

MASS INCARCERATION: PERSPECTIVES ON U.S. IMPRISONMENT

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INTRODUCTION

On February 11, 2000 the Roundtable brought six experts together at the University of Chicago Law School to discuss the extraordinarily high and rising rate of incarceration in the United States. The percentage of the population behind bars in this country is now one of the largest in the world. A few figures and facts will help put the crisis in perspective:

Number of people imprisoned per 100,000 adults (most figures 1996-98)¹

Japan:	37
Netherlands:	74
Italy:	86
Germany:	90
France:	90
Australia:	120
Portugal:	145
Russia:	685
United States:	700 ²

Number imprisoned in US per 100,000 by gender and race (1997)³

White Female:	32
Black Female:	192
White Male:	491
Black Male:	3,253

1. See André Kuhn, *Incarceration Rates Across the World*, 10 (2) *Overcrowded Times* 1-19 (April 1999).

2. Projected figure. See Stan C. Proband, *More than 700 per 100,000 U.S. Residents to be Locked up at Beginning of Third Millenium*, 10 (4) *Overcrowded Times* 2 (August 1999). The actual US incarceration rate as of midyear 1998 was 668. See Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 10 (3) *Overcrowded Times* 1 (June 1999).

3. Proband, 10 (4) *Overcrowded Times* at 2.

The imprisonment rate continues to rise even while the crime rate is falling.⁴

The number of women in prison is increasing faster than the number of men.⁵

A larger percentage of the mentally ill are in prison than are in mental health facilities.

We asked three of our panelists to discuss the broader trends and implications of the incarceration crisis. Alfred Blumstein and Franklin Zimring analyze the phenomenal growth in imprisonment and the social impact of this growth. Douglass Cassel offers an international perspective, comparing US incarceration with that in other countries and discussing the relevance of international law to US imprisonment policy. The following three panelists focus on more specific areas of concern. Mark Heyrman examines the incarceration of the mentally ill. Bernardine Dohrn discusses the imprisonment of children and makes a few remarks on the imprisonment of women. Randolph Stone examines the disparate racial impact of incarceration policies with a few words on the increasing transfers of children to adult facilities. After the symposium in February the panelists were given an opportunity to edit and provide footnotes for their remarks. The discussion that follows the individual presentations has also been edited.

This symposium would not have been possible without the invaluable assistance of Norval Morris. Professor Morris helped us define the issues for discussion and select the panelists. He introduced the speakers and moderated the discussion at the February symposium. His contribution to this project was much greater than the few remarks by him recorded in this text indicate. We are grateful for his generous support and invaluable expertise. David Graver, *Editor-in-Chief*.

NORVAL MORRIS[†]: The experience in this country with mass incarceration is, I think, unmatched in history, except perhaps in Stalin's gulag. To reflect with you on that extraordinary phenomenon, I think the Roundtable has assembled as well-informed a panel as you could possibly find. I delight to be with them because all six are friends and three are former students, and that's a very comforting feeling. [*laughter*]

4. See Kuhn, 10 (2) *Overcrowded Times* at 18; and Tonry, 10 (3) *Overcrowded Times* at 9, 11, 14.

5. Stan C. Proband, *1.8 Million in Prison and Jail at Midyear '98*, 10 (3) *Overcrowded Times* 2 (June 1999).

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Figure 1a: U.S. Incarceration Rate, 1925 - 1975

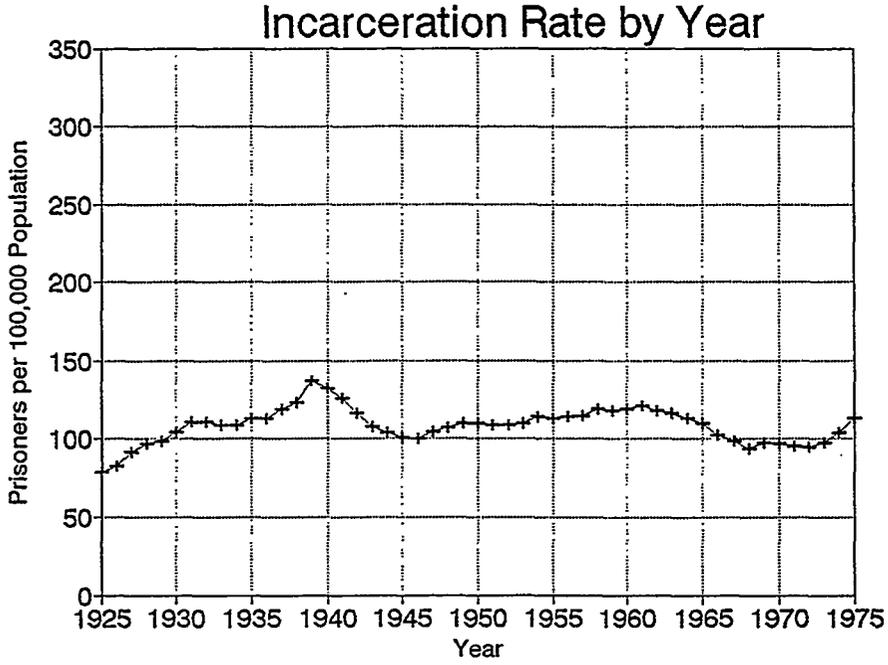
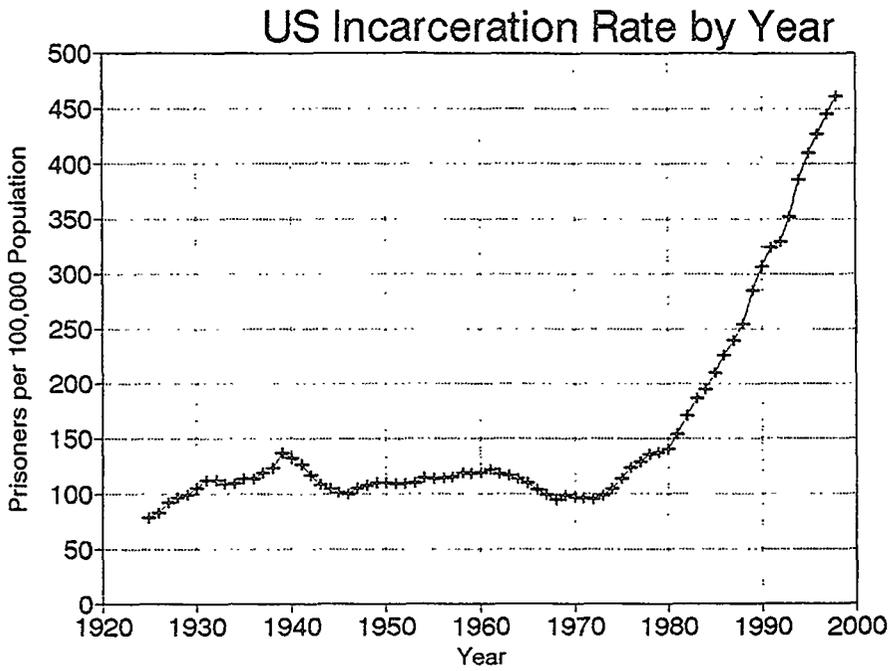


Figure 1b: Trends in U.S. Incarceration Rate



INCARCERATION TRENDS

ALFRED BLUMSTEIN[†]

Since I'm leading off, I want to give you some insight into where our incarceration policy has been in recent years. Let me start with Figure 1a. This is a graph of the U.S. incarceration rate for the fifty years from the 1920s to the early 1970s. And right about 1973, where this graph ends, Jackie Cohen and I wrote a paper entitled "A Theory of the Stability of Punishment⁶," explaining why incarceration was so stable. The theory basically said that as crime went up, the nation would simply raise the threshold of who was bad enough to send to prison, or drop the threshold of how much rehabilitation they had to have in order to be able to move people out on parole. Similarly, when the crime rate went down, we would start incarcerating people for marginal crimes like obscenity and blasphemy.

As soon as that paper came out, the U.S. went on this phenomenal incarceration binge (see Figure 1b). I don't think that is attributable to the publication of that paper. It may be partly attributable to the growing relevance of TV sound bites in the political debate. It's easy for a politician to show a scene of him slamming the prison cell door shut and thereby fixing the crime problem. In contrast, it's far less effective to show that the politician is sensitive to the subtle choices based on impact on families and communities, impact on different racial and ethnic groups, to deal with the complex tradeoff between rehabilitation and incapacitation. All of that is much tougher to capture in a nice sound bite, and so we have seen this incessant political drive to be "tougher [than thou] on crime."

I think it's important to recognize the crime context in which all of that has gone on, and that's displayed in Figure 2 based on data from the FBI's *Uniform Crime Reports* (UCR). The solid boxes depict the homicide rate and the open boxes depict the robbery rate, which does track the homicide rate rather closely. If this very nice recent downward trend in the homicide rate were to continue, then, by 2007, we can anticipate homicide going negative. [laughter] And with the reasonable expectation that that's going to have to

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6. Alfred Blumstein and Jacqueline Cohen, *A Theory of the Stability of Punishment* 64 (2) J Crim L, Criminol & Police Science 198 (1973).

happen on Easter Sunday. [*more laughter*] Of course, that highlights the realization that such trends cannot continue indefinitely, and we have to anticipate a leveling-off or an upswing some time in the next few years.

Now, a number of people have taken the data in these two graphs over the last seven years or so (especially since the peak in 1991) and have calculated the clearly negative correlation between the declining crime rate and the increasing incarceration rate, and have claimed that the crime rate is coming down *because* the incarceration rate is going up, and that proves the virtues of the steadily climbing incarceration rate. Of course, that claim doesn't deal with the fact that there was a rise in the crime rate during the late 80's or the fact that the contribution to the decline in the early 80's was very largely a demographic shift (the aging of the baby-boomers out of the high-crime ages) that had very little to do with incarceration. All of this is meant to highlight the fact that the relationship between crime and punishment is a rather complex one. It is not going to be captured easily in one simple correlation based on seven years of data.

But this decline has become an important part of the rhetoric associated with the preference for more incarceration. When one disaggregates the rise in violent crime of the late 1980s and early 1990s, that rise was very much attributable to young people with handguns, and incarceration is not typically an instrument that can contribute very much to a reduction in young people's crime. It is much more likely to affect older people—over 30, say—who have an extensive criminal history. And people over 30 did have a steadily declining violence rate throughout this period. I think one can attribute an important portion of their decline to incarceration, since the median age in prison is in the low 30s.

An important question related to the growing incarceration rate is to identify just who gets incarcerated. Over 450 per 100,000—almost half a percent of all Americans—are in prison today. Males are in prison at roughly twice that rate; there is a relatively small number of females, but females have had the largest growth rate—from four percent of prisoners to six percent, so that represents a fifty percent increase in the incarceration of women.

The race and ethnicity differences are profound. The non-Hispanic White rate is 193 per 100,000. The Black rate is particularly distressing; one and a half percent of Blacks in America are in a prison today. And if you take the highest risk group, Black males in their twenties, an astounding 8.3 percent of them are in prison. The incarceration rate for Blacks generally is over eight times the White rate. So that rate must raise some important questions. First, how much of that difference is attributable to discrimination within the criminal justice system? I've done a number of analyses on this issue, and the

Figure 2: Trends in Reported Rates of Murder and Robbery

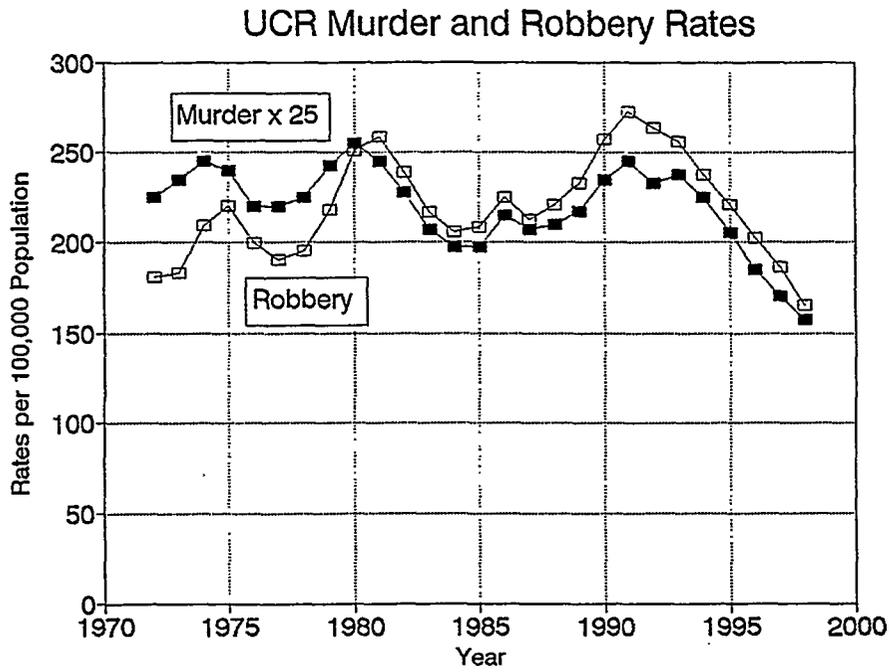
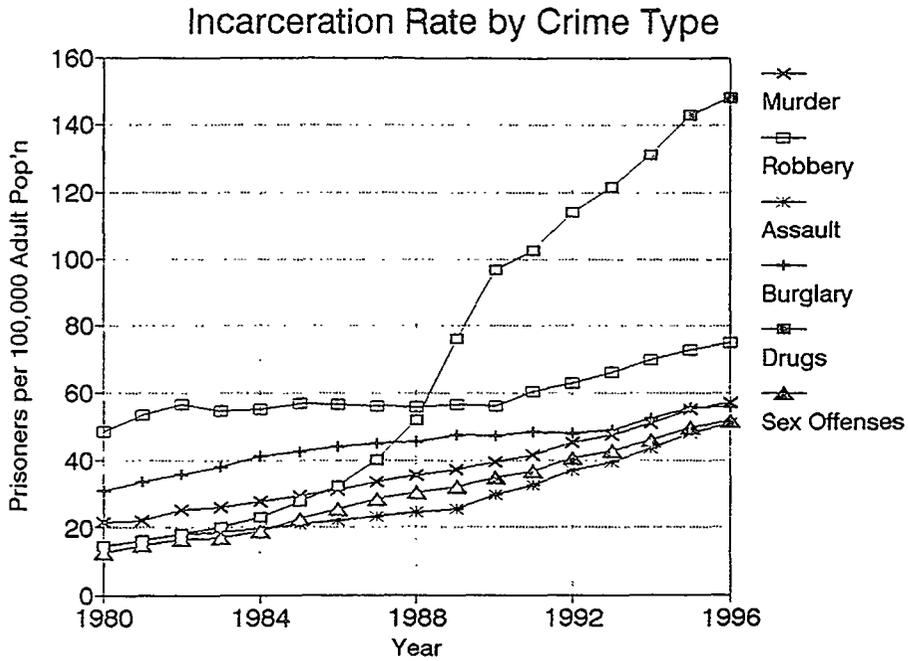


Figure 3: Trends in Incarceration Rate in State Prisons by Crime Type



conclusion here is that, while there may well be important discrimination in the criminal justice system, one simply cannot attribute a factor of eight difference just to discrimination within the criminal justice system. Indeed, those analyses suggest that a majority of that difference can be accounted for simply by differential rates of arrest for the crimes that are most likely to lead to prison—homicide, robbery, burglary, assault, the relatively serious crimes. And in those crimes where there has been a personal confrontation, there is a reasonable similarity between the race of arrestees and victim reports of the race of the offender. It is also the case, however, that the amount you can account for by arrest has been declining rather steadily. The growing saliency of drug offenders in prison is an important contributor to that shift—Blacks are disproportionately incarcerated for drug offenses compared to their arrests on drug charges.

I want to show you how the growth in the incarceration rate varies by type of offense, shown in Figure 3.⁷ There is one offense that demands attention, and that is the incarceration for drug offenses, which used to have about the lowest rate as recently as 1980. Now, it is by far the single most dominant offense. It accounts for over twenty percent of the state prison population and over sixty percent of federal prisoners. Drug offenses are profoundly discretionary in terms of who gets arrested, where police patrol, and in the aggressiveness of police, prosecution, and sentencing policy that is targeted at drug offenders. And one of the distressing ironies about that effort is the futility of incarceration as a means of averting transactions in the drug market. The two principal means by which incarceration should work are through deterrence, scaring people away, and incapacitation, removing them from the street. With the rapist, incapacitation probably works quite well by taking that individual off the street—there is no one likely to replace him. With the drug sellers, there is a market out there that is resilient and that will find replacements, either by people working harder or by recruiting new people. Most often, these have been young people, and they are far more threatening to the general well being than the older drug seller who was locked away. So that this massive incarceration for drug offending is the simplistic approach to dealing with an offense that is admittedly troublesome, but we have been using means that are demonstrably ineffective in getting at the essence of the problem. That's what comprises the biggest chunk of the mass incarceration.

The differences are even more dramatic when one looks at federal prisons, as shown in Figure 4. Sixty percent of federal prisoners today are there for drug

7. Figure 3 and the remaining figures are based on Blumstein and Beck (see note 8 below).

offenses. We are now approaching two million people in state and federal prisons and local jails, and over 400,000 of these are there for drug offenses.

Let me highlight another aspect of the factors contributing to the incarceration growth. Offending is declining, but the criminal justice system has become tougher. And a major contributor to more incarceration is the high rate of parole violation as indicated in Figure 5. Here again, drug offenders are disproportionately represented, both in numbers and in their rate of growth. Of course, as the number of prisoners for drug offenses has grown, they represent a growing number of people on parole, and so their numbers understandably become large. But also, the widespread use of technology to detect when somebody has been using drugs has been an important contributor. In most places, dirty urine is a sufficient basis to send the individual back to prison. So we're seeing lots of people sent back on parole violations for this easily detected violation, and parole violators are becoming an increasing fraction of the people being sent back to prison.

Let me briefly summarize where we are in this mass incarceration and how we got there. Allen Beck of the Bureau of Justice Statistics and I analyzed where in the criminal justice system that growth is coming from⁸. We looked at the period 1980 to 1996. How much of this growth is due to more crime? The answer is not much at all; some crimes were increasing and some were decreasing over that period, but those largely balanced out. How much of it is due to more arrests per crime? Literally, none at all; police are not making more arrests per crime for any of the crime types we looked at. Virtually all the growth is attributable to the policy choices: more commitments per arrest and longer time served, counting parole violation time in the time served. It's roughly half and half in those last two, and, in recent years, increasingly attributable to the growth in time served. That raises the question of where in the determination of time served to next direct attention: legislatures with their passion for passing mandatory-minimum sentencing laws following any heinous crime, judges with their responsiveness to the political pressures, or parole boards that took considerable heat for their release decisions ("abolish parole" is still part of the get-tough rhetoric) are now a major factor in extending time served. At this time, the trend in commitments is relatively flat and the growth of prison is largely a result of increases in time served, partly the sentence and partly the parole process—delay in granting release and growth in recommitments.

8. Alfred Blumstein and Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996* in Michael Tonry and Joan Petersilia, eds, *Crime and Justice: A Review of Research* 17 (Chicago 1999).

Figure 4: Trends in Incarceration Rate in Federal Prisons by Crime Type

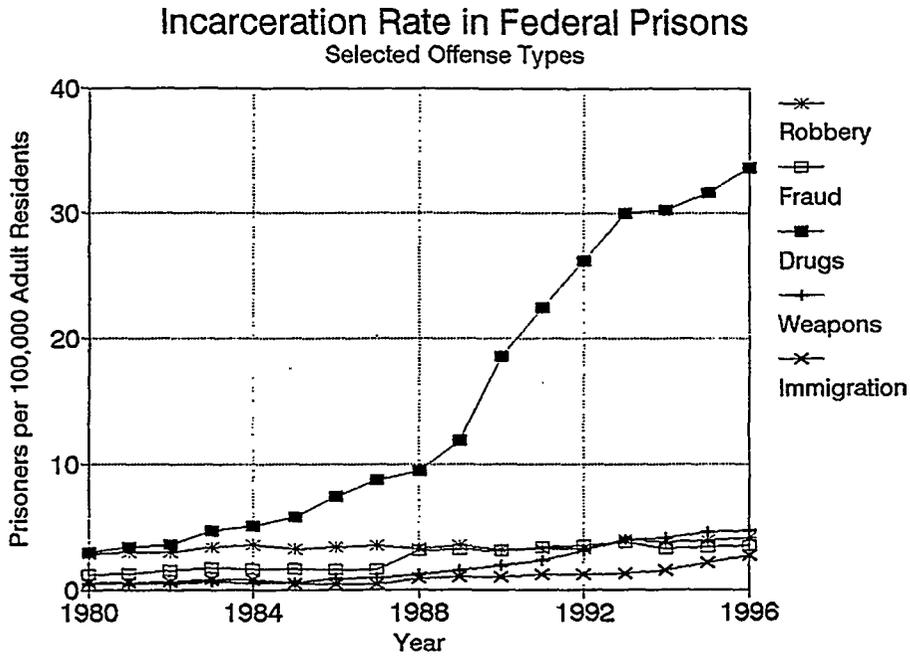
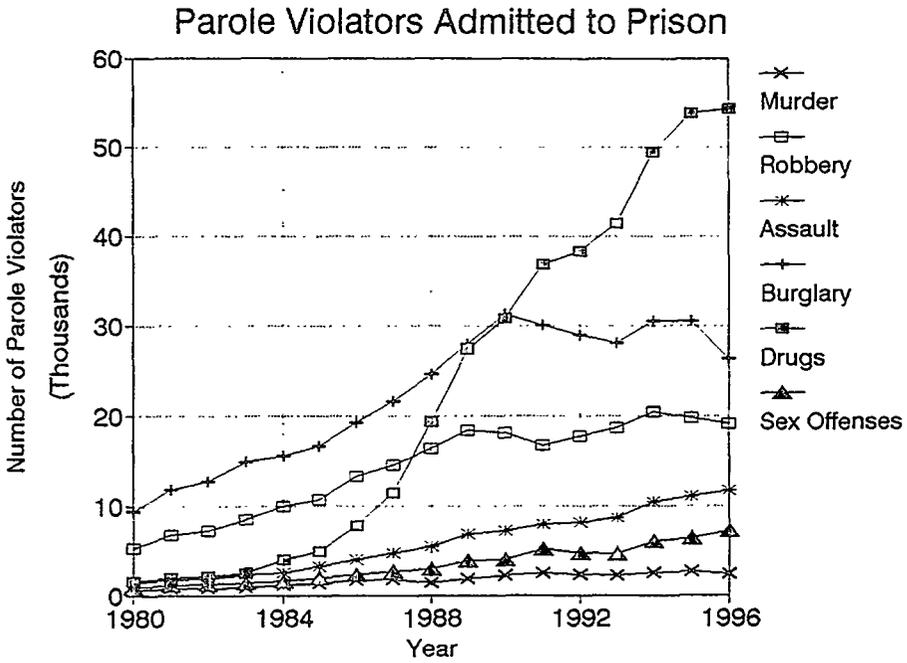


Figure 5: Trends in Number of Parole Violators Admitted to State Prison



The important point emerging from these analyses is that incarceration growth has been a consequence of overt policy choices rather than a consequence of the ills in our society.

I want to go back to a particular concern that I hinted at earlier. It's one that I hope generates some attention and concern in many quarters. The most profound impact of the incarceration growth has been on African-Americans. Their incarceration rate is 8.2 times that of Whites and that's growing—it was 7.6 in 1980. Also, 8.3 percent of Black males in their twenties are in prison compared to 1.6 percent of all U.S. Blacks. The probability that a Black male born today will end up in prison is almost 30 percent. And today one third of all Black males are under control of the criminal justice system—prison, jail, probation, or parole.

Those numbers are certainly mind-boggling. Even if all of those commitments were totally legitimate with no impact of discrimination within the criminal justice system and based on an even-handed administration of the criminal law, that would still represent a major problem. One cannot avoid these rates conveying a profound sense of injustice. These rates are so high because we have extended the criminal justice system into so many areas of private and interpersonal behavior, and so its net is bound to widen. We have to consider the degree to which that expansion is not only unjust to a large group, but also the degree to which it is inherently counterproductive to the mission of the criminal justice system. An important component of the deterrent effect the criminal justice system is intended to engender is the degree to which conviction or incarceration is a stigmatizing act. But stigma is a scarce commodity that has to be rationed carefully. It is hardly conceivable that there is any stigma left to be allocated when one-third of one's colleagues have been similarly denoted. Thus, even though the mass incarceration is increasing the incapacitation effect—but at a diminishing efficiency—it is diminishing the stigma effect, and hence the deterrent effect.

Certainly a major contributor to the incarceration growth has been the drug war. We have been hearing an increasing chorus of concern about the negative consequences of those prohibition efforts, and demands to re-think the national strategy. If we do that re-thinking in an intelligent way, that could go a long way to addressing the many problems associated with mass incarceration.

INCARCERATION PATTERNS

FRANKLIN ZIMRING[†]

I'm only going to discuss one graph showing trends in rates of imprisonment since 1925 (Figure 1b). Now one of the things that you can notice is that if you want real good news—[turning Figure 1b upside-down] just turn it upside down [laughter] and then what I'm going to be discussing is how likely is that? And what I'm going to be saying is that it's not very likely at all. Now let's go back and look at that rate, and let's talk about what story it tells. Then I'm going to question part of the story. This is Al's Figure 1b. It divides the seventy-five years of the twentieth century into two discrete segments. In segment one, before Al published his article, there was very little fluctuation around a mean level of rates of imprisonment per hundred thousand—the number of people in prisons grew because the country grew. But the mean level—an average between 110 and 120 per hundred thousand—never varied during that fifty-year segment by more than 30 percent, up or down. Then after hitting a low of 93 per hundred thousand in 1972, the rate of imprisonment has gone up in 26 consecutive years. That makes our current eight-year record for economic expansion look modest. Twenty-six years in a row.

So far, we are talking about the persistence of the up trend. Now let's talk about its scale. It grew during that time from 93 per hundred thousand to 452 per hundred thousand. This is imprisonment only, and ending in 1998. That's just under fivefold in a quarter of a century. Now prison numbers grew a lot more than that because the population was expanding too, and for each additional unit of population we've also had to increase imprisonment levels by just under fivefold. So we're up more than sixfold if you want to talk about number of people behind bars. But the imprisonment rate, just under fivefold.

What had been a nonvolatile and cyclical phenomenon became very volatile, and very noncyclical. The visual evidence in that the last 25 year segment suggests that the acceleration of prison population was a unitary phenomenon. The same thing was happening throughout the course of those 26 years in a row. A process that starts in the early or middle 1970s and picks up steam in the early 1980s and then just keeps going. History may very well regard the last quarter of the twentieth century in those unitary terms. But it

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seems to me that contrary to that visual evidence, there have been three different patterns of substantive emphasis that have accompanied the steady upward progression at different times during this 26-year push. And I think that it would benefit us to pay attention to those three different eras of substantive emphasis.

From about 1973 to about 1985 the emphasis was on general increases in the commitment of marginal felons to prison, with very few clear patterns by type of crime or by type of offender. The source that I would use to provide empirical data for this is a book called *The Scale of Imprisonment* that Gordon Hawkins and I published in 1991. The early 1980s has a very sharp linear acceleration trend, but it's a trend in everything. The percentage of drug prisoners in American prisons did not go up much between 1979 and 1986. Indeed, drugs went from the fourth leading offense of commitment in aggregate statistics to the fifth. Drugs got nosed out by sex offenders. Even though both were going up, everything was going up—a rising tide was carrying all the boats.

From about 1985 to 1992 or 1993, however, the tide was not raising all boats the same. That was high tide for the war on drugs. It was during that period when, for example, the number of drug offenders in the California prison system went up more than tenfold. And the thing about drug offenders is that it is an arena of real supply-side economics. Your drug offenders are a function of how many arrests you make, which is a function of what kind of commitment you put into the detection business, and business had never been better. And so the substantive emphasis was not on all different kinds of offenses, but between '85 and '92, the war on drugs was a very significantly over-represented part in the total increase of imprisonment in the United States. Drug commitments and drug sentences far outpaced the rate of growth of other offense commitments during that period of time. They've continued to grow a lot since 1993. But they're growing from a higher base and the linear ascent in the growth has not, since 1993, been what it was before.

Now it's the third period in this graph which is the most interesting to me and is going to lead me to some substantive arguments that I'm going to make in a few minutes. That is the period of time when imprisonment rates defy gravity after 1992. Crime rates head down and imprisonment rates keep heading up. This is the high point of a pattern of emphasis that I want to call the new politics of punishment. This is the era of Megan's Law, this is the era of Three Strikes and You're Out in 27 jurisdictions in the United States, this is the era of truth in sentencing. There is a shift in the rhetoric from "lock 'em up" in earlier eras to "throw away the key," and I think there is a pronounced tendency in this last third of that uninterrupted aggregate increase for

lengthening of sentences to be contributing more to the increase in total incarceration than it was in the earlier period of the increase. All of the increases that we've been talking about are policy, to use Al Blumstein's term, but it seems to me that the last leg of this increase is not only policy, but a policy which is much more intimately tied to the politics of criminal punishment than ever before in American history.

I want to talk just about those last six years, between 1992 and the end of 1998. The imprisonment rate grows from 313 to 452 per hundred thousand in only this six-year period. Now that's a growth of 139 prisoners for every hundred thousand. I want to put that in context. The *total* prison population in the United States was 139 per hundred thousand right here [*referring to Figure 1b*] in 1981. That's already in the middle of this growth bar, which means that 139 per hundred thousand, which is as many prisoners proportional to population as we had in this country in 1981 is actually a higher number than we'd ever had before in that century. That means that in the last six years what the United States has *added* in prison stock is another United States prison system the size that it was in 1981 at its then all-time peak. Boy, that's growth. And that's growth, I am arguing, that is associated with a new politics of criminal punishment. Not only has that played a major role in imprisonment trends defying gravity, but I think that that is also the political climate in which we have to talk about the real potentials that exist on the downside for decarceration policies. Because the political climate in which decarceration has got to get discussed is the same political climate that is contributing at this point, at least I'm arguing, to the incarceration.

Now, this is the issue on which I want to turn into the Grinch that stole Christmas. It seems to me that you cannot precisely estimate the independent power of this new political cast on the growth. For that, we need a counterfactual control, a United States from 1992 onward without a political climate that was aimed at increasing imprisonment. But there is certainly nothing evanescent about the new politics of criminal punishment, no reason to expect it to spend itself in the near future, and every reason to believe that the political pressures that have added significantly to the hyper-inflation of incarceration, will also provide resistance to downward emphasis. And it's for that reason that I am very pessimistic about the possibilities of big declines in imprisonment rates. What chance do we have to reverse just the trends of the last six years? That sounds easy and achievable. It would only take us back to over 300 per hundred thousand incarceration rates—that's the sort of level that would still make the Russians and the South Africans proud.

Can we do that at least in this political environment? I doubt it. I think that undoing even the last six years of the American incarceration boom is

going to be more than difficult under current systems, more than improbable under the current political conditions. And this is not a prediction which is based upon the dynamic statistical analysis of growth in imprisonment. That's not something you get when you look at the time patterns. Because the volatility of this should be a two-way street. You look at stock charts and you say "Hey Zimring, do you think the Dow Jones is going to come down much from 11,000?" You look at that stock chart and you turn it upside down and you say "Oh, it could go a long way down." And I believe that.

Imprisonment is just as volatile and just as conditional, but I don't think it's going down, and the reason I don't is not found in the dynamics of prison population fluctuation, it's found in the political conditions which are now governing policy fluctuations. If this were simply a law of physics, anything that goes up that fast can come down fast as well. But physics ain't where we're at, folks. We're dealing with a political short-circuiting process that has removed the insulation that used to exist between political sentiments—where burglars have never been popular in American life, even down there in 1973 before Al Blumstein published his article—and the punishment outcomes that used to be determined a considerable distance from the legislative sentiments and the popular support. Once that short-circuiting process has occurred—and I think that's really a lot of the story of the last seven years—putting the toothpaste back in the tube turns out to be a very delicate surgical procedure. And a very difficult one to get optimistic about in the near or even middle-range policy future of the United States.

AN INTERNATIONAL PERSPECTIVE

DOUGLASS W. CASSEL[†]

I don't think it's accurate to say this panel has six experts on incarceration. I think we really have five experts and one dilettante. I know a bit about international human rights law. I am not an expert on prisons and I am overwhelmed by the expertise and the statistics that we've just received and about which I hope to learn a great deal more. So I apologize to you in advance for supplying nothing more than impressions of the international realities of incarceration. I will then skip quickly ahead to the law.

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On the reality, internationally speaking, it is my impression that no country in the world relies as heavily as the United States does on imprisonment as a crime control technique. Statistically speaking, I think we may be outpaced by Rwanda, where for some years over a hundred thousand people have been imprisoned for genocide out of a total population of, I think, six million, but that's aberrational, a particular response to a genocide which hopefully will be a non-recurring event.⁹ But in terms of ordinary crime for which incarceration is imposed in countries around the world, I think it's true that we are not only world-class, but the world leaders.¹⁰

Now why is that? Well, I think you have to compare us on the one hand to developed countries, and on the other hand, to developing countries. If the comparison is with developed countries, I think that I'm on safe ground saying that the rates of poverty and of economic and social inequality, and the crustiness of that inequality—that is, it has lasted longer—we now have third, fourth, and fifth generations of the underclass locked not only in seemingly permanent poverty, but also in hopelessness and despair—I think that in all of those categories we are the unparalleled leader among the developed countries of the world.¹¹ If that is true, small wonder, then, that we have higher rates of imprisoning that underclass, which responds in violent and criminal forms to the lack of opportunity and lack of hope by committing crimes, and we have few qualms about finally taking the Zimring approach of simply “throw away the keys, who cares about them?” And another factor that comes out of this of course is the drug problem, about which I'll say no more because I think the point is obvious.

9. “According to government statistics at the start of 1999, Rwandan jails held some 150,000 persons: 135,000 were charged with genocide and 15,000 with other crimes.” Human Rights Watch, *HRW World Report 2000, Rwanda*, accessible at <<http://www.hrw.org>>. Rwanda's 1997 population was six million. U.N. Development Programme, *Human Development Report 1999* (hereafter HDR) 200.

10. The U.S. reported to the United Nations Committee Against Torture in October 1999: “The United States currently has the largest prison population and the highest incarceration rate of any country. Sentenced inmates numbered about 436 per 100,000 residents. By mid-year 1997, 1 in every 155 United States residents was incarcerated.” U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties, United States of America*, Report dated 15 October 1999, UN Doc CAT/C/28/Add.5, 9 February 2000, p 23, par 79, accessible at <[http://www.unhchr.ch/tbs/doc.nsf/0/fd58acc3c4d77447802568cf0030f212/\\$FILE/G0040656.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/fd58acc3c4d77447802568cf0030f212/$FILE/G0040656.pdf)>.

11. The most recent U.N. ranking places the U.S. dead last on the Human Poverty Index among 17 industrialized countries ranked in the “High Human Development” category. Based on income data from 1989-94, 19% of Americans had income below 50% of median income, versus less than 14% in the United Kingdom, 12% in Canada and Japan, 8% in France and 6% in Germany. The richest 20% of Americans had 8.9 times as much real gross domestic product per capita as the poorest 20%, versus 7.1 in Canada, 4.3 in Japan, 7.5 in France and 5.8 in Germany (the U.K. was slightly higher at 9.6). HDR at 149.

So if we look at other developed countries, we see much lower rates of violent crime.¹² We see much higher rates of social cohesion. More members of the society are considered to be members of the family, or at least members of the species, and therefore it is considered less acceptable to lock 'em up and throw away the keys.

If we look at developing countries, and that's most of Latin America, practically all of Africa, and a good part of Asia—and that is to say that most of the people of the world live in these countries¹³—an important factor, I think, and I don't know how to measure it, is that there is far less capacity in the criminal justice system than we have. If you look at rates of violent crime, the murder rate in El Salvador, or Guatemala, or parts of Brazil is now higher than it is in Chicago, or major cities in the United States.¹⁴ That wasn't always true, but it is now for a whole variety of reasons. And yet the criminal justice systems of those countries are almost complete failures in terms of catching, convicting, and imprisoning murderers,¹⁵ again for a whole series of reasons.¹⁶ The police are underpaid and undertrained and lack proper forensic laboratories. The systems are so thoroughly corrupt and ineffective in terms of catching criminals and protecting people that both victims and witnesses are afraid to come forward. There is a generalized distrust of public institutions. And so one reason for the far lower rate of incarceration in much of the developing world is not that the upper classes in those countries—which are much smaller than in ours—have a more benign view of the underclass than does the Republican party of the United States—and I should throw in New Democrats and probably a good many Old Democrats as well—but that they simply don't

12. A World Bank report lists the U.S. as having 8.4 intentional homicides per 100,000 for the period 1970-94. P. Fajnzylber, D. Lederman and N. Loayza, *Determinants of Crime Rates in Latin America and the World: An Empirical Assessment* (World Bank Latin American and Caribbean Studies: Viewpoints) 37 (1998). The U.N. Development Programme reports 1994 figures of 1.9 per 100,000 for Canada, 1.0 for Japan and 4.7 for France. No figures are given for the U.K. or Germany. Most highly developed nations have fewer than 5 per 100,000, although there is a broad range from Ireland at 0.7 to The Netherlands at 14.8 per 100,000. HDR at 221.

13. Of the world's 1997 population of 5.7 billion, only 840 million lived in industrialized countries, while 4.5 billion were in developing countries (of which 570 million were in the "least developed countries") and about 400 million were in Eastern Europe and the former Soviet states. HDR at 200.

14. National law enforcement sources reported 82 homicides per 100,000 population in El Salvador 1998, and 77 per 100,000 in Guatemala (unpublished manuscript on file with author).

15. See generally, Elissa Germaine and Erik Langner, *Violent Crime in Latin America* (1999), pp. 10-14 (unpublished manuscript on file with author).

16. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 *Law & Contemporary Problems* 197, 199 and nn. 12-13 (1996).

have the tools and aren't willing to pay the taxes to support a public sector capable of achieving such impressive rates of incarceration as in the U.S.¹⁷

Another factor which is probably far more minor is that the rates of police killings in places like Rio de Janeiro again put to shame the rate of killings by the Chicago police and others in our large cities.¹⁸

So the reality is a complex picture, but I don't think you can begin to analyze the phenomenon of the higher incarceration rate in the United States by beginning with the prison system or criminal justice policy. I think you have to start by looking at the structure of the society if you want to find out why we have come to such a different endpoint at this stage in time than other countries in the world.

Let me turn then briefly to what international law, and particularly international human rights law, has to say about all this. In practical terms of course in the United States it is not a significant factor in terms of our politics, our public policy, our law, or our public opinion. Even most law students today are ignorant of international human rights law. The United States Supreme Court, and the State Department except when it suits its convenience, are downright contemptuous of international law.¹⁹ And the United States is now the only country in the world, with the possible exception of China, that is capable of the self-delusion at the turn of the millennium that international law simply doesn't matter from our point of view: we're strong enough to get what we want, so who cares what other countries might wish to put in international law?

That is not the case for most other countries in the world where international human rights law is much more of a factor than it is here. So here it is perhaps a small chip on the hoof on the front leg of a Trojan horse that is going to take a long time to roll into the consciousness of our judges, of our legal community, and of our public. But it behooves institutions like the University of Chicago Law School and Northwestern, where I teach, to try to make sure that our students and faculty are increasingly aware of that hoof so as to speed its arrival inside the walls of the superpower.

The principal source of international law on this subject in the United States is the International Covenant on Civil and Political Rights, the main United Nations treaty dealing with a broad range of political and civil human

17. For example, Michael Gavin and Ricardo Hausmann, *Fiscal Performance in Latin America: What Needs to be Explained?*, in K. Fukasaku and R. Hausmann, eds, *Democracy, Decentralisation and Deficits in Latin America* 33, 35-38 (Inter-American Development Bank and OECD Development Centre 1998).

18. See generally, Ignacio Cano, *The Use of Lethal Force by Police in Rio de Janeiro* (Institute of Religious Studies 1997).

19. See, for example, *Breard v Greene*, 523 US 371 (1998); *US v Alvarez-Machain*, 504 US 655 (1992).

rights.²⁰ It has now been ratified by something like 140 out of the 190 or so member states of the United Nations,²¹ including by the United States of America under President George Bush in 1992. The treaty in its literal terms does not have a whole lot to say about mass incarceration or about using heavy-handed incarceration as a policy response to crime. Article 9 of the Convention does provide that there is a right to liberty, of which no one may be deprived except in accordance with law.²² But a literal reading of that, of course, means that nations are free to pass laws of the sort that this country has, that allow you to lock up eight percent of the Black male population, if I've got that right. However, there is jurisprudence and there are interpretations of that right of liberty, which suggest a strong bias in favor of looking at options other than deprivation of liberty as a way to respond to any policy problem.²³ So there is an opportunity to use international jurisprudence, if not the terms of the treaty, to argue against imprisonment as the easiest quick response to crime.

Article 10 of the International Covenant provides a number of standards which provide useful tools for policy argument and eventually for potential litigation. Basically they are, first of all, that incarceration to the extent it is done at all must be done in a way which reflects humanity and respect for the inherent human dignity of the person being incarcerated.²⁴ This standard, for example, led Amnesty International to criticize the supermax prisons in this country where people in some of them are locked up for 23 hours a day, and in small cells that have no natural lighting and no windows.²⁵

The Covenant also provides that accused persons must be separated from convicted persons and must be treated as merely accused and not as already convicted criminals.²⁶ It provides that juveniles must be separated from adults, with the treatment appropriate to their age and their legal status, and they must be brought to trial or to legal resolution as soon as possible.²⁷ And importantly, the Covenant says that penitentiary systems shall comprise treatment systems, the essential aim of which is reformation and social

20. Opened for signature, Dec 19, 1966, 999 UN Treaty Ser 171, entered into force, Mar 23, 1976.

21. An updated list is maintained at <<http://untreaty.un.org>>.

22. Art. 9.1.

23. For example, the U.N. Human Rights Committee, which monitors and administers the Covenant, advises, "Pre-trial detention should be an exception and as short as possible." General Comment 8: Article 9 (Sixteenth Session, 1982), accessible at <<http://www.unhchr.ch>>.

24. Art. 10.1: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

25. Amnesty Int'l, *United States of America. A Briefing for the UN Committee Against Torture*, AMR 51/56/00 (May 2000), 15-17.

26. Art. 10.2(a).

27. Art. 10.2(b).

rehabilitation.²⁸ Sounds like something from the reformers in this country almost a century ago, but that's what the treaty that we ratified in 1992 says.

Now when we ratified that treaty we took a number of reservations to it, meaning that we don't commit to fully comply with it.²⁹ I won't mention them all, but among them are a contention by us that in addition to the goals of reformation and social rehabilitation, there are other goals of imprisonment such as punishment, deterrence, and incapacitation.³⁰ Well, that may be true, one can argue sentencing philosophy, but I would suggest that in practice in the United States it's very easy to find punishment and incapacitation as purposes of imprisonment—I'm not so sure about deterrence—but I have considerable doubts at this stage about reformation and social rehabilitation. When we threw away the keys, did we also throw in the towel on these human beings?

Another important legal point is that the United States took a further reservation saying that the treaty is non-self executing,³¹ meaning that the Mandel Legal Aid Clinic and other clever litigators cannot simply run into federal court here, find multiple violations of the treaty in almost any U.S. prison—which would be easy to find—and file a lawsuit. Non-self executing means that you can't sue based directly on the treaty, you can only sue based on legislation that exists within the country or within our own Constitution.³² However, there is an exception to that exception, and it is a principle that has been in U.S. jurisprudence since the beginning of the Nineteenth Century and has the imprimatur of no less than Chief Justice John Marshall. It is a general principle of law that whenever a law of the United States can be interpreted to be consistent with international law, it must be so interpreted.³³ So notwithstanding the effort by George Bush and the Senate to say that you can't enforce this law, I would suggest you can try enforcement through the back door, by using the treaty as an interpretive guide for all of the U.S. law ranging from the Constitution through the statutes to the prison manuals on down.

28. *Id.*

29. See generally, David Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L Rev 1183 (1993).

30. See Stewart at 1199 (cited in note 21).

31. See Stewart at 1202-03.

32. This is one implication of "non-self-executing," among others. See generally, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J INT'L L 695 (1995).

33. *Murray v The Charming Betsy*, 6 US (2 Cranch) 64, 118, 2 L Ed 208, 226 (1804); see generally, Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND L REV 1103 (1990).

MORRIS: Before introducing Mark Heyrman, let me add just one thought of my own. As well as that sharp upward green line of numbers that have come into the jails and prisons of the United States, there has been another sharp upward green line, and that is the increased severity of conditions within our jails and within our prisons. At this stage we turn to particular groups and at this stage, the problems of the mentally ill in prisons and jails.

MENTAL ILLNESS IN PRISONS AND JAILS

MARK J. HEYRMAN[†]

I am here today to complain about how we have thrown persons with mental illness in with criminals. Today's panel is a demonstration of that: they've thrown this obviously mentally ill person [*referring to himself*] in with these obviously criminal types. [*gesturing toward the panel*] Please notice that I am not claiming that the mentally ill people, like me, who are getting thrown in with the criminal types are not also criminals.

STATISTICS RELATING TO PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS

Large numbers of persons with mental illness are in prisons and jails. Some examples—the largest mental hospital in Illinois is the Cook County Jail, our pretrial detention facility. It is the largest mental hospital in the state by far; there isn't anything close. More than 1000 of the 11,000 persons confined in the jail have been identified as mentally ill. Similarly, the largest mental hospital in New York State is Ryker's Island, the pretrial detention facility for New York City.

These two examples are not anomalies. The recent report of the Bureau of Justice Statistics indicates that in 1988 there were over 280,000 persons with mental illness confined in our prisons and jails.³⁴ More specifically, 16.3% of those in jails, 16.2% of those in state prisons, and 7.4% of those in federal prisons were mentally ill.

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34. Bureau of Justice Statistics Special Report, *Mental Health and Treatment of Inmates and Probationers* 1 (July 1999) (hereinafter, "BJS Report"), available at <<http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>>.

GENERAL INCREASES IN INCARCERATION RATES

There are a number of reasons why so many persons with mental illness are in prisons and jails. First, is the huge increase in the total number of persons in prisons and jails which have already been described and explained so carefully today by Al Blumstein and Frank Zimring. Baring other changes, if you increase the total number of people who are in prisons and jails, you will also increase the number of people who are mentally ill in prison. That is, if you simply say that the presence of mental illness among criminals is the same as the presence of mental illness among non-criminals, increasing the total number of incarcerated criminals will increase the number of people who are mentally ill and are incarcerated.

DRUG ABUSE AND ALCOHOLISM

However, all other things are not equal. As we have heard, one of the primary causes for the increased rate of incarceration which has occurred during the past three decades has been the increased rates of conviction for and substantial increases in the sentences served on account of drug related crimes. Persons with mental illness do not, holding other things equal, have a higher rate of criminal behavior than other persons. However, when mental illness co-occurs with substance abuse, then persons with mental illness do have a higher rate of criminal behavior. Additionally, persons with mental illness have a higher rate of alcohol and substance abuse problems than the general public. The reasons for this phenomenon are not completely clear. However, persons with mental illness often use alcohol and illegal drugs as self-medication to relieve the symptoms of their illnesses. Self-medication is more apt to occur among persons who are indigent and, therefore, less knowledgeable about health care and less connected to the health care system.

DEINSTITUTIONALIZATION OF THE MENTALLY ILL

There have been other systemic changes which have contributed to the increased incarceration of persons with mental illness. One is deinstitutionalization. Nationally, the confinement of persons with mental illness in state-operated mental hospitals peaked in 1955 at 559,000 persons.³⁵ Today that number is 70,000—a reduction of over 85%.³⁶ Long-term

35. H. Richard Lamb, M.D. and Linda E. Weinberger, Ph.D., *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 (4) *Psychiatric Services* 423 (April 1998).

36. National Commission on Correctional Health Care, 13 (3) *Correct Care* 1 (Summer 1999).

hospitalization in private mental health facilities has also had a similar substantial decline driven by substantially rising costs, restrictions on insurance coverage of mental illness and general pressures from third-party payers to restrict the duration of hospitalization. These changes in the location for treating persons with mental disabilities have been accompanied by, and indeed partially caused by, substantial improvements in our ability to treat major mental illnesses with psychotropic medication. However, we have not created a community mental health system in most states that has sufficient resources and sophistication to ensure that persons with mental illness continue to take prescribed medication or to use other interventions such as psycho-social rehabilitation and assertive case management in a timely and effective way to prevent relapses.³⁷ We also lack the resources to identify those persons whose mental illness may no longer be in remission and take the appropriate steps to return them to hospitals voluntarily or involuntarily. The reduction in hospital capacity means both that patients are not kept as long and that the standards for admission are more rigorous.

Despite all of the above, we have thus far not been able to demonstrate a clear link between deinstitutionalization and an increase of persons with mental illness in prisons and jails. However, these phenomena have occurred in roughly the same time span and at least some of the mechanisms which suggest causation are fairly straightforward. First, to the extent that more persons with mental illness are living in the community rather than in institutions, their opportunities to commit crime, serious or not so serious, are increased.

DIVERSION AND POLICE DISCRETION

Second, at the very low end of the criminal justice system, that is at the very low end of criminal behavior, police have wide discretion to decide how to treat persons who are mentally ill and may be committing crimes, particularly non-violent crimes. When a police officer is called to attend to a mentally ill person who is acting in a disruptive manner, the officer must decide whether to take that person into the mental health system or take that person into the criminal justice system. If you make it difficult for the police to get people admitted to mental hospitals and kept there at least for the duration of the police shift, then the police are much more apt to take people into the criminal justice system. That is one of the mechanisms through which

37. See, for example, *Report of the Governor's Commission to Revise the Mental Health Code of Illinois* 1-6, 164-176 (1989).

deinstitutionalization may have caused an increase in the number of mentally ill people in prisons and jails.

This phenomenon has been studied in a metropolitan police department in a large Midwestern city on a large lake. Linda Teplin at Northwestern University sent her graduate students to ride in police cars to observe police behavior towards persons with mental illness. Perhaps the most compelling vignette related in this research involves a police officer who picked up a very seriously mentally ill person and started driving toward a mental hospital. However, while they were still some distance from the mental hospital, in a sort of dark place, the police officer, with the graduate student sitting in the police car, dragged the mentally ill person out of the police car, beat him up and put him back in the police car. The officer then took the defendant to the mental hospital where he was admitted. The student understandably was upset by these events and questioned the officer about his conduct. He said, "The only way to get this person into a mental hospital . . . is to make him crazier."

We have so diluted the resources available, that you have to be very, very sick to get into a mental hospital in Illinois and many other states. I suspect most persons would be troubled by the police conduct Dr. Teplin has described. However, I think that the police officer did understand the mental health system.

PRISONS AND JAILS ARE STRESSFUL ENVIRONMENTS

Another reason that many persons in prisons and jails are mentally ill is because these are stressful environments. Our current best understanding of mental illnesses is that they have both genetic and environmental causes. That is, many persons may have a genetic predisposition to mental illness such as schizophrenia, bipolar affective disorder and serious depression. However, environmental factors remain important.³⁸ They may either trigger mental illness in someone with a genetic pre-disposition or be the primary cause of mental illness in someone without such a predisposition. Prisons and jails are unpleasant places, often intentionally so. One of the reasons that they are unpleasant is that they are filled with criminals. If placing someone in a hospital may be therapeutic, at least in part because it may reduce the stress associated with daily life in the modern world, prisons are apt to have the opposite effect.

38. See generally, *Mental Health: A Report of the Surgeon General* (December 1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>.

DIVERSION OF MENTALLY ILL OFFENDERS HAS ALWAYS BEEN SMALL AND MAY BE DECLINING

Diversion out of the criminal justice system of people who are mentally ill has never been large. But it is probably declining. We have already seen the ways in which deinstitutionalization may be reducing the volume of diversions by police officers. However, diversion by the court system may also be declining.

First, some criminal defendants are found unfit to stand trial because of mental illness. However, this finding usually just results in a detour to the mental health system and a delay in criminal processing, not diversion. Virtually everyone found unfit to stand trial due to a mental illness is treated, restored to fitness and returned to the criminal justice system for trial and conviction or acquittal.³⁹

Similarly, a very tiny percentage of people are found not guilty by reason of insanity. It has never been more than one third of one percent of the population. And that too, is declining. As part of the general "Get Tough on Crime" laws, we have narrowed the substantive definition of insanity and we have changed the procedural burdens.⁴⁰ Additionally, we have created an alternative called "guilty but mentally ill" which keeps people who might otherwise be diverted by the insanity defense back into prisons.⁴¹ Persons found guilty but mentally ill are confined in prisons, not mental hospitals.

Finally, we have at least the theoretical possibility, and sometimes the statutory possibility of transferring mentally ill people out of prisons and jails and into state psychiatric hospitals. Almost forty years ago, for example, Illinois adopted a statute which permitted this.⁴² However, the total number of persons diverted under this provision during the ensuing decades is in the single digits.

TREATMENT OF MENTALLY ILL PERSONS IN PRISONS AND JAILS

The explanations I have thus far offered may or may not adequately explain the numbers of persons with mental illness who are now in our prisons and jails. Nevertheless, the scope of the phenomenon is no longer seriously in doubt. What, if anything should be done about it? I start from the premise that

39. The few well-known exceptions to this general rule involve persons whose unfitness was due to a physical, not mental condition. See, for example, *Jackson v Indiana*, 406 US 715 (1972), and *People v Lang*, 498 NE2d 1105 (Ill 1986).

40. George J. Alexander and Alan W. Schefflin, *Law and Mental Disorder*, 759-780 (Carolina Academic 1998).

41. Alexander & Schefflin at 780-791.

42. Currently codified at Ill Rev Stat ch 730, §5/3-8-5 (West 2000).

we should make some effort to provide treatment to this large and growing population. However, this has proven problematic. Only sixty percent of mentally ill prison inmates and 41% of mentally ill jail inmates had received mental health services since admission to the facility.⁴³ The quality of these services, when available, is often very poor.

One of the reasons that mental health services are problematic in prisons and jails is that the idea of mental illness conflicts philosophically with imprisonment. Now, we can talk about this on a higher level of abstraction, and then we can talk about the nitty-gritty of it. The higher level of abstraction is simply free will versus determinism. The treatment of mental illnesses is based, at least in part, on a deterministic sense of human behavior whereas the criminal justice system is based on free will. I am not suggesting that the people who run our prisons are thinking about these philosophical concepts when they determine whether and how to deliver mental health services. But it may influence in some more practical ways how prisons work.

One of these mechanisms is the decline of the rehabilitative idea. For a period of time, which largely ended during the 1970's, one of the goals of incarceration was to make available to criminals an array of social services which would reduce the likelihood that they would re-offend upon release. Very little rehabilitation occurs or is intended to occur in any United States prison today.

Once you get rid of the rehabilitative idea, then acknowledging mental illness makes it harder to be tough on crime. That is, if we are left with imprisonment as simply punishment, the idea is that we are going to inflict the pain. And if we acknowledge that the pain that people with mental illness suffer from is real, we might respond, "Fine. That's what we wanted. We want you to suffer."

Alternatively, if everyone else in prison is supposed to suffer, but we excuse the mentally ill, this may exacerbate fear on the part of people who run prisons that prisoners are pretending to be mentally ill or malingering in order to avoid the pain they would otherwise receive. These concerns are further heightened by the fact that, unlike physical illnesses which often have visible symptoms, mental illnesses may be harder to diagnose and evaluated objectively. This is very troublesome in a prison where where prison administrators and employees must deal with very tough customers.

Of course, providing mental health services is not cheap. Few prisons have high quality health care services because of the cost of providing such services.

43. BJS Report at 9 (cited in note 34).

The quality of mental health services is usually lower still than the quality of other health care services.

SUPER MAXIMUM PRISONS AND THE MENTALLY ILL

There has been a more recent development, that if anything, is making the problem of mentally ill persons in prisons worse. That is, the creation, across the country, of these Super Maximum Prisons, which have been alluded to. One of the common elements of Super Maximum prisons is sensory deprivation. Norval Morris has recently written a wonderful article, not yet published, about TAMMS, which is Illinois' contribution to the Super Max development. My colleague, Jean Maclean Snyder, and I have sued this prison. Thus, in the interest of full disclosure, I must say that I am not completely objective on this topic. We have sued this prison over the fact that they take in people who are seriously mentally ill and do not provide treatment for them. One can question the very idea of putting someone who is diagnosed with a serious mental illness into a prison where one of the goals is sensory deprivation. But, in fact, part of the plan and formula of Super Max Prisons is to have sensory deprivation. Indeed, people with very serious mental illnesses are housed in these Super Max Prisons across the country.

SOLUTIONS: IS THERE ANY HOPE?

There are two possible ways to improve the current situation: (1) improve the mental health services available to persons in prisons and jails; and/or (2) reduce the number of persons with mental illness who are confined in prisons and jails. I am more optimistic about the former than the later.

Improving Mental Health Services in Prisons and Jails

There are two ways of improving mental health services in prisons and jails—legislation and litigation. Neither seem promising, at least in the short run. First, it seems unlikely that this can be accomplished through the ordinary political process. While the public seems quite willing to spend money to build more prisons, it seems much less willing to spend money to make them less unpleasant. However, it should be noted that very little attention has been paid to this topic by the media. Moreover, mental health advocates have largely ignored this issue. It is possible that some improvement could be achieved through an orchestrated and thoughtful focus on this issue by advocates.

Litigation also seems unlikely to achieve a great deal. That is true for several reasons. First, Congress has prohibited local legal aid organizations funded by the Legal Services Corporation from engaging in prison reform litigation. Second, Congress has passed additional legislation making prison reform litigation more difficult generally.⁴⁴ Thirdly, most studies have shown that *pro bono* lawyers are able to satisfy about 10% of the legal needs of the indigent. Fourth, most mental health lawyers are focused on representing persons in mental hospitals or in the community. Fifth, the legal standards applicable to these issues are quite deferential.⁴⁵ Thus, it is unlikely that we will see litigation solving these difficult problems, at least in the short run.

Diversion of Persons with Mental Illness out of the Criminal Justice System

There are several possible ways in which we could reduce the number of persons with serious mental illness who enter the criminal justice system. First, it seems completely implausible to imagine that we will reverse the deinstitutionalization movement. The financial burden on any state which chose this route would be overwhelming.

However, it is more plausible that we could improve community mental health systems and use various criminal justice mechanism to link persons with mental illness to those systems. A number of jurisdictions have improved police training and provided mental health backup services to police departments to help link persons charged with minor offenses to community treatment providers.⁴⁶

Other jurisdictions have adopted a model created for persons with substance abuse problems and created so called "mental health courts."⁴⁷ These

44. The Prison Litigation Reform Act of 1995, Pub L No 104-134, codified at 42 USC §1997e (West 2000).

45. *Youngberg v Romeo*, 457 US 307 (1982), requires merely that the state exercise professional judgment in the provision of services and provides lack of resources as a defense, at least to claims for damages. *Estelle v Gamble*, 429 US 97 (1976), holds that medical services do not violate the Eighth Amendment unless the state is deliberately indifferent to the known medical needs of inmates.

46. In Illinois, a measure designed to accomplish this passed both houses of the legislature and was presented to Governor George Ryan on May 4, 2000. Senate Bill 1599. It seems likely that this bill will take effect by the end of 2000.

47. Among the jurisdictions that have created mental health courts are Marion County (Indianapolis), Indiana, King County (Seattle) Washington, and Broward County (Ft. Lauderdale) Florida. See Symposium: Mental Health Court: Promises and Limitations (Univ of Chicago, Nov 5, 1999); Sue Ellen Christian, "Special Court for Mentally Ill in Talking Stage; Concept Working in Other Cities" Chicago Tribune 1 (Nov 7, 1999) (discussing Ft. Lauderdale and Indianapolis); "Mental Health Court: A King County District Court Pilot Program" available at <<http://www.metrokc.gov/kcdc/mhfact.htm>> (discussing Seattle).

courts identify mentally ill, non-violent offenders and order or sentence them to receive mental health services in lieu of confinement in a jail or prison. It is too early to determine whether these courts will effectively reduce the numbers of persons with mental illness in jails and prisons and whether this innovation will spread to larger, more difficult urban environments such as New York, Chicago and Los Angeles. They do, however, show promise.

A third option is to improve the delivery of community services to persons with serious mental health services *before* they engage in acts which subject them to arrest and incarceration. At present there is not a great deal of public interest in increasing public expenditures on persons with mental illness. However, we are likely to see improvements in the treatment available for mental illness, particularly the development of additional pharmacological treatments which have fewer side effects. This may permit improved services without increased public expenditures. Additionally, private health insurance coverage of mental illnesses is improving due to the recent enactment in twenty-nine states of legislation requiring insurance companies to provide “parity” to coverage of mental illness in their health insurance policies. This development may also reduce the number of persons with serious mental illnesses which are untreated and thereby reduce the number of such persons who end up in the criminal justice system.

Finally, there has been increased public attention focused on the large number of persons with mental illnesses in prisons and jails. This has led to at least the beginning of collaboration between prison reform advocates and mental health advocates. Whether this attention and collaboration will have tangible results remains to be seen.

In sum, it is fair to say that the current picture concerning the treatment of persons with mental illness in prisons and jails is grim. However, there are at least some rays of hope on the horizon.

INCARCERATING CHILDREN

BERNARDINE DOHRN[†]

We have just ten minutes for a crash course about the criminalization of youth, a process that has transformed the landscape for children in the United

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States over the past fifteen years. A friend refers to the increasing blizzard of labels with which we perceive our children as “bad”, “sad”, “mad”, or “can’t add”. Children who are bad are sent into the juvenile justice system or increasingly into the adult criminal system,⁴⁸ children who are sad go into the child welfare system, children who are mad are placed into the mental health system, and children who can’t add are assigned to special education. I posit to you that all of those children have become increasingly “bad” in both the public mind and in social justice policies. As a society we have, in many ways, demonized, criminalized, and, increasingly, arrested and incarcerated our children within the major institutions where youngsters find themselves. Although this development has reconfigured the world for all youth, inequality characterizes the world of juvenile justice.

The terrain which children inhabit—schools, playgrounds, families, institutions—has been reconfigured as children have become a trope for crime, violence, and the worst fears of adults. Rather than reviewing statistics here, two cover drawings from the *New Yorker* illustrate this well. [*holding up New Yorker covers*] First is a youngster coming through the schoolhouse door and setting off the metal detectors as a brutal cop greets and challenges him. The braces on his teeth have set off the school metal detector. It is titled “Back to School.”⁴⁹ The second cover is a pastel illustration of an angelic youngster on a beach, raptly listening to a conch seashell, while around her the adults are listening to their cell phones. This drawing is entitled “Higher Calling.”⁵⁰

Four elements characterize the treatment of children by the criminal and juvenile justice systems, and the political environment which shapes law enforcement policies. First is the common perception that children today are different from how we were. In 1998, two seven and eight year old boys in the Englewood District of Chicago, just West of this university, were arrested for the brutal sexual murder of eleven year old Ryan Harris, and paraded before the public, handcuffed, as the youngest child murderers ever. One must ask why this seemed credible to the prosecutors, the police, the judges, the criminal justice system, the media and the public for the month and a half which was required to unravel that case, throw out the so-called “confessions” and dismiss the charges.

The public and the law enforcement apparatus has become accustomed to thinking of children as demons, as remorseless, as a new breed, as non-human, as animals, as diseases like an epidemic, a plague, or a virus. A decade of nightly

48. Alex Kotlowitz, *Children On Trial*, 74 (45) *The New Yorker* 42-53 (Feb 8, 1999).

49. Owen Smith, *Back to School*, 75 (26) *The New Yorker* (Sept 13, 1999).

50. Carter Goodrich, *Higher Calling*, 74 (22) *The New Yorker* (Aug 3, 1998).

newscasts about youth violence, where each example of youth homicide “has legs”—is multiplied into endless stories for each extreme instance—carries an underlying proposition that children today are different than us. Although I must admit, with three sons who are now college age, that even I find some of today’s youth behavior alien and distasteful, and I struggle to separate the kids from their behavior, as all good parents do. Nonetheless, you may remember this little commentary: “The young are changeable in their desires and quickly sated; they have violent desires which are soon appeased . . . [T]hey are high-minded, for they have not yet been humbled by life . . . All their mistakes are due to excess and vehemence . . . They think they know everything and are positive.” That, of course, was Aristotle, writing in the fourth century BCE.⁵¹ [laughter] The timeless folly doesn’t seem to slow us down one whit.

Second, there is not today a youth crime epidemic. Yet for every serious violent youth offense that you will learn about in the next year, it will be tied, in its media coverage, to a youth crime epidemic. Youth offending is significantly down four years in a row. Only five percent of youth in the United States are ever arrested for anything. Ninety-four percent of all youth arrests are for non-violent offenses. Ninety-four percent. If you ask the public how many kids are arrested for violent crimes, their estimates: urban, suburban, White, Black, rich, poor, are usually around sixty percent. It is actually six percent. Only one half of one percent of all youth are ever arrested for a serious violent offense. There are, on any given day in the United States, well over a hundred thousand children incarcerated in both public and private facilities—the vast majority of them for property, drug, and status offenses.

There *was* a tragic and shocking ten year youth crime epidemic. The tripling of youth homicides between 1985 and 1994 has been carefully analyzed by our colleagues Professors Blumstein and Zimring with startling implications.⁵² While gun homicides by children tripled, non-gun homicides remained flat for that entire decade. So the three-fold increase in youth homicides during that period had an instrumental explanation—other than the bromide that youth today are disrespectful and don’t rise when adults enter the room. Although youth homicides have declined 50% since 1995,⁵³ fifteen youth a day continue to be killed by guns in the United States—a classroom of children disappear every other day. But as Frank Zimring once said in a memorable interview, “A tragedy is not a trend.”

51. See Aristotle, *Rhetoric* 2.12.3-14, cited in Stephen Bertman, ed, *The Conflict of Generations in Ancient Greece and Rome* 43 (Gruener 1976).

52. Franklin E. Zimring, *American Youth Violence* 35-36 (Oxford 1998).

53. David Marash, *Nightline* (May 31, 2000).

Although we all would agree that some few youth must be incapacitated and isolated, I am not the extremist that Shakespeare was when he wrote this in *The Winter's Tale*: "I would there were no age between ten and three-and-twenty, or that youth would sleep out the rest, for there is nothing in the between but getting wenches with child, wronging the ancients, stealing, fighting."⁵⁴ In fact, if we followed Shakespeare's recommendation to capture and put to sleep all youth between the age of ten, and three and twenty, there would still be ninety percent of the violent crime in America. That is to say, adult crime. The focus on youth crime (and youth crime translates automatically in the public mind as *violent* youth crime, even though the facts belie it) is a social choice, a political choice, not a strategic approach to public safety or to crime prevention.

Third, the criminalization of youth has dramatically impacted schools, teaching, and the education of children. Never punish a child by denying them an education: that would seem to be a fundamental tenant of democracy—a principle of John Dewey, Jane Addams and Septima Clark. Rapidly, almost invisibly, that principle has been turned on its head. Federal legislation, a statutory provision in the Safe Schools Act, initially mandated expulsion for gun possession in public schools as a condition of federal funding. A year later, the word "gun" was amended to "weapon" possession, and the snowball raced downhill. Today, every school has disciplinary codes mandating expulsion or suspension for a wide array of misbehavior, characterizing as "violent" typical schoolyard scuffles, threatening words and writings, bringing grandfather's cane to show-and-tell, and possession of Alka-Selzer. Within five years, schools in America have become fortresses, patrolled by armed police. Educators have ceded their pedagogic responsibility to law enforcement officials. What was once misbehavior which resulted in a visit to the vice-principal's office, a call to parents, or afterschool detention hall now becomes a formal matter for law enforcement and legal adjudication—and more importantly, exclusion of students from school.

School-based arrests have escalated. Police who arrest youngsters on school grounds may not even be required to report their actions to the principal and teachers. In Chicago, a public school policy requires that children arrested *off* school grounds, on the weekend, for an offense having nothing to do with school, be expelled from school.⁵⁵ There is no clear nexus between school safety,

54. William Shakespeare, *The Winter's Tale*, Act III, Scene 3, in *The Late Romances*, ed. David Bevington, 400 (Bantam 1988)

55. Steven A. Drizin, *Public Schools Need to Take Closer Look at Expulsion Policy*, 143 (49) *Chi Daily L Bull* 2 (March 12, 1997).

which is everyone's goal, and current policies of policing schools and zero tolerance.

Fourth, there are two systems of justice for children—a public system and a private system. Here, it is possible to see that we know what works for children in trouble.

African American children are disproportionately represented at every stage of law enforcement and the numbers amplify as one goes deeper into legal adjudication and incarceration. Although Black youth comprise fifteen percent of the population in the United States, they represent up to twenty-six percent of the arrests, thirty-one percent of the court referrals, thirty-six percent of those who are formally charged, forty-four percent of those detained pending trial, forty-six percent of those incarcerated after trial, and fifty-two percent of those transferred by judges and tried as adults in adult criminal court instead of in juvenile court. The incarceration rate for Latino youth is also sixty percent higher than for White youth.⁵⁶

Some kids go into the public system of police, courts and corrections, but youngsters whose parents have resources, largely defined by race and income, remain outside the public system for the same misbehavior. Children of privilege who offend may be committed to private mental facilities or hospitals, sent to military or parochial schools, or shipped out of state to live with relatives. Many private facilities, where a majority of White children are placed, are not lovely and may also be harsh for youth. But families who have a choice, when their kids are in trouble with the law, remove their child from the situation, insulate them, provide structure, and make sure that the results of their misbehaving conduct are not lethal to their future opportunities. Most grow out of their wild ways. In this way, society knows what works for kids, because that is what we want for our own children when they are in crisis.

The criminalization of youth has profound, distorting consequences for our common future. There are now eight juvenile correctional facilities in Illinois. One was built in the 1990's, and two are projected for the current '00 decade. Local counties are burdened with their juvenile detention populations. Again, after three decades of effort to remove children from jails with adults, children in Illinois are being held in adult jails. It costs \$36,000 per year, to

56. Eileen Poe-Yamagata and Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*, Building Blocks for Youth Initiative, 2-3, 8, 28 (Youth Law Center, April 2000) (visited 21 June, 2000) <<http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf>>.

incarcerate a child in a state facility in Illinois.⁵⁷ That is the tuition for two students to Exeter or Andover.⁵⁸

Human rights tracking illuminates the terrible consequences of criminalizing youth: what happens to kids at the largely invisible, deep end of juvenile and criminal justice. Human Rights Watch recently published four reports on kids incarcerated in the United States. One documents conditions in Georgia's juvenile "training schools";⁵⁹ one tracks the situation of youth tried as adults in Maryland;⁶⁰ and one describes youth corrections in Louisiana.⁶¹ The fourth report charts the conditions of confinement for unaccompanied children in INS custody.⁶² Another study reveals the maltreatment of children in the private, for-profit institution in Tallulah, Mississippi, and the Justice Department has sued the State of Louisiana and Wackenhut Corrections Corp. for "dangerous and life-threatening conditions" at the Jena Juvenile Justice Center.⁶³ Together, this monitoring constitute a remarkable documentary of the ugly, "snake-pit" consequences of "Get Tough With Kids" policies. Amnesty International, in its first ever report on human rights violations in the United States, produced "Betraying the Young: Human Rights Violations Against Children in the US Justice System," which focuses on abuses involving the incarceration of youngsters.⁶⁴ A single date count in the United States, by the Department of Justice on October 29, 1997, found a hundred and six thousand kids in residential placement, public and private; six thousand five hundred youth held in adult jails pending trial as adults, and

57. Taxpayers' Federation of Illinois, *The Price Tag for Prisons: A Legislative Issue* 3 (May 2000). For overview of report see TFI Online, Publications (visited June 28, 2000) <<http://www.taxpayfedil.org>>.

58. Tuition for Phillips Exeter Academy and Phillips Academy Andover is \$18,900 per year. The cost of room, board, and tuition is \$25,100 at Exeter and \$24,500 at Andover. *Admission to Exeter*, (visited June 7, 2000) <<http://www.exeter.edu/admissions/paying.html>>; *Andover Homepage*, (visited June 7, 2000) <<http://www.andover.edu>>.

59. Human Rights Watch, *Modern Capital of Human Rights?: Abuses in the State of Georgia* (July 1996), available online (visited June 28, 2000) <<http://www.hrw.org/hrw/reports/1996/Us.htm>>.

60. Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (November 1999), available online (visited June 28, 2000) <<http://www.hrw.org/reports/1999/maryland/>>.

61. Human Rights Watch Children's Rights Project, *Children in Confinement in Louisiana* (October 1995).

62. Human Rights Watch Children's Rights Project, *Slipping Through the Cracks: Unaccompanied Children Detained by the US Immigration and Naturalization Service* (April 1997), available online (visited June 28, 2000) <www.hrw.org/hrw/reports/1997/uscrcks/>.

63. 4 (7) *Corrections Journal* 1-2 (April 2000); and Fox Butterfield, *Privately Run Juvenile Prison in Louisiana is Attacked for Abuse of 6 Inmates*, *NY Times* A14 (March 16, 2000).

64. Amnesty International, *United States of America: Rights for All, Betraying the Young*, AI Index: AMR 51/57/98, 12-45 (November 1998).

fifteen hundred children held in adult jails awaiting trial as juveniles.⁶⁵ That data is now two-and-a-half years old; the situation could only be worse.

We have not specifically addressed the issue of gender here. While the prison population in Illinois in the past decade increased ninety-seven percent for adults alone, for women prisoners the increase was one hundred and eighty-one percent. There are 2,760 women incarcerated in the State of Illinois, compared to 982 at the beginning of the decade. The increase in African American females in prison was two hundred and thirty-two percent. Young women are the fastest growing population in juvenile justice as well. The consequences of the prison boom for children of incarcerated parents is astronomical.⁶⁶

This is a map of Illinois prisons and juvenile correctional facilities. [*holding up map of Illinois*] This is the landscape of prisons today in Illinois. No one can say they didn't know. Thank you.

RACE AND IMPRISONMENT

RANDOLPH STONE†

I've been asked to talk about race and the criminal justice system. I've given a version of this talk a number of times and it can be rather depressing to discuss the situation of African Americans in the criminal justice system, particularly as it relates to the imprisonment rate. I was scanning some titles of previous presentations on this subject: one was "When Being Young, Black, and Male Equals Probable Cause," another, "From Social Net to Dragnet," "The Racism is Permanent Thesis," "Black Male Genocide: A Final Solution," and finally, one simply entitled, "The New Slavery." The titles reflect the despair in the way some commentators look at the issue of African Americans and the United States criminal justice system.

As Professor Blumstein noted earlier, there are two million people behind bars in jails and prisons in this country today. Only about forty percent of that two million are violent offenders. Let's review some of the unfortunately familiar racial statistics. In 1997, even though only thirteen percent of the U.S. population, half of the 1.2 million state and federal prisoners, some 550,000,

65. US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 186 (1999).

66. See Marc Mauer, Cathy Potler, and Richard Wolf, *Gender and Justice: Women, Drugs, and Sentencing Policy* (The Sentencing Project 1999).

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were African American. African American males are incarcerated at six, almost seven times the rate of Whites. And as Professor Blumstein pointed out, a Black male child born today has about a thirty percent chance of being incarcerated at some point in his life, compared to only four percent for a Caucasian. I am reminded by some of the graphs we have seen, that in 1926, African Americans, while about 12% of the U.S. population, accounted for twenty-one percent of the prison population. By 1954, it was thirty percent. Still bad, but today it is what should be a shocking fifty percent. In 1989, one out of four African Americans between the ages of 20 and 29 were in prison, on probation, on parole or awaiting trial.⁶⁷ By 1995, it was one out of three.⁶⁸ Predictions are that given our present criminal justice policies the trend will worsen. And in fact in some cities, in Baltimore for example, it's already one out of two—fifty-six percent.⁶⁹ In Washington D.C according to a recent report, it's forty-two percent.⁷⁰ While the numbers are frightening and depressing, when you actually go to a jail, or a prison, or to court, say a drug court at 26th and California, the Criminal Courts building in Chicago, and look behind the courtroom in the lock-up, you see for the most part young African American men and boys. The numbers are depressing, but when you see the numbers turn to human beings, it's more than depressing.

How did we, as a society, get to this point? There are a number of basic themes with variations and rationales. One is that racism or discrimination (direct, institutional or unconscious), both in the criminal justice system and in factors pushing Black people into the criminal justice system contributes mightily to the overrepresentation of Black people in this countries jails and prisons. The other rationale perhaps has a more socio-economic basis, whereas Professor Blumstein has pointed out, the imprisonment rates really mirror to a large extent, the arrest rates. However, if you look at drug arrests in particular, you may conclude that these arrests are also influenced by racism, either unconscious, institutional, or direct.

In this country, to explain the disparity related to the imprisonment of African-Americans, I think history provides some obvious starting points. Without pretending to be comprehensive, perhaps a cursory overview would be instructive. First, the over 200 years of violent, brutal, and degrading slavery

67. The Sentencing Project, *Young Black Men and the Criminal Justice System: A Growing National Problem* (1990).

68. Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later I* (Sentencing Project 1995).

69. Jerome C. Miller, *Hobbling a Generation: Young African American Males in Washington D.C.'s Criminal Justice System* (April, 1992) National Center on Institutions and Alternatives (visited June 23, 2000) <<http://www.igc.org/ncia/balhob.html>>.

70. Miller, *Hobbling a Generation*, (visited June 23, 2000) <<http://www.igc.org/ncia/dchob.html>>.

imposed on African-Americans and designed to destroy families, culture, and hope has had a tremendous impact. The subsequent 100 plus years of legal and extra-legal discrimination and violence coupled with massive urban migration resulting in residential segregation that still exists in many major urban areas today has not helped. Finally, red-lining by insurance companies and banks, substandard housing, discrimination in education and employment opportunities, and hostile law enforcement are a few additional factors that may contribute both to increased criminal behavior and discriminatory enforcement of the law.

Because of this history, some observers are amazed that so many African-Americans manage to avoid the criminal justice system. As Norval Morris noted a few years ago, if you control for socio-economic factors and compare middle-class Blacks with Whites in the same income category, the crime offending rates are virtually indistinguishable.⁷¹ So in essence when we talk about African-Americans in jails and prisons, we're talking in large part, about the so-called underclass: poor people confined for several generations to residentially segregated conditions with failing schools, limited social services, and decreasing employment opportunities.

Ms. Dohrn just talked about the zero tolerance policies as it relates to schools. In some of our prisons, forty percent or so of the inmates are functionally illiterate. In the county jails, perhaps seventy-five to eighty percent have not graduated from high school.⁷² And at the same time, we have zero tolerance programs kicking poor and minority children out of high school. If we know that we are substantially increasing the likelihood of these children being locked up later in life, then it is clearly an act of racism to continue such a policy. If we do not know, then perhaps we can refer to such policies as institutional or unconscious racism. In either case, we must do better.

In looking at what some people call facially neutral policies, such as criminal history records in making decisions, we know that those too are subject to unconscious racism. We know that people in some communities get criminal records for what are called youthful indiscretions in other communities. At the University of Michigan last week at a seminar on juvenile justice, while discussing the eleven-year-old who was prosecuted as an adult for murder, the prosecutor pulled out a sheet of paper and held it up to indicate

71. Norval Morris, *Race, drugs, and imprisonment*, Chicago Tribune, Perspectives 13 (March 30, 1993).

72. See Jeffery Bills, *Jackson Seeks Added Drug-Treatment Beds; At Least 2000 More Urged for County*, Chicago Tribune, Chicagoland 3 (January 1, 1995) (92% of Cook County Jail inmates dropped out of high school and 94% are functionally illiterate); and Rob Karwath, *Study Links High Dropout Rate to State Prison Overcrowding*, Chicago Tribune, Chicagoland 3 (September 15, 1991) (75% of IL prisoners have not completed high school).

the number of times that this child had had contact with law enforcement as her rationale for prosecuting him as an adult. It turns out that out of all of these “contacts”, none of them were convictions or adjudications of delinquency. Those of us in the business know, that in some communities, arrests may be frequent and can often occur absent criminal activity much less conviction. In some communities, people are referred to treatment and situations are handled in-house after consultation with parents. In other communities people are arrested and prosecuted.

Particularly disturbing, is the seepage of our worst criminal justice policies into the juvenile system, as Bernardine just referred to, and that is really scary to me. What we see now in Chicago, for example, are young Black teenagers who are transferred from juvenile to adult courts for drug offenses within a thousand feet of public housing. In the statistics I have seen for October, November, and December 1999, about a hundred kids total were transferred from juvenile court to adult court. Six were for murder charges. Fifty of them were for drug offenses.⁷³ These are kids who, at fifteen and sixteen, will now have permanent felony convictions, whose life chances will be severely restricted. Contrast this situation with that for the kids from the suburbs. The White kids in the suburbs who may be engaging in the same sort of activity, if arrested at all, will go to juvenile court, simply because there is little or no public housing in the suburbs. Some would say that’s another example of an institutional or unconscious racism, although since we all know that public housing in Cook County is 99 percent African American and Latino, I don’t know how unconscious those policies can be.

Other studies have found bias in prosecutorial discretion related to charging policies and many have documented how race has a significant effect on incarceration decisions and sentencing policies.⁷⁴ The quality of counsel and the resources provided to counsel for the poor and racial minorities are also lacking. And we know in the death penalty context, that the race of the victim has a definite effect on whether one will or will not be sentenced to the ultimate penalty. And that seepage occurs, I believe, in your less serious offenses as well.

Another reason that people point to for the increasing incarceration rates for Black men are crime wars: the use of crime as a political issue beginning with Nixon’s wars on drugs and crime and how the law and order movement was also sparked by the civil disturbances and riots in the late 60’s, coupled

73. Juvenile Transfer Advocacy Unit, *Juvenile Transfers—Comparison of Monthly Summaries*, Office of the Cook County Public Defender (January, 2000).

74. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham Law Review* 13 (1998)

with the rise of militancy in the late 60s and early 70s. Some people have suggested that the movement for civil rights also fueled the drive towards mass incarceration of young, Black men. Then there's crime policy. Anytime you have a "Get Tough on Crime" policy, it's going to impact those who are most disadvantaged. For example, in Milwaukee, at one time, possession of small amounts of marijuana was a misdemeanor. But in some suburbs, it was treated as an ordinance violation. So you have inner city kids getting criminal records for possession of marijuana while kids in the suburbs were given a ticket and had to pay a fine.

I have tried to catalogue a number of interrelated and overlapping factors but as a friend recently pointed out to me, what we are really doing is attempting to mop up after 200 plus years of slavery and another 100 plus years of oppression.

Although the problem is immense, I think we can do better and I'm not quite as pessimistic as Professor Zimring is, although there's no reason to expect a big political shift in criminal justice policy. But if I was the governor of a state or could advise the governor, I would start with a moratorium on jail and prison construction while diverting those funds to other areas. My big concern about these 1.8 million people in prison today is that most of them are coming out. And they're coming out in the tens (if not hundreds) of thousands per year at increasing numbers. Therefore it's critical that we develop some form of reentry centers, that provide education, job training, and mental health, drug and alcohol abuse treatment to the people who will be coming out in the near future. And I have other potential solutions that hopefully we can discuss during the question and answer period. Thank you.

AUDIENCE QUESTIONS AND DISCUSSION:

AUDIENCE: What I want to ask the panel is how the techniques of oppression that are being used on criminals are migrating to the community, specifically, the Black community?

ZIMRING: What I want to suggest are two reasons why prison conditions are extraordinarily important litigation and protest issues for people in Year 2000 in ways that might not have been as apparent twenty or thirty years ago. One of the reasons that law professors get interested in imprisonment and conditions of imprisonment in civil society is not simply because prisons are interesting places on their own, but because of where they are in the hierarchy of relations between government and its subjects, and that is, they're right at the bottom. How you define the relationship between the government and the least of its citizens turns out to be extraordinarily important in terms of

standards of civil liberty and stability throughout government. So it's not just a question of the prison and the community, but the prison and other sorts of institutions. It's a question of how you address problems of dependency. Because one of the things that imprisonment is, is a created dependency. For that reason, the issue is the mirror image of less eligibility. Even if all you're worried about is general social standards, that means you should have a special worry for prison, but whether you should have a special worry for prison in all eras or not, if the trend line is as far up as it is in year 2000, and it's not going to be turned upside down soon, that suggests that imprisonment has become the fifty-first American state, and whatever sort of chronic conditions we have had, these are now conditions which are of much more importance in the lives of many more people than ever before. So those are two reasons for the general focus.

There is something else happening that I just want to underline and that is the Super Max prison, which is not created out of criminological necessity, but is the one situation, I think, where we went directly from a motion picture to an institution of social control. "Silence of the Lambs" is probably the legitimate paternity of the Super Max prison construction in the United States. It was made up around an imaginary prisoner, as much as around Marian, Illinois and the other real world phenomena. Everything that I am saying about the less eligibility problems that exist in prisons generally exists in spades for the Super Max. It the scariest single thing going on socially in a not very civil country.

MORRIS: I think it's accurate that the prison is a very good barometer of the general level of social civility in a country. I think it's another way of looking at the two Americas. Randal?

STONE: I just want to make three very brief points. One is the privatization issue. What you're seeing around the country now is big business moving into prisons and the correctional industry. You see advertisements at conferences: "Crime is booming. Let's make money." These are conferences where people come together to figure out how to make money on the prison boom. Secondly, I think in some states now, the costs of the correctional industry are exceeding expenditures for higher education. Some states are spending more on prisons, for the first time, than they are on their college and university systems.⁷⁵ The third area, I guess, is more an impact on culture, particularly at two levels in African American communities. One, where there

75. Robert Worth, *A Model Prison: McKean Federal Correctional Institution*, 276 (5) *The Atlantic Monthly* 38 (November, 1995), (visited June 23, 2000) <<http://www.theatlantic.com/issues/95nov/prisons/prisons.htm>>.

is a churning effect, where more and more African Americans are coming through this system, and expected to rotate through the system. The other side of the coin, obviously, is when we're in these settings here in higher education, universities, and law schools and people talk about the pool problem. Where are the qualified African American law professors, etc? Where is the next Thurgood Marshall? Is he somewhere in Cook County jail, in a prison, on parole, or kicked out of school with a felony conviction at 15?

DOHRN: Two additional notes about the long term consequences of the prison-industrial complex on society. First, the fastest growing union in the United States is the prison guard union *and* the fastest growing major in colleges and universities is law enforcement. Second, The Sentencing Project published an extraordinary study, revealing something those in the field almost knew, but never quite said out loud. Significant sectors have been disenfranchised, or prohibited from voting, by policies of incarceration and imprisonment. Young African American men are *permanently* disenfranchised by felony convictions in many states, particularly Southern states, and the temporary or interim disenfranchisement rate is a decisive proportion of eligible voters. The report warns of a new form of slavery.⁷⁶

AUDIENCE: As scholars and practitioners, how do you respond to the arguments used to broaden the net of incarceration through gang loitering ordinances? These ordinances are usually justified on the theory that neighborhood residents have a right to safety and security. In the context of this discussion, and the incarceration mentality of our society, how do you respond to folks who say, "Well, I think it's bad that we're locking people up, but at the same time, I'd like to go outside my house"?

BLUMSTEIN: As you expand that net, you exacerbate all the problems we've been talking about. We spend something in the order of twenty thousand dollars per prisoner, which is forty billion dollars right now that could be used in many other ways. We are also diminishing the effectiveness of the prison incarceration system in getting high-rate offenders out of the system. We're using a sledgehammer to deal with marginal problems in this society that are going to have deleterious effects. Professor Stone talked about the numbers... we're going to have about half a million people exiting prison per year over the next number of years. How is our society going to deal with them? What has been the deleterious effect on them as a consequence of their socialization into a prison environment? These are fundamental concerns about the costs to society, both monetary and societal, of expanding the

76. *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the U.S.* (The Sentencing Project 1998).

incarceration. Diminishing the stigma, diminishing deterrent effect, bringing prison culture back into the street. All of these require a planning beyond the immediate nuisance associated with loiterers.

COUNCELLOR DOUBLE-FEE.



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