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## The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions

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# The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions

Craig Haney\*

At the outset of this brief article I want to make three preliminary, clarifying points. The first is that we now fully understand—in psychology and related disciplines—that powerful social contexts like prisons can shape and transform the people who enter them. When prison environments become unduly painful they also become harmful, and prisoners carry the effects or consequences of that harm back into the “freeworld” once they have been released. Thus, bad prisons are not only unpleasant or uncomfortable; they can be destructive as well.<sup>1</sup>

It is ironic and instructive that the debate over the psychological effects of imprisonment virtually always revolves around how much *harm* is inflicted rather than how much *benefit* is produced. Even proponents of the prison status quo seem relieved to learn that prisons do not harm literally everyone confined in them. For example, prison expert Frank Porporino summarized some of the literature on prison effects stating: “the evidence indicates that imprisonment is not generally or *uniformly devastating* . . . . Imprisonment, in and of itself, does not seem *inevitably* to damage individuals.”<sup>2</sup> Nonetheless,

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1. Many of the issues discussed in this Article are addressed in greater length and put in a broader context in CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (2006). For a broader discussion of the implications of these context-related or situational effects for law, see Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL’Y & L. 3 (2002); and Craig Haney, *The Contextual Revolution in Psychology and the Question of Prison Effects*, in THE EFFECTS OF IMPRISONMENT 66 (Alison Lieblich & Shadd Maruna eds., 2005).

2. Frank J. Porporino, *Differences in Response to Long-Term Imprisonment: Implications for the Management of Long-Term Offenders*, 80 PRISON J. 35, 36 (1990) (emphasis added).

even those analysts who conclude that incarceration is not uniformly devastating or inevitably damaging rarely deny its potential to do harm. Thus, Porporino also conceded that “relationships with family and friends can be severed . . . particular vulnerabilities and inabilities to cope and adapt can come to the fore in the prison setting, and . . . the behaviour patterns and attitudes that emerge can take many forms, from deepening social and emotional withdrawal to extremes of aggression and violence.”<sup>3</sup> In any event, it is important to acknowledge that adverse prison conditions can hurt *and* harm the people who are exposed to them.

The second preliminary point I want to make is that the most important factor that helps to explain the current crisis in American corrections—a crisis that includes a lack of effective programming and treatment, the persistence of dangerous and deprived conditions of confinement, and the widespread use of forceful, extreme, and potentially damaging techniques of institutional control (such as those utilized in supermax facilities<sup>4</sup>)—is the overcrowding that has plagued our state and federal prison systems for most of the last thirty years. For example, in 1976, even before the incarceration boom began in earnest, a national news magazine told readers: “Prisons all across this country are dangerously overcrowded because of a recent, unexpected influx of inmates.”<sup>5</sup> That influx continued and, over the next three decades, overcrowding and its associated problems increased and many things worsened as a result.

It is important to note that “overcrowding” is used as something of a term of art in this context. Overcrowding in prisons is measured by more than just the ratio of prisoners to rated capacity; it also includes the extent to which a prison, or prison system, houses more prisoners than its infrastructure can humanely accommodate. Indeed, many prison systems have increased their rated “capacity” over the last thirty years without commensurate increases in programming, medical, and mental health resources. These systems are

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3. *Id.*

4. “Supermax prison” is the term given to facilities in which prisoners are confined in solitary-like confinement, nearly around the clock and typically for very long periods of time. See *infra* note 74 and accompanying text.

5. *Yesterday’s “Baby Boom” is Overcrowding Today’s Prisons*, U.S. NEWS & WORLD REP., Mar. 1, 1976, at 65.

“overcrowded” even though, technically, they do not house greater numbers of prisoners than they are designed to hold.

The final preliminary point is that the problems we now face were repeatedly predicted and certainly could have been avoided if the many early warnings had been heeded. As recently as the late 1970s there was a widespread correctional consensus about the evils of “double-celling,” which is the practice of housing two prisoners in a single cell usually designed to hold one person. Even in jurisdictions that were forced to double-cell from time to time, prison administrators understood that it was problematic. For example, as one 1979 correctional task force that included a number of high-ranking prison officials explained:

According to legislative and departmental policy, the Department of Corrections does not sanction double-celling inmates. This task force agrees with the basic premise that *double-celling violates basic standards of decent housing, health, and institutional security*; however, at present, there is no viable alternative to double-celling inmates as population projections are realized. Thus, while concurring that *double-celling is totally undesirable*, the task force must recommend this, and has attempted to propose gradual population increments and associated staffing to lessen the impact of overpopulation.<sup>6</sup>

Twenty-five years later, these observations seem woefully anachronistic. Indeed, starting in the early 1980s correctional officials and politicians began to take the “totally undesirable” practice of double-celling for granted, even though it was one that they had acknowledged violated “basic standards of decent housing, health, and institutional security.”<sup>7</sup> However, nothing had changed to alter the consensus about its undesirability or the risks it posed. Instead, the overwhelming press of numbers forced correctional administrators, line staff and, of course, prisoners to routinely accept

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6. HOUS. INVENTORY & POPULATION IMPACT TASK FORCE, CAL. DEP'T OF CORR., PRISON OVERCROWDING: A PLAN FOR HOUSING FELONS THROUGH FY 1986/87, at iv (1979) (emphasis added).

7. *Id.*

it. In fact, many administrators considered themselves fortunate if they were able to maintain a limit of *only* two prisoners to a cell during their worst periods of overcrowding.

Moreover, if the problem of prison overcrowding *had* been effectively addressed early in the era that saw unprecedented increases in the use of incarceration—for example, when the United States Supreme Court first confronted the then-controversial practice of double-celling in 1979<sup>8</sup>—not only would the recent history of corrections in the United States have been written very differently, but many of the problems that the Commission on Safety and Abuse in America's Prisons has been called upon to address and help resolve likely would never have come about. Unfortunately, in part because of the way the Supreme Court chose to handle this issue, too few lower courts were able to gain meaningful control over this pressing problem. Because judges have continued to grant great deference to correctional officials, who themselves have few options but to accommodate as best they can to the unprecedented influx of prisoners, overcrowding has gone unchecked in many jurisdictions.<sup>9</sup>

Indeed, even under the loose legal standards by which overcrowding was defined (standards that, after 1979, did not prohibit or even discourage double-celling) prison systems continued to hold too many people. Thus, according to the American Civil Liberties Union's National Prison Project, by 1995 there were thirty-three jurisdictions in the United States under court order to reduce overcrowding or improve general conditions in at least one of their major prison facilities.<sup>10</sup> Nine were operating under court orders that covered their entire prison system.<sup>11</sup> And many correctional systems

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8. The Supreme Court first confronted the issue of double-celling in the context of jail confinement in *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that the practice of "double-bunking" does not violate pretrial detainees' due process rights). Two years later the issue was examined in the context of prisons and the Eighth Amendment in *Rhodes v. Chapman*, 452 U.S. 337 (1981) (holding that "double celling" is not cruel and unusual punishment). In both cases, the Court refused to prohibit a practice that most experts and even many correctional administrators regarded as extremely problematic.

9. As evidenced by the fact that many prison systems continue to operate at well above their rated capacities, despite unprecedented prison construction.

10. NAT'L PRISON PROJECT, ACLU, STATUS REPORT: STATE PRISONS AND THE COURTS 1 (1995).

11. *Id.*

that managed to avoid judicial scrutiny were nonetheless significantly overcrowded.<sup>12</sup> The situation has not improved appreciably over the last decade, and in some jurisdictions it has gotten much worse. Even prison systems that supposedly “fixed” their overcrowding problem, often under pressure from the courts, find themselves once again confronting it and related problems.

So, with these three preliminary points in mind—that prisons can be and often are psychologically harmful; having too many prisoners makes already adverse prison conditions much worse; and many of the most serious problems that now plague American corrections could have been avoided if population limits and humane housing standards had been implemented in the early years of over-incarceration—it is possible to discuss overcrowding issues in more detail.

#### OVERCROWDING AND THE PAINS OF IMPRISONMENT

The massive influx of prisoners that began in the late 1970s and early 1980s in the United States produced a rate of growth in the nation’s prison population that scholars and legal commentators have repeatedly characterized as “unprecedented.”<sup>13</sup> Among other things, this unprecedented prison growth meant that systems everywhere became dangerously overcrowded, and many still are. In fact, some prison systems grew so large so quickly that it became difficult for prison officials to keep track of the names and locations of all of the facilities in their system, let alone to meaningfully supervise and oversee them. For example, New York now operates around seventy prisons scattered across the state,<sup>14</sup> fifty-two of which were built between 1973 and 2000.<sup>15</sup> During this same time period the prisoner population in the state increased nearly six-fold, from approximately 12,000 to more than 70,000.<sup>16</sup>

The two largest prison systems in the United States, in California and Texas, also experienced remarkable rates of rapid growth. Over

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12. *Id.*

13. *See, e.g.*, HANEY, *supra* note 1, ch. 3.

14. Ted Conover, *Guarding Sing Sing*, NEW YORKER, Apr. 3, 2000, at 55, 57.

15. *Id.*

16. *Id.*

the last thirty years, California's prisoner population expanded *eight-fold* from roughly 20,000 in the early 1970s to its current population of approximately 160,000 prisoners.<sup>17</sup> Funding for prisoner services and programming did not remotely keep pace, which meant that many more prisoners had to make do on much less. In Texas, over just the brief five-year period between 1992 and 1997, the prisoner population more than *doubled* as nearly 70,000 additional prisoners were added to the prison rolls.<sup>18</sup> Indeed, during the mid-1990s Texas achieved one of the highest incarceration rates in the United States,<sup>19</sup> and the state now operates on contracts with more than one hundred prisons in order to accommodate this expansion in its already sizable prisoner population.<sup>20</sup>

Of course, systems that grow at such a pace are at risk of losing their organizational stability. Despite the rate at which correctional capacity has increased, many prison systems remain significantly overcrowded. Overcrowding, in turn, exacerbates the chronic pains of imprisonment. Not surprisingly, a large literature on overcrowding has documented a range of adverse effects that occur when prisons have been filled to capacity and beyond. I should note that much of this literature was compiled years ago, when overcrowding was thought to be a solvable problem rather than an intractable part of the prison status quo. Although some of the studies are dated, nothing has changed to alter their troubling implications. Thus, as a group of prison researchers summarized in the 1980s, as the trend was just beginning to gather momentum, "crowding in prisons is a major source of administrative problems and adversely affects inmate health, behavior, and morale."<sup>21</sup> Two other early commentators

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17. See, e.g., Center on Juvenile & Criminal Justice: California Prison Growth, [http://www.cjci.org/cpp/ccf\\_growth.php](http://www.cjci.org/cpp/ccf_growth.php) (last visited Oct. 15, 2006).

18. See Tony Fabelo's analysis of the rapid expansion of the Texas prison system, quoted in Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 77 (1999).

19. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 1 (2006).

20. See Texas Department of Criminal Justice: Unit Directory, <http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm> (last visited Oct. 15, 2006).

21. Verne C. Cox et al., *Prison Crowding Research: The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 AM. PSYCHOLOGIST 1148, 1150 (1984); see also PAUL B. PAULUS, PRISON CROWDING: A PSYCHOLOGICAL PERSPECTIVE (1988); Gerald G. Gaes, *The Effects of Overcrowding in Prison*, in 6 CRIME &

concluded their review of the literature in much the same way, stating, “[w]ith few exceptions, the empirical studies indicate that prison overcrowding has a number of serious[,] negative consequences.”<sup>22</sup>

Although other variables may mediate or reduce the negative effects of crowding,<sup>23</sup> the psychological toll of living in a closed environment that houses too many people can be substantial. Thus, despite an occasional study that yields an inconclusive finding,<sup>24</sup> there is little reason to doubt the empirical consensus that crowding significantly worsens the quality of institutional life and increases the destructive potential of imprisonment. Among other things, we know that prison overcrowding increases negative affect among prisoners. “The present study indicates that living under relatively crowded housing conditions in a prison produces both negative affect and a lower criterion of what constitutes overcrowding.”<sup>25</sup> It also elevates prisoners’ blood pressure: “[T]he major hypothesis that there would be an association between degree of crowding and blood pressure, systolic and diastolic, was strongly supported.”<sup>26</sup> In addition, overcrowding leads to a greater number of prisoner illness complaints.<sup>27</sup>

Not surprisingly, exposure to “long-term, intense, inescapable crowding” of the sort that now characterizes many prisons results in high levels of stress that “can lead to physical and psychological impairment.”<sup>28</sup> In addition, overcrowding has been associated with

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JUST., AN ANNUAL REVIEW OF RESEARCH 95 (Michael Tonry & Norval Morris eds., 1985).

22. Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 351 (1983). Overcrowding studies at women’s prisons showed similar effects. See Barry Ruback & Timothy S. Carr, *Crowding in a Woman’s Prison: Attitudinal and Behavioral Effects*, 14 J. APPLIED SOC. PSYCHOL. 57 (1984).

23. See, e.g., Sheldon Ekland-Olson, *Crowding, Social Control, and Prison Violence: Evidence from the Post-Ruiz Years in Texas*, 20 LAW & SOC’Y REV. 389 (1986).

24. See, e.g., Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1126 (1989).

25. See Paul Paulus et al., *Some Effects of Crowding in a Prison Environment*, 5 J. APPLIED SOC. PSYCHOL. 86, 90 (1975).

26. David A. D’Atri, *Psychophysiological Responses to Crowding*, 7 ENV’T & BEHAV. 237, 247 (1975).

27. See, e.g., Garvin McCain et al., *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV’T & BEHAV. 283 (1976).

28. See, e.g., Paul Paulus et al., *Death Rates, Psychiatric Commitments, Blood Pressure,*



higher rates of disciplinary infractions. For example, one study concluded that in prisons “where crowded conditions are chronic rather than temporary . . . there is a clear association between restrictions on personal space and the occurrence of disciplinary violations.”<sup>29</sup>

Among other things, overcrowding directly affects prisoners’ mental and physical health by increasing the level of uncertainty with which they regularly must cope. One useful psychological model of the negative effects of overcrowding emphasizes the way in which being confined in a space that is occupied by too many people increases the sheer number of social interactions persons have that involve “high levels of uncertainty, goal interference, and cognitive load . . . .”<sup>30</sup> Thus, crowded conditions heighten the level of cognitive strain that prisoners experience by introducing social complexity, turnover, and interpersonal instability into an already dangerous prison world in which interpersonal mistakes or errors in social judgments can be fatal. Of course, overcrowding also raises collective frustration levels inside prisons by generally decreasing the resources available to the prisoners confined in them. The amount of things prisoners can accomplish on a day-to-day basis is compromised by the sheer number of people in between them and their goals and destinations.

#### OVERCROWDING AND DEPRIVATION: CREATING A DYSFUNCTIONAL PRISON CONTEXT

In addition to the direct effects of overcrowding on prisoners cited above, it has a profound influence on the broader context of

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*and Perceived Crowding as a Function of Institutional Crowding*, 3 ENVTL. PSYCHOL. & NONVERBAL BEHAV. 107, 115 (1978); see also ADRIAN M. OSTFELD ET AL., STRESS, CROWDING, AND BLOOD PRESSURE IN PRISON (1987).

29. See, e.g., Edwin I. Megargee, *The Association of Population Density, Reduced Space, and Uncomfortable Temperature with Misconduct in a Prison Community*, 5 AM. J. COMMUNITY PSYCHOL. 289, 295 (1977).

30. Cox et al., *supra* note 21, at 1159; see also Edward W. Sieh, *Prison Overcrowding: The Case of New Jersey*, 53 FED. PROBATION 41 (1989) (brief review of problems posed by overcrowding); Bailus Walker, Jr. & Theodore Gordon, *Health and High Density Confinement in Jails and Prisons*, 44 FED. PROBATION 53 (1980) (discussing the health risks of prison and jail overcrowding).

imprisonment. Prisoners in overcrowded correctional settings interact with more unfamiliar people, live in extremely close quarters that afford little or no privacy or respite, and their basic needs are less likely to be addressed or met. That is, overcrowding operates at an individual level to worsen the experience of imprisonment by literally changing the social context or situation to which prisoners must adapt on a daily basis. In addition, overcrowding changes the way the prison itself functions.

For one, prison systems responding to the press of numbers often forgo the careful screening, monitoring, and managing of vulnerable or problematic prisoners—in part because there are too many of them to conscientiously assess, and in part because the system lacks the capacity to address their special needs anyway. As one group of clinicians conceded: “Unfortunately, the prospect of screening inmates for mental disorder and treating those in need of mental health services has become a daunting and nearly impossible task in the present explosion of prison growth.”<sup>31</sup> Unidentified and untreated mentally ill prisoners in mainline prison populations not only are more likely to deteriorate themselves, but also to have a significant adverse effect on the prisoners with whom they must live and interact.

Over the last several decades prison administrators reacted to unprecedented levels of overcrowding in a variety of ways that (no doubt unintentionally) altered the nature of the prison setting, often making prison a more painful, harmful, and even more dangerous place. For example, resources for already limited programming and other activities were re-allocated to create bed space and maintain basic security. As many commentators have observed, the prison overcrowding crisis in the United States coincided with the advent of a correctional philosophy that saw deprivation as a goal rather than a problem.<sup>32</sup> No longer judged by their ability to rehabilitate but, rather, by their potential to punish, prison administrators felt little pressure to provide meaningful programming or activities for

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31. Frank DiCataldo et al., *Screening Prison Inmates for Mental Disorder: An Examination of the Relationship Between Mental Disorder and Prison Adjustment*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 573, 574 (1995).

32. See HANEY, *supra* note 1, ch. 3.

prisoners. Unprecedented amounts of unproductive inactivity resulted.

In the same vein, overcrowded prison systems often failed to address even the most basic educational needs of their prisoners. Surveys of literacy levels in prisons throughout the United States have documented the magnitude of this problem. One national study concluded that about seven out of ten prisoners were either illiterate or functionally illiterate in 1992.<sup>33</sup> Another study reached similar conclusions about the California prisoner population in the mid-1990s. It showed that approximately 20.8% of California prisoners read at below the third-grade level, and another 30% were only “marginally literate” by accepted educational standards.<sup>34</sup> Little has been done to remedy these problems. The state’s massive overcrowding problem hampered efforts to address this issue. By 2002 the California prison system housed over 150,000 prisoners, two-thirds of whom had been incarcerated before.<sup>35</sup> Yet, according to the California Department of Corrections, its prisoners *still* read on average at no more than a seventh-grade level.<sup>36</sup> In fact, like prisoners in many parts of the country, those in California still routinely leave prison, and return, lacking basic literacy skills.

In addition, prisoners in overcrowded correctional systems often are placed on long waiting lists to obtain prison jobs, and some never get them. By the start of the 1990s the Bureau of Justice Statistics reported that nearly 40% of the nation’s prisoners had no prison work assignments at all, and another 40% were assigned to “facility support services” that included primarily laundry, kitchen, and building maintenance jobs.<sup>37</sup> Only 7% of prisoners were involved in prison industry programs where they were likely to obtain useful job experience and develop skills that could be transferred to the free

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33. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *LITERACY BEHIND PRISON WALLS*, at xviii (Oct. 1994), available at <http://nces.ed.gov/pubs94/94102.pdf>.

34. See GARY SUTHERLAND, CAL. STATE UNIV., *READING PROFICIENCY OF INMATES IN CALIFORNIA CORRECTIONAL INSTITUTIONS* (1997).

35. *Id.*

36. CAL. DEP’T OF CORR. & REHAB., *FOURTH QUARTER 2005 FACTS AND FIGURES*, <http://www.cdcr.state.ca.us/DivisionsBoards/AOAP/FactsFiguresArchive/FactsFigures4thQ2005.html> (last visited Aug. 21, 2006).

37. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *NCJ 143496, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992*, at 640 (Kathleen Maguire et al. eds., 1993).

world.<sup>38</sup> A decade later a number of large prison systems were still reporting the same or similar levels of idleness. For example, only a little more than half of all prisoners in California are employed in prison jobs of any kind. Specifically, only 56% of the more than 150,000 California prisoners were employed in any type of work assignment at the end of 2002.<sup>39</sup>

There is widespread agreement among correctional experts that chronic idleness in prison produces negative psychological and behavioral effects. As far back as the 1980s, when trends toward overcrowding and the lack of prison programming had just begun, the United States Government Accounting Office noted: “Corrections officials believe that extensive inmate idleness can lead to destructive behavior and increase violence within institutions. Moreover, idleness does little to prepare inmates for re-entry into society.”<sup>40</sup> Other commentators agreed, noting that “[l]ess than 20 percent of the national prison population works,” and expressing concern that most inmates just “sit around, becoming bored, restless[,] and, sometimes, violent.”<sup>41</sup> They argued that the best way to keep the costs of incarceration low and the potential for rehabilitation high was to “give inmates a job.”<sup>42</sup> But the warning and advice were largely ignored as the trends toward higher rates of incarceration intensified over the next several decades.

Idleness-related frustration increases the probability of interpersonal conflict and assaults in prison. Overcrowding simultaneously reduces the opportunities for staff to effectively monitor prisoner behavior and drastically limits the option to reduce animosities between prisoners by separating them or sending them to different facilities. Thus, overcrowding means that there is less for prisoners to do, fewer outlets to release the resulting tension, a decreased staff capacity to identify prisoner problems, and fewer

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38. *Id.*

39. CAL. DEP'T OF CORR. & REHAB., *supra* note 36.

40. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE ATTORNEY GENERAL: IMPROVED PRISON WORK PROGRAMS WILL BENEFIT CORRECTIONAL INSTITUTIONS AND INMATES 2 (1982).

41. Gordon Mehler, *Prisoners Need Jobs, and We Can't Afford to Let Them Sit Idle*, L.A. DAILY J., July 28, 1984, at 4.

42. *Id.*

ways to solve them when they do occur. The increased risk of victimization is a likely result. For example, one prison researcher has noted that “[i]n less well-regulated institutions in which prisoners have little recourse to protection or in which there may be collusion between dominant prisoners and staff to maintain the peace, sexual violence tends to be greater.”<sup>43</sup> Other researchers agreed that overcrowded conditions in which prisoners have a significant amount of idle time can contribute to a higher level of prison rapes.<sup>44</sup>

Prison overcrowding can also reverberate back through the criminal justice system, creating problems in local jails.<sup>45</sup> That is, prison officials may react to overcrowded conditions by attempting to slow the rate at which they receive new prisoners. In extreme cases, they may refuse to take them at all. But the jail overcrowding that results as prisoners back up in the system, awaiting transfer to prison, is harmful in its own right. For example, “large jail populations may create a logarithmically increasing demand for services, with overcrowding speeding the deterioration of aging jail facilities and further taxing the ability of institutions to provide for basic human needs.”<sup>46</sup>

Unlike prisons, of course, jails are not structured for long-term confinement. Keeping prisoners in jails for longer periods of time means that they will be even further deprived of meaningful activity, programming, or needed services. For some prisoners, the consequences are direr still. Researchers have found that suicides are prevalent in jails with high ratios of inmates to staff members.<sup>47</sup> In addition, the same study found that natural deaths in jail can be

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43. Michael B. King, *Male Rape in Institutional Settings*, in MALE VICTIMS OF SEXUAL ASSAULT 67, 70 (Gillian C. Mezey & Michael B. King eds., 1992).

44. Phil Gunby, *Sexual Behavior in an Abnormal Situation*, 245 J. AM. MED. ASS'N 215, 216 (1981).

45. See, e.g., Henry N. Pontell & Wayne N. Welsh, *Incarceration as a Deviant Form of Social Control: Jail Overcrowding in California*, 40 CRIME & DELINQ. 18 (1994).

46. Wayne N. Welsh, *The Dynamics of Jail Reform Litigation: A Comparative Analysis of Litigation in California Counties*, 26 LAW & SOC'Y REV. 591, 604–05 (1992); see also Paul Paulus & Garvin McCain, *Crowding in Jails*, 4 BASIC & APPLIED SOC. PSYCHOL. 89 (1983).

47. See John D. Wooldredge & L. Thomas Winfree, Jr., *An Aggregate-Level Study of Inmate Suicides and Deaths Due to Natural Causes in U.S. Jails*, 29 J. RES. CRIME & DELINQ. 466, 476 (1992).

reduced when overcrowding is alleviated and other humane standards of confinement are implemented.<sup>48</sup>

As prisons filled to capacity and beyond, jail crowding became the norm. From 1984 to 2000 jails in the United States operated with inmate populations that were at or above 90% of their overall rated capacity.<sup>49</sup> Some facilities are much more crowded and there is evidence that the problem has not subsided in recent years.<sup>50</sup> Jail overcrowding also likely means that increasing numbers of persons will enter the prison system already traumatized by their prior incarceration.

#### IGNORING THE CRITICAL NEEDS OF PRISONERS IN TIMES OF CRISIS

Overcrowding not only changes the context of prison, but also leads correctional administrators to adopt problematic policies and practices that may worsen rather than alleviate many other aspects of the prison experience. Among other things, the unprecedented influx of prisoners and the levels of overcrowding it has produced over the last several decades have badly compromised the evaluation and classification of incoming prisoners. The seriousness of a prisoner's commitment offense and the length of his sentence now largely determine classification levels and, as a result, dictate most housing assignments.<sup>51</sup> This means that fewer new inmates are meaningfully screened or given a careful diagnostic evaluation or what, in the days of rehabilitation, was referred to as a "needs assessment." The task of assigning prisoners to facilities turns largely on whether and where there is available bed-space rather than matching individual prisoner needs with available programming resources.

Of course, as I noted earlier, few prisons are able to provide a majority of their prisoners with educational programs, vocational

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48. *Id.*

49. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 190251, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2000, at 501 (Kathleen Maguire & Ann L. Pastore eds., 2001).

50. See, e.g., HARRISON & BECK, *supra* note 19.

51. See HANEY, *supra* note 1, ch. 10 (discussing how this and other prison practices can be approached with more sensitivity to prisoner needs to minimize negative prison effects and optimize post-prison success).

training, or meaningful jobs that supply them with transferable skills or useful work experience. Thus, the lack of a needs assessment—in systems that are unable to address those needs—is not as pressing a concern as it would be in a properly functioning system. Moreover, the quality of the programs to which prisoners have access is often undermined by the scarce resources devoted to them. For example, here is how sociologist John Irwin characterized the vocational training programs in operating a medium security California prison he recently studied, programs in which fewer than 20% of the prisoners were fortunate enough to be involved:

Several conditions greatly weaken the efficacy of these vocational training programs, most important[ly], the lack of funds and resources. Instructors report that they have great difficulty obtaining needed equipment and materials . . . . Instructors are fired, or they quit and are not replaced . . . . Further, the training programs are regularly interrupted by lockdowns [and inclement weather] during which prisoners cannot be released to the hill for vocational training.<sup>52</sup>

Compromises to prisoner intake screening and classification brought about by overcrowding do produce another harmful consequence. Even by the most conservative calculations, there are several hundred thousand prisoners who are badly in need of counseling and treatment for a variety of pre-existing cognitive, emotional, and psychological problems.<sup>53</sup> Due in part to the overwhelming numbers of incoming prisoners compared to the resources available to devote to the initial classification process, many prison systems do a poor job at identifying such persons, let alone in allocating the necessary resources to treat them.

Especially in recent years, as the criminal justice system relinquished any pretense of tailoring prison treatment to individual offenders, the vulnerabilities or special needs of prisoners became an even less pressing concern. Although certain special needs prisoners *do* have a separate legal status with which to request protection from

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52. JOHN IRWIN, *THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS* 75 (2005).

53. See HANEY, *supra* note 1, ch. 7 (discussing these issues).

especially harsh conditions of confinement,<sup>54</sup> the prison systems in which they are housed often have been unwilling or unable to honor their claims. As prison law expert Fred Cohen has observed, “inmates who look to litigation to further their desire or need for various forms of help must somehow fit themselves into a variety of ‘special needs’ groups.”<sup>55</sup> Yet the fate of special needs prisoners is still uncertain, unpredictable, and unfortunate in many jurisdictions, and is dependent on the particular facility in which they are housed and the particular time they are placed there.<sup>56</sup>

Remarkably, many prison systems have never systematically determined exactly how many of their inmates actually are mentally ill. Some systems use rough estimates obtained from mental health staff, but these estimates are necessarily limited to cases of which the staff is personally aware.<sup>57</sup> Significant underestimates can occur, especially in poorly staffed facilities, which, in turn, may ensure that mental health services and programs will continue to be under-funded and that prisoners are underserved. California’s experience over the last several decades illustrates the pitfalls of this approach. In the late 1980s, the state legislature funded a sophisticated and comprehensive study of mental illness in the state prison system. Its results were both surprising and unsettling. By conducting a series of face-to-face diagnostic interviews with a carefully selected, representative sample of prisoners, the study determined that approximately 7.9% of all of the prisoners incarcerated in California were suffering from one of four “severe mental disorders” (severe organic brain disorder, schizophrenia, major depressive disorder, or bipolar disorder) *and* had experienced current symptomatology within a month of being

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54. An excellent analysis of the legal issues that apply to prisoners who suffer from mental disorders can be found in FRED COHEN, *THE MENTALLY DISORDERED INMATE AND THE LAW* (1998).

55. Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 453 (2004).

56. *Id.* at 465.

57. Indeed, see the much higher estimates contained in a nationwide study that relied on direct, personal interviews with prisoners and jail inmates in DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 213600, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* (2006).



interviewed.<sup>58</sup> Another 17% had less severe but still serious mental disorders.<sup>59</sup>

However, the study also found that nearly 7% of the entire prisoner population had current symptoms and severe mental disorders that were *undetected* by the prison authorities.<sup>60</sup> In the large California prison system this translated into over 4000 prisoners at the time of the study who were currently suffering from severe mental disorders but whose problems had not been identified by prison authorities.<sup>61</sup> Of course, mentally ill prisoners who were not classified as needing treatment were not likely to get any, especially in a system that, like many during this period, de-emphasized most forms of treatment and therapy. In fact, in 1992, when the study was released, the outpatient clinical staff in the California prison system was *less than 20%* of what widely accepted professional guidelines indicated it should have been, given the actual prevalence of mental illness among the prisoners.<sup>62</sup> Seven of the state's prisons, most of them large facilities with several thousand prisoners each, did not have a single psychiatrist on staff; six prisons had no mental health professionals of any kind; and ten had less than one full-time mental health clinician (they had only part-time help).<sup>63</sup>

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58. OFFICE OF HEALTH CARE SERVS., CAL. DEP'T OF CORR., CURRENT DESCRIPTION, EVALUATION, AND RECOMMENDATIONS FOR TREATMENT OF MENTALLY DISORDERED CRIMINALS/OFFENDERS ii-8 tbl.1 (1989).

59. *Id.* at 35 tbl.8.

60. *Id.* at ii-8 tbl.1.

61. Specifically, the study concluded: "A large number of *unidentified* individuals in the general population, were they to be screened, would be diagnosable with the same serious disorders and exhibit related symptoms. Given the size of the unidentified population (over 57,000 at the time of the survey), even the small base-rate of 7% for the four serious disorders amounts to over 4,000 *undetected* [seriously mentally disordered] individuals." *Id.* Before the state took steps to effectively remedy this problem nearly a decade had passed in which there were significant increases in the prisoner population and no corresponding increase in mental health personnel or services. Thus, the number of seriously mentally disordered prisoners who were undetected by the California Department of Corrections likely continued to rise.

62. See generally Donald Specter, *Cruel and Unusual Punishment of the Mentally Ill in California's Prison: A Case Study of a Class Action Suit*, 21 SOC. JUST. 109, 111 (1994).

63. *Id.* The litigation was filed to compel the state to provide adequate care for its mentally ill prisoners. California prisons housed:

[A]most 10,000 prisoners with a current major mental illness, another 20,000 with other serious mental disorders, while approximately 18,000 prisoners need some form of treatment on any given day. The ... [California Department of Corrections]

Thus, treatment resources and staffing levels were woefully inadequate in comparison to the actual magnitude of the prisoners' needs. As a result, many vulnerable prisoners were suffering from painful and potentially disabling psychiatric conditions that were overlooked or disregarded. Treatment resources were stretched so thin that even prisoners who *were* classified by the prison system as suffering from serious mental disorders were being ignored. In fact, 64% of previously diagnosed prisoners also reported that they had not received professional mental health services at *any* time during their present incarceration.<sup>64</sup>

Other direct studies of the number of mentally ill prisoners in different jurisdictions in the United States have produced varying but equally unsettling estimates.<sup>65</sup> Consistent with the notion that the prison system has become the default placement for mentally ill persons as resources have been shifted away from the public mental health system, studies suggest that the prevalence rates for major psychiatric disorders in prison are not only high but appear to be increasing.<sup>66</sup>

At the same time, there is evidence that overburdened correctional systems continue to attach low priority to addressing the needs of mentally ill prisoners. According to a Justice Department study published in 2001 that surveyed over 1500 state public and private adult correctional facilities, more than 20% of state prisons in the United States do not, as a matter of policy, even *screen* inmates at intake to determine their mental health needs.<sup>67</sup> A similar number of prisons fail to conduct any psychiatric assessments of prisoners, and slightly fewer than 20% of these facilities fail to provide inmates with

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currently has the capacity to house only 737 prisoners in a psychiatric hospital and about 3,000 in residential treatment programs.

*Id.* at 110–11.

64. *Id.* at 113.

65. See HANEY, *supra* note 1, ch. 8.

66. See, e.g., Ron Jemelka et al., *The Mentally Ill in Prison: A Review*, 40 HOSP. & COMMUNITY PSYCH. 481 (1989).

67. See ALLEN J. BECK & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 188215, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 1 (2001) (stating that nearly 70% of facilities housing state prisoners screen them at intake for mental health problems).

any therapy or counseling by trained mental health counselors.<sup>68</sup> Slightly less than half of prisons do not have around-the-clock mental health care available for prisoners who may suffer acute psychiatric crises, and a third of them fail to assist inmates in obtaining community mental health services upon release.<sup>69</sup> Because the study relied entirely on the estimates of the correctional administrators themselves, it provides a conservative approximation of the magnitude of the problem. Moreover, the survey asked respondents only about the availability of various services; it did *not* address whether the services, in those cases in which they were provided, were adequate or of sufficiently good quality overall.<sup>70</sup>

#### THE DYNAMICS OF DESPERATION: CYCLES OF DYSFUNCTIONAL BEHAVIOR

There are a number of other ways that overcrowding impacts prisoner behavior and combines with institutional responses or reactions to worsen the overall quality of life in prison. In fact, many of the changes that overcrowding brings about can generate problematic patterns and cycles of actions and reactions that produce a whole host of unintended but harmful consequences over the long run.

For example, overcrowding appears to have especially adverse effects on the institutional behavior of younger inmates. Thus, one study of the Texas prison system found that: “The greater the proportion of young prisoners housed in the institution, the greater

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68. *Id.*

69. *Id.* The figures actually were less favorable when “community-based facilities” were taken into account.

70. My interpretation of these data differs from that of the authors of the study. The tone of the Justice Department report seemed to suggest that mental health coverage in state prison systems was adequate, perhaps even impressive. Thus, at various points the authors noted that “nearly all” of the facilities accomplished one or another of the important mental health tasks that they identified. Yet, mentally ill prisoners are so numerous in the United States that even attending to “nearly all” of them still leaves tens of thousands whose needs are neglected. Moreover, mentally ill prisoners who are in need of therapeutic services but housed in one of the many facilities—between 16–29%, depending on the type of facility—in which no such services are available (let alone readily accessible or properly provided) represent a serious problem that must be addressed if the overall pains of imprisonment are to be appropriately and humanely reduced.

the infraction and assault rates. There is some evidence for an interaction effect between age and prison size. Younger inmates may be more susceptible to the problems and control structures in large prisons than older inmates.”<sup>71</sup> Another study obtained similar results, with overall correlations that revealed “a significant association between density and total assaults . . . and assaults on inmates” such that the greater the density the more frequent the assaults.<sup>72</sup> But researchers found that the relationship between crowding and violence was “strongest in the institutions housing young offenders.”<sup>73</sup>

Age-related crowding effects are not surprising. Younger prisoners tend to be more volatile, sensitive to their surroundings and, in general, more likely to react aggressively to the tensions and conflicts that crowded conditions of confinement generate. However, prison officials and staff members respond to these crowding-related infractions by punishing prisoners, often by placing them in disciplinary segregation units. The heightened reactivity of younger prisoners to their crowded living conditions means that greater numbers of them will be exposed to even harsher conditions in the segregated or isolated housing units where many eventually are confined.

However, a number of adverse and presumably unintended long-term consequences are likely to follow from this scenario. Prison officials typically use an inmate’s disciplinary segregation status to bar him or her from participation in educational or vocational programming. Moreover, extended time spent in segregation simultaneously places prisoners at risk of developing a host of adverse psychological reactions that are associated with long-term isolation.<sup>74</sup> A lack of even minimal forms of programming and

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71. Sheldon Ekland-Olson et al., *Prison Overcrowding and Disciplinary Problems: An Analysis of the Texas Prison System*, 19 J. APPLIED BEHAV. SCI. 163, 174 (1983); see also Gilbert Gaes & William McGuire, *Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates*, 22 J. RES. CRIME & DELINQ. 41 (1985).

72. Peter L. Nacci et al., *Population Density and Inmate Misconduct Rates in the Federal Prison System*, 41 FED. PROBATION 26, 29 (1977).

73. *Id.*

74. See, e.g., Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J.L. & PSYCHIATRY 49 (1986); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450

exposure to potentially disabling solitary confinement jeopardizes subsequent adjustment in the mainline prison population as well as in the freeworld. And, if these prisoners do return to prison after having been released—something we know is unfortunately more likely than not—they often find that their prior disciplinary status leads more readily to their classification as a present security risk, making them prime candidates for assignment to a segregation unit once again. Indeed, some are returned directly to disciplinary segregation, without having committed any new infractions.

Thus, the way officials respond to a structurally caused behavioral problem that they are powerless to control, by reacting to crowding-related disciplinary infractions through the use of punitive isolation, can jeopardize the long-term well-being of prisoners, create even more disruptive behavior later on, and, indirectly, increase crime.

More generally, several studies have suggested that overcrowding is directly associated with increased recidivism. For example, at the start of the 1980s David Farrington and his colleagues found a strong relationship between overcrowding and prison ineffectiveness in England.<sup>75</sup> Prisoners released from overcrowded prisons were more likely to be recommitted for subsequent criminal infractions.<sup>76</sup> The relationship could not be explained away by other variables, leading Farrington to recommend a reduction in prison overcrowding in order to improve the ability of prisons to reduce crime.<sup>77</sup> By sending fewer people to prison, or by reducing the effective lengths of prison sentences, he argued, the effectiveness of imprisonment might be enhanced.<sup>78</sup>

Similarly, several years after Farrington's English study, Canadian researchers concluded that placing low-risk offenders in often overcrowded high-security facilities resulted in high rates of re-

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(1983); Craig Haney, *Infamous Punishment: The Psychological Effects of Isolation*, 8 NAT'L PRISON PROJECT J. 3 (1993); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003) [hereinafter *Mental Health Issues*]; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

75. See David P. Farrington & Christopher P. Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221 (1980).

76. *Id.* at 230.

77. *Id.*

78. *Id.*

incarceration.<sup>79</sup> The rates were significantly higher than those of comparable low-risk offenders who had been placed in halfway houses.<sup>80</sup> The researchers concluded that the failure to properly divert low-risk offenders from high- to low-security facilities, something that overcrowded prison systems often lack the capacity to do, “may actually increase the risk of future recidivism.”<sup>81</sup>

Another example is provided by what one commentator has described the “vicious cycle” into which mentally ill prisoners can fall.<sup>82</sup> A lack of appropriate treatment and care of the sort that occurs more often in overburdened and overcrowded prison systems may worsen prisoners’ mental stability “[c]ausing hostile and aggressive behavior to the point that they break prison rules and end up in segregation units as management problems.”<sup>83</sup> Because of highly stressful conditions in segregation and the fact that mental health care there is usually of very uneven quality “this regression can go undetected for considerable periods of time before they again receive more closely monitored mental health care.”<sup>84</sup> Unfortunately, this is a cycle that “can, and often does, repeat.”<sup>85</sup>

Indeed, psychiatrist Terry Kupers has argued that an unusually high number of mentally ill persons in prison are funneled into long-term segregation, “lockup,” or “supermax” where they are confined to their cells for as many as twenty-three hours a day.<sup>86</sup> My own research and a number of other studies indicate that a high percentage of the prisoners who are confined in these special disciplinary units suffer from serious forms of mental illness.<sup>87</sup> A Canadian study estimated that approximately 29% of prisoners in special handling and long-term segregation units suffered from “severe mental

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79. See James Bonta & Laurence L. Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 312 (1987).

80. *Id.*

81. *Id.*

82. Patricia A. Streeter, *Incarceration of the Mentally Ill: Treatment of Warehousing?*, 77 MICH. BAR J. 166, 167 (1998).

83. *Id.*

84. *Id.*

85. *Id.*

86. TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT *passim* (1998).

87. See, e.g., *Mental Health Issues*, *supra* note 74.

disorders.”<sup>88</sup> A more recent study conducted by a group of Washington state researchers found exactly the same thing: 29% of intensive management prisoners in the state’s correctional system manifested at least one pre-defined indication of serious mental disorder (such as multiple admissions to an acute care mental care facility, or having been in one of the prison system’s residential mental health units).<sup>89</sup>

Especially in prison systems that do not have the resources or inclination to properly treat mentally ill prisoners, disciplinary isolation and supermax confinement offers a short-term (but shortsighted) solution to a difficult long-term problem. Disciplinary units become the default placements for disruptive, troublesome, or inconvenient mentally ill prisoners. However, despite the individual level at which these problems are understood and addressed, the disproportionately high numbers of vulnerable prisoners in disciplinary segregation reflect a failure of system-wide proportions.

In addition, many persons entering prisons suffering from pre-existing psychiatric disorders (who, in past times, would have been treated elsewhere) may find their problems made worse by the stress of confinement. Indeed, symptoms that may have been muted, kept under control, or have gone into remission may emerge in a more diagnosable, flagrant, and disabling form during imprisonment.<sup>90</sup> As Kupers put it: “Mentally disturbed prisoners have a very difficult time remaining stable in the absence of safe, supervised social interactions and meaningful structured activities. Too many end up confined to their cells, where their condition deteriorates.”<sup>91</sup> That is, poor screening and classification combine with inadequate treatment

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88. Sheilagh Hodgins & Gilles Côté, *The Mental Health of Penitentiary Inmates in Isolation*, 33 CAN. J. CRIMINOLOGY 175, 178 (1991).

89. David Lovell et al., *Who Lives in Super-Maximum Custody? A Washington State Study*, 64 FED. PROBATION 33, 36 (2000).

90. The few studies that have attempted to address this issue directly suggest that although prior psychiatric history has some effect on symptomatology during incarceration, conditions of confinement independently contribute to levels of psychopathology. For example, John Gibbs concluded that “going to jail can substantially increase the severity of some symptoms of psychopathology, and the increase is not accounted for by dramatic changes in symptom levels among those with a history of psychological problems prior to confinement.” John J. Gibbs, *Symptoms of Psychopathology Among Jail Prisoners: The Effects of Exposure to the Jail Environment*, 14 CRIM. JUST. & BEHAV. 288, 307 (1987).

91. KUPERS, *supra* note 86, at 82–83.

programs and resources to increase the number of mentally ill prisoners and exacerbate their symptoms. A problem of the prison system's own making is managed through the disciplinary confinement of mentally ill prisoners whose problems have been addressed earlier and better.

#### MAINTAINING CONTROL THROUGH FORCE AND INTIMIDATION

Overcrowding, widespread idleness, and the failure of many prison systems to address the basic needs of prisoners have changed the context of imprisonment. Tense prisons, ones that house too many people with too little to do and whose basic needs are not being addressed, present prison administrators with many volatile and potentially explosive situations. In many instances, their reactions to these conflicts and crises have been predictable but problematic, serving to increase the amount of pain dispensed in prison and, in the long run, exacerbating already dangerous situations.<sup>92</sup>

In the face of extraordinary increases in the number of prisoners, many prison administrators pressed for new tools with which to control and contain them. Most jurisdictions gave up any pretense of carefully managing the prison "careers" of inmates or effectively monitoring the quality of the conditions under which they were kept during the rapid expansion of the prisoner population. Criminologists Malcolm Feeley and Jonathan Simon identified an emerging penological management style in which correctional decision-makers came to think about prisoners only in the aggregate, as dangerous populations that need to be herded, rather than as individuals in need

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92. The criminal justice system in general also "behaves" in response to prison overcrowding in ways that sometimes make its long-term consequences worse. For example, if probation and parole services are also overtaxed by a rapid increase in the number of recently released prisoners—as most studies of these agencies seem to indicate they are—then their agents will be less able to provide guidance and meaningful supervision, or to offer services designed to help probationers avoid prison and assist parolees in making a successful transition back into the free world. This would act to increase the effect of overcrowding as a result of re-offending. *See, e.g.,* JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* (1993); *see also* William R. Kelly & Sheldon Ekland-Olson, *The Response of the Criminal Justice System to Prison Overcrowding: Recidivism Patterns Among Four Successive Parolee Cohorts*, 25 *LAW & SOC'Y REV.* 601 (1991); Edwin M. Lemert, *Visions of Social Control: Probation Considered*, 39 *CRIME & DELINQ.* 447 (1993).



of personal attention.<sup>93</sup> Indeed, in terms that captured both the dehumanized consciousness of the decision-makers and the devalued status of the prisoners under their control, Feeley and Simon analogized the overcrowding-driven new penological ideology as akin to a “waste management” function.<sup>94</sup>

Thus, rather than improving living conditions and investing in prison programs and meaningful activities in which prisoners could participate, many prison systems have committed to harsh policies and procedures designed primarily to maintain rigid order and strict control. They also now rely increasingly on sophisticated and expensive security hardware and surveillance technology. Metal detectors, x-ray machines, leg irons, waist chains, handcuffs, “black boxes,”<sup>95</sup> holding cages, “violent prisoner restraint chairs,” psychiatric screens, chain-link fences, concertina wire, tasers, stun guns, pepper spray, tear gas canisters, gas grenades, and, in some jurisdictions, mini-fourteen and nine millimeter rifles, twelve gauge shotguns, and the like now are employed *inside* the cellblocks of a number of maximum security prisons.<sup>96</sup>

For example, in maximum security prisons in California, guards armed with rifles are strategically positioned inside main-line housing units and authorized to respond to inmate disturbances with lethal force.<sup>97</sup> Prisoners are under what is euphemistically called “gun cover”<sup>98</sup> even when they are asleep. In New York City, the city’s large jail (on Rikers Island) has resorted to what has been characterized as an “iron hand” approach to regain and maintain order by “[u]sing an array of tools and tactics—from a huge SWAT

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93. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 470 (1992).

94. *Id.*

95. As described in a federal lawsuit addressing conditions of confinement at the Marion Federal Penitentiary: “A black box is a small box that fits over the chain connecting the two cuffs and that is designed to prevent an inmate from picking the lock on the handcuffs.” *Bruscino v. Carlson*, 654 F. Supp. 609, 615 n.4 (S.D. Ill. 1987). The black box is designed to immobilize a prisoner’s wrists while he is handcuffed.

96. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1179 n.52 (N.D. Cal. 1995), *rev’d and remanded*, 150 F.3d 1030 (9th Cir. 1998).

97. *Id.* at 1178.

98. *Id.* at 1183.

team to electric stun shields to a program that aggressively prosecutes inmates for crimes committed inside the jails.”<sup>99</sup>

But these iron hands have a decidedly modern, technological grip. At Rikers, for example, “stun devices—large Plexiglas shields threaded with wires—deliver six-second bursts of 50,000 volts of electricity and are used to incapacitate inmates and cut the risk of hand-to-hand violence.”<sup>100</sup> In the late 1990s the devices were being used on average about once a week in the jail.<sup>101</sup> Guards there and elsewhere also employ specially equipped “chairs with magnetic sensors that can search for bits of metal hidden in inmates’ mouths and other body cavities.”<sup>102</sup> Although guards *and* prisoners at some facilities agree that the new combination of technology and toughness can suppress violence (at Rikers what was described as “an almost eerie, ‘Twilight Zone’ calm”<sup>103</sup> was created inside the formerly chaotic jail) it fails to directly address any of the underlying contextual or structural causes of the tensions that precipitated the violence in the first place.

Nonetheless, in the words of one Rikers guard, this harsh and tough approach to prisoner control “shows we’re in charge.”<sup>104</sup> Thus, despite the modern technology in which it is cloaked, the goal of showing who is in charge, sometimes at whatever cost, remains at the core of much contemporary correctional thinking. Moreover, the prison equivalent of the “law of the instrument”<sup>105</sup> means that the sheer availability of technological devices, hardware, and weapons is likely to increase their use, even in response to minor infractions that in past times would have been resolved in other, less forceful ways. Thus, a federal judge summarized the instruments available inside California’s Pelican Bay, a high-security supermax prison, as well as the extent to which they were actually used:

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99. Christopher Drew, *Lockdown—A Special Report; An Iron Hand At Rikers Island Drastically Reduces Violence*, N.Y. TIMES, Nov. 8, 1999, at A1.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Abraham Kaplan is credited with enunciating the “law of the instrument” principle: “when your only tool is a hammer, everything begins to look like a nail.” ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE passim* (1964).

The firearms used at Pelican Bay are: (1) the Ruger Mini-14.223 caliber rifle, (2) the Heckler & Koch Model 94 (“H&K 94”) 9 millimeter carbine, using the Glaser Safety Slug, (3) the Smith & Wesson .38 caliber revolver, and (4) the Remington 12-gauge pump shotgun. Firearms were discharged 177 times in 129 incidents between the time the prison opened [in late 1989] and September 9, 1993. Of the 177 shots fired, 23 were intended to be for effect (i.e. were fired with the intent to hit a person), 152 were intended to be warning shots, and 2 were accidental. 109 shots were fired outdoors and 68 indoors. Of the 152 warning shots, 13 caused or were alleged to have caused inmate injuries from ricochets or bullet fragments.<sup>106</sup>

Indeed, he went on to describe a number of “instances of force being used excessively and for the purpose of causing harm” that occurred so often and in such a way as to constitute a pattern.<sup>107</sup> Thus, he cited a “staggering” number of documented instances of “unjustifiably high levels of force” being used that proved, powerfully and unambiguously, that “a pattern of excessive force [had] become an undeniable reality” at the prison.<sup>108</sup>

In fact, many prison systems have joined in these punitive trends and, among other things, are making more extensive use of a new form of disciplinary segregation or “lockup” of the sort practiced at California’s supermax prison at Pelican Bay. The use of long-term solitary confinement that was tried and then abandoned in the nineteenth century, when its psychological effects were recognized as harmful and inhumane, has returned in the last several decades of the twentieth century, in the form of the modern supermax prison.<sup>109</sup>

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106. *Madrid v. Gomez*, 889 F. Supp. 1146, 1179 n.52 (N.D. Cal. 1995), *rev’d and remanded*, 150 F.3d 1030 (9th Cir. 1998).

107. *Id.* at 1181.

108. *Id.*

109. For a discussion of the psychological effects of this form of confinement, see sources cited *supra* note 77. For an account of the nature of the trends toward supermax confinement, see Russ Immarigeon, *The Marionization of American Prisons*, 7 NAT’L PRISON PROJECT J. 1 (1992); Robert Perkinson, *Shackled Justice: Florence Federal Penitentiary and the New Politics of Punishment*, 21 SOC. JUST. 117 (1994); Michael Isikoff, *Hard Time: The Mission at Marion; Federal Prison Revives Debate on How to Handle Incurable Felons*, WASH. POST, May 28, 1991, at A1; Michael Isikoff, *Human Rights Group Faults Super Security Prisons*, WASH. POST, Nov. 14, 1991, at A36.

Presumably designed to limit and control violence by keeping prisoners isolated from one another, the practice confines them under especially harsh and deprived conditions for very long periods of time, with potentially disastrous psychological consequences. Thus, the harshness and potentially damaging aspects of this form of confinement are not limited to the various instruments of coercive control that are used in them.

In the case challenging the constitutionality of conditions at Pelican Bay, *Madrid v. Gomez*,<sup>110</sup> for example, the judge expressed serious concerns over the “stark sterility and unremitting monotony”<sup>111</sup> of the interior design of the supermax units, and noted that prisoners housed there could “go weeks, months[,] or potentially years with little or no opportunity for normal social contact with other people.”<sup>112</sup> The court also remarked that the sight of prisoners in the barren exercise pens to which they were restricted created an image “hauntingly similar to that of caged felines pacing in a zoo,”<sup>113</sup> and acknowledged that “many, if not most”<sup>114</sup> of the prisoners housed in supermax prisons “experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation”<sup>115</sup> to which they are exposed. Indeed, the court’s opinion acknowledged that “[s]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.”<sup>116</sup> Taking all of this into account, he concluded that Pelican Bay inflicted treatment on prisoners that “may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time.”<sup>117</sup>

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110. 889 F. Supp. 1146 (N.D. Cal. 1995).

111. *Madrid*, 889 F. Supp. at 1229.

112. *Id.*

113. *Id.*

114. *Id.* at 1235.

115. *Id.*

116. *Id.* at 1230.

117. *Id.* at 1280.

However, although the judge also found that overall conditions in the supermax units at issue in *Madrid* were “harsher than necessary to accommodate the needs of the institution,”<sup>118</sup> he decided that he lacked any constitutional basis to close the prison or even to require significant modifications in many of its general conditions.<sup>119</sup> Indeed, despite judicial rulings that have severely criticized these practices, a number of courts have similarly permitted prison systems to continue to employ them. It seems reasonable to speculate that the overcrowding pressures that have plagued prisons in the United States over the last several decades, and driven a number of prison administrators to pursue a drastic supermax “solution” to overcrowding-related problems, also have played a role in the reluctance of courts to put an end to these extreme and dangerous practices.

#### CONCLUSION

As I have tried to show, overcrowding (having more prisoners than a facility can humanely accommodate) is directly connected to many of the problems that currently confront American corrections. Although it is by no means the only cause of the deprived and dangerous conditions that prevail in many of the nation’s prisons or sole reason that many prisoners continue to be exposed to the degrading and harmful treatment, overcrowding is a central and critical issue that must be effectively addressed if these other problems are to be solved. Correctional administrators have been forced to accommodate to an unprecedented number of additional prisoners over the last several decades. They have responded in predictable but sometimes regrettable and ill-advised ways. Many prisoners now lack any form of effective programming or meaningful work during incarceration. Under conditions of unprecedented overcrowding, unheard-of levels of idleness and, in an era where prisons became devoted to punishment rather than rehabilitation, prison administrators still lack positive incentives to manage the inevitable tensions and conflicts that fester behind the walls.

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118. *Id.* at 1263.

119. *Id.* at 1267.

Supermax prisons and other forms of harsh and harmful institutional control have emerged in this context. These questionable approaches to managing prisoner behavior were “seized as a technologically enhanced tightening screw on the pressure cooker-like atmosphere that had been created inside many prison systems in the United States.”<sup>120</sup> In this context, it is important to underscore that many of the costs of overcrowding will be born not only by prisoners, but also by the larger society to which they return. These costs are rarely factored into crime control calculations or political proposals about how best to address the important goal of public safety.

In my opinion, the overcrowding that has plagued our nation’s prison system over the last several decades has changed the nature of imprisonment, altered correctional norms, placed the well-being of many prisoners and correctional staff members in jeopardy, and contributed little or nothing to the worthy goal of reducing crime rates. Many of the dangerous dynamics created by overcrowded prison conditions have been hidden and repressed (but not resolved) by the introduction of supermax and other forceful mechanisms of institutional control. Like the indirect social and psychological costs that are incurred when huge numbers of prisoners are denied meaningful programs or effective treatment for pre-existing problems, the price of this harsh treatment is merely deferred.

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120. See *Mental Health Issues*, *supra* note 74, at 128.