Some Reflections on the Origins and Implications of Mass Imprisonment in the United States

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SOME REFLECTIONS ON THE ORIGINS AND IMPLICATIONS OF MASS IMPRISONMENT IN THE UNITED STATES[†]

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For the first seventy-two years of the 20th Century, imprisonment rates in the United States were notable for their general stability. During the period from 1925 to 1973, the average number of prisoners was approximately 110–120 per 100,000, never varying by more than 30% up or down from that.[1] Indeed, the lowest reported imprisonment rate of the 20th Century was achieved in 1972 when 93 per 100,000 Americans were serving sentences in the nation's jails and prisons.[2] In raw numbers, there were 330,000 American prisoners thirty years ago.[3] Fast-forwarding thirty years, we find that the U.S. imprisonment rate has grown every year since 1972. The most recent reports published by the Bureau of Justice Statistics indicate that the number of prisoners has reached 2.23 million.[4] This translates to one of every 143 U.S. residents, or to an imprisonment rate of 726 per 100,000.[5] In only three decades the United States has moved from being a nation with an

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[1] Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOC'Y 161, 161 (2001).

[2] *Id.*

[3] MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 1 (2003), http://www.sentencingproject.org/pdfs/pub9036.pdf.

[4] U.S. Dep't of Justice, Bureau of Justice Statistics, Corrections Statistics, http://www.ojp.usdoj.gov/bjs/correct.htm (last visited Oct. 22, 2005).

[5] *See id.* (noting that "6.9 million people were on probation, in jail or prison, or on parole at year-end 2003—3.2% of all U.S. adult residents or 1 in every 32 adults").

imprisonment rate not dramatically different[6] from other western nations, to being the global imprisonment leader.[7]

This brief paper will address three questions that are important to explore when attempting to understand the unprecedented number of prisoners in the United States. First, what triggered the increase in the use of imprisonment? Second, what are the contemporary dynamics of prison growth in the United States? And third, what are the implications of mass imprisonment for poverty and social justice?

I.   THE TRIGGER[8]

In his recent influential work on crime titled *The Culture of Control*,[9] socio-legal scholar David Garland argues that between 1890 and 1970 policymakers, practitioners, and criminologists possessed a shared sense of the goals and values that should shape the criminal justice system. This shared sense was rooted in the belief that society had to move away from the brutality and arbitrariness that marked the operations of the criminal justice system prior to 1890. During this eighty-year period, there was an expansion in the liberal legal doctrine of due process and proportionate punishment, combined with a corrections system committed to rehabilitation, welfare, and policies based on sound criminological research. Institutional objectives such as rehabilitation, individualized treatment, and indeterminate sentences were supported by an expansion of probation, parole, juvenile courts, and treatment programs.[10]

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[6] In order to see this pattern, one has to control for the higher rates of lethal violent crime found in the United States. MAUER, *supra* note 3, at 5. Mauer reported that even in today's climate of falling crime rates, the homicide rate remains four times greater than nations in Western Europe. *Id.* He goes on to state that "[a]s the only industrialized nation without strong gun control policies, guns clearly contribute to the disparity in murder rates" in the United States. *Id.*

[7] *See* The International Centre for Prison Studies, Prison Brief, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.html (last visited Sept. 22, 2005). The national rates of imprisonment (per 100,000 population) are as follows: USA 726; Russia 550; South Africa 413, England and Wales 144; Spain 141; Netherlands 123; Australia 120; Canada 116; Italy 97; Germany 96; France 91; Sweden 81; Switzerland 81; and Japan 60. *Id.*

[8] Portions of this section were originally published in Karim Ismaili, *Explaining the Cultural and Symbolic Resonance of Zero Tolerance in Contemporary Criminal Justice*, 6 CONTEMP. JUST. REV. 255 (2003).

[9] DAVID GARLAND, THE CULTURE OF CONTROL (2001).

[10] *See id.* at 27 (explaining that by 1970 it seemed that the penal system was heading in an "increasingly correctionalist direction").

This philosophy, which Garland calls "penal welfarism,"[11] was an outgrowth of a widely shared view that governments could be a force for progressive change and welfare provision. In terms of crime, this meant that *"[t]he state was to be an agent of reform as well as of repression, of care as well as control, of welfare as well as punishment."*[12]   During this period, expressions of punitiveness were extremely rare and an *institutionalized* belief that offenders could be reformed was prevalent.

This, of course, does not describe the criminal justice system of today. How, then, did we move from a system that embraced the objectives of reform, care, and welfare, to one that now prioritizes repression, control, and punishment? The answer to this question takes us to the social, political, and cultural transformations that were underway in the late 1960s and early 1970s. Put simply, this was an extremely turbulent time in America. Recession, stagnation, and other economic troubles were accompanied by a series of social and cultural transformations that were to ripple through a variety of institutions.[13] Changes in the structure of the family and the household—underwritten in large part by welfare state prosperity and economic security—were brought on by declining fertility rates, increases in divorce, the emergence of the single parent home, and a tolerance for alternative family forms. The suburbanization of society and the proliferation of the electronic mass media had significant implications for social relations, consumer capitalism, public services, and the transparency of government. Finally, the general democratization of social life and culture led to increased demands for "equal rights," spurred the growth of pluralist and identity politics, and created the "moral individual." Less constrained by group demands and absolutist moral codes, the moral individual placed greater value on freedom—including the freedom to express oneself in consumer society—and on mutual tolerance.[14]

All of these shifts were to have important consequences for both crime and crime control. The growing consumer culture created more criminal opportunities.[15] These, in turn, were made

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[11] *Id.* at 3.
[12] *Id.* at 39.
[13] *See id.* ch. 4.
[14] *See id.* at 88–89.
[15] *See id.* at 90.

more attractive by the changes in social ecology and culture which reduced the influence of both situational and informal controls.[16] Added to this mix was a large cohort of baby boomer boys, an "at-risk" group that became the driving force behind a steady increase in crime.[17] In sum, "[t]he new social and cultural arrangements made late-modern society a more crime-prone society."[18]

The economic and social turbulence of this period generated a backlash against both the perceived inadequacies of the welfare state, and the "permissive," "selfish" culture that was allegedly de-stabilizing society. Although a political movement against Keynesian economics and moral individualism had been a presence in the United States as early as the 1960s,[19] it was in the 1970s and 1980s that it gained momentum. The new suburban middle class, which increasingly saw bureaucracies and the welfare system as huge drains on public revenues, bolstered this more vital reactionary movement. Despite the fact that the same group had earlier benefited from generous welfare state provisions, this significant portion of the electorate was now distressed by its diminishing returns. It is in this context that a neo-liberal, free market ethos took hold of government and society.[20] But political leaders like Thatcher, Reagan, and Bush were not only motivated by the ideological need to fashion an unencumbered marketplace. They also harbored deep hostility towards a society that had, in their view, become overly permissive, unruly, and dependent on welfare. In this marriage of free market liberalism and neo-conservative authoritarianism, the "New Right" was born.[21]

The emergence of crime as a normal social fact of late-modern society was to test the ability of the state to provide adequate protection and security for all of its residents. This challenge was particularly acute in the 1970s due to a steady and

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[16] *See id.*
[17] *See id.* at 90–91.
[18] *Id.* at 91.
[19] *See* KATHRINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997).
[20] *See generally* Pat O'Malley, *Volatile and Contradictory Punishment*, 3 THEORETICAL CRIMINOLOGY 175 (1999) (discussing the central concerns of neo-liberalism).
[21] *See id.* at 185.

widespread increase in the fear of crime.[22]   While some of these fears were rational—especially for those who lived in impoverished urban centers—television and other mass media sources structured, reinforced, and spread this concern about crime across society. This is significant because the media often presented distorted images of crime, fueling fear in specific sub-populations—most notably in the elderly and the affluent—whose objective risk of victimization, especially violent victimization, was relatively low. In this climate, liberal crime policy came under severe attack, and its political viability was shaken.   The traditional deference granted to criminal justice policy experts quickly eroded under a barrage of criticism from those who argued that the faith in rehabilitation was misplaced, and from others who believed that the system's commitment to reform was questionable.

With fear of crime rising and penal policy undermined, the overtly populist politics of law and order emerged to fill the vacuum.   Put forward as a "New Right" alternative to failed liberal criminal justice policy, this approach to crime was to emphasize expressive policies and punishments in order to re-assert the state's control over crime.   For conservatives who subscribed to this position, the tough posture was the only sensible response to a welfare state that had coddled criminals, entrenched welfare dependency, and undermined traditional social controls. These expressive policies proved popular not only to conservatives; anyone fearful of crime, troubled by welfare, or concerned about the nature of cultural change was a potential supporter.   Able to secure electoral victories throughout the United States in the 1980s and 1990s, this social conservative strand of the New Right left a major imprint on the operations of the criminal justice system.   Instead of indicating need or deprivation, crime came to be viewed as the rational choice of offenders, and the criminal justice system was directed to impose greater controls in order to demonstrate that it was more than capable of handling the "crime problem."

In this type of climate, compassion and individualized assessment eventually lose out to a managerial ethos designed to monitor those who pose a "risk" to society. Those who pose a risk

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[22] *See* David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 446 (1996).

have come to be defined as the underclass, the marginalized, the truly disadvantaged, the undeserving, the different.   Zero tolerance, mandatory sentences, "three strikes and you're out," parole abolition, community notification orders, boot camps, the routine use of prison, and the reduction of treatment and educational programs for offenders are all policies that have been proposed and implemented by this powerful movement.   They have remained—or in some cases have been extended—even when more liberal governments have been elected. The punitive logic is in place; to challenge it is to jeopardize future electoral success.

The state's need to exert control over crime through expressive measures both heightens and spreads the general anxiety about crime.   Politicians have learned that an already anxious public is likely to support those with strong anti-crime views.   Increasingly, these views are punitive and intolerant, and are publicized by media outlets that exploit stories about crime and crime policy because they are profitable. The expressions of outrage and intolerance over crime, along with its constant presence in our culture, legitimize the public's fear and further reinforce the punitive logic.   The result is an increasingly intolerant society that is judgmental and exclusionary rather than inclusive and based on tenets of social justice and social solidarity. In this sense, prisons and prisoners come to symbolize our fears, worries, and insecurities.

II. THE DYNAMICS OF PRISON GROWTH, 1973 TO PRESENT

The dynamics of contemporary prison growth in the United States are complicated and not reducible to a single cause. University of California, Berkeley law professor Franklin Zimring has argued that three distinct patterns of growth can be discerned from the past thirty years.[23] The first period—between 1973 and 1985—coincided with a decline in the dominance of "penal welfarism" in American criminal justice. This period saw an increase in the incarceration of marginal felons, although clear patterns by type of crime or type of offender were not apparent.[24]   The second period—from 1985 to 1992—was characterized by a dramatic shift towards incarceration for drug-

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[23] *See* Zimring, *supra* note 1, at 162.
[24] *See id.*

related offenses.[25] Mandatory sentencing and associated curbs of judicial discretion generate lengthy prison terms for such crimes. Whereas in 1980, 40,000 inmates were serving sentences for drug-related offenses, that number is now 450,000.[26] In the third period—from 1993 to present—imprisonment rates continue to grow even as crime rates decline.[27] This period is also characterized by lengthy sentences caused by the proliferation of habitual-offender statutes like "Three Strikes and You're Out," emotional legislation like Megan's Law, and the general "Truth in Sentencing" movement.[28] A recent study by Alfred Blumstein and Allen Beck finds that, between 1980 and 1996, 12% of the rise in imprisonment could be attributed to increases in crime, while 88% of the increase was due to changes in sentencing policy.[29] In sum, more offenders are going to prison because there are few options but to send them to prison. Moreover, when offenders go to prison, the sentences are very long. For example, the average burglary sentence in the United States is 16.2 months, while in Canada the average is 5.3 months, and in England and Wales it is 6.8 months.[30]

III. THE NEW POVERTY-CRIME RELATIONSHIP

The relationship between social and economic inequality and crime has preoccupied American criminologists for close to seventy-five years. In the late 1930s, sociologists began to challenge the deeply entrenched view that crime was best understood as the problem of individuals who either chose to violate criminal laws, suffered from some sort of medical condition that rendered them unable to control themselves, or simply lacked a moral compass. While these have re-emerged as the most powerful contemporary explanations for criminality, they exist alongside a range of explanations—albeit marginalized in the contemporary culture—that shift the focus away from the individual to an examination of how society might itself be a source of crime. Now, however, with the expansion of the penal

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[25] *See id.*

[26] MAUER, *supra* note 3, at 7.

[27] *See* Zimring, *supra* note 1, at 162.

[28] *See id.*

[29] MAUER, *supra* note 4, at 6 (citing Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 43 (1999)).

[30] *Id.* at 8.

system, criminologists are increasingly asking whether the policies of the criminal justice system are counter-productive and harmful to society. Some of the widely acknowledged social costs of mass imprisonment include: an allocation of state spending to imprisonment rather than to education or social policy budgets; devastating impacts on inmates, their families, and their neighborhoods; the transfer of the prison culture into communities; the discrediting of law and legal authority among the groups most affected; the hardening of social and racial divisions; and finally, the emergence of a crime control industry whose raw material is crime.[31]

The decline of "penal welfarism," and its replacement with a relentless war on crime and drugs, is a national travesty that must be challenged on moral grounds. What does it say about our society when 1.5 million children have a parent in prison?[32] What does it say about our society when nearly one in three black men are likely to be imprisoned in their lifetime?[33] What does it say about our society when 40% of those released from prison will end up going back to jail or prison within three years?[34] What does it say about our society when the number of females in prison has grown sixfold in twenty years,[35] and when, by 1998, 34% of them were serving sentences for drug-related crime?[36] Six hundred thousand adult inmates will be released from prison each year. This translates to sixteen hundred inmates released from prison each day.[37] What does it say about our society when laws and policies have been implemented that exclude former inmates from living in public housing, prohibit them from voting, bar them from receiving welfare benefits, and

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[31] *See* David Garland, *Epilogue: The New Iron Cage*, 3 PUNISHMENT & SOC'Y 197, 198 (2001).

[32] Beth E. Ritchie, *The Social Impact of Mass Incarceration on Women*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 139 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[33] THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 8 fig.4 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf.

[34] Paul von Zielbauer, *Initiatives Aim to Halt Cycle of Felons Returning to Jail*, N.Y. TIMES, Aug. 4, 2003, at B3.

[35] Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 30, at 80.

[36] *Id.* at 88.

[37] JOAN PETERSILIA, WHEN PRISONERS COME HOME 3 (2003).

prevent them from getting a loan to attend college?[38]   When viewed in conjunction with the decline of rehabilitation, why are we surprised at high rates of recidivism?   And why are we surprised at the suggestion that the criminal justice system looks more and more like an institution designed for the lifelong control of the poor?   A decade ago, the Norwegian criminologist Nils Christie warned us that there are no natural limits on the growth of the criminal justice system or on its capacity to control.[39]   When will we heed his warning?   Our only real hope for change is if each of us asks whether the current system represents our values.   If the answer is no, then the next step is to begin a dialogue on what an alternative system might look like.

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[38] *See* Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 30, at 5.

[39] *See* NILS CHRISTIE, CRIME CONTROL AS INDUSTRY 11 (1993).

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