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PREMISE FOR A SENSIBLE SENTENCING DEBATE: GIVING UP IMPRISONMENT

M. Kay Harris* and Frank M. Dunbaugh**

Criminal sentencing practices and the theories on which they are based are the subjects of unprecedented reexamination and debate. Proposals for revising criminal codes and sentencing statutes are receiving lively attention in legislative chambers, judicial conferences, and public forums. This upsurge in interest in how and why society should respond to criminal acts is heartening in many respects. Concern and scrutiny have extended to public forums beyond the narrow circle of philosophers, prisoners, and professors who always have pondered these matters. That concepts such as equity, fairness, common sense, and "doing justice" often rise above the din augurs well.

But there is a disturbing prospect that the most vital issues are being overlooked or avoided amidst the discussion of procedures and processes, theories and terms. Far too little serious consideration is being given to the true nature and uses of imprisonment. In our view, imprisonment as now practiced is too violent and degrading to be imposed by a civilized society. While some forms of restraint may be necessary, we do not believe that our prison practices can be reformed sufficiently to justify their continuance. We are equally skeptical about the prospects of redressing the current dramatic imbalances with respect to who is incarcerated; it is

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unacceptable to retain a harsh system which is applied disproportionately to the poor and minorities.

To most who have experienced them, even just for a visit, America's prisons seem anachronistic, a vestige of some darker, less civilized time. Yet there is a strange reluctance to entertain their abolition; most of the current sentencing debate presupposes heavy reliance on prison confinement. This Article is designed to challenge continued use of the human cage.

We do not believe that abolishing prisons would yield the unfortunate consequences that some foresee. Prisons do not serve the purposes said to require them. There are better responses to crime and social conflict—responses which can help repair the harmful effects of crime and restore social harmony. The focus of the sentencing debate should be shifted to the variety of critical issues surrounding full implementation of alternatives to human confinement.

THE NATURE OF IMPRISONMENT:
“SLOW TORTURES . . . AWAY FROM THE PUBLIC VIEW”

In 1847, seventy-two soldiers who deserted from the United States Army and fought for Mexico during the Mexican-American War were tried for desertion. After all appeals, fifty were sentenced to be executed and fifteen to be lashed and branded. As for the latter:

Lashing and branding was no mild form of retribution, according to descriptions. There were 50 lashes per man, and they were laid on with rawhide whips by brawny Mexican muleteers. The backs of those lashed “had the appearance of a pounded piece of raw beef, the blood oozing from every stripe as given.” The brand was a capital “D” two inches high burned into the cheekbone with a red-hot iron.

Those sentenced to this punishment were also required to dig the graves of the men who were hanged . . . .

Today, most people would react with outrage and disgust to the imposition of such physical abuse. Modern America has reached a point at which “[p]unitive mutilation has become unacceptable even as retaliation for irreversible bodily injury. In-

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deed, we have become repelled altogether by any form of corporal punishment."
Professing humanitarian purposes, imprisonment has been substituted for whipping, mutilation, branding, impaling, and disemboweling. But is imprisonment really so different from or superior to the tortures of the past? Are the pain and suffering, degradation, and humiliation occasioned by flogging and branding truly more onerous than that resulting from an average prison term? How many days in a cage does it take to achieve a quantum of misery comparable to that suffered during the whipping and branding of the deserters?

Dr. Karl Menninger has noted:

Mere imprisonment sounds relatively benign, but the realities of jailing are almost as cruel, harsh and inhuman as the older forms.

... Stocks, whipping posts, dunking and face branding were cruel, but they were honest. Jerking out tongues and tearing off ears had the merit of shorter pain duration than do our present cruelties. Our forefathers' inventions were replaced by the slow tortures of imprisonment—away from the public view.

In recent years, these "slow tortures" have been exposed by an ever growing list of lawsuits in which courts have determined, after extensive evidentiary hearings, that prisoners are being subjected to gross violations of their constitutional rights. The theoretical basis underlying many of these cases is that the "totality of conditions" within the prison or prison system is so inhumane that confinement therein constitutes cruel and unusual punishment, forbidden by the eighth amendment to the Constitution.

The basic concept underlying the Eighth Amendment is nothing less than [human dignity]. While the State has the power to

4. Menninger, supra note 1, at 1, 8 (emphasis in original).
6. See generally Comment, supra note 5.
7. U.S. CONST. amend. VIII. The eighth amendment prohibitions are applicable to the states through the due process clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1972).
punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.8

By the end of 1978, conditions of confinement had been found to be illegal in the prisons of more than one-third of the states.9 Cases pending in eight other states also involve allegations of unlawful prison conditions.10

The evidence presented in these cases exposes the shocking conditions that exist within America’s penal institutions. Prisons are

unsanitary\textsuperscript{11} and unsafe.\textsuperscript{12} Many institutions regularly are over-

11. Extremely unsanitary conditions are common. For example, a federal district court in Mississippi found:

The housing units at [the State Penitentiary at Parchman] are unfit for human habitation under any modern concept of decency. The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard. Open sewage is a breeding ground for rats and other vermin. . . . The entire waste disposal system has been condemned by state health and pollution agencies. . . . Water, contaminated as a result of the inadequate sewerage system, has caused the spread of infectious diseases.

Gates v. Collier, 349 F. Supp. 881, 887 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974). The federal district court in Rhode Island noted:

The entire [Maximum Security Building of the Rhode Island Adult Correctional Institution] is massively infested with cockroaches, rodents, mice, and rats, each of which carries disease throughout the prison. There are cats living in Maximum, and cat feces were observed on the floors of living areas and the showers. . . .

Plumbing throughout Maximum is unsanitary, inadequate, and an imminent danger to public health. . . . Pipes are not equipped with vacuum breakers, creating an ever-present danger that waste water will back up into the fresh water system, even in the food preparation area. . . .

In the lavatories, the Court observed large pools of standing water on the floor, and apparently this is always present. There was a stench of urine coming from this water. The shower areas were filthy, covered with mold and mildew on the floors and the walls. Glass, trash, and dead cockroaches are everywhere on the shower floors.


The kitchen area [of the prison] is infested with rodents, cockroaches and other insects. . . . Due to the lack of ventilation, volatized grease from the stove spreads throughout the kitchen, accumulating with dirt and thus aggravating the basic hygiene problem in the food service area.

. . . . The butcher shop is unsanitary. . . . [It] is not properly cleaned, and pieces of unused meat and fat accumulate under the butcher table.


One expert witness, a United States public health officer, toured facilities at Draper, Fountain, Holman, and Kilby. He testified at trial that he found these facilities wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors. With very few exceptions, his testimony was that, if such facilities were under his jurisdiction, he would recommend that they be closed and condemned as an imminent danger to the health of the individuals exposed to them.

crowded, substantially increasing the dangers of prison life. Overcrowding breeds epidemics, strains medical and psychiatric services, and increases emotional tension, hostility, and aggressive behavior, leading to more frequent outbreaks of violence.\textsuperscript{13} Low


The electric wiring at a majority of the units is frayed, exposed and generally in a bad state of repair, presenting safety hazards to the inmates. Heating facilities are inadequate to heat the inhabited areas; many broken windows at the camps are stuffed with rags to keep out the cold, wind and rain. \ldots At most camps there is also a lack of adequate fire-fighting equipment at the housing units, making it, as stated by Mr. Cook [the penitentiary superintendent], "almost impossible to put out a fire at Parchman with the present water system and the present fire-fighting equipment."


\textsuperscript{13} See, e.g., Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir. 1976):

\begin{quote}
Overcrowding] has a tremendous impact medically and emotionally.

Medically, it's conducive to spreading of epidemic-type diseases. It's conducive to diseases in which there's a breakdown of resistance, such as, for example, TB and the incidence of infection is—where people are really in close proximity to each other, is much greater. And finally, the—emotionally, it produces a lot of depression, frustration, activates violence, promotes aggression. When you're in an institution that's overcrowded, you can begin to feel the tension, you can almost cut it with a knife.
\end{quote}

\textit{Id.} at 28 (quoting expert testimony of federal prison medical officer). The district court, quoting from the Florida Comprehensive Plan for the Criminal Justice System, further affirmed that

\begin{quote}
[t]he environment created by gross overcrowding induces a variety of dangerous conditions. Loss of control increases proportionately with population increase thus producing greater threat to the orderly management of the institutions and the surrounding communities. This condition promotes anonymity and emotional stress. It depersonalizes both the guarded and the guards. Treatment becomes less personal, less flexible, less effective. Crowding people produces a pathology that gives [rise] to increased sexual perversions, emotional instability, social disruption, and extreme depression.
\end{quote}

\textit{Id.} at 31. \textit{See also Anderson v. Redman, 429 F. Supp. 1105} (D. Del. 1977), where the court concluded that

\begin{quote}
[t]he overcrowded living conditions directly affect the psychological well-being of the inmates. Cramped and suffocating quarters increase tension, hostility and aggression, and exacerbate any personal problems an inmate may have, thereby intensifying his anxiety and fear. Adequate control and supervision of the living areas by the correctional staff is impossible, privacy is non-existent and the noise levels are intolerable. An inmate cannot move without getting in another inmate's way. Constant stress, increased tension, and utter frustration generate conflicts and senseless violence over petty matters. Civilized human discourse among inmates and staff is suppressed. Even the time during which a prisoner can see visitors has been cut in half. The cumulative psychological impact of these conditions on the individual prisoner is extremely negative.
\end{quote}

\textit{Id.} at 1112 (footnote omitted).
staff-to-prisoner ratios, exacerbated by crowding, make it difficult if not impossible for staff to protect prisoners.\textsuperscript{14}

One of the greatest horrors of being a prisoner is fear. Court findings demonstrate the conditions that make fear a constant reality of prison life.\textsuperscript{15} In Alabama, for example, a mentally retarded 20-year-old prisoner testified that he was raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.\textsuperscript{16}

Dangers are particularly acute in multibed sleeping areas. Until a federal court intervened, guards at the Cummins Farm unit in Arkansas remained outside the barracks at night; inmate “floorwalkers” were supposed to report disturbances. According to the court:

At times, deadly feuds arise between particular inmates, and if one of them can catch his enemy asleep it is easy to crawl over and stab him. Inmates who commit such assaults are known as “crawlers” and “creepers,” and other inmates live in fear of them. The Court finds that the “floorwalkers” are ineffective in preventing such assaults; they are either afraid to call the guards or, in instances, may be in league with the assailants.

The undisputed evidence is to the effect that within the last 18 months there have been 17 stabbings at Cummins, all but one of them taking place in the barracks, and four of them producing fatal results. . . .

The Court is of the view that if the State of Arkansas chooses to confine penitentiary inmates in barracks with other inmates, they ought at least to be able to fall asleep at night without fear of having their throats cut before morning, and that the State has failed to discharge a constitutional duty in failing to take steps to enable them to do so.\textsuperscript{17}


\textsuperscript{15} For example, the court in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff’d sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 98 S. Ct. 3144 (1978), observed that “[t]he evidence reflects that most prisoners carry some form of homemade or contraband weapon, which they consider to be necessary for self-protection.” Id. at 325.

\textsuperscript{16} Id.

\textsuperscript{17} Holt v. Sarver, 300 F. Supp. 825, 830-31 (E.D. Ark. 1969). The court noted
A psychiatrist for the Florida Division of Corrections supplied the court in *Costello v. Wainwright* with his views concerning factors contributing to prisoner fear in that state's prisons:

There are too many people in too small an area and too tense an atmosphere, the tenseness added to by many of them being the first time in a prison system. They're tense anyway and you add to this the fact of crowding, the fact of fear, the fact of having to wait for food and having to sleep in places for one where there are three or four, the whole thing builds up this personal fear, of panic, of homosexuality, of being hurt physically, of being subject to conversations which they would not be subject to if they were more spread apart, by being subject to—with all due respects—to great racial tension. Some people have never been mixed with others of ethnic—different ethnic colors before and they just don't—they just cannot tolerate it as an individual being closed up with three or four others of different pigmented skin color and different outlooks and all this adds to it. The great numbers that are concentrated there on a 19 year old boy the first time away from home, you know we have lots of 19 year old boys.

Living in constant fear in an unsafe, unsanitary environment with little or nothing constructive to do sharply increases the difficulties in satisfactorily rejoining society upon release. This point has been articulated by many judges deciding cases concerning prison conditions. A federal judge in Alabama noted:

The evidence in these cases also establishes that prison conditions are so debilitating that they necessarily deprive inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed. While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmate's ability to at-

that assaults and killings do occur, even in prisons in which an effort is made to protect the inmates, but that "[a]t Cummins there are no precautions worthy of the name, and the 'creepers' and 'crawlers' take deadly advantage of that fact." *Id.* at 831.

19. *Id.* at 324-25.
tempt rehabilitation, or simply to avoid physical, mental or social deterioration.\textsuperscript{21}

The court in \textit{Costello} made similar observations:

This Court, in the three years that these cases have progressed, has come to the growing realization, through expert testimony and documentary evidence that severe crisis overcrowding creates violence, brutality, disease, bitterness, and resentment as to both inmates and correctional staff. In addition, severe overcrowding in the prison system tends to perpetuate antisocial behavior and foster recidivism so as to ultimately deserve the rehabilitative goals of the correctional system. A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser.\textsuperscript{22}

A federal judge in New Hampshire asserted:

Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.\textsuperscript{23}

When prisoners'-rights litigation intensified about a decade ago, it was generally believed that there were only a few "hell holes" which could be made constitutionally permissible by applying a concerted effort. This outlook has changed dramatically as evidence has accumulated regarding how widespread and intractable the problems of prisons are. Seriously attempting to remedy prison conditions would require far more resources than governmental bodies have thus far been inclined to allocate to corrections.\textsuperscript{24} Efforts to rehabilitate institutions seem especially futile;

\textsuperscript{22} 397 F. Supp. at 38 (footnote omitted).
\textsuperscript{24} Some notion of the expenditures required to attempt a significant improvement of correctional facilities can be obtained from estimates of the costs of complying with judicial decrees aimed at remedying illegal prison conditions. The Budget Bureau in Baltimore, Maryland, estimated that implementation of the court
even many relatively new facilities are obsolete.25 Moreover, to the
about $1.5 million in the first year. M.K. Harris & D.P. Spiller, Jr., After Decision:
Implementation of Judicial Decrees in Correctional Settings 25 (Oct. 1977) (Na-
tional Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep't of
prison system changed from a self-supporting "slave camp" industry with an annual
budget of $1 million, to a publicly funded system with an annual operating budget of
$6 million. Id. at 24. Both systems have been involved in subsequent litigation that re-
quired additional expenditures. An estimate of cost considerations resulting from the
v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 98 S. Ct. 3144 (1978), and
prison system, put the cost incurred at approximately $28,500,000, excluding the cost
of providing additional options for populations projected to 1980 and 1985. See
American Foundation, The Alabama Prison System 6 (Mar. 1977) (study prepared for
ACLU National Prison Project).

25. William G. Nagel, who has visited hundreds of American jails, some built
as early as 1817, and some built as recently as the year of his visit, points out that
even new jails are restrictive, regressive, inhumane, and punitive because they are
so dominated by preoccupation with security and control. Nagel described what he
found when visiting recently constructed facilities around the country:

Our first impression of almost all the new jails we inspected was that
they were designed in hypocrisy. Often built as part of a criminal justice
complex or civic center, they are frequently, on the exterior, inoffensive and
even attractive structures. The approaches are attractively landscaped, some-
times even including fountains and reflection pools. One warden proudly
noted that no bars are visible to outsiders—a now frequent ploy.

The overwhelming impression, once inside, is that the modern Ameri-
can jail, like its predecessor of the last century[,] is a cage and has changed
only superficially. The concepts of repression and human degradation are re-
markably intact.


The National Sheriffs' Association, in similar commentary, notes that some of the
newest jails reflect obsolete concepts:

Most of this country's jails are inadequate, obsolete, and generally
lacking in basic necessities. They were constructed along traditional jail
plans which have changed very little since the beginning of the 17th cen-
tury. More recently constructed jails are also based on obsolete concepts.
They have been designed primarily for dangerous or violent offenders who
make up only a small portion of the jail population. For the most part, their
outmoded design reflects a punitive philosophy which emphasizes only the
concepts of security and control. Predominantly, their physical shells are
warehouses for incarceration rather than effective tools for resolving social
problems. Unqualified incarceration has generally resulted only in further
social alienation and antisocial behavior.

NATIONAL SHERIFFS' ASSOCIATION, JAIL ARCHITECTURE 7 (1975), cited in Na-
tional Clearinghouse for Criminal Justice Planning and Architecture,

In introducing a bill "to provide emergency financial assistance to certain states
and localities for the construction and modernization of correctional facilities and
extent that congregate, coerced confinement is inherently antithetical to the human spirit, and inevitably breeds degradation and despair, the practice of imprisonment is fatally flawed: No amount of amelioration will suffice.26

The concept of imprisonment is itself susceptible to serious constitutional attack. Two theories based on eighth amendment principles illustrate potential challenges to the legality of imprisonment per se.

The Human Destruction Theory.—This theory maintains that it is cruel to inflict punishments upon people that are so destructive that they make it impossible for the people on whom they are inflicted to function effectively in a free society. In Trop v. Dulles,27 the Supreme Court held that removal of citizenship is too severe a penalty for wartime desertion, because it would result in “the total destruction of the individual’s status in organized society.”28

The Court said:

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him and when and for what cause his existence in his native land may be terminated. He may be subject to ban-

26. Federal District Court Judge James Doyle well articulated this notion:

I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive to the brotherhood of man, even more costly by some standards, and probably less rational.


28. Id. at 101.
ishment, a fate universally decried by civilized people. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious. 29

Psychic distress similar to that suggested by the Court in this passage is associated with such characteristics of imprisonment as (1) uncertainty of release dates because of arbitrary parole release policies, (2) an atmosphere of distrust, (3) racial animosity, (4) powerlessness, (5) constant fear of violence, (6) never knowing when an insignificant act might become grounds for disciplinary action and prolonged confinement, (7) inability to maintain social, sexual, and family ties, 30 (8) lack of privacy and freedom in correspondence, (9) interruption of occupational and personal life cycles, (10) loss of control over time and personal action, (11) insufficient physical space, and (12) excruciating idleness, loneliness, and boredom. 31

As previously noted, several courts already have found imprison-

29. Id. at 102 (footnote omitted).

30. The location of many prisons severely impedes inmates' visitation opportunities. For example, since the District of Columbia has no prison for women, female offenders sentenced by District of Columbia courts are frequently sent to the federal women's prison at the remote village of Alderson, West Virginia. There was no public transportation from Washington, D.C. to Alderson, nor any public lodging in the town, until recently when concerned citizens demonstrated to secure a "flag stop" for Amtrak trains, and purchased a house in Alderson for the use of prison visitors.

One of New York State's major facilities, situated at Dannemora, presents similar obstacles to family visits. Dannemora is about 25 miles from the Canadian border and more than 250 miles from either New York City or Buffalo. The federal government is now building a new prison in the same vicinity as Dannemora. It will first be used to house athletes participating in the 1980 Winter Olympics. The structure will eventually serve as a penal facility for youth offenders largely from New York City and Boston. JERICHO, Feb.-June 1978, at 1, 1.

31. This list of deprivations was drawn in part from INSTEAD OF PRISONS, supra note 25, at 51. Such an itemization of the fundamental deprivations inherent in imprisonment strongly suggests that imprisonment is cruel per se. Attention to the more extreme abuses and inhumane conditions challenged in prison litigation should not be allowed to overshadow this fact. As Dr. Menninger highlights:

Confinement anywhere is unpleasant to all animals, human beings included. But incarceration, beginning with the jail experience, is a particularly horrible, painful, dehumanizing, character-destroying kind of confinement. I don't think any victim ever fully recovers from the experience! It means sustaining life for a time in an inescapable environment of evil; evil acts, evil smells, evil sounds, evil associates, evil attitudes. It is a life in an evil and corrupting atmosphere with hope dimmed and common decency smothered! There are no women companions; there are no children; there are no consistent social contacts, no appeals to intelligence or good taste.

Menninger, supra note 1, at 6.
ment to be debilitating and to cause physical, mental, and social deterioration.\(^2\) Extending the *Trop* rationale to prison cases, a court justifiably could hold that imprisonment "subjects the individual to a fate of ever-increasing fear and distress," effects which continue even after release and which are so distressing and destructive as to constitute a fundamental affront to human dignity.

*The Pain Without Purpose Theory.*—Under this theory, punishments are cruel that inflict pain and suffering without serving a legitimate penological purpose. In considering whether the death penalty violates the prohibition against cruel and unusual punishments, the Supreme Court in *Gregg v. Georgia*\(^3\) suggested a new standard for assessing the legitimacy of a particular sanction:

[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.\(^4\)

In *Estelle v. Gamble*,\(^5\) the Court had the opportunity to apply the *Gregg* justification standard to the alleged denial of medical care to prison inmates. Observing that "the [Eighth] Amendment proscribes more than physically barbarous punishments,"\(^6\) the Court found that denial of medical care may result in "pain and suffering which no one suggests would serve any penological purpose,"\(^7\) and held such suffering inconsistent with the eighth amendment's standard of decency.\(^8\) Although the Court in these

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\(^{32}\) See notes 13-23 *supra* and accompanying text.


\(^{34}\) *Id.* at 182-83 (citations omitted) (emphasis added).

\(^{35}\) *429 U.S. 97*(1976).

\(^{36}\) *Id.* at 102 (citations omitted).

\(^{37}\) *Id.* at 103 (citation omitted).

\(^{38}\) A thoughtful Comment on prison reform litigation refers to the rationale of *Gregg* and *Estelle* as "the purposive analysis" and points out that two Supreme Court Justices would have limited states to the least severe punishment adequate to serve legitimate purposes. The Comment notes that by requiring punishments to meet state purposes, courts can deal objectively with many conditions of prison life that are improper but which do not offend the subjective test of "shock[ing] the conscience." Interestingly, it seems not to have occurred to the writer of the Comment
cases did not find imprisonment to be "without penological justification," it did provide a framework for developing this position.

The Federal District Court for the District of New Hampshire in *Laaman v. Helgemoe* rounded out these two constitutional theories with compelling force. The court noted that there is growing recognition that incarcerated persons have a right to serve their sentences under conditions which (1) "do not threaten their sanity or mental well-being," (2) "are not counterproductive to the inmates' efforts to rehabilitate themselves," and (3) "do not increase the probability of the inmates' future incarceration." Asserting that "it plainly defeats society's interests to cultivate recidivism," the court concluded that "punishment for one crime, under conditions which spawn future crimes and more punishment, serves no valid legislative purpose: and, therefore, is without penological justification." *Laaman* 's justification test could well be applied to invalidate all imprisonment:

The touchstone is the effect upon the imprisoned. Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.

It is extremely disturbing that much of the current debate concerning sentencing and sanctions has scarcely confronted the

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39. 428 U.S. at 186-87. A substantial argument could be made that imprisonment does not serve legitimate state interests. For discussion of the failure of imprisonment to satisfy the public safety justifications advanced for it, see text accompanying notes 97-103 infra.

40. 437 F. Supp. 269 (D.N.H. 1977). The court expressly did not rule on the propriety of imprisonment per se. "Incarceration has been chosen by the Legislature of New Hampshire as the punishment for most crimes, a choice neither plaintiffs nor the court questions." *Id.* at 308.

41. *Id.* at 316 (citations omitted).

42. *Id* (citation omitted). The court quoted the following language from *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972): "Unless society subordinates all of the correctional purposes to the goal of rehabilitation, it faces the paradox of promoting the production rather than the reduction of crime." *Id.* at 420, quoted at 437 F. Supp. at 316.

43. 437 F. Supp. at 316.

44. *Id.* at 323.
grim realities of imprisonment. Too often, when awareness and concern regarding the abysmal state of prisons have surfaced, they have been resubmerged by unexamined assumptions or by despair at the unlikelihood of making significant changes.

United States District Court Judge Marvin Frankel, for example, steadfastly supported the criminal code revision bill that passed the Senate during the Ninety-fifth Congress on the grounds that it would reduce arbitrariness and disparity in sentencing. Conceding that prison sentences as presently implemented are excessively long, that the bill would do little or nothing to reduce them, and that, in fact, it might increase them, Frankel nonetheless endorsed the bill on the basis that it at least would promote uniform sentences. In so doing Frankel effectively sanctioned equal harshness for all. He went on to suggest with despair that “nobody today, when capital punishment is again fashionable and politicians win votes by promising greater brutality toward criminals, can hope for any improvement in this respect anytime soon.”

The Committee for the Study of Incarceration, established to investigate the state of imprisonment in the United States, provides another disconcerting illustration of the tenacity of the presumption for continued use of incarceration. The committee did not recommend abolishing incarceration, either immediately or gradually, despite its acute awareness of the inhumanity of present conditions, [its] sense of the inability of courts or administrative agencies to effect meaningful change in the quality of prison life, and the strongly felt desire on the part of at least some members of the Committee to be done with this horrendous system once and for all.

The committee first asserted that the choice before it was to “keep incarceration or fashion a severe penalty of another kind.” It then dismissed the few alternatives considered and concluded that imprisonment must be retained because the alternatives failed

47. Frankel, supra note 46, at D7.
49. Id. at xxxv.
50. Id. at 111.
to satisfy certain practical and humanitarian standards. Astonishingly, the committee ignored the failure of imprisonment to meet the same criteria. For example, the committee rejected corporal punishment on grounds that (1) its severity is not amenable to objective measurement and its use is virtually impossible to control effectively, and (2) it poses disturbing ethical problems: "Besides any physical pain involved, intentional corporal maltreatment evokes in its victims intense feelings of humiliation and terror. . . . Ought a civilized state ever to visit such mortifications?"51 The facts revealed in the many court cases concerning the cruel nature of confinement illustrate the futility of attempting to assess or control the severity of imprisonment. Furthermore, numerous courts have decried prisons for the feelings of terror and degradation they generate among those held captive. The very conditions which led the committee to discard alternatives to confinement permeate our prison system. The committee should have applied consistently the standards it had developed and rejected imprisonment as ineffective and unethical.

The committee failed to confront directly the very questions which it initially and properly had posed for itself: "Ought we to have incarceration at all? Is it appropriate for any purpose whatsoever to place men or women behind walls, to resort to collective residential restraint?"52 "Is it really necessary to inflict so much suffering?"53 Dr. Menninger has suggested that the committee might have reached different conclusions about the propriety of prisons if it had attempted to provide a real description of incarceration or its effects upon the incarcerated. Menninger inquired whether any of the professors and scholars on the committee ever had been inside a jail

[Long enough to feel it? Had they ever visited a bullpen on a hot night or tried to walk through one without slipping? Have any of them tried to live for a time with the smells, the sweat, the vomit, the urine, the mace, the accumulation of bad breath? More the debilitating heat, the fetid air, the broiling summer sun flickering through dirty, half-closed windows. Had or have any members of this august Committee looked closely at—I won’t say reclined on—one of the soiled, torn, lumpy mattresses infested with insects and vermin from which there is no relief

51. Id. & n.*.
52. See notes 9-13 supra and accompanying text.
53. A. VOHN HIRSCH, supra note 48, at xxii-xxiii.
54. Id. at 3.
through the long nights? Have any Committeemen ever been subjected—in the dark—to roaches, lice and bedbugs?

I will not ask if any member of the Committee has ever seen blood running down a trouser leg, or heard the sobs and screams of a boy being chain-raped, with accompanying grunts and raucous shouts.\(^5\)

While rapid change is characteristic of our times, nothing seems to change in our prisons. Menninger’s contemporary description sounds a great deal like Oscar Wilde’s impressions of the Reading Gaol in the last century:

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Each narrow cell in which we dwell
Is a foul and dark latrine,
And the fetid breath of living Death
Chokes up each grated screen,
And all, but Lust, is turned to dust
In Humanity’s machine.\(^6\)
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The Committee for the Study of Incarceration, like many others, failed to face squarely the threshold question: Is imprisonment an acceptable social practice? If it is not, then its continued use is wrong. There is no justification for our tolerance of the strange rationalization that “incarceration may be unacceptable, but we haven’t an alternative.” If imprisonment is not satisfactory, we must shift to different forms of punishment which embody respect for human dignity. Just as we stopped branding, flogging, and cutting off hands because such practices were considered unspeakably cruel, current standards of decency require that we now stop caging people.

**THE INJUSTICE AND IRRATIONALITY OF PRISON USE**

In addition to moral and humanitarian objections to imprisonment per se, there are other strong reasons to move away from the

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6. O. Wilde, *The Ballad of Reading Gaol*, in *Poems* 253, 281 (1910). When Wilde, the English poet and dramatist, was a prisoner in Reading Gaol in 1896, there also were three children serving sentences for snaring rabbits. Like the most hardened felons awaiting trial, they slept on plank beds in cells with solid iron doors; they were crying with hunger. A kindly warder gave the smallest child a few biscuits, and for this was dismissed from his post. The children had been imprisoned because their parents were too poor to pay their fines. They were released only when Wilde paid them himself. Y. Rennie, *The Search for Criminal Man, A Conceptual History of the Dangerous Offender* 271-72 (1978) (citing H. Hyde, *Oscar Wilde: A Biography* 315-17 (1975)).
practice of human confinement. Prisons are a vivid manifestation of an unjust system—a system which cages the least powerful, rather than those who cause the most harm. In ancient Greece, slaves were punished in their bodies, citizens, in their property. Modern America also has a dual system for dealing with harmful behavior. The "slow tortures" of imprisonment are suffered almost exclusively by the poor and minorities for "street crimes," many of which do not involve violence. The rich and influential rarely are imprisoned, even when their "suite crimes" cause serious injury or death.

It has become popular to advocate imprisonment for business crimes as a means of reducing class disparity in sentencing. It is extremely unlikely, however, that white-collar offenses will be pursued as vigorously as "street crimes" or that the severe incarcerative punishments heretofore reserved for the powerless ever will be applied on a broad scale to the powerful. To equalize sentencing and to eliminate this dual punishment system, the most hopeful course lies in using less drastic sanctions in place of imprisonment for all offenses.

Unfair Use of Imprisonment

Nearly half of the people being held in our prisons are black, although blacks constitute less than fifteen percent of the population in this country. In 1973, in the thirty-eight jurisdictions for which there were data, the incarceration rate for blacks was at least three times the rate for whites; in one-third of these jurisdictions it was ten times greater. Most of those confined are poor. In 1974,

58. See text accompanying notes 68-96 infra.
59. Table 6.18, Estimated Number of Inmates of State Correctional Facilities, by Selected Demographic Characteristics, United States, 1974, in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1977, at 616 (M. Gottfredson, M. Hindelange & N. Parisi eds. 1978) [hereinafter cited as 1977 SOURCEBOOK]. This source estimates that blacks constituted about 47 percent of the population of state prisons in 1974. Id.
60. Dunbaugh, Racially Disproportionate Rates of Incarceration in the United States, 1 PRISON L. MONITOR 205, 220 (1979). This article, based on 1973 data, shows that the median incarceration rate for the white population was 43.5 prisoners per 100,000 population, while the median rate for the black population was 367.5 prisoners per 100,000 population. Id. at 220. The study includes data and incarceration rates from 50 jurisdictions for whites (District of Columbia and all states except Connecticut) and from 38 jurisdictions for blacks (limited to those with 25,000 or more blacks in the population). Id. at 221. What is striking about the data is that it is in sharp contrast with the pattern of incarceration rates in other industrialized countries. See note 88 infra. Forty of the 50 jurisdictions had white incarceration rates within the range of ± 50% of the median, that is, they incarcerated between 22 and
only fourteen percent of state prison inmates reported incomes in the year before their arrests of $10,000 or more; twenty-four percent of the prisoners earned less than $2000. As the Solicitor General of the United States has noted, "[E]very racial and economic group that is found at the bottom of the social ladder in any region of the country is also found disproportionately represented in the prison population of that region." It is often assumed that the characteristics of the prison population mirror the facts about who is committing serious crimes. However, two lines of recently assembled evidence cast doubt on this assumption. The first set of analyses implies that use of imprisonment is more closely associated with racial and economic factors than with criminality. The second set suggests that the criminal justice system ignores a large body of serious offenses, so that many persons engaged in harmful, illegal conduct never become liable to criminal punishments, including incarceration. Taken together, these facts strongly suggest that those imprisoned are not necessarily those who inflict the greatest harm on society. Such evidence leads to the conclusion that prison sentences are imposed neither fairly nor sensibly.

A number of studies have explored relationships between socioeconomic factors and imprisonment. William G. Nagel compared crime rates with incarceration rates and with other variables. He found that "there is no significant correlation between a state's racial composition and its crime rate but there is a very great positive relationship between its racial composition and its

61 white people per 100,000 population. Every jurisdiction incarcerated at least 149 black per 100,000 population; 29 of them locked up more than 300 blacks per 100,000 population.


63. Nagel, On Behalf of a Moratorium on Prison Construction, 23 CRIME & DELINQUENCY 154 (1977). The crime rates are based on the FBI's Uniform Crime Reports which reflect crimes reported to the police and are limited largely to "street crimes." The incarceration rates represent the ratio of a jurisdiction's population which is imprisoned. The rates vary a great deal.
The same study found that "states with a high incidence of persons living below the poverty level tend to have a lower crime rate but a higher incarceration rate." This and other studies also have noted a relationship between incarceration rates and unemployment rates. A study performed for the Joint Economic Committee of the Congress found that a one percent increase in unemployment was correlated with a four percent increase in state prison admissions. Another study concluded that regardless of changes in crime rates, "as the total number of unemployed persons increases, the total number of persons present in and admitted to prisons also increases."

Although the average person "thinking about crime" may not consider organizational or business crime, the second line of evidence demonstrates that the economic and human costs of this category of crime are staggering and may outstrip by a substantial margin damage done by "common crimes." This reality makes it especially troubling that criminal justice resources (including confinement) are skewed heavily toward "street crime."

64. Id. at 162 (emphasis in original). A reanalysis of Nagel's findings generally confirmed the results. See J. Nagel, Crime and Incarceration: A Reanalysis (Sept. 1977) (unpublished paper on file with the National Council on Crime and Delinquency).

65. Nagel, supra note 63, at 162 (emphasis in original).


68. James Q. Wilson, in his popular book on this subject, typifies this tendency when he says,

Unless otherwise stated or clearly implied, the word "crime" when used alone in this book refers to predatory crime for gain, the most common forms of which are robbery, burglary, larceny, and auto theft.

This book deals neither with "white-collar crimes" nor, except for heroin addiction, with so-called "victimless crimes." Partly this reflects the limits of my own knowledge, but it also reflects my conviction, which I believe is the conviction of most citizens, that predatory street crime is a far more serious matter than consumer fraud, antitrust violations, prostitution, or gambling.


69. A recent study done by the GAO for the Subcommittee on Crime of the House Committee on the Judiciary reveals that approximately 5.1% of the total budget of the Department of Justice for fiscal years 1977 and 1978 was expended for white-collar crime and public corruption. COMPTROLLER GENERAL OF THE UNITED STATES, RESOURCES DEVOTED BY THE DEPARTMENT OF JUSTICE TO COMBAT WHITE-COLLAR CRIME AND PUBLIC CORRUPTION 2 (1979). See generally SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE
much discussion is devoted to "law and order" and swift apprehension, prosecution, and punishment of law violators, the system makes little pretense of actually trying to enforce all laws. Dangerous and harmful business practices frequently lie outside the reach of the criminal law. Furthermore, criminal justice agents make little attempt to protect us from those business practices which have been defined as crimes. Police and prosecutors generally are not trained, equipped, or expected to deal effectively with such matters as consumer fraud, embezzlement, pollution of air and water, corruption, racial discrimination, and exposure of employees and consumers to toxic substances.

Although the criminal justice system largely ignores business crime, the direct short-term economic impact of this type of crime is at least ten times greater than that attributable to "street crimes" against property, and it frequently results in serious bodily harm. Evidence revealed in civil litigation concerning the behavior of officials in the asbestos industry offers a shocking case in point. It appears that on the instructions of industry officials, physicians concealed vital medical information from asbestos workers. Workers were not informed that they had developed symptoms of asbestosis, although the disease is treatable in early stages and may be fatal if not treated.

Incredibly, it appears to be common for officials to deny and impede recognition of connections between dangerous substances and disease. As another example, the relationship between coal dust and black lung was denied in this country for thirty years after


70. The United States Chamber of Commerce estimated that the short term, direct cost of white-collar crime in 1974 was more than $40 billion, not including antitrust violations such as price fixing. Chamber of Commerce of the United States of America, A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss 5 (1974), cited in White Collar Crime, supra note 69, at 8. In 1976, the Joint Economic Committee of the Congress estimated that the cost of street crimes against property, such as breaking and entering or robbery, amounted to the comparatively low total figure of $4 billion annually. White Collar Crime, supra note 69, at 10. A Ralph Nader report estimated that monopolies cost consumers $48 to $60 billion a year because of fixed prices, lost production, and lack of innovation. Nader Report: Consumers Lose Billions to Invisible Bilk, 1971 Crime & L. 21, cited in M. Parenti, Democracy for the Few 129 (1977).


72. Id. As many as three thousand asbestos workers die prematurely each year as a result of exposure to asbestos in the workplace. N. Ashford, Crisis in the Workplace: Occupational Disease and Injury 324 (1976), cited in L. Schrager & J. Short, Toward a Sociology of Organizational Crime 1 (1977) (unpublished paper on file in office of the Hofstra Law Review) [hereinafter cited as Schrager & Short].
it was accepted in Great Britain. The National Institute for Occupational Safety and Health estimates that seven to fifteen million workers currently are exposed without their knowledge to toxic substances in products sold under trade names. Although all such instances of exposure may not involve criminal conduct or liability of business officials, illegal practices are far from unusual. One estimate concerning occupational accidents placed the number of deaths at 14,200 and the number of disabling injuries at 2.2 million in 1970 alone. Studies suggest that more than half of these accidents are attributable to illegal safety violations or legal but unsafe conditions.

Similar to the workers' situation, concern about business crimes against consumers generally focuses only on economic damage. However, about 20 million serious personal injuries annually are associated with consumer products; approximately 110,000 injuries result in permanent disability, and 30,000 in death. As with attempting to assess employer liability for harm to employees, "readily available data do not specify the contribution of illegal versus legal, dangerous actions to these figures. Both the acute and chronic dangers of consumer products may be illustrated by the replacement of much highly flammable children's sleepwear by Triscoated cancer-producing sleepwear."

A number of cases are now being exposed in which unsafe business practices have endangered, injured, or destroyed whole communities.

One of the worst man-made disasters in this country's history began early one morning in February 1972. A coal company's massive coal-waste refuse pile, which dammed a stream in Middle Fork Hollow in the mountains of West Virginia, collapsed without warning to the people in the long, narrow Buffalo Creek Valley below. This failure unleashed over 130 million gallons of water and waste materials—stream water from recent rains as

73. Schrager & Short, supra note 72, at 21.
76. Id.
77. Schrager & Short, supra note 72, at 22. This latter figure is equal to approximately one and one half times the number of murders and nonnegligent manslaughters committed nationally each year in 1974 and 1975. Table 3.99, Estimated Number and Rate (per 100,000 inhabitants) of Offenses Known to Police, by Offense, Region, and State, 1974-75, in 1977 Sourcebook, supra note 59, at 404-05.
78. Schrager & Short, supra note 72, at 22 (citation omitted).
GIVING UP IMPRISONMENT

well as black coal-waste water and sludge from a coal-washing operation. This 20-to-30-foot tidal wave of rampaging water and sludge, sometimes traveling at speeds up to 30 miles per hour, devastated Buffalo Creek's sixteen small communities.

Over 125 people perished immediately. Most were women and children unable to struggle out from under the thick black water choked with crushed and splintered homes, cars, telephone poles, railroad tracks, and all manner of other debris. There were over 4,000 survivors, but their 1,000 homes were destroyed as well as most of their possessions.79

Painstaking legal investigation showed that although mining company officials did not intend to kill those who perished, they knowingly maintained an illegal dam, placing considerations of profit above those of human life.80 These examples illustrate the need to broaden public perceptions as to what constitutes a crime of violence.

In the 1940's Edwin Sutherland studied seventy of the largest and most influential corporations in the United States. He found that every corporation had been charged with more than one illegal act, and on the average, had been cited fourteen times for violations of law by a court or regulatory agency.81 The elite perpetrators of such lawless activity suffer consequences far different from those which befall so-called "common criminals." "Any ordinary citizen with such a conviction record would be judged an 'habitual offender' deserving of heavy punishment. Yet the guilty companies were provided with special stipulations, desist orders, injunctions, and negotiated settlements or were let off with light penalties."82 Organizations cannot be imprisoned, but the individuals within them can. Yet, those responsible for corporate malfeasance seldom are prosecuted. In the first three years of enforcement of the Occupational Safety and Health Act of 1970,83 for example, no individual was convicted or imprisoned, although criminal fines were levied against organizations.84

80. See id.
81. Of the 980 separate violations Sutherland discovered, 307 were for restraint of trade, 222 for patent infringement, 158 for unfair labor practices, 97 for false advertising, and 66 for illegal rebates. E. SUTHERLAND, WHITE COLLAR CRIME 272 (1949), cited in WHITE COLLAR CRIME, supra note 69, at 13.
82. M. PARENTI, supra note 70, at 129.
84. Schrager & Short, supra note 72, at 5-6. While an organization cannot be
Redressing the Punishment Imbalance

There is little correspondence between offenders who cause serious injury and harm and those persons who actually are imprisoned. Of course, many persons who are imprisoned have done great harm. However, many others are imprisoned for property offenses involving dollar amounts far less significant than those of white-collar offenses for which perpetrators never risk any substantial threat of imprisonment.

Many observers react to this inequality by suggesting that there be a "crackdown" on white-collar offenses and more prison sentences for those who commit them. This, in fact, is the current ambition of the United States Department of Justice. However, if overcoming the traditional preoccupation with street crime is dependent on significantly increasing resources allotted for detecting, prosecuting, and imprisoning offenders involved in organizational crimes, success is unlikely.

The United States is facing widespread economic problems. Inflation is wiping out savings. Rising taxes have spawned a wave of voter-sponsored proposals to restrain government taxing power and spending. Worldwide confidence in the American economy has diminished. There is a growing realization that long term government programs have mortgaged the incomes of future generations. In this context it is unrealistic to expect vast new appropriations to repair, improve, or expand the criminal justice system.

The limits on how much people are willing to expand the criminal justice system already are being reached, especially with respect to imprisonment. By urging passage of tougher laws and

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sentenced to time in prison, as a criminal sanction it can be restricted, restrained, or even dissolved. It is indeed peculiar that there seems to be greater reluctance to destroy a corporation than to destroy an individual.


We must increase the cost to the offenders of committing such crimes by ensuring his or her detection, quick prosecution and punishment more severe than only the possible loss of reputation and community standing. Imposition of prison sentences joined with appropriate fines should be the rule, with probation and early parole reserved only for the most exceptional cases.

Id. at 7. The Deputy Attorney General, Benjamin Civiletti, in nearly identical language, advocates the same position, but suggests that "[i]mposition of heavy prison terms joined with appropriate fines should be the rule." See Fisk, Crime, TRIAL, Oct. 1978, at 41 (emphasis added).
stiffer penalties, the “new realists” have created a dilemma for legislators who recognize this “get tough” public sentiment, but are reluctant to finance full implementation of such laws. The outcome of this interplay of forces has been described clearly by Caleb Foote.

[T]he basic function of discretion in paroling and sentencing practice is . . . to adjust an impossible penal code to the reality of severe limitations in punishment resources. . . . What we have evolved is a system of symbolic punishment in which each [prison] inmate stands for half a dozen or a dozen other convicted felons who are by any standards equally eligible to be there but for whom there are no beds. This system is efficient in court administration, for the threat of being the symbol keeps the guilty pleas flowing smoothly. It is economical by cost-benefit standards, for it probably maximizes the return in general deterrence for dollars expended. It is politically expedient, at least in the short run, because it dupes and pacifies an otherwise potentially rebellious public. It is also, in my opinion, profoundly immoral, violates the spirit of due process and equal protection, turns our criminal courts into sausage factories and breeds disrespect for law in most of those whom it touches.

86. The “new realists” urge more stringent policies for “getting tough on criminals.” James Q. Wilson exemplifies the “new realist” when he asserts that “we have trifled with the wicked, made sport of the innocent, and encouraged the calculators.” J.Q. WILSON, supra note 68, at 209. Ernest van den Haag, in arguing that anyone convicted of a third offense should be imprisoned until age 40, has commented that “[i]f one looks at the present practices of the criminal justice system, . . . one may think that it was to secure the happiness of lawbreakers that our government was instituted.” Reform of the Federal Criminal Laws, Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 8915, 8923 (1977) (statement of Ernest van den Haag) [hereinafter cited as 1977 Hearings]. Such “get tough” cries are hard to reconcile with the realities of crime and incarceration levels. Data from the national victimization surveys conducted by the Census Bureau in the years 1973 through 1976 show that the crimes studied remained relatively constant from year to year, even within offense categories. The rate of personal violence reported was 32 crimes per 1000 persons in all four years, for example. It appears that:

During the four years of national victimization surveys, the country was in the grip not of a crime wave but of a wave of punitiveness. The most visible result of this was the bulging of federal, state, and local prisons and jails. Combined jail and prison populations increased by almost 200,000 to a record 533,000 in 1977. Yet the record number of “incapacitated” criminals did not result in greater safety for the American public.


Americans must recognize that we cannot afford to incarcerate people at the present levels. It has been accurately noted that “Europeans generally dish out [prison] time in spoonfuls; we use buckets.” In light of high construction costs (up to $57,000 per prisoner space) and direct operating costs (as much as $26,000 per year per prisoner), it is folly to rely on policies which require increased use of prisons. Since nonincarcerative punishments are dramatically less expensive, it is apparent that our scarce punishment resources should be reallocated.

If we are serious about concentrating on the criminal activities that cause the most harm, priorities must be rearranged and methods refocused. Such a reordering could follow one of two directions: (1) We could incarcerate only persons convicted of the most serious offenses; or (2) we could employ less drastic and less costly sanctions for all those convicted of crime.

The first option—that only persons convicted of the most serious offenses be incarcerated—has been advanced by numerous individuals and organizations in recent years. The National Council on Crime and Delinquency, in a major policy statement, argues that “[c]onfinement is necessary only for offenders who, if not confined, would be a serious danger to the public.” The National

88. Rothman, Doing Time, N.Y. Times, Sept. 14, 1977, at A21, col. 3. The United States incarceration rate (approximately 235 per 100,000) is in sharp contrast with the much lower rates in Europe and elsewhere. The following rates for 1971 or 1972 were reported in Waller & Chan, Prison Use: A Canadian and International Comparison, 17 Crim. L.Q. 47, 58 (1974) (Table A—Selected countries and the number of persons in prison per 100,000 persons in the population): New Zealand (92.7), Canada (90.0), England and Wales (81.3), Denmark (69.8), Sweden (61.4), France (61.1), Italy (51.2), Japan (46.5), Spain (39.9), Norway (37.1), and the Netherlands (22.4).

Several European countries are affirmatively acting to decrease further the use of prisons. For example, in 1975, the Swedish Minister of Justice announced a plan to reduce the prison population by about 75%. Salomon, Lessons From the Swedish Criminal Justice System: A Reappraisal, Fed. Probation, Sept. 1976, at 40, 42.

89. N. Singer & V. Wright, Cost Analysis of Correctional Standards: Institutional-Based Programs and Parole 17-18 (Jan. 1976) (project conducted by Correctional Economics Center). This calculation, expressed in then-current dollars, derived from a sample of recently constructed or planned institutions. Id. at 17.

90. Coopers & Lybrand, The Cost of Incarceration in New York City 5 (Jan. 17, 1978) (cost study sponsored by National Council on Crime and Delinquency). As the title of this study suggests, this estimate, although broadly representative, is for New York City only, for the year ending June 30, 1976. Id. at 1.

91. Board of Directors, National Council on Crime and Delinquency, The Nondangerous Offender Should Not Be Imprisoned, 19 Crime & Delinquency 449, 449 (1973). The National Council’s policy envisions two kinds of “dangerous offenders” for whom imprisonment would be necessary: (1) the offender who has committed a serious crime against a person and shows a behavior pattern of persistent assaultiveness based on serious mental disturbances, and (2) the offender deeply involved in organized crime. Id. at 456.
Advisory Commission on Criminal Justice Standards and Goals, in recommending that incarceration be reserved for those instances in which no other lesser penalty would serve, said, “It is clear that a dramatic realignment of correctional methods is called for. . . . The criminal justice system should become the agency of last resort for social problems. The institution should be the last resort for correctional problems."92 These are but a few of the many who advocate reordering priorities so that incarceration will be employed on a more rational and nondiscriminatory basis.93

Although these recommendations represent movement in the right direction, they still contain significant dangers that require careful consideration. It is neither an accident nor a surprise that poor people and minorities bear the greatest burden of imprisonment. By and large, the criminal laws have been designed, adopted, and enforced to protect the interests of white men of means.94 Women, minorities, and poor people have had little effective part in the political processes by which laws are enacted and within which enforcement policies, priorities, and budgets are set. To many of those controlling the operation of the criminal laws,

crime is something which shabby, strange, foreign-looking men do, ugly men, men with hairy faces, long-haired and strangely garbed young “hoodlums,” black men, brown men, red men “prowling” (or just standing or walking) in white men’s neighborhoods. Crime is not something in which courteous, well-dressed, white gentlemen get involved. . . .95

It is fantasy to expect judges in today’s society to send “courteous, well-dressed, white gentlemen” to prison. Given the uncivilized nature of our prisons, it defies belief that a significant number of offenders convicted of business crimes, even of the most serious

92. NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 1-2 (1973) [hereinafter cited as CORRECTIONS].
94. Clarence Darrow understood the dynamics:
Those men who own the earth make the laws to protect what they have. They fix up a sort of fence or pen around what they have, and they fix the law so the fellow on the outside cannot get in. The laws are really organized for the protection of the men who rule the world. They were never organized or enforced to do justice. We have no system for doing justice, not the slightest in the world.
type, ever will be locked in with offenders convicted of serious street crimes. If white-collar and street-crime offenders are to be sentenced to comparable punishments for offenses of similar seriousness, the punishments will have to be less severe than imprisonment.

The second option around which to restructure our priorities—turning to nonincarcerative sanctions for all offenders—thus seems far more promising. However, many argue that incarcerative punishments cannot be abandoned because they are necessary for public safety. Most of the leading social policy objectives advanced in support of imprisonment are oriented around crime reduction or control: deterring potential offenders from committing crimes, incapacitating convicted offenders to prevent them from engaging in crimes, and rehabilitating offenders so that they will choose not to commit crimes in the future. Even retribution sometimes is viewed as serving a deterrence function to the extent that people

96. A GAO study of sentencing practices in federal district courts for the year ending June 30, 1977, found that of those districts with 25 or more sentences for bank embezzlement and for bank robbery, none imprisoned more than 30% of those convicted of embezzlement and none imprisoned less than 78% of those convicted of bank robbery. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS, REDUCING FEDERAL SENTENCING AND PROSECUTING DISPARITIES: A SYSTEMWIDE APPROACH NEEDED 7 (1979).

Some sentences imposed the past year in white-collar crime cases have raised again the question of even-handedness in the administration of criminal justice. In one case a person who over a period of years embezzled more than half a million dollars received a sentence of outright probation, plus a token $1,000 fine. Another who stole more than fifty thousand dollars received probation while two who separately stole a quarter of a million dollars received sentences of six months. Another public official who stole thirty to forty thousand dollars of public monies to help build himself a new house received a six month sentence subsequently reduced to about three months.

Lenient sentences of this kind are very disturbing; they are, in the view of this Office, neither just on the merits nor do they appear to be just. They create in the eyes of the public a perception of preferential treatment by the criminal justice process for those with status and wealth.

Certainly, this Office could insist on every white collar case going to trial unless the defendant pled guilty to the entire indictment. The cost would be high—a drain on the court's resources and very much so on the prosecution's by dramatically limiting the number of cases it can investigate. White collar crime cases are tremendously time consuming; they require an enormous investment of investigative and prosecutorial resources, both to investigate and to try.

abstain from law violations to avoid receiving the deserts of their acts.

There is a substantial and growing body of information and sentiment emphasizing the injustice of employing utilitarian objectives as a basis for selecting punishments. For example, although proponents of incapacitative incarceration would not be apt to explain it thus, the essence of what they advocate is confinement of persons who the government asserts may (we cannot be sure) someday (we know not when) commit an act (we know not what) which somehow (we know not how) will endanger some other person or persons (we know not who). Yet the factfinding process by which people are selected for such preventive confinement does not even purport to examine the when, what, how, and who of the feared future offense. Imprisonment is a highly intrusive form of state intervention into an individual’s life. To impose it as a punishment for past, proved acts is an extremely harsh response, too harsh, perhaps, for any offense. But to subject persons to imprisonment for what we guess they might do in the future constitutes a gross denial of human rights. Yet the utilitarian crime-reduction rationales for imprisonment remain popular. The notion that prisons must be employed to confine “dangerous criminals” is particularly tenacious.

It is especially disquieting to note theorists who utilize the utilitarian rationales for incarceration although they are aware of the injustice in doing this. Ernest van den Haag, for example, maintains:

Although [I am] uneasy about the justice of post punishment confinement [for incapacitative purposes,] I believe the protection of society must have priority over the freedom and the comfort of offenders. It is better to confine an offender, even after he has served his punishment, than to let harm come to innocent victims, as long as there is good reason to believe that he is still dangerous. An offender found to be still dangerous who actually is not is in the same unfortunate situation as a suspect.


98. Of course, as has been noted, “[w]e have among us at all times a large number of people who will sooner or later commit violent acts. Most of these people are undetected and, in practical and also constitutional terms, undetectable as to their violent potential.” Cantor, An End to Crime and Punishment, 39 Shingle 99, 112 (1976).
found guilty who actually is not. We must do our utmost to minimize these cases, short of failing to punish the guilty and not confining the dangerous.\textsuperscript{99}

It is important to recognize, however, that even if considerations of public protection are placed above those of fairness and justice, it is dubious whether imprisonment plays a meaningful role in crime control. It is even more questionable whether any changes made in the criminal justice system could appreciably reduce crime.

Existing evidence concerning whether imprisonment serves to deter crime is inconclusive,\textsuperscript{100} but it is popularly believed that increasing the likelihood of going to prison or the length of prison terms deters some people from committing crimes. There is also limited evidence suggesting that crime among people at liberty can be reduced to some extent by incapacitating certain persons. However, massive increases in imprisonment would be necessary to achieve an incapacitative effect that would reduce the crime rate significantly. For example, one study concluded that the most efficient incapacitation policy, in the sense of yielding the greatest crime reduction and the lowest prison-population increase, would be to incarcerate all persons convicted of felonies for 1.2 years.\textsuperscript{101}

\textsuperscript{99} E. \textsc{Van Den Haag}, \textit{supra} note 3, at 250. When decisions are based on the possibility that a person may commit a crime rather than on a process which, although admittedly imperfect, is designed to be impartial, objective, based on established standards, and directed toward ascertaining the facts as to actual past events, a great leap has been made away from basic principles of law.

\textsuperscript{100} The Information Center of the National Council on Crime and Delinquency reviewed 100 recent studies, articles, and books on deterrence, and reached inconclusive findings. For each study that concluded that imprisonment reduces crime through a deterrent effect, another study concluded that it did not. Similarly, an assessment of research studies on deterrence carried out by the Panel of Research on Deterrent and Incapacitative Effects, established by the National Research Council of the National Academy of Sciences, found that no definitive conclusions could be offered on the deterrent effect of sentences. The Panel did conclude that deterrence is only one of many possible explanations for those studies indicating that higher sanction levels are associated with less crime. Dr. Alfred Blumstein, who chaired the Panel, stated that the “major challenge for future research is to estimate the magnitude of the effects of different sanctions on various crime types, an issue on which none of the evidence available thus far provides very useful guidance.” Blumstein, \textit{Research on Deterrent and Incapacitative Effects of Criminal Sanctions}, 6 \textit{J. Crim. Just.} 5 (1978). The Panel’s report was published as \textsc{National Research Council Panel on Research on Deterrent and Incapacitative Effects, Deterrence and Incapacitation} (A. Blumstein, J. Cohen & D. Nagin eds. 1978) [hereinafter cited as \textsc{Deterrence and Incapacitation}].

Theoretically, this could reduce overall crime by 20 percent—although reducing violent crime by only 10.9 percent—but would increase the prison population by 85 percent, or about a quarter of a million new prisoners. The budgetary implications of such a policy shift alone would make its adoption highly unlikely. The same is true with respect to implementing proposals designed to enhance deterrence by increasing the odds of prison punishment. There simply is little possibility that the certainty of conviction and imprisonment will be increased to an extent necessary to give such potential effects any chance of operating.

There is little debate that rehabilitation is ill-served by imprisonment. The National Advisory Commission on Criminal Justice Standards and Goals concluded:

> The failure of major institutions to reduce crime is incontestable. Recidivism rates are notoriously high. Institutions do succeed in punishing, but they do not deter. They protect the community, but that protection is only temporary. They relieve the community of responsibility by removing the offender, but they make successful reintegration into the community unlikely. They change the committed offender, but the change is more likely to be negative than positive.

While some of those incarcerated may undergo positive change, prisons are probably the worst setting in which to seek this change. Thus, few of those concerned with rehabilitation will argue that prisons are necessary for that purpose.

The idea that prisons are needed to protect the public is based on myth. Imprisonment in record-high doses has not succeeded in securing domestic tranquility. Placing our hopes on more of the same is seriously misguided.

It is clear that imprisonment never will be imposed on all persons who seriously endanger others. As long as only a symbolic set

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under grant from National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep’t of Justice.

102. Id. See also DETERRENCE AND INCAPACITATION, supra note 100; Van Dine, Dinitz & Conrad, *The Incapacitation of the Dangerous Offender: A Statistical Experiment*, 14 J. RESEARCH CRIME & DELINQUENCY 22 (1977). Furthermore, the impacts projected in these studies were based on “street crime” type offenses. We have no idea whether or how much incarceration prescribed at various levels might deter or effectively incapacitate persons participating in organizational crimes. Presumably, a substantial increase in law enforcement attention also would be required before the certainty of apprehension, conviction, and punishment could reach significant levels.

103. CORRECTIONS, supra note 92, at 1.
of those eligible are caged, racial and economic biases will affect the selection process. Thus, to equalize justice and focus law enforcement efforts on the crimes of greatest concern, it is imperative that new priorities be set and that less expensive, nonincarcerative penalties be employed for all offenders.

**ALTERNATIVE DIRECTIONS AND NEW CONCERNS**

Recognizing that prisons with their attendant evils are not essential to community peace and security frees us to pursue justice in ways more harmonious with America's traditional human values. This is not a vain hope, but a real prospect. Shortrange social policies cannot be expected to eliminate crime and violence, but society can respond to crime in ways that are nonviolent, just, and consistent with our collective interests. By illustrating the wide variety of nonincarcerative sanctions already in operation, this section is intended to stimulate discussion about their functioning, the purposes they should serve, and the new issues they pose.

Probation is probably the best known alternative to incarceration. During this century, its use has grown to the point that well over a million persons are under probation supervision at any given time.104 Under a probation sentence, convicted offenders remain at liberty in the community subject to varying levels of supervision and a variety of conditions established by sentencing courts. Numerous other nonincarcerative sanctions, although not as common as probation, are increasingly being implemented and accepted; these alternatives deserve still greater attention.

Available methods for reducing the use of confinement include eliminating some criminal statutes and otherwise limiting the jurisdiction of criminal courts, developing alternatives to conventional adjudication, minimizing defendants' penetration into the criminal system, and utilizing alternative sanctions within the structure of the criminal law. Statutes and enforcement practices that bring within the criminal justice system persons who are mentally ill or alcoholic or who voluntarily and privately engage in practices which differ from espoused norms—so called "victimless crimes"—should be eliminated.105

105. It has been suggested that decriminalization can occur as a result of po-
Many of the interests fostered and protected by governmental action ordinarily are not connected with the criminal process.\(^{106}\) Philadelphia attorney Gilbert M. Cantor has gone so far as to suggest that all criminal laws could be abolished and the mechanisms of the criminal justice system totally dismantled without harm to public interests.\(^{107}\) Cantor maintains that reliance on civil litigation to allow victims of crime to recover damages suffered would shift the emphasis "from harming the 'criminal' to helping the victim,"\(^{108}\) and would foster a movement towards building responsible behavior as the desired norm of a free society. In Cantor's scheme, civil confinement for treatment would be permitted, at least initially, under strict legal constraints where a defendant's behavior was especially outrageous or bizarre.\(^{109}\) However, the vast majority of cases would be handled through tort actions for money damages, including punitive or exemplary damages, and other civil remedies such as injunctions and contempt proceedings.\(^{110}\) Cantor also urges greater use of the "composition," that is, an adjustment between the parties.\(^{111}\) In such an adjustment, a defendant agrees, with the

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\(^{106}\) The federal government's program for desegregating the public schools in the South presents a good example. After it became clearly illegal to segregate school children by race, the numerous school officials who perpetuated this unlawful behavior were engaged in criminal conduct in violation of 18 U.S.C. § 242 (1976). Nonetheless, instead of resorting to criminal prosecutions, federal officials chose to use a variety of nonpunitive means to achieve compliance with the law. The 1964 Civil Rights Act, 42 U.S.C. §§ 2000a to 2000d-6 (1976), provided the statutory authority. Pursuant to 42 U.S.C. § 2000d-1 (1976), the Secretary of HEW withheld federal aid to education funds from school districts which refused to desegregate. The Attorney General initiated civil suits under 42 U.S.C. § 2000c-6(a) (1976) to compel school boards to develop and implement plans to desegregate. The Commissioner of Education provided technical assistance (including plan development) and special training opportunities to school districts undergoing desegregation, as authorized by 42 U.S.C. § 2000c-2 to -4 (1976). During the period from about 1965 to 1971, these techniques were employed frequently and in a coordinated fashion to bring nearly all of the 2,702 school districts in the eleven southern states into compliance with the federal desegregation standards. These efforts ended a great deal of illegal behavior without imprisoning a single school official.

\(^{107}\) Cantor, *supra* note 98, at 107-12.

\(^{108}\) Id. at 113.

\(^{109}\) Id. at 108.

\(^{110}\) Id. at 108-11.

\(^{111}\) Id. at 111. The system of "composition" suggested by Cantor is similar to a historical practice rediscovered recently by researchers in Europe. According to Dr. Herman Bianchi, Director of the Criminological Institute at the Free University
approval of an officiating judge or panel of arbitrators, to act or refrain from acting in specified ways, such as agreeing to make restitution or to perform personal services or to cease hazardous activity (e.g., dumping dangerous chemicals into a river). A variety of procedures designed to stop conflicts, resolve disputes, or redress injuries without involving criminal courts already are in use. Community courts, neighborhood justice centers, community complaint centers, and administrative tribunals\textsuperscript{112} operate on a neighborhood level, at varying degrees of independence from formal criminal justice agencies. They rely principally on mediation, whereby disputants arrive at a mutually agreeable resolution with minimal intervention by a third party, or on arbitration, whereby the people in conflict give a neutral party authority to render a binding decision after a full private hearing.\textsuperscript{113}

The Community Board Program, for example, operates in several neighborhoods in the San Francisco area. Volunteers from the community are trained to listen to problems and conflicts and help work out solutions. All participation is voluntary; the program has no formal connection to the criminal justice system.\textsuperscript{114} In the Night Prosecutor Program in Columbus, Ohio, citizen complainants and commercial bad-check cases are referred to trained law student mediators who attempt to resolve conflicts through brief administrative hearings.\textsuperscript{115} These programs generally deal with minor incidents involving family members, neighbors, and housing managers and tenants, but their scope could be expanded considerably.\textsuperscript{116}

in Amsterdam, the Netherlands, there were only about 100 criminal trials a year in Toulouse, France, during the 17th and 18th centuries, although it was a city of about 60,000 inhabitants and the jurisdiction of the courts extended into the countryside. Crimelike conflicts—even acts of extreme violence—were not resolved by trials, but by contracts entered into by the family of the offender and the family of the victim. These contracts called for a variety of payments and services; one such contract, for example, required an offender's family to find a husband for a rape victim. Researchers found thousands of these contracts in the archives of the civil notaries. Lecture by Dr. Herman Bianchi, University of Baltimore (Dec. 7, 1978).

\textsuperscript{112} See generally \textit{The New Justice, supra} note 105.

\textsuperscript{113} \textit{Instead of Prisons, supra} note 25, at 115.


\textsuperscript{115} See generally Citizen Dispute Settlement: The Columbus Night Prosecutor's Program (National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep't of Justice 1974).

\textsuperscript{116} See generally Hofrichter, \textit{Justice Centers Raise Basic Questions, 2 New Directions in Legal Services} 168, 168-72 (1977); \textit{Instead of Prisons, supra} note 25, at 114-18. A Senate bill, S. 957, 95th Cong., 1st Sess. (1977), which did not pass in the 95th Congress, would have provided funds, technical assistance, and research money for local dispute resolution projects.
Pretrial intervention or diversion programs have been established throughout the country in recent years. These programs involve deferring prosecution of defendants who are deemed likely to benefit from treatment or services or whose offenses are seen as being of little consequence. These programs not only serve to lessen the strain on overburdened courts, but also offer defendants treatment or training options and the possibility of avoiding further criminal processing. Although there are procedural variations, the programs generally operate by securing the agreement of defendants to abide by specified conditions over a prescribed period during which prosecution is suspended. If the defendant satisfies the conditions—usually requiring freedom from arrests and participation in training, education, or counseling—the original charges are dismissed.\(^{117}\)

There are also many means of avoiding incarceration after conviction. The commitment not to rely on imprisonment is as significant in itself as the existence of alternative programs. Holland, for example, which has an imprisonment rate approximately one-tenth that of the United States,\(^{118}\) does not have a large array of alternatives to incarceration. Motivated by the strong belief that imprisonment should be used only as a last resort and then only in small increments, Dutch sentencing practices rely heavily on fines, even for serious offenses. In 1975, fines constituted 43.4% of all penalties imposed for serious offenses.\(^{119}\) An additional 20.7% of the penalties consisted of fines combined with suspended incarcerative sentences.\(^{120}\)

\(^{117}\) See generally J. Mullen, The Dilemma of Diversion (1975) (monograph prepared for National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep't of Justice). This report contains a comprehensive bibliography of articles and reports on pretrial diversion as well as detailed descriptions of programs operating in Minneapolis (Project De Novo), Massachusetts (The Court Resource Project), and Florida (The Dade County Pre-Trial Intervention Project). The report also highlights many questions being raised about these programs.

\(^{118}\) See, e.g., Doleschal, Rate and Length of Imprisonment, 23 CRIME & DELINQUENCY 51 (1977).

\(^{119}\) How Holland Supports Its Low Incarceration Rate, Reachout, July 1978, at 1, col. 2, 6, col. 2 (Newsletter of the Criminal Justice Team for the New York Conference, United Church of Christ). In 1975, only five percent of convicted federal defendants in the United States were sentenced with a fine only. In 1976, the figure rose to eight percent, but one-half of these sentences were for traffic offenses and migratory bird violations. See Table 5.22, Defendants Sentenced in U.S. District Courts, by Offense and Type and Length of Sentence, Fiscal Year 1976, in 1977 SOURCEBOOK, supra note 59, at 552-53; Table 5.23, Defendants Disposed of in U.S. District Courts, by Type of Disposition and Type and Length of Sentence, Fiscal years 1945-75, in 1977 SOURCEBOOK, supra note 59, at 554-55.

\(^{120}\) How Holland Supports Its Low Incarceration Rate, Reachout, July 1978,
Use of money fines as a criminal penalty could be expanded considerably in the United States. Fines could be graded according to ability to pay; in addition, installment payments could be permitted and other nonincarcerative penalties instituted if payment is not made. The Swedish “day fine” system offers a model worth emulating. The theory underlying the day-fine system is that “a monetary penalty should be equally burdensome for both rich and poor.”121 The amount of a fine is based on (1) the seriousness of the offense and (2) the offender’s financial resources.122 Offense severity is ranked on a scale of “day fines” from 1 to 120.123 The offender’s financial worth is reduced to a per diem income, generally formulated at one-tenth of one percent of annual income.124 For example, drunk driving might be assigned a value of 50 “day fines.” An offender earning $20,000, would have a per diem figure of $20. Thus, the penalty set for this offender would be 50 multiplied by $20 or $1000. For an offender who earned $10,000 annually, the penalty would be half as much.

Although imprisonment for unpaid fines is possible in Sweden, strenuous efforts are made to avoid it. By considering ability to pay, allowing extensions of time and installment payments, and enforcing payment, the number of persons actually imprisoned for nonpayment is kept between 100 and 200 persons per year. Given that about 250,000 persons are punished with fines each year, nonincarcerative methods of enforcement clearly predominate.125

In some instances, the fruits of fines assessed against individual or corporate offenders may be passed on, directly or indirectly, to crime victims. Some states provide direct compensation to vic-

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122. Id.
123. Id.
124. Id. at 112-13. The Swedish formula also makes adjustments for the offender’s dependents and the amount of property he or she owns. Id. at 113-14.
125. Id. at 114.
tims of crimes.\textsuperscript{126} In addition, a number of jurisdictions have formalized programs to assist offenders in making restitution.\textsuperscript{127} An adult restitution program in Georgia, for example, was designed to provide an alternative penalty for felony offenders who otherwise would be sentenced to the state’s overcrowded prisons. One part of the program is residential; converted motel and similar facilities are used as community restitution centers where offenders convicted of serious offenses are required to reside during the initial phase of their restitution participation. Other components are combined with probation or parole and are nonresidential. Participating offenders are assisted in finding employment and their earnings are distributed so as to gradually help repay victims.\textsuperscript{128}

Another form of penalty involves requiring offenders to provide service to the victim or, symbolically, to the community to help mend the damage caused. Within the last decade, some courts here and abroad have begun to use community service sentences on a regular basis. California alone now has more than fifty programs designed to place offenders in nonpaid positions with nonprofit or tax-supported agencies to perform fixed quantities of work or service as a sentencing option or condition.\textsuperscript{129} Typical tasks performed include planting trees and shrubbery, stuffing envelopes, helping the elderly or disabled, assisting in hospital wards and kitchens, and tutoring.


\textsuperscript{128} B. Read, \textit{Offender Restitution Programs in Georgia} (unpublished paper on file with the authors).

\textsuperscript{129} \textit{See, e.g.}, M.K. Harris, Community Service by Offenders (forthcoming from National Council on Crime and Delinquency under contract to American Bar Association); J. Beha, K. Carlson & R. Rosenblum, Sentencing to Community Service (Oct. 1977) (report prepared for National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep’t of Justice).
The British turned to community service sentences specifically as a means of reducing prison crowding. This penalty now is employed throughout the United Kingdom. The offenders involved have been convicted of felonies for which they could have been incarcerated. Furthermore, approximately ninety percent of the participants have had prior convictions and about half previously have served a custodial sentence.\textsuperscript{130}

The alternatives to incarceration discussed here are only those that are relatively well developed. They have been developed with primary focus on offenders involved in street crimes, although many of them, such as composition and community service, may be quite suitable for dealing with organizational crime as well. If prisons were outlawed, an even broader array of sanctioning and resolution options would, in all likelihood, be devised.

In reevaluating how best to respond to crime, the focus of concern should be shifted from the present preoccupation with society's right to retaliate against the offender with disabling force. Crime places stress on the fabric of the social structure; retaliation only serves to widen the gap between the offender and the community. Because crime undermines our confidence that the moral values of the culture can bind us together for mutual protection and well-being, society should respond to it in ways that tend to rebuild that confidence and reinforce our fundamental values. To best serve the interests of society, the interests of each of its members must be considered, including those of victims and offenders, as well as those of the broader community.

Society's interests will be served well by efforts to restore victims to their precrime condition, the damage having been repaired; to restore offenders to full status in the community, the slate having been cleaned; and to restore social harmony, the values necessary or important to society having been honored. The actions taken in response to crime should express the community's disapproval, and should encompass holding the offender responsible for his or her actions. Where feasible, involvement of the offender in righting the wrong is especially appropriate. This not only helps the victim, but also permits the offender to regain full integrity and status in the community.\textsuperscript{131}


\textsuperscript{131} Professor Bianchi points out that resolving crimes by contract has the ben-
In many cases, the offender will not be able to fully repair the damage. Being a victim of crime often includes suffering and other intangible effects that are difficult to redress. Offenders whose earning power is low or whose offenses are very severe will be unlikely to make full monetary restitution. It will be difficult to determine appropriate forms of compensation for crimes like price-fixing and polluting where harm is spread widely. Nonetheless, aiming toward restoring the victim is constructive and can help to restore social harmony.

As noted above, this Article does not attempt to present a fully developed formulation of the interests that society should try to serve in deciding how to respond to crime. Rather, the aim is to effectuate a shift in the sentencing debate away from the current focus on stale questions surrounding street crime and imprisonment—such as fixed versus indefinite terms or mandatory versus advisory guidelines on length of term—to a variety of delicate and novel issues associated with abandoning imprisonment. It would be folly to assume that all nonincarcerative penalties will be free from objectionable features. Undoubtedly, some suggested penalties will be unduly intrusive, inconsistent with individual dignity and privacy, or otherwise undesirable. However, articulating goals and principles to guide development of nonincarcerative sanctions, plus early delineation of the criteria by which new penalties will be evaluated, could help in avoiding many potential pitfalls. The following questions illustrate the types of concerns that need to be explored:

How can we prevent application of new, attractive, nonincarcerative sanctions to offenders who otherwise would have been dealt with less severely?

To what extent can we rely on the civil courts instead of the criminal justice system?

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132. See 1977 Hearings, supra note 86, 8575-9895 (sentencing and general codification). Although the criminal code bill continues to be touted as a sentencing reform, the voluminous testimony deals almost exclusively with penalties of incarceration. In addition, that full implementation of the allowed penalties would be likely to yield massive increases in human confinement at the federal level was neither raised nor challenged by many of those who testified, including some persons who have on other occasions strongly criticized America's over-reliance on incarceration.
What alternatives to confinement will be satisfactory for dealing with persons who have committed violent acts?

How can public attitudes and public policies be attuned to the realities of the harm done by corporate and organizational crime?

What mechanisms should we establish for compensating victims of crime in cases where the offender is unable to make full restitution or is never found?

Where the obligation to make restitution exceeds the offender's ability to pay, should we forgive some portion of the debt, require the offender to perform community service work, or impose other penalties?

How can we measure the extent of the injury and compensate the victims (the public) in corruption cases, such as bribery or vote fraud?

What sorts of sanctions should be imposed on offenders who fail to comply with the terms of nonincarcerative sentences?

What are the fundamental features, if any, that distinguish one form of behavioral control, such as imprisonment, from residential and nonresidential alternatives, such as probation, supervision, curfews, or halfway house residence?

How can sentencing disparity be avoided with penalties geared to the needs of victims?

Is it inevitable that the racial and class discrimination so characteristic of our confinement policies will be maintained as new practices are adopted?

Serious exploration of these and other questions will require a great deal of time, soul searching, and imagination. The process of full debate in this arena should be delayed no longer.