Cornell Law Review

Volume 62
Issue 2 *January 1977*

Article 3

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SEXUAL DEPRIVATION AND PENAL POLICY

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Over the past quarter century, penal practices in the United States have become progressively more humane[1] and increasingly sensitive to the dignity of the prisoner.[2] The common practice of handcuffing an inmate to the bars of an isolation cell and placing him on a bread and water diet, sometimes for weeks, has been outlawed by court decision and administrative action.[3] Such antediluvian outrages as the "Tucker telephone," used until recently in certain jurisdictions, have been abandoned upon their exposure to a disgusted public.[4] The federal courts, in passing on a mounting tide of prisoners' rights litigation, have consistently affirmed

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The authors wish to acknowledge the research assistance of Michael S. Smith and Janet Lawson Sweeney's helpful comments on the manuscript.

[1] *See* Note, *The Role of the Eighth Amendment in American Prison Reform*, 38 U. CHI. L. REV. 647 (1971). *See also* Note, *The Eighth Amendment and Prison Conditions; Shocking Standards and Good Faith*, 44 FORDHAM L. REV. 950 (1976), where the author states:

> Despite the shocking conditions revealed in eighth amendment cases, a historical perspective gives great cause for optimism. Although cruel and unusual punishments have been forbidden in the Anglo-American system for almost three centuries, the most important developments have taken place in the last eleven years. The tortures, corporal punishments and intentional cruelties which were everyday reality for the prisoners throughout most of our history are now largely abolished.

Id. at 972.

[2] This thesis and its implications for the social organization of the prison are treated at length in J. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977).

[3] For a description of "stringing up," see N. LEOPOLD, LIFE PLUS 99 YEARS 149-50 (1958).

[4] The "Tucker telephone," used in the Arkansas prison system until the late sixties, has been described as follows:

> The telephone . . . consisted of an electric generator taken from a crank-type telephone and wired in sequence with two dry-cell batteries. An undressed inmate was strapped to the treatment table at Tucker Hospital while electrodes were attached to his big toe and to his penis. The crank was then turned, sending an electrical charge into his body. In "long distance calls" several charges were inflicted—of a duration designed to stop just short of the inmate's fainting. Sometimes the "telephone" operator's skill was defective, and the sustained current not only caused the inmate to lose consciousness but resulted in irreparable damage to his testicles. Some men were literally driven out of their minds.

T. MURTON & J. HYAMS, ACCOMPLICES TO THE CRIME 7 (1969).

the right of prisoners to humane treatment,[5] declaring unconstitutional such practices as corporal punishment,[6] aversive drug conditioning,[7] the tranquilizing of inmates in juvenile institutions,[8] and the maintenance of substandard living conditions within institutions.[9]

Despite this transformation in the prisoner's moral and legal status, he is still subject to a form of punishment that is perhaps the most painful of all—that of total heterosexual deprivation. Although prison reform has moved forward on other fronts, the enforcement of heterosexual deprivation upon this country's 280,000 state and federal prisoners continues as a nearly universal policy. It is not clear, however, whether the practice derives from fundamental principles of criminal jurisprudence, or is merely an unintended consequence of imprisonment, which has taken on the facade of actual policy through long custom and usage. What is certain is that the leading scholars of imprisonment have paid virtually no attention to the propriety of imposing such a total deprivation. We begin, therefore, by questioning whether enforced heterosexual deprivation is a defensible penal policy under any of the rationales of criminal justice—namely, rehabilitation, social defense, and retribution.

I

EXAMINING THE RATIONALES FOR ENFORCED SEXUAL DEPRIVATION

A. *Rehabilitation*

It might seem unlikely that sexual deprivation could be justified in a penal system organized to rehabilitate prisoners. Modern

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[5] There are two outstanding casebooks in this area: R. SINGER & W. STATSKY, RIGHTS OF THE IMPRISONED (1974), and S. KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS (1976).

[6] Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[7] Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

[8] Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). For a detailed discussion of the litigation challenging the use of thorazine in Illinois, see P. MURPHY, OUR KINDLY PARENT THE STATE (1974). A host of other practices in juvenile institutions have been declared unconstitutional. *See, e.g.*, Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) (physical abuse of juvenile inmates held unconstitutional absent exigent circumstances); Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (isolation of juveniles in unlit cells held unconstitutional).

[9] *E.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

notions of resocialization are incompatible with prolonged enforcement of heterosexual abstinence and denial of meaningful social interaction with the opposite sex. Yet when the first American penitentiaries were constructed, sexual deprivation constituted a central tenet of a rehabilitative penal policy.

Although the historical record is not entirely clear, it is generally accepted that the American penitentiary was a Quaker innovation.[10] It was conceived as an institution infused with special moral values and constructed upon the assumption that all men —even criminals—are perfectible and redeemable. Thus, the penitentiary did not rise in response to a crime wave or to escapes from the jails of the period. Rather, it was an idealistic response, representative of the Jacksonian period of institution building, to the moral degeneration fostered by sordid local jails and to the perceived general degeneration of American morals.[11]

In early American prisons like the notorious Walnut Street Jail in Philadelphia, the deterioration of sexual morality had time and again provoked the agitation of reformers. One observer described the Walnut Street Jail as follows:

> It . . . represented . . . a scene of promiscuous and unrestricted intercourse, and universal riot and debauchery. There was no labor, no separation of those accused, but yet untried, nor even of those confined for debt only, from convicts sentenced for the foulest crimes; no separation of color, age or sex, by day or night; the prisoners lying promiscuously on the floor, most of them without anything like bed or bedding. As soon as the sexes were placed in different wings, which was the first reform made in the prison, of thirty or forty women then confined there, all but four or five immediately left it; it having been a common practice, it is said, for women to cause themselves to be arrested for fictitious debts, that they might share in the orgies of the place. Intoxicating liquors abounded, and indeed were freely sold at a bar kept by one of the officers of the prison. Intercourse between the convicts and persons without was hardly restricted. . . . It need hardly be added, that there was no attempt to give any kind of instruction, and no religious service whatsoever.[12]

Sexual promiscuity was a condition of the early jails that cried out

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[10] For a good history of the American penitentiary, see H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 322-439 (3d ed. 1959).

[11] This point is brilliantly developed in D. ROTHMAN, DISCOVERY OF THE ASYLUM 79-108 (1971).

[12] *Quoted in* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 483 (9th ed. 1974).

for reform. If the purpose of the penitentiary was to rehabilitate through religious penitence those unfortunates who had fallen into moral degeneracy, no aspect of this rehabilitation was more important than the prisoners' sexual reformation.[13] And the Quakers made complete sexual abstinence an integral part of their prison policy.

Of course, theories and norms concerning both rehabilitation and sexuality have changed over the years. Present advocates of rehabilitation—those who believe rehabilitation to be a central, if not the sole, principle for justifying imprisonment—do not view heterosexual deprivation as an instrument to achieve that end. Those with a psychological orientation more likely believe just the opposite—that the prisoner's self-image, self-esteem, and attitude toward authority are adversely affected by prolonged sexual deprivation. This is especially true in the prison, where heterosexual deprivation is associated with a high incidence of homosexuality[14] and homosexual rape,[15] as well as with more diffuse expressions of violence. Perhaps still more deleterious long-term effects remain undocumented.

Drawing support from the fact that the average prisoner is youthful, at the height of his sexual needs, and at the point in life where he is most likely to form intimate familial bonds, proponents of rehabilitation today advocate penal policies that strengthen ties to the community. The maintenance of social relationships, including normal sexual relationships, is thought to serve, rather than

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[13] The concern of prison reformers even extended to masturbation. In 1847 a committee investigating New York prisons noted that "the besetting sin of all prisons [is masturbation] . . . . Its existence is very marked in Auburn, and is doubtless one exciting cause of much of the insanity which has prevailed there." *Quoted in* W.D. LEWIS, FROM NEWGATE TO DANNEMORA 131 (1965).

[14] *See* Korn, *Of Crime, Criminal Justice and Corrections*, 6 U. S.F. L. REV. 27, 60 (1971). Almost all studies of women's prisons have focused on the formation of homosexual bonds and pseudo-families. *E.g.*, R. GIALLOMBARDO, SOCIETY OF WOMEN: A STUDY OF A WOMEN'S PRISON 123-29, 133-57 (1966); E. HEFFERNAN, MAKING IT IN PRISON 92-100 (1972); D. WARD & G. KASSEBAUM, WOMEN'S PRISON: SEX AND SOCIAL STRUCTURE (1965). For a description of homosexuality in juvenile institutions for girls, see R. GIALLOMBARDO, THE SOCIAL WORLD OF IMPRISONED GIRLS: A COMPARATIVE STUDY OF INSTITUTIONS FOR JUVENILE DELINQUENTS (1974).

[15] *See* A. SCACCO, RAPE IN PRISON (1975); L. Carroll, Race and Sexual Assault in a Maximum Security Prison (paper delivered at the Annual Meeting of the Society for the Study of Social Problems, Aug. 1974). *See also* Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, TRANS-ACTION, Dec. 1968, at 8, wherein the author states: "Virtually every slightly built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates." *Id.* at 9.

undermine, the rehabilitative goal. Therefore, the rationale of rehabilitation no longer provides a justification for sexual deprivation in our prisons.

B. *Social Defense: Restraint and Deterrence*

In the context of the criminal justice system, social defense has several meanings. Most generally, it means that society is entitled to defend itself against criminal acts. Imprisonment serves this protective function in two different ways, through restraint and deterrence. The former operates during the period of imprisonment, and the latter after release.

Prisons serve the goal of restraint by isolating criminals from society. Sexual deprivation does not support, and perhaps undermines, the objective of isolating rather than punishing offenders. In fact, improved prison conditions and a lessening of privations might well increase the efficacy of a containment policy, while sexual deprivation may stimulate hostility and motivation to escape.[16] Hence, systems of imprisonment that best embody the policy of restraint resemble exile communities.[17] An exile community may be conceived as an autonomous society that functions normally internally, while sharply limiting contact with even the closest neighboring communities. In such a setting, sexuality, like all other aspects of social life, is left to run its natural course.

One contemporary example is Mexico's Tres Marias Penal Colony, which holds some of the most serious offenders in that country.[18] Approximately twenty percent of the eight hundred prisoners live with their families in homes that they have constructed:

> The prisoner has complete freedom on the island's thirty-four thousand acres. He is free to pursue an occupation of his choice. The only requirement is to observe regular working hours. He may farm or establish himself in business, tax free . . . .
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> . . . .
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> On his own time the prisoner may hunt in the forest, fish, manufacture approved furniture or curios (of shell, silver, or

[16] Whether fear of sexual attack is a defense to prosecution for escape is discussed in Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

[17] We have described the structure and characteristics of autonomous prison communities in Jacobs & Steele, *A Theory of Prison Systems*, 21 CRIME & DELINQUENCY 149, 158-60 (1975).

[18] *See* Jewell, *Mexico's Tres Marias Penal Colony*, 48 J. CRIM. L.C. & P.S. 410 (1958).

> gold), participate in sports, or other recreation. The island supports a moving picture theatre, athletic fields, and a boxing ring. Games are often played against teams from schools on the mainland.[19]

The policy of deterrence attempts to reduce the likelihood of future misconduct by threatening painful consequences. Deterrence has been conceived as a method of tipping the scales where an individual weighs alternative courses of conduct,[20] or as a method of dramatizing the boundaries of socially acceptable behavior, thereby reinforcing group cohesion and morality.[21] Both theories of deterrence rest on the use of intentionally inflicted punishment as a response to misconduct. The type and degree of punishment are determined by and calibrated to the desired deterrent effect—a functional rather than an ethical calculation.

As punishments go, contemporary imprisonment is mild and unimaginative. Our ancestors were less restrained.[22] Both modern

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[19] *Id.* at 411.

[20] *See, e.g.*, J. ANDENAES, PUNISHMENT AND DETERRENCE (1974); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London 1823); J. BENTHAM, *Principles of Penal Law*, *in* 1 WORKS OF J. BENTHAM (London 1843); F. ZIMRING & G. HAWKINS, DETERRENCE (1973).

[21] Emile Durkheim long ago observed that in punishing, a society teaches its moral code. Moreover, Durkheim theorized that a society without punishment is impossible. This is not to say that punishment must be brutal or barbaric; but according to Durkheim, punishment is the essential process through which the collective conscience affirms its solidarity by labeling certain behavior as deviant. E. DURKHEIM, RULES OF THE SOCIOLOGICAL METHOD 65-73 (8th ed. 1938).

[22] Our literature is replete with examples of the barbarity of past punishments. One picturesque example will illustrate:

> The sheriffs, attended by two marshals and an immense number of constables, accompanied the procession of the prisoners from Newgate, where they set out in the transport caravan, and proceeded through Fleet Street, and the Strand; and the prisoners were hooted and pelted the whole way by the populace. At one o'clock, four of the culprits were fixed in the pillory. . . . Immediately a new torrent of popular vengeance poured upon them from all sides—blood, garbage, and ordure from the slaughter house, diversified with dead cats, turnips, potatoes, addled eggs and other missiles, to the last moment . . . . The vengeance of the crowd pursued them back to Newgate, and the caravan was filled with mud and ordure. No interference from sheriffs and police officers could restrain the popular rage. . . .
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> . . . .
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> Then—it was June, 1594—the three men, bound to hurdles, were dragged up Holborn, past the doctor's house, to Tyburn. A vast crowd was assembled to enjóy the spectacle. The doctor, standing on the scaffold, attempted in vain to make a dying speech; the mob was too angry and too delighted to be quiet; it howled with laughter . . . and the old man was hurried to the gallows. He was strung up and—such was the routine of the law—cut down while life was still in him. Then

imprisonment and the theory of deterrence were born of a humane desire to eliminate the barbarities of prior forms of punishment.[23] Although some current proposals to "get tough" with criminals are stated in the language of deterrence, the concept historically emerged as a reaction to extremely severe punishment, rather than as a vehicle for advocating increased severity. The utilitarian Jeremy Bentham argued that the punishment done the offender should never be greater than that necessary to maintain social control.[24] Furthermore, the benefit to society should not exceed the harm to the offender. Both Cesare Beccaria[25] and Bentham, the two leading exponents of the "classical school" of criminology, advocated moderate punishments and were humanitarians by the standards of their day.[26]

Thus, modern deterrence theory follows a tradition that justifies punishment only to the extent necessary to prevent future crime. How much punishment is necessary to deter crime? As a subject for serious scientific investigation, this question has only begun to be explored.[27] Currently available data indicate that crime rates are far more responsive to an increase in the certainty, rather than the severity, of punishment. There is little evidence that increasing the severity of an already severe punishment produces a greater deterrent effect.[28]

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the rest of the time-honored punishment—castration, disembowelling, and quartering—was carried out. Ferriera was the next to suffer. After that, it was the turn of Tinoco. He bad seen what was to be his fate, twice repeated, and close enough. His ears were filled with shrieks and moans of his companions, and his eyes with every detail of the contortions and the blood. . . . Tinoco, cut down too soon, recovered his feet after the hanging. He was lusty and desparate; and he fell upon his executioners. The crowd, wild with excitement, and cheering on the plucky foreigner, broke through the gnards, and made a ring to watch the fight. But, before long, the instincts of law and order reasserted themselves. Two stalwart fellows seeing that the executioner was giving ground, rushed forward to his rescue. Tinoco was felled by a blow on the head; he was held firmly down on the scaffold; and like the others, castrated, disemboweled, and quartered.

Quoted in S. RUBIN, THE LAW OF CRIMINAL CORRECTION 418-19 (2d ed. 1973).

[23] *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 48-67 (1971); H. BARNES & N. TEETERS, *supra* note 10, at 328-37; D. ROTHMAN, *supra* note 11, at 79-108.

[24] According to the principle of utility, a specific punishment is justified if it promotes the good of the people, or as Bentham put it, "when the tendency it has to augment the happiness of the community is greater than any it has to diminish it." J. BENTHAM, 1 AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 5 (London 1823).

[25] C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS ch. 27 (4th ed. London 1775).

[26] *See* H. MANNHEIM, PIONEERS IN CRIMINOLOGY 36-67 (2d ed. 1972).

[27] *See* F. ZIMRING & G. HAWKINS, *supra* note 20, at 2.

[28] *See* F. ZIMRING, PERSPECTIVES ON DETERRENCE 83-92 (1971).

The relationship between deterrence and specific prison conditions is also unclear. Imprisonment, even under the best of conditions, is a sufficient punishment to bring into play the mechanism of deterrence, and it has not been determined whether ameliorating the harshness of prison life reduces the deterrent effect. As one scholar has written:

> [W]hat is essentially prison-like about prisons will probably mean that the unattractiveness of prison as a general deterrent is relatively insensitive to many changes in the conditions of penal confinement. If this is the case, conjugal visits, protein diets, and television privileges can be added or subtracted from the basic environment of penal confinement without affecting the fundamental aversion to loss of freedom experienced by the vast majority of our citizens.[29]

It would appear that only a small increase in the deterrent effect of imprisonment could be achieved by severely increasing the harshness of prison life. But to achieve a marginal or uncertain reduction in crime by sharply increasing the suffering of imprisoned felons raises serious questions of justice. The policy of sexual deprivation strikes so near the core of human life, with such brutal force, and with so little apparent utility that we do not think it can be justified by the principle of deterrence any more than by the principles of restraint or rehabilitation.

C. *Punishment: Retribution and Desert*

Perhaps the most intensely felt punishment in contemporary American prisons is the all but universal absence of physical and social intercourse between the sexes.[30] The significance of this deprivation was poignantly expressed by Mersault in Camus' *The Stranger*:

> Those first months were trying, of course; but the very effort I had to make helped me through them. For instance, I was plagued by the desire for a woman—which was natural enough, considering my age. I never thought of Marie especially. I was obsessed by thoughts of this woman or that, of all the ones I'd had, all the circumstances under which I'd loved them; so much so that the cell grew crowded with their faces, ghosts of my old

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[29] *Id.* at 79-80.

[30] In his classic prison study of almost two decades ago, Gresham Sykes pointed out that the chief problems for the convicted man are the deprivations of liberty, goods and services,.heterosexual relationships, security and autonomy. G. SYKES, THE SOCIETY OF CAPTIVES 64-83 (1958).

passions. That unsettled me, no doubt; but, at least, it served to kill time.

I gradually became quite friendly with the chief jailer, who went the rounds with kitchen hands at mealtimes. It was he who brought up the subject of women. "That's what the men here grumble about most," he told me.

I said I felt like that myself. "There's something unfair about it," I added, "like hitting a man when he's down."

"But that's the whole point of it," he said; "that's why you fellows are kept in prison."

"I don't follow."

"Liberty," he said, "means that. You're being deprived of your liberty."

It had never before struck me in that light, but I saw his point. "That's true," I said. "Otherwise it wouldn't be a punishment."[31]

Total heterosexual deprivation has become as much a part of American imprisonment as walls, gun towers, bars, and gates. It has been assumed almost without discussion that such deprivation is appropriate punishment for all prisoners.[32] Yet the policy is neither historically universal nor logically demanded by any theory of punishment. Not all societies have subjected their prison popula-

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[31] A. CAMUS, THE STRANGER 96-97 (Knopf 1946). In one of the most poignant accounts of imprisonment ever written by a prisoner, Victor Nelson wrote:

> For of all the possible forms of starvation, surely none is more demoralizing than sexual starvation. If one becomes sufficiently hungry or thirsty, one naturally suffers a great deal; but usually only for a comparatively brief time. Relief is always in sight—even if it come in the desperate form of death. But to be starved for month after weary month, year after endless year, in a place where 'every day is like a year, a year whose days are long,' for sexual satisfaction which in the case of a lifer, may never come, this is the secret quintessence of human misery.

V. NELSON, PRISON DAYS AND NIGHTS 143 (1934).

Alone among authors who argue that sexual deprivation is not a painful aspect of imprisonment are Gagnon & Simon, *The Social Meaning of Prison Homosexuality*, FED. PROBATION, Mar. 1968, at 23. Their evidence, drawn from the Kinsey studies, is contradicted by every other study of the prison community with which we are familiar.

[32] Our system of criminal jurisprudence has almost arrived at the goal set by classical nineteenth century penologists—a single undifferentiated sentence of ordinary imprisonment. Imprisonment with or without hard labor, and corporal punishment by more or less gruesome means, have been replaced by the antiseptic, quantified concept of specified years of imprisonment. Whether special consideration should be given to certain types of offenders with respect to conjugal visits and other programs to ameliorate sexual deprivation is an interesting question. Must there be a single policy applicable to all? Might we implement a conjugal visitation program for property offenders but not for offenders against the person; for older offenders rather than the younger ones, or vice versa; for short termers rather than long termers? Until we stop thinking about prisons as a single type of standard institution and about prisoners as an undifferentiated mass, such questions will not be taken seriously.

tions to complete heterosexual abstinence. In the Czarist prison camps, opportunities existed for amorous liaisons and conjugal relations. For instance, Dostoevsky recorded that Siberian prisoners were sometimes allowed to have sexual relations with women from nearby towns.[33] Even in the German concentration camps, where prisoners were either worked to death or exterminated, there existed efficient bureaucratic mechanisms to provide prisoners with prostitutes.[34]

Today, in the Latin American countries it is widely believed that heterosexual abstinence is unnatural, even for convicted criminals. A 1958 survey of marital relationships of prisoners in twenty-eight countries found that Argentina, Mexico, and Puerto Rico[35] attempted to accommodate and maintain the sexual relationship between husband and wife.[36] The survey concluded: "The Latin American countries apparently accept sexual desires as normal and family unity as fundamental."[37] Moreover, in the Soviet Union wives are brought to prisons for several days at a time at government expense.[38] And India, Burma, and the Philippines permit some prisoners to live with their families in certain confinement complexes.[39] Finally, the Scandanavian countries, consistent with their more liberal attitude toward sex, have substantially ameliorated the anguish of prolonged heterosexual deprivation through liberal furlough and private visitation programs.[40]

Even in our own country, the corruption that existed in many prison systems during the 1930's and 1940's provided opportunities for some prisoners to maintain heterosexual relations. Various scandals were unearthed at Michigan's Jackson Prison in the mid-forties:

> Prison employees took inmates to houses of prostitution. "In payment for the services of the prostitutes," said the Attorney

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[33] F. DOSTOEVSKY, MEMOIRS FROM THE HOUSE OF THE DEAD 38 (Oxford Univ. Press 1965).

[34] *See* E. KOGON, THE THEORY AND PRACTICE OF HELL 135-36 (1950).

[35] Cavan & Zemans, *Marital Relationships of Prisoners in Twenty-Eight Countries*, 49 J. CRIM. L.C.&P.S. 133, 136-37 (1958).

[36] Despite poor prison conditions, Mexican penal policy continues to treat private visiting as routine. Even American women offenders serving sentences for drug offenses are "trucked to the men's prisons once a week for conjugal visits with spouses or loved ones." N.Y. Times, May 23, 1976, § 1, at 22, col. 1.

[37] Cavan & Zemans, *supra* note 35, at 137.

[38] *See* R. SINGER & W. STATSKY, *supra* note 5, at 567.

[39] *See id.*

[40] *See* Ward, *Inmate Rights and Prison Reform in Sweden and Denmark*, 63 J. CRIM. L.C. & P.S. 240 (1972).

> General, "several of the inmates would steal eggs, chickens, meats, etc., from the prison farm for such payment. One inmate testified that two bushels of potatoes would get the best prostitute in Jackson." To go to town, they had only to call a taxicab. The taxi fare from prison to whorehouse was eight dozen eggs. A notorious gangster was made the houseboy of an assistant deputy warden; the gangster's girl friend moved into the house. The wife of a man serving four to ten years for assault with intent to rape visited him in Jackson while he was a patient in the prison hospital; a sheet was hung over the doorway and she was left alone with him two hours . . . .[41]

Moreover, eliminating sexual deprivation as a formal policy of prison administration is not unknown in the United States. The most progressive state in this regard is Mississippi. According to Columbus Hopper, conjugal visits have been available to all married and common-law married prisoners at the vast Mississippi State Prison Farm for as long as anyone can remember.[42] He credits the success of the program to the small size and nonbureaucratic organization of the various campuses where prisoners live, the rural culture of Mississippi which accepts sexuality as natural, and the racial caste system which early fostered a belief that blacks could not survive without sexual relations.[43] The conjugal visitation program in Mississippi appears to have had salutary effects on homosexuality, violence, and the maintenance of marriages.[44] More recently, in 1968, California adopted a program of conjugal visits in all state prisons.[45] Legal wives and immediate families are allowed two-day visits, with family life, rather than sex, being emphasized through the use of symbols such as kitchens and playgrounds. While half of the state's inmates are eligible for the program, only about twenty percent participate.[46]

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[41] J. MARTIN, BREAK DOWN THE WALLS 26 (1954). An interesting modern example is provided in R.T. DAVIDSON, CHICANO PRISONERS: THE KEY TO SAN QUENTIN 110 (1974), where the author relates that prisoners have had intercourse with a nurse in the prison hospital.

[42] C. HOPPER, SEX IN PRISON 64 (1969).

[43] *Id.* at 79-80.

[44] *Id.* at 80.

[45] *See San Quentin: It's a Nice Place to Visit*, Los Angeles Times, Mar. 21, 1976, CC part II, at 1, col. 1.

[46] *See id.* By 1972 the program had grown to 6,000 visits by one or more family members. In the last quarter of 1975 there were 2,816 private visits, of which slightly more than one-third were by the wife only. *See id.* Furthermore, the introduction of a conjugal visitation program has led to a marriage boom in California prisons. *See* TIME, Mar. 15, 1976, at 12.

Although prisons in many parts of the world run successfully without enforced sexual abstinence, in the United States there is widespread public opposition to conjugal visits, even where such programs involve no threat to prison security. Critics typically charge that such programs minimize the severity of punishment. A citizen in Wallkill, New York, voiced her pithy objection to a planned conjugal visitation program: "They're in there for punishment, and it's a lot of privileges they're getting . . . . [T]he prisoners do seem to be coddled."[47] Thus phrased, the problem is reduced to a question of "just deserts": how severe a punishment does the criminal deserve for his crime? Although punishment less severe than what is just depreciates the seriousness of the offense, punishment more severe violates the rights of the convict.[48] This principle is easily stated; applying it is more difficult.

The difficulty of determining the "proper" punishment for a given crime is exacerbated by the natural human urge to demand retribution or vengeance. In a sense, retribution and desert are but the subjective and objective approaches to the task of assessing a proper punishment. The call for retribution is the passionate reaction of those involved, those injured, those threatened. The call for desert is the objective, more cool-headed reaction of the detached observer,[49] transcending empathy and passion and considering matters from the perspective of neutral ethical principles. Such detachment is, of course, never completely attained. Human judgments as to the deserts of crime contain a large element of passion as well as higher qualities of reason and justice.

Moreover, Americans are not noted for their objective consideration of matters relating to sex. Our puritan heritage in matters sexual and penal makes rational analysis of the sexual deprivation issue particularly difficult. Certainly, conjugal visitation, the policy most directly ameliorative of enforced sexual deprivation, should be a far more important item on the prison reform agenda than the myriad calls for new counseling and training programs. Perhaps, as both Karl Menninger[50] and Ernest van den Haag[51] have suggested, punishment itself has become sexualized,

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[47] *Reported in* N.Y. Times, Feb. 14, 1976, at 29, col. 1.

[48] *See* N. MORRIS, THE FUTURE OF IMPRISONMENT 73-77 (1974). A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1976).

[49] *See* Christie, *Utility and Social Values in the Court Decisions on Punishment*, *in* CRIME, CRIMINOLOGY AND PUBLIC POLICY 287 (R. Hood ed. 1974).

[50] K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

[51] E. VAN DEN HAAG, PUNISHING CRIMINALS 203-06 (1975).

and retribution inextricably linked to sexual instincts.[52] Even persons not versed in twentieth-century psychoanalytic theory can recognize the close psychological connection between the infliction of punishment and sexual or libidinal drives.[53] This psychological linkage has undoubtedly reinforced acceptance of enforced heterosexual deprivation as a nearly universal penal policy in the United States.

Therefore, whether or not prolonged sexual deprivation will ultimately be considered appropriate for none, some, or all criminals, we conclude that the absence of rational discussion of the question undermines the present legitimacy of the policy.[54] For

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[52] Van den Haag argues that corporal punishment was sexualized in the Western world in the eighteenth century and consequently abandoned in the nineteenth century:

> Once sexualized, the rational, instrumental functions of inflicting physical pain were overwhelmed and ultimately had to be given up. Ego (rational, instrumental) activities often become inhibited altogether when sexualized—i.e., once they are used as, or felt to be, vehicles for the direct gratification of libidinal (or aggressive) drives. They become fused with the drives they express and are blocked when these are. The ego activities, then, cannot be used any longer as means for realistic (ego) purposes, regardless of how useful they are. Psychoanalysts are familiar with the inhibition in individuals of activities such as reading, walking, writing or mentation as a result of such a fusion, such an invasion by the libido which overwhelms rational functions. Something analogous has happened to society with respect to the punitive conditioning of individuals by means of deliberately inflicting pain. Infected with, or tainted by, sexual gratification, corporal punishment became inadmissible, just as tainted evidence is inadmissible in our courts. Business and pleasure do not mix. Corporal punishment now is perceived as debasing sexual exploitation, even as homosexual rape. (By the eighteenth century, pain was inflicted mainly by men on men.)

Id. at 203-04.

[53] Historically, the most obvious manifestation of this fusion was the widespread use of castration to punish crimes, whether or not the crime itself was sexual. *See* notes 2, 22 *supra*.

[54] *See* Albraham, *Deviant Sexual Behavior in Men's Prisons*, 20 CRIME & DELINQUENCY 38 (1974). The author notes the "remarkable paucity of professional literature on the subject." *Id.* at 39.

Although prisoners have repeatedly called attention to the intense pain of prolonged heterosexual deprivation, there has been remarkably little policy analysis in this area. Few of the best-known texts in criminology and penology even mention the topic. Edwin Sutherland and Donald Cressey, in CRIMINOLOGY (9th ed. 1974), do not discuss conjugal visits or sexual deprivation. Linda Singer and Ronald Goldfarb, in AFTER CONVICTION (1973), take only one and one-half pages (out of 735) to note that "[l]ong, enforced sexual abstinence, especially among young people, is a cruel and unnecessary form of punishment which must irritate and undoubtedly frustrates any chance of rehabilitation." *Id.* at 391. They conclude that "[t]he taboo of sex and the conventional shortsighted pseudo-moralism of prison administrations in America make it unlikely that conjugal visitations will be allowed generally without a judicial declaration that it [*sic*] may not be denied." *Id.* at 392. The authors might have extended their observation about shortsightedness to students of the prison as well. *See also* Kent, *The Legal and Sociological Dimensions of Conjugal Visitation in Prison*, 2 NEW ENG. J. PRISON L. 47 (1975).

this reason, we think that the policy can no more be justified by the principle of retribution than it can by the principles of rehabilitation and social defense.

II

TOWARD AMELIORATING ENFORCED HETEROSEXUAL DEPRIVATION IN PRISON

If the nearly universal American policy of imposing heterosexual deprivation upon its prison population is not a postulate deduced from higher principles of criminal jurisprudence, but merely persists through force of custom and tradition, then we ought to think seriously about practical alternatives. Putting aside both political and legal obstacles for the moment,[55] we turn to an examination of two policies that have been suggested to ameliorate heterosexual deprivation in our prisons: furloughs and conjugal visits.[56]

A. *Home Furloughs*

A furlough program allows the prisoner to leave the institution for up to several days at a time, usually unsupervised, in order to attend to personal matters in the outside world—*e.g.*, looking for a job, interviewing for school, visiting with family. The

[55] Any serious discussion of prison policy must eventually confront two basic truths about contemporary American prisons. First, many of the abuses of imprisonment are literally built into the very steel and concrete of the mega-prisons, as well as into the habits of prison guards and administrators, and into what has come to be called prison culture. Even when the rare opportunity arrives to make a fresh start, to build and hire anew, the old ways die hard. The political risks of change are huge; thus the tendency to maintain the old is strong. Second, prison systems are chronically short of resources. Convicted criminals do not command a high degree of public empathy. Beyond the basic requirements for security, prison budgets do not receive a high priority in the allocation of public resources.

These two realities form the background for implementation of changes in imprisonment. They create an inertia that renders any reform difficult. Yet one must also keep in mind that they are not in themselves legitimate arguments against any particular change. Rather, they make the allocation of scarce resources especially difficult.

[56] A third conceivable strategy to ameliorate heterosexual deprivation exists—integrating the prison. Already there are several examples of "co-ed" minimum security institutions around the country. Given the generally relaxed rules at such institutions, there are no doubt some opportunities for illicit sexual encounters. But it is difficult to see how a formal policy to allow "dating" in co-ed institutions would ever be accepted politically. In addition, there are not enough women prisoners in the various state systems to make co-ed imprisonment a possibility for more than a small percentage of the male population. A poignant account of the sexual and emotional relationships that developed among male and female prisoners of co-ed Soviet labor camps is found in 2 A. SOLZHENITSYN, THE GULAG ARCHIPELAGO 227-50 (1975).

program is well known in the Latin American countries (Argentina, Chile, Mexico, and Puerto Rico), as well as in many European societies (Denmark, Germany, Great Britain, Greece, Sweden, and Switzerland).[57] Sweden's furlough program is frequently said to be the most liberal anywhere, since most prisoners are eligible within months after admission to prison, and even the most serious offenders may be furloughed after having completed two years of their sentences.[58] In the United States, in 1918, Mississippi became the first state to introduce a furlough program.[59] Only four other states and the District of Columbia were operating similar programs by 1965, but by the early 1970's, twenty-eight of the fifty states allowed furloughs in some form.[60]

It is difficult to determine how the currently existing programs are administered. In the only survey on the topic, Delaware reported that it instituted a furlough program in 1969, that there are "numerous" participants in the program, that the purposes for which furloughs are granted are "home visits, job or school interviews, etc.," that the criteria used for selection are "institutional adjustment, offense, program participation," and that no problems have been encountered.[61] What cannot be ascertained from the available data is how many of the unspecified number of furloughs are for purposes of home leave, permitting the prisoner an opportunity for conjugal or other sexual relations. Clearly some of the states responding to the survey and indicating that they have a furlough program do not offer such an opportunity; indeed, some of the programs might better be termed "special leaves," since they are available only for emergencies, speeches, or "other compelling reasons."[62]

The effectiveness of a furlough program in ameliorating sexual deprivation depends upon the percentage of prisoners allowed to participate. In the United States, with its high rate of violent crime, it is inconceivable that unsupervised furloughs would be approved for serious offenders and those serving long sentences, since such prisoners would then be able to escape at will. It is true that escapes have been rare in existing furlough programs, such as

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[57] *See* Markley, *Furlough Programs and Conjual Visiting in Adult Correctional Institutions*, FED. PROBATION, Mar. 1973, at 19.

[58] *See* Ward, *supra* note 40.

[59] *See* Markley, *supra* note 57, at 21.

[60] *See id.* at 22-24.

[61] *See id.*

[62] *See id.*

the one in Illinois.[63] This merely evidences, however, the success of a cautious program which limits furlough eligibility to prisoners who are within six months of parole eligibility,[64] and further narrows eligibility through case by case screening. The fact that the furloughed prisoners are expected to return to the streets within six months minimizes the risk to society in permitting the furlough.

Despite the applause that home furloughs have received from reformers,[65] the risk posed to society militates against a major expansion of the program. It therefore does not offer a viable mechanism for the general amelioration of sexual deprivation in prisons. Of course, a furlough program might be modified to include close supervision in order to reduce the risk of the prisoner escaping or committing new crimes. The practicality of such a modified plan is most questionable, however, given the difficulty of adequately supervising home visits and the almost prohibitive expense of such supervision. Hence, we are led to conclude that if the enforced sexual deprivation of our prison population is to be ended, it will have to be through an in-prison conjugal visitation program.

B. *Conjugal and Private Visitation Programs*

A conjugal visitation program allows the prisoner's spouse to enter the prison to engage in family interaction, including sexual relations. As noted earlier, conjugal visits are well established in Scandanavia, Latin America, and Mississippi.[66] In 1968 California started such a program by placing house trailers on the grounds of some of its largest institutions.[67] More recently, New York has announced a pilot program to be introduced at one of its medium

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[63] Between September 1969 and February 1976, the Illinois Department of Corrections granted 5,811 home and family furloughs. Only 59 prisoners did not complete the furlough successfully, either having absconded (45) or having been arrested for a new crime (14). Telephone interview with Ed Gramley, Illinois Department of Corrections (Aug. 1976).

[64] In addition, the regulations provide that furloughs will not be available to those convicted of murder or other class one felonies, those involved in organized crime, or those whose furlough might "attract undue attention." Illinois Department of Corrections, Administrative Regulations § 817.

[65] *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 128-29 (1970).

[66] *See* notes 35-44 and accompanying text *supra*.

[67] San Quentin, for example, has three house trailers for medium security prisoners and six apartments for minimum security prisoners. Folsom has only one house trailer. Telephone interview with H. George Watkins, Visiting Lieutenant, California State Prison at San Quentin (Aug. 31, 1976).

security facilities.[68]

The claims most often made in favor of conjugal visits are that they will reduce violence, homosexual rape, and homosexuality, that they will bolster the prisoner's self-image, and that they will contribute to the maintenance of family ties.[69] None of these claims have been carefully evaluated, although Hopper's data on the Mississippi system provide limited support.[70] There can be no doubt that such visits do alleviate some of the suffering experienced in prison. Unless there are compelling grounds to reject the program, we would support it for this reason alone.

The greatest challenge to those who advocate conjugal visits does not seem to be in building a strong affirmative case, but in meeting the many objections to such programs.[71] Most of these objections focus on the difficulties of administering conjugal visits, rather than on the principle itself. One criticism is that prison personnel will not support the program and that to force it upon them will lower morale, leading to organizational strain.[72] There is no empirical support for this assertion. In fact, Hopper's evidence indicates that a conjugal visitation program would *reduce* tensions and hostilities in the prison and somewhat ease the plight of the custodian.[73] To be sure, any liberalization in the operation of an established prison is likely to be greeted with some skepticism and resistance, but certainly this is no reason to abandon reform. What it does suggest is the continuing need for staff development and training.

Another objection, sometimes raised by prisoners,[74] is that giving prison administrators discretion over conjugal visits would hand them too powerful an instrument of control over inmate behavior.[75] Prisoners would feel compelled to follow rules, sub-

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[68] *See* N.Y. Times, Feb. 14, 1976, at 29, col. 1.

[69] *See* C. HOPPER, *supra* note 42, at 71.

[70] *Id.* at 92-95, 102.

[71] These objections are discussed in Balogh, *Conjugal Visitations in Prisons: A Sociological Perspective*, FED. PROBATION, Sept. 1964, at 52; Hayner, *Attitudes Toward Conjugal Visits for Prisoners, id.*, Mar. 1972, at 43; Johns, *Alternatives to Conjugal Visiting, id.*, Mar. 1971, at 48; Markley, *Furlough Programs and Conjugal Visiting in Adult Correctional Institutions, id.*, Mar. 1973, at 19.

[72] *See* Johns, *supra* note 71, at 49.

[73] C. HOPPER, *supra* note 42, at 140-41.

[74] *See* interview with Fran O'Leary, *reprinted in* IN PRISON 137 (J.E. Trupin ed. 1975).

[75] The recently implemented "family reunion program" at New York's Wallkill prison, for example, makes a "good conduct record" a prerequisite to participation. Administrators candidly admit that the program "is being used as a carrot." Telephone interview with Rev. Earl B. Moore, Director of Ministerial Services, New York State Department of Correc-

mit to authority, and perhaps stifle their complaints for fear that conjugal visitation privileges might be revoked. We do not believe that greater adherence to rules and submission to authority would be unwelcome developments, as long as viable mechanisms were maintained for challenging gross abuses of administrative discretion. Nor does it appear to us that the best way to develop responsible penal administration is by limiting prison reforms. Innovations such as parole, work release, furloughs, and minimum security have been among the most important milestones in the history of American prison reform. To the extent that such programs are unfairly administered, the problem should be met head-on by providing ombudsmen, access to counsel, and administrative review. Administrators should be held accountable to written rules and be required to give written reasons for such administrative actions as granting or denying requests for conjugal visits. In any event, the disadvantage of any slight increase in abuse of discretion is more than outweighed by the benefits to be achieved by ending sexual deprivation in our prisons.

The most difficult problem in implementing a conjugal visitation program is defining eligibility. Should all prisoners, regardless of their crimes, be eligible for conjugal visits from the beginning of their sentences? Given the fact that prison conditions are not formally considered in the judicial sentencing process, there seems to be no reason for corrections departments to impose what are effectively different sentences by excluding some offenders from the program. Yet it is a troublesome question whether conjugal visits should be available to sexual offenders and others whose crimes suggest serious psychopathology.[76] The problem may best be re-

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tional Services (Aug. 30, 1976).

The Family Visiting Regulations promulgated by San Quentin's Warden provide:

> Inmates who have violated rules directly related to visiting may not be eligible for family visiting permanently, or for a specified period of time as determined by a disciplinary committee, but minor rule infractions, if not directly related to visiting will not be a factor in determining eligibility.

The concern about abuse of authority could also be met, of course, by disallowing the use of conjugal visits as either a reward or punishment. Whether maintenance of a satisfactory disciplinary record should be a prerequisite to eligibility and whether denial of conjugal visits would be a permissible administrative sanction for violation of the prison rules are important questions. In Mississippi, according to Hopper, conjugal visitation rights are not subject to suspension as a penalty, and all prisoners are eligible to participate, except those serving time in segregation. Added support for removing conjugal visits from the reward/punishment continuum can be found in the fact that regular visits are not subject to suspension as a punishment in American prisons. *See* C. HOPPER, *supra* note 42, at 60.

[76] California's "family visiting program" excludes "mentally disordered sex offenders."

solved by making some kind of psychological diagnostic procedure a part of the program. Whether prisoners under the sentence of death should be permitted to have conjugal visits is an even more difficult question. None of the reasons for which we advocate conjugal visits apply as strongly to those who have been sentenced to death. On balance, we believe that they should be excluded.

The New York, California, and Mississippi programs have all been limited to married prisoners,[77] although several of the Latin American countries permit visits by *novias* and prostitutes. To open the program to all may put the prison in the position of running a bordello, but to limit the program to spouses would exclude the majority of prisoners from participating. It should be recalled that as regular visiting is administered in most prisons, the inmate is limited to visits from specified friends and relatives.[78] To allow the prisoner to choose any person for a private visit would clearly undermine the entire system of controlling the prisoner's contacts with the outside. Nevertheless, this is not a conclusive argument against the program, but rather a point that needs to be recognized in order to make an informed decision about the implications of a private visitation program.

It might also appear that if unmarried men were not allowed to participate, they would become embittered, thereby leading to increased tension and violence. This point assumes that conjugal visits, as the term implies, would only be available to married men. If they were defined as private visits, as is the case in Sweden, there would be no need to distinguish between married and unmarried men:

> In Sweden we generally allow unsupervised visits in the open institutions. An inmate may take a visitor to his private room,

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Telephone interview with H. George Watkins, Visiting Lieutenant, California State Prison at San Quentin (Aug. 31, 1976).

In New York, sex offenders—those convicted of "heinous crimes" and prisoners with "mental defects"—are not eligible for conjugal visits. Telephone interview with Rev. Earle B. Moore, Director of Ministerial Services, New York State Department of Correctional Services (Aug. 30, 1976).

[77] Actually, both the New York and California programs stress family preservation and downplay the sexual aspect, no doubt because of fear of adverse public opinion. Eligible prisoners in both states may have visits either with wives or other members of the nuclear family. Mississippi, unlike New York and California, recognizes common-law marriages for purposes of the visiting program.

[78] *See* Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971) (denied asserted constitutional right of prisoner to visit with friends and business associates). *But see* Duren v. Procunier, 1 PRISON L. REP. (ABA) 179 (N.D. Cal. 1972) (restraining order granted permitting woman to visit her imprisoned male friends).

> whether it is his father, mother, brother, sister, wife, fiance, or someone else close to him. Since the inmate has a key to his room, nobody pays any attention if he locks himself in with his visitor. Moreover unsupervised visits in special rooms may be permitted in closed institutions also. I do not know whether sexual intercourse occurs during such visits, although I can always hazard a guess. In our opinion, sexuality is strictly a personal matter. We do not ask questions, we make no special provisions. We merely decide whether the individual inmate can be trusted to receive a visitor without supervision.[79]

Even if private or conjugal visits were only available to married men, Hopper's careful study suggests that the resentment argument is a complete myth.[80] And even if resentment did materialize, it would hardly justify scrapping a humane and principled program. Present visiting arrangements at prisons are not cancelled because many prisoners never have visitors. Whether private visits should be extended beyond the prisoner's wife and family to include friends or anyone he wishes to have visit, is an open and important question. It surely can be argued that the state is acting within its legitimate interests to favor marriage or other family relationships. But perhaps the best solution is for the state to make no judgment about who is a suitable visitor, except to assure itself that security is not being threatened.[81] We believe that the state should prevent those with serious criminal records from visiting prisoners. In addition, visitors who do not cooperate in the administration of the program should be excluded.

With these exceptions, we would favor seeing the program run as it is in Sweden. The state should assure itself that the individual applying for a private visit has an established relationship with the prisoner. And if information about prostitution does come into the hands of the prison staff, it should be passed along to the proper law enforcement authorities in the same way that such information would be handled on the street.

No doubt the advocates of rehabilitation have the strengthening of family ties in mind, rather than the encouragement of tran-

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[79] Ward, *supra* note 40, at 246 (quoting Eriksson, The Treatment of Criminals in Sweden 5, Sept. 1967).

[80] C. HOPPER, *supra* note 42, at 98-101.

[81] This, of course, raises important and delicate questions about the types of searches that are appropriate for those who come to the prison for private visits. *Cf.* Black v. Amico, 387 F. Supp. 88 (W.D.N.Y. 1974) (free defendant need not submit to strip search before visiting jailed codefendant); State v. Colby, 263 S.C. 468, 210 S.E. 2d 914 (1975) (fourth amendment no bar to search of prison visitors).

sient sexual relations with prositutes, in suggesting that sexual relations be permitted even during a prison term. On the other hand, it seems likely that self-esteem, which by all accounts is severely threatened in prison, would be bolstered by any type of heterosexual experience, especially in a society that so emphasizes sexuality. We do not minimize the danger that abuses would occur, but we are not dealing with the Boy Scouts. Abuses, and very serious ones, are already occurring in our prisons. Finally, it must be remembered that no reform is achieved without costs, and this may be an instance where the costs should be borne.

No matter who is eligible to participate, one can also expect to hear the argument that conjugal or private visits would increase the number of welfare babies.[82] This objection too should be taken seriously. No doubt there would be children born of these in-prison liaisons, and one need not be overly moralistic to believe that this is not the best of circumstances in which to bring children into the world. On the other hand, it is not clear that the state has a valid interest in attempting to discourage the birth of children to prisoners' wives.[83] The total welfare population is unlikely to be substantially affected by such births. Moreover, it seems unfair to raise this objection when there is so little concern for the wives and children of prisoners, who are deprived of the material and emotional support of their husbands and fathers. Birth control solves this problem and should be forthrightly suggested to the prisoner and his family.

C. *A Practical Plan for Implementing Conjugal or Private Visits*

The architectural constraints of the hundred year old mega-prison bastilles pose a substantial obstacle to introducing a humane private visitation program. The size of the inmate population, the crowded living conditions, the absence of privacy, and the atmosphere of constant surveillance make it difficult to imagine a well-run private visitation program being introduced at a reasonable cost.

Conjugal or private visits need not, however, be instantly adopted across the board in every prison. We have argued at length elsewhere that entire state and federal prison systems should become even further differentiated by increasing the num-

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[82] *See* Barlogh, *supra* note 71, at 55; Johns, *supra* note 71, at 49.

[83] *See* Dandridge v. Williams, 397 U.S. 471, 508 (1970) (dissenting opinion, Marshall, J.).

ber of separate units.[84] Once attention shifts to prison systems, it becomes apparent that some units can easily be adapted to private visits, while others cannot. For example, a prison farm in a remote area (like the camps on the plantations of the Mississippi Penitentiary) would be an ideal location for the construction of dormitory-like units where private visits could take place with safety and dignity. A large and crowded city jail, on the other hand, will remain completely unadaptable. In deciding which types of institutions to build and which to phase out, it is imperative that emphasis be placed upon the functional interdependence of the multiple units of an entire prison system.

If there are some units within a prison system where conjugal or private visits can reasonably be made, who should be assigned there? Should those spaces be allocated to the less serious offenders and to those inmates who have been orderly in the maximum security facilities? Should the spaces be assigned to long-term inmates who face the prospect of years of prolonged sexual deprivation, or to short-term inmates who will soon return to their families and their ordinary sexual lives? Or perhaps the spaces should be made available to married inmates with strong family ties? An interesting possibility is seen in the northern Swedish prison region, where one unit has been established as a kind of hotel where an inmate and his or her visitor may "rent" a room for a weekend.[85]

We find the latter idea particularly attractive. Given the current budget crises in state governments, the huge fixed costs of the existing prison infrastructure, and the rapidly rising prison population, it is impossible to imagine a wholesale abandonment of the mega-prison and the creation of new, smaller, more liveable institutions where private visits could be administered with ease. On the other hand, a single new or reconstructed model unit, through which prisoners maintaining good behavior could be rotated, is more likely within the capacity of existing resources. The cost of such a unit would be easier to justify than many other expenditures, since it would be available to a sizeable proportion of the prison system's population. In addition, at a time of increased crowding, tension, and strain the unit would represent a reward for conforming behavior that might serve to reinforce social control throughout the prison system.

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[84] *See* Jacobs & Steele, *A Theory of Prison Systems*, 21 CRIME & DELINQUENCY 149 (1975).

[85] *See* Ward, *supra* note 40, at 247.

CONCLUSION

Complete heterosexual deprivation, far from being a universal and indispensable constituent of imprisonment, is a culturally bound practice, for which there is little unambiguous support. Sexual deprivation appears antithetical to both the rehabilitative and the social-defense-by-restraint models of imprisonment. Such deprivation has not been shown to add to the deterrent effect of imprisonment and is not justified under classical utilitarian theory. We are thus brought back to the rationale of imprisonment as punishment. It is in light of this rationale (containing notions of both "just desert" and retribution) that the practice finds its roots.

The Supreme Court, in interpreting the eighth amendment's prohibition of "cruel and unusual punishment," has said that the concept "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[86] Although one might think that complete heterosexual deprivation is at least as cruel and unusual as the denial of adequate cell space, recreation, and physical security, to date the courts have not held enforced sexual deprivation to constitute cruel and unusual punishment.[87] This will surely remain true for the foreseeable future as well, given the long history of the practice and its general acceptance in society.[88] The Supreme Court's recent decision upholding the constitutionality of the death penalty[89] and its refusal to expand prisoners' rights in other recent cases[90] support the conclusion that enforced heterosexual deprivation will find no remedy in the courts.

If sexual deprivation is to be ameliorated through furloughs or private visits, it will have to be done by state legislatures and departments of correction. This is not altogether unthinkable, as

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[86] Trop v. Dulles, 356 U.S. 86, 101 (1958) (under certain circumstances expatriation so severe a penalty as to violate eighth amendment).

[87] In Tarlton v. Clark, 441 F.2d 384 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971), for example, the court held that the refusal of the prison to permit a prisoner to have sexual relations with his wife on her visits to the prison did not violate the eighth amendment. *Accord*, Payne v. District of Columbia, 253 F.2d 867 (D.C. Cir. 1958); *In re* Flowers, 292 F. Supp. 390 (E.D. Wis. 1968). *See generally* Kent, *supra* note 54.

[88] *But see* Heistand & Halvonik, *Prisoners' Rights to Conjugal Visits*, 29 NAT'L LAW. GUILD PRAC. 91 (1972). The authors note that the conjugal relationship is arguably a fundamental right, and that the state would be hard-pressed to find a countervailing compelling interest. They also suggest that substantive due process and cruel and unusual punishment could be bases for legal attack. *Id.* at 92-94.

[89] Gregg v. Georgia, 96 S. Ct. 2909 (1976).

[90] *E.g.*, Meachum v. Fano, 96 S. Ct. 2532 (1976) (denied attachment of due process rights where prisoner transferred from one prison to another).

the experience in Mississippi, California, and New York demonstrates. But the present trend seems to be toward incarcerating more offenders, while giving little attention to their rehabilitation.[91] Legislatures and executives seem to be in no mood to institute new measures to reduce the suffering of prisoners. On the other hand, one should not altogether discount the continued vitality of the forces of humanitarianism which have led to so many important prison reforms in the past decade.

As debate continues over the proper role of imprisonment in a democratic society, there is no avoiding the straightforward value question—is enforced heterosexual deprivation the desert of those sent to prison? People may disagree. We have indicated our conclusion that the policy is unjustly severe and destructive. Yet the very lack of discussion of the issue is most disturbing; for in our view, it is this silence which gives the practice of sexual deprivation the facade of principled penal policy.

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[91] *See* Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22.