

The Concept of “Less Eligibility” and the Social Function of Prison Violence in Class Society

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INTRODUCTION

To what extent are rapes, beatings, and other assaults essential to the punitive function of the modern prison? Officially, violence of this sort is unlawful and clearly outside the bounds of legitimate punishment. The United States Supreme Court has declared more than once that being assaulted is not “part of the penalty that criminal offenders pay for their offenses against society.”¹ Likewise, Congress has recently enacted legislation condemning prison rape, the most salient form of prison violence, and purporting to eradicate it from contemporary prisons.² Indeed, the view that assaults are not legitimate aspects of punishment is ubiquitous among representatives of the legal, political, and academic establishment, all of whom, virtually without exception, regard such violence as a deviant, dysfunctional phenomenon with no legitimate place in the realm of modern punishment.³

In reality, violence thoroughly defines the prison experience. Prisoners face a substantial risk of being beaten, raped, and even killed at the hands of their fellow

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1. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also* *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Estelle v. Gamble*, 429 U.S. 97 (1976).

2. *See* Prison Rape Elimination Act, 42 U.S.C. §§ 15601-09 (Supp. 2005).

3. *See infra* Part II(C).

inmates or keepers.⁴ In a way that is sometimes difficult for those who are unfamiliar with prison to appreciate, prisoners inhabit a world comprehensively defined by this kind of violence. Such violence is the dominant arbiter of social status in prison. It is the means by which authority, hierarchy, and privilege are articulated among prisoners and between prisoners and their keepers. And it is, paradoxically, the most reliable protection against being the victim of violence.

The fact that violence so thoroughly defines the prison experience in these ways calls into question the truth of the official, conventional view that places it outside the bounds of punishment policy. Indeed, a critical reflection on the social meaning of violence in prison, one that focuses on the social function of the prison, the reality of the prison experience, and the relationship of that reality to life and social structure outside of prison, supports the very different and disturbing conclusion that violence is actually integral to the prison's role *as prison* in contemporary society. Such a critique, which this Article develops, suggests that violence is an essential means by which the prison has sustained its punitive function amidst the unrelenting depredations and insecurities of lower class life in contemporary America.

This argument is premised on the fact that the prison's inhabitants are overwhelmingly the unemployed, the underemployed, and other denizens of the lower classes.⁵ This reality reflects the underlying fact that imprisonment is fundamentally geared to imposing retribution and deterrence on those who flout norms of property and order, or who otherwise translate the pressures of social marginality and material deprivation into violent or otherwise unacceptable behaviors. In any case, this falls overwhelmingly on the poor. Ideally—that is, by its own stated ideals—the prison would advance this agenda by inflicting on these people punishments that are integral to its formal and legally authorized structure, which is to say by depriving inmates of the social and material benefits of a free-world existence and subjecting them to intensive regimentation and control. Critically, however, such means of punishment are relevant only in relationship to the lives

4. Violence in the contemporary prison is discussed *infra* Part II(B).

5. See *infra* Part III(B).

that those who would be punished are fated to live outside of prison, which for the people the prison means to punish, are characterized by relentless poverty, inequality, and social marginality; by profound material deprivation and insecurity; and by altogether woeful life prospects. At the same time, the material conditions of prison life, while by no means fundamentally attractive, have improved significantly—to the point that, in some ways, prisoners may well experience greater material support and security in prison than is typical of their free world existences. In the context of these convergent developments, violence constitutes a crucial means by which the prison has maintained its punitive function and with this its relevance as a means of social control.

In fact, this Article argues, the importance of violence to the punitive function of the prison has actually increased over the last several decades, in response to a deterioration of the conditions of lower class life wrought by structural changes including the demise of the manufacturing sector, the decline of organized labor, the onset of chronic fiscal crisis, and the retrenchment of the welfare state. As these changes have consigned the poor ever more thoroughly to a world of deprivation and insecurity, they have placed a greater premium on the punitive function of violence in prison. Thus, the prerequisites of prison violence, as well as the root impediment to its eradication, may be located, not simply in failings of law and policy, but in the political economy of contemporary capitalism.

This critique of the larger social meaning of prison violence draws on the concept of “less eligibility.” Initially formulated by early Nineteenth Century liberals, principally Jeremy Bentham,⁶ the concept of less (or “lesser,” depending on the usage) eligibility was first articulated in a truly critical fashion by Twentieth Century critical theorist and criminologist Georg Rusche.⁷ For Rusche less eligibility embraces the general proposition that the criminal justice system must present to its usual subjects—again, the unemployed, the underemployed, and the poor generally—punishments that are worse than their

6. See, e.g., JEREMY BENTHAM, *Panopticon; Or, The Inspection-House*, in THE WORKS OF JEREMY BENTHAM 37, 122-23 (John Bowring ed. 1843).

7. Rusche’s development of the concept of less eligibility is discussed *infra* Part III(A).

typical conditions of life in the free world. Otherwise, said Rusche, the prison in particular, as the dominant form of modern punishment, would lose its punitive effect. It might then become a refuge from the deprivations and uncertainties of law-abiding life, sought after by the poor. Or, more likely, it might lose its ability to deter or otherwise sanction the pursuit of criminality as a life course or as a reaction to debased life conditions. By either route, such a failure of less eligibility would negate the prison's ability to function as an effective mechanism of social control.

Importantly, the fact that the kind of violence this critique concerns itself with is illegal does not necessarily refute its relevance to the logic of less eligibility. To the contrary: That such violence is so thoroughly unlawful allows it to serve the state as a mode of punishment without the state ever confessing the true extent of its resort to such barbarity and without thereby surrendering much in the way of its legal and political legitimacy. Indeed, by deeming prison violence illegal, the state in its various manifestations can actually condemn the phenomenon, while yet relying on it as part of regime of control. In similar fashion, the illegality of this violence also impedes a true grasp of its functions, as it induces critics of prison violence to mistake illegality for a mark of deviance, and then to see prison violence as a problem calling for greater and more effective legal regulation—and not, as I contend is the better argument, as a phenomenon unhappily intrinsic to punishment in a class society.

It should be stressed at the outset that what makes prison violence relevant in this critique is not that a prison experience free of rape, stabbings, and other assaults is in any objective sense devoid of considerable punitive effect. Clearly the very fact of incarceration even under ideal conditions is intensely unpleasant. Indeed, prison is hell, under the best of circumstances. But, critically, so are the lives of poor people. It is this potential equivalency or comparability of misery between these realms, and not the idea that prison is otherwise a fundamentally nice place, that highlights the importance of violence to the prison's social function. Or, to make the point differently, less eligibility presents the issue of punishment as a question of effective punishment, in which the determinative factors are both relative and contextual: relative in the sense that the punitive function of prison depends on the life

conditions of would-be prisoners outside of prison; and contextual in that this question of relative punishment varies both historically and with the social circumstances of those to be punished. And the prison in this sense can indeed be relatively *un*-punitive and thus unsuited to its central purpose of punishing the poor.

I develop this argument in several parts. Part II reviews the state of violence and material existence in American prisons. Drawing on empirical studies as well as narrative accounts, it stresses the prevalence and normalcy of rape, torture, and other practices, and the importance of these dynamics in defining the prison experience. It then describes briefly how, in contrast to violence, the material conditions of prison have more or less steadily improved over the past several decades. Finally, this Part reviews the role of law in this realm. Developing a point anticipated in this introduction, it stresses the law's contradictory tendency to formally renounce violence as a legitimate aspect of punishment, while actually doing relatively little to prevent its occurrence, and builds from this a critique of law's role in legitimating prison violence and frustrating a critical appreciation of violence's constitutive role in the contemporary prison.

Part III undertakes to explain prison violence by the logic of less eligibility. To do this, it first considers at greater length how Rusche developed less eligibility into a critical concept capable of exposing the latent functions of modern punishment. Second, drawing on both empirical sources and critical literature on the nature of criminal sanction, this Part describes the extraordinary degree to which the criminal justice system focuses on the poor and the degree to which this focus reflects not only a quest for public order and safety, but an agenda of control and class domination. Finally, invoking both empirical and other evidence of the deterioration of lower class social conditions over the last three decades, and evidence of widespread tolerance of such conditions in both official and lay quarters, this Part develops the central claim that the brutality of the contemporary prison represents a normal, socially functional mechanism by which prison has maintained its punitive relevance and its legitimacy as punishment, amidst deprivation, gross inequalities, and other features of lower class life in contemporary American society. Part IV is a conclusion that highlights the implications of this critique, in particular what it says

about the inherent barbarity of prison as a form of social control in contemporary capitalist society and the inadequacy of liberal critique to understanding this dynamic.

I. VIOLENCE, THE LAW, AND MATERIAL EXISTENCE IN PRISON

One of the most startling developments in law and policy of the last half century involves a dramatic growth in the prevalence of incarceration. Today well over two million people are incarcerated in America, about two-thirds of them (over 1.4 million) in prisons and the remainder (about 750,000) in local jails.⁸ These figures reflect an incarceration rate that is higher than that of any other country in the world⁹ and also entirely unprecedented in American history. Since 1980, the number of people in criminal confinement in the United States has increased five-fold.¹⁰ The increase since 1960 has been even more dramatic.¹¹ These absolute increases have far outstripped overall population growth, such that the rate of incarceration has increased dramatically over the last several decades.¹²

This dramatic increase in the overall scale of punishment is the immediate result of a number of discrete shifts in sentencing law and policy, in particular limitations on the availability of discretionary release from custody and the creation of new concepts of criminality. This trend has

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: ADULTS ON PROBATION, IN JAIL OR PRISON, AND ON PAROLE, tbl.6.1.2006 (2006).
<http://www.albany.edu/sourcebook/pdf/t612006.pdf>.

9. Haeyoun Park et al., *Prison Populations Around the Globe*, N.Y. TIMES, Apr. 18, 2008,
http://www.nytimes.com/interactive/2008/04/22/us/20080423_PRISON_GRAPHIC.html#

10. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: ADULTS ON PROBATION, IN JAIL OR PRISON, AND ON PAROLE, *supra* note 8.

11. See, e.g., HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME* 18-22 (2003).

12. See, e.g., THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 197976, PREVALANCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: ADULTS ON PROBATION, IN JAIL OR PRISON, AND ON PAROLE, *supra* note 8, at tbl.6.13(2007), <http://www.albany.edu/sourcebook/pdf/t6132007.pdf>.

been roundly condemned by critics, who have questioned whether imprisoning so many people has conveyed any worthwhile benefits in crime prevention or even reasonable measures of retribution, and have also emphasized the unacceptable human costs and the destructive social consequences of doing so.¹³

A. *The Emerging Role of Violence in the Prison*

However problematic these quantitative increases in incarceration may be, numbers alone do not capture the significant ways in which criminal punishment has evolved over the last several decades. Since the late 1960s, prisons have undergone an important qualitative change, centered on the changing role of violence in constituting their social order. Of course, the prison experience has always been violent, and violent in several different ways. To lawfully confine someone against their will presupposes a prerogative to maintain that condition by force, which is realized quite tangibly in the prison's defining structures and practices—its walls and bars and fences; its guard towers; the near comprehensive authority that prison administrators and staff wield over inmates' lives.¹⁴ However, the prison has also been violent in more explicit ways that transcend these more abstract, existential elements. This more overt mode of violence, clearly revealed in assaults among inmates and between inmates and prison officials, has also characterized the prison since its inception. But this kind of violence has undergone palpable changes in form and prevalence, as well as social meaning. It is through such changes that violence has come to occupy a uniquely significant role in the structure and meaning of the contemporary prison. A brief reflection on the evolution of the prison over the last 100 years or so helps to frame this point.

During the first half of the Twentieth Century, American prisons came to conform to a considerable degree

13. See, e.g., KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2004); ALAN ELSNER, *GATES OF INJUSTICE: THE CRISIS IN AMERICA'S PRISONS* 11-28 (2004); REITZ & RUTH, *supra* note 11.

14. This theme is one of several explored in the excellent essay by Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 *CRIME & JUST.* 205 (1999).

to a particular model of governance and organization, which penologist John Irwin (among others) calls the "Big House."¹⁵ In many ways, the Big House realized the stereotypical representations of the prison in early and mid Twentieth Century film and literature: a methodical architecture of cells, cell blocks, and tiers; an array of distinctive common areas ("the yard," the prison cafeteria, the various factory-like working areas); and an imposing wall that embraced the institution, starkly defining its spatial limits.¹⁶ This architecture both reflected and helped to shape an equally distinct social structure, marked above all by the comprehensive (and, especially in a passive way, quite violent) regimentation of inmate life. As Irwin describes it, the Big House was fundamentally a "place of banishment and punishment.... Its major characteristics were isolation, routine, and monotony. Its mood was mean and grim...."¹⁷ The Big House was also a place of self-regimentation, in which prisoners developed and adhered to relatively rigid hierarchies and social norms that put a surprisingly high premium on stability and the containment of conflict.¹⁸ As a result, while the Big House prison was by no means devoid of overt acts of violence, its structures combined to limit the prevalence of such violence as well as to limit its role in the internal governance of the prison and in the constitution of prison culture.¹⁹

The Big House began mid-century to be replaced as the dominant model of prison by what Irwin calls the "correctional institution."²⁰ This shift was occasioned in the first place by changes in both social structure and penal policy, marked by increasing ethnic and racial diversity of inmate populations, which eroded the structural underpinnings of the Big House's norms and hierarchies.²¹ Second, the move to the correctional model was grounded in a new penological orthodoxy focused on uncovering the social and psychological causes of crime as well as the

15. JOHN IRWIN, PRISONS IN TURMOIL 3-5 (1980).

16. *Id.*

17. *Id.* at 5.

18. *Id.* at 8-21.

19. See MATHEW SILBERMAN, A WORLD OF VIOLENCE: CORRECTIONS IN AMERICA 61-64, 116-18 (1995).

20. IRWIN, *supra* note 15, at 37.

21. *Id.* at 62.

prospects of rehabilitation.²² The "correctional values" implicit in these approaches were realized in this new model by a liberalization of prison administration, at the center of which was an expanded focus on therapy, education and job training, and other reformist efforts, often integrated with newly rationalized, discretionary sentencing practices.²³ Although this successor model of punishment thus displaced many of the Big House's governing norms with very different structures of control and conflict mediation, it managed by most accounts to maintain relatively low levels of overt violence and to hold in check the role of such violence in institutional governance and culture.²⁴ According to Irwin, the correctional institution's embrace of rehabilitative approaches was especially effective in promoting "peace and stability," as the ideology itself as well as the many programs devised to effectuate it gave structure and meaning to the prison experience, distracted inmates from more destructive behaviors, and generally devalued conflict and violence in everyday life.²⁵

The correctional model prevailed (more or less) in the 1950s and into the 1960s.²⁶ But already in the early 1960s, it was under pressure.²⁷ And by the mid 1970s the correctional model had totally collapsed, superseded by a very different regime.²⁸ What emerged by the late 1970s was a model of imprisonment defined much more than its predecessors by violence: not only violence of the passive and implicit sort that inheres in the very fact of imprisonment, which was often greatly expanded by new, more vigorous technologies of control, but violence in pronounced and overt forms—violence as the actual experience of serious assaults, as pervasive risk of victimization, and as thoroughly constitutive of the culture and social order of the prison.²⁹ The reasons for this

22. *Id.* at 44-47, 60-62.

23. *Id.*

24. See SILBERMAN, *supra* note 19, at 61-64.

25. IRWIN, *supra* note 15, at 60-62.

26. *Id.* at 37, 66.

27. *Id.* at 66, 72-78.

28. *Id.* at 161-212.

29. *Id.*

transition are several, involving demographic changes, changes in the internal politics of the prison and in punishment policies, and a shift in the overarching politics of crime and social order.³⁰ The ways in which these changes increased violence are fairly straightforward, having to do with their destabilizing effect on prison institutions and norms and their eventual tendency to add new dimensions of conflict to prison life and to introduce new, violent media for the resolution of conflict.³¹ A brief review of how this happened reveals these points and at the same time provides an introduction to a later discussion of the social context that has shaped this condition of violence and that gives it meaning.

By the early 1960s, the proportion of black inmates in American prisons had begun a steady rise, one which continues to this day.³² As the number of black inmates increased, so did their efforts to assert prerogatives traditionally denied them in prison by white and Hispanic inmates and by prison administrators.³³ These efforts internalized militant (and sometimes radical) themes from the emergent politics of Black Nationalist and radical groups. This was in turn articulated in different ways. To a degree, militancy took the form of direct challenges to white and Hispanic prisoners—for space, access to the perquisites of confinement, and the like. Of course this approach fomented counter-organization and reaction by whites and Hispanics and ultimately a pattern of considerable conflict—and violence—among all these groups which remains in place today.³⁴ To a significant degree too,

30. *See id.* at chs. 4-7.

31. According to criminologist Mathew Silberman, the rehabilitative, rights-based, “corrective” regime preconditioned the rise of a new model, pervaded by violence, by means of “decoupling” formal authority structures in the prison from informal authority structures, thus leaving those informal structures to re-develop around agendas defined primarily by the interests of powerful inmate factions. The shift in punishment philosophy in a harsher, more punitive direction, gave barbaric conditions that developed an ideological justification. SILBERMAN, *supra* note 19, at 116-24.

32. *See* BONCZAR, *supra* note 12, at 1-4; BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, fig. 3, at 7 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpvs97.pdf>; REITZ & RUTH, *supra* note 11 at 31.

33. *See* IRWIN, *supra* note 15, at 66-88.

34. *See* CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 2000 (1999).

though, the demand for racial standing emanating from black prisoners lay the groundwork for a broader, more explicitly political and universalist push for prisoners' rights—and even, to a degree, for radical social change. However manifested, and however well-justified by a history of racial repression and even visions of social justice, this movement also contributed to increased violence.³⁵ Beyond its immediate tendency to heighten racial strife, it had the effect of destabilizing existing hierarchies and norms, and de-legitimizing existing institutions; this increased conflict of all kinds at the same time that it reduced the capacity of the institutions to resolve these conflicts in relatively peaceful ways.³⁶

Indeed, these changes in the demographics and group politics of the prison contributed in another way to escalating violence, in particular by the role they played in altering the politics and practices of prison administration, which in turn had its own immediate effects in cultivating violence. The assertion and counter-assertion of group identity and politics among inmates, the stridence with which inmates prosecuted militant and radical themes, and the conflicts that accompanied these developments were all widely received by prison staff and administrators as challenges to their authority and legitimacy.³⁷ Often abetted by racism,³⁸ the reaction of staff and administrators evolved into increasingly overt conflict between staff and inmates—and resort by prison administrators to increasingly repressive methods of control. Inevitably, this dynamic became self-perpetuating as repression generated more conflict between staff and inmates as well as among the inmates themselves; and all of this further eroded the informal networks and norms that had stabilized the prison.³⁹ Ironically, this entire dynamic was also aggravated in some ways by the relative success of the

35. IRWIN, *supra* note 15, at 110-120.

36. *Id.* at 74-75, 110-120.

37. Irwin, for example, speaks at length of how inmates agitating for prisoner rights or radical social change in the 1960s and 1970s not only annoyed typically conservative prison staff and administrators, but also exposed the problems of the prison, including violence and racism, to outside view, thus further challenging their authority and also the very legitimacy of the prison. See IRWIN, *supra* note 15, at 66-152.

38. *Id.* at 124-26.

39. *Id.* at 123-29, 133-52.

prisoner rights movement.⁴⁰ For, while this movement eliminated many fundamentally unjust practices and improved the lives of inmates in key ways, it accomplished this by means like inmate strikes, lawsuits, legislative and journalist investigations, and so forth, which were perceived by staff and administrators as challenges to their authority, and to which they frequently responded with repressive, sometimes quite violent practices.⁴¹ Indeed, the fruits of prisoners' efforts, which took form in a set of rights regarding disciplinary proceedings, visitation and self-expression, and material conditions of confinement, both further unsettled existing norms and structures, and aggravated resentments among inmates and between inmates and staff.⁴² In any case, according to Irwin, a major consequence of the focused crackdowns on inmate radicals and activists and the groups they formed in the 1960s and 1970s was the creation of power vacuums that were then occupied by more purely criminal—and violent—gangs.⁴³

At least as important as these effects in the proliferation of a culture of violence was a thoroughgoing shift in the politics of incarceration. The politics of "law and order" that emerged in the late 1960s entailed a decisive repudiation of the rehabilitative ideal in favor of an approach that saw imprisonment fundamentally as a means of punishment.⁴⁴ In this new political context, many programs that had worked to stabilize the social order of the prison were eliminated without being replaced with equally functional substitutes.⁴⁵ Moreover, by so firmly embracing punishment as the central goal of incarceration, this shift in the politics and ideology of incarceration legitimated the very violence that it was—in part—ostensibly concerned with controlling. Ironically, as the next section elaborates, violence itself became a more prominent part of the prison's punitive apparatus, as a means by which the new politics of punishment realized their ambition.

40. *Id.* at 133-52.

41. *Id.*

42. These gains are discussed *infra*, Part II.

43. See IRWIN, *supra* note 15, at 133-52.

44. On this development, see, for example, PARENTI, *supra* note 34, at 3-38.

45. See IRWIN, *supra* note 15, at 181-206; SILBERMAN, *supra* note 19, at 117-18.

All of these problems were aggravated by dramatic increases in the size of the incarcerated population. One effect of such growth was serious and systemic overcrowding, which stretched security resources in prison at the same time that it likely increased already rising levels of stress and conflict among inmates and between inmates and staff.⁴⁶ The growth of the prison population had another effect. It also diminished resources available for those rehabilitative and reformist programs that survived into this period, thus further reducing their role in stabilizing prison life.⁴⁷ Such conditions remain in place today.⁴⁸ They continue to frame security issues and to underlie an irrational logic by which the very prevalence of incarceration constrains its competent and humane administration.⁴⁹

By all these means, violence established itself as the defining substance of the contemporary prison experience,

46. See SILBERMAN, *supra* note 19, at 27-28.

47. For a helpful review of these and other dysfunctions associated with overcrowding as the problem developed in the 1970s and 1980s, as well as in contemporary times, see Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J. L. & POL'Y 265 (2006).

48. According to the Bureau of Justice Statistics' latest estimate, state prison systems are operating at somewhere between 1% below and 15% above their "rated capacities," while the federal system is operating at 40% above its rated capacity. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 213133, PRISON AND JAIL INMATES AT MIDYEAR 2005 1, 7-8 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>. The key, of course, is the concept of "rated capacity," which is a figure based on the relevant jurisdiction's own formal determination of how many inmates its facilities can house. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE OF STATISTICS, U.S. DEPT OF JUSTICE, NCJ 210677, PRISON IN 2004 at 7 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>. By the more conservative and realistic measure of "design capacity"—based on accommodations as envisaged by architects—a number of states with large prison populations are much more crowded. *Id.* California, for example, held about 165,000 inmates in 2004, which is more than double its prisons' designed capacity of roughly 81,000; Illinois, with about 44,000 inmates, was operating at 135% of its prisons' rated capacity, but 161% of its design capacity. *Id.* at 4, 7. And of course, both of these measures of capacity are entirely the devise of corrections authorities and are not in any way tied to an objective measure of what constitutes decent accommodations.

49. On the relationship between overcrowding and prison violence, see, for example, Gerald G. Gaes & William J. McGuire, *Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates*, 22 J. RES. CRIME & DELINQ. 41 (1985).

as a condition in which inmates are immersed and from which they cannot escape, and as a dominant means by which the prison articulates its punitive function. To be sure, on some limited grounds—in particular, the incidence of homicide—prisons may have become somewhat less violent in the past ten years or so.⁵⁰ But as the next Part shows, this retrenchment has not been a general one; violence remains very much at the center of the prison experience. Moreover, the greater use of intensive control methods, which seems responsible for these limited reductions in violence, in some ways intensifies the forms of violence that remain.

Before describing in more detail the state of violence in prison today, a critical point must be made about the larger social forces responsible for the development of this situation. One might be tempted to see these changes either in largely political terms, as the result of discrete changes in the ideology and practice of punishment, or as the result of isolated, even accidental, developments of one kind or another in the domain of criminal justice. In fact, the violence of the contemporary prison did not emerge in such isolated fashion. Along with the larger law and order movement of which they are a part, such things as the repudiation of rehabilitation, the massive increase in incarceration, and the increasing racial disparity of the prison population constitute elements of a broader change over the last several decades in the politics of crime and punishment. The criminal justice system has assumed an increasingly dominant and aggressive role in managing challenges to property and social order that arise in a class-stratified society.

By this account, which is developed at length in the work of critical sociologists like Loïc Wacquant, Katherine Beckett, and Bruce Western, modern capitalism relies on institutions of social control to deter impulses to disorder and disrespect of property that flow from its essential features: its grounding in often exploitative working conditions, permanent unemployment, and the existence of deep social inequality and political marginality.⁵¹ Over the

50. See CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NJC 210036, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf>.

51. See generally, Katherine Beckett & Bruce Western, *Governing Social*

past several decades, these scholars argue, the dominant forms of social control of the poor have evolved from a reliance on “soft”—if pernicious—social welfare programs, which emerged through much of the post-war era, to a much “harder” approach rooted in the aggressive use of criminal justice and penal institutions to impose order, hierarchy, and discipline on those who might reject such conditions.⁵² Moreover, according to such scholars, this shift has occurred in the context of the emergence of neo-liberal policies which have increased social inequality and led to the development of entrenched pockets of “advanced marginality,” and thus further inspired the embrace of punitive, reactionary forms of social control.⁵³ From such a vantage, the changes that scholars like Irwin identify as redefining the role of violence in prison are best seen, not as developments simply internal to prisons or as the products of changing ideology, but rather, as Christian Parenti suggests, as part of a larger shift in the politics of social control of the lower classes and in political economy itself.⁵⁴

It is very much the aim of this Article to develop this critique as it relates to prison violence. This contextualization of the contemporary prison is significant to this Article’s analysis not only for locating the causes of prison violence within an overarching social policy—rather than in some simple oversight or accident of state policy, or in neglect and indifference in the abstract—but also for anticipating this Article’s central argument about the reflexive role that violence plays in further suiting the prison to its role as an institution of repressive social control in a time of crisis and inequality. We return later to this question of the relationship between violence and class conflict.

Marginality: Welfare, Incarceration, and the Transformation of State Policy, 3 PUNISHMENT & SOC’Y 43 (2001); PARENTI, *supra* note 34; Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001).

52. See, e.g., Katherine Beckett & Bruce Western, *supra* note 51; Loic Wacquant, *supra* note 51. Cf. DAVID M. GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

53. Loïc J. D. Wacquant, *The Rise of Advanced Marginality: Notes on its Nature and Implications*, 39 Acta Sociologica 121 (1996).

54. See PARENTI, *supra* note 34, at 3-66.

B. Violence in the Contemporary Prison

In 1958, Gresham Sykes published *Society of Captives*, an exploration of the sociology of the prison. A highlight of that book is Sykes' succinct but penetrating account of the "pains of imprisonment"—those incidents of incarceration that constitute its punitive dimensions, as actually experienced by the inmates themselves.⁵⁵ Sykes perceived that the punitive aspects of incarceration included both "punishments which the free community deliberately inflicts on the offender," as well as features of incarceration that "might be seen as the unplanned (or, as some would argue, the unavoidable) concomitants of confining large groups of criminals for prolonged periods."⁵⁶ For Sykes, these punitive aspects of imprisonment consisted of the denial or "deprivation" of five conditions: liberty; goods and services; heterosexual relations; autonomy; and security.⁵⁷ What is especially remarkable about Sykes account is his inclusion here of the loss of security, as this involves a frank recognition on his part that the "concomitants" which help define punishment may entail experiences which are not only devoid of formal authorization but also quite illegal.⁵⁸

As we have already seen, the situation of violence in prison has actually deteriorated since Sykes' day. This condition manifests itself not in the sense that such assaults are ubiquitous, to the point that every inmate is either a constant victim or perpetrator (or both), or that assaults can be seen anywhere or anytime in the prison. Rather, the hegemony of prison violence articulates itself through a combination of actual assaults and threats of assault, and in particular, by the role that these play beyond their immediate effects in comprehensively defining social roles, constituting hierarchy, and generally comprising a medium of social interaction and institutional governance. In such fashion, violence embraces every inmate whatever his or her immediate place in the matrix of victimization and perpetration, adding to the pains of

55. See generally, GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 64 (Princeton Univ. Press 1958).

56. *Id.* at 64.

57. *Id.* at 65-78.

58. *Id.*

imprisonment not only the risks and realities of death or serious bodily injury, but an unavoidable, unrelenting, and ultimately intensely taxing obligation to participate in a process by which one's social being is continuously defined and redefined by violence.⁵⁹

1. *Sexual Assaults.* The most notorious type of prison violence is rape. The subject of an endless assortment of crude jokes and stupid plot lines in popular culture, prison rape is, in reality, a very serious component of prison life. It is not clear exactly how frequently rape occurs in prison. Attempts at accurate estimation are frustrated by the very dynamics that make rape so fundamental to the culture of the contemporary prison. Prison rape involves deep disparities in strength and power between victim and perpetrator, which intensify both the stigma and real risks of retribution for those who might identify themselves as victims. Moreover, prison administrators and staff are often disinclined to investigate and catalogue allegations of assault that do come their way. The result is that the crime is underreported and difficult to account even by sophisticated interview and survey techniques.

Data compiled pursuant to the Prison Rape Elimination Act of 2003 (PREA), which requires the Bureau of Justice Statistics to develop reports on the subject, suggest a surprisingly low incidence of prison rape: 6,241 “allegations of sexual violence in prison *and jail*” in 2005, of which only 855 were deemed “substantiated.”⁶⁰ But such data are surely inaccurate, as they derive primarily from self-reporting by institutions and by inmates themselves.⁶¹

59. Significantly, while Sykes imagined the deprivation of security to involve victimization at the hands of other inmates—it is from his work that we get the now-commonly quoted comment by an inmate: “The worst thing about prison is you have to live with other prisoners.” *Id.* at 76-78. They are not today, and never have been, the only deprivors of security.

60. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, 1 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf> (emphasis added). On the methodology employed to develop these figures, see *id.* at 3-5; BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, DATA COLLECTION FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/dcprea03.pdf>.

61. Section 15601(2) of the statute notes that while “[i]nsufficient research has been conducted” on the issue of prison rape, “experts have conservatively

More careful studies of prison rape suggest something very different. A survey of prison inmates at several Midwestern prisons in the 1990s by Cindy and David Struckman-Johnson—one of the most comprehensive studies on this subject yet conducted—revealed that more than 20% of inmates “had experienced at least one incident of pressured or forced sex while incarcerated in their state,” with a significant percentage of these apparently subject to forcible or aggravated rape.⁶² A more recent study based on a survey of inmates in a maximum security prison in the South in 2000 revealed that 18% of inmates had been the target of “sexual threats,” and 8.5% had been sexually assaulted.⁶³ Other studies of the phenomenon have revealed roughly comparable rates of victimization.⁶⁴

While this literature puts to rest the notion, encountered in some quarters, that every inmate is either victim or perpetrator of sexual assault, it confirms that rape occurs relatively frequently in prison—frequently enough to play a key role in defining the prison experience.⁶⁵ The importance of rape in this regard is very much accentuated by the particular ways in which it occurs in prison—who it

estimated that at least 13 percent of the inmates in the United States have been sexually assaulted.” 42 U.S.C. § 15601(2) (Supp. III 2005).

62. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383-85 (1994); ELSNER, *supra* note 13, at 62; *see also* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 (1996). Estimates of the frequency of rape victimization in prison vary from less than 1 % to as high as 41%. *See, e.g.*, WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 126 (Plenum 1982) (estimating 41% victimization in the homosexual population); Richard Tewksbury, *Measures of Sexual Behavior in an Ohio Prison*, 74 SOC. & SOC. RES. 34, 38 (1989) (estimating less than 1% victimization).

63. Christopher Hensley et al., *Examining the Characteristics of Male Sexual Assault Targets in a Southern Maximum-Security Prison*, 20 J. OF INTERPERSONAL VIOLENCE 667 (2005).

64. For a review of the academic research on this topic, *see* Christopher Hensley & Richard Tewksbury, *Inmate-to-Inmate Prison Sexuality: A Review of Empirical Studies*, 3 TRAUMA, VIOLENCE, & ABUSE 226 (2002); Christopher Hensley et al., *Introduction: The History of Prison Sex Research*, 80 PRISON J. 360 (2000).

65. It is worth noting in this regard that even empirical research that adheres to the view that rape is less common than sometimes perceived by the public or other groups acknowledges the degree to which inmates perceive the phenomenon as widespread. *See, e.g.*, Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413, 427 (1995).

involves, under what circumstances, and with what meaning attached. Despite the fantasies of some reactionary commentators, who dismiss prison rape as just deserts for convicted sex offenders or other easy targets of contempt, who gets raped in prison has relatively little to do with any code of retribution.⁶⁶ Inmates who are weak, either in their own physical or emotional constitution or as measured by the politics of the institution, are the ones likely to be raped. Gay inmates are at greater risk than straight inmates, sex offenders (as well as non-violent offenders) more than other offenders, and effeminate or youthful inmates more than older and more masculine inmates; but membership in one of these categories is by no means a necessary condition of victimization.⁶⁷ Far more important is an inmate's relative strength or weakness, both perceived and actual. The dynamics that define those who rape these victims are even more complicated. Strength of some sort—physical or institutional (for example, high rank in a prison gang)—is, of course, a prerequisite. Beyond this, offenders probably vary considerably in background.⁶⁸ In stark confirmation of the

66. On this attitude, see, for example, Dan Bell, *‘They Deserve It,’* THE NATION, July 10, 2006, at.18.

67. Robert Dumond identifies the following categories of vulnerable inmates:

“(a) young, inexperienced; (b) physically small or weak; (c) inmates suffering from mental illness and/or developmental disabilities; (d) middle-class, not “tough” or “streetwise”; (e) not gang affiliated; (f) known to be homosexual or overtly effeminate (if male); (g) convicted of sex crimes; (h) violated the “code of silence” or “rats”; (i) disliked by staff/other inmates; (j) previously sexually assaulted.”

Robert W. Dumond, *Inmate Sexual Assault: The Plague that Persists*, 80 PRISON J. 407, 408-09 (2000). See also HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 63-76 (2001), available at <http://www.hrw.org/reports/2001/prison/report.html> [hereinafter NO ESCAPE: MALE RAPE IN U.S. PRISONS]. On the greater vulnerability of gay inmates, see, for example, WOODEN & PARKER, *supra* note 62, at 140-41, 224; Hensley et al., *supra* note 63 at 675-76; Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 48 FED. PROBATION 46, 47 (1984).

68. As a recent report by Human Rights Watch put it,

The characteristics of prison rapists are somewhat less clear and predictable [than those of victims], but certain patterns can nonetheless be discerned. First, although some older inmates commit rape, the perpetrators also tend to be young, if not always as young as their victims—generally well under thirty-five years old. They are

characterization of rape in the free world as an assertion of power and privilege more than a fulfillment of sexual urges, few if any perpetrators identify themselves as homosexual outside of the prison context—a fact that also destroys the myth of the “homosexual prison rapist.”⁶⁹ Indeed, it seems clear that prison rape is motivated much more by the psychology and sociology of power and control than by sexual desire as such. Famed inmate-journalist Wilbert Rideau quotes a top security official at the Louisiana State Penitentiary at Angola:

Most of your homosexual rape is a macho thing.... It's basically one guy saying to another: 'I'm a better man than you and I'm gonna turn you out to prove it.' I've investigated about a hundred cases personally, and I've not seen one that's just an act of passion. It's definitely a macho/power thing the [sic] among inmates. And it's the basically the insecure prisoners who do it.⁷⁰

Lending further support to this characterization of prison rape is evidence that suggests that rape is an important medium for the expression of interracial conflict.⁷¹

Rape is, of course, a crime, even among prisoners. For that population it is in fact doubly unlawful, as even consensual sex among inmates is prohibited. And yet rape in prison can be as much a reflection of semi-official

frequently larger or stronger than their victims, and are generally more assertive, physically aggressive, and more at home in the prison environment. They are “street smart”—often gang members. They have typically been convicted of more violent crimes than their victims.

NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 63-64.

69. *Id.* at 64, 70. On prison rape as an expression of power, see *id.* at 96-98.

70. Wilbert Rideau, *The Sexual Jungle in LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 73, 75 (Wilbert Rideau & Ron Wikberg, eds., 1992). See also SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 257-268 (1993).

71. Research on the demographics of prison rape reveals a higher rate of interracial victimization than random chance alone would suggest, as well as that victims are disproportionately white and offenders disproportionately black. See Christopher Hensley et al., *Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities*, 18 J. INTERPERSONAL VIOLENCE 595, 601-02 (2003); Struckman-Johnson & Struckman-Johnson, *supra* note 62, at 386. There is also evidence to suggest a tendency of inmates—especially blacks and Hispanics—to limit intra-racial abuse, at least insofar as this involves members of their own group. NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 71-73.

tolerance, even approval, as it is the simply inability of authorities to assert complete control over inmate populations.⁷² In some circumstances, it is clear that rape is used by prison officials as a means of control in its own right—as a means of punishing inmates who are (by the officials' reckoning) especially troublesome, of breaking the will of defiant inmates, and of rewarding (by accommodating their victimization of others) inmates who are in some way helpful to the institution's interests.⁷³ Where rape is sanctioned in this fashion, a victimized inmate has little hope of gaining the institution's protection from further abuse. Even where it is not so sanctioned, victims of rape often encounter considerable indifference on the part of administrators and staff who would rather not antagonize powerful rapists, who anticipate difficulties with successful investigation, or who for some other reason cannot be bothered.⁷⁴ Many staff simply may take the position that defense against rapes and other assaults are an inmate's own obligation.⁷⁵ Even where administrators and staff are prepared to help, inmates who are raped face another, in some respects more serious, impediment to gaining their assistance: the very real threat of violent, even fatal, retribution for being a "rat" or a "snitch."⁷⁶ Such realities underscore the special horrors that attend rape in prison.

The circumstances of prison rape also vary in terms of how the crime is perpetrated. A substantial percentage of cases clearly involve rape in the strictest sense of the term: the immediate use of force or threats of force to overcome victims' resistance or non-consent. This is true, of course,

72. A related problem is the apparent tendency of prison administrators to underestimate the frequency with which inmates engage in sexual activity, whether coercive or consensual, and to underestimate the degree to which inmates live in fear of this fate. See Christopher Henley & Richard Tewksbury, *Wardens' Perceptions of Prison Sex*, 85 PRISON J. 186 (2005); see also Christopher Henley & Richard Tewksbury, *Wardens' Perceptions of Inmate Fear of Sexual Assault: A Research Note*, 85 PRISON J. 198 (2005).

73. See, e.g., ELSNER, *supra* note 13, at 70-71.

74. See, e.g., No Escape: Male Rape in U.S. Prisons, *supra* note 67, at 143-56; ELSNER, *supra* note 13, at 63-72.

75. See SILBERMAN, *supra* note 19, at 19.

76. ELSNER, *supra* note 13, at 60-61; see also JEFFREY IAN ROSS & STEPHEN C. RICHARDS, BEHIND BARS: SURVIVING PRISON 72-74 (2002). On the dangers of being labeled a snitch generally, see SILBERMAN, *supra* note 19, at 33-34, 63, 71.

with gang rapes, which constitute a sizeable fraction of these cases, as well as many single-offender rapes.⁷⁷ Other prison rapes involve more subtle means of overcoming victims' unwillingness, including wearing down a victim with lesser threats over time or trading sex for protection from third-party threats—some of which are invariably staged for the occasion.⁷⁸ And still other cases involve the exchange of sex for goods, privileges, and so forth—something that more closely resembles prostitution.⁷⁹ Rather than narrowing the range of what should be called rape, these scenarios highlight the unique complexities of sexual coercion within prison.⁸⁰ Just as feminist critics have questioned the volition that is supposed to characterize prostitution,⁸¹ those who research the prison rape phenomenon have questioned whether any sexual encounters in prison can be taken as truly consensual.⁸² Given the omnipresence of violence and threats of violence that inhere in prison, consent can be quite difficult to define—or withhold.⁸³

However it takes place, rape can be a one-time experience for its victim, particularly if it occurs in jail, among a transient population of inmates, or if a victim overcome in a moment of weakness somehow later manages to visit truly telling retribution on the perpetrator.⁸⁴ For many victims, though, being raped in prison becomes a recurrent experience—a downward spiral, by which the very fact of being raped stamps an inmate as weak and

77. NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 81-83, 85-87.

78. *Id.* at 87-89.

79. *Id.* at 82, 89.

80. For a review of these scenarios, see, for example, NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at ch. 5.

81. See, e.g., Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006); see also Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in HUMAN RIGHTS OF WOMEN 532 (Rebecca J. Cook ed., 1994).

82. NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 81-98.

83. See, e.g., NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 83-85.

84. This latter scenario is unlikely, given the way victims of prison rape are typically chosen—"sized up"—fairly carefully for this inability and unwillingness to resist or visit retribution on the perpetrator.

vulnerable, which leads to further assaults, a further diminution of standing, and so forth.⁸⁵ In some cases, this culminates in the victim's consignment to a condition of permanent sexual enslavement, marked by intensive control, possession, even sale and purchase at the hands of stronger inmates.⁸⁶ Needless to say, those who are the victims of sexual assault in prison suffer not only physical injury and loss of standing in the prison, but also deep psychological trauma, including clinical depression and anxiety, self-loathing, post traumatic stress, and anger.⁸⁷

These characteristics highlight prison rape's quality as an extremely serious crime that can potentially befall almost any inmate in any institution. To be sure, the risks in any particular case are defined by a number of variables. For one thing, not all prison administrators and staff are callous or cynical in how they deal with rape. Humanitarianism, professionalism, and perhaps fear of legal liability inspire many to take the crime seriously—to steer vulnerable inmates away from perpetrators, to punish perpetrators, to rescue victims from further victimization, and so forth. Likewise, the overall cultures of institutions, as defined by architecture, racial composition, the presence of gangs, and so forth, vary in their tolerance for rape and their reliance on rape as an ordering device.⁸⁸ Nevertheless, there is a risk of being raped in every prison. And for every prison that is relatively free of rape, there is one where the situation is worse than average.

A similar point can be made about individual circumstances. An inmate who is physically and emotionally strong, does not have powerful enemies, and is prepared to defend himself faces little immediate risk of victimization. Indeed, an especially relevant factor in determining whether an inmate will be targeted for abuse is whether that inmate successfully projects an image of

85. NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 7-8; SILBERMAN, *supra* note 19; see also Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prison*, N.Y. TIMES, Oct. 16, 2004, at A1.

86. NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 90-95.

87. See CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 183-84 (2005); HANS TOCH, LIVING IN PRISON: THE ECOLOGY OF SURVIVAL 231-34, 274-80 (1992); NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at ch. 6.

88. See Struckman-Johnson & Struckman-Johnson, *supra* note 62, at 386-88.

courage, aggressiveness, and a willingness to fight.⁸⁹ Successfully advertising these traits can go a longer way than actual strength, physical or otherwise, in defining whether an inmate will be marked for victimization. But not all inmates are strong or capable of appearing strong, and those who are strong one day can be weakened by injury or illness (including mental illness) or by a change in their political fortunes within the institution; if their strength is only reputational, and not genuine, this can be exposed and they can be transferred to a different institution, the circumstances of which can suddenly heighten their vulnerabilities. By any of these means, a once-safe inmate can become a potential victim. Accounts by rape victims feature a number of stories of inmates who are initially able to resist but are eventually worn down, manipulated, taken advantage of when sick, or otherwise eventually conquered.⁹⁰ Ironically, too, under some circumstances the appearance of strength can itself mark an inmate as a tempting target for an offender or group of offenders seeking to enhance their reputation. For all of these reasons, no one facing prison can know with great certainty that he will not be a victim of rape.⁹¹

The fear of being raped runs deep in prison populations, abetted by prisoners' own perceptions that prison rape is even more common than it is in fact.⁹² This reality, as summarized by Mary Ellen Batiuk and Norman Smith, is one in which,

[T]he threat of sexual violence actually dominates the prison environment and structures much of the everyday interaction that goes on among inmates. In fact, the

89. See TOCH, *supra* note 87, at ch.9; NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67, at 67-68.

90. See generally NO ESCAPE: MALE RAPE IN U.S. PRISONS, *supra* note 67; Wilbert Rideau, *The Sexual Jungle in LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS*, *supra* note 70.

91. As Cindy and David Struckman-Johnson found in their research, "a climate of fear about sexual assault dominate[s] the prison." Struckman-Johnson & Struckman-Johnson, *supra* note 362, at 386.

92. See Richard Tewksbury, *Fear of Sexual Assault in Prison Inmates*, 69 PRISON J., 62, 62 (1989). On inmates' tendencies to exaggerate the prevalence of sexual assault, see, for example, Saum et al., *supra* note 65, at 423-24. See also SILBERMAN, *supra* note 19, at 15-16; TOCH, *supra* note 87, at 279.

threat of sexual victimization becomes the dominant metaphor in terms of which almost every other aspect of "prison reality" is interpreted.⁹³

Notably, this depiction of prison rape accords with some feminist accounts of how rape defines the social world of women far beyond the spatial or temporal boundaries, or probabilities, of actual victimization.⁹⁴

For inmates, as for women in the free world, this tendency to colonize existence with fear, anxiety, and a consuming urge to embrace self-protective behavior is what gives rape its power to define social structure. It has already been mentioned that prison rape is more about power and control than sexual desire. Powerful inmates who rape their fellow prisoners derive from this a validation of rank, privilege, and so forth. Similarly—and again, an analogy can be drawn to the way rape might be said to define the free world relationship between women and men—even those powerful inmates who do not elect to confirm their power by raping others inhabit a world in which their status entails and is defined by a *potential* prerogative to rape.

On the other side of this dynamic, virtually all inmates see victimization as a fate that awaits one who is not sufficiently vigilant and not sufficiently strong of mind and body. In the words of penal psychologist Hans Toch, in the ongoing process by which prison defines victims and victimizers, rape "lurks... as the ultimate penalty, the most extreme form of power that may be held over the victim."⁹⁵ To put this point differently (and here to depart from the analogy to free world rape), it is not by accident that those who escape being raped in prison are successful in this regard, including those who are very strong. It is, rather, because they participate successfully in an ongoing discourse by which the surest way to avoid the violence of

93. Norman E. Smith & Mary Ellen Batiuk, *Sexual Victimization and Inmate Social Interaction*, 69 PRISON J. 29, 30 (1989).

94. See generally MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* (Univ. of Ill. Press 1991) (1989). See also Wilbert Rideau, *The Sexual Jungle in LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS*, *supra* note 70, at 73-74.

95. TOCH, *supra* note 87, at 188.

being raped is to communicate a willingness to meet violence with violence.

The dynamics of rape as just described are usually thought to apply disproportionately to male inmates. Female inmates have traditionally been thought to engage only rarely in inmate-on-inmate sexual assault, and indeed to engage in fewer assaults of all kinds.⁹⁶ However, recent research has questioned this assumption, particularly with regard to rape.⁹⁷ It may be that rapes have gone unnoticed in this context, obscured perhaps by false suggestions of consent. In any case, something that female inmates do face with much greater frequency than males is the prospect of being raped at the hands of prison guards and other officials. This is, in fact, a very serious problem for women in prison.⁹⁸ In some cases such misconduct involves outright forcible rape; in others, the crime is accomplished by the use of threats, intimidation, or promises of benefits to manipulate inmates into unwanted sexual relationships.⁹⁹ Either way, the ability of prison employees to impose their will on inmates is rooted in their ability to visit severe retribution on those who resist or report their victimization.¹⁰⁰

2. *Non-Sexual Assaults.* According to criminologists Jeffrey Ross and Stephan Richards (who brings to bear his own experience of eleven years as a prison inmate), “[s]hort of being raped, the second greatest fear of prisoners is being beaten, stabbed, or killed in the joint.”¹⁰¹ Such fear is well-founded. Physical confrontation is a constant risk in prison, often triggered by the smallest affront to another inmate—an errant stare, a bump, anything of the sort. Such encounters are frequently interpreted as overt challenges to

96. On this debate, see, for example, Kimberly R. Greer, *The Changing Nature of Interpersonal Relationships in a Women's Prison*, 80 PRISON J. 442 (2000).

97. See Dyan McGuire, *Violence as a Routine Feature of Prison Life for Women: A Qualitative Assessment*, 30 CORR. COMPENDIUM, July-Aug. 2005, at 1, 3-5, 36.

98. See generally, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996).

99. See ELSNER, *supra* note 13, at 134-38.

100. See *id.* at 136-38; see also HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS, *supra* note 98.

101. ROSS & RICHARDS, *supra* note 76, at 115.

an inmate's standing, as an expression of "disrespect." Regardless of how it is initiated or by whom, failure to rise to such a challenge can often constitute an enormous mistake, as cowardice, timidity, even an air of reason or humanity in the face of confrontation can mark a victim as weak and put the inmate on a path to exploitation, rape, even death.¹⁰² As penologist Mathew Silberman put it, "within the prison world, being willing to fight and, if necessary to kill is essential to survival."¹⁰³ Or in the words of an administrator at a maximum security prison, "[y]ou know it's a Catch 22 for inmates. [As an inmate] [y]ou've got to fight at times. You've [either] got to have a huge reputation built on the fact that you fought before or you've got to fight now."¹⁰⁴

Defending oneself is also laden with risks, however. This was evident to Sykes:

[T]he inmate is acutely aware that sooner or later he will be "tested"—that someone will "push" him to see how far they can go and that he must be prepared to fight for the safety of his person and his possessions. If he should fail, he will thereafter be an object of contempt, constantly in danger of being attacked by other inmates who view him as an obvious victim, as a man who cannot or will not defend his rights. And yet if he succeeds, he may well become a target for the prisoner who wishes to prove himself, who seeks to enhance his own prestige by defeating the man with a reputation for toughness.¹⁰⁵

To this it should be added that unless a victorious inmate kills or seriously injures his adversary—which present other, obvious problems—that adversary may well attack him at some other time and place. In any case, a beaten enemy may have allies among other inmates who

102. SILBERMAN, *supra* note 19, at 14-41.

103. *Id.* at 28; *see also id.* at 36-37.

104. *Quoted in* LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* 138 (2004).

105. SYKES, *supra* note 55, at 77-78.

can extract vengeance in his behalf. In this world, as Sykes describes it, “no man stands assured of [his] future.”¹⁰⁶

Penologists continue to debate the immediate genealogy of such violence, with competing camps arguing either that violence is imported into prison or that the prison itself cultivates violence.¹⁰⁷ Whatever the better side of this argument—an issue that is irrelevant to the present project—what is clear is the function that such violence plays in prison. What makes non-sexual violence so compulsory in today’s prison is its prominent role, like that of rape, in defining rank, hierarchy, and all-around social standing. This is not simply done in some abstract fashion, but by the way assault defines, on the one hand, who will play the role of victim and be a source of exploitation and an object through which others confirm their social superiority and, on the other hand, not only who will play the role of exploiter, but who will enjoy even the privilege of being left alone. To connect this observation to the earlier discussion of the evolution of prison, it might be said that violence is so ubiquitous in prison precisely because it governs the prison in this way.¹⁰⁸

Like the data on rape, the official data on non-sexual assault in prisons and jails are both inadequate and, in some ways, highly misleading. This dearth of reliable data reflects some of the same problems that hamper research on prison rape. In particular, inmates’ fear that reporting assaults is likely to expose them to retribution as well as a loss of the very standing that is at stake in such a conflict. Equally important is the failure of many administrators to investigate and catalogue assaults that come to their attention, particularly if they do not result in serious injury, involve powerful inmates who could cause even greater problems if disciplined, present some difficulty in investigating, or might possibly result in administrative hassles or civil liability. These problems are reflected, not only in a disparity between official data and other

106. *Id.* at 78.

107. For a review of competing theories surrounding this issue, see, for example, Shanhe Jiang & Marianne Fisher-Giorlando, *Inmate Misconduct: A Test of the Deprivation, Importation, and Situational Models*, 82 PRISON J. 335, 338-42 (2002).

108. See SILBERMAN, *supra* note 19, at 74-75.

sources,¹⁰⁹ but also in otherwise inexplicable variations in the figures reported by different institutions and jurisdictions.¹¹⁰

In any case, while there is some evidence to suggest that the frequency of fistfights in prison is reduced by a pervasive fear that this could lead to more serious, even lethal combat,¹¹¹ such fights are not uncommon, with as many as half of inmates reporting engaging in them.¹¹² In only a relatively few cases do such encounters actually lead to homicides, particularly in recent times as administrators have managed to effect dramatic reductions in violent deaths in prisons and jails.¹¹³ But stabbings, bludgeonings, and other serious assaults remain fairly commonplace. Official data for 2000, which inevitably excludes a significant number of attacks that were never reported,¹¹⁴ indicate 34,355 inmate-on-inmate assaults in state and federal prisons.¹¹⁵ Another authority identifies 7,797 inmate-on-inmate assaults in that year that resulted in injuries requiring medical attention.¹¹⁶ Moreover, research

109. This disparity was highlighted in one of the early empirical studies of the prevalence of non-sexual assaults. In their study of assaults in the North Carolina prison system in the early 1970s, Dan Fuller and Thomas Orsagh found a significant disparity between official rates of assault and rates calculated from inmates' accounts. Dan A. Fuller & Thomas Orsagh, *Violence and Victimization Within a State Prison System*, 2 CRIM. JUSTICE REV. 35 (1977).

110. See, e.g., JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 24-25 (2006).

111. See SILBERMAN, *supra* note 19, at 37. This is not to say that fistfights and such do not occur in prison—they do, but with a recognition that they could easily escalate into lethal combat. See *id.* at 54.

112. See, e.g., SILBERMAN, *supra* note 19, at 92 (“[M]ore than half of all inmates reported engaging in some sort of violence, including fistfights, with fellow inmates.”).

113. The dramatic decline in rates of homicide and well as suicide in prisons and jails over the last several decades is one of the few unqualifiedly positive achievements in contemporary prison and jail administration. See MUMOLA, *supra* note 50.

114. On the difficulties inherent in accounting non-sexual assaults in prison, see, for example, David R. Eichenthal & Laurel Blatchford, *Prison Crime in New York State*, 77 PRISON J. 456, 457-58 (1997).

115. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, 9-10 tbl.16 (2003).

116. CAMILLE GRAHAM CAMP & GEORGE M. CAMP, THE CORRECTIONS YEARBOOK, 2001: ADULT SYSTEMS 53 (2002).

by the Bureau of Justice Statistics in the 1990s revealed that some 10% of state prison inmates had been injured in a fight.¹¹⁷ This data is confirmed by recent surveys of New York state prisons (which are not regarded as especially violent), conducted by the Correctional Association of New York, which reveal high rates of “confrontation” among inmates, with over half of some populations reporting a past conflict with another inmate.¹¹⁸

A conscious awareness among inmates that they could be drawn into such conflict at almost any time is a defining feature of the prison experience.¹¹⁹ Aware of what is at stake, prisoners spend considerable time and psychic energy identifying potentially dangerous situations and planning to avoid them or, if that is not possible, to negotiate them with the least possible risk of injury to physical body or reputation.¹²⁰ For Sykes, this situation creates a widespread experience among inmates of “acute anxiety,” defined by uncertainty as to what will happen and whether one will muster an adequate response when it does.¹²¹ There is no reason to think this dynamic is any less true for inmates today than it was when Sykes performed his study.¹²² Prison culture today puts an even greater emphasis on “toughness” and on an inmate’s willingness to resort to “extremes of violence.”¹²³

In fact, American prisons house hundreds of thousands of inmates who suffer some form of mental illness.¹²⁴ This

117. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MEDICAL PROBLEMS OF INMATES, 1997, 1, 4-6 (2001) [hereinafter MEDICAL PROBLEMS OF INMATES].

118. See CORR. ASS’N OF N.Y., GREEN HAVEN CORRECTIONAL FACILITY 13-14 (2006) [hereinafter GREEN HAVEN CORRECTIONAL FACILITY]; CORR. ASS’N OF N.Y., UPSTATE CORRECTIONAL FACILITY 11 (2006) [hereinafter UPSTATE CORRECTIONAL FACILITY].

119. See, SILBERMAN, *supra* note 19, at 82.

120. Interestingly, one of the more salient accounts of this conflict-avoidance dynamic is drawn from the context of a women’s prison. McGuire, *supra* note 97, at 4-5, 36.

121. SYKES, *supra* note 55, at 78.

122. See, SILBERMAN, *supra* note 19, at 14-41, 61-78.

123. *Id.* at 35.

124. In fact, as of 2005, over half of inmates manifested a “mental health problem.” BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) [hereinafter MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES].

condition, which reflects a de facto policy of using incarceration to deal with mental illness among the poor as well as shortcomings in the provision of mental health treatment in prison,¹²⁵ exacerbates the problem of prison violence in two ways. First, it increases assaults against inmates by fellow prisoners and staff alike, as the mentally ill find themselves unable to manage the threat of violence from other inmates or to comply adequately with orders from prison staff.¹²⁶ Second, such people often become assailants themselves, as their sense of reality is distorted and their facility for self-control decays.¹²⁷

The cruel dilemmas surrounding violence can be exacerbated in an institution dominated, as many are, by gangs. Outwardly organized along racial and regional lines, such organizations are also often heavily involved in protection rackets, prostitution, the sale of contraband, and other criminal enterprises.¹²⁸ Prison gangs sometimes compel disinterested inmates to choose sides during periods of conflict, which can unwittingly embroil an inmate in cycles of violence. They can also convert gang rivalries into larger-scale racial conflicts.¹²⁹ Perhaps even more problematically for the typical inmate—given that actual membership in or affiliation with prison gangs may be lower than anecdotal evidence sometimes suggests—is the fact that such gangs often are responsible for catalyzing waves of inmate violence and institutional retribution.¹³⁰

125. See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16-25 (2003) [hereinafter ILL-EQUIPPED].

126. See *id.* at 56-59, 80, 82-86. According to data from the Bureau of Justice Statistics, more than one-third of prison inmates experience "persistent anger or irritability" and a significant number experience delusions or other psychotic symptoms. MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, *supra* note 124, at 2-3.

127. See ILL-EQUIPPED, *supra* note 125, at 39-42, 58-60.

128. On the prevalence of gangs in contemporary prisons, see, for example, Chad R. Trulson, et al., *Gang Suppression and Institutional Control*, 68 CORR. TODAY 26 (2006); See also Ann Scott Tyson, *Prison Threat: Gangs Grab More Power*, CHRISTIAN SCI. MONITOR, July 15, 1997, at 1.

129. For example, for years the Los Angeles County Jail has been fraught with violence along racial lines, beneath which are gang conflicts. See, e.g., Darryl Fears, *'Like Living in Hell,'* L.A. TIMES, Mar. 27, 1998, at B1.

130. As Silberman writes, "even when gang membership is small, the gangs tend to dominate the inmate power structure." SILBERMAN, *supra* note 19, at 28. For an empirical argument that gang membership and affiliation is causally related to higher rates of prison violence, see Gerald G. Gaes et al., *The*

Another kind of violence that inmates face is assault by prison guards. A prerogative to violence is encoded in the legal license that prison officials enjoy to use reasonable force to compel inmates to obey their lawful commands, to protect persons or property, and generally to manage their institutions in an orderly and safe manner. An inmate who refuses an order related to this prerogative invites a violent response, one that may go well beyond what is required to ensure his or her compliance. Indeed—and this highlights the second way in which violence inheres in imprisonment—the sociology of the prison itself generates a tendency among many guards to accomplish their functions in a violent fashion. To a considerable degree, guards too are drawn into the culture of violence that permeates the prison and that allocates authority in accordance with one's willingness to resort to violence. A guard who fails to project this image faces heightened risks of victimization by inmates as well as loss of esteem (and possibly support) in the eyes of coworkers.¹³¹ In other cases, staff-on-inmate violence may be still more nefarious—for example, motivated by racism, criminal aims, or interpersonal disagreement. However it originates, such violence can assume brutal, even sadistic proportions.

Violence by guards can of course be lawful or unlawful, as defined by whether it constitutes reasonable and appropriate use of force to compel an inmate to obey a lawful command, to protect persons or property, or to maintain order.¹³² A neat enough distinction on paper, the line between lawful and unlawful force can be blurry in actual practice, especially as perceived by the inmate. In a

Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct, 82 PRISON J. 359 (2002).

131. For a thoughtful account of the complexities of guarding prison inmates, including the importance of adhering to informal norms, see TED CONOVER, *NEWJACK: GUARDING SING SING* (2001). See also Mathew Purdy, *Prison's Violent Culture Enveloping Its Guards*, N.Y. TIMES, Dec. 19, 1995, at A1, B8.

132. For a discussion of the degree of force staff may use to accomplish this, see *Hudson v. McMillian*, 503 U.S. 1 (1992). On the prerogative of prison staff to use force in self-defense or in defense of others, see, for example, *Whitley v. Albers*, 475 U.S. 312 (1986); *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971). On their right to use force to enforce prison rules, see, for example, *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). On the right to use force to prevent escape, see, for example, *Henry v. Perry*, 866 F. 2d 657 (3d Cir. 1989).

context where staff enjoy prerogatives to regulate essentially all aspects of inmate life, and where such prerogatives may be articulated formally or informally, and by different people at different times, an inmate may well face confusing, even contradictory commands. Moreover, in such a context, disobedience can easily constitute a pretext for the use of force. Nor does an inmate need to be a "problem" to be beaten by guards. He or she may have the misfortune to cross the wrong person, which they may do even by asserting their legal rights; he or she may be the victim of collective punishment or mistaken identity; or he or she may (as for example, in responding to a physical challenge by another inmate, or in refusing to bear witness against another inmate) find himself or herself compelled by the brutal realities of the prison experience to flout prison rules or to defy the orders of a guard. In any of these ways, inmates with no desire to create trouble may find themselves the object of prison guards' wrath.

While attempts to determine the frequency of such assaults run up against the same impediments as those that focus on other kinds of prison abuse,¹³³ and while the phenomenon varies among, and even within, institutions, it is clear that beatings are not uncommon in contemporary prisons. Academic studies support this characterization,¹³⁴ as do reports by human rights organizations,¹³⁵ accounts by journalists,¹³⁶ and more than a few reported judicial

133. For example, at several of the institutions recently surveyed by the Correctional Association of New York, a high proportion of inmates reported abstaining from filing complaints against guards for fear of retaliation. *See, e.g.*, CORR. ASS'N OF N.Y., ATTICA CORRECTIONAL FACILITY 4-5 (2005) [hereinafter ATTICA CORRECTIONAL FACILITY]; CORR. ASS'N OF N.Y., AUBURN CORRECTIONAL FACILITY 3 (2005); CORR. ASS'N OF N.Y., ELMIRA CORRECTIONAL FACILITY 4-5 (2005); GREEN HAVEN CORRECTIONAL FACILITY, *supra* note 118, at 13.

134. *See, e.g.*, SILBERMAN, *supra* note 19; Hans Toch, *Hypermasculinity and Prison Violence*, in MASCULINITIES AND VIOLENCE 168 (Lee H. Bowker ed., 1998).

135. *See, e.g.*, AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL 32-49 (1998); GIBBONS & Katzenbach, *supra* note 110; HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES: A HUMAN RIGHTS WATCH REPORT (1991). —

136. *See, e.g.*, Rick Bragg, *Prison Chief Encouraged Brutality, Witnesses Report*, N.Y. TIMES, July 1, 1997, at A12; Holly J. Burkhalter, *Barbarism Behind Bars: Torture in U.S. Prisons*, THE NATION, July 3, 1995, at 17; Purdy, *supra* note 131 (describing seventeen brutality cases against guards at one prison that were either won at trial or settled in the plaintiffs' favor between 1990 and 1995); Jill Riepenhoff, *Two Guards Charged in Inmate's Beating*, THE COLUMBUS DISPATCH, Dec. 29, 1998, at B1; John Sullivan, *New Jersey Set To*

decisions.¹³⁷ This characterization is also supported by detailed surveys of New York prisons by the Correctional Association of New York, mentioned earlier, which reveal evidence of widespread and pervasive physical abuse of inmates by prison workers, even at some of that state's model institutions.¹³⁸ Indeed, at some institutions the Associations' researchers found that *eighty percent* or more of inmates felt "unsafe" in the face of abuse and threats of abuse by guards.¹³⁹

3. *Disturbances.* Yet another category of violence in prison, which can often transcend the usual inmate-on-inmate/staff-on-inmate dichotomy, comprises "disturbances" involving multiple inmates—what have been called in the literature, acts of "collective" as opposed to interpersonal violence.¹⁴⁰ These may consist of fights involving several or more inmates, melees implicating inmates and correctional staff, and, in their most essential form, full scale riots involving dozens or more inmates who wrest control of the institution. Data from 2000 and 2001 identify hundreds of reported "altercation[s] involving three or more inmates, resulting in official action beyond summary sanctions," involving approximately 7,860 inmates—and this is just a partial total, as not every jurisdiction reported, and some

Investigate Inmates' Claims Of Brutality, N.Y. TIMES, Apr. 26, 2003, at B1, B5; *Videotape of Prison Beating Prompts F.B.I. Investigation*, N.Y. TIMES, Aug. 20, 1997, at D17 (describing widespread beatings and dog attacks at a Texas prison).

137. See, e.g., *United States v. Serrata*, 425 F.3d 886 (10th Cir. 2005) (convicting jail guards of violating the civil rights of an inmate they beat and kicked); *United States v. Lambright*, 320 F.3d 517 (5th Cir. 2003) (convicting prison guard of violating the civil rights of an inmate he beat to death in a cell); *United States v. Velazquez*, 246 F.3d 204 (2d Cir. 2001) (convicting prison guards of criminal deprivation of civil rights and conspiracy in connection with the beating death of an inmate); *Grimm v. Lane*, 895 F. Supp. 907 (S.D. Ohio 1995) (deciding a civil rights lawsuit by inmates severely beaten in apparent retaliation for escape attempt).

138. See GREEN HAVEN CORRECTIONAL FACILITY, *supra* note 118, at 10-13; see also ATTICA CORRECTIONAL FACILITY, *supra* note 133, at 4-5; CORR. ASS'N OF N.Y., PRISON VISITING COMM., STATE OF THE PRISONS 2002-2003: CONDITIONS OF CONFINEMENT IN 14 NEW YORK STATE CORRECTIONAL FACILITIES 33-35 (2005); UPSTATE CORRECTIONAL FACILITY, *supra* note 118, at 9-11.

139. GREEN HAVEN CORRECTIONAL FACILITY, *supra* note 118, at 11; see also UPSTATE CORRECTIONAL FACILITY, *supra* note 118, at 11 (noting that over half of inmates "frequently feel very unsafe").

140. Bottoms, *supra* note 14 at 205-07.

that did used more exacting criteria to define an “altercation.”¹⁴¹ Although they are a defining feature of the prison in the post-“corrections” era, full scale riots are fairly uncommon. Still, during the same time frame, 2000 to 2001, jurisdictions reported about ten “forcible attempt[s] to gain control of a facility,” of which half were described as “gang-related.”¹⁴² Moreover, the infrequency of prison riots has to be qualified when judging their significance by the stunning degree of mayhem that they can cause. The 1971 uprising at New York’s Attica Correctional Facility resulted in the death of 39 inmates and guards, mostly at the hands of authorities; the 1980 riot at New Mexico’s State Penitentiary at Santa Fe left 33 inmates dead, mainly supposed “snitches” who were tortured and killed by fellow inmates; in 1986, rioting prisoners in a West Virginia prison killed three alleged snitches from their ranks; and in 1993, nine prisoners and a guard were killed in an Ohio prison riot.¹⁴³ Only a few years ago, guards at California’s Pelican Bay State Prison shot thirteen inmates during a riotous fight along racial lines among some 260 prisoners.¹⁴⁴ In each of these cases, many other inmates were beaten, stabbed, and sometimes raped. These are but the most notorious among many other, often deadly riots to occur in American prisons over the last several decades.¹⁴⁵

141. *Riots, Disturbances, Violence, Assaults and Escapes*, CORRECTIONS COMPENDIUM, May 2002, at 6, 11-14 [hereinafter *Disturbances*]; see also CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, *supra* note 82 at 10 tbl.16 (describing 606 “major disturbances”—those involving five or more inmates—for the year 2000).

142. *Disturbances*, *supra* note 141, at 6, 15-17.

143. See, BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971-1986* (Oxford 1991); *The Attica Revolt: Hour by Hour*, N.Y. TIMES, Oct. 4, 1971, at 1; Pamala G. Hollie, *Officers Recapture New Mexico Prison Without Resistance*, N.Y. TIMES, Feb. 4, 1980, at A1; Ronald Smothers, *2 Bodies Found in Ohio Prison Debris*, N.Y. TIMES, Apr. 23, 1993, at A14; William K. Stevens, *Riot in Prison Ends in Relief and a Dispute*, N.Y. TIMES, Jan. 5, 1986 at 17.

144. *Inmate Dies and 12 Are Hurt as Riot Erupts in California Prison*, N.Y. TIMES, Feb. 24, 2000, at A14.

145. See, e.g., *1 Dead in Large Riot at California Prison*, N.Y. TIMES, Feb. 5, 2006, at 22; *16 Hurt as Maryland Prison Riot is Quelled*, N.Y. TIMES, May 26, 1991, at 26; *200 Officers Storm Prison in Pittsburgh to End Riot*, N.Y. TIMES, Jan. 28, 1987, at A18; *At Least 13 Injured as Inmates Riot in Puerto Rico*, N.Y. TIMES, Dec. 8, 1988, at A30; *Guards Quell Riot at California Prison*, N.Y. TIMES, Dec. 21, 2001, at A32; Michael deCourcy Hinds, *Rioters Destroy Nearly Half the Building in a Pennsylvania Prison*, N.Y. TIMES, Oct. 28, 1989, at 9; *Inmate Dies*

As the number of casualties just mentioned suggests, disturbances of this kind can easily entangle an inmate in serious violence, with the risk of death or serious injury. Beyond this, such episodes of their very nature constitute challenges to the authority of the institution; they are, in Anthony Bottoms' words, representative of "a significant breakdown in the normal patterns of social order in an institution."¹⁴⁶ As such, they are destabilizing, and for this reason can bring about lasting reverberations of interpersonal violence, including both inmate-on-inmate assaults as well as retributive assaults by staff on inmates, as actors on both sides of the bars seek to reassert authority and standing. Major disturbances are also almost certain to result in policy changes by the institution, in the guise of heightened security, that aggravate the articulation of violence by formal, structural means.¹⁴⁷ It is worth recalling in this regard that the "supermax" prison concept arose out of unrest at the United States Penitentiary at Marion, Illinois, in 1983, which had left two guards dead.¹⁴⁸

4. *A World of Violence.* The prison is, above all, a "world of violence"—to use Silberman's apt phrase.¹⁴⁹ As the foregoing description reveals, this is true on multiple levels. It is true in the relatively direct sense that many inmates are raped, many more are assaulted in other ways, and most all inmates face some risk of assault, even if not immediate. It is also true in a different, more universal and more fundamental sense—in the sense that violence is the dominant mode of discourse in prison life. It is the medium by which inmates define their place in the social order of the prison. This manifests itself in a very immediate way for victims and perpetrators: to be a victim of violence, especially a passive victim, confirms weakness, inadequacy,

and 8 are Hurt as Riot Erupts in California Prison, N.Y. TIMES, Feb. 24, 2000, at A14; *Inmate is Killed at Illinois Prison: Disturbance Leaves 3 Guards Injured, One Critically*, N.Y. TIMES, July 15, 1991, at B7; *Inmate Killed in Riot at California Prison*, N.Y. TIMES, May 26, 1989, at A10; John T. McQuiston, *Dozens are Injured in Further Outbreak of Rikers I. Unrest*, N.Y. TIMES, Aug. 22, 1990, at A1; Ronald Sullivan, *7 Stabbed and 5 Others Hurt in Rikers Clash*, N.Y. TIMES, Dec. 20, 1994 at B3.

146. Bottoms, *supra* note 14, at 206.

147. BERT USEEM ET AL., RESOLUTION OF PRISON RIOTS: STRATEGIES AND POLICIES 223 (1995).

148. ELSNER, *supra* note 13, at 141.

149. SILBERMAN, *supra* note 19.

and ultimately inferiority; and to successfully inflict violence or to wrest concessions by the threat of violence confirms entitlement, superiority, and the prerogative to dominate. But it is also true in an indirect but even more comprehensive way—in the sense that all inmates must invoke violence and the threat of violence more or less continuously, if only to earn the right to abstain from the role of either victim or perpetrator.¹⁵⁰

Ironically, at the same time that this account stresses the importance of violence in prison, it also contradicts a popular image of prisons as utterly awash in violence, if not simply out of control. This image is manifestly false, as indicated by statistics and other indicia cited above. But it is false in a way that actually abets the critique of prison violence undertaken in this Article. First, more than simply being false and open to smug refutation by defenders of the status quo, the exaggeration of prison violence serves to obscure the real importance of violence in the contemporary prison. Once prisons are seen as utterly awash in violence, they begin to contradict, both functionally and conceptually, the concept of the prison *as prison*—that is, as a place of structured, orderly, and socially-sanctioned punishment. Conveniently, then, the violence that constitutes this condition assumes a deviant quality vis-à-vis established norms of crime and punishment. Second, where violence is revealed, as it is here, as a normal feature of prison life, commonplace without being utterly ubiquitous, and integrated in subtle ways with its everyday practices to the point of being mundane, a very different sense of its meaning can emerge. Recognizing the normalcy of prison violence in this fashion allows one to perceive its true role as constitutive of the social order of the prison and to judge it, not as an affront to the prison as prison, but as an integral means by which the prison actually advances its punitive agenda.

In order fully to appreciate the meaning of violence in prison, it is helpful to reflect on several aspects of prison that amplify violence's effects. Two such aspects are underscored by Lorna Rhodes, in a striking ethnography of a maximum security prison.¹⁵¹ Rhodes' narrative emphasizes how the very institutions of security and control

150. See generally TOCH, *supra* note 87.

151. See RHODES, *supra* note 104, at 55-60.

that pervade the contemporary prison repress and constrain the entire universe of social intercourse, thereby condensing the meaning of overt violence and emphasizing its special significance as a mode of self-definition and defiance within the prison. The more the prison is subject to the rigidities of control and security, the more important violence becomes in opposition to such means, as a way that inmates and staff alike continue to assert hierarchy and standing. Rhodes' observations invite a similar point about the intense levels of inactivity and boredom that flow from the dynamics of security and control.¹⁵² In opposition to such conditions, violence stands out even more as a medium of sovereignty, spontaneity, and of deviation from security and control—and as such, all the more fundamental to defining hierarchies, prerogatives, and overall social standing in ways that are not predefined bureaucratically. It is in precisely this sense that the relationship between violence and “respect” reveals its foundations.¹⁵³

Another aspect of the prison that heightens the impact of violence within its walls is the fact that there is quite literally no escape from the violence that arises within. An inmate obviously cannot even contemplate fleeing entirely from the zone of danger. Moreover, there is seldom any refuge within prison.¹⁵⁴ Even if possible, to extract oneself from the immediate environs of a challenge or threat risks a concession of stature and further victimization. Seeking out protection or sympathy is not a good option either. Doing so will often only further confirm, and may well aggravate, the loss of stature that attends the assault itself.¹⁵⁵ And the request may well fall on deaf ears. Or, even if it triggers intervention, such an appeal may result in removal to a place of continued, even aggravated risk, or to a place of safety that nonetheless subjects the inmate to unbearable levels of control and isolation in some kind of protective custody. Such is one aspect in the interplay of passive and overt violence in the prison experience.

152. See generally *id.* (discussing how the monotony of prison life impacts those incarcerated).

153. See *id.* at 61-95 (discussing how boredom triggers violence in prisoners).

154. See TOCH, *supra* note 87, at 279.

155. Even inmates who complain about assaults and gain transfer to other institutions often find that their reputation as victim precedes them, setting them up for further victimization.

C. *The Indifference of "Deliberate Indifference" and Other Contradictions of Legal Right in the Context of Prison Violence*

If this world of violence prevailed in defiance of a legal regime that was well-designed to eliminate violence and that was actually deployed to that end, it would be difficult to interpret this condition by the logic of less eligibility. For less eligibility contemplates punishment as policy, if only of a tacit kind. In fact, the law adopts a distinctly contradictory approach to prison violence characterized, on the one hand, by its formal condemnation of prison violence, but on the other, by a significant degree of indifference to violence on a practical level. This approach is entirely compatible with a view of prison violence as integral to the social function of the prison. In it can be seen the law's functions in obscuring and rationalizing prison violence, negating it in a formal and juridical sense, casting it as anomalous and deviant when it does manifest itself, while allowing it to reign relatively unimpeded. By this means, the law denies that violence is part of the logic of punishment while presenting itself to would-be critics of prison violence as an appropriate focus point of reform. All of this distracts from a critical understanding of the prison violence problem.

1. *The Decline and Resurgence of the "Hands-Off" Approach.* To a considerable degree, the contradictory relationship between prison violence and the law comprises one aspect of a broader conflict about the legal right of prisoners to challenge their conditions of confinement. Until the 1960s, courts routinely cited doctrinal concerns, like separation of powers and lack of subject matter jurisdiction, as well as practical concerns about their own competency in penological matters and worries about the effects of litigation on prison discipline, to justify a "hands off" approach to suits filed by inmates.¹⁵⁶ While never a formal doctrine in its own right, the hands-off approach effectively denied inmates the opportunity to adjudicate claims regarding their treatment in prison.¹⁵⁷ It also reflected a

156. See JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 64-65 (2001); SILBERMAN, *supra* note 19, at 110-11.

157. See JOHN A. FLITER, *supra* note 157.

general reluctance of courts to assert jurisdiction over matters involving prison life, and a general tendency of authorities in all branches of government to defer to the administrative and policy choices of prison officials.

Courts retreated from the hands-off approach in the 1960s and early 1970s. Particularly important in this regard were several Supreme Court cases in the early 1960s: *United States v. Muniz*, in which the Court endorsed the right of an inmate to sue the government under the Federal Tort Claims Act;¹⁵⁸ and *Cooper v. Pate*, in which the Court recognized the right of prisoners to sue their keepers under the Civil Rights Act, 42 U.S.C. § 1983.¹⁵⁹ These cases ushered in a brief period, lasting through much of the 1970s, during which inmates used expanded access to the courts to challenge conditions of confinement on a broad front, encompassing issues like access to legal representation and law libraries, visitation policies, a host of religious practices, racial segregation, as well as health care, diet, and other physical aspects of accommodation.¹⁶⁰ Perhaps the high-water mark in this trend came with the courts' endorsement of a test of the constitutionality of conditions of confinement that looked to the "totality of conditions" experienced by inmates in an institution.¹⁶¹ Though they did not banish violence from prison—which, as we have seen, was actually escalating during this time—these cases did help bring about substantial improvements in many other aspects of prison life.

By the late 1970s and early 1980s courts were broadly reconsidering this relatively liberal attitude towards inmate rights. Courts began in effect to resuscitate the hands-off doctrine, bringing back limits on inmates' access to the courts and invoking other procedural and substantive barriers to effective legal challenges to prison conditions. This shift, which continued through the 1980s and 1990s,

158. See *United States v. Muniz*, 374 U.S. 150 (1963).

159. See *Cooper v. Pate*, 378 U.S. 546 (1964).

160. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (discussing the right to be free of cruel and unusual punishments); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (discussing the right to due process in disciplinary proceedings); *Cruz v. Beto*, 405 U.S. 319 (1972) (discussing the right to free exercise of religion); *Johnson v. Avery*, 393 U.S. 483 (1969) (discussing the right of access to the courts).

161. See, e.g., *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976); *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970).

was marked by Supreme Court decisions rejecting inmates' challenges to searches on privacy grounds,¹⁶² limiting prisoners' access to legal literature,¹⁶³ limiting visitation rights,¹⁶⁴ narrowing prisoners First Amendment rights in the religious context,¹⁶⁵ upholding the practice of double-celling inmates,¹⁶⁶ and weakening inmates' due process protections in disciplinary hearings.¹⁶⁷ In making these determinations, the courts made clear that, while they are not entirely beyond the realm of constitutional protection, prisoners only enjoy such constitutional rights as are consistent with “legitimate penological interests”;¹⁶⁸ and that in determining what those interests are, courts must generally defer to the discretion of prison officials, granting them wide deference in fashioning and implementing penological policies.¹⁶⁹

Critics of this resurrection of the hands-off approach have pointed out its conspicuous correspondence with a precipitous rise in both the overall number of prisoners and the proportion of them who are black or Hispanic, raising the possibility that the politics of race have factored into the change in jurisprudence.¹⁷⁰ This claim coheres with a point developed later in this section: that the rise and fall of prisoners' rights are connected historically with the logic of less eligibility and the deterioration of social conditions of those subject to confinement. The shift back to the hands-off approach represents in juridical form the more practical dynamic of violence as a mode of punishment.

2. *The Legal Regulation of Violence in Prison Under*

162. See *Hudson v. Palmer*, 468 U.S. 517 (1984).

163. See *Lewis v. Casey*, 518 U.S. 343 (1996).

164. See *Overton v. Bazzetta*, 539 U.S. 126 (2003).

165. See *Turner v. Safley*, 482 U.S. 78 (1987).

166. See *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979).

167. See *Sandin v. Conner*, 515 U.S. 472 (1995).

168. *E.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 415 n.13 (1989).

169. See, *e.g.*, *Rhodes*, 452 U.S. at 352. The Supreme Court has made clear, in fact, that prison officials are under no obligation to choose policies that are the least restrictive of prisoners' constitutional rights. *Turner*, 482 U.S. at 90-91.

170. See Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 81 (2007).

Contemporary Law. Notwithstanding the return of the hands-off approach, contemporary law nominally prohibits prison violence in a number of ways. It provides grounds for both civil and criminal liability of those who commit prison violence, whether they are inmates or their keepers, as well as prison staff and administrators who are aware of or who tolerate violence against inmates, even where they are not directly involved in the violence itself. Likewise, inmates who are the victims of prison violence may be able to enjoin such violence or the conditions that facilitate it. Such potential for liability and equitable relief is rooted in a number of provisions of federal and state law: federal constitutional torts under 42 U.S.C. § 1983; tort liability under traditional state law doctrine; and criminal liability under both traditional state law doctrines as well as more specialized provisions of federal and state law.

On the surface, these regimes constitute an impressive bulwark against prison violence, one that in seemingly rational and humane ways balances prisoners' rights against the necessary concomitants of custody, and that seems to defy the recent trend away from the legal protection of prisoners just described. In fact though, their true significance is thoroughly undermined by important, if sometimes subtle, constructions in substantive and procedural law, and in particular by the way these constructions interact with the practical realities of prison life and administration. While such realities do not completely emasculate the law, they seriously diminish the ability of the law to actually restrain, deter, or punish prison violence.

Nowhere is the compromise of ostensibly expansive formal rights by means of limiting constructions of law more evident than in the effort to police prison violence by invoking the United States Constitution. The Constitution is uniquely relevant in framing the rights of prisoners, in that every aspect of prisoners' lives is controlled by the state and implicates the constitutional limits of state action.¹⁷¹ The key provision in this context is the Eighth Amendment, which governs claims involving prison conditions generally, as well as prison violence.¹⁷² On its

171. See *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

172. The vast majority of all prisoner complaints under the Constitution involve the Eighth Amendment. See, e.g., Howard B. Eisenberg, *Rethinking*

face alone, the amendment would seem to function as a broad condemnation of prison violence: what could be more cruel and unusual, as measured by "contemporary standards of decency"¹⁷³—the standard of Eighth Amendment law—than to suffer an unprovoked beating or rape? Indeed, the Eighth Amendment has been construed broadly to protect inmates from rapes, assaults, and other acts of violence in prison. It is in interpreting the Eighth Amendment that the Supreme Court has disclaimed the notion that prison violence constitutes "part of the penalty that criminal offenders pay for their offenses against society."¹⁷⁴ Nevertheless, both the Supreme Court and lower courts have been quick, too, to qualify the implications of these basic propositions with limiting language, noting on separate occasions that the amendment "does not mandate comfortable prisons,"¹⁷⁵ and that it does not prohibit cruel and unusual *conditions* but, rather, cruel and unusual *punishments*.¹⁷⁶

More than simple dicta, these pronouncements accord with a number of restrictive interpretations that the courts have imposed on both the substantive meaning of the Eighth Amendment *and* the all-important procedural means by which it can be enforced to actually remediate or deter prison violence. Part of the problem is that, as constrained by the state action doctrine, the Eighth Amendment can only apply to prison violence derivatively. It does not condemn assaults directly but rather only where prison administrators or staff are responsible for causing such violence or suffering it to occur. Defined in these terms, the rights guaranteed by the amendment (as well as other provisions of the Constitution) *are* enforceable as civil actions for damages or equitable relief under 42 U.S.C. § 1983, which contemplates liability where individuals are deprived of their constitutional rights by persons acting

Prisoner Civil Rights Cases and the Provision of Counsel, 17 S. ILL. U. L.J. 417, 457 (1993).

173. This qualifier is central to courts' construction of the Eighth Amendment. *E.g.*, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

174. *Rhodes*, 452 U.S. at 347; *see also Hudson v. McMillian*, 503 U.S. 1, 10 (1992); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Estelle*, 429 U.S. at 97.

175. *Rhodes*, 452 U.S. at 349.

176. *See Del Raine v. Williford*, 32 F.3d 1024, 1031 (7th Cir. 1994).

“under color of law.”¹⁷⁷ But the courts have imposed very important limits on such use of the statute in such cases. For one thing, they have made clear that damage actions under § 1983 cannot proceed directly against states *as states*. While municipalities (which often run jails, but seldom prisons) can be directly sued for damages, damage actions under the statute can only be brought against state officials in their personal capacity.¹⁷⁸ Moreover, individuals sued under § 1983 may well enjoy the benefits of the doctrine of qualified immunity, which precludes the imposition of liability for damages on defendants who exercise a discretionary function in an objectively reasonable manner and in good faith—even where this

177. The statute in its entirety reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1994). The United State Supreme Court ruled more than forty years ago that state inmates could bring suit under this statute to challenge their conditions of confinement. *Cooper v. Pate*, 378 U.S. 546 (1964); *see also Preiser v. Rodriguez*, 411 U.S. 475 (1973). By its literal terms, 42 U.S.C. § 1983 appears to exclude federal prison workers from liability. They may, however, be liable under the statute to the same extent as state officials. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Claims involving religious freedom, political expression and association, privacy, and due process may also be enforced via § 1983. *See Sadin v. Conner*, 515 U.S. 472 (1995); *Hudson*, 503 U.S. at 1; *Turner v. Safley*, 482 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

178. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). A municipality's liability under § 1983 is generally limited to cases in which the actions of its officers or agents accord with official policy or custom, or reflect “deliberate indifference” on the part of one charged with making for the entity policy. *See, e.g., Ali v. District of Columbia*, 278 F.3d 1 (D.C. Cir. 2002); *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997). Damage actions against a state directly or against a state officer in her or his official capacity are deemed prohibited by the Eleventh Amendment. *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-70 (1989); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

manifestly violates a prisoner's constitutional rights.¹⁷⁹ It should be noted, too, that before even filing a § 1983 claim, a prisoner is required by the Prison Litigation Reform Act (the PLRA) to exhaust available administrative remedies.¹⁸⁰ Furthermore, under the PLRA prisoners who have filed three or more suits *in forma pauperis* that were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted," may not file further suits *in forma pauperis* "unless the prisoner is under imminent danger of serious physical" harm.¹⁸¹

Just as important as these procedural hurdles in limiting the availability of constitutional claims to check prison violence are substantive prerequisites of § 1983 liability imposed by the courts. Prisoners may sue under § 1983 for assaults committed against them by prison administrators or staff. In such a case, the "core judicial inquiry," according to the Supreme Court, is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause [the inmate] harm."¹⁸² To some degree, this test applies in such cases in a straightforward and not altogether ungenerous fashion. But it is not without complication, one area of which concerns the type and degree of force required to make out a viable claim. While the Supreme Court in the 1992 decision, *Hudson v. McMillian*, has made clear that "serious" injury is not necessarily required to establish liability,¹⁸³ several cases underscore a continued willingness of lower courts to dismiss claims involving

179. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Some actors, in particular judges, prosecutors, legislators, and witnesses, enjoy absolute immunity from § 1983 liability. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Burns v. Reed*, 500 U.S. 478 (1991); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

180. 42 U.S.C. § 1997(e)(a) (2000). Notably, this requirement applies even where the administrative body is not authorized to tender the remedy sought in the § 1983 claim. *Booth v. Churner*, 532 U.S. 731 (2001).

181. 28 U.S.C. § 1915(g). Nearly all § 1983 suits by inmates are filed *in forma pauperis*. See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, fn. 8 (1993).

182. *Hudson*, 503 U.S. at 7. It is worth noting that excessive force cases can also be articulated as deprivation of liberty interest without due process of law. See *Freeman v. Franzen*, 695 F.2d 485, 491 (7th Cir. 1982).

183. *Hudson*, 503 U.S. at 7.

isolated or insufficiently corroborated acts of abuse.¹⁸⁴

Another complication in such cases involves liability where the defendant is not the actual assailant, but rather another prison employee connected in some way to the assault. As a general rule, prison workers have a duty under § 1983 to intercede in an unlawful assault against an inmate by a coworker, provided they know of the assault and have a reasonable opportunity to intervene.¹⁸⁵ The liability of prison workers for assaults committed against inmates by their subordinates turns on whether such supervisory officials are “deliberately indifferent” to a “substantial risk” that such assaults are likely to occur and fail to take reasonable steps to prevent them.¹⁸⁶ The problem with this standard has much to do with the meaning of deliberate indifference.

The concept of deliberate indifference was actually elaborated on by the Supreme Court in a 1994 decision, *Farmer v. Brennan*, which addressed the limits of § 1983 liability in the context of inmate-on-inmate assault. *Brennan* involved a suit by a transsexual inmate in the federal system who was raped and beaten by another inmate after being transferred into the prison’s general population, despite the victim having previously been segregated at another (male) prison for her own safety. *Farmer* affirmed the basic principle that prison staff and officials may be liable for exposing inmates to the risk of violence.¹⁸⁷ More problematic, though, was what *Farmer* actually required a plaintiff to prove in order to prevail. *Farmer* held that a plaintiff must prove two elements, one objective and the other subjective. The objective element is relatively straightforward: that the plaintiff actually faced a “substantial risk of serious harm.”¹⁸⁸ More controversial is *Farmer*’s construction of the subjective element, which entailed the measure of deliberate indifference on the part of the defendant that is required to prevail in such claims. The deliberate indifference requirement had been

184. See, e.g., *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997); *Willis v. Youngblood*, 384 F.Supp. 2d 883 (D.C. Md. 2005).

185. See, e.g., *Estate of Davis by Ostenfield v. Delo*, 115 F.3d 1388 (8th Cir. 1997).

186. See, e.g., *id.*; *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997).

187. *Id.* at 832.

188. *Id.* at 834.

established by the Court almost twenty years prior, but had not been clearly defined; in fact it had been subject to ambiguous interpretation in other inmate-on-inmate assault cases.¹⁸⁹ The *Farmer* Court made clear that deliberate indifference contemplated that the defendant was actually, subjectively aware of the risk that the plaintiff faced attack and failed to take reasonable steps to abate that risk.¹⁹⁰

While *Farmer* has been decried as callous for the Court's own indifference to the realities of prison violence and the difficulties plaintiffs face in satisfying its standard,¹⁹¹ such a critical judgment of the case is only partly true and partly attuned to what really makes *Farmer* most problematic. *Farmer* not only endorsed the basic concept of § 1983 liability in prison violence cases, it also endorsed several more specific principles that are favorable to plaintiffs, including: that they need not have notified staff or administration of the harm they perceive or that it is apt to befall them individually; that they need not wait until they have been assaulted to establish the claim; and that they need not prove any intention to harm them on the defendants' part.¹⁹² In all of these respects, *Farmer* was more favorable to prisoners than it could have been. But critics of the decision are right that the case leaves in place

189. The deliberate indifference concept was first established in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Prior to *Farmer*, some federal circuits had interpreted *Estelle* to require proof of actual knowledge of the risk of harm to satisfy the deliberate indifference standard. See, e.g., *Lamarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993); *DesRosiers v. Moran*, 949 F.2d 15 (1st Cir. 1991); *Ruefly v. Landon*, 825 F.2d 792 (4th Cir. 1987). Other circuits employed a more liberal standard. See, e.g., *Young v. Quinlan*, 960 F.2d 351, 360 (3rd Cir. 1992) (holding that "a prison official is deliberately indifferent for purposes of the Eighth Amendment when he 'knows or should know' of the dangers facing the inmate"); *Stokes v. Delcambre*, 710 F.2d 1120, 1125-26 (5th Cir. 1983); *Stewart v. Love*, 696 F.2d 43 (6th Cir. 1982).

190. *Farmer*, 511 U.S. at 838-42. A plaintiff may satisfy the requirements of *Farmer* in two ways: (1) by demonstrating officials' deliberate indifference to a particularized threat against the inmate; and (2) by showing that the institution maintained inadequate security. Compare *Odom v. South Carolina Dep't of Corrs.*, 349 F.3d 765, 772 (4th Cir. 2003), and *Horton v. Cockrell*, 70 F.3d 397 (5th Cir. 1995), and *Swofford v. Mandrell*, 969 F.2d 547 (7th Cir. 1992) with *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992).

191. See, e.g., Will A. Smith, *Civil Liability for Sexual Assault in Prison: A Challenge to the "Deliberate Indifference" Standard*, 34 CUMB. L. REV. 289 (2004).

192. *Farmer*, 511 U.S. at 842-43, 848.

significant barriers to successful prosecution of a constitutional tort. In particular, *Farmer's* subjective test of deliberate indifference gives defendants ample opportunities simply to deny their awareness of the circumstances of an inmate's assault.¹⁹³ Defendants may avoid liability if they are able to characterize the risks that led to the plaintiff's victimization as everyday risks inherent to incarceration and not, in that sense, substantial or likely to lead to serious harm.¹⁹⁴ They may undertake to show that they acted reasonably in preventing or avoiding the risk.¹⁹⁵ They may deny a causal connection between their breach of duty and the injury sustained by the inmate.¹⁹⁶ And they may in any case lie. The problem with *Farmer*, in other words, is not that it explicitly narrows prisoners' right to use § 1983 to remedy or deter violence against themselves or their fellow prisoners; rather, what makes *Farmer* problematic is that it formally endorses this right while leaving prisoners with much to prove if they are to make meaningful use of it.

The legal regime created by *Farmer* and the procedural and jurisdictional impediments to § 1983 claims described earlier create real impediments to using the statute to address the problem of prison violence. Even if a plaintiff is able to negotiate these, the prisoner may find it difficult to achieve a meaningful remedy. Although § 1983 contemplates injunctive relief, the PLRA requires that injunctive relief be narrowly tailored to address the specific injury demonstrated by the plaintiff and that any such injunction expire after a finite period of time.¹⁹⁷ Moreover, while § 1983 also authorizes compensatory, nominal, and punitive damages, under the PLRA, the plaintiff must demonstrate physical injury if she or he is to recover for emotional or mental injury incurred while in custody.¹⁹⁸

193. For a critique of *Farmer's* implications in the context of prison assaults, see, for example, Buchanan, *supra* note 171, at 83-86; James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 (2003).

194. See, e.g., *Brown v. Hughes*, 894 F.2d 1533, 1537 (11th Cir. 1990).

195. See, e.g., *Farmer*, 511 U.S. at 844-45.

196. See, e.g., *Best v. Essex County*, 986 F.2d 54 (3d Cir. 1993).

197. 18 U.S.C. § 3626(a)(1)(A) & (a)(2) (2000).

198. 42 U.S.C. § 1997(e)(e) (2000). A similar requirement applies to *Bivens* actions against federal prison staff or officials. See 28 U.S.C. § 1346(b)(2) (2000).

Moreover, the statute imposes significant limits on attorney fees in prisoner lawsuits, which interacts in a pernicious fashion with the three-strikes rule on suits *in forma pauperis* to limit dramatically prisoners' access to the courts.¹⁹⁹

These rules make it difficult for inmates to win meaningful relief in § 1983 cases. Even before the PLRA was enacted, the overwhelming majority of § 1983 suits filed by inmates—by one accounting, 94%—failed entirely to garner the inmate any remedy at all.²⁰⁰ If anything is awarded, it is not likely to be very significant.²⁰¹ The plaintiff brutally beaten by guards in *Hudson*, for example, had been awarded only \$800 at trial.²⁰² Nor is there any guarantee that equitable relief will actually make the inmate any safer, or even protect him or her from retribution by prison workers or fellow prisoners.

A prisoner has other avenues by which to seek civil relief in a case of prison violence. The prisoner may file a state tort claim, premised on the theory that prison officials have a duty under statute or common law to provide for their security and are not licensed to discipline or otherwise manage inmates by resorting to intentionally tortious conduct. Establishing the substantive basis for liability in such a case is relatively clear-cut and often is not particularly challenging, at least not in the worst cases. The greater doctrinal difficulty for many inmates is overcoming the doctrine of sovereign immunity, which is retained in many states. In these jurisdictions, the viability of an inmate's suit will often turn on whether the particular duty in question is regarded as ministerial or discretionary. If it is deemed discretionary, the inmate can prevail only if such discretion is grossly abused.²⁰³ A prisoner attacked by a fellow inmate may also sue that person for assault and the

199. 42 U.S.C. § 1997(e)(d)(1)-(3) (2000).

200. ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 36 (1994). While this figure refers to all § 1983 suits, regardless of the nature of the underlying claim, the largest percentage of such suits in this study—21%—did rest on claims of inadequate physical security. *Id.* at 17.

201. *See id.* at 36-37.

202. *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

203. *See, e.g.*, JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF INMATES § 11.11-12 (Anderson 8th ed. 2006).

like. For obvious reasons, such a strategy is, at best, a waste of time; at worst, it could also be a dangerous provocation.

Whether the claim is based in federal or state law, the most significant challenge for an inmate wanting to file a civil suit involving abusive conditions is to overcome the practical impediments to successfully initiating and litigating the case while imprisoned. By their very condition, inmates have limited access to counsel and are, in any case, almost certainly indigent and dependent either on representing themselves or on finding an attorney who will take the case on a contingent or reduced-fee basis. The limitations of *pro se* representations are obvious in light of the typical inmate's limited education and lack of access to legal resources.²⁰⁴ Even assuming that effective counsel can somehow be secured, the plaintiff and his lawyer face enormous hurdles in gathering competent evidence in a prison environment. Access to both witnesses and physical evidence relevant to the case is likely to be limited. Witnesses, including both correctional administrators and staff and fellow inmates, may have a sufficiently strong interest in defeating the inmate's lawsuit that they will withhold or distort evidence. Or they may in any case fear retribution from colleagues should they even be seen to support the plaintiff's claim.

Both state and federal law provide for criminal liability in cases of prison assaults. Those who actually assault prisoners are subject to prosecution under traditional doctrines of assault law, whether they be prisoners themselves or prison administrators or staff.²⁰⁵ Moreover, under federal law, as well as that of several states, prison workers may face special forms of criminal liability for abusing prisoners. The criminal counterpart to §1983, 18 U.S.C. § 242, criminalizes the deprivation of constitutional

204. A comprehensive study of § 1983 suits filed by inmates, published in 1994 by the Bureau of Justice Statistics, found that almost all (96%) suits of this kind—of which the largest share (21%) concerned claims involving physical security—were filed *pro se*. HANSON & DALEY, *supra* note 201, at 17, 22. Moreover, inmates may not be represented by Legal Services Corporations in any suit concerning prison conditions. 45 C.F.R. § 1637.3 (2007).

205. This is true in the sense that there are no provisions in the criminal codes that exempt inmate-on-inmate assaults and that prison workers must justify their use of force against inmates and have no general license to assault them.

rights under color of law. This provision has been interpreted to require that the deprivation be willful, that it involve a right guaranteed by the United States Constitution, and that the defendant have acted under color of *state* law.²⁰⁶ The typical provision in state law subjects either public officials, broadly defined, or prison workers specifically to special forms of criminal liability for intentionally abusing people in their custody.²⁰⁷

Whatever the basis of criminal liability, actually securing a successful prosecution for an assault committed against a prisoner is quite problematic. This is true whether the assault involves a fellow prisoner or a prison worker. The initial problem for a prisoner who has been victimized is, as always, negotiating the risks of retribution that might attend reporting the case. As noted earlier, prudence often dictates doing nothing of the kind. Even if a prisoner does want to file a criminal complaint, she or he must find a way to effectively communicate the complaint to the responsible authorities. The more accessible option, to report the crime to prison staff or administrators, is fraught with risk of retribution and also presumes that such persons will relay the complaint to local police or prosecutors, who typically have jurisdiction to investigate and prosecute crimes that occur in prisons located within their jurisdictions. Even if a complaint is relayed, or if the prisoner manages to communicate it directly, she or he faces another layer of problems. Local police and prosecutors are often familiar with or are otherwise likely to identify with prison workers, especially where the prison is situated in a rural or small-town setting. Of course, police and prosecutors enjoy virtually unlimited discretion in deciding whether to investigate or prosecute a complaint. This is true in any setting; but prisoners are especially vulnerable to an unjust decision of this kind, as they are so lacking in social standing and may be regarded as deserving their fate.²⁰⁸ Indeed, part of the problem is that

206. See, e.g., *Screws v. United States*, 325 U.S. 91, 93 (1945); *United States v. Classic*, 313 U.S. 299, 326 (1941); *United States v. Jackson*, 235 F.2d 925, 927 (8th Cir. 1956).

207. See, e.g., ARIZ. REV. STAT. ANN. § 31-127 (2002); CAL. PENAL CODE § 2650 (West 2000). It should also be noted that some forty-four states criminalize any sexual contact between prisoners and correctional staff, whether it is consensual or not. See Buchanan, *supra* note 171, at 46.

208. Prosecutors in New York State, for example, “decline to prosecute as

district attorneys and sheriffs are usually elected and for that reason may be particularly sensitive to the political consequences of investigating and prosecuting crimes in local prisons.²⁰⁹ Prisoners do not vote, but guards and other prison workers do, and in some cases have translated their collective ire at being implicated in prison assaults into real trouble for district attorneys who have prosecuted them.²¹⁰ While these problems are especially pronounced where a prison worker is charged with assault, they can also come into play where administrators or staff (or the institution itself) stand to lose credibility or incur civil liability for an inmate-on-inmate crime. In any event—and this is true of unelected federal authorities as well—for many reasons police and prosecutors often downplay cases of violent crime where the victim is a prisoner. Even if they do go forward, they are apt to face problems securing credible witnesses and often find it difficult to convince a jury that a crime has occurred—or, even if they are convinced of that, that anyone deserves to be punished for it.²¹¹

much as 75% of all [prison crime] cases referred to them” and have effectively “decriminalized” virtually all misdemeanors.” Eichenenthal & Blatchford, *supra* note 114, at 456.

209. Of special note in this regard is the 1981 U.S. Supreme Court decision, *Leeke v. Timmerman*, 454 U.S. 83 (1991). *Leeke* involved an attempt by inmates, who had apparently been beaten by guards in the course of a prison disturbance, to use § 1983 to compel the issuance of arrest warrants against the culpable guards, where state officials had conspired to prevent those warrants from being issued. *Id.* Although a federal district court and the Fourth Circuit had allowed the claim, at least insofar as it demanded equitable and declaratory relief, the Court rejected completely the idea that enforcement could be compelled in this way. *Id.* See also *Oliver v. Collins*, 904 F.2d 278, 281-81 (5th Cir. 1990) (involving an inmate who alleged that the local sheriff did not press criminal charges against officers who assaulted him).

210. See, e.g. ELSNER, *supra* note 13, at 199-200.

211. Not infrequently, prison workers are acquitted in the face of clear evidence of criminal abuse. For example, in 1991, seven defendants were acquitted in federal court of charges that, as guards at Florida's Charlotte Correctional Institution, they tormented and ultimately beat to death an HIV-positive inmate named John Edwards who had been transferred to that facility for biting another guard. The defendants were acquitted despite forensic evidence of a savage beating and the testimony of fellow guards that the abuse of Edwards was unjustified and retaliatory. David Green, *Guards Acquitted: Seven Officers are Cleared of Accusations They Beat and Tormented a Prison Inmate*, SARASOTA HERALD-TRIBUNE, Jan. 16, 1999, at 1A. A few years later three Florida prison guards were acquitted of charges stemming from the deadly beating of death row inmate Frank Valdes under circumstances suggesting that the dominant place of prisons in the local economy made a fair hearing of the case difficult. Phil Long, *Jury Acquits Three Prison Guards*,

It must be remembered, too, that none of these rights, such as they are, are of much value in preventing a particular case of violence. At best, they are useful in redressing injuries already inflicted—securing damages or altering the way an inmate is treated in prison—and perhaps engendering changes in corrections policies and practices that might diminish violence in the future. But what these rights cannot do—what they manifestly have not done—is guarantee to any inmate incarcerated today that she or he will not inhabit a world of violence.

3. *The Limits—and the Ideology—of Law in the Context of Prison Violence.* This contradictory relationship between law and violence, by which the law condemns violence without effectively preventing it, can be understood in two very different ways. On the one hand, it may counsel a certain degree of optimism about the prospects for effective legal reform. The law at least does not condone prison violence; and its condemnation, though practically ineffective, can be read as a positive ideological statement of some import. Moreover, the fact that the law has brought about some real improvements in prison conditions in other realms can be taken as proof of its real value as a basis of reform in this one. By this view, which is typical among reform-minded critics, law can, in essence, be self-correcting in this context. The problem of prison violence, though reflected in the inefficacy of law, can yet be remedied by a program of more earnest and careful legal regulation.

On the other hand, that the law so stridently renounces

MIAMI HERALD, Feb. 16, 2002, at 1A. Jurors discounted the testimony of ten inmates and several prison employees in acquitting the defendants. *Id.* Several years later, after prosecutors dropped charges against five other inmates, the state paid Valdes' family over \$700,000 in settlement of a lawsuit over his death. Luisa Yanez, *Family of Man Killed by Guards Settles Suit*, MIAMI HERALD, Jan. 31, 2007. Another example comes from California. In 1993, a group of guards at Corcoran Prison appear to have deliberately allowed an inmate to be raped as punishment for the inmate having earlier kicked another guard. After initial attempts at a criminal investigation of the case were frustrated by a “code of silence” among other officers, the guards were initially prosecuted, only to be acquitted by a jury, amidst a media campaign led by the guards' union to generate sympathy for the defendants. See Amnesty Int'l, *California Prisons: Failure to Protect Prisoners from Abuse*, AI Index AMR 51/79/00, May 24, 2000. Later, another group of guards from Corcoran were acquitted of federal criminal charges for having set up “gladiator” fights among inmates. *Guards Acquitted of Staging Gladiator-Style Fights*, N.Y. TIMES, June 10, 2000, at A16. The guards were acquitted despite substantial evidence of their guilt and the state's settlement of civil claims in the case. *Id.*

prison violence without restraining it in a comprehensive and effective way can be read quite differently. From this perspective, the law can actually be seen to abet the state's reliance on violence as a mode of punishment. For in this context, the state can continue to rely on violence to fulfill the prison's punitive function without ever having to acknowledge this reality. Indeed it can point to the law's prohibitions of prison violence as proof that it has repudiated violence as a tool of punishment. Worse still, by the simple artifice of describing the law's failure to effectively prohibit prison violence as a reflection of the law's lingering inadequacy, the state can actually hold itself out as the most appropriate agent to redress the problem of violence, which it can then undertake in ways that never actually subvert the role of violence in prison.

Nowhere are these tendencies more evident than in the Prison Rape Elimination Act (PREA), which Congress passed unanimously. The text of that statute goes on at great length about the many harms of prison rape and the obligation of the government to "eliminate" the phenomenon.²¹² Yet the statute itself does nothing to advance this agenda; its practical effects are confined to stressing the need for education and training, facilitating the gathering of data on the subject, encouraging the rewriting of formal standards for dealing with prison rape, and providing various grants to government entities that run the prisons and jails in which these outrages occur.²¹³ More than a simple failure, PREA can be seen as an instrument by which the state has, by omission, actually authorized the continued role of violence in defining the prison experience and its punitive function, while distancing itself from this very thing.

Critics of prison violence who put their faith in the prospect of legal reform risk participating in this deceptive, disingenuous project.²¹⁴ Of course, the call for more effective redress of prison violence is not in itself problematic; it

212. See 42 U.S.C. §§ 15601-15602 (2007).

213. See 42 U.S.C. § 15601- 9 (2007).

214. See, e.g. UNITED STATES OF AMERICA: RIGHTS FOR ALL, *supra* note 135 at 80-86; Jerita L. DeBaux, *Prison Rape: Have We Done Enough? A Deep Look at the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203 (2006); Robertson, *supra* note 194 at 473-80; Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J. L & POL'Y 125 (2006).

actually exudes a level of concern for the security and the humanity of prisoners that is not exactly commonplace in our culture. What is problematic about such a demand, though, is the notion inherent in it that violence is somehow dysfunctional and deviant vis-à-vis the true and legitimate logic of punishment—that such violence is alien to the prison’s identity as prison. As I argue more thoroughly below, violence does not negate the prison or corrupt the state’s prerogative to punishment; it actually fulfills the prison’s fundamental social function; it is not alien to the prison, but rather integral to its meaning in contemporary society. Those who fail to grasp this point blind themselves to the futility of their efforts and condemn themselves to a campaign for legal reforms that will never actually root out prison violence. And in so doing, they also unwittingly assist the state in denying just how much its dominant system of punishment—and, ultimately, the social structure that the state itself supports—actually relies on the very violence that the law purports to prohibit.

D. Material Conditions of Life in the Contemporary Prison

One area in which efforts at reform and the rise of a culture of professionalism in prison administration have had an unquestionably positive effect is in improving the material conditions of life experienced by the vast majority of prison inmates. To be clear: as a rule, prisons hardly offer the luxurious, “country-club”-type accommodations sometimes attributed to them in reactionary commentary. Instead, the typical prison (particularly if of high or medium security classification) is relentlessly austere, usually exceptionally noisy, and often bathed in foul odors. Prison food is usually not very palatable and sometimes of questionable quality or healthfulness. The quality of medical and dental care is often somewhat questionable, too. As mentioned earlier, overcrowding has emerged in the last few decades as a chronic problem, reducing many facilities designed for single-cell occupancy to double- and even triple-bunking of inmates. And inmates are subject to the “pains” inherent in the fact of incarceration: isolation from family and friends, loss of liberty, regimentation, and so forth.

And yet, for all these important qualifications, prisons have improved dramatically on almost every one of these fronts over the last several decades—and done so as a direct

consequence of reformist activism and the rise of administrative professionalism.²¹⁵ With occasional exceptions, prisoners are afforded, at little or no cost to themselves, the basic necessities of life: a reasonably healthy diet, fairly clean and sanitary accommodations, and even functional attire. And although health care for inmates is subject to valid criticism (not to mention being the butt of many jokes) for being substandard,²¹⁶ it is surprisingly competent, as reflected in the fact that prison inmates actually have a *lower* mortality rate than members of their age group from the population at large.²¹⁷

Moreover, despite recent efforts in the name of fiscal discipline and less eligibility to curtail such programs, many inmates can even avail themselves, again at little or no cost, of secondary and sometimes higher education, as well as employment skills training. According to the Bureau of Justice statistics, as of 2000, about 84% of state prisons offered secondary education to inmates; about 56% offered vocational training; and over one-quarter offered college courses.²¹⁸ More than half of inmates reported taking advantage of these, with about 23% advancing their secondary education, 32% taking up vocational training, and 10% studying at the college level.²¹⁹ Occasionally, prisoners may even be presented with opportunities for

215. On the importance of litigation to this trend, see, for example, Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993).

216. See, e.g. Dean A. Dabney & Michael S. Vaughn, *Incompetent Jail and Prison Doctors*, 80 PRISON J. 151, 153-54 (2000); Michael S. Vaughn & Leo Carroll, *Separate and Unequal: Prison Versus Free-World Medical Care*, 15 JUST. Q. 3, 4-6 (1998).

217. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001-2004 at 3 (2007). See also Ingrid A. Brinswanger, et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 161 (2007). This is despite the fact that prisons are so violent and that many inmates arrive at prison already suffering significant health problems. See MEDICAL PROBLEMS OF INMATES, *supra* note 117.

218. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 4 tbl.3 (2003) [hereinafter EDUCATION AND CORRECTIONAL POPULATIONS]. Federal prisons offered these programs at significantly higher rates: 98.7% offered secondary education; 80.5% offered college courses; and 93.5% offered vocational training. *Id.*

219. *Id.* at 4 tbl.4. Notably, only access to college education programs seems to have been diminished in recent years. *Id.* at tbl.3.

artistic or cultural indulgences. Notably, the people who find themselves in prison have no general right to any of these things in the free world. And as we shall see later, in Part III, the social conditions of life in the social strata from which most prisoners hail are in fact so deprived and insecure with regard to precisely these basic aspects of existence as to compare unfavorably with life inside prison. It is precisely as a consequence that violence shows its relevance to the meaning of prison in contemporary society.

II. LESS ELIGIBILITY, SOCIAL STRUCTURE, AND PRISON VIOLENCE

This Article's central claim is that violence is essential to the prison's social function in contemporary society. Such an understanding of prison violence is dependent, analytically, on a critical concept of less eligibility. The first section of this Part identifies such a concept in the work of its most effective exponent, Georg Rusche. Integral to such a concept is a dynamic, interactive view of the relationship between prison conditions and political economy, one centered on the fundamental idea that the social meaning of punishment is relative to the life conditions of the lower class. Accordingly, the second section of this Part emphasizes several themes: the nature of imprisonment as a mode of controlling the poor and as an experience largely reserved to the poor; the remarkable degree to which the social circumstances of the lower class have either stagnated or deteriorated over the last several decades; and the basis of these developments in class and social structure in changes in political economy and class politics. In a similar vein, the final section of this Part undertakes to show how, via the concept of less eligibility, this deterioration in the conditions of lower class life and the larger changes in political economy and social structure that attend it actually explain the role of violence in the contemporary prison, rejecting the view that such violence is deviant or anomalous in favor of an interpretation that sees it as fundamental to the nature of crime and punishment in an unequal society.

A. *Georg Rusche and the Development of a Critical Concept of Less Eligibility*

As conceived by Bentham, the concept of less eligibility was more a normative aspiration, steeped in liberal

assumptions about the possibilities of humane punishment, than it was a device for unmasking the actual nature of punishment in modern society.²²⁰ Thus Bentham's classic formulation of the concept exudes not only a distinctly prescriptive tone, but also the rather bald suggestion that the logic of less eligibility simply should not extend to matters of violence.²²¹ He writes, "Saving the regard due to life, health, and bodily ease, the ordinary condition of a convict doomed to a punishment which few or none but the individuals of the poorest class are apt to incur, ought not to be made more eligible than that of the poorest class of subjects in a state of innocence and liberty."²²²

Bentham's notion reflects a general tendency among Enlightenment thinkers, not only to discount abusive violence as a factor of less eligibility, but also to rely on the concept primarily to identify the preferred type of punishment that should be imposed on those convicted of crimes.²²³ In this capacity, the concept actually takes on a largely reactionary cast, as it informs an essentially normative quest to preserve the functionality of criminal punishment, particularly the newly-emergent prison, as a means of deterring crime, and to secure the prison's punitive function and reputation against more ambitious calls for reforms.²²⁴ It would be left to Georg Rusche in the early Twentieth Century to invert this tendency and use less eligibility to expose within the dynamics of criminal punishment the politics of class domination and social control—including, potentially, the way these dynamics might inhere in the abusive realities of modern punishment.²²⁵

220. See generally, Bentham, *supra* note 6.

221. *Id.*

222. *Id.* at 122-23.

223. See generally, Edward W. Sieh, *Less Eligibility: The Upper Limits of Penal Policy*, 3 CRIM. JUST. POL'Y REV. 159, 159 (1989).

224. On this reactionary aspect of the history of less eligibility, see, for example, DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* 11-15 (1985); GEORGE RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 105-07 (2003). See also HERMANN MANNHEIM, *THE DILEMMA OF PENAL REFORM* (1939).

225. The concept of less eligibility appears only infrequently in contemporary critiques of prison conditions. An example includes Dean A. Dabney & Michael S. Vaughn, *Incompetent Jail and Prison Doctors*, 80 PRISON J. 151 (2000). See also Edward W. Sieh, *supra* note 224.

Although Rusche is an important figure in the critical discourse on punishment, surprisingly little is known about his personal life and even his intellectual development. What is known about the man is owed largely to the inquiries of criminologist Dario Melossi. Melossi's biographical sketch of Rusche describes a singularly enigmatic figure, difficult to deal with, secretive, and without any lasting family connections or enduring friendships.²²⁶ Born in Germany in 1900, Rusche completed doctorates in philosophy and social science in the mid 1920s.²²⁷ By the early part of the next decade, he had embarked on a study of the political economy of punishment that brought to bear a broadly Marxist perspective, attuned to the dynamics of class conflict and to the importance of economic structures in the development of social institutions and cultural norms.²²⁸ Rusche would never actually complete this project, however. Over the next decade or so, his work was continually interrupted by exile and by his own often chaotic (and sometimes quite questionable) personal affairs.²²⁹ By 1950, Rusche had taken his own life.²³⁰ Besides a few articles, his intellectual legacy consisted of only one major piece, the book *Punishment and Social Structure*, which had been published in 1939.

Widely regarded as a seminal contribution to the study of punishment, *Punishment and Social Structure* was sponsored by the so-called Frankfurt School—the eclectic assortment of neo-Marxist philosophers and social thinkers whose exile from Nazi-dominated Europe seeded American culture with heterodox, sometimes radical insights on philosophy, cultural criticism, and social theory.²³¹ Unfortunately for Rusche, the Frankfurt School's assistance came at a price: the unwelcome participation of Otto

226. Melossi, *Introduction*, in RUSCHE & KIRCHHEIMER, *supra* note 225 at x-xxi; *see also*, Dario Melossi, "George Rusche: A Biographical Essay," 14 CRIME & SOC. JUST. 51 (1980).

227. Melossi, *Introduction*, in RUSCHE & KIRCHHEIMER, *supra* note 225 at x.; Melossi, *supra* note 227.

228. DAVID GARLAND, *supra* note 225, at 89.

229. Melossi, *Introduction*, in RUSCHE & KIRCHHEIMER, *supra* note 227 at x-xxi.

230. *Id.* at xxi.

231. *Id.* at xviii-xix.

Kirschheimer, one of their ranks (and an important figure in the critical discourse on politics and jurisprudence²³²), as co-author of the project. Although *Punishment and Social Structure* bears both men's names, the book's most important insights, however, are overwhelmingly Rusche's.²³³

Rusche was, without question, a gifted social critic who used his grounding in Marxist analysis to remarkable effect. His recasting of less eligibility drew on a broader project of his to understand punishment, not abstractly or juridically, as was (and still is) the dominant tendency, but historically, in its interrelationship to social structure and class.²³⁴ It was from this standpoint that Rusche developed a provocative hypothesis about the relationship between labor and punishment for which he, along with Kirchheimer, is probably most often remembered today. As usually articulated, this hypothesis centers on the notion that the relative scarcity or abundance of labor at a given historical moment within a society directly affects the intensity with which punishment is imposed.²³⁵ This idea, in turn, is typically expressed even more narrowly as the claim that changes in rates of unemployment are directly reflected as changes in incarceration rates.²³⁶ The resulting "labor supply" theory has been the subject of a number of empirical studies, some dismissive, but at least as many purporting to confirm its essential claim.²³⁷

232. On Kirchheimer's intellectual life, see WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 3-6 (1994).

233. On Rusche's life, see RUSCHE & KIRCHHEIMER, *supra* note 225 at x; Dario Melossi, *Georg Rusche and Otto Kirchheimer: Punishment and Social Structure*, 9 CRIME & SOC. JUST. 73, 73 (1978). Apparently, Rusche authored the majority of *Punishment and Social Structure*—chapters II through VIII, of a total of XIII. *See id.* at xviii.

234. *See* RUSCHE & KIRCHHEIMER, *supra* note 225 at 5-6; George Rusche, *Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice*, 10 CRIME & SOC. JUST. 2, 2-3 (Gerda Dinwiddie trans.) (1978) [hereinafter *Labor Market and Penal Sanction*].

235. Melossi, *Introduction*, in RUSCHE & KIRCHHEIMER, *supra* note 225 at xxiii.

236. For a review of this thesis, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 89-110 (1990).

237. *See, e.g.*, Theodore G. Chiricos & Miriam A. Delone, *Labor Surplus and Punishment: A Review and Assessment of Theory and Evidence*, 39 SOC. PROBS. 421 (1992).

As intriguing and provocative as this labor supply thesis is, it actually represents only a small part of broader, more nuanced thesis that Rusche developed on the political economy of punishment. As Melossi argues, Rusche's scholarly inquiries constitute an overarching effort to understand the role that criminal punishment plays as an institution of class domination and control.²³⁸ For Rusche, the essential function of punishment in society has consistently entailed a project of disciplining the lower classes, maintaining their participation in labor markets or other institutions of production, and ensuring their acquiescence to prevailing institutions of property, social hierarchy, and authority.²³⁹ This view of Rusche, which seems quite well-grounded in a careful re-reading of his work, not only re-situates the labor supply hypothesis as a small part of a much broader theoretical campaign to unmask the connection between punishment and labor; it also preserves a better sense of the central thrust of Rusche's work, from which, importantly, his critical thoughts on less eligibility emerge.²⁴⁰ A brief review of his thesis makes this point clear.

For Rusche, the connection between labor and punishment manifests itself in several interlocking ways. On perhaps the most obvious level is a close correspondence between the dominant modes of labor in society and the dominant forms of punishment in that society.²⁴¹ For example, in slave economies, enslavement has tended to constitute the dominant mode of punishment; similarly, manufactory capitalism has tended to imprint its structures and norms in the architecture of the modern penitentiary.²⁴² Closely related to this homology of form is

238. See Melossi, *Introduction*, in RUSCHE & KIRCHHEIMER, *supra* note 225.

239. See generally RUSCHE & KIRCHHEIMER, *supra* note 225. See also *Labor Market and Penal Sanction*, *supra* note 235, at 3.

240. See RUSCHE & KIRCHHEIMER, *supra* note 225, at xxiii-xxviii.

241. *Id.* at 53-58, 62-71, 128-31; *Labor Market and Penal Sanction*, *supra* note 235, at 4-8.

242. See, e.g., RUSCHE & KIRCHHEIMER, *supra* note 225, at 53-58, 62-71, 128-31. See also MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850*, at 174-206 (1978); DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* (Glynis Cousin trans., 1981). On this dynamic as it reflected itself in the development of Nineteenth and Twentieth century prisons in the South around the plantation model, see, for example, DAVID M. OSHINSKY, "WORSE THAN

another, more active level of interaction between labor and punishment involving the role that punishment has consistently played in disciplining, motivating, or otherwise regulating labor. In Rusche's view, the dominant punishments of the last millennium variously betray means of coercing people to work when circumstances otherwise discourage labor market participation, of dealing with surplus people in times of labor surplus, and of encouraging compliance with the structures and norms of the prevailing political and economic order. Thus, he argued, changes in the character of punishment in society tend to reflect relatively shorter-term, cyclical changes in the condition of labor in society. In times of labor scarcity, punishment tends to serve as a means of disciplining and motivating workers, even on occasion playing a direct role in putting them to work; and it develops around forms, methods, and rationalizing ideologies essential to this function. In times of labor surplus, punishment is reoriented to preempting social disorder, warehousing the socially redundant, punishing threats to property or other expressions of disorder by cruel means, and so forth; and it changes its structure and ideology to accommodate this mode as well.²⁴³ According to Rusche, too, the tendency of punishment to relate to labor in such variable ways reflects itself, in part, in regular changes in the extent of punishment in society—that is, the intensity and degree to which punishments already in existence are actually used.²⁴⁴ The labor supply thesis just mentioned follows from this particular aspect of Rusche's work.

Hidden from those who confine their attentions to these aspects of Rusche's scholarship is another, equally provocative proposition: that in articulating its function as an institution of labor control, and in sustaining this function amidst evolving social conditions, punishment undergoes regular, often cyclical changes, not merely in its overall form or intensity of use, but in the degree to which its operative punitive aspect is stressed in actual application. In other words, another key idea of Rusche's is that punishment is generally harsher under conditions of labor surplus than labor scarcity, in part because more

SLAVERY." PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

243. See generally, RUSCHE & KIRCHHEIMER, *supra* note 225 at chs. II-VII.

244. *Labor Market and Penal Sanction*, *supra* note 235, at 3-8.

severe means are required to motivate labor; in part because the anger, alienation, and desperation of the poor inspire more affronts to property and authority and other deviant tendencies; and in part because the diminished social value of labor under such conditions reduces impediments to labor's harsh treatment. Likewise, punishment tends to be less harsh under conditions of labor scarcity because less is then required to motivate and discipline workers, and because the relatively higher social value of labor under such conditions militates against harsh treatment.²⁴⁵ It is in this context that the question of less eligibility becomes central to Rusche's critique and that Rusche recasts the concept in more critical terms.²⁴⁶

The essential importance of less eligibility to Rusche's argument is clear: if punishment is to serve as an effective institution of class control it must feature a genuinely punitive character—no less so than if its aim were simply moral retribution or the control of crime in the interests of public safety. This notion encompasses a very basic and commonplace view of less eligibility: that the prison cannot be so attractive to the poor that it offers an attractive alternative to the life in the free world; otherwise, the argument goes, the poor would seek out punishment. Rusche embraces this view of less eligibility; in his words incarceration must be sufficiently less eligible to deter “persons who might use the gaol as a place of ultimate refuge” from the hardships of the free world.²⁴⁷ Nevertheless, this very basic view of less eligibility represents its weakest formulation. It is apparently this definition that renowned criminologist Norval Morris has in mind when he dismisses the concept as unrealistic in contemporary times, declaring that only a thoroughly “institutionalized” person would trade the free world for prison, no matter their respective material offerings.²⁴⁸ Perhaps this is so; although, as we shall see in the next section, the relevant trade-offs may not be as Morris' critique presumes.

In any case, what really distinguishes Rusche's

245. See RUSCHE & KIRCHHEIMER, *supra* note 225 at chs. II-IV.

246. *Labor Market and Penal Sanction*, *supra* note 235, at 3-4.

247. See RUSCHE & KIRCHHEIMER, *supra* note 225, at 113 (citations omitted).

248. See Norval Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 636 (1966).

conception of less eligibility, and what lends it such a critical quality, is how it transcends this basic formation. In particular, Rusche appreciated the important role that criminality plays in giving a more textured meaning to the less eligibility problem. Crime, after all, mediates the relationship between punishment and its social functions in the sense that only those who are either actually or potentially subject to criminal liability may be controlled by criminal punishment. For Rusche, this requirement in no way compromises the ability of criminal punishment to serve as an institution of class control, since criminality itself is so thoroughly and conveniently concentrated among the lower classes.²⁴⁹ But what criminality does do is add a complicating dimension to the less eligibility problem. Although the concentration of criminality among the poor should not be taken simply as proof of the lower classes' greater moral degeneracy or dangerousness, it does reflect the proliferation among the poor of factors, quite independent of the possible attractions of incarceration, that underlie the commission of crimes. As Rusche appreciated, and as we will discuss in the next section, such tendencies can be understood in terms of both rational and irrational responses to deprivation and social inequality.²⁵⁰ In any case, the fact that the poor are already disproportionately inclined to criminality means that the less eligibility problem must entail not simply a circumstance where prison is so attractive that the poor elect it as a means of support—the circumstance that Morris and others might find so improbable—but also one in which the relative loss of punitive effect of criminal sanction excessively elevates the attraction of crime as a response to poverty, thus entirely defeating any use of criminal sanction as a means of social control.²⁵¹ Understood in this way, less eligibility can fail far more easily than Morris and other critics might imagine.

Other critical advantages of Rusche's account of less eligibility flow from the way he integrates less eligibility into a broader critique of the political economy of

249. See *Labor Market and Penal Sanction*, *supra* note 235, at 3.

250. See *id.*

251. In Rusche's words, "If penal sanctions are supposed to deter these strata from crime in an effective manner, they must appear even worse than the strata's present living conditions." *Id.*

punishment. For Rusche, the practical implications of less eligibility—the determinations of just what is less eligible in a particular situation—are as historically contingent as the overall nature and function of punishment; indeed, the tendency of a system of punishment to maintain its lesser eligibility inevitably influenced the magnitude of punishment (for example, the length of average prison terms) as well as its kind—whether, for example, a particular sentence might involve incarceration versus, say, corporeal punishment.²⁵² In this fashion, Rusche saw that the meaning of what is less eligible would necessarily vary with the changing functions of punishment at any particular time as well as with the changing reality of what, in a relative sense, constitutes punishment at a particular point in history.²⁵³ Similarly, for Rusche, the logic of less eligibility augments and reflects the general tendency of dominant modes of production and established labor techniques to influence the nature of punishment in society.²⁵⁴

Of course, some punishments, like death by torture, are less eligible than just about anything. In practice, the less eligibility concept is most relevant to relatively milder sanctions, like transportation and especially incarceration, which can either be modulated for greater or lesser puniton or traded off against each other to the same end. In a modern context, less eligibility is primarily concerned with the prison. To a degree, the logic of less eligibility can be implemented through changes in the length of incarceration, such that the very length of a sentence (combined with its definitiveness) is sufficiently daunting to eliminate any indifference about the costs of criminality. But less eligibility in the context of incarceration can go well beyond this to include within its harsh metric a concern for maintaining the harshness of the prison experience itself. It is with this in mind that Rusche speaks of the “cruel penalties” needed to sustain less eligibility.²⁵⁵ And while Rusche does not expressly include illegal violence in this vein, the relentlessness with which he emphasizes the realities of punishment over its formal and legal

252. See *Labor Market and Penal Sanction*, *supra* note 235, at 3-8.

253. See generally *Labor Market and Penal Sanction*, *supra* note 235,

254. See *id.* at 6-7.

255. See *id.* at 4.

pretenses leaves no doubt on how this issue fits in this theory.

Rusche was aware that historical contingency in the meaning of less eligibility varied as well with the social conditions of those subject to its logic.²⁵⁶ As the circumstances of the working class change for better or for worse, so does the punitive value of any particular punishment scheme. While a general deterioration in the social conditions for this class effectively reduces the punitive effect of punishment, a general improvement has the opposite effect of increasing effective punishment. Rusche was in fact very explicit in anticipating how long and short cycles of economic crisis and prosperity, as well as the rise of the welfare state and other developments that might generally improve the lot of the lower classes, would all indirectly influence the relative harshness of punishment.²⁵⁷

B. *Punishment, Political Economy, and the Degradation of Lower Class Life*

Our society is home to many people who stand to be tempted in such fashion. According to the most recent data from the Census Bureau, in 2005, 37 million Americans, or about 12.6 percent of the population, lived in poverty as officially defined by the federal government.²⁵⁸ More troubling, 16 million existed in a condition of “deep” or “severe” poverty: subsisting on less than \$5,080 per year per individual, or \$9,903 per year for a family of four.²⁵⁹ The same data reveal a massive 49.3 million people subsisting at or below an income of only 125 percent of the poverty

256. See generally, RUSCHE & KIRCHHEIMER, *supra* note 225; *Labor Market and Penal Sanction*, *supra* note 235.

257. *Id.* at 6-7.

258. In 2005, 36,950 Americans lived in poverty, which the Census Bureau defined in 2005 as an annual income of \$10,160 for an individual under 65 years of age and \$19,806 per year for a family of two adults and two children. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 13 (2006) [hereinafter INCOME, POVERTY, AND HEALTH INSURANCE]. It should be noted that the official poverty measure has been the subject of considerable criticism for relying on an outdated methodology that likely understates the poverty rate. LAWRENCE MISHLE ET AL., THE STATE OF WORKING AMERICA: 2006/2007, at 282 (2007).

259. See DENAVAS-WALT ET AL., *supra* note 259, at 6.

line, which works out to an annual income for a single adult of less than \$15,240, or \$29,709 for a family of four.²⁶⁰ Still more troubling is a recent analysis of data from the Internal Revenue Service (which accounts income somewhat differently than the Census Bureau) by the *New York Times*. The *Times* report paints a bleak picture of concentrated destitution: notably, that some 60 million Americans live on less than seven dollars per day.²⁶¹ A similar reality is evident in terms of accumulated wealth. According to the Economic Policy Institute, as of 2004, 17% of households had either a net worth of zero or less than zero; 29.6 percent had a net worth of less than \$10,000; and the average net worth of the poorest 40 percent of households was only \$2,200.²⁶² Needless to say, these dismal reflections of poverty stand alongside an obscene concentration of privilege at the other end of the spectra of income and wealth—an issue to which we will return shortly.²⁶³

Consistent with the implications of less eligibility and the broader critique of punishment as class control in which it participates, it is overwhelmingly from such lower social strata that the criminal justice system draws its victims. This is of course an obvious fact, no less today than in Rusche's time. Still, some basic statistics underscore the point. According to a recent report by the Department of Justice drawing on data from the mid-1990s, less than one-half of jail inmates were employed full-time before their arrest; twenty-two percent received government assistance (a very high number for a mostly adult male population); and only about one-third earned more than \$12,000 per year before they were arrested.²⁶⁴ Likewise, few defendants

260. *See id.* at 17, 45.

261. David Cay Johnston, '04 *Income in U.S. Was Below 2000 Level*, N.Y. TIMES, Nov. 28, 2006, at C1, C7.

262. *Id.* at 263 tbl.5.9; MISHEL ET AL., *supra* note 259, at 257 tbl.5.5.

263. For example, as of 2004, the top one percent of wealthiest households held assets worth an average of \$14,770,400. MISHEL ET AL., *supra* note 259, at 263 tbl.5.9. Cumulatively, such people held one-third of all household wealth in the country. *Id.* at 253-54 tbl.5.3. Similarly, the richest one-fifth of the population accounted for 84.7 percent of household wealth. *Id.* In that same year, the top 0.1 percent of the population, which includes about 300,000 Americans, reported greater combined pre-tax income than the poorest 120 million Americans. Johnston, *supra* note 262.

264. CAROLINE WOLF HARLAN, DEP'T OF JUSTICE, PROFILE OF JAIL INMATES

possess any real assets whatsoever.²⁶⁵ The vast majority—about eighty percent—cannot afford the services of a lawyer.²⁶⁶ Naturally, such is the class background of prison inmates as well. While direct measures of class among this population are usually mooted by their circumstances, indirect measures suffice to make the point. For example, according to official data from 1997, about three-quarters of state prisoners did not finish high school; and of these, over thirty-nine percent identified going to work, into the military, or “financial problems” as the reason they left school.²⁶⁷

Such figures imply a fact essential to Rusche’s concept of less eligibility: that poverty and social marginality tend to beget criminality. This is indeed true, albeit for reasons that (again, consistent with Rusche’s critique) transcend any simple inferences about the correlation of class background with moral depravity or dangerousness. The strong relationship between poverty and criminality can be understood as a product of the concentration of criminogenic forces in lower class life. By this view, a combination of stresses, frustrated ambitions, fractured family structures, and other life conditions uniquely concentrated in lower class life produce greater levels of alienation, “deviance,” and ultimately criminal behavior.²⁶⁸ Of particular relevance to the current topic is a thesis, strongly associated with Steven Messner and Richard

1996 3-4 (1998).

265. Andrew Karmen, *Poverty, Crime, and Criminal Justice*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 25, 27 (William C. Heffernan & John Kleinig eds., 2000).

266. CAROLINE WOLF HARLAN, DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1, 6 (2000).

267. EDUCATION AND CORRECTIONAL POPULATIONS, *supra* note 219, at 3.

268. This perspective has traditionally consisted of several related theories. For some scholars, social inequality creates “ecological” conditions that generate crime. *See, e.g.*, CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS at ix-xiii (1942). For others, the disjuncture of means and ends for the poor in stratified societies generates criminality. *See generally* RICHARD A. CLOWARD & LLOYD E. OHLIN, DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS (1960). For still others, the tendency for capitalism to generate high levels of “egoism” engenders criminality among the lower classes. *See, e.g.*, WILLIAM A. BONGER, CRIMINALITY AND ECONOMIC CONDITIONS 401-07 (1916). For a review of these and more contemporary theories on this topic, see Theodore G. Chiricos, *Rates of Crime and Unemployment: An Analysis of Aggregate Research Evidence*, 34 SOC. PROBS. 187 (1987).

Rosenfeld, that attributes much of the criminality in American society (including high rates of violent crime) to a desire by poor, exploited, and socially marginalized people to realize conventional measures of social comfort and success, and to the way this pursuit of the "American Dream" ultimately generates crime.²⁶⁹

Indeed, it is possible, in a yet more direct way, to see in the criminality of the lower classes more or less rational responses to poverty and the limited opportunities of lower class life. This point is underscored in several important ethnographies that emphasize the important role of crime as a mode of material support in lower class life.²⁷⁰ It is also revealed, in a rather more stark way, in the statistical dynamics of criminality itself. A large majority of felony convictions in state courts are for property and drug crimes.²⁷¹ Likewise, about forty-one percent of all state inmates are serving time for property crimes or drug offenses, along with another fourteen percent incarcerated for robbery.²⁷² The same observations about the relationship between crime and lower class life invite a still more critical reflection on the class politics that inhere in the way the criminal law is defined. Such an exercise might, for example, involve asking just why it is that certain behaviors are criminalized and others not? To the same end, one can ask why breaches of the law by the poor are more aggressively prosecuted or punished than those common to the more affluent.²⁷³

269. STEVEN F. MESSNER & RICHARD ROSENFELD, *CRIME AND THE AMERICAN DREAM* at ix-1 (4th ed. 2007).

270. See Jeffrey Fagen, *Gangs, Drugs, and Neighborhood Change*, in *GANGS IN AMERICA* 39 (Ronald C. Huff ed., 2nd ed. 1996); JOHN HAGEDORN WITH PERY MACON, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* 101-05, 118-27 (1988); JAY MACLEOD, *AIN'T NO MAKIN' IT: LEVELED ASPIRATIONS IN A LOW-INCOME NEIGHBORHOOD* 31-33 (1987); JOAN W. MOORE, *GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE* (1991); BETTY LOU VALENTINE, *HUSTLING AND OTHER HARD WORK* (1978). See generally SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2006).

271. See, e.g., BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, *VIOLENT FELONS IN LARGE URBAN COUNTIES* 2 tbl.1 (2006) (describing felony convictions in state courts in the 75 largest counties, by most serious charge, 1990-2002).

272. PAIGE M HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2005* at 9-10 tbls.13 & 14 (2006).

273. For a reflection on these questions, see generally JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* (8th ed. 2006).

What is clear, in any case, is that in practice criminality is uniquely prevalent among the poor. As Rusche understood, such a strong relationship between class and crime is essential to the criminal justice system functioning as a system of class control, as it is the very thing that allows punishment to be brought to bear as a means of control. Critically, for the present argument, this relationship also directly implicates the logic of less eligibility. In order for incarceration truly to function as punishment—let alone class control—it is not enough that it be punitive in the abstract or even in some democratic sense; the prison must be punitive for the poor and it can only be punitive in relation to the social conditions of the poor. Such is the medium by which the concept of less eligibility draws out a connection between prison violence, on the one hand, and poverty and inequality, on the other.

C. Less Eligibility and the Meaning of Prison Violence in Social Context

Where crime exists as both a reaction to poverty and a means of economic support, and where poverty is so pervasive, the prison is at great risk of losing its punitive effect and becoming, if not a haven for the poor, then a sanction with little meaning to those it is intended to punish and to deter. Indeed, this risk of a loss of less eligibility has been heightened over the past several decades, as the social conditions of the poor have in some ways actually deteriorated over this period, while the material conditions of confinement (*sans* violence) have actually improved. This dynamic exposes the historical character of the less eligibility problem as well as its grounding in political economy, particularly where connected to changes in the role and nature of violence in prison.

1. *The Political Economy of Poverty and Inequality.* The deteriorated social conditions of the poor are evident in both absolute and relative terms. In absolute terms, for example, the official poverty rate, which fell dramatically and steadily from the late 1950s until about 1970, has remained almost unchanged since then; and, given changes in population, vastly more people subsist below the poverty

line today than in the 1970s.²⁷⁴ Worse, the “poverty gap”—the average amount by which the income of the poor falls beneath the poverty rate—has increased significantly since the mid 1970s.²⁷⁵ Similarly, the percentage of people in deep poverty is at the highest level since 1975.²⁷⁶ These trends in poverty rates are consistent with trends in wages and overall income, which have remained stagnant over the last three decades, despite steady increases in worker productivity.²⁷⁷ This problem is greatest among low-wage workers, with average wages in the lowest tenth percentile actually 2.3 percent less in 2005 than in 1979.²⁷⁸ Likewise, the percentage of American households with zero or negative net worth was greater in 2004 than it was in 1983; the percentage of households with a net worth of less than \$10,000 has remained virtually unchanged over that period.²⁷⁹ And the net worth of the bottom forty percent of American households, which averaged \$5,400 in 1983, now averages only \$2,200.²⁸⁰ These downward trends in income and wealth accompanied a dramatic increase in the spatial concentration of poverty in blighted, usually urban, neighborhoods.²⁸¹

Social class is nothing if not a relative concept. An even more startling and disturbing picture of the deterioration of lower class life is evident when such measures are contrasted to the economic conditions of the upper classes. The picture that emerges is one of rapidly growing inequality. The *Times*’ analysis of IRS data found that between 1979 and 2004, the average income of taxpayers “on the ninety-fifth to ninety-ninth rung of the income ladder rose by fifty-three percent;” that one-third of all increases in national income during that period went to the top one percent of income earners; and that half of that

274. INCOME, POVERTY, AND HEALTH COVERAGE, *supra* note 259, at 13, fig. 4.

275. MISHEL ET AL., *supra* note 259, at 288-90, fig. 6C.

276. Tony Pugh, *U.S. Economy Leaving Record Numbers in Severe Poverty*, MCCLATCHY NEWSPAPERS, Feb. 22, 2007, http://www.mcclatchydc.com/staff/tony_pugh/story/15657.html.

277. MISHEL ET AL., *supra* note 259, at 112-14.

278. *Id.* at 120-22 tbl.3.4.

279. *Id.* at 257 tbl.5.5.

280. *Id.* at 263 tbl.5.9.

281. See PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 29-58 (1996).

went to the top one-tenth of these people, whose average incomes more than tripled over that period.²⁸² This trend represents the reversal of a significant leveling of income inequality in the post-War/post-Depression era.²⁸³ While the average wealth of the bottom forty percent of the population declined between 1983 and 2004, that of the top one percent has increased some seventy-seven percent over the same period.²⁸⁴ Moreover, the poor have been left behind, not just by the obscenely wealthy, but also by the middle-class. While the middle-class has also lost economic ground to the truly wealthy (measured, for example, by changes in income and share of national wealth), its modest gains in total wealth and in income have distanced its members from the truly poor.²⁸⁵ The resulting exacerbation of relative poverty for the poor is significant not merely as a measure of overall social marginalization, but also as an index of how much the criminogenic pressures of poverty—relative deprivation, alienation, and the like—have increased over the past several decades.

Such changes in wealth and income are more than accidents or the results of isolated developments in policy or economic structure. Rather, they reflect wide-spread and deep-seated changes in political economy, centered in a number of key developments in both politics and social structure. Some of these changes may be grouped under the heading of “deindustrialization,” in particular the decline of employment in the traditionally high-wage manufacturing sector,²⁸⁶ the shift of remaining plant to low-wage markets, and the demise of organized labor.²⁸⁷ These developments,

282. Johnston, *supra* note 262, at C1; see also Thomas Piketty & Emanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. OF ECON. 1 (2003); U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: A BRIEF LOOK AT POSTWAR U.S. INCOME INEQUALITY 1 (1996).

283. See Piketty, *supra* note 283, at 11, fig. I.

284. The overall increase in average wealth for this group has been from \$8,315,200 to \$14,770,400. MISHEL ET AL., *supra* note 259, at 263 tbl.5.9.

285. See, e.g., *id.* at 121-25, 263.

286. See generally BEYOND THE RUINS: THE MEANINGS OF DEINDUSTRIALIZATION (Jefferson Cowie & Joseph Heathcott eds. 2003). On the effect of this shift on wages, see MISHEL ET AL., *supra* note 259, at 168-71.

287. By official measure, as of 2006, only 12.0 percent of wage and salary workers in the U.S. were union members, down from 12.5 percent the previous year, and down from 20.1 percent as recently as 1983. UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Union Members in 2006*, at 1 (Jan. 25,

which have significantly reduced economic opportunities for working-class people, were already underway as early as the 1950s and 1960s;²⁸⁸ but they accelerated from the 1970s onward.²⁸⁹ And while the effects of deindustrialization on working class people were muted in 1960s and 1970s by increasingly generous welfare policies,²⁹⁰ the period since the mid 1970s—especially the 1980s and 1990s—has been marked by a dramatic retrenchment of the welfare state.²⁹¹ This phenomenon has its origins in the rise in the 1970s of a more or less chronic fiscal crisis, rooted in what some scholars have identified as the inherent inability of the modern, capitalist state to fund the welfare state while sustaining its political legitimacy among elites.²⁹² However, the retrenchment of the welfare state has also drawn on an ideological element, one that has not only questioned the overall social value of the welfare state and endorsed various regressive changes in tax policy, but also sought to normalize the inequality and even the extreme deprivations of lower class life.²⁹³ In any event, it manifested itself in a series of efforts to draw back available benefits, encourage work, and limit eligibility—thereby to ensure that welfare remained less eligible than life on the margins of the working class. These efforts culminated in the 1996 enactment of the Personal Responsibility and Work Opportunity Act.²⁹⁴

2007), available at <http://www.bls.gov/opub/ted/2007/jan/wk4/art05.htm>. On the “premium” that union representation creates in higher wages, see MISHEL ET AL., *supra* note 259, at 181-89.

288. See generally THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2005).

289. This theme is developed in the context of explaining black urban poverty by William Julius Wilson. WILLIAM J. WILSON, *WHEN WORK DISAPPEARS* ch. 1 (1997); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1990).

290. MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 262-63, 278 (10th ed. 1996).

291. See, e.g., CHRISTOPHER PIERSON, *BEYOND THE WELFARE STATE?* chs. 5-6 (3rd ed. 2006).

292. See generally JAMES O’CONNOR, *THE FISCAL CRISIS OF THE STATE* (2001); Claus Offe, *Crises of Crisis Management: Elements of a Political Crisis Theory*, in *CONTRADICTIONS OF THE WELFARE STATE* 35 (John Keane ed. 1984).

293. See generally BRENDON O’CONNOR, *A POLITICAL HISTORY OF THE AMERICAN WELFARE SYSTEM: WHEN IDEAS HAVE CONSEQUENCES* (2004).

294. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. On the overall thrust of this legislation, see O’CONNOR, *supra* note 294, at 226-35. On reform efforts prior to

All of these changes, together, might be said to embody the ascendance of neo-liberal policy and ideology over those of conventional post-war liberalism.²⁹⁵ While post-war liberalism never challenged the fundamental tenets of capitalism and class structure, it did contemplate a viable welfare state committed to modest redistribution of wealth, income, and economic power via a functional social welfare system and a modest array of labor and employment laws and other means of economic regulation. Neo-liberalism repudiates this approach entirely, aggressively dismantling and discrediting government regulation of this sort while bolstering government functions that are of direct benefit to wealth and power businesses and denizens of the upper class. Ironically, both neo-liberalism and the changes in policy that have attended its rise might also be situated within a broad decline in the overall viability of the American economy. Reflected in long term declines in important economic indicators, including productivity and growth rates,²⁹⁶ as well as the rising fortunes of competitive economies, such a development is notably quite consistent with other historical shifts in the geography of capitalism. In any case, such a decline has given considerable authority to the central neo-liberal projects of intensifying the exploitation of the working class (as by the weakening of the labor movement and the extension of working hours), rolling-back the welfare state, and reducing tax burdens on businesses and wealthy people.

The poverty of income and wealth brought about by these changes has manifested itself in widespread material deprivation. Faced with escalating property values and declining government subsidies, a large and growing segment of the lower classes finds itself unable to afford

this legislation, see Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 280-98 (1998).

295. For a broad perspective on the rise of neoliberalism, its precepts, and its implications for social policy, see generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005). See also ROBERT POLLIN, CONTOURS OF DESCENT: U.S. ECONOMIC FRACTURES AND THE LANDSCAPE OF GLOBAL AUSTERITY 3-20 (2003).

296. See Andrew Glyn, et al., *The Rise and Fall of the Golden Age*, in THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE 39 (Steven A. Marglin & Juliet B. Schor eds., 1990); David M. Gordon, *Chickens Home to Roost: From Prosperity to Stagnation in the Postwar U.S. Economy*, in UNDERSTANDING AMERICAN ECONOMIC DECLINE 34 (Michael A. Bernstein & David E. Adler eds. 1994); see generally ERIC HOBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991, at 403-18 (1996).

adequate housing.²⁹⁷ As a consequence, millions of lower class people currently live in woefully substandard dwellings which are often vermin-infested, crowded, and without proper lighting, climate control, or plumbing.²⁹⁸ Moreover, many poor people must skimp on other needs to pay for housing, substandard or not.²⁹⁹ Others are less fortunate. Perhaps 750,000 people are homeless at any given time; and each year, many times this number, perhaps two or three million people “pass through” a state of homelessness.³⁰⁰ Importantly, these people are for the most part homeless because they are poor, and not, as popular conviction often holds, because they are mentally ill or drug-addicted.³⁰¹ Moreover, the most durable component of this population, those apt to remain homeless the longest, are African-American males—who are also disproportionately represented in the prison population. Denied access to shelters and housing assistance, these men

297. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 2006, at 20-29 (2006) [hereinafter, *THE STATE OF THE NATION'S HOUSING*].

298. Official data from the federal government reveals millions living in substandard housing. U.S. DEP'T OF HOUSING AND URBAN DEV., *TRENDS IN WORST CASE NEEDS FOR HOUSING, 1978-1999* 1-9 (2003). See also *THE STATE OF THE NATION'S HOUSING*, *supra* note 298, at 26.

299. *THE STATE OF THE NATION'S HOUSING*, *supra* note 298, at 26-27.

300. A January 2007 report by the advocacy group, the National Alliance to End Homelessness, used a “point-in-time” count of the homeless conducted in January 2005 to generate an estimate of 744,313 homeless people in America, of whom 44% were “unsheltered.” MARY CUNNINGHAM & MEGHAN HENRY, *HOMELESSNESS COUNTS* 3, 10 (2007). This figure is not incompatible with data from the federal government, which for the same month, January 2005, estimates a total homeless population of 754,147, of whom 415,366 were sheltered and 338,781 unsheltered. An analysis of census data from 1996 suggested that in a given year, 2.5 to 3.5 million people experience homelessness. MARTHA BURT ET AL., *HELPING AMERICA'S HOMELESS: EMERGENCY SHELTERS OR AFFORDABLE HOUSING* (2001).

301. While substance abuse and mental illness are surely problems that contribute to and exacerbate homelessness, it is not at all clear that they explain homelessness—not any more than substance abuse and mental illness among the affluent explains the fact that these people are so seldom homeless. On this issue, see for example, JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* 26-27 (1992); KENNETH L. KUSMER, *DOWN & OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* 242-43 (2002); HEIDI SOMMER, *HOMELESSNESS IN URBAN AMERICA: A REVIEW OF THE LITERATURE* 13-14 (2000). What is clear is that the homeless are “the poorest of the nation's poor,” earning, according to Somner's 2000 review of urban homelessness, a median of only \$300 per month. *Id.* at 16-17.

are, in the words of one scholar of homelessness, “generally expected either to take care of themselves on the streets or face incarceration.”³⁰²

Deprivation shows itself in other realms as well. Nearly 15 million people with a household income of less than \$25,000 have no health insurance—despite the availability of government insurance for some low income people.³⁰³ Likewise, untold numbers of poor people curtail their education or that of their dependents and forego clothing, toiletries, and other basic necessities for want of resources.³⁰⁴ For others, poverty means food insecurity and even hunger; according to the U.S. Department of Agriculture’s annual report on the subject, in 2005, 11.0 percent of American households (about 35 million individuals) experienced food insecurity during the year, and of these households, 3.9 percent (about 10.5 million individuals) experienced “very low food security”—what the Department used to call *hunger*.³⁰⁵

Notably, for millions, too, these deprivations are not the wages of idleness, but rather the bitter fruit of hard work in monotonous, sometimes dangerous, and often degrading employment conditions.³⁰⁶ Indeed, according to some authorities, almost half the people who are *homeless* work for a living.³⁰⁷ Moreover, many of the poor who do not work

302. TODD DEPASTINO, CITIZEN HOBO: HOW A CENTURY OF HOMELESSNESS SHAPED AMERICA 261 (2003).

303. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH COVERAGE IN THE UNITED STATES: 2005, *supra* note 259, at 22 tbl.8

304. KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 39-41 (2000). *See also* HEATHER BOUSHEY & BETHNEY GUNDERSEN, ECON. POL’Y INST., WHEN WORK JUST ISN’T ENOUGH: MEASURING HARDSHIPS FACED BY FAMILIES AFTER MOVING FROM WELFARE TO WORK (2001).

305. MARK NORD ET AL., U.S. DEP’T OF AGRICULTURE, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2006 at 6 tbl.1A (2007). On the Department’s change in terminology, see *id.* at 6. Not surprisingly, both measures of food insecurity are concentrated among low-income households. *Id.* at 16.

306. The so-called “working poor” phenomenon is very real. *See* NEWMAN, *supra* note 305, at 39-41; DAVID M. SCHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA (2005). According to the U.S. Department of Labor, as of 2004, 7.8 million people who worked or were actively looking for work lived in households beneath the poverty line, with the phenomenon being most frequent among workers in the service, construction, farming, and natural resource extraction sectors. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, A PROFILE OF THE WORKING POOR, 2004, at 9 (2006).

307. SOMMER, *supra* note 302, at 17 (reporting that forty-nine percent of

are in this condition not because they are fundamentally lazy, but because they simply cannot find work. In other cases, they are, by some combination of race, class, and gender identity, criminal history, or physical disability, effectively unemployable in the conventional sense. At the same time, a very prominent but often-ignored feature of lower class life is the degree to which conventional work, “off-the-books” employment, and criminality interlace to form networks of material support, security, and social meaning for people who otherwise have little access to these things.³⁰⁸

2. *Poverty, Inequality, and the Meaning of Prison Violence.* Here is where the logic of less eligibility comes into play. On the one hand, life for the poor in America is truly horrible: deprived, insecure, utterly undesirable. On the other hand, as horrible as prison is even without the risk of violence, it does shield its inhabitants from these deprivations and insecurities. As mentioned above, prison guarantees inmates a fairly decent and stable material existence. Inmates receive more or less decent accommodations, a reasonably balanced diet, and largely competent medical and dental care. Moreover, they get all of this at little or no cost to themselves. While they may be compelled to work, seldom is such work particularly arduous; and in any case willingness to work cannot be (and almost never is) made a condition for continued receipt of basic necessities. In fact, in some cases, prisoners may even have the chance to advance their education or job skills while incarcerated. To be sure, as other scholars have pointed out, reactionary reformers continually seek to maintain less eligibility precisely by limiting and even worsening these aspects of incarceration.³⁰⁹ But there are

homeless people describe work as a source of income). See also DOUG A. TIMMER ET AL., *PATHS TO HOMELESSNESS: EXTREME POVERTY AND THE URBAN HOUSING CRISIS* (1994).

308. For a telling account of this dynamic, see, for example, VENKATESH, *supra* note 271.

309. On the role of less eligibility in explaining the restriction of prisoners’ access to reformatory work, see, for example, Gordon Hawkins, *Prison Labor and Prison Industries*, 5 *CRIME & JUST.* 85, 101-03 (1983). On the role of less eligibility in the curtailment of prisoners’ access to educational opportunities, see Joshua Page, *Eliminating the Enemy: The Import of Denying Prisoners Access to Higher Education in Clinton’s America*, 6 *PUNISHMENT & SOC’Y* 357 (2004).

clear limits to how far such efforts can go, not least given the institutional interests of prison administrators and other corrections professionals in maintaining such services. And there is, too, the law, which not only requires that physical conditions of confinement meet minimal constitutional standards, but also is more effective at policing compliance with standards concerning such things as diet, health care, and physical accommodations than it is in dealing with something so diffuse and deniable as violence.

The sad reality today is that, absent the element of violence, life inside of prison is not so dramatically worse for the poor than their lot in the free world, and in some ways is better. This is not, of course, because prisons are fundamentally attractive places; but because the circumstances of lower class life outside of prison are so awful. Without the real threat of being assaulted and the pervasive obligation to participate in a culture of violence that come with incarceration, in some cases the poor might well, by committing a crime, elect incarceration as a last-ditch means of gaining material support. It is in fact very easy to imagine how, if prisons were shorn of their culture of violence, a truly desperate person—one with no job, no shelter, perhaps intermittently hungry—might choose to be incarcerated, if only to tide herself or himself over until a time when conditions might hopefully improve. It is even easier to see how, in the absence of such violence, a person might adopt an attitude of deep indifference to incarceration, perhaps neither desiring it nor particularly dreading it. Such a person is more likely resort to crime as a means of support or as an outlet of frustration and anger about their social position, notwithstanding the risk of imprisonment.

In fact, hundreds of thousands of poor people already embrace crime or the meager offerings of incarceration in this fashion, notwithstanding the cruel realities of prison violence. The risk, from the standpoint of less eligibility, is that without prison violence, many more would make this choice. Violence helps to prevent this. It guarantees that anyone so drawn to prison as a means of support or made indifferent to its punitive aspirations by its relative generosity in material support will have to reckon with the risk of being assaulted; they will have to live a life defined by the threat of violence; and they will have to inhabit this world knowing (or soon made well aware) that there is

seldom any escape from such violence.

To say that violence works in this way to enhance the punitive effect of prison does not necessarily require that people rationally calculate, on the basis of accurate information, their criminal decisions—that they take into account their precise chances of being victimized or the exact costs involved in avoiding victimization. This kind of scenario is unlikely and unrealistic in any case; and it is also quite unnecessary to the logic of less eligibility. All that is needed is the vaguest, most basic kind of deterrent-like effect: that would-be prisoners know in a very general way that violence is a pervasive and unavoidable aspect of the prison experience; and that, if only in the most diffused way, such a sense of prisons as violent enters their thoughts about the value and consequences of engaging in criminal behavior. In fact, research shows that incoming prisoners perceive prison violence in precisely this way.³¹⁰ In making this point, it is worth stressing several others. The first is something stressed earlier in discussing the dynamics of violence in prison: that it is precisely a great uncertainty of risk that gives violence in prison such a trenchant quality. Second, it is also worth recalling that most people imprisoned in this country are there for crimes that are quite susceptible to at least this diffused kind of deterrence. Finally, there is also the matter of general deterrence, meaning, in this context, the way the horrors of prison violence (including uncertainty about one's chances of being victimized) are communicated to the poor generally gives some of them pause to reconsider their compliance with establishment norms and also reminds them of how seriously the state takes this question.

To be sure, the claim here is not that prison violence works perfectly to preserve and advance the logic of punishment. There are ways in which violence might actually work against less eligibility—as, for example, by appealing to the appetite of the psychotically violent. In any case, to expect such perfect functionality is an unrealistic goal of social critique. Such a level of functionality is irrelevant to a critique premised on identifying a major role that violence plays in sustaining the meaning of the prison as punishment. On a related point, to say that violence is

310. See Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 54-55 (1989).

central to the logic of punishment, and that punishment in this sense is rooted in an agenda of class control, is not to suggest that the overall project of control is carried out perfectly or even (by its own standards) well. If it were, its own apparent irrelevance would have been manifested long ago in the very disappearance of class-related criminality.

The objection might also be raised that the less eligibility function of prison violence is undercut by the elevated role that violence plays in the lower class life in the free world. In fact, the premise of this objection is true; violence is concentrated in lower class communities. Moreover, as we mentioned earlier, “street smart” inmates who are familiar with violence are the ones most likely to avoid being victimized and to perpetrate violence in prison. Nevertheless, violence in prison is qualitatively different than street violence. As noted earlier, violence in prison occurs in an environment this is at least initially foreign to the offender, featuring diverse racial, ethnic, and regional groups, as well as the complicating omnipresence of state authority in the person of the guards, and requiring strategies and responses different than those appropriate to the free world. Similarly, it is also much more difficult in prison to control spatially and temporally the terms under which one meets violence. One cannot as easily walk away from conflict or remove oneself, even temporarily, from its domain. Finally, even if those denizens of the lower class who are most habituated to violence are to some extent less influenced by prison violence in the equation of less eligibility, this speaks only to their circumstances; it does not address the situation of the remainder of that social stratum, who likely still perceive the risks of victimization that come with imprisonment, whether they have yet been incarcerated or not.

To make another point clear: It is not my argument that violence represents a discretely chosen aspect of punishment policy. Indeed, it is quite clear that, but for occasional outbursts of reactionary rhetoric, the idea of violence as explicit part of punishment is roundly renounced by elites who make these decisions.³¹¹ We have

311. Occasionally, a figure of authority does expressly condone prison violence. Pennsylvania prosecutor Gordon Zubrod recently elicited the criticism of the Supreme Court of Canada for threatening defendants awaiting extradition from Canada with prison rape. See *United States v. Cobb*, [2001] 1 S.C.R. 587 (Can.). Journalist Dan Bell recounts a similar statement in 2001 by

seen this already in reviewing the role of the law in proscribing, and in failing to prevent, prison violence. The fact is that policies often emerge and hold sway without ever being specifically nominated as such—and without ever ceasing to be policies. Not least is this true of the criminal justice system, whose many class-, race-, and gender-control dimensions have been convincingly laid bare, not only in the relative absence of documents that confess these orientations, but against an entrenched ideology (centered on the “justification” of punishment) that aggressively denies such orientations.³¹² Similarly, to say that violence is part of the logic of punishment is to participate in this kind of immanent critique that cuts against the force of official pronouncements and ideology. Rusche deemed less eligibility as the “leitmotiv” of punishment, not its formal purpose.³¹³ To again invoke Gresham Sykes, violence is an “unplanned concomitant” of incarcerations, but it is part of the metric of punishment all the same.³¹⁴ As Sykes appreciated, it is illegal, to be sure; but such illegality does not negate its character as a mode of punishment or, indeed, as an integral feature of punishment policy. Violence is an obvious and enduring part of the prison that has remained conspicuously immune to efforts at abolition by law. Its illegality of course precludes it being formally authorized as punishment at the same time that, as argued earlier, it helps to obscure this function.

In fact, violence performs its less eligibility function with some unique advantages to the criminal justice system. By relying on violence to sustain its punitive function, the prison is able to retain its character as punishment without descending to overtly debased practices—for example, starving inmates, denying them basic health care, or making them perform truly arduous labor and thus putting itself in flagrant violation of basic constitutional and human rights norms. And yet because prison violence is so familiar (if in a distorted, caricatured

California Attorney General William Lockyer, that he would “love to personally escort [Kenneth] Lay... to an 8-by-10 cell that he could share with a tattooed dude that says, ‘Hi, my name is Spike, honey.’” Bell, *supra* note 66, at 18.

312. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

313. RUSCHE & KIRCHHEIMER, *supra* note 225, at 94.

314. SYKES, *THE SOCIETY OF CAPTIVES*, *supra* note 55, at 64.

way) the prison is able, too, to retain the legitimacy that flows via a widespread faith that, by violence, the prison continues to punish those who flout dominant, officially sanctioned social norms. Ironically, by these means, violence allows those invested in a sanitized, bourgeois vision of criminal justice as a neat means of correction and retribution to believe this vision can be realized, even when they acknowledge how pervasive violence actually is in prison—provided, of course, they do not see it as an integral part of punishment. Violence has yet another advantage in this context. It is, for the most part, free. True, governments may occasionally incur financial liability. But this is rare, and the amounts involved quite meager. For the most part, beatings, rapes, and such come at no extra expense to the taxpayer.

The connection that less eligibility reveals between prison violence and political economy gives historical content to the evolution of violence in this realm. In particular, the critique of prison violence in terms of less eligibility suggests that the overall intensity of violence in prison is dependent, not so much on questions of social morality, law, or even politics in the narrow sense of the word, but rather political economy and ultimately social inequality: the greater the level of social inequality, the greater the risk to less eligibility, the more pressure to sustain the punitive function of the prison. In this light the increase and entrenchment of prison violence described earlier in this Article can be seen in the light of the logic just described, as a response precisely to the stagnation and deterioration of the condition of the lower classes over that same period. As the logic of less eligibility has called for more pronounced means of punishment, violence has become ever more entrenched in the prison experience and ever more integral to the prison's function as prison. Or, to put this differently, if one wants to identify the root cause of prison violence, one should look not so much for ineffective laws, sadistic or incompetent prison staff or administrators, or political motifs of the abstract and detached sort. Instead, one must look more broadly and more deeply into the structure and ideology of contemporary society: at the relentless use of the criminal law to punish and control the poor; at the ruthless conditions of deprivation and inequality that define poverty in our society; and ultimately at the very logic of capitalism, which so inexorably generates all these conditions. Here one will find the true

reasons that our prisons are so awash in violence.

CONCLUSION

To argue, as this Article does, that violence is integral to the functionality of the prison in contemporary society, brings to the surface a number of important issues. Not least among these is the question, what can be done about this? The dominant impulse among humane, reform-minded people is to think that, surely, the problem of violence in prison can and should be addressed by changes in law and policy. But as Rusche observed, less eligibility is, if nothing else, a ceiling on reform. If, as I argue here, violence is truly essential to the prison's ability to punish the poor, and so to advance penal and social control agendas that are fundamental to modern criminal justice, then the quest for reform is likely doomed to failure, in that it unknowingly encompasses a challenge to the very notion of the prison. Rusche does speak of another possibility: that if reform would destroy the lesser eligibility of punishment it might nonetheless be carried out provided it is accompanied by a "more subtle deterioration of prison conditions."³¹⁵ This is not merely an unfortunate prospect. Arguably, it explains the prison's reliance on illegal violence, in that violence has become so integral to the punitive integrity of prison in the first place precisely because prison conditions have improved in so many other respects.

There is yet another possibility implied in the radical tone of Rusche's critique. If, as I argue, the root cause of persistent prison violence can be located in the prison's enduring commitment to punishing the poor and doing so amidst conditions of staggering social inequality and material deprivation, then the problem of prison violence can actually be refocused as an issue of class conflict and class inequality—and redressed on that level. To make this point differently, just as less eligibility can be taken, generally, as a means of justifying the deprivation or brutalization of inmates, so too can the concept be read in a more radical vein to counsel an attack on the social circumstances that render the idea of prison devoid of violence so self-contradictory in the first place.

315. *Labor Market and Penal Sanction*, *supra* note 235, at 4.

Of course there is no reason to think this likely—and every reason to think that violence will continue to play an important role in punishment. Perhaps no single fact underscores this unfortunate point more clearly, or makes clearer the real way that class, political economy, and punishment interact in our society, than a recent development in sentencing policy. Rather than improve jail conditions for all inmates, a number of jurisdictions (chiefly in California) now offer to the affluent, for about \$100 a day, exclusive confinement, in a facility devoid of the unpleasant—and violent—conditions to be found in the normal lock-up.³¹⁶ What better way to maintain the less eligibility of punishment for the poor while sparing those few convicted people who are not poor the needless pain that these conditions would entail? Such is the likely destiny of punishment reform in class society.

316. Jennifer Steinhauer, *For \$82 a Day, Booking a Cell in a 5-Star Jail*, N.Y. TIMES, Apr. 29, 2007, at A11.