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# Foreword: Incarceration American-Style

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The prison is the centerpiece of American criminal justice policy. But in the United States today, incarceration is more than just a mode of criminal punishment. It is a distinct cultural practice with its own aesthetic and technique, a practice that has emerged in recent decades as a catch-all mechanism for managing social ills. The aesthetic of incarceration—orange jumpsuits, cell blocks, bars, barbed wire—has become a cultural referent so familiar it may be readily exploited for political<sup>1</sup> and even comedic purposes.<sup>2</sup> As for the technique definitive of the practice, although perhaps less widely recognized, its key features have become the default way for maintaining custodial control over imprisoned populations: greatly restricted movement;<sup>3</sup> limited media access to the facility;<sup>4</sup> strict limits on visits and communication with family and friends on the outside;<sup>5</sup> minimal access to or

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\* Professor of Law, UCLA School of Law. As I indicate in the text, I am indebted to the work of anthropologist Lorna Rhodes. I am grateful to Rhodes as well for her comments on an earlier draft of this essay and for permission to quote from her unpublished manuscript, *Dreaming of Psychiatric Citizenship: A Case Study of Supermax Confinement*, the reading of which sparked the central argument I develop here. I also thank Bernard Harcourt for providing me the opportunity to engage with Rhodes' work, the *Harvard Law & Policy Review* for providing this forum, James Forman, Jody Freeman, Hayley Horowitz, and Terry Kupers for their comments and suggestions, and Eli Tomar and the reference librarians of the UCLA Hugh and Hazel Darling Law Library for their research assistance.

<sup>1</sup> The popular outrage over bonuses awarded to executives at AIG Insurance, a company that received a multi-billion dollar bailout from Congress in 2008, provided innumerable examples by which the aesthetics of incarceration were invoked to make a political point. See e.g., Dave Chandler, *Wanted: Economic Populist Obama*, METRODENVERGREENS.ORG, Mar. 21, 2009 (“[T]he concept that AIG executives who brought down the roof should get anything besides pink slips and orange jumpsuits is sickening.”); schwabob.com, *Now They Want/Got 150 Billion?!?!?!?*, <http://www.shwabob.com/blog/?cat=21> (last visited July 19, 2009) (featuring a photograph of the bars of a prison cell, and one of a poolside resort, with the caption “AIG Execs Should Be Here [i.e. in prison]. . . Not Here! [i.e. at a resort]”).

<sup>2</sup> See, e.g., The Onion, *Prison Economy Spirals As Price of Pack of Cigarettes Exceeds Two Hand Jobs* (video clip), [http://www.theonion.com/content/video/prison\\_economy\\_spirals\\_as\\_price](http://www.theonion.com/content/video/prison_economy_spirals_as_price) (last visited July 13, 2009) (featuring “Big Dap Ramirez,” an “inside expert” on the prison economy represented in an orange jumpsuit with a cellblock backdrop, and “Onion Network Prison Economics Expert Hal Rogan,” shown in front of a prison complex, complete with guard towers and barbed wire).

<sup>3</sup> For statutes regulating and limiting inmate movement, see, e.g., CAL. CODE REGS. tit. 15, § 3274 (2009); CAL. CODE REGS. tit. 15, § 3333(a) (2009).

<sup>4</sup> See Hannah Bergman, *Barring Journalists*, NEWS MEDIA & L., July 1, 2006, at 1; MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* §14.1 (3d ed., West 2008) (“[T]he media has not always had an easy time in gaining entry into prisons.”); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1528 (2004) (noting that “nine states now bar reporters from conducting face-to-face interviews with inmates”) (citation omitted).

<sup>5</sup> See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 129–32 (2003) (upholding regulations significantly restricting visits to prisoners); see also Donald Braman, *Families and Incarceration, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 117, 120 (Marc Mauer & Medea Chesney-Lind eds., 2002) (explaining that phone calls from prison

control over personal effects;<sup>6</sup> a lack of privacy vis-à-vis staff or other prisoners;<sup>7</sup> limited access to meaningful work,<sup>8</sup> education,<sup>9</sup> or other programming;<sup>10</sup> little if any concern for the self-respect of the incarcerated;<sup>11</sup> an “us” versus “them” dynamic between the incarcerated and custodial staff;<sup>12</sup> and increased reliance on solitary confinement for the purpose of punishment or control.<sup>13</sup>

Incarceration in this sense is most commonly employed in the criminal justice context as a way to punish convicted offenders. But its reach has also come to include many others who have not been criminally sentenced but whom the state has nonetheless targeted for the strict control that incarceration provides. Thus, in addition to convicted criminal offenders, we incarcerate pretrial detainees.<sup>14</sup> We incarcerate the mentally ill.<sup>15</sup> We incarcerate

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can be expensive and noting that “many families have their phones disconnected within two months of [a family member’s] incarceration”).

<sup>6</sup> See, e.g., CAL. CODE REGS. tit. 15, § 3191 (2009) (regulating and limiting prisoners’ possession of personal property).

<sup>7</sup> See *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984) (holding that prisoners are not entitled to Fourth Amendment protection against searches of their cells and personal property since they have no reasonable expectation of privacy).

<sup>8</sup> “[B]y 1997, only 6.2% [of the prison population] was gainfully employed. . . . Intellectually challenging positions are few, and many prisoners do not find their abilities tapped by the menial jobs available.” MUSHLIN, RIGHTS OF PRISONERS § 7.1 (3d. ed., 2003). See also Robert P. Weiss, “Repatriating” Low-Wage Work: *The Political Economy of Prison Labor Reprivatization in the Postindustrial United States*, 39 CRIMINOLOGY 253, 269 (2001) (arguing that “in an extremely coercive penal environment, work can be liberating”).

<sup>9</sup> See 20 U.S.C.A. § 1091(r)(1) (West 2009) (excluding any student from federal loan eligibility following a drug-related conviction); 20 U.S.C.A. § 1070a(b)(7) (West 2009) (excluding from Pell grant eligibility “any individual who is incarcerated in any Federal or State penal institution”); Joshua Page, *Eliminating the Enemy: The Import of Denying Prisoners Access to Higher Education in Clinton’s America*, 6 PUNISHMENT & SOC’Y 357, 373 (2004) (arguing that by eliminating Pell grant eligibility for incarcerated persons, Congress “committed prisoners to ‘social death’, [by] eliminat[ing] the only vehicle that many prisoners had for accumulating valued cultural capital”).

<sup>10</sup> See Jamie Lillis, *Prison Education Programs Reduced*, CORRECTIONS COMPENDIUM, Mar., 1994, at 1 (“At least half of all U.S. state correctional systems have made cuts in their inmate education programs during the last five years, especially in vocational and technical training.”).

<sup>11</sup> See James M. Binnall, *Respecting Beasts: The Dehumanizing Quality of the Modern Prison and an Unusual Model for Penal Reform*, 17 J.L. & POL’Y 161, 162 (2008); Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 354 (2005).

<sup>12</sup> See John J. Gibbons & Nicholas De B. Katzenbach, Commission Co-Chairs, *Prison Reform: Commission on Safety and Abuse in America’s Prisons* [A Report of The Commission on Safety and Abuse in America’s Prisons], 22 WASH. U. J.L. & POL’Y 385, 406, 465 (2006); Andrea Jacobs, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 281-84 (Fall 2004).

<sup>13</sup> See Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement: Is This Torture?*, THE NEW YORKER, Mar. 30, 2009, at 36.

<sup>14</sup> See WILLIAM J. SABOL & TODD D. MINTON, U.S. BUREAU OF JUSTICE STATISTICS, BULLETIN: JAIL INMATES AT MIDYEAR 2007, 11 tbl. 7 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jim07.pdf> (reporting that, at midyear 2007, 479,400 adults in American jails were classified as “awaiting trial or in [an]other unconvicted category”).

<sup>15</sup> See Terry A. Kupers, *What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1013-15 (2008) (explaining

undocumented immigrants, asylum seekers, and legal immigrants with prior felony convictions.<sup>16</sup> We incarcerate juvenile offenders.<sup>17</sup> We incarcerate, as a preventive measure, previously convicted sex offenders.<sup>18</sup> In some cases, we even incarcerate children without homes of their own.<sup>19</sup> And we incarcerate—in military-run institutions often closely mirroring standard domestic American prisons—those labeled “enemy combatants” in the “war on terror.”<sup>20</sup> Incarceration, in short, has become the first-line policy response to a range of social problems, the instinctive American response to perceived threats to the social order.

The puzzle is why. It is not as if mass incarceration in the criminal context has been an unmitigated policy success. In fact, the weight of the evidence suggests the opposite. As for crime prevention, as Todd Clear and James Austin explain in this volume, mass incarceration does considerably less than might be thought to reduce crime and foster public safety.<sup>21</sup> It is, moreover, extremely expensive,<sup>22</sup> expending funds that could otherwise be

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that a number of states authorize the “postrelease civil commitment” of convicted offenders judged to pose a threat to public safety as a consequence of mental illness).

<sup>16</sup> See MARK DOW, *AMERICAN GULAG: INSIDE US IMMIGRATION PRISONS* 8-9 (2004).

<sup>17</sup> As of 2006, almost 93,000 juvenile offenders were held in residential placement facilities. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *OJJDP STATISTICAL BRIEFING BOOK* (Sept. 12, 2008), available at <http://ojjdp.ncjrs.gov/ojstatbb/corrections/qa08201.asp?qaDate=2006>.

<sup>18</sup> See, e.g., CAL. WELF. & INST. CODE §§ 6600–6608 (West 2009) (establishing that convicted sex offenders found to pose a future threat to society may be detained indefinitely in a secure mental health treatment facility administered by the California Department of Corrections); see also *Kansas v. Hendricks*, 521 U.S. 346, 350-53 (1997) (upholding as constitutional a Kansas statute providing for the indefinite civil commitment of repeat sex offenders determined to pose a future risk of “predatory acts of sexual violence”).

<sup>19</sup> See NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 212 (2005) (describing the Orange County “children’s shelter”—a facility situated next to the juvenile detention center—where the children slept two to a room “along a long corridor,” “the doors locked from the outside,” “windows were covered with wire mesh,” and the children, when taken outside, “play[ed] beneath barbed wire”).

<sup>20</sup> The numerous aesthetic and technical parallels between the domestic incarceration of convicted criminal offenders and the military detention of those designated “enemy combatants” are not coincidental. To the contrary, the military drew on those with expertise in American corrections to establish its prison systems in Iraq, Afghanistan, and Guantánamo Bay. See Avery F. Gordon, *Abu Ghraib: Imprisonment and the War on Terror*, 48 *RACE & CLASS* 42, 46 (2006) (citing Mark S. Inch, *Twice the Citizens*, *CORRECTIONS TODAY* 79 (Dec. 2003)); Gordon, *supra*, at 46–47 (citing Maj. Gen. Donald J. Ryder, *Military and Civilian Corrections: The Professional Bonds*, *CORRECTIONS TODAY* 8 (Dec. 2003)); see also Fox Butterfield, *The Struggle for Iraq: Prisoners; Mistreatment of Prisoners is Called Routine in US*, *N.Y. TIMES*, May 8, 2004, at 16 (reporting that Lane McCotter, appointed to direct the reopening of the Abu Ghraib prison in Iraq, had formerly been the director of the Utah Department of Corrections, but had resigned from the post “after an inmate died while shackled [naked] to a restraining chair for 16 hours”).

<sup>21</sup> See Todd R. Clear & James R. Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 *HARV. L. & POL’Y REV.* 307, 307–11 (2009); see also Shawn D. Bushway & Raymond Paternoster, *The Impact of Prison on Crime*, in *DO PRISONS MAKE US SAFER?*, 119, 144–45 (Steven Raphael & Michael A. Stoll eds., 2009) (noting the lack of evidence that our criminal justice laws effectively prevent crime).

<sup>22</sup> See John W. Ellwood & Joshua Guetzkow, *Footing the Bill: Causes and Budgetary Consequences of State Spending on Corrections*, in *DO PRISONS MAKE US SAFER?*, *supra* note

spent on more socially productive enterprises.<sup>23</sup> And as Nkechi Taifa and Catherine Beane observe, mass incarceration has inflicted considerable social harm on children, families, and communities.<sup>24</sup> Yet the prison population continues to grow, and effective strategies for reform persist in eluding even those legislators who seek real change.<sup>25</sup> That this practice has spread so widely beyond the criminal justice context only deepens the mystery.

The contributions to this symposium focus on the criminal justice component of the puzzle. Considering different aspects of the issue—judicial discretion,<sup>26</sup> sentencing policy,<sup>27</sup> and the risk factors for criminal conduct<sup>28</sup>—these essays together explain how we have found ourselves with so many people in prison (over 2.3 million at last count<sup>29</sup>) and suggest how we might reverse this trend. In this Foreword, I focus on a related phenomenon: the way that, although it falls well short of serving society’s interests, the American carceral system has in recent decades come to seem immune from challenge, and indeed to have taken on a life of its own. My basic claim is that this perception is accurate—that this system *has* become self-generating. Using the example of the prison, I argue that American-style incarceration, through the conditions it inflicts, *produces* the very conduct society claims

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21, at 207, 208 (explaining that in 2000, states spent an average of \$1 billion annually on their prison systems, up from an annual average of \$280 million per state in 1980).

<sup>23</sup> By the mid-1990s, for example, California was shifting resources away from education and toward the cost of corrections. A report by the Justice Policy Institute noted that “in 1980, higher education accounted for 9.2% of [California’s] General Fund expenditures, while corrections accounted for 2.3%. [In 1997], for the first time in California’s history, more money [was] spent on corrections (9.4% of the General Fund) than on higher education (8.7%).” TARA-JEN AMBROSIO & VINCENT SCHIRALDI, *THE JUST. POL’Y INST., FROM CLASSROOMS TO CELL BLOCKS: A NATIONAL PERSPECTIVE* 2, 15 (Jan. 1997). Ellwood and Guetzkow report that nationally, “a 1 percentage point increase in the share of the budget devoted to correctional spending is associated with a decline of about 1.7 percentage points in welfare [spending].” Ellwood & Guetzkow, *supra* note 22, at 228. And even where an increase in the cost of corrections is not directly linked to a reduction in state spending in other areas, mass incarceration diverts public resources from more socially productive enterprises, since *any* money the state spends on corrections is money unavailable to be spent elsewhere.

<sup>24</sup> See Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV., 283, 288 (2009); see generally TODD R. CLEAR, *IMPRISONING COMMUNITIES* (2007); BERNSTEIN, *supra* note 19; INVISIBLE PUNISHMENT, *supra* note 5. See also Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 221, 239 (2009) (“Survey data indicate that men who have been incarcerated are much more likely to have violent relationships with their partners, even if they were incarcerated for nonviolent offenses”). On the material effects on children of having an incarcerated parent, see *infra* note 95 and accompanying text.

<sup>25</sup> See Clear & Austin, *supra* note 21.

<sup>26</sup> See Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261 (2009).

<sup>27</sup> See Clear & Austin, *supra* note 21.

<sup>28</sup> See Taifa & Beane, *supra* note 24.

<sup>29</sup> See THE PEW CENTER ON STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008). This number, moreover, understates the scope of incarceration, not taking into account the more than 650,000 people who have been released annually from state and federal prison since 2000—only to be replaced with other prisoners. WILLIAM J. SABOL & HEATHER COULTURE, U.S. BUREAU OF JUSTICE STATISTICS, *PRISON INMATES AT MIDYEAR 2007*, at 4 tbl. 4 (2007), available <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (revised June 2008).

to abhor, and thereby guarantees a steady supply of offenders whose incarceration the public will continue to demand. To make this case, I draw first on the work of anthropologist Lorna Rhodes,<sup>30</sup> which traces this process in the particular context of the supermax prison. I then look to the prison more generally and consider the multiple ways the institution of incarceration as a whole effects a similar (and in some respects identical) reproductive process. I argue, moreover, that this process does more than merely ensure that incarceration remains the favored means of criminal punishment. It also operates to create a class of permanently marginalized and degraded noncitizens, marked out by the fact of their incarceration for perpetual social exclusion and ongoing social control.

This is not, of course, the way the system is generally understood by those committed to its use. The prevailing justificatory discourse is instead one of rationality and free will,<sup>31</sup> on which the incarcerated are incarcerated as a consequence of their own culpable acts freely undertaken.<sup>32</sup> But once one recognizes the many structural mechanisms by which the carceral system secures its own reproduction, it is hard not to be skeptical of this radically individualistic notion. It is not that incarcerated offenders have not committed crimes. But the question of why people break the law is more complicated than the ideology of personal choice and free will is able to acknowledge.<sup>33</sup> And although, in the prevailing political climate, it is sometimes easy to forget, the state is not bound to answer crime with imprisonment. One often hears it asserted that “those who do the crime must do the time.” This easy slogan, however, is too quick. It misses entirely the fact that the “time” prescribed for any given offense is not preordained, but is instead a political decision made by legislators with the power to craft alternative responses if they so choose. The ready recourse to incarceration that typifies the current system is thus by no means inevitable. Yet incarceration continues to dominate the universe of policy responses to all but the most minor crimes, suggesting that what drives the carceral process is not the offenders’ choice to offend, but society’s choice to respond to those offenses with time in prison. That prison sentences are persistently justified with reference to personal responsibility and free will only indicates the extent to which society and its legislators have failed to perceive—or are wholly in-

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<sup>30</sup> See LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* (2004) [hereinafter RHODES, *TOTAL CONFINEMENT*].

<sup>31</sup> See Lorna A. Rhodes, *Supermax Prisons and the Trajectory of Exception*, 47 *STUD. IN L., POLS. & SOC. (NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE)* 193, 207 (2009) [hereinafter Rhodes, *Supermax*] (“The contemporary correctional discourse in the United States emphasizes that prisoners have made *choices*. Historical or social contextualization is minimized in favor of an intense focus on the volitional nature of crime and the culpability of the individual.”) (emphasis in original).

<sup>32</sup> The readiness with which this discourse is internalized is crisply illustrated in a cartoon by David Sipress, published in *The New Yorker* on April 15, 2002. A man, standing in front of a monkey cage, says to the boy whose hand he is holding: “He didn’t *do* anything, Gregory. This is a zoo.”

<sup>33</sup> For a discussion of the many factors contributing to criminal behavior, see Taifa & Beane, *supra* note 24.

different to—the way a carceral system may create the very “deviants” whose exclusion from society is thought to be so urgently needed.

First, consider supermax.<sup>34</sup> In these “prisons within prisons,” people “are confined for 23 or more hours a day in small single cells and removed—cuffed, tethered, and under escort—only for brief showers or solitary exercise.”<sup>35</sup> Those who misbehave are subject to forcible cell extractions, pepper spray, tasers, confinement in restraint chairs, and “the imposition of ‘isolation time’ during which they receive no exercise or showers.”<sup>36</sup> These highly restrictive conditions are typically justified as necessary to house the “worst of the worst”<sup>37</sup>—those prisoners whose extreme violence and unruly behavior make them unfit for life in the prison’s general population. As Rhodes demonstrates in her study of the “control” units of the Washington state prison system, the reigning discourse is that of autonomous choice, on which prisoners are understood to be in supermax because they have “chosen to be bad.”<sup>38</sup> The official message to residents is that they can earn their way back to the relative freedom of the general population units by “choosing to be good.” And when they are not good—when they engage in “disruptive activity” like yelling, banging on their cell doors, or throwing feces, blood or urine—they alone are considered “accountable” for the extra time added as punishment to their supermax terms.<sup>39</sup>

The problem, of course, is that the notion of the purely rational actor making calculated decisions, well known to be a myth in other spheres, is particularly mythical in the supermax context.<sup>40</sup> Rhodes’ work reveals a system in which human beings who are denied any healthy way of expressing themselves struggle against a system that operates on “an economy of attention” in which the more desperate they become for interpersonal interaction, the more studiously the officers ignore them.<sup>41</sup> It should be no surprise if

<sup>34</sup> Details of design and regulation vary among supermax units, but “the essential features” of this form of confinement are “isolation, intensive surveillance, and elaborate precautions against assault and escape whenever prisoners are out of their cells.” Lorna A. Rhodes, *Changing the Subject: Conversation in Supermax*, 20 *CULTURAL ANTHROPOLOGY* 388, 406–07 n. 6 (2005) [hereinafter Rhodes, *Conversation*].

<sup>35</sup> See Lorna A. Rhodes, *Dreaming of Psychiatric Citizenship: A Case Study of Supermax Confinement* 6 (draft paper on file with the author) [hereinafter Rhodes, *Dreaming*].

<sup>36</sup> *Id.*

<sup>37</sup> RHODES, *TOTAL CONFINEMENT*, *supra* note 30, at 58.

<sup>38</sup> See *id.* at 61. Rhodes quotes from a Massachusetts “prison media booklet,” explaining that it “is the sincere hope of the [Department of Corrections] that inmates will conform their conduct to a minimum level of good behavior and leave the [supermax unit] at less than full occupancy; however, that choice will be up to the inmate.” *Id.*

<sup>39</sup> *Id.* at 66–67.

<sup>40</sup> See Rhodes, *Supermax*, *supra* note 31, at 207–10. For a critique of the myth of the rational actor, see Russell Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051 (2000).

<sup>41</sup> RHODES, *TOTAL CONFINEMENT*, *supra* note 30, at 204. Even acts of self-destruction that seem plainly to be cries for help are regarded by officers in supermax units as manipulative bids for attention. For example, in the eyes of one officer, an inmate who has repeatedly cut himself “knows what he is doing. He’s manipulating us.” As this officer sees it, “this guy . . . has been trained that good things happen to him when he acts as he does [he is sent to the infirmary, gets attention.]” This officer proposes a different approach: to “stop making good

prisoners, driven to extremes, resort to violent disruption or antisocial behavior or if, over time, some residents of supermax become unfit for any form of community life, whether inside or outside the prison.

As one of Rhodes' subjects eloquently puts it, supermax "breaks inmates it is not meant for, and it makes inmates it is meant for."<sup>42</sup> It is the second half of this insight that bears emphasizing here: supermax *makes its own inmates*. Certainly, this cannot literally be true, since all supermax prisoners originally had to come from some other carceral facility, and officials had to deem them supermax-eligible before they could be exposed to such conditions. There thus may well have existed, prior to supermax, prisoners so violent and volatile that they could only be held safely under highly restrictive conditions. But the construction of supermax facilities, and the official determination embodied in this construction—that prisoners posing serious behavioral problems must be housed in this way—positioned supermax as the necessary and inevitable policy response to unruly prisoners. And the consignment to life under supermax conditions of prisoners who might, under other circumstances, have been regarded as emotionally troubled or mentally ill<sup>43</sup> but who now find themselves labeled "the worst of the worst" in turn guarantees a regular supply of prisoners whose continued bad behavior justifies the ongoing use of supermax confinement.<sup>44</sup> There are thus two senses in which supermax may be understood to "make its own inmates" by: (1) defining the policy universe of possible ways to view—and respond to—disfavored behaviors, and (2) creating conditions of confinement likely to reproduce the very disfavored behaviors that justified incarceration under those conditions in the first place.

But supermax is not the only carceral institution that makes its own inmates. The same is arguably true of the American prison in general. I have already alluded to one aspect of this process: the way it is taken for granted, both politically and popularly, that the appropriate policy response to all but

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things happen and start making him suffer consequences." *Id.* at 155–56 (brackets in the original).

<sup>42</sup> Rhodes, *Dreaming*, *supra* note 35, at 13.

<sup>43</sup> See *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995) (noting that, for mentally ill inmates, confining them under supermax conditions is "the mental equivalent of putting an asthmatic in a place with little air to breathe").

<sup>44</sup> In a chilling article, psychiatrist Terry Kupers traces the process by which an under-resourced system denies prisoners with serious mental illnesses meaningful psychiatric treatment and then buries them in supermax conditions that all but guarantee their continued "acting out" and thus the extension of their time in supermax. See Kupers, *supra* note 15, at 1008–10 (2008). Two mechanisms further assure the indefinite detention of the seriously mentally ill. First, under "postrelease civil commitment" laws, prison officials may keep any prisoner in custody whose mental illness justifies a finding that he "poses a substantial danger of physical harm if released." *Id.* at 1013–14. Second, rather than issuing disciplinary tickets for conduct such as "throwing" (i.e. throwing bodily waste at officers) or physically lashing out, prison officials may instigate criminal prosecutions for assault. With a conviction comes time added to the original sentence, which the defendant will in all likelihood spend in supermax. In this way, Kupers explains, the system can effectively bury those people who have become out-of-control as a consequence of the carceral conditions to which they have been subjected. See *id.* at 1013 (labeling this process "hiding the evidence").

the most minor crimes is a term of imprisonment.<sup>45</sup> This assumption calls out for critical inquiry, especially given the disproportionate number of people in prison who suffer from drug addiction<sup>46</sup> and severe mental illness,<sup>47</sup> who are poor,<sup>48</sup> unskilled, poorly educated,<sup>49</sup> and likely to have been subject to neglect or abuse as children.<sup>50</sup> It is not obvious that people with such profiles, especially those who committed non-violent offenses,<sup>51</sup> should be labeled as criminals deserving incarceration. In a society not already committed to a carceral path, they might as easily—and arguably more appropriately—be regarded as people whom society has failed, who for that reason warrant a more sympathetic response. Also demanding critical scrutiny are the behaviors society has chosen to criminalize. The war on drugs is one obvious example of a penal strategy not entailed by the targeted conduct, since the phenomenon of narcotics use could as readily call for regulation and demand-reduction as for interdiction and criminalization. Yet having constructed a system of routinely incarcerating drug offenders—users as

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<sup>45</sup> See Clear & Austin, *supra* note 21, at 308 (noting that incarceration rates in the United States are “almost five times higher than the historical norm” over the twentieth century, and “three to five times higher than in other Western Democracies”); see also James Forman, *Exporting Harshness: How the War on Crime Has Made the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 101, 111–16 (2009) (comparing the scope of incarceration in the United States and in other nations of comparable wealth, demonstrating that the U.S. is an extreme outlier, and attributing this difference to the way “we have chosen to respond to . . . crime” over the last four decades).

<sup>46</sup> See *infra* note 54 and accompanying text.

<sup>47</sup> See *infra* note 55 and accompanying text.

<sup>48</sup> Of all state prisoners arrested in 1997, from 61.4 percent to 84.9 percent (depending on education level) earned less than \$2,000 in the month before their arrest. CAROLINE WOLF HARLOW, U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: EDUCATION & CORRECTIONAL POPULATIONS 8 tbl. 14 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>. Fewer than twenty percent of felony defendants in state courts in the country’s seventy-five largest counties in 1996, and only a third of felony defendants in federal court in 1998, could afford their own attorneys. CAROLINE WOLF HARLOW, U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.gov/bjs/pub/pdf/dccc.pdf>.

<sup>49</sup> See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 4 (2003) (“Fully one-third of all prisoners were unemployed at their most recent arrest, and just 60 percent of inmates have a GED or high school diploma (compared to 85 percent of the U.S. adult population). . . . 11 percent of inmates, compared with 3 percent of the general population, self-reported having a learning disability.”).

<sup>50</sup> This is especially true of women prisoners. See CAROLINE WOLF HARLOW, U.S. BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS: PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (reporting that in a national inmate survey “[b]etween 6% and 14% of male offenders and between 23% and 37% of female offenders reported they had been physically or sexually abused before age 18”).

<sup>51</sup> Among state prisoners serving terms in excess of one year, 47 percent are non-violent offenders. HEATHER C. WEST & WILLIAM J. SABOL, U.S. BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2007, at 21–22 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf> (revised May 2009). In 2002, only one quarter of jail inmates were being held for a violent offense. See DORIS D. JAMES, U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002, at 1–4 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf> (revised Oct. 2004). See also Ambrosio & Schiraldi, *supra* note 23, at 2 (noting that “[f]ully 84 percent of the increase in state and federal prison admissions [between 1980 and 1997] was accounted for by nonviolent offenders”).

well as dealers—it has become difficult for Americans to conceive of other responses to the use and sale of drugs. At a minimum, these examples raise the possibility that the American prison, like supermax itself, may by its very prevalence shape perspectives on penal policy so as to make certain its own continued use.

Here, however, I mean to focus on the second and more direct sense in which carceral institutions reproduce themselves, and to consider how it is that the people who have been marked out for incarceration may become *through the experience of incarceration* the very “anti-social” misfits whose exclusion from society was thought so necessary. The most obvious mechanism for this form of institutional parthenogenesis is the infliction of significant burdens on the incarcerated, both during the prison term and afterwards, which collectively increase the likelihood that they will commit new crimes after release. As just noted, those whom society incarcerates for their crimes are already drawn disproportionately from society’s most disadvantaged members.<sup>52</sup> Presumably, a system committed to helping former prisoners pursue a different path would take steps to address what Taifa and Beane in this volume describe as the “interrelated risk factors” for criminal conduct, factors that together “fuel the cycle of incarceration.”<sup>53</sup> Yet as things stand, it is hard to imagine a system *less* well-designed to facilitate successful re-entry.

In American prisons today, there is little effective drug treatment, although as many as half or more of incarcerated offenders have reported problems with drug and/or alcohol addiction.<sup>54</sup> Nor is there anything like sufficient mental health care to provide adequate treatment for the estimated fifty-six percent of state prisoners who suffer from serious mental illness.<sup>55</sup> The emphasis on custody over what might be termed “rehabilitation” means that whatever skills people may have had on admission are likely to deteriorate during their prison term,<sup>56</sup> and also that few people are likely to develop new skills while in prison that will be useful to them on release. Strict limits on visiting, combined with the high cost of phone calls from prison<sup>57</sup> and the widespread practice of siting prisons far from the urban centers where pris-

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<sup>52</sup> See *supra* notes 46–50 and accompanying text; Taifa & Beane, *supra* note 24, at 304.

<sup>53</sup> Taifa & Beane, *supra* note 24, at 301.

<sup>54</sup> See CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 6 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dudsf04.pdf> (revised Jan. 19, 2007); JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 1–2 (2002), available at <http://www.ojp.gov/bjs/pub/pdf/sdatji02.pdf> (revised July 2005).

<sup>55</sup> See Kupers, *supra* note 15, at 1008 (citing U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISONERS AND JAIL INMATES (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppjin.pdf>).

<sup>56</sup> See Bruce Western, et al., *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT*, *supra* note 5, at 165, 176.

<sup>57</sup> See Braman, *supra* note 5.

oners' families are most likely to live,<sup>58</sup> mean that few people in prison are able to retain close family ties<sup>59</sup>—even though “one of the predictors of post-release success is the quality of a person’s ongoing contact with loved ones.”<sup>60</sup> Grossly inadequate medical care<sup>61</sup> leaves many prisoners with serious and/or chronic medical conditions which can impair successful reintegration. Severe overcrowding in often unhygienic conditions, together with what is frequently an absence of institutional strategies for preventing the spread of disease, means that prisoners face infection rates for HIV, hepatitis C, tuberculosis, and even staph that are far in excess of infection rates outside the prison.<sup>62</sup> Add to this picture the multiplicity of civil disabilities<sup>63</sup>—some formal, some informal—that make it hard for former prisoners to piece together the components of a stable life (home,<sup>64</sup> family,<sup>65</sup> work,<sup>66</sup>

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<sup>58</sup> See Tracy Huling, *Building a Prison Economy in Rural Areas*, in *INVISIBLE PUNISHMENT*, *supra* note 56, at 197.

<sup>59</sup> See Braman, *supra* note 5.

<sup>60</sup> Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 132 (Almerindo E. Ojeda ed., 2008).

<sup>61</sup> See generally BENJAMIN FLEURY-STEINER WITH CARLA CROWDER, *DYING INSIDE: THE HIV/AIDS WARD AT LIMESTONE PRISON* (2008). “[O]n average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [Department of Correction’s] medical delivery system.” *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at \*2-3 (N.D. Cal. Oct. 3, 2005).

<sup>62</sup> See, e.g., S. 714, 111th Cong. § 2(14) (2009) (“Prisons have become public health risks. The number of State prisoners with HIV is 2.5 times greater than the general population. The number of State prisoners with hepatitis C is 9 times that of the general population.”); Jessica R. MacNiel, Mark N. Lobato & Marisa Moore, *An Unanswered Health Disparity: Tuberculosis Among Correctional Inmates, 1993 Through 2003*, 95 AM. J. PUB. HEALTH 1800 (2005); Brent Staples, *Editorial Observer: Treat the Epidemic Behind Bars Before it Hits the Streets*, N.Y. TIMES, June 22, 2004, at A18; Silja J.A. Talvi, *Deadly Staph Infection ‘Superbug’ Has Dangerous Foothold in U.S. Jails*, ALTERNET, Mar. 23, 2009, <http://www.alternet.org/story/69576>.

<sup>63</sup> See Marc Mauer & Meda Chesney-Lind, *Introduction* in *INVISIBLE PUNISHMENT*, *supra* note 5, at 4–5 (“[A]s a result of his conviction a formerly incarcerated person may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal education assistance. His driver’s license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. . . .”) (quoting AMERICAN BAR ASSOCIATION TASK FORCE ON COLLATERAL SANCTIONS, *PROPOSED STANDARDS ON COLLATERAL SANCTIONS AND ADMINISTRATIVE DISQUALIFICATION OF CONVICTED PERSONS* (Jan. 18, 2002)).

<sup>64</sup> Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT*, *supra* note 5, at 45 (“Tenants who have been evicted from federally assisted housing because of drug-related criminal activity are ineligible for federally assisted housing for a period of three years. The new laws also give local authorities discretion to deny admission to applicants with other kinds of criminal records.”).

<sup>65</sup> Before regaining custody of their children, newly released parents may be required, among other things, to attend parenting classes, complete drug-treatment programs, and provide stable residences. Meanwhile, finding work and housing is difficult, and many parents must reimburse foster parents, and even the government, for support their children received during their incarceration. Unable to meet these unrealistic demands, many parents find their parental rights permanently terminated. See BERNSTEIN, *supra* note 19, at 154–56.

<sup>66</sup> See Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, By Race, Class, and Criminal Involvement*, in *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 203–05 (Shawn Bushway, Michael A. Stoll, and David F. Weiman eds., 2007)

schooling<sup>67</sup>), and it should come as no surprise if many former prisoners are unable to avoid reoffending on release.

In turn, furthermore, these burdens have profound and deleterious effects on the children of imprisoned parents, effects that increase the likelihood of intergenerational incarceration. There are at present 2.4 million American children with a parent in prison or jail.<sup>68</sup> For African-American children, the risk of having an incarcerated parent is especially high—nine times that of white children.<sup>69</sup> All these children experience their own psychological trauma at the disappearance of their parents, trauma that can turn to anger and frustration at an extended absence that they may not understand, and anger and resentment toward the parent (and the world) once they are old enough to make sense of the loss.<sup>70</sup> And, of course, there are material effects of having an incarcerated parent. The children lose their parents' emotional support and daily presence. They are forced to face the attitudes of authority figures (teachers, police officers, etc.) who expect them to “wind up just like their parents.”<sup>71</sup> And they are more likely to grow up in poverty or to end up in foster care,<sup>72</sup> where they “are significantly more likely to be abused and neglected . . . than their peers in the general population,”<sup>73</sup> and thus less able to develop the resilience they need if they are to forge a healthier life path than their parents. Indeed, the experience of being in foster care “is one of the best predictors there is that a child will wind up behind bars.”<sup>74</sup> Not all children facing these circumstances will end up in prison. Many will not. But given the many material and psychological burdens that come with having an incarcerated parent, the odds that such children will themselves be incarcerated at some point in their lives are notably higher than they would be had their parents remained free.<sup>75</sup>

For incarcerated offenders themselves, in addition to the material barriers to successful reentry, the day-to-day experience of imprisonment can

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(“Employers express a reluctance to hire inmates, and ex-inmates face earning penalties of between 10 to 30 percent.”) (citations omitted).

<sup>67</sup> See Lillis, *supra* note 10.

<sup>68</sup> See BERNSTEIN, *supra* note 19, at 2, 4 (noting that “[t]hree in every hundred American children has a parent behind bars”).

<sup>69</sup> See *id.* at 61. Twenty-five percent of African-American children born in 1990 had a parent sent to prison. See Western & Wildeman, *supra* note 24, at 236. By the early 2000s, “around half of black children whose parents dropped out of high school had a parent sent to prison.” *Id.*

<sup>70</sup> See BERNSTEIN, *supra* note 19, at 59 (noting that a “child who loses his parents to prison may lose his faith in the state” and face “a kind of moral jeopardy”).

<sup>71</sup> *Id.* at 211; see also ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 1–2 (2001) (describing an incident in which a staff member at a public middle school pointed out a ten-year-old African-American boy and stated “matter-of-factly” that “[t]hat one has a jail-cell with his name on it”).

<sup>72</sup> See BERNSTEIN, *supra* note 19, at 144 (noting that “[a]t any given moment, ten percent of the children of women prisoners and two percent of the children of incarcerated men are in foster care”).

<sup>73</sup> *Id.* at 145–46.

<sup>74</sup> *Id.* at 147.

<sup>75</sup> See *id.* at 212 (“In all, as many as half of male children whose parents have been incarcerated will wind up behind bars.”).

take a severe emotional and psychological toll, which, as Terry Kupers puts it, can “destroy prisoners’ ability to cope in the free world,” leaving them “broken, with no skills, and a very high risk of recidivism.”<sup>76</sup> The experience of long-term incarceration alone can undermine a person’s capacity to function in a healthy “pro-social” way on the outside.<sup>77</sup> Psychologist Craig Haney labels this phenomenon “prisonization,” the “psychological process of adapting to life in an institution where one is neither expected nor permitted to make decisions, where trust is a liability and intimacy a danger.”<sup>78</sup> Given the “learned passivity” that comes with a total loss of control over one’s life,<sup>79</sup> it is not to be wondered if those who have served their time are unable to take the steps required to build a successful post-prison existence—and if those who remain behind bars come to seem necessarily and inevitably the subject of continued confinement.

Moreover, once one takes into account the compromised character of American prison conditions, it becomes clear that the process by which this institution “makes its own inmates” is at once more complex and more insidious than may have at first appeared. It is not only that those who have been to prison for committing a crime will face material and psychological challenges making them more likely to commit further crimes on release. It is also that the experience of living under the conditions that currently define life in many of the nation’s prisons and jails can do such psychological and emotional *damage* that at least some people subject to those conditions, whatever their character prior to imprisonment, will invariably come to resemble the image of the angry, unstable, anti-social, and potentially dangerous deviant that already justifies the state’s persistent recourse to incarceration.

Consider the matter of personal space. As Justice Marshall noted in his dissent in *Rhodes v. Chapman*, “long term inmate[s]” require a minimum amount of personal space if they are “to avoid serious mental, emotional, and physical deterioration.”<sup>80</sup> But American prisons today are often chronically overcrowded, which means that people routinely live jammed into dormitories<sup>81</sup> or doubled up in tiny cells designed for a single person,<sup>82</sup> a

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<sup>76</sup> Kupers, *supra* note 60, at 129.

<sup>77</sup> *See id.*

<sup>78</sup> BERNSTEIN, *supra* note 19, at 183 (summarizing the findings of Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND RE-ENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 66 (Jeremy Travis & Michelle Waul, eds., 2003)).

<sup>79</sup> *See* BERNSTEIN, *supra* note 19, at 182 (citing JUDITH HERMAN, *TRAUMA AND RECOVERY* 74 (Basic Books 1992)).

<sup>80</sup> *Rhodes v. Chapman*, 452 U.S. 337, 371 (1981) (Marshall, J., dissenting).

<sup>81</sup> As of 2006, over 15,000 California inmates were sleeping in prison common areas “such as prison gymnasiums, dayrooms, and program rooms.” OFFICE OF GOVERNOR ARNOLD SCHWARZENEGGER, *PRISON OVERCROWDING STATE OF EMERGENCY PROCLAMATION*, Oct. 14, 2006, available at <http://gov.ca.gov/proclamation/4278>.

<sup>82</sup> These cells are often as small as 55 square feet (including bunk bed, desk, toilet and sink), and routinely house two men, leaving each inmate approximately “20–24 square feet” of living space, “an area about the size of a typical door.” *Rhodes*, 452 U.S. at 371 n. 3 (1981) (Marshall, J., dissenting). This is far less than the minimum of 40 to 80 square feet of living

situation that alone may seriously compromise prisoners' "mental [and] emotional" capacities, and which can readily give rise to anger, tension, and hostility—and thus to disorder and violence— even among people not typically prone to aggression.<sup>83</sup>

At the same time, the increased use of solitary confinement as punishment for disciplinary infractions means that more and more prisoners are experiencing the damaging effects of isolation. In this way, in addition to producing those cases of extreme dysfunction that justify the ongoing use of punitive isolation, whether in supermax or under less extreme conditions, the carceral system is also undermining the psychological and emotional capacities of innumerable prisoners who will at some point be released.<sup>84</sup> Studies show that people who have lived in supermax are likely to be not only more erratic and violent in their behavior, but also angrier. Haney's research involving prisoners in the "secure housing unit" (SHU) of California's Pelican Bay facility found that "almost ninety per cent of [residents] had difficulties with 'irrational anger,' compared with just three per cent of the [prison's] general population."<sup>85</sup> These combined effects on residents can lead to longer stays in isolation.<sup>86</sup> But the self-perpetuating tendencies of supermax and other forms of solitary confinement have also meant that in a growing number of cases, prisoners are completing their sentences while in highly restrictive solitary confinement and being released directly to the community.<sup>87</sup> Unsurprisingly, when prisoners are freed straight from any type of solitary confinement, "there is often trouble," since "[t]he anger that has been mounting during their stints in isolation causes many prisoners great difficulty controlling their tempers just after being released."<sup>88</sup> Thus, both crowding and isolation contribute to the reproductive logic of the prison, producing inmates whose anger, volatility, and general inability to function successfully in a social milieu are very likely to prompt disruptive and anti-social behavior both out in the free world and in the prisons themselves. Such behavior, in turn, seems to validate the collective commitment to the ongoing use of the carceral form.

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space *per person* recommended by the many professional correctional associations that have studied the issue. See *id.* at 371 n. 4.

<sup>83</sup> See Kupers, *supra* note 60, at 130.

<sup>84</sup> "[F]or just about all prisoners"—even those without documented mental health histories—"being held in isolated confinement for longer than 3 months causes lasting emotional damage if not full-blown psychosis and functional disability." Kupers, *supra* note 15 at 1005–06. This suggests that courts considering Eighth Amendment challenges to supermax conditions should not distinguish between prisoners who showed signs of mental illness prior to their transfer to supermax and those who did not, but should instead grant relief to all prisoners held under supermax conditions. See Rhodes, *Conversation*, *supra* note 34, at 404; Weidman, *supra* note 4, at 1529–46 (exploring the various ways that federal courts facing Eighth Amendment challenges to supermax conditions have distinguished mentally ill prisoners and accorded them special protections that are not granted to supermax inmates as a whole).

<sup>85</sup> Gawande, *supra* note 13.

<sup>86</sup> See *supra* text accompanying notes 39–41.

<sup>87</sup> Kupers, *supra* note 15, at 1011.

<sup>88</sup> *Id.* at 1010.

There is still another component of life in the modern American prison that powerfully contributes to the institutional project of making the inmates it is meant for: the ever-present possibility of violence. Although this phenomenon has many explanations, prison violence is most frequently traceable to a complex set of institutional dynamics, especially prevalent in higher security men's facilities, reflecting what is best understood as a culture of "hypermasculinity."<sup>89</sup> In this culture, there is a behavioral code that "says carry yourself like a man, be hard and tough, and don't show weakness."<sup>90</sup> Those who act against this code risk being labeled a "punk" and thus becoming a target for all manner of abuse, from intense verbal harassment and theft of personal property to serious physical assault and rape.<sup>91</sup> Men in prison therefore work hard at seeming tough and avoiding any word or act that might suggest weakness or vulnerability.<sup>92</sup>

Being forced to maintain a constant front of hypermasculinity over a long period can take a profound psychological toll. Men who have lived under these conditions report corrosive effects on the possibility of meaningful interpersonal interaction, since "[w]ithout trust or letting someone know at least some of your weaknesses, no strong bonds can develop."<sup>93</sup> The effect of these emotional barriers is more than just loneliness. Over time, the need to project a tough image, and thus to build emotional walls, compromises one's ability—crucial to a stable, healthy life—to forge meaningful bonds with others, whether inside or outside the prison. In addition, the unrelenting need to project an image of "hardness and toughness"<sup>94</sup> demands a constant readiness to use violence to prove one's own "manliness." This posture too can become instinctive if sustained long enough. Such instincts may serve a person well in a carceral context, but their likely accom-

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<sup>89</sup> See generally Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111 (Don Sabo, Terry A. Kupers & Willie London eds., 2001); see also *Part III: The Social Construction of Prison Masculinity*, in PRISON MASCULINITIES, *supra*, at 59.

<sup>90</sup> Derrick Corley, *Prison Friendships*, in PRISON MASCULINITIES, *supra* note 89, at 106.

<sup>91</sup> See Kupers, *supra* note 89, at 114. For a thoughtful treatment of the phenomenon of prison rape generally, and its cultural and legal dimensions in particular, see Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006).

<sup>92</sup> See Don Sabo, *Doing Time, Doing Masculinity: Sports and Prison*, in PRISON MASCULINITIES, *supra* note 89, at 61, 64 ("The meanings around hardness and softness also flow from and feed homophobia, which is rampant in prison."). While conducting research at the Los Angeles County Jail, I myself witnessed a particularly memorable display of the collective performance of this cultural code. In a dormitory housing around 100 medium security general population prisoners, perhaps 15 or 20 men watched a television from which emanated the pop song *Sweet Dreams (are Made of These)* by the Eurythmics. This song is one to which people listening will often sing along and even dance or at least move to the music. However, although the majority of the dorm's residents were young enough to be familiar with the song, the men whose eyes were fixed on the screen were sitting *stock still*. One young man, plainly having difficulty retaining this posture, was mouthing the words with an otherwise straight face. Had the song been playing in one of the dorms that housed the gay male and transgender prisoners who were the focus of my study, there would have been without fail a small riot of dancing and singing. But then, the Jail's segregation unit for gay male and transgender prisoners is notable for the absence of any sign of the culture of hypermasculinity that is so obviously present in the Jail's general population units.

<sup>93</sup> See, e.g., Corley, *supra* note 90, at 106–07.

<sup>94</sup> Sabo, *supra* note 92, at 65.

paniments—belligerence, insensitivity, a hair-trigger temper, an inability to admit error, back down, compromise, or work through differences in a mutually respectful way—are precisely the antisocial tendencies that society fears in former prisoners. They are also tendencies that are very likely to keep their possessors caught in “the cycle of incarceration” even after they have served their initial prison terms.<sup>95</sup>

There is an even worse malignancy in all this pressure to seem tough, which is arguably the source of the greatest damage done by incarceration in American prisons: the direct link between the culture of hypermasculinity and the fear of rape.<sup>96</sup> In many facilities—especially the overcrowded ones<sup>97</sup>—the threat of rape motivates a gendered economy of respect, in which the more masculine one appears, the more respect one gets, and thus the greater one’s protection from victimization. Sexual predators, by their predation, prove themselves to be men,<sup>98</sup> and those prisoners who appeal to correctional officers for protection will often be told to “fight or fuck.”<sup>99</sup> In such a climate, even those not otherwise prone to violence must be constantly prepared to fight.<sup>100</sup> Those unable to defend themselves can escape their dilemma only by “hooking up” with more powerful prisoners, who will protect them from violent rape by other prisoners in exchange for unlimited sexual access and other “wifely” duties like cooking and cleaning.<sup>101</sup>

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<sup>95</sup> See Taifa & Beane, *supra* note 24, at 283. Nell Bernstein argues that the metaphor of a “cycle” is too “elegant a word to describe the process,” and prefers instead that of “being caught in a turning gear.” BERNSTEIN, *supra* note 19, at 217. Bernstein is focused on the experience of children of incarcerated parents who try to avoid becoming incarcerated themselves, but the point applies just as well—and perhaps better—to the experience of former prisoners trying to avoid reoffending.

<sup>96</sup> See sources cited *supra* note 91. Although the focus here is on men’s prisons, sexual violence is also present, and does considerable damage, in women’s prisons.

<sup>97</sup> In crowded dorms, “there are rows of bunks blocking the view,” so that “beatings and rapes can go on in one part of the dorm while officers sit at their desks in another area. The noise level is so loud that muffled screams cannot be heard.” Kupers, *supra* note 60, at 130. And when two men are housed in a single cell, the more vulnerable one may be entirely subject to the will of the other when they are locked in at night.

<sup>98</sup> See James E. Robertson, ‘Fight or F—’ and Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted by Aggressors, 29 IND. L. REV. 339, 399 (1995) (quoting JACK H. ABBOTT, *IN THE BELLY OF THE BEAST* 121 (1981)) (“Many times you have to ‘prey’ on someone, or you will be preyed on yourself.”); Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens, in PRISON MASCULINITIES* *supra* note 89, at 118, 119 (“The sexual penetration of another male prisoner by a Man . . . is seen as a validation of the penetrator’s masculinity.”).

<sup>99</sup> Ristroph, *supra* note 91, at 155; Robertson, *supra* note 98, at 339. In a memoir of his time in a violent Michigan prison, T.J. Parsell tells of one prisoner, forced into sexual slavery by his “owner,” who, “when he once tried to get into [protective custody, was told by the guards] that if he didn’t like fucking no more, then he should go back out on the yard and fight like a man.” T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN’S PRISON* 152 (2006); see also *id.* at 98 (“You either fight or submit.”).

<sup>100</sup> See JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 163 (1994) (noting that “the very conditions that occur regularly in most prisons may force prisoners to engage in acts of serious violence in order to avoid being mutilated, raped, or murdered themselves”).

<sup>101</sup> See Donaldson, *supra* note 98, at 120.

This last resort, sometimes referred to as “protective pairing,” has also perhaps more aptly been described as “sexual slavery.”<sup>102</sup>

Not all prison environments reproduce these dynamics. Nor, even in those that do, are all prisoners caught up in them.<sup>103</sup> But for those who are not so lucky, the experience of living in such a culture is deeply degrading and dehumanizing, and can do serious emotional and psychological damage. Prisoners facing such conditions are not free just to walk away. They must instead remain in what can only be a permanently traumatized state, bereft of any peace of mind and constantly terrorized.<sup>104</sup> Would it be any wonder if, having endured such conditions for months or even years on end, a person might be so full of rage and self-loathing, so incapable of forming bonds of trust with other people, that he might have trouble (re)building stable, healthy relationships or even navigating ordinary social interactions on the outside? Or that he might react with anger and violence to encounters that would cause no stress or tension to one who had not been so abused?

As this brief sketch suggests, incarceration in the American prison is not a practice designed to achieve the successful social reintegration of the people who have served their time. What is effected instead is a process of dehumanization whereby incarcerated persons, through repeated humiliations, come to occupy a degraded position in the eyes of both prison officials and the public at large.<sup>105</sup> In a variety of ways, the prison’s operation reinforces the notion that prisoners are “a breed apart . . . the scum of the

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<sup>102</sup> See *id.* at 119 (explaining that punks are, “for all practical purposes, slaves [who] can be sold, traded, and rented or loaned out at the whim of their ‘Daddy’”); see also GILLIGAN, *supra* note 100, at 180; Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1 (describing one prisoner’s experience in a Texas prison, where for eighteen months, as a sex slave to a gang, he was “forced into oral sex and anal sex on a daily basis,” “bought and sold” and “rented . . . out” for sex for the benefit of the gang); see also HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 70 (2001).

<sup>103</sup> Older prisoners, prisoners known to be connected to powerful people inside or outside the facility, and others who for whatever reason are respected and left alone may be able to shield themselves from the sexual violence of the prison culture. See Kupers, *supra* note 89, at 116 (noting that in prison, “some frail intellectuals make themselves invaluable to other prisoners by becoming knowledgeable about law . . .” thereby “becom[ing] immune to gladiator battles” because “the prison toughs leave them alone.”).

<sup>104</sup> See BERNSTEIN, *supra* note 19, at 182 (quoting JUDITH HERMAN, TRAUMA AND RECOVERY 74 (1992)) (explaining that “[p]rolonged, repeated trauma . . . occurs only in circumstances of captivity”). For further discussion on the likely psychological effects as well as the normative implications of such conditions, see Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. (forthcoming 2009).

<sup>105</sup> In this sense, incarceration and its effects may be understood to constitute one long “status degradation ceremony.” See JAMES GILLIGAN, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES 152-53 (1996) (quoting Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM J. SOC. 420, 420 (1956)). The process starts early, with the “ritual degradation of booking,” when prisoners are stripped naked and forced to bend over in front of a group of officers and other inmates and submit to “digital anal rape,” a process that “is consciously and deliberately intended to terrify and humiliate the new inmate.” GILLIGAN, *supra*, at 154.

earth.”<sup>106</sup> The degradation of prisoners, an integral part of the prison culture itself, no doubt helps maintain the system of sexual violence that is often met with indifference and inaction by correctional officers.<sup>107</sup> But it also provides a pat normative justification for the perpetuation of the whole carceral system. If prisoners are “a breed apart,” and if, despite knowing the consequences, they persist in their “choice to be bad,” then perhaps there is nothing left for society but to shut them out of the public space altogether, in a place where the threat they pose can be contained. In this way, society never has to confront the fact that the perceived need to control an out-of-control population may stem from the conditions, both inside and outside the prison, to which the incarcerated have been subjected. The absence of any meaningful re-integrative project is thus revealed as both cause and effect of the system’s reproductive success; without such a project, prisoners’ re-entry efforts will in many cases be doomed to fail, and one can expect no real social investment to reintegrate those regarded as (non)people unfit for society. Here is an effective recipe for simultaneous social abandonment and continued carceral control, as those who have been incarcerated and subsequently deprived of any meaningful social or psychological support are sure to become ever more marginalized from the body politic, and the more marginalized they become, the more likely they are to wind up back in prison.

That the criminal justice system has long since abandoned rehabilitation for an agenda of controlling marginalized populations is well recognized by contemporary criminologists.<sup>108</sup> In a landmark essay published in 1992, Malcolm Feeley and Jonathan Simon sketched the contours of what they called “the new penology,” the goal of which is merely “to manage populations of marginal citizens with no concentrated effort toward integration into mainstream society.”<sup>109</sup> Feeley and Simon traced the emergence of this “new penology” to the existence of an enduring American “underclass,” a “permanently marginal population, without literacy, without skills, and without hope; a self-perpetuating and pathological segment of society that is

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<sup>106</sup> See Dolovich, *supra* note 104, Part II.D (quoting KELSEY KAUFFMAN, *PRISON OFFICERS AND THEIR WORLD* 231 (1988)). This perception “plays an important part in lowering barriers to violence in prison.” Officers trained not to touch prisoners or even call them by their names speak of “maggots killing each other, of inmates bleeding and dying, not men.” KAUFFMAN, *supra*, at 231.

<sup>107</sup> See James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C.L. REV. 433, 446 (2003) (“According to some inmates, staff regard rape as a legitimate deterrent to crime and a just desert for its commission.”); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment among Male Inmates*, 36 AM. CRIM. L. REV. 1, 42 (1999) (discussing correctional officers’ inability to maintain order and protect prisoners).

<sup>108</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on an Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 463 (1992).

<sup>109</sup> See Feeley & Simon, *supra* note 108, at 463.

not integratable into the larger whole, even as a reserve labor pool.”<sup>110</sup> Almost two decades later, incarceration has become a sure mark of membership in the underclass, a mark that only the most resilient and most fortunate are able to erase. Being so marked signals to mainstream society both difference and danger—that one is not like other people, and that one represents a threat to the social order, a threat demanding ongoing surveillance and probable reincarceration.

The humiliation and dehumanization of the people we incarcerate is a key component of this transformation from citizen to perpetual potential inmate—which brings us back to the orange jumpsuits. There is no penological reason why, within limits, people in prison cannot wear their own clothes. In France and Germany, “[p]rison uniforms have generally been abolished.”<sup>111</sup> But in the United States, orange jumpsuits are considered an integral part of the carceral process, arguably because of the way being forced to wear them makes prisoners feel, as James Whitman puts it, “diminished, lessened, lowered.”<sup>112</sup> If this is so, the degradation of the people we incarcerate is not a byproduct of the practice but instead a central component, one that both stems from and feeds the wholesale indifference with which American society generally regards the fate of its prisoners.

Prisons, in short, “make their own inmates” by constructing and branding *as* inmates the people in their custody. More than simply a term indicating a single aspect of one’s personal experience, “inmate” becomes a fixed social identity, placing those to whom it is ascribed simultaneously within the reach of state control and outside society’s moral circle. What is being mapped here are the pieces of a social system, complete with its own justificatory discourse (rationality/free will), identity categories (free citizen, inmate), structuring mechanisms (institutionalized degradation), and profound material effects (the burdens and harms inflicted on the incarcerated<sup>113</sup>). This system, however, cannot be a closed loop. Like residents of supermax, all those who are today coded as “inmates” had to start out as *non*-inmates, and thus had to come from somewhere. But from where?

If the profile of the current prison population is any guide, the answer is plain: in the United States, inmates typically start out as poor people of color—poor African-Americans in particular.<sup>114</sup> It is this group that forms

<sup>110</sup> *Id.* at 467.

<sup>111</sup> JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 8 (2003).

<sup>112</sup> *Id.*

<sup>113</sup> A complete accounting of these material effects would also include the benefits, both financial and psychological, that accrue to citizens in general, and in particular to those who make a living from the carceral system. For consideration of the financial dimensions of incarceration and an argument as to the illegitimacy of considering potential economic benefits when setting carceral policy, see Sharon Dolovich, *State Punishment and Private Prisons*, 55 *DUKE L.J.* 437, 515–45 (2005).

<sup>114</sup> Although African-Americans make up no more than 12.8 percent of the American population, U.S. CENSUS BUREAU, *USA STATE & COUNTY QUICKFACTS*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited July 7, 2009), almost 42 percent of the people behind bars in the United States are African-American. See WILLIAM J. SABOL & HEATHER

the core of society's surplus population, the "permanently marginal" of Feeley and Simon's telling, who comprise "a self-perpetuating and pathological segment of society . . . not integratable into the larger whole."<sup>115</sup> Many prisoners, of course, are not African-American. Indeed, almost forty percent of American prisoners are white.<sup>116</sup> But in today's carceral culture, in which morality has replaced slavery's use of biology as the legitimizing discourse of exclusion and control, the category of the socially dispossessed will necessarily capture whites (and other racial groups) as well as blacks. In any case, "black" and "white" are not biological traits. They are cultural ascriptions of social status.<sup>117</sup> And as the history of race in America has consistently shown, the identity of those perceived as a threat to the social order has invariably been defined by an association with the subjects of slavery.<sup>118</sup> That thousands of prisoners are white does not make the category of "inmate" in the United States today any less a racialized one.

This is not the place to explore the deep legacy of slavery for American criminal justice policy. It is, however, hard not to see a connection between the distinct penal practices adopted in the wake of Emancipation—the plantation prison, convict leasing<sup>119</sup>—and the then-emerging political imperative of controlling newly freed Blacks. It is, moreover, telling that, as Loïc Wacquant has observed, the dramatic expansion of the penal system that began in

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COUTURE, U.S. BUREAU OF JUSTICE STATISTICS, BULLETIN, U.S. DEPARTMENT OF JUSTICE, PRISON INMATES AT THE MIDYEAR 2007, at 7 tbl. 9 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (estimating that of the 2,090,800 people behind bars in the United States in 2007, 814,700 were black men and 67,600 black women); see also THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2009), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_factsaboutprisons.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprisons.pdf) (estimating that forty percent of persons in jails or prisons in 2008 were black). Latinos too are overrepresented, making up almost twenty percent of the incarcerated population, see HEATHER C. WEST & WILLIAM J. SABOL, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007, at 4 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf> (revised May 12, 2009), although they make up no more than 14.8 percent of the population in general. See U.S. CENSUS BUREAU, *supra*. The same is true of Native Americans. See RONALD B. FLOWERS, MINORITIES AND CRIMINALITY 111 (1990); SUZANNE J. CRAWFORD & DENNIS F. KELLEY, AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA 486 (2005).

<sup>115</sup> Feeley & Simon, *supra* note 108, at 467. See also Loïc Wacquant, *Deadly Symbiosis: When the Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 105 (2001) (arguing that what he calls "the hyperghetto" today "serves the *negative economic function of storage of a surplus population* devoid of market utility, in which respect it also increasingly resembles the prison system") (emphasis in the original).

<sup>116</sup> See WILLIAM J. SABOL & HEATHER COUTURE, U.S. BUREAU OF JUSTICE STATISTICS: PRISON INMATES AT MIDYEAR 2007, at 7 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (revised June 2008) (reporting numbers indicating that non-Hispanic whites represented 37.1 percent of the 2,299,100 people incarcerated at midyear 2007).

<sup>117</sup> See Loïc Wacquant, *The New 'Peculiar Institution': On the Prison as a Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 379 (2000) (arguing that "the creation of a racial caste line separating what would later become labeled 'blacks' and 'whites'" was "an *unforeseen by-product* of the systematic enslavement and dehumanizing of Africans and their descendants on North American soil") (emphasis in the original).

<sup>118</sup> See WHITMAN, *supra* note 111, at 173 (observing that the "identification of prisoners with slaves is of central importance for the history of the generalization of low status [to prisoners] in American punishment").

<sup>119</sup> See DAVID OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

the 1970s followed a period that saw the dismantling of Jim Crow, urban race riots in the north (to which millions of blacks had emigrated to escape “continued peonage in the rural South”) and the rise of the civil rights movement.<sup>120</sup> If a “ghetto” may be understood as a site of “stigma, constraint, territorial confinement, and institutional encasement” for the management of an ostracized minority, it may not be too great a stretch to regard the modern American prison, as Wacquant puts it, as a kind of “juridical ghetto,” in which disfavored populations, disproportionately black, may be forcibly and effectively kept physically apart from society.<sup>121</sup>

In this Essay, I have focused on the process by which the prison may be said to “make its own inmates.” No doubt, each existing carceral context (jail, juvenile detention, immigration detention, the military detention of “enemy combatants,” etc.) will differently manifest its own reproductive logic depending on the particularities of its own internal culture and justificatory discourse. But appreciating the central role the American prison plays in sustaining the divide between mainstream America and the set of “dispossessed and dishonored” people who have become the primary repository of society’s hatred and fear<sup>122</sup>—largely poor, young, black (and brown) men<sup>123</sup>—prompts one to notice the way these various carceral forms operate *in tandem* to maintain that racialized divide. Together, they form a single carceral system, one which, through its tenacity and sheer size, has established itself as a key component of American society in general. And on behalf of that society, this carceral system at once excludes and controls whatever populations—most frequently populations of color—the isolation and management of which have come to seem socially and politically desirable.

Those individuals who can be found guilty of a crime are moved straight into the prison system. But the array of carceral institutions that has

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<sup>120</sup> See Wacquant, *supra* note 117, at 381.

<sup>121</sup> *Id.* at 383; see also *id.* at 384 (arguing that today’s “black ghetto,” together with the contemporary American prison, “constitutes a single *carceral continuum* which entraps a redundant population of younger black men (and increasingly women) who circulate in closed circuit between its two poles in a self-perpetuating cycle of social and legal marginality with devastating personal and social consequences”) (emphasis in the original).

<sup>122</sup> *Id.* at 95.

<sup>123</sup> It is notable that the group of African Americans invariably regarded with hatred and fear is now just a subset of the larger racial group. Indeed, as James Forman has suggested, several developments in the criminal justice context, including the move to community policing and the hiring of appreciable numbers of black police officers, indicate the extent to which many African Americans are no longer perceived as a threat to the social order merely by virtue of their race. James Forman, *Community Policing and Youth as Assets*, 95 J. OF CRIM. L. & CRIMINOLOGY 1, 23 (2004); see also Wacquant, *supra* note 117, at 99 (noting that “as African Americans differentiated along class lines and succeeded to full formal citizenship, . . . a burgeoning middle and upper class of professionals and salary earners [has been able] to partially compensate for the negative symbolic capital of blackness with their high status cultural capital and proximity to centers of political power”). Forman asks whether “the inner-city minority community writ large [has] been rescued from its historical association with criminality” by the identification of “an even more marginal sub-group on which to pin the blame” and suggests that it is young black men who have emerged as the new, concentrated target of hatred and fear in American society. Forman, *supra*, at 23.

arisen alongside the prison indicates that the legal justification of a criminal conviction has not proved sufficient to satisfy American society's existing appetite for social control. Other parallel institutions have thus emerged to fill the gaps. There is now often seamless movement among the various carceral contexts, so that a person who is caught up in one institution will become more likely to be caught by another. Sometimes this institutional transfer is legally cued, as when individuals eligible for deportation are transferred directly from prison or jail to immigration detention,<sup>124</sup> or when people who are mentally ill are incarcerated indefinitely on completion of their sentences.<sup>125</sup> In other cases, the move from one carceral context to another is simply the predictable result of prior incarceration of whatever form. No one is surprised, for example, when a young man who has spent more than nominal time in juvenile detention "graduates" to adult prison or jail. And though it may be too soon for this phenomenon to have emerged from the incarceration of so-called "enemy combatants" in the "war on terror," given the systematically restrictive and degrading conditions to which some prisoners at Abu Ghraib and Guantánamo Bay have been subjected and the likely emotional and psychological damage they have suffered, it should be no surprise if even those detainees who were previously innocent of hostile acts against the United States were motivated on release to take up arms against the nation responsible for the treatment they endured—thus opening the way for their perhaps permanent reincarceration should they again be caught.

That this vast carceral system has emerged in a nation with such a deep self-professed commitment to the ideal of universal liberty may seem profoundly paradoxical. But this conjunction may be no accident. In a related context, Steve Martinot argues that the racial categories of "white" and "black" can exist only in relation to each other. One knows that one is "white," and what it means to *be* "white," only by keeping always in mind what it means to be "black" as that state has been defined by the prevailing culture.<sup>126</sup> Whites, Martinot suggests, must as the dominant group "inferiorize[ ] another group in order to superiorize itself."<sup>127</sup> Perhaps, in the same

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<sup>124</sup> See 8 U.S.C.A. § 1357(d) (West 2009) (providing, with regard to controlled substance laws, that if "a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien"); Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws By State and Local Police*, 7 SEATTLE J. FOR SOC. JUST. 321, 333–35 (2008) ("Under current practice, if a police officer brings an undocumented noncitizen to jail following an arrest, a stay at the jail—regardless of the length of the stay and even if no charges are [ultimately] filed—will most likely lead to the deportation of the noncitizen once an immigration detainer is issued."); Bridget Kessler, *In Jail, No Notice, No Hearing. . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 583–85 (2009) (explaining that the Department of Homeland Security may "take custody over an individual who is already in jail after he or she has completed his or her criminal sentence").

<sup>125</sup> See *supra* note 15.

<sup>126</sup> STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE* 186 (2003).

<sup>127</sup> *Id.* at 59.

way, freedom in twenty-first-century America depends on the *un*-freedom of some other unfortunates, the “dishonored and dispossessed,”<sup>128</sup> against whose radically constrained existence the life of the modern American citizen seems wonderfully unfettered by comparison, however circumscribed by social, political, and economic realities.<sup>129</sup>

In colonial days and in the early decades of the Republic, American citizens had African enslavement against which to measure their treasured ideal of liberty and give it substance.<sup>130</sup> In the United States today, there are no more slaves, but there *are* plenty of inmates—who were, it bears noting, once juridically construed as “slaves of the state.”<sup>131</sup> The “reduced status and state”<sup>132</sup> of those tagged with this contemporary degraded identity certainly offers a standard against which the conditions of life of even the worst-off free-world citizens in American society would favorably compare.

It is telling that, as Clear and Austin report in this volume, even those state officials committed to reining in the growth of their prison systems have been able to do no more than nip around the edges of the problem.<sup>133</sup> It would seem that, having built penal institutions of the sort explored here, legislators are now unable to decarcerate on anything close to the scale necessary to make a difference. In this Essay, I have suggested a number of explanations for why this might be. It may be that, having commenced the practice of incarceration and pursued it so profligately, we are unable to stop, since the conditions to which prisoners have been subjected make it hard for them to adjust to life on the outside, leading them continually to reoffend. Or perhaps, having commenced this practice, we are *afraid* to stop, because having marked out certain people as appropriate subjects for incarceration, we can no longer regard them as among the body of citizens for whom a life free from ongoing surveillance and control is desirable or appropriate. Or maybe, having grown accustomed to mass incarceration, we do not *want* to stop, since what is being done to the people in the orange jumpsuits enables the American ideal of liberty by marking its opposite, making the rest of us feel ourselves to be the free, self-directed and self-actualizing agents of our national narrative.

These theories, if at all compelling, together indicate the enormity of the challenges facing those committed to dramatically reducing, if not elimi-

<sup>128</sup> Wacquant, *supra* note 117, at 95.

<sup>129</sup> Martinot himself applies this logic to the emergence of the first penitentiaries in early nineteenth-century America. MARTINOT, *supra* note 126, at 73 (finding it “significant that the idea of the penitentiary arose during the 1830s, during the Jacksonian era, just at the moment the nation was priding itself on its openness and freedom”).

<sup>130</sup> See TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 38 (1992), *quoted in* MARTINOT, *supra* note 126, at 73 (“The concept of freedom did not emerge in a vacuum. Nothing highlighted freedom—if it did not in fact create it—like slavery.”).

<sup>131</sup> See, e.g., *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 793 (1871).

<sup>132</sup> See MARTINOT, *supra* note 126, at 63.

<sup>133</sup> See Clear & Austin, *supra* note 21, at 314 tbl. 1.

nating altogether, the practice of American-style incarceration.<sup>134</sup> But a theme evident in the Essays to follow may point the way out. That theme is an insistence on acknowledging the humanity and individuality of the people we put behind bars. It is embodied in Taifa and Beane's call for an evidence-based approach to tackling the risk factors for criminal conduct; in Judge Gertner's endorsement of evidence-based sentencing practices and guided discretion; and even in Clear and Austin's macro-level demand that policy-makers reduce the prison population by eliminating mandatory sentencing. The self-perpetuating character of the American carceral system will not be disrupted until society as a whole begins to see that it is fellow human beings we are incarcerating. Until this fact is recognized, the wise strategies for change proposed by these authors will not be widely or seriously considered. But once it is recognized, those same strategies will be irresistible.

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<sup>134</sup> No doubt even in a much reduced carceral system, public safety would require the incapacitation of some especially dangerous individuals. But such incapacitation need not take the current form. Indeed, this Essay has suggested reasons to think that the public interest in reducing the incubation of violence and other unhealthy behaviors in the prisons would be better served by a very different approach.

