

# Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?

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There is already a large literature on the causes and effects of mass incarceration<sup>1</sup>—or hyper-incarceration as Loïc Wacquant more accurately labels the phenomenon.<sup>2</sup> Much less has been written about exit strategies,<sup>3</sup> and, so, I want to devote this paper to exploring the available options.

In doing so, however, I start by holding open the possibility that there are no such options. Leibnizian optimism has a dark side: If successful exit strategies were possible, they would surely have been discovered already. As the old economist joke has it, if that piece of paper lying on the ground were really a \$100 bill, someone would have picked it up by now.

Beyond this general point is the dispiriting reality that the tragedy of hyper-incarceration is tied to very large political and economic trends that are unlikely to be reversed. As others have convincingly demonstrated, the proximate cause of the astonishing growth of imprisonment seems to be the collapse of the black ghetto and, with it, of more subtle forms of discipline that once kept a racially defined “underclass” under control.<sup>4</sup> That collapse, in turn, relates to very

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<sup>1</sup> For an introduction to the literature, see, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* (David Garland ed., 2001); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

<sup>2</sup> Wacquant argues that the “hyper-incarceration” more accurately describes the phenomenon because the risk of imprisonment is heavily weighted toward a particular sub-community. See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 82, 82 (David Garland ed., 2001).

<sup>3</sup> For some proposals, see GOTTSCHALK, *supra* note 1, at 238–39 (proposing “infusing the U.S. penal system with an ethos of respect and dignity for its millions of prisoners, parolees, probationers, and former prisoners that is sorely lacking”); MICHAEL JACOBSON, *DOWNIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 216–17 (2005) (proposing state-based reform).

<sup>4</sup> For a short description of the splintering of the African American ghetto, the development and concentration of the African American “underclass,” and the accompanying breakdown of earlier methods of social control, see William Julius Wilson, *Cycles of Deprivation and the Underclass Debate*, 59 *SOC. SERV. REV.* 541 (1985). For Wilson’s full-blown and classic study, see WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) [hereinafter *THE TRULY DISADVANTAGED*]. Loïc Wacquant has provided the most

persistent racism, the splintering of the African-American community, the selective unemployment effects of world trade and globalization, and, most broadly, the decline of the U.S. economic and political power that supported American prosperity for generations.<sup>5</sup> Devising a strategy to reverse all of that would be quite an undertaking.

There is little reason, then, to be very hopeful about the possibilities of change. In this paper, I nonetheless want to explore the potential for approaches that ignore underlying causes and address instead the micro-processes that support hyper-incarceration. I do so, in large part, because of my belief that human dignity requires resistance to overwhelming evil, even in cases where the evil is quite unlikely to be overcome. Perhaps paradoxically, in some cases the response may even require trafficking in the very evil one is resisting. At least we need to discuss this possibility, and in what is undoubtedly the most controversial part of this paper, I do so.<sup>6</sup> In Part I, I describe the micro-processes that would need to be disrupted. Parts II, III, and IV outline various forms of political intervention that might accomplish such a disruption. Part V assesses the available choices for what is to be done.

### I. THE MICRO-PROCESSES OF REPRESSION

As I have just mentioned, there are very powerful forces that have pushed us toward the incarceration of an unprecedented number of our fellow citizens. But, powerful as they are, these underlying forces probably could not have produced this result without a supporting ideology that made the outcome acceptable. To see this, we need to focus on just how remarkable that outcome is. From 1970 to 2009, the number of people incarcerated in the United States has grown from 196,429 to 2.25 million, an increase of more than 1000%.<sup>7</sup> On a per capita basis,

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detailed and persuasive account of the way that mass-incarceration has replaced chattel slavery, Jim Crow, and the ghetto as methods of social control. See Loic Wacquant, *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 378 (2000): "Not crime, but the need to shore up an eroding caste cleavage, along with buttressing the emergent regime of desocialized wage labor to which most blacks are fated by virtue of their lack of marketable cultural capital, and which the most deprived among them resist by escaping into the illegal street economy, is the main impetus behind the stupendous expansion of America's penal state in the post-Keynesian age and its de facto policy of 'carceral affirmative action toward African-Americans [sic].'" See also ALEXANDER, *supra* note 1.

<sup>5</sup> Cf. THE TRULY DISADVANTAGED, *supra* note 4, at 62 (attributing the "social dislocation among the ghetto underclass" to "shifts in the American economy...the historic flow of migrants, changes in the urban minority age structure, population changes in the central city, and the class transformation of the inner city.").

<sup>6</sup> See *infra* notes 53–60 and accompanying text.

<sup>7</sup> Compare MARGARET WERNER CAHALAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, HISTORICAL CORRECTION STATISTICS IN THE UNITED STATES 1850-1984, at 35, 76 (1986), available at <https://www.ncjrs.gov/pdffiles1/pr/102529.pdf> (196,429 incarcerated individuals in the U.S. in 1970) with HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PRISON INMATES AT MIDYEAR

these numbers put us far ahead of any other nation in the world.<sup>8</sup> And for the latter part of this period, when most of the increase has come about, it has occurred against the backdrop of a *declining* crime rate.<sup>9</sup>

As astounding as these outcomes are, they understate the impact on the African American community. Black men are more than six times more likely to be incarcerated than white men.<sup>10</sup> Twenty percent of black men born between 1965 and 1969 have been imprisoned by the time they reach their early thirties.<sup>11</sup> According to Bruce Western, Meredith Kleykamp, and Jake Rosenfeld, “[twenty nine] percent of black male [high school] dropouts under the age of [forty] were behind bars on an average day in 2000.”<sup>12</sup>

All this has happened with a minimum of political opposition. Indeed, at least until very recently, political pressures have favored higher, rather than lower rates of incarceration.<sup>13</sup> Granted, the underlying causes of these trends are broad and powerful. Still, we need to explain why such a large and disturbing transformation occurred without triggering meaningful controversy. After all, the causes of global warming are also broad and powerful, but the phenomenon has nonetheless generated a political response. Why is there no comparable response to hyper-incarceration?

2009—STATISTICAL TABLES, tbl. 2 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf> (2,297,400 imprisoned individuals in 2009).

<sup>8</sup> See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, KING’S COLLEGE LONDON, WORLD PRISON POPULATION LIST 1 (8<sup>th</sup> ed. 2009) [hereinafter WORLD PRISON POPULATION] *available at* [http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th\\_41.pdf](http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf) (reporting that the United States has the highest prison population rate in the world with 756 incarcerated individuals per 100,000 in population, followed by Russia (629), Rwanda (604), St. Kitts & Nevis (588), and Cuba (about 531)). When one includes people in administrative detention, China has the most total people imprisoned. However, even by this measure, the U.S. leads the world in the per capita rate of imprisonment. See James Forman, *Why Care about Mass Incarceration?*, 108 MICH. L. REV. 993, 1004 n.49 (2010), quoting Roy Walmsley, [WORLD PRISON POPULATION].

<sup>9</sup> “Violent and property crime rates, including the rate of every type of violent and property crime measured by the [National Crime Victimization Survey] declined between 1999 and 2008.” By 2008, crime rates were at or near their lowest levels in over three decades. See MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CRIMINAL VICTIMIZATION, 2008, at 1 (2009) *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf>.

<sup>10</sup> WEST, *supra* note 7, at 2.

<sup>11</sup> See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004).

<sup>12</sup> Bruce Western, Meredith Kleykamp, & Jake Rosenfeld, *Crime, Punishment, and American Inequality 7* (June 2003) (unpublished manuscript) (on file with Princeton University), *available at* <http://inequality.princeton.edu/papers/western-crime.pdf>.

<sup>13</sup> See, e.g., KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); MARC MAUER, RACE TO INCARCERATE (1999); STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY (1984). On the deep-seated political structures that push toward increased incarceration rates, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

The simple answer to this question is racism, and, unsurprisingly, racial divisions are indeed part of the story. It does not follow, though, that racism—defined as simple, irrational racial prejudice and animus—explains all that is wrong. By insisting on this explanation, we run the risk of oversimplifying the problem, and by insisting on this definition, we run the risk of oversimplifying racism itself. The explanation treats racism as a personal moral failing or an irrational mistake, rather than as a self-perpetuating system that creates the very conditions that seem to validate it. Moreover, and relatedly, the explanation ignores (or seems to ignore) the real social dysfunctions that plague the inner-cities. If we are to develop strategies of disruption, we need a more finely textured description of the ideological structures that produce the political acquiescence necessary to carry out a program of hyper-incarceration.

In previous work, I have written at some length about these structures,<sup>14</sup> so I will do no more than briefly describe them here. The analysis starts with two competing models for crime control. The economic model treats crime and efforts to control crime as the rational response to incentives. On this model, the government sets the price of crime at a level designed to produce the optimal amount—that is, the level of crime such that the social cost of preventing the last unit is just below the cost of the crime itself.<sup>15</sup> Criminals and potential criminals, in turn, treat the risk of punishment as a cost of doing business. They, too, rationally calculate costs and benefits and commit crimes if, but only if, the benefit they receive is greater than the threatened punishment, discounted by the likelihood that it will be inflicted and appropriately adjusted according to taste for risk.<sup>16</sup>

A deficiency of the economic model is that it seems descriptively inaccurate, or at least quite incomplete. Anyone who has studied the politics of crime control knows that it is driven at least as much by anger and fear as by careful cost-benefit calculations.<sup>17</sup> Policy makers can talk openly about the costs and benefits of, say,

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<sup>14</sup> See Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97 (1996); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984); Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111 (1981).

<sup>15</sup> For standard expositions of the model, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

<sup>16</sup> See, e.g., David Pyle, *Economists, Crime and Punishment*, in THE ECONOMIC DIMENSIONS OF CRIME 83, 84 (Nigel G. Fielding et al. eds., 2000); Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 405–07 (1990).

<sup>17</sup> See, e.g., DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 135–36, 191–92 (2001); Jonathan Simon, *Fear and Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment in the United States*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 15, 15 (David Garland ed., 2001). See generally BECKETT, *supra* note 13.

increasing the speed limit on highways, but no one says publicly that there is an optimal level of rape and murder. It is not surprising then, that our actual policies depart substantially from the results we would attain if we focused solely on economic efficiency. For example, Bruce Western estimates that from 1993 to 2001, increases in incarceration rates produced a two to five percent drop in serious crime at a cost of \$53 billion.<sup>18</sup> This figure represents just the direct economic costs of imprisonment. It includes none of the huge costs to individual lives and communities imposed by our gargantuan imprisonment program. Whether any particular drop in crime is worth the cost obviously depends on how one values crime avoidance, but almost everyone would say that this is an exorbitant price to pay for relatively insignificant benefits. Of course, not everyone agrees with Western's analysis,<sup>19</sup> but even if he is wrong, there can be no doubt that, for example, our current practice of incarcerating superannuated prisoners who continue to serve very long sentences into their dotage involves a great deal of waste.<sup>20</sup>

On the other side of the ledger, it is extremely implausible that the threat of punishment alone motivates most people to obey the law, and it is obviously not true that most people need to be incapacitated to prevent crime. I do not mean to endorse the more radical assertion that deterrence does not work at all, that the threat of punishment is unnecessary, or that incapacitation is always illegitimate. The precise effects of deterrence are disputed, and it is doubtful that there is a linear relationship between the extent of punishment and the extent of deterrence.<sup>21</sup> Still, at least on a gross level, deterrence probably works at the margin, and it is at

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<sup>18</sup> According to Western's analysis, ninety percent of the decrease in crime that occurred during this period would have happened even if there had been no increase in incarceration rates. During the period he studied, the rates for state prisoners went from 725,000 to 1.2 million, or an increase of sixty-six percent. Assuming the annual cost of incarcerating an individual is \$22,000 per year, Western estimated that a two to five percent decrease in serious crime was purchased at a cost of \$53 billion. See WESTERN, *supra* note 1, at 186–87.

<sup>19</sup> For example, Stephen Levitt estimates that the increased incarceration rate during the same period produced more than a thirty percent reduction in violent crime and more than a twenty percent reduction in property crime. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 184 (2004). For similar estimates, see William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA 97 (Alfred Blumstein & Joel Wallman eds., 2000).

<sup>20</sup> There is widespread agreement that the propensity to commit criminal acts peaks in the teen years and then declines quickly as individuals reach adulthood. See, e.g., David Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 189 (1986); Darrell J. Steffensmeier, Emilie Andersen Allan, Miles D. Harer, & Cathy Streifel, *Age and the Distribution of Crime*, 94 AM J. SOC. 803, 826 (1989); Charles R. Tittle & Harold G. Grasmick, *Criminal Behavior and Age: A Test of Three Provocative Hypotheses*, J. CRIM. L. & CRIMINOLOGY 309, 342 (1997), although there is disagreement about the causal mechanism that produces this result. See Farrington, *supra* at 230–33.

<sup>21</sup> See generally Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010).

least possible that the margin is quite large.<sup>22</sup> Similarly, it is doubtless true that some people who are incapacitated would commit further crimes if released. But these observations in no way contradict the further assertion that the vast majority of people would obey the law (or at least most laws) even if they were not worried about punishment. Put differently, we would live in a very different world if everyone committed every crime that they thought they could get away with.

Standing in opposition to the economic model is the moralism model. On this model, punishment designed to achieve the purely instrumental goals at the base of the economic model is impermissible. Instead, the government should punish crime on the basis of moral desert, and the extent of punishment should be calibrated to the extent of blame.<sup>23</sup> The targets of potential criminal sanctions, in turn, do not, or do not only, calculate costs and benefits. Rather, most of them desist from crime because they have internalized the same standards of blameworthiness that motivate and justify the threatened punishment.

The moralism model may be more descriptively accurate than the economic model, but it suffers from problems of its own. The central difficulty is that it rests on ideas about free will, blameworthiness, and desert that are disputed at best and totally incoherent at worst.<sup>24</sup> True, there may be widely shared intuitions about polar cases and about the general structure of moral desert,<sup>25</sup> although even this point is disputed.<sup>26</sup> But even within this general agreement, if indeed such an agreement exists, there is no obvious and uncontroversial algorithm that converts these intuitions into an exact ranking of relative blameworthiness or, more importantly, into precise levels of punishment.<sup>27</sup> The effort to define these

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<sup>22</sup> See, e.g., JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974). On the importance of thinking about deterrence at the margin, see George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996). For some important qualifications, see Neal Kumar Katyal, *Deterrence's Difficulty*, 95 Mich. L. Rev. 2385 (1997).

<sup>23</sup> The classic statement of this position is in IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100–01 (J. Ladd, trans., The Bobbs-Merrill Co., Inc., 1965). For useful modern restatements, see Milton Goldinger, *Punishment, Justice, and the Separation of Issues*, 49 MONIST 458 (1965); K. G. ARMSTRONG, *The Retributivist Hits Back*, 70 MIND 471 (1961).

<sup>24</sup> The best exploration of these themes is still Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>25</sup> See, e.g., Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007) (arguing that “human intuitions of justice about core wrongdoing—both the sense that serious wrongdoing should be punished and the sense of the relative seriousness of wrongdoing—are deep, predictable, and widely shared.”) For argument that ordinary individuals have an intuitive sense of “moral grammar,” see John Mikhail, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge*, 50 PSYCHOL. LEARNING & MOTIVATION 28 (2009).

<sup>26</sup> See Donald Braman, Dan M. Kahan, & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010) (claiming that empirical research demonstrates deep disagreements over what constitutes a wrongful act and how wrongful it is).

<sup>27</sup> Cf. Robinson & Kurzban, *supra* note 25, at 1892 (conceding that there are disagreements about relative blameworthiness of wrongdoing outside of core cases).

gradations rests on extremely problematic assumptions about moral agency—assumptions that cannot be proved empirically and that may well make no sense philosophically.

In the real world, of course, both the economic and the moral model are at work on both the law enforcement and potential criminal side of the ledger. The amount of crime and incarceration we end up with may be crucially influenced by the balance between the two models. For present purposes, though, the important points are not just that each model has problems of its own, but also that the interaction between the two models can produce pathological outcomes.

To see the difficulty, we must first notice that the bright line I have so far drawn between the two models can be misleading. Each model has a tendency to collapse into the other. Thus, even if we were fully committed to the economic model, it is still likely that the most economically efficient way to produce a low level of crime at low cost is to inculcate moral inhibitions against criminal activity. Norms of this sort will prevent people from committing crimes even when doing so is personally advantageous. Society therefore need not bear the costs of making criminal activity personally disadvantageous. In a world where people have not absorbed these norms, the probability of detection and severity of punishment needs to be extremely high in order to reduce crime to acceptable levels.

Even from the economic point of view, then, it makes sense for criminal sanctions to be imposed—or at least to be seen to be imposed—on a moral basis. After all, if the government itself treats criminal punishment as no more than the cost of doing business, why should a potential criminal treat it any differently? If, instead, the government treats criminal punishment as an expressive act that conveys moral condemnation, there is at least some chance that potential criminals will internalize desirable moral norms.<sup>28</sup> And even if that hope is not realized—even if the potential criminals remain hard-hearted profit maximizers—they will still have to add the cost of public condemnation to their overall cost-benefit calculus.

Just as the economic model tends toward collapse into the moral model, so too the moral model tends toward collapse into the economic model. As noted above, our standards for blameworthiness cannot withstand serious analysis. Many others have shown that if one takes a broad enough view, all criminal conduct is in some sense caused by factors beyond the subject's control and for which she is not to blame. Conversely, if one takes a narrow enough view, all criminal conduct is caused by an act of will for which the subject is to blame. Sometimes we take a broad view, sometimes we take a narrow view, and, despite heroic efforts by many apologists for the criminal justice system, no one has adequately justified this shift in focus.<sup>29</sup>

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<sup>28</sup> See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996) (arguing that “[t]he law can discourage criminality not just by ‘raising the cost’ of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits.”).

<sup>29</sup> See, e.g., Kelman, *supra* note 24, at 593–94.

In the face of this philosophical incoherence, it is easy for culpability standards to turn into efficiency standards. We end up blaming when it is useful to blame. Whether it is useful, in turn, depends on a cost-benefit analysis. So, for example, conduct is sometimes coded as not “blameworthy” because it is not deterrable at a reasonable cost, rather than because it does not violate Kantian principles.<sup>30</sup> Similarly, sometimes we seem to determine blameworthiness by selfishly, if unconsciously, calculating the risk of being victimized by crime against the risk of being labeled a criminal.<sup>31</sup>

The intersection of the economic and moral models and the tendency of each to collapse into the other produce serious pathologies. Consider first the economic side of the ledger. Punishment as blame may indeed be economically efficient, but it achieves this efficiency only if its economic motivation is obscured. Blaming is instrumentally effective precisely because it is perceived to be motivated by moralism. Problems therefore arise when those threatened by criminal sanctions begin to believe that the punishment is economically motivated. Ironically, the problems only deepen if the punishment is in fact morally motivated.

We can see why this is so by examining the moralism side of the ledger. As I have argued above, in the absence of good non-instrumental standards for blaming, the practice tends to devolve into an unconscious cost-benefit analysis.<sup>32</sup> Given this fact, it is not surprising that mainstream groups and target groups develop different culpability standards. Being labeled a criminal is different for the two groups. People in isolated, economically marginal circumstances suffer more criminal violence than those who are better off but they also suffer much more state violence at the hands of police and prosecutors. Because of this difference, members of the target community will have different views of relative culpability for the same act done under the same circumstances. To be clear, the two communities need not disagree on fundamental questions of right and wrong. It is enough that the target community perceives the calibration of moral fault to the

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<sup>30</sup> See H. L. A. Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 95, 107–08 (Sidney Hook, ed., Collier Books 1961) (describing the view that “the rationale of excuse is not . . . that the accused should in view of his mental condition be excused whatever the effect of this on others, but rather the mere fact that excusing him will not harm society by reducing the efficacy of the law’s threats for others.”).

<sup>31</sup> See, e.g., CLAYTON A. HARTJEN, CRIME AND CRIMINALIZATION 13 (2d ed. 1978) (“the criminalization process is contingent on a variety of forces and circumstances relating to the relative threat some person’s (or group’s) behavior poses for those who seek to repress it, and the relative power of each to either impose its will on the other or to ward off the effort to impose a criminal label.”); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 569 (2000) (“[R]esearch has shown that blame and responsibility attributions are influenced by factors such as a victim’s or perpetrator’s personality, . . . social attractiveness, . . . or status.”); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1388 (2003) (“[a]lthough people tend to attribute their own misconduct to external constraints, they tend to attribute the behavior of others to personality rather than context.”).

<sup>32</sup> See generally *supra* notes 28–31.



degree of punishment to be out of kilter, or that it believes that the norms are being applied more harshly to them than to others.<sup>33</sup>

Under these circumstances, the target community will see itself as being unfairly singled out. It will see the dominant community as not really following moral norms, but instead acting in its narrow self-interest. Moral incentives to obey will, therefore, erode and be replaced by mere economic incentives because, from a moral point of view, the threat of punishment is perceived to be unjust. Avoiding criminal sanctions turns into little more than a prudential concern. Because the risk of imprisonment is just the cost of doing business, the level of crime rises.

If the dominant group were in fact motivated by the economic model, it might recognize that more lenient sanctions would in fact produce greater crime prevention and, so, back off. Precisely because it is morally motivated however, a stable equilibrium is out of reach. When the target group commits more crimes, the mainstream community becomes more morally indignant, which, in turn, leads to still harsher sanctions. Targets of these sanctions feel even more unfairly treated, so they feel even less moral obligation to obey the law. Their still more “outrageous” conduct produces more moral anger, and yet harsher sanctions.

The story I have told so far does not mention racial or class prejudice. Of course, perceptions of moral division are most likely to arise when there is already racial stigma and stereotyping. The important point, though, is that once the cycle begins, the perception of “otherness” becomes self-reinforcing and remains even if racism and classism (at least in the standard sense of those terms) were somehow to drop out of the picture.

Because the targets perceive themselves as unfairly singled out, their conduct is less constrained by majority moral norms, and, so, they *in fact* become “other.” This dynamic explains how hyper-incarceration can coexist with the emergence of a black middle class, the election of a black President, and a perceived decline in racial tension. The successful emergence of some African Americans from a segregated world dominated by poverty and racial concentration serves only to further narrow and isolate the target, thereby increasing its disconnection from mainstream norms,<sup>34</sup> which, in turn, reinforces mainstream perception of

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<sup>33</sup> On the growing divergence between the way that the majority community and minority communities perceive crime and criminals, see Victor M. Rios, *The Hypercriminalization of Black and Latino Male Youth in the Era of Mass Incarceration*, in RACIALIZING JUSTICE, DISENFRANCHISING LIVES: THE RACISM, CRIMINAL JUSTICE, AND LAW READER (Manning Marable, Ian Steinberg, & Keesha Middlemass, eds., 2007); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 37–38 (1995); John Hagan & Holly Foster, *Profiles of Punishment and Privilege: Secret and Disputed Deviance during the Racialized Transition to American Adulthood*, 46 CRIME L. & SOC. CHANGE 65, 66 (2006).

<sup>34</sup> See Richard Thompson Ford, *Barack is the New Black: Obama and the Promise/Threat of the Post-Civil Rights Era*, 6 DUBOIS REV. 37, 43 (2009) (“Today there are, effectively, at least two Black communities: an increasingly prosperous and well-educated professional class and an increasingly isolated, poorly socialized, and demoralized underclass. These two Black communities

“otherness.” Negative stereotypes about the remaining target population come to seem normal and empirically justified, while the nagging fear of racism is quieted by the counterexamples of African Americans who are “assimilated.” The fragile “assimilated” status of these African Americans, in turn, rests crucially on their ability to separate themselves from the despised underclass that is left behind. The racial solidarity that might otherwise ameliorate the isolation therefore fails to take hold.<sup>35</sup>

Hyper-incarceration itself further intensifies this isolation. Incarcerated individuals become nonpersons. They are hidden from our view and have little contact with the outside world. They cannot vote or assert themselves politically in any meaningful way. Moreover, individuals returning to their communities after a period of imprisonment find their family lives shattered, their community ties disrupted, and paths toward meaningful employment blocked.<sup>36</sup> No wonder, then, that the recidivism rate is very high and that the prospects of forming political and affective links with those in the mainstream community are so bleak.

This is undoubtedly a dismal picture. Are there political strategies that might disrupt the self-reinforcing downward cycle that permits hyper-incarceration? In the Sections that follow, I explore three possibilities.

## II. THE POLITICS OF AMELIORATION

One set of strategies forsakes the goal of “solving” the hyper-incarceration crisis, at least in the short term. The problem is just too big and the underlying causes too powerful to expect us to return immediately to anything approaching a sane balance between crime and punishment. But we should not let the best be the enemy of the good. While we await a permanent solution, or, indeed even if a permanent solution never comes, there are things that can be done in the here-and-now that will improve the situation.

Consider first strategies directed toward the economic model. These strategies attempt to make criminal punishment more costly, thereby changing the balance of costs and benefits of incarceration. The most venerable method of raising costs is the exploitation of criminal procedure liberalism. Of course, criminal procedure liberals must publicly deny that they are simply attempting to obstruct the criminal process. Instead, they must paint themselves as believers in virtues like the “rule of law,” the control of government overreaching, and the protection of constitutional rights. Doubtless, many criminal procedure liberals are

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are joined by a shared history but increasingly divided by lifestyle, values, norms of behavior, and life prospects”). Cf. *THE TRULY DISADVANTAGED*, *supra* note 4, at 144.

<sup>35</sup> See generally James Forman, *The Black Poor, the Black Elites, and American Prisons*, 32 *CARDOZO L. REV.* 791 (2011).

<sup>36</sup> See, e.g., WESTERN, *supra* note 1, at 163 (discussing the effect of incarceration on family connections and community ties); *id.* at 109 (discussing the effect of incarceration on employment opportunities).

totally sincere about their motives. Nonetheless, even if they are skeptical of these stated objectives, opponents of mass incarceration can exploit arguments along these lines to make criminal punishment more costly while sidestepping the pathologies described above.

Supreme Court decisions interpreting the Sixth Amendment's Confrontation Clause provide a recent example. The Court has held that the government must produce live testimony by laboratory technicians who perform forensic tests rather than rely upon a written report.<sup>37</sup> Justice Scalia, a conservative textualist who exhibits no apparent concern about hyper-incarceration, wrote this decision along with others reinvigorating the Confrontation Clause.<sup>38</sup> On their face, these decisions seem to have nothing to do with the micro-processes described above or, indeed, with hyper-incarceration at all. No doubt, Justice Scalia was focused instead on interpretation of text, original public meaning, and respect for constitutional principle. Yet these decisions have the effect of making the prosecution of at least some kinds of cases more costly, and for that reason, opponents of hyper-incarceration should encourage them. If prosecution resources remain static as costs rise, the result will be better plea bargains for defendants that will result in shorter sentences.

Ironically, the Confrontation Clause cases and other decisions like them have this economic effect precisely because they appear to be motivated by noneconomic factors. On standard liberal accounts, rights must be protected even if it is instrumentally useful to ignore them.<sup>39</sup> Thus, the argument that requiring live testimony by laboratory technicians will be costly and is not worth the benefit runs up against the claim that constitutional rights have no price tag. This relative imperviousness to cost, in turn, provides political space for costs to be raised, thereby producing salutary results.

In a similar fashion, death penalty opponents have been quite successful in exploiting procedural rights to raise the costs of capital punishment, to the point where some jurisdictions simply cannot afford to kill.<sup>40</sup> Prison reform litigation,

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<sup>37</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

<sup>38</sup> *See also Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 83 (2006). *But cf. Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (statements not testimonial under the Confrontation Clause when their primary purpose was to help police meet emergency).

<sup>39</sup> *See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY* 133–34, 268–74 (1977).

<sup>40</sup> Consider, for example, the case of Brian Gene Nichols. During an escape attempt, Nichols murdered a judge, a court reporter, a deputy sheriff, and a federal agent. Two of the murders occurred before several eyewitnesses, and Nichols confessed to all the crimes. He also offered to plead guilty in exchange for a sentence of life imprisonment without possibility of parole, but the prosecution insisted on seeking the death penalty. Over the next several years, the state paid \$2.9 million to prosecute Nichols. As a direct result, Georgia has lacked the money to bring other capital cases to trial. For example, Jamie Ryan Weiss, an accused murderer, has been in jail for nearly four years without trial because the state cannot afford to pay for a defense attorney. For news accounts detailing these facts, see Manuel Roig-Franzia & Melanie Lasoff Levs, *3 Slain in Atlanta Courthouse Rampage*, WASH. POST, Mar. 12, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A28346-2005Mar11.html>; *Brian Nichol's Defense Tab Put at \$2.9 Million*, THE ASSOCIATED

when it is successful, makes prisons more humane, but from an economic point of view the more important effect is to make prisons more costly and their use less attractive.<sup>41</sup> More broadly, enforcement of Fourth and Fifth Amendment rights raise the cost of catching and prosecuting criminal suspects.

In more subtle ways, the “innocence” movement accomplishes similar ends. With the advent of DNA testing, it has become apparent that many more innocent defendants are convicted than apologists for our broken system have supposed.<sup>42</sup> Concerns about “actual innocence” point the way toward more effective assistance of counsel, less reliance on unsupported eye witness identification, and more access to post-conviction remedies.

Superficially, it might be thought that these concerns relate to the moralism model. After all, incarcerated people who are innocent are hardly blameworthy. If this were the only effect of the movement, though, it would do little to relieve hyper-incarceration. It is true that the criminal justice system reaches less reliable results than many have supposed, but no one thinks that releasing every innocent prisoner tomorrow would put even a dent in hyper-incarceration.<sup>43</sup> Instead, the main impact of the innocence movement may be to raise the costs of incarcerating the innocent and guilty alike. Increased concern about wrongful conviction translates into more procedural protections, which, in turn, mean, once again, better plea bargains offered by overextended prosecutors. It is politically possible to raise these economic costs precisely because protection of the innocent is thought to be morally required even when the protection is economically inefficient.

These strategies use the moralism model instrumentally to accomplish economic goals. Other ameliorative strategies, in contrast, target moral intuitions directly. They attempt to soften both mainstream and target community attitudes. On the one hand, they try to induce the mainstream to be more understanding of the constrained choices available to members of the target community. On the

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PRESS (July 22, 2009, 9:46 AM) <http://www.Accessnorthga.com/detail.php?n=221972&c=6>; Bill Rankin, *Case Could Decide Whether Georgia Can Afford the Death Penalty*, THE ATLANTA JOURNAL-CONSTITUTION (Nov. 10, 2009, 6:04 PM), <http://www.ajc.com/news/Atlanta/case-could-decide-whether-192386.html>; Jeffrey Toobin, *Death in Georgia: The High Price of Trying to Save an Infamous Killer's Life*, THE NEW YORKER (Feb. 4, 2008), [http://www.newyorker.com/reporting/2008/02/04/080204fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2008/02/04/080204fa_fact_toobin).

<sup>41</sup> See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding lower court order mandating reduction of state prison population by as much as 46,000 inmates because of constitutional deficiencies in health care).

<sup>42</sup> According to Stuart Taylor Jr. and K.C. Johnson, since 1989, DNA evidence has exonerated more than two hundred prisoners including fourteen death row inmates. See STUART TAYLOR JR. & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 362–65* (2007). See generally JIM DWYER, PETER NEUFELD, & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003).

<sup>43</sup> See generally Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety about Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010).

other hand, they try to induce members of the target community to assume more of the “personal responsibility” that the mainstream community expects.

For example, numerous jurisdictions now have “drug courts” where drug abusers are diverted from prison and instead provided with social services reinforced by the threat of ultimate incarceration if they fail to comply.<sup>44</sup> The theory behind the programs is that social intervention will make individuals conform to mainstream standards without necessitating their removal from the community. On a more general scale, there is emerging evidence that the rehabilitative ideal may have been too quickly dismissed by its critics. In a few places, serious and hopeful experiments in rehabilitation are beginning to take place.<sup>45</sup>

These programs are directed at the target community. Other programs attempt to reform the mainstream community or attempt to change the attitudes of both groups. For example, my colleague James Forman has suggested a sweeping and visionary program modeled on “Teach for America” that would induce middle class young people to enter prisons where they would educate prisoners. The program is aimed partially at the rehabilitation of prisoners, but, perhaps more importantly, it is also aimed at changing the attitudes of the young people who teach the prisoners. The hope is that the teachers will identify with their pupils and that, after leaving the program, they will form a dedicated alumni cadre that might significantly impact the politics of incarceration.

Forman’s program is only a proposal, but for many years, Lori Pompa has actually run a program called Inside-Out that is motivated by similar goals.<sup>46</sup> Unlike Forman’s proposal, where the students teach the inmates, Inside-Out treats undergraduates and inmates as equals. As described in its website, the program

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<sup>44</sup> According to the National Drug Intelligence Center, there are now 2,038 drug courts active in all fifty states. NATIONAL DRUG INTELLIGENCE CENTER, U.S. DEP’T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2010 at 6 (Feb. 2010), available at <http://www.justice.gov/ndic/pubs38/38661p.pdf>. For some examples of studies of the cost effectiveness of drug courts, see NATIONAL INSTITUTE OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS: THE SECOND DECADE, 27–31 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/211081.pdf>; Shannon M. Carey et al., *California Drug Courts: Outcomes, Costs, and Promising Practices: An Overview of Phase II in a Statewide Study*, 3 J. PSYCHOACTIVE DRUGS 345 (2006).

<sup>45</sup> For some examples, see Dora Schriro, *Correcting Corrections: Missouri’s Parallel Universe*, in U.S. DEP’T OF JUSTICE, SENTENCING & CORRECTIONS: ISSUES FOR THE 21<sup>ST</sup> CENTURY 1 (2000); JANEEN BUCK WILLISON et al., THE URBAN INSTITUTE, EVALUATION OF THE RIDGE HOUSE RESIDENTIAL PROGRAM: FINAL REPORT (May 2010), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/230741.pdf>; Daniel J. Bayse, Scot M. Allgood, & Paul H. Van Wyk, *Family Life Education: An Effective Tool for Prisoner Rehabilitation*, 40 FAMILY RELATIONS 254 (1991). See generally J. Stephen Wormith et al., *The Rehabilitation and Reintegration of Offenders: The Current Landscape and Some Future Directions for Correctional Psychology*, 34 CRIM. JUST. & BEHAV. 879 (2007).

<sup>46</sup> See *About Us*, THE INSIDE-OUT CENTER, <http://www.insideoutcenter.org/about-us.html> (2010).

brings college students together with incarcerated men and women to study as peers in a seminar behind prison walls. The core of the Inside-Out Program is a semester-long academic course, meeting once a week, through which 15 to 18 “outside” (i.e. undergraduate) students and the same number of “inside” (i.e. incarcerated) students attend class together inside prison.<sup>47</sup>

Instead of focusing on the relationship between students and inmates, the restorative justice movement seeks to reconcile criminals with their victims. Offenders are made to see the damage that they have caused and, when the program works, to feel and express remorse. Victims, in turn, come to feel more at peace with their loss and, perhaps, to forgive the offenders. On both sides, anger, fear, and misunderstanding give way to a shared moral vision.<sup>48</sup>

What are we to make of these and other ameliorative efforts? Some of them undoubtedly soften the system’s brutality. Still, there are reasons for caution. Three difficulties in particular are worthy of attention.

First, we must confront the familiar problems of legitimization and redirected anger. Ameliorative measures can make things slightly better, but they can also make them a lot worse by reinforcing ideological defenses against more fundamental change. This risk is especially acute for criminal procedure liberalism. No doubt, criminal procedure protections raise the costs of detection and conviction of criminals. Unfortunately, they also reinforce the widespread belief that hyper-incarceration is morally justified. Perhaps it is not merely coincidence that the United States has both the world’s most detailed and constricting criminal procedure rules and the highest incarceration rate.<sup>49</sup> The strictness of the rules may convince people that the criminal suspects who manage to make their way through all of the procedural filters are the worst of the worst. Our thick network of procedures makes it appear that anyone who does not deserve the harsh treatment we hand out will not receive it. Worse yet, lingering anger at the criminals who remain unpunished because of, say, the Fourth Amendment exclusionary rule, gets redirected at those criminals we can get our hands on.

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<sup>47</sup> See *id.*

<sup>48</sup> For collections of articles on the restorative justice movement, see *RESTORATIVE JUSTICE* (Declan Roche, ed., 2004); *RESTORATIVE JUSTICE AND CIVIL SOCIETY* (Heather Strang & John Braithwaite, eds., 2001). See generally DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* (2003).

<sup>49</sup> See, e.g., Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 690 (1997) (asserting that US has the most elaborate procedures in the world for determining who is punished and the largest prison population in the industrialized world); William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENT. 55, 66 (1996) (arguing that it is “not an accident that a country with a system of criminal procedure that is the most complicated and the most expensive in the western world and, if the truth be known, a trial system that is not very reliable, would also turn out to have a system that threatens, and sometimes inflicts, punishments that are harsh compared to those in other countries.”).

A second problem is that programs that might produce real benefits when considered by themselves inevitably become corrupted by the malfunctions of the system in which they are embedded. Restorative justice and drug courts are particularly susceptible to this corruption. Both of these programs attempt to induce a moral, rather than economic point of view among the target group. But in a world where the moral and economic are already closely intertwined, there is again a risk that one will collapse into the other. Thus, from a moral point of view, a perpetrator who admits to his crime, apologizes, and reconciles with his victim is indeed less worthy of punishment. So is a drug user who comes to recognize the power that drugs hold over him and accepts counseling to overcome the problem. But economically motivated criminals know that punishment can be avoided by feigning a moral attitude, and, so, they will submit for instrumental rather than moral reasons.<sup>50</sup> Meanwhile, those in charge of the punishment apparatus are aware of this opportunity for manipulation, and that awareness is bound to create cynicism.<sup>51</sup> Perhaps after they are tricked a few times, they become skeptical about the prospects of true reconciliation. The upshot is not mutual understanding and a breaking down of barriers, but more mutual distrust and hatred.

Finally, ameliorative strategies are problematic because they tend to be self-limiting. After all, if they were not self-limiting, they would not be merely ameliorative. For example, there is only limited benefit that can be derived from the ideological commitment to non-instrumental rights. As discussed above, vindication of these rights makes imprisonment more expensive. But there is always the risk that policymakers will respond by bearing the increased cost rather than by reducing rates of incarceration. Alternatively, if the rights become expensive enough, there is a risk that the ideology will be abandoned. Criminal procedure liberalism has ameliorated brutality to some extent, but it has also produced a considerable backlash precisely because it is thought to be too costly in terms of crime prevention.<sup>52</sup>

Other ameliorative strategies are self-limiting because they are directed primarily at low hanging fruit. Consider, for example, proposals to flood the prison with idealistic young college and law students. The proposals are worth pursuing for the good they will do on their own terms, and it is possible that, if implemented, they will mobilize a group of people dedicated to reform. Still, it would be foolish to suppose that programs like this will produce large scale social change. Young people willing to volunteer for such service are likely to be already inclined toward empathic connections to prisoners. People without this empathic link will not volunteer, and it is precisely those people who are the source of most

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<sup>50</sup> See WILLIAM IAN MILLER, *FAKING IT* 76 (2003) (noting that “[a]pologies are driven with suspect motives” and that “[i]n a nutshell, the problem is that remorse is easy to fake”). For a discussion of the risks that apologies will be corrupted by the instrumental exigencies of adjudication, see Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135 (2000).

<sup>51</sup> See generally Taft, *supra* note 50.

<sup>52</sup> See, e.g., FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* (1970).

of the problem. We do not have to speculate about these limitations. For all of its laudable good work, no one claims that Inside-Out, which has been in existence for thirteen years,<sup>53</sup> has put a dent in hyper-incarceration.

Just as programs aimed at the mainstream community tend to preach to those already converted, so too, programs aimed at the target community reach only a small subset of the relevant population. Drug courts are wonderful, but it is fanciful to assume that social services are going to address more serious violent crime and the deep social malfunctions that cause it. Restorative justice has the most praiseworthy of ambitions and may even do some good, but it is simply naïve to suppose that individual reconciliation between a few criminals and victims will heal the huge social rift that has produced our current difficulties.

### III. THE POLITICS OF TRANSFORMATION

Understanding the problems with ameliorative approaches naturally leads us to ask whether we can do better. Suppose we forsake the goal of modest piecemeal reform and aim instead at radical transformation. Strategies of this sort rest on the supposed fragile and vulnerable character of the ideology that justifies the system. On this view, it may seem that this system is impregnable, but that is only an illusion. The careful and relentless exposure of the hypocrisy, brutality, and injustice at the base of the system can bring it down.

These strategies are closely allied to important strands of the critical legal studies movement. Some people allied with the movement (“crits”) believed that the internal contradictions of liberalism could be exploited to such an extent that the system could be revealed for what it is—an empty shell that supports power and privilege only so long as we allow it to do so.<sup>54</sup>

Projects along these lines would, for example, explore the contradictions in mainstream accounts of blameworthiness. Moral condemnation, on this view, amounts to no more than an ideological cover for the exercise of power by some people over others.<sup>55</sup> It does not follow, though, that the economic model can simply replace the moral model. It, too, rests on unchallenged assumptions about what, precisely, counts as a “cost” and a “benefit”—about who is benefited and on whom the costs are imposed.<sup>56</sup>

Once we clear away the ideological detritus, we are left with a simple question: Do we really want to live in a decent society? Critical Legal Studies has many strands and many of its adherents had complicated positions. Still, at least in their optimistic moods, many crits thought that, with the freedom provided by

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<sup>53</sup> See THE INSIDE-OUT CENTER, *supra* note 46.

<sup>54</sup> See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269–79 (1987).

<sup>55</sup> Cf. Kelman, *supra* note 24.

<sup>56</sup> Cf. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388 (1981).



deconstruction of constraining structures of thought, people would make the right decision.<sup>57</sup>

I must confess to more than a little attraction to this way of thinking. A fair amount of my own work has been influenced by it. As a serious strategy for producing change, though, it leaves much to be desired. One problem with focusing on micro-processes is that they may be more deeply embedded than some critics supposed.

It is true that as a logical or intellectual matter the justificatory standards that shield the criminal justice system from criticism are quite vulnerable. No one has provided a good answer to the arguments deconstructing free will on the one hand and instrumental rationality on the other, at least as they apply to our practices of criminal punishment. It is nonetheless simply a mistake to suppose that these structures of thought will collapse once they are shown to be incoherent. They reflect ways of living and perceiving, rather than merely intellectual arguments. It will not do to try to dismantle them so as to damage the system they protect; they are impervious to attack precisely because they protect that system.

Nor is it obvious that if the structures were somehow dismantled, their collapse would produce a more humane system. The structures serve functions that would have to be served by something else if they disappeared. On the one hand, belief in personal responsibility and the possibility of moral choice is, itself, a determinant of behavior. Without it, there might well be more crime. On the other hand, cost-benefit analysis is a check on wanton and purposeless brutality. Without it, there might well be more punishment.

As Meir Dan-Cohen pointed out years ago, we would be well served if we could maintain "acoustic separation" between the mainstream and target communities.<sup>58</sup> We could then inculcate personal responsibility in the target community, thereby reducing crime, while convincing the mainstream community that members of the target community have very constricted choices, thereby reducing punishment. We could convince the target community that it is instrumentally rational to obey the law because of the strong possibility of punishment, while convincing the mainstream community of the instrumental rationality of reducing punishment levels. But nobody has a clue how to maintain such separation or, indeed, how to induce either set of beliefs in the first place. In any event, advocates of radical transformation want to dismantle these false categories altogether, rather than maintaining them for separate communities.

Moreover, even if a frontal assault on justificatory rationales were a more promising strategy, we would still need to give it some specific programmatic

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<sup>57</sup> For an example of the optimistic strain in Critical Legal Studies scholarship, see Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 220 (1987) ("If the resigned and complacent arguments turn out, over and over again, to be wrong, it may be that after all it is possible that altruism, community, democratic participation, equality, and so forth, can be promoted without destroying freedom and economic efficiency.")

<sup>58</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

content. Ameliorative strategies have their limits and problems, but at least they consist of real proposals that are being, or might actually be, implemented. What kind of program does radical deconstruction entail?

It is not only naïve but also inexcusably solipsistic to suppose that writing law review articles is such a program. Perhaps localized subversion holds out greater promise,<sup>59</sup> but there is a remaining vagueness about what this subversion would consist of. In any event, as invigorating and liberating as these individual acts of defiance may be, the chance of their sparking a global change seems quite remote.

A program of large-scale organization of target communities and building bridges based on racial solidarity between those communities and mainstream African Americans seems more promising. But there is no need to rehearse yet again the difficulties of mobilizing dispirited and isolated minority communities, the powerful reasons middle class African Americans have for distancing themselves from those communities, or the panicked opposition among the privileged that such organization produces. Moreover, even in this context, the problem of programmatic content remains. If organizers offer no practical programs at all, they appear unreasonable and utopian. If they offer such programs, they fall back into the amelioration trap.

In any event, as a comfortable, wealthy, white academic, I am afraid that I am not about to start knocking on doors in the inner city. As a personal matter, I nonetheless remain committed to the practice of dismantling justificatory categories, but people like me need to give up on the absurd claim that doing so promises immediate social transformation. The categories deserve attack because they are false and constricting. The people who argue for them deserve censure because they should know better and because their arguments provide a cover for an unjust status quo. Acts of rebellion, whether in law reviews or as localized subversion, are good in themselves. But no one should suppose that these acts will ultimately solve our problems. And, in the meantime, the waste and suffering from hyper-incarceration goes on unabated.

#### IV. THE POLITICS OF ACCOMMODATION

Suppose that instead of reforming the micro-processes, we attempt to harness them for our own purposes. Could we use a kind of reverse English to set these powerful forces in a different direction? There is no getting around it: Some of the proposals I consider in this section are ugly. They assume—indeed promote—callousness, racism, and selfishness. But these are desperate times. If these impulses can be made to work for good causes, then we should consider using them.

In fact, there are aspects of conservative thought—of varying degrees of respectability—that support an attack on hyper-incarceration. At the base of all of

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<sup>59</sup> For a defense, see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 609–11 (1982).

them is recognition of the fact that hyper-incarceration is a big, bloated, government program, with all the negative connotations that conservatives regularly attach to that label. Apart from the defense establishment, it is hard to think of another activity of government that involves so many people, such a large share of the public fisc, and so much waste. Moreover, hyper-incarceration is not just any big government program. It is a massive experiment in social engineering. Like, say welfare or a cap-and-trade regime for carbon, it assumes that bureaucrats will be able to diagnose and solve very large social problems through government fiat. Conservatives have every reason to reject this assumption.

The aspect of hyper-incarceration most vulnerable to this charge is the war on drugs. The drug war has incarcerated huge numbers of people at great expense in a demonstrably failed effort to change individual behavior that imposes no obvious harm on others.<sup>60</sup> At one time, drug abuse was a signature issue for conservatives worried about the moral unraveling of the country. Long prison sentences for drug users and sellers were always in tension with libertarian strands of conservative thought, however.<sup>61</sup> The large-scale federal involvement also conflicts with conservatism's bias toward localism.<sup>62</sup> Finally, the insistence on a government obligation to prevent drug abuse is hard to reconcile with notions of personal responsibility that are at the core of almost all conservative thought. As modern conservatism moves away from culture war issues, these tensions become more salient, and, so, the prospects of exploiting them expand.

It does not follow that drugs alone are either the sole source of or sole solution to the hyper-incarceration problem. If everyone convicted of drug offenses were released from every local, state, and federal prison tomorrow, the United States would still have a hyper-incarceration problem. Moreover, although libertarian conservatism is enjoying something of a renaissance, social conservatism is far from dead, and these conservatives remain resistant to drug legalization.<sup>63</sup>

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<sup>60</sup> According to The Sentencing Project, there has been a 1100% increase in the number of persons incarcerated on drug charges since 1980, from about 40,000 people to 500,000. The number of people now incarcerated for drug offenses is greater than the number incarcerated for all offenses in 1980. See MARC MAUER, *THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 1* (2009), available at [http://sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://sentencingproject.org/doc/dp_raceanddrugs.pdf). Despite these efforts, as of 2009, an estimated 21.8 million Americans aged 12 or older, or 8.7% of the population, were current drug users. See OFFICE OF APPLIED STUDIES, U.S. DEP'T HEALTH & HUMAN SERVS., *RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1* (2010), available at <http://www.oas.samhsa.gov/NSDUH/2k9NSDUH/2k9Results.htm>.

<sup>61</sup> For an example of libertarian criticism, see David Boaz & Timothy Lynch, *The War on Drugs*, in *CATO HANDBOOK FOR POLICYMAKERS 337* (7<sup>th</sup> ed. 2009).

<sup>62</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 57–58 (2005) (Thomas, J., dissenting) (arguing that local cultivation and consumption of marijuana is not commerce within the meaning of the Commerce Clause of Article I).

<sup>63</sup> See, e.g., Charles D. Stimson, *Legalizing Marijuana: Why Citizens Should Just Say No*, LEGAL MEMORANDUM 56 (The Heritage Foundation, Washington, D.C.), Sept. 13, 2010, available at [http://thf\\_media.s3.amazonaws.com/2010/pdf/lm0056.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/lm0056.pdf); Lydia Saad, *U.S. Support for Legalizing Marijuana Reaches New High*, GALLUP, Oct. 19, 2009, available at

The potential for conservative opposition to hyper-incarceration extends beyond drugs, and beyond libertarianism, however. For fiscal conservatives, worried about massive government spending, high taxes, and huge deficits, the cost of hyper-incarceration is, or at least should be, a source of major concern. Each prisoner costs the government an average of \$23,867 per year to maintain,<sup>64</sup> and the prison system averages seven percent of state general fund spending.<sup>65</sup> In times of prosperity, perhaps we could indulge our taste for retribution. In these leaner times, long sentences become a luxury that we cannot afford.<sup>66</sup>

One has to ask, as well, precisely who benefits from these expenditures. That question, in turn, suggests the possibility that the racism historically supporting hyper-incarceration might be made to face in the opposite direction. Despite the well-publicized cases of cross-racial violence, the fact is that the vast majority of victims of African American crime are, themselves, African American. Most African American drug dealers sell drugs to other African Americans,<sup>67</sup> and African Americans are the victims of the overwhelming majority of murders committed by African Americans.<sup>68</sup>

Viewed from this perspective, hyper-incarceration might be characterized as yet another effort to tax middle class white people for the benefit of the black underclass. It feeds into the deep suspicion of “Reagan Democrats” that government generally is an instrument for the redistribution of wealth at the expense of hard working “ordinary Americans” and for the benefit of the lazy and ignorant.<sup>69</sup>

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<http://www.gallup.com/poll/123728/u.s.-support-legalizing-marijuana-reaches-new-high.aspx>; John P. Walters, *Drug Legalization Isn't the Answer*, WALL ST. J., March 6, 2009, at A15, available at <http://online.wsj.com/article/SB123630239109047197.html>. According to a Gallup Poll, seventy-eight percent of self-described liberals favor decriminalization of marijuana use, but seventy-two percent of conservatives oppose decriminalization.

<sup>64</sup> See ONE IN 100: BEHIND BARS IN AMERICA 2008, THE PEW CENTER ON THE STATES, 11 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

<sup>65</sup> See STATE EXPENDITURE REPORT, NAT'L ASS'N OF STATE BUDGET OFFICERS 54 (2010), available at [http://www.nasbo.org/Publications/StateExpenditure Report/State Expenditure Report Archives/tabid/107/default.aspx](http://www.nasbo.org/Publications/StateExpenditure%20Report/State%20Expenditure%20Report%20Archives/tabid/107/default.aspx).

<sup>66</sup> For some evidence that states are beginning to respond to the fiscal pressures, see Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 18, 2010, at A1 (reporting that state sentencing advisory commission has put in place a program to tell judges cost of individual sentences they impose). See also *infra* notes 70–74.

<sup>67</sup> See K. JACK RILEY, NAT'L INST. OF JUSTICE & OFFICE OF NAT'L DRUG CONTROL POLICY, RESEARCH REPORT: CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE IN SIX U.S. CITIES I (1997) (“Respondents were most likely to report using a main source who was of their own racial or ethnic background, regardless of the drug considered.”).

<sup>68</sup> See JAMES ALAN FOX, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S., (2006), available at <http://bjs.ojp.usdoj.gov/content/homicide/race.cfm> (from 1976 to 2005, eighty-six percent of white victims killed by whites and ninety-four percent of black victims killed by blacks).

<sup>69</sup> See, e.g., PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 178–83 (2007).

It turns out, then, that lack of empathy for the target community might be an engine for reform rather than for repression. Nor is this merely a hypothetical possibility. It remains too early to know for sure, but it appears at least possible that hyper-incarceration has begun to slowly recede.<sup>70</sup> Both the state and federal governments have softened draconian drug laws, and incarceration of users has declined dramatically.<sup>71</sup> Many states have enacted reforms that attempt to control the growth of prison populations.<sup>72</sup> Other states have responded to crippling fiscal problems by actually releasing nonviolent offenders.<sup>73</sup>

Perhaps the ameliorative and transformative efforts discussed above have caused some of these changes. Some, no doubt, have nothing to do with micro-processes, but are simply unavoidable reactions to overwhelming fiscal concerns. It is also possible that incarceration rates are sensitive to crime rates, but lag well behind them. Incarceration rates may finally be falling in a delayed reaction to the very substantial reduction in the rate of crime.<sup>74</sup> Still, it is always a mistake to underestimate the effect of racism on American politics. If hyper-incarceration

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<sup>70</sup> The Pew Center on the States reports that for the first time in nearly forty years, the number of state prisoners declined in 2009, although the decline was modest and was more than counterbalanced by an increase in the number of federal prisoners. See THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010) available at [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf?n=880](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880) [hereinafter PRISON COUNT 2010]. See also HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS DATA BRIEF, PRISONERS AT YEAREND 2009—ADVANCE COUNTS 1 (2010) (data showing declining rate of increase in prison population since 2006).

<sup>71</sup> See, e.g., NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2009: DEVELOPMENTS IN POLICY AND PRACTICE 1–2 (2010), available at [http://www.sentencingproject.org/doc/publications/s\\_ssr2009Update.pdf](http://www.sentencingproject.org/doc/publications/s_ssr2009Update.pdf) (reporting three states scaled back scope of mandatory minimum drug sentences) [hereinafter THE STATE OF SENTENCING]; Erik Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 28, 2010, at A16 (reporting House passage of bill that would reduce disparities between mandatory federal sentences for crack and powdered cocaine); Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1 (reporting on agreement to dismantle mandatory minimum sentences for lower-level drug felons and widen reach of drug courts); On the growth of drug courts that provide diversion rather than incarceration for drug offenders, see *supra* notes 39–40.

<sup>72</sup> See, e.g., THE STATE OF SENTENCING 2009, *supra* note 71 (reporting that seven states have amended probation and parole policies to expand good time and earned time programs; two states have created incentive programs for local jurisdictions to reduce probation revocations; and four states created oversight committees or task forces to address sentencing laws, overcrowding, and reentry services).

<sup>73</sup> See, e.g., PRISON COUNT 2010, *supra* note 70 (reporting that Mississippi rolled back to twenty-five percent from eighty-five percent the portion of sentences that nonviolent offenders are required to serve prior to parole eligibility and that Michigan reduced its prison population by more than 6000 by, among other things, reducing the number of inmates who serve more than 100% of their minimum sentence); Jennifer Steinhauer, *To Cut Costs, States Relax Prison Policies*, N.Y. TIMES, March 25, 2009, at A1, available at <http://www.nytimes.com/2009/03/25/us/25prisons.html?pagewanted=all> (reporting that “many [state] governments, out of money and buried under mounting prison costs, are reversing . . . policies [of long prison sentences].”).

<sup>74</sup> See *supra* note 8.

ever ends, its demise may be caused not by white people caring more about African Americans trapped in poverty and crime, but by their continued insistence on not caring at all.

The question, then, is whether these inchoate trends might be encouraged and reform hastened by taking advantage of conservative and racist impulses. The approach has some attraction, if only because it sidesteps the daunting obstacles to fundamental change. For example, white support for hyper-incarceration may rest more on mistaken factual assumptions than on deep ideological commitments. Whites regularly overestimate the risks that they face from criminal violence.<sup>75</sup> If they could be convinced that these risks are mostly borne by African Americans,<sup>76</sup> their attitudes toward hyper-incarceration might change. Correcting this factual mistake is almost certainly easier than establishing affective connections between majority and minority communities.

Still, the downsides of this strategy are obvious. First, the approach takes conservative commitments to libertarianism and localism at face value. There is a long and sad history of abandonment of these commitments when they come into conflict with less defensible conservative goals of protecting reserves of power and privilege. Who is to say that they will not be abandoned again if they are seen to advance progressive causes?

An attack on hyper-incarceration grounded in racial resentment does not pose this difficulty, but it has problems of its own. Should progressives traffic in this currency, even if it has short-term salutary effects? Even if they should, the effort to harness racism will be effective only if opponents of racial justice can somehow be tricked into acting in ways that are not in their self-interest. A politics of accommodation therefore requires a deviousness that may be too clever by half. Opponents of hyper-incarceration must somehow maintain the discipline and disingenuousness to convincingly misrepresent their own objectives.

Finally, there is the question of who, precisely, is the one being tricked. It is, after all, true that poor African American communities bear the brunt of criminal violence.<sup>77</sup> It is a fact, and not just a racist fantasy, that young black men regularly slaughter other black men in the streets of our inner cities, that poor families in minority communities live in daily fear of rapes and armed robberies, and that the

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<sup>75</sup> See Lincoln Quillian & Devah Prager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 SOC. PSYCH. Q. 79 (2010).

<sup>76</sup> According to the Bureau of Justice Statistics, with the exception of simple assault, blacks experience a higher rate of criminal violence than whites for every crime that the Bureau measures. See MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS BULLETIN, CRIMINAL VICTIMIZATION 4 (2009). According to a poll conducted by Money Magazine, sixty-nine percent of Americans believe that white victims of crime are more or equally likely to be attacked by members of other races, when, in fact, they are most often victimized by members of their own race. Walter L. Updegrave, *As Grim Crime Scenes Fill Our Newscasts and Nightmares, Americans Feel More Threatened by Violence than Ever*, MONEY, July 1, 1994, available at [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1994/06/01/88911/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1994/06/01/88911/index.htm).

<sup>77</sup> See RAND, *supra* note 76; see also Updegrave, *supra* note 76.

lives of many African Americans are destroyed by drug addiction. If there is indeed a racist argument against hyper-incarceration, does it follow that there is an argument grounded in racial justice for it?

Of course, virtually all progressives will deny that it does follow, and I am inclined to agree with them. Progressives will rightly claim that hyper-incarceration makes the problem worse rather than better. What is needed to protect the African American community from criminal predation, they will say, is not a brutal criminal justice system, but employment, economic justice, decent schools, and an end to racial isolation. But now we have come full circle. A focus on these solutions directs our attention, once again, to the seemingly intractable problems of the black underclass and to the forces that cause these problems. It was precisely the impulse to escape this focus that motivated the attention to micro-processes in the first place.

#### V. WHERE THIS LEAVES US

Unsurprisingly, then, there is not a politics that simply and cleanly solves the hyper-incarceration problem. What we are left with is an unhappy choice between strategies, each of which has important defects and poses significant dangers. So what is to be done? I am not at all sure, but in this final section, I want to suggest the possibility that our choice should be dictated more by temperament than by pragmatics.

None of the available options are likely to work very well, if at all. The incarceration of millions of our fellow inhabitants is almost certainly symptomatic of a more systemic, possibly terminal, illness in American-style constitutional democracy. In particular, it is tied to the decline of good jobs, economic mobility, and community cohesion. Those declines, in turn, are both symptoms and causes of America's global decline.

No empire lasts forever, and there is plenty of reason to believe that the American empire is in its last days. The question, then, is not whether the patient will recover, but what kind of treatment will produce death with dignity.

There are three temperamental responses to this tragic choice. At the risk of metaphor overload (and, perhaps, of using yet again a tired and inapt comparison), one might liken the trilemma to various attitudes toward the Holocaust adopted by people of good will as their world collapsed in Nazi-occupied Europe. Although the disanalogies are obvious, there is nonetheless a core similarity in the basic, tragic structure of the available choices.

One response to the Holocaust was to do the little one could to protect individuals from Nazi atrocities. No one supposed that these individual acts of courage and decency would end the slaughter. Still, something is better than nothing, and, as the experience in Denmark demonstrates, sometimes little things

add up to bigger things.<sup>78</sup> People attracted to this response will want to engage in the politics of amelioration.

Others believed that these ameliorative efforts trivialized the enormity of the disaster. The only decent response to an evil of this magnitude, they believed, was to stand and fight, even in the full knowledge that the struggle was futile. The brave, doomed rebellion in the Warsaw ghetto illustrates this response.<sup>79</sup> People who are attracted to it will want to engage in the politics of transformation.

Finally, some believed that heroic as it was, this sort of rebellion was also self-indulgent. Nothing could be gained by pointless martyrdom, but at least something might be achieved by Faustian bargains that dealt with the Nazis on their own terms. Those who followed this course negotiated with Nazis over Jewish lives<sup>80</sup> or joined the Judenrat, which collaborated with the Nazis in the hope of softening their policies at the margin.<sup>81</sup> People attracted to this response will want to engage in the politics of accommodation.

I am afraid that I have very little to say about the choice between these alternatives. First, this is not the sort of dispute that is likely to be settled by some sort of winning logical argument or even by a clear-eyed analysis of the consequences of various courses of action. It is a dispute about what kind of people we imagine ourselves to be, not about how to achieve our ends. Second, when I try to imagine myself confronted with this choice in Nazi-occupied Europe, I can easily see myself following each of the three courses of action. I do not suppose that I would be exactly at peace with any of these choices, but neither need any of the choices be a source of deep regret and self-condemnation.

My worry about myself is not that I would make a wrong choice between these alternatives, but that I would avoid the necessity of choice by adopting a stance of world-weary passivity or complacent indifference. There is no good way to deal with overwhelming evil, but there is surely a way not to deal with it. Willful blindness, craven apologetics, and flaccid acquiescence are not options when millions of our fellow inhabitants are behind bars. Like the people of good will trapped in Nazi Europe, we opponents of hyper-incarceration need to confront the truth of our situation and be honest about how bleak the prospects are. But pessimism should not be confused with passivity. Even if our efforts accomplish nothing at all, and whatever form our politics take, we must do what we can to stop the horror.

Our personal dignity demands no less.

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<sup>78</sup> Because of the conduct of the Danish people and government, more than ninety-eight percent of the Jewish population was saved. See MOSHE BEJSKI, THE INTERNATIONAL SCHOOL FOR HOLOCAUST STUDIES, THE "RIGHTEOUS AMONG THE NATIONS" AND THEIR PART IN THE RESCUE OF JEWS 6, available at [http://www1.yadvashem.org/yv/en/righteous/pdf/resources/righteous\\_rescue.pdf](http://www1.yadvashem.org/yv/en/righteous/pdf/resources/righteous_rescue.pdf) (last visited Oct. 13, 2011).

<sup>79</sup> For an account, see ISRAEL GUTMAN, RESISTANCE: THE WARSAW GHETTO UPRISING (1994).

<sup>80</sup> See, e.g., YEHUDA BAUER, JEWS FOR SALE? NAZI-JEWISH NEGOTIATIONS, 1933-1945 (1994).

<sup>81</sup> For a sympathetic account of the Judenrat, see ISAIAH TRUNK, JUDENRAT: THE JEWISH COUNCILS IN EASTERN EUROPE UNDER NAZI OCCUPATION (1972).