleading, for its instantiation is experienced at a highly local level.

What is it about “imprisoned communities” that explains their unequal experiences? We have demonstrated that imprisonment is not randomly inscribed across the urban landscape. Both logic and criminal justice “common wisdom” would suggest that the hot spots of punishment are those that generate the most crime. This is in part the case.

To take the most straightforward example, we calculated the rate of crime disaggregated by those forms that tend to generate the most public attention and that have been implicated in the imprisonment run-up: violence (assault, rape, and homicide), robbery, drug-related offenses, and burglary. At the community level, these crimes cluster together and correlate highly with later incarceration rates. For example, violence and drug crimes during the period 1995 to 2000 are both correlated at greater than 0.70 ($p < 0.01$) with incarceration rates in 2000 to 2005 across communities. Because prison sentencing does not occur instantaneously following an incidence of crime, we allowed for a lag effect by

comparing two intervals of time that include multiple years, simultaneously allowing for variability in temporal lag patterns and reducing measurement error in both crime and incarceration rates. We also created a summary measure that combines information from the four major categories of crime. The results confirmed that all four crime rates correlate strongly with each other and form a single factor based on a principal components analysis. To capture the common variance, we calculated the first principal component, which is a simple linear combination of the four crime rates weighted by their association with the common factor. Put simply, the scale reflects the overall “crime propensity” of each community.

One might argue that arrest rates are a more direct measure of criminal *offender* production as opposed to the criminal *offense* production reflected in the crime rate. But high rates of citizen-reported crime are the more public face of victimization and demands for action against crime, and thus may be more relevant in terms of generating demand for punishment and reinforcing negative reputations about safety in select communities. Previous research has also shown that arrest rates and estimates of criminal offending rates are closely related to the crime rate, in large part because offenders tend to commit crimes relatively close to home.⁹ Consistent with this general argument, in the years 1998 and 1999, the total arrest rate is correlated 0.78 ($p < 0.01$) with the total crime rate across neighborhoods in Chicago. We do not have arrest data across all relevant years in question that would allow us to pursue this issue further, thus we rely on the summary crime rate for the main analysis. We find that incarceration rates are very tightly connected – at the neighborhood level – with

prior rates of crime. Specifically, consistent with our expectations, the crime factor correlates 0.72 ($p < 0.01$) with the later incarceration rate.

This pattern does not mean that the social features of communities can be set aside in thinking about communities’ risk for incarceration. There is a line of theoretical work arguing that concentrated inequality exacerbates existing patterns of criminal justice punishment. In particular, the attributions and perceptions of dangerousness attached to stigmatized and spatially concentrated minority groups have been hypothesized to increase the intensity of both unofficial beliefs about social disorder¹⁰ and official decisions to punish through incarceration.¹¹ According to this argument, offenders from communities of concentrated disadvantage are themselves stigmatized and are more likely to be incarcerated when compared to those in less disadvantaged communities with similar crime rates.

We examined the broad contours of this thesis by estimating the relationship between dimensions of concentrated poverty and later incarceration, adjusting for the crime rate. Prior work on the Chicago data, and on national figures as well, has shown that correlated aspects of urban disadvantage tend to cluster, particularly the percentage of the population that is in poverty, unemployed, on welfare, and in single-parent, female-headed families. All of these factors are more prevalent in segregated African American areas (as indicated by the percentage of African Americans).¹² Whether tracts or community areas, these social characteristics thus cluster together, defining a factor we label “concentrated disadvantage.”¹³ The correlation between concentrated disadvantage in 2000 and the incarceration rate in 2000 to

2005 is significant: 0.78 ($p < 0.01$).

But disadvantage also co-varies with the crime rate; in fact, the correlation between disadvantage and the crime rate is equal to that of disadvantage and incarceration (0.78). Under these conditions, it is difficult to estimate independent associations other than with a simple model in which both the crime rate and disadvantage are allowed to predict later incarceration. Nevertheless, this finding suggests that both factors have explanatory relevance, especially at the tract level, where we have more cases and, as a consequence, greater statistical power.

Figure 4 evaluates our claim, visually reflecting the magnitude of associations. The incarceration rate per 100,000 is graphed on the left axis. The bars refer to the indicators of the crime rate (combined six-year average of burglary, robbery, violence, and drugs) and the 2000 concentrated disadvantage scale, each split into equal thirds. At each level of the crime rate, incarceration rates increase monotonically with concentrated disadvantage. Note that at the very highest level of crime, those communities most "at risk" for punishment in the classic criminal-punishment sense are nonetheless clearly differentiated. In fact, communities that experienced high disadvantage experienced incarceration rates *more than three times higher* than communities with a similar crime rate. At all levels of concentrated disadvantage, crime rates significantly predict later incarceration as well. Thus it is not that incarceration is somehow "irrational," rather it is increased in certain social contexts in ways that cannot be explained by crime. Analysis not shown confirmed that this pattern is maintained when racial composition (percent of the population that is African American) is entered as a separate control and not included in

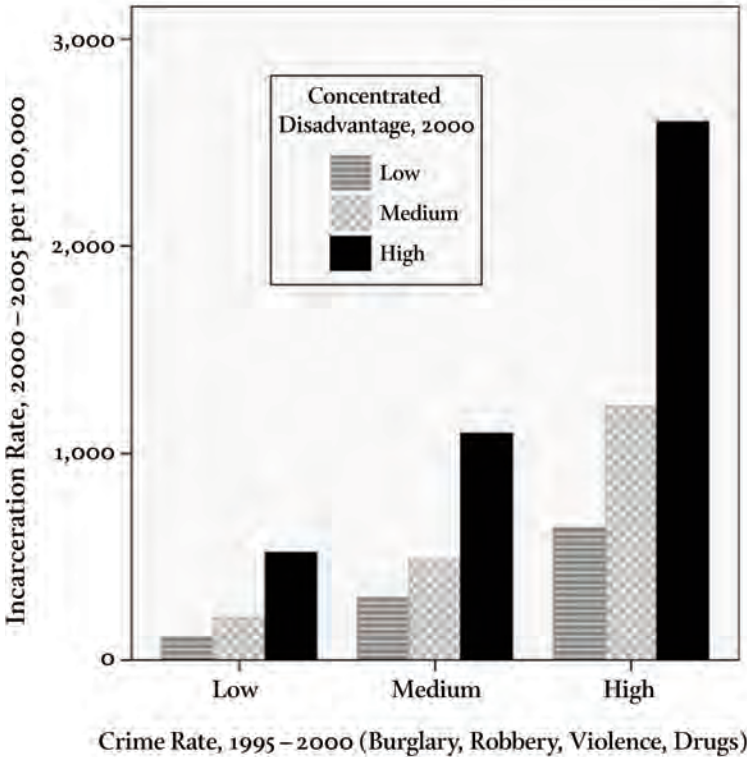
the disadvantage scale and when the arrest rate of neighborhood residents (an indicator of offender production) is controlled.

We also explored the possibility of a reverse pathway of influence, whereby incarceration was specified as a predictor of future concentrated disadvantage independent of the crime rate leading up to that point. Our data (not shown) revealed that the incarceration rate in 1990 to 1995 strongly predicts concentrated disadvantage in 2000 when we control for the crime rate in 1995 to 2000 ($p < 0.01$), a strict test given that the crime rate is measured *after* the imprisonment rate and thus has presumably reaped any deflection from deterrent or incapacitation effects. The magnitude of the predictive association between incarceration and future disadvantage was similar to that of crime and disadvantage, and again, the relationship held when racial composition was considered as a separate control from the disadvantage factor.

What we appear to observe, then, is a mutually reinforcing social process: disadvantage and crime work together to drive up the incarceration rate. This combined influence in turn deepens the spatial concentration of disadvantage, even if at the same time it reduces crime through incapacitation. In such a reinforcing system with possible countervailing effects at the aggregate temporal scale, it is difficult, if not impossible, to estimate the overall net effect of incarceration. Moreover, one can argue that there is measurement error or misspecification in the nature of our crime rate control, a reality we acknowledge and have discussed above. But we have measured those offenses that are known to the criminal justice system and that have been shown to drive public opinion and, we suggest, incarceration decisions.

Robert J. Sampson & Charles Loeffler on mass incarceration

Figure 4
Incarceration by Concentrated Disadvantage and Crime, 1995 – 2005



Source: Authors' calculations based on information collected from the Circuit Court of Cook County, the U.S. Census Bureau, and the U.S. Department of Justice.

Recent data from Chicago also show that arrest rates closely track crime rates and that offenders are highly constrained by spatial proximity and racial segregation in choosing crime locations.¹⁴ And when we directly control for the arrest rate of residents, we obtain the same results for concentrated disadvantage.

Thus, although the entire pathway from crime to offender to prison sentence is indeed unobserved in our data, it is hard to imagine relevant characteristics that could diminish the significance of incarceration rates that differ by three-fold or more. It seems more likely that while crime leads to incarceration up to a point, there is much more “input” to

the system in the way of social cues and systematic community-level or contextual effects.¹⁵ In other words, crime and incarceration are partially decoupled at the community level. We suggest that the cluster of features reflected in *concentrated disadvantage* is a prime candidate for the source, but possibly also the consequence, of incarceration.

Mass incarceration has drawn much interest, but with few exceptions, little rigorous attention has been paid to the way that incarceration shapes and is shaped by local communities. Some claim that incarceration depletes social capital and thereby harms already disad-

vantaged communities.¹⁶ Others claim that deterrent or incapacitation effects of incarceration reduce crime and thereby improve human well-being, especially in disadvantaged communities that initially had the highest crime rates and have since witnessed the largest decreases in crime.¹⁷ As recently suggested by a systematic review of the available evidence on criminal recidivism, these apparently dueling arguments are not necessarily mutually exclusive. Imprisonment may be criminogenic even as the threat of punishment by confinement is a deterrent.¹⁸

We have investigated the spatial concentration of imprisonment in Chicago as well as the possibility that concentrated disadvantage is implicated in the spatial concentration of punishment beyond its contribution to criminal offending or arrest production. We do not claim to have set up a strict test of causality, and our data are limited as data always are. But the patterns we uncovered are consistent with our theoretical framework, are large in magnitude, and make conceptual sense at different levels of analysis. Specifically, while there seems to be little doubt that crime decreases have followed increased incarceration rates in recent years, the nature of this relationship is complex; aggregate trends in crime and imprisonment mask the magnitude of neighborhood concentration and the deep penetration of incarceration in high-rate communities (Figures 2 – 3). High levels of concentrated imprisonment, year after year, would seem unlikely to contribute to social-capital formation or other social processes that foster healthy communities.

We have also shown evidence consistent with the thesis that concentrated disadvantage strongly predicts later incarceration (adjusting for crime) and that incarceration strongly predicts later dis-

advantage (again adjusting for crime). The results are not simply attributable to the racial makeup of areas; although African Americans are both poorer and more likely to be incarcerated than whites or Hispanics, the association of concentrated disadvantage with incarceration is robust and therefore appears to be contextual rather than compositional in nature.

There are two implications from these findings. One is the likely reciprocal interaction whereby community vulnerability and incarceration are involved in a negative-feedback loop. Disadvantaged communities are more likely to be highly incarcerated communities, which increases their likelihood of becoming even more disadvantaged in the future. The second implication concerns the flip side of prisoner production. If communities disproportionately produce prisoners, they will disproportionately draw them back upon release. After all, even when imprisonment rates have soared, most prisoners return to a home community.¹⁹ These twin feedback loops need further testing, but conceptually they may help explain both the high degree of stability and the fundamental dilemma of highly imprisoned communities. Unless an alternative policy is implemented, the evidence suggests, a subset of communities will continue to produce concentrated disadvantage, concentrated crime, and concentrated imprisonment.

The logic of our essay is consistent with recent calls for a community-level approach to penal reform. Such an approach seeks to reintegrate offenders and help counteract the hardships – including high crime – that already disadvantaged neighborhoods face when unemployed ex-felons return home. The maps of Figures 2 and 3 paint a particularly stark picture of communities on the edge. Concentrated incarceration may have the

unintended consequence of increasing crime rates through its negative impact on the labor market and social-capital prospects of former prisoners.²⁰ What is more, evidence shows that neighborhood context plays a major role in the recidivism rates of ex-prisoners.²¹ The integration of prisoner release programs

and efforts to build community capacity are important steps for policy.²² Along with policy reform, efforts to destigmatize and achieve justice for communities are crucial to overcoming the vicious cycle of crime production, victimization, incapacitation, and disadvantage.

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Candace Kruttschnitt

The paradox of women's imprisonment

It's very hard. . . . It is very hard. There are eight women in one room, you know . . . especially when everybody gets up in the morning and gets ready at the same time. . . . There was six to a cell; now they put another [bunk] bed in there, which made it eight. It's terrible.

I think sometimes . . . we're like, we're getting warehoused, through storage, you know . . . women's storage or something . . . just kind of put away, because um, you don't see much focus on women's prison. You see a lot on men's.

– From inmates at Valley State Prison for Women¹

In 1991, during the height of the imprisonment boom in the United States, a distinguished scholar commenting on a Blue Ribbon Commission on Inmate Population Management noted that because females represent only a fraction of the prison population they are relatively unimportant. As he put it, “[W]hen you have got as much of a change as we do in a system, which is 95 percent male . . . you are not going to be looking hard at the females in the system.”² On one level, this assertion makes perfect sense given the small percentage females

occupy in the overall prison population. On another level, the increasing rate of imprisonment of female offenders may produce a wide range of unintended, and negative, developments for both communities and families. To unravel these developments, we first need to look at the numbers in both global and temporal contexts. We can then consider the collateral consequences of imprisoning an increasingly large number of women offenders. In other words, we are “going to be looking hard at the females in the system.”

Women make up between 2 and 9 percent of the total prison population in about 80 percent of the prison systems throughout the world.³ In the United States, women fall at the higher end of this distribution, making up 7 percent of all individuals under the jurisdiction of state and federal authorities.⁴ While this is a small percentage of the prison population, women have been hit especially hard by the mass imprisonment movement, as revealed by a comparison of proportionate growth rates of male and female prisoners. Between 1980 and 2008, the U.S. women's imprisonment rate increased more than sixfold, moving from 11 to 69 per 100,000 residences, as the incarceration rate for men increased

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a little more than threefold, moving from 275 to 957 per 100,000.⁵ Although various factors contributed to this disproportionate growth in women's imprisonment, two factors are particularly important. The first is the shift from indeterminate to determinate sentencing. Indeterminate sentencing, which guided penal policy for three-quarters of the twentieth century, was an "offender-based," as opposed to an "offense-based," system.⁶ In this context, judges could consider a woman's role in the offense and the extent and severity of her prior record along with external factors, such as her family responsibilities, when determining the costs and benefits of a noncustodial or custodial sanction. With the move to determinate sentencing, judicial discretion was severely curtailed, and persistent offending rather than the severity or dangerousness of offending emerged as the most important criterion for imprisonment.⁷ Second, these gender-neutral sentencing policies were compounded by the war on drugs, which produced mandatory prison sentences for certain drug offenses.

The result of this legislation has been dramatic not only in terms of the sheer increase in the female imprisonment rate, but also in terms of the offender and racial compositions of the aggregate state prison population. Whereas in the 1980s most of the women behind bars were convicted of either violent crimes or property offenses (and only 12 percent were incarcerated for a drug offense), by the end of the century violent offenders made up just 28 percent of the female prison population and drug offenders 35 percent.⁸ Their numbers have grown so fast that, currently, one-third of all the women in the world who are being held behind bars are in the United States,⁹ and a disproportionate number of them are African

American women's imprisonment rates increased by 50 percent, topping out at 175 per 100,000. There are signs that this trend may be waning, as arrests and convictions of African Americans for drug offenses declined somewhat between 1999 and 2005.¹⁰ Nevertheless, the current incarceration rate for African American women in this country (150 per 100,000 in 2007) exceeds the total imprisonment rate (that is, both men and women) of all European countries except Spain.¹¹ It is unlikely that this development will change in the near future, as the passage of "truth in sentencing" laws in twenty-nine states requires that offenders, especially those convicted of violent crimes, serve at least 85 percent of their sentence before becoming eligible for release.

Costs accrued to the United States, in both social and human capital, from the incarceration binge of the last several decades is the subject of serious concern to both scholars and policy-makers. Social capital (networks and collective action) affects how individuals can achieve their goals within their communities and neighborhoods; human capital (the resources and skills individuals use to function effectively in society) builds on and draws from social capital. Though the social capital of both men and women is important to understanding community life, assessments of the toll the mass incarceration movement has taken on society have been primarily concerned with the large numbers of men who are cycling in and out of already low-functioning neighborhoods. This inattention to female offenders, at least in this context, is surprising because women are particularly invested in community social networks. They have more networks outside of their families and are more emotionally responsive to social ties than are

men.¹² Early ethnographies of poor urban areas depicted women as the “glue” that kept disorganized neighborhoods functioning, as they drew upon their social networks to supplement welfare payments and minimum-wage employment.¹³ Recent empirical studies of support networks in disadvantaged neighborhoods, however, suggest that it is the leverage women have in child care, not in financial matters, that is crucial.¹⁴ They wield considerable informal social control in their interactions with neighbors and their children, and in some contexts, these ties can have a significant impact on controlling crime.¹⁵ As sociologist Dina Rose and criminologist Todd Clear point out, these types of support are particularly important in poor communities, which are more dependent on informal currencies of exchange than are individuals living in more well-off communities.¹⁶ Therefore, the threshold for negatively impacting socially disorganized neighborhoods by removing women may be lower than it is when men are removed; or, stated differently, removing fewer females through incarceration may have a stronger effect on communities than removing larger numbers of males.

The degree to which women can effectively draw from and contribute to their communities depends on their own human capital and the educational and economic opportunities which they, in turn, provide for their children. Researchers take seriously the missed educational opportunities and attendant job prospects for male offenders and their families when men are sent to prison. But what is the cost to society and individual families when women are sent to prison? As Bruce Western and Becky Pettit point out in their essay in this issue, serving time diminishes subsequent economic opportunities among individuals who

are, by and large, already socially and economically disadvantaged.¹⁷ This is no less true of women than of men, many more of whom are the only caretakers in the family. Because the number of female prisoners grew at a faster pace than the number of male prisoners over the last decade of the twentieth century, the number of children with a mother in prison doubled (up 98 percent), whereas the number of children with a father in prison increased by just over 50 percent. Specifically, at the end of the last decade, 65 percent of the women in state prisons (and 59 percent of those held in federal facilities) had children under the age of eighteen, and the majority of these women were single custodial parents prior to their arrest. Despite their heavy “breadwinner” responsibilities, 70 percent of female state prison inmates (compared to 53 percent of male inmates) report they were living on less than \$1,000 a month prior to their arrest. These prisoners were three times more likely than their male counterparts (and five times more likely in the federal prisons) to rely on transfer pays such as welfare or unemployment insurance to support their families prior to imprisonment.¹⁸

Loïc Wacquant suggests in his essay for this issue that “workfare and prisonfare” are two sides of the same coin that serve to “ensnare” marginal females and males.¹⁹ Welfare ensures poor women and their children are held personally accountable to the state, while the accountability of their male counterparts is controlled through various arms of the criminal justice system. In reality, however, women inmates are subjected to both forms of regulation, as they are disproportionately likely to have been under the aegis of the welfare system both prior to imprisonment and after.²⁰ Moreover, the restructuring of welfare regulations has added to the obstacles

faced by incarcerated women, with the move from Aid to Families with Dependent Children (AFDC) to the Temporary Assistance to Needy Families (TANF). Since all but eight states imposed a lifetime ban on TANF for persons convicted of drug felonies – an offense for which women are much more likely to be imprisoned than men – it is not surprising that 20 percent of the mothers in state prison reported being homeless or living on the streets prior to their incarceration.²¹

A central concern with sending women to prison has always been what happens to their children; this concern has been heightened, of course, with the increasing numbers of women behind bars. When fathers go to prison, in virtually all cases (90 percent), the children reside with their mother. But when mothers go to prison, only a little more than one-quarter (28 percent) report that their children are residing with their father. Instead the children are often moved to live with a grandparent (53 percent) or another relative. In some cases, they are placed in, or remain in, foster care (10 percent).²² The passage of the Adoption and Safe Families Act (ASFA) by Congress in 1997 furthered women's insecurities about the whereabouts of their children when they are imprisoned. The ASFA, unlike its predecessor (the 1980 Adoption Assistance and Child Welfare Act, which discouraged states from removing children from their homes), places time limits on reunification efforts and encourages states to terminate parental rights when reunification is not feasible within specified time frames. Because twenty-five states have adopted statutes that are applicable to incarcerated parents,²³ women prisoners' chances of post-incarceration reunification with their children have substantially diminished. Reunification is virtually impossible for women, such as this prisoner, who lose track of their children after birth:

I was there for four days because I had a C-section, otherwise most of the girls are there less than twenty-four hours. They give birth, they see the baby, and then they're brought straight back here... either they have arrangements for family to pick them up or they go to the State... [Y]ou're not allowed to make phone calls from the hospital. [The social worker] was making the phone call back and forth between the twin's father and up north [where my friend lived]... [W]hen it got down to the fourth day, she told me, "Well, I think it'll be okay if he takes them." But he's on drugs; now he's in jail; now I don't know where my kids are.

Such reports from prisoners about the location of their children are taken, and reflect their whereabouts, at only one point in time. Yet interviews with children of incarcerated mothers reveal they often experience considerable instability in their home life and schooling as a result of, for example, living first with a grandparent, then with an aunt, and then in a foster home or with a friend.²⁴ Further, the homes of relatives, and even foster homes, are rarely ideal living situations. Relatives often reside in marginal neighborhoods, lack steady employment, and have substance abuse problems of their own, thereby adding to the risks these children already face.²⁵ As the following woman makes clear, prisoners are often acutely aware of how this affects their children:

My daughter is having problems because I'm not home with her, you know? And sometimes they treat her good where she lives, and sometimes they don't, you know? She lives with my cousin... they start messing with her and that makes her sad.

There is no question that incarceration restructures families, but when mothers are incarcerated, it often devastates them.

Developmental outcomes of children who have lost a parent to incarceration are not well understood, particularly when it is the mother who has been removed from the home. While scholars have been careful to consider the possibility that losing an unstable or abusive parent may actually be beneficial to a child's development, the available evidence suggests there are few, if any, advantages for children to parental imprisonment. Specifically, the best available research (prospective longitudinal studies that are able to account for competing risks like parental criminality, low family income, poor parenting, and low child IQ) finds that parental imprisonment increases the risk of school failure, delinquency, unemployment, mental health problems, and drug abuse among children.²⁶ There is also evidence suggesting that maternal or paternal arrest increases family instability and economic strain independent of parental traits (for example, substance abuse, mental health problems, lack of education, race) that may contribute to such instability and economic adversity.²⁷

There are several reasons why we might expect that maternal imprisonment is particularly difficult for children. First, because mothers are often the primary caretakers and source of parental attachment, especially for young children, their loss may be felt more acutely by children than when fathers are removed from the home. Second, it may be harder to maintain close ties with an imprisoned mother than an imprisoned father since there are fewer state prisons for women than men, and they are often located in more remote regions. Certainly, the vast majority of imprisoned mothers and fathers report having some contact with their children since admission to prison (either by mail or by phone), but more than one-half of the mothers in state prison report

never having received a visit from their children.²⁸ For those who haven't seen their children, or who haven't seen them for many years, the toll it takes on their well-being can be quite significant:

I saw my children a few years ago. . . . I need to see them. I need to know, besides a letter. . . . I need to see them, person to person, and to be able to look in their eyes and I'll know whether they're alright or not. . . . I need it for peace of mind. I need it for structure, for myself. And I have told myself for years that it didn't matter, but really it does matter.

Unfortunately, most of the research on the developmental effects of parental incarceration has failed to examine (1) whether children's behavior problems are worse when mothers, rather than fathers, go away and (2) how age at parental separation due to incarceration affects children. There are, however, a few studies that report worse effects for children of imprisoned mothers, relative to those with imprisoned fathers. While these findings may be attributed to differences in maternal versus paternal attachment or contact availability during the carceral period, they also may be due to the high probability that these children will have no parental figure, or a deviant one, when their mother is incarcerated. Women offenders' prospects for mate selection are clearly limited by both the disorganized neighborhoods in which they reside and their deficiencies in human capital, which are compounded by a period of imprisonment.²⁹ It is also important to recognize that the stigma derived from having a parent incarcerated is likely to be much greater when it involves the mother rather than the father. Despite increases in female arrest rates, offending remains more normative for men than women. Not surprisingly, and even with limited data sources, the

most complete review of this literature concludes “that children may have worse reactions if their mother is imprisoned, if parents are imprisoned for longer periods of time and if parents are held in more punitive penal contexts.”³⁰

These are distressing findings because we know that sentence length and conditions of confinement have changed for women. Largely as a result of truth-in-sentencing legislation and various “add-ons,” which allow prosecutors to increase sentences based on offenders’ prior records, the average time served in state prison for those serving a first sentence increased by seven months (from twenty-two to twenty-nine months) during the 1990s.³¹ For federal prisoners, this average increased further still between 1986 and 1997, doubling from fifteen months to twenty-nine months; for drug offenders, it jumped from twenty to forty-three months.³² Several scholars are also documenting how the boom in prison construction is affecting women’s conditions of confinement. California is particularly noteworthy in this respect. Over the course of the 1990s, three new correctional facilities for women opened; two of these facilities (Central California Women’s Facility and Valley State Prison for Women) have a design capacity of two thousand each (holding four women in each cell). Currently, these two facilities are both at 200 percent occupancy, housing four thousand inmates who are double-bunked (eight per cell) in each facility. Because both of these facilities were designed to accommodate male offenders in the event that the female prison population eventually declines, the women are subjected not only to extreme levels of overcrowding but also to far more security than they need.³³ The conditions of confinement, subject to much research during the rehabilitative era of the 1960s, have virtually been

ignored in the current punitive climate. Yet we know that the effects of overcrowding and extreme levels of security are debilitating and last beyond the period of incarceration.³⁴

Reentering and “soon-to-be-released inmates” paint the saddest picture of our current imprisonment crisis. Women are 8 percent to 10 percent of these returnees.³⁵ They have very different needs and obstacles than their counterparts did in earlier years because women’s prisons now hold more drug offenders and offenders with mental health problems. Prison programs that might address these needs are nearly absent since state budgets have been sharply cut in the recession, and state legislators want to make it clear that the prisons they are running are not “country clubs for cons.” Even the most basic skills necessary for rebuilding their lives are often difficult for prisoners to obtain while incarcerated. For example, only about one-third of all inmates who were preparing for release from prison in 1997 had participated in either an educational program (35 percent) or a vocational program (27 percent).³⁶ Most states cut back on educational programs for prisoners when the federal government eliminated inmates’ eligibility for Pell Grants (which supported their efforts to obtain secondary education) in the mid-1990s. The reduction in prison education programs occurred as part of the Violent Crime Control and Law Enforcement Act, despite numerous findings that link education to lower recidivism rates, especially among female ex-offenders.³⁷

Vocational training and work release programs are also known to be effective in reducing recidivism.³⁸ Yet in California (which had the largest prison population of any state in 2007) nearly one-half of all the prisoners released in 2006 report-

ed they had not participated in any work assignment or rehabilitation programs for the entirety of their imprisonment.³⁹ Vocational programs and job training are especially important for women prisoners who hope to reunite with their children and overcome their dismal work histories to support them. In fact, job assistance has been shown to be quite important for reducing women's odds of reoffending. A sample of women with felony convictions in Minnesota and Oregon were interviewed as they entered a period of probation/parole supervision and reinterviewed six months later. At the time of the follow-up interview they were asked whether they reoffended (had been rearrested or had violated their conditions of supervision) and whether they had received one of two kinds of state resources: subsidized housing or assistance in identifying potential employers, filling out job applications, and developing interview skills. Analysis of the data (which addressed risk level, education, age, and race) revealed that providing these resources reduced the odds of recidivism by 83 percent.⁴⁰

The lack of planning for the reentry of female offenders is particularly striking given the sizable growth in the female inmate population and the considerable rhetoric that has developed around the notion of "what works" for women offenders. The conventional wisdom is that women need "gender responsive" programming to address their unique backgrounds and circumstances: histories of abuse, drug addiction, and poor parenting skills. Nevertheless, the development of such programs, particularly in prison and in the period of transition from imprisonment into the community, has been spotty at best.⁴¹ In California, 80 percent of prisoners report having a substance abuse problem, but only 18 percent are placed in programs that would

address this problem,⁴² even though such programs are known to lower levels of post-release substance abuse.⁴³ Prisoners are well aware of the lack of resources they have for changing their lives and the apparent abdication of rehabilitative services by the "California Department of Corrections and Rehabilitation." As the prisoners describe it, this shortage of services includes not just basic education but much-needed drug treatment as well.

There are many fewer programs now than when I came. . . . The system has given up on rehabilitation; it's warehousing, not rehabilitating, people. We need more education programs. The youngsters coming in need to be tested on reading and writing; they should be required to get their GEDs first and then be assigned to jobs. They have to learn to read and write before they leave here or they'll be coming right back.

I'm third time committed. I never got drug diversion to begin with. . . . I asked the judge when I got busted this time for a rehab, in-patient program out on the street. No chance. . . . I don't understand that. I really honestly do not understand that. Why would you want to continually put somebody in here and to bring them back? Because it's not helping; it's not. All it's doing is creating a worse attitude out there on the street. You go back and create more criminal activity.

Programming that would address parenting needs is also absent despite research that shows that children often act as a catalyst for positive change in women offenders.⁴⁴ The Vera Institute study⁴⁵ of maternal incarceration found that "being responsible for children often serves to put a brake on a parent's destructive behaviour, including drug use and illegal activities [and] once that brake is removed, destructive behaviour accelerates." But the chances of reunification hinge not

only on the degree to which women are seen as “adequate” parents but also the degree to which they can provide a stable environment for their children. Public housing has long been the most viable option for released prisoners since private property owners have the right to deny housing to anyone with a criminal record. But since 1988, when Congress amended the public housing statute with a “one strike” option that can exclude applicants with a criminal record, women offenders have few options for providing a safe, secure, and affordable place for their children to live.⁴⁶

The paradox of women's imprisonment, then, lies in the sizable repercussions it has on society given the small number of individuals it affects. There is no question that many of these women have exercised poor judgment, but most are still an important resource for their communities and their families, and all of them will have a significant impact on the risk of criminality in the next generation of youth. It seems reasonable to suggest that many communities and children will be better off if

we imprison fewer women. But how will this be accomplished? Legislative changes that give greater weight to the severity and dangerousness of an offender's actions, rather than to their risk of reoffending, would be an important start. Relatively few women offenders pose a serious risk to society, and many would be much better served by remaining under court supervision in their communities. Such legislative changes must, however, be coupled with scientifically credible drug treatment programs. Because women's substance abuse problems play a large role in both their offending histories and in the likelihood that their children will suffer family and economic instability, we need a greater public health (as opposed to criminal justice) investment in effective interventions for drug addiction. Women prisoners' needs obviously extend beyond these suggestions and include, as noted, adequate housing and secure employment; but, at least in the short term, these investments could have sizable payoffs by generating more community stability and putting fewer children at risk.

ENDNOTES

¹ These quotes, and subsequent quotations from prisoners throughout this article, are taken from the study “Women in Prison in the 1990s: A Temporal and Institutional Comparison” conducted by the author and Rosemary Gartner and funded by the National Science Foundation (Grant #9617285).

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⁴ Bureau of Justice Statistics, *Prison Inmates at Midyear 2008 – Statistical Tables*, NCJ-225619 (Washington, D.C.: U.S. Department of Justice, 2009).

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- ⁶ Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, 2001), 114.
- ⁷ California's passage of the Three Strikes law in 1994 is paradigmatic of this shift. As Zimring and his colleagues noted about this piece of legislation, "Any trivial felony by a twice-convicted burglar will call down a larger sentence for a third time loser than a non-aggravated second degree murder will generate for a non-third strike defendant"; Zimring, Hawkins, and Kamin, *Punishment and Democracy*, 9.
- ⁸ Candace Kruttschnitt and Rosemary Gartner, "Women's Imprisonment," in *Crime and Justice: A Review of Research*, vol. 30, ed. Michael Tonry (Chicago: University of Chicago Press, 2003), Table 3.
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- ¹² See Ronald Kessler and Jane D. McLeod, "Sex Differences in Vulnerability to Undesirable Life Events," *American Sociological Review* 49 (1984): 620 – 631; Jay R. Turner and Franco Marino, "Social Support and Social Structure: A Descriptive Epidemiology," *Journal of Health and Social Behavior* 35 (1994): 193 – 212; Natalia Sarkisian and Naomi Gerstel, "Kin Support among Blacks and Whites: Race and Family Organization," *American Sociological Review* 69 (2004): 812 – 837.
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- ¹⁵ Pamela Wilcox Rountree and Barbara D. Warner, "Social Ties and Crime: Is the Relationship Gendered?" *Criminology* 37 (1999): 789 – 814.
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- ¹⁸ Bureau of Justice Statistics, *Incarcerated Parents and Their Children*, NCJ-182335 (Washington, D.C.: U.S. Department of Justice, 2000).
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- ²⁰ See Kristin F. Butcher and Robert J. LaLonde, "Female Offenders Use of Social Welfare Programs Before and After Jail and Prison: Does Prison Cause Welfare Dependency?" working paper series 07.18 (Chicago: Harris School, University of Chicago, 2006). Butcher and LaLonde examined patterns of welfare receipt for 45,000 women inmates from Cook County, Illinois, sentenced to prison or jail terms. They found that in the four to five months after parole, women's welfare receipt rates drop, but after one year they approach their base levels of receipt prior to prison.
- ²¹ Butcher and LaLonde also found that the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) had no effect on the use of TANF by female drug offenders in Illinois, but the Illinois legislature provided these women with a variety of avenues for waiving the bans; Butcher and LaLonde, "Female Offenders Use of Social Welfare Programs Before and After Jail and Prison," 35. See also Christopher Wildeman, "Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment," unpublished paper (University of Michigan, School of Public Health, 2009).

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- ³⁵ Joan Petersilia, "From Cell to Society: Who is Returning Home?" in *Prisoner Reentry and Crime in America*, ed. Jeremy Travis and Christy Visser (New York: Cambridge University Press, 2005), 19.
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- ³⁷ Christopher Uggen and Candace Kruttschnitt, "Crime in the Breaking: Gender Differences in Desistance," *Law and Society Review* 32 (1998): 339–366. See also Nancy G. La Vigne, Lisa E. Brooks, and Tracey L. Schollenberger, "Women on the Outside: Understanding the Experiences of Female Prisoners Returning to Houston, Texas" (Washington, D.C.: Urban Institute, Justice Policy Center, 2009).

- 38 R. Seiter and K. Kadela, "Prisoner Reentry: What Works, What Does Not, and What Is Promising," *Crime and Delinquency* 49 (2003).
- 39 Joan Petersilia, "California's Correctional Paradox of Excess and Deprivation," in *Crime and Justice*, vol. 37, ed. Tonry, 211.
- 40 Kristy Holtfreter, Michael D. Reisig, and Mary Morash, "Poverty, State Capital, and Recidivism among Women Offenders," *Criminology and Public Policy* 3 (2004): 185–208. Research on 142 women released from Texas state prisons and jails in 2005, as part of the Returning Home Study of prisoner reentry in Maryland, Illinois, Ohio, and Texas, found that women who participated in job training in prison were more likely than those who did not participate to be employed eight to ten months after their release; La Vigne, Brooks, and Schollenberger, "Women on the Outside," 7.
- 41 See Kruttschnitt, "Women's Prisons," in *Oxford Handbook of Crime and Criminal Justice*, ed. Tonry.
- 42 Little Hoover Commission, *Breaking the Barriers for Women on Parole* (Sacramento, Calif.: Little Hoover Commission, 2004), 43.
- 43 La Vigne, Brooks, and Schollenberger, "Women on the Outside," 11.
- 44 Peggy C. Giordano, Stephan A. Cernkovich, and Jennifer L. Rudolph, "Gender, Crime, and Desistance: Toward a Theory of Cognitive Transformation," *American Journal of Sociology* 107 (2002): 990–1064.
- 45 Vera Institute of Justice, *Hard Data on Hard Times*, 14.
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Jeffrey Fagan

*The contradictions of
juvenile crime & punishment*

Juvenile incarceration in the United States is, at first glance, distinctly different from its adult counterpart. While some juvenile facilities retain the iconic aesthetic of adult incarceration¹ – orange jumpsuits, large cellblocks, uniformed guards, barbed wire, and similar heavy-security measures – others have trappings and atmospherics more reminiscent of boarding schools, therapeutic communities, or small college campuses. These compact, benign settings avoid the physical stigmata of institutional life and accord some autonomy of movement and intimacy in relations with staff. They also give primacy to developmentally appropriate and therapeutic interventions.

However, like its adult counterpart, juvenile corrections, whether located in a human warehouse or a therapeutic community, is designed mainly to control its residents and restrict their personal freedoms. Movement and association are intensively regulated; outside contact with family, friends, and intimate partners is attenuated and used as an incentive for good behavior; access to media and culture is restricted; privacy is nonexistent; and choice of clothing, language, and other modes of personal expression is

off-limits. Whatever developmental importance these forms of self-expression and self-determination may have for adolescents, it is sacrificed to the primary goals of security, control, discipline, and punishment. Most important, at either end of the continuum of institutional climate, the options of solitary confinement, physical restraint, or other forms of extreme deprivation exist to control the defiant and unruly or to punish wrongdoing. Accordingly, the naming conventions for these juvenile facilities are deceptive: these are not “training schools” or “centers” or any other kind of school or academy, nor are they “homes.” These are correctional facilities whose primary purpose is to punish.

One would expect such institutions to be reserved for those who are most deserving of punishment or those who pose a nontrivial risk to public safety. But under the enduring doctrine of *parens patriae*,² we incarcerate children for a mixed bag of rationales, ones that do not always comport with the punitive dimensions of juvenile incarceration. *Parens patriae* obligates the court to act beyond the need simply to protect children from the harms of noxious social circumstances or to avail them of developmental and material supports that their families have failed to provide. The doctrine allows –

even mandates – juvenile courts to protect children from themselves: from their associations with antisocial peers, from poor decision-making with respect to crime, and from harms to their physical and mental health to which they expose themselves.³ As a result, we incarcerate children because their homes are too dangerous or criminogenic; because they are both delinquent and mentally ill or addicted to intoxicants and there are no other appropriate placements; because they need therapies that are unavailable elsewhere, even though they pose no security risks; because they are homeless; because they are sexually active at young ages; or because we think they may commit some crime in the near future.⁴

The resulting landscape of juvenile incarceration has been, not surprisingly, complex and shifting since the 1970s, the decade when adult incarceration trends began their robust increase. Since that time, juvenile incarceration, and juvenile justice itself, has been situated in a space bounded by the transcendent nineteenth-century child-saving movement, the procedural rights movement of the 1960s, and the raw emotional politics of violent crime and punishment in the past three decades. Accordingly, we see contradictions everywhere in this terrain. Growth in the incarcerated population since the 1970s has been restrained, even in the face of a youth violence epidemic,⁵ and even as rhetoric has grown harsher and statutes have been revised to express the language of retribution and incapacitation.⁶ States, for the most part, have acknowledged the advantages of small facilities to advance the core rehabilitative and therapeutic projects that informed the creation of separate institutions for juveniles nearly two centuries ago, even if they have not necessarily acted on those ideas and instincts.⁷ At the same time, the conditions in juvenile corrections often

remain harsh, a sign of both cynicism about rehabilitation and institutional self-interest, as well as neglect.⁸ States have quickened the pace of expulsions of juvenile offenders to the criminal courts and prisons as a way to “get tough,”⁹ even as they refuse to lower the age of majority and fundamentally alter eligibility for the protections of juvenile institutions. Racial disparities remain durable and defy explicit legislative and policy efforts to reduce them.

These contradictions and puzzles inform this essay on juvenile incarceration. The patterns of growth in juvenile corrections suggest ambivalence about the reform and rehabilitation of juvenile offenders, notions that have been battered by three successive waves of high crime over the past thirty years. On the one hand, courts and legislatures want to be tough; on the other hand, there are strong preservationist instincts at play that have muted the growth in incarceration of minors. “Getting tough” on juvenile offenders has thus been assigned to the criminal courts and adult correctional institutions. But there are signs of ambivalence there, with relatively short sentences and a responsiveness to crime rates in new admissions (flow) and total population (stock) that is the opposite of what we see for adults. States have demonstrated their ambivalence by avoiding change to the age of majority, the last resort in increasing punitiveness for juveniles. Such a step would be a poison pill for the doctrine of *parens patriae* in which juvenile corrections is steeped. Racial disparity pervades juvenile incarceration, yet Congress attempted remedial steps never contemplated for adults, by engaging states in a collaborative project to reduce racial inequalities in juvenile detention and corrections. What this all adds up to is an institutional landscape that at once fears child criminals and wants

to punish them harshly, but at the same time adheres to the transcendent philosophy of child-saving.

Beginning in the 1970s, the traditional discretion of juvenile court judges to place youths in correctional confinement was contested, as was the discretion of corrections officials to determine how long youths would remain in placement. On balance, discretion lost. The introduction of mandatory minimum sentences for juveniles in New York and elsewhere in the 1970s was followed in subsequent decades by new laws mandating waiver to adult court and mandatory placement in a secure facility.¹⁰ In this hardening political atmosphere, fueled by rising juvenile arrest rates and a punitive drift toward more formal processing and less diversion, one might have predicted rapid and persistent growth in the rate of juvenile imprisonment starting in the 1970s. By the 1990s, when a moral panic over a new species of juvenile offenders known as “superpredators”¹¹ and the spread of violent youth gangs further animated legislatures to pass tougher sentencing laws for juveniles,¹² the conditions seemed ripe for the juvenile court to follow a trajectory of incarceration growth similar to the rise in adult rates.

But it didn’t happen, at least not in juvenile corrections. Growth in juvenile incarceration in both public and private facilities was only a fraction of the growth in adult incarceration. Juvenile incarceration – both in short-term detention and longer-term correctional placements – rose from 73,023 youths in public institutions and private residential facilities in 1977 to 95,818 in 1992, the year preceding the modern peak in juvenile arrests for felony crimes.¹³ Juvenile incarceration peaked in 2000 at 108,802, a rate of 356 per 100,000 youths ages ten to seventeen. The placement rate declined by more

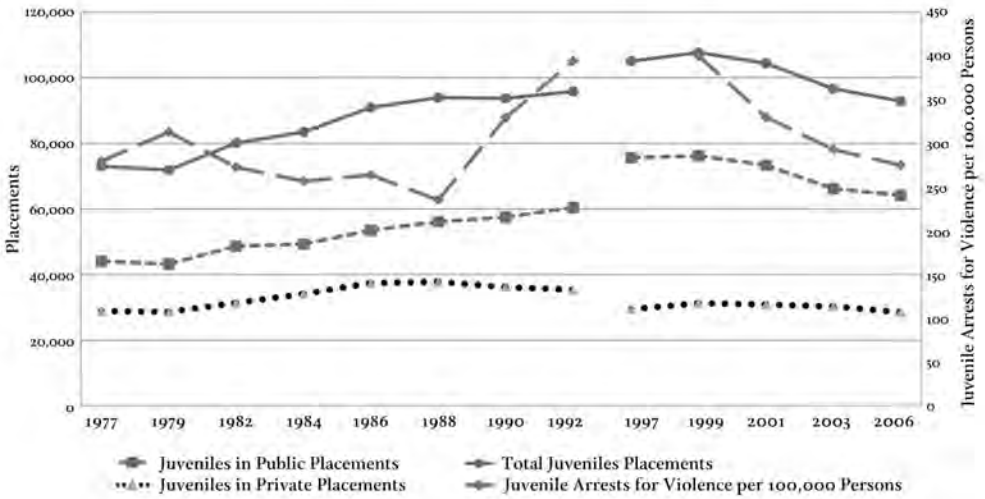
than 20 percent by 2008, to approximately 81,000 children living in either state-operated facilities or privately operated group homes, or 263 youths per 100,000 persons ages ten to seventeen.¹⁴ This juvenile placement rate today pales in comparison to the adult incarceration rate of 762.¹⁵

Figure 1 shows that placements in public facilities accounted for most of the rise and fall in juvenile incarceration, and that these were somewhat responsive to the rise and subsequent fall in juvenile arrests. Between 1997 and 2008, juvenile arrests declined by 33 percent, while the overall correctional placement of youths declined by 26 percent.¹⁶ Placement in private facilities rose more slowly and was fairly stable over time.

About 70 percent were committed following an adjudication of delinquency, and 28 percent were detained prior to the resolution of their case.¹⁷ They were incarcerated on a variety of offenses, with the greatest number placed for person offenses (34 percent) followed by property offenses (25 percent). Drug offenses accounted for 9 percent of the incarcerated population, but more were placed for “public order” offenses such as alcohol or disorderly conduct (11 percent) than were placed for drugs. As with their adult counterparts, many (16 percent) were placed for technical violations of probation or juvenile parole. One in twenty was placed for any of several “status offenses”: social behaviors that do not violate any criminal code but that capture the court’s attention due to the risk of danger to the child’s well-being.¹⁸

The area that grew most, however, was the number of juveniles below age eighteen in state prisons. The pattern in Figure 2 shows a rise in the number of persons below age eighteen incarcerated in state prisons from 1985 to 2004, as well as new admissions for that same group.

Figure 1
 Juvenile Placements in Public and Private Facilities and Juvenile Arrests for Violence, 1977 – 2006



Source: Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement* (National Center for Juvenile Justice, 2008), <http://ojjdp.ncjrs.gov/ojstatbb/ezacjrp>; Steven D. Levitt, “Juvenile Crime and Punishment,” *Journal of Political Economy* 106 (1998): 1156 – 1185.

The patterns reflect broader trends in juvenile crime and arrest, especially the spike in juvenile violence from 1987 to 1996. The census population of minors in prison peaked at 5,400 in 1996 and declined by nearly half, to 2,477, in 2004.¹⁹ The population remained stable through 2007, when 2,283 youths were in state prisons or privately operated correctional facilities programmed for adults.²⁰

Two trends in Figure 2 are notable and suggest conflicting instincts.

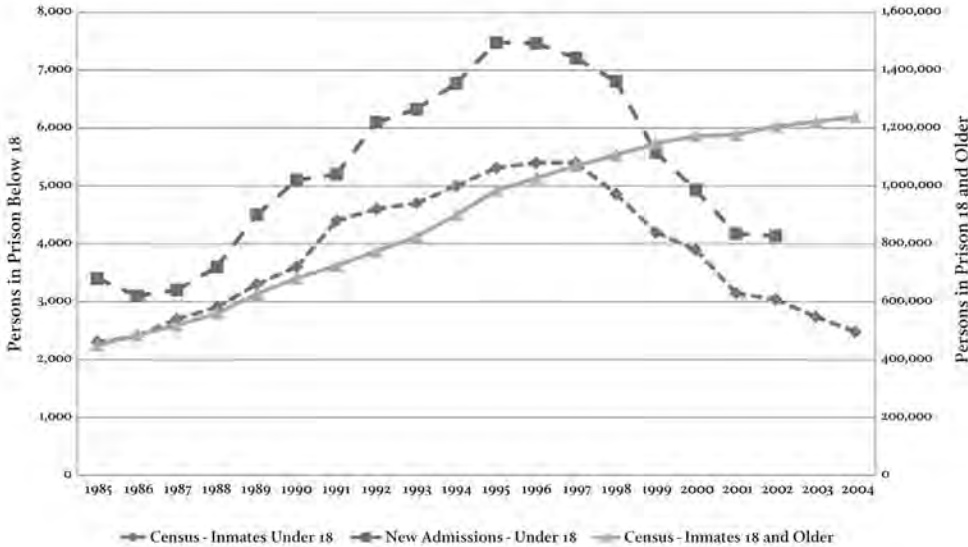
One is the rapid growth in the number of youths sentenced as adults. This trend is responsive to crime trends and also reflects a growing punitiveness toward youth crime that was structured into sentencing statutes. (The “get tough” trend for juveniles is discussed later in this essay.) But the sentences seem to be attenuated, suggesting that the legislatures were tempered in setting tariffs for minors. Figure 2 shows that the number of new admissions of minors to adult

prisons tracks the trend for the one-day census. There is no buildup of “stock” for this population, unlike the steady growth for adults.

The similar trend lines for the population census and the new admissions suggest that the sentences for this population were shorter and releases were quicker, reflecting a de facto youth discount that many states structure into sentencing statutes under “youthful offender” or “juvenile offender” provisions.²¹ The responsiveness in the decline of juveniles in adult prisons beginning in 2000 shows a sensitivity to declining crime rates that is not evident for the adult population.

Nevertheless, even short-term exposure for youths to adult prisons has risks for youths and for public safety. To the extent that legislators ignored these risks, the wholesale transfer of minors to the criminal courts was a reckless experiment. A robust body of research shows that recidivism rates are in fact higher for youths

Figure 2
Inmates under Eighteen in State Prisons, 1985 – 2004



Source: Howard Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2006), 236 – 238, <http://ojjdp.ncjrs.gov/ojstatbb/nr2006>.

sentenced as adults, after controlling for relevant offender and offense characteristics.²² There appears to be no marginal deterrent effect from incarcerating minors as adults, which was a cornerstone of youth policy in the 1990s. One explanation for the elevated recidivism rates may be the effects of adolescents' exposure to prison life and adult convicts. While likely to be separated physically from older inmates, the institutional climate on the youth side may hardly differ from other blocks in the prison: the separation may be one of degree rather than kind. Indeed, it may even worsen the chaos and violence of correctional confinement by concentrating youths who are at their peak ages of criminality and diminished self-control.²³ Only a few studies have compared the correctional experiences of youths in prisons and juvenile incarceration, but all agree that placing youths in prisons comes at a cost: they are less like-

ly to receive education and other essential services, they are more likely to be victims of physical violence, and they manifest a variety of psychological symptoms.²⁴

The residual consequences of adolescents' exposure to violence in adult prisons are uncertain. But as a matter of principle, it is not easy to reconcile this particular harm with the diminished blameworthiness and culpability of adolescents. Social and behavioral science informed recent Supreme Court jurisprudence on youth crime and punishment,²⁵ but criminal court sentencing policies more generally are hostile to the new cognitive science of diminished culpability of adolescents.²⁶ Potentially disfiguring punishments seem disproportionate, if not cynical, in the context of this new evidence about the blameworthiness of adolescents, especially if criminal justice goals are not well served by transfer and subsequent incarceration.²⁷

There are puzzles and contradictions behind these trends. While American lawmakers exponentially expanded prison capacities for adults starting in the 1980s, there was – with rare exceptions – no expansion of the capacities to incarcerate minors. This was one of two non-events in modern juvenile justice that illustrate the dissonance in thinking about responses to serious youth crime. Figure 1 shows that the rate of increase in juvenile confinement was a fraction of the rate of increase in juvenile arrests; as crime declined, juvenile courts responded quickly by decelerating the rate of placements.

Yet in the juvenile system, even as states made the choice not to build new juvenile space and not to dramatically increase youth confinement, every state toughened its juvenile delinquency codes rhetorically to deemphasize rehabilitation and focus on punishment, retribution, and incapacitation.²⁸ Thus, “getting tough” in the juvenile system was not an institutional project, but a statutory one. Programming was largely unaffected, as the locus of effects of these new measures was on court decisions. The changes took several forms, but all had the combined effect of marginally increasing the likelihood of juvenile correctional confinement or lengthening the time spent in placement.

The harder work of “getting tough” was outsourced to the criminal justice system, with states more often than not using “regular” criminal law for juveniles. Statutes were amended to ease and expand the number of youths transferred to the criminal courts for sentencing as an adult.²⁹ The results are evident in Figure 2, as the number of youths confined in adult prisons rose (and fell) sharply. The “get tough” measures took several forms. Between 1990 and 1997, every state in America modified both its juvenile and criminal codes to expand

the number of youths eligible for transfer to the criminal courts.³⁰ In 1995 alone, nineteen states amended their criminal codes to facilitate the discretionary transfer of delinquents to the criminal court or the wholesale exclusion of youths from the juvenile court.³¹ Each strategy was designed to increase punishment in numbers and in severity. Several states adopted mandatory minimum sentences for youths committed to state juvenile corrections authorities. Others adopted sentencing guidelines that fixed sentences in the juvenile system based on a grid of offense, offender characteristics, and victim characteristics. Still other states expanded eligibility for sentencing minors to life without parole, or death in prison, and made those sentences automatic upon conviction for enumerated crimes.³² Prior to the 2010 U.S. Supreme Court ruling in *Graham v. Florida* that banned life-without-parole sentences for juveniles who did not commit murder,³³ approximately 2,484 youths were serving such sentences in 2008, many as young as thirteen, and many others for crimes other than murder or manslaughter.³⁴

But these developments point to the second non-event in the toughening of juvenile justice and juvenile incarceration. Certainly, a state that truly wanted to crack down on juveniles and make incarceration harsher could simply have lowered its age of majority and sent all its older juvenile offenders to adult prisons. Only two did so: Wisconsin and New Hampshire lowered the age of majority from seventeen to sixteen in the 1990s.³⁵ In fact, one state, Connecticut, has begun a process to incrementally raise its age of majority from sixteen to eighteen.³⁶ New York and North Carolina maintain the age of majority at sixteen; in most states, it is still eighteen.

Stopping short of the more obvious and expedient step of lowering the age

of majority, states have instead used an incremental and piecemeal legislative strategy to criminalize delinquency and thereby allow them to sentence adolescents to adult punishment for crimes committed as minors. But despite the wave of transfer legislation, the current statutory landscape is an elaborate game of chutes and ladders, with some youths automatically transferred to the criminal courts only to be “reverse waived” back to the juvenile courts. As a result, many adolescent offenders (though no one knows exactly how many) escape the reach of the criminal law and its harsher punishments. Nevertheless, a large number are removed from the juvenile to the criminal courts by statutory exclusion, judicial discretion, or the administrative practices and preferences of prosecutors.³⁷

Viewed in this way, legislators appear ambivalent, refusing to abandon completely the principles of juvenile justice, yet seeking to divide delinquents into two categories: those worthy of the remedial and therapeutic interventions of the juvenile court and those who should be abandoned to the punitive regime of criminal justice in the name of retribution and public safety. The complexity of state laws, the piecemeal character of the statutory landscape, and the fact that most states have overlapping transfer mechanisms suggest a philosophical duality. The punitive and child-saver instincts for youth crime coexist uneasily in the current statutory environment, forcing a binary choice between criminal and juvenile court jurisdiction – a choice that is not well suited to reconcile these tensions.³⁸

On balance, the business of getting tough on juvenile offenders was assigned to the criminal justice system, while the juvenile system remained relatively small and still wrapped, however thinly, in its

rehabilitative and child-saver clothing. Why did juvenile corrections expand so little during a time of unprecedented and unrestrained growth in adult corrections? And why did it transform from warehousing to embracing smaller, more therapeutically grounded facilities?³⁹ The numbers reveal the tension between two features of American jurisprudence surrounding juvenile offenders. We believe deeply in child-saving, yet we are quick to expose violent children to the harshest punishments in service to the same punitive instincts that drive mass incarceration of adults. But even there, we pull our punches. We pull back from the brink of fully embracing punitiveness toward juveniles, reserving it instead for adults. Not only is the philosophy of child-saving an important normative modifier of these instincts, it is also deeply embedded in the institutions of juvenile justice and juvenile corrections.

One episode illustrates the connections between the visceral push for punitiveness and political culture. In 1996, former U.S. Secretary of Education William Bennett and two colleagues published *Body Count*.⁴⁰ The book offered a “moral poverty” theory of youth crime, rejecting social theories of juvenile crime causation that focused on economic poverty, discrimination, family dysfunction, or savage levels of inequality. Instead, for Bennett and his coauthors, it was moral poverty that characterized a coming wave of “superpredators” who would commit extremely violent crimes and be immune to rehabilitative interventions. They characterized this new breed of young offenders as impulsive and remorseless, fearing not “the stigma of arrest, the pains of imprisonment, [or] the pangs of conscience.” These (predicted) young criminals were portrayed nearly as a separate species. The authors’ predictions were based on

data that were compiled through 1993, the peak year of juvenile crime and violence in the United States.⁴¹ Their predictions turned out to be horribly wrong.⁴²

But the damage was done. The book supplied strong and scary rhetoric to fuel the legislative panic that, in general, produced a wave of get-tough legislation across the country. So strong and persuasive was this rhetoric that it led one state (Pennsylvania) to build a youth prison in anticipation of a surge of superpredators, not a juvenile center that emphasized rehabilitation and other services. The State Correctional Institute at Pine Grove opened in 2000, its plan and design based on population projections from the superpredator era and with that profile of the young offender in mind. At its opening, the prison housed 178 young offenders, well below its capacity of 1,000.⁴³ By that time, youth crime had fallen in Pennsylvania, and the number of youths below eighteen in adult prisons had fallen to sixty-six.

To fill this new youth prison, the state moved young offenders from some traditional correctional settings to Pine Grove, and the state's juvenile court judges made good use of the new placement option. Pine Grove today is well occupied, housing approximately one thousand inmates below the age of twenty-one. Built to house the expected wave of superpredators, today it is filled with a heterogeneous group of adolescent offenders whose profiles are more typical of the variety of youth crimes that characterize contemporary youth dockets.

The character of juvenile incarceration has also changed dramatically over three decades. Beginning in the 1970s, as adult correctional populations surged, large juvenile corrections facilities in several states were replaced by smaller facilities housing fewer than thirty children per

center, sometimes in community-based residential programs but other times in "campuses" that included cluster or residential "pods."⁴⁴ Jerome Miller, architect of the Massachusetts reforms, showed that scandals involving staff abuse of youth residents, as well as youth suicides and uncontrolled violence, often sparked these changes. Massachusetts, Pennsylvania, Utah, and Florida, among others, moved from large, toxic warehouses to these smaller, disaggregated dormitory-like units.⁴⁵ In effect, the capacities of these systems were capped, and any expansion required the participation of the private sector.⁴⁶

Yet noxious conditions still prevail in many juvenile corrections facilities and systems, and litigation is not uncommon. In *Galloway v. Texas*,⁴⁷ for example, plaintiff Galloway was placed in detention at fourteen and held until he reached nineteen, the maximum age of juvenile jurisdiction, based on unreviewable administrative decisions by facility staff. The trial record showed that Galloway and many others had been physically and sexually abused, subjected to physical punishment, abused by other inmates (abuse that was often sanctioned by staff), and denied access to counsel. Essential services – medical care, education, psychiatric treatment – were found to be substandard. More than five hundred children were released from unlawful juvenile corrections confinement in Texas as a result of the ruling.

Conditions in New York State juvenile corrections facilities were investigated recently by the Civil Rights Division of the U.S. Department of Justice, which reported similar problems. As a result, there is now federal oversight of four of the state's largest youth corrections facilities.⁴⁸ And in California, the state was ordered back to court for failure to comply with the terms of a consent de-

cree that committed the juvenile corrections authority, the Division of Juvenile Justice of the California Department of Corrections and Rehabilitation (formerly the Youth Authority), to conform to professional and legal standards for essential services and the safety of its wards.⁴⁹ These cases are not isolated instances; litigation to remedy violent, abusive, and other substandard conditions in juvenile incarceration and detention has been repeated across the country for decades.

Structurally, federal civil rights litigation in these instances is constrained in its force and reach by the Prison Litigation Reform Act (PLRA).⁵⁰ In *Galloway*, for instance, relief was limited by the PLRA's constraints on which conditions can be litigated, its short paths to termination of existing remedial decrees, and its restrictions on the authority of federal judges to order future remedies. The PLRA applies fully to juvenile corrections and detention facilities: Congress classified juvenile facilities as "prisons" and their occupants "prisoners." In doing so, it erected tall and robust barriers to children's assertion of their rights: in effect, they face the same hurdles that adult prisoners do. For children, the problem is compounded because they cannot sue in their own name, and also by the fact that Federal Rule of Civil Procedure 17 relegates the question of capacity and overcrowding to state law. Under these conditions, children cannot get to court without a guardian, and most lack the social capital and experience to activate those resources. Furthermore, there simply are no local enforcement mechanisms to ensure compliance with federal litigation. It is up to local district attorneys to enforce the law when abuses are revealed. The political complications are obvious.

Again, we see very different visions of juvenile justice and incarceration. One is represented by the development of new

models and institutional designs for the rehabilitation of serious juvenile offenders. This vision includes attention not just to basics such as education, but to new models for working with children and their families to sustain therapeutic successes beyond the time of correctional confinement.⁵¹ The other vision is typified by institutions that are violent, abusive, and indifferent to the essential developmental interventions for adolescent offenders. Attorney and legal scholar Michael Tigar characterizes these as places where juvenile punishment has taken on the distorted values of criminal law and correctional institutions, where intervention is secondary to security and punishment, and where indifference tolerates abuse and violence.⁵² In these places, services are thin and differ little from ordinary jails, only that the residents are younger, smaller, and more easily exploited. Between these poles are the institutions that struggle to mount effective programs with a population of difficult children who pose security as well as therapeutic challenges.

Racial disparities in juvenile detention and incarceration closely resemble racial disparities in the imprisonment and jailing of adults. Considering the negative consequences of incarceration on crime and social well-being, these disparities unfortunately may multiply the effects of other forms of disadvantage and may become an endogenous form of inequality that is difficult to escape. Social scientists call this a "poverty trap."⁵³

In the 2006 census of juveniles in residential placement, 40.2 percent of residents were African American and 20.5 percent were Hispanic, compared to 35 percent white.⁵⁴ These disparities were greater for person crimes and drug offenses (44 percent were African American in each category) and less for techni-

cal violations (37 percent were African American) and status offenses (33 percent were African American). In fact, 50 percent of incarcerated status offenders counted in the 2006 juvenile corrections census were white.

Racial disparities are far worse for pre-trial detention, compared to those who are incarcerated following a finding of delinquency. Nearly half (48 percent) of those detained for person crimes, 45 percent detained on drug offenses, and 46 percent detained for public order offenses were African Americans, compared to less than 30 percent whites in each of these categories.⁵⁵ (Public order offenses include weapons offenses as well as public drinking and a range of low level – and high police-discretion – misdemeanor offenses.)

These disparities are not well explained by differences in crime rates.⁵⁶ Studies using several designs and analytic strategies conclude that racial disparities in the decision to detain and incarcerate youths are influenced by race and risk factors such as family structure that are correlated with race more than criminal behavior.⁵⁷

Other research implicates fundamental cognitive and unconscious processes in the production of disparities. Two studies based on observations of decisions by police or probation officers illustrate the role of race in the attribution of blameworthiness, risk of future crime, and recommendations for punishment. Sociologists George Bridges and Sara Steen, analyzing narratives of presentence reports by probation officers in three counties in Washington State, showed that probation officers were more likely to attribute the causes of crime for African American youths to internal character and personality attributes rather than external factors such as family, neighborhood, or school. These internal attributions led to conclusions about “responsibility,”

whereas external attributions tended to reduce culpability by externalizing the origins of crime (and its severity) for white youths to the defendant’s social surroundings. These internal attributions in turn led to racially disparate attributions of risk of future offending and harsher sentencing recommendations. Bridges and Steen also noted that a criminal history tends to multiply these effects.

Educational psychologist Sandra Graham and organizational behavior scholar Brian Lowery produced similar results using an experimental paradigm in which police and probation officers made judgments about culpability and predictions of future crime following exposure to race-specific or race-neutral subliminal primes. Compared to officers given a race-neutral prime, police and probation officers given race-specific primes rated a hypothetical offender with more negative traits such as hostility and immaturity, attributed greater culpability, had higher expectations of recidivism, and endorsed harsher punishment. These results were robust to controls for consciously expressed beliefs about African Americans.

Studies based on case-processing data also reach the same conclusions, as does a research summary prepared for the Department of Justice. This is true both in criminal court and for juveniles who are transferred to criminal court.⁵⁸

The policy studies raise two difficult questions. First, are the effects of disparate outcomes at early stages predictive of outcomes – including the decision to detain or incarcerate a young offender – at later stages? Researchers disagree on this point. Some suggest that disadvantage at early decision points, such as the decision to detain or to treat a case formally instead of using a diversionary alternative, at a minimum carries forward and perhaps multiplies across decision

points. Others suggest that disparities at each stage are unique to decisions at that stage, net of filtering at each stage. In either case, there is a unique additive component for race that seems to produce disparate outcomes overall, including correctional placements.⁵⁹

Second, and more fundamentally, does the combined evidence from experimental and observational studies suggest that racial bias is present in the juvenile justice system with sufficient salience to produce disparities? It is always difficult to identify and control for all the counterfactuals that would have to be defeated in order to make such a claim. At the least, these would include a set of institutional preferences and norms that are difficult to measure and that are likely to vary widely across locales. But what is important to note is that the two most likely counterfactuals – differences in criminal behavior and differences in social risk indicia – are not significant producers of racial disparities.

Based on the research of Graham and Lowery, conscious bias is not a significant producer of racial disparity either, but subconscious bias may be, as well as racial differences in punitiveness and racial stereotypes. Sociologist Lawrence Bobo and Victor Thompson, for example, summarize public opinion research to show that negative racial stereotypes, antiblack affect, and collective racial resentments translate into increased punitiveness.⁶⁰ We have no reason to believe that this might not apply to probation workers and police officers who produce a supply of cases for the juvenile court. Research on “colorism” shows that both African Americans and white Americans associate skin tone with criminality and deserved punishment.⁶¹ In a series of tests on implicit bias, every population group except African Americans unconsciously associates “African American” with crime

or danger and reacts accordingly.⁶² Tests include recognition of African American faces in crime situations (including possession of weapons)⁶³ and whether to shoot unarmed suspects when they are shown holding ambiguous objects other than guns.⁶⁴ Confirming what Bridges and Steen and Graham and Lowery reported, the Plant and Peruche tests given to police officers produced the same results.

The impacts of racially disparate decisions in juvenile detention and incarceration go beyond the loss of liberty and exposure to socially and emotionally disfiguring punishments. Juvenile incarceration attenuates the accumulation of social capital to access job networks and other supports; instead – at a developmentally sensitive and strategic period of transition from adolescence to adulthood – it leads to the accrual of criminal capital that sustains delinquency beyond the time of placement.⁶⁵ In this way, incarceration compounds social and racial disadvantage to sustain inequalities over the life course,⁶⁶ with crime itself only a partial explanation of the sources of that disadvantage. For minors, developmental trajectories following incarceration suggest that crime is less a factor than cascading social disadvantage. Studies of criminality over the life course show the unique and lasting disadvantage that accrues from an early incarceration experience, no matter the behavior that led to the period of incarceration.⁶⁷ Incarceration at a young age not only increases the risk of future incarceration, it mortgages the long-term prospects of young males for marriage, employment, and social stability over a lifetime. Even a short spell in detention adversely influences the outcomes of cases once they get to court, tipping the odds toward harsher punishment instead of diversion or probation.⁶⁸ Young offenders who are

detained in jails or group homes while their cases work their way through court are more likely to be placed in a correctional institution at the conclusion of the case than those who return home or to school as their cases are resolved. Early correctional placement has a multiplier effect on the prospects of future imprisonment. To the extent that incarceration effects carry forward, we might ask whether the social harms of incarceration on young people are simply those of their parents revisited on them – and whether the harms to them will be revisited on their children.⁶⁹

In the political economy of incarceration, it is remarkable that either a legislative or executive branch would acknowledge racial disparity much less seek remedies to it. Thus, the efforts of the Department of Justice and Congress to reduce racial disparities in juvenile confinement through public interventions are courageous and noteworthy. Because this step was reserved for minors, it again signals the special place child-saving holds as a normative imperative and policy preference in the culture of crime and punishment.

To regulate public sector practices that might lead to racial disparities, Congress took a rare step in 1992, passing legislation requiring states that receive federal juvenile-justice funds to implement strategies to reduce disparities (where those disparities exist) in the confinement rates of minority juveniles. This provision, known as the disproportionate minority contact statute (DMC),⁷⁰ seems modest in comparison to Title VII of the Civil Rights Act: it applies only to state-run juvenile justice programs receiving federal funds. Failure to comply can cost an agency at least 25 percent of its federal juvenile-justice support.

Legal scholar Olatunde Johnson⁷¹ describes the DMC provision as unique in several ways. First, it calls on public actors to reduce disparities no matter what the cause, no matter whether intentional or reflective of the types of passive discrimination that characterize everyday institutional business, even if these practices advance the criminal justice interests of the public agency. Action requires only that there be a showing that the agency was complicit in producing disparity. Second, the statute requires states to gather analytic data to diagnose the institutional practices or public policies that produce racial disparities, and to identify appropriate steps to change those practices. In effect, the statute requires states to look beyond “invidious bias” to discover and remedy the sources of disparity. States were tasked with submitting intervention plans that reflected their analysis of the sources of disparity, developing interventions, and assessing the success of their efforts. In 2002, Congress broadened the mandate of DMC to look not just at confinement, but also at any type of contact. This expansion recognized the role that police and early-stage juvenile justice decisions play in producing disparities.

There are stories of both success and failure under DMC. Johnson notes that when DMC succeeds, it is because it leveraged the power of internal and external local advocates to design measures to reduce disparity. The data analytic component has also produced informational transparency that levels the playing field between advocates and government officials. It is a process of what legal scholar Heather Gerken calls “federalism all the way down,” in part localizing solutions and also developing local expertise that competes with interior institutional logic and norms.⁷²

Johnson suggests that failures under DMC reflect the weakness of local en-

forcement and ambivalence, if not resistance, that are, in turn, reflections of the local political structure. It requires internal change agents within agencies as well as external agents, especially advocacy groups. Localities could be exposed to lawsuits based on the information developed through the data analytic process, creating an untenable political tension. A set of political scripts that invokes public safety concerns in the face of systemic reform efforts is a blunt instrument to neutralize reform.⁷³ Thus, the recurring renewal of political support – based on research – is essential to sustain the reform. And this, as Johnson points out, is hardly a sure bet, since radically disparate treatment is not a strong motivation to expend political capital. The counterargument is that revelations of the connection between public policy and racially disparate treatment leading to incarceration make a strong normative argument that political actors ignore at their own risk. Perhaps the current low-crime era affords a moment to push ahead with this project.

The opposing, if not contradictory, trends in the philosophy and practice of juvenile incarceration can be observed empirically in states' variations in the practice and reach of juvenile incarceration. At the peak of juvenile incarceration, states varied in their incarceration populations from a low of 70 per 100,000 juveniles in Vermont to a high of 583 in Louisiana.⁷⁴ Explanations for variation are themselves varied: from racial threat and symbolic threats to public order, to violent crime rates, to loose couplings between juvenile and adult correctional systems, to variation in the political traction of “get tough” policies.⁷⁵ These diverse explanations matter because they speak to different strains in the political culture of crime and punishment – in particular about whether *juvenile* crime

and punishment is itself a symbolic or substantive concern.

Symbolic threats are sociologically connected to structural conditions, including minority threat, inequality, and public manifestations of crime such as gangs. When professor of law Jonathan Simon speaks about “governing through crime,” he portrays a discourse and subsequent political mobilization built on crime fears that translate into legislative action. These threats create emotions beyond the facts of crime itself by imparting social meaning to crime: gang violence signals the rise of an enemy, for example, and the trifecta of gangs, guns, and drugs signals a very particular and urgent threat to social order. Even property crime can translate into a threat through its spurious connection to violent crime. If crime itself is racially skewed, whether among juveniles or adults, then disconnecting symbolic threats from the real fears of crime becomes more difficult.

Sorting out these threats is a difficult empirical task. An analysis by criminologist Daniel Mears of state variation in juvenile incarceration suggests that it is not just the threat of violent crime that explains differences between states, but a combination of adult crime rates, adult incarceration rates, and juvenile property crime rates. What happened to the super-predator discourse about juvenile violence? Why was it not a more powerful predictor of juvenile incarceration? Quite likely, the discourse was already incorporated into other “get tough” measures, including adult incarceration rates and policies, as well as adult crime.

State variation may also conceal internal systemic and political factors that bear on institutional capacities. Consider the stories told earlier about Texas, California, and Pennsylvania (and add New York to the analysis). Texas made no changes in capacity in the face of liti-

gation and a consent decree. California's Youth Authority reduced its capacity from ten thousand a decade ago to less than two thousand today in response to litigation. Pennsylvania built a juvenile prison that now houses nearly one thousand young offenders, but New York State is attempting to close several of its juvenile incarceration facilities, and may yet do so if the Civil Rights Division of the Justice Department proceeds from its investigation to pursue litigation. However, New York's efforts to downsize its system have been neutralized by the structure of union contracts and political constraints from local legislators fearing adverse economic impacts from the closing of institutions. There are 241 empty beds out of about 300 in the six nonsecure residential facilities targeted for closing, and 254 state employees will lose their jobs if the closings proceed.⁷⁶ The math suggests part of the reason why closing is so hard to achieve.

The number of minors locked up across the nation is a small fraction of the adolescents under the supervision of the juvenile and criminal justice systems, but it casts a long shadow over the principles and practice of juvenile and criminal justice. Separate institutions for juveniles, and later a separate court, served the twin goals of protecting adolescent offenders from the stigma and brutality of criminal justice and intervening in their lives to remedy the conditions that animated their antisocial behavior. Yet the punitive turn in juvenile justice increased the use of incarceration by juvenile courts and the expulsion of juvenile offenders to adult jails and prisons.⁷⁷ Not only are both forms of juvenile incarceration plagued by unconstitutionally cruel conditions and institutional neglect, but the emphasis on punitiveness, including the exile of juveniles to the criminal justice system, before adolescent development may do more harm than good.

Three facts suggest that the punitive turn in juvenile corrections is neither a socially productive nor a principled path. First, new behavioral and biological research about maturity and criminal culpability, largely focused on emotional regulation, impulsivity, decision-making, and other behavioral functioning closely linked to brain development and the social psychological skills that it controls, suggests that children remain immature and therefore less culpable well into late adolescence.⁷⁸ Second, adolescents who are tried and punished as adults are rearrested and incarcerated more often, more quickly, and for more serious crimes.⁷⁹ They are more likely to suffer mental health problems, including traumatic stress reactions, and are less likely to receive effective services to overcome their developmental or other behavioral deficits. And third, lengthened sentences for juvenile offenders, whether in juvenile or adult corrections placements, are of no apparent consequence to public safety.⁸⁰

These facts argue for a return to the first principles of juvenile justice: avoiding harm and stigma and building the social capital and human capacity of the child. Declining crime rates, the pervasiveness of racial disparities in detention and incarceration, the intellectual and political exhaustion of the "toughness" paradigm in juvenile justice, and new gains in the science of adolescent development have converged to create an opportunity for principled reform. More careful regulation and deliberation of the use of incarceration can lay the foundation for more effective and fair policies. While the law has moved toward increasing the incarceration of younger teens, social and biological evidence suggests moving in the other direction. Perhaps it is time for the law to change course and follow the science and the principles it evokes.

ENDNOTES

- ¹ Sharon Dolovich, "Incarceration: American Style," *Harvard Law & Policy Review* 3 (2009): 237.
- ² *Parens patriae* is a doctrine commonly associated in both policy and law with the rights and obligations of the state and courts toward children and incapacitated adults. The diminished competence and autonomy of children is the court's justification for invoking *parens patriae* to supplant parental authority and assert control over children. See Julian Mack, "The Juvenile Court," *Annual Report of the 32nd Conference of the American Bar Association* (1909), 451.
- ³ In *Schall v. Martin* (467 U.S. 253, 1984), Justice Rehnquist argued that preventive detention is designed to protect the child and society from the potential consequences of the child's own "folly."
- ⁴ *Ibid.* The court said that the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention. The court rejected claims about accuracy of such predictions, stating that "from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct" and that a prediction of future criminal conduct is "'an experienced prediction based on a host of variables' which cannot be readily codified" (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 [1979]).
- ⁵ Philip J. Cook and John H. Laub, "The Unprecedented Epidemic in Youth Violence," in *Crime and Justice: A Review of Research*, vol. 24, *Youth Violence*, ed. Michael Tonry and Mark H. Moore (Chicago: University of Chicago Press, 1998), 27.
- ⁶ Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (New York: Oxford University Press, 1999); Franklin E. Zimring, *American Youth Violence* (New York: Oxford University Press, 1998).
- ⁷ Paul Lerman, "Twentieth-Century Developments in America's Institutional Systems for Youth in Trouble," in *A Century of Juvenile Justice*, ed. Margaret K. Rosenheim et al. (Chicago: University of Chicago Press, 2002).
- ⁸ See, for example, *Inside Out: Youth Experiences Inside New York's Juvenile Placement System* (Citizens' Committee for Children of New York, 2009), <http://www.cccnewyork.org/publications/CCCjuvenilejusticereport2009.pdf>.
- ⁹ Jeffrey Fagan, "Juvenile Crime and Criminal Justice: Resolving Border Disputes," *Future of Children* 8 (2008): 81.
- ¹⁰ *Ibid.*
- ¹¹ William J. Bennett, John J. Dilulio, Jr., and John P. Walters, *Body Count: Moral Poverty – and How to Win America's War Against Crime and Drugs* (New York: Simon & Schuster, 1996).
- ¹² Malcolm W. Klein, *The American Street Gang* (New York: Oxford University Press, 1995); Feld, *Bad Kids*.
- ¹³ Placement data for the years between 1993 and 1997 are not available. Prior to 1993, data were collected every three years as part of the Children in Custody (CIC) census, conducted by the Office of Juvenile Justice and Delinquency Prevention. It was based on a mail survey with response rates that varied by year. Starting in 1997, CIC was replaced by the Census of Juveniles in Residential Placement (CJRP), a one-day count conducted by the U.S. Bureau of the Census of all children placed in public and private facilities. The differences in the two data sets reflect both the types of facilities included and whether residents are counted based on the state from which they were committed or, in the newer census, the state where they were placed. When aggregated to examine national trends, any biases resulting from these differences are minimized.
- ¹⁴ Melissa Sickmund, *Juveniles in Residential Placement, 1997 – 2008* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2010), <http://www.ncjrs.gov/pdffiles1/ojjdp/229379.pdf>.

- 15 The rate for adults is 509 per 100,000 persons in prisons and 762 per 100,000 in prisons or local jails. Heather C. West and William J. Sabol, *Prison Inmates at Mid-Year 2008 – Statistical Tables* (Bureau of Justice Statistics, U.S. Department of Justice, 2009), Table 1, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pimo8st.pdf>.
- 16 Sickmund, *Juveniles in Residential Placement*.
- 17 Melissa Sickmund et al., *Census of Juveniles in Residential Placement Databook* (National Center for Juvenile Justice, 2008), <http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/>.
- 18 These offenses include running away from home, incorrigibility, truancy, curfew violation, and underage drinking.
- 19 Howard N. Snyder and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2006), <http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/>.
- 20 See West and Sabol, *Prison Inmates at Mid-Year 2008*, Table 21.
- 21 See, for example, Ruth D. Peterson, “Youthful Offenders Designations and Sentencing in the New York Criminal Courts,” *Social Problems* 35 (1988): 111 – 130.
- 22 Andrea McGowan et al., “Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,” *Morbidity and Mortality Weekly Report* 56 (RR-9) (November 30, 2007): 1 – 11; Donna Bishop, “Juvenile Offenders in the Adult Criminal System,” *Crime and Justice* 27 (2000): 81 – 167; Fagan, “Juvenile Crime and Criminal Justice.” But see Steven D. Levitt, “Juvenile Crime and Punishment,” *Journal of Political Economy* 106 (1998): 1156.
- 23 This separation, however meaningful or substantively vague, was at the heart of the earliest forms of juvenile justice in the nineteenth century, when separate institutions for youths were created to shield them from the stigma and exploitation of older convicts. The motivations, though, were not entirely benevolent. The new youth-only institutions were also accommodations to the growing tendency among judges to avoid harsh punishments by dismissing criminal cases against older children, setting child offenders free without any form of social regulation or control. See John Sutton, *Stubborn Children: Controlling Delinquency in the United States, 1640 – 1981* (Berkeley: University of California Press, 1988); and David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971). In 1851, in New York, the Children’s Aid Society opened the House of Refuge for Delinquent Children under twelve, ostensibly to separate the “older” cohort of juvenile offenders from the very young ones. This division effectively created a disputed developmental territory between early and later adolescence; reformers used the territory to contest age-based linkages between vulnerability and culpability and the appropriate institutional responses.
- 24 Martin Forst, Jeffrey Fagan, and T. Scott Vivona, “Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy,” *Juvenile & Family Court Journal* 40 (1989): 1; “The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court,” research brief no. 5 (MacArthur Research Network on Adolescent Development and Juvenile Justice), http://www.adjj.org/downloads/3582issue_brief_5.pdf.
- 25 Two recent Supreme Court opinions cited a body of robust social and behavioral science that demonstrates the diminished culpability of adolescents with respect to regulation of emotions and impulses, capacity to foresee consequences of their actions, and susceptibility to peer influences. See *Roper v. Simmons* (543 U.S. 551 [2005]) and *Graham v. Florida* (No. 08-7412, 982 So. 2d 43, reversed and remanded [2010]).
- 26 Elizabeth S. Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Cambridge, Mass.: Harvard University Press, 2008).
- 27 Fagan, “Juvenile Crime and Criminal Justice.”

- ²⁸ Feld, *Bad Kids*; Zimring, *American Youth Violence*.
- ²⁹ See, for example, Patricia Torbet et al., *State Responses to Serious and Violent Juvenile Crime* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 1996).
- ³⁰ Fagan, "Juvenile Crime and Criminal Justice"; Donna Bishop, "Juvenile Offenders in the Adult Criminal System."
- ³¹ Torbet et al., *State Responses to Serious and Violent Juvenile Crime*.
- ³² See *State v. Standard*, 569 S.E.2d 325, 329 (2002). In general, see *The Rest of Their Lives* and *The Rest of Their Lives, 2008 Update* (Amnesty International and Human Rights Watch, 2005 and 2008), <http://www.hrw.org/en/node/11578/section/1> and <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>. The fact that mandatory life-without-parole sentences require a predicate of transfer, the cumulative disadvantage of poor counsel and early-stage detention compound the risks for a life-without-parole sentence through disadvantages at the early stages of charging and plea bargaining.
- ³³ See *Graham v. Florida*.
- ³⁴ See *The Rest of Their Lives, 2008 Update*; also *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (Equal Justice Initiative, 2008), http://eji.org/eji/files/Cruel%20and%20Unusual%202008_o.pdf.
- ³⁵ Torbet et al., *State Responses to Serious and Violent Juvenile Crime*.
- ³⁶ See *The Connecticut Juvenile Justice Strategic Plan: Building Toward a Better Future* (State of Connecticut Judicial Branch, 2006), http://www.jud.ct.gov/external/news/JuvenileJustPlan/CJJ_ExecutiveSummary.pdf.
- ³⁷ Fagan, "Juvenile Crime and Criminal Justice."
- ³⁸ A few states developed statutes to try juveniles as adults but sentence them to juvenile correctional institutions. The theory was that the determination of guilt or innocence should respond to an adult standard of culpability, and that the trial itself was a form of expressive condemnation for the minor's offense. However, the reach of these laws was narrow, affecting few youths in a small number of states. Moreover, although the laws did succeed in shielding juveniles from placements with adults, they were no more than half-measures with respect to avoiding the stigma of a criminal conviction. See Patricia Torbet et al., *Juveniles Facing Criminal Sanctions: Three States that Changed the Rules* (2000), <http://www.ncjrs.gov/pdffiles1/ojdp/181203.pdf>.
- ³⁹ Even California's controversial Youth Authority has conformed to this trend; for many years it was an exception. However, the total incarcerated juvenile population declined from approximately 10,000 in 1996 to 1,568 today. See *2008 Population Report* (Division of Juvenile Justice, California Department of Corrections and Rehabilitation, 2008), http://www.cdcr.ca.gov/reports_research/research_tips.html.
- ⁴⁰ Bennett, Dilulio, and Walters, *Body Count*.
- ⁴¹ Cook and Laub, "The Unprecedented Epidemic of Youth Violence."
- ⁴² Zimring, *American Youth Violence*.
- ⁴³ "Pennsylvania Opens Nation's First Youth Prison," *Corrections Digest*, December 15, 2000.
- ⁴⁴ See, for example, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* (Columbus: Ohio State University Press, 1991).
- ⁴⁵ See, for example, Lloyd Ohlin et al., "Radical Correctional Reform: A Case Study of the Massachusetts Youth Correctional System," *Harvard Educational Review*, special issue on The Rights of Children, 120 (1974).
- ⁴⁶ Edmund F. McGarrell, *Juvenile Correctional Reform: Two Decades of Policy and Procedural Change* (Albany: State University of New York Press, 1988).

- 47 Civ No. 1:07-CA-276 (W.D. Tex.). See also Sylvia Moreno, "In Texas, Scandals Rock Juvenile Justice System," *The Washington Post*, April 5, 2007.
- 48 Nicholas Confessore, "Federal Oversight for Troubled N.Y. Youth Prisons," *The New York Times*, July 14, 2010. Letter from Loretta King, Acting Assistant Attorney General, to Governor David A. Paterson, Re: Investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center, August 14, 2009, http://www.justice.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf.
- 49 *Farrell v. Gate*, RGO3-079344 (Cal. Super. Ct. 2004).
- 50 See 18 U.S.C. section 3626 (1995).
- 51 See Michelle Inderbitzin, "Reentry of Emerging Adults: Adolescent Inmates' Transition Back Into the Community," *Journal of Adolescent Research* 24 (2009): 453. Also see Scott Huey et al., "Mechanisms of Change in Multisystemic Therapy: Reducing Delinquent Behavior through Therapist Adherence and Improved Family and Peer Functioning," *Journal of Consulting and Clinical Psychology* 68 (2000): 451.
- 52 Michael E. Tigar, "What are We Doing to the Children?: An Essay on Juvenile (In)Justice," *Ohio State Journal of Criminal Law* 7 (2010): 849.
- 53 Robert J. Sampson and Jeffrey Morenoff, "Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods," in *Poverty Traps*, ed. Samuel Bowles, Steven Durlauf, and Karla Hoff (New York: Russell Sage Foundation, 2006), 176–203.
- 54 Sickmund et al., *Census of Juveniles in Residential Placement Databook*.
- 55 Juvenile arrest rates for drug offenses are strongly at odds with their involvement in drug use and drug selling. See, for example, Leonard Saxe et al., "The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies," *American Journal of Public Health* 91 (2001): 1987.
- 56 *Ibid.* See also, Donna M. Bishop, "The Role of Race and Ethnicity in Juvenile Justice Processing," in *Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice*, ed. Darnell F. Hawkins and Kimberly Kempf-Leonard (Chicago: University of Chicago Press, 2005).
- 57 George S. Bridges and Sara Steen, "Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms," *American Sociological Review* 63 (1998): 554; Sandra Graham and Brian S. Lowery, "Priming Unconscious Racial Stereotypes about Adolescent Offenders," *Law & Human Behavior* 28 (2004): 483.
- 58 Kareem L. Jordan and Tina L. Freiburger, "Examining the Impact of Race and Ethnicity on the Sentencing of Juveniles in the Adult Court," *Criminal Justice Policy Review* 21 (2010): 185.
- 59 Carl E. Pope, Rick Lovell, and Heidi M. Hsia, *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 through 2001* (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2002), http://www.ojjdp.ncjrs.gov/dmc/pdf/dmc89_01.pdf; David Huizinga et al., *Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities* (U.S. Department of Justice, 2007), <http://www.ncjrs.gov/pdffiles1/ojjdp/grants/219743.pdf>.
- 60 Lawrence Bobo and Victor Thompson, "Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System," *Social Research* 73 (2006): 445.
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- ⁶⁴ E. Ashby Plant and B. Michelle Peruche, "The Consequences of Race for Police Officers' Responses to Criminal Suspects," *Psychological Science* 16 (2005): 180.
- ⁶⁵ Patrick Bayer, Radi Hjalmarsson, and David Pozen, "Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections," *Quarterly Journal of Economics* 124 (2009): 105. Bayer and colleagues show that adolescents placed in correctional institutions are more likely than those in smaller residential placements to form stronger peer networks with other delinquents that lead to higher rearrest rates within two years of release.
- ⁶⁶ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).
- ⁶⁷ Robert J. Sampson and John H. Laub, *Crime in the Making: Pathways and Turning Points through Life* (Cambridge, Mass.: Harvard University Press, 1993); Jeffrey Fagan and Richard B. Freeman, "Crime and Work," *Crime and Justice* 25 (1999): 113.
- ⁶⁸ Fagan and Freeman, "Crime and Work." Also see Donna M. Bishop, "The Role of Race and Ethnicity in Juvenile Justice Processing"; Rodney L. Engen, Sara Steen, and George S. Bridges, "Racial Disparities in the Punishment of Youth: A Theoretical and Empirical Assessment of the Literature," *Social Problems* 49 (2002): 194; Donna M. Bishop and Charles E. Frazier, "Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis," *Journal of Criminal Law and Criminology* 86 (1996): 415.
- ⁶⁹ See, for example, Christopher Wildeman, "Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage," *Demography* 46 (2009): 265. Also see Bruce Western and Christopher Wildeman, "The Black Family and Mass Incarceration," *Annals of the American Academy of Political and Social Sciences* 621 (2009): 221.
- ⁷⁰ See Act of Nov. 4, 1992, Pub. L. No. 102-586, section 2(f)(3)(A)(ii), 106 Stat. 4982, 4993-94 (codified as amended at 42 U.S.C. section 5633 [Supp. III 2005]).
- ⁷¹ Olatunde C.A. Johnson, "Disparity Rules," *Columbia Law Review* 107 (2005): 374.
- ⁷² Heather Gerken, "Federalism All the Way Down?" *Harvard Law Review* (forthcoming).
- ⁷³ See Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).
- ⁷⁴ Sickmund, *Juveniles in Residential Placement*.
- ⁷⁵ Daniel Mears, "Exploring State-Level Variation in Juvenile Incarceration Rates: Symbolic Threats and Competing Explanations," *The Prison Journal* 86 (2006): 470.
- ⁷⁶ Matt Schwarzfeld, "Fewer Lock-Ups, Enough Money?" *City Limits Weekly*, February 25, 2008.
- ⁷⁷ In addition to expanding the crime categories that triggered transfer to the criminal court, many states reduced the minimum age at which offenders could be sentenced by criminal courts to age ten or younger. In a few states, all barriers to criminal court were removed down to the age of infancy; Snyder and Sickmund, *Juvenile Offenders and Victims*.
- ⁷⁸ For a discussion of this evidence, see *Roper v. Simmons* (543 U.S. 551 [2005]); and *Graham v. Florida* (560 U.S. 130 S. Ct. [2010]). See also Scott and Steinberg, *Rethinking Juvenile Justice*.
- ⁷⁹ Andrea McGowan et al., "Effects on Violence of Laws and Policies."
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Marie Gottschalk

Cell blocks & red ink: mass incarceration, the great recession & penal reform

The financial crisis, coupled with the election of Barack Obama, has raised expectations that the United States will begin to empty its jails and prisons because it can no longer afford to keep so many people behind bars. As Attorney General Eric Holder told the American Bar Association last summer, the country's extraordinary incarceration rate is "unsustainable economically."¹

Some evidence suggests that economic hardship may force a major shift in penal policy that will reduce the country's incarceration rate, which for years has been the highest in the world. Dozens of states cut their corrections budgets in 2009, and many proposed closing penal facilities to cover gaping budget gaps. States have enacted a slew of penal reforms aimed at shrinking their prison populations. Last year the total state-prison population dipped for the first time since 1972.²

The sentiment that the "war on drugs" may have lost its momentum is widespread. Congress and the Obama administration have been seriously considering measures to reduce the sentencing disparity between crack and powder cocaine and to soften other drug laws. Several states and municipalities have designated

enforcement of marijuana laws their lowest priority, and a number of states are debating marijuana decriminalization. Last fall, Minneapolis became the first major U.S. city without a narcotics squad when it disbanded its special drug unit to help close a massive budget deficit. The U.S. Sentencing Commission, the panel that sets guidelines for the federal courts, has begun to investigate alternatives to incarceration, and last October, Congress ordered the Commission to review mandatory minimum sentencing.

The current economic distress certainly provides an opportunity to rethink the direction of U.S. penal policies. But we should not assume that the crushing economic burden will unhinge the carceral state. While the prison population edged downward in twenty-seven states between 2008 and 2009, it continued to grow in twenty-three others. Meanwhile, the federal prison population increased nearly 7 percent.

Mounting fiscal pressures on their own will not spur communities, states, and the federal government to empty jails and prisons. The race to incarcerate began in the 1970s, at a time when states faced dire financial straits. It persisted over the next thirty years despite wide fluctuations in the crime rate, public opinion, and the economy. The 2001

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recession raised hopes that the prison population would shrink as severe budget deficits forced states to close prisons and lay off guards. But the surge of sentencing and drug-law reforms enacted in the wake of that recession did not make a dent in the U.S. incarceration rate. If history is any guide, rising public anxiety in the face of persistent economic distress and growing economic inequalities may, in fact, ignite support for more punitive penal policies.

Economic crises may foster public punitiveness for several reasons. Growing economic despair, rising uncertainty about the country's economic future, and massive dislocations in the labor, real estate, and financial markets may effectively fortify the "culture of control" that sociologist David Garland identified as the lifeblood of the prison boom launched nearly four decades ago. In Garland's account, societal angst stemming from deep structural changes in the U.S. economy and society in the immediate postwar decades ushered in a new culture of control premised on harsh punishment and extensive surveillance. Widespread perceptions of state impotency in addressing the economic upheavals of the 1970s further bolstered the shift in policies.

The U.S. government's inability to tame the economic demons in the current financial crisis (and its alleged culpability in releasing those demons) casts doubt on the efficacy, legitimacy, and *raison d'être* of the state. While the government struggles to restore economic health, some public officials may be tempted to act out in impulsive, unreflective ways, promoting highly punitive measures for their immediate symbolic and expressive value.³ The apparent surge in firearm purchases in early 2009 and the brazen display of weapons at public events – notably the town meetings called in

Summer 2009 to discuss health care reform – are ominous indicators of growing public anxiety that may have important implications for penal policy and law enforcement. The not-too-subtle message appears to be that if the state is not prepared to protect the public, individuals are locked and loaded to do so.

Furthermore, there is a well-established "relationship between economic insecurity and scapegoating behavior."⁴ Claims that immigrants are stealing jobs from citizens have more salience in today's plunging economy and in turn justify harsher attacks on the immigrant population. In a striking new development, Latinos now represent the largest ethnic or racial group in the federal prison system. High-profile raids of workplaces that employ large numbers of immigrants have become more commonplace, and local police are collaborating more closely with the federal authorities to detain and deport immigrants. As a consequence, immigration detention has become a growth industry. The number of people held by Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) on any given day has increased more than elevenfold since the early 1970s as the immigration service has become a miniature Bureau of Prisons.

Studies of the United States and other industrialized countries indicate that the imprisonment rate tends to rise with the unemployment rate, regardless of whether the crime rate is rising or falling.⁵ Experts disagree about the underlying causal relationship between the unemployment rate and the incarceration rate. We do know that public opinion about crime and punishment is highly susceptible to political manipulation. Some suggest that during hard economic times, it is easier – and more tempting – for

government officials and politicians to exploit the popular stereotype of a marauding underclass. Deteriorating economic conditions do not necessarily cause a spike in the crime rate – but the public often believes they do. As the sociologist W. I. Thomas once said, if people define situations as real, they are real in their consequences.

Certain crimes tend to rise in recessions and recede in good times, but this relationship is not ironclad. For example, crime rose during the boom years of the 1960s; it fell during the Reagan recession of the early 1980s and rose during the recession of the late 1980s and early 1990s (due in part, most likely, to the destabilization of established drug markets with the introduction of the crack trade). Some evidence suggests that the crime rate for certain offenses drops during tough economic times, as people go out less, shop less, carry less money, and have less to spend on alcohol. This correlation may explain why crime spiked in the Roaring Twenties but plummeted after the 1929 stock market crash.

Although crime does not necessarily rise during periods of economic distress, protests, strikes, and civil unrest often do, as the unemployed, unions, the elderly, veterans, the poor, the sliding middle class, and other groups take to the streets. In times of political and social unrest, government officials, politicians, and prominent commentators often conflate crime and social protest and by doing so provide an opening to strengthen the law-and-order apparatus. The imposing armories that dot American cities, for instance, were built as part of the late-nineteenth-century response to the wide-scale urban unrest of the Gilded Age.

Labeling demonstrations and other acts of protest as crime is an age-old strategy to justify expansions of law en-

forcement and delegitimize challenges to the prevailing political and economic order. The response to the civil rights movement is a good case in point. When Senator Barry Goldwater (R-Ariz.) denounced the “growing menace” to personal safety in his electrifying speech before the 1964 Republican Convention, he was appealing not only to fears of crime but also to fears of racial integration and the burgeoning civil rights movement. A full decade earlier, conservative congressional Democrats were already strategically using the street-crime issue to delegitimize the civil rights movement, even though the crime rate remained stable in the mid-1950s.⁶ As riots broke out in major cities across the country in the mid-to late 1960s, conservatives “worked vociferously to conflate crime and disobedience, with its obvious extensions to civil rights.”⁷ This was a doctrine not just of words but of deeds. Conservative Southern Democrats shrewdly used civil rights bills as a vehicle to stiffen and broaden criminal penalties. Should widespread civil unrest break out in the next couple of years, calls to amplify law enforcement will likely increase, as will efforts to portray ensuing protests as criminal behavior.

The Great Depression and the New Deal offer a cautionary tale to those who claim that mounting fiscal pressures will automatically soften U.S. penal policies and ultimately reverse the prison boom. During the Great Depression, vast numbers of Americans took to the streets, fueling fears that the social and economic fabric of the United States was tearing apart. This political turbulence sparked calls for greater police authority to regain control.

The Depression provided an opportunity to legitimize the expansion of a number of federal and state powers,

ranging from government control of the economy to law enforcement.⁸ The profound social anxiety associated with massive economic distress made the public susceptible to calls from President Franklin D. Roosevelt and J. Edgar Hoover, director of the Federal Bureau of Investigation, to get tough on criminals – whatever the cost – even as crime rates fell in the 1930s. Furthermore, the construction of prisons and the expansion of law enforcement were touted as public works programs that promised to boost the flailing economy.

The recent economic downturn may spur a comparable expansion of law enforcement and the penal apparatus. The economic stimulus package enacted in February 2009 resuscitated two controversial law enforcement programs that the Bush administration had begun to phase out. The stimulus bill pumped \$1 billion into Community Oriented Policing Systems, or COPS, which provides federal grants to local police forces and was one of the signature programs of the Clinton administration's draconian 1994 crime bill. COPS was created to reduce crime by promoting community policing tactics whereby police officers would walk their beat and act more like members of the community than aggressive outside enforcers. But COPS also fostered more confrontational styles of policing by funding SWAT teams and encouraging the wider use of paramilitary tactics and equipment. Over the years, COPS has had a minimal effect on reducing the crime rate.⁹ Democrats have persistently defended COPS, while many conservatives and Republicans have called for phasing it out. In the stimulus package debate, Senator Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, pushed for resurrecting COPS on the grounds that it would aid the economy "as fast, or faster than, other spending."

Joined by police chiefs and law enforcement organizations, Leahy played on public fears of rising crime during economic downturns.¹⁰

The stimulus package also threw a lifeline to the controversial Byrne Justice Assistance Grants program, which was established under the Anti-Drug Abuse Act of 1988 and became a cornerstone of the war on drugs. The bulk of these grants has been used to fund law enforcement programs, most notably special drug enforcement units and anti-gang initiatives. The drug units, which are largely unaccountable to local police chiefs and sheriffs, have proliferated across the country (thanks to Byrne money) in spite of their contested efficacy.

Though championed by police unions and other law enforcement organizations, the Byrne program has come under withering attack from the right and the left over the years. The American Civil Liberties Union has documented numerous civil rights and other abuses by Byrne drug task forces. In late 2007, Congress unexpectedly slashed Byrne grants by two-thirds, to a record-low allocation of \$170 million. State and local officials pushed hard to restore Byrne funding in the stimulus package, promoting it as a key crime-stopping measure and a way to generate jobs.¹¹ The Economic Recovery Act of 2009 included more than \$2 billion in new Byrne funding and an additional \$600 million to increase state and local law enforcement across the country.¹²

A stated goal of the Obama administration's economic recovery package was to favor projects that were "shovel ready." As a result of the unprecedented prison boom of the last three decades, many states now have the experience and capacity to build prisons fast. Some states planned to use the stimulus money

they received from Washington to expand or maintain prison infrastructure.

In his address to the American Bar Association last summer, Attorney General Holder lamented that spending on incarceration has continued to increase even as crime rates have flattened or dipped. “We will not focus exclusively on incarceration as the most effective means of protecting public safety,” he promised.¹³ But the administration’s 2010 and 2011 budgets for the Department of Justice (DOJ) reduced spending for juvenile justice programs and significantly increased allocations for law enforcement and new prison construction. The DOJ’s proposed \$100 million allocation for the Second Chance Act in 2010, to provide services to people reentering the community after prison, is a drop in the department’s \$29 billion budget and comprises barely 0.14 percent of the \$70 billion spent nationwide on corrections each year. As many states grapple with how to reduce their budget deficits by closing prisons and diverting offenders to probation and other community-based programs, the federal government is dramatically bolstering its law enforcement and penal operations.

Evidence increasingly shows that prisons provide few economic benefits to local communities, notably the rural areas that have been the primary sites for new prison construction since the 1980s.¹⁴ Nevertheless, there are compelling economic development arguments in favor of prisons, even when budgets are tight. First, the huge incarcerated population in the United States artificially lowers the official unemployment rate for males by at least 2 percent, making the U.S. economy appear more successful than it actually is.¹⁵ Second, corrections and law enforcement have become major sources of employment on a national level, even if

individual prisons do not necessarily bolster the local market. In 2006, the country spent more than \$68 billion on corrections, which employs an estimated 750,000 prison guards and other personnel. It spent another \$100 billion on police and \$47 billion on the judiciary. In an economic downturn, mass incarceration may “exert a Keynesian, stabilizing effect, to be sustained for economic reasons.”¹⁶ As legal scholar Michael Cavadino and criminologist James Dignan explain, “In a perverse variation of Keynes’s hypothetical cure for recession – get the state to hire large numbers of people to dig holes and then fill them in again – the USA has hired one lot of people to keep another lot locked up.”¹⁷ It is no wonder that top state officials in Illinois tried to stem public anger over the Obama administration’s plans to transfer some Guantánamo detainees to an empty supermax prison in northwestern Illinois by portraying the plan as an economic windfall for the local community.

Public officials who have attempted to close penal facilities have faced fierce local resistance, even when they have promised not to eliminate anyone’s job or release any offenders early. Prison guards’ unions, private prison companies, public bond dealers, and the suppliers of everything from telephone services to Taser stun guns compose a “motley group of perversely motivated interests” that has coalesced “to sustain and profit from mass imprisonment.”¹⁸

Antiprison activists are developing fresh economic arguments and strategies to challenge these vested interests. They have seeded growing doubts that prisons necessarily bring economic development to rural communities and have tried to make the financial burden of penal facilities more visible. For example, some groups have begun to educate the public on lease-revenue bonds (LRBs), a back-

door way to finance new prison construction that skirts states' balanced budget rules and voter-ratification requirements for new government-bond projects.¹⁹

Most prison costs are fixed and are not easily cut. The only way to substantially reduce spending on corrections is to send fewer people to jail or prison and shut down penal facilities. Confronted with powerful interests that profit politically and economically from mass imprisonment, public officials make largely symbolic cuts that do little to reduce the incarcerated population – or save money. Rather, these cuts render life in prison and life after prison leaner and meaner.

As the federal prison population grows and staff positions go unfilled, homicides, assaults, and other acts of violence appear to be on the rise in federal penitentiaries.²⁰ Reports of inmates being fed spoiled or inedible food are rising nationwide. Budget cuts have targeted so-called nonessential prison services like educational, substance abuse, and vocational programs that help reduce recidivism and were already grossly underfunded.

Charging prisoners fees for services like meals, lodging, and visits to the doctor is becoming more common. Politicians in Des Moines, Iowa, even considered charging inmates for toilet paper to save \$2,300 a year. In some cases, former prisoners and family members of juvenile offenders have been sent to prison because they could not pay off fees charged by corrections. As judicial budgets contract, judges in some states have become exceptionally aggressive about collecting fines and fees. Sending poor people to jail if they cannot pay corrections fees or court-imposed fines is a practice of dubious constitutionality.

These developments are part of what some call a new war on the poor, as poverty is increasingly criminalized.²¹ The

number of ordinances against the poor for acts of vagrancy, panhandling, and sleeping on the street has been rising since 2006. “Zero tolerance” policing is increasingly prevalent, as officers issue more tickets and make more arrests for minor infractions like jaywalking, littering, and truancy. Justice delayed is often justice denied as judges and courthouses go on furlough, judgeships remain vacant to save money, and trials are postponed. The quality of justice is also deteriorating because of cuts in legal services for the indigent.

At the same time that poverty is being criminalized, states and the federal government are slashing social services for the poor, a scenario that may result in more people ending up in prison. The limited research available suggests that certain types of social welfare spending reduce crime. What we do know conclusively is that states and countries that spend more on social welfare tend to have lower incarceration rates, while high rates of inequality are associated with higher rates of imprisonment.

The vested interests in maintaining the United States' extensive penal system are considerable. A sea of red ink may be a necessary, but not sufficient, condition to force the closing of prisons and jails and to spur a sharp drop in the incarcerated population. The most telling precedent for such a shift is the deinstitutionalization of the mentally ill in the latter half of the twentieth century. Deinstitutionalization was a rare instance when the government eventually shut down a vast archipelago of institutions that states had invested in heavily for many years. But the shutdown involved a protracted political drama that played out for decades. In 1955, the state mental health population was 559,000, nearly as large on a per capita basis as the prison popu-

lation today. By 2000, it had fallen to below 100,000, a drop of more than 90 percent.²² The development of new drugs like Reserprine and chlorpromazine to combat mental illness helps explain some of this drop. But federal actions, the culmination of decades of political agitation around this issue, were the primary catalyst.

The deinstitutionalization case demonstrates the enormous importance of the political context for the development and implementation of successful federal and state policies to dramatically shrink state institutions. Rising anxiety among state officials about the escalating costs of state mental institutions in the late 1940s did not on its own empty state asylums; leadership at the federal level was critical to enacting change. Another vital component was the shift in the training, worldview, and identity of the psychiatric profession, as the American Psychiatric Association split over the question of institutional care versus the community mental health model. Furthermore, the emergence of major new and interconnected social movements (including the civil rights movement and the senior citizens movement) as well as journalistic and popular attention to the dire conditions in state mental hospitals were pivotal in pushing policy-makers to embrace change. Moreover, the issue had to be reconceived. No longer was mental health concerned only with individuals and their individual diseases. Rather, mental health became a barometer for the health of the whole community.

Mental institutions were a huge and growing drain on state budgets for years, yet deinstitutionalization progressed very slowly. Politicians and policy-makers faced enormous resistance to closing state mental hospitals. Unions and communities for which mental hospitals were the primary employer bitterly opposed

closing the facilities. Only after many contentious years did unions secure government support to retrain workers in psychiatric hospitals to prepare them to be transferred into community treatment programs. Even though many of the psychiatrists moved on and many residents of state mental hospitals were eventually transferred to other facilities or released, these largely empty hulks stayed open for decades. It wasn't until the 1990s – nearly four decades after talk of deinstitutionalization began – that whole institutions began to close in large numbers. It took just as long for political leadership and the public to acknowledge that successful integration requires more than adequate medical treatment; the mentally ill need access to housing and jobs as well. Remarkably, it wasn't until 1993 that state funding for community mental health surpassed state funding for mental institutions.²³

The expected financial savings from deinstitutionalization were oversold to politicians and the wider public, thus undermining the case for adequate funding of services for the mentally ill. Cutbacks in mental-health funds, which started in the Reagan years, and cuts in federal money for public housing and other services resulted in streams of apparently deranged people living on the streets. This outcome fueled a backlash against deinstitutionalization and community mental health and overshadowed the fact that many mentally ill people made successful transitions to community life. With the closing of state mental hospitals and the contraction of federal money for treatment, services, and housing, jails and prisons, unfortunately, became the mental institutions of last resort for many people with mental health problems.

It is also important to keep in mind that states were able to reduce their mental health tab by getting someone

else to pick up the bill. Under the landmark Medicare and Medicaid legislation enacted in 1965, the federal government would not reimburse states for the cost of care for indigent and senile elderly people residing in state asylums. As a result, the elderly, who made up a large proportion of the state mental hospital population, were transferred to nursing homes, where the federal government would pick up the cost.

Although there are important parallels between deinstitutionalization of the mentally ill and efforts to end mass incarceration, there are also major differences suggesting that successfully reducing the country's incarcerated population will be an even greater challenge.

The mentally ill and their legal advocates had considerable access to the court system to press their civil rights claims and to expose the dire conditions in state mental hospitals. By contrast, the 1996 Prison Litigation Reform Act, the Anti-terrorism and Effective Death Penalty Act, and a string of unfavorable court decisions have made it increasingly difficult for inmates and their legal advocates to use the courts to pursue civil rights claims and to document and expose the degrading and inhumane conditions in U.S. prisons and jails. Likewise, the media no longer serve as vehicles to prod reform. Due to cutbacks and restructuring in the news business, investigative pieces documenting abuses in all kinds of institutions (prisons, nursing homes, hospitals) are increasingly rare. Furthermore, prison and state officials have been erecting ever-higher barriers for journalists attempting to cover what happens behind prison walls, including, in some states, complete bans on face-to-face interviews with inmates. Moreover, the once vibrant in-house penal press is nearly extinct.

Debates about crime, punishment, and law and order have been deeply entangled in wider political battles and electoral strategies in ways that the mental health issue never was. Mental health policy has been a controversial subject from time to time, but it has never been a lightning rod in American politics in the way penal policy and law and order have been since the 1960s.

Republicans waged the rebirth of the modern Republican Party on the "Southern strategy." They used the rhetoric of law and order as code words for race to undermine the new Democratic majority resting on the civil rights movement and to build a new coalition of white voters anchored in the South and West. Bill Clinton staked his campaign for the White House on a kinder, gentler version of the law-and-order Southern strategy to woo the so-called Reagan Democrats back to the party. Given the high profile of crime and punishment at the federal level and how this issue has been a pillar for repositioning the major political parties, political openings to shift penal policy in a less punitive direction are fraught with risk and are hard to sustain.

Public opinion poses an additional hurdle to penal reform. Penal policy is particularly vulnerable to moral panics – often fueled by politicians – in the wake of certain high-profile crimes or events. Some suggest that moral panics are more likely to occur during periods of broad uncertainty and insecurity in society. Faced with a particularly heinous high-profile violent crime, many public officials believe that they need to respond with bold law-and-order gestures to address what they perceive to be the public's anger and moral outrage.

Yet policy-makers grossly misperceive public opinion on penal matters, mistakenly seeing the public as more supportive of punitive measures than it actually

is.²⁴ This judgment error may explain policy-makers' persistent reticence to make bold moves that would slash the incarceration rate and why politicians across the political spectrum respond to increases in the crime rate by reflexively calling for more prisons and tougher sentences.

In reality, public opinion research indicates that Americans have a much more nuanced view of spending on criminal justice than the popular media or public-policy debates suggest. The public overwhelmingly favors spending more on policing, crime prevention programs for young people, and drug treatment for nonviolent offenders. But it strongly opposes additional funding for prisons.²⁵

Differences in the structure of state institutions and the quality of civic life may help to explain why redirecting penal policy from the law-and-order path, however costly it has become, will be more difficult in some states than in others.²⁶ The case of California is a stark reminder that political and institutional logic can matter as much as or more than economic logic in determining the future course of penal policy. California has been teetering on the brink of fiscal and social disaster for several years. Commentators have even begun to refer to it as a "failed state," a term usually associated with countries like the Congo or Afghanistan. The Golden State has been unable or unwilling to soften its Three Strikes law, the toughest in the nation. Third-strike offenders in California – some with modest third offenses, such as petty theft – languish in the state's overcrowded prison system at an average cost of \$49,000 a year.²⁷

The state's voter initiative and referendum process continues to warp penal policies, making California highly vulnerable to penal populism and well-funded single-issue groups. Facing fiscal Arma-

geddon, the state's voters nonetheless narrowly approved Proposition 9 in November 2008; it toughens requirements for granting parole and calls for amending the state's constitution to give crime victims unprecedented influence on criminal cases. Voters soundly rejected Proposition 5, which would have expanded alternative sentences for nonviolent drug offenders and saved billions of dollars.

California faced a \$24 billion budget shortfall in 2009 at the same time that a federal court was demanding that the state spend billions more on prison health care or else release about forty thousand offenders to relieve gross overcrowding. A proposal to release some nonviolent offenders created a political firestorm. A watered-down compromise was nearly scuttled in the eleventh hour in the State Assembly after the sensational story of Phillip Garrido became front-page news worldwide in Summer 2009.²⁸ Law enforcement groups successfully pressed Democrats to strip the bill of provisions to reduce sentences for some nonviolent offenders and establish a commission to revise prison sentencing guidelines. The final bill had the capacity to reduce the prison population by sixteen thousand inmates, far fewer than originally proposed.²⁹

The current economic crisis presents an opportunity to redirect U.S. penal policy that opponents of the prison boom should exploit. But framing this issue as primarily an economic one will not sustain the political momentum needed over the long haul to drastically reduce the prison population. Economic justification also ignores the fact that a successful decarceration will cost money. The people reentering society after prison need significant educational, vocational, housing, health, and economic

support. We need to make considerable reinvestments in reentry to ensure that the communities prisoners return to are not further destabilized by waves of former prisoners whose time inside has greatly impaired their economic, educational, and social opportunities.

In addition, while we need to make reentry a priority, we cannot focus only on those who are released. We need to reduce the number of people who are sent to jail or prison and the length of their sentences. Prisons and jails exacerbate many social ills that contribute to crime and poverty and are unlikely to significantly rehabilitate anyone. Roughly half the people in U.S. prisons are serving time for nonviolent offenses (many of them property or petty drug offenses that would not warrant a sentence in many other countries), while sentences for violent offenses have lengthened considerably.

Criminal justice is fundamentally a political problem, not a crime-and-punishment problem. A vast penal system is well on its way to becoming a key governing institution in the United States. Like the vast military-industrial complex that quickly insinuated itself into the political and economic fabric in the postwar decades, the penal system has become so large and so integral to the U.S. polity and the economy that we barely see it anymore.

Framing the carceral state primarily as an economic issue may yield some

short-term benefits. However, focusing too heavily on the economic burden may draw attention away from the fact that the penal system has begun to fundamentally alter how key social and political institutions operate and to pervert what it means to be a citizen in the United States.³⁰ It also undercuts the compelling civil- and human-rights arguments that the carceral state raises as it removes wide swaths of African Americans, Latinos, and poor Americans from their neighborhoods. Mass incarceration devastates the families and communities the imprisoned leave behind. It raises troubling questions about the fairness and legitimacy not only of the criminal justice system but also of the political system more broadly. In the absence of more compelling arguments against the prison buildup and of a durable movement to sell these arguments to skeptical policy-makers and the wider public, it becomes that much easier to revert to funding a vast carceral state, no questions asked, once the economy picks up.

A durable reform movement to weather the backlash that will inevitably be sparked by efforts to substantially reduce the incarceration rate has yet to coalesce. The economic crisis does not spell the beginning of the end of mass incarceration in the United States. To borrow from Winston Churchill, “It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”³¹

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Loïc Wacquant

*Class, race & hyperincarceration
in revanchist America*

The single greatest *political* transformation of the post-civil rights era in America is the joint rolling back of the stingy social state and rolling out of the gargantuan penal state that have remade the country's stratification, cities, and civic culture, and are recasting the very character of "blackness" itself. Together, these two concurrent and convergent thrusts have effectively redrawn the perimeter, mission, and modalities of action of public authority when it comes to managing the deprived and stigmatized populations stuck at the bottom of the class, ethnic, and urban hierarchy. The concomitant downsizing of the welfare wing and up-sizing of the criminal justice wing of the American state have not been driven by raw trends in poverty and crime, but fueled by a politics of resentment toward categories deemed undeserving and unruly. Chief among those stigmatized populations are the public-aid recipients and the street criminals framed as the two demonic figureheads of the "black underclass" that came to dominate the journalistic, scholarly, and policy debate on the plight of urban America¹ in the revanchist decades that digested the civil disorders of the 1960s and the stagflation of

the 1970s, and then witnessed the biggest carceral boom in world history.²

In this article, I show that the stupendous expansion and intensification of the activities of the American police, criminal courts, and prison over the past thirty years have been finely targeted, first by class, second by race, and third by place, leading not to *mass* incarceration but to the *hyperincarceration* of (sub)proletarian African American men from the imploding ghetto. This triple selectivity reveals that the building of the hyperactive and hypertrophic penal state that has made the United States world champion in incarceration is at once a delayed reaction to the civil rights movement and the ghetto riots of the mid-1960s³ and a disciplinary instrument unfurled to foster the neoliberal revolution by helping to impose insecure labor as the normal horizon of work for the unskilled fractions of the postindustrial laboring class.⁴ The double coupling of the prison with the dilapidated hyperghetto, on the one side, and with supervisory workfare, on the other, is not a moral dilemma – as recently argued by Glenn Loury in his Tanner Lecture⁵ – but a political quandary calling for an expanded analysis of the nexus of class inequality, ethnic stigma, and the state in the age of social insecurity. Reversing the racialized penalization of

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poverty in the crumbling inner city requires a different policy response than mass incarceration would and calls for an analysis of the political obstacles to this response, which must go beyond “trickle-down” penal reform to encompass the multifaceted role of the state in producing and entrenching marginality.

The tale of the unexpected and exponential growth of jails and prisons over the past three decades in America after a half-century of carceral stability has often been told. But the raw increase of the population behind bars – from about 380,000 in 1975 to 2 million in 2000 and some 2.4 million today (counting juveniles and persons held in police lockups, who are not registered by official correctional statistics) – is only part of the story of the multisided expansion of the penal state.⁶ Four distinctive yet submerged dimensions of America’s punitive turn after the close of the Fordist era form the backdrop to my analysis of the deployment of the disciplinary tentacles of the state toward the poor.

First, this phenomenal increase is remarkable for having been fueled, not by the lengthening of the average sentence as in previous periods of carceral inflation, but primarily by the *surge in jail and prison admissions*. Thus the number of people committed to state and federal penitentiaries by the courts ballooned from 159,000 in 1980 to 665,000 in 1997 (accounting for more than 80 percent of inmate growth during that period) before stabilizing at about a half-million annually after 2002. This surge sharply differentiates the United States from Western European countries, most of which have also witnessed a steady, if comparatively modest, rise in incarceration over the past two decades, but one where growing stock is not due to increases in flow.⁷ A major contributor to this “vertical”

growth of the carceral system in America is the steep escalation in the volume of persons arrested by the police and the vastly enlarged role assumed by jails as frontline dams of social disorders in the city. This police hyperactivism has been disproportionate to and disjoined from trends in crime. One example: in New York City, under the campaign of “zero tolerance” promoted by then-Mayor Rudolph Giuliani, the number of arrests increased by 40 percent between 1993 and 1998 to top 376,000 while crime decreased by 54 percent to reach 323,000, meaning that the police arrested more persons than it recorded offenses by the end of that period, compared to half as many at the start. Even though a growing share of these arrests were abusive and did not lead to charges, admissions to jail rose by one-fourth, causing rampant congestion and daily pandemonium in the city’s custodial facilities.⁸

As a result of intensified policing coupled with a rising propensity to confine miscreants, American jails have become gargantuan operations processing a dozen million bodies each year nationwide, as well as huge drains on the budgets of counties and pivotal institutions in the lives of the (sub)proletariat of the big cities.⁹ Indeed, because they treat vastly more people than do prisons, under conditions that are more chaotic due to high turnover, endemic overcrowding, population heterogeneity, and the administrative shift to bare-bones managerialism (the two top priorities of jail wardens are to minimize violent incidents and to hold down staff overtime), jails create more social disruption and family turmoil at the bottom of the urban order than do prisons. Yet they have remained largely under the radar of researchers and policy analysts alike.¹⁰

Second, the vertical rise of the penal system has been exceeded by its “hori-

zontal” spread: the ranks of those kept in the long shadow of the prison via probation and parole have swelled even more than the population under lock, to about 4 million and 1 million, respectively. As a result, the total population under criminal justice supervision bloated from 1.8 million in 1980 to 6.4 million by 2000 and 7.4 million in 2007. Probation and parole should be incorporated into the debate on the penal state, not only because they concern a much larger population than that of convicts (in 1998, eleven states each held in excess of 100,000 probationers under their heel, more than France did, with 87,000), but also because both are more likely to lead (back) to imprisonment than not: two in five probationers and six in ten parolees who exited this status in 1997 were returned to custody within three years, either because they had committed a new offense or because they had violated one or another administrative condition of their release (failing an alcohol test or losing a job, missing an appointment with their parole officer, or traveling outside of their county of assignment without permission, for example). The purpose and functioning of parole have changed drastically over the past thirty years, from spring toward rehabilitation to penal trap, so that parole is now properly construed as an *extension* of the custodial system, rather than an *alternative* to it.¹¹

The reach of penal authorities has also been dramatically enlarged beyond probation and parole by the exponential growth in the size, scope, and uses of criminal justice databases that, as of 2000, contained roughly sixty million files on an estimated thirty-five million individuals. Novel panoptic measures include the diffusion of official “rap sheets” through the Internet, the routinization of “background checks” by employers and realtors, the spread of public notifi-

cation statutes (and related laws seeking to expurgate specific categories of convicts, such as sex offenders, from the social body), and the shift from old-style fingerprints and mug shots to DNA prints coordinated by the FBI.¹² These institutional tentacles, and the routine practices of profiling, surveillance, and enclosure at a distance that they permit, severely curtail the life chances of former convicts and their families by stretching the effects of judicial stigma on the labor, housing, and marital markets as well as into daily life.¹³ Legislators have further amplified these sanctions by adding a raft of restrictions on the access of ex-felons to public services, privileges, and benefits, from public housing and public employment to college scholarships, parenting, and voting rights.¹⁴

Third, the advent of penal “big government” was made possible by astonishing increases in funding and personnel. Prison and jail expenditures in America jumped from \$7 billion in 1980 to \$57 billion in 2000 and exceeded \$70 billion in 2007, even as crime first stagnated and then declined steadily after 1993. (Meanwhile, criminal justice expenditures grew sevenfold, from \$33 billion to \$216 billion.) This budgetary boom of 660 percent – amounting to a veritable *carceral Marshall Plan* during a period when successive administrations proclaimed to rein in public spending – financed the infusion of an additional one million criminal justice staff, which has made corrections the third largest employer in the nation, behind only Manpower Inc. and Wal-Mart, with a monthly payroll of \$2.4 billion.

The upsizing of the carceral function of government has been rigorously proportional to the downsizing of its welfare role. In 1980, the country spent three times as much on its two main assistance programs (\$11 billion for

Aid to Families with Dependent Children [AFDC] and \$10 billion for food stamps) than on corrections (\$7 billion). By 1996, when “welfare reform” replaced the right to public assistance by the obligation to accept insecure employment as a condition of support, the carceral budget came to double the sums allocated to either AFDC or food stamps (\$54 billion compared to \$20 billion and \$27 billion, respectively). Similarly, during the 1990s alone, Washington cut funding for public housing by \$17 billion (a reduction of 61 percent) and boosted corrections by \$19 billion (an increase of 171 percent), effectively making the construction of prisons the nation’s main housing program for the poor.

Fourth, the building of America’s gigantic penal state is a *nationwide endeavor and a bipartisan achievement*. Many scholars have rightly stressed that the United States does not have a criminal justice system so much as a loose patchwork of independent jurisdictions beset by administrative fragmentation and policy dispersal bordering on incoherence.¹⁵ In light of wide regional and state variations, others have highlighted the role of “local political culture” and modes of “civic engagement” in determining the mix and intensity of penal sanctions.¹⁶ Still others have reported that Republican governors, a large African American urban population, and “a state’s religious and political culture” exert a significant influence on incarceration rates.¹⁷ Yet for all these and other geographic disparities and peculiarities, it remains that, over the past thirty-odd years, penal escalation has left no corner of the country untouched and has brought about de facto unification in the aggressive deployment of punishment. Aside from Maine and Kansas, all states saw their correctional counts grow by more than 50 percent be-

tween 1985 and 1995, at the peak of the carceral boom. Everywhere the ideal of rehabilitation has been abandoned or drastically downgraded, making retribution and neutralization the main practical rationale for confinement.

Increases in the civic salience of crime and distrust in government have pushed all jurisdictions toward greater punitiveness.¹⁸ Moreover, policy control over criminal justice has migrated to the federal level, where it has grown steadily more symbolic and less substantive since the 1970s.¹⁹ Indeed, this national slant is one of the distinctive causes of the severity of the punitive turn, as it strikes at impoverished minority districts in the city.²⁰ This national trajectory has been uninterrupted by changes in political majority in statehouses, Congress, and the White House, as both parties have reflexively supported penal activism and expanded incarceration.²¹ Republicans will claim that they are “tougher on crime,” but Democratic majorities have run up the carceral tab in California, Illinois, Michigan, and New York. It was a Democratic president, Jimmy Carter (former governor of Georgia, one of the country’s most repressive states), who jump-started America’s great “carceral leap forward.” And another Democratic president (and former governor of another superpunitive state, Arkansas), Bill Clinton, who pushed for the most costly crime bill in world history (the Violent Crime Control and Law Enforcement Act of 1994), oversaw the single largest expansion of incarceration in the annals of democratic societies: Clinton tallied an increase of 465,000 convicts for an added \$15 billion, compared to 288,000 convicts for a boost of \$8 billion for Ronald Reagan.

The foregoing indicates that the *footprint of the penal state on the national body is much broader and heavier* than usually

depicted. At the same time, it is also considerably more *pointed* than conveyed by the current debate. It has become conventional among justice activists, journalists, and analysts of the U.S. carceral scene to designate the unprecedented and unparalleled expansion of the American correctional system at the close of the twentieth century as “mass incarceration.”²² The term was (re)introduced in the national prison debate in the late 1990s (until then, it had been used to refer to the internment of Japanese Americans in concentration camps during World War II) and was soon codified by David Garland at the interdisciplinary conference on “Mass Incarceration: Social Causes and Consequences,” held at New York University in 2000, which boosted research on the topic.²³ The designation of mass incarceration is intuitively appealing because it helps spotlight the outlier status of the United States on the world scene, dramatize the condition at hand, and thus draw scholarly and public attention to it. But, much as it has been useful in terms of mobilizing intellectual and civic resources, the notion obscures signal features of the phenomenon.

Mass incarceration is a mischaracterization of what is better termed *hyperincarceration*. This is not a mere terminological quibble, for the change in wording points to a different depiction of the punitive turn, which leads to a different causal model and thence to different policy prescriptions. *Mass* incarceration suggests that confinement concerns large swaths of the citizenry (as with the mass media, mass culture, and mass unemployment), implying that the penal net has been flung far and wide across social and physical space. This is triply inaccurate. First, the prevalence of penal confinement in the United States, while extreme by international standards, can hardly be said to concern the masses.

Indeed, a rate of 0.75 percent compares quite favorably with the incidence of such woes as latent tuberculosis infection (estimated at 4.2 percent) and severe alcohol dependency (3.81 percent), ailments which no one would seriously contend have reached mass proportions in the United States.²⁴ Next, the expansion and intensification of the activities of the police, courts, and prison over the past quarter-century have been anything but broad and indiscriminate.²⁵ They have been *finely targeted*, first by class, second by that disguised brand of ethnicity called race, and third by place. This cumulative targeting has led to the *hyperincarceration* of one particular category, *lower-class African American men trapped in the crumbling ghetto*, while leaving the rest of society – including, most remarkably, middle- and upper-class African Americans – practically untouched. Third, and more important still, this *triple selectivity is a constitutive property of the phenomenon*: had the penal state been rolled out indiscriminately by policies resulting in the capture of vast numbers of whites and well-to-do citizens, capsizing their families and decimating their neighborhoods as it has for inner-city African Americans, its growth would have been speedily derailed and eventually stopped by political counteraction. “Mass” incarceration is socially tolerable and therefore workable as public policy only *so long as it does not reach the masses*: it is a figure of speech, which hides the multiple filters that operate to point the penal dagger.²⁶

Class, not race, is the first filter of selection for incarceration. The welcome focus on race, crime, and punishment that has dominated discussions of the prison boom has obliterated the fact that inmates are *first and foremost poor people*. Indeed, this monotonic class recruitment is a constant of penal history since the

invention of houses of correction in the late sixteenth century²⁷ and a fact confirmed by the annals of U.S. incarceration.²⁸ Consider the social profile of the clientele of the nation's jails – the gateway into America's carceral archipelago. This clientele is drawn overwhelmingly from the most precarious fractions of the urban working class²⁹: fewer than half of inmates held a full-time job at the time of arraignment and two-thirds issue from households with an annual income coming to less than *half* the "poverty line"; only 13 percent have some postsecondary education (compared to a national rate above one-half); 60 percent did not grow up with both parents, including 14 percent raised in foster homes or orphanages; and every other detainee has had a member of his family behind bars. The regular clients of America's jails suffer from acute material insecurity, cultural deprivation, and social denudement – only 16 percent of them are married, compared to 58 percent for men of their age bracket nationwide. They also include disproportionate numbers of the homeless, the mentally ill, the alcohol- and drug-addicted, and the severely handicapped: nearly one in four suffers from a physical, psychic, or emotional ailment serious enough to hamper his or her ability to work. And they come mostly from deprived and stigmatized neighborhoods that have been devastated by the double retrenchment of the formal labor market and the welfare state from the urban core.³⁰ Conversely, very few members of the middle and upper classes ever sojourn at the "Graybar hotel," especially for committing the minor to middling crimes that account for the bulk of prison convictions. (In 1997, 11 percent of new court commitments to state penitentiaries were for public order offenses, 30 percent for narcotics convictions, and 28 percent for property crimes.)

Martha Stewart and Bernie Madoff are but spectacular exceptions that spotlight this stringent class rule.

Race comes second. But the ethnic transformation of America's prison has been at once more dramatic and more puzzling than generally recognized. To start, the ethnoracial makeup of convicts has completely *flip-flopped* in four decades, turning over from 70 percent white and 30 percent "others" at the close of World War II to 70 percent African American and Latino versus 30 percent white by century's end. This inversion, which accelerated after the mid-1970s, is all the more stunning when the criminal population has both shrunk and become *whiter* during that period: the share of African Americans among individuals arrested by the police for the four most serious violent offenses (murder, rape, robbery, and aggravated assault) dropped from 51 percent in 1973 to 43 percent in 1996,³¹ and it continued to decline steadily for each of those four crimes until at least 2006.³²

Next, the rapid "blackening" of the prison population even as serious crime "whitened" is due *exclusively* to the astronomical increase in the incarceration rates of *lower-class* African Americans. In his book *Punishment and Inequality in America*, sociologist Bruce Western produces a stunning statistic: whereas the cumulative risk of imprisonment for African American males without a high-school diploma tripled between 1979 and 1999, to reach the astonishing rate of 59 percent, the lifetime chance of serving time for African American men with some college education *decreased* from 6 percent to 5 percent.³³ Here again, the media melodrama around the arrest of Harvard University star professor Henry Louis Gates in Summer 2009 has hidden the fact that middle- and upper-class African Americans are *better off* under the present penal regime than they were thir-

*Class, race
& hyper-
incarceration in
revanchist
America*

ty years ago. It has played to the national obsession for the black-white duality, which obfuscates the fact that *class disproportionality inside each ethnic category is greater than the racial disproportionality between them*: African American men are eight times more likely to sojourn behind bars than European American men (7.9 percent versus 1.0 percent in 2000), but the lifetime probability of serving time in prison for African American males who did not complete their secondary education is twelve times that for African American males who went to college (58.9 percent versus 4.9 percent), whereas that class gap among white men stands at sixteen to one (11.2 percent versus 0.7 percent).³⁴ The fact that these ratios were considerably lower two decades ago for both African Americans and European Americans (of the order of one to three and one to eight, respectively) confirms that enlarged imprisonment has struck very selectively by class inside of race, which again refutes the diagnosis of a “mass” phenomenon.

How was such double, nested selectivity achieved? How is it possible that criminal laws ostensibly written to avoid class and color bias would lead to throwing so many (sub)proletarian African American men under lock, and not other African American men?³⁵ The class gradient in racialized imprisonment was obtained by targeting one particular place: the *remnants of the dark ghetto*. I insist here on the word *remnants*, because the ghetto of old, which held in its grip a unified, if stratified, African American community, is no more. The communal Black Belt of the Fordist era, described by a long lineage of distinguished African American sociologists, from W. E. B. Du Bois and E. Franklin Frazier to Drake and Cayton to Kenneth

Clark, imploded in the 1960s, to be replaced by a dual and decentered structure of seclusion composed of a degraded *hyperghetto* doubly segregated by race and class, on the one hand, and the *satellite African American middle-class districts* that mushroomed in the adjacent areas vacated by the mass exodus of whites to the suburbs, on the other.³⁶

But to detect the tightening linkage between the decaying ghetto and the booming prison requires that one effects two analytic moves. First, one must break out of the narrow ambit of the “crime and punishment” paradigm that continues to hamstring the scholarly and policy debate, in spite of its increasingly glaring inadequacy. A simple ratio suffices to demonstrate that crime cannot be the cause behind carceral hyperinflation: the number of clients of state and federal prisons boomed from 21 convicts per thousand “index crimes” in 1975 to 125 per thousand in 2005. In other words, holding the crime rate constant shows that the American penal state is six times more punitive today than it was three decades ago.³⁷ Instead of getting sidetracked into investigations of the crime-punishment (dis)connection, one must recognize that the prison is not a mere technical implementation of government designed to stem offending, but a core state capacity devoted to *managing dispossessed and dishonored populations*. Returning to the early history of the prison in the long sixteenth century readily discloses that penal bondage developed, not to fight crime, but to dramatize the authority of rulers, and to repress idleness and enforce morality among vagrants, beggars, and assorted categories cast adrift by the advent of capitalism.³⁸ The rise of the prison was part and parcel of the building of the early modern state to discipline the nascent urban proletariat

and to stage sovereignty for the benefit of the emerging citizenry. The same is true four centuries later in the dualizing metropolis of neoliberal capitalism.³⁹

A second analytic shift is needed to ferret out the causal connection between hyperghettoization and hyperincarceration: to realize that the ghetto is not a segregated quarter, a poor neighborhood, or an urban district marred by housing dilapidation, violence, vice, or disrepute, but an *instrument of ethnoracial control* in the city. Another return to social history demonstrates that a ghetto is a sociospatial contraption through which a dominant ethnic category secludes a subordinate group and restricts its life chances in order to both exploit and exclude it from the life-sphere of the dominant. Like the Jewish ghetto in Renaissance Europe, the Black Belt of the American metropolis in the Fordist age combined four elements – stigma, constraint, spatial confinement, and institutional encasement – to permit the economic extraction and social ostracization of a population deemed congenitally inferior, defiled and defiling by virtue of its lineal connection to bondage. Succeeding chattel slavery and Jim Crow, the ghetto was the third “peculiar institution” entrusted with defining, confining, and controlling African Americans in the urban industrial order.⁴⁰

Penal expansion after the mid-1970s is a political response to the collapse of the ghetto. But why did the ghetto collapse? Three causal series converged to undercut the “black city within the white” that hemmed in African Americans from the 1920s to the 1960s. The first is the post-industrial economic transition that shifted employment from manufacturing to services, from central city to suburb, and from the Rustbelt to the Sunbelt and low-wage foreign countries. Together with renewed immigration, this shift made African American workers redundant and

undercut the role of the ghetto as a reservoir of unskilled labor. The second cause is the political displacement provoked by the Great White Migration to the suburbs: from the 1950s to the 1970s, millions of white families fled the metropolis in reaction to the influx of African Americans from the rural South. This demographic upheaval, subsidized by the federal government and bolstered by the courts, weakened cities in the national electoral system and reduced the political pull of African Americans. The third force behind the breakdown of the ghetto as ethnoracial container is African American protest, fostered by the accumulation of social and symbolic capital correlative of ghettoization, culminating with the civil rights legislation, the budding of Black Power activism, and the eruption of urban riots that rocked the country between 1964 and 1968.

Unlike Jim Crow, then, the ghetto was not dismantled by forceful government action. It was left to crumble onto itself, trapping lower-class African Americans in a vortex of unemployment, poverty, and crime abetted by the joint withdrawal of the wage-labor market and the welfare state, while the growing African American middle class achieved limited social and spatial separation by colonizing the districts adjacent to the historic Black Belt.⁴¹ As the ghetto lost its economic function of labor extraction and proved unable to ensure ethnoracial closure, the prison was called on to help contain a dishonored population widely viewed as deviant, destitute, and dangerous. This coupling occurred because, as previously suggested, ghetto and prison belong to the same organizational genus, namely, *institutions of forced confinement*: the ghetto is a sort of “ethnoracial prison” in the city, while the prison functions in the manner of a “judicial ghetto” at large. Both are charged with enfolding a stig-

matized category so as to defuse the material and/or symbolic threat it poses for the broader society from which it has been extruded.

To be sure, the structural homology and functional surrogacy of ghetto and prison do not mandate that the former be replaced by or coupled with the latter. For that to happen, specific policy choices had to be made, implemented, and supported. This support sprang from the fearful reaction of whites to the urban riots and related racial upheavals of the 1960s and from the rising political resentment generated by government powerlessness in the face of the stagflation of 1970s and the subsequent spread of social insecurity along three tacks. First, middle-class whites accelerated their exodus out of the capsizing cities, which enabled the federal government to dismantle programs essential to the succor of inner-city residents. Second, working-class whites joined their middle-class brethren in turning against the welfare state to demand that public aid be curtailed – leading to the “end of welfare as we know it” in 1996. Third, whites across the class spectrum allied to offer ardent political backing for the “law and order” measures that primed the penal pump and harnessed it to the hyperghetto. The meeting ground and theater of these three political thrusts was the “revanchist city”⁴² in which increasing inequality, diffusing social precariousness, and festering marginality fed citizens’ rancor over the alleged excessive generosity of welfare and leniency of criminal justice toward poor African Americans.

Two trains of converging changes then bolstered the knitting of the hyperghetto and the prison into a carceral mesh ensnaring a population of lower-class African Americans rejected by the deregulated labor market and the dereliction of public institutions in the inner city.⁴³

On the one side, *the ghetto was “prisonized”* as its class composition became monotonously poor, its internal social relations grew stamped by distrust and fear, and its indigenous organizations waned to be replaced by the social control institutions of the state. On the other side, *the prison was “ghettoized”* as rigid racial partition came to pervade custodial facilities; the predatory culture of the street supplanted the “convict code” that had traditionally organized the “inmate society”⁴⁴; rehabilitation was abandoned in favor of neutralization; and the stigma of criminal conviction was deepened and diffused in ways that make it akin to racial dishonor. The resulting symbiosis between hyperghetto and prison not only perpetuates the socioeconomic marginality and symbolic taint of the African American subproletariat, feeding the runaway growth of the carceral system. It also plays a key role in the revamping of “race” by associating blackness with devious violence and dangerousness,⁴⁵ the redefinition of the citizenry via the production of a racialized public culture of vilification of criminals, and the construction of a post-Keynesian state that replaces the social-welfare treatment of poverty with its punitive containment.

Yet the tightening nexus between the hyperghetto and the prison does not tell the whole story of the frenetic growth of the penal institution in America after the civil rights revolution. In *Punishing the Poor*, I show that the unleashing of a voracious prison apparatus after the mid-1970s partakes of a broader restructuring of the state tending to criminalize poverty and its consequences so as to impress insecure, underpaid jobs as the modal employment situation of the unskilled segments of the postindustrial proletariat. The sudden hypertrophy of the penal state was thus matched and

complemented by the planned atrophy of the social state, culminating with the 1996 law on Personal Responsibility and Work Opportunity, which replaced the right to “welfare” with the obligation of “workfare.” Each in its fashion, workfare and prisonfare respond, not just to the crisis of the ghetto as a device for the sociospatial seclusion of African Americans, but to the repudiation of the Fordist wage-work compact and of the Keynesian social compromise of the postwar decades. Together, they ensnare the marginal populations of the metropolis in a *carceral-assistential net* designed to steer them toward deregulated employment through moral retraining and material suasion and, if they prove too recalcitrant and disruptive, to warehouse them in the devastated core of the urban Black Belt and in the penitentiaries that have become its distant yet direct satellites.

The workfare revolution and the penal explosion are the two sides of the same historical coin, two facets of the reengineering and masculinizing of the state on the way to the establishment of a novel political regime that may be characterized as *liberal-paternalist*: it practices *laissez-faire* at the top, toward corporations and the privileged, but it is intrusive and disciplinary at the bottom, when it comes to dealing with the consequences of social disinvestment and economic deregulation for the lower class and its territories. And, just as racial stigma was pivotal to the junction of hyperghetto and prison, the taint of “blackness” was epicentral to the restrictive and punitive overhaul of social welfare at century’s end. In the wake of the ghetto mutinies of the 1960s, the diffusion of blackened images of crime fueled rising hostility toward criminals and fostered (white) demands for *expansive* prison policies narrowly aimed at ret-

tribution and neutralization.⁴⁶ During the same years, the spread of blackened images of urban destitution and dependency similarly fostered mounting resentment toward public aid, bolstering (white) support for *restrictive* welfare measures centered on deterrence and compulsion.⁴⁷ Race turns out to be the symbolic linchpin that coordinated the synergistic transformation of these two sectors of public policy toward the poor.⁴⁸

Again, like the joining of hyperghetto and prison, this second institutional pairing feeding carceral growth can be better understood by paying attention to the structural, functional, and cultural similarities between workfare and prisonfare as “people-processing organizations”⁴⁹ targeted on problem populations and neighborhoods. It was tightened by the transformation of welfare in a punitive direction and by the expansion of the penal system to “treat” more and more of the traditional clientele of welfare. Both programs of state action are narrowly directed at the bottom of the class and ethnic hierarchy; both effectively assume that their recipients are “guilty until proven innocent” and that their conduct must be closely supervised as well as rectified by restrictive and coercive measures; and both use deterrence and stigma to achieve behavioral modification.

In the era of hypermobile capital and fragmented wage-work, the monitoring of the precarious segments of the working class is no longer handled solely by the maternal social arm of the welfare state, as portrayed by Frances Fox Piven and Richard Cloward in their classic 1971 study *Regulating the Poor*.⁵⁰ It entails a *double regulation* through the virile and controlling arms of *workfare and prisonfare acting in unison*. This dynamic coupling of social and penal policy at the bottom of the class and ethnic structure operates

through a familiar division of labor between the sexes: the public aid bureaucracy, reconverted into an administrative springboard to subpoverty employment, takes up the task of inculcating the duty of working for work's sake to poor women (and indirectly to their children), while the penal quartet formed by the police, the court, the prison, and the probation or parole officer shoulders the mission of taming their men – that is, the boyfriends or husbands, brothers, and sons of these poor women. Welfare provision and criminal justice are animated by the same punitive and paternalist philosophy that stresses the “individual responsibility” of the “client”; they both rely on case supervision and bureaucratic surveillance, deterrence and stigma, and graduated sanctions aimed at modifying behavior to enforce compliance with work and civility; and they reach publics of roughly comparable size. In 2001, 2.1 million households received Temporary Assistance to Needy Families, for a total of some 6 million beneficiaries, while the carceral population topped 2.1 million and the stock under criminal justice supervision surpassed 6.5 million.

In addition, welfare recipients and inmates have nearly identical social profiles and extensive mutual ties of descent and alliance confirming that they are the two gendered components of the same population. Both categories live below 50 percent of the federal poverty line (for one-half and two-thirds of them, respectively); both are disproportionately African American and Hispanic (37 percent and 18 percent versus 41 percent and 19 percent); the majority did not finish high school; and many suffer from serious physical and mental disabilities limiting their workforce participation (44 percent of AFDC mothers as against 37 percent of jail inmates). And they are closely bound to one another by kin and marital and

social bonds, reside overwhelmingly in the same impoverished households and barren neighborhoods, and face the same bleak life horizon at the bottom of the class and ethnic structure. This intertwinement indicates that we cannot hope to untie the knot of class, race, and imprisonment, and thus explain hyperincarceration, if we do not relink prisonfare and workfare, which in turn implies that we must bring the social wing of the state and its transformations into our analytic and policy purview.

Revanchism as public policy toward the dispossessed has thrust the country into a historical cul-de-sac, as the double coupling of hyperghettoization and hyperincarceration, on the one hand, and workfare and prisonfare, on the other, damages both society and the state. For society, the spiral of penal escalation has become self-reinforcing as well as self-defeating: the carceral Moloch actively destabilizes the precarious fractions of the postindustrial proletariat it strikes with special zeal, truncates the life options of its members, and further despoils inner-city neighborhoods, thereby reproducing the very social disorders, material insecurity, and symbolic stain it is supposed to alleviate. As a result, the population behind bars has kept on growing even as the overall crime rate dropped precipitously for some fifteen years, yielding a paradoxical pattern of *carceral levitation*. For the state, the penalization of poverty turns out to be financially ruinous, as it competes with, and eventually consumes, the funds and staff needed to sustain essential public services such as schooling, health, transportation, and social protection.⁵¹ Moreover, the punitive and panoptic logic that propels criminal justice seeps into and erodes the shielding capacities of the welfare sector, for instance by inflecting the

practices of child protective services in ways that turn them into adjuncts of the penal apparatus.⁵² It similarly undercuts the educational springboard, as depleted inner-city schools serving a clientele roiled by mass unemployment and penal disruption come to prioritize and manage issues of student discipline through a prism of crime control.⁵³ Lastly, the law-and-order guignol diverts the attention of elected officials and saps the energy of bureaucratic managers charged with handling the problem populations and territories of the dualizing city.

If the diagnosis of the rise of the penal state in America sketched here is correct, and hyperincarceration proceeding along steep gradients of class, race, and space – rather than mass incarceration – is the offshoot of a novel government of social insecurity installed to absorb the shock of the crash of the ghetto and normalize precarious wage labor, then policies aimed at shrinking the carceral state must effectively *reverse revanchism*. They must go well beyond criminal justice reform to encompass the gamut of government programs that collectively set the life chances of the poor, and whose concurrent turnaround toward restriction and discipline after the mid-1970s have boosted the incidence, intensity, and duration of marginality at the bottom of the class and ethnic order.⁵⁴

A variety of cogent proposals for reducing America's overreliance on confinement to check the reverberations of urban dispossession and dishonor have been put forward on the penal front over the past decade.⁵⁵ These proposals range from the renewal of intermediate sanctions, the diversion of low-level drug offenders, the abolition of mandatory sentencing, and the generalized reduction of the length of prison terms, to the reform of parole revocation, the incorporation of fiscal and social impacts into judicial

proceedings, and the promotion of restorative justice. Whatever the technical means chosen, achieving sustained carceral deflation will require insulating judicial and correctional professionals from the converging pressures of the media and politicians, and rehabilitating rehabilitation through a public campaign debunking the neoconservative myth that “nothing works” when it comes to reforming offenders.⁵⁶

Deep and broad justice reform is urgently needed to reduce the astronomical financial costs, skewed social and administrative burdens, and rippling criminogenic effects of continued hyperincarceration. But generic measures to diminish the size and reach of the prison across the board will leave largely untouched the sprouting epicenter of carceral growth – that is, the urban wastelands where race, class, and the penal state meet and mesh – unless they are combined with a concerted attack on labor degradation and social desolation in the decaying hyperghetto. For that to happen, the downsizing of the penal wing must be accompanied by the reconstruction of the economic and social capacities of the state and by their active deployment in and around the devastated districts of the segregated metropolis. The programmed dereliction of public institutions in the inner city must be remedied through massive investment in schools, social services, health care, and unfettered access to drug and alcohol rehabilitation. A Works Progress Administration-style public works program aimed at the vestiges of the historic Black Belt would help at once to rebuild its decrepit infrastructure, to improve housing conditions, and to offer economic sustenance and civic incorporation to local residents.⁵⁷

In sum, the diagnosis of hyperincarceration implies that puncturing America's

bloated and voracious penal state will take more than a full-bore political commitment to fighting social inequality and ethnic marginality through progressive and inclusive government programs on the economic, social, and justice fronts.

It will necessitate also a spatially targeted policy to break the noxious nexus now binding hyperghettoization, restrictive workfare, and expansive prisonfare in the racialized urban core.

ENDNOTES

- ¹ Michael B. Katz, ed., *The “Underclass” Debate: Views from History* (Princeton, N.J.: Princeton University Press, 1995); Alice O’Connor, *Poverty Knowledge: Social Science, Social Policy, and the Poor in Twentieth-Century U.S. History* (Princeton, N.J.: Princeton University Press, 2002).
- ² See Neil Smith for a stimulating discussion of the notion of *revanche* as an extended and multiform “visceral reaction in the public discourse against the liberalism of the post-1960s period and an all-out attack on the social policy structure that emanated from the New Deal and the immediate postwar era”; Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (New York: Routledge, 1996), 42. See also Michael Flamm for a painstaking account of how the conflation of racial tumult, antiwar protest, civil disorder, and street crime laid the social foundation for the political demand for “law and order” in the wake of the class and racial dislocations of the 1960s; Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2005).
- ³ Loïc Wacquant, *Deadly Symbiosis: Race and the Rise of the Penal State* (Cambridge: Polity Press, 2010).
- ⁴ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, N.C.: Duke University Press, 2009).
- ⁵ Glenn C. Loury, “Racial Stigma, Mass Incarceration, and American Values,” Tanner Lectures on Human Values, Stanford University, April 4–6, 2007. A revised version is included in Glenn C. Loury, with Pamela Karlan, Tommie Shelby, and Loïc Wacquant, *Race, Incarceration, and American Values* (Cambridge, Mass.: MIT Press, 2008).
- ⁶ Wacquant, *Punishing the Poor*, chap. 4–5.
- ⁷ Frieder Düinkel and Sonja Snacken, *Les Prisons en Europe* (Paris: L’Harmattan, 2005).
- ⁸ Wacquant, *Punishing the Poor*, 262–263, 121–125. The spiteful tenor of Giuliani’s campaign of “class cleansing” of the streets and its strident racial overtones are captured by Neil Smith, “Giuliani Time: The Revanchist 1990s,” *Social Text* 57 (Winter 1998): 1–20.
- ⁹ The sheer scale of American jails puts them in a class of their own. In 2000, the three largest custodial complexes in the Western world were the jails of Los Angeles (23,000 inmates), New York (18,000), and Chicago (10,000). By contrast, the largest penitentiary center in Europe, the Fleury-Mérogis prison just south of Paris, held 3,900 and is considered grotesquely oversized by European standards.
- ¹⁰ The last close-up study of the daily functioning of a big-city jail and its impact on the urban poor, John Irwin’s fine ethnography of San Francisco’s jail, dates from thirty years ago. See John Irwin, *The Jail: Managing the Underclass in American Society* (Berkeley: University of California Press, 1985).
- ¹¹ Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press, 2003).
- ¹² The national DNA database from crime scenes, persons “known to the police,” and (former) convicts compiled by the FBI (under the Combined DNA Index System [CODIS])

- program) more than doubled over the past five years alone to reach eight million offender profiles. Its explosive expansion, fed by technological innovation and organizational imperatives, is springing a new “racialized dragnet” thrown primarily at lower-class African American men due to their massive overrepresentation among persons stopped by police; Troy Duster, “The Exponential Growth of National and State DNA Databases: ‘Cold Hits’ and a Newly Combustible Intersection of Genomics, Forensics and Race,” paper presented to the CSSI, University of California, Berkeley, February 24, 2010.
- ¹³ Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (Chicago: University of Chicago Press, 2007); David Thacher, “The Rise of Criminal Background Screening in Rental Housing,” *Law & Social Inquiry* 31 (1) (2008): 5–30; Richard Tewksbury and Matthew B. Lees, “Sex Offenders on Campus: University-Based Sex Offender Registries and the Collateral Consequences of Registration,” *Federal Probation* 70 (3) (2006): 50–57. For an extended analysis of ramifying penal disabilities outside of prison walls, see Megan L. Comfort, “Punishment Beyond the Legal Offender,” *Annual Review of Law and Social Science* 3 (2007): 271–296.
- ¹⁴ Kathleen M. Olivares, Velmer S. Burton, Jr., and Francis T. Cullen, “Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes Ten Year Later,” *Federal Probation* 60 (3) (1996): 10–17.
- ¹⁵ Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991); Michael Tonry, “Fragmentation of Sentencing and Corrections in America,” *Alternatives to Incarceration* 6 (2): 9–13.
- ¹⁶ Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (New York: Oxford University Press, 2009).
- ¹⁷ David F. Greenberg and Valerie West, “State Prison Populations and Their Growth, 1971–1991,” *Criminology* 39 (1) (2001): 615–654; David Jacobs and Jason T. Carmichael, “Politics of Punishment across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates,” *Social Forces* 80 (1) (2001): 61–89. But see Kevin B. Smith, “The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates,” *The Journal of Politics* 66 (3) (2004): 925–938.
- ¹⁸ Franklin E. Zimring and David T. Johnson, “Public Opinion and the Governance of Punishment in Democratic Political Systems,” *The Annals of the American Academy of Political and Social Science* 605 (2006): 265–280.
- ¹⁹ Nancy E. Marion and Willard M. Oliver, “Congress, Crime, and Budgetary Responsiveness: A Study in Symbolic Politics,” *Criminal Justice Policy Review* 20 (2) (2009): 115–135.
- ²⁰ Lisa L. Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* (New York: Oxford University Press, 2008).
- ²¹ “The war on crime – with its constituent imagery that melded the burning cities of the 1960s urban riots with the face of [Willie] Horton as (every) black man, murderer, rapist of a white woman – remade party affiliations and then remade the parties themselves, as the war came to be embraced and stridently promoted by Republicans and Democrats alike”; Mary Louise Frampton, Ian Haney-López, and Jonathan Simon, eds., *After the War on Crime: Race, Democracy, and a New Reconstruction* (New York: New York University Press, 2008), 7.
- ²² See, for example, Joel Dyer, *The Perpetual Prisoner Machine: How America Profits From Crime* (New York: Basic Books, 1999); Paul Wright and Tara Herivel, eds., *Prison Nation: The Warehousing of America’s Poor* (New York: Routledge, 2003); Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (New York: New York University Press, 2005); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2006); and Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).

- ²³ David Garland, ed., *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001). Ironically, the generalized notion was first broached, not in the U.S. prison debate, but in Western Europe by the French justice official and scholar Jean-Paul Jean in a discussion of the “mass incarceration of drug addicts” in France’s jails; Jean-Paul Jean, “Mettre fin à l’incarcération de masse des toxicomanes,” *Esprit* 10 (1995): 130–131. (I used the term myself in several publications between 1997 and 2005, so this conceptual revision is in part a self-critique.)
- ²⁴ Diane E. Bennett et al., “Prevalence of Tuberculosis Infection in the United States Population: The National Health and Nutrition Examination Survey, 1999–2000,” *American Journal of Respiratory and Critical Care Medicine* 177 (2008): 348–355; Bridget F. Grant et al., “The 12-month Prevalence and Trends in DSM-IV Alcohol Abuse and Dependence: United States, 1991–1992 and 2001–2002,” *Alcohol Research & Health* 74 (3) (2004): 223–234.
- ²⁵ To be sure, David Garland singles out two “essential features” that define mass incarceration: “sheer numbers” (that is, “a rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type”) and “the social concentration of mass imprisonment’s effects” (“when it becomes the imprisonment of whole groups of the population,” in this case “young black males in large urban centers”); Garland, *Mass Imprisonment*, 5–6. But it is not clear why the first property would not suffice to characterize the phenomenon, nor what “markedly above” entails. Next, there is a logical contradiction between the two features of mass reach and concentrated impact (no other mass phenomenon “benefits” a narrow and well-bounded population). Lastly, Bernard Harcourt has pointed out that the United States had rates of forcible custody exceeding 600 per 100,000 residents from 1938 to 1962, if statistics on penal confinement and mental asylums are merged; Bernard Harcourt, “From the Asylum to the Prison: Rethinking the Incarceration Revolution,” *Texas Law Review* 84 (2006): 1751–1786. These definitional troubles suggest that the *mass* characterization is an ad hoc designation crafted inductively to suit the peculiarities of U.S. incarceration trends at the twentieth century’s close (as Garland observes, “a new name to describe an altogether new phenomenon”).
- ²⁶ The martial trope of the “war on crime” has similarly hindered the analysis of the transformation and workings of criminal policy. This belligerent designation – espoused by advocates and critics of enlarged incarceration alike – is triply misleading: it passes civilian measures aimed at citizens for a military campaign against foreign foes; it purports to fight “crime” generically when it targets a narrow strand of illegalities (street offenses in the segregated lower-class districts of the city); and it abstracts the criminal justice wing from the broader revamping of the state entailing the simultaneous restriction of welfare and expansion of prisonfare.
- ²⁷ Pieter Spierenburg, *The Prison Experience: Disciplinary Institutions and Their Inmates in Early Modern Europe* (New Brunswick, N.J.: Rutgers University Press, 1991).
- ²⁸ David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (New York: Aldine, 1971); Scott Christianson, *With Liberty for Some: Five Hundred Years of Imprisonment in America* (Boston: Northeastern University Press, 1998). The only exceptions to this class rule are the periods and countries in which the prison is used extensively as an instrument of political repression; Aryeh Neier, “Confining Dissent: The Political Prison,” in *The Oxford History of Prison: The Practice of Punishment in Western Society*, ed. Norval Morris and David Rothman (New York: Oxford University Press, 1995), 350–380.
- ²⁹ Wacquant, *Punishing the Poor*, chap. 2.
- ³⁰ William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Knopf, 1996); Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Cambridge: Polity Press, 2008).
- ³¹ Michael Tonry, *Malign Neglect: Race, Class, and Punishment in America* (New York: Oxford University Press, 1995), 17.

- ³² Michael Tonry and Matthew Melewski, "The Malign Effects of Drug and Crime Control Policies on Black Americans," *Crime & Justice* 37 (2008): 18.
- ³³ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006), 27.
- ³⁴ Cf. *ibid.*, 17, 27.
- ³⁵ Lower-class African American women come next as the category with the fastest increase in incarceration over the past two decades, leading to more African American females being under lock than there are *total women* confined in *all of Western Europe*. But their capture comes largely as a by-product of the aggressive rolling out of penal policies aimed primarily at their lovers, kin, and neighbors. (Men make up 94 percent of all convicts in the nation.) In any case, the number of female inmates pales before the ranks of the millions of girlfriends and wives of convicts who are subjected to "secondary prisonization" due to the judicial status of their partner; Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (Chicago: University of Chicago Press, 2008).
- ³⁶ Wacquant, *Urban Outcasts*, 117 – 118.
- ³⁷ The increase of this index of punitiveness is 299 percent for "violent crimes" as compared with 495 percent for "index crimes" (aggregating violent crime and the major categories of property crime), confirming that the penal state has grown especially more severe toward lesser offenses and thus confines many more marginal delinquents than in the past.
- ³⁸ Georg Rusche and Otto Kirscheimer, *Punishment and Social Structure*, rev. ed. (New Brunswick, N.J.: Transaction Press, 2003); Catharina Lis and Hugo Soly, *Poverty and Capitalism in Pre-Industrial Europe* (Atlantic Highlands, N.J.: Humanities Press, 1979); Spierenburg, *The Prison Experience*.
- ³⁹ Loïc Wacquant, "Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity," *Sociological Forum* 25 (2) (2010): 197 – 220.
- ⁴⁰ Loïc Wacquant, "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh," *Punishment & Society* 3 (1) (2001): 95 – 133.
- ⁴¹ Wilson, *When Work Disappears*; Mary Patillo-McCoy, *Black Picket Fences: Privilege and Peril among the Black Middle Class* (Chicago: University of Chicago Press, 1999).
- ⁴² Smith, *The New Urban Frontier*.
- ⁴³ Wacquant, *Deadly Symbiosis*, chap. 3.
- ⁴⁴ Gresham Sykes, *The Society of Captives: A Study in a Maximum Security Prison* (Princeton, N.J.: Princeton University Press, 1958).
- ⁴⁵ Loïc Wacquant, "Race as Civic Felony," *International Social Science Journal* 181 (Spring 2005): 127 – 142.
- ⁴⁶ John Irwin, *Prisons in Turmoil* (Boston: Beacon Press, 1980).
- ⁴⁷ Martin Gilens, *Why Americans Hate Welfare* (Chicago: University of Chicago Press, 1999); Sanford F. Schram, Joe Soss, and Richard C. Fording, eds., *Race and the Politics of Welfare Reform* (Ann Arbor: University of Michigan Press, 2003).
- ⁴⁸ In the media and policy debates leading up to the 1996 termination of welfare, three racialized figures offered lurid incarnations of "dependency": the flamboyant and wily "welfare queen," the immature and irresponsible "teenage mother," and the aimless and jobless "deadbeat dad." All three were stereotypically portrayed as African American residents of the dilapidated inner city.
- ⁴⁹ Yeheskel Hasenfeld, "People Processing Organizations: An Exchange Approach," *American Sociological Review* 37 (3) (1972): 256 – 263.
- ⁵⁰ Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare*, expanded edition (New York: Vintage, 1993; first published in 1971).

- 51 This is well illustrated by the current predicament of California, a state that employs more prison guards than it does social workers: it just slashed its higher education budgets and increased college tuition by 30 percent in response to a deficit of \$20 billion in 2009, when it spends an extravagant \$10 billion on corrections (more than its yearly outlay for universities for fifteen years running). The state now faces a stark choice between sending its children to college or continuing to throw masses of minor offenders behind bars for brutally long terms.
- 52 Dorothy E. Roberts, "Criminal Justice and Black Families: The Collateral Damage of Over-enforcement," *U.C. Davis Law Review* 34 (2000): 1005–1028.
- 53 Paul J. Hirschfield, "Preparing for Prison? The Criminalization of School Discipline in the USA," *Theoretical Criminology* 12 (1) (February 2008): 79–101.
- 54 Wacquant, *Urban Outcasts*, 69–91, 280–287.
- 55 Michael Tonry, ed., *Penal Reform in Overcrowded Times* (New York: Oxford University Press, 2001); Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56 (5) (2004): 1271–1305; Jacobson, *Downsizing Prisons*; Marie Gottschalk, "Dismantling the Carceral State: The Future of Penal Policy Reform," *Texas Law Review* 84 (2005): 1693–1750; Marc Mauer and the Sentencing Project, *Race to Incarcerate*, rev. ed. (New York: Free Press, 2006); James Austin and Todd R. Clear, "Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations," *Harvard Law & Policy Review* 3 (2007): 307–324.
- 56 Contrary to the dominant public vision, research has consistently shown the superiority of rehabilitation over retribution. "Supervision and sanctions, at best, show modest mean reductions in recidivism and, in some instances, have the opposite effect and increase reoffense rates. The mean recidivism effects found in studies of rehabilitation treatment, by comparison, are consistently positive and relatively large"; Mark W. Lipsey and Francis T. Cullen, "The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews," *Annual Review of Law and Social Science* 3 (2007): 297–320. That hardened criminals do change and turn their lives around is shown by Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (Washington, D.C.: American Psychological Association, 2001); that even "lifers" imprisoned for homicide find pathways to redemption is demonstrated by John Irwin, *Lifers: Seeking Redemption in Prison* (New York: Routledge, 2009).
- 57 See the powerful arguments of Mary Pattillo for immediately "investing in poor black neighborhoods 'as is,'" instead of pursuing long-term strategies of dispersal or mixing that are both inefficient and detrimental to the pressing needs and distinct interests of the urban minority poor; Mary Pattillo, "Investing in Poor Black Neighborhoods 'As Is,'" in *Legacy of Racial Discrimination and Segregation in Public Housing*, ed. Margery Turner, Susan Popkin, and Lynette Rawlings (Washington, D.C.: Urban Institute, 2008), 31–46.

Jonathan Simon

*Clearing the “troubled assets” of
America’s punishment bubble*

An analogy can be drawn between the troubled assets that contributed to the recent economic crisis and the “troubled assets” of mass incarceration. The former now endanger the survival of the U.S. financial sector (indeed, our entire economy); the latter endanger the fiscal viability and democratic legitimacy of the state. The crucial challenge facing reformers is how to “clear” the complex aggregations of human beings, social and financial capital, information networks, political alliances, and managerial practices that were produced during the long period in which we inflated both the economic and carceral bubbles. In both cases, we must establish new norms and procedures for assessing risk and promising security. We also must recognize the opportunities that the present disasters have created for reinvigorating our economy and democracy. California is the extreme example of this public-sector crisis and is useful as a means to identify strategies for unwinding mass incarceration.

As George Lakoff, Mark Johnson, and other students of cognition have demonstrated, metaphors are far more than lit-

erary frills that excite and, perhaps, expand the imagination. Instead, they are cognitive colonizers, spreading from one part of our thinking to affect other areas. They can reorganize how we understand ideas and concepts and how we act on that understanding.¹ When powerful metaphors sweep through government, they can reorganize our democracy, too. The “war on crime” has proven to be one such metaphor, recasting lawbreakers as enemy combatants, victims as idealized citizen-subjects, and law enforcement as combat forces directed at enemy positions rather than breaches of the penal code.² In this essay, I propose a counter-metaphor to the war on crime (albeit a more limited and temporary one) that will help us think in new ways about how to resolve the social and institutional legacies of that “war.”

We would benefit from thinking about the enormous escalation of the prison population in America between about 1980 and 2005 – what sociologists call mass imprisonment³ – as analogous in important respects (although not in all) to the expansion and remarkable inflation of the residential real estate market in America during roughly the same period (especially in the last decade-and-a-half). The market eventually burst, unleashing social destruction.⁴

Three distinct aspects of the housing situation bear a relation to mass imprisonment. First, the lesson that institutions, not just individuals, are responsible can be transposed from housing to prisons. While both housing prices and prison populations are conventionally depicted as inflated by trends in individual behavior – more demand for real estate and more crime – the bursting of the housing bubble revealed that expansion of the market for homes was primarily a product of political and institutional decisions. These decisions enabled a far wider range of individuals to “qualify” for loans and gave lenders increasing incentives to behave irresponsibly in their assessment of risk. Likewise, many contemporary criminologists believe the prison population explosion is due not to more crime and criminals, but to policies begun in the 1980s that enabled prosecutors to send more people to prison for longer sentences.

Second, the bursting of the housing bubble, and the resulting collapse in the value of mortgage-based securities, created what is known colloquially as the troubled assets problem. These securities, which were widely distributed in the financial economy of the United States and many other countries, became unstable in their valuation. Unable to price these securities, the financial institutions that had absorbed them found their own financial position destabilized. The “troubled assets” of the penal state are the huge and expensive institutional systems constructed over the past several decades and the millions of formerly incarcerated persons who have been distributed by the penal system into cities and towns in every state.⁵ Many of them have been concentrated in communities already plagued by low levels of social capital.⁶ Their presence in these communities, accurately or not,

is taken as a sign of increasing danger, thereby diminishing the already chronic deficits of social capital.

Third, the attempt to protect and revitalize the financial community has been described as “clearing” the troubled assets. The government response has been twofold. The financial bailout provided billions of dollars in government money to stabilize financial institutions struggling with troubled assets on their balance sheets. In addition, the Obama administration, in the spring of 2009, announced plans to help clear troubled assets by reparceling the mortgages into lots and encouraging private individuals and entities to bid on them. Government subsidies in a variety of forms, including loan guarantees that backstop investors against big losses, would provide substantial incentives to support these “private” investments.

A federal “bailout” for America’s poorest communities would undoubtedly address many of the consequences of mass imprisonment. Creating new capacities for community organization through support for schools, employment, drug treatment, mental health care, and housing would go a long way toward integrating the formerly incarcerated. It would also help communities absorb and cope with the externalities of the prison experience that the formerly incarcerated bring with them to the communities where they return. The case for this kind of “justice reinvestment” has been made elsewhere (and forcefully) and needs little metaphorical help.⁷

A more novel approach might be modeled on the government’s involvement in opening new markets, where the troubled assets held by giant banks are reassessed by individual investors with expertise in how to assess such risks (with financial guarantees from the federal

government to backstop risk). The key to this strategy is the recognition that there is more value in the troubled assets than the bleakest current assessments suggest. Mortgage-backed securities were sold with the promise that bundling large numbers of mortgages together would ensure that the risk of individual failure would be balanced by fulfillment of the large majority of obligations in each security. That promise turned out to be false; but the reverse assumption, that the assets are now worth nothing, is also likely to be false.

The equivalent assumption for the troubled assets of the penal state, that anyone who has been incarcerated is dangerous and a risk to society, is also false. Just as mortgage entrepreneurs aggressively expanded the scope of who qualified for a home loan (sometimes borrowers with nothing to put down and little evidence of income), the actors we might consider penal entrepreneurs of the 1980s and 1990s aggressively marketed young drug and property offenders as bad enough to be sent to state prison. This stance was a shift from the practice of a decade earlier, when these offenders likely would have been handled with probation or jail. By tossing lots of good risks in with the bad, expansive prison growth has created a potentially large upside risk to the formerly incarcerated. One can imagine reentry strategies that attempt to make the nature of the risks posed by the formerly incarcerated more accurate and visible.

According to conventional wisdom, today's enlarged prison populations are the product of the long wave of crime that began in the 1960s and continued, with temporary remissions, through the mid-1990s, when sustained downturns began (which have leveled off in most

places). Most criminologists accept a very different story. Reported crime began to rise in the mid-1960s and peaked in the early 1970s while incarceration rates were historically low. By the time incarceration rates began to climb in the early 1980s, crime was subsiding. While crime increased again in the mid- to late 1980s, and decreased after the mid-1990s, incarceration rates continued to grow steadily until the early 2000s.

Political scientists and criminologists share the perspective that the dramatic growth of the prison population was generally achieved by intentional policy changes, specifically the adoption of laws sending more drug and property offenders to prison (rather than jail or probation), lengthening prison sentences for serious crimes, and requiring prisoners to serve larger portions of their sentences before being released.⁸

Mass imprisonment differs from early waves of enthusiasm for the prison as an instrument of social control both by the scale of increase and by the shift to strict reliance on imprisonment for wholesale categories of crime.⁹ Whether through formal changes to sentencing or changes in practice, the decision to send people to prison, and for how long, has been increasingly decoupled from individualized judgments about the level of risk offenders pose to public safety.

What can be added to this widely shared picture by building a metaphorical link to the housing boom? Several interesting relationships between prison and housing highlight why both took so long to be seen as problems. Institutional assessments of risk played a central role in the inflation of both bubbles.

First, there is a long-standing cultural narrative in the United States that casts both prisoners and homeowners as captains of their own fate. Indeed, they represent polar opposites in the classic

American narrative, in which personal character and willful action are the major elements in a subject's journey. The narrative culminates with a subject arriving at a station that practically and symbolically defines his or her journey: the big house in the suburbs or the "big house" prison even farther out.¹⁰ Especially in contrast to Europe, the United States has long stood out for both the number of its citizens held in prison and the number who own their own homes.

Thus, it is unsurprising that for many there is little apparent tension between our image as a nation of responsible homeowners and the fact that we also lead the world in incarceration.¹¹ However, in the aftermath of the catastrophic deflation of the housing bubble, and in light of evidence that our prison populations remain at historically high levels despite more than a decade-and-a-half of declining crime rates in most of the country, we would do well to question both versions of this narrative of individual choice. With both housing and prisons, private action was part of the story, but it could not have produced the historic rises without significant institutional help.

For the prison boom, institutional help was undeniably governmental and state-based, mostly via legislation and the exercise of prosecutorial discretion.¹² As for the housing boom and bubble, historians will be sorting out the roles of financial institutions and regulators for years to come. But there is no doubt that, since the New Deal, both major parties in the United States have advanced explicit federal policy to expand the market for homeownership. Because there is no large pool of renters at the top of the income scale waiting for the right tax or other incentive to buy (other than in a handful of rent-controlled apart-

ments in San Francisco and New York), expansion can be only toward enabling buyers with fewer assets and less income.¹³ Both parties proclaimed that expanding homeownership to communities of lesser economic means would help make those communities stronger and more stable. So-called subprime mortgages were initially celebrated as offering a way to move many less economically well-off families onto the homeownership "elevator" of values.

The two booms were, at best, miscalculated. Both mass imprisonment and the expansion of the subprime loan market destabilized the neighborhoods they were intended to aid. Imprisoning so many drug and property offenders has removed valuable contributors to families and communities in the most disadvantaged communities, while foreclosures have left many urban and suburban neighborhoods coping with abandoned properties. In both cases, the result has been fragmentation of social networks and capital in ways that criminologists have long associated with increasing risk of crime and disorder in communities.¹⁴

The prison and housing booms also can be compared in the role that distorted processes of risk assessment played in both. One of the biggest factors in mass imprisonment has been the unchecked role of prosecutors in determining who goes to prison and for how long.¹⁵ Think of the county prosecutor as the prison bubble's equivalent to the housing bubble's mortgage broker. Sentencing changes in the 1980s and 1990s gave prosecutors unprecedented discretion to "qualify" defendants for prison; in the past, many of these defendants would not have gotten through the "underwriting" of judges and juries and would have been excluded from prison. Instead, they would have ended up in

the county jail or on probation, the penal equivalent of the rental market.

In both bubbles, faulty reasoning, embedded in a culture increasingly lacking accountability, was central to casting complex individual risks as generically better or worse. Brokers – sometimes fraudulently, but presumably mostly as a result of extremely lax regulations – presented home buyers and home deals as better risks than many of them actually were. Prosecutors – again, one assumes not fraudulently, but rather as a result of the crime logic of contemporary state government – presented defendants as worse risks than many of them actually were.

Our major financial institutions are afflicted by the large amount of questionable and complicated financial instruments that can no longer be readily traded or priced. Uncertainty about the value of these assets undermines the ability of the holding financial institutions to lend money. What are the troubled assets of the penal state, and in what sense do they threaten the financial viability of the state more broadly?

The prisons themselves are the clearest example of troubled assets in the penal state. California is particularly noteworthy in this respect. In a deliberate policy to secure communities by sending many more troubled individuals to state prison (as opposed to various county-level treatment and punishment options), California built twenty-one new prisons between 1984 and 2000.¹⁶ Despite this growth, the prisons have been overcrowded and managed on a nearly state-of-emergency basis for most of that period, punctuated with increasingly huge and expensive federal court orders. These prisons, disastrously designed to accommodate growth in high-security bed capacity and located far

from the state's major cities, have proved impossible to operate efficiently. They have become a catastrophic financial liability akin to the "legacy" litigation burden of tobacco manufacturers or the unfunded pensions of the former Big Three automakers.

The recent history of litigation over medical-care delivery in California prisons, *Plata v. Schwarzenegger*, is revealing. Despite the fact that two-thirds of California's prisons were built since 1980, they were designed without adequate hygienic space for examining and treating penal subjects and were located in rural parts of the state, which already suffered from chronically low levels of medical professionals.¹⁷ As a result of *Plata*, the state now faces spending billions to retrofit prisons with hospital spaces and to hire adequate medical staff.

A second important troubled asset is California's correctional workforce. The nearly 35,000 correctional officers and parole agents who make up the majority of the workforce in California prisons and parole units belong to the California Correctional Peace Officers Association, long considered the most potent political lobby in the state and arguably the strongest law enforcement organization in the country.¹⁸ This large and powerful workforce means that, despite emphasizing no-frills custody over rehabilitation, California has the most expensive penal system in the world.¹⁹ Yet because of mismanagement and overcrowding, it still cannot accomplish safe and secure custody. (This, however, is not the fault of the workforce, which faces a dangerous and dehumanizing job that education and training alone cannot ameliorate.)

The millions of prisoners and former prisoners in the United States constitute the largest and most important of the

troubled assets associated with the penal state. One may fairly ask, how can prisoners be said to threaten a penal state? After all, they are its *raison d'être* and most important asset. One very important dimension of the troubled assets metaphor as applied to prisoners is the fear that time spent in our nation's mostly nonrehabilitative and sometimes dangerously overcrowded and mismanaged prisons makes former inmates graver threats to their communities than before they were imprisoned.

Indeed, much of the critical discussion of prisoner reentry over the past decade has only intensified this negative perspective on the formerly incarcerated.²⁰ The penal state is placed in a very uncomfortable posture by the specific metaphor of reentry, with its implication of local communities affected by what prisons produce. When politicians were selling the prison boom, the emphasis was on removal, not reentry. While the reentry metaphor has been productive in challenging the penal state, it ultimately underscores the apparent risk of those inside prisons. But consider the assets inherent in the troubled assets metaphor. The house at the bottom of those convoluted securities is ultimately an asset to the community where it sits. It was the mortgages and their assembly into mortgage-backed securities without sufficient underwriting that redefined those assets as troubled. Likewise, among prisoners and former prisoners there are many, perhaps even a majority, who are a net asset to their communities.

Problematic risk assessment before the housing-based financial crisis, and lack of calculability and trust after, made certain assets toxic to financial institutions. Now consider the metaphor in terms of the penal state. The incarcerated and formerly incarcerated constitute troubled assets on the books of both the

penal state and real communities. They are troubled not necessarily because they are inherently dangerous, but because of questionable risk assessment by the criminal courts. The opacity and ineptness of the punitive segregation practiced in most American prisons today make it very difficult to assess prisoners' actual risks, as well as the value they might serve in the community once released.

The risk assessment problem manifests inside the penal state's own institutions. California is an extraordinary example of the penal state's general tendency to overload high-security prisons by overstating the risks posed by offenders in custody. There is also a routine tendency to rely on emergency measures like lockdowns, which prevent violence but make medical care and mental health treatment (let alone programming) nearly impossible as a result. A further problem for the penal state is the chronic recycling of persons released from prison back to prison, either through administrative parole revocation procedures or through arrests and prosecutions facilitated by parolees' diminished Fourth Amendment protections. Many criminologists have identified this circuit between parole and prison as profoundly destabilizing to both prisons and communities.

This destabilization is happening precisely at the moment when the emerging green economy is making reinvestment in central cities seem more imaginable than ever. Indeed, many of these rebound cities that enjoyed some population and investment growth in the 1990s are now struggling with both the aftereffects of the mortgage bubble bursting and the prospect that a deflating prison bubble will discharge even more former prisoners on their streets.

Perhaps the most interesting, under-noted, and potentially transformative

entailment of the troubled assets metaphor comes from recognition of the compromised physical and behavioral health prospects of many prisoners. California's medically dysfunctional prisons are an extraordinary liability. The very poor health of many California prisoners, made worse by chronic neglect inside, creates its own morass of liability. Very long sentences doom many California prisoners to die in prison: a fifth of the prison population is serving a life term. Thus, the state is very likely to be financially responsible for the medical management of a population that is already sick and aging faster than people outside of prison. The costs of this unfunded legacy are probably in the tens of billions of dollars. Removing ill prisoners to community custody settings, where their treatment can be delivered at much lower costs, represents an opportunity to dramatically lower future liabilities.

Like the troubled assets of the mortgage crisis, prisoners and the formerly incarcerated are assets who bring both capacities and risks to states and communities. Mass incarceration has marked them in the aggregate as dangerous in ways that are likely to be unreliable; it has assessed their overall danger at far too high a level. Yet in the absence of effective practices that could render their unknowable risks more visible, then, like mortgage securities, prisoners and the formerly incarcerated are marked as worse than worthless: they are harmful liabilities.

As of this writing, it remains unclear how far the government will proceed in coaxing new markets for the troubled mortgage assets on the books of major financial institutions, or whether those efforts will succeed. But this uncertainty should not deter us from exploring the

compelling metaphor between the housing and prison booms. After all, we are not trying to transplant real policies but, rather, what we might think of as "political imaginaries." Once we have borrowed from one kind of crisis to learn how to think about another, those new ways of thinking will generate productive policy approaches within their domain-specific context.

A huge federal investment in the social and institutional infrastructure of America's large cities, particularly in those neighborhoods to which most prisoners return, would help clear the legacies of the penal state and lead to a long-term reduction in penal costs. While the adoption of health care reform in 2010 may signal a turn toward increasing investment in poor families and communities by the federal government, any substantial reinvestment is likely to unfold slowly and incompletely given the current economic crisis. Federal intervention ultimately may be required to help states reabsorb their massively distended penal populations, but we must consider ways that states themselves can begin to help "price" and clear their own assets.

For the prisons themselves, we need a conversion program similar to the plan developed to handle former military installations closed down as a result of Congress's base-closing commission in the 1990s. Some prisons might be converted into junior colleges, wind farms, or server locations for giant Internet companies. States will need prisons even after the tide is turned on mass imprisonment; some of the newer prisons could provide a modern platform for a smaller, more efficient and humane system. Ironically, in California the oldest prisons are also those with the best locations. They are close to the cities from which prisoners come and to which they return, and

these prisons have large bases of professionals nearby to support even modest rehabilitation goals.²¹

The correctional workforce should be downsized along with the prison population and institutions. Officers and their unions are not the cause of mass imprisonment, but the prison bubble has led to an expensive model of custody that must be recognized for what it is: unsustainable. These resources could be re-allocated to more efficient providers of public safety. Governor Schwarzenegger recently proposed the privatization of corrections in a bid to sustain high prison populations at lower costs.²² An alternative model, which has many of the benefits with few of the risks of privatization, calls for massively shifting responsibility for both custody and reentry to county-level governments. County governments maintain greater proximity to the real crime problems in America and have great flexibility in how they seek to reduce those risks.²³

Prisoners and former prisoners are at once the easiest and most intractable of the penal state's troubled assets. The state can stop producing so many new prisoners (although this is more easily said than done, as evidenced by the recent failure of several modest proposals to reduce the number of Californians going to prison). However, the state can do little directly to reduce the number of former prisoners; in fact, shrinking the prison population by releasing current prisoners will only create more former prisoners. Also, the legacy of fear concentrated on former prisoners constitutes a volatile political force that threatens to overwhelm the modest administrative reforms designed to stabilize the constant recycling between prison and parole.²⁴

Given the concentration of chronically ill persons in our prisons, we have a

golden opportunity to use prisons to reduce health care costs. Smoking is already banned in California prisons. It is not hard to imagine turning much of the prison system into a large health maintenance organization. While at it, we might train prisoners to deliver health care to their aging fellow inmates. These skills would be highly useful in our aging society (although, even equipped with these skills, former prisoners will likely face withering exclusionary barriers on the outside).

Former prisoners who have come out of the shadows to engage in collective efforts to restore their rights and the well-being of their communities add an even more positive kind of social capital to their communities, which often suffer from substantial deficits in horizontal ties among people. Take San Francisco's Ban the Box movement, for example. The organization, created by formerly incarcerated people, began by focusing on the ubiquitous boxes on employment applications that prospective employees are to check if they have ever been convicted of a crime. Ban the Box led a successful campaign to get San Francisco's public agencies to remove the box. Following that success, they have also begun to organize around public safety, seeking alliances with law enforcement, crime victims, and other community groups. Political organizing of this sort is one way to clear troubled assets.

In California and elsewhere, there is now a great deal of interest in evidence-based correctional programming. This new wave of "rehabilitation" may be most valuable in its ability to provide prisoners with greater opportunity to distinguish themselves through participation and achievement in such programs (at least as valuable as any substantive work the programming does). Currently half of all California prison-

ers leave without having participated in a single program. But even the emaciated social capital of the warehouse prison can be turned to some value by helping clear former prisoners of their toxicity. The one bright star in California's penal programming has been its fire camps, which train (and when necessary deploy) thousands of inmates to fight wildfires in California. Not only do the camps pull thousands of prisoners out of overcrowded mainline prisons (prisoners who currently meet a very demanding and narrow range of classification parameters), but the firefighting experience has been celebrated by both prisoners and communities as a successful way to rehabilitate prisoners and restore community. Given that the United States – California in particular – faces a future of increasingly grave threats from climate change, combined with our bad habit of building large cities in environmentally hazardous areas, we ought to build on the fire camp model.

Imagine that every California prison inmate who is physically and mentally fit and willing were given special training in civil engineering, firefighting, and emergency first aid to enable him to be a frontline rescuer in the face of a major catastrophe like Hurricane Katrina or a major earthquake in San Francisco or Los Angeles. This scenario would turn hundreds of thousands of former prisoners into a shadow force of possible rescuers. (It would be up to them whether to use their skills to help

when the time arrived.) Unlike job training or even drug treatment, this kind of training would provide no obvious economic advantage to felons, as against ordinary poor people; at the same time, it would raise the social capital of every former prisoner and every community to which the prisoners return.

There is no guarantee the present troubles will lead Americans to abandon mass incarceration or hyper-inflated real estate. In both cases, however, independent pressures – especially the emergence of the climate change problem and new threats to domestic security arising from terrorism, disease, and environmental disasters – are beginning to call into question the logic of restoring either the prison or the housing bubble. It may take us a decade or more, complete with some false starts, but sooner or later mass imprisonment will seem like the SUV does now: a huge and embarrassing mistake propped up by both individuals and institutions. When that day comes, we will need a way of thinking about the troubled legacies of mass imprisonment. Mass incarceration was not a penological or criminological idea; indeed, virtually every penal expert opposed it. Evidence-based penal policies will be part of the solution, but only if we find a new way of imagining our path out of mass incarceration. We will need a path that leads through the rhizome-like pathways of metaphoric reasoning.

ENDNOTES

¹ George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).

² David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

- 3 David Garland, "Introduction: The Meaning of Mass Imprisonment," *Punishment & Society* 3 (1) (2001): 5; Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006).
- 4 While incarceration rates began to rise in most states in the late 1970s, it was not until the early 1980s that they began to grow at an increasingly faster rate. Most economists would place the real estate bubble in the late 1990s and this decade, but significant inflation of housing prices in many of the future affected areas – Florida, Arizona, Nevada, and California, for example – began in the 1980s as well. In another recent article, I explore what I take to be important correlations and causal connections between the growth of American homeownership and the salience of crime to the important role of home values in personal wealth. My claim in this essay is not that there is a causal relationship between the housing and prison booms, but rather that we can learn to think differently about how to respond to the crises in the latter from some of the ways we are learning to understand the former.
- 5 Some may object to my referring to people as "troubled" or "toxic" assets. My goal, however, is precisely to draw on the dynamic set up by the original financial metaphor to recast the penal setting. While some troubled assets may truly be toxic in the sense that they are simply fraudulent deals with no real value, many other loans reflect real value in their underlying properties. But that value is made inaccessible by the current price uncertainty. The real problem of prison is that it casts the value of the formerly incarcerated into enduring doubt even when many are engaged in conduct valuable to their communities. Furthermore, the practice of incarceration does little to make the imprisoned less troubled.
- 6 Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).
- 7 Susan Tucker and Eric Cadora, *Ideas for an Open Society: Justice Reinvestment* (New York: Open Society Institute, 2003).
- 8 Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006).
- 9 Garland, "Introduction: The Meaning of Mass Imprisonment."
- 10 Mike Davis, *Ecology of Fear: Los Angeles and the Imagination of Disaster* (New York: Metropolitan Books, 1998).
- 11 Ruth Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).
- 12 William J. Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505.
- 13 Both Presidents Bill Clinton and George W. Bush strongly supported this path toward capital accumulation for working Americans. President Bush spoke of his vision for an "ownership" society. Both presidents presided over a significant expansion of incarceration (moderated in effects only by steep secular declines in crime). Under both administrations, the standard explanation of both more prisons and more homeownership was to produce safer and more stable neighborhoods.
- 14 See John Hagan, "Social Embeddedness of Crime and Unemployment," *Criminology* 31 (1993): 465; Clear, *Imprisoning Communities*.
- 15 Simon, *Governing through Crime*.
- 16 Joshua Page, *The "Toughest Beat": Politics, Punishment, and the Prison Officers' Union in California* (New York: Oxford University Press, forthcoming), 2.
- 17 The problems actually go much deeper than this since the system's heavy reliance on state-of-emergency management techniques like lockdowns makes it nearly impossible to deliver medical care even with the necessary hygienic space and medical professionals.

¹⁸ Page, *The “Toughest Beat.”*

¹⁹ With an average pay of more than \$73,000 (which can jump to more than \$100,000 with overtime), California’s correctional workforce is the highest paid in the country. However, the officers are expected to provide only custody, and their required educational qualification is merely a high school diploma. Joan Petersilia, *Understanding California Corrections: A CPRC Policy Research Program Report* (Berkeley: California Policy Research Center, 2006).

²⁰ Jeremy Travis, Amy L. Solomon, and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* (Washington, D.C.: Urban Institute, 2001).

²¹ San Quentin, for example, is the state’s oldest prison, dating to the 1850s. It remains the best in terms of programming because of the incredible volunteer community in the Bay Area. While most of the structures ought to be closed and much of the land sold, a modest-sized prison should remain because of the extraordinary advantages of urban prisons and the strong resistance to building on new sites.

²² Editorial, “A Poor Prison Plan for California,” *Los Angeles Times*, January 17, 2010.

²³ See Lisa Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* (New York: Oxford University Press, 2008).

²⁴ Page, *The “Toughest Beat,”* 200.

Nicola Lacey

*American imprisonment in
comparative perspective*

Over the last forty years, a number of Western democracies have significantly increased their use of imprisonment. What explains this phenomenon? The most influential line of reasoning looks to the global economic changes that began in the 1970s: the contraction or collapse of manufacturing industries; the creation of a large sector of people who faced long-term unemployment or were employed in insecure forms of work; and consequent pressure on the welfare state. These changes, it is argued,¹ have eroded the consensus that sustained postwar penal welfarism. A rise in recorded crime across Western countries gradually normalized criminal victimization and the management of the risk and fear of crime. Crime became, for the economically secure, an increasingly politicized issue, generating a “penal populism” that brought in its wake repressive and managerial criminal justice strategies.

This is a powerful argument. However, its focus on structural forces and on general categories such as “late modern society” or “post-Fordism”² directs attention away from variations in the institutional framework through which those forces are mediated in different

countries. This is unfortunate; notwithstanding the wide diffusion of a political discourse of penal populism, there are striking differences in the extent to which that discourse has led to greater severity in penal practice. Not all “late modern” democracies have plumped for a “neoliberal” politics. Countries like Denmark, Germany, and Sweden have managed to sustain relatively moderate, inclusionary criminal justice systems – systems premised on reintegrating offenders into society – throughout the period in which the British and American systems have moved toward ever-greater penal severity. Even then, the differences in the scale and quality of punishment between British and American penal systems are striking, with the United States occupying an unenviable position as the unrivaled leader among advanced economies in the costly business of mass imprisonment.

The baleful distinctiveness of the United States’ incarceration record is epitomized, though not exhausted, by imprisonment rates between four and twelve times higher than those in other political economies at similar levels of development (see Figure 1). The picture becomes even more baffling when we consider variation among U.S. states’ imprisonment rates, which, in the mid-2000s, ranged from less than double those of the most

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Figure 1
Political Economy, Imprisonment, and Homicide

American
imprison-
ment in
comparative
perspective

	Imprisonment Rate (per 100,000)	
	2002 – 2003	2008 – 2009
Neoliberal Countries (Liberal Market Economies)		
United States	701	760
Canada	108*	118
New Zealand	155	196
England and Wales	141	153
Australia	115	129
Conservative-Corporatist Countries (Coordinated or Hybrid Market Economies)		
The Netherlands	100	100
Italy	100	97
Germany	98	90
France	93	96
Social Democracies (Coordinated Market Economies)		
Sweden	73	74
Denmark	58	63
Finland	70	67
Norway	58	70
Oriental-Corporatist (Coordinated Market Economies)		
Japan	53	63

*Denotes data from 2003 – 2004.

Sources: Adapted from Peter A. Hall and David Soskice, “An Introduction to the Varieties of Capitalism,” in *Varieties of Capitalism*, ed. Peter A. Hall and David Soskice (Oxford: Oxford University Press, 2001), 1 – 68; Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (London: Sage, 2006); International Centre for Prison Studies, <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief> (September 2009).

punitive of other advanced economies to rates more than ten times higher. What explains the extraordinary scale and severity of the “harsh justice”³ meted out in the U.S. penal system today?

Comparative and historical research are central to any attempt to answer this question. For their analysis of imprisonment rates, youth-justice arrangements, and privatization policies in twelve countries, criminologists Michael Cavadino and James Dignan developed a fourfold typology of criminal justice systems nested

within different kinds of political economy: neoliberal, conservative-corporatist, oriental-corporatist, and social-democratic.⁴ Cavadino and Dignan show that the social-democratic Nordic countries⁵ have maintained humanity in the quality of punishment and moderation in its scale while some of the neoliberal countries – notably the United States – have been moving in the direction of mass incarceration under ever-harsher conditions. These countries are surpassing the penal severity of not only social-demo-

cratic countries but also both kinds of corporatist economy.

Understanding why resemblances across types of political economy persist over time; why they produce systematically different patterns of punishment; and whether these differences are likely to survive the increasing internationalization of economic and social relations is crucial to answering the key policy question for the United States today: can the forces that have produced mass imprisonment be countered, and if so, how?

We can begin to examine these questions by drawing on recent political-economic analysis of comparative institutional advantages as well as capacities for strategic coordination inherent in differently ordered systems.⁶ Political-economic forces are mediated by cultural filters and by the economic, political, and social institutions that influence the interests, incentives, and identities of relevant groups of social actors. This institutional mediation of cultural and structural forces produces a state's significant and persistent "varieties of capitalist system," which, notwithstanding globalization, we see across states at similar stages of development. Varieties of capitalism either favor or inhibit penal tolerance and humanity in punishment.

My argument starts with the distinction between liberal and coordinated market economies developed by political scientists Peter Hall and David Soskice.⁷ A coordinated market economy such as Germany or Sweden functions primarily in terms of long-term relationships and stable structures of investment, not least in education and training oriented to company- or sector-specific skills, and incorporates a wide range of social groups and institutions into a highly coordinated governmental structure. In a political-economic system premised on incorporation, and hence on the need to reintegrate

offenders into society and the economy, decision-makers are more likely to opt for an inclusionary criminal justice system and less likely to favor exclusionary stigmatization in punishment. Moreover, the interlocking institutions of these coordinated market economies conduce to an environment of relatively extensive informal social controls, which in turn supports the cultural attitudes that underpin and stabilize a moderated approach to formal punishment.

A liberal market economy (of which the extreme case, for any argument about criminal justice, is the United States) is typically more individualistic in structure, is less interventionist in regulatory stance, and depends far less strongly on the coordinating institutions needed to sustain long-term economic and social relations. In these economies, flexibility and innovation, rather than stability and investment, form the backbone of comparative institutional advantage. It follows that, particularly under conditions of surplus unskilled labor (conditions that liberal market economies are more likely to produce), the costs of a harsh, exclusionary criminal justice system are less than they would be in a coordinated market economy. This variation in production regimes also implies differences in the economic activities in which countries excel and, consequently, involves different constraints on the sway of the market and different degrees of influence for financial capitalism.

Accordingly, in the environment produced by the global economic crisis in the 1970s and the subsequent collapse of Fordism, these long-run institutional dynamics took on a special significance for criminal justice policy in liberal market economies. Confronted with political-economic imperatives that led to ever-increasing disparities of wealth and de facto status distinctions in the liberal

economies, economic dynamics fed into the political and social forces that favor harsh and extensive punishment. By contrast, in countries whose economic arrangements have sustained a consensus-oriented system, where long-term investment in high-skill economic activity was affected relatively little by the demise of Fordism, and where social inequality has remained much less acute, political and penal dynamics are different.

These comparative differences are not just a question of economic organization; indeed, economic differences are themselves reinforced by independently important features of political structure and organization. Certain political systems, too, conduce to – or militate against – support for the economic and social policies that enable governments to pursue inclusionary criminal justice policies. In liberal market economies with majoritarian electoral systems, particularly under conditions of low trust in politicians, low deference to the expertise of criminal justice professionals, and a weakening of the ideological divide between political parties focused on the median voter, the unmediated responsiveness of politics to popular opinion in the adversarial context of a two-party system makes it harder for governments to resist intensifying penal severity. These dynamics become particularly strong when both parties take up a law-and-order agenda and when – as in the United States over the last thirty years – economic inequality and insecurity have fed popular anxiety about crime. This renders penal policy as an especially suitable platform on which politicians from all points of the political spectrum may appeal to median voters.

By contrast, in the proportionally representative (PR) systems of coordinated market economies, where negotiation and consensus are central, and where incorporated groups can have greater

confidence that their interests will be effectively represented in the bargaining process that characterizes coalition politics, the dynamics of penal populism may be easier to resist. Due to the discipline of coalition politics in PR systems, which require that bargains are struck before elections, voters can be more confident about the policy slate for which they are voting⁸ – a striking difference from majoritarian systems, in which a party with a comfortable majority is more or less unconstrained by its own manifesto once elected. The result is that long-standing PR systems⁹ typically produce a significant buffer between a popular demand for punishment and the formation of penal policy.

Finally, both the long-term relationships typical of a coordinated market economy and the negotiated style of politics typical of proportional representation lead to greater redistribution and lower social inequality. In particular, even as economies and cultures are increasingly integrated through global trade and communication, coordinated market economies have been able to maintain their significantly more generous welfare states.¹⁰ In light of the strong comparative evidence that associates generosity of welfare provision with moderation in punishment,¹¹ it has been suggested that, particularly in the wake of the move to “workfare” policies in liberal market countries such as the United States, in which performing work is a condition of receiving aid, the penal system has come to replace the welfare system as the means of governing social marginality.¹²

Factors such as unemployment rates, levels of inequality, and welfare-state structures have been studied fairly extensively by scholars of crime and punishment. The form of the constitution, the nature and status of the professional bureaucracy,¹³ the organization and influ-

ence of the media, and various aspects of legal and political culture and of demographics (notably, the demographics of race and age)¹⁴ have also attracted considerable attention. But the effects of institutional features such as electoral systems, the organization of political parties, and the structure of education and training on the dynamics of inclusion and exclusion, which are known to affect not only crime but punishment rates, have attracted much less attention. Yet the comparative evidence tells us that many European countries have maintained relatively stable imprisonment rates, even during times of rising crime and/or popular anxiety about crime, precisely because of these broader institutions: a political system that insulates policy-making from direct electoral pressure; a strong and independent expert bureaucracy; an education system geared toward long-term investment in skills; and a generous welfare state.

On the surface, the U.S. criminal justice system is much as we might expect of a liberal market economy. Nonetheless, with an imprisonment rate three-and-a-half times higher than that of the next most punitive liberal market economy, New Zealand (see Figure 1), the United States is an extreme case. The contrast between the United States and its neighbor Canada, which has seen a relatively stable imprisonment rate since the 1960s,¹⁵ is especially striking. The checks and balances attendant on Canada's distinctive federal structure; the influence of Francophone culture, particularly in the large province of Quebec; a relatively robust consensus orientation in politics; and a conscious sense of the desirability of differentiating Canadian politics and society from those of the United States appear to have offered Canada substantial protection from mass imprisonment.¹⁶

One approach to understanding American "penal exceptionalism" is to review each of the institutional features of a liberal market system; determine whether the United States presents extreme forms of some or all of these features; and assess whether it does so to an extent consistent with its distinctively costly and punitive criminal justice. Certainly, this approach reveals at least a partial picture. The U.S. majoritarian system is characterized by remarkably weak party discipline, a highly politicized bureaucracy, and constitutional controls oriented to due process rather than to the substance of punishment or criminalization. Moreover, the U.S. economy is marked by low levels of unionization, employment protections, and industry/union/government coordination and investment in training; it experienced an exceptionally catastrophic collapse of Fordist industrial production; and its welfare system is particularly ungenerous when compared with other welfare states. The country has a reputation as a classless society, yet these political-economic factors produce especially high levels of social inequality and polarization, most vividly along lines of race.¹⁷ To this reality we should add the very substantial institutional capacity in the prison and prosecution systems that has built up over the entire course of American history.¹⁸ In view of these features, the American economy's response to the collapse of Fordist production and the financial problems attendant on the oil crisis of the early 1970s has been to roll back the welfare state and move in a "neoliberal" direction, leading to the consolidation of a sizable underclass of those excluded from effective membership in the polity and economy. Compounded by cultural factors such as low levels of social trust and high levels of moralism yet weak structures of informal social control, this distinctive combina-

tion is a recipe for especially high levels of punishment.¹⁹

To this picture, we must add three further features. First and most important is the fraught issue of race. In the wake of high levels of social conflict during and immediately after the civil rights movement, the criminal process has been increasingly invoked as a method of disciplining African Americans; incarceration of young African American men in particular has reached extraordinarily high levels. Intense and widespread punishment has knock-on effects for family and social structure, for political participation, and for community governance.²⁰ It leads to devastating further consequences at every level of civil society and political and economic life.²¹ The widespread practice of felon disenfranchisement inevitably excludes a disproportionate number of African Americans from political participation. Disenfranchisement laws, which tend to take more votes from Democratic than from Republican candidates, played a decisive role in Senate and presidential elections from the 1990s, thus creating a clear incentive for Republican politicians to support extensive criminalization and incarceration, even in a context of diminishing crime rates.²² What is more, demographic changes – particularly white flight to the suburbs in Northern cities, which were to be so decisively affected by the collapse of Fordist production – have led to a decline in the political influence of African American voters.²³

The dangerous cocktail of racial politics and criminal justice politics is undoubtedly one important contributor to mass imprisonment. And while the overrepresentation of both migrants²⁴ and certain ethnic groups, notably young African American men, is a marked phenomenon in the criminal justice systems of many countries (the disproportion in

the United Kingdom, for example, corresponds to that in the United States), the much larger population of African Americans in the United States than of black Britons in the United Kingdom entails a much greater impact on overall prison numbers. In 2006, the incarceration rate for men in the United States was 943 per 100,000; disaggregating by race, this drops to 487 for white males, rising to 1,261 for Hispanic and Latino males and a staggering 3,042 for African American males.²⁵

Second, and interacting with race, is the U.S. government's "war on drugs." Over the last forty years, the increasing criminalization of drug use has had a decisive impact on levels of punishment,²⁶ with a particularly marked impact on young African American men.²⁷ While African Americans were twice as likely as whites to be arrested for a drug offense in 1975, they were four times as likely in 1989. Yet during this period, white high school seniors reported using drugs at a significantly higher rate than African Americans, while drug use as a whole was already on the decline at the inception of the war on drugs. The expectation of electoral payoffs lies at the root of this costly and disastrous policy and points the explanatory finger at features of the U.S. political system.

Third, sentencing reform has been a significant factor in the trend toward mass incarceration in the United States. The collapse of faith in the rehabilitative ideal ushered in a formalized approach to sentencing through a range of determinate sentencing legislation at both federal and state levels. This legislative intervention in the sentencing system has had a tendency to consolidate the politicization of punishment; undermine the autonomy and status of the judiciary; and increase the power of prosecutors.²⁸ Note, however, that the

structure of sentencing legislation varies markedly between jurisdictions in the United States, which may help to explain some regional variation (though identifying the direction of causation here is no easy matter).

Taken together, these factors, it can be argued, are in themselves sufficient explanation for the acute politicization of criminal justice and penal severity in the United States. But the huge penal disparity between the United States and other liberal market economies at similar levels of economic and political development has become markedly greater over the last thirty years. This is a trend we can explain only by unraveling longer-term institutional dynamics and their interaction with the economic and social environments of recent decades. In the earlier part of the twentieth century, American penal practices equated much more closely to those of comparable countries. Until the mid-1970s, the U.S. imprisonment rate was relatively stable, ranging from a low of 119 in 1925 to 153 in 1974, with moderate fluctuations, and breaching the 200-mark in only a single year, 1939.²⁹ In the early 1970s, the U.S. imprisonment rate was about one-and-a-half times higher than that of England and Wales. Today, despite the fact that the English rate has itself almost doubled, the U.S. imprisonment rate is almost five times higher than that of England and Wales. While some explanatory factors (notably, the collapse of Fordism) relate specifically to the more recent period in which those disparities have grown, many of the salient features of the U.S. system, including its relatively high African American and Hispanic population, have a much longer history.

Moreover, even granting the relevance of the argument that the United States is an extreme case of a liberal market economy, the scale of the penal disparities

that have emerged over the last three decades invites a more careful analysis. Sociologists Katherine Beckett and Bruce Western have argued that increasing social inequality in the United States is strongly associated with the general rise in punishment and with imprisonment in particular.³⁰ Yet this explanation begs the question of why these dynamics should have become so extraordinarily marked during this period – and in certain states in particular. In 2001, the imprisonment rate ranged from a high of 1,398 per 100,000 in Louisiana to a low of 288 in Maine, with average rates in the South (1,052) one-and-a-half times those in the Northeast (646), compared with an overall U.S. rate of 688.³¹ The variation also applies to racial patterns of incarceration: the rate of imprisonment for African Americans in the United States in 2006 ranged from highs of 4,710 and 4,416 per 100,000 in, respectively, South Dakota and Wisconsin to “lows” of 851 in Hawaii, 1,065 in Washington, D.C., and 1,579 in Maryland.³² Analogous differences can be seen in patterns of capital punishment: since the re-legalization of the death penalty in 1976, more than 70 percent of all executions have been carried out by Southern states, with Texas alone accounting for more than a third of the executions that took place in the thirty years between 1976 and 2006.³³ How are these striking facts to be explained?

Answering that question is a large task, and I can do no more than point out some promising lines of inquiry suggested by the broad account that I have already sketched. I will focus not on the United States’ minimal welfare system, its racial politics, or its staggering (though regionally variable) record of social inequality, but rather on what is perhaps the least obvious distinguishing

feature of the United States: its political system.

The significance of political institutions and structures for criminal justice is beginning to attract some very fruitful analysis. Marie Gottschalk has traced the shifting role of criminal politics in American history, pointing to a gradual accretion of institutional capacity that ultimately bolstered the prison expansion of the late twentieth century, as well as to a political structure that favored a distinctively punitive victims' movement.³⁴ Vanessa Barker's recent study of California, New York, and Washington, D.C., shows how the varying structure and culture of state politics have fed into large regional disparities in patterns of punishment.³⁵ Lisa Miller has illuminated the shaping force of policy-making environments at national, state, and local levels, diagnosing a distortion of political representation at the national and state levels, one that has been of great significance in the upswing in punishment as a result of the increasing federalization of criminal policy.³⁶ For the purpose of this argument, I will focus on two lines of inquiry: the nature of the U.S. party system and the highly decentralized nature of its electoral democracy. In both cases, I shall argue, long-standing features of the U.S. political system have, in the particular social and economic environments since the 1970s, worked to produce historically unprecedented levels of imprisonment.

In the case of the party system, during most of the period that has seen the prison buildup, the conventional wisdom has been that voter affiliation with the two main parties is organized along lines that link rather weakly to stable ideological positions.³⁷ While a weakening of left-right ideological affiliation and an increased emphasis on political leaders is not singular to the U.S. party system,

in other countries this trend has been more recent and less extreme. Voter affiliations (hence the strategies candidates use in seeking election) tend therefore to be defined by the policies and personalities of office-seekers or office-holders. In this context, policies likely to secure independent votes by appealing to median voter interests are a key preoccupation for political leaders – not least in a system characterized by weak party discipline and in which it pays leaders (particularly presidents, who are less constrained than are members of Congress to answer to local constituents) to make a direct appeal to voters they hope to win over. Unfortunately, in part as a result of a uniquely punitive victims' movement,³⁸ criminal justice has often been identified by political leaders as an issue with the ability to draw median voters. The perceived political import of criminal justice has set up, loosely speaking, a "prisoners' dilemma" in which both major political parties risk becoming locked into a costly strategy they dare not abandon because of the electoral advantage, particularly vis-à-vis the median voter, which they fear would accrue to the other party. A key example at the national level is the war on drugs. Indeed, the increased federalization of criminal justice policy,³⁹ a development that facilitated not only the war on drugs but also the development of a uniquely rigid sentencing framework that has made its own contribution to the upward drift in punishment, can be seen as a direct result of the prisoners' dilemma effect at the national level.

The electoral prisoners' dilemma dynamic has an equally important impact in the United States at the state and local levels.⁴⁰ This brings us to the second dimension of the American political system that is relevant to "harsh justice": the radical diffusion of electoral politics.

The peculiarly decentralized quality of American democracy creates a situation in which the prisoners' dilemma is reproduced through frequent elections at state, county, and municipal levels, significantly increasing its impact. Furthermore, individuals seeking election at the local level have an interest in advocating popular policies, the costs of which do not necessarily fall on the electoral constituency.⁴¹ Increased resort to imprisonment is a key example.

These points are of particular importance in any attempt to explain American penal harshness, in large part because "law and order" in national politics has been, if anything, less salient in the United States than it has been in the United Kingdom, Australia, or New Zealand, with national preoccupations focusing on issues like terrorism, drug policy, and capital punishment rather than on overall issues of prison capacity and extent (a matter which in any case is largely in the hands of individual states). But the dynamics of state-level politics are just the beginning of American political decentralization, and though state politics have undoubtedly been of great consequence for the move to mass imprisonment, the local level of the county or city – far more costly to research, and hence much less fully understood – has almost certainly been of equal or even greater significance.

The weak party discipline and personality-domination that characterize national and state-level politics are probably even more prominent in local politics. Here, actors with key roles in the criminal process (mayors, judges, district attorneys, sheriffs) are often elected, and thus are subject to direct electoral discipline; their election campaigns depend on extensive radio and television advertising focused on individual record or policy commitments rather than on party platforms. Moreover, the practice of

electing officials (county commissioners, school boards, treasurers) reaches deep into institutions at one or more remove from the criminal justice system, yet they are institutions in which playing to voter preferences will likely bring the "governing through crime" agenda into play.⁴²

The impact of such elections on criminal justice policy is demonstrated by empirical research. For example, economist Steven Levitt determined that the electoral cycle across fifty-nine large U.S. cities has a significant impact on police hiring, with increases in the size of the police force "disproportionately concentrated in mayoral and gubernatorial election years," a relationship that held when demographic, socioeconomic, and other factors were controlled for.⁴³ Nor are judges immune from this syndrome. For example, political scientists Gregory Huber and Sanford Gordon found that sentences for selected serious crimes increased the closer the sentencing judge was to a reelection date,⁴⁴ while legal scholar and economist Joanna Shepherd found a strong association between state supreme court judicial decisions and "stereotypical preferences" of voters, according to whether judges faced reelection in a Republican- or Democrat-majority constituency.⁴⁵

Economist Andrew Dyke has demonstrated an equally striking effect of electoral cycles on criminal justice in a study of the impact of district attorney elections on criminal case outcomes in North Carolina.⁴⁶ Defendants faced a higher probability of conviction and a lower probability of having all charges dismissed in an election year, suggesting that in the run-up to an electoral contest, sitting district attorneys are more reluctant to dismiss cases and more concerned to assert their "tough on crime" credentials. At each level, then, the opportunities for

an exacerbation of the prisoners' dilemma dynamic are more extensive in the American system than in other liberal market economies with lower levels of political decentralization, stronger systems of party discipline, and fewer electoral offices of relevance to criminal justice.

Note, finally, one particularly important feature of these American electoral dynamics. Crime ranks among the most important issues identified in national opinion surveys and is seen as an especially salient electoral issue when the economy is performing well.⁴⁷ Local officials like district attorneys and mayors, therefore, stand to gain electorally by promising tougher measures on crime. Yet, crucially, they may not have to fund the costs of such measures themselves or, if they do have to fund them, may not face the full political costs of their economic choices. Mayors, for example, are not responsible for most aspects of a city's economic performance. In fact, even state governors are rarely regarded by voters as notably responsible for the state of the economy; economic management is primarily attributed to the federal level. In this context, tough law-and-order policies are electorally attractive – and politically costless. This is a powerful recipe for a prisoners' dilemma in which political actors – including voters – become locked into policy choices that would be in their best interest (individually and as part of a community) to avoid.

The challenge, then, is to find ways within the liberal market economy institutions of the United States to create analogues of the institutional features that appear to have protected coordinated market systems from, as it were, putting their criminal justice money where their penal populist mouth is. The major structural features of the U.S. system that I

have argued play a key role in producing mass imprisonment are not susceptible to direct policy intervention. But if I am right that, over the last thirty years, features of the political system have had particular importance, this correlation suggests two possible ways forward. One approach would be to increase electoral accountability at the local level, by making the economic and other knock-on costs of electoral platforms in the criminal justice field more transparent to the electorate and more clearly attributable to the decision-making of particular officials, thereby raising the electoral costs of such policies. The second approach would be to insulate the development of penal policy from the dynamics of competition for electoral office – dynamics that otherwise conduce to a reactive and short-term framework for policy development. This separation will be hardest to achieve in states where constitutions provide mechanisms not only for direct citizen involvement in shaping penal policy but also for the entrenchment of the resulting policies. But in some states, and at both local and federal levels, there is surely potential for reallocating aspects of criminal justice decision-making to expert commissions or bodies that would combine expert and stakeholder involvement and that would, like many existing institutions (including courts), be somewhat insulated from direct electoral pressure, while being subject to more indirect forms of democratic accountability. As an outsider to the U.S. system, I make this proposal tentatively. But it is worth noting that such an approach has been advocated by three influential American scholars in their acute analysis of the genesis and impact of the Three Strikes policy in California.⁴⁸

ENDNOTES

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- ³⁴ Gottschalk, *The Prison and the Gallows*.
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- ³⁶ Lisa L. Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* (New York: Oxford University Press, 2008); see also Stuntz, "The Pathological Politics of Criminal Law" and Stuntz, "Unequal Justice."
- ³⁷ Notwithstanding the apparent polarization produced by a hardening of opinion in the conservative wing of the Republican Party, both major parties encompass exceptionally broad – and overlapping – policy orientations.
- ³⁸ Gottschalk, *The Prison and the Gallows*.

- 39 Stuntz, “The Pathological Politics of Criminal Law.”
- 40 My argument here is somewhat at odds with Lisa Miller’s finding that local politics in Philadelphia evinced a more complex, less straightforwardly punitive analysis of crime than that which pertained to national or state levels. Miller’s argument is that the distance of state and national politicians from constituents’ concerns, in which both criminal victimization and the deleterious social impact of mass imprisonment register rather strongly, and the influence of prosecutors and other pro-victim lobbies has had a decisive impact on the acceleration of punitiveness at those levels; Miller, *The Perils of Federalism*. This argument is persuasive, and an excellent example of the ways in which both the size and the fragmentation of the U.S. system have affected its penal policy. But the studies I cite below suggest that in the competition for office, law-and-order bidding wars nonetheless feature strongly at the local level.
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Mark A.R. Kleiman

Toward fewer prisoners & less crime

Mass incarceration can be approached from (at least) four perspectives: those of social science, cultural criticism, advocacy, and policy analysis.

The social scientist wants to know about causes and consequences, to employ theories to explain events such as the explosion of incarceration in America over the past generation, and to use events to develop new theories. The cultural critic strives to elucidate meanings, asking about the intentions behind the actions of participants in the social, administrative, and political processes that produce a given set of results; about how they justify those actions to themselves and others; and about the character of the social order that produced those processes and their results. The advocate searches for persuasive means to the end of ameliorating an already identified evil. The policy analyst tries to figure out what course of action would best serve the public interest, all things considered, trying to take into account unintended as well as intended consequences.

Viewed through a policy-analytic lens, “mass incarceration” looks like only a partial problem definition; the

other part of the problem is crime. If the crime problem were trivial, or if incarceration had only a trivial effect on crime, the solution to the problem of mass incarceration would be trivially obvious: release those currently locked up and end the practice of sending offenders to jail or prison. The policy analyst’s work would then be complete, and the task of persuasion could then be turned over to the advocate, guided by the social scientist and the cultural critic.

But if crime is a real problem and if incarceration can be one means (among many) to control crime, then the situation looks more complicated. One would need to measure the harms done by crime as well as the harms done by incarceration, ask about the effects of alternative incarceration policies on the rates of different sorts of crime, and consider the likely results of making more use of other crime-control measures, including alternative forms of punishment, while reducing incarceration.

For example, it seems clear that increasing police activity can reduce victimization rates. Thus it ought to be possible in principle, given some target level of victimization, to “trade off” policing against incarceration: adding police while reducing imprisonment. Whether that tradeoff would be desir-

able is a different question. The extremely aggressive style of the New York Police Department, even if we credit it with reducing crime (and, consequently, reducing incarceration as well), seriously complicates the lives of poor, young African American, Dominican, Puerto Rican, and Haitian New Yorkers.

Is it better to live in a city with fewer prisoners but more police surveillance? The answer is not obvious on its face: resolving the question would require both the collection of facts and the assignment of values to different outcomes. But it is the sort of question that a policy analysis starting from the problem of mass incarceration must try to answer, if crime matters and if incarceration is one means of reducing it. That analysis must also ask *which* offenders to release early or not to incarcerate at all.

Thinking about mass incarceration and crime control as twin problems can create two tactical advantages for those committed to reducing mass incarceration. First, since many political actors are concerned about crime and do think that incarceration helps control it, advocates of incarceration reduction will find a better hearing if they propose alternative means of crime control instead of simply ignoring the crime problem. Second, there is evidence that support for highly punitive approaches to crime varies – albeit with a substantial lag – with the crime rate, so that success in reducing crime will tend to facilitate the project of incarceration reduction. As the crime explosion of 1962 to 1994 helped produce the problem of mass incarceration, the crime collapse since 1994 might help ameliorate it, especially if victimization rates continue to fall.

Even at current levels, crime – especially in poor African American communities – remains a first-order social problem, comparable in magnitude to

the problem of mass incarceration. Merely reducing the prison head count without also making the lives of residents of dangerous neighborhoods safer would solve only half the problem.

The measurable losses from crime do not seem to be especially large compared to the measurable losses from other sources of risk: surely not large enough to account for the level of public concern over crime. Across households, the average property lost to burglary comes out to about \$4 per month, a small fraction of a typical utility bill. Homicide is a horrible event, but also a rare one; twice as many people die on the highways each year as are deliberately killed by others.

Victimization risk imposes costs on those who are never actually victimized, because of the costly efforts they make to avoid victimization and because of the “external costs” of victimization-avoidance measures taken by others. Crime, like incarceration, deprives people of liberty; it does so by making them afraid. The deprivation of liberty is, in general, less profound – though there are certainly people who feel trapped in their homes because they are afraid to go outdoors – but it extends to a much larger group of people. The costs of crime avoidance easily swamp the immediate costs of victimization.

If the bulk of crime-related loss is not victimization loss, then the rate of completed victimization – the crime rate – is not a good proxy for the seriousness of the crime problem. A neighborhood abandoned due in part to crime, or where residents stay inside behind locked doors for fear of muggers, or a park that many people are afraid to enter after dark, may have a lower rate of completed crime than a safer neighborhood or park simply because so many

fewer people are at risk. Even before the spectacular post-1994 crime decrease, New York City had a relatively low burglary rate compared to other big cities. But the public impression that burglary risk was higher in New York was nonetheless probably correct: as a visitor could easily notice, New Yorkers were habituated to being much more careful about burglary-proofing their homes than was common in cities where burglary was less on residents' minds.

The extent to which the fear of crime reflects mass-media choices about what sort of "news" to emphasize remains an open question. Certainly, there is no strong tendency for measures of fear to shift quickly with, or even in the same direction as, measured crime. But this need not indicate that the fear itself is irrational or insensitive to the actual crime risks prevalent in various social milieux, since victimization might fall precisely as a result of increased precaution.

If the level of precaution tends to rise with the criminal riskiness of the social environment, and if precaution tends to reduce the rate of being victimized, then the measured changes in the rate of completed crime will tend to understate the changes in the underlying risk, especially when crime is increasing. For example, if the number of robberies doubles even as potential victims are taking greater precautions against being robbed, then the rate of robbery per exposed person-hour – imagining that such a quantity could be measured – must have gone up even more. The flow of population away from high-crime urban neighborhoods and into lower-crime suburbs and exurbs means that the measured crime rate could fall even as the level of risk in every area continued to rise.

The observation that the Great Crime Decline has left the country with "only"

250 percent of the crime rates prevalent in the early 1960s is less reassuring than it would seem. I am not very old, but I am old enough to recall when American storefronts, unlike European storefronts, did not have metal shutters, and when middle-class parents did not regard it as imprudent to allow their teenage children to ride late-night buses through tough neighborhoods. If Americans continued to be as careless about the risks of crime as they were forty-five years ago, the rate of completed crime would no doubt be substantially higher. The loss of that carelessness – or rather, of a social environment that made that carelessness rational – is not a small loss, and it becomes no smaller if we blame it on television news shows rather than on muggers.

The fear of crime deprives the residents of high-crime neighborhoods of economic opportunity by driving jobs away from the places where they live. Whether the "spatial mismatch" between the location of the unemployed and the location of unfilled jobs is an important cause of high minority unemployment remains a contested question, but there can be no doubt that having to commute farther to work is, at best, an inconvenience, especially for teenagers who would be working only part-time and whose attachment to the labor market may be weak. Those disadvantages tend to accumulate, since teenagers with less work experience become less attractive employees as young adults. Worse still, anything that makes licit employment less attractive will tend to make its illicit alternatives more attractive; a criminal record can be a very substantial barrier to subsequent employment in the licit economy.

Poverty to crime to job loss to poverty to crime is a positive-feedback loop: poor neighborhoods are often high-

crime neighborhoods, high-crime neighborhoods tend to be low-opportunity neighborhoods, low-opportunity neighborhoods encourage criminal activity by their residents, and criminal activity, in turn, makes the neighborhoods even less attractive places in which to live and do business and makes some of the residents less attractive as potential employees. Loss of residents, especially the relatively prosperous residents most likely to be able to afford to move out, makes a neighborhood less attractive to retail businesses, and the loss of retail services in turn makes the neighborhood a less attractive place to live for those who have other options.

The economic geography of every metropolitan area provides testimony to the importance of crime as a factor shaping residential and business location decisions. How else could one account for the coexistence of housing abandonment and new housing construction only a few miles apart? There are many reasons for moving to the suburbs, but crime ranks high on the list. The same applies to business-location decisions. It would be unconventional to insert a discussion of crime control in a treatise on reducing suburban sprawl, but it would not be irrelevant.

That poverty is a cause of crime is a commonplace, though the mechanisms involved are complex and poorly understood. That crime is a sustaining cause of poverty is no less true, though in the past it has been remarked on much less. The poor are victimized directly; the probability of criminal victimization falls with income. They are victimized again as a result of crime-avoidance behavior that limits their opportunities and blights their neighborhoods.

The picture is worst for African Americans; even adjusting for overall lower incomes, African Americans suffer much

more crime than do members of other ethnic categories. Homicide provides the most dramatic example: representing less than 15 percent of the population, African Americans suffer more than 50 percent of the murders.

The problem tends to be self-sustaining. Given a constrained criminal justice system, punishment per crime tends to be lower where crime is more common. Assuming that the threat of punishment has some deterrent effect, growing up where that threat is smaller – and licit economic opportunity less available – should be expected, other things equal, to lead to a higher rate of criminal activity. Indeed, that is what we find. African Americans are far more heavily victimized than others, but not as a result of cross-ethnic aggression; crime is overwhelmingly intraracial.

Paradoxically, then, efforts to reduce the racial disproportion in the prison population are likely to intensify the implicit racial discrimination among victims that results from lower per-crime rates of punishment, leaving African Americans even more exposed to victimization. The critique of the current system in terms of imposing prison sentences and the consequent social stigma on a much higher proportion of African Americans than of whites is fully justified by the facts, but the mechanisms involved are far more subtle than conscious, or even systemic, racial discrimination by officials against African American perpetrators.

In some ways it would be better if, as is often asserted, systemic racial bias, in the form of more severe punishment for African American offenders, lay at the root of the problem; then eliminating racial bias could eliminate disproportionate incarceration. But if the actual problem is the positive-feedback loop from high criminal activity to low pun-

ishment-per-crime back to high criminal activity, no such fix is available. The standard critique portrays a melodrama; the reality is a tragedy.

If crime and mass incarceration are both great evils, then we should look for ways to have less of both, for example by substituting some other form of punishment for incarceration to serve the twin functions of incapacitation and deterrence. If, as sociologist and anthropologist Bert Useem and economist Anne Piehl argue, the rising scale of incarceration has brought its marginal crime-control benefits down close to – or in some instances below – zero, then to some extent we could reduce mass incarceration without increasing crime. But the data do not suggest that 50 percent of current incarceration is useless, and cutting our incarceration rate in half would still leave it more than twice its historical norm and more than twice the level in any other advanced polity.

Probation and parole are the two systems that manage convicted offenders outside the walls of prisons and jails. Fines, community service, diversion to drug treatment or mental health treatment, and “restorative justice” programs all rely on probation and parole supervision as their enforcement mechanism, without which they are no more than helpful hints from a judge. Alas, that enforcement is generally very weak, and compliance with “alternative sanctions” spotty at best. In California’s famous Proposition 36 drug-diversion program, only about one entrant in four completed the prescribed course of treatment, and virtually none of the rest faced any consequence for renegeing on the bargain they had made with the court, other than the lost opportunity to have their convictions expunged and the risk that an outstanding bench warrant might

complicate the aftermath of some future arrest. Those are precisely the sort of important but delayed consequences that impose suffering without changing behavior to any great extent.

That failure does not stem from the laxity or laziness of probation officers – though no doubt some probation officers, like some workers in any job category, are lax and lazy – but from the conditions under which they work. Typically, a big-city probation officer supervises more than one hundred clients and is expected to meet with each of them once a month. That schedule alone largely fills a working week, and the time required to prepare a violation report to send to the supervising judge is measured in hours. So the number of referrals is constrained by the officer’s time. The judge and the judge’s staff are also busy, and will not thank the probation officer for subjecting them to a flurry of revocation motions.

Short of the threat of revocation, a probation officer’s leverage over a client is limited. Only the judge can order a term of confinement; the probation officer (generally with the concurrence of a supervisor) can only use moral suasion and impose additional requirements, such as more frequent meetings. But what if the client defies those requirements as well?

If a revocation motion is made, the judge, too, has a limited repertoire of sanctions. She can send the offender to prison or jail, usually for a period of months but sometimes for years. She can impose more onerous conditions of supervision (which, again, the probationer may well ignore). She can lengthen the period of supervision, which is a noticeable inconvenience but one that doesn’t hit until sometime in the future.

None of these options is attractive. Jails and prisons are crowded, and what-

ever the probationer did to earn the conviction that underlies his probation term, the violation of probation conditions is likely to be relatively trivial: a missed meeting or a “dirty” drug test. To a judge who has just put someone on probation for a burglary, sending someone else away for a mere “technical” violation seems disproportionate, unless that violation comes at the end of a very long string. (Sometimes a new substantive offense is handled as a violation of probation rather than prosecuted afresh; in those cases, a term behind bars is a more likely outcome.)

As a result, the most likely consequence for a probationer caught breaking a probation rule is a warning, either from the probation office or (less often) from the judge. If the probationer keeps it up, at some point it will prove to be the case that his previous “last warning” really *was* the last, and he will be on his way to, or back to, a cell. But such deferred and low-probability risks, though they may cumulate to a great deal of punishment, do little to reduce the violation rate. The lack of an immediate and high-probability aversive consequence for a violation helps sustain the high violation rate, and the high violation rate in turn guarantees that most violations will not be sanctioned. This is simply the social trap of the neighborhood with a high crime rate and a low punishment risk per offense, writ small; the community corrections system reproduces the cruel and futile randomized draconianism of the larger criminal-justice system. (Parole supervision is tighter, though it, too, over-relies on severe sanctions, but there are about five times as many probationers as parolees.)

Just as the threat of severe sanctions is largely impotent at controlling behavior if the sanctions are uncertain and de-

ferred, the threat of even a mild sanction can be potent if the consequence follows the act swiftly and certainly. In Hawaii, a judicial warning that the next positive drug test would draw an immediate jail term measured in days succeeded in virtually ending drug use for more than three-quarters of a group of chronically defiant felony probationers, most of them methamphetamine users. The hard part was organizing the judge’s staff, the probation department, the sheriff’s office, the police, the jail, prosecutors, and defense counsel to deliver on that warning when the rules were broken. (That meant, for example, developing a two-page, check-the-box or fill-in-the-blank reporting form to replace the elaborate motion-for-revocation paperwork; since only a single violation is in question, very little information is needed.)

Half of the probationers in the program – dubbed HOPE (Hawaii’s Opportunity Probation with Enforcement) – never faced an actual sanction; the warning alone did the job. On average, the group subjected to tight supervision spent about as many days in jail for probation violations as a comparison group, with more but shorter spells. But they spent only about a third as many days in prison after revocations or new convictions, and had only half as many arrests for new crimes.

The project now covers about 1,500 offenders, about one in five felony probationers on the island of Oahu; the judge plans to expand it to 3,000, and intends to manage all of them himself, by contrast with a drug-court judge who typically manages a caseload of 50 to 75. Most of the participants, but by no means all, are drug abusers; the process works just as well enforcing different sets of rules on domestic violence offenders and on sex offenders. The underlying process isn’t specific to drug

abuse; it applies basic principles of behavioral change relevant to a wide range of behaviors, as long as the behaviors can be easily monitored. South Dakota's 24/7 program, which requires repeat drunken drivers to submit to twice-a-day breathalyzer tests, has dramatically reduced their risk of winding up in prison for a third offense.

Commercial vendors now sell, for \$15 per month, a service that tracks the whereabouts of a GPS monitor; parents place them in their young children's backpacks to be able to find them when they stray. One version of that service provides "exception reporting": after the parent enters a weekly schedule of where the child is supposed to be at given hours of given days, the system sends a text message to the parent's cell phone or email inbox if the child isn't where he is supposed to be.

Now imagine mounting such a unit on an anklet that can't be removed without setting off an alarm. That would make the whereabouts of an offender wearing that anklet subject to continuous monitoring. Comparing offenders' position records with the locations of crimes reported to the 911 system would make it difficult for anyone wearing an anklet to get away with a new predatory offense. Street gangs would not welcome the presence of members whose location is transparent to the police. Such a system would make it feasible to enforce curfews, stay-away orders, "community service" obligations, and requirements to appear as scheduled for employment or therapy, and to enforce home confinement as a sanction for violations of probation or parole conditions.

Unlike the expensive process of monitoring sex offenders, in which any straying constitutes a potential emergency and the system must therefore be staffed around the clock, for routine probation-

ers and parolees there would be no urgency about responding to a mere schedule violation; it would suffice for the probation or parole officer to be notified the next morning. As long as the offender is still wearing the device, finding him would pose no challenge, and the next day is soon enough for a sanction to be effective.

An emergency would arise only when an offender removed the device; usually that would mean he was planning either to commit a new crime or to abscond from supervision. But the police department, already staffed 24/7, could respond to those (presumably rare) events.

The operational challenges would be legion: developing rules about imposing and relaxing restrictions; figuring out what to do if the GPS unit loses contact with the satellite; dealing with false alarms; ensuring that the police respond quickly and vigorously to absconding; and managing the sanctions hearings. But given the results from HOPE, it's a reasonable guess that 80 percent, perhaps even 90 percent of probationers and parolees would comply with the system in the sense of not shedding the GPS device, and that they would be highly compliant with rules and commit very few new crimes. They would probably also find it much easier to secure employment – despite their criminal records – once employers found that they were not only certified drug-free but also showed up for work every day under pressure from their probation or parole officers. As a result, many fewer of them would wind up returning to prison.

Once probation and parole involved that sort of monitoring, only a limited number of cases would justify using incarceration: people who commit such heinous crimes that justice demands it (the Bernie Madoffs of the world), peo-

ple whose demonstrated tendency for assault or sexual predation requires their incarceration to protect potential victims, and those who, in effect, *choose* incarceration by absconding. Everyone else could be adequately punished and largely incapacitated from reoffending with position restrictions alone, backed by monitoring and brief jail stays for violations. That could reduce the inflow to prison (both by reducing the number of revocations and persuading judges to sentence more felons to probation instead) and increase the outflow from prison by encouraging parole boards to make more early-release decisions. Moreover, converting probation into a real punishment, rather than the placeholder for an absent punishment that it now largely is, would be expected to deter crime, reducing the inflows to both prison and probation.

How far this process might go is anyone's guess. But it would not be utterly fantastic to hope that the United States might find itself a decade or two from now with a European incarceration rate and crime rates resembling those of the 1950s.

The change could not be made overnight; each jurisdiction that adopts such a system will need an operational "shake-down" period. Furthermore, it is essential that the program not outgrow its capacity to monitor and sanction; once offenders come to believe that the threat of quick incarceration is a bluff, their offending will so swamp the system that it will become a bluff.

But other than the need for shaking down and then phasing in, this approach has no natural upper limit. HOPE costs about \$1,400 per year on top of routine probation supervision, which is to say that it costs about twice what routine supervision alone costs. Most of that excess goes to drug treatment for the minority

that cannot comply without professional help. It pays for itself several times over in reduced incarceration costs alone, which means that cost need not be a barrier to expansion if some way can be devised to recycle the savings to the state budget from reduced incarceration into the county budgets that bear most probation costs.

The implementation of this idea will vary from jurisdiction to jurisdiction and from population to population. In various ways, it could be applied to juvenile offenders, probationers, parolees, and those released while awaiting trial either on bail or on their own recognizance. For juvenile probationers in particular, "outpatient" supervision under tight monitoring backed with the threat of forty-eight hours' solitary confinement for each violation might succeed in squaring the circle of finding a punishment aversive enough to deter but not so damaging as to risk pushing a juvenile toward persistent criminality by reducing his commitment to, and opportunities within, the world of school and licit work.

The project of what might be called "virtual" or "outpatient" incarceration cannot expect a universally warm welcome. In a criminal-justice-policy debate that sometimes seems to take place between the disciples of Michel Foucault and those of the Marquis de Sade, it will be too intrusive for the foucauldians and not retributive enough for the sadists. But for those not overly reluctant to punish lawbreakers with some months or years of a boring, go-to-bed-early-and-show-up-for-work middle-class lifestyle, and unwilling to accept current levels of incarceration or of crime, the virtual prison cell offers the prospect of having less of both.

With respect to the population not currently in prison, including pretrial

releasees and those newly placed on probation who would not have gone to prison otherwise, there is no doubt that the proposed system represents a further extension of state control over individuals. Whether that is desirable could be debated, with the answer depending in part on the empirical results in terms of crime, days behind bars, and employment, family, and housing status, and in part on the value one assigns to the liberty and privacy of the recently arrested (including their liberty to commit fresh offenses with impunity). In the somewhat longer run – over a period of a few years – the result might be to reduce the scope of direct state control by discouraging offenses and thus reducing the total size of the prison-jail-probation-parole-pretrial release population.

Such a happy ending cannot be guaranteed. The program has yet to be tried out on parolees; it is possible (though I would rate the probability as small) that massive absconcion and consequent return to prison would make it operationally infeasible. It is more plausible that, in some jurisdictions, a combination of haste, under-resourcing, and administrative noncompliance would lead to program breakdown, with the supervised population discovering that, despite the threat, violation did not in fact lead swiftly and predictably to confinement. If that happened, violation rates would surely soar, thus putting the program into a “death spiral” of increasing violation rates and decreasing swiftness and certainty of sanctions. Preventing such a breakdown is no easy task; managing the behavior of offenders is straightforward compared to managing the behavior of officials, and most of all the behavior of independent officials such as judges.

The other risk is that some offenders who, under the current system of loose

supervision, get away with minor violations, finish their assigned terms, and then go straight would find the new system of tighter supervision intolerable, commit repeated technical infractions leading to short confinement terms, abscond, and wind up in prison. That risk would be especially grave if the system were applied to misdemeanants in addition to felons, since the misdemeanants start out with a much lower level of prison risk.

But if the application of “outpatient incarceration” can be restricted to those who would otherwise face, with high probability, repeated spells of actual incarceration, then on balance it promotes not only public safety but the liberty and life prospects of the offender population. There are worse fates than being forced to live a law-abiding life.

Robert Weisberg & Joan Petersilia

*The dangers of Pyrrhic victories
against mass incarceration*

The term “mass incarceration” merits careful scrutiny. It is a dramatic term, spurring political and academic demands that the United States take account of, and seek to reverse, its decades-long commitment to increased imprisonment. The term is justifiably dramatic in two senses. First, the American use of incarceration is, comparatively, an international anomaly and embarrassment. Second, the magnitude of the secondary effects of incarceration in the United States has been so great as to constitute a structural change in our social, economic, and familial life.

But “mass incarceration” is also a *melo-*dramatic term, implying some things about American criminal justice that are not entirely true or are flatly untrue. To some, the term may signify conspiratorial governmental control, with fascist or Stalinist implications. While incarceration in the United States has indeed inflicted horrendous and disproportionate effects on the poor and on minority groups, these harms stem far more from an accumulation of misguided policies – and from negligence or reckless indifference toward these harms – than from any monolithic state strategy of political

control. To others, the word *mass* conveys the sense of an epidemic, with the implication that it is a self-generating or self-reinforcing phenomenon that may run beyond our control. But as discussed below, recent events suggest that the incarceration rate is far more subject to control by very undramatic and mundane changes in policy than the imagery may suggest. Finally, *mass* suggests numbers that cannot bear any meaningful relationship to the legitimate goals of the criminal justice system. However, no particular measured incarceration rate is *inherently* unjustified. The question is whether some proportion of our incarceration is unnecessary or is not cost-beneficial. It surely is, but the degree of excess of disproportion is a complex matter to unravel, requiring us to consider the current social and economic context of criminal justice as it has evolved in recent decades, with a healthy respect for the force of path-dependence. Unfortunately, “unnecessary incarceration” or “inefficient incarceration” is not much of a motivating phrase for reform movements.

The evocative power of the term “mass incarceration” is both a virtue and a vice. In this essay, we deliberately tilt slightly toward the vice side because we fear the unintended consequences of the vir-

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tue side. Our key concern is the implication that if sheer mass is the main problem, then there is inherent value in reducing the size of the mass. In the abstract, having a smaller percentage of Americans in prison seems an undeniably good thing. But that abstract truth does not mean that short- or mid-term reduction is necessarily feasible or desirable *per se*.

The timing of the American Academy's project on *The Challenge of Mass Incarceration in America* provides an excellent occasion for considering the unintended consequences and hidden risks of reducing the mass, because, as it turns out, the growth curve of the mass has altered even in the very short period since the project was conceived.

As recently as three years ago, prison populations were still increasing on the incredibly steep curve of recent decades. In twenty years, the sum of state and federal prison populations increased from two hundred thousand to close to a million-and-a-half, and academics and other reformers decried the devastation this increase wrought on family and social relations, the labor market, public health, and even the democratic voting franchise. Efforts were made to raise public consciousness, and some states began to think about criminal justice in the terms of rational regulatory cost-benefit analysis – to which criminal justice had previously been immune. The public still wants to incapacitate violent offenders, especially sex offenders, but it has exhibited some softening of attitude toward those perceived as nonviolent drug offenders. As a result, the prison population curve has flattened, and in some states prison populations have been decreasing slightly. Some of the recent policy changes have been accompanied by a sensible new commitment to

reentry and rehabilitation programs. Yet just as fiscal constraints were helping motivate a fresh look at prison populations, those constraints morphed into the drastic 2008 economic downturn, which aborted many of the new rehabilitation commitments.

California is the most notable example. After thirty years of steady increases in its prison population (sometimes by 20 percent in a single year), California reached an all-time high of 173,500 prisoners in 2006. The population started to decline in 2007 and has continued to drop, even while the general population of the state continues a slow and steady increase. The August 2009 prison census was the same as it was in 2005: about 166,500. That number is sure to decrease further in response to recent federal court orders mandating cuts in the state's thirty-three adult prisons to 137.5 percent of design capacity within two years. The cuts will reduce California's prison population by approximately forty thousand inmates.

These facts hardly suggest that victory over the social costs of mass incarceration is anywhere near. But they have induced hope and provided some indication of which political and economic developments might feasibly emerge to turn the imprisonment curve distinctly downward. The rise of the broad intellectual movement against mass incarceration coincided about a decade ago with some interesting developments in a few states. Most notably, Massachusetts and New York began reconsidering their Rockefeller-era drug laws, and very fruitful, below-the-radar political truces in the tough-on-crime demagoguery wars made partial repeal of these laws possible. These subtle and salutary political developments mixed some degree of fiscal concern with moral embarrassment over the social costs of mandatory sen-

tences. The developments were generally not *crisis-driven*, and because they were changes in crime definition or statutory sentencing, they became rooted in the larger criminal justice infrastructure of the state. Simultaneously, some states made remarkable progress in deploying sentencing commissions to apply cost-benefit rationality in sentencing and corrections. Some of the most promising progress was made in the South, such as in North Carolina, which saw the emergence of a once unimaginable bipartisan move toward cost-benefit rationality. Moreover, empirical studies of some of the commission guidelines systems suggest that they can significantly reduce racial and geographic inequities in sentencing across counties within a state.¹

Whatever the synergy between intellectual movements and policy change, we have recently begun to see some lessening of the earlier political demagoguery around crime as well as greater respect for the worthiness of investment in rehabilitation and reentry. Polling suggests that the public is at least slightly less passionately in favor of prison and long sentences as the solution to the crime problem, especially because we now have less of a crime problem. Politicians do not want to credit the recent econometric studies suggesting that the post-1985 spike in incarceration probably accounts for no more than a quarter of the 1990s crime drop²; but it has been beneficial for the movement against mass incarceration that crime is currently a less salient public issue.

The implications of this slight alteration in the prison population curve are important, multiple, and subtle. For one, the alteration casts doubt on the view of mass incarceration as a force of nature in American life that either cannot be controlled or can be controlled only by revolutionary structural changes wrought in

response to a sense of mass exigency. In this regard, an important recent paper reminds us that just a few years ago, the state of California, under its most famous conservative governor, Ronald Reagan, was motivated and able to change its sentencing and correctional laws so as to reduce its prison population by as much as a third.³ On the other hand, the recent flattening of prison populations has so far been short-term and slight. While flattening of the curve reinforces the oft-forgotten idea that America is capable of reducing its sentencing requirements and imprisonment rates, we also must remember the problem of path-dependence. Whatever caused our prison population to reach such remarkable heights, the absolute size of the reduction now needed to mimic the percentages of earlier reductions – reductions achieved off a much smaller base – may be institutionally and politically infeasible. Even if dramatic reductions can occur, they may be illusory if the policy changes that prompt them are superficial in ways that might guarantee a new cycle of prison increases in the future. We believe there is a grave risk of backfire if advocates attempt to reduce mass incarceration simply for the sake of reduction rather than coupling advocacy with a full consideration of the causes of recidivism. Indeed, even if small increases in crime by released prisoners, parolees, or probationers diverted from prison are not statistically meaningful, they may reignite the political demagoguery that contributed to mass incarceration in the first place.

While the time may be ripe for modest optimism, the emphasis should be on modesty. The inertial and self-reinforcing effects of the prison boom may be so strong that even significant changes in public and political opinion will not permit dramatic unraveling of the last

few decades in the next one or two. But these effects also caution us to consider both the good and bad ways (measured in the long term) that victory can be achieved in the nearer term.

Reformers attacking mass incarceration tend to decry the much-noted turn in American criminal justice from an older rehabilitation model toward a model based on harsh retribution and incapacitation. They also tend to valorize so-called alternative sanctions. More recently, they have (justifiably) promoted the notion of risk-needs assessment as a key tool of rational cost-benefit analysis in criminal justice. But the key historical lesson is the complex and sometimes contradictory relation among these principles and goals – a lesson that is lost when these principles and goals are superficially and sentimentally blurred together. If rehabilitation is a nobler goal for incarceration than retribution, it still requires some sort of incarceration and does not by itself have any short- or mid-term effect of reducing prison populations. If rehabilitation is carried out through intermediate sanctions, then it is not necessarily at odds with prison reduction if it is done the right way. But the recent aborted national experiment in intermediate sanctions proves that it is puzzlingly easy to implement alternative sanctions in the wrong way.

The original – and continuing – advocates of alternative sanctions have compiled a body of information in a new and refined “what works” literature. It was always the intent of these social scientists and advocates that if prisoners were released, the release would be coupled with community-based plans to help them in their reintegration. Those plans would make use of actuarial risk assessments to

identify those who should be targeted; a combination of surveillance and work/education; incentives to keep people in the program; and swift, certain punishment for those who violate probation and parole or who continue to commit crime. The programs would be operated collaboratively by law enforcement and corrections officials, backed with assistance given to family members who would be part of the intervention, as well as the innovation of reentry courts. The literature tells us convincingly that this approach is the most efficacious one to enhance public safety and prisoner reentry at the same time. However, we now risk getting only a half-loaf: the release but not the necessary reentry programs.

If prison populations decrease dramatically in the next few years, it will make a big difference in the long run to know what causes the decrease in the short run. The lessons of previous alternative sanctions movements are highly admonitory. Alternative modes of sentencing and incarceration are very different from prison-reduction policy directives *per se*. Earlier movements sometimes proved futile because investment in the logistics and the research basis for the alternative sanctions was often neglected, as if the moral attraction to alternative sanctions caused policy-makers and reformers to ignore the hard and expensive work the sanctions require.⁴ Another cautionary example is the much-noted analogy to the mental hospital deinstitutionalization movement in the 1970s. That the terrible hospitals were closed was a triumph of good science and smart politics. But the consequences in some places were horrible, in part because the irresistible mantra of treating the mentally ill in “the community” ignored the problem that there often was no “community.” In reality,

there was inner-city slum public housing, which soon became a psychiatric ghetto.⁵

There is a direct parallel between our prison-crowding situation today and the predicament the United States found itself in during the mid-1980s, the heyday of the intermediate sanctions movement. The movement was motivated very specifically by horrendous crowding problems in the Southern states together with a poor regional economy. In some ways, it was forced on the states by Eighth Amendment cruel-and-unusual punishments litigation, anticipating the current situation in California. When the courts ordered the states either to build new facilities or find some other way to punish offenders, the states had to be creative because they lacked money for prison construction. The result was a set of innovations in alternative sanctions: Georgia, for example, developed an intensive supervision program (ISP) for probationers. Its self-evaluation yielded some evidence that Georgia's ISP participants had very low recidivism rates, and the apparent lesson was that the ISP had saved the state the cost of two new prisons. These ideas spread, and by the mid-1990s virtually every state had passed some kind of legislation for intermediate sanctions.

Probation and parole departments across the country implemented ISPs. The programs were meant to reduce caseloads, keep a closer watch on offenders, and offer more support services. The hope was that prison-bound offenders would be "diverted" from expensive prison cells to more intensive community programs. What were the overall results? There is a settled body of research that has evaluated ISPs of the mid-1990s; these are the key conclusions from that research:

- ISPs were seldom used for prison diversion, but rather to increase the supervision of those already on probation.
- The "casework" portion of ISPs was never implemented because there was insufficient funding and political will. The surveillance side (drug testing, electric monitoring) was fully implemented, turning the ISP into a net-widening mechanism that simply increased returns to prison.
- Because ISPs did not reduce prison populations, prisons costs increased along their natural vector. As a result, ISPs were deemed failures as cost-savers and were generally dismantled between 1995 and 2000.

Many ISPs that were begun with great optimism and political fanfare were discontinued after just a few years because they failed to reduce prison commitment rates. Retrospective analysis of the national experiment showed that ISPs seldom followed a theoretical model supporting rehabilitation, and even when they did, they were insufficiently funded to deliver adequate programs. ISPs (at that time) were funded at about \$2,000 to \$5,000 per year, per offender. Effective rehabilitation programs, particularly for substance abusers, were estimated to cost about \$10,000 to \$15,000 per year, per offender. Clearly, the programs were insufficiently funded for the kinds of help they were designed to provide.

One result of the 1990s intermediate sanctions movement was a backlash in support for rehabilitation programs and alternative community sanctions. Instead of demonstrating that nonprison sanctions could decrease commitments to prison, some of the ISPs showed just the opposite: implementing intensive probation and parole supervision resulted in increased prison commitments.

Some supporters of prison buildup used this evidence to argue that alternatives had been tried and that they did not work. It was a recycling of the 1960s nothing-works phenomenon, but this time buttressed with more rigorous experimental evaluation data.

Within a short decade, ISPs went from being “the future of American corrections” (according to *The Washington Post*⁶) to a failed social experiment. In the end, the author of the national ISP evaluation lamented that the empirical evidence regarding intermediate sanctions is decisive: without a rehabilitation component, reductions in recidivism are elusive.⁷ This lesson may well repeat itself if advocates focus solely on the goal of reducing mass incarceration without advocating simultaneously for a sufficient infusion of funds to help criminal offenders become law-abiding citizens.

Campaigns against mass imprisonment have varied motives and sources. These motives and sources are not necessarily mutually inconsistent, but the differences counsel caution. It is perfectly right to view mass incarceration as a civil rights disaster and a national moral embarrassment. The implications of mass incarceration in terms of inequality of social and economic opportunity are as wide and foundational as the concerns about social and economic opportunity that motivated the civil rights movement of the 1960s. But if that undeniably valid characterization of mass incarceration fuels a mostly “liberationist” approach to reducing incarceration, it runs the risk of terrible backfire. Its beneficiaries, at least in the short run, will be millions of young men who may be relieved of the immediate burden of formal state custody but will hardly be prepared to enjoy all the potential ben-

efits thereof. The civil rights movement ran the risk of not succeeding according to some expectations, but it did not run the risk of failing in the way that prison reduction could. If the hard work is not done, we may face another round of backfire, disillusionment, and susceptibility to political demagoguery.

From one perspective, alleviating mass imprisonment hinges on rehabilitation and reentry programs that can make reintegration possible and can truly lower recidivism. From another, it is a matter of undertaking tough, smart triage in sorting prisoners for release and in deciding which prisoners are amenable to which forms of alternative sanction. We know much more today about how to identify the subset of offenders who will truly benefit from rehabilitative programming, and we should not waste taxpayer monies on those who will not. The rehabilitation programs themselves will have to be run by very well-trained, and therefore very expensive, functionaries who know how to rely on the available evidence-based protocols for measuring and predicting the potentially dangerous and for adjusting practices to fit with different kinds and degrees of supervision. It will require recognizing that drug rehabilitation and other cognitive behavioral programs are very hard work and that they normally take months of engaged commitment by offenders to succeed.

Thus, a strictly morals-driven approach to mass incarceration risks ignoring these crucial minefields in criminal justice reform. But the apparently opposite motivation for reform, coldly pragmatic concerns about economics, is risky in its own way. It is good for politicians to view criminal justice more as a regulatory system subject to cost-benefit analysis than as a temple of political theology. In

this regard, the emerging fiscal concerns of a few years back that pushed politicians in a more regulatory direction were salutary. However, if fiscal concern becomes too self-justifying a motivator for criminal justice reform, it will prove just as dangerously shortsighted as the liberationist approach, especially now that modest fiscal concern has turned into a huge fiscal exigency in the states.

Recent events in California illustrate this truth all too well. For the first time in recent memory, the prison population is declining in California; recent legislative budgets, interacting with federal court intervention, will force further declines. For those who decry mass incarceration, there is a dangerous temptation to see this reduction as a possible silver lining to the economic crisis. Although it has arisen partly because of the federal court injunction and partly because of deep-seated constitutional obstacles in the structure of California's government, it may well be the reality of fiscal disaster that will lead to further reductions in prison overcrowding. But a dysfunctional political economy brought the state to this fiscal disaster, and that dysfunction will survive the imminent prison reduction. Just as the legislature reluctantly accepted a very compromised prisoner reduction plan – mostly a parole reform plan – to satisfy both the courts and the accountants, it also took the perverse next step of slashing hundreds of millions of dollars from adult prison and parole rehabilitation programs. Thus large prisoner release orders may facilitate only an interim prisoner reduction, because if nothing changes in the determinate sentencing and parole laws, no bureaucratic alteration in parole supervision practices will delay for long a massive return of released people to prison, if they remain criminally active.

Many reformers promote the principle of risk-needs assessment as a tool of criminal justice policy; in doing so they move beyond blind belief in the value of prison reduction per se. But even here, there is a risk that reform will only pay rhetorical fealty. In September 2009, California released the results of its actuarial prediction instrument, known as the California Static Risk Assessment (CSRA).⁸ The results showed that of the 148,706 prisoners considered in the CSRA, almost 76 percent had a moderate-to-high risk to re-offend. A detailed analysis by criminologist Susan Turner and her colleagues shows that within the moderate risk group, 69 percent can be expected to be rearrested for a felony within three years of their prison release (22 percent for a violent felony). Within the high risk group, 82 percent are predicted to be rearrested for a felony within three years (38 percent for a violent felony).⁹

California prisoners have high needs, most of which go untreated during incarceration. Two-thirds of all prisoners were identified on the CSRA as having a moderate-to-high substance abuse risk, and nearly half (45 percent) exhibited moderate-to-high anger problems. Yet in 2009, when the prison population equaled more than 170,000, there were just 11,000 substance abuse treatment slots and just 200 anger management treatment slots in California prisons. California has *no* sex offender treatment in prisons despite the fact that about 9 percent of the California prison population is serving a current term for a sex crime conviction.¹⁰ Similar treatment scarcity exists in California's parole system: in July 2009, there were just 521 substance abuse treatment slots for the 128,554 parolees coming home.¹¹ In the September 2009 report, California's Inspector General called the re-

sults “expected and alarming” and urged increased investment in the state’s rehabilitation programs. The report concludes, “Without consistent funding and support for rehabilitative programming, lasting reform can never be achieved.”¹²

Ironically, just two days after that report was released the state legislature passed a budget slashing prisoner education, drug treatment, and job training programs. The cuts, totaling more than \$250 million, represent more than a third of the previous year’s entire budget for adult prison programs. Prison substance abuse programs will be shortened to three months (compared to the current six to thirty-six months) of treatment, and treatment staff will be reduced by 50 percent. Traditional classroom education will be replaced by “self-directed” programs, and the classroom instruction that does remain will often be taught by volunteers and inmate teaching assistants, resulting in teacher layoffs numbering between six hundred and eight hundred. Parolee programs are being similarly decimated, with reductions in day reporting centers, reentry partnerships, and residential multiservice centers. Public safety is at serious risk if release of moderate- and high-risk offenders is done without regard to reentry. But it is also at risk when reentry is done but done *badly*, especially at a time when unemployment is increasing. This compounding factor puts parolees in competition with free citizens for jobs and benefits that are already scarce.

California is not alone in this regard. While prison and parole populations are decreasing across the United States, the very programs necessary for success in reentry are disappearing. We can choose our favorite metaphoric cliché: this is a perfect storm, a recipe for disaster, a crash-and-burn scenario. Reductions in

prison population may end up being blamed – sometimes wrongly, but sometimes rightly – for the outcomes. The current situation may provide another opportunity to set alternative sanctions and reentry support on the right course. But if we fail in this respect yet again, we might face awful recidivism in the coming years, and we will enter another dismal cycle in which “nothing works” will be the old-new mantra.

Rather than speaking of mass incarceration, we should redefine our terms and focus on curtailing *unnecessary* incarceration. Liberal reforms often pay rhetorical fealty to the trope of “public safety.” If incarceration is to become a rational tool of social regulation, reformers will have to be more than rhetorical in acknowledging that many, or perhaps most, people convicted of serious crimes need to spend a portion of their lives behind bars. However misguided and excessive were the harsh new criminal laws and determinate sentencing systems created thirty years ago, the justifying purposes of retribution, incapacitation, and deterrence still have moral and utilitarian purchase. To put it differently, on the one hand, given the history of racial and economic injustice in America, a deep and plausible moral argument can be made that great numbers of people now in prison do not deserve to be there, nor, in a similar sense, has American society earned the right to keep them there. On the other hand, when government makes choices at particular decision points within the criminal justice system, from apprehension to prosecution to trial to sentence, those choices are only to a limited degree the *causes* of mass incarceration; they are also the *effects* of the deeper causes of mass incarceration. Just as deliberate governmental decisions to imprison are not necessarily the dominant cause

of the problem, the simple decision not to imprison cannot itself be the dominant solution.

Alternative nonprison sanctions may prove very cost-efficient for the state and salutary for society because they mitigate the metastatic effects of imprisonment on the economic and social lives of ex-inmates. Therefore, they will morally mitigate, if not justify, the costs of criminal prosecution. The notion of alternative sanctions, however, poses the risk of inducing reformers to view it sentimentally. Nonprison sanctions are still sanctions that often involve serious restrictions on liberty and movement. They also entail intrusions on privacy because law enforcement officers who are monitoring probationers, parolees, and the like have enhanced powers of search and seizure, and these officers have many behavioral criteria beyond the strict test of probable cause to justify the intrusions.¹³ Some of the most promoted forms of alternative supervision, from the halfway house to the much-touted global positioning systems (GPS), involve the “carceral discipline” often decried by social critics as the modern culture of control (to use sociologist David Garland’s words) or as “governing through crime” (legal scholar Jonathan Simon’s words). In effect, we may have a triumphantly broad reading of the Eighth Amendment that tosses us against a very narrow reading of the Fourth Amendment.

The voluminous recent scholarship on mass incarceration, including the work of all the authors in this issue, has been a brilliant intellectual achievement. Some of it takes the form of broad social theory, with magisterial, historical sweep. Some of it partakes of American-studies cultural analysis, focusing on the strange variety of American “exceptionalism.”

Some of it has been state-of-the-art econometric analysis of the highest level, but usefully translated into striking inferences about the searing social and economic secondary punishments that mass incarceration has wrought. The study of mass incarceration has been a major interdisciplinary phenomenon in American academia, and it has been rare in that it aligns with and has greatly influenced the public’s view of the criminal justice system. It deserves much of the credit for the fresh look American society is taking of the condition of its sentencing laws and correctional systems.

But a key lesson of the history of criminal justice reform is that academics must pay their dues on the less magisterial, more mundane side of the issues as well. Those interested in translating the “what works” literature into operational programs must make certain that the programs are implemented fully and coherently, not dismantled or watered down through the political process in ways that undermine their effectiveness. This fact certainly does not deny the great value of the work already done; indeed, that work will complement the new studies. Academics must now recognize that the gritty, detailed work of figuring out how to do reentry right is part of their professional obligation. This task will entail ground-level, state-by-state studies to determine which programs work in prisons, which ones work outside prisons, which prisoners can be helped and which cannot: all the questions on which policy-makers and front-line officials need urgent guidance.

ENDNOTES

- ¹ John F. Pfaff, "The Continued Vitality of Structured Sentencing Following *Blakeley*: The Effectiveness of Voluntary Guidelines," *UCLA Law Review* 54 (2006–2007): 235.
- ² Steven Levitt and William Spelman have assessed the size of these elasticities relative to the drop in violent crime over the 1990s, both concluding that about 25 percent of the violent crime drop can be attributed to the increased use of incarceration. See Steven D. Levitt, "Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not," *Journal of Economic Perspectives* 18 (1) (2004): 163–190; and William Spelman, "The Limited Importance of Prison Expansion," in *The Crime Drop in America*, ed. Alfred Blumstein and Joel Wallman (New York: Cambridge University Press, 2000).
- ³ Rosemary Gartner, Anthony N. Doob, and Franklin E. Zimring, "The Past is Prologue? Decarceration in California Then and Now," unpublished working paper.
- ⁴ For a review of these results, see Joan Petersilia, "A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?" in *Perspectives on Crime and Justice: 1997–1998 Lecture Series* (Washington, D.C.: National Institute of Justice, 1998); and Joan Petersilia and Susan Turner, "Intensive Probation and Parole," in *Crime and Justice: An Annual Review of Research*, ed. Michael Tonry (Chicago: University of Chicago Press, 1993).
- ⁵ Robert Weisberg, "Restorative Justice and the Dangers of 'Community,'" *Utah Law Review* (2003): 343, 363–368.
- ⁶ Kathy Sawyer, "Tougher Probation May Help Georgia Clear Crowded Prisons," *The Washington Post*, August 16, 1985. See also Dudley Clendinen, "Prison Crowding in South Leads to Tests of Other Punishments," *The New York Times*, December 18, 1985.
- ⁷ Joan Petersilia, "A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?" *Federal Probation* LXII (2) (1998).
- ⁸ California Rehabilitation Oversight Board, Biannual Report (Office of the Inspector General, State of California, September 15, 2009), <http://www.oig.ca.gov/pages/c-rob/reports.php> (accessed January 4, 2010).
- ⁹ Susan Turner, James Hess, and Jesse Jannetta, "Development of the California Static Risk Assessment Instrument (CSRA)" (University of California, Irvine, Center for Evidence-Based Corrections, November 2009), <http://ucicorrections.seweb.uci.edu/pubs> (accessed January 4, 2010).
- ¹⁰ Prison Census Data, "Characteristics of Inmate Population" (California Department of Corrections, August 2009), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Offender_Information_Reports.html.
- ¹¹ California Rehabilitation Oversight Board, Biannual Report.
- ¹² *Ibid.*, 11.
- ¹³ *United States v. Knights*, 534 U.S. 112 (2001).

Glenn C. Loury

Crime, inequality & social justice

Crime and punishment are certainly contentious topics, and the authors gathered in this issue do not always agree with one another. For my own part, I must confess to having a personal stake in this issue. As an African American male, a baby boomer born and raised on Chicago's South Side, I can identify with the plight of the urban poor because I have lived among them. I am tied to them by the bonds of social and psychic affiliation. I myself have passed through the courtroom and the jailhouse on my way along life's journey. I have twice been robbed at gunpoint. I have known – personally and intimately – men and women who lived their entire lives with one foot on either side of the law. Whenever I step to a lectern to speak about incarceration, I envision voiceless and despairing people – both offenders and victims – who would have me speak on their behalf. Of course, personal biography has no authority to compel agreement about public policy. Still, I prefer candor in such matters to a false pretense of clinical detachment and scientific objectivity. While I recognize that these revelations will discredit me in some quarters, that is a fate which I can live with. Allow me to share a few

critical observations of my own about crime, inequality, and social justice.

One principal point of disagreement among contributors to this volume has to do with how the fact of mass incarceration relates to the social problem of crime. Mark Kleiman claims that mass incarceration is only a partial problem definition; the other part of the problem is crime. This stance is in sharp contrast to that of Loïc Wacquant, who insists that “hyperincarceration” (his preferred term, since only those living in the lower social strata face much risk of imprisonment) isn't really about crime at all. Rather, he says, it's about “managing dispossessed and dishonored populations.” There is merit in both viewpoints. There can be no doubt that public ideas about crime – especially fears of violent victimization – have fueled the imprisonment boom. To speak of a crisis of mass imprisonment without reference to crime is, indeed, to address only one part of the problem. After all, declarations of “war” against crime (and, most noticeably, against *criminals*) are a primary means by which political aspirants now signal their bona fides to their electorates. The long upward trend in crime rates from the mid-1960s to the early 1980s “primed the penal pump” by hardening attitudes and discrediting liberal criminal justice

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policies. It is certainly the case, therefore, that the steep rise of imprisonment in the United States is closely intertwined with the social experience and political salience of crime in American life. We cannot understand the one without thinking carefully about the other. Nor can we persuade voters to undo the one without addressing their concerns about the other.

Yet evidence suggests that changes over time in the scale of incarceration have not been caused in any direct way by changes in the extent of criminal behavior. Indeed, linkages between prisons and crime have been anything but simple and direct. Prison populations have been on the rise steadily for more than three decades. However, crime rates increased in the 1970s; fell, then rose again in the 1980s; and increased before sharply decreasing again in the 1990s. For two generations, crime rates have fluctuated with no apparent relationship to a steady climb in the extent of imprisonment. Today, with prison populations as large as they have ever been in American history, crime rates are about the same as they were in 1970, when a then-falling U.S. prison population reached its lowest level in a generation. Prisons and crime cannot be rightly understood simply as opposite sides of the same coin. Incarceration does not exhaust the available means of crime control. Nor does criminal offending directly explain the profound *qualitative* institutional transformation that we have witnessed in the United States over the past two generations.¹

Further, the trend of racial disparity in imprisonment rates cannot be accounted for as a consequence of changes in rates of offending over time. Crime rates, especially for violent offenses, have always been higher among African Americans than whites in the United States. This long-term disparity goes far toward explaining the historical fact of greater im-

prisonment for African Americans. Certainly there is little doubt that those who commit violent crimes should be punished, regardless of race. If more African Americans commit such offenses, more will be imprisoned, and no issues of impropriety would be raised thereby. Yet it is significant that the racial disparity of imprisonment rates has increased dramatically since the prison boom began, largely because of the “war on drugs.” African Americans were vastly overrepresented among persons incarcerated for drug offenses during the 1980s and 1990s, even as African Americans were no more likely to be using or selling drugs than whites. Moreover, despite a sharp drop in violent crime rates, starting in the early 1990s and extending to the present, racial differences in imprisonment rates have begun a slight decline only in the last few years.

As for the links between imprisonment and public safety, the widely held notion that one prevents crime by incapacitating criminals is simplistic. It fails to take account of the fact that for many crimes – selling drugs, for instance – incapacitated criminals are simply replaced by others, there being no shortage of contenders vying for a chance to enter the illicit trade. (It also ignores the reality of criminal victimization within prisons – no small matter.) Furthermore, by adopting a more holistic view of the complex connections between prisons and communities, we can immediately recognize the significance of the fact that almost everyone who goes to prison is eventually released, most after just two or three years. Evidence suggests that for these hundreds of thousands of ex-offenders released each year, time behind bars will have *diminished*, not enhanced, their odds of living crime-free lives: by lowering employability, severing ties to communal supports, and hardening attitudes.

Thus, the impact of high incarceration rates on the sustainable level of public safety over the long term is ambiguous. The fact – amply demonstrated for the case of Chicago by Robert Sampson and Charles Loeffler in this volume – that incarceration in large American cities is so highly concentrated means that the ill effects of having spent time behind bars may diminish the social opportunities of others who reside in the most heavily impacted communities and who themselves have done nothing wrong. Spatial concentration of imprisonment may foster criminality because it undermines the informal social processes of order maintenance, which are the primary means of sustaining pro-social behavior in all communities. In some poor urban neighborhoods, as many as one in five adult men is behind bars on any given day. As the criminologist Todd Clear has written, “[T]he cycling of these young men through the prison system has become a central factor determining the social ecology of poor neighborhoods, where there is hardly a family without a son, an uncle or a father who has done time in prison.”² This ubiquity of the prison experience in poor, minority urban neighborhoods has left families in these places less effective at inculcating in their children the kinds of delinquency-resistant self controls and pro-social attitudes that typically insulate youths against lawbreaking. As Clear concludes from his review of the evidence, “[D]eficits in informal social controls that result from high levels of incarceration are, in fact, crime-promoting. The high incarceration rates in poor communities destabilize the social relationships in these places and help cause crime rather than prevent it.”

The relationship between prison and public safety is complicated in view of the fact that “what happens in San Quen-

tin need not stay in San Quentin.” Nor does the evidence afford us much comfort in the thought that, at the very least, a threat of imprisonment will deter future would-be offenders from breaking the law. Among children exposed to an incarcerated parent or sibling – youngsters who can be assumed to have firsthand knowledge of the penalties associated with lawbreaking – the likelihood of their eventual incarceration is actually higher, not lower, than is the case for otherwise comparable children with no such exposure, which attests to the weakness of the deterrent effect of the sanction. Furthermore, in a careful review of the econometric evidence on this question, economist Steven Durlauf and public policy expert Daniel Nagin conclude:

The key empirical conclusion of our literature review is that there is relatively little reliable evidence for variation in the severity of punishment having a substantial deterrent effect, but there is relatively strong evidence that variation in the certainty of punishment has a large deterrent effect. . . . One policy-relevant implication of this conclusion is that lengthy prison sentences, particularly in the form of mandatory minimum type statutes such as California’s Three Strikes Law, are difficult to justify on a deterrence-based crime prevention basis.³

Disparities by social class in this punishment binge are enormous, and they have far-reaching and often deleterious consequences for the families and communities affected. The prisoners come mainly from the most disadvantaged corners of our unequal society; the prisons both reflect and exacerbate this inequality. The factors that lead young people to crime – the “root causes” – have long been known: disorganized childhoods, inadequate educations, child abuse,

limited employability, delinquent peers. These are factors that also have long been more prevalent among the poor than the middle classes, though it has for some time been unfashionable to speak of “root causes.” Nevertheless, as Bruce Western stresses in his comprehensive empirical survey of this terrain, “punishment” and “inequality” are intimately linked in modern America, and the causality runs in both directions.⁴

Racial disparities in the incidence of incarceration are also huge. The subordinate status of African American ghetto-dwellers – their social deprivation and spatial isolation in America’s cities – puts their residents at great risk of embracing the dysfunctional behaviors that lead to incarceration. Also, it is quite clear that punishment policies serve expressive, not merely instrumental, ends. Americans have wanted to “send a message,” and have done so with a vengeance. In the midst of such dramaturgy – necessarily so in America – has lurked a potent racial subplot. Inequalities by race in the realm of punishment exceed those found in just about any other arena of American social life: at roughly seven to one, the black-white ratio of male incarceration rates dwarfs the two to one ratio of unemployment rates, the three to one nonmarital child-bearing ratio, the two to one black-white ratio of infant mortality rates, and the one to five ratio of net worth. (The homicide rate is a noteworthy exception to this generalization about racial disproportions. For twenty- to twenty-nine-year-old males, the black-white ratio has been in the neighborhood of ten to one in recent years.) It is of some political significance that, for young African American men, coercion is the most salient feature of their encounters with the American state. In this issue, Bruce Western and Becky Pettit report that more African American male high school dropouts

are held in prisons than belong to unions or are enrolled in any (other) state or federal social welfare programs. They estimate that nearly 70 percent of African American male dropouts born between 1975 and 1979 will have spent at least one year in prison before reaching the age of thirty-five.

Given the scale of imprisonment for African American men, and the troubled history of race relations in this country, it can be no surprise that some observers see the advent of mass incarceration as the catalyst for a new front in the long, historic, and still incomplete struggle for racial justice.⁵ Because history and political culture matter, considering the factor of race is crucial to a full understanding and evaluation of our current policy regime. It is true that slavery ended a long time ago. But it is also true that an ideology of racial subordination accompanied the institution of African slavery, and this racial ideology has cast a long shadow. Thus, in his recently published history of the entanglement of race with crime in American political culture at the turn of the twentieth century,⁶ historian Khalil Muhammad contrasts the treatment of two related, but differently experienced, phenomena: crime by newly arrived European immigrants and crime by African Americans. Looking at the emergent statistical social-science literatures of that period, Muhammad makes clear that the prevailing ideological climate in the United States at that time led analysts and critics to construe the many problems of urbanizing and industrializing America in distinct ways. In essence, poor, white city-dwelling migrants were understood to be committing crimes, but the poor African Americans migrating to those same cities were seen as inherently criminal.

Our unlovely history of race relations is linked to the current situation, both as a matter of social causation – since the

structure of our cities, with their massive racial ghettos, is implicated in the production of deviancy among those living there – and as a matter of ethical evaluation – since the decency of our institutions depends on whether they comport with a narrative of national purpose that recognizes and seeks to limit and to reverse the consequences of history’s wrongs. It is certainly arguable (take Loïc Wacquant’s essay in this volume, for example) that managing social dysfunction via imprisonment has now become the primary instrument for reproducing racial stratification in American society.

What does all this tell us about our purportedly open and democratic society? What manner of people do our punishment policies reveal us Americans to be?

Just look at what we have wrought. We have established what, to many an outside observer, looks like a system of social caste in the centers of our great cities. I refer here to millions of stigmatized, feared, and invisible people. The extent of disparity between the children of the middle class and the children of the disadvantaged to achieve their full human potential is virtually unrivaled elsewhere in the industrial, advanced, civilized, free world. And it is a disparity that is apparently taken for granted in America.

I see the broader society as implicated in the creation and maintenance of these damaged, neglected, feared, and despised communities. People who live in these places know that outsiders view them with suspicion and contempt. The plain historical fact is that North Philadelphia, the West Side of Chicago, the East Side of Detroit, or South Central Los Angeles did not come into being by accident or because of some natural processes. As Wacquant emphasizes in this issue, these social formations are man-made struc-

tures that were created and have persisted because the concentration of their residents in such urban enclaves serves the interests of others. The desperate and vile behaviors of some of the people caught in these social structures reflect not merely their personal moral deviance, but also the moral shortcomings of our society as a whole. Yet many Americans have concluded, in effect, that those languishing at the margins of our society are simply reaping what they have sown. Their suffering is seen as having nothing to do with us – as not being evidence of broader, systemic failures that can be corrected through collective action. As a consequence, there is no broadly based demand for reform – no sense of moral outrage, anguished self-criticism, or public reflection – in the face of what is a massive, collective failure. American political culture, it seems, accepts as credible no account of personal malfeasance other than the conclusion that the offending individual is unworthy.

The legal scholar William Stuntz has recently called attention to the close connection in American history between local control, democratic governance, and inequalities of punishment.⁷ He suggests, persuasively in my view, that increases in the severity and inequality of American punishment have mainly been due to a shift over the course of the twentieth century in the ways that crime and punishment policies are formulated. Because caseloads have grown alongside reliance on plea bargaining, prosecutors have gained power at the expense of juries; because a thicket of constitutional protections has been elaborated, federal appellate judges exert more influence than trial judges; because of population decentralization trends in large urban areas – with judges now elected mostly on county-wide ballots and police no longer drawn preponderantly from the

communities where they make arrests – suburban and exurban voters now have a good deal more to say than do central-city residents about crime control policies, even though they are less affected by those policies.

The law, Stuntz argues, has grown more extensive in its definition of criminality and has left less room for situational discretion. Alienation of urban populations from democratic control over the apparatus of punishment has resulted in more inequality and less leniency. There is too much law and too little (local) politics. Local populations bear the brunt of the misbehavior by the lawbreakers in their midst. Yet, at the same time, they are closely connected to lawbreakers via bonds of social and psychic affiliation. Mass incarceration is a political not a legal crisis, one that arises from a disjunction between the “locus of control” and the “locus of interests” in the formulation of punishment policies.

Following Stuntz, I wish to suggest that punishment, rightly construed, is a communal affair; and that an ambiguity of relationship – involving proximity to both sides of the offender-victim divide and a wealth of local knowledge combined with keen local interests – is essential to doing justice. Viewed in this light, hyperincarceration and the (racial) inequalities that it has bred are more deeply disturbing because urban minority communities, where both the depredations of crime and the enormous costs of its unequal punishment are experienced, have effectively been divorced from any means of influencing the administration of criminal justice.

To the extent that the socially marginal are not seen as belonging to the same general public body as the rest of us, it becomes possible to do just about anything with them. Yet, in my view, a pure ethic of *personal responsibility* could never pro-

vide an adequate foundation for justifying the current situation. In making this claim, I am not invoking a “root causes” argument (he did the crime, but only because he had no choice) so much as I am arguing that society as a whole is implicated in the offender’s choices. We have acquiesced in structural arrangements that work to our benefit and the offender’s detriment and that shape his consciousness and sense of identity such that his choices, which we must condemn, are nevertheless compelling to him.

In his influential treatise, *A Theory of Justice*, the philosopher John Rawls distinguishes between principles that should govern the distribution of primary goods in society and the very different principles that should determine the distribution of the “negative good” of punishment. He explicitly states that justice in the distribution of economic and social advantages is “entirely different” from justice in the realm of criminal punishment. He even refers to “bad character” as relevant to punishment.⁸ As I understand Rawls, his famous “difference principle” – arrived at in “reflective equilibrium” from his hypothetical “original position” – presupposes the moral irrelevance of the mechanisms by which inequalities emerge. (For example, Rawls sees “ability” as a morally irrelevant trait, a manifestation of luck. So, unequal individual rewards based on differences in ability cannot be justified on the grounds of desert.) Yet because he does not see the mechanisms that lead to disparities of punishment as being morally irrelevant, he would not apply the difference principle when assessing the (in)justice of such inequalities, since they are linked to wrongdoing.

In my view, justice is complicated by the reality that the consequences wrought by our responses to wrongdoing also raise questions of justice. The phrase “Let jus-

tice be done though the heavens may fall” is, for me, an oxymoron; no concept of justice deserving the name would accept mass suffering simply because of blind adherence to an abstract principle (such as “do the crime, and you’ll do the time”). It is common for ethicists to say things such as “social welfare should be maximized subject to deontological constraints,” meaning that actions like distributing body parts taken from a healthy person to render ten other persons healthy cannot be morally justified. But this conviction should go both ways: abstract moral goals should be subjected to constraints that weigh the consequences induced by such pursuits. In the realm of punishment, retribution against offend-

ers and notions of deserved punishment exemplify deontological principles. But even if current incarceration policies perfectly embodied these principles (and that is an eminently dubious proposition), it still would not be sufficient to justify such rigid adherence to moral obligation. For the reason that the effects of mass incarceration – on families and communities that may themselves have done nothing wrong – can cause sufficient harm, the principled claims that punishment is deserved should not be allowed to dictate policy at whim. A million criminal cases, each one rightly decided, can still add up to a great and historic wrong.

ENDNOTES

- ¹ For an illuminating exploration of the deeper roots of this transformation, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).
- ² Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2009), 10.
- ³ Steven Durlauf and Daniel Nagin, “The Deterrent Effect of Imprisonment,” unpublished working paper (University of Wisconsin-Madison, March 2010).
- ⁴ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006).
- ⁵ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).
- ⁶ Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010).
- ⁷ William Stuntz, “Unequal Justice,” *Harvard Law Review* 121 (8) (June 2008): 1969–2040.
- ⁸ The full quote from Rawls is: “It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults”; John Rawls, *A Theory of Justice*, rev. ed. (1971; Cambridge, Mass.: Belknap Press of Harvard University Press, 1999), 314–315.

Poem by Etheridge Knight

A Wasp Woman Visits a Black Junkie in Prison

After explanations and regulations, he
Walked warily in.
Black hair covered his chin, subscribing to
Villainous ideal.
“This can not be real,” he thought, “this is a
Classical mistake;
This is a cake baked with embarrassing icing;
Somebody’s got
Likely as not, a big fat tongue in cheek!
What have I to do
With a prim and proper-blooded lady?”
Christ in deed has risen
When a Junkie in prison visits with a Wasp woman.

“Hold your stupid face, man,
Learn a little grace, man; drop a notch the sacred shield.
She might have good reason,
Like: ‘I was in prison and ye visited me not,’ or—some such.
So sweep clear
Anachronistic fear, fight the fog,
And use no hot words.”

After the seating
And the greeting, they fished for a denominator,
Common or uncommon;
And could only summon up the fact that both were human.
“Be at ease, man!
Try to please, man!—the lady is as lost as you:
‘You got children, Ma’am?’” he said aloud.

The thrust broke the dam, and their lines wiggled in the water.
She offered no pills
To cure his many ills, no compact sermons, but small
And funny talk:
“My baby began to walk . . . simply cannot keep his room clean . . .”
Her chatter sparked no resurrection and truly
No shackles were shaken
But after she had taken her leave, he walked softly,
And for hours used no hot words.

Etheridge Knight (1931 – 1991) began writing poetry while an inmate at the Indiana State Prison from 1960 to 1968. His first collection, “Poems from Prison,” was published in 1968 and was followed by “A Poem for Brother/Man (after His Recovery from an O.D.)” (1972); “Belly Song and Other Poems” (1973), for which he was nominated for both the Pulitzer Prize and National Book Award; and “Born of a Woman: New and Selected Poems” (1980). His work was included in “For Malcolm” (1967) and “Black Voices from Prison” (1970) and was collected for “The Essential Etheridge Knight” in 1986. “A Wasp Woman Visits a Black Junkie in Prison,” from “The Essential Etheridge Knight,” by Etheridge Knight, © 1986, is reprinted by permission of the University of Pittsburgh Press.

Poems by Lucille Clifton

cruelty. don't talk to me about cruelty

cruelty. don't talk to me about cruelty
or what i am capable of.

when i wanted the roaches dead i wanted them dead
and i killed them. i took a broom to their country

and smashed and sliced without warning
without stopping and i smiled all the time i was doing it.

it was a holocaust of roaches, bodies,
parts of bodies, red all over the ground.

i didn't ask their names.
they had no names worth knowing.

now i watch myself whenever i enter a room.
i never know what i might do.

what spells raccoon to me

what spells raccoon to me
spells more than just his
bandit's eyes
squinting as his furry woman
hunkers down among the fists
of berries.
oh coon
which gave my grandfather a name
and fed his wife on more than one
occasion
i can no more change my references
than they can theirs.

Lucille Clifton (1936 – 2010) served as Distinguished Professor of Humanities at St. Mary's College of Maryland, Chancellor of the Academy of American Poets, and Poet Laureate of the State of Maryland from 1974 to 1985. She was elected a Fellow of the American Academy in 1999. Her poetry collections include "Blessing the Boats: New and Selected Poems, 1988 – 2000" (2000), which won a National Book Award; "Good Woman: Poems and a Memoir, 1969 – 1980" (1987) and "Next: New Poems" (1987), both of which were nominated for a Pulitzer Prize; and "Two-Headed Woman" (1980), which was also a Pulitzer Prize nominee and the recipient of the University of Massachusetts Press Juniper Prize. "cruelty. don't talk to me about cruelty" and "what spells raccoon to me," from "Next: New Poems," by Lucille Clifton, © 1987, are reprinted with the permission of BOA Editions, Ltd.

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Inside back cover : Prisoners in lockstep formation at the state prison in Auburn, New York, in the 1830s. The engraving originally appeared in John W. Barber and Henry Howe, *Historical Collections of the State of New York; containing a general collection of the most interesting facts, traditions, biographical sketches, anecdotes, &c. relating to its history and antiquities, with geographical descriptions of every township in the state* (New York: S. Tuttle, 1846). Image courtesy of the Seymour Public Library, Auburn, New York.

