

# Exclusion and Control in the Carceral State

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## I. EXCLUSION AND CONTROL AS A PENAL INSTITUTION

Over the course of the 1990s, two policy innovations emerged that were quickly and widely adopted by criminal justice systems around the United States. The first was life in prison without the possibility of parole (LWOP),<sup>1</sup> a criminal penalty first introduced as an alternative to execution in capital cases<sup>2</sup> but quickly taken up by legislators nationwide and applied to a broad range of crimes.<sup>3</sup> The second was supermax

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<sup>1</sup> See MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004) (“During the 1990s the growth of persons serving life without parole [was] precipitous, an increase of 170 percent, between 1992 and 2003. Overall, one of every six lifers in 1992 was serving a sentence of life without parole. By 2003, that proportion had increased to one in four.”).

<sup>2</sup> The first life-without-parole statutes “were promoted by prosecutors and enacted by law-and-order legislators who were fearful of facing a punishment scheme without a capital option” after the Supreme Court struck down the death penalty as unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1841 (2006). After the Court upheld newly written death penalty statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976), effectively restoring the “capital option,” LWOP sentences were pushed heavily by death penalty opponents in death-eligible cases “as a way of reducing the number of death sentences.” Note, *supra*, at 1841.

<sup>3</sup> Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT’G REP. 27, 27-28 (2010) (“[D]epending on state law, LWOP can be used for a variety of offenses. In at least 37 states, LWOP is available for nonhomicide convictions, including convictions for kidnapping, burglary, robbery, carjacking, and battery. . . . [In some] states—such as Alabama, California, Florida,

confinement,<sup>4</sup> in which prisoners are locked in small cells for twenty-three to twenty-four hours a day with little or no human contact or sensory stimulation.<sup>5</sup> This ultra-restrictive custodial form originated out of a desperate attempt by officials in one federal penitentiary to regain control of an out-of-control facility<sup>6</sup> and rapidly became the preferred strategy across the country for housing those people judged too difficult or dangerous to remain in a prison's general population.<sup>7</sup>

Much has been written about each of these policies individually. Yet to consider them only in isolation risks missing what they together reveal about the structure of the broader penal system in which they arose. In one sense, LWOP and supermax simply enact the practical mechanics of incarceration: the exclusion from the shared public space of those deemed a threat to public order and security, and the exercise of

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Georgia, Louisiana, South Carolina, Virginia, and Washington—LWOP is mandatory upon conviction of serious habitual offender laws . . . . In 2010, a 22-year-old defendant convicted of robbing a sandwich shop received an LWOP sentence under [Florida's Prison Release Reoffender Law] as a result of his having been released from prison for a previous drug conviction.”).

<sup>4</sup> See MORRIS L. THIGPEN & SUSAN M. HUNTER, NATIONAL INSTITUTE OF CORRECTIONS INFORMATION CENTER, SPECIAL ISSUES IN CORRECTIONS, SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE 3-6 (1997) (reporting that fifteen supermax facilities or units were opened from 1989 through 1993, that five more were opened from 1994 through 1996, and that five additional facilities or units were online to open by 1999).

<sup>5</sup> See LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON 23 (2004); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1528 (2004).

<sup>6</sup> The facility in question was the United States Penitentiary at Marion, Illinois (USP Marion), at which, “[b]etween February 1980 and June 1983, there were 14 escape attempts, 10 group disturbances, 54 serious assaults on inmates and 28 on staff: eight prisoners died at the hands of their fellow prisoners. After a summer of escalating violence against inmates and staff, punctuated by lockdowns, shakedown and suspended activities, two prison officers were killed in separate incidents. . . . Shortly afterwards, a state of emergency was declared and USP Marion was placed on permanent lockdown status.” Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem*, 1 PUNISHMENT & SOC’Y 163, 167-70 (1999).

<sup>7</sup> *Id.* at 176 (explaining that in terms of “operational policies” for their new high-security facilities, “many states looked to Marion as a model”); see also Stephen C. Richards, *USP Marion: The First Federal Supermax*, 88 PRISON J. 6, 8-18 (2008).

state control to keep those marked out for such exclusion separate and apart from society for the duration of their sentences. But LWOP and supermax are exclusion and control *nonpareil*, and the rapid and enthusiastic embrace of both policies across the country reveals the centrality of these imperatives to contemporary American penality. Every polity that incarcerates as punishment must remove and restrain those who are sentenced to prison. But in the United States, exclusion and control has emerged<sup>8</sup> over the past several decades as the animating mission of the carceral project, so that today, the primary function of the American penal system is to exclude and control those people officially labeled as criminals.<sup>9</sup>

This account contrasts sharply with the more familiar ways of construing the penal system—i.e., as the means to achieve retribution or to ensure public safety by deterring or otherwise preventing the commission of crime. Yet a closer look at the way the system actually operates makes clear the poor fit between these more conventional explanations and the realities of American penal practice.<sup>10</sup> What one finds instead is a system both inhumane and self-defeating, in which the most disadvantaged and marginalized citizens are targeted for exclusion under harsh conditions certain only to exacerbate whatever incapacities and antisocial tendencies already consigned them to social marginalization even prior to their incarceration. In this way, the system makes it extremely hard for former prisoners—even those whose crimes were relatively minor—to build healthy and productive lives on the outside. It thus virtually guarantees that many people who have been in custody will have repeated recourse to criminal conduct. Rather than taking steps to address the disabilities and social disadvantages known to be predictors of crime, the American penal system instead imposes longer and longer periods of exile.

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<sup>8</sup> In this article, “exclusion and control” represents a single concept: the animating imperative of the American carceral system. It thus takes the singular form of the verb.

<sup>9</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. (forthcoming 2012) (on file with the author) (mapping the process—the “guilt production”—by which this labeling occurs).

<sup>10</sup> See *infra* Part II; see also Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* (Charles J. Ogletree, Jr. & Austin Sarat eds., forthcoming 2012).

This way of responding to antisocial conduct has a further self-defeating effect: it ensures that the prisons themselves will eventually suffer a crisis of control. It is simply not possible to concentrate in closed institutions those people found to pose the greatest public safety threat, to provide them with no productive pursuits or help in developing pro-social skills, and to expect anything other than chronic disorder. How is a system designed to answer the violation of society's behavioral norms with exclusion and control to respond to disorder within the institutions already containing those deemed too dangerous or disruptive to remain free? The answer, of course, is supermax. Built to house the most uncontrollable people in prison, supermax emerges as simply a further iteration of the same imperative of exclusion and control that drives the carceral system in general. And here too, a familiar pattern emerges: those people targeted for exclusion and control are subjected to conditions certain only to (re)produce whatever incapacities or antisocial tendencies justified their incarceration in the first place, thus legitimizing the extension of their social exclusion.

Heightened disorder, both in society in general and inside the prison itself, is the predictable effect of a system designed primarily to exclude and control. Yet despite its evident failings, the American commitment to this penal strategy persists.<sup>11</sup> What explains this steadfast allegiance? Although there are no doubt many contributing factors, the answer lies at least in part in the compelling discursive terms on which current penal practices are justified. In the twenty-first-century United States, exclusion and control is more than just a functional mechanism for responding to crime. It is a full-fledged social institution with its own supporting narrative, the success of which has been to ground and secure an abiding public faith in the rightness—and righteousness—of prevailing penalty.

The work of anthropologist Mary Douglas on the nature and

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<sup>11</sup> To be sure, there are signs that enthusiasm for existing practices is abating, with states across the country seeking ways to shrink their prison populations and reduce recidivism. But for the most part, this shift appears to be a function of state budgetary woes in a period of severe economic recession rather than a principled rejection of exclusion and control as a penal strategy. I take up the implications of this apparent change of heart and the prospects it implies for meaningful penal reform at the end of this essay. *See infra* Conclusion.

functioning of social institutions is instructive here.<sup>12</sup> Douglas notes that, without more, merely “instrumental or provisional practical arrangement[s]” cannot become fixed and stable institutions, since these arrangements may be easily disturbed by any individual who chooses to act alone.<sup>13</sup> For an institution to take hold and succeed, “it needs a parallel cognitive convention to sustain it,” a way of justifying its existence that “fit[s] with the nature of the universe” as understood by those acting within it.<sup>14</sup> In any particular case, the cognitive convention—i.e., the ideology—that legitimizes a given institution need not be logically unassailable or even rational. It need only seem to “fit” with widespread perceptions of the natural order. Once this fit is established, once collective acceptance of the “naturalness and reasonableness” of the institution’s motivating ideas takes hold, the institution itself starts to frame public perceptions, to shape the way external phenomena are perceived<sup>15</sup> in ways that reinforce belief not only in the logic and necessity of institutional practices but also in their moral propriety.<sup>16</sup>

As will be seen in what follows, exclusion and control can be readily understood as an institution in Douglas’s sense. As such, it has been remarkably successful; the rapidity with which the extreme strategies of LWOP and supermax have come to be regarded as necessary and appropriate penal options, and indeed, the sheer size and reach of the American carceral system in general, indicate the extent to which the logic of exclusion and control has come to dominate popular perceptions of the proper state response to perceived criminal deviance and disorder.<sup>17</sup>

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<sup>12</sup> See generally MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1986).

<sup>13</sup> “We want conventions about pedestrian crossings to exist, but we will violate them ourselves if we can do so with impunity. Enough impatient pedestrians to create a critical mass will march across and hold up the cars in defiance of traffic lights.” *Id.* at 46.

<sup>14</sup> *Id.*

<sup>15</sup> As Douglas puts it, a successful institution “causes [its members] to forget experiences incompatible with its righteous image, and it brings to their minds events which sustain the view of nature that is complementary to itself. It provides the categories of their thought, sets the terms for self-knowledge, and fixes identities.” *Id.* at 112.

<sup>16</sup> See *id.* at 92 (“Institutions systematically direct individual memory and channel our perceptions into forms compatible with the relations they authorize.”).

<sup>17</sup> This dominance signals the deep hold of a successful institution. As Douglas explains,

In some cases, exclusion and control may be an appropriate public policy tool. But four decades of the American experiment with mass incarceration have demonstrated that exclusion and control is more often than not an inadvisable policy response. What is needed is a widespread commitment to pursuing alternative approaches. This commitment, however, will not arise unless the hold exclusion and control currently has over popular and political thinking about crime and punishment can be broken.

Douglas suggests that the “necessary first step” to achieving “intellectual independence” from institutional thinking is “to discover how the institutional grip is laid upon our mind.”<sup>18</sup> To that end, this essay maps the contours of exclusion and control—the institution that has defined the American carceral enterprise since the mid-1970s—exploring how it operates, the ideological discourse that justifies it, and the resulting normative framework that has successfully made a set of practices that might otherwise seem both inhumane and self-defeating appear instead perennially necessary and appropriate. The sustaining

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successful institutions are able to frame whatever social problems arise in terms that validate their defining arrangements. *See id.* As a consequence, every problem seems to have the same solution. Thus, “[i]f the institution is one that depends on participation, it will reply to our frantic question [of what is to be done]: ‘More participation!’ If it is one that depends on authority, it will only reply, ‘More authority!’” *Id.*; *see also id.* (“Institutions have the pathetic megalomania of the computer whose whole vision of the world is its own program.”); Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 128 (Jody Freeman & Martha Minow eds., 2009) (arguing that privatization currently operates as just such an institution in the realm of public governance). The present essay argues that, over the past several decades, exclusion and control has emerged as the dominant institution in the American penal context, with the consequence that each time perceived threats to the social order have appeared, the prescription has been the same: “exclude and control!” Indeed, as I have argued elsewhere, the reach of the American carceral project extends well beyond the criminal justice context, to define the state’s routine response to social deviance and disorder more generally. As a consequence, even in the absence of any criminal conviction, members of a range of groups have been targeted for exclusion and control. These groups include pretrial detainees, the mentally ill, undocumented immigrants, asylum seekers, juvenile offenders, previously convicted sex offenders, and those labeled “enemy combatants” in the “war on terror.” For further discussion on this point, see Sharon Dolovich, *Incarceration American-Style*, 3 *HARV. L. & POL’Y REV.* 237, 238-39 (2009).

<sup>18</sup> DOUGLAS, *supra* note 12, at 92.

discourse of this penal system is a radically individualist one that locates the causes of crime exclusively in the free and conscious choice of the offenders themselves.<sup>19</sup> However severe the resulting punishment, the penal subject is regarded as having brought it on himself through his own willfully criminal behavior. Society is thus absolved of any responsibility for either the crime itself (since it is the product of individual choice) or the punishment (because it is demanded by the individual's own criminal conduct). From this perspective, it becomes easy to construe criminal actors as incorrigible evildoers, since why else would they persist in their criminal conduct? This easy transition from seeing criminals as conscious and active choosers of criminal activity to regarding them as evil incorrigibles makes vivid the moral economy underpinning this institution, on which the people judged as criminals come to be regarded as less than human and thus eligible for treatment that might otherwise seem illegitimate.

Appreciating the "cognitive conventions" by which current penal practices are rendered at once logical and legitimate proves to shed light on the otherwise puzzling rapid emergence of LWOP and supermax, as well as on a number of other equally mystifying features of the American penal landscape, including why sentences are so often grossly disproportionate to the offense; why, given the multiple complex causes of crime,<sup>20</sup> the state persists in responding to criminal conduct by locking up the actors; why prison conditions are so harsh; why recidivism is so high; why extremely long sentences are so frequently imposed even for relatively non-serious crimes; and even why the people we incarcerate are disproportionately African-American. Without claiming to provide comprehensive answers to these vexing questions, this essay does offer a framework that helps to explain these striking aspects of the American carceral system. This framework takes as its starting point the practical demands incarceration imposes on the state itself: the exclusion and control of the people sentenced to prison. But as will be shown, in the American context, efforts to make sense of this way of responding to antisocial behavior quickly lead beyond practicalities to a moral economy

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<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See, e.g., Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283 (2009).

on which the incarcerated lose not only their liberty but also their full moral status as fellow human beings and fellow citizens. What happens to them is thus no longer a matter for public concern. As a consequence of this collective indifference, penal practices that may otherwise seem counterproductive, unnecessarily harsh, and even cruel become comprehensible and even inevitable.

The remainder of this essay proceeds as follows: Part II sketches the structure of the American carceral system, exposing both its dependence on the logic of exclusion and control and the moral economy that drives it. Part III explores the self-defeating nature of current carceral practices—the way the combination of prison conditions and post-carceral burdens ensures that many people who have done time will return to society more prone to criminal activity than previously. Part IV considers the question of how such an evidently self-defeating system has been able to sustain itself, and locates the answer in the radically individualist ideology, pervasive in the criminal context, that construes all criminal conduct as exclusively the product of the offender's free will. Part V illustrates the way this individualist discourse constructs criminal offenders as not just unrepentant evildoers but also sub-human—a process referred to as “making monsters”—and examines the work this normative reframing does to vindicate the penal strategy of exclusion and control and justify the arguably inhumane treatment of prisoners. Part VI explores the way that perceiving criminal offenders as moral monsters makes it difficult to distinguish the relatively few individuals who are genuinely congenitally violent and dangerous from the vast majority who are not; through this ideological (re)construction, *all* people who persist in committing crimes, even nonviolent offenders, can come to seem appropriate targets for extended and even permanent exclusion. Part VII considers the racial implications of exclusion and control, in particular the way the cultural construction of African Americans as “incorrigible” may explain why members of this group are overrepresented as targets of the American carceral system. Part VIII shifts the focus to the prison itself, where the self-defeating logic of exclusion and control has reappeared behind bars in the form of the supermax prison. Finally, the Conclusion considers how the destructive and self-defeating dynamic of exclusion and control may be disrupted. It argues that a political strategy emphasizing the financial costs of incarceration is bound to fail unless it also generates an ideological reorientation towards recognizing the people



the state incarcerates as fellow human beings and fellow citizens, entitled to respect and consideration as such.

## II. SOCIETY'S CARCERAL BARGAIN

The logic of exclusion and control is first and foremost the logic of imprisonment. When people are sent to prison, the burden thereby imposed on those individuals is obvious. What tends to go unnoticed is that each custodial penalty also imposes a corresponding burden on the state—that of assuming responsibility for targeted individuals for the duration of their sentence. This official responsibility, the concomitant of every decision to incarcerate, can be understood as *the state's carceral burden*.<sup>21</sup>

This burden has a weighty normative dimension, in the obligation it represents for the state to meet the basic human needs of the people it incarcerates.<sup>22</sup> But more important for present purposes is the immediate practical aspect of the state's carceral burden: as to each person ordered incarcerated, it becomes the state's responsibility to orchestrate their removal from the shared public space and engineer their continued absence from society for the specified period.

The first of these two steps—removal—is the more dramatic, offering the striking visual of the prison-bound offender removed from the courtroom in chains. This moment represents the public announcement of extended social exclusion. But the second step—the administrative task of guaranteeing that person's continued absence from society—is what makes incarceration possible. Sentenced offenders are, after all, human beings, who may be expected to resist their exile and escape back into the free world unless they are prevented from doing so. Hence the familiar components of the carceral enterprise: bars, locks, razor wire, electronic perimeter fences, etc. It is in these practical components of carceral restraint that social exclusion and state control become necessarily fused. There can be no carceral project, no physical banishment from society, without the simultaneous, unremitting control

<sup>21</sup> See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921-22 (2009) (introducing the idea of the state's carceral burden).

<sup>22</sup> I have explored the normative dimensions of the state's carceral burden at some length elsewhere. See *id.* at 911-23; see also *id.* at 935-72 (considering the doctrinal implications of the state's carceral burden in the Eighth Amendment prison conditions context).

of the excluded by the state.

This was not always so. The seventeenth-century English practice of transportation, whereby convicted offenders were placed on ships bound for the colonies, allowed for banishment without forcing the state to have to guarantee offenders' absence from society on a constant basis.<sup>23</sup> In the modern era, there are no new worlds to which social outcasts may be sent and forgotten. Today, the only realistic form of effective banishment is internal exile, unceasingly maintained—hour by hour, day by day, week by week—by the relentless exercise of state control.

Imprisonment is a method of criminal punishment employed the world over. But nowhere else has the possibility of consigning citizens to long-term state custody captured the political imagination to the extent it has in the United States.<sup>24</sup> In American society, it is taken for granted that social exclusion enforced by the state is the appropriate response to the commission of antisocial acts. Yet judged from a policy perspective, it is not obvious why this should be. Precisely because social exclusion entails ongoing state control of the excluded, this penal strategy is extremely expensive, consuming resources that could otherwise be spent

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<sup>23</sup> See A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775*, at 3 (1987) ("As soon as [transported convicts] were safely consigned to merchants, authorities assumed no responsibility for their welfare. Parliament enacted laws to prevent their early return home but took no steps to regulate their treatment either at sea or in the colonies.").

<sup>24</sup> See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 ("The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners."); see also THE SENTENCING PROJECT, *FACTS ABOUT PRISONS AND PRISONERS* (2008), available at [http://www.ala.org/ala/aboutala/offices/olos/prison\\_facts.pdf](http://www.ala.org/ala/aboutala/offices/olos/prison_facts.pdf) ("The 2007 United States' rate of incarceration of 762 inmates per 100,000 population is the highest reported rate in the world."). At year's end 2008, there were 1,320,145 people in custody in state prisons, 198,414 people in federal prisons, and another 785,556 people in local jails, for a total of 2,304,115. See WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2008* (2009 (revised 2010)), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. And this number does not even count the many other populations—juvenile offenders, previously convicted sex offenders, undocumented immigrants, asylum seekers, legal immigrants with prior felony convictions, detainees in the "war on terror," etc.—who are incarcerated in detention centers that often closely resemble American prisons. See Dolovich, *Incarceration American-Style*, *supra* note 17, at 238-39; see also *supra* note 17.

on more socially productive enterprises.<sup>25</sup> It also takes a profound toll on children, families, and communities when individuals are removed from society as punishment. Children are deprived of their parents,<sup>26</sup> often winding up in foster care, where they “are significantly more likely to be abused and neglected . . . [than] are their peers in the general population.”<sup>27</sup> Families lose wage earners, increasing the likelihood that family members left on the outside will fall into or remain in poverty,<sup>28</sup> and communities lose potentially contributing participants. And for all

<sup>25</sup> In 2005, total state expenditures on corrections reached close to \$43 billion. See PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT – STATISTICS AND FACTS: STATE CORRECTIONS SPENDING, *available at* <http://pewcenteronthestates.org/uploadedFiles/Statistics%20and%20Facts.pdf>. In 2007, the combined expenditure on corrections by the states, local governments, and the federal system exceeded \$67 billion. See TRACY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURES AND EMPLOYMENT EXTRACTS 2007 (NCJ 231540, 2010), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2315>. The Pew Center reports that “[i]n 1987, the states collectively spent \$10.6 billion of their general funds—their primary pool of discretionary tax dollars—on corrections. [In 2007], they spent more than \$44 billion, a 315 percent jump, data from the National Association of State Budget Officers show. Adjusted to 2007 dollars, the increase was 127 percent. Over the same period, adjusted spending on higher education rose just 21 percent.” PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 4 (2008), [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (citing data from the National Association of State Budget Officers State Expenses Report FY 2006).

<sup>26</sup> See NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005); Dolovich, *Incarceration American-Style*, *supra* note 17, at 247 & nn.67-75.

<sup>27</sup> BERNSTEIN, *supra* note 26, at 145. To compound the problem, foster care “itself is one of the best predictors there is that a child will wind up behind bars.” *Id.* at 147.

<sup>28</sup> As Bruce Western has observed, “[a]bsent fathers in prison and jail and low marriage rates among ex-convicts ultimately increase the number of female-headed households. The risks accompanying these households are well-known. About half of all female-headed families live below the poverty line, [and] their children face high risks of school failure, teen pregnancy, poor health and delinquency.” For this reason, Western concludes that “[t]he follow-on costs of incarceration for American families would . . . seem to be substantial.” BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 157-58 (2006); *see also* LAURA T. FISHMAN, WOMEN AT THE WALL: A STUDY OF PRISONERS’ WIVES DOING TIME ON THE OUTSIDE 274-75 (1990) (“Wives’ accounts showed that imprisonment inadvertently kept most wives at the edge of subsistence while legitimating the male flight from economic support of their wives and children.”).

this, it is not even clear that punishing crime with social exclusion serves the aim of public safety, whether by rehabilitating offenders or deterring crime. Indeed, given the affirmatively harmful and arguably criminogenic conditions of many American prisons and jails, a strong case can be made that incarcerating convicted offenders as punishment is more likely to compromise public safety than to enhance it.<sup>29</sup>

If incarceration does not even promote public safety, how are we to explain the state's virtually automatic recourse to social exclusion as punishment? Initially, the answer may seem to lie in the retributivist notion of just deserts: convicted offenders should be banished from society, notwithstanding the heavy costs associated with this penalty and the social toll it arguably takes, simply because they deserve it. But if this notion serves to justify the exercise of the state's power to punish those who violate its criminal laws—in my view an open question<sup>30</sup>—it is at best incomplete as an explanation for why state punishment so readily takes the form it does. Given the frequent lack of correlation between the severity of the crime and either the length of sentence<sup>31</sup> or the experience of prison,<sup>32</sup> it seems hard to argue that incarceration is motivated by a

<sup>29</sup> See Dolovich, *Incarceration American-Style*, *supra* note 17, at 240-41 (arguing that “American-style incarceration, through the conditions it inflicts, produces the very conduct society claims to abhor and thus guarantees a steady supply of offenders whose incarceration the public will continue to demand”).

<sup>30</sup> See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 310 (2004) (“Any theory of state punishment in a liberal democracy must grapple with the problem of political legitimacy.”); Jeffrie Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3, 3 (1985) (noting that, even assuming that retribution is a morally compelling justification for punishment, this approach still leaves unanswered the deep question of whether it is “the legitimate business of the state” to pursue the retributivist aim of punishing the people who deserve it).

<sup>31</sup> See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010) (reviewing a sentence of LWOP for a juvenile defendant found by the judge to have participated in a carjacking while on probation); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a fifty-year mandatory minimum prison term for a defendant convicted of stealing \$154 worth of video cassettes from two Kmart stores); *Ewing v. California*, 538 U.S. 11 (2003) (upholding a twenty-five-year mandatory minimum prison term for a defendant convicted of stealing three golf clubs worth \$399 each); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding an LWOP sentence for a defendant convicted of possession of 672 grams of cocaine); see also *infra* note 117.

<sup>32</sup> See Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 21, at

commitment to imposing morally proportionate punishment.<sup>33</sup> Indeed, if the aim were proportionate punishment, one would not expect to find “any single mode of punishment—incarceration or any other—to be applied to the large range of different offenses.”<sup>34</sup> And even assuming some correlation between the blameworthiness of the offender and the severity of the prison term, this would still not explain why the punishment of choice is exile and not some other penalty.

To understand what motivates the American impulse to respond to all but the most minor infractions with prison, we must look to another theory of punishment that has taken center stage in recent years: the theory of incapacitation, according to which “offenders are imprisoned . . . to restrain them physically from offending again while they are confined.”<sup>35</sup> On this theory, criminal offenders are not moral agents expected to pay penance for their crimes. In fact, what they have done in the past is largely irrelevant. The concern is with possible future dangerousness—with what they may do if allowed to remain free. Viewed from this perspective, to punish with social exclusion makes perfect sense. Incarceration may be expensive and create serious negative externalities

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919 (explaining that harmful prison conditions are borne equally by all residents of a given facility, regardless of their offense of conviction, and that specific harms experienced by individual prisoners are in practice inflicted randomly, with no connection to the victim’s original crime).

<sup>33</sup> See MICHAEL TONRY, THINKING ABOUT CRIME 141-43 (2004). Indeed, the frequently disproportionately harsh character of many criminal sentences when compared with the offense of conviction belies any claim that the imprisonment of convicted offenders in the United States is driven by a meaningful commitment to just deserts. See Robert S. Gerstein, *Capital Punishment—“Cruel and Unusual”?: A Retributivist Response*, 85 ETHICS 75, 77 (1974) (explaining that if, as retributivists argue, “the purpose of punishment is to restore the balance of advantages necessary to a just community, then punishment must be proportioned to the offense: any unduly severe punishment would unbalance things in the other direction”); see also *id.* (describing retribution as “a limit on the severity of punishment”); Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 400 (1979) (explaining that Kantian retributivism aims to “make the kind and degree of punishment approximate as closely as possible the offender’s culpability and the harm resulting from the offense”).

<sup>34</sup> Email from David Dolinko, Professor of Law, UCLA Sch. of Law, to author (May 6, 2011) (on file with author).

<sup>35</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3 (1995).

for society as a whole. It may neither deter nor rehabilitate. It may frequently yield disproportionate punishments. But if nothing else, it does keep the incarcerated from committing new crimes for the duration of their sentences.

Or does it? Incapacitation is based on the theory that incarceration keeps people from reoffending while they are locked up. Yet every day, in prisons and jails around the country, incarcerated people commit innumerable crimes. Among other things, they steal, rape,<sup>36</sup> assault,<sup>37</sup> kill,<sup>38</sup> extort money or other goods,<sup>39</sup> sell and use illegal drugs,<sup>40</sup> and exchange sex for money or some other consideration.<sup>41</sup> This state of affairs is hardly a secret. Nor should it come as a surprise. To the

<sup>36</sup> See Hearing Before the New York UPR Human Rights Consultation Criminal Justice Panel (testimony of Cynthia Totten, Just Det. Int'l, Sexual Abuse Behind Bars: A Human Rights Crisis in New York Detention Facilities) (Feb. 26, 2010), *available at* <http://www.justdetention.org/pdf/UPRSubmission.pdf> ("According to the best available research, 20 percent of inmates in men's prisons are sexually abused at some point during their incarceration. The rate for women's facilities varies dramatically from one prison to another, with one in four inmates being victimized at the worst institutions.").

<sup>37</sup> *Santiago v. Goord*, 783 N.Y.S.2d 154, 155 (App. Div. 2004) (affirming that petitioner, a prison inmate, was guilty of "arranging for another inmate to assault a third inmate[, an assault] for which petitioner paid several bags of heroin"); *NBCI Inmate Assaulted, Taken to Shock Trauma*, CUMBERLAND TIMES-NEWS (MD), June 20, 2011 (reporting transfer of prison inmate to hospital after an assault by other inmates left him needing surgery); *Kan. Inmate Beaten for Suspected Honey Bun Theft*, WICHITA EAGLE, June 21, 2011.

<sup>38</sup> *State v. Robb*, 723 N.E.2d 1019, 1028 (Ohio 2000) (appeal of defendant, a prison inmate found guilty of killing two people, one inmate and one correctional officer, who had both been taken hostage); Stuart Pfeifer, *Inmate's Death Is Ruled a Homicide*, L.A. TIMES, Dec. 12, 2006, at B1 (reporting the fatal beating of a prisoner in the L.A. County Jail—the fourth slaying that year of a prisoner in the jail).

<sup>39</sup> See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 51 n.258 (2011).

<sup>40</sup> See Wayne Gillespie, *A Multilevel Model of Drug Abuse Inside Prison*, 85 PRISON J. 223, 225 (2005) (explaining that although "the exact percentage of drug using inmates remains uncertain and may even vary from prison to prison," available research suggests that "the proportion of prisoners who use drugs during confinement appears to range from one fifth to upwards of two thirds of the total inmate population").

<sup>41</sup> See Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012) (noting the exchange of sex for items purchased from the facility's canteen that occurs in the L.A. County Jail).

contrary, it seems reasonable to expect that, absent concerted efforts to maintain safe and humane conditions of confinement, a strategy of keeping convicted criminal offenders locked up together in close quarters for long periods with few available socially productive activities is a sure way to guarantee that criminal conduct will continue unabated.

In truth, the commission of crime in prison poses no real problem for the claim that incarceration incapacitates. Even to suggest it seems like game playing. In American society, it is well understood that the intended beneficiaries of the restraints of incarceration are the people who remain free. The fact of crime in prison—even brutal crime—poses no challenge to the logic of this view, because the protection of those excluded by imprisonment is not the point. According to Zimring and Hawkins, by the mid-1990s, incapacitation had become “the principal justification for imprisonment in American criminal justice.”<sup>42</sup> It seems fair to say that the version of incapacitation that has been so widely embraced is this partialist one, on which the needs and interests of the people subjected to state punishment quite simply do not count.

To see things in this light is to begin to recognize the implicit bifurcation at the heart of American penalty, between those “innocents” who are deemed worthy of the state’s protection and those “incorrigibles” who, having been targeted for state punishment, may be victimized with impunity.<sup>43</sup> This implicit division is reinforced by and in turn reinforces a structural feature of imprisonment: when someone is sent to prison, free-world citizens are able, entitled, and even invited to proceed as if that person *no longer exists*. Incarceration works to reassure society’s remaining members that the incarcerated person is no longer someone who will

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<sup>42</sup> ZIMRING & HAWKINS, *supra* note 35, at 3; *see also id.* at 4 (explaining that “incapacitation rose to prominence by process of elimination as a scholarly and public debate about *other* functions of imprisonment undermined faith in prison rehabilitation as an effective process and deterrence as a basis for making fine-tuned allocations of imprisonment resources”).

<sup>43</sup> In this way, prisons operate as what Giorgio Agamben calls “states of exception,” in which the protection of law and other constraints on state power have been withdrawn. In such a state, occupants are reduced to “bare life,” and may be killed without being either sacrificed (because, not being people of value, their deaths demand no ritual) or murdered (because their deaths are regarded as having no legal significance). *See* GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 6-8, 17-19, 105 (1998).

cause them any trouble or someone as to whom they need ever spare another thought. In fact, from the perspective of society in general, incarceration simply *is* removal. Except in cases involving the most minor infractions, the people found guilty of criminal offenses just . . . disappear.

One could imagine other policy responses to antisocial conduct that would be far more burdensome for civil society. Lawbreakers might be regarded not (or not only) as malefactors needing punishment but instead (or also) as people in need of social support and intervention, or even as people whom society has perhaps failed in some way and as to whom the collective should therefore seek to make amends. Instead, a system based exclusively on the imperatives of social exclusion and state control simply removes offending individuals from the shared public space, thereby freeing the typical citizen from having to think at all about the people the state has incarcerated. And, it bears emphasizing, citizens enjoy this appealing benefit only because the state has built, financed, and continuously operates a vast shadow system of carceral institutions designed to keep prisoners out of sight.

This arrangement may be understood as *society's carceral bargain*.<sup>44</sup> On the terms of this bargain, society as a whole is able to single out certain individuals for removal from the shared public space and need not think about them again until they are released. But this collective act of forgetting is possible only on condition that the state is ready and able to honor its carceral burden to keep those individuals totally separate and apart from society for the duration of their sentences.<sup>45</sup> Of course, those

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<sup>44</sup> See Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 21, at 922 (introducing the idea of society's carceral bargain).

<sup>45</sup> It may seem odd to label as a "bargain" what I have here framed as an arrangement between the state and society. The term "bargain" typically refers to an agreement between two distinct parties, and the state and society may seem more properly understood as a single entity—the polity. But it is not unfamiliar to imagine even a single individual actor making a bargain with herself, notwithstanding that she alone would bear the burdens and reap the benefits of the deal. And here, the framing is even less paradoxical, since the scope and complexity of any modern polity means that innumerable somewhat autonomous institutions are always operating simultaneously. In the present instance, it is no great leap to imagine the state and civil society as distinct components, with the former implementing and maintaining particular burdensome arrangements (here, the incarceration of designated individuals) for the benefit of the



who choose to notice the people society has thereby excluded are free to do so. The point is that they need not do so unless they choose.

This simple feature of a penal system that responds to antisocial conduct with exclusion and control makes plain the normative judgment motivating the division noted above, that between worthy citizens and seemingly unworthy prisoners. That is, depending on how it is implemented, a carceral response may exclude its subjects from society *not only physically but also morally*. To mark someone out as an appropriate object for erasure from the public consciousness is to signal that person's removal from the category of moral subjects to whom respect and consideration are owed just by virtue of their shared humanity. As a consequence of society's carceral bargain, those the state incarcerates come to be collectively regarded as not just non-citizens but also "nonhumans,"<sup>46</sup> who exist beyond the shared public space in both a physical sense and a normative one.<sup>47</sup>

### III. THE SELF-FULFILLING LOGIC OF EXTENDED IMPRISONMENT

In theory, there need not be anything permanent about the social exclusion incarceration represents. A society that responds to criminal acts by banishing the actor could also be a society in which the people so excluded would be reintegrated as full members upon the completion of their sentences. Indeed, there is a notion one often hears in the context of

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latter.

<sup>46</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring) (explaining that the "barbaric punishments condemned by history" are those that "treat members of the human race as nonhumans, as objects to be toyed with and discarded," and that as such they are "inconsistent with the fundamental premise of the [Eighth Amendment prohibition on cruel and unusual punishment] that even the vilest criminal remains a human being possessed of common human dignity").

<sup>47</sup> This is not to say that civil society ignores its prisoners. To the contrary, there often seems to be something close to a cultural obsession with prisons and prisoners. But the public gaze contains no recognition of the shared humanity or the equal moral status of the people in prison. Instead, through a systemic process of dehumanization, prisoners become what William Connolly calls "paradigmatic substitutes," receptacles for all society's anger, frustration and vitriol. WILLIAM E. CONNOLLY, *THE ETHOS OF PLURALIZATION* 42 (1995). As I argue in Parts V and VI, prisoners thus come to be seen not as people, but as something less—as animals, as mere repositories of evil. See *infra* Part V; *infra* Part VI.

criminal justice, that those who have served their time have “paid their debt to society.” That notion implies precisely this sort of temporary exclusion: that people may commit crimes and be punished, but the experience of punishment in effect wipes the slate clean, after which it is as if the crime (and the punishment) never occurred. In this way, the same people who once stood judged by the state as criminals would rejoin society as full and equal citizens upon completion of their sentences.

Where, however, exclusion from the body politic is moral as well as physical, meaningful post-release reintegration is likely to be extremely difficult, if not impossible. In part, the problem lies in the psychological effects of characterizing some subset of the population as nonhuman, even temporarily; once someone is excluded from the universe of people one is supposed to care about, it can be difficult, without some dramatic change on one side or the other, to restore that person in one’s own mind to equal moral status with oneself. But there are also significant material obstacles to restoring formerly incarcerated people to society’s moral circle, obstacles ultimately traceable to the collective denial of the shared humanity of the people the state imprisons—and which combine to ensure that no reintegration of former prisoners, whether normative or practical, need ever take place.

If society is to realize the ideal implied in seeing time served as debt canceled, people would need to return from prison capable of rejoining society in a pro-social way. Unfortunately, in the American context, the opposite is more often the case. In part, the problem arises from the profile of the population most likely to be incarcerated. In the United States, those who wind up in prison are disproportionately likely to be suffering from drug addiction,<sup>48</sup> severe mental illness<sup>49</sup> and/or

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<sup>48</sup> See CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, at 6 (2006) (revised Jan. 19, 2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsf04.pdf>; JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES 2002, at 1-2 (2005), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatji02.pdf>.

<sup>49</sup> See Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1008 (2008) (citing LAUREN E. GLAZE & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), *available at* <http://bjs.ojp.usdoj>

learning disabilities;<sup>50</sup> to be indigent, unskilled, and/or poorly educated;<sup>51</sup> and/or to have been subjected to serious abuse or neglect as children.<sup>52</sup> Thus even prior to their imprisonment, many people in custody already faced serious obstacles to making a positive contribution to their families and communities.

Of course, one could imagine a penal system designed to address these disadvantages so as to increase the chances of successful reentry. In the American carceral system, however, not only are people in prison not helped to overcome the disabilities they may have brought with them into custody, but the conditions to which they are subjected can themselves cause serious psychological and emotional damage. Many incarcerated people are thus certain on release to be even more unfit for law-abiding and productive lives than they were when they went in.<sup>53</sup> Among other destructive dynamics, conditions in many American prisons—men's prisons in particular—are marked by chronic overcrowding, the widespread use of punitive isolation, an ever-present threat of physical violence, and a culture of hypermasculinity in which aggression is rewarded and any shows of emotion or sensitivity to others are invitations

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.gov/content/pub/pdf/mhppji.pdf).

<sup>50</sup> See LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF PRISONERS 2 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf> (reporting that “[l]earning was the most commonly reported impairment among state and federal inmates (twenty-three percent and thirteen percent respectively)"); LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006) (reporting that an “estimated 227,200 jail inmates reported having impaired functioning, most commonly a learning impairment (twenty-two percent), such as dyslexia or attention deficit disorder, or having been enrolled in special education classes”).

<sup>51</sup> See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 4 (2003) (“Fully one-third of all prisoners were unemployed at their most recent arrest, and just 60 percent of inmates have a GED or high school diploma (compared to eighty-five percent of the U.S. adult population).”).

<sup>52</sup> See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf> (reporting that, in a national inmate survey, “[b]etween 6% and 14% of male offenders and between 23% and 37% of female offenders reported they had been physically or sexually abused before age 18”).

<sup>53</sup> The argument in the remainder of this paragraph and the one following is adapted from Dolovich, *Incarceration American-Style*, *supra* note 17, at 245-52.

to victimization of all kinds.<sup>54</sup> Under these circumstances, it should be no surprise that people who have done time often respond to the considerable challenges of reentry with anger, aggression, and even violence. Even people who are able to avoid the worst effects of these dynamics while incarcerated are likely to flounder on the outside after years of living in a constant state of tension and watchfulness under conditions in which initiative-taking and self-direction are rarely encouraged and often punished.<sup>55</sup>

As Terry Kupers bluntly puts it, the experience of incarceration can “destroy[] a prisoner’s ability to cope in the free world.”<sup>56</sup> Far from leaving prison able to assume the responsibilities of membership in a shared social space, many people instead leave American prisons “broken, with no skills, and [with] a very high risk of recidivism.”<sup>57</sup> This is the reproductive logic of the American prison: more often than not, it undermines any pro-social capacities people might have brought with them to prison while simultaneously subjecting those in custody to a set of damaging and degrading conditions likely to generate the sorts of antisocial behaviors that justified their incarceration in the first place.<sup>58</sup>

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<sup>54</sup> For further discussion on the role of the hypermasculinity imperative in constituting dangerous and destructive dynamics in prison, see Dolovich, *Strategic Segregation in the Modern Prison*, *supra* note 39, at 11-19.

<sup>55</sup> As prison psychologist Craig Haney explains, “[t]he process of institutionalization in correctional settings may surround inmates so thoroughly with external limits, immerse them so deeply in a network of rules and regulations, and accustom them so completely to such highly visible systems of constraint that internal controls atrophy or, in the case of especially young inmates, fail to develop altogether. Thus, institutionalization or prisonization renders some people so dependent on external constraints that they gradually lose the capacity to rely on internal organization and self-imposed personal limits to guide their actions and restrain their conduct. . . . Parents who return from periods of incarceration still dependent on institutional structures and routines cannot be expected to effectively organize the lives of their children or exercise the initiative and autonomous decision making that parenting requires.” CRAIG HANEY, *THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT* 81, 79-87 generally (2002) (paragraph structure modified).

<sup>56</sup> Terry Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 129 (Almerindo E. Ojeda ed., 2008).

<sup>57</sup> *Id.*

<sup>58</sup> I develop this argument in more detail in Dolovich, *Incarceration American-Style*, *supra* note 17, at 245-52.

It is not difficult to see the connection between the conditions of confinement in American prisons and the moral economy at the core of society's carceral bargain. A society that regards its prisoners as outside the circle of humanity, unworthy of equal consideration and respect, is a society that will be indifferent to the conditions of confinement to which the incarcerated are subjected. But the story does not end here, because the time-limited character of most prison terms means that many of the people who had been hidden out of sight will one day come home.<sup>59</sup> And when that happens, even the most well-adjusted among them will face serious obstacles to successful reentry. Many will find themselves without the support of friends or loved ones who over the years may have died or become estranged or just moved on.<sup>60</sup> Employers may be reluctant to hire them.<sup>61</sup> People newly released from prison are also likely to have little or

<sup>59</sup> Since 2000, an average of 650,000 people have been released annually from American prisons. See WILLIAM J. SABOL & HEATHER COUTURE, U.S. BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 at 4, tbl. 4 (2007) (revised 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>. And this does not even include the estimated 12 million people who pass through American jails every year. TODD S. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2009 – STATISTICAL TABLES 2 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf> (reporting that “[l]ocal jails admitted an estimated 12.8 million persons during the 12 months ending June 30, 2009, or about 17 times the size of the inmate population (767,620) at midyear”). Even assuming a high number of repeat players in the system, the number of people who have at some point been incarcerated in the United States over the past four decades is staggering. See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (“At yearend 2001 there were 1,319,000 adults confined in State or Federal prison and an estimated 4,299,000 living former prisoners. A total of 5,618,000 U.S. adult residents, or about 1 in every 37 U.S. adults, had ever served time in prison.”).

<sup>60</sup> This is especially likely to be the case with older inmates. See GOODWILL INDUS. INT’L, INC., ROAD TO REINTEGRATION: ENSURING SUCCESSFUL COMMUNITY REENTRY FOR PEOPLE WHO ARE FORMER OFFENDERS 4-5, 9 (2009), available at [http://www.goodwill.org/wp-content/uploads/2011/01/Road\\_to\\_ReIntegration\\_Exec\\_Summary.pdf](http://www.goodwill.org/wp-content/uploads/2011/01/Road_to_ReIntegration_Exec_Summary.pdf); *Help For Older Ex-Prisoners*, CHR. SCI. MONITOR, Jan. 14, 2002, available at <http://www.csmonitor.com/2002/0114/p10s2-comv.html>.

<sup>61</sup> See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 24 (2007); Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, By Race, Class, and Criminal Involvement*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED

no money on which to rely while trying to set themselves up with the components of a post-carceral life.<sup>62</sup> After living for long periods—sometimes for years—making few decisions and taking little if any responsibility for the provision of personal needs like food, laundry, etc., they may feel themselves at sea and unable to manage the endless details of daily life on the outside.<sup>63</sup> To make matters worse, they may yet be wrestling with the temptations of substance abuse after years without effective drug treatment.<sup>64</sup> In other words, for many if not most people,

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PRISONERS IN POST-INDUSTRIAL AMERICA 203, 203-05 (Shawn Bushway, Michael A. Stoll, & David F. Weiman eds., 2007) (“Employers express a reluctance to hire inmates, and ex-inmates face earning penalties of between 10 to 30 percent.”) (citations omitted).

<sup>62</sup> See NANCY LA VIGNE ET AL., URBAN INST. JUST. POL’Y CTR., RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS, AND COMMUNITY GROUPS 10-11 (2008) (explaining the financial implications of incarceration for individuals relying on state assistance, and other reasons why former prisoners tend to face financial difficulty on release).

<sup>63</sup> See *supra* note 55.

<sup>64</sup> According to the National Institute on Drug Abuse, “[t]he connection between drug abuse and crime is well known—one-half to two-thirds of inmates in jails and State and Federal prisons meet standard diagnostic criteria (DSM-IV) for alcohol/drug dependence or abuse. Yet only seven percent to seventeen percent of these prisoners receive treatment in jail or prison, so that most of the over 650,000 inmates released back into the community each year have not received needed treatment services.” NATIONAL INSTITUTE ON DRUG ABUSE, TREATING OFFENDERS WITH DRUG PROBLEMS: INTEGRATING PUBLIC HEALTH AND PUBLIC SAFETY, [http://www.nida.nih.gov/tib/drugs\\_crime.html](http://www.nida.nih.gov/tib/drugs_crime.html) (last visited June 20, 2011). More specifically, a 2005 study found that “[o]verall, only 24% of inmates report receiving any type of drug treatment since admission (including non-clinical interventions such as self-help groups or drug education programs), down from one-third of inmates in the 1991 survey [and] . . . only 10% of state inmates report receiving any clinically- or medically-based drug treatment since admission (i.e. excluding drug education or 12-step programs).” Steven Belenko & Jordan Peugh, *Estimating Drug Treatment Needs Among State Prison Inmates*, 77 DRUG & ALCOHOL DEPENDENCE 269, 276 (2005), available at <http://www.sciencedirect.com/science/article/pii/S0376871604002522>. The Federal Bureau of Prisons (BOP) is obligated under statute to provide drug treatment to all eligible inmates. See 18 U.S.C.A. § 3621(e) (West 2006). According to BOP reports, the system comes close to meeting that target: in 2008, eighty percent of “eligible inmates” (defined as someone determined by the BOP to have a substance abuse problem and who is “willing to participate in a residential substance abuse treatment program,” 18 U.S.C.A. § 3621(e)(5)(B) (West 2006), received some form of “residential drug abuse treatment.” FEDERAL BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS, FISCAL YEAR 2008 – REPORT TO THE

successful reentry is sure to be extremely hard.

Here again is a moment for political imagining. One could, for example, imagine a society in which the fact that many formerly incarcerated people seem unable to build healthy and productive lives and thus to avoid reoffending would provoke a searching public dialogue with the aim of identifying and rethinking the social policies to which this unfortunate situation might be traced. But in the American context, far from working to alleviate the burdens of reentry, the state instead exacerbates them.<sup>65</sup> As a consequence, people newly released from prison

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CONGRESS 10 (2009), *available at* [http://www.bop.gov/inmate\\_programs/docs/annual\\_report\\_fy\\_2008.pdf](http://www.bop.gov/inmate_programs/docs/annual_report_fy_2008.pdf). It is, however, unclear how much of this treatment includes drug education programs, 12-step programs and other non-clinical interventions, and how much includes what has been called “intensive clinical services,” which are more effective at treating addiction. Faye S. Taxman et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 J. SUBST. ABUSE TREAT. 239, 251 (2007), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2266078/>.

<sup>65</sup> True, in 2007, President George W. Bush signed into law the Second Chance Act, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.), which “provides for community and faith-based organizations to deliver mentoring and transitional services to individuals returning to their communities from jails and prisons” and was also intended to “help connect individuals released from jails and prisons to mental health and substance abuse treatment, expand job training and placement services, and facilitate transitional housing and case management services.” REENTRY POLICY COUNCIL, RECAP OF THE SECOND CHANCE ACT OF 2007 (2008), *available at* [http://reentrypolicy.org/announcements/recap\\_of\\_sca](http://reentrypolicy.org/announcements/recap_of_sca). To date, Congress has appropriated over \$200 million for Second Chance Act programs. REENTRY POLICY COUNCIL, SECOND CHANCE ACT APPROPRIATIONS UPDATE, *available at* [http://reentrypolicy.org/government\\_affairs/second\\_chance\\_act](http://reentrypolicy.org/government_affairs/second_chance_act). Certainly, this law is welcome both for its investment in prisoner reentry programs and “as a symbolic political gesture.” Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES MAG., Dec. 24, 2006, *available at* <http://www.nytimes.com/2006/12/24/magazine/24GOP.t.html>. As I suggest below, this symbolism alone may contribute to building the discursive foundation for meaningful penal reform. *See infra* Conclusion. But the law itself is still very limited, even as to its effects on “the tangled web of sanctions and preclusions currently mandated under federal law for formerly incarcerated persons and ex-offenders,” including limits on access to cash assistance and food stamps for people with drug convictions and restrictions on access to public housing for anyone with a felony record. *See* Jessica S. Henry, *The Second Chance Act of 2007*, CRIM. L. BULL., May-June 2009, at 416. And given how much is spent annually on incarceration across the country, \$200 million is a drop in the bucket. *See supra* note 25.

face not only the psychological, material, and structural obstacles noted above, but also a host of state-imposed disabilities—including, among other impediments, “bans on entry into public housing, restrictions on public-sector employment, limits on access to federal loans for higher education, and restrictions on the receipt of public assistance”<sup>66</sup>—that make it even harder for them to successfully reintegrate.<sup>67</sup>

Former prisoners thus routinely face a complex web of mutually reinforcing incapacities. For this reason, it can be extremely difficult for

<sup>66</sup> PAGER, *supra* note 61, at 24; *see also* MARC MAUER & MEDA CHESNEY-LIND, *Introduction*, in *INVISIBLE PUNISHMENT* 1, at 4-5 (“[A]s a result of his conviction [, a formerly incarcerated person] may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal education assistance. His driver’s license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. . . .”) (quoting AMERICAN BAR ASSOCIATION TASK FORCE ON COLLATERAL SANCTIONS, *PROPOSED STANDARDS ON COLLATERAL SANCTIONS AND ADMINISTRATIVE DISQUALIFICATION OF CONVICTED PERSONS* (2002)); Dolovich, *Incarceration American-Style*, *supra* note 17, at 246 n.65.

<sup>67</sup> It is hard to overstate the breadth of the legal disabilities placed on people with felony convictions. The American Bar Association Criminal Justice Section recently embarked on a project to catalogue all state and federal statutes and regulations that impose legal consequences on people with felony convictions. *See* Janet Levine, *Collateral Consequences Project*, Temple Univ., <http://isrweb.isr.temple.edu/projects/accproject/>. As of November 2010, the project had catalogued over 38,000 such provisions, and project advisors estimate that the final number could reach or exceed 50,000. *See* Gabriel Chin, *Citizenship and Community*, panel presentation, *Symposium: The Constitution in 2020: The Future of Criminal Justice* (Florida State University College of Law, Tallahassee, Fla., Oct. 8, 2010). Many of these restrictions will likely prove unobjectionable, particularly those that carefully tailor the restriction to the nature of the crime. To take an example at random: in Missouri, the board of trustees administering the state employees’ retirement system is directed by statute to cease paying benefits “to any beneficiary of an administrative law judge or legal advisor who is charged with the intentional killing of the administrative law judge or legal advisor without legal excuse or justification. A beneficiary who is convicted of such charges shall no longer be entitled to receive benefits.” R.S. Mo. § 287.835 (West 2010). It is hard to argue with the validity of such a policy. But in many other instances, the restrictions are far broader and seemingly gratuitous. For example, under federal law, anyone convicted of drug possession or drug trafficking may permanently lose access to all “federal benefits.” *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of a Drug Conviction*, 6 IOWA J. GENDER RACE & JUST. 255, 259 (1999) (citing 21 U.S.C. § 862(a)(1)(A) (2006)). As Chin notes, this blanket exclusion potentially applies to over 750 federal benefits, “including 162 by the Department of Education alone.” *See id.* at 259-60.



many people in this position to free themselves from what Nell Bernstein calls the “turning gears” of the criminal justice system.<sup>68</sup> Under these conditions, it is wholly predictable that many people will find it too hard to adjust to life in the free world and will eventually find themselves back behind bars.<sup>69</sup> Even those who are able to stay out of prison will likely struggle to stay afloat, the components of a stable and healthy life far out of reach.<sup>70</sup> As a consequence, formerly incarcerated people may expect to spend much of their lives moving between the wholesale social exclusion of prison life and the liminal state of social marginality to which society’s outcasts are consigned.

In this way, the taint of incarceration comes to last even beyond the incarceration itself. Far from being welcomed back to society as moral and political equals, newly released offenders are expected to remain in the free world only temporarily. In the eyes of society, they come to be seen as *perpetual potential inmates*, who pose a constant threat to the social order and who therefore need ongoing surveillance and probable reincarceration. What at first appeared as a system of only temporary exclusion and control thereby emerges as something very different: a process whereby some people come to be permanently excluded from mainstream civil and political society and marked out for unceasing state control—whether the partial control achieved through probation, parole or other forms of monitoring,<sup>71</sup> or the wholesale control of

<sup>68</sup> BERNSTEIN, *supra* note 26, at 217.

<sup>69</sup> Indeed, given the apparently endless public enthusiasm for adding to the burdens of reentry, it can at times seem that this failure is almost the point; it is as if, having once marked out these individuals for incarceration, society as a whole is determined to trap them in a cycle of wrongdoing and reincarceration, thus vindicating the judgment as to their unfitness for society implied by their initial imprisonment.

<sup>70</sup> As Western and Pettit have succinctly put it, former prisoners have collectively become “a group of social outcasts,” whose “[s]ocial and economic disadvantage, crystallizing in penal confinement, is sustained over the life course.” Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DAEDALUS, Summer 2010, at 8. This group has “little access to the social mobility available to the mainstream.” *Id.*

<sup>71</sup> In some cases, exposure to official surveillance is justified by the potential for criminality and need not even require a prior conviction. *See, e.g.*, *Wyman v. James*, 400 U.S. 309 (1971) (upholding the power of welfare caseworkers to conduct warrantless searches of the homes of families on social assistance); *Sanchez v. County of San Diego*, 464 F.3d 916, 920-23 (9th Cir. 2000) (extending *Wyman* to warrantless searches by law enforcement seeking evidence of criminal fraud) (cases discussed in Priscilla Ocen, The

imprisonment.<sup>72</sup>

#### IV. THE OBFUSCATORY FUNCTION OF RADICAL INDIVIDUALISM

To repeat: given the multiple layers of mutually reinforcing burdens under which the people who have done time typically labor upon release—the disadvantages they brought with them into custody, the destructive effects of the prison experience, and the myriad structural and other obstacles to successful reentry—it is entirely predictable that many people in this position will at some point commit new crimes. Indeed, considered collectively, the penal practices just canvassed seem almost designed to produce chronic disorder on the part of those caught by the system, thereby undermining rather than promoting the likelihood that former prisoners will be successfully reintegrated.

Yet the collective commitment to prevailing practices abides. What explains the staying power of such a self-defeating penal strategy? Here we come to one of Douglas's key insights: institutional arrangements, if they are to persist, require a sustaining "cognitive convention," a collective understanding that makes the institution's practical imperatives seem natural, reasonable, and wholly appropriate.<sup>73</sup> Judged by this standard, the ideological discourse that shapes public perceptions of criminal acts and the people who commit them has been a remarkable success.<sup>74</sup> According to its dominant narrative, crime is purely a product of the individual choice and free will of the actor. Flowing from this understanding is a particular view of imprisonment: people in prison are behind bars solely as a consequence of their own culpable acts freely

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New Racially Restrictive Covenant: Race, Welfare and the Policing of Black Women in Subsidized Housing 19-20 (unpublished draft on file with the author)).

<sup>72</sup> See Dolovich, *Creating the Permanent Prisoner*, *supra* note 10, at 99-100 (arguing that "the American carceral system, although perhaps rhetorically motivated by more familiar penological purposes . . . is in practice designed to mark certain undesirables as social deviants and consign them to lives beyond the boundaries of mainstream society").

<sup>73</sup> See DOUGLAS, *supra* note 12, at 46; *see also id.* at 112 ("Any institution that is going to keep its shape needs to gain legitimacy by distinctive grounding in nature and in reason.").

<sup>74</sup> See *id.* at 92 (explaining that "the most effective such institution-sustaining ideologies will shape individual perceptions in ways that fix processes that are inherently dynamic . . . hide their influence, and . . . raise our emotions to a standardized pitch on standardized issues").

undertaken.<sup>75</sup> This radically individualist account, which emerged in its starkest form during the Reagan era,<sup>76</sup> stands in clear contrast to the rehabilitative model that defined American penalty—at least rhetorically—until the mid-1970s. More will be said below concerning this contrast.<sup>77</sup> For now, it bears noting that from this perspective, there is no space even to recognize, much less to take account of, the reproductive logic of the carceral system. If someone commits a crime, it is simply because they have “chosen to be bad.”<sup>78</sup> As for repeat offenders, their inevitable failure to escape what Loïc Wacquant has called “a self-perpetuating cycle of social and legal marginality”<sup>79</sup> becomes instead proof of their stubborn unwillingness to seize the opportunity offered by their release to take a different path. This construction helps to explain why the commission of crime by former prisoners so often prompts demands for longer and longer periods of banishment.<sup>80</sup> Viewed through this lens, what one sees are people so apparently contemptuous of society’s behavioral norms that even the prior public condemnation of their own previous wrongful acts could not move them to mend their ways.

<sup>75</sup> Dolovich, *Incarceration American-Style*, *supra* note 17, at 241-43 for further discussion on this point.

<sup>76</sup> See, e.g., GIL TROY, *MORNING IN AMERICA: HOW RONALD REAGAN INVENTED THE 1980S* 120 (2005) (“While every decade in the twentieth century upped the consumerist ante, the 1980s marked a giant step toward an almost reckless, autonomous individualism . . . . With little institutional, ideological, or moral traction, ‘matters of personal preference’ predominated.”); James A. Morone, *Nativism, Hollow Corporations, and Managed Competition: Why the Clinton Health Care Reform Failed*, 20 J. HEALTH POL. POL’Y & L. 391, 397 (1995) (“Even before the 1994 election, Americans operated in the political shadow of Ronald Reagan. . . . The rhetoric of aggressive individualism, racial suspicion, and economic greed ran through American political culture.”).

<sup>77</sup> See *infra* Part V.

<sup>78</sup> RHODES, *TOTAL CONFINEMENT*, *supra* note 5, at 61.

<sup>79</sup> Loïc Wacquant, *The New “Peculiar Institution”: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 384 (2000).

<sup>80</sup> See JFA INSTITUTE, *UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION* 13 (2007) (describing the adoption of mandatory sentencing, “truth in sentencing,” and “three strikes” laws, “all of which extend prison sentences” for repeat offenders, as arising from the belief that “anyone with two or three convictions for a relatively wide range of offenses is a dangerous habitual criminal” who should be kept “in prison for an extremely long time”).

This sense of repeat offenders as people who have somehow failed to learn the moral lessons punishment is supposed to teach—or to appreciate the seriousness of purpose behind a relatively light sentence for a first- or second-time offender—raises the possibility that the imposition of escalating sentences for subsequent convictions<sup>81</sup> may only represent society's desperate effort to get obstinate malefactors to pay attention. But this particular reading, although perhaps capturing some of the public's evident exasperation with repeat offenders,<sup>82</sup> mistakenly presumes a collectivity genuinely seeking to reintegrate those who have gone astray. As the above discussion suggests, however, notwithstanding the time-limited nature of most custodial sentences, the American carceral system instead seems designed to trap already marginalized citizens in a permanent cycle of reoffending and reincarceration. It is as if "those people," having once been brought under state control, should have to remain there for good, freeing the rest of us from ever having to deal with them again.

The discourse of personal choice and individual agency that dominates public and political thinking about crime and punishment justifies and thereby sustains the project of perpetual marginalization and exclusion.<sup>83</sup> Indeed, a closer look at this discourse reveals the multiple ways it not only supports this project but is key to its success. First, the notion that people are incarcerated as a consequence of their own freely chosen acts shrouds the possibility that their antisocial conduct may have been produced at least to some extent by forces not realistically within their own control. It thus obscures the way political choices—including choices as to how society responds to crime—may in part be to blame for the seeming inability of some individuals to break free of the carceral system.<sup>84</sup>

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<sup>81</sup> See, e.g., CAL. PENAL CODE § 667(e)(2)(A) (West 2011) (imposing a twenty-five-year mandatory minimum for any felony committed by someone with two previous convictions for offenses designated "serious or violent").

<sup>82</sup> See *infra* text accompanying note 228.

<sup>83</sup> The emerging political support for "reentry" suggests a possible point of challenge to this project. I discuss this possibility below at text accompanying notes 250-53.

<sup>84</sup> To acknowledge that forces beyond the control of the actor may play a role in his criminality is not to deny any individual responsibility for criminal conduct. The point is simply that the causes of crime are necessarily more complex than can be recognized within the justificatory discourse of free will and personal choice. Our inability in any

Second, and perhaps even more central to the logic of exclusion and control, this radically individualist way of framing the issue drives the notion that criminal offenders, especially repeat criminal offenders, are unrepentant evildoers determined to cause harm to others. Neatly denying the possible contingency of crime, this framing justifies the exclusionary project as the only viable social response: if incorrigible offenders are stubbornly persisting in their choice to be bad, then society has no realistic alternative but to remove them from the shared public space and place them where the threat they pose can be contained.

Third and finally, this view of criminal conduct as necessarily the product of individual choice fits perfectly into the reconfiguration of the incarcerated as outside the set of people to whom equal consideration and respect are necessarily due. Indeed, from within the free choice narrative, it is easy to see both how and why offenders—with their apparent refusal to exercise any restraint or show any regard for others—come to seem scarcely human. How else are law-abiding citizens to regard someone who willfully persists in violating society's laws, thereby inflicting harm on innocent citizens, other than as "a breed apart,"<sup>85</sup> as "a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help"?<sup>86</sup> Far from frustration at the apparent inability of criminal offenders to successfully reintegrate, the insistence on a carceral response with which American society has habitually come to greet the commission of crime seems more to reflect a demand finally to be free of the threat of chronic social disorder and danger posed by people regarded as barely even human and who, whatever species they are, seem congenitally unwilling or unable to play by society's rules.

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given case to fully understand all the forces at play—whether those within a person's control or those beyond it—when someone commits a crime should at least prompt some humility on the part of those who define the penalties, and some restraint as to the harshness of those penalties.

<sup>85</sup> KELSEY KAUFFMANN, *PRISON OFFICERS AND THEIR WORLD* 231 (1988).

<sup>86</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 136 (2001).

## V. MAKING MONSTERS: THE REQUISITE MORAL PSYCHOLOGY OF EXCLUDED CRIMINAL OFFENDERS

This last narrative move—from criminal offenders as moral outcasts to criminal offenders as a different species altogether—enables the final consolidation of the institutional arrangements underpinning society’s carceral bargain. Prior to this point, these arrangements may have seemed vulnerable to challenge not only as self-defeating over the long term but also as inhumane towards the people sent to prison. Even in a polity prone to locate the causes of crime solely in the free will of the actor, people may balk at the cruel treatment of incarcerated offenders. Yet once it is understood that criminals are a “different breed” altogether,<sup>87</sup> the almost cavalier attitude as to the fate of the people thereby banished from society becomes not merely defensible but perfectly appropriate, and the mechanisms of exclusion and control are revealed as obviously necessary. How else are we to deal with these dangerous monsters? This neat trick of rhetorical framing, by which criminal offenders become not just nonhuman but something inherently scarier and more threatening, is what finally clinches the success of the exclusionary enterprise.<sup>88</sup>

A closer examination of this perceptual shift from criminal offenders as unworthy to criminal offenders as dangerous monsters<sup>89</sup>

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<sup>87</sup> Craig Haney, *Demonizing the “Enemy”: The Role of “Science” in Declaring the “War on Prisoners,”* 9 CONN. PUB. INT. L.J. 185, 223 (2010) (quoting SAMUEL YOCHELSON & STANTON E. SAMENOW, *THE CRIMINAL PERSONALITY: THE CHANGE PROCESS* 5 (1977)) (internal quotation marks omitted).

<sup>88</sup> Cf. MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT* 119-87 (1996) (exploring the pervasiveness of the metaphor equating criminals with “filth” and collecting citations to judicial opinions in which defendants or witnesses are referred to as “filth,” “dirt,” “scum,” or “slime”).

<sup>89</sup> The construction of criminal offenders as moral monsters has been to a significant extent media driven. As Ray Surette has observed, “[t]he repeated message in the entertainment media is that crime is perpetrated by predatory individuals who are basically different from the rest of us and that criminality stems from individual problems. In the media, crime is behavior criminals choose freely, and media criminals are not bound or restrained in any way by normal social rules and values. Over the course of this century . . . [m]edia criminals have become more animalistic, irrational and predatory (a process paralleled by media crime fighters), and their crimes more violent, senseless and sensational, while their victims have become more random,

reveals the delicate ideological dance that is required to vindicate the exclusionary project. To justify responding to crime with exclusion, it is essential to foreclose the uncomfortable possibility that any factors besides the personal choice of the offender might have contributed to the commission of a crime—at least any factors originating in society more generally. Otherwise, banishing the offender would be an insufficient response for a polity genuinely committed to preventing crime (because removing that person would not fully address the root causes of crime), not to mention potentially unfair to the offenders themselves (because they may not be entirely or even mostly to blame).

To this extent, the notion of criminal violations as purely the product of an actor's free will is all that is required to justify a carceral response. Still, a challenge remains: demonstrating that people who commit crimes by choice necessarily pose the sort of ongoing threat of danger and disorder for which there is no protection but extended social excision.<sup>90</sup> Depending on the circumstances, a perfectly rational person

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helpless, and innocent. . . . The news media have mirrored the entertainment media in the pursuit of predator criminality. . . . [T]oday crime news is composed largely of violent personal street crimes [like] murder, rape and assault while more common offenses such as burglary, theft, and fraud are notably underplayed. The vast majority of crime coverage pertains to violent or sensational crime. . . . [S]ince most crime news is of violent interpersonal crime, it follows that the blank image [of the criminal] is filled by the public with a faceless predator criminal." Ray Surette, *Predator Criminals as Media Icons*, in *MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING* 132, 134-35 (Gregg Barak ed., 1994); see also *id.* at 132 ("Predator criminals are modern icons of the mass media.").

<sup>90</sup> Reference to a "violent and dangerous criminal" generally calls to mind someone who is male—and also black, although this racial coding is typically only implicit. See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276 (2007) ("In American society, a prevalent representation of crime is that it is overwhelmingly committed by young Black men. Subsequently, the familiarity many Americans have with the image of a young Black male as a violent and menacing street thug is fueled and perpetuated by typifications everywhere."); Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 376, 378-79 (1997) ("[N]ot only are African-Americans more likely than whites to be portrayed as criminal suspects in news stories about violent crime, but they are also more likely to be depicted as physically threatening. . . . Experimental studies from social psychology . . . show consistently that the same behaviors acted out by black and white targets are interpreted very differently by white subjects, with the black target often seen as more guilty and more aggressive than the white.") (internal citations

might be motivated to break the law for any number of reasons—to achieve a calculated revenge, perhaps, or because of material want. But to motivate the deep and abiding fear of crime and criminal alike that justifies extended incarceration, the danger of reoffending must be great, and the threatened violations must be serious. Otherwise, some other less drastic penal strategy—and perhaps even a non-custodial one—might equally serve.

It is therefore not enough that the offender be conceived as an active chooser of crime, as is assumed by the stripped-down, radically individualist theory of criminal offending. If he is a wholly rational actor, in control of his choices, he must also be understood to be driven to crime by a depraved preference for doing harm. In short, he must be thought of as inherently evil, almost compulsively—yet still deliberately—criminal. Only in this way can it be plausibly claimed that incarceration is both necessary and sufficient to control the ongoing and fearsome threat this population poses to society at large. And in the final *coup de grâce*, once criminal offenders are understood to be driven by either rank evil or (almost) compulsive violence, it becomes difficult, if not impossible, to regard them as human. To properly fit this description, a person would have to be a monster.

Notice what is required of criminal offenders on this account: they must not only choose to commit crimes but must be positively *driven* to do so by forces *contained solely within themselves*. Offenders must be both deliberately and compulsively criminal, simultaneously unwilling and unable to forgo the commission of crimes. And they must be these things as a consequence of their own essential, internal character. To be sure, this is an awkward normative posture. But the logic of exclusion and control demands that the targets of incarceration occupy this narrow psychological berth. Only in this way can it be possible simultaneously to (1) justify incarceration (because the offender, having chosen to offend, deserves it); (2) absolve society of any responsibility for the causes of crime (because they originate entirely within individual wrongdoers themselves); and (3) instill in ordinary citizens an abiding fear that they could be victimized at any time by twisted (nonhuman) actors who are driven by a compulsive preference for causing harm to others. At this

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omitted).



point, “evil” is just shorthand for describing the dangerous predators who are thought to be out there, ready at any time to terrorize the rest of us. And “monster” is as good a way as any to conceive of someone so obviously deranged. Such beings may look human, but their persistent criminal conduct betrays them. Their exclusion and ongoing control becomes necessary precisely because of the inherent danger they represent.

The point here is not that all those who commit crimes are in fact monsters with the sort of twisted moral psychology just outlined. It is rather that the imperatives of exclusion and control that shape the American penal system must presume them to be so as an ideological matter, if not a factual one. In this way, prisoners in this system come to be perceived as like Giorgio Agamben’s figure of the “wolfman” or “werewolf,” a “monstrous hybrid of human and animal” which, although bearing the outward appearance of a man, is widely recognized as not human at all, but as subhuman.<sup>91</sup> As such, these “monstrous hybrids” may be killed without ceremony or, at the very least, banned from the community without a second thought.<sup>92</sup> Exclusion of these monsters becomes precisely what must be done to protect those who *are* regarded as fully human and thus as full citizens. Consider, moreover, what this perspective suggests about the appropriate conditions of confinement for convicted offenders: if the werewolf is successfully trapped, he may perhaps be kept alive, but no efforts need be expended to ensure his well-being or to help him flourish despite his constraints. He is nonhuman, an animal, and thus merits no such consideration.<sup>93</sup>

This understanding of the criminal offender contrasts starkly with the conception that informed American penalty for much of the twentieth century—that of “flawed but fixable” individuals capable of

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<sup>91</sup> AGAMBEN, *supra* note 43, at 105.

<sup>92</sup> See *id.* at 104-05.

<sup>93</sup> This conception is consistent with Jonathan Simon’s characterization of “total incapacitation” as a means to guard society from the “contamination” thought to emanate from convicted offenders. See Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of LWOP*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* (Charles J. Ogletree, Jr. & Austin Sarat eds., forthcoming 2012).

reform.<sup>94</sup> This latter notion fit naturally within a rehabilitative model, which saw it as “the state’s responsibility . . . to provide the expertise and resources needed to remediate [an individual’s] flaws.”<sup>95</sup> Although the depth of the commitment to this penological approach varied across states,<sup>96</sup> the recognition of individual offenders as *people*, “with all the psychological and sociological complexity inherent in being human,” informed penal policy until the 1970s, even in jurisdictions with shallow rehabilitative commitments.<sup>97</sup> Although the system still locked people up, the overall incarceration rate in the mid-1970s hovered around 113 per 100,000 (as compared with 743 per 100,000 in 2009),<sup>98</sup> parole was routinely granted,<sup>99</sup> and it was not unusual for people with criminal records to put their pasts behind them and reenter mainstream society.

<sup>94</sup> MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* 9 (2010).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 50.

<sup>97</sup> Mona Lynch, *The Contemporary Penal Subject(s)*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY AND A NEW RECONSTRUCTION* 89, 90 (Mary Louise Frampton, Ian Haney Lopez & Jonathan Simon eds., 2008). For example, as Mona Lynch convincingly shows, in Arizona, a highly punitive state with at best a thin commitment to rehabilitation even in the heyday of this model elsewhere in the U.S., it was still the case that “the basic humanity of the prisoner was generally perceived to be intact,” and it was still “generally accepted that he or she was both capable of being returned to the broader community and in most cases deserved to have that opportunity upon reformation.” LYNCH, *supra* note 94, at 125-26.

<sup>98</sup> See MARGARET WERNER CAHALAN, U.S. DEPARTMENT OF JUSTICE, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850 — 1984*, at 35 (1975 data), available at <http://www.ncjrs.gov/pdffiles1/pr/102529.pdf>; LAUREN E. GLAZE, U.S. BUREAU OF JUSTICE STATISTICS, *BULLETIN: CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 7 (2009 data), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf>.

<sup>99</sup> See, e.g., CAL. PENAL CODE § 3041(a) (West 2011) (providing that “[o]ne year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall . . . meet with the inmate and shall normally set a parole release date”). This statute is still formally on the books, but the granting of parole in California has long since ceased to be a matter of course. Over the past decade, the California Parole Board has denied ninety-eight percent of the parole petitions that have come before it. For further discussion of the gradual disappearance of parole over the past several decades, see Dolovich, *Creating the Permanent Prisoner*, *supra* note 10, at Part IV.

Prior to the 1970s, moreover, LWOP was virtually nonexistent.<sup>100</sup>

Since that time, the “conceptualization[] of the criminal/penal subject”—i.e., the way those individuals marked out for criminal punishment are “imagined by policy makers, court personnel, penal administrators and others who are in the business of state punishment”—has shifted away from regarding convicted offenders as capable of change and thus potentially law-abiding, and towards seeing members of this group as “cold, calculating, free-willed actors who choose [. . .] evil in killing and harming others.”<sup>101</sup> At the same time, penal systems nationwide have moved decisively away from even the pretense of rehabilitative aspirations and toward an explicit commitment to exclusion and control—and penal practices have changed accordingly.<sup>102</sup>

As Craig Haney has shown, this construction of criminals as inherently, pathologically deviant received a “scientific” imprimatur in the mid-1970s, when psychiatrist Samuel Yochelson and psychologist Stanton Samenow claimed to have penetrated “inside the criminal mind.”<sup>103</sup> In their work, “Yochelson and Samenow asserted that the basic thought patterns of criminals (and, by implication, the structure of their brains) were fundamentally different from those of the rest of us.”<sup>104</sup> As they saw it, “[c]rime resides within the person and is ‘caused’ by the way he thinks . . . . Criminals think differently from responsible people.”<sup>105</sup> Indeed, in the view of Yochelson and Samenow, “the criminal mind was so fundamentally different from that of normal people that it was

<sup>100</sup> See Marie Gottschalk, *The Worst of the Worst? Life Sentences and Penal Reform*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 9 (Charles J. Ogletree, Jr. & Austin Sarat eds., forthcoming 2012).

<sup>101</sup> Lynch, *The Contemporary Penal Subject(s)*, *supra* note 97, at 89, 91, 96. As Lynch puts it, “in contrast to previous conceptions, where various defects and impediments were seen as the root cause of criminality, the rationality and free will of the contemporary serious criminal is now seen as contributing to his perceived threat and inherent evilness. He chooses to wreak criminal havoc for pleasure, greed, or other selfish and immoral purposes, so he deserves no help or intervention to facilitate law-abiding behavior.” *Id.* at 96.

<sup>102</sup> See CAL. PENAL CODE § 1170(a)(1) (West 2011) (“The Legislature finds and declares that the purpose of imprisonment for crime is punishment.”).

<sup>103</sup> Haney, *Demonizing the ‘Enemy’*, *supra* note 87, at 219 (quoting STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* (1984)).

<sup>104</sup> *Id.* at 220.

<sup>105</sup> *Id.* at 220–21 (quoting SAMENOW, *supra* note 103, at xiv).

appropriate to describe lawbreakers as literally ‘a different breed.’”<sup>106</sup> On this basis, moreover, these authors made the striking claim that, as Haney puts it, “*all* criminals—from car thieves to murderers—thought exactly alike: ‘[W]ithout exception, one criminal is like another with respect to (these) mental processes.’”<sup>107</sup>

In the mid-1980s, this deracinated and putatively scientific account was taken up and further legitimated by Harvard sociologist James Q. Wilson, who argued that the function of the penal system was not to reform offenders but “to isolate and . . . punish” them.<sup>108</sup> Whereas the rehabilitative approach emphasized the social inputs of individual criminal behavior, Wilson (echoing Yochelson and Samenow) argued that the problem was the individuals themselves. As Wilson put it, “[w]icked people exist. Nothing avails except to set them apart from innocent people.”<sup>109</sup> As he framed the issue, in terms consistent with the Reagan era’s stern individualism,<sup>110</sup> if criminal offenders do bad things, it is because of who they are and what they therefore choose to do, and no interventions, however well-meaning, can change them. And if individual actors choose to do wrong, not only is there no help for them, but the rest of us need have no sympathy for them, since, by their own criminal choices, they reveal themselves, like Agamben’s “wolfman,” as beyond the required scope of moral consideration.<sup>111</sup>

This approach strips any sense of human complexity from explanatory accounts of criminal behavior. It also presumes a uniformity of character among all those who break the law. People who commit

<sup>106</sup> *Id.* at 223 (quoting YOCHELSON & SAMENOW, *supra* note 87, at 5).

<sup>107</sup> *Id.* at 221 (quoting SAMUEL YOCHELSON & STANTON E. SAMENOW, *THE CRIMINAL PERSONALITY: A PROFILE FOR CHANGE* 316 (1976) (Haney’s emphasis omitted)).

<sup>108</sup> JAMES Q. WILSON, *THINKING ABOUT CRIME* 193 (1985), *quoted in* JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 64 (2003); *see* Haney, *Demonizing the ‘Enemy’: The Role of Science in Declaring the ‘War on Prisoners’*, *supra* note 87, at 219 (noting that the work of James Q. Wilson, as well as that of Yochelson and Samenow, together seemed to provide “strong empirical support” for a biological theory of criminality, helping “not only to solidify the move to abandon prison rehabilitation programs but also to provide indirect support for substituting increasingly harsh and more painful prison policies”).

<sup>109</sup> WILSON, *THINKING ABOUT CRIME*, *supra* note 108, at 193.

<sup>110</sup> *See supra* note 76.

<sup>111</sup> *See supra* text accompanying notes 91-93.

crimes are no longer viewed as “flawed but fixable” individuals<sup>112</sup> shaped by adverse life experiences and their own complex psychologies.<sup>113</sup> Indeed, apart from the inherent tendencies that drive them unerringly to criminality, they are barely held to have salient personal characteristics at all. This stripped-down conception of criminal offenders, moreover, points directly and inexorably toward a strategy of exclusion and control. Once one adopts the Wilsonian theory of crime as purely the product of compulsive individual wickedness, the Wilsonian prescription—setting “the wicked” apart from “innocent people”—comes to seem both natural and appropriate.

#### VI. FEARING THE MONSTERS WE MAKE: PREEMPTIVE EXCLUSION AS PENAL STRATEGY

To the foregoing, one might respond that criminals, who have proved their deviance by their own behavior, *should* be permanently exiled. And certainly, in cases where freedom from state custody would bring a plausible risk of serious violence, the state may have no choice but to keep that person separate and apart from society until he no longer poses a threat. But even in such cases, conditions of confinement could be humane and designed to promote personal development to the greatest possible extent. Moreover, the possibility that some people may be too violent or dangerous to live freely in society does not mean that all those people the state incarcerates necessarily pose this level of threat. Indeed, in the American context, incarceration is not at all contingent on a plausible risk of serious violence. Were this strategy reserved only for those too violent or dangerous to remain safely in society, there would be no mandatory sentences, no abolition of discretionary parole, no LWOP—all practices applied regardless of an individual’s particularities—and no public or political resistance to releasing anyone found not to pose a significant risk to any person’s physical security or bodily integrity. The only relevant issue for those in custody would be their ability to live safely in society with others.<sup>114</sup> Nor would there be

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<sup>112</sup> LYNCH, *supra* note 94, at 9.

<sup>113</sup> Lynch, *The Contemporary Penal Subject(s)*, *supra* note 97, at 90.

<sup>114</sup> For further discussion of these policies and their contribution to the exclusionary project, see Dolovich, *Creating the Permanent Prisoner*, *supra* note 10.

any public or political objection to reserving incarceration only for those convicted offenders who are found to pose such a risk going forward. But in the United States, this is not the case. To the contrary, at least half the people behind bars in the United States are doing time for nonviolent offenses,<sup>115</sup> and extremely long sentences and even LWOP sentences<sup>116</sup> are routinely imposed for a wide range of crimes, including nonviolent and other relatively less culpable offenses.<sup>117</sup>

<sup>115</sup> See DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002, at 3 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf> (reporting numbers indicating that 74.6 percent of jail detainees are in custody for nonviolent offenses); PRISONERS UNDER THE JURISDICTION OF THE FEDERAL BUREAU OF PRISONS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t600232009.pdf>; FEDERAL BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS (2011), available at <http://www.bop.gov/news/quick.jsp#4> (reporting numbers indicating that 97.1 percent of BOP prisoners were convicted of nonviolent offenses); ESTIMATED NUMBER AND PERCENT DISTRIBUTION OF PRISONERS UNDER JURISDICTION OF STATE CORRECTIONAL AUTHORITIES, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t600012008.pdf>; HEATHER C. WEST, WILLIAM J. SABO & SARAH J. GREENMAN, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 7, tbl. 7 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf> (reporting numbers indicating that 47.6 percent of state prisoners are in custody for nonviolent offenses).

<sup>116</sup> In the current climate, there is often little practical difference between parole-eligible life sentences and LWOP sentences, since the politicization of parole decisions has made review boards and governors extremely reticent about granting parole. See Dolovich, *Creating the Permanent Prisoner*, *supra* note 10, at Part IV; *infra* note 159.

<sup>117</sup> See *supra* note 3. For example, as of December 2010, of the 8,727 people serving twenty-five-year mandatory minimums for a third strike in California, more than half were convicted of property crimes (2,527), drug crimes (1,350) or other nonviolent crimes, including weapons possession (480) and driving under the influence (53). CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, OFFENDER INFORMATION SERVICES BRANCH ESTIMATES AND STATISTICAL ANALYSIS SECTION DATA ANALYSIS UNIT, SECOND AND THIRD STRIKERS IN THE ADULT INSTITUTIONAL POPULATION tbl. 1 (2010), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Quarterly/Strike1/STRIKE1d1012.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d1012.pdf).

Moreover, as of 2004, some 2,000 people (about thirty-nine percent of all federal lifers) were serving life terms for drug offenses in the federal system. A further 3,000 people were doing life for drug offenses in state prison, see MAUER ET AL., *supra* note 1, at 10-11, 13, 19, and an estimated 5,000 additional lifers nationwide were convicted of property crimes. *Id.* at 19. Behind these statistics, there are thousands of real people who have been targeted for extended and frequently permanent exclusion for relatively minor

offenses. To cite just a few: Vincent Carnell Hudson was convicted in Mississippi of possession of less than 0.10 grams of cocaine and sentenced to LWOP under that state's habitual offender statute. *See Hudson v. State*, 31 So.3d 1 (Miss. Ct. App. 2009) (identifying Hudson's prior convictions as "(1) felony shoplifting, (2) possession of heroin, (3) aggravated assault on a law enforcement officer, (4) armed robbery, and (5) felony driving under the influence"). Sylvester Mead was convicted in Louisiana of "public intimidation" after making "a drunken threat to a police officer," and was sentenced as a habitual offender to LWOP. *See State v. Mead*, 288 So.3d 470, 472 (2d Cir. 2008) (identifying Mead's previous convictions as aggravated battery and simple burglary) (cited in Jessica Henry, *Death in Prison Sentences: Overutilized and Underscrutinized*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 66 (Charles J. Ogletree, Jr. & Austin Sarat eds., forthcoming 2012)). Onrae Williams was convicted in South Carolina of distributing less than a half a gram of cocaine and sentenced to LWOP as a habitual offender. Sholam Weiss was convicted of fraud and money laundering and sentenced to 845 years in federal prison; his co-defendant, Keith Pound, got 740 years. *See Henry, Death in Prison Sentences, supra* at 71. George Martorano, a first offender, was convicted of conspiracy and marijuana distribution, and got life in federal prison. *See id.* Clarence Aaron, charged in federal court with various drug conspiracy offenses for having arranged a meeting between a drug dealer and a prospective customer, received three life sentences. *See id.* And perhaps most famously, Ronald Harmelin, a first-time offender, was convicted in Michigan for possession of 672 grams of cocaine and sentenced to LWOP—a penalty eventually upheld by the United States Supreme Court. *See Harmelin v. Michigan*, 501 U.S. 957 (1991); *see also Ewing v. California*, 538 U.S. 11 (2003) (twenty-five years for stealing golf clubs worth \$1200); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (fifty years for stealing \$154 worth of video cassettes); *Rummel v. Estelle*, 445 U.S. 263 (1982) (life in prison for obtaining \$120 by false pretenses); *Hutto v. Davis*, 454 U.S. 370 (1981) (forty years in prison for possession and distribution of nine ounces of marijuana); Henry, *Death in Prison Sentences, supra* at 71 (cataloguing many individual cases of extremely long sentences—what she calls "death in prison" sentences—for nonviolent and other relatively nonserious crimes); *FAMILIES AGAINST MANDATORY MINIMUMS, PROFILES OF INJUSTICE*, available at <http://famm.org/ProfilesOfInjustice.aspx> (cataloguing many cases of people receiving lengthy sentences for nonviolent and other relatively nonserious crimes).

Certainly, many people receiving life sentences were convicted of violent crimes. According to a 2004 Sentencing Project report, almost sixty-nine percent of those serving life sentences were convicted of homicide and a further 21.2 percent were convicted of other violent crimes. *See MAUER ET AL., supra* note 1, at 13. Not all homicides, however, are equally culpable. For example, among those serving life for homicide are 800-2,000 women convicted of killing their batterers, *see id.* at 14 (noting that "some scholars view these estimates as conservative"), nearly two-thirds of whom killed their partner in the midst of an abusive incident. *Id.* The sixty-nine percent of people doing life for homicide also includes people convicted of felony murder, in which

That the strategy of exclusion and control is so broadly applied may at first seem puzzling. Are not the real criminals, and thus the appropriate penal targets, those who are extremely violent and dangerous? Certainly, when Americans “think of locking up criminals, they usually have an image in mind of a violent offender—a murderer or a rapist.”<sup>118</sup> It is thus unsurprising that when sociologist Esther Madriz asked women their perception of criminals, what emerged was an image “of criminals as animalistic, as savages or monsters[, as] insane or ‘unbalanced.’”<sup>119</sup> As

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any deaths that occur in the course of committing another felony may be charged as murder against all participants—even against people who did not themselves commit or even intend the killing, and even when the death was accidental. *Id.* at 18. As for the twenty-one percent of life sentences handed out for “other violent crimes,” it is worth noting that even within the category of violent crime, “the actual physical violence is often overstated.” PRISON POLICY INITIATIVE, THE FACTS ABOUT CRIME (2004), available at <http://www.prisonpolicy.org/articles/factsaboutcrime.pdf>. As the National Criminal Justice Commission explained, “the vast majority of violent crimes are assaults where one person hits or slaps another or makes a verbal threat. Only about 8% of the victims of violent crime nationally went to a hospital emergency room” [and] “[m]ost were released immediately the same day.” Moreover, “[o]f all the victims of violent crime nationally, slightly over 1% require a hospital stay of one day or more.” REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 11-12 (Stephen R. Donziger ed., 1996); see also DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 2002, at 3 tbl. 3 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf>. (defining “violent crime” to include murder, negligent manslaughter, kidnapping, rape, other sexual assault, robbery, assault and “other violent,” a category including blackmail, extortion, hit-and-run driving with bodily injury, child abuse, and criminal endangerment); WEST, SABOL, & GREENMAN, *supra* note 115, at 32 (defining the category of “violent crime” to include murder, non-negligent manslaughter; negligent manslaughter, rape, other sexual assault; robbery; assault; and “other violent”). Although it is impossible to tell what fraction of that 21.2 percent of life sentences for non-homicide offenses classified as violent were of a relatively less culpable nature, it is important to recognize that some of them may well have been. The point here is not that the state may not legitimately punish the people who commit such crimes. It is simply to underscore the fact that in the American carceral system, extended imprisonment is not reserved for the most serious violent offenses.

<sup>118</sup> REAL WAR ON CRIME, *supra* note 117, at 9. As the Commission went on to observe, however, “the vast majority of people filling our expensive new prisons are nonviolent property and drug offenders.” *Id.*

<sup>119</sup> Esther I. Madriz, *Images of Criminals and Victims: A Study on Women’s Fear and Social Control*, 11 GENDER & SOC’Y 342, 346 (1997). Yet, as Madriz noted, “[t]his image contrasts with the reality of crime. From the criminal statistics, we know that



Madriz reports, participants “on several occasions used similar words to describe criminals: monsters, crazy, insane, mad, maniac, nuts, cracked, bizarre, weird[,] . . . out of control.” Many subjects further described criminals as “people who lack any human compassion [or] human sentiments.”<sup>120</sup>

This scary image, however, can in no way be thought to represent the norm among people with criminal records.<sup>121</sup> No doubt there *are* people in state custody too violent and dangerous to be released—the Charles Mansons, the Jeffrey Dahmers, the perpetrators of the awful Connecticut home invasion in 2007.<sup>122</sup> Such people—the apparently genuine moral monsters—seem by their very existence to attest to the fact of evil and the urgency and validity of an exclusionary response. But it is hard to credit the notion that such people are anything but exceptions. At present, there are more than 2.3 million people in custody in state and federal prisons and jails in the United States,<sup>123</sup> and another five to seven million people on probation or parole. Every year, between 650,000 and 700,000 people are released from prison, and ten to twelve million churn through the nation’s jails.<sup>124</sup> Even granting the likelihood of many repeat players, this is an enormous number of people. Unless the moral

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mass murders . . . are an extremely rare occurrence. When these events occur, however, the media bombard and saturate readers and viewers with reports about the incident, recreating images of atavistic criminals,” creating a “moral panic” that politicians turn to their advantage. *Id.* (internal citations omitted).

<sup>120</sup> *Id.* at 346-47. As for crime victims, they were conceived by respondents as “completely helpless and at the mercy of these ‘mentally disturbed’ persons.” *Id.* at 346. Moreover, Madriz found that “regardless of the race and socioeconomic background of the women, the images of criminals [were] strongly racialized, with Black and Latino men being uppermost in the fears of most women.” *Id.* at 345; *see also infra* Part VII.

<sup>121</sup> As Lynch put it, since the mid-1980s, when today’s harshly punitive penal culture began to emerge nationwide, “[t]he imagined prototypical offender in popular, political, and even justice policy circles [has] tended to be the scariest (although statistically rarest) type of criminal, who need not be understood or corrected but who must at any cost be contained and disempowered.” Lynch, *The Contemporary Penal Subject(s)*, *supra* note 97, at 94.

<sup>122</sup> *See* Stephen Singer, *William Petit Testifies in Connecticut Home Invasion, Murder Trial*, HUFFINGTON POST, (Sept. 14, 2010, 10:11 PM), [http://www.huffingtonpost.com/2010/09/14/william-petit-testifies-i\\_n\\_716330.html](http://www.huffingtonpost.com/2010/09/14/william-petit-testifies-i_n_716330.html).

<sup>123</sup> *See infra* note 151.

<sup>124</sup> *See supra* note 59.

disposition of the dangerous violent predator is epidemic in American society—a possibility arguably disproved both by common sense and by the relatively few serial murders, rapes, and other extremely violent actions compared with the sheer number of convicted offenders<sup>125</sup>—some other explanation is needed for the vast scope of the carceral system.

As it turns out, the answer to this puzzle is already at hand. The ideological construction of criminal offenders as monsters contains everything necessary to understand both the scale of the exclusionary enterprise and its seeming readiness to impose extended banishment even on people whose conduct or record suggests no tangible evidence of a violent threat. At the heart of this construction is a notion of criminality as congenital, as both deliberate and compulsive, and as inevitably scary and dangerous. The assessment of the threat posed by a given individual is based not on the particulars of his or her character or life experience or even on the nature of the crime(s), but on an assertion, based on the fact of persistent illegal conduct, of what he or she must inherently *be*. No longer do we seek to learn about the causes of criminality by trying to understand individual offenders “with all of the[ir] psychological and sociological complexity.”<sup>126</sup> In the contemporary American penal system, it is assumed that everything there is to know about a given offender can be found in the mere fact of his criminal history.

This, in short, is Yochelson and Samenow’s “criminal mind” meets Wilson’s “wicked people.” The resulting syllogism appears to look like this: if you commit crimes, you must have a criminal mind, making you of “a different breed” and necessarily wicked. And if you are wicked, you are, by definition, an appropriate target for social exclusion and state control. On this logic, no individualized proof of a violent disposition is required. A criminal propensity is a criminal propensity, and nothing an individual offender might say or do (or not say or not do) can change the fact of his own pathologies. In fact, with criminals being who they are—wily, untrustworthy, erratic—the wisest course would seem to be to maintain a skeptical response to any claims of their having been rehabilitated or otherwise misunderstood.

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<sup>125</sup> This is not to minimize the suffering of those who are victims of serious violent crimes, but simply to note that the numbers of such crimes are inconsistent with the notion that violent predators are ubiquitous.

<sup>126</sup> Lynch, *The Contemporary Penal Subject(s)*, *supra* note 97, at 90.

This ideological framing helps to explain why the carceral state targets for repeated or extended exclusion and control even people who have not committed serious or violent crimes, and why it maintains in custody even people who arguably pose little risk of recidivism.<sup>127</sup> From this perspective, what might seem like overinclusivity and thus unfair and gratuitous punishment is in fact sensible and judicious preemptive action<sup>128</sup> taken against people who, by their own criminal conduct, have already sufficiently demonstrated the inherent danger they pose. If their crimes have as yet been nonviolent or otherwise relatively nonserious, it is of no account, since—again, from this perspective—the fact of their criminality shows it to be only a matter of time before they commit serious violent offenses.

To see this expansive and teleological view of criminality in practice, one need look no further than the few Supreme Court cases that have considered Eighth Amendment claims of unconstitutionally disproportionate prison sentences. A dominant theme in these cases is the defendants' inveterate criminality and the legitimacy of a severe penal response aimed at protecting society from the danger they pose. In *Rummel v. Estelle*, the Court upheld a life sentence for a third offense under a Texas habitual offender statute that, according to the Court, allows the state "to segregate [a] person from the rest of society for an extended period" based "on the propensities he has demonstrated" through his repeated criminal conduct.<sup>129</sup> As the Court put it, "[h]aving twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law."<sup>130</sup> In *Solem v. Helm*, the Court struck down an LWOP sentence for a seventh felony conviction imposed under South Dakota's "recidivist statute," over the dissent of four Justices who opined that "[s]urely, seven felony

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<sup>127</sup> See Dolovich, *Creating the Permanent Prisoner*, *supra* note 10 (tracing the disappearance of meaningful parole consideration even for those who can demonstrate their fitness for release).

<sup>128</sup> See DOUGLAS, *supra* note 12, at 112 (explaining that successful institutions "gain legitimacy by distinctive grounding in nature and in reason").

<sup>129</sup> *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

<sup>130</sup> *Id.*

convictions warrant the conclusion that [Helm] is incorrigible.”<sup>131</sup> With this view, the *Solem* dissent echoed the trial judge, who at sentencing asserted that Helm had “certainly proven” himself “an habitual criminal . . . beyond rehabilitation,” and that “the only prudent thing to do [was] to lock [him] up for the rest of [his] natural life” so that no “further victims of [his] crimes” will “be coming back before the Courts.”<sup>132</sup> And in *Ewing v. California*, the Court upheld a twenty-five-year mandatory minimum sentence imposed under California’s three-strikes law, affirming the state’s interest “in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.”<sup>133</sup>

Certainly, many considerations drove the outcomes of these cases and the resulting legal standards, under which none but a vanishingly small number of Eighth Amendment disproportionality claims have any hope of success. But the concern here is not with the Court’s legal analysis or the constitutional implications of this line of cases. It is instead with the image of criminality that comes through in the above-quoted language and the penological theory this image betrays. In these cases, the subjects of punishment are “habitual offenders” with “a propensity” for crime. They are “incorrigible,” “beyond rehabilitation,” and “simply incapable of conforming” to society’s behavioral norms. This being so, how could anyone doubt the appropriateness of extended prison terms for these malefactors?

Judging from these descriptions, and from their accompanying affirmation of sentences effectively consigning the defendants to die in prison, one might well imagine the actors in question to be among the “worst of the worst,” people who have proved themselves too violent or dangerous to remain free. Yet the reality is something else entirely. Rummel’s crime was obtaining \$120 by false pretenses—he had “accepted payment in return for his promise to repair an air conditioner” that “was never repaired”<sup>134</sup>—and his two previous offenses (fraudulent use of a credit card and passing a bad check) cost his victims a total of

<sup>131</sup> *Solem v. Helm*, 463 U.S. 277, 317 (1983) (Burger, C.J., dissenting).

<sup>132</sup> *Id.* at 282-83 (majority opinion) (quoting trial judge).

<sup>133</sup> *Ewing v. California*, 538 U.S. 11, 29 (2002) (quoting *Rummel*, 445 U.S. at 276).

<sup>134</sup> *Rummel*, 445 U.S. at 286 (Powell, J., dissenting).

\$108.36.<sup>135</sup> As Justice Powell noted in his dissent, none of Rummel's offenses "involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon."<sup>136</sup> Helm's offense of conviction was that of "uttering a 'no account' check for \$100."<sup>137</sup> His six priors included three counts of third-degree burglary and one count each of obtaining money under false pretenses, grand larceny, and "third-offense driving while intoxicated."<sup>138</sup> As for Ewing, he was convicted of stealing three golf clubs "priced at \$399 apiece," which he had spirited out of a golf course pro shop concealed in his pants leg. He was arrested in the parking lot after "[a] shop employee, whose suspicions were aroused when he observed Ewing limp out of the [store], telephoned the police."<sup>139</sup>

True, among Ewing's prior convictions was a robbery/burglary in which Ewing "accosted a victim in the mailroom of [an] apartment complex," claimed to have a gun, and pulled a knife.<sup>140</sup> But the point here is not that these three men did no wrong, nor that they deserved no punishment.<sup>141</sup> It is that, taken in context, none of them—Ewing included—can fairly be thought to pose the kind of danger that would justify anything close to permanent exclusion. Indeed, taking into account Ewing's full criminal history,<sup>142</sup> one sees not a dangerous

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 295.

<sup>137</sup> *Solem*, 463 U.S. at 281.

<sup>138</sup> *Id.* at 279-80.

<sup>139</sup> *Ewing*, 538 U.S. at 18.

<sup>140</sup> *Id.* at 19.

<sup>141</sup> It bears noting, however, that by the time Ewing stole the three golf clubs (the crime that earned him the sentence appealed to the Supreme Court), he had already served his sentence for the robbery/burglary described in the text.

<sup>142</sup> As Justice O'Connor recounted, "[i]n 1984, at the age of 22, [Ewing] pleaded guilty to theft. The court sentenced him to six months in jail (suspended), three years' probation, and a \$300 fine. In 1988, he was convicted of felony grand theft auto and sentenced to one year in jail and three years' probation. After Ewing completed probation, however, the sentencing court reduced the crime to a misdemeanor, permitted Ewing to withdraw his guilty plea, and dismissed the case. In 1990, he was convicted of petty theft with a prior and sentenced to 60 days in the county jail and three years' probation. In 1992, Ewing was convicted of battery and sentenced to 30 days in the county jail and two years' summary probation. One month later, he was convicted of theft and sentenced to 10 days in the county jail and 12 months' probation.

predator but a smalltime petty thief and public nuisance with a drug problem, whose repeated encounters with the criminal justice system likely only exacerbated both his addiction and his seeming inability to obey the law.<sup>143</sup>

Ewing's case is instructive here. Given his steady pattern of offending and the apparently escalating seriousness of his crimes,<sup>144</sup>

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In January 1993, Ewing was convicted of burglary and sentenced to 60 days in the county jail and one year's summary probation. In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in the county jail and three years' probation. In July 1993, he was convicted of appropriating lost property and sentenced to 10 days in the county jail and two years' summary probation. In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to 30 days in the county jail and one year's probation.

In October and November 1993, Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period. He awakened one of his victims, asleep on her living room sofa, as he tried to disconnect her video cassette recorder from the television in that room. When she screamed, Ewing ran out the front door. On another occasion, Ewing accosted a victim in the mailroom of the apartment complex. Ewing claimed to have a gun and ordered the victim to hand over his wallet. When the victim resisted, Ewing produced a knife and forced the victim back to the apartment itself. While Ewing rifled through the bedroom, the victim fled the apartment screaming for help. Ewing absconded with the victim's money and credit cards.

On December 9, 1993, Ewing was arrested on the premises of the apartment complex for trespassing and lying to a police officer. The knife used in the robbery and a glass cocaine pipe were later found in the back seat of the patrol car used to transport Ewing to the police station. A jury convicted Ewing of first-degree robbery and three counts of residential burglary. Sentenced to nine years and eight months in prison, Ewing was paroled in 1999.

Only 10 months later, Ewing stole the golf clubs at issue in this case." *Ewing*, 538 U.S. at 18-19.

<sup>143</sup> To use an analogy from HBO's television show *The Wire*, Ewing is not Chris or Snoop (Marlo Stanfield's hitmen) who kill readily and without hesitation or conscience when ordered to do so, or even Omar, the shotgun-toting drug thief who exclusively and self-consciously targets only dealers. To judge from his criminal history, Ewing seems most like Bubbles, the drug addict always on the lookout for an opportunity to make some quick cash, who scrapes and steals his way from one high to the next. *HBO: The Wire: Homepage*, HBO, <http://www.hbo.com/the-wire/index.html> (last visited June 13, 2011).

<sup>144</sup> Although the theft of the golf clubs—which served as his third strike—certainly complicates any effort to frame Ewing as an increasingly violent individual, at least on the basis of his criminal record.

Ewing's twenty-five-year mandatory sentence may seem a wise and wholly appropriate way to deal with someone so plainly and uncontrollably maladapted. But once we exchange the individualist lens for one recognizing the role social and institutional factors can play in constraining the options, exacerbating the antisocial tendencies, and thereby promoting the criminality of targeted offenders, Ewing's trajectory comes to seem less a function of any innate wickedness or congenital proneness to lawbreaking than the combined effect of addiction, limited options, and the state's relentlessly (if initially constrained) penal response to his illegal behavior. From this perspective, one starts to see the way American society makes its own monsters, not only ideologically ("a breed apart"<sup>145</sup>) but also to some extent literally. That is, the penal practices that comprise the state's response to criminality seem designed only to increase the likelihood of disorderly, erratic, and possibly dangerous behavior by the people marked for punishment. With such a system in place, the state's increasing resort to a penal strategy of exclusion and control is both predictable and inevitable.

The appeal of the individualist framework is not hard to fathom. If the causes of crime are wholly internal, exclusively the product of an individual's inherent disposition, crime prevention becomes a simple matter: get rid of the criminals. Even granting the more complex account, one which recognizes the role played by social institutions in fostering or exacerbating criminal impulses, exclusion and control still retains an undeniable appeal, at least at first. It is hard work to deal with complex social dynamics; to fix deeply dysfunctional public institutions; to remedy maladaptive tendencies; and to help broken people overcome the corrosive effects of drug addiction, mental illness, and the trauma of childhood physical abuse and neglect, among other pathologies. Success is sure to be elusive. Backsliding is certain.<sup>146</sup> Meanwhile, law-abiding citizens remain fearful of escalating violence and grow tired of "[t]he daily

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<sup>145</sup> See *supra* Part IV.

<sup>146</sup> The elusive nature of success in rehabilitating offenders no doubt fed the rapid embrace of the suggestion that "nothing works," made by Robert Martinson in his well-known 1974 essay making this claim as to prison rehabilitative programming. See Jerome Miller, *Criminology: Is Rehabilitation a Waste of Time?* WASH. POST, Apr. 23, 1989 (discussing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 22-54 (1974)).

tribulation of minor crime and disorder.”<sup>147</sup> Judged against the difficulty of tackling the myriad causes of crime—not to mention the unsatisfying absence of opportunities a structuralist approach would afford for righteous indignation or the wholesale moral condemnation of criminal offenders—a regime of straight-up exclusion and control offers an attractive simplicity. And, at least initially, it holds the promise of freedom from crime, since in a regime of exclusion and control, convicted offenders conveniently disappear behind the prison walls. For a system that has already traveled far down this road, the prospect of pulling back from a strategy of exclusion and control can be unnerving.<sup>148</sup>

In short, if the people who wind up in prison are already those least capable of abiding by society’s behavioral norms, if prison conditions are likely only to exacerbate the antisocial tendencies of the people inside, and if the obstacles to reentry are so difficult to overcome, it becomes easy

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<sup>147</sup> GARLAND, *supra* note 86, at 164 (noting that concern with “[t]he daily tribulation of minor crime and disorder easily slides into a concern with ‘crime as such’ which in turn connotes violent predatory crime”).

<sup>148</sup> This point may be stated even more boldly. That is, even granting the social determinants of crime, and the fact that many of the people who break the law have been primed to do so by the “slums and ghettos, bad schools and dysfunctional families,” in which they have lived and developed and possibly come to lack the moral resources and personal and economic capital that might have helped them take a more socially adaptive path, the fact remains that they are who they are. Plainly, society lacks the political will to address the destructive effects of the various social institutions in which the most disadvantaged citizens find themselves. Email from Heidi Li Feldman, Professor of Law, Georgetown Univ. Law Ctr., to author (June 6, 2011) (on file with the author). And, some might argue, if, as a consequence, it falls to the criminal justice system to identify and remove those who, having been subjected to these conditions, prove unable to live law-abiding lives, that may be unfortunate, but maybe this is just how it needs to be. Again, this way of framing the issue will have an undoubted appeal for some observers. Before this framing is embraced too readily, however, two points bear noting. First, the corrosive effects of the penal system itself, canvassed above in Part III, indicate that the state’s response to crime may exacerbate whatever incapacities a given person might bring with them into custody, thus increasing the likelihood of further antisocial conduct down the line. This point suggests that the penal system is more than simply a response to the failings of other social and political institutions, but in fact operates to produce the results this objection decries. Second, the harsh and even inhumane character of conditions in many prisons and jails suggests that the driver of current penal practice is something other than a much regretted sense that the only way to keep society safe is to lock away any potentially disruptive people.



to see the appeal of maintaining the current approach, which at least promises to ensure that those unfortunates trapped in the system are kept far away from the innocent citizens who pose no such threat. There is, however, a fatal flaw in this quiescent posture. As *Ewing*'s criminal history suggests, the benefits of exclusion and control, however alluring, can only be short-term, since an exclusively penal response will frequently lead to repeated, and possibly more serious, criminal conduct. In *Ewing*, Justice O'Connor affirmed that states are entitled to incapacitate those found to be "incapable of conforming to the norms of society as established by its criminal law."<sup>149</sup> But what if this incapacity were only exacerbated by the state's relentless insistence on responding to all criminality, however minor, with exclusion and control? Even if, as in *Ewing*'s case, initial sentences were brief, the exclusive reliance on a carceral response arguably made further criminality on *Ewing*'s part all but certain.

At a minimum, it seems clear that a system that responds to crime with conditions certain to (re)produce antisocial behavior will find itself relying more and more heavily on a carceral response. And sure enough, one finds over the past few decades in the United States an increased reliance on incarceration in general and LWOP sentences in particular.<sup>150</sup> Evidence of the increased use of incarceration in general may be found in the sheer number of people being consigned to prison. Between 1970 and 2008, the total population of American prisons and jails went from approximately 360,000 to 2.3 million.<sup>151</sup> Moreover, as Todd Clear and

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<sup>149</sup> *Ewing v. California*, 538 U.S. 11, 29 (2003).

<sup>150</sup> See ASHLEY NELLIS & RYAN S. KING, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 5 (2009) (noting that the "frequency with which [life and LWOP sentences] have been used has increased dramatically during the last 20 years as sentencing statutes, prosecutorial practices, and parole policies have evolved in a more punitive direction").

<sup>151</sup> See THEODORE L. DORPAT, CRIMES OF PUNISHMENT: AMERICA'S CULTURE OF VIOLENCE 55 (2007) ("In 1970, there were about 200,000 Americans in prison."); BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 104 (2d ed., 1988) (reporting that the number of jail inmates reached 160,863 in 1970); PEW CENTER ON THE STATES, ONE IN 100, *supra* note 25, at 5 ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258.").

James Austin observe, since the mid-1990s, a mix of legislative policies “that enhanced penalties for felonies greatly increased the average length of prison terms, which led to expanding prison populations even as crime rates dropped,” creating a “growing backdrop of people serving long sentences.”<sup>152</sup> As for LWOP, in 1992, there were 12,453 people serving this sentence nationwide.<sup>153</sup> By 2003, there were over 33,000, and by 2008, over 41,000.<sup>154</sup> Every state except Alaska has made LWOP an available penalty,<sup>155</sup> and as of 2009, at least six states and the federal system have eliminated parole eligibility entirely for those receiving life sentences, making LWOP the norm in these jurisdictions.<sup>156</sup> Between 2003 and 2008, the number of LWOP sentences imposed grew at a rate “nearly four times [that] of the parole-eligible life sentenced population.”<sup>157</sup> Moreover, although some 100,000 people serving life sentences formally retain the possibility of parole, the steady disappearance of meaningful parole consideration over the past few decades<sup>158</sup> has effectively transformed all life sentences into LWOP

<sup>152</sup> Todd R. Clear & James Austin, *Reducing Mass Imprisonment: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 312 (2009) (“[O]ver the last thirty-six years, the United States has built a policy designed to grow prisons.”). A recent report by leading penologists found that, between 1993 and 2002, the average length of time served in prison increased from 21 months to 30 months—and even this finding “underestimate[s] the average length of current prison sentences because [the 2002 data] do not include time served by prisoners sentenced under recent punitive laws (such as ‘three strikes and you’re out’) who have not yet been released.” JFA INSTITUTE, UNLOCKING AMERICA, *supra* note 80, at 3 (listing as authors James Austin, Todd Clear, John Irwin, Barbara Owen and others); see also Marc Mauer, *Causes and Consequences of Prison Growth*, 3 PUNISHMENT & SOC’Y 12 (2001) (“Despite the fact that crime rates [] declined for much of the 1990s, prison populations have continued their seemingly inexorable climb.”).

<sup>153</sup> See MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 fig. 3 (2004).

<sup>154</sup> See NELLIS & KING, *supra* note 150, at 9-10 & fig. 2.

<sup>155</sup> See *id.* at 6 tbl. 1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 3.

<sup>158</sup> *Id.* at 6 (“[Parole] eligibility does not equate to release and, owing to the reticence of review boards and governors, it has become increasingly difficult for persons serving a life sentence to be released on parole.”).

sentences,<sup>159</sup> thereby expanding the reach of permanent exclusion.<sup>160</sup>

<sup>159</sup> California is a case in point. In California, life sentences typically take the form of some minimum number of years (typically seven, fifteen, or twenty-five) to life. Prisoners do not become parole-eligible until they have served the minimum. But once they serve that time, the governing regulations direct the Board of Parole Hearings (the Board) to consider parole eligibility. Required by law to take into account a wide range of circumstances, including the crime itself, the individual's criminal and "social" history, and his or her behavior while incarcerated, *see* 15 CAL. CODE OF REGULATIONS (CCR) § 2281(c)(1), (c)(3), (d)(2), (d)(9) (2008); 15 CCR § 2402(c)(1), (c)(3), (d)(2), (d)(9) (2008). The Board is to consider whether the prisoner "pose[s] an unreasonable risk of danger to society." *See* 15 CCR § 2281(a) (2008); 15 CCR § 2402(a) (2008). If not, a parole date is to be set. *See* CAL. PENAL CODE § 3041(a) (West 2011) ("One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners should . . . meet with the inmate and should normally set a parole release date."). Given the population at issue, it would not be surprising if many people who came before the Board were found ineligible for parole at their earliest possible release date. Still, assuming meaningful review, one might expect the Board to see some appreciable number of people, especially by the third or fourth time around, who could be released with minimal public safety risk. Yet, for the past decade, the Board has denied 98 percent of the petitions it hears. *See* Keith Wattle, Presentation at UCLA School of Law: Introduction to Life Sentences in California (November 10, 2010); *see also* Jennifer Chaussee, *For Paroled Lifers, Release Dates May Come Only with the Courts*, CAPITOL WKLY., Jan. 13, 2011 (reporting that, according to one survey of 300 lifers in custody, only two had been granted release dates by the state parole board, while a further six had had their parole denials overturned in the courts). From this, one might conclude that lifers in California are especially dangerous. In fact, the evidence suggests that the Board's practice of routinely denying petitions is a product not of meaningful review of the merits of each case, but rather of a determination not to grant parole except in the rarest of cases. This sort of resistance is not unique to California. Across the country, parole boards and governors have grown increasingly reticent to release even those people with strong cases that they would pose a minimal risk to public safety. As a result, "it has become increasingly difficult for persons serving a life sentence to be released on parole." NELLIS & KING, *supra* note 150, at 6.

<sup>160</sup> These features of an expanded penal system—increasingly lengthy sentences, an increase in the prison population, the expanded use of LWOP, and the disappearance of meaningful parole for lifers—represent only the most obvious strategies for a penal system increasingly reliant on an exclusionary response to crime. In addition, a wide range of penal practices, from the increased use of mandatory minimums and other determinate (and increasingly harsh) sentencing schemes, to the burdensome legal disabilities imposed on formerly incarcerated people post release, to the frequently dangerous and inhumane character of prison conditions themselves can also be regarded as components of an exclusionary strategy. Their profligate use indicates a state

Measured against the penal system as a whole, LWOP remains of necessity a relatively rare sentence.<sup>161</sup> Still, this particular penalty has a powerful appeal for a system seemingly incapable of otherwise tackling the causes of antisocial conduct and social disorder. Those with LWOP sentences will spend the rest of their natural lives behind bars. LWOP is thus social exclusion at its most extreme, allowing the permanent removal from the shared social space of those deemed most socially undesirable. Viewed from the perspective of civil society, this is a brilliant strategy. If someone scares you or makes you uncomfortable, if they seem broken or unstable or chronically unable to conform to society's behavioral norms, you *could* confront your discomfort and acknowledge the structural forces and political choices that combine to keep this person on society's margins.<sup>162</sup> With this recognition, you could embark on a difficult and possibly fruitless effort to increase his prospects for a meaningful life while at the same time trying to keep him from engaging in socially harmful behavior. Or you could just convince yourself that he must be a monster, wave your hand, and make him go away. Notice that when the choice is framed at this point in the process, the appeal of the exclusionary strategy is undeniable. As with any successful institution, this is the genius of exclusion and control.<sup>163</sup> Having followed this path for so many years, and having as a society come to feel entitled to freedom from the risk of disorder posed by marginalized people whose needs and interests are no longer regarded as matters of collective concern, we may have reached a moment when the pursuit of any other approach, even if theoretically possible, seems inconceivable.<sup>164</sup>

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seemingly determined whenever possible to permanently banish those people once marked out as prisoners and, when permanent banishment is not possible, at least to maintain the isolation and social marginalization of members of this group from the broader society. See Dolovich, *Creating the Permanent Prisoner*, *supra* note 10.

<sup>161</sup> As of 2008, there were slightly more than 41,000 people serving LWOP sentences, approximately 1.7 percent of the total incarcerated population. See NELLIS & KING, *supra* note 150, at 1, 3.

<sup>162</sup> See, e.g., Taifa & Beane, *supra* note 20.

<sup>163</sup> See DOUGLAS, *supra* note 12, at 92, 112.

<sup>164</sup> See *id.*

## VII. INCORRIGIBILITY, EXCLUSION, AND RACE

Exclusion and control is not costless. To the contrary, it is expensive and labor-intensive and has serious unintended consequences for society as a whole.<sup>165</sup> But whatever the costs to society in general, this strategy takes its greatest toll on the incarcerated. This allocation of burdens may explain why there has been relatively little social resistance to mass incarceration and its effects. The people who suffer most from harsh penal policies are the most politically disenfranchised<sup>166</sup> and socially marginalized of society's members. Members of this group are, as already noted, disproportionately likely to be mentally ill, drug-addicted, undereducated, unskilled, and/or indigent.<sup>167</sup> Put plainly, these are people mainstream society just does not care that much about. Once one factors in the dramatic overrepresentation in the American prison population of people of color, African Americans in particular,<sup>168</sup> what may have at first seemed merely like ill-conceived policy starts to look like something more insidious.<sup>169</sup>

Recall the moral economy of society's carceral bargain. Those marked out for exclusion and control are thereby transformed into penal subjects to whom the citizens who retain their political status and freedom of movement need no longer give another thought. In this way, prisoners lose not only their liberty but also their full moral status and thus their claim to the equal respect and consideration necessarily due to

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<sup>165</sup> For discussion, see Dolovich, *Incarceration American-Style*, *supra* note 17, at 239-40, 247; *see also supra* Part II.

<sup>166</sup> In most cases, people with felony convictions cannot serve in the military, and in many states, people with felony convictions also cannot vote or serve on juries. *See Chin, Race, the War on Drugs*, *supra* note 67, at 261.

<sup>167</sup> *See supra* Part III.

<sup>168</sup> *See Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 21, at 976-77 (explaining that "although African Americans make up no more than 13 percent of the American population, at least 40 percent of the people behind bars in the United States are African-American," and that "Latinos too are overrepresented, making up 20 percent of the incarcerated population although they are no more than 14.8 percent of the population in general").

<sup>169</sup> *See Wacquant*, *supra* note 79, at 384 (arguing that the "black ghetto" and the prison together "constitute a single *carceral continuum* which entraps a redundant population of younger black men (and increasingly women) who circulate in closed circuit between its two poles in a self-perpetuating cycle of social and legal marginality with devastating personal and social consequences").

fellow human beings and fellow citizens. They come to be regarded as nonhumans,<sup>170</sup> perpetual potential inmates,<sup>171</sup> “a breed apart,”<sup>172</sup> and even monsters.<sup>173</sup> This status helps explain a feature of the exclusionary regime that might otherwise seem puzzling: how it is that, in order to protect some people from the relatively unserious harms arising from the “daily tribulation of minor crime and disorder” committed by the likes of Rummel and Helm, we are willing to consign the Rummels and Helms to the indignity and hopelessness of a life lived in the custody of the modern penal state. It might be one thing to subject to the harms of imprisonment those people who pose a real threat of serious physical violence to others.<sup>174</sup> But to inflict this experience, for years and in some cases permanently, on someone whose conduct is merely a nuisance would seem extremely hard to justify—unless that nuisance were created by someone whose pain and suffering did not morally signify. Once the targets of exclusion and control are viewed as outside society’s moral circle, any penal harms they experience no longer count. The only entries in the ledger become the benefits that accrue to society from removing a possible source of disorder. From this perspective, incarceration starts to seem all upside, the penological equivalent of lancing a boil.

In today’s carceral regime, in other words, to be a prisoner is to occupy a morally degraded state, in which any harm you suffer counts for nothing.<sup>175</sup> This brings us back to the question of race. As Wacquant has argued, the history of race relations in America, from slavery to Jim Crow to the northern ghetto, has been one of racial segregation officially and violently enforced.<sup>176</sup> In each iteration, African Americans were ascribed a

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<sup>170</sup> See *supra* Part IV.

<sup>171</sup> See *supra* Part III.

<sup>172</sup> See *supra* Part IV.

<sup>173</sup> See *supra* Parts V-VI.

<sup>174</sup> Although even then, acknowledgement of shared humanity might still move us to aim for minimally decent conditions of confinement.

<sup>175</sup> Recall Agamben’s “wolfman,” as to whom the fact of his confinement is all that matters. Because he is not human, because he is a monster, it is morally irrelevant if he is confined in harsh and even cruel conditions. See AGAMBEN, *supra* note 43; *supra* Part V.

<sup>176</sup> See, e.g., Loïc Wacquant, *Class, Race, and Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74-89; Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the Race Question in the U.S.*, 13 NEW LEFT

degraded moral status,<sup>177</sup> of which, in today's era of mass incarceration, "criminal" or "inmate" may simply be the latest version.<sup>178</sup> Certainly, the drivers of exclusion and control are complex, and not reducible to any one variable, be it race or otherwise. Yet it surely bears noting that, as segregation based exclusively on race has become constitutionally impermissible, the carceral system—which allows for both the physical removal and moral degradation of targeted individuals—has dramatically expanded and disproportionately targeted people of color.<sup>179</sup>

It would be a mistake to dismiss this juxtaposition as mere coincidence. To the contrary, the official ascription of congenital criminality and incorrigibility that motivates the present exclusionary regime has a palpable racial dimension, which helps to explain the penal system's disproportionate targeting of people of color, African Americans in particular.<sup>180</sup> As has been seen, the move from a rehabilitative ideal to a system driven to exclude and control brought with it an accompanying shift in the conceptualization of the penal subject.<sup>181</sup> The targets of state punishment were once viewed as "flawed but fixable" and thus capable of reform, but this view has since been supplanted by a deracinated conception of offenders as inherently wicked, driven to criminality by

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REV. 41 (2002).

<sup>177</sup> As Ann Arnett Ferguson explains, "[i]mages of Africans as savage, animalistic, subhuman without history or culture—the diametric opposite of that of Europeans—rationalized and perpetuated a system of slavery. After slavery was abolished, images of people of African descent as hypersexual, shiftless, lazy, and of inferior intellect, legitimated a system that continued to deny rights of citizenship to blacks on the basis of race difference." ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 79 (2001).

<sup>178</sup> See Jennifer Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 889 (2004) (reporting the results of studies in which "Black faces" were found to look "more criminal to police officers; the more [stereotypically] Black, the more criminal").

<sup>179</sup> For more on the overrepresentation of African Americans in the criminal justice system, see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000); MARC MAUER, *RACE TO INCARCERATE* 129-70 (2d ed. 2006); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1475-641 (1988); see also *supra* note 169.

<sup>180</sup> See *supra* note 168.

<sup>181</sup> See *supra* Part IV.

their own depraved preference for wrongdoing.<sup>182</sup> On this contemporary view, any sense that the people who commit crimes are complex human beings with the full range of human emotions, impulses, and aspirations has fallen away. Once people have been stripped of their humanity, it becomes easier to see them solely as a threat to be contained and an appropriate target for state control.<sup>183</sup> American society has long been inclined to perceive African Americans through a lens of race that obscures individual complexity and ascribes character defects and moral failings generally to members of this group.<sup>184</sup> In such a context, it is predictable that African Americans would be more likely than whites to be judged incorrigible and more readily found to pose a criminal threat<sup>185</sup> regardless of their actions.<sup>186</sup>

The work of Ann Arnett Ferguson illustrates the way race can inform official ascriptions of incorrigibility—and how these ascriptions can become manifest in decisions to exclude and control.<sup>187</sup> Ferguson studied the disciplinary process at an unnamed American middle school, where a disproportionate number of African-American boys were winding up in detention. What she found was not that the African-American boys were behaving worse than the white boys, but that the teachers’

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<sup>182</sup> See *supra* Part IV.

<sup>183</sup> See AGAMBEN, *supra* note 43, at 8-10, 104-05; GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (2005); Lynch, *The Contemporary Penal Subject(s)*, *supra* note 97; Mona Lynch, *Selling ‘Securityware’: Transformations in Prison Commodities Advertising, 1949-99*, 4 PUNISHMENT & SOC’Y 305 (2002).

<sup>184</sup> See FERGUSON, *supra* note 177, at 79.

<sup>185</sup> Evidence from social psychology attests to the greater readiness of research subjects—college students and police officers alike—to associate African Americans with criminality. See Eberhardt et al., *supra* note 178; Hurwitz & Peffley, *supra* note 90, at 376-77 (“Experimental studies from social psychology . . . show consistently that the same behaviors acted out by black and white targets are interpreted very differently by white subjects, with the black target often seen as more guilty and more aggressive than the white.”) (internal citations omitted). Indeed, the direct stereotypical association of “Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.” Eberhardt et al., *supra* note 178, at 876; see also *supra* note 90.

<sup>186</sup> This is not to suggest that African Americans do not engage in criminal conduct, but only that there are reasons to expect that African Americans are more likely to be perceived as a threat even when their conduct is no different than that of people of other races.

<sup>187</sup> See FERGUSON, *supra* note 177.



*perceptions* of the misconduct, the way they made sense of the behavior they saw, differed markedly depending on the race of the boy. Generally speaking, Ferguson observes, boys enjoy a greater dispensation to misbehave than do girls. As she puts it, “[b]oys will be boys: they are mischievous, they get into trouble . . . . Boys are naughty by nature.”<sup>188</sup> As a result, Ferguson notes, “rule breaking on the part of boys is looked at as something-they-can’t-help, a natural expression of masculinity in a civilizing process.”<sup>189</sup> Yet she found that this dispensation did not seem to extend to African-American boys. Instead, “the school read[] their expression and display of masculine naughtiness as a sign of an inherent, vicious, insubordinate nature that as a threat to order must be controlled.”<sup>190</sup> Though only school children, when the African-American boys Ferguson observed acted out, their conduct was taken as evidence of their inherent badness: “their behavior is incorrigible, irremediable.”<sup>191</sup> It was, moreover, already seen through the lens of the penal system, so that “[i]n the case of African American boys, misbehavior is likely to be interpreted as symptomatic of ominous criminal proclivities.”<sup>192</sup> And perhaps unsurprisingly, having been excluded from the dispensation to be “naughty,” these boys received “harsher, more punitive responses to [their] rule-breaking behavior.”<sup>193</sup>

Although Ferguson’s study was limited in scope, her conclusions suggest the ease with which authority figures can regard African Americans as “incorrigible, irremediable.” Her work also exposes the way the threat of “predation” that African Americans are thought to pose can be officially attributed exclusively to “their own maladaptive and inappropriate behavior,” thereby obscuring the social, economic, and even ideological context that might inform such behavior.<sup>194</sup> As Ferguson herself recognizes, the assumption of African-American “incorrigibility” she unearthed in her research has direct correlates in the public discourse on crime. Considering the way the media “demoniz[es] . . . very young

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<sup>188</sup> *Id.* at 85 (original emphasis deleted).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 86.

<sup>191</sup> *Id.* at 90.

<sup>192</sup> See FERGUSON, *supra* note 177, at 89.

<sup>193</sup> *Id.* at 90.

<sup>194</sup> *Id.* at 82.

black boys who are charged with committing serious crimes,” Ferguson notes that in such cases, “there is rarely the collective soul-searching for answers to the question of how ‘kids like this’ could have committed these acts that occurs when white kids are involved.” Instead, “the answer to the question seems to be inherent in the disposition of the kids themselves.”<sup>195</sup>

Ferguson’s findings, in short, expose the racial motivations that can inform official ascriptions of incorrigibility. If this dynamic extends beyond the public school system to the broader penal context, one would expect African Americans to be disproportionately represented among the nation’s prisoners, and especially among those singled out for life sentences or for the permanent exclusion of LWOP. And indeed, available data clearly indicate a marked disproportion of African Americans receiving these sentences. Overall, African Americans constitute approximately thirteen percent of the American population. Yet, as of 2009, members of this group made up 37.5 percent of all prisoners nationwide.<sup>196</sup> Moreover, as of that same year, 48.3 percent of all lifers, 56.4 percent of those serving LWOP, and 56.1 percent of those who received LWOP as a juvenile (JLWOP) were African-American.<sup>197</sup> In fourteen jurisdictions, including the federal system, the proportion of African-American lifers exceeded sixty percent.<sup>198</sup> And in fourteen of the thirty-seven states with people serving JLWOP, the proportion of African Americans serving that sentence exceeded sixty-five percent.<sup>199</sup>

Not only, therefore, are African Americans overrepresented among those in custody, but their representation increases with each heightening of penal severity. In other words, the more complete the exclusion a penalty represents and the more extreme the social rejection it

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<sup>195</sup> *Id.*

<sup>196</sup> See NELLIS & KING, *supra* note 150, at 11.

<sup>197</sup> See *id.* at 11-14, 17, 20-23.

<sup>198</sup> See *id.* at 11-13 & tbl. 3. The other jurisdictions with over sixty percent African-American lifers are Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia. See *id.*

<sup>199</sup> See *id.* at 20-21 & tbl. 8. These jurisdictions include Alabama (75/89), Arkansas (38/57), Delaware (13/19), Illinois (74/103), Louisiana (97/133), Maryland (15/19), Minnesota (1/1), Missouri (24/35), North Carolina (17/26), Pennsylvania (231/345), Rhode Island (1/1), South Carolina (11/14), Texas (2/3), and Virginia (21/28).

signifies, the greater the odds that a person subject to it will be African American. Again, many factors may explain the disproportionate representation of people of color in these populations. Nevertheless, there is a notable interplay between the animating construction of the penal subject in a regime of exclusion and control and the way African Americans are frequently perceived in American society more generally. To put it plainly, in a penal system that imagines criminality as both congenital and ineluctable, those people whose humanity is most readily denied and who are regarded as inherently dangerous just by virtue of their skin color are more likely to be perceived as criminals and thus as appropriate subjects for exclusion and control. Given America's history of race relations, the possibility that racial animus drives our collective eagerness to exclude those judged incorrigibly criminal poses a serious challenge to the legitimacy of the prevailing penal regime.

#### VIII. THE PATTERN CONTINUES: EXCLUSION AND CONTROL ON THE INSIDE

By the terms of society's carceral bargain, the state assumes custodial responsibility for the people marked out for social exclusion. This bargain allows for the removal from the shared public space of those people feared to pose the greatest threat to the social order and leaves the public free to disregard them for the duration of their sentence. And by locating the causes of crime solely and squarely within individual offenders, the reigning narrative protects civil society from having to confront the fact that the necessity for containing a seemingly uncontrollable population may stem from conditions to which the socially marginalized have been systematically subjected both inside and outside the prison. This narrative further enables the collective delusion that the very people who have been judged to pose the greatest threat to the social order require the least social investment and the least public concern. This point bears emphasizing: *incarceration enables the fiction of a problem solved.*

But the people we incarcerate do not just disappear. They simply relocate to one of the many carceral institutions designed to keep them separate and apart from society. Here is yet another moment for political imagining. In theory, there is no reason why these institutions should not be safe, orderly, and humane. Although residents may be forbidden to return to society, they could still be given opportunities for self-

development and personal growth, to set and achieve goals, and to build friendships and forge meaningful relationships with people both inside and outside the prison. They could still, in other words, be able to do all that human beings can do to make meaningful lives, save engaging in free movement outside the prison walls. True, being human beings, the people who have been banished in this way are likely to respond to their confinement with anger, frustration, and resentment. But it is not inconceivable that a society committed to maintaining maximally humane prison conditions could find ways to help the people inside to make the most of their situation.

Yet even to embark on such an approach would require recognition of the humanity of the people in prison and of the fact that, like everyone else, they have needs and interests, the ability to change and grow, and the desire for meaning, not to mention the capacity to fear violence and suffer abuse. A society that automatically regards convicted criminal offenders as not just nonhuman but as moral monsters will by definition be unable to recognize the shared humanity of the people the state incarcerates, and thus will be unwilling to make the investment necessary to ensure that prison conditions are as humane as possible.

At present, conditions in many American prisons resemble those one might expect to find in a polity that lacks the capacity or inclination to empathize with the people it incarcerates. Far from being a site of meaningful experience or even socially productive activity, the American prison has become little more than what Jonathan Simon aptly describes as “a space of pure custody, a human warehouse or even a kind of social waste management facility,” where detainees are “concentrated [simply] for purposes of protecting the wider community.”<sup>200</sup> Holding more and more people for longer and longer periods, the current carceral regime has left many people behind bars with no incentive to behave well. At the same time, the people being singled out for incarceration are more and

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<sup>200</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 142 (2007). As Simon explains, “[t]he waste management prison promises no transformation of the prisoner through penitence, discipline, intimidation, or therapy. Instead, it promises to promote security in the community simply by creating a space physically separated from the community in which to hold people whose propensity for crime makes them appear an intolerable risk for society.” *Id.* at 142-43.

more broken, whether from the many risk factors of social marginalization—drug addiction, mental illness, poverty, etc.—or from a prior incarceration, or both. The combined effect of these trends is a prison population less and less able or willing to accede quietly to the institutional restrictions to which they are subjected or to behave in ways conducive to a safe and orderly prison. Under these circumstances, breakdown is inevitable.

It is a tribute to the success of the exclusionary project that the daily manifestations of this breakdown are not generally visible or apparent to society at large. But those who are familiar with the internal workings of carceral facilities can readily see the signs. In many American carceral facilities, people who are seriously mentally ill are under-medicated, over-medicated, or not treated at all.<sup>201</sup> Power over the prison population is frequently an ongoing negotiation between prison officials and the most powerful prisoners—often gang leaders who, among other things, may control a lucrative black market within the prison and use violence against their enemies with impunity.<sup>202</sup> There is a perennial threat of riots, whether orchestrated by gangs or other groups of powerful prisoners for their own political or economic reasons<sup>203</sup> or sparked by

<sup>201</sup> See Kupers, *What to Do with the Survivors?*, *supra* note 49, at 1008 (explaining that although the Bureau of Justice Statistics estimates that fifty-six percent of state prisoners have “mental illness serious enough to require mental health treatment,” there are “insufficient mental health services in our prisons to adequately treat even 10% to 12% of [the current prisoner population]”).

<sup>202</sup> *Tuft v. Chaney*, No. H-06-2529, 2010 WL 420003, at \*10 (S.D. Tex. Jan. 29, 2010) (explaining that the “black-market prison trade in tobacco is often controlled by prison gangs who . . . pay corrupt correctional officers to smuggle contraband into prison units or to look the other way when inmates smuggle in contraband [and often] enforce the settlement of tobacco-related debts . . . with violence”); JOSEPH HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* 92-100 (2001); John M. Broder, *Trial Begins for Members of Aryan Prison Gang*, N.Y. TIMES, Mar. 15, 2006, at A18 (“The members of the Aryan Brotherhood are particularly violent, disciplined, fearless, and committed to controlling and dominating the prison population through intimidation and murder.”) (quoting Michael W. Emmick, Assistant U.S. Attorney for the Central District of California).

<sup>203</sup> See, e.g., Guillermo Contreras, Robert Crowe & Sara Ines Calderon, *Gang Riot at Three Rivers Prison Leaves Inmate Dead*, CHRON.COM (Mar. 28, 2008, 5:30 AM), <http://www.chron.com/disp/story.mpl/metropolitan/5657825.html> (reporting on a riot at a federal prison in which “[o]ne prisoner was killed and 22 injured,” which “appeared

genuine grievances over the lack of adequate services (food, medical, psychiatric, etc.) or other harmful effects of chronic overcrowding.<sup>204</sup> Cell extractions performed by correctional officers suited up for combat are common,<sup>205</sup> as is the use of force in general.<sup>206</sup>

The overall effect of these and other corrosive components of contemporary American prison life is a set of institutions the daily functioning of which is marked by relentless volatility punctuated by regular bursts of extreme disorder and serious violence.<sup>207</sup> Prison

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to stem from ongoing tensions between rival prison gangs. . . . U.S.-born inmates of Mexican descent who call themselves Chicanos and inmates who are Mexican nationals, known as Paisas in the federal system,” possibly in “retaliation for assaults or tensions in the federal system between the Texas Mexican Mafia and the Paisas”); Solomon Moore, *Hundreds Hurt in California Prison Riot*, N.Y. TIMES, Aug. 9, 2009, at A9 (reporting on a riot at a “large California prison . . . injuring 250 prisoners and hospitalizing 55,” which “broke down along racial lines, with black prison gangs fighting Latino gangs in hand-to-hand combat”).

<sup>204</sup> See, e.g., *Update: Fires Out at Reeves County Detention Center*, NEWS WEST 9.COM, (Feb. 5, 2009), <http://www.kwes.com/global/story.asp?s=9794955> (reporting on a riot at a local jail, started by detainees reported to be “demanding better healthcare,” the second time since December of the previous year when detainees in the facility rioted “for better healthcare and treatment”); *Indiana Prison Riot: Addition of Arizona Prisoners May Have Created Unacceptable Overcrowding Issues*, ASSOCIATED CONTENT, (Apr. 24, 2007), [http://www.associatedcontent.com/article/224952/indiana\\_prison\\_riot\\_addition\\_of\\_arizona.html](http://www.associatedcontent.com/article/224952/indiana_prison_riot_addition_of_arizona.html) (reporting on a riot at an Indiana prison reported to have arisen over “overcrowding issues includ[ing] prisoners without beds and not enough bathrooms”).

<sup>205</sup> See, e.g., Human Rights Coalition, *Prisoners Beaten, Shackled and Starved in SCI Dallas Prison*, PHILA. INDEP. MEDIA CENTER, (May 9, 2010), <http://www.phillyimc.org/en/prisoners-beaten-shackled-and-starved-sci-dallas-prison> (reporting on events in a Dallas prison during which, over three days, officers performed seven “‘cell extractions’ (attacks by teams of guards wearing riot gear and armed with pepperspray, night sticks and electroshock weapons)”; Lydia Mulvany, *Inside the County Jail*, GATEHOUSE NEWS SERVICE, (May 2, 2008), <http://www.wickedlocal.com/plymouth/news/x828500079> (explaining in detail the process of cell extractions).

<sup>206</sup> See John R. Hepburn, Marie L. Griffin & Thomas V. Shade, *The Use of Force in Correctional Institutions*, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 379, 379-85 (Peter M. Carlson & Judith Simon Garrett eds., 1999).

<sup>207</sup> See JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 6, 11-12 (2006), available at [http://www.veradc.org/pdfs/Confronting\\_Confinement.pdf](http://www.veradc.org/pdfs/Confronting_Confinement.pdf); James Zogby, *The Crisis in America’s Prisons*, MEDIA MONITORS NETWORK, (July 12, 2004), <http://usa.mediamonitors.net/Headlines/The-Crisis-in-America-s-Prisons>.

populations, in short, are becoming harder to manage, which is the predictable effect of who we incarcerate, for how long, and under what conditions. As a result, in many institutions, there is what can best be described as a crisis of custodial control. And if the potential harm to prisoners from such conditions counts for little politically, the risk of harm to custody staff and other civilians working inside the facility *is* a serious cause for public concern, as are the implications of such disorder for the carceral project more generally.

This situation raises a dilemma for the carceral state. In civil society, the response to people whose behavior is thought to be dangerous or unruly or to pose a threat to the social order is to exclude them from the shared public space. They are banished from society and placed under ongoing state control. But *prisoners* who are violent or disorderly, who act out or otherwise misbehave, have already been banished. When a crisis of control occurs in the prison, how then is the state to respond?

In a different system, it might be possible to imagine a different response. But the American carceral system is itself the product of an entrenched understanding as to how to deal with those who, for whatever reason, do not conform their behavior to the demands of the law. This is a system built on the twin imperatives of exclusion and control, and there is no reason to expect the institutional response to the threat of disorder to be any different just because the context in which the threat arises is one populated by those who have already been exiled from the broader society. Indeed, the legitimacy of the system demands fealty to this approach and a belief in its wisdom and success. Segregation of the seemingly recalcitrant appears to have worked once. Why would it not work again? This response may be costly, but it has an appealing simplicity. Dealing with the root causes of violence and social disorder is difficult. It is easier to isolate the people who pose a threat and to restrict their scope of action. True, this approach may wind up exacerbating the problem. But so long as the agents of disorder can be further contained, the prevailing pattern need not be disrupted.

Enter supermax, “prisons within prisons.”<sup>208</sup> Although the details

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<sup>208</sup> Lorna Rhodes, *Dreaming of Psychiatric Citizenship: A Case Study of Supermax Confinement*, in *A READER IN MEDICAL ANTHROPOLOGY: THEORETICAL TRAJECTORIES, EMERGENT REALITIES* 181, 184 (Byron J. Good et al. eds., 2010).

of design and form vary among institutions, the basic idea of supermax borrows from the conditions of punitive isolation, under which prisoners who act out in the general population are often temporarily confined. The “essential features” of this type of confinement are “isolation, intense surveillance and elaborate precautions against assault and escape whenever prisoners are out of their cells.”<sup>209</sup> In practice, this translates into targeted individuals being locked down—often for years—in small single cells (typically resembling concrete boxes) for twenty-one to twenty-four hours a day, with little or no human contact, minimal sensory stimulation, and “removal—cuffed, tethered, and under escort—only for brief showers or solitary exercise.”<sup>210</sup>

Whatever else might be said about the inhumane and self-defeating conditions of supermax,<sup>211</sup> it does succeed brilliantly at its intended purpose: containing the potentially disruptive forces that create a risk of violence or disorder in the prison’s general population. Indeed, it is arguable that supermax is critical to the success of the entire carceral enterprise. The appeal of society’s carceral bargain is the freedom it grants citizens from having to reckon with either the existence of the people in prison or the socially destructive effects of their own carceral choices. Genuine disorder in the prison would threaten this freedom by forcing the reality of the polity’s vast carceral system onto the public consciousness, whether through mass riots, escapes, or other manifestations of the state’s loss of control. Supermax gives prison officials the ability to banish certain especially disorderly prisoners even from the limited and constrained society of the prison’s general population. In this way, this new penal strategy neatly contains any possible threat to the successful fulfillment of the state’s carceral burden—success on which society’s carceral bargain depends.

The nature of supermax confinement reveals the logic of exclusion and control in its starkest form. Its conditions are justified by the need to break down the resistance of those people in the prison who refuse to comply with the terms of their confinement, and who instead

<sup>209</sup> Lorna Rhodes, *Changing the Subject: Conversation in Supermax*, 20 CULTURAL ANTHROPOLOGY 388, 406-07 n.6 (2005).

<sup>210</sup> Rhodes, *supra* note 208, at 184.

<sup>211</sup> For more on this point, see Dolovich, *Incarceration American-Style*, *supra* note 17, at 242-43.



“choose” to be disruptive and difficult.<sup>212</sup> As anthropologist Lorna Rhodes demonstrates in her study of the Washington State prison system’s “control units,” the reigning discourse is that of autonomous choice, on which prisoners are understood to be in supermax because they have “chosen to be bad.” The official message to residents is that they can earn their way back to the relative freedom of the general population units by “choosing to be good.” And when they are not good—when they engage instead in “disruptive activity,” like yelling, banging on their cell doors, or throwing feces, blood or urine—they alone are considered “accountable” for the extra time added to their supermax terms as punishment.<sup>213</sup>

As we have seen, however, the line between free choice and structural compulsion is not so easily drawn. The people slated for supermax, having been culled from the prison’s general population, are already disproportionately likely to be grappling with incapacities like drug addiction, mental illness, and learning disabilities. Ill-equipped to navigate difficult personal challenges, they were then confronted with the damaging effects of prison life. Yet finding—surprise!—that some people in this position are incapable of conducting themselves in an orderly way while in prison, the state responds by removing them to even more restrictive conditions, with almost no positive human interaction or sensory stimulation.<sup>214</sup> Given this combination of relentlessly destructive forces, it seems nothing short of bizarre to regard all those housed in supermax as willful agents of their own behavioral choices.

Once, however, the move to supermax is understood as simply a further iteration of the imperative of exclusion and control that drives the carceral system more generally, it becomes possible to recognize this discourse of free will and individual agency as crucial to the whole

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<sup>212</sup> See RHODES, TOTAL CONFINEMENT, *supra* note 5, at 61. As a Massachusetts “prison media booklet” explains, it is “the sincere hope of the [Department of Corrections] that inmates will conform their conduct to a minimum level of good behavior and leave the [supermax units] at less than full occupancy; however, that choice will be up to the inmates.” *Id.*

<sup>213</sup> See *id.* at 66-67.

<sup>214</sup> On the seriously damaging mental health effects of supermax conditions, see Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124 (2003); Kupers, *What to Do with the Survivors?*, *supra* note 49, at 1005.

enterprise. It is not enough that those marked out for supermax confinement are unable to control their conduct. To vindicate this penal response—which might otherwise be open to condemnation as deeply inhumane and also self-defeating, since only likely to exacerbate the very causes of disorder that motivated this further exclusion—it is necessary not only that the people transferred to supermax be wholly responsible for their conduct, but also that they are compelled to violence and disorder by their own depraved preferences. They must, in short, be dangerous monsters who pose a serious ongoing threat that cannot be contained in any other way.<sup>215</sup> And once someone has been marked out as inherently, almost compulsively violent,<sup>216</sup> it becomes irrelevant that the conditions of his confinement might themselves be harmful, destructive, or otherwise cruel. Having been revealed as by nature a monster, he is no longer—if he ever was—someone whose possible suffering is of any concern.

Supermax thereby enables the state's own carceral bargain. Those people who are so broken and incapacitated that they cannot contain their tendencies to disruption and disorder are marked out for further removal, freeing prison officials from having to contend with—or fear—their presence in the prison's general population or even from having to think about them again until they are released from supermax confinement. This is a considerable benefit, one that can only be enjoyed

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<sup>215</sup> Again, as with criminal offenders in general, this construction is facilitated by the fact that some number of people in supermax—most notably, some of the most powerful gang members—are both extremely dangerous and seemingly in control of their actions. See Michael Montgomery, *All Things Considered: Nuestra Familia, A California Prison Gang* (NPR radio broadcast Mar. 7, 2005). At the same time, as with the construction of criminals in general as monsters, the point is not that all supermax residents actually fit this description, but that as an ideological matter, they must be held to do so. In fact, since the widespread adoption of supermax units and facilities, states have routinely held a number of individuals in supermax conditions who do not fit the image of the out-of-control monster. In some cases, classification to supermax appears to have been driven by the need to fill the beds or to justify to the public the massive financial outlay required to build the facility. See HALLINAN, *supra* note 202, at 204-05 (reporting that Virginia, having trouble filling its supermax beds, classified to supermax prisoners who qualified for medium-security facilities).

<sup>216</sup> The qualifier “almost” is necessary to maintain the fiction that residents of supermax who act out are making the choice to do so. For this to be possible, they must be taken to retain some control over their own violent actions.

so long as the state commits itself to keeping those people totally separate and apart from the general population. The radical individualism of the dominant justificatory narrative helps those officials who benefit from supermax confinement to frame this strategy as the only appropriate response to recalcitrant prisoners who cannot seem to learn their lesson and/or who are so inherently dangerous and disorderly that they will insist on “acting out” despite the cost.

Among those marked out for supermax confinement are likely to be the most disturbed and out-of-control people behind bars. By disappearing them into facilities designed for absolute control, the state is able to contain any threat they would otherwise pose to the order and security of the prison. At the same time, as before, there will be many people swept up into supermax who are not the most dangerous, but whose disorderly—or, as is likely in the prison environment, simply disobedient—conduct led state officials to flag them preemptively for the increased control supermax provides. Here is the supermax version of the Yochelson-Samenow/Wilsonian syllogism: if the triggering conduct does not at first seem to warrant supermax confinement, it is nonetheless revealing of an inherently “wicked” and disorderly nature, necessitating the extreme control supermax represents. Whatever the actual extent of the danger they pose, those individuals singled out for supermax confinement have been judged by prison officials to be inherently deviant “incorrigibles” who are unable to conform to the behavioral norms of the prison’s general population, and thus on whom even more extreme methods of exclusion and control must be imposed. In this way, as with the carceral system in general, supermax fuels the collective delusion that, with the removal of those people found to pose the greatest threat to the social order, the problem they represent has been resolved. But just as before, the problem has not been resolved. It has simply been displaced by a strategy that is certain only to exacerbate whatever incapacities were driving that disorder in the first place.

Thus supermax too has a reproductive logic, producing inmates whose anger, volatility, and general inability to function successfully in a social milieu, whether inside or outside the prison, makes them very likely to engage in antisocial behavior as bad as or worse than that which justified their imprisonment in the first place. And as with the prison system in general, the dynamic of exclusion and control in the supermax context will eventually generate the need for increasingly longer periods

in solitary confinement.

In a 2008 article, psychiatrist Terry Kupers describes a process whereby state prisons without sufficient resources to adequately treat the mentally ill people in their custody respond to the inevitable disorderly conduct of those prisoners by transferring them to supermax, thereby subjecting them to conditions that guarantee their continued “acting out” and thus the extension of their time in punitive isolation.<sup>217</sup> Kupers refers to this process—by which the very people who are most incapacitated and most in need of outside intervention and assistance are instead buried in supermax—as “hiding the evidence.”<sup>218</sup>

The foregoing suggests that the pattern Kupers describes, chilling as it is, is only emblematic of the general impulse to exclude and control,<sup>219</sup> repeated over and over again by a system designed to externalize the effects of its own penal choices. It is not only that the penal institution of exclusion and control secures its own reproduction in a way that is ultimately self-defeating and denies the humanity of those it excludes. Even more disturbing is what the pattern reveals about the political bargain American society is prepared to make at the expense of the people it incarcerates. It begins to seem as if, in order to avoid having

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<sup>217</sup> See Kupers, *What to Do with the Survivors?*, *supra* note 49, at 1008-10; see also Dolovich, *Incarceration American-Style*, *supra* note 17, at n.44.

<sup>218</sup> Kupers, *What to Do with the Survivors?*, *supra* note 49, at 1013. For example, a mentally ill man named Anthony Gay was serving a seven-year sentence in Illinois for violating his probation when he was transferred to the state’s supermax facility. While in supermax, Gay engaged in repeated acts of self-mutilation, “slicing his arms, legs, penis and testicles with bits of metal or glass hundreds of times.” Amy Fettig, *97 Years in Prison for a Mentally Ill Man Who Threw Feces*, ACLU (Sept. 30, 2011, 12:43 PM), <http://www.aclu.org/blog/prisoners-rights/97-years-prison-mentally-ill-man-who-threw-feces>. Gay was removed from supermax for a short time, but subsequently returned to solitary confinement, at which point his self-mutilation escalated. See *id.* Rather than removing Gay from isolation, prison officials chose instead to pursue criminal assault charges against him for “throwing”—that is, “throwing feces, urine, and possibly juice through [the] food slot [of his cell door] at correctional officers.” *Id.* The prosecution was successful, and Gay received a 97-year sentence, see *id.*, which, unless his appeal is successful, he will no doubt spend in solitary confinement, without adequate mental health treatment.

<sup>219</sup> This impulse has arguably come to define not only the American response to crime, but the preferred response to all perceived threats to the social order. See Dolovich, *Incarceration American-Style*, *supra* note 17, at 258-59.

to confront the multiple complex causes of the insecurity and instability endemic to contemporary American life,<sup>220</sup> we are prepared to single out those members of society who are already the least capable of navigating the demands of modern existence and to subject them to conditions that make it even harder for them to survive, much less to build stable and healthy lives. In this way, criminal offenders have become the scapegoats of American society.<sup>221</sup> This reproductive logic creates the very people society most fears, and then blames them for whatever disorderly conduct in which they subsequently engage. And it does so in a way that almost guarantees them lives of degradation and abuse, whether inside or outside the prison. That this self-reinforcing pattern is justified by the conduct and consequent perceived incorrigibility of the targets themselves is perhaps its most ingenious feature. For the reasons canvassed above,<sup>222</sup> moreover, it would be unsurprising if those most frequently singled out as incorrigible and thus consequently subjected to the heightened control of life in supermax were disproportionately African-American. And although efforts to unearth data regarding the racial profile of the people held in supermax confinement were unfortunately unavailing,<sup>223</sup> anecdotal evidence suggests that African Americans as well as Latinos are indeed overrepresented both in supermax and in segregation units more

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<sup>220</sup> See GARLAND, *supra* note 86.

<sup>221</sup> As Connolly argues, “[c]riminals provide paradigmatic substitutes,” toward which citizens may channel their desire for revenge against whatever they perceive has done them wrong—“against entire groups who pose a threat to [their] security[, o]r against constituencies whose way of being threatens the security of [their] identity,” or even “against the world for not providing the clear and closed concepts of responsibility, identity, merit, and punishment [they] thought for sure it would come equipped with.” CONNOLLY, *supra* note 47, at 42. “After all,” Connolly notes, “[criminals] are guilty of something and the state has already decided they must suffer.” As he goes on to observe, “the pleasures of revenge involve making the target suffer, realizing that *you* are the agent of this suffering, and knowing that you have sufficient cover to avoid reprisal or official detection.” *Id.* at 42-43.

<sup>222</sup> See *supra* Part VII.

<sup>223</sup> Although the Federal Bureau of Justice Statistics—the gold standard for data on the American penal system—does collect information regarding the racial make-up of carceral facilities, the form in which the numbers are reported does not allow for a break-down of custody levels by race. Interview with Tracy Snell, Statistician, Bureau of Justice Statistics (Mar. 15, 2011).

generally.<sup>224</sup>

## IX. CONCLUSION: DISLODGING THE HOLD OF EXCLUSION AND CONTROL

The American carceral system is designed to exclude and control. Given this institutional logic, it is predictable that society—wishing finally to be rid of those social undesirables it had once been allowed to forget, only to have them reappear more unruly than ever—will demand increasingly lengthy sentences for criminal offenders. It is also inevitable that a system that locks its most damaged and uncontrollable citizens out of sight, rather than addressing the causes of their disorderly conduct, will confront a crisis of control in its prisons. Hence the swift and enthusiastic embrace of both LWOP, which ensures permanent exclusion, and supermax, which controls the most out-of-control people in prison through social isolation and physical confinement. Certainly, not everyone is in prison for life, nor is everyone in prison housed in supermax. But these penal options, despite their relatively recent vintage, have already come to seem indispensable to the management of the American carceral system. Their rapid and widespread acceptance reflects the extent to which a system built on the twin imperatives of exclusion and control has been pushed to extremes by society's inability to imagine any other way of dealing with the many causes of social disorder.

More than three decades into the American experiment with exclusion and control, two tendencies that have long been developing are now plainly manifest. The first is the absence of any concerted strategies or other evidence of a genuine collective commitment to the successful reintegration of former prisoners.<sup>225</sup> The second is the readiness on the part of mainstream society to brand some subset of the population—disproportionately poor African Americans and other people of color<sup>226</sup>—as irredeemably antisocial, and to abandon them to permanent marginalization and perpetual state control. Together, these two features of the American carceral system virtually guarantee the persistence of

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<sup>224</sup> See Terry Kupers, Personal Communication, Mar. 12, 2011 (on file with the author) (reporting that, in his experience, “segregation units and supermax . . . are disproportionately black and Latino”).

<sup>225</sup> See *supra* note 65 (discussing the Second Chance Act of 2007 and its limitations).

<sup>226</sup> See *supra* note 168.

serious social disorder. Yet this persistence, rather than motivating a reorientation in strategy, seems instead only to strengthen the collective commitment to exclusion and control.

At times, it is violent emotions—fear, hatred, anger<sup>227</sup>—that seem to drive this self-defeating system. From this perspective, the combination of LWOP and supermax starts to look something like a manifestation of the collective will to destroy those marginalized citizens who are most hated and feared, yet who, given constitutional limits on capital punishment, cannot be affirmatively executed. Certainly, considering the heinousness of some violent crimes, this annihilationist impulse is sometimes understandable. But given the eagerness with which the machinery of exclusion and control is regularly deployed against socially marginal people whose crimes were less grievous, it is hard to resist the impression that many of those targeted by these policies or caught up in the spirit they represent are instead being punished for having stubbornly refused to make themselves disappear, thereby forcing society to do it for them.

At other times, the emotions propelling a harsh penal response appear more tepid, to the point that in some cases—in particular those involving persistent nonviolent offenders—it almost seems as though the motivating impulse is irritation or impatience at again being bothered by someone the state has presumably already identified as a source of disorder. This sense of exasperation and righteous indignation is effectively captured in sentencing schemes premised on the notion of “three strikes and you’re out.” The implication of this phrase is not that targeted offenders are too violent or dangerous to be allowed to live freely in society, but that there are only so many chances society is prepared to extend before it washes its hands of you permanently.<sup>228</sup> Here the

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<sup>227</sup> See *supra* note 221.

<sup>228</sup> This intuition is consistent with the account of this phenomenon provided by David Garland in his magisterial book, *THE CULTURE OF CONTROL*, *supra* note 86. Garland describes the way that certain categories of crime have become an expected and seemingly permanent part of the lived reality of mainstream American society in late modernity. This reality has forced people to change habits to try to prevent themselves from being victimized. “Citizens [have become] crime conscious, attuned to the crime problem, and many exhibit high levels of fear and anxiety.” Many of these crimes cannot be prevented and the state makes no claim to be able to do so. As a consequence, “crime represents for daily life” a “cumulative nuisance” that brings with it “a measure of

impetus for exclusion and control seems neither hatred nor glee at the suffering of the target but indifference to his experience, just so long as he can be made to disappear.

As different as these responses may seem, they share a common core: the determination to excise from the shared public space those people identified as socially undesirable. To effect this excision becomes the state's carceral burden, which requires the relentless exercise of state control over the exiled. Hence the emergence of exclusion and control, the foundational imperatives of the modern-day carceral enterprise. As has been seen, there is an undoubted appeal to this regime: it promises an easy fix to the threat of violence and disorder posed by society's most maladapted members. Who would not want to snap one's fingers and make the source of one's greatest fears disappear? Yet in truth, there is no such easy fix. The risks of instability and disorder posed by the people most likely to wind up in prison do not disappear. To the contrary, a carceral response only exacerbates them. For this reason, it is inevitable that many formerly incarcerated individuals will continue to violate the criminal law. The political challenge for a society wishing to check this dynamic is to cultivate the capacity to make appropriate judgments as to when a given person represents a genuine danger and when a carceral response is instead simply the most expeditious way to cleanse society of an undesirable presence.<sup>229</sup>

But first, the problem itself must be recognized. And this clear-eyed recognition of the counterproductive nature of an exclusionary response is impeded by society's carceral bargain, the arrangement by which the state commits to removing certain marked individuals and keeping them separate and apart from the public space, thereby allowing society's remaining citizens the luxury of not having to think about them again until they are released. This bargain has both practical and normative dimensions. As a practical matter, the incarcerated person vanishes, leaving society free to ignore the endemic social ills that may

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irritation, frustration and aggravation." And people who are irritated and impatient at the fact of crime "bec[o]me less willing to countenance sympathy for the offender, more impatient with criminal justice policies that were experienced as failing and more viscerally identified with the victim." *Id.* at 164.

<sup>229</sup> See KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 21-22 (2010).



have contributed to the offense of conviction or whatever threat the defendant was taken to pose. As a normative matter, the incarcerated person is transformed into someone without moral or political standing, someone outside the circle of humanity, to whom few if any obligations are owed. Society's carceral bargain thereby becomes doubly appealing: intractable social and political problems vanish and the moral world shrinks, thereby making life easier, more comfortable, and less demanding for the people who remain.

Again, however, society's carceral bargain does not actually make these problems disappear; it instead only compounds them. In the short term, further escalation of the carceral response offers a possible fix. But as has become increasingly clear, this strategy is ultimately unsustainable. The state can only build so many prisons before the foolhardy nature of the scheme becomes evident. Indeed, the current state of the California prison system offers proof—if proof were needed—that the carceral apparatus has outer limits. Since the mid-1970s, the number of state prisons in California has gone from twelve to thirty-three, and by the new millennium the overcrowding and violence in those thirty-three institutions had grown so extreme that, in 2006, Governor Schwarzenegger was driven to declare a “Prison Overcrowding State of Emergency.”<sup>230</sup> Meanwhile, in 2009, a three-judge panel of the Ninth Circuit found that severe overcrowding in California's prisons was the “primary cause”<sup>231</sup> of the dangerously inadequate and unconstitutional medical and mental health care provided to prisoners throughout the California prison system.<sup>232</sup> The order the panel subsequently issued, requiring California to reduce the population of its prisons to 137.5 percent of capacity, was upheld by the United States Supreme Court in 2011.<sup>233</sup> Given the extreme nature of the remedy, the tight restrictions

<sup>230</sup> Governor Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (Oct. 4, 2006), <http://gov.ca.gov/news.php?id=4278>.

<sup>231</sup> 18 U.S.C. § 3626(a)(3)(E)(i) (2006).

<sup>232</sup> See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P., No. C01-1351 TEH, 2009 WL 2430820, at \*1-23 and generally (E.D. Cal. Aug. 4, 2009).

<sup>233</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011). It might be thought that the Court's ruling in *Plata*, which required California to reduce the population of its prisons to 137.5 percent capacity, indicates a shift away from exclusion and control toward a more inclusive penal approach. But this reading of the case would be too quick. For one

the Prison Litigation Reform Act imposes on federal courts when they consider requests for injunctive relief related to prison conditions,<sup>234</sup> and the limited scope of the constitutional protections for prisoners endorsed by even the most progressive Justices on the Roberts Court, the outcome of *Plata* was surprising, to say the least. That the *Plata* Court upheld the panel's order indicates just how dire the situation in the California prisons had become. Over the past three decades, prisons across the country have become increasingly overcrowded, violent, and unsafe for prisoners and correctional officers alike, and American society is no closer to addressing the challenges posed (and faced) by those we repeatedly incarcerate: drug addiction, mental illness, illiteracy, learning disabilities, the trauma of childhood abuse and neglect, and so on.<sup>235</sup>

The question then becomes: how can the ongoing dynamic of exclusion and control be disrupted? As may by now be evident, effecting this disruption will require exposing the illusory nature of society's carceral bargain. It must be clearly seen that, despite the physical disappearance of incarcerated individuals, despite the high walls and barbed wire and the distance that often exists between the people in prison and the communities where they grew up and/or committed their crimes, the people the state sends to prison continue to exist. What's more, notwithstanding the outsized salience of LWOP and supermax and the psychological comfort they may provide, the time-limited nature of most custodial terms means that the vast majority of the people we send

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thing, *Plata* requires only a reduction in overcrowding, which means that if California proves able to create capacity in other ways besides the release of prisoners—e.g., building more prisons, transferring people to prisons out of state, requiring county jails to hold more state prisoners, etc.—so long as the prisons remained at or below 137.5 percent capacity, the state would still be in compliance. And state officials have clearly indicated that their strong preference would be to comply without having to release anyone currently in prison before the expiration of their sentences. Furthermore, as explained below, changes in practice alone—especially changes perceived to have been forced on the states by the courts—will not bring about a shift away from exclusion and control. For such a shift to occur, changes in practice would need to be accompanied by an ideological reorientation. Until exclusion and control comes to be seen as inhumane and illegitimate, lasting penal reform may be elusive.

<sup>234</sup> Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

<sup>235</sup> See Terry A. Kupers, *How to Create Madness in Prison*, in *HUMANE PRISONS* 47 (David Jones ed., 2006).

to prison will eventually come home. Bringing widely into view these two simple but incontrovertible facts and emphasizing their implications is an essential component of any effort to bring about change.

There is, however, a structural problem with any political strategy that emphasizes the practical drawbacks of exclusion and control. As noted, the harms caused by this penal regime fall most heavily on the incarcerated themselves. This population is already drawn from the most politically and economically disenfranchised, people sure to become even more marginalized after serving time. And the unfortunate and even shameful reality is that the harms suffered by members of this group count for little in the American political process. The same, moreover, may be said of the harms done to the families and communities of currently and formerly incarcerated individuals. Most notably, children of the incarcerated suffer myriad harms when their parents are imprisoned, including psychological trauma at the disappearance of their mothers and fathers, the loss of daily emotional support, an increased risk of poverty, and the threat of abuse and neglect in foster homes and other temporary lodgings.<sup>236</sup> Even when parents are released, they face a raft of challenging stressors that can take a toll on their children and other family members.<sup>237</sup> These stressors, among them the after-effects of the traumas of the carceral experience, only exacerbate the likelihood that their children will grow up to follow in their parents' footsteps. Yet although these malign effects of the American carceral system are well-documented,<sup>238</sup> the evidence from the past several decades indicates little political will for protecting the people in this position—even the children—from the harms of the carceral system.<sup>239</sup> This political

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<sup>236</sup> See Dolovich, *Incarceration American-Style*, *supra* note 17, at 247 (cataloguing the harms suffered by the children of incarcerated parents); see also BERNSTEIN, *supra* note 26; DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004).

<sup>237</sup> See, e.g., JENNIFER GONNERMAN, *LIFE ON THE OUTSIDE: THE PRISON ODYSSEY OF ELAINE BARTLETT* (2004).

<sup>238</sup> See, e.g., TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2009).

<sup>239</sup> Given the constitutional prohibition on cruel and unusual punishment, it might seem that the judiciary would at least have a role to play in constraining the state's power to impose excessive prison sentences or to subject people in custody to inhumane conditions of confinement. But prevailing Supreme Court doctrine concerning both the

disposition seems to suggest that if a political strategy emphasizing the costs of the penal system is to generate public demand for reform, the focus must be on the burdens this system creates for society more broadly.

In this regard, the most obvious starting point is the economic cost of the state's carceral burden. As already noted, incarceration is extremely expensive,<sup>240</sup> expending funds that could better be put to more socially productive uses, especially in a time of budget shortfalls. For this reason, some observers regarded the fiscal crisis into which many states were plunged in the wake of the 2008 collapse of the subprime mortgage market as offering the potential for promoting meaningful penal reform.<sup>241</sup> Such optimism has not proved groundless. Since 2009, in their scramble to fund essential services, many state legislators have sought cuts in corrections: closing facilities, easing up on the grounds for parole revocation, and even reducing the number of people being sent to prison.<sup>242</sup> Yet straightened state coffers alone will not be enough to herald

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length of prison sentences imposed and the prison conditions in which those sentences are served makes it abundantly clear that there is no judicial will to push against the tide of penal excess that has shaped the American carceral system over the past few decades. Even assuming a judicial inclination toward meaningful Eighth Amendment enforcement, the individualized nature of the majority of prisoners' constitutional claims—in part an artifact of the relative rarity of counsel available and willing to bring suit on behalf of classes of prisoners—means that any moderating pressure imposed by the courts could necessarily be only piecemeal. Thus, although one could argue that the Eighth Amendment at present is considerably underenforced, *see Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, supra* note 21 (making this case), when the aim is a wholesale reorientation of the penal system, it may be necessary to look beyond the judiciary for the possibility of meaningful change.

<sup>240</sup> *See supra* note 25.

<sup>241</sup> *See, e.g.,* Michael Santos, *Economic Crisis Opens Possibilities for Penal Reform*, PRISON NEWS BLOG, (Mar. 4, 2009), <http://prisonnewsblog.com/2009/03/economic-crisis-opens-possibilities-for-prison-reform/>; JUSTICE POLICY INSTITUTE, PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY (2009), [http://www.justicepolicy.org/images/upload/09\\_05\\_REP\\_PruningPrisons\\_AC\\_PS.pdf](http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf); Richard Faussett, *Conservatives Latch Onto Prison Reform*, L.A. TIMES, Jan. 28, 2011, *available at* <http://articles.latimes.com/2011/jan/28/nation/la-na-conservative-crime-20110129>.

<sup>242</sup> *See, e.g.,* Editorial, *Are Prisons Too Costly for States?*, DENVER POST, Feb. 9, 2009 (12:30 AM), *available at* [http://www.denverpost.com/opinion/ci\\_11659204](http://www.denverpost.com/opinion/ci_11659204) ("Growing prison populations and dire budget shortfalls have forced states to consider criminal

real reform. Certainly, given the extreme overcrowding in many penal facilities<sup>243</sup> and the hundreds of thousands of people currently doing time for nonviolent offenses,<sup>244</sup> any efforts to reduce the number of people in prison would be welcome. However, for reductions in the prison population to be sustained over the long term, they must be complemented by the provision of effective drug treatment programs, educational and vocational training for those in custody, and assistance for former prisoners seeking to assemble the components of a stable life on the outside (home, job, drug treatment, family reunification, etc.). Otherwise, it is just as likely that many of the people granted early release will eventually reoffend. And when that happens, so long as the mindset of exclusion and control remains undisturbed, their subsequent offenses will be traced, not to the state's shortsightedness in releasing people from prison in a worse position than when they went in, but to a willful and deliberate refusal on the part of former prisoners to obey the law—a refusal that may only seem all the more galling because undertaken despite the state's beneficence in granting early release. Even assuming the present fiscal crisis were to generate a contraction in the carceral apparatus, unless there is a fundamental shift in society's commitments away from exclusion and control as a matter of principle, this contraction would only last until the economy revives.

These same limitations, moreover, are arguably presented by a strategy focusing on another obvious social harm caused by mass incarceration: the increased spread of infectious diseases. Over the past

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justice policy changes that until recently might have been considered political suicide. Those changes, which are being enacted or debated in states across the country, are designed to reduce prison and jail populations through sentencing changes, recidivism reduction programs and early release modifications.”); Michael Rothfeld, *State Senate OKs Cuts in Prison Spending*, L.A. TIMES, Aug. 21, 2009, at A6; Patrick McGreevey, *State Cutting Inmate Rolls*, L.A. TIMES, Jan. 26, 2010, at A8; Monica Davey, *Safety Is an Issue As Budget Cuts Free Prisoners*, N.Y. TIMES, Mar. 5, 2010, at A1.

<sup>243</sup> See Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 21, at 887 (explaining that “American prisons today are often chronically overcrowded, which means that people routinely live jammed into dormitories or doubled up in tiny cells designed for a single person”).

<sup>244</sup> See JOHN IRWIN, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, AMERICA'S ONE MILLION NONVIOLENT PRISONERS (1999), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/one\\_million.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/one_million.pdf).

decades, prisons have become incubators for a range of serious health hazards, including HIV, tuberculosis, hepatitis C and staph.<sup>245</sup> People exposed to these infections in prison will invariably spread them to people on the outside once they are released. This concern has led to increasing calls for effective public health strategies to reduce the spread of infections in prison.<sup>246</sup> But again, the potential for this problem to prompt meaningful prison reform is limited. For one thing, the people most at risk of infection from newly released prisoners are the sexual partners and family members of the infected person. And as has been seen, penal harms exported beyond the prison do not tend to count politically if they are contained within already marginalized communities. Moreover, as with possible reforms precipitated by the need for economic retrenchment in the face of budget shortfalls, once the underlying problem—in this case a need for effective public health strategies—is resolved, any broader public concern with disease-fostering prison conditions is likely to disappear.

It is therefore not enough to emphasize the practical costs of a carceral strategy. If there is to be meaningful reform, a fundamental normative reorientation toward the people the state incarcerates is necessary. Admittedly, it is easier and perhaps more appealing to regard convicted offenders as moral monsters. Especially if their crimes are heinous, moral consideration may understandably seem to be more than the perpetrator deserves. But acknowledging an offender's status as a human being is not the same as excusing his crimes. To the contrary, it could be argued that respect for wrongdoers as moral beings demands infliction of an appropriate punishment.<sup>247</sup> Nor would acknowledging the moral status of criminal offenders preclude the use of imprisonment

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<sup>245</sup> See, e.g., Jessica R. MacNeil, Mark N. Lobato & Marisa Moore, *An Unanswered Health Disparity: Tuberculosis Among Correctional Inmates, 1993 Through 2003*, 95 AM. J. PUB. HEALTH 1800, 1802 (2005) (finding that tuberculosis rates among prisoners were substantially higher than among the population in general); Brent Staples, *Treat the Epidemic Behind Bars Before It Hits the Streets*, N.Y. TIMES, June 22, 2004, at A18 (describing widespread incidence of HIV, hepatitis, tuberculosis, and staph in U.S. prisons); Silja J.A. Talvi, *Deadly Staph Infection 'Superbug' Has a Dangerous Foothold in U.S. Jails*, ALTERNET, (Dec. 4, 2007), <http://www.alternet.org/story/69576> (describing drug-resistant strain of staphylococcus in prisons and jails around the country).

<sup>246</sup> See sources cited *supra* note 245.

<sup>247</sup> See generally Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 501 (1968).

as punishment (although it would demand a commitment to ensuring that conditions of confinement be at least minimally decent and humane). At its core, what this acknowledgement *would* require is that society abandon its collective disposition to ignore, dismiss, and otherwise assume away the existence of the people we incarcerate, and instead affirm their shared humanity.

Considering the present bleak reality of the American penal system, such a shift may seem impossible. However, there are some bright spots on the current carceral landscape, which suggest that such a change may yet be brought about. Over the past decade, a surprising coalition of conservative and progressive organizations and legislators has coalesced around two penological issues: prison rape and reentry.<sup>248</sup> This coalition was essential to the passage of two important pieces of federal legislation, the Prison Rape Elimination Act of 2003 (PREA)<sup>249</sup> and the Second Chance Act of 2007 (SCA).<sup>250</sup> Neither of these laws is without flaws, and arguably neither goes far enough to remedy the problem at issue.<sup>251</sup> Still, the ideas motivating these pieces of legislation have the potential to seed a shift in the public perception of people in custody. In terms of PREA, the political push to prevent prison rape<sup>252</sup> has both exposed and condemned

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<sup>248</sup> See Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize To End Prison Rape*, 32 J. LEGIS. 129, 129 (2006) (describing the “unique coalition of civil rights groups and religious organizations that pressed prison rape onto Congress’ agenda”).

<sup>249</sup> Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006).

<sup>250</sup> Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

<sup>251</sup> Most notably, PREA, which directed the Attorney General to adopt standards designed to detect, prevent and respond to prison rape, specifically forbids the establishment of any standards that “would impose substantial additional costs . . . on prison authorities.” 42 U.S.C. § 15607(a)(3) (2006). And the funding thus far appropriated for reentry programs pursuant to SCA has been far less than is needed to create meaningful possibilities for successful reintegration. See Henry, *supra* note 65 (suggesting that the practical effects of the Second Chance Act have thus far been limited); see also *supra* note 65.

<sup>252</sup> This push is ongoing. In February 2011, the Department of Justice issued a Notice of Proposed Rulemaking for the National Standards to Prevent, Detect, and Respond to Prison Rape. See National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6281 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115) (Att’y Gen. regulations proposed pursuant to PREA) (§ 115.42 (c)). The comment

the suffering of people in prison—thereby affirming them *as* people, whose violation demands a concerted political response. As to the SCA, the commitment to reentry acknowledges that people who have broken the law, like all human beings, have made mistakes and, in most cases, deserve the opportunity—a “second chance”—to redeem themselves. Taken together, these normative conceptions pose a direct challenge to the dehumanized, essentialized, and unforgiving conception of the penal subject presently animating the American system of exclusion and control.

Of the two, it is the ideas driving the reentry movement that appear to have gained more political traction. And certainly, the possibility of a meaningful public commitment to prisoner reentry is a welcome one. It is, however, important that advocates in this arena not lose sight of the PREA piece of the picture, which underscores the moral obligation society has to the people it incarcerates while they are in custody. Although reentry is crucial, an exclusive focus on the moment of return risks reinforcing the notion that society need not concern itself with the people in prison until the point when they are preparing for release. It is precisely this mindset that has fueled the destructive, self-defeating, and frequently cruel practices that define the present-day American carceral system.<sup>253</sup> What is needed instead is a combined push to recast in terms of our shared humanity not just our image of the people who are returning from prison, but also our image of the people who remain behind bars.

In sum, if the hold the institution of exclusion and control currently has over the American carceral system is to be dislodged, society needs to acknowledge and affirm that, despite their physical relocation outside the boundaries of the shared public space, the people sentenced to prison remain part of the moral and political community. Once this recognition is achieved, many of the practices endemic to the current system—from LWOP and supermax on down—will come to be regarded not as necessary and appropriate components of a legitimate penal system, but as, in all but the most extreme cases, the deeply misguided and arguably cruel practices of a regime scarcely recognizable as a system

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period closed in April 2011, and final standards are expected in 2012.

<sup>253</sup> See, e.g., Kupers, *Prison and the Decimation of Pro-Social Life Skills*, *supra* note 56.



of justice.

Liberal democracies certainly have the right to punish criminal offenders, and they even have the right, in some cases, to subject offenders to extended social exclusion and state control. But this authority does not justify subjecting any and all lawbreakers to this treatment. What seems currently to be missing from the American system of exclusion and control is an awareness of the state's obligation to constrain and limit the exercise of its own carceral power. The challenge facing those who seek meaningful penal reform is to frame a theory of legitimate punishment that simultaneously acknowledges the public's legitimate anger toward violent offenders, its fear of serious crime, *and* the shared humanity of the people with criminal records.<sup>254</sup> Only in this way will it be possible simultaneously to satisfy society's understandable desire to condemn those who have committed horrible crimes, to ensure society's protection from those people too violent and dangerous to remain free, and yet to ensure appropriate limits on the penal harms the state inflicts in the name of criminal punishment.

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<sup>254</sup> See *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring) (affirming that "even the vilest criminal remains a human being possessed of common human dignity").