

# Manufacturing Social Violence: The Prison Paradox & Future Escapes

## SpearIt\*

America is the land of the second chance, and when the prison gates open, the path ahead should lead to a better life.

- George W. Bush from 2004 State of the Union Address

When the prison gates fly open, the dragons will emerge...

- George Jackson from *Soledad Brother*

### I. INTRODUCTION

The prison system, at both state and federal levels, has been experiencing unprecedented growth over the last thirty years,<sup>1</sup> accompanied by a striking spike in violence therein. Guiding this explosion in prisoner population is a shift in public policy that has shied away from rehabilitative or correctional concerns in favor of ideals guided by retributive, and to a lesser degree, detainment principles. The two ideals have been embraced to the detriment of rehabilitation and practical death of deterrence.<sup>2</sup> The point is obvious: the more people put into the criminal justice system, the less capable it becomes in controlling crime through deterrence.<sup>3</sup> Although some have recently argued for deterrent sentencing as a crime prevention strategy,<sup>4</sup> the predominant trend “represents a decisive turn away from the human relations model because it

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\* The author earned a Master’s in Theological Studies from Harvard University in 2000 and Ph.D. from the University of California, Santa Barbara in Religious Studies in 2006. Currently he is a J.D. student at the University of California, Berkeley School of Law, class of 2009 and teaches for the Prison University Project at San Quentin State Prison. The author would like to extend special thanks to Professor Jonathan Simon, Dean Victoria Ortiz, Keramet A. Reiter, and Mojgone Azemun for helping to push this work forward—I am greatly indebted.

1. THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY THREE YEARS OF CONSECUTIVE GROWTH (2006), [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_newfigures.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf).

2. HENRY N. PONTELL, A CAPACITY TO PUNISH: THE ECOLOGY OF CRIME AND PUNISHMENT 104 (1984).

3. *Id.* at 107.

4. ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 45 (1999).

rejects the principle that rehabilitation is a goal of imprisonment. More precisely, it rejects the idea that prisons have goals at all.”<sup>5</sup>

Today, penitentiaries operate in an environment that is radically different from that of its 18<sup>th</sup> Century creators. Yet, nearly two hundred years later, Jonathan Simon’s *Governing Through Crime* (2007) depicts how we have achieved a state of governance through crime rooted in fear. In this new regime, punishment knows no limits as the author notes, “Virtually no constitutional limitations have been found on the amount of prison time as punishment.”<sup>6</sup> These combined forces have produced a number of complex and contradictory results, the most perplexing of which has been society’s subsequent nod of approval toward prison expansion for three decades and counting.<sup>7</sup> This alarming trend, however, was sounded by Sanford H. Kadish in 1967, when he declared American criminal jurisprudence to be in a “crisis of overcriminalization.”<sup>8</sup> Yet if one looks at the astounding increase of felonies that are now punishable by imprisonment compared to the 1960s, one finds that in places like California, Kadish’s crisis has worsened. These shifts in public attitude, then, combined with heavy legislating and sentencing, are seen to be overwhelmingly responsible for current conditions in corrections.

As public vengeance and victim’s rights have become orthodoxy in punishment, prisoner’s rights have diminished in turn. At the federal level, the combination of the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act present what has been described as a nearly “impenetrable wall” against prisoners legal redress for violation of human rights.<sup>9</sup> Simultaneously, at the state level, studies have repeatedly shown that prison-acquired aggression often finds its way back to the streets and to families through ex-prisoners, guards, or other means. This aggressive influence on the outside world presents a somewhat backward political picture since this institution—meant to increase public safety—poses adverse consequences for society. This is especially evident in California, whose mission statement declares, “We enhance public safety through safe and secure incarceration of offenders, effective parole supervision, and rehabilitative strategies to successfully reintegrate offenders into our communities.”<sup>10</sup> In the

5. Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 114 (1987).

6. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 31 (2007); see also *Megan’s Law: Crime and Democracy in Late Modern America*, 25 Law & Soc. Inquiry, 1111, 1111 (2000).

7. See generally Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, 4 MEASUREMENT AND ANALYSIS OF CRIME AND JUST. 451 (2000).

8. SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 21 (1987). 85

9. TARA HERIVEL & PAUL WRIGHT, *PRISON NATION: THE WAREHOUSING OF AMERICA’S POOR* 279 (2002).

10. California Department of Corrections and Rehabilitation,

pages that follow, I offer a set of data that documents the various threats posed by prisons to ordinary citizens, which in the aggregate undermines this very mission.

The following section, *Prisons and Society: Dangerous Dialectics*, examines some of these tensions between prison violence and that found in civil society. It looks at the myriad ways prisons link to violence outside of prison. The section begins by surveying contemporary studies in prison violence, which is complemented by an examination of prison guards and the effects of work on them and their domestic lives. These two parts are followed by a brief survey of socio-legal literature that comments on this phenomenon, and provides a solid theoretical framework to consider the qualitative data in the next section.

*Screams from the Cellblock*, attempts to elaborate on the meaning of violence behind bars. It considers the empirical and qualitative dimensions of prison violence and its social side-effects by presenting original data collected in interviews with ex-prisoners. These real-life commentaries offer much insight to daily existence behind prison walls and provide a sobering look into the thoughts and memories of some of the many thousands of yearly parolees who find their way back to the city streets, suburbs, and beyond. These interviews are complemented by a survey of the voices found in American prison literature. When combined, these sources paint a bleak picture of the criminal justice system, one that may be headed for disaster.

*Policy: What to do?* offers a set of policy recommendations to bring relief to a problem that has gone nearly unnoticed in mainstream public debate, but has been described as a “crisis” in scholarly circles for some time now.<sup>11</sup> But according to other scholars, talk of “crisis” is “clearly inappropriate for a situation that has now endured for several decades.”<sup>12</sup> As Dean Erwin Chemerinsky recently stated at the 2008 Caleb Foote Symposium, *Prison Reform in California*, the crisis has reached a point where we must now talk in terms of “catastrophe.”<sup>13</sup> Taking these perspectives in mind, this section offers a distillation and synthesis of what penal and prisoner rights reformers have been advocating for many years. Even though many of these recommendations are restatements of suggestions made decades ago, like Kadish’s trumpet call, they remain as relevant as ever, providing a set of lessons that can help both

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[http://www.cdcr.ca.gov/About\\_CDRC/docs/mission.pdf](http://www.cdcr.ca.gov/About_CDRC/docs/mission.pdf) (last visited Nov. 3, 2008).

11. Consider Professor Jonathan Simon’s 2007 course at UC Berkeley School of Law entitled “The California Prison Crisis”; RUTH GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); *AMERICA’S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICIES* (Stephen D. Gottfredson & Sean D. McConville eds., 1987).

12. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 19 (2001).

13. This conference was sponsored by the Berkeley Center for Criminal Justice held on Oct. 10, 2008 at the UC Berkeley School of Law.

society and prisoners escape from the prison paradox. This concluding portion of the study reveals, perhaps, the greatest paradox of all—namely, that daily we are reminded about the many ways prisons or their by-products are linked to violence in civil society, yet hardly anyone dares to shoot a suspicious eye at the institution. Equally ironic is that American taxpayers continue to pour more money and faith into the prison system than ever before.

## II. PRISONS & SOCIETY: DANGEROUS DIALECTICS

Two decades ago, Mark S. Fleisher's *Warehousing Violence* (1989) told of the porous nature of penitentiaries, and specifically, of the relationship between street life and prison life.<sup>14</sup> In this ethnography of Lompoc inmate culture, the researcher notes that inmates who grew up living by rules of the street find prison advantageous because it strengthens their "social identities as convicts and as street gangsters."<sup>15</sup> In such situations, a reputation built up in prison can translate into a major resume on the street. Although Fleisher's study explicitly connected the cultural patterns between street and prison life, other research has developed this theme.

In *A World of Violence* (1995), Matthew Silberman specifies the two chief ways that prisons threaten society: "The prison system often releases individuals who are more dangerous than when they entered prison...Ironically, the violent adaptations that occur in today's prisons are brought to the streets by the released convict, creating a vicious cycle of violence between society and the prison system designed to stop violence."<sup>16</sup> In this logic, one goes to prison and eventually exits back to society, *more dangerous* than before. Such data points to a proposition that prisons can function as incubators that breed violence inside prison and beyond.

More recently, Rosevelt Noble's *Black Rage* (2007) has asserted that scholars have undermined the extent to which prison violence connects to violence on the outside.<sup>17</sup> He writes, "In most studies of staff violence in prison, criminologists have failed to consider the *spill-over* effect of inmate violence."<sup>18</sup> In an attempt to help fill this lacuna in study, what follows examines how "spill-over" violence is caused not only by inmates, but also by guards.

One researcher has written that inmates are at risk "the minute they enter prison to the moment they leave."<sup>19</sup> Although this may be overstating the point, danger is clearly a part of prison life. Joan Petersilia has noted that new

14. MARK S. FLEISHER, *WAREHOUSING VIOLENCE* (1989).

15. *Id.* at 131.

16. MATHEW SILBERMAN, *A WORLD OF VIOLENCE* 173-74 (1995).

17. ROSEVELT L. NOBLE, *BLACK RAGE IN THE AMERICAN PRISON SYSTEM* (2006). 87

18. *Id.* at 235.

19. Olga Giller, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659, 687.

prisoners turn to gangs for protection once they are incarcerated.<sup>20</sup> This collateral effect, especially for those who join Chicano/Mexican gangs, can mean a lifetime commitment to a gang. The consequence is further sources of violence for those departing prison: on the street one may have to perpetrate violence on behalf of the gang simply to avoid becoming a target of the gang himself. Further, the same gang member is a general target for rival gangs. So, whether the threat comes from one's own gang or from rivals, these unfortunate cycles suggest that an inextricable relationship exists between events in prison and what happens on the street, a phenomenon that should be of concern to all.

### *A. Burgeoning the Belly of the Beast*

Michel Foucault's *Discipline and Punish* (1975) has traced the development of the modern prison as a desired improvement of the violent punishment that guided previous generations of penology.<sup>21</sup> For him, the right to punish an offender is an extension of Rousseau's social contract, "a formulation that opposes an individual to the entire social body; in order to punish him, society has the right to oppose him in his entirety...the offender becomes the common enemy. Indeed he is worse than an enemy for it is from within society that he delivers his blows—he is nothing less than a traitor...a monster, a madman, perhaps, a sick and, before long, abnormal individual."<sup>22</sup> This attitude provides insight to the stark mechanics operating toward the objectification of prisoners, which, for society, works to justify the brutality behind bars. Far away from the prying eyes of the public, the prison becomes a "laboratory in which the state seemingly has all the advantages, the imprisoned having as resources only resistance, manipulation, will, or blind faith."<sup>23</sup>

Foucault argues that prisons were developed as a reaction to the penal "treatments" that characterized punishment in common law England and later, America. In the American colonies, punishment manifested itself in various forms of public violence and shaming that included the stocks, whipping posts, and the pillory, social performances that Foucault calls the "spectacle of the scaffold."<sup>24</sup> Public hangings and all other punishments were carried out publicly so that the offender was at once punished and humiliated, but also so that others who might be considering similar behavior would be simultaneously deterred. Mutilation (e.g., the removal of a limb, ear, eye, etc.) was another method, one that left a permanently visible reminder of one's trespasses.<sup>25</sup>

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20. JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS 33 (2006).

21. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

22. *Id.* at 101.

23. *Id.* at 17.

24. *Id.* at 32.

25. PETER M. CARLSON & JUDITH SIMON GARRETT, PRISON AND JAIL ADMINISTRATION 8 (1999).

The difference, then, between that system and the prison system that evolved from it is two-fold.<sup>26</sup> First, punishment was previously an act of publicity, which sits in contrast to the closed doors of the penitentiary. Second, the punishment was the conscious infliction of pain and suffering on the body, but now, punishment aims to afflict an individual's psyche. In eighteenth century America, two lines of reasoning influenced the development of the new system from what Willens calls the "old authoritarian" model:

The authoritarian prison has historical roots in the slave plantation. It also derived from a choice between two model prisons that competed for favor in the North...The Quakers supported the Philadelphia model, which kept prisoners in permanent solitary confinement. The Philadelphia model relied on the reformatory power of silent reflection. It failed by unpredictably driving its prisoners insane. The Auburn model, by contrast, kept prisoners in silent but collective labor. Built by the earliest prison reformers, the Auburn model relied on the reformatory power of hard labor. It seemed a humanitarian answer to the Quaker failure because hard work did not apparently cause insanity.<sup>27</sup>

The Quakers were thus instrumental in developing the penitentiary system as we know it, an institutional innovation that was deeply rooted in the ideology of rehabilitation. Although retribution was the order of the day, these Christians had a mind for helping sinners overcome their sins. Their rehabilitative model rooted itself in the religious notion of "penitence," the need to reconcile criminal misdeeds with the will of God. To these penal reformers, a crime against society was synonymous with sinning against God, a correlation that birthed the need for religious repent; hence the original and lasting designation "penitentiary," or the place of penitence. Unlike those who came before, the Quakers believed that crime stemmed from being a sinner instead of from social influences. Modern prisons, thus, are the descendents of these religiously influenced experiments in non-violence, designed to resurrect a prisoner and release him back to society healed and ready to be a productive member.

Some two hundred years later, however, prisons have become a different beast, with a wholly different set of power dynamics. One of the pioneering attempts to understand the tensions between prisoners and guards, the notorious Stanford Prison Experiment, conducted in 1971 by psychologist Phillip Zimbardo, gave the world a startling glimpse of what can happen under the

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26. Pieter Spierenburg has challenged that changes in the modes of repression were a reflection of changing sensibilities. For Spierenburg, Foucault's ignoring of archival data yields an ideological gap in his approach to analyzing the move away from public punishment to prisons. PIETER SPIERENBURG, *THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE* 5 (2007). Accordingly, Timothy Gorringer has noted, "Where Foucault discounted humanitarian impulses, Spierenberg [sic] argued that the change in punishment from public torture to imprisonment was bound up with changes in sensibility evident from 1600's onwards." TIMOTHY GORRINGER, *GOD'S JUST VENGEANCE* 9 (1996).

27. Willens, *supra* note 5, at 69-70.

dynamics of custody.<sup>28</sup> In this simulation of a prison environment, volunteer graduate students were randomly selected to be prisoners and guards. In the role-play, guards were given uniforms, flashlights, sunglasses, and badges to denote their authority and the inmates were stripped of their possessions and given nightgowns. Shortly after the experiment began, the guards started to taunt and harass the make-believe prisoners. By the third and fourth days of the experiment, the guards began to treat the prisoners in a way that bordered on torture. Due to the terrible turn this experiment took, Zimbardo was forced to stop the project altogether.<sup>29</sup> According to the official website of the Stanford Prison Experiment, “One guard was nicknamed ‘John Wayne’ by the prisoners because he was so sadistic. Yet he was the ‘nicest’ guy on the street, and he only made his transformation from the gentle Dr. Jekyll to the monstrous Mr. Hyde when he put on his guard’s uniform.”<sup>30</sup>

Although the experiment has not been free of its share of criticism,<sup>31</sup> the underlying events are nonetheless revealing. The events of the experiment represent something even more stark than what guards may become because they also speak to what *prisoners* may become. For the “guards” to be so cruel to the “prisoners” while knowing full well that they were innocent of any actual wrongdoing is quite a damning notion when applied to prisons in general. How might guards react when faced with people whom they really think have committed crimes? Hopes for impartial treatment and an environment free of vigilante justice are pretty much extinguished. Stanford students, some of the brightest in the country, could not even complete an experiment on the topic because of the vile tendencies the experiment drew out of them.

Of course, the Stanford Prison Experiment did not allow for violence against the assigned inmates. On paper, neither do real prisons, but the threat is always there. In this regard, Erving Goffman’s *Asylums* (1961) early on characterized prison as a “total” institution—one that directs one hundred percent of an inmate’s existence and routine. As Goffman writes, a “total institution may be defined as a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.”<sup>32</sup> Immediately connected to this observation is the role human bodies play in the institutional drama. Goffman continues:

[T]here is personal disfigurement that comes from direct and permanent mutilations of the body such as brands or loss of limbs. Although this

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28. Stanford Prison Experiment, <http://www.prisonexp.org> (last visited Oct. 23, 2008).

29. *Id.*

30. *Id.*

31. See S. Alexander Haslam & Stephen Reicher, *Beyond Stanford: Questioning a Role-Based Explanation of Tyranny*, 18 BULL. SOC’Y FOR PERSONALITY & SOC. PSYCHOL. 22 (2003).

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

mortification of the self by way of the body is found in few total institutions, still, loss of sense of personal safety is common and provides a basis for anxieties about disfigurement. Beatings, shock therapy, or in mental hospitals, surgery—whatever the intent of staff in providing these services for some inmates—may lead many inmates to feel that they are in an environment that does not guarantee their physical integrity.<sup>33</sup>

Violence thus looms in the daily life of a prisoner, who can never be guaranteed bodily integrity. The above passage reveals both the physical and psychological stresses that inmates must endure. Yet, prisoners are not alone in their plight. As the growing literature on prison guards shows, prison guards also suffer from their time spent in prison. For example, in California, due to its “catch and release” parole policies, career guards are likely to have spent more aggregate time in prison than many prisoners. And as a result of guards suffering from high stress, their families also suffer—sometimes—from abuse and violence.

### *B. Guards Imprisoned*

It is well documented that prison guards and correctional officers are characterized by psychological factors such as high levels of stress and burnout.<sup>34</sup> Psychologists have defined burnout in terms of emotional and/or physical exhaustion, decreased job productivity and over-depersonalization.<sup>35</sup> A stressed person has been defined as one who “has discovered that familiar environmental transactions—customary ways of coping with the environment—are hopelessly challenged.”<sup>36</sup> The effects of stress and burnout can greatly impact a prison guard’s domestic life,<sup>37</sup> and when correctional

33. *Id.* at 21.

34. See generally PETER FINN, ADDRESSING CORRECTIONAL OFFICER STRESS: PROGRAMS AND STRATEGIES (National Institute of Justice, Issues and Practices in Criminal Justice Series No. 183474, 2000); Robert G. Huckabee, *Stress in Corrections: An Overview of the Issues* 20 J. CRIM. JUST. 479 (1992); Francis T. Cullen, *The Social Dimensions of Correctional Officer Stress*, 2 JUST. Q. 505 (1985); Frances E. Cheek & Marie Di Stefano Miller, *The Experience of Stress For Correction Officers: A Double-Bind Theory of Correctional Stress*, J. CRIM. JUST. 105 (1983); Marie L. Griffin, *Gender and Stress*, 22 J. CONTEMP. CRIM. JUST. 5 (2006); Joseph R. Carlson et al., *Correctional Officer Burnout and Stress: Does Gender Matter?*, 83 PRISON J. 277 (2003); John T. Whitehead & Charles A. Lindquist, *Correctional Officer Job Burnout: A Path Model*, 23 J. RES. CRIME & DELINQ. 23 (1986); W.B. Schaufeli & M.C.W. Peeters, *Job Stress and Burnout Among Correctional Officers*, 1 INT’L J. STRESS MGMT. 19 (2000); John T. Dignam et al., *Occupational Stress, Social Support, and Burnout Among Correctional Officers*, 14 AM. J. COMMUNITY PSYCHOL. 1573 (1986); for a general review of the literature on corrections officers see Susan Philliber, *Thy Brother’s Keeper: A Review of the Literature on Correctional Officers*, 4 JUST. Q. 9 (1987).

35. Lawrence Gerstein et al., *The Role of the Environment and Person When Predicting Burnout Among Correctional Personnel*, 14 CRIM. JUST. & BEHAV. 352, 352 (1987). 91

36. HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 141-42 (1977).

37. Elaine Crawley, *Bringing It All Back Home? The Impact of Prison Officers’ Work on Their Families*, 49 PROBATION J. 277 (2002).

officers take their stress home with them, it simply multiplies the damage.<sup>38</sup> Furthermore, working in a prison is dangerous, and guards are faced with a multiplicity of threats and pressures at competing levels.<sup>39</sup> Consequently, guards must adopt ways to cope with such severe stress conditions if their psychological health is to remain intact.<sup>40</sup> Additionally, the prison system has increasingly become the new asylum for the mentally ill.<sup>41</sup> Thus, on various fronts, the physical and psychological integrity of the guards is constantly threatened.

The emotional effects of prison work were recognized as early as 1833, when Alexis de Tocqueville and Gustave de Beaumont studied American culture, specifically prisons. Writing on Sing Sing Prison in New York, they noted, “[t]he safety of the keepers is constantly menaced. In the presence of such dangers, avoided with such skill, but with difficulty, it seems to us impossible not to fear some sort of catastrophe in the future.”<sup>42</sup> A century and a half later, the *Encyclopedia of American Prisons* (1996) traced modern signs of trouble to the 1920s, when psychologists warned about the “‘social distance’ between the prison staff and administration” which left officers feeling manipulated and “as much imprisoned as those they guarded.”<sup>43</sup>

In 1971, psychologist Allan Berman undertook a study to determine characteristics of prison guard profiles. This research included a series of psychological tests on both guards and prisoners to determine each group’s “violence potential.”<sup>44</sup> In the startling conclusion of the study, Berman indicated the two groups had an “almost identical” potential for violence, asserting that officers are as likely as inmates to engage in assaultive behavior.<sup>45</sup> According to the author, “[t]his would carry along the correlative

38. STEPHEN WALTERS & TOM CAYWOOD, CORRECTIONAL OFFICERS IN AMERICA: THE EMERGENCE OF A NEW PROFESSION 86 (2006).

39. See ELAINE CRAWLEY, DOING PRISON WORK: THE PUBLIC AND PRIVATE LIVES OF PRISON OFFICERS (2006); TOM MARTIN, BEHIND PRISON WALLS: THE REAL WORLD OF WORKING IN TODAY’S PRISONS (2003); PRISON GUARD AND CORRECTIONAL OFFICER: THE USE AND ABUSE OF THE HUMAN RESOURCES OF PRISONS (1981); James B. Jacobs & Harold G. Retsky, *The Prison Guard*, 1 URB. LIFE 5-29 (1975); J.E. THOMAS, THE ENGLISH PRISON OFFICER SINCE 1850: A STUDY IN CONFLICT (1972).

40. See generally THOMAS MATHIESEN, DEFENCES OF THE WEAK (1965); JOHN IRWIN, THE FELON (1970); GERSHAM SYKES, THE SOCIETY OF CAPTIVES (1970); STANLEY COHEN & LAURI TAYLOR, PSYCHOLOGICAL SURVIVAL: THE EXPERIENCES OF LONG TERM IMPRISONMENT (1973); Toch, *supra* note 35.

41. See generally MARY BETH PFEIFFER, CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL (2007); THE NEW ASYLUMS (PBS Video 2005).

42. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE (Francis Lieber trans., Carey, Lea & Blanchard eds., 1970) (1833).

43. Marilyn D. McShane, *Correctional Officers: History*, in ENCYCLOPEDIA OF AMERICAN PRISONS 118 (Marilyn D. McShane & Frank P. Williams III eds., 1996). 92

44. Allan Berman, Presentation at the Eastern Psychological Association Meeting (Apr. 16, 1971).

45. *Id.*

implication that the reasons why one group is behind bars and the other group is guarding them may be due to incidental factors.”<sup>46</sup>

Since de Tocqueville’s observations, nearly two centuries ago, little has changed about the dangerous nature of prison work, and the effects of stress on correctional personnel can be devastating.<sup>47</sup> Some reports indicate that the average life span of correctional officers in some prisons is fifty-nine years, while the national average is seventy-five. The divorce rate is purportedly twice the national average, and line officers have high rates of alcoholism and suicide.<sup>48</sup> Lastly, correctional officers are “more prone than the general public to heart attacks, high blood pressure, and ulcers.”<sup>49</sup>

In an effort to learn more about a guard’s work in prison, experienced journalist and Ph.D. holder Ted Conover actually went undercover and worked as a correctional officer at Sing Sing Prison. Entitled *Newjack*, Conover’s work details his own behavior and treatment of both prisoners and his family at home.<sup>50</sup> After becoming a guard, his stress and aggression levels skyrocketed. Conover even began to hit his child, something he had not previously done.<sup>51</sup> Even during his vacation break from his job, he found himself traumatized by dreams about the prison, recalling, “All I knew then was that even though my body was two thousand miles away, my mind was still trapped in Sing Sing.”<sup>52</sup> Although this study was arguably novel and unorthodox, other inquiries have documented similar effects of prison employment on officers:

Most officers recognized the changes that had taken place in themselves and spoke of those changes with sorrow and bitterness in the interviews. Many of their young marriages were in trouble or destroyed. Some officers were so burnt out that they could not go into supermarkets or take their children to the zoo. Others were so drug dependant that they had to get drunk before going to work on the 7 A.M. shift. Some were so angry and frustrated that they punched holes in the walls of their homes and abused those whom they loved. They suffered severe headaches, hypertension, nightmares. Most of all, they were desperately unhappy and despaired that life could ever seem good again.<sup>53</sup>

Lucien X. Lombardo found similar conclusions in *Guards Imprisoned*, an investigation into the guard lifestyle and its bipolar mix of chaos and

46. *Id.*

47. McShane, *supra* note 43, at 129.

48. *Id.*; see also Steven J. Stack & Olga Tsoudis, *Suicide Risk Among Correctional Officers: A Logistic Regression Analysis*, 3 ARCHIVES OF SUICIDE RES. 183, 185 (1997) (indicating that the risk of suicide among guards is 39% higher than that of the rest of the working age population).

49. McShane, *supra* note 43, at 129.

50. TED CONOVER, *NEWJACK: GUARDING SING SING* (2001).

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51. *Id.* at 244.

52. *Id.* at 115.

53. KELSEY KAUFFMAN, *PRISON OFFICERS AND THEIR WORLD* 212 (1988).

boredom.<sup>54</sup> Faced with danger and a sense of powerlessness, Lombardo describes the prison guard as “a classic example of an alienated worker. To cope with these frustrations he resigns himself to the inevitability of forces beyond his control and finds alternatives to or strikes out against situations within his grasp.”<sup>55</sup> Although these realities are stark in themselves, they are greatly compounded by the growing mentally ill population, which presents tremendous challenges for guards in maintaining order in prisons.

In 2006, the Bureau of Justice Statistics reported that more than half of all prison and jail inmates nationwide have mental health problems—well over one million inmates.<sup>56</sup> This current swell and transformation has been articulated in *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, a decade-long study published in 2003. This study explains the historical and sociological contours of mental health in prisons:

Fifty years ago, public mental health care was based almost exclusively on institutional care and over half a million mentally ill Americans lived in public mental health hospitals. Beginning in the early 1960s, states began to downsize and close their public mental health hospitals, a process called “deinstitutionalization.” Many factors precipitated the process...In 1955, the rate of persons in mental hospitals was 339 per one hundred thousand; by 1998, it had declined to twenty-nine per one hundred thousand.<sup>57</sup>

In the prison environment, mentally ill prisoners are prone to violence as a means to cope with prison life. Further, prisons are more likely to discipline prisoners with mental illness than prisoners without mental illness.<sup>58</sup> Cutbacks in psychological health spending have created environments in which it is not uncommon for thirty percent of all prisoners to suffer from some emotional or psychiatric problem. Nationally, the country now has over 2.2 million people in its jails and prisons. Of these, an estimated 330,000 are mentally ill, and empirical evidence is beginning to demonstrate that this is a conservative

54. LUCIEN X. LOMBARDO, *GUARDS IMPRISONED: CORRECTIONAL OFFICERS AT WORK* 140 (1981).

55. *Id.* at 140-41.

56. Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (U.S. Dep’t of Justice Bureau of Justice Statistics 2006); in 2000, the American Psychiatric Association reported estimates that as many as one in five prisoners were seriously mentally ill. Am. Psychiatric Ass’n, *Psychiatric Services in Jails and Prisons* at xix (Am. Psychiatric Publ’g 2000) (reporting that as many as one in five prisoners were seriously mentally ill); *see also* Impact of Mentally Ill on the Justice System: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 106th Cong. 10 (2000) (statement of Rep. Ted Strickland).

57. HUMAN RIGHTS WATCH, *ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* (2003) <http://hrw.org/reports/2003/usa1003/usa1003.pdf> (last visited Nov. 6, 2008).

58. David W. Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism*, 24 J. CONTEMP. HEALTH L. & POL’Y 1, 3 (2007); *See also* Jamie Fellner, *Mental Health and Prison Rules*, 41 HARV. C.R.-C.L.L. Rev. 391, 402-03 (2006).

figure.<sup>59</sup>

Acting as a dragnet deposit for law enforcement procedures,<sup>60</sup> police have helped make prisons the home of the mentally ill, which is partially why prisons are so violent and difficult to manage. The growing asylum population directly impacts a guard's life, especially since guards are primarily trained to deal with criminals who are presumed to be rational actors and not mentally ill. The criminalization of the mentally-ill has dramatically changed the prison population, although guard training has lagged behind and changed very little.<sup>61</sup>

### C. Colored Questions, Gender-Bending & Sexual Punishment

Theoretical and empirical inquiries have revealed deep connections between law, corrections, and race to questions of power in society, especially the power to incarcerate.<sup>62</sup> In "Mapping the Margins of Intersectionality," Kimberlé Crenshaw is particularly insightful in her analysis of social stratification in terms of "intersectionality." Crenshaw explores the way factors like race, gender, and other identity categories interact to shape multiple experiences of marginality.<sup>63</sup> According to this theory, "Discourses have failed to consider intersectional identities such as women of color...as both women *and* of color within discourses shaped to respond to one *or* the other, women of color are marginalized within both."<sup>64</sup> In its thrust, this position seemingly evolves from James Diego Vigil's notion of "multiple marginality," which is derived from his study of youth gangs.<sup>65</sup> To survive in street culture, writes Vigil, "One must have a street identity...there are many intricacies to this street identity."<sup>66</sup> For Vigil, environmental, economic, social and cultural "features of the street gang suggest a developmental sequence...barrio children whose lives are most intensely affected by marginality in these dimensions are more at risk to become gang members."<sup>67</sup>

59. MARY BETH PFEIFFER, *CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL* XIII (2007).

60. See LINDA A. TEPLIN, *KEEPING THE PEACE: POLICE DISCRETION AND MENTALLY ILL PERSONS*, NAT'L INSTITUTE OF JUSTICE J. (July 2000).

61. Linda A Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 BRITISH J. PSYCHIATRY 293, 293-99 (1985).

62. For an excellent overview of these issues and the literature, see Michael D. McCamish, *The Theatre of Prison: Power, Resistance, Family and the Production of Illegality*, Starring the California Department of Corrections (2000) (unpublished Ph.D. dissertation, California Institute of Integral Studies), <http://www.escapeartists.co.uk/images/pdfs/prisontheatre.pdf>.

63. Kimberlé Crenshaw, *Mapping the Margins of Intersectionality, Identity, Politics, and Violence Against Women of Color*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 357 (Kimberlé Crenshaw et al. eds., 1995).

64. *Id.* at 358.

65. JAMES DIEGO VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* 9 (1988).

66. *Id.* at 1.

67. *Id.*

Furthering themes linking criminal justice and marginal communities, Randall Kennedy's *Race, Crime, and the Law* has examined society's tendency to use "color as a proxy for dangerousness."<sup>68</sup> In Kennedy's pigmentocracy, the high rates of arrest and convictions of Blacks yield "circumstances in which as a statistical matter, a police officer would be correct in estimating that man's blackness identifies him as more likely than a similarly situated white person to be involved in criminal wrongdoing."<sup>69</sup> Disparate treatment based on race is the basic tenet of David Cole's *No Equal Justice*, which also explores race and American criminal justice to argue that the administration of criminal law is based on "exploitation of inequality."<sup>70</sup> Cole contends that far from ensuring justice and equality, "*our criminal justice system affirmatively depends on inequality.*"<sup>71</sup>

The above insights are perhaps nowhere as revealing as peering into the power dynamics of the prison system. In a world where the word of a guard is gold over the word of a prisoner, guards wield tremendous power in the enforcement or non-enforcement of policies for inmates, including forms of racial discrimination and segregation. Poole and Regoli's study of institutional rule breaking and prison deviance commented on how this racial drama sometimes unfolds:

[P]erceptions of inmate behavior based on racial stereotypes may foster a more oppressive disciplinary posture among guards in their response to blacks. The greater visibility of black inmates may also evoke greater attention to and concern for their actions; i.e., their behavior may be viewed more suspiciously...Similarly, if black inmates perceive that they are being differentially treated, they may react more defiantly or with greater hostility toward guards.<sup>72</sup>

Silberman compares this racial inequality to that found across American cities, where "racial injustice contributes to violent crime, especially among members of minority groups whose crime rates are significantly higher than the majority."<sup>73</sup> Accordingly, Noble has written, "For black inmates, the over-representation of whites in positions of power within prison structure reinforces the subordinate position of Blacks found within free society."<sup>74</sup>

As the above studies indicate, "who" is behind bars is partially a result of "who" is sought and caught on the outside. In many instances there may be

68. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 136 (1998).

69. *Id.* at 145.

70. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 5 (1999).

71. *Id.*

72. Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 *Law & Soc'y Rev.*, 931, 933 (1980).

73. Silberman, *supra* note 16, at 67.

74. Noble, *supra* note 17, at 22.

direct correlations between policing practices and the current ethnic composition of the prison population.<sup>75</sup> Correlations may also exist between racial bias in the courts, in the form of judge and jury biases, and the current ethnic composition of the prison population.<sup>76</sup> In addition, when it comes to punishment, many so-called white-collar criminals, who themselves are usually white, almost never spend time in general population prisons, where they would be a minority. Some have argued that this phenomenon stems from an “empathy factor,” which “leads some judges to compare the environment from which the defendant comes in order to determine whether imprisonment is an appropriate sentence.”<sup>77</sup> This situation means that “who” is in prison has a lot to do with who can “afford” not to be in prison. For white, middle class America, the cost of prisons appears socially worthy so long as it is paid for with minority prisoners. Commenting on this point, Mauer asserts, “It is hard to imagine that this complacency would exist if the more than a million and a half prisoners were the sons and daughters of the white middle class.”<sup>78</sup> Or more drastically, one might wonder what might happen if white males were imprisoned at the same rate as blacks?<sup>79</sup> At that fantastic level, the question of cost would cease to be metaphoric; California corrections alone operates on an annual budget of nearly ten billion dollars.<sup>80</sup>

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75. Jack Glaser, *The Efficacy and Effect of Racial Profiling: A Mathematical Simulation Approach*, 25 J. of Pol. Analysis & Mgmt., 395-416 (2006); Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. OF POL. SCI., 375-401 (2000).

76. See, e.g., Mustafa El-Farra, *Race and the Jury: Racial Influences on Jury Decision-Making in Death Penalty Cases*, 4 HASTINGS RACE & POVERTY L.J. 219 (2006); Philosophical Transactions of Royal Soc’y. London, 1709-26 (2004); Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and “Terrorist” Trials*, 78 CHI.-KENT L. REV., 1143 (2003); Sara Hoffman Jurand, *News & Trends: Juror Studies Show Bias, Discontent*, 37 TRIAL 94 (2001); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB POL’Y & L., 201-229 (2001); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI., 119-33 (1973); For examples of racially prejudiced judges see the opinion in *Dred Scott* of Chief Justice Taney: “Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.” *Dred Scott v. Sandford*, 60 U.S. 393, 412 (1857). See also the trial judge of the lower court in *Loving*: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.” *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

77. STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 161 (1988).

78. MARC MAUER, *RACE TO INCARCERATE* 12 (1999).

79. Indeed it would be hard to imagine what it would look like if Whites were criminalized in proportion to Blacks nationwide. Given that roughly 1/3 of Black males are somehow entangled in the criminal justice system, if the same figure were applied to the nearly 100 million<sup>97</sup> white male population, the figure would be astounding—roughly 30 million adult and juvenile Whites either in prison, jail, on probation, or on parole.

80. California Department of Corrections and Rehabilitation: Budget Information

These tremendous figures lead to other questions concerning the prison industry and prison labor that are relevant in the discussion of why minorities are behind bars in such large numbers and with such wide public support. In this respect, C. Eric Lincoln's *Race, Religion, and the Continuing American Dilemma* offers a historical framework to consider the racial ideas that may inform an understanding of the present system:

Neither human life nor human dignity is characteristically sacred to us, and the political overtones of the frequent assaults on public officials suggest that life in general is cheap in America. Black life is cheapest of all. It has always been bought and sold with impunity, whether at the slave-auction block, or in the courtrooms, or through a thousand and one sophisticated stratagems designed to exploit whatever values the white man recognized in the black condition—economic, sexual, political, military, psychological and so on, ad infinitum. Black life is still cheap. And it continues to be a paradoxical aspect of the ecological structure of American civilization.<sup>81</sup>

Emerging from the ashes of the chattel slave era, American jails were conceived in the Jacksonian Era, whose policy-makers employed jails as a form of social control policy.<sup>82</sup> This was not simply a matter of controlling populations on the outside, but also of economics, as the birth of the prison likewise symbolized the birth of “a factory of men.”<sup>83</sup> Today's prisons produce profits for private businesses who bid for government contracts to become custodial agents of the government in incarceration. These companies' stocks also are publicly available for purchase on Wall Street, a conundrum that has fueled debates over private prisons.<sup>84</sup>

As is often pointed out, prison walls are not meant simply to keep prisoners in, but also to keep people out.<sup>85</sup> This means that the perpetrators of the many daily episodes of rape, attack, and other forms of physical battery will rarely be brought to justice. Although prisoners are certain to get extended sentences for involvement in such altercations, this says nothing about the

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<http://www.cdcr.ca.gov/Budget/index.html> (last visited Oct. 16, 2008).

81. C. ERIC LINCOLN, *RACE, RELIGION AND THE CONTINUING AMERICAN DILEMMA* 4-5 (Hill and Wang ed. 1999) (1984).

82. DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* 99 (Glynis Cousin trans., 1981).

83. *Id.* at 143.

84. *See, e.g.*, PRISON LABOUR: SALVATION OR SLAVERY?: INTERNATIONAL PERSPECTIVES (Dirk Van Zyl Smit & Frieder Dunkel eds., Ashgate Publ'g Co. 1999); MICHAEL A. HALLETT, *PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE* (2006); JOEL DYER, *THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME* (2000); KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); DAVID SHICOR, *PROFITS FOR PUNISHMENT: PRIVATE PRISONS/PUBLIC CONCERNS* (1995); CHARLES H. LOGAN, *PRIVATE PRISONS: PROS AND CONS* (1990); JOHN H. DILULIO, *PRIVATE PRISONS* (1988).

85. *See Crimes & Punishments: A History* (Films for the Humanities and Social Sciences 1993).

conditions that foster these episodes in the first place. In other words, one might wonder, what part is the prison playing in all this? Who is overseeing the policies that support such systemic violence? The life prisoners endure behind bars goes well beyond the sentence handed out in court, for the violence that prisoners may face is never mentioned during sentencing. Nonetheless, violence is the norm. But perhaps even more important for society is the meaning of sexual violence behind bars, and its implications for society.

In the prison film *American Me*, one of the first scenes depicts the founder of the Mexican Mafia being raped shortly after being admitted to juvenile prison in California.<sup>86</sup> Later, after spending nearly his entire youth and adult life in prison at San Quentin, he is freed, and eventually meets a young woman. In one scene, as they become intimate for the first time, the film pans back to the prison, where members of his gang are preparing to rape an enemy's son, who is incarcerated. As the vendetta-prison-raping commences, the camera goes back to the couple, which shows the man violently flipping the woman to a position nearly identical to the victim in prison, positioning her for the same treatment. As he forces her down, she starts screaming, fights him off, and runs out of the room. One lesson from the film is that this sexual encounter gave the main character his first chance to show off what he had learned in prison. It also teaches how society is inextricably related to the people and events behind bars, whether it be the enemy or the young woman—the story is the same—watch out for the prison.

As the above film attempts to capture, there are many social dynamics at play in prison, but above all, the extreme recurrence of sexual victimization in prison is a predominant factor. "A youthful inmate," Justice Blackmun wrote in 1980, "can expect to be subjected to homosexual gang rape his first night in jail."<sup>87</sup> Often called "America's oldest, darkest, yet most open secrets," prison rape runs rampant behind bars.<sup>88</sup> According to one researcher, prisoners are raped daily in an organized and somewhat formalized economy of destruction.<sup>89</sup>

Concomitant with racial violence, there are forms of sexual violence with their own hierarchies that are defined by gendered and sexual behavior, which scholars have written about in the past decades. In *Prison Victimization*, Lee H. Bowker noted that some feminists argue "heterosexual rape symbolizes the condition of women in American society more than any other act."<sup>90</sup> And perhaps, as there may be for women in general, in prison "there is widespread

86. AMERICAN ME (Universal Studios 1992).

87. U.S. v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

88. Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference"*, 92 J. CRIM. L. & CRIMINOLOGY 127, 128 (2000-02).

89. Willens, *supra* note 5, at 53, 54.

90. LEE H. BOWKER, PRISON VICTIMIZATION I (1980).

fear of being raped, and this fear motivates prisoners to defend themselves carefully against the possibility.”<sup>91</sup> In the event defense is overcome, the long term effects of victimization might include crying spells, sporadic nausea, and haunting memories of the experience.<sup>92</sup>

Other research has found that when whites do not control an institution there is a prevalence of gang rapes by blacks on young white prisoners.<sup>93</sup> Weiss and Friar have attributed this phenomenon to changing racial demographics in U.S. prisons. He writes, “Since the majority in the United States prisons are black, Hispanic, and Chicano, the white inmates are now the most vulnerable to sexual violence.”<sup>94</sup> The consequences of this behavior inflame racism among whites in a cycle of racial hatred. In *Prison Sexual Violence*, researcher Daniel Lockwood reinforces the idea that most aggressors are nonwhite and most targets are white. He writes:

Targets tell us that they grow to hate nonwhites as a result of their experiences. Generalizing their feelings about specific aggressors to the aggressors’ ethnic group, targets talk about deep racial prejudice developing. Fueled by fear, by whites’ relative weakness in prison, reinforced by anger and violence, racism is a corollary of the target experience.<sup>95</sup>

Others have argued that these patterns behind bars directly relate to the prevalence of sexual violence in society at large. Detailing the reciprocal nature of this process, Lee Bowker’s *Prison Masculinities and Violence* notes:

The existing prison system serves to reproduce destructive forms of masculinity. Rather than reduce crime, imprisonment in the United States today perpetuates men’s violent proclivities. The abandonment of rehabilitation and the embracement of punishment by contemporary corrections exacerbates class, race, and gender antagonisms, thereby creating more toxic confrontations between elite males and lesser-status males and females.<sup>96</sup>

Christian Parenti’s *Lockdown America* offers a journalist’s report of the sexual exploits that prisoners, both male and female, face under incarceration.<sup>97</sup> He estimated that nearly 200,000 men are raped annually in American prisons. Parenti noted his estimate is less than the “Stop Prison Rape” group’s estimate,

91. *Id.*

92. DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE* 97 (1980).

93. LEE H. BOWKER, *PRISONER SUBCULTURES* 109 (1977).

94. CARL WEISS & DAVID JAMES FRIAR, *HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT* 49 (1974).

95. Lockwood, *supra* note 92, at 78.

96. Lee Bowker, *On the Difficulty of Eradicating Masculine Violence*.<sup>100</sup> *Multisystem Overdetermination, in MASCULINITIES AND VIOLENCE* 4-5 (1998).

97. CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (2000).

which is closer to 290,000.<sup>98</sup> Regardless of which estimate is closer to the truth, what is certain is that these estimates claim to tell how many have been raped, but not *how many times*. This is important when considering the above works, which invariably tell of prisoners made into “punks,” prostitutes, or sex slaves, who often are forced to perform multiple sex-acts in a single day. Thus, these preliminary figures are, at best, a starting point in the process of accounting for prison rape. To be sure, this neglected area of research awaits an accurate account of just how prevalent these acts are.<sup>99</sup>

As the female prison population continues its growth, the number of cases of sexual violence against women prisoners has also grown. Parenti explains, “Inmate on inmate rape also occurs in women’s prisons and jails, but a far greater problem for female convicts is the sexual depravity and aggression of their male (and sometimes female) keepers. From coast to coast, guards routinely rape women prisoners with near-total impunity.”<sup>100</sup> The news from juvenile facilities is even worse. According to *U.S. News & World Report*, “Juvenile justice facilities across the nation are in a dangerously advanced state of disarray, with violence an almost everyday occurrence and rehabilitation the exception rather than the rule. Abuse of juvenile inmates by staff is routine.”<sup>101</sup> Sexual violence is even more widespread, as the U.S. Justice Department revealed in its ongoing study of the juvenile system.<sup>102</sup>

Thus, whether told by scholars, journalists, or the government, the prison seemingly towers above all as the house of pain.<sup>103</sup> Under custody and confinement, American citizens experience inflicted pain and suffering that would surely demand accountability in the outside world, but in an economy of suspended rights, almost anything goes. The next section offers a telling set of primary data to expand on just what “anything” means.

98. *Id.* at 190.

99. Recently, however, the federal government has taken action to address sexual violence in the prison system. In 2004, President George W. Bush signed the Prison Rape Elimination Act of 2003 (PREA), Prison Rape Elimination Act, 11 Stat. 972 (2003), a law that is the first of its kind to be passed that specifically addressed sexual violence behind bars. This legislation outlines a number of measures to help prevent prison rape, which includes authorizing the Bureau of Justice Statistics to carry out a yearly comprehensive study on the prevalence of rape behind bars and its affects on prisoner populations.

100. *Id.*

101. Angie Cannon, *Juvenile Injustice*, U.S. NEWS AND WORLD REP., Aug. 9, 2004, at 28.

102. U.S. Department of Justice, *Corrections Officials Reported More Than 6,200 Sexual Violations in the Nation’s Prisons and Jails During 2005* (2006), <http://www.ojp.usdoj.gov/bjs/pub/press/svrca05pr.htm> (Rule 18.2.3(a)).

103. See generally CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (American Psychological Association 2005); ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1987); NILS CHRISTIE, LIMITS TO PAIN (1981).

*D. Extra! Extra!—Another Parolee Strikes*

There are many ways that ex-prisoners are involved in violent crimes in society, which offer poignant samples of the manufacturing social violence thesis. Such reports are nothing new, and by now are pretty normative episodes in American culture. The story of the prisoner who exits the penitentiary only to end up committing violent crimes is a trite one indeed. It is one that happens all the time, linking ex-prisoners to acts of homicide, rape, and other brutal forms of violence. The violent acts perpetrated beyond prison maintain the brutal trappings found within, a point that can be tested against a simple scan of American newspapers in the last decade.<sup>104</sup>

Across the country one will find cases of horrific acts that cannot be described without invoking the prison in some way or other. For example, one report entitled “Disabled Black Man is Dragged to Death,” tells of three white supremacists who, on December 8, 1998, kidnapped and assaulted a handicapped man, who eventually lost an arm and was decapitated.<sup>105</sup> During the course of the trio’s criminal and appeal trials, it was established that the origins of this attack was engineered inside the Tennessee Colony Penitentiary as an initiation ritual into a white supremacist gang. In another reported episode entitled “Parolee Linked to Killing of 5 Women in Michigan Capitol,” a paroled sex offender began a killing spree only a month after he was paroled for the third time.<sup>106</sup> On the front page of the *Oakland Tribune* January 9, 2008 reads the title “Parolee Charged in Fatal Beating,” from an article that describes a man with a prior manslaughter conviction who, according to officials, “raped and tortured” a woman.<sup>107</sup> According to the report the rampage ended in the December 24<sup>th</sup> vicious rape of woman and the New Year’s Day fatal beating of a 19-year-old woman.<sup>108</sup>

The list of such events throughout the U.S. goes on and on, seemingly infinitely, yet we still have scant empirical information on the aggregate violent impact of ex-prisoners on civilian life as a whole. Still, plans are hatched behind bars, ex-prisoners are involved in violence against civilians, and from many accounts, non-violent prisoners end up adapting to the violent world of prison life. At this point one might be tempted to ask, why are more than half of prisoners locked up for non-violent crimes while the perpetrators in the news articles above walked the street? Or more broadly-speaking, what does it mean

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104. In fact, it would be a major challenge to pick up any major newspaper within a week and *not* read about an ex-prisoner involved in some violent crime.

105. Sue Ann Pressly, *Disabled Black Man Is Dragged to Death*, THE RECORD, June 10, 1998, at A1.

106. Nick Bunkley, *Parolee Linked to Killing of 5 Women in Michigan Capital*, N. Y. TIMES, Sept. 1, 2007, [http://www.nytimes.com/2007/09/01/us/01arrest.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/09/01/us/01arrest.html?_r=1&oref=slogin).

107. Harry Harris & Angela Woodall, *Parolee Charged in Fatal Beating*, OAKLAND TRIBUNE, Jan. 9, 2008, at A1.

108. *Id.*

that all of them had spent significant time behind bars? Might the effects of the prison experience be a partial impetus behind these fantastic acts of brutality?

Of course, one might argue that such individuals already had violent propensities before arriving at prison or the secured housing unit (SHU), and therefore, were already dangerous. However, such a line of reasoning is undercut by the literature on the psychopathological effects of solitary confinement,<sup>109</sup> a history that is bolstered by recent investigations. A front page story by *L.A. Times Magazine* on the 2003 state of Pelican Bay State Prison exemplifies the point.<sup>110</sup> Entitled "The Cruellest Prison," it reports on the effects of confinement in the SHU: "hallucinations; hypersensitivity to external stimuli; paranoia; panic attacks; hostile fantasies involving revenge, torture, and mutilation...smearing oneself with feces or biting chunks of flesh from one's own body."<sup>111</sup> The report details case after case of prisoners who spent large blocks of time in solitary, sometimes up to seven years, to be released to the public after a mere two weeks time to readjust to light, conversation, and other stimulants. Here, Goffman's notion of inmate "disculturation" is readily discernible as a state of psychological limbo that "renders him temporarily incapable of managing certain features of daily life on the outside, if and when he does get back to it."<sup>112</sup> In an environment where the "ultimate measure of the architectural, social, and physical violence of the SHUs is the intensity and prevalence of the insanity they create,"<sup>113</sup> long term isolation takes the pains of prison and intensifies them with little concern for the long-term psychological consequences to prisoners.<sup>114</sup> Other studies have been reviewed to show "at the very least, the healthiest SHU inmate runs a substantial risk of experiencing complex, formed hallucinations, developing hyper-responsivity and vivid fantasies, and suffering massive free-floating anxiety."<sup>115</sup>

### III. SCREAMS FROM THE CELLBLOCK

The very substratum of the prison is violence. At its base, forced restraint and detainment are themselves the building blocks of prison violence. Such captivity invariably is linked to physical/sexual, psychic, and symbolic forms of

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109. See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *Crime and Justice* 441, 456 (2006); see also Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *AM. J. PSYCHIATRY* 1450, 1450 (1983).

110. Vince Beiser, *The Cruellest Prison*, *L.A. TIMES MAGAZINE*, October 19, 2003.

111. *Id.*

112. Goffman, *supra* note 32, at 13.

113. Parenti, *supra* note 97, at 207.

114. Craig Haney and Mona Lynch, *Regulating Prisons and the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 477, 566 (1997).

115. Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 *EMORY L.J.* 1089, 1130 (1996).

institutional violence.<sup>116</sup> Whether it comes from inmates or guards the prison is described as a locus of extreme violence, repression, and control. Its operations are based on a scopic system that subjects detainees to intense and constant surveillance over every inch of the body. With the advent of surveillance technology, prisons have pushed the panopticon of the past to greater heights. Such violent forms are compounded by extra-legal types that include fights, rapes, beatings, and bodily deprivations, all of which constitute prison life and the lived experiences of prisoners. These realities, when added to the fact of severe overcrowding, paint a grave picture of prison life.

This research employed “intensive interviewing” as the approach to acquire data about the meaning and prevalence of violence behind bars.<sup>117</sup> This method corresponds to a “psychologically more sensitive employment of interviewing methods,”<sup>118</sup> where the notion of “intensive” might attempt to describe the heightened charge of thoughts and emotions that can be triggered in the interview process. More generally, the ethnographic approach has been used in a number of studies on prison culture.<sup>119</sup> Common among these studies are certain methods that are rooted in the ethnographic model including interview, participant observation, intensive interview, letter writing, and survey—as well as employment of a multitude of media and recording technologies. Interviewing, as used here, does not employ the mechanics of a legal deposition or cross-examination, nor does it portend to offer a neutral description of people and their habits from a detached point of view. Rather, it is a strategic attempt to discover history through oral narration and conversation, for the ethnographer to allow the participants to be informants.<sup>120</sup>

116. Here one might consider various state laws that disenfranchise felons from voting or serving on juries. With such a system in play, there is virtually no check to balance power since prisoners, the ones who know most about their homes, are legally unable to participate in or change the system. See *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50 (Marc Mauer & Meda Chesney-Lind eds., 2002).

117. See Henry H. Brownstein, *Using Intensive Interview Data: Teaching Concepts of Ethnicity and Ethnic Group Relations*, 9 *TEACHING SOCIOLOGY* 189 (1982).

118. *THE RESEARCH INTERVIEW: USES, AND APPROACHES* 147 (Michael Brenner et al. eds., 1985).

119. See generally DONALD RAY CRESSEY WITH CONTRIBUTIONS FROM JOHAN GALTUNG, *THE PRISON: STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE* (1961); ROSE GIALLOMBARDO, *SOCIETY OF WOMEN: A STUDY OF A WOMEN'S PRISON* (1966); JOHN IRWIN, *THE FELON* (1970); JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS* (1973); LEO CARROLL, *HACKS, BLACKS, AND CONS: RACE RELATIONS IN A MAXIMUM SECURITY PRISON* (1974); JAMES B. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977); LYNN E. ZIMMER, *WOMEN GUARDING MEN* (1986); JOHN J. DIULIO, *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (MACMILLAN 1987); MARK S. FLEISHER, *WAREHOUSING VIOLENCE* (1989); ALLEN FELDMAN, *FORMATIONS OF VIOLENCE: THE NARRATIVE OF BODY AND POLITICAL TERROR IN NORTHERN IRELAND* (1991); PETE EARLEY, *THE HOT HOUSE: LIFE INSIDE LEAVENWORTH PRISON* (1994); JAMES A. BECKFORD AND SOPHIE GILLIAT, *RELIGION IN PRISON* (1998).

120. Harry R. Dammer, *Piety in Prison: An Ethnography of Religion in the Correctional Environment* 26 (published Ph.D. dissertation, University of Michigan) (Microfilms International

There are a number of factors that warrant the use of “intensive” when qualifying this research method. The distinction aims to separate the type of interviews conducted in this research from those that are casual and relaxed in nature. For example, that all interviews took place at Homeboy Industries might itself be enough to justify its use. Located in the heart of east Los Angeles, CA, this neighborhood is often designated by the police and media as the “gang capital” of the world. As this organization sits in the middle of gang territory, each day’s worth of interviews posed a potential risk, most specifically from the gangs themselves. Since Homeboy Industries is viewed by some as anti-gang, their employees have been targeted for vicious attacks. Over the course of this research two Homeboy Industries employees were murdered during business hours, both of which occurred while the employees were removing gang graffiti from community walls.<sup>121</sup> These grave events underscore the intensity and seriousness of work being done at Homeboy Industries, while simultaneously offering a sober look at how hanging with these homeboys could spell the end of your life.

Although there are many advantages to this type of research, difficulties may attend this process of data collection, including the use of media equipment for recording.<sup>122</sup> As with any qualitative study that admits informant information, there is a concern to avoid what Silberman calls “systematic deception in responses,” that is, when the informant knowingly and willfully offers unreliable information.<sup>123</sup> To avoid this real challenge, Lofland and Lofland have elaborated on the importance of “getting in,” or “gaining the acceptance of the people being studied.”<sup>124</sup> According to their view, there is a direct relationship between how much a subject trusts the researcher, and whether a subject will divulge factual information. In this scheme, the attributes of the investigator, of the setting or situation to be studied may create barriers to the acquisition of rich data.<sup>125</sup> As Silberman’s ethnographic study of prison violence notes, many potential participants did not agree to interview for fear of being seen as cooperating with the prison,<sup>126</sup> which underscores the importance

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1992).

121. Matt Krasnowski, *On Dangerous Ground: L.A. Crews Trying to Clean up Behind Graffiti Gangs Suffer Fatal Attacks*, SAN DIEGO UNION TRIBUNE, August 22, 2004, [http://www.signonsandiego.com/uniontrib/20040822/news\\_1n22graffiti.html](http://www.signonsandiego.com/uniontrib/20040822/news_1n22graffiti.html).

122. Brenner et al., *supra* note 118, at 154; in addition to these problems, the danger of such recordings include questions of privacy and ensuring that documented evidence can never be used as incriminating evidence against subjects. As a general heuristic, then, tape recorders might best be introduced later, especially since the first few interviews is when rapport begins to develop. However, there may be only one interview possible, so each ethnographer must decide on the basis of the willingness of informants and their feelings about using a tape recorder whether to use a tape recorder or not.

123. Silberman, *supra* note 16, at 5.

124. John Lofland & Lyn H. Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* 20 (1994).

125. *Id.* at 15.

126. Silberman, *supra* note 16, at 5.

of the researcher's approach to the subject.

### *A. Intense Interviews*

For many ex-prisoners who make their way back to the streets, a violent future awaits. This is the conclusion drawn from the interviews I conducted with ex-prisoners in California. The primary subjects for this part of the study are from California state prisons and from the Federal Corrections Institute at Lompoc and at Terminal Island. The state of California has experienced perhaps the most dramatic prison explosion of any of the U.S. states. It is home to the second largest prison population, with over 173,000 prisoners.<sup>127</sup> The research site at Homeboy Industries is fueled by the "Jobs for a Future," program that attracts an ever growing number of the more than 135,000 parolees released by California in 2007 alone.<sup>128</sup>

This organization has been the subject of many media reports, and its director, Father Greg Boyle, has appeared repeatedly in academic studies, news reports, and books.<sup>129</sup> Homeboy Industries has been profiled by Tom Brokaw, the *L.A. Times*, and has been featured on *60 Minutes* and on A&E Television's *20th Century with Mike Wallace*. This organization was also the subject of Celeste Fremon's book, *G-Dog and the Homeboys: Father Greg Boyle and the Gangs of East Los Angeles*, a journalistic account of the outreach work being done by Father Boyle's organization.<sup>130</sup>

Father Boyle facilitated the interview process by allowing all interviews to take place on the premises and by providing a seemingly limitless supply of ex-prisoners to interview. One of my first encounters was with a young, self-proclaimed Chicano who was covered in tattoos including on his shaved skull, which sported horns. The horns were intended to prove a point:

I put them on me because that is the mark of the beast, what an ex-con lives with. I figured that since society already pegs me as a demon, I'm going to run with it. I don't give a fuck, really. If society wants a monster, I can be it.

127. California Department of Corrections, *Fall 2007 Adult Population Projections 2008-13* (2007), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Projections/F07pub.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F07pub.pdf).

128. CAL. DEP'T OF CORR. AND REHAB., CALIFORNIA PRISONERS AND PAROLEES 2007 (2008), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPris/CALPRISd2007.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2007.pdf).

129. See ROBERTO S. GOIZUETA, CAMINEMOS CON JESUS: TOWARD A HISPANIC/LATINO THEOLOGY OF ACCOMPANIMENT (1995) (focusing on Father Greg's involvement in the Holy Week procession in the East Los Angeles community). The Chicano Studies Research Center at UCLA Library has procured a large collection of writings from prisoners and gang members, which were donated by Father Boyle.

130. CELESTE FREMON, G-DOG AND THE HOMEBOYS: FATHER GREG BOYLE AND THE GANGS OF EAST LOS ANGELES (1995).

This individual was especially resentful of the extra punishments and write ups he earned under incarceration:

Why do we have to pay for the zoo that we live in? If someone attacks me, I have no other choice but to fight, and even kill if I have to. Why do I get punished for defending my life? What sense does that make? They make it seem like it's wrong to fight back, but for us, it is survival. Between living and dying, I choose to fight...the real trick is to ask, "who's running this show?" The answer to this should make heads roll, but we're the only ones who suffer. They get pensions.

Another subject offered insight into the strong connections that link street activity, including gangs and drugs, to the prison. This particular individual had been out for only two weeks when the interview took place and by all subjective means, it seemed that his re-adjustment was taking a toll. Only thirty years old, this man started serving a fourteen year sentence as a juvenile, several of which were done in solitary confinement. This time was spread over Folsom, San Quentin, and Pelican Bay prisons. Like the man above, he sported a number of tattoos, one of which was a thick spider-web sprawled on his elbow. When I asked him about it he explained:

The elbow is my joint, my hood. This is our home and we know every square inch of it. It's ours. We weave the web throughout the hood as a line of defense. And I am the spider. If you mess with my hood, you'll get tangled up in the web, and we're waiting. We're always waiting. It's like a fly who gets caught up—death is coming.

He was also quite candid about the aura of aggression that permeates life behind bars, and had been involved in numerous fights. Although before imprisonment he had already suffered gunshot wounds, he did not know that things would turn worse once he went to prison. He recalls:

As you can see, I'm not big, so I got to watch my back more. Outside it wasn't no big a deal because I was always strapped. I could take care of myself—no problem. But in the *pinta* it's different. A man's dick is his gun. It is the best weapon you have in here because a stick or pipe can only break bones, but when someone gets punk'd, then its over. The whole person is broken. Ruined.

He went on to tell of a particular episode in which he lost a molar tooth due to a stabbing injury, which he indicated by opening his mouth wide:

That motherfucker came after me hard before I saw the shank. It was like a screwdriver without a handle. Anyway, he swung at me hard from underneath, and he stabbed me in the neck. It crossed over and hit my jawbone and actually popped one of my molars right here. I went to the infirmary, and later was written up for fighting. They never found the shank.

The above scenario is much like that related by the subject with the horn tattoos. Namely, when violence erupts, one may have to fight to survive—even

though this act might result in further punishment. Speaking on the specific policies that help create violent situations, one interviewee was particularly vindictive in his tone. Having spent eight of his twenty eight years of age incarcerated, he was resentful of the way prisons settings are structured:

I've seen it happen too many times. Why do they put thieves and petty people in the same tier with the hardened niggas? They become celly bitches until they are released or kill themselves, whatever comes first...It's like taking a regular dog and beating it up. More than likely he's gonna learn how to fight and attack. That's what they do in here. They breed a bunch of mad dogs and let them loose on society. Sometimes it's hard as hell. You can bump into someone on the street, and just like that, it's on. I wasn't like this before though. In fact, before getting to prison, I never really had a fight, except when I was a kid.

Like the other accounts, this story is filled with violent memories of the prison, some of which are unshakable, even after exiting the institution. These accounts tell of people who have been pushed close to their physical and psychological limits, some beyond.

Judging from my talks with individuals, violence behind bars is apparently everywhere, at every turn, and is often drawn across racial lines. One parolee who had been released two months previously from San Quentin, laid out the demographic mappings as follows:

That's what you figure out really quick in the pen. You got to stick with your own kind, otherwise you'll get stuck out. For real, g. All that division on the street—that shit don't exist inside. When you first come in, it don't matter what set you're from, as much as your *raza*. And that's how it's sliced up....Blacks over here, Whites over there, and whatever else. It's kind of fucked up because it makes the place easier to watch over when the colors war with each other. That's probably what they want in the first place, but most of us just don't know it.

The fear of violence is thus a motivating factor that impels one to seek protection. This very fear stems from the prison administration's lack of control of the institution, and offers yet another way that prisons create violence. In this case, the consequences of not "sticking" to your own kind can be disastrous. Although the modern penitentiaries were conceived in the image of a silent, safe and sobering spell of work or solitude, the postmodern prison is a loud and sometimes maddening place that allows for very little safety or thought other than strategizing to survive. According to the written response of another subject:

The prison is not a place where prisoners rehabilitate. In fact, it seems that at a place like Terminal Island which is a middle security Federal Prison, many prisoners come in for nonviolent crimes and soon find their personalities shifting towards violence and survival...The reality of prison is that you cannot survive without the help of others. If you isolate yourself from others, you will most likely be taken advantage of and be

placed in harm's way. Prison is the survival of the fittest; you adapt to make your stay as feasible as possible.

This inmate's definition of "the fittest" is hardly a model citizen. In prison, being the fittest can range from being the most physically imposing, running a gang or smuggling outfit, or being the most prolific rapist. Here, respect is the most valuable cultural capital, and it must be earned. The quickest way to earn respect, though hardly painless, is to fall in with like company.

Similar patterns of prison gang dominance over the streets and individuals can be seen in those who turn to gangs for protection and connections once they are incarcerated.<sup>131</sup> "Having made a lifetime commitment to the prison gang," Petersilia writes, "the new members export these new connections, hostile attitudes and skills back to their home communities when they are released. California's 'catch and release' parole policies, which continually recycle inmates between prison and home, clearly facilitate this linkage."<sup>132</sup> This ironic situation is "cyclical and toxic," and as she notes "as prison gangs gain power, prisoners perceive the prison as being less safe and administrators in less control, causing more of them to join gangs for protection."<sup>133</sup> Thus, the side-effect of these events is that individuals who involve themselves with gangs for the immediate benefit of protection, don't realize or even care that their affiliation might become a long term commitment, maybe a lifetime commitment, a phenomenon that has elsewhere been described as prisoner's "learning dependency."<sup>134</sup> Such dependency is also exemplified in forms of institutionalization, where prisoners are taught to depend on the prison to such a degree, that they cannot function in society without great difficulty. This was the case with the character "Brooks" in the film *Shawshank Redemption*, who after a long spell of prison life, committed suicide, preferring death to coping with life on the outside.<sup>135</sup>

It is hardly a mystery why one might want to join a gang in a place like prison, where there is safety in numbers. As one subject pointed out in interview, "I witnessed just about every form of violence imaginable. From fist fights, to stabbings, suicides, hangings, riots to gassings, to razor-slashings; some to kill and some to just mark you to send a message. I've seen inmates gang raped. Basically, you name it." Another subject added, "To myself, violence is the answer most prisoners feel is the true meaning of getting respect. It's basically tradition. Let's just say I believed in a cause that I would have died for. So when I was called to do dirt, then dirt is what was kicked up. What the fuck?"

Compounding issues in prison is the reality of racial segregation, a factor

131. Petersilia, *supra* note 20, at 33.

132. *Id.*

133. *Id.*

134. ANN CORDILIA, *THE MAKING OF AN INMATE: PRISON AS A WAY OF LIFE 3* (1983).

135. *THE SHAWSHANK REDEMPTION* (Columbia Pictures 1994).

that often aids in the construction of super-gangs and increases the scope of gang violence throughout the prison system. One simple example of this phenomenon is the *Sureño/Norteño* split, whereby countless Mexican/Chicano street clicks are prone to divide themselves along imaginary north/south borders in prison—from many to just two huge polar divisions. Here, the “rules” of race are simplified, as another inmate explains, “I didn’t post up with nobody on the outside, but when I got locked up, I ran with the Mexicans, the *Sureños*. I had to follow suit.” For another individual, as with many others, the question of race was intimately tied to protection, as he explains:

If you see a Mexican being messed with by, for instance, a Black guy, then you are obligated to take it out on the nearest Black guy. This is how the Mexican connection works. It’s like a chain reaction...You know how they say, “If you fuck with the bean, you get the whole burrito.”

Illustrating the raw power of their blocks, prison gangs in the spring of 2008 forced the simultaneous lockdown of all California prisons.<sup>136</sup> The rationale for this measure was to thwart an impending *Norteño* retaliation that was to take place wherever the gang was organized—in practically every state prison. By its historically segregationist policies, the California Department of Corrections and Rehabilitation (CDCR) aided in the creation of such super-gangs. Being forced to live among racially-like inmates indeed divides the races, but it also unites them in the process. The schismatic nature of street gangs is reorganized behind bars, and instead of countless rival factions from neighborhoods, the swaths of space are staggered. The numerous gangs are reconstituted into just a few that exert powerful influence, as these recent events exemplify.

These testimonies and analyses offer a unique glimpse of the meaning of violence for those living in a violent world, which points to prison personnel and policy as partly responsible for these conditions. In addition, this glimpse dramatically reveals the porous nature of prison walls and how individuals can get trapped in a seemingly endless cycle of violence. To be sure, as long as the prison administration cannot ensure security for inmates, the gang problem can never be eradicated. The following section continues the idea of letting those with personal experience with prisons speak for themselves.

### *B. From the Pens of Pens*

American prison writing has produced a steady stream of testimony since the early 1900s, nearly all of which is unanimous in characterizing the prison as violent and brutal. By the late 1970s, the river of prison literature overflowed out to the American public in mass-market paperbacks, newspapers, magazines,

and major motion pictures.<sup>137</sup> The growing number of prisoners being glorified in the media spawned a public backlash that helped de-fund creative writing classes, literary journals, and other programs, culminating in the 1994 Federal Crime Bill, which prohibited the government from awarding Pell Grants to felons.<sup>138</sup> Nonetheless, over the last half of the twentieth century, many prison memoirs and other writings have become extremely popular and widely read—and almost all of them tell of harrowing experiences under incarceration.

Perhaps the most famous prison memoir is the *Autobiography of Malcolm X*, a work that devotes several chapters to Malcolm X's imprisonment.<sup>139</sup> Reflecting on his violent experiences in prison, he writes, "Any person who claims to have a deep feeling for other human beings should think a long long time before he votes to have other men kept behind bars—caged."<sup>140</sup> Since Malcolm X's incarceration in the 1950's there have been numerous internal indictments that have spoken of the brutal life behind bars.

In the 1960s, writings like George Jackson's *Soledad Brother* focused on the antagonisms created by guards to control prisoners.<sup>141</sup> In his analysis, Jackson asks, "How can the sick administer to the sick?" a rhetorical question that gets at the very heart of the violence wielded by guards.<sup>142</sup> Such sentiments were echoed a decade later in Abbott's *In the Belly of the Beast*, which told of his many years locked in a "blackout cell," the solitary confinement of his era.<sup>143</sup> His description gives a step by step account of how institutional punishment induces mania. Abbot writes, "At first you move gingerly about the cell because of the body wastes of prisoners who preceded you. You spend much of your time in the first long days squatting with your back defensively against a wall—squatting on the outskirts of the filth on the floor which radiates from the hole."<sup>144</sup> Eventually solitary confinement began to take its toll and lead Abbot into violent madness:

Whenever I stirred in the cell, dust rose to my nostrils. Insects crawled on me when I was lying down and I became a ball of tension...I heard someone screaming far away and it was me. I fell against the wall, and as if it were a catapult, was hurled across the cell to the opposite wall. Back and forth I reeled from the door to the walls, screaming. Insane. When I regained consciousness I was in a regular cell. I had been removed from

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137. H. Bruce Franklin, *Introduction, in PRISON WRITING IN 20<sup>TH</sup>-CENTURY AMERICA* 14 (H. Bruce Franklin ed., 1998).

138. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103<sup>rd</sup> Cong. § 513 (1994).

139. ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

140. *Id.* at 152.

141. GEORGE JACKSON, *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* (1970).

142. *Id.* at 164.

143. JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 27 (1981).

144. *Id.* at 28-29.

the *blackout cell*. Every inch of my body was black with filth and my hair was completely matted.<sup>145</sup>

Abbot's account attests to other ways in which punishment can induce psychological stress to the point of self-inflicted violence. Validating such accounts, studies have indicated that inmates housed in solitary confinement have the highest incidences of suicide in prison.<sup>146</sup> In his case, the punishment of solitary confinement only exacerbated conditions and unnecessarily created further violence.

In the 1990s, writings like James W. Dooley's prison-biography continued the tradition of retelling this dangerous journey through prison. He notes "[s]ometimes in prison I felt like a wild beast by having to fight just to survive...many times I would think, what the hell, maybe I should just kill myself and end it all."<sup>147</sup> Similarly, writers like Mumia Abu Jamal offer vivid accounts of prison life, and specifically, death row. In *Live from Death Row* Jamal tells of one man's disturbing "Descent into Hell":

[D]uring the midday meal, the unmistakable odor of burnt hair drifted sharply around the block. "Somebody's burnin' hair, man! You smell that...?" ...Moments later, a naked man walked down the tier, his front darkened like wheat toast, an acrid stench rising like an internal sacrifice. He walked slowly, deliberately, as if lost in thought, as if involved in a languid, aimless stroll on the beach. Twelve hours later he was pronounced dead, with over 70 percent of his body burned.<sup>148</sup>

In another account, Jamal tells of a guard's excessive beating of a prisoner in which he hears the "unmistakable sounds of meat being beaten by blackjack, of bootfalls," followed by:

"Get off that man, you fat, greasy, racist, redneck pig bitch muthafucka!"

My tired eyes snap open; the cracks, thuds, "oofs!" come in all too clear. Damn. No dream.

Anger simmers at this abrupt intrusion into one of life's last pleasures on B block—"home" of the state's largest death row—the all-too brief respite of dreams.

Another dawn, another beating, another shackled inmate pummeled into the concrete by a squadron of guards.<sup>149</sup>

These dramatic accounts reveal that prisoners face the threat of violence on at least two major fronts—from other prisoners and from guards. Finally, recent

145. *Id.* at 27.

146. Pfeiffer, *supra* note 58, at IV.

147. JAMES W. DOOLEY, *INSIDE HUNTSVILLE PRISON* 156 (1981).

148. MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* 23-24 (1996).

149. *Id.* at 65-66.

works such as Stephen Hartnett's *Incarceration Nation*, representing a twelve year investigation into prison poetry, found images of prison life pervaded by violence and physical humiliation, which perhaps sums up this section well:

but for the pleasure to inflict  
 pain damaging the guards  
 as much as the prisoners  
 the temptation so great  
 to abuse the impunity  
 of unchecked power  
 guard culture so klanish  
 defining honor through cruelty  
 dehumanizing others themselves  
 we know guard violence  
 is neither idiosyncratic  
 nor a form of self-defense<sup>150</sup>

#### IV. POLICY: FUTURE ESCAPES FROM PRISON

Over the last half-century, two major streams of thought about approaching prison reform have emerged. One stream seeks to address problems in American law, jurisprudence and law enforcement, frequently through sentencing reform. The other focuses on prison policy and management, and primarily aims to reform through institutional policy.<sup>151</sup> The first approach is concerned with the legal mechanisms that have tremendously broadened the range of felonious crimes, lengthened time in sentencing, and disenfranchised minority communities. Broadly speaking this might be best understood as non-inmate centered litigation. The second approach centers on issues directly related to a prisoner's conditions behind bars, and might be best understood as litigation that centers on prisoner's rights.<sup>152</sup>

With this background in mind, the goal of this section is to move beyond the manufacturing social violence thesis to posit solutions to correct what is incorrect about corrections. The method used for this task integrates previous recommendations and other political measures into a holistic prescription designed to help deflate the prison crisis quickly and efficiently. It is an unabashed set of escape plans to help lead the state and society out of the prison paradox.

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150. STEPHEN JOHN HARTNETT, *INCARCERATION NATION: INVESTIGATIVE PRISON POEMS OF HOPE AND TERROR* 31 (2003).

151. See, e.g., REPORT OF THE CORRECTIONS INDEPENDENT REVIEW PANEL: REFORMING CORRECTIONS (2004), [http://cpr.ca.gov/Review\\_Panel/](http://cpr.ca.gov/Review_Panel/).

152. See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV., 1555 (2003).

## A. The Major Areas of Reform

### 1. Strategic Sentencing

The length of prison sentences being doled out is far too severe. Indeed, when compared to the rest of the industrialized world, the U.S. leads in incarceration rates, length of sentences, and raw prison population.<sup>153</sup> Further, allowing overcrowded prisoners to spend long periods of time in an environment such as the one described in this article does not do society any good. Certainly, current conditions behind bars suggest that non-violent offenders, to begin with, should not be imprisoned at all. Though this might sound quite radical, there is little logic in incarcerating those who do not pose a physical threat to themselves or society—the sort of threat prisons were intended to thwart in the first place. This approach would be more sensible than many current systems, which indiscriminately incarcerate violent and non-violent individuals who, more than anything else, learn to adapt to their violent ecology.

Others argue that we must abandon “the traditional, symbolic, fusion of prison with punishment, and devise a more utilitarian definition of who should be imprisoned, and for how long.”<sup>154</sup> This argument might also stand for the proposition that only violent offenses should be punishable by prison since those offenders present a physical danger. In this way, the prison would be used with the greatest political good in mind. This argument may also suggest that solitary confinement might be used only within clearly defined time limits under justifiable penal principles. Currently, over half of all prisoners are incarcerated for non-violent crimes. An exodus of non-violent prisoners of this proportion would amount to significant savings in the budgets of many states without posing much risk to society. As Judge Thelton Henderson noted in *Plata v. Schwarzenegger* (2007), “The court could consider closing some institutions or ordering the release of prisoners...those who pose the least security risk as a means of general population reduction.”<sup>155</sup>

In places like California there is an urgent need for a sentencing commission to normalize and scale back punishment, and it has been argued that without a sentencing commission, arbitrary penalty enhancements and high

153. Elliot Currie, *Crime and Punishment in the United States: Myths, Realities, and Possibilities*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1998).

154. Michael E. Sherman, *Prisons in the Theater of American Justice*, in *THE DILEMMAS OF PUNISHMENT: READINGS IN CONTEMPORARY CORRECTIONS* 45 (Kenneth C. Haas & Geoffrey P. Alpert eds., 1986).

155. *Plata v. Schwarzenegger*, No. C01-1351 TEH, (N.D. Cal., filed July 23, 2007). Schwarzenegger apparently took this advice, recently announcing that as many as 20,000 prisoners could be released as a part of larger scheme to cut California’s budget deficit. See John Wildermuth, *Prisons: 22,000 Nonviolent Inmates Could be Set Free Early*, S.F. CHRONICLE, Jan. 12, 2008, at A8.

mandatory minimums will continue to contribute to overcrowding.<sup>156</sup> California's Determinate Sentencing Law, enacted in 1976, explicitly states that the purpose of imprisonment is punishment and notes further, "[t]his purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances."<sup>157</sup> Some have linked this law to the rise of retribution in the penology of the 1970s, helping to pave the way for a shift toward more draconian laws throughout the U.S.<sup>158</sup>

From that period to the present, a flood of voices have advocated more sensible sentencing measures.<sup>159</sup> This wave includes legal scholars like Frank Zimring and Gordon Hawkins who advocate addressing the failures of the parole system, legislation, and the drug war through remedial measures such as boot camps, increasing the prison threshold, and diversion of nonviolent property felons.<sup>160</sup> Similarly, other scholars argue for sentencing commissions and "shifts in attitudes toward imprisonment," which would subsequently translate into more restrictive selection for imprisonment and result in less overcrowding.<sup>161</sup> According to the Sentencing Project, the rate of incarceration in the U.S. is 726 per one hundred thousand citizens.<sup>162</sup> Yet in Japan, the rate is astonishingly lower, at only 62 per one hundred thousand citizens; India boasts half of that at only 30 per one hundred thousand citizens.<sup>163</sup> These numbers show how other democratic countries, both more and less economically developed, have figured out other ways of dealing with crime other than mass incarceration—perhaps we should as well.

A further recommendation for sentencing and prison policy centers on the

156. Casey McTigue, *The Problem of Post-Cunningham Judicial Review: The Impact of Gall, Kimbrough and Senate Bill 40 on California Sentencing*, 13 BERKELEY J. CRIM. LAW 199, 213 (2008).

157. Cal. Penal Code 1170(a)(1)(West 2007).

158. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992).

159. See, e.g., PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Andrew Ashworth & Andrew Von Hirsch eds., 2008); The National Council on Crime and Delinquency, *Task Force on Prison Crowding: Responding to California's Prison Crisis* (2006), [http://www.nccd-crc.org/nccd/pubs/2006\\_ca\\_taskforce.pdf](http://www.nccd-crc.org/nccd/pubs/2006_ca_taskforce.pdf); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991); JOAN PETERSILIA, *EXPANDING OPTIONS FOR CRIMINAL SENTENCING* (1987); MARTIN LYLE FORST, *SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY* (1982); NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUST., *DETERMINATE SENTENCING: REFORM OR REGRESSION: PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING* (1977); LEO H. WHINERY, *PREDICTIVE SENTENCING* (1976); *SENTENCING THE OFFENDER—A BIBLIOGRAPHY* (Compiled by Dorothy Campbell Tompkins 1971).

160. FRANKLIN E. ZIMRING & GORDON HAWKINS, *PRISON POPULATION AND CRIMINAL JUSTICE POLICY IN CALIFORNIA* 29-38 (1992).

161. Alfred Blumstein, *Prisons: Population, Capacity, and Alternatives*, in *CRIME AND PUBLIC POLICY* 231 (James Q. Wilson ed., 1983). 115

162. The Sentencing Project, *supra* note 1.

163. *Id.*; see also Roy Walmsley, *Global Incarceration and Prison Trends*, 3 FORUM ON CRIME AND SOC'Y 65-78 (2003).

geographical location of the prisons themselves. In some instances, prison overcrowding has forced states like California to ship prisoners across state lines to other state's facilities.<sup>164</sup> After such inter-jurisdictional transfers, prisoners are housed in institutions located thousands of miles away from the jurisdiction in which their adjudication took place.<sup>165</sup> Practically speaking, these long distances cripple rehabilitative or restorative potential by precluding visits by friends, family, advocates, or attorneys, who may concomitantly help maintain a prisoner's mental stability. Further, a long distance precludes the prisoner from gathering evidence, contacting eyewitnesses, accessing legal aid or accessing other resources necessary to fight for freedom in court. Prison projects built on rural lands by towns which compete to become the home for new prisons also preclude access to the above mentioned resources.<sup>166</sup> For the indigent prisoner, which includes the vast majority of those behind bars, a long distance between home and the institution spells disaster in many ways. Sociologically speaking, this reality also yields something of a clash of cultures. As Noble asserts, "[w]hite correctional officers are primarily from rural areas where interracial contact is infrequent and racial prejudice is prevalent...coming from rural areas, many White guards have little to no experience in dealing with Black culture."<sup>167</sup> Such deep cultural gaps effectively work to the detriment of prisoners since prisons tend to facilitate the process of objectification, such that the less these cultural identities mean to guards, the less prisoners mean.

To shield prisoners from deportations to remote institutions, sentencing and housing policies should prohibit prisoners from being housed outside the county in which the felony offense occurred. If there is no institution therein, the default should be placement in the nearest one, without exception. Moreover, prisons would do better to staff themselves with a more racially diverse workforce. Ideally, staff would resemble the prisoner population itself. But as it stands, ethnic minorities are the bulk of prisoners, while Whites make up most of prison personnel. This unseemly and unsightly situation is one that must be remedied urgently—on one end or the other, as these cultural considerations are not mere scholarly musings. Rather, they translate into real life consequences for prisoners who are often resentful of a "White" administration. Consider, for example, that prisoners are prone to having additional time imposed on their original sentence for infractions committed under incarceration, a procedure that is heavily reliant on the testimony of guards. Thus, guards wield very real power that is constantly under the sway of

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164. Nancy Vogel, *Thousands of Inmates to be sent out of State*, L.A. TIMES, Feb. 03, 2007, at B1.

165. David Shichor & Dale K. Sechrest, *Privatization and Flexibility: Legal and Practical Aspects of Interjurisdictional Transfer of Prisoners*, 82 THE PRISON J. 386 (2002).<sup>116</sup>

166. STEVEN R. DONZIGER, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 94 (1996).

167. Noble, *supra* note 17, at 23.

subjectivity and constantly subject to abuse.

## 2. Prison Normalization and Violence Reduction

It is well known that prisoners suffer from brutal forms of violence and sexual deprivation. However, what is not well known is that normalization or stabilization is an active ingredient that can counter-balance these social dispositions. Toward this end, one scholar advocated implementing prisoner disciplinary codes that “directly proscribe” the various forms of sexual harassment.<sup>168</sup> In this way, prisoners would have a set of bright-line rules to govern inmate victimization, rather than having to resort to the discretion of guards to determine what behavior accords with what infractions. But, of course, rules mean nothing without the proactive efforts of correctional officers to administer these prohibitions fairly and consistently.

Regardless of what resources are given toward equitable administration, the challenges of the mentally ill population will remain a formidable challenge to achieving a more normal prison. This point is worth reiterating—rehabilitative potential and violence reduction will be compromised by this growing segment of the prison and jail populations. One measure to combat this situation would be for states like California to convert a number of their current prisons into facilities like Atascadero, which is designated specifically for mentally ill criminals. By sifting out the cases of severe mental illness from throughout the state prison population, this measure could alleviate a tremendous burden from the other prisons, which are not prepared to deal with such prisoners. At the very least, for their safety or the safety of other prisoners, mentally ill prisoners should be housed according to their particular diagnosis and treatment<sup>169</sup> and have special housing for this purpose.<sup>170</sup>

To help achieve normalization, prisons might classify and house prisoners according to offense, rather than according to other factors, such as race.<sup>171</sup> For example, inmates who are known sexual predators should be segregated from the general population. Additionally such inmates, who are at increased risk of attack, should only be confined in protective custody as a last resort. As one scholar admonishes, “To do otherwise would re-victimize them through the stigma and isolation entailed by this form of segregation.”<sup>172</sup>

168. James E. Robertson, *Cruel and Unusual Punishment in U.S. Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 47 (1999).

169. Ball, *supra* note 58, at 58.

170. Bonnie J. Sultan, *The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in United States Prisons*, 13 GEO. J. POVERTY L. & POL'Y 357, 375 (2006).

171. California has seen the ineffectiveness of using race to segregate and house, and is currently in the experimental phase of desegregating prisoners. See Frank Stoltze, *California Prisons Start Desegregating Inmates*, NPR, Aug. 6, 2008, <http://www.npr.org/templates/story/story.php?storyId=93336656>.

172. Ball, *supra* note 58, at 47-48.

In some prisons, a better state of normalization has been achieved through better policies. For example, prisons in the Netherlands operate on a “principle of minimal restrictions,” which means that a “prisoner has the same civil rights as any other citizen, unless the realization of these rights is impossible under the necessary conditions of detention.”<sup>173</sup> Thus, prisoners kept in such facilities are afforded more freedom as to with whom they may associate, what they may do, and when they may do it. Compared to their American counterparts, Dutch prisons keep the stress of bondage to a bare minimum. This concept has been advocated in the U.S. under the term “community corrections,” if only rhetorically.<sup>174</sup> The guiding principle behind these models is that prisons are inherently hurtful, so conditions of confinement should focus on minimizing the harm.

A step in that direction might be to recognize that separating guards and prison personnel according to sex is a sensible policy. According to the logic of some current administrators, prisons must hire both male and female employees, lest administrators be faced with sexual discrimination charges. This current organizational structure has funneled female guards in male prisons, and males into female prisons, a strategy that has routinized rape and other forms of sexualized violence. In 2006, this point was demonstrated at Tallahassee Federal Prison, a female prison, where federal agents attempted to arrest six male prison guards for their involvement in, among other things, sexual abuse against female prisoners.<sup>175</sup> In this explosive encounter, one federal agent and one prison guard were shot dead in exchanged gunfire, demonstrating yet again the deadly episodes that can take place behind prison walls.

Exposing male prisoners to female guards is equally problematic. Nudity during showering, strip searches, and solitary confinement can become a tremendous source of anxiety and humiliation for male prisoners being monitored by female guards. For some, these experiences are even sacrilegious. Thus, this article recommends strictly that female guards watch over female prisoners, and male guards over male prisoners. Under this system, there should be no question of sexual discrimination based on the rationale of separating the prisoners themselves by sex. In other words, if the “separate but equal” logic is adequate to justify separating prisoners by sex, why does this rationale not apply to prison staff as well?

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173. A.M.V. Klamthout & D. van der Landen, *Breda Prison, Holland: From Water Cell to Container Cell—The State of the Dutch Prison*, in *THE STATE OF THE PRISONS—200 YEARS ON 97* (D. Whitfield ed., 1991).

174. MICHAEL SHERMAN & GORDON HAWKINS, *IMPRISONMENT IN AMERICA: CHANGING THE FUTURE* 101 (1981).

175. Michael Peltier, *U.S. Agent Among Two Dead in Florida Prison Gunfight*, REUTERS, June 21, 2006, [http://www.redorbit.com/news/general/545829/us\\_agent\\_among\\_two\\_dead\\_in\\_florida\\_prison\\_gunfight/index.html](http://www.redorbit.com/news/general/545829/us_agent_among_two_dead_in_florida_prison_gunfight/index.html).

Perhaps the most challenging policy questions emerge regarding how to quell the destructive levels of masculinity exhibited behind bars. As one study explains, “[w]hile the causes of sexual harassment among male inmates are partly rooted in pre-prison experiences, they are exacerbated by the deprivations of prison life.”<sup>176</sup> Such behavior is the result of deprivations imposed by incarceration as well as the experiences and values inmates bring to the institution. Although there may not be any ready fixes for this problem, much can be gained by simply making prison staff aware of these destructive patterns and their root causes: “Indeed, responding to sexual harassment simply through tighter control of inmates may be counterproductive because such measures further challenges an inmate’s masculinity, making him more likely to engage in sexual harassment as well as other forms of prison violence.”<sup>177</sup> These recommendations are far from a prescription to end violence in prisons. However, they offer some remedy for the lawmakers for this perpetually dangerous and paradoxical situation.

### 3. Collateral Considerations

As discussed earlier, many states do not allow convicted felons to vote or sit on juries. As a result, a large number of minority males have been almost entirely disenfranchised from the political process.<sup>178</sup> Regarding reintegration into society, the shackles of a felony conviction are nearly impossible to shake off, haunting every job, housing, and school application.<sup>179</sup> These policies, rather than encouraging ex-prisoners to have a stake in the political process, strip away their incentive. Thus, this article advocates a policy that would never abridge the voting rights of felons, whether in or outside of prison. Rather than further alienating prisoners, policymakers should try to ensure that prisoners have a vested interest in society and access to the political process. Moreover, other civic responsibilities, such as jury duty, should resume upon release without any technical barriers. These guarantees would allow ex-prisoners to have meaningful participation in the political process and would avoid forcing them to continue seeking extra-legal or extra-political means to better their lives. Such reform may also help reestablish basic democratic values. For many, the ultimate expression of “freedom of speech” is the right to vote, but in America, millions of ex-felons sit silenced.

Other ways to reduce the prison population are the final collateral considerations. These methods may include population caps, litigation, and

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176. Robertson, *supra* note 168, at 48.

177. *Id.* at 48-49.

178. See generally Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50 (Marc Mauer & Meda Chesney-Lind eds., 2002).

179. There is a movement to restore voting rights to felons; see Jori Lewis, *Voting Prison Blues*, MILLER-MCCUNE, Nov.-Dec. 2008, at 27.

more creative forms of punishment. Although capping the prison population has a certain set of appeals, it also has limitations as an effective remedy. Population caps work to maintain a status quo based on population quotas, which ignores the causes underlying the need for a cap in the first place. As a temporary measure, population caps may be useful. However, for the long term, even caps would have to be scaled down. Also, as demonstrated by common law history, litigation is a useful tool to affect changes to conditions behind bars. Like population capping, this approach may not be the most efficient way to address the problem. However, litigation has its role, and sometimes, suing is a prisoner's only recourse.

### B. Final Thoughts

This article has argued that prisons work to perpetuate violence against civilians. Long recognized as the elite training college for criminality, mania, and violence, prisons act as a locus for all types of dangerous confrontations and explosive events including race wars and riots. In addition to violence within, prisons encourage and contribute to all types of violence against innocent civilians. The destructive toll of ex-prisoner assaults and attacks against civilians is compounded by the socially negative impact prisons often have on prison guards and the impact they in turn have on society. Most people would like to think that prisons are a place where prisoners are locked up and segregated from the rest of society, but unfortunately, this is not the case.<sup>180</sup> The sociology of prisons ultimately reveals cycles of violence. This is especially true in California, where “only 21% of California parolees successfully complete parole—half the national average—and two out of three inmates returning to prison are parolees.”<sup>181</sup> The current predicament poses a paradox: rather than protecting society and providing social stability, prisons produce and reproduce violence. Today, with an unprecedented number of incarcerated citizens, the stakes are greater than ever. Prisons may be breeding grounds for new forms of racial and religious violence.<sup>182</sup> Whether discussed by scholars, prisoners, ex-prisoners, the government or the media, prisons are characterized as deeply flawed, or even completely broken.<sup>183</sup> This view has existed since at least the prison reform efforts of the early 1900s, when

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180. Giller, *supra* note 19.

181. Petersilia, *supra* note 20, at 2.

182. See SpearIt, *God Behind Bars: Race, Religion & Revenge*, 37 SETON HALL L. REV. 497 (2007); THE GEORGE WASHINGTON UNIVERSITY, HOMELAND SECURITY POLICY INSTITUTE, OUT OF THE SHADOWS: GETTING AHEAD OF PRISONER RADICALIZATION, A SPECIAL REPORT, available at <http://www.gwumc.edu/hspi/pubs/Out%20of%20the%20Shadows.pdf>); *Prison Radicalization: Are Terrorist Cells Forming in U.S. Cell Blocks?: Hearing Before the Senate Comm. on Homeland Sec. & Gov't Affairs*, 109<sup>th</sup> Cong. 37-45 (2006) (statement of Frank J. Cilluffo, Director, Homeland Sec. Pol'y Inst.), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:30597.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:30597.pdf).

183. See, e.g., ANGELA DAVIS, ARE PRISONS OBSOLETE? (Open Media 2003).

reformers mournfully proclaimed: “No one talks of reforming the Black Death.”<sup>184</sup>

In today’s prison culture, it is impossible to discern whether the reformer’s reference to the “Black Death” was intended metaphorically or literally. For contemporary criminal justice, these problems should be of the utmost concern since the system’s substantive instrument of punishment, the penitentiary, is defective in many ways. These pose challenges to any correctional or rehabilitative regime, and as the Report of the Corrections Independent Review Panel has unequivocally expressed to California Governor Arnold Schwarzenegger, “Violence must be brought under control to make programming possible.”<sup>185</sup> Simultaneously, many incarcerated rightly believe themselves to be imprisoned for acts that do not require the severe sanction of imprisonment. These prisoners reject the idea that they need “rehabilitation”; they believe the system needs rehabilitation instead.

The issues surrounding rehabilitation cannot be stressed enough. Damage is done by simply advocating “rehabilitation” as a workable solution to our criminal justice woes. This type of advocacy wipes the slate clean for the criminal justice system, ignoring corrupt policing tactics, courtroom biases, racial profiling, unfair sentencing laws, and incompetent prison administration as culprits of mass imprisonment. In other words, proposing only rehabilitation as the solution, downplays the glaring maladies that plague the criminal justice system. By stressing rehabilitation, one ignores all the unfairness of criminal justice and lays the full burden of crime on the prisoner. So, although there is a need for rehabilitative programs, there are clear limitations to their overall efficacy. Perhaps the most important of these limitations is the prisoner’s own view about whether he needs rehabilitation or *whether he even believes in rehabilitation*.

The diminished role of rehabilitation thus magnifies the manufacturing social violence thesis by connecting social violence directly to prisons, prisoners, ex-prisoners, and guards. From organized gang leaders who order “hits” from inside the prison’s confines to the mentally unstable being released, the range of assaults against society is spectacular and stunning. As one correctional officer recently noted on MSNBC’s Lockup Series from Corcoran Prison, “Anyone who thinks that the Mexican Mafia cannot ‘reach out and touch someone’ doesn’t understand the reality of this place.”<sup>186</sup> As early as 1973, Mitford noted this particular prison gang’s influence on the outside:

Unless an inmate is given parole—and many times not even then—he is not going to endanger his own life, and that of his family on the outside, by getting his name on the Mafia’s shit-list, or on that of any other similar

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184. Julian Hawthorne, *Our Barbarous Penal System*, HEARST’S MAGAZINE, Feb. 1914, 205, 206.

185. Reforming Corrections, *supra* note 151, at 126.

186. *Lockup Series: Corcoran* (MSNBC television broadcast Nov. 11, 2005).

type clique—all of which are worthless, and have neither political nor moral tenets. The members of these cliques, many of them, have brothers on the outside who have been, and will be again, in prison themselves, and who are happy to settle a vendetta by killing someone out there.<sup>187</sup>

Since the 1970s, prison gangs have grown in size and become even more sophisticated. Thus, all of the additional punishment and legislation directed toward gang members appears to be having little effect on gang activity. No gang reform is possible without prison reform eliminating the dangerous conditions within prisons—the very conditions that encourage prisoners to join a gang in the first place.

Finally, we cannot overlook the fact that most prisoners eventually make their way back into society. Here, the question of “who is or is not a prison gang member is important because it can represent the difference between a prisoner serving time in the SHU or in a less restrictive prison environment.”<sup>188</sup> Releasing tens of thousands of SHU prisoners, many of them mentally ill, creates a situation that “will lead to large numbers of extremely damaged individuals returning to society over the coming decades.”<sup>189</sup> The reality is that “most of the prisoners locked away in the maddening solitude of the SHUs will one day be freed to return to our midst—some of them angrier, more impulsive and more unbalanced than ever. And we will all have to live with those consequences.”<sup>190</sup> Stated more accurately, some of us will have to die as well.

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187. Mitford, *supra* note 119, at 47.

188. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115, 1118 (1995). 122

189. SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* 144 (2008).

190. Beiser, *supra* note 110, at 98.