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VOLUME 47

SPECIAL ISSUE

NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE

AUSTIN SARAT
Editor

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NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE

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SPECIAL ISSUE NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE

EDITED BY

AUSTIN SARAT

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ZONING OUT DISORDER: ASSESSING CONTEMPORARY PRACTICES OF URBAN SOCIAL CONTROL

Steve Herbert and Katherine Beckett

ABSTRACT

In Seattle and other cities, recent expansions of trespass law make the regulation of public space easier and more extensive. A range of new tools allow police officials to clear spaces of those deemed undesirable; they define zones of exclusion and increase the police's power to make arrests. The use of these tools extends contemporary practices of using criminal law to address instances of urban "disorder." We draw on data from Seattle to catalog some of these new tools, the capabilities they create, and the implications they generate. One important such implication is that they work to push undesirables so far to the margins – spatially, socially, politically, legally – as to render them far outside the body politic. The use of these techniques thus raises important questions about the advisability of addressing social problems by increasing the power of the criminal law.

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INTRODUCTION: "ANYWHERE BUT AURORA"

It is early on a weekday morning. Herbert is riding in a police van cruising Seattle's Aurora Avenue. A state highway, Aurora was once the city's primary north–south arterial. For this reason, it is lined with several motels. Many of these are now somewhat rundown, and reportedly serve as sites for the exchange of drugs and sexual services.

Also in the van are two officers. One works for the Seattle Police Department, the other for the Washington State Department of Corrections. Their partnership is part of a "Neighborhood Corrections Initiative." Each officer brings unique capacities to the enterprise. The SPD officer can access databases that can search by name and by vehicle for information of criminal wants or warrants, and for such restrictions as suspended driver's licenses. He can also make an arrest for perceived violations of the law. The DOC officer's database is confined to those with any history with his Department. He is particularly interested in anyone who is "DOC active", i.e., currently on probation or parole. The DOC officer seeks to determine whether anyone under supervision is in compliance with the various conditions of probation or parole. In the pursuit of such verification, the DOC officer can search anyone under supervision, as well as his/her vehicle and domicile. If he discovers a violation, he can make a "DOC arrest." Given their respective databases and capabilities, the two possess an impressive combined power.

The officers are headed to an Aurora motel that they describe as particularly notorious. The DOC officer wants to check on a registered sex offender who is a resident of the motel. As they enter the parking lot, however, they see two men walk from the lot and onto a side street. The SPD officer heads off in pursuit. He catches the men a half-block away, and orders their hands on a parked car. He retrieves their identification, and radios in a request for information about each of them. What he subsequently learns leads him to arrest each man for criminal trespass. The arrest is enabled by the "Aurora Motel Criminal Trespass Program," created by the Seattle Police Department in 2005. Twenty-five motels participate in the program, which enables SPD officers to "admonish" anyone on the premises of any of those motels who they believe lacks a legitimate purpose for being there. Once admonished, a citizens can be arrested for criminal trespass if they are subsequently found on the property of any of the motels for any reason for a period of two years.

As he escorts the handcuffed men to the back of the van, the SPD officer tells them he has no choice in the matter, because a "zero tolerance" policy is in operation on Aurora. "I don't care if you go downtown, to Tacoma, or to Shoreline," he tells them. "You need to be anywhere but Aurora."

MARKING SPACE

In Seattle, incidents like this are increasingly common. The criminal trespass program in active operation on Aurora Avenue represents just one of a number of new techniques used to police urban space. Over the past two decades, municipal governments across the United States have adopted a range of novel social control techniques, including civil injunctions, loitering-with-intent laws, new applications of trespass law, off-limits orders, and more expansive Department of Corrections' surveillance practices.

These techniques are intended to address such phenomena as prostitution, drug use, public drinking, and transience; they are largely aimed at removing those deemed ''undesirable'' from particular locales where they are believed to cluster. Beyond this instrumental purpose, these techniques work to broaden state legal authority, to disperse state surveillance throughout the urban environment, and to expand the criminal justice system. In the process, they reduce, if not eliminate, the rights-bearing capacity of their targets. These social control mechanisms make it easier for police officers to question, search, and arrest individuals who spend time in public space. Further, those who are subjected to these techniques are very nearly powerless to contest them.

Whatever else they accomplish or represent, they stand as yet another example of the use of criminal law as a key mechanism of governance (Beckett, 1997; Simon, 2007). Those deemed ''disorderly'' find themselves ever more able to become entwined in the criminal process, and ever more susceptible to police pressure to relocate. To govern urban ''disorder'' through a crime-reduction strategy can often mean to ignore underlying social realities, such as the unavailability of affordable housing, and to thereby merely exacerbate the challenges facing the socially disadvantaged. In this process, it is too easy for governments to create what Inniss (2003) provocatively describes as ''hypercriminalized spaces.'' The logic of zoning is used to bound ever broader areas where one or another form of conduct is prohibited, and thereby to continually extend the reach of criminal law ever more intrusively (see also Suk, 2006).

We use this paper to describe and assess these robust mechanisms of urban social control. In doing so, we draw heavily on preliminary findings from data gathered in Seattle, which includes: analysis of archival materials, and of police and court records; ethnographic observations; and interviews with a range of actors – police, prosecutors, defense attorneys, neighborhood anti-crime activists, and those excluded from particular areas. We begin our assessment by first situating these techniques and their

development in historical perspective. We argue that they are a somewhat predictable extension of the logics of the hegemonic philosophy of "broken windows" and the "civility laws" that became popular in the 1990s. We then identify the key characteristics of the new techniques and describe their use, paying particular attention to how they operate to reduce the rights-bearing capacity of those who are subjected to them. We also outline some additional implications of these measures, including the very real possibility that they are ultimately self-defeating. As our interviews with banished individuals make clear, the new tools of social control work in practice to reduce people's ability to secure conditions of material or physical security.

The interviews also reveal the psychic and social impacts of spatial ostracism. Targeted individuals understandably express a sense of isolation from the body politic, a near complete marginalization. The mobilization of criminal law to address "disorder" is thus part of a larger rendering of certain individuals as outside the bounds of respectability, as unwanted miscreants in need of expulsion. The expansion of formal social control is thus a process in need of continued critical assessment.

SITUATING URBAN SOCIAL CONTROL

Efforts to police vagrants and other "undesirables" possess a long history (Chambliss, 1964; Dubber, 2005). People who are not spatially anchored and who appear to contribute little to the collective economy have long been stigmatized and their behavior criminalized. In the United States, this criminalization was historically accomplished through statutes prohibiting vagrancy, loitering and public drunkenness. Many such statutes were employed, in particular, by Southern cities as a means to police race relations and civil rights protest (Roberts, 1999; Yeamans, 1968). In other cities, too, these statutes were widely used to enforce social and spatial boundaries (Leonard, 1945).

Yet these statutes were subjected to disabling scrutiny during the 1960s and 1970s. Contested before the Supreme Court, many were rendered unconstitutional because of vagueness and the associated license they provided for indiscriminate policing (see, e.g., *Papachristou v. City of Jacksonville*, 1972; *Shuttlesworth v. City of Birmingham*, 1965).

Many subsequent methods of policing urban space can be understood, at least in part, as responses to this overturning of laws formerly used to exert control over undesirables. This is made explicit by one of the key architects of the new control regime, George Kelling. Here is how he, with his frequent

co-author Catherine Coles, characterize what they term a judicial "revolution": "In the judicial arena, the courts developed a ... body of legal precedent in which constitutional protections for the fundamental rights and liberties of individuals were expanded and elevated to a position of far greater significance than either the responsibilities of individuals, or community interests" (Kelling & Coles, 1996, p. 41). From this perspective, a "libertarian" revolution allowed "disorder" to grow because deviance was deemed an expressive act that deserved protection. New legal tools needed birthing.

Toward this end, many cities during 1980s and 1990s passed so-called "civility codes." These laws made it impermissible to engage in various behaviors commonly associated with the homeless and others who spend considerable time in public space. Some of these laws criminalized mere presence in space, by making it illegal to sit or lie on sidewalks or benches. Others criminalized such activities as public elimination and panhandling (on these codes, see Foscarinis, 1996; Mitchell, 2003). By targeting specific behaviors, they generally avoided the proscription against vagueness, and many of these laws passed constitutional scrutiny (see, e.g., *Roulette v. City of Seattle*, 1996, which upheld Seattle's ban on sitting or lying on sidewalks).

George Kelling not only helped municipalities to craft such codes, he and another co-author, James Q. Wilson, provided ideological justification for them with their "broken windows" theory (Wilson & Kelling, 1982; for elaboration, see Kelling & Coles, 1996). This wildly popular theory suggests that if "disorder" is tolerated in a particular place, more serious crime will soon occur there. That, they argued, is because fear of disorder diminishes residents' capacity to exercise informal social control. When this occurs, neighborhoods can expect an invasion from the criminally minded who lack fear of apprehension. For Wilson and Kelling, disorder most potently takes human forms. They possess greatest concern about "disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed" (Wilson & Kelling, 1982, p. 32). According to this theory, then, the policing of homeless and others in public space is necessary to reduce more serious crime.

The broken windows theory found its most robust incarnation in New York City, where it was used to legitimate a "zero tolerance" policy on violations of civility codes (see Bratton, 1998; Harcourt, 2001; Silverman, 1999). Because crime diminished during the zero tolerance period, New York's then-mayor, Rudy Guiliani, used the policy to great political effect. Even though recent studies question the causal relationships between broken windows policing and falling crime rates,[1] the political benefits of

asserting their existence were dramatic (Manning, 2001). This "success" helped legitimate the broken windows theory and its transformation of urban policing.

The civility codes were thus a response to judicial restrictions on the policing of vagrancy and loitering, and were legitimated by the popular broken windows theory. They worked to criminalize behaviors associated with urban "undesirables" and to legitimate aggressive policing against them. The new tools employed in Seattle and other "innovative" cities represent further extensions of these logics.

NEW TECHNIQUES OF URBAN POLICING: A CATALOG

New policing practices make it even easier to survey and arrest those who spend considerable time in urban public space, and to place pressure on them to relocate. The primary goal of these new techniques is, in the words of the American Prosecutors Research Institute, to "make the problem go away" (APRI, 2004, p. 1). We focus here on three of these new tools: innovations in criminal trespass law, parks exclusions, and court-imposed spatial exclusions, dubbed SOAPs (Stay Out of Areas of Prostitution) and SODAs (Stay Out of Drug Areas). They are notable for their increased use in Seattle, and for the significant power they grant the police. We describe each of these in turn.

Criminal Trespass

Private property owners possess the right to determine who can and cannot be on their property. Anyone who remains on private property after being requested to leave can be arrested for criminal trespass. The police historically made many such arrests, but usually only after an explicit request by a property owner. However, trespass laws are being interpreted, adapted, and implemented in ways that extend exclusions across both space and time.

For example, in order to facilitate the use of trespass law on sidewalks and other public property,[2] many municipalities now convey public streets and sidewalks to local property owners. This grants the new owners the right to enforce no-trespass orders (see Flanagan, 2003; Mitchell, 2006). This practice occurs in Richmond, VA; Knoxville, TN; Tampa, FL; El Paso, TX, and other US cities (Flanagan, 2003). In many cases, streets located

within a public housing facility are conveyed to public housing authorities to endow those agencies with the right to exclude certain individuals from those formerly public streets (Mitchell, 2006). The Supreme Court recently upheld this practice (in *Virginia v. Hicks*, 2002), affirming the right of local governments to enforce laws that reflect "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[3]

Moreover, the size of the physical spaces from which people are banned is increasing. Seattle's Aurora Motel Trespass Program is one example. The city has a similar program that covers 320 of the parking lots in downtown Seattle. Anyone excluded from one of the properties is simultaneously excluded from all of them.[4]

Notably, these agreements endow the police with the right to impose and enforce exclusions. In Seattle and other cities, authorities are increasingly issuing "trespass admonishments" to people who are perceived as "out-of-place" or disorderly. Those who receive trespass admonishments are banned from particular places for extended periods of time. In Seattle, police officers issuing these "civil" admonishments are not required to record the reason for the exclusion.[5] Every month, hundreds of people are admonished from public places, such as parks, the bus system, and libraries, as well as private and semi-private places that are normally open to the public, including commercial establishments, historic districts, and apartment complexes. A violation of these civil orders is a criminal offense.

Parks Exclusion Orders

"Undesirables" often spend time in public parks. The City of Seattle adopted its "parks exclusion" law in 1997 in order to "restore civility" to city parks.[6] Prior to the law's adoption, individuals could be removed from public parks only if there was probable cause that they had committed an offense that warranted arrest; minor violations of park rules (such as littering, being present after hours, or possessing an open container of alcohol) typically resulted in a citation. With the parks exclusion law, however, police are now authorized to remove persons for committing crimes or more minor infractions of park rules and to ban them from some or all city parks for up to one year. Although the legislation defines the exclusion order as administrative in nature, violation of such an order is a criminal offense.

Off-Limits Orders: SOAPs and SODAs

Another important application of trespass law is the imposition of spatial restrictions as a condition of probation, deferred prosecution, suspended sentence, and/or pre-trial release. These exclusion orders rest on the combined principles of trespass and zoning law (Flanagan, 2003), and are now in effect in municipalities in many states, including Washington, Oregon, California, Florida, Ohio, and Washington, DC (see Sanchez, 1997; Flanagan, 2003; Hill, 2005; Wood, 2004).[7] In these and other jurisdictions, both judges and DOC officers can order recipients to stay out of areas that are thought to be plagued by significant levels of disorder. These zones are pre-designated by courts, after a showing by police and prosecutors that a history of either prostitution or drug sales is well established.

In some respects, this practice is not entirely novel: judges long ago acquired discretion to impose conditions on people sentenced to probation or parole, including geographic constraints. However, the standardization and widespread imposition of spatial exclusions from pre-defined drug or prostitution "zones," combined with technological developments that speed the dissemination of information about these exclusions, marks a significant change from past practice. Rather than being used in a limited and individually tailored way, these "off-limits" orders represent "mechanized production-line justice that no longer embraces the goal of individual rehabilitation, and are instead geared toward a project of social engineering that is largely without check" (Hill, 2005, p. 175).

The zones from which people are excluded may comprise significant parts of the city. Nearly half of Seattle, for example, and virtually all of downtown, are defined as a "high drug area" from which someone might be banned. Those banned from Zones 1 and 2, for example, are barred from the downtown core, where many social and legal services are concentrated.[8] Many of these we interviewed were banned from the area that contained not only high levels of drug activity, but also their social network, shelter, and case worker, as well as other needed social services. Violation of an exclusion order is a criminal offense.[9]

NEW TECHNIQUES OF URBAN POLICING: AN ASSESSMENT

Given the growing popularity of these new techniques, they deserve critical assessment. They possess a number of implications that bear consideration.

For one, they work to expand the range of "crimes" to which police attention can be directed. In each case, a civil admonishment or order means that mere presence in space may trigger law enforcement investigation and possible arrest. As a result, these techniques work to broaden the definition of crime and expand significantly the ability of the police to exercise territorial control (see Herbert, 1997). In each case, a particular bounded place is identified – a commercial establishment or zone, a library, a city park, a prostitution or drug area. A particular individual is subsequently banned from one or more of those places. That individual is then subject to arrest if he or she violates the ban. The police are thus in a position to more easily "clean up" an area reputed to host ongoing activity considered a nuisance. They possess legal justification to investigate and arrest those they consider suspicious or unsightly. In this way, the police are able to use territorial boundaries as a means of both extending and legitimating their power (see also Blomley, 2004; Sack, 1986).

Officials hope that if they assert their territorial authority strongly enough, people will be persuaded to go elsewhere. Recall the police officer in the opening vignette, who demanded that the two men he arrested be "anywhere but Aurora." He cared little just where they went; they needed simply to leave his area. The sergeant who supervises this officer admitted in an interview that this is the central purpose of the criminal trespass program. It works, she said, to "make it uncomfortable" for people to spend time on Aurora because they will eventually "have no place to hang out." For this reason, she said, the police "can make them move." Similarly, an assistant city attorney admitted that the parks exclusion orders did not address any underlying issues, such as persistent drinking. However, he noted, the exclusion orders can get people to "do [their drinking] someplace else." Many of the excluded persons with whom we spoke shared this assessment, telling stories of being pushed from one part of the city and back again by officers who simply sought to move them out of their territory. As one of our respondents put it, "They're just passing the buck. Kicking us from one section to another."

The fact that mere presence in space can constitute a crime for the banished obviously lowers the threshold of probable cause that the police must meet to make an arrest. Far easier to arrest someone for mere presence in a SOAP zone than for solicitation. The latter involves acquiring evidence of an actual or promised transaction, and is a more difficult task. Thus, to make mere presence in space a crime is to erode legal protections against state action.

Such erosion is also accomplished through the blurring of private and public authority. This occurs most clearly with criminal trespass. The right

to exclude inheres in the private property owner's capacity to determine who can and cannot be present. The trespass agreement effectively transfers this authority to a public agency, the police. Once they possess the authority to exclude, the police can invoke and actualize the threat of arrest and punishment to attempt to deter individuals from inhabiting the space in question. Yet the police's territorial authority is legally couched as merely an extension of the private authority held by the property owner, and not so much as a pro-active strategy on the part of the state's coercive arm – which it very much is. In practice, property owners typically sign a trespass agreement only after being approached by the police. The police can thus use the criminal trespass program as means to appropriate private power while they simultaneously obscure their immense and pro-actively exercised public power.

Further, the trespass agreement provides a very low standard for the police to use in ascertaining whom to admonish; they need only to determine that a target lacks a "legitimate purpose" for being in the place in question. This, too, is a long way from establishing probable cause of the commission of a crime. Our analysis of a four-month sample of criminal trespass admonishments from 2005 indicates that the police did not provide *any written justification* for the exclusion in nearly two-thirds of the criminal trespass admonishments they issued. Clearly, the police feel little need to account for how they choose to exercise the authority granted them by the trespass agreements.

Another legal advantage of these techniques is that they enable police to appear not to be arresting individuals based upon their status, which is constitutionally impermissible (see Foscarinis, 1996). For example, much of the controversy around Seattle's parks exclusion law centers on whether it is used to remove the homeless from city parks. Even if the police are targeting that particular class of individuals – as some of them admit they are – the fact that infractions of parks rules can legally trigger an exclusion notice, combined with the existence of pre-defined parks exclusion zones, helps the police to avoid the appearance of doing so. Similarly, the existence of SODA zones enables officers to stop "known drug offenders" in those zones without seeming to single people out on the basis of prior convictions. The zones are clearly demarcated, and individuals are notified when they are not allowed inside those zones. Their subsequent presence inside a zone is easily made justification for an arrest. The police can thereby rationalize their actions as based upon the individual's behavior, not his/her status.

The police also rationalize the use of these techniques with the rhetorics of community support and of broken windows (see Kelling, 1987; Sykes, 1986).

In Seattle, many of these techniques are deployed by units who are officially associated with the police department's "community police teams." These are officers who are dedicated to working closely with neighborhood groups to solve ongoing problems (on these, see Herbert, 2006). The Seattle police officer in the opening vignette exemplifies this practice. His sergeant, who heads the community police team, defends programs like criminal trespass because, she says, "the community wants it." She and others also invoke the broken windows theory as justification for doing everything possible to get individuals to move off Aurora and other places with histories of criminality. Indeed, some citizen activists claim that Seattle officials have given them photocopies of excerpts from Malcolm Gladwell's book, *The Tipping Point*, which includes an analysis of New York's crime drop that celebrates broken windows policing (Gladwell, 2000).

Such rhetorics – of community support, of undesirables as broken windows – also help erode any sense that denizens of public space are robust rights bearers. Constitutional restrictions become more suspect in face of community pressure to crack down on crime (see the debate in Meares & Kahan, 1999); anyone considered "disorderly" is by definition beyond the pale of respectable citizens, and perhaps does not deserve the same level of protections against state authority (see Harcourt, 2001; Feldman, 2004).

But such declines in rights lie well beyond mere rhetoric. Those who are subjected to one or another of these zoning strategies possess extremely limited avenues for challenging their exclusion. Take criminal trespass. Recall that an arrest for trespass often follows an initial admonishment. Yet there are no legal avenues available to contest an admonishment. Indeed, as noted, the police are not even required to provide a written justification for the admonishment in the first place. The only means to seek redress is after an arrest. At that point, one can invoke various due process rights in legal proceedings to challenge the admonishment and arrest. However, for reasons long ago explicated by Feeley (1979), the typical defendant will rarely do so; the time, resources, and uncertainty associated with the exercise of due process rights dissuade most criminal defendants from doing so, particularly those in the lower courts. Further, according to public defenders who frequently handle such cases, whenever they file motions that seek to challenge criminal trespass more broadly, prosecutors typically respond by dropping the charges.

As a result of a modification of the original statute, those served with parks exclusions orders may *request* a hearing with the Parks Hearing Officer (in writing and within one week of the issuance of the exclusion order). Yet the forum for doing so is one supervised by the Parks

Department. Further, the indigent are not provided free legal counsel. Not surprisingly, challenges to these orders are exceedingly rare, according to the assistant city attorneys with whom we spoke.

SOAPs and SODAs are even less likely to be contested (Hill, 2005; Moser, 2001; see also Scharff, 2005). Although statutes that allowed these spatial exclusions to be imposed at the time of arrest by police officers were successfully challenged, the jurisdictions that continue to issue these orders authorize judges to do so as part of a pre-trail release or as a condition of sentencing. In Seattle, according to several assistant city attorneys, SOAP and SODA orders will invariably be requested, and granted, as part of sentencing proceedings for relevant defendants. They cannot be challenged once imposed.

In sum, a number of novel social control techniques broaden police power considerably: they entrench the police's ability to enforce boundaries, to meld private and public power, and to disguise the policing of status. Of course, the police believe they exercise this authority beneficently.

JUSTIFYING THE NEW TECHNIQUES

From one perspective, police and prosecutors in Seattle are merely recognizing and responding to some realities about crime's geography, that is, it tends to cluster in places (see Eck, 1998; Rengert, Ratcliffe, & Chakravorty, 2005). If one accepts this truism, then it can seem sensible to try to extract particular individuals from those places. This can even be construed as in the interests of the individual who is removed. Indeed, another important rationale for off-limits orders (i.e., SOAPs and SODAs) is therapeutic: keeping offenders away from "hot spots" will, it is argued, help to keep them out of trouble.[10] As a program manager for Seattle's drug court argues, excluding people convicted of a drug crime from parts of the city benefits not only the neighborhood, but the banished themselves: "Unless they live in that area, there's no reason for them to be hanging around in those areas where there's drug dealing," she said. "It's not so much Big Brother as it is an attempt to protect them."[11] Certainly, this is how DOC officers defend the Neighborhood Corrections Initiative described in the introduction. For these officers, it is necessary to monitor "DOC active" individuals out in the field. Past offenders, these officers argue, are often "their own worst enemy," unable to resist the temptations of the streets. The presence of NCI officers can thus be understood as a sensible deterrent and an aid to rehabilitation.

The deterrent effect is arguably enhanced by the ease of arrest and the certainty of conviction. The various exclusion zones are usually bounded clearly, and an individual's banishment statuses are easily verified through accessible databases. As soon as an officer observes an individual violating an exclusion order, things typically proceed smoothly forward toward arrest and conviction.[12] According to the SPD sergeant who supervises the community police team that works on Aurora Avenue, anyone caught trespassing is "going to jail." And according to an assistant city attorney, the subsequent prosecution is a "slam dunk." It is easy, of course, because the standard of the violation is so low. Flanagan's (2003, p. 341) discussion of SODA orders applies as well to other uses of trespass authority: "While the exclusion is predicated on a suspicion of sorts, derived from both the individual's membership in a class of persons previously arrested for, or convicted of, drug related crimes, as well as a recognition of the reality of recidivism, a probable cause belief that the excluded individual is committing a repeat offense at the time of apprehension is not required to secure an arrest for running afoul of trespass-zoning."

Trespassing and SODA/SOAP violations are not themselves especially serious matters; they rarely result in significant jail time. But note that providing the police cause to make an arrest for these violations allows them to search the arrestee. As one King County Superior Court judge explained, "What DOC uses that provision [the SODA order] for is to conduct a search of you because they know you are in the wrong place, that gives them suspicion that you're probably in the wrong place for the wrong reason."[13] As DOC-police communication and coordination improves, this benefit is increasingly enjoyed by police officers as well.

Here is how Kelling and Coles (1996, p. 146) legitimate this implication of broken windows policing, as applied to "turnstile jumpers" who sought to avoid paying subway tolls: "Just as every fare beater was not a felon, not every petty criminal is a serious criminal; yet enough are, or have information about others who are, that contact with petty offenders alerts all criminals to the vigilance of the police and gives police legitimate access to information about more serious problems." William Bratton (1998, p. 154) is more colorful in his description of how New York police responded to their increased license to search:

> For the cops, this was a bonanza. Every arrest was like opening a box of Cracker Jack. What kind of toy am I going to get? Got a gun? Got a knife? Got a warrant? Do we have a murderer here? Each cop wanted to be the one who came up with the big collar. It was exhilarating for the cops and demoralizing for the crooks.

If one accepts the centrality of the police's role as the pre-eminent body to thwart or otherwise respond to crime and "disorder," then one can easily endorse tools that provide them the power to exercise that capacity as muscularly as possible. As one police officer in Seattle noted about these tools, "We like anything that increases our authority."

EXPANDING POLICE AUTHORITY

And yet:

Later during the day on Aurora Avenue, the Neighborhood Corrections Initiative team is still searching for banned individuals. They are cruising Aurora's northern stretches, where six motels are clustered. They stop their car by one woman, whose somewhat time-worn appearance alerts their suspicions. They ask for her identification. Checks on their databases reveal a five-year-old conviction for drug possession. The SPD officer, lacking any cause for taking matters further, informs her that there are statutes against loitering for prostitution or drug trafficking. (These are statutes that criminalize behaviors that can be construed as soliciting to attract customers for drugs or sexual services.) Given this, he tells her, she should "think twice about hanging out on Aurora."

A block south, they stop in front of another woman, this one younger but dressed in a short skirt and a colorful blouse. She beats them to the punch: "I knew you were going to stop to talk with me." She references Aurora's reputation as her explanation. She assures them she is entirely innocent, merely waiting for a ride from her boyfriend. A check of her identification reveals nothing, so the officers do little but engage her in friendly banter.

The officers then are summoned in to help resolve a family crisis in the parking lot of a motel. It takes several minutes, but once the situation is calmed, the SPD officer wanders down the parking lot. He is particularly curious about a BMW convertible which is parked in front of one of the rooms. He clearly is suspicious about the presence of a gleaming expensive car on the grounds of a somewhat decrepit motel. After questioning another resident to determine the room in which the car's owner is presently lodged, the officer approaches the unit. He kicks the door loudly, and announces the presence of a police officer. When he gets no response, he repeats the loud kicking. A third set of kicks is required before the door opens. Inside, he finds what he was looking for – the car's driver in bed with a prostitute, recently used crack pipe on the bedside table. The officer berates the man in question, whose head hangs

in shame. He questions the woman, wondering aloud whether he should arrest her. He decides to flip a coin to determine his decision, the result of which redounds to the woman's favor. Whether this is merely a ruse is hard to say, but he does extract a promise that she will visit her probation officer soon. And, of course, he informs each of them that they are to desist from any further such activities on Aurora Avenue.

Some zones, according to Gerald Neuman (1996), are anomalous. By this he means they lie outside the ordinary rules of legal procedure; these are places like Guantanamo Bay. One of the dangers of these, he notes, is that the relaxation of one rule in the zone can quickly lead to the relaxation of others: "When an anomalous zone is defined so that mere presence in the zone results in suspension of the rule, its subversive potential is magnified. Meanwhile, within an anomalous zone, disrespect for one fundamental value may breed disrespect for others" (Neuman, 1996, p. 1216).

Given the license to patrol Aurora Avenue aggressively, and possessing tools that allows them to banish an ever-wider array of individuals, the NCI team appears quite relaxed in their observations of criminal procedure. The officers feel no hesitation to stop, question, and run checks on those whose appearance they consider suspicious. They further feel like a door that shields private property is no meaningful barrier to their desire to investigate hunches. They may not be able to literally kick the door down, but their actions are tantamount to doing so.

This is the nearly inevitable consequence of the extensive criminalization of space. The policing of zones of exclusion grants extensive discretionary authority to the police. This authority, by definition, is difficult to cabin. The capacity of citizens to resist being questioned, arrested, or searched by the police is eroded in the process. Such protections are those ostensibly guaranteed by the Fourth Amendment and are increasingly anemic (on the general erosion of the Fourth Amendment in the Rehnquist era, see Cloud, 1993; Maclin, 1993; Sklansky, 1998). Decided deference is granted to the police power (Dubber, 2005), such that police discretion to investigate and arrest is significantly wider than during the *Papachristou* era. This is especially true in cities like Seattle where new and "innovative" social control techniques enhance police authority.

As one Seattle public defender noted, the homeless and others who spend considerable time in public space do not generate significant sympathy from society as a whole, and are often cited as a source of fear and anxiety. This stigmatization provides the police significant elbow room to keep close tabs on those who spend much of their lives on the street. This is enabled, that public defender argued, by "inducting people into the criminal justice

system." Once in the system, many of them are banished from one place or another. These banishments provide the police license to question, search, and arrest many, if not most, of those who spend significant time in public.

As a consequence, those perceived as disorderly are increasingly deprived of the rights of citizenship. As Leonard Feldman (2004; see also Bickford, 2000) persuasively argues, the danger of broken windows rhetoric is largely that it erodes our collective sense that homeless and other marginalized individuals are, in fact, rights-bearing citizens. As unkempt undesirables, they stand outside the margins of respectable society. Their seeming inability to contribute to the collective good through productive employment leaves them stigmatized culturally and mostly powerless legally. In downtown Seattle, and many other places, they possess few, if any, shields against police intrusion. Today, many can barely move through public space without simultaneously traversing a zone from which they have been prohibited, and thereby to risk being interrogated and searched simply for being there. The freedom to go from some places to others without fear of suspicion or apprehension is denied; due process protections against state authority are anemic in their force and rare in their use.

UNINTENDED CONSEQUENCES

This denial of the rights of citizenship underscores and reinforces the social marginality of the excluded. Zoned out of place, they find themselves with few places to go. They understandably complain bitterly about their exclusion, alienated as they are by the overt signals that they are not wanted. Further, many of them see the enforcement of trespass to be an exercise in futility, or even as counterproductive. As they pushed further into the netherworld, they are decidedly less secure: less able to find lodging, safety, social services, and employment. Their path back to "respectability" is thus all the more arduous.

Those who are subjected to these forms of exclusion express extreme frustration with the sense of ostracism that they feel daily. Here is how some of our interviewees described their exclusion orders:

Sonya, a newly homeless African-American woman:

> I felt offended, I was offended, like I don't have any rights, like I don't matter or 'nothin, and I felt that it was a racial thing because the majority of the people were black people there. And I was really offended.

Mary, a homeless middle-aged White woman:

> I dunno how I feel about it anymore, I'm just like, well, I'm a little paranoid sometimes. I'm a little paranoid, you know, and if I see a police officer I try to not look at him, I try to seem like a normal person. I don't suppose I look like one. You know just like look up at the buildings, like I'm lookin' at the numbers, like I'm lookin' for something. I dunno. I'm just getting' tired of them always runnin' my name ...

Aaron, a homeless, African-American man living with AIDS:

> It just, it just a hurtin' thing, you know, when you're not violating the law – I wouldn't consider it, breaking the law, you know what I mean? Any other state – I've been in just a couple in Colorado and California, that's what the parks are for, you know. People sleep in the parks, you know. you're not drinking, you're not doing drugs, you're just sleeping... And pretty much now, I'm just, I gotta sleep there you know what I mean?
>
> Interviewer: Does it make you mad?
>
> Yeah it make me mad (laughs). Of course it make me mad you know? Where am I gonna sleep? Behind somebody's house so they could shoot me?

Not infrequently, our interviewees noted the hypocrisy involved in excluding people from parks and other public venues for drinking alcohol. Vic, a white Vietnam Vet, banned from Pike Place Market where he made his living playing music, made this point strongly:

> Vic: Since then I have not drank in the market, uh, it [being excluded] is just too tough on me. Now, I have not, I have not drank in the market while I play, but I can go to any bar in the market I can sit down with the sloshy drunk guys next to me, you know, guys off the ships and the guys are you know, sailors off the boats and hey, I (hiccup), I have (hiccup) no problem with that guy. You know, they don't exclude him as he stumbles down the market and knocks over the veggie stand, you know. No, he's cool, or the fat guy with the big wallet who just got off the cruise ship from Alaska and he's still drunk when he gets off the ship. Yeah, see those guys, that's alright as long as you have money and you're dressed fine. You know, in the finest fashions.
>
> Beckett: So you see it as it being about class?
>
> Vic: Oh yeah, it's definitely a class thing, there's no doubt about it. Most, most, of the, time, I work with Indians awful lot here at Chief Seattle Club and many of them are indigent. Many of them have alcohol problems so they hang out in the parks, which is the only place on the streets you can go. They sit there and have a drink, 'cause that's the cheapest high they can get, to endure their meager existences and of course here comes a police, we want to clear 'em out because we're having those big ships come in from Alaska. You don't want those drunk Indians sitting on that park bench – that's just terrible. It's alright for the drunk Alaskans to sat down there and puke, but it's not alright for the Indian guy.

In addition to creating much anger and resentment, it seems unlikely that the new techniques produce their intended results with any regularity. Only a small minority of those we interviewed reported consistently staying out of the area from which they had been excluded. Those who did so simply relocated to another area without changing the offending behavior (i.e. sleeping in parks, drinking alcohol, or using drugs). This is an obvious shortcoming of banishment as a social control strategy; those displaced from one locale will inevitably arrive someplace else (Moser, 2001; Snider, 1998). Any sense of collective responsibility for downtrodden citizens withers in the face of constructing and enforcing barriers against those found distasteful. When asked about what to do if the Aurora strategies were to work so well that prostitutes and drug users migrated to another commercial strip, the Seattle Police Department sergeant suggested that the same strategies need simply to be deployed there, also. A business owner on Aurora was more sanguine about trespass programs that she strongly supported: ''They don't really solve anything. That's the sad fact.''

Nor did most of those we interviewed report a therapeutic benefit from their exclusion. Although a minority did report that the exclusion motivated them to stay out of trouble, a clear majority found it quite unhelpful. Those who were kicked out of the parks, for example, simply reported finding other locations to sleep, often less familiar parks or places they often experienced as less secure. Sonya was excluded from the first park she found on her first night of homelessness. She was cited for sleeping there after hours:

> Beckett: You liked it there?
>
> Sonya: Yeah 'cause you know, everybody looks out for everybody. Lots of black folks sleep up there, and I felt more comfortable with that. I wasn't worried about anybody doin' anything to me. I don't feel safe now because I'm sleepin' in, you know, abnormal places you know. Like I said everybody looks out for everybody [at the park]. I wasn't worried about nothing. I am worried now. I am worried now.

Juan, a Latino man banned from all city parks for drinking, described walking all night after being told to leave the park and ''take his ass to Belltown'':

> There's no shelter there. I just walked all night long. My eyes hurt right now. I'm not gonna lie down and have some crackhead think that maybe I got three dollars... No, I'll walk all night. Sometimes I'll walk over to that park called Freeway Park and I'll sleep over there, but that's not very safe.

This sense of decreased security is profound for sex workers, already one of the most vulnerable groups. If pushed further from visibility, their

protection against predation becomes even more minimal (Hubbard & Sanders, 2003, Sanchez, 1997). To the extent that they and intravenous drug users engage in behaviors that can contribute to the spread of potentially fatal diseases, their social and spatial stigmatization makes such risky behavior more difficult to prevent (Hill, 2005; Weitzer, 2006).

Those excluded from parks also stressed the many negative effects of being kicked out of the parks, which host public bathrooms, meal programs, and other services. Here's Jermain, an African-American homeless man excluded from the parks:

> They come over to 1st and Yesler, spread out the food, set up racks of clothes and you get a number and when they call your number and you pick out a few things. And it takes me out for all of that. Which I need, all of that. You know, they give out the hygiene kits. So basically, you tellin' me, you can't live here, we don't want you here, but really I don't know any other place to go where they give you help like that, nowhere.

Of our interviewees who had received SODA or SOAP orders, only a few reported that the court's spatial exclusion was helping them. Most felt that their exclusion merely put them on edge and rendered their already difficult daily existence more precarious. Don, a homeless African-American man, excluded from all city parks, also has a SODA order that restricts his access to the area that includes his shelter and case manager:

> It's like, when I come out of the building, I got to duck my head and watch for them at all times. I got to sneak [puts his hood over his head, looks furtively over his shoulder]. Now, now, on this first arrest, for the SODA violation, DESC announced over the intercom, "they're feedin' in the park for anyone who wants to go over." Ok, first thing is, I'm trespassed from the park, so I got to go sneak in front of you [pointing at his friend], and I got to bribe somebody to let me up front so I could grab somethin' and get back out of the way. Then, I've got to be able to make back across 3rd Street, and get back up into DESC [a shelter]. I didn't make it.

Responses to this feeling of constant surveillance varied, but many of our interviewees oscillated between caution and an unwillingness to give up too much. Here is how Don described it:

> Beckett: So what do you do?
>
> Ronald: I sneak.
>
> Beckett: How do you sneak?
>
> Ronald: I try to turn my head away [holding his hood over his head], try to see who's in the cop car, to see him before he sees me, see if he knows you, if he knows me I gotta make a move, maybe for a doorway or somethin'. But you know, there's so many cameras down there you know damn well they got you on some of these cameras all the

time. But you still, all right, I'm goin to the Lazarus Center, but I know damn well I'm gonna stop and kick it with so and so who does drugs, and me and this girl, we're gonna laugh and giggle and have some fun along the way, and-

Beckett: You can't do that anymore?

Ronald: They're sayin' I can't do that anymore, but I'm gonna do it. I got to do it! I'm not gonna say, uh, 'I can't talk to you, I got to get the to Lazarus center, I'm on a SODA.' Noooo. [pauses, adopts a street voice] 'Wassup, girl? Watch you doin'?' [laughter] That's it. You know, I'm goin' on with my life. I don't have a home, at least let me have some fun!

Many of those we interviewed described frequent, if short-term, jail stays as a result of their arrests for being in parks or other parts of the city, raising the obvious possibility that the new policies contribute significantly to the over-crowding of the lower courts and jails. Many reported that the violation of an exclusion order led to jailing, fines, and ongoing surveillance. Whatever public safety benefits accrue to such practices, they work to make it harder for those targeted to turn their lives in a different direction. Some also described the loss of their ability to secure work, often their last connection to conventional society. Take Ramiro, a Latino man from Texas and self-described alcoholic. Ramiro arrived in Seattle several years ago and, despite his addiction to alcohol, was able to support himself through day jobs facilitated by a local agency, Casa Latina. Unfortunately for Ramiro, some of the men who stand outside Casa Latina sell drugs:

The guys [who sell crack] stand in front of Case Latina in order to blend in. I'm standin' here because I'm lookin' for a job! And every once in awhile the police will do a raid. I don't know where they got the cameras or how they're watching, but they're watching. They pull up in their cars, and then the bicycle cops come down the hill, and they come in, and they line everybody up along the fence. Okay, i.d. I didn't have i.d., blah blah, ok you don't have any warrants, but what are you doing down here, are you selling dope? And I said no, I'm only looking for work. How come you're always talking to these guys? These guys are known crack dealers. I said, hey, man, you know, I'm socializing. I didn't have a crack pipe on me. I don't use crack. So they don't arrest me . . . But they tell me now you can't come to Casa Latina anymore because you have a tendency to be out here socializing with the crack dealers and we think you're selling crack. But I never had any crack on me, no pipe, nothing. So now I can't go over there to Casa Latina.

At the time of our interview, Ramiro was supporting himself by selling single beers to homeless people who could not afford to buy more than one, and by occasionally hooking up the professionals who come to party in Pioneer Square with drug dealers. He did not like his new line of work:

Ramiro: I don't feel good when I hustle. It gives me a bad feeling. Because I prefer to work for my money. When I'm out there hustling people, it degrades me, okay. And, let

> me show you something [pulls up sleeves and shows many scars on wrists]. I do this kind of shit to punish myself. Ok, see right there? I took a piece of glass and I stabbed myself…
>
> Beckett: To punish yourself?
>
> Ramiro: To punish myself for the things that I do.

CONCLUSION

It is hard to see significant long-term collective benefits from the aggressive pursuit of territorial strategies to manage marginalized urban populations. Shunted from the body politic, pushed from one location to another, deprived of many of the rights of citizenship, prodded and searched by intrusive and coercive state actors, perpetually threatened with detention, their marginal status is constantly underlined and reinforced. Once on the margins, they find it nearly impossible to do anything but stay there. This is the gravest danger of zones of criminality: the work they perform in physical space reinforces the work they perform in cultural and legal space. Communities able to exercise effective territorial control shunt them aside, implicitly competing with other communities to absolve themselves of responsibility.

What is occurring in Seattle is an unsurprising extension of the continuing criminalization of much social behavior; it is what can happen when "disorder" is rendered a problem to be addressed by the criminal justice system. The creation of zones of exclusion is a sensible means to acquire sufficient control of those considered undesirable. Yet once embraced, the zoning logic easily intensifies, and ever more space is defined in exclusionary terms. In the process, police power becomes ever more robust. Yet these territorialized processes flow from a questionable prior decision to treat various social phenomena – such as homelessness, prostitution, mental illness, and drug abuse – as criminal matters. As one Seattle city attorney noted, "The criminal justice system is a lousy place to solve a social problem."

To the extent that this is true, the increasing spatialization of crime is a trend in the wrong direction. It only intensifies the weight the formal control apparatus places upon those considered disorderly, and fails to address the underlying conditions that bedevil them. Granted, the creation of zones of exclusion provide the police and other public officials the ability to appear to be doing something in response to public concerns about crime. But the limited long-term utility of these territorial techniques only reinforces the need to see beyond the too-easy tendency to criminalize behavior and

to criminalize space. These techniques only increase the physical, cultural, and political distances between the respectable and the less-so, and thereby only exacerbate various forms and manifestations of inequality. For these reasons, these techniques deserve ongoing and critical scrutiny.

NOTES

1. That zero tolerance *caused* the decline in crime is an argument largely disputed by academics: on the New York case, see Bowling (1999), Greene (1999), Karmen, 2000; on the general relationship between policing disorder and the reduction of crime, see Harcourt (2001), Sampson and Raudenbush (1999), Taylor (2000). For a general critique of broken windows, see Herbert and Brown (2006).

2. In order to be trespassed from a public space, a person must be forewarned – either by posted regulations or in the form of a trespass warning or admonishment – prior to arrest. In Seattle, for example, a person may be arrested for trespass in a public park at 11:01 p.m. if posted rules state that the park closes at 11 p.m. The police may also issue an ‘‘admonishment’’ to stay out of a particular public space or type of space (e.g., all metro stops and busses) for violating a rule in one such location. Because there is little regulation of the circumstances under which these admonishments are given, critics worry that their use and enforcement may be arbitrary or discriminatory (see National Coalition for the Homeless, 2006, p. 82).

3. In this case, the defendant was arrested for trespassing when delivering diapers to his daughter; he did not receive formal notification of his barment until after his second such arrest (see Mitchell, 2006).

4. Although most of those admonished in our 2005 sample were not banned from the areas covered in these agreements, there is reason to suspect that such arrangements are increasingly popular with city officials, and that the spatial consequences of an admonishment will therefore be enhanced over time.

5. Other authorities, including metro transit police, public housing authorities, and public library staff, also have the right to exclude alleged rule-breakers.

6. Seattle Ordinance 111727 authorized administrative suspension of park use by individuals who violate laws and rules in the parks. For a partial list of other cities that employ similar measures, see http://www.mrsc.org/Subjects/Parks/adminpg.aspx#Enforce

7. The particulars of these orders vary across jurisdictions. In Portland, Oregon, and Cincinnati, these exclusion orders were initially authorized by city legislation and were imposed by the police at the time of arrest (Sanchez, 1997; *Johnson v. City of Cincinnati*, 310 F.3d 484, 2002 WL 31119105 (6th Cir. 2002)). In Portland and Cincinnati, these statutes were successfully challenged, in part, on the grounds that the barment did not require conviction, but merely arrest (see Busse, 2002; Coalition for the Homeless, 2006). Challenges to these ordinances led to their modification, such that the spatial restrictions are now imposed after arrest as a condition of release or sentence by judges or probation officers, as is the case in Seattle and other cities (Moser, 2001).

8. The legal bases for judicial exemptions vary across jurisdiction. In some jurisdictions, exceptions may be granted if people live, work, or have other ''legitimate'' reasons to be in the proscribed areas. Under Washington State law, the court has the discretion to allow the respondent to enter the area from which s/he has been excluded only for health or employment reasons.

9. Under Washington State law, a first-time violation that does not occur within one thousand feet of a school is a gross misdemeanor; all other violations are class C felonies.

10. See Murakawa (2006).

11. Quoted in Ho, Vanessa. "Seattle will again try zoning out drug deals." Seattle P-I.

12. According to our interviewees, police officers vary a great deal in their interest in making such arrests.

13. *State v. Lewis* 105 Wash. App 1057 (1999), unpublished opinion, quoted in Okomski, Andrea, n.d. "Drug Exclusion Zones – The Case against Washington's Law." This observation has been amply corroborated by our observations and interviews.

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ASPECTS OF NON-DEMOCRATIC POLICING: THE RISE OF THE NAZI POLICING SYSTEM

Peter K. Manning

INTRODUCTION

The study of policing in Anglo-American societies has been severely restricted in the last 20 years to quasi-historical overviews, studies of policing in times of stable, non-crisis periods in democratic societies that in turn had survived the crisis as democracies. Perhaps the epitome of this is the sterile textbook treatment of policing in Canada and the United States – a sterile rubble of functions, duties, training surrounded by clichés about community policing. Scholarly writing on democratic policing and its features is severely limited by lack of inclusiveness of the range of contingencies police face, and many respects this work is non-historical and non-comparative. In the present world of conflict and strife that spreads beyond borders and challenges forces of order at every level, the role of police in democratic societies requires more systematic examination. In my view, this cannot be achieved via a description of trends, a scrutiny of definitions and concepts, or citation of the research literature. Unfortunately, this literature makes a key assumption concerning police powers in democratic societies: that the police are restricted by tradition, tacit conventions, and doctrinal limits rooted in the law or countervailing forces

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within the society. While these constraints are sometimes summarized as a function of "the rule of law," this assumption is much deeper and more pervasive than belief in the rule of law. It is possible to have a non-democratic police system that conforms to the rule of law and reflects the political sentiments of the governed. It is also possible to have non-democratic policing emerge from a quasi-democratic system as I show in reference to the transformation of the police in the Weimar Republic to the police system of the Third Reich. The complex relationship between policing and a democratic polity remains to be explored.

In order to examine democratic policing and its vicissitudes, it is necessary to see how it succumbs as well as how it comes into being (Bayley, 1975). While democratic policing has been the subject of important recent work (Bayley, 2005; Sklansky, 2004), it has not been contrasted with an ideal-type non-democratic policing. Stating the characteristics of democratic policing should alert us to alternatives and to the social forces that shape policing in a non-democratic direction. This chapter is an effort to characterize a contrast conception, non-democratic policing. My primary concern is to use the palimpsest of the NAZI police system as a set of interrelated coordinated elements with a functional purpose, to reflect on the current trends in American policing and the vague notions that are used to shape and rationalize it publicly. My example, the NAZI[1] police under Hitler and Himmler from 1933 to 1936, is critical because it identifies the features that were transformed to produce a new form of policing, not yet envisioned in a democratic state (Chapman, 1970).[2] The structure created was radical and visionary: a combination of the NAZI ideology of racial purity and superiority, chauvinism, anti-Semitism, and imperialism (Merkl, 1987, pp. 91–92). It reverberated with unrestrained powers, but was rooted in centralization of bureaucratic authority. The state as a bureaucratic apparatus and the party as a network of loyalists in and out of government were intertwined. Nazi ideology produced a social object – the Jews as a threat – but it also was a facet of the powerful, effective organizational weapon.[3] The centralized policing system was a bureaucratic creation that was formed in the context of a coup d'etat.[4] While some of the strategies and tactics used by the inner cadre are revealed in any study of bureaucratic in-fighting and policy formation, the rapidity of the success and its murderous consequences are worthy of closer attention.

This chapter describes the transformation of the German police pre-1933 to the NAZI police system. From 1918 to 1933, the German police in their several forms were legally guided, state-based, and authorized by a legitimate elected government whose executives were accountable to an

electorate (Westermann, 2005, pp. 23–25). Merkl (1987, p. xiv), in a somewhat ironic point, states that the NAZIs "won power legally that is, without a violent revolution."[5] The transformation of the Weimar police in less than 14 years, even given their frequent reorganization and the rising power of the paramilitary police (Diehl, 1977), to a police that were a part of a reactionary police state reveals the fragility of such forms of democratic social control.

The initial question addressed in this chapter is: what is democratic policing? Following this, I ask: it is possible to contrast this formulation with an example of non-democratic policing, policing in Nazi Germany from February 1933 when Hitler was named pro-Chancellor of the German Republic to late 1935 with some reference to events prior to September 1939 – the beginning of World War II? Using criteria that characterize democratic police, I contrast these to the police of the Third Reich and find them wanting. The final section of the chapter notes some non-democratic trends in the United States.

This chapter is limited in significant and important ways. It is not intended as a social history of Germany in this period, and certainly is neither a full description of the causes of the rise of the Nazi Party and the careers of its powerful charismatic leaders, Hitler, Himmler, Goering, Heydrich, Hess, and Goebbels, nor a full description of the group threat ideas that seem to lie behind the mobilization of the NAZI and German citizens in complicity against their dramatized opponents. My sources are secondary but the bibliographies of the key books noted below contain the relevant primary sources in the original language. My aim is to describe the changes within a sociological framework in which a democratic and loosely coordinated set of policing organizations was transformed into a quite centralized system that, while legalistically grounded and rationalized, failed to meet the criteria of democratic policing.

ROUTINE AND EMERGENCY IN POLICE STUDIES

The ways in which the public police are assembled to combat threats to public order and security, i.e., those not covered immediately and obviously by legal doctrines and laws, vary. Symbolic violence, that is officially legitimate violence directed toward socially defined enemies of a vague and categorical sort, has various targets, is unpredictable and multifaceted, and patterns and accompanies what might be called the management of threats. The threats to security in modern democracies are now cast in the language

of the law and law enforcement, even as the on-going work of policing is less precise. Patterns of centralization and decentralization of the police are critical in understanding the nature of the mobilization of police power and authority (Bayley, 1975), but policing the symbolic rather than the real creates anomalies for democratic policing which focuses on law breaking. Police power is a flexible matter, and while the public police compete with private agencies and voluntary ordering associations, the core of the public police role is sustaining – not creating – order in the name of the state. This assumes police loyalty to the organization and to the state, and a kind of flexible, politically sensitive neutrality toward the causes and consequences of such disruption. Crises, such as natural disasters like the hurricane Katrina created floods and the bursting of the levees in New Orleans, plagues and epidemics, and internal uprisings, make salient assumptions about police loyalty and functioning. These are tests implicitly of loyalty to the state or city, as well as countervailing political power centers that appear. The principle problem of organizing policing is maintaining loyalty of the officers on the one hand, and compliance of the public on the other. Both of these problems are exacerbated in times of political crisis.

Clearly routine domestic policing differs from that arising in periods of acute internal division and national crisis, e.g., a civil war (Hadden, 2001; Reichel, 1988), policing in the time of enormous on-going external war echoed internally, e.g., Shanghai after the Japanese conquest of large parts of China in 1936 (Wakeman, 1996, 1995), or rapid nationalist expansion (the Texas republic in conflict with Spain and then Mexico – Webb, 1936). Little research has been carried out on the domestic role of the police in societal crises. Consider additional complex conflict situations as the policing of Vichy France and France after 1942 by German and French police (Vinen, 2006; Ousby, 1997); the vicious policing of the Germans after the conquest of Poland and southern Russia (Westermann, 2005); the British policing of Malaysia, Palestine, and India prior to independence in 1948; and the actions of the French police and army during the Algerian revolt (Horne, 2006). The perhaps best studied pattern of policing in this regard is the British policing of Northern Ireland, i.e., the combined policing of MI-5, the British Army, and the Royal Ulster Constabulary (RUC) that was focused largely on Catholic revolutionaries labeled "the IRA" (in spite of enormous internal diversity in the Catholic groups opposing British rule), and with considerably less regard to the counter revolutionary efforts of protestant paramilitary groups. These comparative points do however suggest some fundaments of policing found in any organized policing system.

For these fundaments, we turn to Egon Bittner, a man who himself was interned in a German concentration camp with his family. As Bittner (1971, pp. 34–35ff) has written concerning policing in general, the courts and legislature are hesitant to directly control the limits of policing as they are an "as and when force" who apply violence when they judge it is needed and whose actual mobilization cannot be fully anticipated nor limited. The interventions of police are often preternatural. In addition to the mobilized role of the public police there are private police, various forms of semi-official and official auxiliaries, paramilitary organizations, and reserve police that rise in importance in periods of transition. The balance between the legitimate violence wielded by the public police, that which they permit or overlook, and that which they foster or touch off is variable as well. As we shall see in the Weimar Republic, it is clear that assassinations, street beatings, and the like by paramilitary groups were often tolerated by the public police or at least they were unable to manage them (Liang, 1970, p. 109; Diehl, 1977; Evans, 2005, pp. 273–279). The political sympathies of the Weimar police did not lie with the social democrats (SD) and they did not effectively intervene in efforts by the SA to brutalize the SD-based demonstrations; on the other hand, the police were divided in their sympathies in regard to the miners' strike in the early 'eighties in the North of England, but acted effectively to prevent strike breakers from being injured.

The role of the police in the case of "national security" and threat, hinges on the collective perception of the threat, in part produced by symbolic representations, cartoons, films, rhetoric, demonstrations, and even attempted secretly plotted attempts to overthrow a government (the attempted "Kapp Putsch" in 1920 and Hitler's "Beer Hall Putsch" in Munich in 1923) create, construct, and sustain the imagery of collective danger. Political rituals of violence, such as assassinations, public executions, and rampages of violence such as the Nazi counter attack on the SA, the "Night of the long knives," in June 1934, and the attack on Jews and Jewish shops in November of 1938, the "Night of broken glass" punctuate and dramatize the presence of danger. These events, of which the years of 1923–1939 saw many, were highly ritualized violence directed at political enemies, designed to symbolize threat and retaliation, shaming and degradation, and demoralization of enemies (Tilly, 2003, pp. 14–15). These efforts were pointed and well-thought-out efforts at status degradation of entire groups: Jews, political opponents of the NAZI party, both reducing the status of the designated threatening groups and elevating the importance of those claiming to sustain the homeland. The police in these protean movements were more by-standers than protagonists

except in a few instances, but with the rise of Hitler and the guidance of Himmler they became instrumentalities of official terror and violence. The ideology of the NAZI party was infused by training and recruitment and party members embedded in the various extant policing units. A new centralized police system with an important and powerful security police emerged quickly after their ascension to power.

The characteristics of the police in the Weimar Republic are important as they provide a background against which the new NAZI system emerged. The first reforms in Berlin were intended to make a less politicized and more service force a kind of community policing employing foot patrols, dogs, and horses as well as motorized patrol. The police force was doubled to about 20,000 (Liang, 1992, p. 242). The on-going reform of the Berlin police, especially the investigative units, was a sensitive issue because the social democrats had felt the sting of surveillance and observation as a result of their political views and they wanted a more scientific and systematic investigative bureau (Liang, 1970, Ch. IV). The state police in the 17 states remained as did the other divisions and units (village police, large city police, gendarmes, and a small security police in Berlin). The Weimar republicans wanted a responsive police and did not wish to centralize control of the police as a means to gain power. According to Liang, 1918–1919, was a period of reform and success of policing, especially in Berlin (p. 243). This was followed by a period he calls the "battle for Berlin" in 1932–1937. At this point the democratic principles of policing devised earlier by the Weimar police officials were applied and produced massive failure in controlling the City (243–244ff). He writes they failed because of "a pedantic commitment to legality" (p. 246). Germany lacked security abroad, had no balance between competing groups, and did not develop a national network of communication and cooperation. In short, the NAZI use of political violence, co-optation of the courts and civil service, and their very advanced modes of recruitment of regional police authorities to the party provided an opportunity for reform that the social democrats did carry out. The SD policing was weak, especially in Berlin where the NDSP was strong, violent, and effective, it was not a system, was committed to procedural justice unlike the NAZI system, and the police did not resist or rebel when the NAZI took over Prussia and in time the nation. These are the weaknesses that the NAZIs exploited and played upon.

Germany became a totalitarian *police state* in the sense that it was intensely policed; that the police powers were extreme, open-ended, and applied routinely; that policing was quite unified and directed by the NAZI party headed by Adolf Hitler; that modes of informal control were reduced

as formal powers increased; and finally, that the criminal justice system was itself highly politicized and offered no remedies, criminal or civil, for police excesses (Neumann, 1966, pp. 540–547). The functioning of the NAZI police system, which included high and low policing, policing dealing with national security as well as crimes of the conventional or named sort, police auxiliaries used to further party ends, concentration camps as well as jails, arrests as well as preventive detention without arrest or warrant, and a unified system of police/army and political units, dramatically demonstrates non-democratic features of policing.

THEORIZING POLICING: DRAMATURGY

The study of policing requires a theoretical stance, for mere description leaves nothing but the facts assembled as described. The essence of the drive to power and sustaining it until the late 'thirties was massive and dramatic symbolism that conflated the state, charismatic leadership, a selective rejection of the past and a reincarnation of the primitive Teutonic pre-Christian icons and heroes. In many ways it was a reactionary movement heavy with a traditional Germanic and anti-Christian symbolism and ritual, and harkened to the past to imagine the future (Hohne, 1971, pp. 163–181); it was in any case an evocative, mystified dramatic social movement. It was also a marginal and minority party when Hitler seized power and the rapidity of capturing key administrative posts via party memberships and assassination was intended to show ruthless and relentless ordering. Uniforms and military symbolizing suffused the society and its government; honorific titles in the party drew ambivalent elites into the network of governance. For these reasons as well as because the idea that a centralized police system, an amalgam of the party's forces and the legal public police, was "sold" to civil servants, state-based politicians, suggests the utility of a dramaturgical view. The transformation of the police in this time period requires a dramaturgical perspective as well as a grasp of organizational tactics.[6]

A dramaturgical perspective addresses how and why the police are granted the mandate they hold (Manning, 1997). This matter is particularly complex when legitimate order is challenged, and when the challenges come from forces of the political right (Liang, 1970, pp. 109–113; Kertzer, 1998, pp. 163–167). This is true because in general the occupation is a conservative one in both senses: the police mandate requires sustaining the status quo whatever that might be, and because the focus on order and ordering

attracts those most concerned with enforcing current moral and political premises. Ritual, repeated somewhat standardized and redundant, repetitive sequences involving powerful symbols, are both unifying and dividing. Any revolutionary movement, especially a reactionary one, must pit itself both *against* the police (a representatives of the status quo) and *with* the police (as fellow reactionaries and similarly disadvantaged and marginalized) while challenging and attempting to reform the status quo. Hitler, the center protagonists in this chapter, was acutely aware of this ambivalence and used the SA "Storm troopers," the active violent wing of the NAZI party, as police auxiliaries and sought their support until 1934 and after (Browder, 2004, p. 140). As Browder (2004, p. 140) observes, Hitler was a master of rhetoric supportive of a sentimentalized view of order and control and brilliant street tactician of chaos and the timing of it. As Koonz (2003, p. 10) writes, Hitler utilized encoded presentations that promised a new ethical and moral order whose long-term aim was racial genocide. This rhetoric upheld, as she writes (p. 8) "... the right of a government to annul the legal protections of assimilated citizens on the basis of what the government defined as their ethnicity."[7] As I show later, this principle was applied to any opposition to the imputed order the Third Reich. How is the symbolic presentation of policing and their visible practices fitted and retro-fitted to public expectations, imagery, and the extant collective consciousness?

A perspective on policing sensitive to change and transformation must include more than description of the operation of designated public police agencies if it is to explain the distribution of formal ordering and sanctioning in society. Policing, as a formal domestic organized and usually uniformed mode of control, is a system of units composed of voluntary associations, semi-formal and ad hoc groups, private uniformed police, and public police (Klockars, 1979). Patterns of policing are complex, have historical roots, and are concealed by ideological canopies or beliefs about police functions and the police image. In many respects, democracy depends on the belief of the citizens that the police are a neutral force restricted, restrained, and accountable, and on their compliance. The allusion of control and the facade of order and control are always at risk when events surface that challenge the ideological canopy, or when divisions between classes or ethnic-cultural groups surface in violence. Conversely, the subjective orientation of publics to the credibility of police performances, collective, team or individual, remains problematic. These ambiguities of belief and perception suggest that police must systematically undertake dramaturgical work to sustain precisely this nuanced edge between violence, control, and order. In the broadest sense, the public police mandate is

problematic because it must manage the edges of the public and the private in social relations. Much of police work, selectively maintaining such a working construction of the mandate, is backstage and invisible to the public. Like all institutions, policing is a mode of managing societal risks, of maintaining the appearance of control over the insoluble. The police deal with failure – failure in socialization, in institutional socialization, in other formal controls, yet they claim to be in control and managing crime and disorder. For policing, that which requires management is something resembling disorder and that is the risk that must be managed and seen to be managed. This contradiction, perhaps a paradox, that an insoluble must be managed, means at least that all institutions of necessity must create mini-ideologies to rhetorically obscure the deep and constant gap between expectations and performance.[8]

As we shall see below, the police are both an instrumentality of the state and are seen in modern societies as a direct representation of collective well-being or security. The two are deeply intertwined in that every act to achieve an end also has connotation and associations that ramify beyond the immediate situation. The instrumental aspect is seen when they enforce the laws, provide services of different sorts to different classes (the lower strata as both victims and perpetrators, the middle and upper strata victims primarily), and manage disorder by persuasion, violence, and personalized authority. When they refuse to come when called, act rudely, atop and question innocent people routinely, and sweep through areas arresting those on the street, they symbolize differential treatment and it erodes their trustworthiness (Weitzer & Tuch, 2006). They are also the repository of sentiments, assessors of trust and symbols of the security of the state. As "instruments" of the state their role is indirect and they are seen as neutral, not as agents of the state advancing a special political ideology or current political philosophy. This is an essential ideology in a democratic society. They are viewed as neutral on behalf of the state in the resolution of conflicts. The alleged neutrality of the state is true in the sense that when the law changes, the police will enforce it,[9] whether their interests as individuals or as an organization are damaged or affected. Police claim in their rhetoric to be politically neutral and serve the people. The potential for policing to be known as political remains and is usually revealed in a breach such as their excessive violence in controlling riots. When, however, police action is invisible, preemptory, and its actions are with neither appeal nor remedy, and they cannot be predicted by the people affected, policing becomes a destructive force. The historic commitment of democratic policing since Peel to responding to citizen demand rather than mounting their own

police-planned interventions is a source of restraint. Their restraint is partially tacit, based on the need to sustain compliance from citizens and to be seen as being benign and forgiving, partially an historic preference for random patrol and response to 911 calls, and partially a result of legal-procedural constraints arising from court and prosecutors' supervision. The notion that policing is a social service of a kind connected to the state, and not simply devoted to punishing criminals or the more euphemistic term, engaging in ''law enforcement,'' is a recent formulation, one arising in the early nineteenth century (Liang, 1992, p. 18). On the other hand, their role as a redistributing life chances and opportunities, either building up field stops, arrests, and violations of parole, driving licenses that cumulate producing negative career trajectories, or avoiding applying them to others, is rarely discussed in the literature of criminal justice and criminology (for an exception, see Cicourel, 1967). The police are a distributive agency because they alter the life chances of young men in particular because once convicted of a felony, few jobs are open to them and criminal record even for many misdemeanors can reduce chances for employment. Investigations of parole violations are urged (Kennedy, 1998) and these in turn lead to jail-time and lowered job opportunities. Citizen and entitlements are affected – felons in many states are denied the vote and upon release to hold selected jobs and buy guns. Background checks have become even more stringent since 911 and are used even for routine low skill jobs. They are also a mode of redistribution as they play a role in recovering lost property, making insurance claims, providing differential protection to some segments of the community more than others, and overlooking potential violations. These add quality to some life styles and increase life chances. As Black (1976, 1981) has so brilliantly and consistently shown, law ''works'' down and its application increases vertical stratification.

A theme in political science, emphasizing the role of the police as one aspect of a communal system of services, salaries, and jobs, a very strong and well-illustrated point in the literature of the late 'sixties and early 'seventies (see Banfield & Wilson, 1966; Banfield, 1965), is only weakly echoed now. Of current scholars, only Skogan (2006) has accepted the centrality of the police as a part of an urban governance system including contracts, favors, resources, appointments, and political clout through policing. The implications of the work of political scientists such as Putnam (2000) is that policing at least does not reduce collective efficacy. The extent to which policing can contribute to collective efficacy, rather than reducing social disorganization is still being debated.[10] In this way, the ideal

role of the police can be seen as avoiding increasing inequalities, either by "equal enforcement of the law" across classes, ages, and sexes (impossible given the way the law as written differentially attends to life styles, age, and sex differences), recognizing the differential impact of harsh enforcement of the law, and/or accommodating differences in areas of the city. As I show later in the paper, policy-driven, categorically based enforcement is perhaps most likely to increase inequalities.[11]

Clearly, the nation state's interests in survival and the sense of well-being of the citizenry do not always coincide as the rise of police-based totalitarian states such as Hitler's Germany, Stalin's Russia, and Mao's China demonstrate. Modern policing has acquired a reputation as a promoter of security, not simply as a violent, coercive force. The extent to which this is possible, let alone whether it has taken place, is moot. The modern police in democracies claim this as an aspect of their mandate and stimulate public expectation of this via media liaison (Mawby, 2002). On the other hand, developments in the last 25 years and the last 6 in particular suggest that the state as imagined by neo-conservatives, the elected or selected heads of government in North America, has displayed a decreasing obligation to serve as an equalizing mechanism, and to act as a less than benign force in regard to the well-being of the marginal and powerless (Garland, 2000). Control ideologies such as the "Broken windows" idea promoted by Kelling and Wilson, have the potential to collapse and conflate violations of civil law, regulatory standards and crime; control of nuisance with violations of civility, even as they urge a concern for order rather than narrow "law enforcement." The point is that the role of police in sustaining or reducing liberties, life chances, and quality of life (see Clear et al., 2003) is rarely discussed while the focus on their crime fighting role is always feted, even when they fail (see Manning, 2001).

DEMOCRATIC POLICING

The fundamental idea of a neutral, preventive, reactive, and service-based police was crafted by Robert Peel, building on the ideas of Chadwick, Bentham, and more recently Patrick Colquhoun. The degree of centralization within a democratic system varies as do its image, distribution by ranks and its geographical allocation but it is defined more accurately by its practices (Bayley, 1975). Here is a definition of Anglo-American policing based largely on practices which can be broadly applied to characterize

"democratic policing" (Manning, 2003, pp. 41–42) and to contrast it with non-democratic practices.

> The police [as an organization in Anglo-American societies], constituted of many diverse agencies, are authoritatively coordinated legitimate organizations with ideological grounding that stand ready to apply force up to and including fatal force in specified political territories to sustain politically defined order and ordering via tracking, surveillance and arrest. As such, they require compliance to command from lower personnel, and the ability to proceed by exception.

Consider this formulation in a broader context. The role of ideology, which is the hidden, is a canopy that protects police against periodic charges that they are "political" or serving special interests, is not stated in discussions of the police. The focus of much police research is upon the organization or on aspects of the occupational culture relevant to the behavior of patrol officers on the street. The belief that the police rarely if ever violate unstated democratic principles is essential to their survival in a competitive organizational network of service providers (see Clark & Sykes, 1974, pp. 460–461, 466–472). This protects them in a sense against the occasional public revelation of their malfeasance, mistakes, and willful violence. The embeddedness of the police in a broader socio-political culture and in policing culture, that which specifies the expectations of policing as a practice, are equally ignored. Nevertheless, the police are embedded in a policing culture reflecting the values, beliefs, myths, and historical conventions of the society in which they are found (Loader & Mulchay, 2003). This policing culture, in turn, is a facet of the mandate or the ever negotiated contract between the institution of policing and the public. The organization and the role may differ and the democratic police may not always police democratically; conversely police in non-democratic states can police democratically. The role of tracking and surveillance will continue to vex those who wish to control the police. The police capacity to track citizens within the law has vastly increased in the last 25 years. The sanctioning powers, i.e., the use of the criminal sanction and access to the criminal justice system, are an important feature that distinguishes the public from the private police. Private police on duty are often off duty public police who can exercise the arrest sanction, so that the monopoly of control of the arrest sanction is less clear in use than might be expected, but the limiting factor is that private police cannot per se enter a case into the criminal justice system: they cannot apply the criminal law sanction action to behavior.[12]

The implicit bargain or negotiated order between top command and lower participants is often overlooked in the capacity of police to act consistently. This does not depend upon policing as a military rank-based structure. The importance of rule by exception is the key to the covert power of bureaucratic commanders – they can rule by exception in given cases to sustain top command power and authority. Policing operates with a focus on the here and now, the immediate and pragmatic response to an incident, rarely has written policies or plans, and relies on its bottom-heavy patrol forces to stand ready to apply needed violence as and when. This, combined with the case-by-case approach which it shares with the legal institutions, lawyers, and the courts, leaves them free to define justice retrospectively and emphasize the merits of their behavior. While it remains reactive in large part, pressures are arising from the potential of electronic surveillance, and forensic advances moves policing toward more preemptive and anticipatory intelligence-led activities.

The presence of democracy as an ideology and practice shapes what is expected implicitly of police. Although attempts have been made to outline democratic policing, including ideas of George Berkeley based on public administration, ideas of David Sklansky, and David Bayley which combine philosophic and legal constraints and expectations, and more general outlines suggested by the works of Newburn, Jones and Smith, Shearing, and the socio-historical ideas of Loader, Mulchay, and Walker. For the purposes of this chapter, the outlines of Sklansky and Bayley are most useful as they specifically describe programmatic expectations of policing which can then be refined with more abstract aspects of democratic practices.

David Bayley (2005) has set out some plausible guidelines by which one could assess "democratic policing." With some modification, these six principles are hopeful statements of what policing should be:

1. Procedurally fair and constrained.
2. Equal in its application of coercion to populations defined spatially and temporally.
3. Largely reactive to citizens' complaints and reticent rather than sporadic and prone to periodic proactive interventions.
4. Responsive to requests/calls for service.
5. Fair in internal evaluation, promotion, and disciplinary treatment of police officers.
6. Fair in practices of hiring, demotion, and firing.

Such lists omit values and context, much like PowerPoint talks. What is expected of policing is not contained by such lists of principles, but is

embedded in tacit, non-stated values. Whatever the structure and degree of specialization of democratic police, they are restrained by a congeries of law, custom, and local traditions. They are also constrained by competing institutions and traditions (self-help, private security agencies, and local institutions).

Functionally, policing is an aspect of formal social ordering and in that sense operates as an agency for the redistribution of life chances in a population (an inference from John Rawls, 2001, pp. 50–52). Perhaps it is to philosophers we must grudgingly turn. The ideas governing my discussion of the (potential) redistribution function of public policy and the actions of agencies is found in John Rawls in his *Theory of Justice* (1970, 2001) and summarized (and revised) as *Justice As Fairness* (2001, pp. 42–43).[13]

(a) Each person has the same indefeasible claim to a full adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; *and*
(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least – advantaged members of society (the difference principle).

As Rawls explains at length, this formulation assumes that inequality along many dimensions (education, income, life style, extant social capital such as savings and assets) exists *and* that any framework that assumes equality of choice or action available to all choosers, e.g., rational choice theories, is misleading. Police alter life chances; they act as a redistribution mechanism even as they act in the context of the present inequalities of even a wealthy society. I argue following Rawls that the principle governing democratic policing as practice should be the "difference principle," i.e., given the current range of inequalities in education, opportunity, income, and skills, any police practice *should not further increase extant inequalities*. At the local community level, this "life chances" or current inequalities idea is roughly mapped onto the capacity of the local community to sustain itself (informally). This may in turn require formal social control in the form of policing.

For what reason are *tacit expectations* of police important? I would argue that it is because they are trust assessors and must be trustworthy.[14] Police are the conveyors of trust to people on behalf of the state, representatives of trust and trustworthiness, and the assessors of trust on behalf of the citizens. Behind the question of trust is of course risk and riskiness. To place this in the context of policing, it is clear that risks of several kinds are of concern

to police because they act in effect as the "formal bottom-line" of risk assessment. While it is clear that institutions mediate and reduce fundamental uncertainties, they are also social locations in which uncertainties are defined and managed collectively. Change produces uncertainty. Police are like points on a compass; they are markers and locators, remarkable, and relocators of social boundaries, collective and individual. Police stand for and stand in place of the ordering and ordering of society.

With reference to the assessment of police functioning, I suggest applying a basic summary rule. The primary rule guiding democratic policing should not be the naive idea that the police, our appointed sacred agents, can fully insure security, control crime, reduce disorder, and increase the quality of life in cities but should instead be the difference principle. I translate as a rule of thumb for these purposes: policing and its base practices should not further increase the present inequalities in the society. Like the oath of Hippocrates, police should be urged, constrained, guided, and rewarded to avoid further damage to the social fabric.

In addition, there are limits to and constraints upon democratic police practice. These are some sedimentation of common and civil law, custom, cultural values, and past practices. Attitudes toward the police are a weak indicator of these more collective, historic, and sociologically grounded predispositions and beliefs. Hsi-Huey Liang (1992, p. 2), based on a study of the principle Western European police systems, suggests that in fact sharp patterns characterize, shape, and constraint their practices. Democratic policing, to review his argument, reflects tacit ideas that shape practices: the police are restrained by social matters other than law, custom, and are embedded in more than merely local traditions. As can be seen when totalitarian states alter the law, the "spirit" must remain. Conversely, of course, if the spirit is non-democratic it will prevail in any case. Expanding his argument, Liang infers that democratic police at best are to:

1. Be legalistically guided.
2. Be focused on individuals, not group politics.
3. Avoid the use of torture.
4. Strive to ensure minimal damage to civility or sustain conventional modes of etiquette among strangers.
5. Avoid (state-sponsored) terrorism and anti-terrorist activities.

Using these general features of "democratic policing," to judge the operation of police in Western Europe in the time period studied, whether such standards are met or not, allows Liang assert the importance not only of the essential features of democratic policing, but also the *penumbra* of

police-like activities that shadow his definition. He claims that in order to avoid a monopoly of official force, activities, or groups include the existence of high or political police, self-policing or revenge-based actions, and a central state police, or a kind of gendarmerie are needed. Through citizen resistance, parallel and counter police forces, a restrained democratic police is sustained. Competition in the exercise of violence is essential in a democracy. The *strategies* (and tactics as well although he does not discuss these) used, perhaps necessary for the survival of a democratic mode of policing, are complex and well-known: they include using the threat of potential violence; moves to divide and conquer opposition prior to confrontation; using force, violence and deceit; and developing credible myth-making over long periods of time (Liang, 1992, pp. 14–17). The myth-making aspect is conjoined to the quasi-sacred aspect of democratic policing – their distance, awesome features, mystery and inscrutability. Presumably, the use of terrorism and anti-terrorist tactics turn the people against the police because these tactics divide loyalties and increase social distance between citizens their police. This in turn leads to a failure of citizens to testify, witness, provide information, and to cooperate with police inquiries. Returning to the principles suggested above by combining the ideas of Bayley (2005) and Sklansky (2004–2005), we should add to three ideas to Liang's. Democratic police should be:

6. Largely reactive to citizens' complaints and reticent rather than sporadic and prone to periodic proactive interventions.
7. Fair in internal evaluation, promotion and demotion, and disciplinary treatment of police officers.
8. Fair in practices of hiring and firing.

The preference for a reactive modality that is recommend by this list is based on the notion that if the domestic police arm for battle, draw and display automatic weapons, don hard protective garb, train for violent, dynamic and destructive interventions, and as a result mount periodic crackdowns, "operations," "sweeps," and other intense patrol and searches in selected areas of a city against citizens, the police will deal with people as a category, "residents of hot spots," or "key players" and the police will stop, frisk, search, and arrest a considerable number of innocent, police-supportive citizens and perhaps alienate others. These operations, *prima facie*, are iniquitous in the application of the law and of fair treatment because they increase inequalities within and across areas of the city. They are an exercise in symbolic and real marginalization of designated groups. The literature suggests that promotion to the top ranks was political and

personal, but this does not characterize non-democratic policing exclusively. There is little evidence on the internal workings of the police with respect to routine evaluation, promotion in rank, and in firing based on performance.

These eight principles will be used below under the heading "Expectations of democratic policing..." to analyze the NAZI policing system.

NON-DEMOCRATIC POLICING

Prior to assessing the consequence of the created NAZI system, it is necessary to analyze the organizational process that eventuated in a new unique policing system in these years in Germany suggests that the transformation of a weak, almost fragile, innovative, mode of policing into an efficient, bureaucratic, focused politicized secret mechanism. This system was a collection of loosely confederated organizations, designed for war making, domestic policing and promoting international terrorism, if nothing else provides a case study of organizational innovation and control. Rather than a full analysis,[15] I want to identify the primary tensions that revealed weaknesses exploited by the party leaders to produce a centralized system of totalitarian policing.

The entire process by which the police were elevated to a central tool in sustaining political party power is a complex matter based on bureaucratic in-fighting, collective behavior, ritualized violence, scapegoating and demonizing, and a full analysis is unfortunately beyond the scope of this chapter. My focus is on the emergence of the non-democratic features over the course of a six-year period with a close focus on the years between 1933 and 1936 at which time Himmler created a policing system and achieved relatively comprehensive control of policing in the Third Reich. From 1933 to 1939, changes with dramatic results, multiple consequences, and in the end a virtually complete transformation of the system of policing took place. The questions to be discussed concern the elements of the German state contributing to the rise of a powerful and intimidating policing system, the organizational sources of the emergent policing system of Nazi Germany in 1933–1939, and the reconfigured policing system that resulted.

CHANGES AND THE TRANSFORMATION OF THE GERMAN POLICE POST-WORLD WAR I

The police at the end of World War I in Germany were in part an inheritance of the Bismarck era, which emphasized security against foreign

enemies and in part a reflection of the several German states that were assembled after the fall of the Austro-Hungarian empire.[16] Germany had 17 separate states or Lander each with a police force, although they were over shadowed by police of Prussia in part because of the symbolic centrality of Berlin, at the time of the NAZI coup, and local police at the state and city level. The states were relatively strong and had local small-city or village police, gendarmes, and state police. The Berlin police also had national security obligations. There was no central authority coordinating policing organizations, nor a federal police per se. As Bayley (1975, p. 363) summarizes, the centralized control of Bismarck and the creation of a German Empire, was balanced by a "dispersed police power."[17] The process of transformation described in this section are not meant as singling out the process as intrinsically diabolical, sociologically unique with respect to the strategies and tactics employed, nor the social conditions that gave rise to the new configuration.[18]

Even providing a sketch of the transformation of public policing is challenging. In many respects, the internal working of the various units is not known. Overt reorganization moves are best known and insofar as they reflect on the principles of democratic policing and their opposite, this will be noted. A comparison is made below at the end of the section on the transformation of the German police (pp. 51–53). The time period of interest here is post World War I, and omits the detailed discussion of the social organization of policing prior to this time. After the hopeful establishment of the fungible Weimar Republic in 1919 (named after a German city that was the location for a constitutional convention that lead to an election and the establishment of a legitimate government), efforts were made by reformers to shape a democratic police. Like the reforms resulting from the revolution of 1848, the idea was to organize the police based in the several states, and to reduce the power of the Berlin police.

Structural Conditions

Several major political factors existed during this period that were to shape policing in Germany through to the advent of the Second World War. The first factor to be considered is the conditions set by the Versailles peace treaty (and later, the Brian-Kellogg pact) in 1918. It limited the number of police officers and the weapons they were permitted to carry, the size of the officer corps (about 4,000), the size of the army (set at 100,000 men) and of the navy, its composition and tonnage among other conditions, and

banished military training academies. The second is the rather fragile nature of the democratic police system that had emerged in the late nineteenth century. This included 17 state police systems with heads with considerable autonomy, a national system to be discussed later which included a gendarmerie modeled after the French, and an emerging legally guided state and local policing system. Liang (1992, p. 240) argues that a lack of foreign enemy and defeat in war discredited the previous Prussian style based on internal order against foreign enemies (my paraphrase). The national or federal police were relatively weak. Third is the devastated economy, the large number of ex-service men with military experience and high unemployment meant that men were available for political mobilization and their discontent could be easily harnessed. Germany saw the rise of a number of paramilitary groups that were quasi-legitimate – the *Freikorps*, a kind of auxiliary police, the *Stehlem* (steel helmet) composed of former members of the German army, the *Hilfpoliezei*, or police auxiliary or reserve, the Civil Guards, "combat leagues," and many others.[19] By 1921, the NAZI party had established the Storm Troopers, or SA, who were in effect the paramilitary arm of the party. These groups were a constant challenge to public police authority. In effect, as Diehl (1977) has shown in detail, the very powerful and widespread paramilitary groups, somewhere around 1½ million by 1933 and growing to some 4 million by the summer of 1934 (Evans, 2005, p. 14), set the form for a "militarization of politics." Merkl (1987, p. xx) argues that those recruited to the SA in particular (based on interviews gathered by Theodor Abel) had an authoritarian, militaristic view of politics. Much political action took place in the form of conflict between paramilitary groups who disrupted demonstrations, beat up opposition party workers, and attempted to suppress political dissent. Mobilizing via paramilitary groups seeking political ends became an acceptable and legitimately pursued mode. As Diehl (1977) observes in his Epilogue, the social system was based on strife and conflict and the wish for order was palpable even as though the means, the SA, the NAZI party, and its rapidly created policing units, were only partially acceptable. Fourth, following the creation of what is called Weimar Republic, is the constant strife, coalition governments with weak legitimacy and rising number of competing parties, including the Nazis. This fragmented party system was another source of dis-equilibration of the state. The Weimar created several forms of policing, inside and outside of Berlin, in part to moderate their political role, in part to reduce the power of the Prussian state within the German nation, and in part to create a competent, scientific detective bureau, only to see each reform fail (see Liang, 1970, Ch. V). A fifth factor is the long tradition of

militarism and the military connected to the aristocracy as a source of order. This was both questioned and made pathetic by the disastrous defeat of Germany in a war it had welcomed, if not precipitated. The militarization of the society in the post-Weimar period was a matter of degree, a continuity of a cultural theme, rather than a new idea. The existence of external enemies of the state had been played upon since the revolution of 1848 and especially under Bismarck and William II. A sixth factor is the absence of strong mediating institutions in the German state. There were few except the military and the efficient civil bureaucracy, and a combination of control of these with an incipient local police system had great potential in a militaristic state. Seventh is the mode or style of policing in Germany. The police historically had broad powers. Police observers as early as Fosdick (1969 [1915]) had noted that the German police, and certainly those in Berlin, had powers to censor (films, plays, books), act to protect national security, and served as political police in broad aspects. They were concerned with security and conspiracy especially those involving plans to overthrow the state. Finally, the process of developing a democratic police as a modern democratic state emerged was entangled with the process of collapse and destruction of other institutional orders within the society (Koonz, 2003; Evans, 2005, 2006). In effect, the Weimar reforms, like the ones post-1933, concerned changing all the major institutions in the society, not simply changing the forms of governance. While the below section is divided into topics that are roughly chronological, the transitions were not simply chronological.

FEATURES OF THE TRANSFORMATION

Within three years of Hitler's assumption of the position of Chancellor in February 1933, the police system of Germany was refashioned. Central players in this were Hitler, as *Reichsfuhrer*; Goering, as Minister for Prussia; Frick, as Minister of the Interior; Himmler in various positions within the party and the Reich bureaucracy; and Daluege, Heydrich, Nebe, and other police officials. Reforms in 1936 placed Himmler in virtually complete charge of policing in the Third Reich and drew new lines of authority (Browder, 2004, p. viii). The center of these reforms was Hitler and the aim to produce loyalty to the party, an ideological canopy over all police actions, unrestrained actions potential, and a core of an emergent army prohibited by the Versailles Treaty. Hitler was the head of the party, the state, and its bureaucracy: person, state, party, and society were fused in his politics.

Hitler created constant conflict between his allies within the center of the party, and fostered competition between Frick, Goering, Himmler, and Heydrich. So, e.g., Himmler was in constant conflict with Frick and Blomberg of the Wehrmacht over control of the uniformed police and the role of the Waffen-SS (armed SS officers serving as troops). This dynamic meant that the actual control was a struggle and not clearly indicated by diagrams or organizational charts. In the final years of the war, Himmler controlled all policing, including the SS units (three brigades) embedded in the Wehrmacht (Neumann, 1966, p. 548); the SD, which was the security service within the SS, originally Hitler's body guards and loyal protectors. Heydrich was the head of the SIPO, the combined criminal police and the state security police or the Gestapo. Although nominally under the bureaucratic line of authority running to Hitler from the Minister of the interior, Frick (Browder, 2004, p. 232), Himmler was in operational control of policing in the Third Reich and in time, its conquered territories and states.

Semantic Thickets

These changes, discussed below, suggest that a discussion of "police" in this period using terms like "uniformed police," "security police," or even the SA or SS is misleading. While the SS was in fact an organization originating as Hitler's personal body guard, it morphed, largely under Himmler, into an organization intended to track and control party loyalty, became a specialized police force, had three army field divisions, and served as a national secret police. The SS functionally paralleled the uniformed police, the political and crime police, many of whom were members of the NAZI party and/or the SS. A further problem for a non-German reading person is that sometimes scholars use the German phrase for a police organization, sometimes use the slang/shortened term such as the Geheime Staatspolizei or Gestapo, sometimes use the abbreviation of the full German word, sometimes use the official shortened term such as SS, and sometimes a series of letters such those indicating abbreviated titles. Browder (2004) discusses the emergence of the SIPO and the SD. SIPO is an official abbreviation for state police and SD is a combined acronym for state police including the criminal police and the Gestapo. "State police" sometimes refers to the police of a given state such as Saxony or Prussia, and sometimes the central Reich police headed by Himmler after 1936. In addition to this, "security police" applies to the functions of a unit under Heydrich, a unit in the

Party called the SS, which grew from a small group that formed Hitler's body guard (Hoffman, 1979; Hohne, 1971, pp. 22–28) to a major force under Hitler, and units within the state police. The embedded nature of these functions in virtually every police unit, secret surveillance and tracking of enemies and threats to the state ordained order, is revealing. Not only were intelligence and spying-based preemptive units present in all police units, and all police units were mandated to be aware of enemies of the state regardless of the legal niceties, any and all the enemies of the state were of interest to all manner of police officers. These enemies were defined as concealed, hidden, duplicitous, double agents who could even be found inside the SS, the loyal core of the movement, as well as among obvious named and demeaned categories of people.

While it is true that no organizational chart reveals power or networks of relationships that cross levels and departments, the changes in responsibilities were frequent, the underlying aims of producing Aryan purity did not surface until the late 1930s. As such diagrams are of less help than usual (see Browder, 2004, p. 232; Hohne, 1971, the insert following p. 530; Westermann, 2005, p. 56).[20]

Many questions come in to mind in what follows as reorganization or bureaucratic arguments over the domain of responsibility of an agency are discussed. These are features of all bureaucratic organizations, but the underlying rationality is often unclear except for the drive to uncontested power.[21] A case in point might be the argument between the *Lande* (German states), *Gaulieters* (Nazi party officials at the state level), and the Gestapo over control of the border guards. Border guards, being at the bottom of the organizational chart are dealt with a series of letters (an acronym based on a collapsed series of German words) or left off completely. A further confusion is that the units at issue such as the SS could have police as functioning members and so were called SS officers; could have members who were functioning as police in that sense were "policemen" could be policemen in the army (not as exclusively as military police but as army members) who were SS members. Thus, reference to "the SS" has little referential value unless it designates a particular functioning unit with the SS (this in turn was a complicated unit of the Nazi and of the German government that included combat troops, officers who were available to guard Hitler when he traveled; guards in concentration camps, and intelligence units functioning parallel to and competing with the Reich intelligence system, the Abwehr.

Duties, composition, leadership, and role within the state varied for each organization and they were frequently reorganized. They became more

centralized, more in service of the central party authorities, Hitler and Himmler, and more integrated with the war effort in general. They became in effect a centralized, party controlled policing system rather than a set of constitutive quasi-autonomous parts accountable to local elected authorities they had been in the Weimar Republic and until 1936. In effect, they were transformed from an accountable civil police to force loyal to the ruling faction, not accountable to the courts, merged with the army and the NAZI party, and carried out a wide range of duties that included running concentration camps with their associated murderous activities, surveillance, torture, and *agent provocateur* activities on behalf of the party. Finally, although this is presented as a series of reorganizations and consolidations, the series of steps that resulted in the reconfiguration of the police system were not predictable. They began perhaps with Von Papen's coup nationalizing the Gestapo of Prussia under federal rather than state control. He then put the NAZI party in command of policing in Prussia. In due course elected officials were replaced. Himmler then persuaded various members of the various state Gestapo and uniformed police to join the SS and gathered and eventual control of the several Gestapo (first in Prussia and then throughout Germany).

Phase One: Bringing the SA under Control

The problems of reorganization were probably not imagined at the beginning in part because of Himmler's success in infusing SS members into the police and recruiting the police to the SS. The first problem Hitler undertook to solve was to gain control over the paramilitary SA, which had served Hitler well from 1921 as a street-fighting unit, a force for intimidation, a nucleus for a protean army, and a core of brutal violent party loyalists. They had become a powerful force, growing from 750,000 men in February 1933 to over 2 million in a year (Evans, 2006, p. 14). By 1934, they reached 3 million and there were some 4.5 million in the military association, *Stehlhelm* and in other paramilitary associations. The SA had become associated with the police as an auxiliary, but Goering, a former head of the SA, disbanded them as a police auxiliary in August 1933. This was to reduce their power and to create alternative, more centralized, and controlled policing units. The head of the SA, Roehm, wanted to make the SA the core of a future army and a challenge to the then smaller Wehrmacht and its generals. Hitler forced him first to renounce his claims and at the same time co-opted the army to his position. The SA was allowed to terrorize people

on the streets until the organization resisted integration into the centralized, party-dominated, politicized federal structure of policing Himmler was creating, and eventually orchestrated the notorious "night of the long knives" (June 30, 1934) a shooting, purging, and jailing of the leadership of the SA. The SA leader, Roehm, was assassinated and his core leadership shot and/or imprisoned. Soon, SA membership dwindled from 2.9 million in August of 1934 to 1.2 million in 1938 (Evans, 2006, p. 41). Hitler had *ex post facto laws* passed to legalize the purge and pursuit of conspirators against the Reich (Evans, 2006, p. 38). The civilian leadership of the police in several states was replaced with SS members, NAZI party loyalists. A twofold effort was made, from 1934 on until 1939, when NAZI party membership was required for police officers, to purge non-party members or sympathizers in the police and recruit loyalists.

Phase Two: Police Reassessment and Reorganization

The second phase or problem-solving activity, following the decapitation of the SA, was reorganization from the center and top of the emerging policing system. Himmler's first reorganized police in 1933 (Westermann, 2005, p. 36) included three broad divisions outside of Prussia – the SS (basically the police associated with the NAZI party), the uniformed police, and the security police (divided into the criminal police and the Gestapo or secret state police). The uniformed police, in turn, were divided into three major divisions – the state-based large city *Schupo*; the smaller city police; and finally the *landespolizei* or Gendarmerie. The latter were garrisoned police who were held in reserve to control civil uprisings and disorders. In late 1936, after much in-fighting, Himmler became head of the SS and Chief of the German Police. This was a second reorganization (Westermann, 2005, p. 56). Under him were three branches: the security service (under Heydrich); the Main office of the security police (in which were located the criminal police and the Gestapo); and the Main office of the uniformed police (headed by Daluege). This diagrammatic view reveals a notional division of authority and functions because the members of the bureaucratic system were sworn to loyalty to Hitler personally and to Himmler in the case of police. The growth of the SS is a further differentiation and specialization of the central policing forces of the Reich. By 1933, the SS had grown to 50,000 men. This growth in the SS was a move to develop a centralized internal military capacity, produce a surveillance capacity internal to the party and in the Third Reich at large, as well as to integrate police, state, and party.

Phase Three: The Amalgamation of a Police System

Once the units were outlined and some staffing done, the core idea, it would appear, was to make the police an extension of the party, and represent them dramaturgically as police and agents of the government. The amalgamation was accomplished in a series of steps that were a combination of shrewd personal charisma and insights into party and personal politics by Himmler; bureaucratic in-fighting within and across the ministries of the Third Reich; and shifting coalitions between Himmler, Goering, and their deputies (Heydrich, Daluege, Mueller, Nebe, and others). This transformation involved no less than nine major changes in the policing system of the Third Reich. Bear in mind that there was arguably no centralized police system in the Weimar Republic and the Berlin police were crime-focused in large part. It was a series of state-based policing units under local control; a protean police in Berlin that had importance because of the capital and the importance of Prussia in Germany; and an astonishing number of police auxiliaries, paramilitary groups, and civic associations. The major changes are:

1. Police units that were extant had changes in their functions and duties, e.g., the border guards became infiltrated by members of the SS which trumped their functions to include sustaining the purity of the state rather then monitoring movements across borders and collection of taxes and duties.
2. Unclear, vague duties and functions were subject to expansion as the police units became drawn closer to the party structure and the central government. Gestapo, when established formally in 1933, began with a mandate to investigate threats to the internal security of the Reich, but over time co-opted the Abwehr (German intelligence under Canaris) and usurped powers of intelligence gathering concerning both foreign and domestic enemies.
3. The functions were changed even as the police units retained a name. The Prussian Gestapo (state security police) were arrogated to a quasi state function of Reich security by Chancellor Von Papen in July 1932, when he removed Social Democrats (SD) from power in Prussia and brought the police under his authority (Browder, 2004, pp. 48–49). Members of the police with SD membership were purged and this opened the Prussian police to entry by NAZI party members (Browder, 2004, p. 49). These changes broadened police functions, altered the political composition and sympathies of the police in Prussia, and drew the organization under

federal rather than local elected control. The uniformed order police, in a significant shift discussed below, were trained as citizen soldiers with obligations to go to war as soldiers rather than to sustain domestic order (Westermann, 2005).

4. Labels for functioning units were changed. The SA, the storm troopers and violent arm of the NAZI party begun in 1921, became almost synonymous with the police auxiliaries used to control riots in large cities. Thus, although aligned legalistically acting in support of the public police, they were in fact party loyalists carrying on functions that sustained their party and reduced the social capital of the parties composed of social democrats, socialists, and communists. Intelligence units, such as those begun by Diels and Heydrich in Prussia, were later to become fully functioning security police offices under the title of crime police unified with the Gestapo after 1936.
5. Police organizations with vague and overlapping functions were in constant competition with each other. Their heads, like other bureaucrats, working to broaden and/or refine their powers. The SS, still Hitler's body guards and in charge of his personal security, contained an internal unit, the SD, to scrutinize NAZI party members, to track and watch them and to investigate their (party) loyalty.
6. In due course, the mandate of the SD was broadened to include surveillance of both internal and external enemies of the Reich. In this sense, they competed with the Abwehr on the one hand, and the Gestapo or the "political police" on the other.
7. Lines between NAZI party loyalty, organizational loyalty, and state or Land (designation for German states and their governmental structure) accountability were collapsed, blurred, or denied in time. While, e.g., the SS were strictly speaking a party unit, the core of old loyalists and spearhead of a radical social movement, they were also integrated into the Wehrmacht, into the Gestapo, the uniformed police, and local city police organizations. As mentioned above, the obligation was to Hitler and the party, not to specific duties or mandate of the organization.
8. Competition over emerging and new policing functions was widely sustained throughout the period. The control over the policing of "political prisoners" and the means by which they were to be controlled (transported, jailed, placed in concentration camps) was contested domain sought by both the Gestapo and the SS. While the Gestapo did the primary job of arresting and jailing, the Death's Head unit of the

SS maintained control over the concentration camps and supervised the work duties and murder of the detainees. These competitions were both de facto and de jure as the laws changed making the mandate of the SD, SIPO, and SS broader and almost open-ended.

9. As Himmler achieved greater control over the political composition of policing units, i.e., the loyalties of the members of the units in the policing system, policing duties became increasingly open-ended and focused on matters of "order" and control rather than "law enforcement." In time, the Gestapo was outside the law, there were no institutionalized remedies for their excesses, separate courts were established for Gestapo members, and the conflation of citizen loyalty, Aryan identity, and devotion to the war effort became standards for judging the citizen.

In each of these moves, the nexus of loyalty was altered, the scope of duties widened, the control or restraint of the law loosened, and the control of Himmler increased. Without question, the bureaucratic maneuvers were skillful and effective in these early years (see Chapman, 1970, Ch. 8). The personalistic and political control of the police by Hitler and Himmler was so extensive that it would be difficult to imagine resistance from within the police organization. As a result of the reorganization, the social democratic memberships (union members who were democratic socialists) of the police were radically attenuated, and many were dismissed. The aim was to substitute NAZI loyalty for the duty to the police organization. The model of this was the SS, Hitler's personal body guard. As a generalization, data show that the closer one was to Hitler physically, the more loyalty to Hitler was required – including a direct oath of loyalty to Hitler himself and secondarily to the party and the state (Evans, 2006, p. 43; Hoffman, 1979). This oath was made retroactively valid (Evans, 2006, p. 46). Conflict between the SS and the *Wehrmacht*, and between divisions within the system existed, and between Frick, Minister of the interior, and Himmler, but not resistance to Himmler from "below." The aim was in short to integrate the SS, the army, and the police in their various forms (and there were many), ideologically, and in respect to their skills, weapons, attitudes, and powers. In some sense, these conflicts and struggles are classic bureaucratic maneuvering, not unique to Germany or the NAZI period. The thematic aspect is the conflict between party and state loyalty, which certainly characterizes the tensions found in any democratic elected government.

Phase Four: The Emergence of the Soldier-Policeman

In some deep sense, the aim of the NAZI elite was to develop national strength in part symbolized by parades, rallies, celebrations of youth, and Aryan purity, and by developing secretly an infrastructure of military capacity. One striking aspect of this reorganization process was the production of a ‘‘police soldier.’’ This new role was to function in cooperation with the SS and the security police, mount joint operations with the army in occupied zones, and to slaughter innocent non-combatants – the old, sick, disabled, and retarded, women, children, and others who were killed with impunity inside and outside of Germany (Browning, 1998; Westermann, 2005). These several moves in reorganization enabled the uniformed police, who had been local agents controlled by elected officials in the several German states and in Berlin, to become part of a shadow army and a political extension of the party and the central government. The police were seen as ‘‘political soldiers’’ in several senses. They were to be trained with the military in war and in war-making weapons, and thus were expected to be prepared to fight as soldiers in addition to other duties if need be. They were expected to be ideologically attuned to and loyal to the aims of the NAZI party. Their horizons were to be broad: they should be prepared to act in concert with the military in suppression of enemies of the state – variously labeled as sympathizers, Jews, communists, Bolsheviks, criminals, etc. The labels were irrelevant in practice as the police battalions in World War II murdered, jailed, tortured, and arrested these groups with impunity and with respect to general guidance rather than laws or the Geneva convention. They were not under the command of the Wehrmacht, although they were fully equipped as soldiers and acted toward non-combatants as if they were enemy soldiers. Only their green (not gray or black) uniforms and insignia distinguished them.

The uniformed soldiers, although drawn from police organizations in areas and cities within Germany, were expected to have ‘‘SS ethics’’ to be loyal, take their identity from the role, and act as defenders of the state. Because of this holistic aim and definition of policing, the aim was to create cooperation and blur the characteristic differences that historically and legally had obtained between the three branches of police and the army. This tactic was especially visible once the Third Reich had occupied large parts of eastern and northern Europe and invaded Russia.

Training and socialization of the uniformed police was designed to make a ‘‘citizen-soldier.’’ The view, emphasized in training, in operations, in policy statements and in action, was the ideology of annihilation of enemies

of the state. These were epitomized by Bolsheviks and Jews, but included other categories such as the retarded, disabled, infirm, and mentally ill (Koonz, 2003; Westermann, 2005, pp. 10–102). The dehumanizing and demonizing of external enemies was extreme, systematic, continuous, and effective. The attention internally and externally was on those defined as enemies of the state, and the police either directly arrested, jailed, or murdered them, facilitated the actions of the SA or other street-terrorist groups who preyed on and beat communists, Jews, and union members.

The several police thus elided several important distinctions associated with democratic policing – not only the list provided by Liang, but in the broadest sense – they no longer regarded the distinction between "low policing," domestic ordering, law enforcement work based in a local territory with some obligation to local politics and people, and "high" policing which is attuned to national security, state-survival and well-being, internal and external political "enemies" (Chapman, 1970; Brodeur, 1983, 1999). The army, the party, and the everyday domestic police forces were interlarded and integrated under one command. The result of these moves in organizational restructuring and socialization, was to create a large number of men, some 250,000 or more, who were willing to massacre innocents in large numbers with impunity and enthusiasm between 1939 and 1945.

While the above narrative is presented in order as four phases, the processes described were not strictly speaking chronological; each of the phases was a segment of a social movement that had policing as its object. Some conditions are apparent in this transformation. Both necessary and sufficient conditions for the emergence of the NAZI police state emerged. However, building a centralized policing system was an internal coup d'etat. The local police became subservient to central governmental control under the Minister of the Interior, Frick and Himmler. The policing units became associated with the party and parties not under the influence of the NAZI party were not allowed to thrive. The opposition to the NAZI party was fragmented and rising threats of opposition were met with violent acts against Jews as symbolic enemies double coded as Jews (non-Aryan and racially impure people) and Bolsheviks (political enemies of the Third Reich) (King & Brustein, 2006). The police even as they were transformed, were unable and/or unwilling to police neutrally and became an arm of the government of the day rather than accountable to local elected councilors and mayors. They could no longer carry out neutral third-party policing to protect the interests of all the citizens. Ritualized violence and collective displays mobilized the people with the party against demonized enemies.

EXPECTATIONS OF DEMOCRATIC POLICING APPLIED TO THE NAZI POLICE

The expectations of democratic policing, a combination of the principles of Liang, Bayley, and Sklansky (as stated above) and shaped by the political philosophy of John Rawls, can be reviewed in reference to the primary time frame of 1933–1936. The socio-political context is a weak state with competing power centers in which a well-organized and coordinated party manipulated fear to obscure alterations in the infrastructure of governance. I shall review the general points of my argument concerning democratic policing and its contrast conception. I will address the points to demonstrate that NAZI policing is non-democratic, and end the analysis with some speculations about the current policing situation in the United States.

Liang's criteria, a variation on the general principles, suggests the relevance of *legalistically guided policing*, an unlikely term to apply to NAZI Germany. Theorists of democracy such as Rousseau and Rawls assume that citizens must be ruled as a result of consent, an implicit contract, and that this is revealed in elections and legislation by representatives. While laws were passed (see below) and elections held, they did not establish democratic governance or policing. The matter nevertheless is complex and on the one hand, one could argue that policing was entirely legal in the sense that a legal apparatus was developed to justify and sanction actions that are morally wrong by most criteria (the killing, torturing, and deporting of innocents whose "crimes" were a matter of culture and politics). On the other hand, policing in the NAZI regime was not legalistically guided: courts did not review police decisions, no procedures were in place to supply guidance and remedies to miscarriages of justice, and no actions were subject to review by higher civil servants. In fact, it was carefully protected against remedies, defined as outside the law or subject only to review in specialized courts. The aim in effect was to enforce a politically defined order. Himmler stated in effect the law is Hitler's will and the view of the NAZI party was that courts as a restraint were irrelevant (but not as a means of validating their wishes and policies). Chapman (1970, p. 71) writes in a stark manner, "Hitler was meticulous in providing legal grounds and support for everything he did." Those in power believed that the law was to be no impediment to enforcing control over matters that offended or people who were disorderly. The Gestapo grew to over 20,000 by 1939, and their work was both overt and violent and secretive and investigatory. Their actions were to be reviewed only by special courts. Those in concentration camps were "outside the law."

Surely the rise of the NAZI leadership to control in Germany was a revolution albeit made legal after the fact. The party leaders found the law a useful tool and shaped it to their interests and ends.

- They added new laws such as those covering the on-going redefinition of a Jew, threats of groups, encouraged the courts to favor reactionary parties, and not to punish right wing assassinations. Leaders stated flatly that the law was to be no impediment to enforcing control over matters that offended or were disorderly.
- They supported a politicized view of order and ritualized view of violence. The notion of "legalistically guided" was a tertiary matter – a tool in the interest of sustaining order and reducing disorder which included ethnic cleansing, the retarded, the disabled, and miscellaneous "terrorists" and criminals. Symbolic acts of loyalty, ordering and terrorizing the innocent, trumped "law enforcement."
- The party position was reflected in the views of the courts by 1934. This was that police could act to control any matter that violated public decency whether it was under the control of law or not (Liang, 1992, p. 258, quoting Werner Best, a NAZI legal authority).
- The party controlled legislature passed retroactive laws including: capital punishment (Burleigh, 2000, p. 166); rationalizing the murder of SA members on the night of the long knives (Burleigh, 2000, p. 159); a loyalty oath to Hitler (Evans, 2006, p. 43); and torture – legal rationalization was constructed to justify its use (Liang, 1992, p. 258).
- They encouraged the police to operate freely under an undeclared martial law based on the law of February 28, 1933 which permitted uncontrolled opening letters, listening, search and seizure, and detention without written permission (Burleigh, 2000, p. 152).
- The party's agents, the Gestapo, began to take people directly to concentration camps after their release from jails under the label of preventive detention (Evans, 2006, p. 75).
- Party leaders encouraged the use of torture although it was to be targeted and regulated (Evans, 2006, pp. 76, 125). Preventive detention was widely used so that arrests were made without warrants, prisoners were transferred from jails to concentration camps (Evans, pp. 73–75).
- A three strikes law was combined with retroactive sentencing of offenders of a wide variety (Evans, 2006, p. 76).
- New offenses were created and the net was widened to include moral degeneracy in connection with even minor crimes (Evans, 2006, p. 79).

- Prisons were used as warehouses, holding depots for slave labor, and loci for open-ended punishment and torture. The prison populations almost doubled, from 69,000 to 122,000 in four years from 1933 to 1937 (Evans, 2006, p. 79). They were guarded by SS officers, who were technically police.
- Special courts were created for the SS. These were outside normal civilian courts, and as Neumann wrote (in a manuscript originally drafted in 1942) they could shoot civilians at will; could incarcerate without trial; and were outside judicial and legal controls (Neumann, 1966, p. 455).

In summary, the law was used as a means to achieve other ends. It was used to embed and encourage actions that are repugnant in Western democracies. In many respects, individual civil liberties were suspended or made irrelevant to the police. The closer the police agents (SS, the Gestapo) to the party inner ruling cadre, the greater latitude they had in the shadow of the law. Courts had little jurisdiction over police actions and were complicitous in any case (Evans, 2006, p. 73); new courts were created much like military tribunals for SS and Gestapo violations (Evans, 2006, p. 95); little written approval such as warrants was needed and there was little prospective guidance of police actions; preemptive action carried out by the SS and Gestapo; there was no routine mode of appeal; retroactive laws justified and made legal previous acts that might not have been defined as crimes; and distinctions between crimes, moral degeneracy (attributed to heredity), disorder, political opposition, and the race-culture elision that was called the Jew was erased.

The second criteria, policing should focus on individuals (i.e., their criminal behavior) not categories or groups, was rapidly eschewed. Nazi policing was categorical policing. Policing was in large part group and politically based not only in the state security police (the SIPO and the SD), the SS, but in the uniformed police as well. As Arendt (1985, p. 6) most dramatically points out, policing in Germany was terrorism directed against the innocent. Those outside the putative respectable category (which was constantly being refined and redefined by Nazi jurists) were social constructions of the party apparatus. This circle of disrepute became wider over time to include Slavs, Rumanians, "Gypsies," Jews, Bolsheviks, the retarded and mentally ill, and civilians in territories conquered in war. New laws targeted those who were impure, such as Jews, the mentally retarded, "gangs" in Berlin, and vagrants and mendicants (Evans, 2006, p. 88). They were the targets of operations by the Gestapo in April 1938. This was followed by the "Night of broken glass," November 8–10, 1938, which was

the targeting and destroying of Jewish shops while police stood by and protected non-Jewish shops if they were at risk. Those arrested in 1938 were those who were "work-shy" tramps and other itinerants, "asocials," who were first placed in jails and then moved directly into concentration camps. These camps-as-prisons were full of political prisoners (a number that increased from 7,500 to 21,000 by 1939).

The third criterion is that democratic police should avoid damage to civility. This is perhaps best seen as a matter of strangers treating each other equally in public or collective demeanor that is as Webster's 9th (244) states, "adequate in courtesy and politeness." The metaphors used by the NAZI government to characterize state enemies, were intended to destroy some forms of civility and to elevate others. This was high dramaturgy because the public ceremonies marked the valued physical and moral features of the Aryan, and mass publicity denigrated Jews and Bolsheviks in particular. In the ideological view of the government of the day, offense to civility was symbolized by those groups defined by the state as enemies of the "spirit." Symbolic acts of loyalty, ordering and terrorizing the innocent, trumped "law enforcement." Ceremonial executions of communists were held (Evans, 2006, p. 66). The SA used torture against social democrats (Evans, 2005, p. 21). The damage to civility included not only the 8 million dead, the political prisoners, those opponents of the state hung, decapitated, gassed and murdered, taken to state labor camps from all over the conquered states, seizing possessions include high art and sculpture arrogated from wealthy Jews and others, etc. By 1939, there were 20 concentration camps and 160 labor camps run by the SS. The number of people in prison, at least a short hand index of civility, and a comment on social control in any case, doubled (from 69,000 to 122,000) from 1933 to 1937.

The fourth criteria, that democratic policing should be reactive and sensitive to citizens' demands is certainly not met. While there is little literature on the everyday policing in villages, small towns and the extensive rural areas of Germany, policing at the German federal level and in Berlin in particular, was preemptive, and for the marginalized groups, it a kind of state sponsored terror. Uneven attacks were unpredictable, violent, and unequal in application, proactive in nature, planned and executed in militaristic fashion.

Democratic policing, according to the criteria advanced, should eschew terrorism and anti-terrorism. The NAZI police did not. Since this proposition is stated in the negative, presence of such activities is in this sense non-democratic. This stipulation is particularly relevant to the operations of local police rather than specialized police units within a government

designed to deal with such matters (in the United States, the FBI and the CIA, in the UK, the once named MI-5 and MI-6). While a limited case could be made for such operations at the federal level the local police have no competence, training, or resources to engage in either and the threat of such undermines collective well-being in diverse communities. The police in the Third Reich practiced widely terrorism and anti-terrorism. The "night of the long knives" and the "night of broken glass" were only the two most horrendous examples of terrorism against defined enemies of the state. These actions were not a function of direct citizen requests or "demand."

If we consider the Rawlsian difference principle, as stated above, policing in this era increased radically inequalities. It was designed in fact to increase inequalities, and to eradicate those seen as enemies of the state. The aim was to destroy the Jews, seen as wealthy opponents of the NAZI state and spirit. Mapping was used to locate Jews in Amsterdam after the NAZI occupation (Scott, 1998, p. 79) and thus insure their being rounded up and their property seized.

Two other matters define democratic policing. Democratic policing should be fair in hiring, promotion, and demotion (Bayley and Sklansky). Access to a position in NAZI policing was always shaped by moral and political criteria unrelated to skill, and the aim was to have NAZI policing, the officer core in particular, composed of Aryans (this was never pinned down as to criteria). The criteria for command and in due course for hiring were loyalty to the party, not skill, or other qualities, it is unlikely that internal evaluation, promotion, and disciplinary treatment was fair in any of the three police branches. Party loyalty was paramount, although there was an attempt to include only Aryans failed because of the cumbersome nature of proving a non-Jewish past. The most visible and obvious matters were the manipulation of the higher command in the police in the interests of NAZI party goals. Hiring after 1939 was based on membership in the NAZI party and ironically included the stipulation that a police officer could not be drafted into the army. Of course, many were functioning as soldiers and died as soldiers. The process of promotion and evaluation are not commented above in the sources consulted.

REFLECTIONS ON THE PRESENT

The transformation of the organization, strategies and tactics of the police, and the refocusing of their socialization and loyalties, from the several versions of policing in the Weimar state to the NAZI system is perhaps

unique. Are there trends of interest? Are there features of non-democratic policing that are surfacing in the policing of the United States in this century? Perhaps they are the signs of a nation under stress from imagined foreign enemies, perhaps they are harbingers. The broader analyses of the relationship between classes, industrialization, the demonizing of internal enemies and nationalistic empire building is found in the history of ideas. It is clear, however, that the integration of the police, local, state, and federal, into a police system was accomplished in the Third Reich, and the consequences were severe. Here are a few parallels.

First consider election fraud and manipulation and politicization of governmental agencies run by civil servants. In a moment worthy of note, given the experience in this country in 2000 and 2004, Hitler's people discredited ballots and used terror to intimidate voters (Evans, 2006, pp. 110–111). These tactics were effective and Hitler's plebiscites always yielded high numbers in his support after 1933. His was an elected government, although as a member of a coalition based on the party's gathering about 38 percent of the popular vote, Hitler's appointment as Chancellor was a surprise and gave him leverage to politicize all the relevant state agencies. There are indications that the Bush administration has acted in this way in regard to the Justice Department, The Surgeon General's Office, the EPA, FEMA, and of course created the new sprawling Homeland Security a essentially national security-based agency standing ambivalently between national interests, law, and even the now weakened corpus of international law.

Second, consider how the last 10 years have seen the conflation of crime and disorder. This was first noticed by Moynihan showing that by defining deviancy down, making the incidental, various, diverse, and symbolic indicative of deeper, intolerable disorder and dissent, new forms of policing and control were made possible. Community policing based on broken windows maxims is a child of this movement. This definitional move, at once minimizing the legal constraints, also permitted what might be called "metapolicing," or the policing of varieties of order, not just order itself. Order, as in the broken windows essay, is defined by the powerful and the police, perhaps even the officer, rather than by any objective and legalistic standard (see Kelling & Coles, 1998). This by extension, as seen in Boston and New York, leads to the use of civil fines which tend to ratchet up punishments for life style, applying criminal sanctions to those who fail to pay fines, observe contempt of court rulings, or ignore warrants.

As noted in the previous section, a long history of common law has refined "crimes" to refer to the behavior of individuals, not to suspects,

''persons of interest,'' suspected groups, or thoughts. By a focus on Aryans and racial purity, the Third Reich set a standard for acceptable resident citizens and excluded recent immigrants, those without proper birthright (definition of a Jew legally), and set out iconic targets as fearful: Gypsies, Jews, and by extension, the disabled, the retarded and mentally ill. This is echoed in the Wilson and Kelling article (1982) from which the ''broken windows'' perspective was developed in their discussion of predators from ''outside'' who prey on residents. In *Fixing Broken Windows* (Kelling & Coles, 1998), this is attributed to offensive behaviors of the panhandlers and mentally ill on the streets, and the authors urged extending this to other vaguely defined categories such as ''gangs'' ''jay walkers,'' and ''panhandlers.'' The claim here is two sided – such behavior should be curtained officially and laws should be passed to permit more severe sanctioning. It is the insider–outsider distinction that is axial, not the particulars. The more recent focus on ''illegal immigrants'' a category created by law in the 1980s and now applied retroactively, has shades of a categorical focus, as does race profiling.

In the years since 9/11, the United States has seen ''terrorism'' and ''anti-terrorism'' used as a symbol or icon rather than directly concern a set of specific set of behaviors. The recent moral panic about terrorism has lead to attempts to interview Arab Americans en masse (Thacher, 2005). The Patriot Acts, recently renewed (July, 2007) give broad powers to monitor communications, reading, and authorizes no-knock and warrant less searches.

The police in the Third Reich were ''militarized'' literally and figuratively. Police in the United States in the last 20 years have increased their firepower not only through developing special weapons and hostage teams, but in acquiring and using very powerful street weapons. They have vastly increased the range of weapons used from pepper spray to other non-lethal weapons (pepper ball guns, electric stun guns and tasers, plastic handcuffs, etc.). They are now equipped with many types of protective outfits – from Ninja Turtle suits to HAZMAT fully clothed self-contained uniforms – acquired robots for bomb disposal, trained dogs to sniff bombs and drugs, and video surveillance technology. They have been trained with the military, and involved in training police in war zones such as Iraq, Kosovo, and Bosnia. The US Army and the National Guard, on the other hand, have been deeply involved in domestic policing activities in this country and abroad. As Kraska and Kappeler (1993) show, the use of warrants, dynamic entry, SWAT type teams, and mounting ''military operations'' in cities increased in the 1990s.

Profiling, as it is now called, is a reflection in practice of the inequalities in this society. Profiling is commonly called "race profiling," but in fact is the study of differential stops of people of color, the young, and primarily young minority youths at the boundaries of primarily white communities. The controversy arose when it was discovered that Maryland and New Jersey state police officers were stopping drivers on I-95 (an interstate/federal highway that runs from Florida to Maine along the east coast of America) on the basis of a profile, or set of putative attributes based on categories and presumptions, that had been created by DEA to alert officers to possible drug transporters driving south to north from Florida. This led to disproportionate number of stops of black motorists in these states and complaints. A 6-million dollar suit was settled in Maryland. The attorneys general of the two states intervened, required monitoring, and soon discovered that the pattern of differential stops was quite clear. Several New England states (Massachusetts, Rhode Island, and Connecticut) have adopted laws that require police to monitor and report their stops. The data from these studies in many states and cities show that disproportionate stops of people of color are made within big cities; across areas; within smaller cities and towns, and within state boundaries (McDevitt & Farrell, n.d.). They reflect institutional patterns based on habit, past experience of "disorderly" or "high crime" areas, demand for production of traffic stops as an indication of activity; and long standing oral traditions about where to make stops, where the "trouble lies," and what areas are seen as "high crime." These practices are foreshadowing of governing by crime (Simon, 2007), as well as what Hannah Arendt calls policing of "carriers of tendencies" (1985, p. 424), and the policing of the "objective enemy" a category of people "...defined by the policy of the government and not by [their-ed] own desire to overthrow it" (p. 423). Those included in these categories become the targets of symbolic violence in which "...new objective enemies are discovered according to changing circumstances" (Arendt, 1985, p. 424).

CONCLUSION

This chapter is an effort to refine what is expected of democratic policing by describing an extreme example for comparison. Much has been assumed by researchers about policing in the context of stabile political systems and legitimate governments. The idea that the rule of law stands independently of tacit conventions or the idea that law can be used to justify and

rationalize non-democratic policing is not well discussed (but see Horowitz, 2000). The efforts of the NAZI party under Hitler and directed by Himmler to create a centralized police system were dramatically successful. The work, which in effect unified the former state police and the three branches of the central State police (the SS, the State Police – Gestapo and criminal police – and the uniformed police), with the NAZI party and shadowing the central state bureaucracy, was accomplished in 1933 to 1936. The NAZI police system, its structure and functioning, violated eight features advanced as characterizing "democratic police" as an ideal type. It was particularly successful in using law to justify it decisions, terrorist tactics, and targeting categories of people rather than individuals whose actions have broken the law. By blurring the line between order, civility, legality, and ideological and chauvinistic notions of threat, the police became an instrumentality of state terror. Some parallels to recent developments in the United States are noted at the end of the chapter.

NOTES

1. The acronym NAZI is widely used and is probably a pun in German derived from the title of the party in German, the German National-Socialist Workers Party. I use NAZI policing to refer to the forms of policing organized by Hitler, Frick and Himmler, and later Heydrich during the course of the Third Reich. My primary concern here is the period between 1918 and 1935, rather than the later period following the reorganization of 1936–1937 (Browder, 2004, p. 236).

2. Clearly, the socio-political-economic aspects of the collapse of the Weimar Republic (Abraham, 1986) and rise of the NAZI party are beyond the scope of this analysis and the debate about what forces coincided to produce its rise and fall are still in progress.

3. Threats are created social objects used to manipulate public opinion and mobilize citizen morale. As such, their reality is secondary to their perceptible presence. For example, the Jews constituted less than 1 percent of the population of Germany in 1933, yet were used as major threats to the mythical German Aryan culture. In this sense, as Arendt (1985) correctly argues, the Jews as targets were a means to translate a fiction into a reality, one part of an idealized world of belief that formed the ideational basis for the Third Reich. As King and Brustein (2006) argue, the facade of Jewish threat was in one sense only a synecdoche for the threat of increasing social democratic ballot strength. The use of threats as a tool to reconfigure the policing system of Germany has been subject to large scholarly literature including the vast work on the holocaust (see the summaries in Evans, 2005, 2006). The memory of the holocaust and collective memory of the event continues to shape German society (Salvelsberg & King, 2005). The primary analysis of the machinations of the bureaucracy of the Third Reich, by Neumann (1966) and

Chapman (1970, Ch. 8), reveal that NAZI loyalists repeatedly out maneuvered the courts, the civil service, and even the army.

4. Authors of the significant and large literature on the rise of the Third Reich seem compelled to discuss theories of how and why the transformation occurred, and each concludes there is no consensus on the causes of the revolution, the role of Hitler, the place of the bureaucratic in-fighting, psychoanalytic theories based on the personalities, and so on. Then, each proceeds to suggest a quasi-sociological framework presented in a weak way and summarized in the conclusion. See, for example, Evans (2005, 2006).

5. I consider this ironic in the sense that Hitler's moves, once elected and appointed were on the margins of legality since the country was in effect under martial law declared by von Hindenburg. The central role of violence and paramilitary groups is the topic of both of Merkl's fine studies of paramilitary members of the SA (1975, 1987) and Diehl's overview (1977).

6. Browder, in the most succinct and useful overview of the creation of the German police system during this time (2004), uses the term, "The selling of the police state" as the title to his 14th chapter.

7. Koonz's (2003) work, based on detailed historical analysis of Hitler's march through German institutions, science, education, religion, art, music, and literature, presents a wide array of means by which racial purity was produced and promoted through symbolic means – posters, cartoons, films, newsletters and newspapers that elevated certain aesthetic forms, types and appearances, and derogated others. The effort was two-sided – circulating extreme caricatures, cultural icons, of the sought after and of the extruded and excluded. See, for example, the picture on page 19 of a caricatured Jew behind a similarly cast female above a coffin suggesting that the threat of Jewry would lead to the death of the German spirit or *volkgeist*. Koonz's argument is that Hitler and others were promoting a secular ethics of racial purity "…a comprehensive ethical revolution (p. 16)." The police, especially in the uniform of the SS and Gestapo, were on the forefront of this revolution.

8. Liang (1970, p. 96) argues persuasively that Hitler and the NAZI party were very careful to not alienate the police in the late Weimar period. They used propaganda and avoid riotous confrontations, unlike the social democrats and communists. As a result, they were more welcomed as the party began to infiltrate the police in Berlin and police were encouraged to join.

9. The enthusiasm and diligence of this "enforcement" is a variable of course. It is well known that the police do not enforce all the laws all the time or even more than a few (Klinger, 1997).

10. The work of Skogan and associates in Chicago is very promising in regard to increased trust in the police, reduced crime victimization, increased civility of interactions, and joint problem solving is promising, but it is unique in level, detail, time frame, and sophistication of design in studies of the impact of community policing programs. Other careful studies, for example, monographs by Lyons (1999), Herbert (2006), and Fielding (1985) do not report gains in community resilience. Skogan's work and a recent monograph by Weitzer and Tuch (2006) based on national surveys and surveys in Washington, DC, show the striking impact of race, age, and education on attitudes toward and experiences with the police. They do

suggest that changes in police tactics have affected community well-being, social integration, or attachment.

11. The most dramatic example of policy-driven policing that targets areas, persons (gang members are called ''major players'' in Boston and tracked and targeted), particular drugs, or disorders because it makes assumptions about the category of person rather than acts on known and well-analyzed intelligence, increases their probability of arresting certain people by virtue of their color, neighborhood, age, or in recent times, religion. The research of Defleur (1975) and Beckett, Nyrop, and Pfingst (2006) makes clear that the ''targeting'' is based on race, not activity given the contrast between arrest figures and observed distribution activities.

12. One of the most powerful aspects of the NSDP's surge to power was the loyalty of ex-service men in the police auxiliaries, many of them members of the SA, and the insertion of SS members into the police. There is some evidence (Liang, 1970; Merkl, 1975; Browder, 2004) that members of paramilitary groups who served as police auxiliaries prior to the 1934 and the public police in Berlin, did not subscribe to the notion that police were meant to be neutral third-party agents of the state. As noted below, Himmler systematically recruited police officers in the German states and local officials to the SS.

13. Rawls makes abundantly clear that he is engaged in a thought experiment – a what if formulation – and thus does not advocate polices nor speculate about what might be done to produce any given social conditions. His view is that if the principles he sets out obtained would it possible to create a just society. My argument parallels his in the sense that the principles – do not increase inequalities and open positions to competition – set the stage for a consideration of policing at a more abstract level consistent with political philosophy, and would give some distance form the common present assumption that policing should be judged ultimately on whether the officially recorded crime rate dips down for brief periods of time in large cites.

14. The work of Tom Tyler and associates (Tyler, 2006; Tyler & Huo, 2002) on trust in the police and the trust if the police in their own rules and values, and their role in shaping compliance with rules (Tyler, Callahan, & Frost, 2007) are important and indeed ground-breaking. My emphasis is on the ways in which practices, what the police actually do, shapes public compliance and reflects the public's sense fairness and fair treatment. Thus, questions if respect and disrespect between citizens and police are the most important nexus for examining the interactional/attitudinal effects of police practices and the role of attitudes in behavior (see Mastrofski, Reisig, & McCluskey, 2002).

15. A deeper analysis would require a scheme such as that developed by Phillip Selznick in regard to the power of the Russian communist party in governance, *The Organizational Weapon* (1960); Hannah Arendt's masterful *Origins of Totalitarianism* (1985), or Franz Neumann's *Behemoth* (1963). On balance, the finest overview of the emergence and consolidation of the Third Reich is Richard J. Evans' trilogy of which two volumes have been published (2005, 2006). Jean-Paul Brodeur has argued in written communication that the connection between party authority and governance varied in totalitarian states (China under Mao, Russia under Stalin, and German under Hitler). This may be a variable, but the key point is that the lines between governmental authority and party power were sufficiently

blurred to allow each source of power and individuals with roles in both shape decisions that widely affected the citizens of the country without their compliance or consent. Hitler was head of party, head of the state, and the guardian of the Reich (Evans, 2006, p. 43), and loyalty was sworn first to him, not the constitution or the state.

16. I summarize these points from Liang (1970, 1992) and Bayley (1975).

17. Bayley adds that the police were politically utilized without clarifying his remark.

18. My aim is not to explain the Holocaust or the actual day-to-day operations of the German police. Jean-Paul Brodeur (April 4, 2007) has argued (personal communication) that the existence of the holocaust, carried out by the SS-shaped German police and the Army, leaves a ''murderous residue.'' He further opines that the activities of the German police in connection with the annihilation of the Jews are not democratic police functions and thus this case study cannot be a study of democratic policing, even non-democratic policing because extermination of some portion of the body politic cannot be considered governance. The argument of this chapter concerns the transformation process, not the excesses that resulted and raises some questions concerning the present changes in American policing (and perhaps North American policing and policing in the UK).

19. These voluntary groups, many of which were composed of veterans of World War I, were used from time to time, especially in Berlin, between 1919–1933. They survived for various lengths of time until some were disbanded (Diehl, 1977: Appendix). Others were integrated with uniformed police (Westermann, 2005, p. 41) but they continued to be powerful and associated with political parties, social classes, and regions. They were a daunting challenge to as well as a support of the authority and legitimacy of the public police.

20. Compare, for example, Westermann's chart to Hohne's. Hohne's chart is translated into English, is quite extensive as a fold out three pages in the paperback book, and the most detailed and clear of those in the relevant books I have consulted. In respect to the Hohne diagram, because of the use of German abbreviations at the periphery of the chart and the relative scope of the diagram (equivalent to the modern question of ''zooming'' in or out to concentrate or diffuse the interest of the observer), it is difficult to imagine how the topology of the diagram reflects closeness or distance of one unit from another and their actual functions.

21. Even Arendt (1977) in a brilliant analysis of Eichmann's purposes in view of his testimony at his trial, cannot fully account for the logic of the holocaust, and hinges much of her explanation on his efforts to be a good civil servant, getting sufficient trucks available for shipping Jews, making sure the trains had enough capacity, monitoring efficiency, etc.

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PROTECTING DUE PROCESS IN A PUNITIVE ERA: AN ANALYSIS OF CHANGES IN PROVIDING COUNSEL TO THE POOR

Alissa Pollitz Worden and Andrew Lucas Blaize Davies

ABSTRACT

Most criminal justice scholars agree that the past three decades have witnessed a punitive shift in criminal justice policy, public opinion, and political rhetoric. Have these political trends also left their mark on policy approaches to due process rights? The provision of counsel to indigent defendants is a signature issue in debates over due process rights. The Supreme Court expanded dramatically the circumstances under which states were required to provide counsel in the 1960s and 1970s, though decisions about the implementation of this mandate were left to individual states. We examine the evolution of indigent defense policy, at the state and local level, over the past three decades, and ask two questions: First, did policies evolve in the directions expected by reform advocates? Second, to the extent that policies developed differently across states, how can we account for those differences? We find that refomers' optimistic projections about structure and funding have not been realized, and that adoption of progressive policies has been uneven across states. Most importantly, we find evidence that the politics of ideology and racial

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conflict have played a significant role in states' indigent defense policy over the past three decades.

INTRODUCTION

The past two decades have seen considerable attention paid to what David Garland has called "the punitive turn" (Garland, 2001): a pattern of criminal justice policy development beginning in the 1970s characterized by dramatic shifts toward aggressive enforcement and punitive sentencing by criminal justice systems. While the "punitive turn" description is intended to be a general account of criminal justice policies, the evidence adduced has generally come from observations of punishment policies and their consequences. But criminal justice policy encompasses more than punishment. In this paper we examine changes in policy approaches to due process rights during the period of the punitive turn, using state-level policies on indigent defense as a case study. We seek both to shed light upon the development of this understudied policy area, and to expand understanding of the punitive turn itself by evaluating its generalizability across policy areas within criminal justice.

During the 1960s and 1970s, the Supreme Court held that the Sixth Amendment of the United States Constitution implied all indigent criminal defendants facing the possibility of incarceration were entitled to state-provided counsel. Because as many as 80% of felony defendants are unable to afford counsel (Bureau of Justice Statistics, 2001), the form and substance of indigent defense policy defines the quality and character of justice itself in an adversarial system (Scheingold, 1974; Feeley, 1983). The implementation of this mandate, however, was left to the discretion of states, leaving the development of indigent defense programs and policies open to influence from state political environments.

The critical importance of counsel for criminal defendants is uncontested; indeed, Malcolm Feeley maintained, after the conclusion of the "due process revolution," that the development of the Sixth Amendment right was transformative:

> Perhaps the single greatest change in the operations of the criminal courts in the past half century has been the expansion of the right to counsel. Not only has it done the obvious – provided protections for the accused – it has led to improvements in the quality of the work of police, prosecutors, and judges (1983, p. 206).

But for poor people accused of crimes, the right to legal counsel has not always ensured the right to effective representation. Inconsistencies and

inadequacies in service provision to indigent defendants across and within states have drawn the attention of advocates, professional groups, and policymakers, who have argued that the standards of service provided to indigent defendants are unacceptably low (Benner & Lynch, 1973; Bureau of Justice Statistics, 2001; American Bar Association, 2004). Indigent defense programming across the United States has been described as chronically underfunded, staffed by lawyers who lack oversight, training, or professionalism. Meanwhile, these programs impose significant (and sometimes unpredictable) burdens upon state and local budgets, and they compete for scarce resources with other policies and programs related to crime and punishment. As a result, indigent defense policy raises questions about the cost, fairness, and accountability of criminal courts in providing representation to the poor.

This paper charts the development of indigent defense during the era of the punitive turn. We begin with a brief review of the scholarship on the punitive turn, paying particular attention to theoretical accounts of its causes and to discussions in that literature of the impact of these changes on due process policies. We then examine the legal, political, and programmatic context of indigent defense policy in the 1960s and 1970s, noting the optimistic expectations and predictions of reform advocates during that era. Drawing on data spanning three decades, we assess how much progress has been made toward realization of the reform agenda at the national level. Lastly, we draw upon existing research into the political forces within states which have driven punitive policies, and assess the influence of those forces on indigent defense policies at three points in time during that era. Hence, our research addresses two questions. First, did the emergence of consensus on better models for representing the poor presage steady improvements and equality in legal services over time, or did the broader social turn toward harsher treatment of suspects and offenders derail policy changes? Second, did variability in states' political climates explain the indigent defense policies at the outset of the period under investigation, and does that variability account for stability or changes in policies throughout the era?

THE EVOLUTION OF CRIME POLICY: THE PUNITIVE TURN

Garland characterizes criminal justice policy prior to the 1970s as a hybrid "penal-welfare" model (Garland, 1985; Garland, 2001; see also

Duffee, 1990). Criminal justice policy and practice, Garland argues, was largely in the hands of scientists, professionals, and a ''liberal elite'' who were trusted with the authority to diagnose and treat the social problem of crime, and the individual problems of offenders. The state's responsibility was not only to sanction wrongdoers, but also to create social conditions that improved public welfare. In such a context, crime did not preoccupy the public, nor did it dominate public discourse about social problems.

By the 1970s, however, crime rates had begun to rise, and over the next two decades politicians increasingly questioned the criminal justice system's ability to counteract the trend.[1] Debates about the most effective responses to crime moved from the professional to the political realm (Scheingold, 1984; Beckett, 1997; Lyons & Scheingold, 2000; Tonry, 2006), and a cascade of state and federal legislation increased the scope of criminalized behavior, the harshness of punishments, and the costs of criminal justice (Hughes, 2006). Following the passage of *Gregg v Georgia* in 1976, most states reinstated capital punishment, and the number of executions per year rose steadily from 0 to a peak of 98 in 1999 (Death Penalty Information Center, 2007). At the same time, grassroots movements emerged around specific crime policy issues such as registration for sex offenders and increased punishments for habitual offenders. Crime victims and survivors became active political agents, promoting legislative changes in criminal codes and processes (McCoy, 1993).

What accounts for this significant historical shift? Most experts reject the simplest explanation, that increases in incarceration were a direct response to rising crime rates and (indirectly) to public outcries about crime (Scheingold, 1984; Beckett, 1997; Garland, 2001; Tonry, 2006; Zimring & Johnson, 2006). They note that analysis of public polls on crime offer no convincing support for this account, and, further, the markers of the punitive turn continued to escalate long after crime rates leveled off. Garland (2001) offers instead a more complex account. The increase in punitiveness, he argues, was one manifestation of changes among larger economic and social forces that themselves contributed to increasing crime, including the failure of capitalist production to ensure prosperity, increasing levels of social disorganization within both families and neighborhoods, widening gaps between consumers' resources and incomes and their expectations, growing disparity in levels of economic well-being across races and classes, and the emergence of an identifiable welfare class.

Beckett and Sasson (2004, Chapter 4) carry this thesis one step further, suggesting that the shift toward punitiveness also had roots in public (and particularly Southern) reactions to the 1950s civil rights movement,

and politicians' strategic manipulations of these reactions. The successes of the civil rights movement rendered overtly racist political platforms untenable, requiring some conservative politicians to find other ways of voicing their opposition. One such approach was to characterize the movement as permissive and lawless. By doing so, it became possible to voice opposition to desegregation and to the extension of civil rights to African Americans through the ostensibly deracinated language of crime. Racial fears could be reconstructed and recoded into respectable-sounding concerns about criminality, drugs, urban riots, and welfare dependency (Mendelberg, 2001).

Crime was introduced as a national campaign issue by Barry Goldwater in 1964, but its prominence skyrocketed under presidents Nixon and, later, Reagan, both of whom combined rhetoric about crime, drugs, and traditional values into campaign platforms aimed at white working- and middle-class voters (Jacobs & Helms, 1996; Jacobs & Tope, 2007; but see Tonry, 2006).[2] Democratic politicians quickly learned to keep pace with the crime crackdown rhetoric, as evidenced by the Clinton administration's Crime Control Act, which expanded federal criminal law, and created financial incentives for states to criminalize and punish more offenses and offenders.[3] These strategies proved successful, at least for the purposes of launching campaigns and winning elections. They also proved contagious; in many state legislatures and in Congress, politicians competed to claim credit for increasingly tough punishment policies.

Garland (2001) and others have cataloged the consequences of this turn. Garland noted the decline of rehabilitative policies and programming, along with reduced confidence in the professionals who had been responsible for implementing them; the emergence of emotional, public, and punitive discourses on crime; and a "new criminology" grounded in assumptions about individual choice and criminal behavior. The concrete results include higher rates of incarceration and larger numbers of people under supervision; vast increases in the criminal justice infrastructure, including prisons; and the commercialization and privatization of criminal justice functions (Garland, 2001). Beckett and Sasson (2004) emphasized, as well, the reconstructed role for the crime victim, manifested in compensation programs for victimization losses, newly legislated victim rights, and a sympathetic identity for victims in public narratives about crime.[4] Zimring observed that public discourse about crime policy was increasingly grounded in a zero-sum fallacy, in which "all a citizen must do to choose a punishment policy is decide whether she prefers victims or offenders" (2001, p. 147).

In short, scholars have suggested that the policy shifts of the punitive turn were experienced across many domains of criminal justice policy, and they

have often included due process rights in the catalog of consequences. For example, Garland (2001, pp. 12, 98) has argued that it resulted in the "relaxation of civil liberties offered suspects, and rights of prisoners" and attempts to "reverse the 'rights revolution'". Beckett and Sasson argue that the victims' rights movement successfully promoted the interpretation that new protections of defendant rights "had unfairly tipped the balance in favor of criminals," to the detriment of victims (Beckett & Sasson, 2004, p. 141). However, the assertion that state policies defining due process protections were affected by the upswing in punitive policy-making has yet to be empirically tested. The examination of the recent history and politics of indigent defense policy in this paper is an effort to contribute to this underexamined question.

THE EVOLUTION OF INDIGENT DEFENSE POLICIES

The political environment of the 1950s and 1960s provided little warning of the looming changes in crime and criminal justice policy. Instead, the growing interest in criminal justice reform among policymakers and professionals (as well as among academics) focused as much on rehabilitation, equitable treatment, and due process as on punishment. In 1967, the Presidential Commission painted a troubling picture of criminal courts, featuring disadvantaged and uninformed defendants, overtaxed lawyers, rushed proceedings, pervasive plea bargaining, and inequitable sentencing. By the 1960s, social scientists were discovering what courthouse regulars had long known – that many criminal justice agencies routinely operated outside the boundaries of formal law, developed their own sets of informal norms that governed decision making, and did not always behave as procedural and substantive law prescribed. By the 1970s, trial courts were no longer the sole province of legal scholars; they had become the subject of social science researchers' inquiries into processes including plea bargaining, bail setting, and sentencing (Sudnow, 1965; Newman, 1966; Levin, 1972; Frankel, 1973; Clarke & Kurtz, 1983).

At about the same time, the civil rights movement and a series of Supreme Court rulings in defendants' rights cases raised expectations about achieving policy reform through litigation, and reformers turned to the courts, rather than legislatures, to advance the interests and rights of disadvantaged groups (Scheingold, 1974; Handler, 1978; Cavanaugh & Sarat, 1980). Lawyers were recast as advocates not just for individuals but also for groups, causes, and principles, particularly when the issues involved poor

people, racial minorities, prisoners, or other voiceless and repressed groups (Bohne, 1978; Jacobs, 1980; see also Feeley, 1983; Sarat & Scheingold, 1998).

By the late 1960s, these concerns and expectations had converged around the relatively newly established right to counsel for indigent people accused of crimes. By the early 1970s a loose coalition of professionals, policy-makers, and advocates reached agreement on the general contours of a "best practices" model for indigent defense. In this section we briefly review the circumstances that led to that consensus, and take stock of indigent defense policies across the states at that early point in time.

The Right to Counsel and the Evolution of a Reform Agenda

The institutionalization of a right to counsel in state prosecutions began in 1932, when the Supreme Court declared a right to counsel in capital cases (*Powell v. Alabama*, 1932). Historical records confirm that judges in some jurisdictions had made a practice of assigning lawyers pro bono to poor defendants long before this (Special Committee, 1959; Brownell, 1961; McDonald, 1983; Albert-Goldberg & Hartman, 1983), and that by the turn of the century lawyers in ethnic communities had organized programs for providing legal help to new immigrants (Special Committee, 1959). However, *Powell* marked the first time the Court had agreed that when a citizen was haled before a state court, legal representation was a necessity rather than a luxury. In 1963, the right was extended to defendants accused of any felony (*Gideon v. Wainwright*, 1963), and, in 1972, many misdemeanors (*Argersinger v. Hamlin*, 1972). After *Argersinger*, however, the attention of the Court waned. Although it had specified in some detail the circumstances under which indigent defendants were eligible for representation, the Court had not provided instructions about the implementation of this mandate.[5]

An important consequence of the Court's post-*Argersinger* silence was considerable variability in state and local approaches to the implementation of indigent defense provision.[6] The primary responsibility for screening defendants, assigning lawyers and assuring their quality remained largely a local courthouse obligation. Policies on matters such as eligibility, the compensation of lawyers, or the provision of representation in matters not covered by the Supreme Court rulings, to mention but a few, varied across jurisdictions. Early research emphasized the negative consequences of these inconsistencies: many lawyers working in criminal courts, particularly those assigned to indigent defendants, were overworked, burned out, and poorly

compensated at best. At worst, they were incompetent and duplicitous (Blumberg, 1967; Sudnow, 1965; Casper, 1972). Subsequent research has called these stereotypes into question (Snellenberg, 1985; Emmelman, 1993; Weiss, 2004), but has continued to underscore the difficult working conditions faced by defense lawyers for the poor.

In the context of the boon offered to defendant rights by the Supreme Court rulings on the Sixth Amendment, however, reformers were optimistic and quickly began advocating for higher quality indigent defense services and programs.[7] Even before *Gideon*, advocates, professional groups, and policymakers had begun to articulate standards for indigent defense services. By 1956, the National Legal Aid Association (previously concerned primarily with civil legal matters) had established a "Defender Section"; two years later it changed its name to the National Legal Aid and Defender Association (NLADA). In 1959, the NLADA published *Equal Justice for the Accused* in partnership with the Bar of the City of New York, setting out some of the earliest standards for the provision of representation to criminal defendants (Special Committee, 1959). The NLADA also filed amicus briefs in cases such as *In re Gault* (1967) and *Furman v. Georgia* (1972), and published the first *Guidelines for Legal Defense Systems* in 1976 as part of the work of the National Study Commission on Defense Services (National Legal Aid and Defender Association, 1976). In August 1964, the American Bar Association's Standing Committee on Legal Aid Work became the Standing Committee on Legal Aid and Indigent Defendants, and in 1978 the ABA included indigent defense in its compendium of standards for criminal justice (American Bar Association, 1978).

Interest in improving legal representation for poor people also existed within government itself. As early as 1967 the President's Commission called for better services and more funding for criminal defense programs (President's Commission on Law Enforcement and the Administration of Justice, 1967). In 1974, meanwhile, Congress established the Legal Services Corporation to provide counsel and advocacy on civil legal issues, which soon expanded its caseload to include impact litigation on matters of prisoners' rights (Katz, 1982).

The standards promulgated by the NLADA in 1976 and by the American Bar Association in 1978 recommended a variety of approaches to assure quality representation for clients including (but not limited to) reducing defender workload, insuring the political independence of defense providers, mandating attorney training, providing adequate support services, and introducing systems of oversight and monitoring. Subsequent recommendations have closely mirrored these original formulations (e.g., American Bar

Association, 2002, 2004), though some have focused on specific areas such as the attorney–client relationship (Steinberg & Feige, 2002; New York State Defenders Association, 2005) or other issues which have arisen since the 1970s, such as the increasing reliance on contracting for defender services (Spangenberg Group, 2000).

Since the 1960s, the messages from advocacy groups have retained striking consistencies – perhaps signaling that changes have been less swift in coming than had been hoped. First, advocates have called repeatedly for indigent defense services to be delivered primarily through institutionalized public defender offices, staffed by full-time salaried attorneys and overseen by state agencies or commissions (National Legal Aid and Defender Association, 1976; American Bar Association, 1978, 2002, 2004; Fabelo, 2001). Second, advocates have argued that responsibility for funding defender services should not be left to local governments, which are not all equally well situated to provide resources. The NLADA took this position in 1976. The American Bar Association went even further, arguing in both 1978 and 2004 that the federal government should provide assistance.[8] Third, all parties have long agreed that indigent defense services are underfunded (President's Commission, 1967; see also Moran, 1982; Harvard Law Review, 2005). In 1967 the President's Commission on Law Enforcement and Administration of Justice recommended that attorneys be paid fees ''comparable to that which an average lawyer would receive from a paying client'' (President's Commission, 1967, p. 61). Twenty-five years later, the organization expressed its concerns more urgently, arguing that indigent defense in the United States was ''in a state of crisis'' and that funding was ''shamefully inadequate'' (American Bar Association, 2004, p. v).

To summarize: by the 1970s, when the Supreme Court completed its key rulings on the right to counsel in state courts, reformers from advocacy, professional, and government sectors had agreed on the core components of a ''best practices'' model for indigent defense. This model included extensive use of public defender systems to deliver legal services, state-level organization and funding of indigent defense programs, and significantly higher funding levels overall. Reformers were optimistic about the direction of change. However, with no explicit directions from the Court on how to organize and implement programs, state and local governments were left to their own devices. As a result, indigent defense in the early 1970s presented a patchwork of approaches to implementation and funding, with only some jurisdictions adopting the models favored by reformers. We turn now to a description of the diversity of arrangements that were in place by the early

1970s, and an investigation of the evolution of state policies and practices over the subsequent three decades.

Indigent Defense in the 1970s

No reliable data appear to exist on the prevalence of public defender programs in the 1960s or 1970s. According to an early report, before *Gideon*, 16 states did not provide for attorney compensation at all (Special Committee, 1959).[9] In states that did pay lawyers, it appears that appointment was generally by ad hoc assignment, and that courts typically relied on local, not state, tax revenues to fund defense services (Brownell, 1961). The earliest inventory of state policies known to the present authors reported that in 1972, sixteen states had ‘‘statewide’’ programs, though the details of the delivery systems used were not described (Benner & Lynch, 1973). We therefore cannot conclude that these states had adopted public defender models. We note that most of them were small, New England and Atlantic coast states with few jurisdictional divisions in their governments and justice systems.

Regarding funding centralization, more data are available. By 1975, according to records published in the Sourcebook for Criminal Justice Statistics (1977), state governments funded an average of 41% of indigent defense costs statewide, the remainder being funded by local authorities (see Table 1).[10] States varied a great deal on this dimension, however: 14 appropriated no funds at all and a further 13 provided less than 25% of statewide costs. Seventeen states covered over 75% of costs, leaving just 6 sharing responsibility for funding between state and local governments at intermediate levels.

Funding levels themselves also varied considerably across states, and did so independently of the level of state support for the system. In 1975 the average state spent $3.13 per capita on indigent defense (adjusted to 2005 dollars) from both state and local sources. One in 3 states spent less than half that amount ($1.50 per capita or less), while 13 states spent $4.50 or more. The full range spanned $0.14–$14.56, a difference of a 100-fold.

Changes in Indigent Defense Policies: 1975–2005

By the early 1970s, reformers had predicted that states would move toward fully funded, centralized public defender models. Were those predictions

Table 1. Characteristics of Indigent Defense Policies in the States.

Funding	1975	1986	2005
State support: % expenditures provided by state			
Mean	41.5	54.5	67.0
Minimum	0.0	0.0	0.0
Maximum	100.0	100.0	100.0
Total expenditures per capita (state and local) in 2005 dollars			
Mean	3.13	6.26	11.43
Minimum	0.14	1.23	4.00
Maximum	14.56	22.97	40.96
Primary program type	1986	2002	
Public defender	29	30	
Assigned counsel	16	4	
Contract	0	5	
Mixed	5	11	

correct? To begin to answer this question, we must rely on data from several sources, collected at different points in time. The Spangenberg Group published comprehensive studies of state and local indigent defense programs for 1986, 2002, and 2005 (and has continued to gather data on program funding and features since then; Spangenberg, 1988; Spangenberg Group, 2002a, 2002b, 2004, 2006). We rely on these studies to chart the prevalence of public defender models by contrasting data from 1986 and 2002.[11] We do so cautiously, however, noting that data on public defender models may not be directly comparable across these two points in time, insofar as some state and local officials have used the term "public defender" more expansively to cover delivery systems other than those which accord with the organized model recommended by reformers. We also rely on these reports to describe state and local expenditure data for 1986 and 2005 which we compare with the 1975 figures provided above (Sourcebook, 1977).

Table 1 reveals that states' subsidy of indigent defense, as measured by the percentage of total expenditures borne by state rather than local budgets, varied at all three time points from 0 to 100%, but state subsidy of indigent defense has not been static over time. The most important observation to be had from these data is that reformers correctly predicted at least the trend in the balance of state–local funding for indigent defense, which is in the direction of states taking on more responsibility for expenses, rather than further devolution of those costs to localities. However, this shift has not

been dramatic over the past three decades. Table 2 categorizes states based on the level of change or stability in state subsidy of indigent defense between 1975 and 2005, by coding states, for each year, as low state support (25% or less), moderate state support (25–75%), or high state support (more than 75%). Twenty states have assumed full (or nearly full) responsibility for indigent defense throughout this time period. However, 13 states have always left funding entirely up to local governments. Fifteen states have shifted toward higher state subsidies – from minimal or moderate funding, toward moderate or high funding.[12] States that have consistently relied on local revenues to pay for indigent defense include most far western states, and rustbelt states. Most southern states and New England states have either always generously subsidized indigent defense, or have come to do so over time.

Table 1 also reports expenditures per capita (from both state and local sources) in 1975, 1986, and 2005. These figures suggest that (in constant 2005 dollars) expenditures per capita for indigent defense have increased

Table 2. The Evolution of Indigent Defense Policy.

Change in Ranking of Total Expenditures per Capita, 1975–2005	Change in Percentage of Expenditures Borne by State, 1975–2005				
	Consistent low state support (less than 25%)	Moved from low to moderate support (25%–75%)	Consistent moderate support (25%–75%)	Moved from low/moderate to high state support (over 75%)	Consistent high support (over 75%)
Consistently top third	**CA, WA**	**NY**		***AZ***	**FL, NM, DE, MD, AK,** *OR*, **VT**
Rose from lowest or middle	*NE*, SD	OK		***WV, IO*, WI, MN**, MA	**NH**, MT
Consistently middle third	**IL, PA**		GA	***TN***	***VA*, WY, CT, RI**
Fell from middle or high	**NV**, *ID*, MI				NC, ***MO*, NJ, HI**, KS, **CO**
Consistently lowest third	TX, *LA*, MS, *UT*	*IN*, OH	**SC**	***AR***, ND, ***KY***, ME	AL

Notes: Fonts indicate stability or change in dominant public defender model between 1986 and 2002. Plain font represents no adoption of public defender as primary program type, italics indicates movement away from public defenders; bold face italics indicate movement toward public defenders, and bold face indicates presence of public defenders as primary program type throughout these two decades.

substantially – by about 300% in the last 30 years – although the cost to taxpayers of indigent defense remains small in comparison with most other criminal justice outlays.[13] Furthermore, almost every state increased expenditures, although not always in a steady fashion. Over this 30-year period, the average across states for per capita expenditures on indigent defense had risen from $3.13 to $11.43 in constant dollars. Variation across states was still considerable, however. The most extreme values still showed a 10-fold difference (from $4 and over $40 per capita). However, we argue caution in interpreting these changes as significant increases in program quality, since during this period the number of defendants arrested, and deemed eligible for indigent defense, increased substantially (but by unknown degrees); and incarceration rates increased by over 400% during this era (Sourcebook of Criminal Justice Statistics Online, 2006).

We categorized states by coding their comparative increases in indigent defense spending, distinguishing among states that, between 1975 and 2005, were (1) consistently in the lowest tertile, (2) fell from the middle or highest, (3) consistently in the middle tertile, (4) rose from the lowest or middle, or (5) consistently in the highest tertile. These categories are also presented in Table 2. Most states (31) remained relatively stable, 9 fell from one category to the next, and 10 earned a place in a higher category. Most southern and rustbelt states remained in the lowest category, or declined in their rankings. Most states that advanced in the ranking are in the upper midwest.

Next, we take a cautious look at states' utilization of public defender models. The Spangenberg Group conducted national studies in 1986, and in 2002, that estimated the prevalence of service delivery models in the states. We note that many states used a mix of models,[14] and further, that state statutes that specified the use of public defenders might have used that term in different ways. That said, the Spangenberg data suggests that 22 states relied primarily on public defender models throughout those two decades. Eight states replaced other systems with public defenders during this time, while seven replaced public defenders with other program types. Thirteen states maintained assigned counsel or contract programs throughout this period.

A look at the specific states that moved toward public defender systems suggests a geographic trend: Tennessee, Virginia, West Virginia, Kentucky, Arkansas, and Missouri are contiguous rural border states. Lacking more detailed information on the histories of these states' policies, we cannot say whether this commonality is significant. It resembles the kind of geographically based diffusion of innovation first described by Walker (1969; see also Berry & Berry, 1999; Daley & Garand, 2005) – although this still

begs the question of how the process of policy change began. There is less commonality among those states that moved away from public defender models. In these states public defender models were replaced by a mix of program types across jurisdictions, usually involving the adoption of at least some contract programs.[15]

Lastly, we observe that despite reformers' recommendations, there is little evidence that states adopted their reforms as a package. A few states score high on all these dimensions, and have for decades; likewise, a few states are characterized by locally funded, minimally funded assigned counsel or contract programs. But almost every other combination of these three dimensions is represented in Table 2, suggesting that states' policies remain as heterogeneous now as 30 years ago.

What might we conclude from these data? From the reformers' point of view, there is good news and bad news. First, indigent defense expenditures now represent a greater share of state budgets. While one in four states the funding of indigent defense remains largely a local problem, 15 states have significantly increased their share of state funding, 20 states continue to take on most of the financial responsibility, and no state has significantly shifted more of the burden back to local governments. Second, but more ambiguously, expenditures for indigent defense have risen significantly, in real dollars, although not at the same rate in all states. It might be premature to conclude that this increase results primarily from more generosity on local and state legislators' parts, however. During this time, although crime rates peaked and then dropped, incarceration rates rose dramatically, suggesting that indigent defense dollars, while being drawn at an increasingly higher per capita rate from public coffers (and increasingly more from state than local funds), were probably being distributed across a much larger group of clients. Third, it appears that states are no more likely to rely predominantly on public defender programs now than they were 20 years ago. We do not have data on the populations of the jurisdictions served by various program types within states, however, and in many of states mixtures and hybrids of systems are in place, with the result that we cannot tell whether higher or lower numbers of defendants themselves are represented by public defenders now than previously. However, it is certainly not the case that since 1982 most assigned counsel and contract states shifted to public defender programs. Finally, despite reformers' hopes that the "best practices" model would be adopted wholesale, data on changes in state policy suggest that these three dimensions – program type, state subsidy, and expenditure levels – were, and remain, largely independent.

STATE POLITICS AND INDIGENT DEFENSE POLICIES: 1975–2005

Our theoretical point of departure for this study is Garland's account of the punitive turn, which attributes the increase in punitive and repressive crime and justice policies to social, economic, and political forces that have galvanized conservative politics since the late 1960s and early 1970s. By this account, sharp and sustained increases in incarceration, correctional spending, and the use of capital punishment, along with the decline of the rehabilitative ethic, were accompanied by challenges to civil liberties and due process rights. But these national trends mask state-level variation. Our exploration of state policies from 1975 to 2005 suggests that, overall, indigent defense policies have not progressed as expected by early reformers – an outcome that is consistent with the prediction that punitive politics would take a toll on due process as well as sentencing policies. However, we also observe that there has been considerable variability across states in the evolution of indigent defense policy, especially expenditures and state support. Some states have advanced considerably on one or both of these dimensions, while others have not. Subsequent analyses concern only these two dimensions, due to the unavailability of sufficient reliable data on public defender program mandates.

The punitive turn thesis is useful because it directs our attention toward three explanations for policy shifts that are relevant not only to change over time, but to variation across place as well: the ideology of political leadership; public anxiety and tension over race; and states' relative punitivity. We extrapolate from national-level accounts of policy change, note empirical evidence on the influence of these state political characteristics on punishment policy, and develop hypotheses about state variation in indigent defense policy, across states, during this era.

Garland (2001) writes that, at the national level, conservative political leadership increasingly and successfully capitalized on crime issues to retain the support of an alarmed public. During this period, the White House and Congress declared wars on both drugs and crime, increased the scope of federal penal codes, and subsidized both state law enforcement and the development of punitive sentencing codes. Most recently, the Bush administration has continued aggressive enforcement of immigration laws, and has supported legislation that redefines and restricts historical standards of citizens. There is also some evidence that more punitive crime policies are the work of more conservative legislatures at the state level (e.g., Culver, 1999). We hypothesize that the political ideology of state elites is likely to

have shaped the development of due process policies including indigent defense policy.

The most visible manifestation of the punitive turn, of course, has been the tremendous increase in incarceration, an expression of punitiveness that resulted from changes in correctional policy and criminal justice administration, as well as public tolerance of the mounting costs of these policies (McGarrell & Duffee, 2007). Not all states have equally punitive appetites, however. In 1975, states' incarceration rates varied from 27 to 210 persons per 100,000 citizens. Although all states' incarceration rates increased during the subsequent 30 years, the sizes of the increases varied dramatically; some states merely doubled their incarceration rates, while others multiplied by a factor of 10 or more. It is true, of course, that incarceration rates (and other measures of punitivity) are influenced by a state's volume of crime, especially serious crime. But scholars have also attributed variation in regimes' use of incarceration to their social and political cultures, and have begun to try to account for why states vary in their appetite for punishment at national as well as state levels (Newman, 1978; Wilkins, 1991; Barker, 2006). We hypothesize that states whose publics have tolerated (or embraced) the sorts of sentencing policies and practices that create high incarceration rates will be less likely to pursue progressive due process policies, such as indigent defense, which increase the costs of criminal adjudication and create potential value conflicts with punishment goals.

Beckett and Sasson (2004) observe that the acceleration of punishment might not have taken place in the absence of the civil rights movement, which, they argue, stirred racial intolerance and permitted the subtle recoding of racism into the "politics of law and order" in state and national politics. The entanglement of racial animosities and disparities with criminal justice policy is nothing new, of course. After Reconstruction, unauthorized executions – lynchings – were intended to remind African Americans of their vulnerability (Phillips, 1986). In the early 1900s, the jailing of black (and poor white) men served the economic needs for cheap labor in some southern states (Myers, 1993). In the 1800s the disenfranchisement of felons was explicitly justified as a means of neutralizing the "menace of Negro domination" in elections (Behrens, Uggen, & Manza, 2003). Common to these historical observations, as well as Beckett and Sasson's thesis, is the "racial threat" hypothesis, which posits that dominant groups that feel more, or increasingly, threatened by minority groups will adjust their social control of those groups accordingly (Blumer, 1958; Blalock, 1967; Turk, 1969).

The racial threat hypothesis has many variants, and it has been employed to account for changes in policy over time (in response to changes in

perceived threat), as well as across places that vary in racial composition. Whites may perceive large minority populations as a political threat, with the potential to shape elections (Eitle, D'Alessio, & Stolzenberg, 2002; Behrens et al., 2003), or as economic competition, especially in tight times (Jacobs & Helms, 1996; Eitle et al., 2002). Whites may also respond fearfully to the specter of black-on-white crime (Liska & Chamblin, 1984; Eitle et al., 2002). In most of these formulations, the potential ''threat'' has been measured in terms of black population, and empirical support for this thesis has been found in several domains of criminal justice policy.[16] It has been most commonly tested in studies of sentencing, incarceration, and correctional policy (Barlow, Barlow, & Johnson, 1996; McGarrell & Castellano, 1991; McGarrell & Duffee, 2007; Percival, 2007; Myers & Talarico, 1986; Ulmer & Johnson, 2004; Kramer & Ulmer, 2002; Sorenson & Stemen, 2004; see also Jacobs & Helms, 1999; Beckett & Western, 2001; Jackson, 1989; but see Britt, 2000).[17] We hypothesize, therefore, that states with larger African American populations will have begun the punitive era with less progressive indigent defense policies, and will retain such policies throughout the era.

However, the racial threat hypothesis posits a structural effect of racial composition on policy outcomes, leaving implied and unmeasured the mechanism by which racial heterogeneity begets more racially charged attitudes. Further, this thesis suggests a linear relationship between black population and whites' reaction, such that, up to some tipping point, every additional increment of minority population generates proportionately more social control. In studies at the state level, where no state has a black population as high as 40%, one might expect the dynamics of race-motivated policies to have more to do with perceptions than census figures. Hence we also test a slightly different version of the racial threat hypothesis: states where public opinion is more hostile to racial diversity are less likely to adopt progressive criminal justice policies, specifically, stronger indigent defense policies, since such policies might appear to work largely to the benefit of disadvantaged minority citizens (for similar reasoning, see Johnson, 2001; Percival, 2007).

Lastly, we recognize that states vary both in their needs for criminal court representation – the number of eligible recipients – and in their capacities to provide it. Indigent defense is a matter of due process rights, but it is also a policy that redistributes public resources to means-tested disadvantaged clients. Of course, indigent defense differs from many federal mandates regarding redistributive policies insofar as local and state authorities may decide who is (and is not) eligible for counsel, and how much (if at all) to pay lawyers to represent those clients, so we might expect demand and

resources to play limiting but not determinative roles in setting indigent defense budgets. It is impossible to accurately estimate demand for legal services, historically or in the present, since most states do not keep records of assigned counsel. However, it is reasonable to expect that the number of people entitled to free representation is a function of both reported crime and poverty; hence we control for both these variables in estimating the effects of political variables on funding policy. We hypothesize that higher demand for services produces higher levels of expenditures. We also hypothesize that higher demand produces greater pressures on state governments to provide relief to localities (Soss, Schram, Vartanian, & O'Brien, 2001; Kelleher & Yackee, 2004).

We also control for states' capacity to provide services, by including a measure of state wealth. All else equal, states with more resources tend to spend more on redistributive programs (Tweedie, 1994; Koven & Mausoloff, 2002). There is some evidence that wealthier states are also more likely to adopt innovative policies and experiment with reform agendas (Mohr, 1969; Walker, 1969; Berry & Berry, 1999). Therefore, we hypothesize that, all else equal, states with greater economic capacity – wealthier states – spend more on indigent defense.

We predict that the division of costs between state and local governments is also shaped by demand, and that it may influence expenditures. Research on welfare policy suggests that where caseloads are high, states may feel obliged to assume more of the financial burden to relieve overtaxed local governments (Soss et al., 2001; Kelleher & Yackee, 2004). Hence we hypothesize that states facing higher demand for services will accept a higher percentage of expenditures for legal services, relying less on local resources. Finally, because localities compete for valued resources – taxpayers, businesses, employment opportunities – they have little incentive to invest more than the minimum to subsidize needy residents who draw down public support (Peterson, 1981). States have somewhat more elasticity in their budgets (Worden & Worden, 1989). We hypothesize that where state legislatures assume more responsibility for funding programs, overall expenditures will be higher.

To summarize: we hypothesize that indigent defense policy, specifically decisions about the level of state support and total levels of expenditures, are shaped at the state level by the ideology of political leadership, and by a state's punitiveness, and by the climate of racial tolerance or threat. We further hypothesize that a state's level of demand for defense services, and its economic capacity, will influence these policy outcomes. While some of these variables have remained relatively constant at the state level over the course of the punitive turn, others have not. We test these hypotheses

at three points in time (for which comparable data on program funding are available): 1975, 1986, and 2005. Our approach to these analyses is exploratory, albeit guided by the theories discussed above. Adequate data do not exist to permit a rigorous time-series analysis and formal test of our hypotheses about changes over time; instead, we are seeking patterns and comparisons, which may permit us cautiously to draw inferences about the dynamics of indigent defense policy.

DATA, MEASURES, AND ANALYSIS PLAN

We tested hypotheses about political and economic influences on two of the variables presented in Table 3: the proportion of a state's indigent defense expenditures that are covered by state funds, and how much was spent (by state and local governments) per capita on indigent defense overall.[18] Consumer Price Index data were also obtained to render the expenditure figures in constant (2005) dollars (Bureau of Labor Statistics, 2007). We drew on data from multiple sources to operationalize the independent variables, making every attempt to ensure comparable measures for the three points in time. We measured states' economic well-being (capacity) with two estimates of tax capacity per capita: the first, estimated by the ACIR during the 1970s and 1980s, and the second, a parallel measure estimated periodically by the US Treasury.[19] Data on states' poverty rates were taken from the US Census, matching available yearly rates as closely as possible to the dates for which indigent defense data were available. Crime was measured using the Uniform Crime Reports rates for serious violent and property crime. We use these measures as proxies for demand.

We measure elite ideology with a variable constructed by Berry, Ringquist, Fording, and Hanson (1998, 2001) a weighted combination of ideological scores for five key actors in each state's government (the governor, and the two party leaders for each legislative chamber).[20] We reverse the original coding of this index so that higher values represent more conservative ideology. We operationalized a state's punitiveness as its propensity to incarcerate offenders, or the rate of incarceration per capita. When crime rate is controlled in multivariate analyses, incarceration per capita reflects states' relative willingness to use prison as punishment (McGarrell & Duffee, 2007; see also Newman, 1978; Wilkins, 1991).

We included two measures in the models to test the racial threat hypothesis. The first is the proportion of a state's population who self-identified as black or African American in census data most proximate to years for

Table 3. Descriptive Statistics.

	Minimum	Maximum	Mean	SD	Source
Individual poverty rate, 1979	7.83	23.42	12.31	3.43	Census Bureau:
Individual poverty rate, 1986	3.70	26.60	13.89	4.56	Historical
Individual poverty rate, 2002	5.80	19.80	11.69	3.13	poverty tables
Percent African American, 1975	0.16	34.70	8.90	9.09	State Politics and
Percent African American, 1986	0.25	35.96	9.60	9.40	Policy Quality Data Resource
Percent African American, 2000	0.26	36.33	9.94	9.62	Census Bureau
Political liberalism index, 1972	0	86	40.25	21.22	Berry and Berry
Political liberalism index, 1984	13	90	53.81	19.40	(1999) and Berry
Political liberalism index, 2000	0	91	38.80	26.20	et al. (2001)
Incarceration rate, 1972 (per 100,000)	29	174	76.00	35.70	Sourcebooks for Criminal
Incarceration rate, 1986 (per 100,000)	53	447	183.29	82.21	Justice Statistics
Incarceration rate, 2004 (per 100,000)	141	794	391.12	151.08	
Index crime rate, 1972	1436.50	6413.11	3582.30	1202.76	Federal Bureau of
Index crime rate, 1986	2316.68	8228.39	4928.55	1384.14	Investigation
Index crime rate, 2005	1928.40	5351.20	3741.34	948.56	
Taxable resources per capita, indexed, 1975	70.00	153.70	98.97	14.89	Advisory Commission on
Taxable resources per capita, indexed, 1986	65.00	151.00	97.63	18.30	Inter-governmental Relations
Taxable resources per capita, indexed, 2004	67.693	159.615	97.823	17.86	US Treasury

which indigent defense data were available. The second is a measure of public values, which we label "public illiberality." There are no readily available contemporary state-level measures of public racial animosity or distrust. However, two sets of state-level opinion measures have been developed by Norrander (2001) and Brace, Sims-Butler, Arceneaux, and Johnson (2002). These items, extracted respectively from the National Elections Studies and the General Social Survey, were aggregated to the state level over a series of years from 1974 to 1998. The authors of these studies observed that the measures were "remarkably stable" over time (see Brace et al., 2002, p. 181), inasmuch as state values at one year were extremely powerful predictors of values in subsequent years.[21] These measures also predicted policy outcomes at the state level more powerfully than more general measures of ideology or partisanship.

We draw upon these scholars' work to construct a measure of public illiberality, which we hypothesize is negatively associated with progressive indigent defense policies. We conducted a factor analysis of 10 items that were plausibly related to views on race, equality, tolerance, crime, and justice. Five of these produced a single strong dimension that includes attitudes about racial equality, attitudes about affirmative action, tolerance of diverse viewpoints, rating on a liberal-conservative scale, and religiosity.[22] Together, these items produce an alpha of 0.77. We use as our measure of public illiberality the factor scale score comprised of these five items.[23] Higher scores on this measure indicate more conservative, less tolerant values.[24]

Finally, we note that although racial composition and public illiberality are correlated ($r = 0.412$), the former is by no means determinative of the latter. Interestingly, while deep South states score predictably high on the scale, other states with large African American populations do not (such as Maryland and Michigan), and some states with negligible minority populations have very illiberal publics (e.g., Idaho). Hence we are persuaded that both measures merit inclusion, and we return to the implications of using them both in our discussion and conclusions.

Some of the independent variables vary a good deal over time, and across states (such as tax capacity and incarceration rates); and some vary little over time (such as minority population). Some of these measures also covary, and present potential problems of multicollinearity. To assess those potential problems we (1) ran series of models, beginning with a simple equation including only our control variables measuring state demand and capacity before adding political variables, (2) ran collinearity diagnostics on all models, and (3) also re-estimated models after deleting variables with negligible coefficients, to ensure that the results were stable.[25]

The following sections report, for each of these points in time, the results of multivariate models predicting state subsidy of indigent defense expenditures, and total levels of spending (per capita) on indigent defense programs.

FINDINGS

State Subsidy of Indigent Defense

We hypothesized that elite conservatism, state punitiveness, public illiberality, and racial composition would inhibit states' willingness to assume

centralized funding for indigent defense programming, leading them to leave those costs to local governments. We also hypothesized that state support for indigent defense would be associated with higher capacity and demand: states with more resources, as well as those with heavier caseloads, might relieve communities of this burden. Table 4 presents the results of these analyses, for 1975, 1986, and 2005. This table includes information on the statistical significance of coefficients, as an intuitive guide to assessing substantive significance. We note, however, that our data constitutes a universe, not a sample, and by necessity has a small *n*; and therefore reliance on measures of statistical significance for evaluating hypotheses is inadequate (and likely to result in unjustified rejection of hypotheses; see Wright, 2003; Cohen, 1994).

The first column reports the results of ordinary least squares regression for the two dependent variables for 1975. The results suggest that, as of 1975, states' wealth, poverty, and crime made little difference in their

Table 4. State Politics and State Subsidy of Indigent Defense, 1975, 1986, 2005.

	1975		1986		2005: Model I		2005: Model II	
	b (SE)	*β*	*b* (SE)	*β*	*b* (SE)	*β*	*b* (SE)	*β*
Constant	67.643		70.310		55.147		65.707	
	(68.169)		(55.023)		(69.139)		(53.671)	
State tax capacity	0.000	0.003	0.708	0.342*	0.759	0.336*	0184	0.081
	(0.472)		(0.409)		(0.455)		(0.369)	
Crime rate	−0.001	−0.041	−0.007	−0.232	−0.004	−0.101	−0.007	0.163
	(0.007)		(0.006)		(0.007)		(0.005)	
Poverty rate	−2.184	−0.174	−0.928	−0.095	0.487	0.037	1.293	0.098
	(2.941)		(1.838)		(2.707)		(2.105)	
Elite conservatism score	−0.379	−0.194	−0.612	−0.267*	−0.591	−0.373**	−0.237	−0.147
	(0.326)		(0.314)		(0.243)		(0.200)	
Public illiberality	−9.119	−0.213	−0.796	−0.018	14.390	0.349*	12.117	0.294**
	(9.987)		(8.891)		(7.645)		(5.946)	
% African American	1.665	0.351	0.899	0.191	−1.266	−0.294	−1.472	−0.342**
	(1.168)		(0.916)		(0.841)		(0.654)	
Incarceration rate	0.082	0.086	−0.123	−0.232	0.022	−0.089	−0.014	−0.057
	(0.246)		(0.120)		(0.048)		(0.037)	
							0.649	0.676***
							(0.121)	
R^2	0.134		0.265		0.224		0.544	

Note: Entries are OLS regression coefficients. We include indicators of statistical significance: ***0.01, **0.05, *0.10.

willingness to take the financial burden of indigent defense off localities. Likewise, the hypotheses about political variables receive little support. States with more conservative legislatures assumed less state-level responsibility for funding, but this association is very weak. The same is true for one of our hypotheses about racial threat and public illiberality: states whose publics scored higher on the illiberality scale tend to keep indigent defense funding at the local level, although again this association is very slight. Somewhat surprisingly, in 1975, states with higher proportions of African Americans contributed higher percentages to indigent defense, relying less on local governments. Incarceration rates, in turn, had no effect on the likelihood of states taking responsibility for indigent defense funding. Overall, the model explains little variance across states.

The results for the 1986 analysis paint a somewhat different picture. By 1986, crime and incarceration rates had doubled from 1975, and any criminal justice policy may have become more subject to the influences of economics and politics than previously. State economic capacity significantly influenced legislative funding: wealthier states contributed more to indigent defense while poorer states relied more heavily on local budgets. Further, states with higher crime rates left communities to pay for a higher proportion of indigent defense, in contradiction to our prediction that states with higher demand for indigent defense would pick up more of the tab for these programs. States with more conservative political elites continued to contribute less to indigent defense costs; and the positive association between the proportion of African Americans and state subsidy carries over from 1975. However, our measure of public illiberality plays no role in this policy outcome by 1986. Importantly, at this key point in the acceleration of incarceration, more punitive states (those with higher incarceration rates) invested less in indigent defense, suggesting that where the punitive turn took strongest hold, defendants' right to counsel became a low priority in statehouses.

By 2005, state wealth remained a significant influence on state subsidy of indigent defense, although our proxy variables for demand for services played a negligible role. States with conservative elites continued to leave a greater share of funding to local governments. States with fewer African American residents did likewise, in contrast with the predictions of the racial threat hypothesis; and by 2005, in contrast with our predictions, states with more illiberal publics took on more responsibility for centralized indigent defense funding.

In short, the models accounted for more variance in state subsidy of indigent defense in the 1980s and recently (compared with 1975). Of course,

indigent defense had emerged as a permanent, and growing, budget item for states and local governments by the 1980s, perhaps catalyzing a different set of political concerns that those that shaped policy in the earlier years. State wealth became a more reliable predictor of state subsidy; it was a modest influence on centralized funding by the 1980s, and remained so 20 years later. Our proxy measures for demand failed to exert any sustained effect, in contrast with the findings of welfare politics studies. Liberal governing institutions appear to be responsible for movement in the direction of greater state funding, a finding consistent with our theoretical prediction. The racial threat hypothesis, however, finds support (albeit mixed) in these analyses only long after indigent defense had become institutionalized as a policy issue: in 1986, our measures of racial heterogeneity and public illiberality played no role in the model, but by 2005 higher proportions of African Americans were associated with lower levels of state support. However, contrary to our predictions, states that scored high on illiberality spent proportionately more state than local resources on this policy issue. Finally, there is no evidence that states' punitiveness, as measured by incarceration rates, is associated with state support for indigent defense.

In order to further interpret these findings, we attempt to identify the variables that accounted for shifts in support between 1975 and 2005. We recollect that states' values on this variable varied greatly in 1975, although our political and economic hypotheses failed to explain much variance at that early point. Subsequently, on the matter of state support for indigent defense, states either stayed in place (continuing to contribute a low, or high proportion of total funds), or else advanced their subsidy of programs-no state backslid on this variable over this period. Therefore, we analyze 2005 data again, including a control for 1975 state support. The last column (Model II) presents this analysis. States that shifted their funding toward state, away from local, sources over this time period, therefore, are those denoted by variables that appeared significant in 2005 (Model I).

The most striking result is revealed by the variance explained: simply by controlling for state subsidy from 30 years previous, Model II more than doubles the explained variance over Model I. This suggests great stability over three decades, despite the fact that the policy in question is one that had scarcely been fully established in 1975, and has been the subject of considerable debate ever since. However, the results also suggest that the impact of public illiberality and minority population remained distinctive in 2005, three decades after policies first started to settle on this issue – but not completely the way theory predicts. More illiberal states subsidized indigent defense more, although states with larger minority populations remained

regressive on this issue (or, to put it another way, more liberal publics stayed in place, while largely white states invested more, centrally, in indigent defense).

These findings are partially compatible with our predictions, although they suggest more complex dynamics than we are able to explore with these data. At the risk of oversimplifying, we might cautiously conclude the following: First, shortly after indigent defense became a visible policy issue, the division of funding between state and local governments was only weakly associated with economic and political variables – perhaps in part because the politics of indigent defense were in their infancy in statehouses. As caseloads rose, however, states' willingness to take on financial responsibility (and perhaps local governments' demands that they do so) became a matter of political debate but also of economic necessity. Once established, these patterns remained in place for decades. However, shifts toward state subsidy since then are significantly associated with variables related to race.

The mystery remaining is this: why did states with illiberal publics increase their centralized funding for indigent defense, while states whose publics scored lower on this scale stand still? We recollect the earlier findings about the adoption of public defender programs, which occurred, during the era covered by our study, in border states. Setting aside the quantified results of hypothesis testing, we observe that some of the shifts toward state funding occurred in the same states: Kentucky, Tennessee, Arkansas, Missouri, West Virginia. (Adjacent states – Indiana, Ohio, Iowa, Oklahoma – add to this pattern.) It is possible that the adoption of public defenders is linked with increases in state support. Perhaps these trends track together. We cannot explain, however, why this pattern is at least in part attributable to border states, and can only conclude that a clearer understanding of this must await a more nuanced analysis of state legislative histories.[26]

Indigent Defense Expenditures

Table 5 presents results of analyses of indigent defense expenditures. In 1975, a state's economic capacity, crime rate, and poverty rate explained a substantial amount of variance.[27] As predicted, states with more resources, and potentially higher indigent caseloads, spent comparatively more on indigent defense. These effects remain substantial and steady with the addition of political variables. Elite ideology played a minimal role in setting expenditures. However, there is some support here for the racial threat

Table 5. State Politics and Indigent Defense Expenditures, 1975, 1986, 2005 (2005 Dollars).

	1975		1986		2005: Model I		2005: Model II	
	b (SE)	*β*	*b* (SE)	*β*	*b* (SE)	*β*	*b* (SE)	*β*
Constant	−12.226		−7.130		−9.495		1.242	
	(2.456)		(3.951)		(9.639)		(7.830)	
State tax capacity	0.083	0.549***	0.067	0.346**	0.109	0.327*	0.032	0.096
	(0.017)		(0.030)		(0.065)		(0.053)	
Crime rate	0.001	0.370***	0.001	0.173	0.001	0.108	−0.001	−0.117
	(0.000)		(0.000)		(0.001)		(0.001)	
Poverty rate	0.331	0.449***	0.191	0.210	0.509	0.262	0.366	0.188
	(0.105)		(0.130)		(0.375)		(0.295)	
Elite conservatism score	−0.015	−.132	−0.001	−0.004	0.010	0.043	0.007	0.031
	(0.012)		(0.023)		(0.036)		(0.028)	
Public illiberality	−0.642	−0.255*	−1.596	−0.387**	−2.328	−.383**	−0.689	−0.113
	(0.359)		(0.626)		(1.102)		(0.919)	
% African American	−0.045	−0.161	−0.123	−0.278*	−0.131	−0.207	−0.048	−0.076
	(0.043)		(0.065)		(0.119)		(0.095)	
Incarceration rate	0.008	0.145	0.013	0.269	0.002	0.045	−0.003	−0.070
	(0.009)		(0.009)		(0.007)		(0.005)	
State subsidy (current year)	0.012	0.211**	0.005	0.050	0.025	0.171	0.024	0.161
	(0.005)		(0.011)		(0.021)		(0.017)	
State subsidy 1975							1.667	0.692***
							(0.322)	
R^2	0.690		0.594		0.333		0.601	

Note: Entries are OLS regression coefficients. We include indicators of statistical significance: ***0.01, **0.05, *0.10.

hypothesis: illiberal states spent less on indigent defense per capita, as did states with more African American residents (although this association is quite modest). As predicted, where state governments took on a greater share of costs, expenditures were higher.

Similar patterns hold in 1986: wealth, crime, and poverty exert positive effects on overall spending, although the latter two factors have diminished considerably. Cost sharing between state and local governments exerts a negligible effect on total expenditures, counter to our expectations. States that relied less on local funding sources also spent more, although the association is very small. However, although elite ideology remains inconsequential for predicting expenditures, the roles of race-related variables become more substantial: states with more illiberal citizens, and with more black citizens, spent less.

In 1986, states that incarcerated at a higher rate also spent more per capita, a finding contrary to our prediction that more punitive states would give short shrift to indigent defense. However, given the fact that incarceration rates had doubled between 1975 and 1986 in many states, it is possible that this variable is simply capturing differences in levels of demand for indigent defense services. Our original measure of demand, reported crimes, may not approximate actual caseload levels within states as well as incarceration rates themselves – the latter having originally been proposed as a measure of state punitiveness. To the extent that states imprisoned more people, net of crime rate, than they had in the past, they may have experienced greater obligations to provide counsel for felony prosecutions.

In 2005, the pattern is again similar (Model I). Resources (and to a lesser extent, the poverty rate) drove expenditures, as we expected. The ideological atmosphere of the statehouse played no significant role. The racial threat theory again receives support, particularly from our measure of public illiberality. Although incarceration rates had continued to rise, the rate of growth was less exponential during the intervening 20 years than it had been in the preceding 10. However, it is noteworthy that while these patterns remain fairly stable across decades, the 2005 model explains only half the amount of variance accounted for by the 1975 model.

To summarize, throughout the punitive turn, total expenditures on indigent defense were shaped by resources and demand (tax capacity, crime rate, and poverty rate). As we hypothesized, however, states that relied less on local government funding spent slightly more money per capita on indigent defense. Although the ideology of political elites played a negligible role in shaping expenditures, the politics of race is important. The results suggest that both racial composition and public illiberality are associated with lower rates of spending on indigent defense, all else equal.[28]

Again, we consider the possibility that the dynamics of indigent defense funding changed during this era. The last column of Table 5 models indigent defense expenditures per capita in 2005, controlling for expenditures in 1975. This model explains a good deal of variance in 2005, but requires little more than one variable to do so: levels of expenditures 30 years before, in 1975. (The correlation between 1975 and 2005 figures is 0.715.) The magnitudes of the economic and political coefficients dwindle accordingly. We can only conclude from these findings that while in the early years of the punitive turn the politics of indigent defense funding was the politics of race and public illiberality – a fairly durable sort of politics – at present the politics of indigent defense funding is the politics of incrementalism rather than innovation.

We are cautious in drawing conclusions about the implications of these findings for understanding the punitive turn and its effects, at the state level, on indigent defense policy. The most conservative inferences to be made are (1) that states' economic capacity and demand for services predictably shaped expenditures shortly after indigent defense was institutionalized as a federalist policy problem for state and local governments; (2) that by the 1980s, the politics of indigent defense was infused with the politics of race and public values, and (3) that these patterns persist to the present.

DISCUSSION AND CONCLUSIONS

We interpret our findings with the caution that should accompany any research that relies on archived data. First, our measures of some key variables are limited. For example, our measures of demand for defense services include crime rate and poverty rate, which are at best proxies for caseload. An ideal measure of caseload would incorporate not merely numbers of clients, but adjustments for case difficulty, appeals, and the like. Further, it remains the case that while crime first rose, and then declined throughout the time period we studied, arrests and prosecutions for some crimes, particularly drug crimes, have increased, so the number of arrestees eligible for defense services is unknown.[29]

In particular, our findings suggest that public opinion about race may be important, and proxies may be suboptimal substitutes in testing theories about racial politics. We allow for the possibility that the same may be true in estimating the influence of public punitiveness – an attitudinal construct – by relying on measures of system practices – incarceration rates – although a thorough discussion of this issue is beyond the scope of this paper. In keeping with the tendency in extant literature, we measured punitive orientation using incarceration rates while simultaneously controlling for crime rates. Yet, contrary to our predictions, incarceration rates did not prove strongly predictive of low investment in indigent defense, suggesting either that state punitiveness and due process orientation are unrelated, or else that incarceration rates are not a satisfactory measure of punitive orientation. The latter possibility appears particularly likely in the context of this study given the inclusion of a measure of public illiberality in our model. Although originally included as a proxy measure for racial intolerance, it could be that public illiberality is a finer measure of punitive policy direction than the incarceration rate itself. If this is so, it would seem to suggest both that, in the present study, the incarceration rate should be

interpreted as a measure of demand for indigent defense services, but also more broadly, that scholars should in the future consider the importance of attitudinal measures in approaches to state-level punitiveness.

Second, we are obliged to draw inferences about decisions, and decision processes – moreover, at multiple levels of government – from outcomes data. The vast majority of jurisdictions initially experienced *Gideon* and its aftermath as a local courthouse and budgetary problem, not as a state responsibility, and adapted in various ways. Some states took on varying levels and types of responsibility for consolidating the provision of counsel, but we cannot know from our data exactly what political processes produced these shifts. We can document that they occurred sometimes, but not always, and in some states, not others; and we can offer observations about the general economic and political conditions that did (or did not) seem to matter. A next line of research (and one that would more completely fulfill the expectations for a genealogical study) would be case studies of state and local policy changes.[30]

Third, we cannot test an implicit and important assumption of the reformers' "best practices" model: that the model in fact would produce better outcomes for defendants. The past 40 years of research have produced many attempts to compare the relative merits of publicly paid and privately retained counsel, as well as attempts to evaluate the relative efficiency and effectiveness of service delivery models for indigent defense.[31] These studies have produced no conclusive answers, however, in part because of the difficulty of measuring effectiveness of counsel, and, within states, the limited variability across jurisdictions (particularly regarding funding rates). The findings, therefore, tell us more about the politics of indigent defense reform than about measured changes in quality of services for defendants.

With these caveats in mind, we review our findings, with the dual objectives of understanding the politics of indigent defense policy, and making a contribution, albeit a modest one, to the literature on the punitive turn. We observe that, at the aggregate level, indigent defense programs have not advanced very much from their origins, and certainly not as much as early reform architects had hoped. To the extent we could map changes in the use of public defender models, we found little evidence that states have moved in that direction. The balance of state versus local support for indigent defense budgets has shifted to the former, as reformers recommended; but while that shift has alleviated the uncertainty of some local governments, it has not resulted in better funding for programs overall. And while total expenditures have indeed increased, it is not at all clear that

this increase is net of increases in caseload and case complexity. Indigent defense policies may not have backslidden during the punitive turn, but neither have they evolved in the directions recommended by reform advocates.

At the state level, we noted evidence that the pace of the punitive turn varied, and we proposed that the purported causes of the turn at the national level would play out differently at the state level, resulting in different patterns of policy evolution. Specifically, we hypothesized that conservative lawmakers, illiberal publics, racially divided publics, and punitive regimes would maintain minimalist defense programs; liberal lawmakers, publics relatively free of racial tension, and less punitive regimes would be more likely to follow the reform path laid out in the 1960s and 1970s. We find some evidence to support the expectation that some states' political climates may have insulated them from punitive national rhetoric and recommendations.

Wealthy states (those with higher tax bases) adopted elements of the reform agenda at an earlier point in time, a finding consistent with welfare policy literature that reports more state assistance for the poor in states with more slack resources. Predictably, expenditures are a function of poverty and crime, as well. As caseloads rose in the 1980s, liberal lawmakers were more likely than their conservative brethren to increase the proportion of state monies to cover expenses, although they were no more likely to contribute to meaningful increases in total expenditures (nor did greater state subsidies result in bigger total budgets). We speculate that the 1980s move toward devolution, from federal to state and from state to local governments, was quite compatible with conservative lawmakers' views about who should pay for legal services, but liberal lawmakers resisted this trend as indigent defense placed greater strains on county budgets. We find little evidence of a direct tradeoff between punishment practices and due process at the state level in these findings, however, our measure of punitiveness plays a negligible role in these analyses.

The most important observation to make, however, involves indigent defense expenditures and race. Our test of the racial threat hypothesis entails two measures, proportion of the population that is African American and a scale of public illiberality. Both are stable over time. As hypothesized, states with larger minority populations spent less on defendants' legal services throughout this era. States whose residents are less tolerant of diversity, including but not limited to racial diversity, likewise spent less. This suggests that the recoding of race issues into crime issues from the 1970s to the present may have had far-reaching effects on public thinking about criminal justice, particularly since the effect of this variable increases somewhat over

time. Our data do not permit us to search for a direct link between public attitudes and budget making, but at the margins, increases in expenditures may be possible only in political climates that are not suffused with racial distrust and animosity. Elsewhere, perhaps, the best that can be hoped for is that expenditures will remain constant and not decline.

In conclusion, we offer three observations and suggestions for future research. First, while scholars analyzing the punitive turn reasonably have tended to pay attention to variation in punishment policies and practices, we ought also to look for evidence in other domains of criminal justice, such as due process, rehabilitation, and restorative justice, where the turn historically collided with reformers' optimism about improving justice systems through closer attention to defendants' rights and offenders' reintegration. One might expect that evidence of the turn, in these domains, would appear not in the form of dramatic legislation or sharp turnabouts in policy and practice, but rather, in the more subtle and dispiriting stalling out of promising innovations.

Second, our exploration of the political climates associated with indigent defense policy offers enough evidence of state-level variation to invite more intensive study of the politics of due process policies more generally. It appears, at least for determining expenditures, that public values matter. We cannot explain precisely why, particularly when elite ideology seems to play little role. Interest groups, professional advocacy organizations, and organized agency interests may be responsible for pushing forward a reform agenda. Their absence from a political stage may ensure that little progress is made, but when present, their success may hinge on the political climate. Further, significant changes in programs may result not from legislative action but rather, from judicial decisions at the state level. There is enough evidence in these results to justify a closer inquiry into states' political narratives.

Finally, social scientists ought to be mindful of the potential for policy shifts in any direction other than that to which they have become accustomed in the last three decades. Over 20 years ago, Scheingold suggested that the meteoric rise in incarceration might be near a peak:

> ... the law-and-order tide may be turning, but for pragmatic rather than principled reasons. It certainly would be unrealistic, at least in the short run, to expect any changes in the punitive policy preference of the general public. If, however, it becomes increasingly less attractive, even for fiscal reasons, to campaign on get-tough anticrime platforms, the political climate may cool significantly. The ensuing depoliticization of crime will put policy back in the hands of the criminal process professionals. Without the intense public scrutiny that has characterized the last twenty years, the professionals can be expected to lead a retreat from the puntitive drift of recent years. (Scheingold, 1984, p. 231)

At the time of this writing, executions have dropped, and many states are revisiting their capital punishment statutes; incarceration rates are stabilizing; and some of the harsher manifestations of the punitive turn, such as juvenile waivers to adult court, are being called into question. Tools that were created to combat crime, such as DNA analysis, are being used to exonerate the falsely convicted. While Scheingold may have misjudged the timing, he may have been correct in suggesting that public policy might return to more moderate positions after its immersion in punitiveness, or might take on a new set of priorities altogether. If the politics of due process, like the politics of punishment, are the politics of public values, contemporary scholars would do well to develop the theoretical linkages that might help predict progressive as well as regressive shifts in public policy.

NOTES

1. Criticism of 1970s policies came from diverse sources. Among some academics, support for the rehabilitative ideal fell away (Martinson, 1974), as its natural liberal allies began to question the legitimacy of the indeterminate sentencing which the treatment model required (Greenberg & Humphries, 1980). Two alternative models emerged, often in conflict: just deserts advocates favored carefully measured retribution in the hope that by emphasizing the question of desert, the excesses of rehabilitation could be avoided (von Hirsch, 1976; von Hirsch & Ashworth, 1992), while conservative critics argued for harsh sanctions to deter and control dangerous and deviant behavior (Wilson, 1975; Van den Haag, 1975).

2. This conflating of race, disorder, and crime was an important piece of the "southern strategy" that resulted, ultimately, in the partisan realignment that cracked the post-war Democratic coalition of union members, southerners, and northern liberals; within two decades much of the universally Democratic south was governed by conservative Republicans at state, and eventually local, levels, and southern voters reliably supported Republican Presidential candidates.

3. Examples include: expansion of the applicability of the federal death penalty, creation of 50 new federal offenses including gang membership, enhanced protections for rape victims, providing grant money for more aggressive local and state prosecutions of domestic violence charges, authorization for hiring 100,000 local police officers, and licensing the use of boot camps for delinquent minors.

4. Garland's account has been criticized on several points (see Brown, 2006; Matthews, 2005; Zedner, 2002), and it is not the only account of the changes in criminal justice systems in the 1980s. Though some have cautioned against "dystopian" discussions of penal punitiveness, and others have dismissed the phenomenon altogether, neither such counter-argument seems to have had much effect on the prevailing opinion of increasing harshness (Matthews, 2005; Zedner, 2002). For example, Feeley and Simon (1992) emphasize internal and institutional

forces, such as the displacement of rehabilitative goals with managerial goals in corrections, to explain these changes. The fact remains, however, that all indicators point to a sharp increase in the use of the criminal justice apparatus as a reaction to social problems.

5. The partial exception to this characterization of the Court's follow-up is *Strickland v. Washington* (1984) in which a two-part test was specified to assess whether the representation provided to defendants had been "effective," and not merely token.

6. An important and, to the authors' knowledge, largely unexamined question is why the Court had so little to offer states regarding the form and funding of counsel. That question is beyond the scope of this paper. However, Scheingold (1974, Chapter 8) offers some thoughtful hindsight into this general problem, observing that, by definition, if a right was established through litigation it probably faced entrenched resistance, which was unlikely to abate following a ruling; and that courts were ill-suited to oversee compliance with rights rulings.

7. After decades of crime control rhetoric and policy, it is somewhat difficult to imagine the chipper optimism that accompanied the legal rights movement. As early as the1950s, Harrison Tweed, then president of the National Legal Aid Association, was of the opinion that "The Legal Aid tide is on the flood....we cannot fail if we put our shoulders to the wheel" (Brownell, 1961, p. 15). A decade later, the President's Commission had resolutely addressed indigent defense as a practical problem that could be resolved with more data and funding (President's Commission, 1967).

8. For the most part, this suggestion fell on deaf ears, and federal funds have not been used to subsidize state indigent defense costs. However, the call for federal subsidy of public defender programs was resuscitated in 1998, when a Department of Justice report called for greater "collaboration" between prosecutors, public defenders, and other members of the court, in the development of crime-fighting innovations such as drug court treatment programs and gang suppression strategies. The report went so far as to recommend the use of Byrne grants to public defender offices that agreed to work cooperatively with the criminal justice system (Bureau of Justice Assistance, 1998).

9. These are primarily southern states, but notably also include New York, Massachusetts, Pennsylvania, and New Jersey, as well as Utah.

10. Data on state and local expenditures were originally gathered through "the joint efforts of the Law Enforcement Assistance Administration and the U.S. Bureau of the Census," based on surveys of all states, all county governments, all municipal governments with populations (1970) of 10,000 or more, and a sample of municipalities with smaller populations; results were weighted to create estimates for all municipalities (Sourcebook for Criminal Justice Statistics, 1977, pp. 42, 48–63).

11. Data from the Spangenberg study cited here were supplemented by some independent research into defense delivery systems across states in 2002. A list of sources is available from the authors.

12. Two states – Georgia and South Carolina – have had inconsistent funding patterns. Georgia moved from funding about 40% of expenses in 1975, to minimal state support through the next three decades, to 40% in 2005. South Carolina's state funding fluctuated from a high of 67% to a low of 43% in 2005.

13. For example, while on average the price (to taxpayers) of indigent defense per capita was $6.00 in 2002, the per capita cost of welfare programs was $118, and for corrections, $780 (United States Census Bureau, 2000).

14. States that have not legislated a single standard service delivery model exhibit a wide array of mixes. Some prescribe public defender programs in urban areas, but leave smaller jurisdictions to their own choices. Others simply leave the decisions to local governments, which make various choices about program types.

15. We note that six of the seven states that turned away from public defender systems (Oregon, Idaho, Utah, Nebraska, Indiana, Massachusetts) had not been identified by the NLADA 10 years earlier as being state-centralized programs. This suggests the possibility that state-level organization may be associated with the persistence of public defender models over time.

16. An illustrative, but by no means comprehensive, set of examples: police use of force (Chamlin, 1989); arrest rates (Brown & Warner, 1992); disenfranchisement of felons (Behrens et al., 2003).

17. This hypothesis has found some support at the state level in the context of welfare policy: states with more minority citizens provide fewer welfare benefits and more restrictions on eligibility (Soss et al., 2001; Gilens, 1999). Indigent defense is a matter of due process, but it is also a redistributive policy with means testing. Arguably, in the (white) public mind, race is even more linked to criminal behavior than to welfare eligibility, so we speculate that indigent defense policy might be particularly vulnerable to race politics.

18. There are other measures that might have proven useful, were they available. Comparable data on caseloads is not readily available (but see Strickland, 2005). Moreover, because expenditures per case probably do not reflect policy choices about allocations to defendants (especially in states where costs are shared or primarily borne locally), and reflect averages across jurisdictions, it is not the most theoretically useful variable for our purposes here. A second measure might be a proxy version of the first: expenditures per crime. We estimated this measure using UCR data on index crimes; it is correlated at above 0.700 with the variable we did employ, expenditures per capita, for each year. We conducted analyses using both these dependent variables, and they produced substantively similar results (available from authors on request).

19. This measure of capacity directly compares states in each year, by establishing an index value for each state that is the state's proportion of the average for that year, which is set at 1.00 (so, e.g., a state with 120% of the average taxable resources for all states would have an index value of 1.20). Some state policy researchers have relied on proxy measures of citizen wealth to capture capacity, such as median household income (Koven & Mausoloff, 2002) or expenditures (Miller, 1991). However, median values say little about distributions (a state might have many extremely wealthy residents but also many working class residents), and more importantly, states tax many commodities and activities other than personal income. Further, states and localities are obliged almost without exception to produce balanced budgets (National Conference of State Legislatures, 1999), which means that governments at those levels can spend only what they can take in. Therefore, although governments are obliged to provide legal services to indigents, they may (and, we predict, do) adjust their spending depending upon the amount of money available. From a theoretical perspective, therefore, expenditures in any policy

domain or program area (adjusted for state size or population) is a more meaningful measure of a state's commitment to that policy in the context of the funds available for all policy areas (McGarrell & Duffee, 2007; Guetzkow, 2004); and, for example, research in welfare policy has found that expenditures are more closely related to state wealth than to measures of citizen wealth such as the cost of living or median income (Tweedie, 1994; see also Jacobs & Carmichael, 2001).

20. Berry et al. (2001) also created a measure of citizen ideology, for the 1960s through 2000. This measure is rather highly correlated with their measure of elite ideology in the earlier years of this study (above 0.700), but the correlation diminishes by 2000 (to 0.343). Because our hypotheses emphasize the importance of legislators' views on due process, on a policy matter that would typically be of very low visibility and salience to the voting public, we elect to use the elite ideology measure for the analyses. For parallel analyses, see Songer (2000) (as cited in Benesh & Martinek, 2002).

21. For additional data on the stability of attitude constructs over time, see McIver, Erikson, and Wright (2001). The virtue of combining data over years comes, of course, from the larger *n* obtained from each state.

22. The factor analysis produced a primary factor with an eigenvalue of 3.277. Factor loadings for the five most significant variables were (1) racial tolerance: 0.877, (2) general tolerance of diverse or minority viewpoints: 0.928; (3) attitudes toward affirmative action: 0.689; (4) ideological self-placement: 0.847; and (5) religiosity: 0.675. Variables that did not load on this factor, and did not comprise clearly interpretable scales, included items on feminism, welfare, party identification, and two items on capital punishment.

23. The importance of the religiosity variable in our measure of illiberality merits a bit of reflection. The GSS measure of religiosity included one's assessment of how religious one is, and the frequency with which ones prays and attends church. In discussing international variability in incarceration rates and capital punishment, Wilkins observed that historically, many religions have served the dual social purposes of reinforcing beliefs about behavioral norms and simplifying believers' need to distinguish right from wrong, and hence good from bad people (Wilkins, 1991). The 1980s in particular was a decade in which Republican politicians linked policy views tightly to conservative religious perspectives, and conflated crime with irresponsible, sinful, and irreverent behavior. So we follow the lead of other scholars (Jacobs & Carmichael, 2001; Greenberg & West, 2001; Morgan & Anderson, 1991) who suggest that measures of religious adherence might predict endorsement of repressive criminal justice policies.

24. We considered alternative measures of public values linked to conservatism. Some scholars have employed Berry's measures of citizen ideology (Berry et al., 1998), but its construction has been criticized as derivative of elite opinion, not public opinion (Norrander, 2001). Those measures are correlated with our illiberality variable at 0.69 (1972), 0.45 (1984), and 0.43 (2000). In preliminary analyses, we also considered Elazar's classic conceptualization of political culture (Elazar, 1984). Empirically, Berry's measure of public liberalism is correlated with Elazar's culture measure at the state level: individualistic states are more liberal than moralistic states, and moralistic more so than traditionalistic states. It is likewise correlated with our measure of public intolerance (in the same pattern). We elect to use the more direct measure of public opinion, given our interest in the racial dimension. We also note that a more specific measure would have estimated the illiberality of white respondents; Percival (2007) has reconstructed one measure of this sort, using

one of the GSS items; unfortunately those data were not available to the authors at the time of this writing.

25. For all analyses, tolerances ranged from 0.32 to 0.74, and variance inflation factors did not exceed 2.9. More significantly, when models were run including only variables that exerted a substantively significant effect in the original equation, coefficients and explained variance were nearly identical.

26. We considered one hypothesis: these border states, motivated to reinstate capital punishment, felt obliged to create reputable defense systems to fend of, or respond to challenges from, appellants in capital cases. However, a cursory analysis offers no support for this hunch: neither the date of reinstitution, nor the date of first execution, sets these states apart from others.

27. Regression analyses including these variables alone for the 1975 data produced an R^2 of 0.58.

28. At first this might seem like an untenable finding, since it is often assumed that southern states are both most racially intolerant and most heavily populated with African Americans. However, these are distinct constructs. These data suggest that states in the far west (e.g., Idaho, the Dakotas) and border states have small black populations, but comparatively intolerant publics. On the other hand, some east coast (e.g., Maryland, Connecticut, New Jersey, Delaware) and industrial states (e.g., Illinois, Michigan) have substantial minority populations, but tolerant publics. Of course, one confounding issue in this measure is that to the extent African Americans were respondents in the surveys that provided these measures, they were unlikely to express racially intolerant views. Recently, Garrick Percival has identified and attempted to remedy this problem (Percival, 2007). His data were unavailable for this study. At a minimum, however, this makes the intolerance measure a conservative one.

29. Our confidence in the dual use of crime and poverty as indicators of demand is bolstered by a study of Georgia's 159 counties, for which caseload data were available; poverty and crime together explained 92% of the variance in caseload in that study (Worden & Worden, 1989).

30. Indeed, some scholars have undertaken this sort of historical study, although typically focusing on specific cities. See, for example, McInytre (1987). More generally, on this point, see Williams (2003), Miller (2004).

31. See Benjamin and Pedeliski (1969), Grier (1971), Levine (1975), Hermann, Single, and Boston (1977), Bohne (1978), Wheeler and Wheeler (1980), Clarke and Kurtz (1983), Houlden and Balkin (1985), Worden (1993), Fender and Brooking (2004). More recently, see Iyengar (2007), for an analysis of federal indigent defense programs, which concludes that organized public defenders do better by their clients than do assigned counsel. We caution readers from extrapolating these findings to state prosecutions, since state and federal prosecutions differ greatly in terms of offense type, offender characteristics, eligibility for counsel, and process.

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JUDICIAL DISCRETION AND THE UNFINISHED AGENDA OF AMERICAN BAIL REFORM: LESSONS FROM PHILADELPHIA'S EVIDENCE-BASED JUDICIAL STRATEGY

John S. Goldkamp and E. Rely Vîlcică

ABSTRACT

Following in the footsteps of critics of the 1920s and 1930s, Caleb Foote's 1954 study of the bail system in Philadelphia set the agenda for bail reform in the United States focusing on judicial discretion and the inequities of a predominantly financially based pretrial detention system. This article argues that the bail reform movement originating in the 1960s fell short of its objectives in its failure to engage judges in the business of reform. From Foote's study on, Philadelphia has played a role historically in studies of bail, detention, and reform. The article considers the experience of Philadelphia's judicial pretrial release guidelines innovation from the 1980s to the present and its implications as an important contemporary bail reform strategy in addressing the problems of bail, release, and detention practices. The implications of the judge-centered

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pretrial release guidelines strategy for addressing pretrial release problems in urban state court systems are discussed in light of the original aims and issues of early bail reform.

> The social interest in the scientific administration of justice is much greater than the public commonly conceives.
>
> – Pound (1913, p. 328)

INTRODUCTION

When one discusses "bail reform," which these days one rarely does, there is an implicit assumption that bail reform is something that has already occurred, perhaps even long ago. The term conjures up a "movement" from back in the days of movements, probably starting and ending sometime in the 1960s, which saw the Warren Court revolution, the civil rights movement, Attorney General Robert F. Kennedy, the National Bail Conference, the pioneering work of the Vera Institute in New York, and the landmark Federal Bail Reform Act of 1966, as well as many other compelling developments. In certain important respects, depending on what one means by "reform," this assumption of bail reform mainly as an event of the past may not be too far off the mark. Although many important changes in American bail practices have transpired since that decade of ferment, bail reform in local jurisdictions has failed to accomplish its most difficult challenges.

The main explanation for the limited success of bail reform lies in its failure to engage judges centrally, to make bail reform "judicial" reform. However, the pressures of population, crime, local law enforcement, and growing criminal caseloads periodically force a moment of reckoning, when pretrial release and detention practices – by extension the criminal courts – will come under critical scrutiny. Then, again, often because of jail overcrowding, questions about judicial bail practices move to center stage.

Written in a period of false quiet regarding pretrial release and detention issues in the United States, this essay considers a particular bail reform strategy that stands apart from its predecessors because it focused directly on the improvement of judicial decisionmaking by engaging judges centrally in the process of study, policy debate, and change. Piloted first in Philadelphia in the early 1980s, the judicial pretrial release guidelines[1] offered a different, complementary, but more direct approach to improvement of

pretrial release and detention practices than the Vera Institute information-based innovation of the 1960s and early 1970s (Goldkamp & Gottfredson, 1985; Goldkamp, Gottfredson, Jones, & Weiland, 1995). As the reform agency model initiated by Vera (Ares, Rankin, & Sturz, 1963) has given birth to reform legislation – for example, the Federal Bail Reform Acts of 1966 and 1984 and the preventive detention law in the District of Columbia[2] – still missing in the new century is a viable method for addressing the difficult problems of judicial discretion that lie at the core of bail, pretrial release, and detention problems in the United States. Often problems that cannot be addressed adequately by criminal justice decisionmakers themselves are addressed by legislatures or emergency court orders through imposition of rules that may not be closely attuned to decisionmaking challenges and realities.

The main experience of the judicial guidelines strategy for pretrial release has been generated in the Philadelphia courts, although bail guidelines (later renamed "pretrial release guidelines")[3] were also field tested in several other jurisdictions with mixed results (Goldkamp et al., 1995). However, perhaps beginning with Foote's classic – and highly critical – study of bail in the 1950s (Foote, 1954), Philadelphia has played a special role in the history of bail research and reform in the United States. The Philadelphia experience with judicial pretrial release guidelines has marked a different path to bail reform that still poses an alternative model for dealing with problems of bail and jail of relevance to the current struggles of courts and justice systems in many localities. This essay draws lessons from the experience of judicial pretrial release guidelines in the Philadelphia courts over the last quarter of a century and considers the implications of this judicial strategy – its method, process, and challenges – for addressing difficulties of pretrial release and detention as they continue to confront localities and state court systems in the 21st century.

The judicial pretrial guidelines strategy is not quintessentially "new," any more than discussions of problems with judicial discretion in American bail practices are new (see, e.g., Pound, 1906, 1913; Pound & Frankfurter, 1922; Beeley, 1927; Moley, 1930; Wickersham Commission, 1931; Morse & Beattie, 1932; Foote, 1954) or any more than "evidence-based" crime policy is new (that term describes much of criminal justice research over many decades). In fact, the judicial guidelines strategy for bail has its origins in the work of Don Gottfredson and colleagues (Gottfredson, Wilkins, & Hoffman, 1978) exploring a voluntary, self-regulating action-research approach to parole and sentencing decisionmaking. Because the judicial guidelines method structures but preserves judicial discretion and seeks to

incorporate flexibility and adaptability into an accountable decisionmaking process, judicial pretrial release guidelines are potentially of great contemporary value in the 21st century as local jurisdictions continue their almost never-ending struggles with jail overcrowding and bail practices are targeted as a chief culprit.

At the core of the bail and jail dilemma (still) is how judicial discretion can be most constructively guided at the pretrial release stage – not because discretion is somehow "bad," but because pretrial release and detention require fair and effective procedures that improve over the collective subjectivity of individual judicial decisions. There are two main choices of approach at this moment in time: either (a) state courts can develop a self-managing strategy to deal flexibly but effectively with the problems of pretrial release and detention; or (b) they should be prepared for the imposition of external rules in the form of legislation or emergency court orders regulating pretrial release and detention in less flexible ways. Such legislation will, undoubtedly, be adapted from what state jurisdictions would consider the "foreign" models of the Federal and District of Columbia courts. Local decisionmakers generally resist such externally imposed rules (e.g., sentencing guidelines), wish to preserve their discretion, and do better with solutions of their own devising that may more realistically address local realities. Jurisdictions will have more or less time to ponder the state of their bail, pretrial release, and detention practices, depending on local jail conditions, population, and crime trends. However, large urban jurisdictions may have little time to deliberate as they seem to reel from one overcrowding crisis to another, expend scarce resources in constructing new facilities, and outside intervention becomes an all-too common remedy. In jurisdictions like Philadelphia, the judiciary has less and less freedom to operate as if its pretrial release decisions can be made in isolation from other justice system pressures, agencies, politics, crises, and budgets.

As a methodology, the judicial guidelines strategy has demonstrated the potential for addressing longstanding but still current challenges relating to pretrial release and detention. However, in operation, the judicial reform requires judicial maintenance and leadership – and needs continually to address the changing needs of the judicial officers making those decisions. With mainly one jurisdiction's experience as evidence, this essay assesses apparent strengths and weaknesses of judicial pretrial release guidelines strategy, taking advantage of its track record in Philadelphia to date. At its core, the pretrial release guidelines strategy faces the challenges of other "rational" reforms (Gottfredson & Gottfredson, 1980; Hawkins, 1992) in

adapting to changing circumstances outside of their immediate locus of control and operation.

PROBLEMS WITH AMERICAN BAIL PRACTICES

Many of the most basic criticisms of the American bail system that jurisdictions still struggle with today had been formulated in the literature and commentary by the 1930s. These criticisms were virtually always raised in the context of inhumane conditions of confinement in jails, but also focused on the inconsistent and discriminatory effects of cash bail, the troublesome role of the bondsman, the challenge of prediction and assessment of defendant risks, and even questioned whether pretrial detention disadvantaged defendants in the subsequent judicial disposition of their cases. The first critical study of bail practices themselves can be found within Pound and Frankfurter's larger study of the criminal justice system in Cleveland (Pound & Frankfurter, 1922). They wrote that "amid all the abuses regarding bail bonds... the illogical variability in amounts demanded" and the "inadequacy of sureties [bondsmen]" (p. 154) were particularly problematic. Their strong criticism of the role of the bondsman was undisguised:

> The real evil in the situation is not the matter of easy bail, but the disreputable professional bondsmen who make a business of exploiting the misfortunes of the poor, and whose connections with 'runners' and 'shysters' tends to prostitute the administration of justice.... (Pound & Frankfurter, 1922, p. 290)

Just five years later, Beeley published his study of bail and pretrial detention in the Cook County Jail. His characterization of the role of bondsmen paralleled that of Pound and Frankfurter: he bluntly described them as "anomalous" and "extra-legal parasites" (Beeley, 1927, pp. 39, 56). Most noteworthy, Beeley collected a great deal of "social data" on the inmates in detention and attempted empirically to identify criteria predictive of defendants' likely performance (attendance in court) if granted release. At a time when Warner (1923), Hart (1923), and Burgess (1928) were developing risk measures for parole, Beeley's classification sorted pretrial detainees into groups of "dependable" and "undependable" defendants based on such criteria as the current criminal charge, "social history," and various personal characteristics. Finding that many "dependable" defendants were detained unnecessarily because they were poor and could not afford even small amounts of cash bail, Beeley's study fundamentally

questioned the fairness and effectiveness of the bail system in Chicago: ''The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe'' (Beeley, 1927, p. 160).

Drawing on his involvement with crime surveys and commissions in New York, Illinois, Virginia, Pennsylvania, Ohio, Connecticut, Michigan, California, Indiana, and Missouri, Moley (1930, pp. vii, 43–61) also proved a strong critic of the financially based bail system in the United States, pointing to its ineffectiveness, for example, in the collection of the bond forfeitures[4] from bondsmen and arguing that bail lacked deterrent impact when bondsmen were involved. Moley complained that the cash bail system was inherently unjust in its allocation of pretrial detention based on defendants' financial resources (or lack thereof) and argued that ''the cruel extortion of fees'' practiced by the professional bondsmen from ''ignorant people'' was particularly unjust (Moley, 1930, p. 48).

In 1931 the Wickersham Commission (National Commission on Law Observance and Enforcement, 1931) echoed the themes identified by Beeley and Moley and emphasized the need for research on bail ''in the direction of the individualization of bail determinations based on the history, character, standing, personality, and record of the accused'' (1931, p. 12). In their 1932 study of the flow of felony cases in Multnomah County (Portland, OR) during 1927 and 1928, Morse and Beattie examined bail setting and its relationship to later outcomes. They found that detention was brought about by means of relatively low amounts of cash bail. Bail amounts appeared mainly to be determined by the severity of the offense charged and, for the first time in the literature, they reported an association between pretrial detention and worse case dispositions (conviction and more severe sentences), when detainees were compared to released counterparts.

Like his predecessors, Foote found that the main determinant of the pretrial release or detention status was the amount of bail, which in turn was determined by the type/nature of offense and the circumstances of the charge. It followed from this use of financial bail terms that a defendant's liberty or confinement would be determined by the ability to post the bail. Foote failed to find evidence documenting a relationship between judges' financial bail deliberations (assigning dollar amounts) and the defendant's likelihood of eventual appearance for trial, which, he argued, was the only legitimate constitutional aim of bail (Foote, 1954, pp. 1031–1032). His study documented a number of other inappropriate uses of bail, including setting money bail for incapacitative purposes (to accomplish sub rosa the detention of ''dangerous'' defendants), as a means to ''break crime waves,'' or, simply, as a method for inflicting punishment as well as to express

personal prejudice toward certain defendants (Foote, 1954, pp. 1038–1039). Foote also noted the nearly complete neglect of any alternatives to financial terms of bail or detention, such as the release of defendants on their own recognizance (Foote, 1954, p. 1040; see also Alexander et al., 1958). Echoing Morse and Beattie's findings from decades earlier, his comparative analysis of the treatment of bailed (released) and jailed defendants revealed striking differences between the two groups in likelihood of conviction and of subsequent prison sentence: detained defendants were more likely to be convicted and to receive incarcerative sentences. Contrary to ''conventional wisdom,'' those most likely to fail to appear in court were defendants charged with the least serious of offenses.

CHALLENGES FOR REFORM

This review is purposely selective and limited to the classic literature in this area[5] because by the 1930s and certainly by the 1950s, the principal challenges had already been identified for reform of bail practices. They can be organized into five main categories: (a) the plight of jails and conditions of confinement; (b) questions about the legitimate and constitutional purposes of ''bail'' (preventing defendant flight vs. crime), as well as about non-legitimate practices; (c) problems of information available and criteria relied upon in the determination of pretrial release or detention; (d) decision options or choices that could be drawn upon to respond to the goals of the decision in light of the information available; and (e) fundamental problems associated with the exercise of judicial discretion.[6]

Jails

Historically, American bail practices have been implicated by the often dismal state of local jails. Currently, jails hold in excess of 765,000 persons on a given day in the United States, more than half of which consist of defendants who are accused of crimes and are being held in pretrial detention (Pastore & Maguire, 2006: Table 6.1.2006). When reviews of the jailed population find that some defendants are mainly being held in pretrial detention for lack of the price of bail (or, as Goldfarb (1965) referred to it, for ''ransom''), judicial bail practices are called into question. When jails are filled beyond capacity and a large portion of that overcapacity is explained by pretrial detention, judicial bail practices and court processing time are

closely scrutinized. Though not specific to Philadelphia, this phenomenon has played itself out repeatedly in Philadelphia several times over the last several decades (in the late 1960s, late 1970s, late 1980s, late 1990s and, again, currently), providing impetus for both "regular" bail reform and special reform procedures, including the judicial guidelines approach.

The Legitimate Goals of the Pretrial Release Decision

Foote was not the first to question the legitimacy of the various purposes to which the bail decision was put; though he provided the first data illustrating its highly discretionary uses. The title as well as the content of his 1954 study, "Compelling Appearance in Court ...," and his later writings (Foote, 1965a, 1965b) reflected his position that bail could only legitimately be directed at the problem of ensuring a defendant's attendance in court. His study and his other writings strongly criticized the sub rosa use of cash bail to detain defendants deemed dangerous by magistrates for one unstated reason or another. This was a view held by many leaders of bail reform during the 1960s (Ares et al., 1963; Freed & Wald, 1964).

A great deal of legal commentary during the 1950s and 1960s – not reviewed here – debated this position, with many arguing that danger (variously defined) was an appropriate concern at the bail stage and/or that because it was being pursued sub rosa anyway, it ought to be recognized explicitly so that it could be dealt with as a legitimate bail goal (see, e.g., Goldkamp, 1979, 1985).[7] The landmark bail reform legislation, the Bail Reform Act of 1966,[8] recognized only the purpose of ensuring a defendant's appearance at court at the pre-conviction stage of criminal proceedings. Signs that the pro-preventive detention (defendant danger) argument was beginning to prevail, however, were clear with the enactment of the District of Columbia's preventive detention code in 1970.[9] Although only applying to the District of Columbia, the nation's first preventive detention law signaled a second generation of "bail reform" oriented to defendant danger, which culminated in the Federal Bail Reform Act of 1984[10] (modeled closely on the D.C. law) and the modification of many state laws to include danger as an explicit aim of bail practices – if not adopting the procedures included in the D.C. and Federal laws (Goldkamp, 1985; ABA, 2002).

Reviews of the D.C. law by the D.C. Court of Appeals in *United States v. Edwards*,[11] and the Federal detention law in *U.S. v. Salerno*,[12] pretty much silenced the argument against the illegitimacy of the danger aim and preventive detention. The effect on the states, however, was mainly to open

the door wider to the danger agenda in bail that had long been dominant (though sub rosa, carried out through setting unaffordable cash bail).[13] Some states adopted special procedures for detaining dangerous defendants, but no state made this a requirement that could not be easily circumvented merely by resorting to cash bail in the traditional manner (Goldkamp, 1985). For the state courts and localities, the main result was a validation, if not expansion, of judicial discretion in bail determinations when issues of dangerousness were being considered – though sub rosa treatment of the issue through cash bail as the principal means for detaining defendants was not abolished.

Information

The Vera Institute model of bail reform, well described elsewhere (Ares et al., 1963; Freed & Wald, 1964; Thomas, 1976; Goldkamp, 1979), basically sought to influence judges to make greater use of nonfinancial alternatives (personal recognizance release) by providing better and different information than previously made available to judges at the first appearance stage. The underlying theory of the Vera-type reform, borrowing from Beeley's work of the late 1920s, was to rate defendants based on their "community ties" (employment, residence in the community) through a "point-scale" and to recommend nonfinancial release to the presiding judge based on defendants ratings. (Defendants with sufficient community ties were deemed releasable without cash bail being set – the modern version of Beeley's "dependable" defendants.) The Vera point-scale, which was widely adopted as the reform was emulated across the nation, packaged as the new and better information scheme relating to defendants' likely appearance in court, and was promoted as "objective": it had the aura of being empirically based (though in fact it was not) and seemed to be based on some implicit theory about establishing a defendant's standing in the "community" as major determinant of risk. The most significant contribution of the Vera innovation was the fact that it gave birth nationally to the pretrial services movement. Since that time, pretrial services agencies have become nearly indispensable agencies supporting the pretrial release decision process. (The recent ABA Standards (2002: Standard 10-1.10) state that "every jurisdiction should establish a pretrial services agency or program . . . .").

Two studies, which sought to examine the impact of bail reform in the late 1970s, produced important evidence relating to the informational strategy of the Vera-type reform.[14] In a national study of selected bail reform sites,

Thomas (1976) found signs of widespread adoption of the Vera Institute procedures and an associated generally increased use of nonfinancial release. Thomas concluded, however, that the Vera community ties ratings had mainly served to allow the defendants who would have afforded release under cash bail to gain release on the equivalent of ''good credit'' (see also, Feeley, 1983; Walker, 1993). In other words, defendants who would not be able to raise cash bail for their release were also unlikely to receive ratings that would earn them recommendations for nonfinancial release. The implication of the Thomas study was that the population of jailed poor defendants targeted by bail reform was missed.

The second study, by one of the current authors, examined bail decision-making practices in Philadelphia in its post-bail reform era (Goldkamp, 1979). If Foote's 1954 study of bail practices in Philadelphia was an example of bail practiced ''at its worst,'' the Goldkamp study sought to study bail ''at its best.'' After nearly a decade of reform, Philadelphia at the time of the Goldkamp study was by then ''a model of bail reform and exemplary pretrial services that other cities sought to emulate'' (Goldkamp, 1980, p. 179).

Goldkamp found that bail reform had a noticeable effect in Philadelphia. One of the nation's leading pretrial services agencies had been installed, all incoming defendants were interviewed prior to their first appearances in court (with recommendations for ROR) and the pretrial services agency had developed a strong conditional release program. Pretrial detention as a proportion of entering defendants had decreased notably since the time of the Foote study of Philadelphia's practices. Compared to Foote's 75 percent pretrial detention rate in the 1950s, Goldkamp reported that only 25 percent of all defendants were detained beyond a 24-h period. Only 12 percent were detained during the entire pre-adjudication period. Moreover, for those detained, the duration of confinement was notably shorter than reported in Foote's study (Goldkamp, 1979). In a general sense, much like Thomas' national findings, the Goldkamp findings seemed generally supportive of the notion that bail reform in Philadelphia succeeded in some of its major goals: individualization of the pretrial release decision, introduction of nonfinancial release, reduction in the use of cash bail and, consequently, reduction in the proportions of defendants detained.

Goldkamp's analysis of factors influencing judicial decisions at the pretrial release decision, however, found that contrary to the intended effect of Vera-type information-based reform procedures community ties items did not play a significant role in shaping judges' actual pretrial custody decisions – and were not helpful predictors of defendant risk. Not only did

the seriousness of charge "standard," heavily criticized by Foote in 1954, "survive undaunted" (Goldkamp, 1980, p. 188), but it was still the main identified determinant of the judges' bail determinations in Philadelphia (Goldkamp, 1979) – despite the best efforts of pretrial services to introduce other types of information about defendants.

The 1979 study offered two possible explanations for this: either judges remained convinced that the nature of charge was the most reliable indicator of defendant's likelihood of fleeing, or, more likely, the judges remained adamant in using this standard because it allowed them to flexibly manipulate bail to achieve other than prevention-of-flight purposes (i.e., punitive or sub rosa preventive detention). Thus, while judges had "more and better" information available on defendants' backgrounds at the first appearance pretrial release decision, the information content of the reforms in Philadelphia (in the law and in the pretrial services background investigation and recommendation) did not limit the judges' highly discretionary bail and detention decisions. The study concluded that the Philadelphia judges made use of the Vera-type information to rationalize after-the-fact what they had already decided. Based on his interviews with Philadelphia bail judges, Goldkamp found some evidence – though perhaps less than Foote – that pretrial detention could even be assigned as outright punishment based on the charge standard ("to educate defendants with 'a taste of jail,'" or "to pre-collect fines from prostitutes") (Goldkamp, 1980, p. 189).

Decision Options/Choices

In its first generation, then, bail reform was, at least, an indirect attack on the dominant role of cash in release determinations. Bail reform strategies of the 1960s recognized that one of the problems with pretrial release decisionmaking was that the decisionmaker had little choice in selecting options other than financial bail: dollars were the traditional currency of release and detention determination. With no other alternatives to consider (use of personal recognizance was rare), the judge's only question was which dollar amount to select. Not only did this lead to highly variable approaches by different judges and different courts, but the prospects for release or detention were mediated by the defendant's ability to raise cash (or by the bondsman's willingness or availability to intervene). As Foote (1954) – and Beeley (1927) before him – had argued, manipulation of amounts of cash bail was not shown to be empirically related to the risks of flight or danger that defendants may have posed; rather, the manipulation of cash mainly

affected the chances that defendants would be detained (and the bondsman's profit margin). In most bail studies, it took very little (relatively low bails) to cause the detention of defendants (Goldkamp, 1979; Goldkamp & Gottfredson, 1985).

The Goldkamp study documented the near disappearance of the bondsman in Philadelphia, as Philadelphia had become, in effect, a "bondsmen-free" zone.[15] Cash bond was replaced by deposit bail (under a "ten percent" program), which required defendants to pay ten percent of the bail amount (the equivalent of the bondsman's fee) to gain release. Unlike the bondsman's fee, the ten-percent deposit would be returned (minus a service charge) once the defendant attended court. This represented at least a narrowing of the use of financial conditions.

Conditional release represented a second-stage attempt at securing nonfinancial release for defendants who had cash bails set and who had been detained as a result.[16] Pretrial services staff could argue before a judge at bail review that, based on specific arrangements for custody in the community or participation in school, work, or treatment, defendants with clear plans could be released without the necessity of requiring financial bail. Post-bail reform studies of state jurisdictions (Thomas, 1976; Goldkamp, 1979) suggest that use of personal recognizance (ROR) had become more common, giving judicial decisionmakers now two main options. Few other nonfinancial conditions of release were routinely available to provide additional release options for bail judges. The post-reform studies found that financial bail – with its discriminatory economics – was still the main vehicle for bringing about detention: defendants without resources could not raise bail and would be detained.

Fundamental Problems of Judicial Discretion

Despite its low visibility and lack of prestige as a judicial duty, the determination of pretrial release is not a simple matter for the presiding judicial officer. The decision occurs at the first judicial stage and is often made under the pressure of caseload volume and time constraints, depending on how long the defendant has been in police custody. Certainly, a helpful job skill for the pretrial release decisionmaker would be the ability to excel at making short-term predictions of human behavior (i.e., to anticipate how would defendants perform if granted pretrial release). Preferably, this predictive skill should derive from an innate quality because, on the job, the decisionmaker will only rarely be informed of the success or

failure of previous decisions. Bail decisionmakers are not made aware of the many defendants who negotiate the adjudication process without problems during pretrial release. The feedback that does occur is mainly negative (the media will soundly criticize release decisions when one has gone wrong). The bias in the rare negative feedback that does occur encourages conservative, defensive decisionmaking: as time passes and the occasional release decision goes awry, individual decisionmakers "learn their lessons" that it is judicially safer to err in the direction of pretrial detention. As occasional negative events occur, bail judges become less willing to take chances and resort more often to the security of cash bail and pretrial detention.

Support resources available to assist the judicial decisionmaker can be critically important to the quality of judicial decisionmaking at the pretrial release stage,[17] yet the availability of such decision resources vary notably from one jurisdiction to the next. Some jurisdictions operate with little or no support (in which case decisions are made mostly "in the dark"), while others – for example, the District of Columbia and Federal courts, but also a number of state court systems in urban settings – operate with relatively well-developed pretrial services support structures, though the extent to which these support structures influence judicial decisionmaking also varies considerably.[18]

While all states offer procedural guidance for the pretrial release decision and some suggest criteria that should be considered, in most jurisdictions, nevertheless, the judicial decisionmaker must exercise a great deal of discretion in translating the abstractions of law to apply in individual cases. In some states, laws contain usefully little or are relatively silent on the criteria that should be governing the judge's decision; in other states, and in the Federal and District of Columbia laws, a great many factors are suggested for the judge to consider before making a pretrial release decision – which is almost the same as having too few (Goldkamp, 1979, 1985). Regardless of the criteria suggested in law and issues related to computerization aside, the information available may be rather basic, insufficient, or unreliable, and may be presented through different sources (e.g., police, prosecutor, defender, and pretrial services, if they exist) for the judicial decisionmaker to sort through.

In short, having very little or having a great deal of guidance in law produces pretty much the same result: judges or judicial officers deciding pretrial release have to rely a great deal on their own discretion. Individual judges or judicial officers deciding pretrial release exercise that discretion differently. In early descriptive studies (Foote, 1954) and later studies focusing on judicial variation in bail (Goldkamp, 1979;

Goldkamp & Gottfredson, 1985) judicial variation translated into decisions that were disparate across judges and within judges' own sets of decisions in similar cases over time.

In the 1979 Philadelphia decisionmaking study, after accounting for the influential role of criminal charge (and other two or three less influential factors – e.g., the presence of weapon), Goldkamp found that a large amount of variance in bail decisions remained unexplained, even though more than 50 case- and defendant-related variables were considered as predictors of pretrial release decisions in the analyses. The inference that the unaccounted for variation could be at least partly explained by some judge-related, difficult to measure, variables (e.g., their personal views on bail) was unavoidable (and backed up by personal interviews with 20 bail judges) and thus raised questions about the fairness and equity of the bail decisionmaking. To the extent that variation could not be explained empirically by measurable factors, then bail decisions were athematic and inconsistent: decision outcomes (detention and release) were, therefore, disparate.

With a wealth of information available for the judge at the bail decision, Goldkamp's study suggested that the Vera-type innovation failed to engage the judges in reform and did not alter the dynamics of the discretionary decisionmaking process involved in bail determinations and in the sub rosa use of preventive detention through cash bail (see also Feeley, 1983; Walker, 1993). Judges were still dealing frequently with assessments of defendant dangerousness in a sub rosa fashion, even though protection of the community was not then recognized under Pennsylvania law as a legitimate purpose of bail – or in most other states at the time. Given the lack of an ability to explain bail decisions statistically except through charge measures, Goldkamp's findings raised doubts about the effectiveness of bail decisions from the point of view of prediction of defendant misconduct during pretrial release, questioning how inconsistently applied themes (beyond the common charge standard) could translate into steady and strong predictions of defendant behavior, if every judge is independently improvising. If sound prediction of either defendant flight or risk of pretrial offending were the legitimate goals, then Goldkamp's study raised questions about the appropriateness of factors that could be used in guiding the bail decision.

This disparity in bail decisionmaking meant that defendants were treated inequitably due to the vagaries of judicial approach, chance and cash bail, and suffered further system hardships as the result of their inconsistent assignment to detention. Goldkamp (1979) reported, for example, that detained defendants were substantially more likely later to receive incarcerative sentences than defendants who had been released before trial,

even after applying adequate controls. Goldkamp's findings questioned the idea that similarly situated defendants were being treated similarly (hence the "two classes of accused" in the study's title) and still found that prevalence of cash bail as the main means of detention raised questions of economic bias, notwithstanding some of the progress made in adopting nonfinancial release and the deposit bail system. As long as cash bail was to be employed, the study concluded, economic discrimination would continue to be an issue of concern – heightened by erratic and athematic bail decisionmaking.

In most of its aspects to date, bail reform has clearly intended to deal with the exercise of judicial discretion involved in the determination of the question of a defendant's pretrial liberty and the discriminatory economics of dollar bail. Depending on the reform initiative (and one's point of view), bail reform has attempted to influence, assist, reshape, guide, structure, "tame," or eliminate judicial discretion at the core of the release decision. Goldkamp (1979) concluded that the problem of dealing with judicial discretion in pretrial release and detention represented a major unfinished agenda with important consequences for the accused, the public, jails, judges and, even, neighborhoods, despite its generally low profile.

JUDICIAL REFORM OF BAIL: THE BASIS FOR THE GUIDELINES STRATEGY

Based on analysis of the shortcomings of bail reform to that date, the judicial pretrial release guidelines strategy was designed to address pretrial release and detention as a problem of judicial decisionmaking and discretion. The judicial strategy was field tested in Philadelphia in the early 1980s (using an experimental design for implementation) (Goldkamp & Gottfredson, 1985), and was officially adopted as judicial policy by the Philadelphia Municipal Court in 1982. It has been adapted and revisited over the last two decades as Philadelphia's justice system has dealt with cycles of serious jail overcrowding crises. Though it was also piloted in several other jurisdictions (Boston, Phoenix, Miami, and Indianapolis) with varying degrees of difficulty (Goldkamp et al., 1995), the pretrial guidelines approach has continued to be at the core of the judicial approach to pretrial release in Philadelphia. As a judicially developed and adopted policy, it stands alone in the nation in the first years of the 21st century – one might

argue, in isolation – as an empirically informed approach to the problems of judicial discretion at the bail stage.

The designers of the first judicial "bail guidelines" took several lessons from the critical research published through the late 1970s.[19] The most important lesson was that, no matter how well developed pretrial services information resources were, judges had to be centrally involved in the process of devising major improvements in pretrial release. The second lesson was that judges could benefit from improved information development and presentation (including but not limited to defendants' actuarial risk of flight and crime),[20] but that the information had to be directly related to the constitutional aims of bail (flight and crime) and had to "make sense" to the judges. A third lesson was that judges needed to agree upon the intended goals of pretrial release and devise options related to those goals, all in the light of the information assembled. The place of the dollar in determining conditions of release needed considerable narrowing. Moreover, various release options needed to be developed to address the type of defendants identified by the guidelines as posing higher than normal risks or special problems for a jurisdiction.

Fourth, the judges needed to agree on a conceptual framework that promoted the equitable treatment of defendants at bail and, yet, that reflected the decision values and needs of the decisionmakers who were dealing with a difficult decisionmaking problem. With a conceptual framework decided upon, the guidelines would posit presumptive release options for each category of Philadelphia defendant and, with use, feedback would be collected on judges' decisions, release practices and defendant performance so that adjustments could be made on an ongoing basis. The guidelines needed to provide an explicit and understandable framework so that the decisionmaking process was more transparent (less sub rosa). Finally, the guidelines framework needed to provide accountability and reviewability. To achieve this, the guidelines required judicial decisionmakers to provide written reasons when judges departed from the guidelines.

The development of the guidelines then was a result of a collaborative process between the researchers and the judiciary informed by in-depth empirical study of then current practices. The 1977–1979 guidelines feasibility study, which involved a sample of 4,800 Philadelphia defendants (stratified by 6 charge categories and 20 sitting judges), was designed to work with the judges of Municipal Court to look at their practices – issue by issue – and to critique what they found in the hopes of crafting a better pretrial release strategy. During the feasibility study, the findings of judicial disparity, dominant reliance on cash bail, the use of cash to cause detention,

and even the rates of failures to appear and of rearrest among defendants released by each of the Municipal Court judges during the study period were all "put on the table" of collaborative analysis and discussion.

While the data surprised the judges and showed patterns and findings contrary to many of their working assumptions concerning bail and detention, it was the great variation in bail approach and in detention and release outcomes across judges that most compelled their attention. They agreed on the need for greater consistency across the court and were dismayed by the aberrant results found when individual judges were contrasted: some judges generated low rates of detention in their decision, but high rates of failure to appear and rearrest, while others had low rates of confinement with low rates of misconduct – and many other variations across the court of 20 judges were noted. As a working group, the Municipal Court judges saw the utility of a court guidelines strategy to provide guidance for judges in transacting bail without imposing rigid, mandatory rules.

The process of deciding on a structural approach for framing the guidelines started with discussion of many possible conceptual models of pretrial release decisionmaking. Alternative models were considered, for example, based only on predictive scales anticipating defendant flight or danger, or based merely on capturing current practices well and focusing on greater coherence in bail decisions, or based on direct preventive detention, among others. The models discussed differed in philosophy, aims and in the extent to which they differed from actual court practices as reflected in the feasibility data, and thus, would have all represented new approaches for the Municipal Court.

The judges felt most comfortable developing a model in the form of a matrix defined by the juxtaposition of two dimensions: one representing the seriousness of the lead charge in a defendant's case (15 ordinal categories) and the other representing the (actuarial) likelihood of a defendant's failure to appear in court or to be rearrested (5 ordinal categories).[21] The judicial reasoning for settling on such a policy framework to guide future pretrial release decisions was surprising. After listening to the researchers' summary of the criticism of the "charge standard" from the literature over the decades, the judges nevertheless convincingly argued that they valued such a standard, though not for the reasons the researchers or the literature assumed. In fact, they did not view the charge-seriousness dimension as a good measure of a defendant's increased fear of penalty or of heightened interest in fleeing to avoid punishment. Instead, they viewed the charge measure as a crude indication of the potential costs of mistakes that could

be made in making release decisions. For example, judges would worry less about having mistakenly permitted the release of an alleged high-risk numbers-runner who then failed to appear in court and returned to illegal activities than they would about an alleged, low-risk rapist who gained release and then reoffended. Clearly, the judges pointed out, the cost of the latter mistake would be weighed by the judges far greater than the former.

The rationale for the risk dimension responded to a different need. All judges had different hunches about attributes of defendants, their backgrounds, and cases that provided clues as to whether they might flee or pose a threat of crime to the community. It was clear, when these were discussed as a group, that their individual approaches to the problem of prediction were highly impressionistic and subjective. Because the judges seldom received feedback about their decisions – how defendants fared about the pretrial release stage – they were attracted to an empirically derived (and validated) actuarial dimension that would display a relative ranking of the chances defendants were very likely, likely, or unlikely to engage in misconduct.

As a result, the first guidelines framework would classify all future Philadelphia defendants into one of 75 possible categories (5 risk × 15 charge categories).[22] The selection of these two dimensions ended up improvising a "risks-stakes" version of decisionmaking. The juxtaposition of risk and charge seriousness meant that the judges saw pretrial release decisions as requiring a balancing of both kinds of concerns. As a core organizing framework, the court's new presumptive pretrial release policy would be different in concept than a more conservative approach that might merely have mirrored or summarized existing decision practices.

The next task was to present data relating to each of the 75 categories showing the past bail decisions, uses of ROR, median bail amounts, rates of detention, and rates of FTA and rearrest, even rates of dismissal. Then, with policy input from the judges, the researchers engaged in the painstaking process of establishing what the presumptive release policies "should be" in each of the 75 categories – keeping in mind the aims of pretrial release and the problems posed by dollar bail. The judges discussed the proposition of eliminating financial bail, but rejected it as unfeasible and too radical a change. When the judges were finally comfortable with the result, the 75-category matrix was organized into three types of decision zones or ranges, one in which the cells would all suggest ROR release for defendants, one which would include all cells suggesting either ROR or low cash bail (ten percent) amounts, and then a third zone including all remaining cells with various ranges of suggested cash bail ranges, ten percent of which would be posted by defendants to gain release.

Having mapped out the governing dimensions and the presumptive release decisions to go with each category, there only remained the understanding of how this judge-centered approach would operate. First, because this approach was designed as a judicial decision resource, the aim was to structure or "guide" judicial discretion, not eliminate it. The operating assumption from the working group creating the guidelines was that the guidelines were voluntary; if designed and used correctly, one would expect to see agreement by the judges with the suggested options in a large majority of the cases, that is, around 70–75 percent of the time. But, when judges or commissioners wished to depart from the guidelines, they would be required to provide written reasons for their exception-taking, which would serve two purposes: first, they would build into guidelines use some accountability among the judges (as reasons would be reviewed in appealed decisions); second, the reasons would serve as a basis for ongoing review of the guidelines, which were expected to evolve and improve over time, for example, as new crime problems came to dominate the criminal caseload. The bail guidelines allowed for immediate appeal (by telephone) to an on-call referee judge by the District Attorney, when the judge's decision fell below the guidelines, and by the defendant, when the judge's decision went above the guidelines suggestion.

Because the judicial guidelines also represented an information-based resource (in that sense following in the tradition of the Vera Institute), they depended on a major supportive role on the part of the pretrial services agency in generating the necessary information to permit classification of defendants under the matrix. The guidelines also included a provision for pointing out special circumstances to the judicial decisionmaker that ordinarily would not fit into the guidelines information. Pretrial services had to adapt its previous Vera-type information collection process to focus on the new information required for the guidelines designed to be more directly judicially relevant. The information strategy of the guidelines was to capsulate the information that judges felt they needed and would actually rely on and to have that information form part of either the risk dimension or the charge dimension.

IMPLEMENTING JUDICIAL GUIDELINES (I): THE PHILADELPHIA BAIL EXPERIMENT

The testing of the judicial guidelines for bail in Philadelphia's Municipal Court from January 1981 through March 1982 was extraordinary for several

reasons. First, this judge-centered approach was implemented using an experimental design in the nation's fourth largest urban court system where bail was conducted seven days per week around the clock. In a process supervised by the president judge himself, "bail" judges were randomly assigned to an experimental (guidelines) or control (normal) group for the purposes of bail decision duties. As is reported in detail in Goldkamp and Gottfredson (1985), this meant maintaining two bail systems in the same court working in parallel for over a year. For the purposes of this article, the results of that trial are reviewed briefly.

First, the evidence-based guidelines development strategy clearly engaged judges themselves centrally in the business of reviewing and reforming their own bail practices. The pretrial services collection of information was reshaped to address the information needs of the bail guidelines classification. Judges stayed within the presumptive decisions suggested by the guidelines at about the desired level – in 76 percent of the cases they decided. They provided reasons for exceptions as expected in most of the instances when the decisions they made departed from the guidelines.

Judicial disparity was reduced (when decisions of the experimental judges were compared to the controls), similarly situated defendants were treated "more similarly" under the guidelines approach, partly because an explicit framework based on the purposes of bail was established. The use of pretrial detention was not reduced – the proportions detained were roughly the same under both approaches – however, the use of detention was much more selective under the guidelines approach. Detention occurred more often in categories targeted as the more seriously charged and higher risk by the guidelines classification, while detention under the control group (non-guidelines judges) was more dispersed across defendant categories. Failure to appear rates and rearrest rates among defendants gaining release under the guidelines were no higher than the rates resulting from defendants released under the non-guidelines approach. Finally, and most importantly, the guidelines approach allowed for review of both the pretrial release practices of the judges and the performance of defendants henceforth on a category-specific basis. Especially difficult categories could be identified and interventions could be designed to deal with problems identified through this type of empirical feedback. In short, while the judicial bail guidelines might not have reduced the jail population, as some may have wished, the Municipal Court was left with a rational, open, and reviewable system for bail determinations at the first appearance stage based on solid empirical evidence.[23] The working presumption was that the guidelines would be reviewed and updated on a periodic basis.

JUDICIAL REFORM NEUTRALIZED BY JAIL OVERCROWDING

The Municipal Court had been open to reviewing its bail practices and to efforts to improve them mainly, but not entirely, because of the media attention forced on the court related to the emerging jail overcrowding crisis.[24] Problems in Philadelphia's jails were not an entirely recent development at that time (see, e.g., Pennsylvania Committee on Penal Affairs, Public Charities Association, 1938); they had been building since 1970s (see Fig. 1). Unfortunately, the pressure from jail overcrowding pushing the Municipal Court constructively to review its bail practices ended up gaining so much momentum that it undermined or overwhelmed the historically innovative attempt to have judges sensibly manage their own bail practices and to generate empirical evidence supporting their approach.

In reaction to the conditions of confinement in the Philadelphia jail system (known as the Philadelphia Prisons System), a civil rights lawsuit, *Jackson v. Hendrick*,[25] alleging unconstitutional conditions of confinement had been filed in the state courts in 1971 and had been working its way onto center stage during the 1970s. This lawsuit, which only reached settlement in 2002, resulted in the convening of a three-judge panel to oversee the correction of unconstitutional conditions at the Prisons and produced a variety of consent decrees that affected how the local justice system could make use of confinement in the local jail facilities. The overcrowded conditions in the Philadelphia Prisons and the ongoing lawsuit were strongly in the background as the guidelines feasibility research was beginning in 1978.

In fact, the *Jackson* judges had issued a series of consent decrees affecting the city correctional facilities. These included setting a population limit of 2,200 inmates (in 1977), a 1,000-person reduction in the jail population (in 1984), ordering the City to adopt a "one-man/one-cell" rule,[26] and, to be put in effect when the population "cap" was exceeded, special emergency release of defendants held in default of $1,500 or less, starting with those held for the longest time (1979) and later (1980) of defendants held on bail of $3,000 or less and of all defendants held on misdemeanor charges. In 1979, when the feasibility study for the guidelines was nearing completion, the population level was exceeded and lists of all inmates held in detention on bail of $1,500 (really $150 under Philadelphia's ten percent plan) or less began to be drawn up periodically (Goldkamp, 1983). While various appeals were ongoing, the Philadelphia Municipal Court adopted the bail guidelines in 1982 at a time when the inmate population exceeded 4,000 inmates and

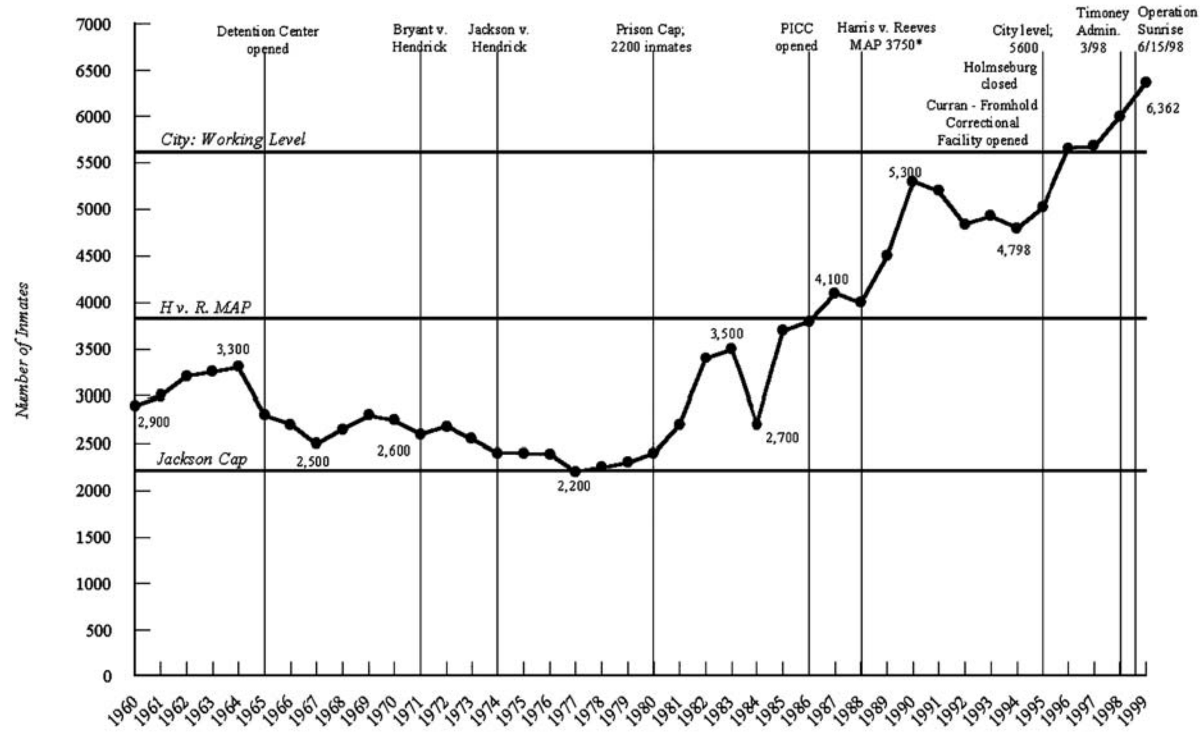

Fig. 1. Philadelphia Inmate Population in Historical Context, 1960–1999.

the *Jackson* lawsuit was increasingly having the effect of superseding the initial bail practices in Municipal Court altogether.

At first, during the period of development and implementation of the guidelines, the impact of the crowding litigation was not directly felt by Municipal Court commissioners at the initial bail stage. The *Jackson* consent decrees involved review of detainees already held – those reviews would occur in the Court of Common Pleas – and did not directly affect the initial bail determinations made in Municipal Court. Soon, however, the new bail commissioners realized that whatever they decided, the *Jackson* court order would supersede. Municipal Court commissioners became aware of the fact that if, at first, they set a financial bail of $1,500 or less, defendants would be automatically released at the Prisons. Next they realized that any amount of $3,000 or less would be guarantee automatic release of defendants upon arrival at the institutions. Newly in place, the bail guidelines quickly became nearly irrelevant as the reasoned policies and category-specific approaches to defendants – considering detention, public safety, flight, and equity – were superseded by crowding court decree.

In 1982, the crowding litigation branched out into Federal Court in *Harris v. City of Philadelphia*,[27] resulting in consent decrees in 1986 and 1991 and a series of orders between 1994 and 1999.[28] The orders in *Harris* further superseded the authority and meaningfulness of initial bail determinations in Municipal Court by specifying a list of "detainable" offenses – all others would not be held in the Prisons, until the population was reduced. For a certain period, from the late 1980s and into the early 1990s, it is fair to say that the Federal court emergency crowding reduction orders rendered post-arrest pretrial release determinations in Municipal Court – and the guidelines that would have directed them – basically meaningless. As the local court system decisionmakers adjusted to the Federal emergency rules, a variety of compensatory behaviors were exhibited. For example, bail commissioners could set extraordinarily high bail in a highly publicized case, ignoring the guidelines, knowing fully well that the defendant would be released once transported to the correctional facilities if the charges did not include the detainable offenses specified in the Federal court order. This saved face for the commissioners, giving them favorable publicity and "a pound of flesh" by causing the defendants to have to go through being transported, processed at the Prisons, and released. Meanwhile, as a result of the Federal court imposed release procedures, defendants recorded failure-to-appear rates as high as 80 percent and were rearrested in roughly 40 percent of cases (Goldkamp & Harris, 1992). Local pretrial release practices had become chaotic and nearly irrational, and were failing to

accomplish the constitutional aims of preventing flight and crime during the pretrial period.

JUDICIAL GUIDELINES (II): RESPONSE TO JAIL OVERCROWDING

In the early 1990s, the City of Philadelphia enlisted the cooperation of the local courts and the justice agencies to devise a response to the ongoing crowding litigation. Apart from the sense of chaos that existed in the local justice system in reaction to the crowding realities and special release emergency rules, the City was being fined by the Federal court for failing to reduce the population and meet terms of consent decrees in the case. In 1995 Philadelphia's then mayor appointed a task force, chaired by the chief criminal judge of the Court of Common Pleas, to review pretrial release practices and re-examine the potential for judicial guidelines – now a distant memory from a decade earlier – to reduce the pretrial jail population.

Once again the researchers conducted a brief feasibility study to examine the then current bail practices and effects on detention, releases, public safety, and flight. Included in the Pretrial Task Force this time, however, was an expanded group representing not only Municipal Court, but the Court of Common Pleas, the Philadelphia Defender Association, the Philadelphia District Attorney, and the Pretrial Services Division. Using the same process of collaboration, empirical evidence and policy debate, the Task Force adopted a revised guidelines model, which was fit to the data to estimate its likely effects until the Task Force felt that it had crafted a reasonable approach to guide the pretrial release decision process. A principal, explicit aim of the redesign of the pretrial release guidelines was to attempt to reduce the categories in which cash bail could be employed, thereby reducing the use of pretrial detention. In this exercise, involving active policy debate by all parties, a great deal of care was taken to estimate the likely detention associated with the presumptive bail and release decisions posited in the guidelines on a category specific basis. Again, the option of eliminating the use of financial bail was rejected as politically unfeasible.

The 1995 guidelines, renamed "pretrial release" guidelines, differed from the 1981 guidelines in several important ways. First, the participation of all criminal justice actors made the final product reflective of system-wide input, not just judicial input. Although these guidelines would still be meant

to govern the decisionmaking of Municipal Court bail commissioners at the first judicial stage and were adopted in 1995 as the policy by the Philadelphia courts, they were not formed as an entirely "in-house" judicial policy. The reconstruction of guidelines was one element of an alternatives-to-incarceration plan that would return full authority to the local courts, to get the Philadelphia courts and justice system out from under the various Federal emergency release orders (Goldkamp & Harris, 1992).

Second, the 1995 pretrial release guidelines differed in form. Instead of being defined by a 5-part risk dimension and a 15-part charge seriousness dimension, the new guidelines had a 4-part risk dimension and a 10-part seriousness dimension. The resulting matrix had 40 categories of defendants, not 75 (see Fig. 2). Using this matrix, the same analyses of previous release decisions, detention, and defendant performance were carried out and used to inform debate about the presumptive release conditions that should be associated with each of the categories in future decisions. The 40 categories were grouped into 4 zones, which differed from the 3 zones derived from the 75-category classification of the earlier bail guidelines. Zone 1 included all categories of defendants for whom ROR (personal recognizance) or outright release would be suggested. Zone 4 included categories of defendants for whom ranges of cash bail would be recommended (and because cash bail was not abolished this zone was where pretrial detention could occur).

The new pretrial release guidelines placed a priority on the development of release options that could address the category-specific risks of defendants as defined by the guidelines. Zones 2 and 3 were new categories of medium- to high-risk defendants with medium-serious charges for whom special supervision would be recommended. Zone 2 defendants would be released to a lesser level of supervision involving checking in and personal visits to Pretrial Services (Type I release) and Zone 3 (Type II release) would involve higher levels of supervision by Pretrial Services. The policy logic involved in this new classification was that the problem with pretrial detention did not come in the highest-risk most seriously charged cases (the "worst" cases) or in the lowest-risk and least seriously charged cases (the "best" cases) – for decisions in these types of cases were relatively clear-cut and obvious. Rather, the challenge for improving pretrial release and reducing the use of detention was to be found in the development of safe release options to be employed in the medium categories of defendants who would ordinarily often have cash bail set and be detained and would "semi-often" engage in pretrial misconduct if released.

For these relatively risky but not obviously dangerous categories of offenders, some middle ground involving pretrial release needed to be

	Least Serious				**Charge Seriousness Level**						*Most Serious*
RISK	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*HOMICIDE*
Lower **1**	ROR/ Standard Conditions *1*	ROR/ Standard Conditions *5*	ROR/ Standard Conditions *9*	ROR/ Standard Conditions *13*	ROR/ Standard Conditions *17*	ROR/ Standard Conditions *21*	ROR/ Standard Conditions *25*	$1,000- 3,000 *29*	$1,500- $4,500 *33*	$2,000- $8,000 *37*	Held Without Bail
2	ROR/ Standard Conditions *2*	ROR/ Standard Conditions *6*	ROR Standard Conditions *10*	ROR/ Standard Conditions *14*	ROR/ Standard Conditions *18*	Release on Special Conditions Type I *22*	Release on Special Conditions Type I *26*	$2,000- $4,500 *30*	$2,500- $5,500 *34*	$2,500- $8,000 *38*	Held Without Bail
3	ROR/ Standard Conditions *3*	Release on Special Conditions Type I *7*	Release on Special Conditions Type I *11*	Release on Special Conditions Type I *15*	Release on Special Conditions Type II *19*	Release on Special Conditions Type II *23*	Release on Special Conditions Type II *27*	$2,500- $5,000 *31*	$3,000- $6,500 *35*	$4,500- $15,000 *39*	Held Without Bail
4 *Higher*	Release on Special Conditions Type I *4*	Release on Special Conditions Type I *8*	Release on Special Conditions Type I *12*	Release on Special Conditions Type II *16*	Release on Special Conditions Type II *20*	Release on Special Conditions Type II *24*	$2,500- $4,500 *28*	$3,000- $5,000 *32*	$3,000- $8,000 *36*	$6,000- $50,000 *40*	Held Without Bail

Fig. 2. Philadelphia Pretrial Release Guidelines Matrix.

found. After finding a basic lack of empirical literatures on supervision (either at the pretrial or post-conviction stages), it was necessary to ''invent'' pretrial supervision for these middle-group defendants for the 1995 guidelines. This was accomplished through a series of carefully linked field experiments to generate evidence on the basis of which to design appropriate supervision as a condition of release for use under the guidelines (Goldkamp & White, 2006). Apart from revamping the computerized collection of pretrial services information, this meant that Pretrial Services had to develop supervision services that it had not previously operated.

In addition to ''mere'' pretrial supervision, the new guidelines involved a special informational, orientation approach to make certain that defendants understood the requirements of the criminal process. Also, because many of the Type I and Type II special release categories of defendants involved drug offenders, several treatment options were developed to be targeted to these defendants while on release, including a drug court (the Philadelphia Treatment Court), a Criminal Justice Treatment Network for Women, and other special approaches. The overarching idea was that to convince the commissioners to release defendants on these newly devised conditions, the conditions would have to be seen as meaningfully addressing the risks – of failure to appear in court or of new crime – defendants posed.

With the jail population in Philadelphia continuing to climb (see Fig. 1 above), the new pretrial release guidelines were implemented at the end of 1995 as part of the City's plan to resolve the *Harris* jail overcrowding litigation (Goldkamp & Harris, 1992) – which was ''settled'' in 2000 after 18 years of litigation.[29] The same operational understandings as in the previous bail guidelines were continued (agreement in a majority of instances, written reasons for exceptions, immediate appeal to referee judge). In an effort to demonstrate that the strategy had been implemented, the impact and operation of the pretrial release guidelines were evaluated in their first year of operation (Goldkamp, Harris, White, Weiland, & Collins, 1997). Under the circumstances, the guidelines could not be evaluated through a judicial experiment with random assignment, as they had been in 1981, nor could they be contrasted, except in a general sense, with a normal, baseline period representing pre-implementation functioning of the bail system because the Federal emergency orders limiting pretrial detention had for so long superseded ''normal'' bail practices. However, the evaluation sampled pretrial release decisions under the guidelines during two periods in the first year of operation: the first from December 1995 through March 1996 (Phase I), and the second from June 1996 through August 1996 (Phase II). The results of the very early-stage implementation of the approach showed

some promise – and yet revealed what should have been seen as future concerns needing follow-up.

For the guidelines to have their planned impact on pretrial release and detention practices the working assumption was that bail commissioners presiding at first appearance would make decisions that agreed with the guidelines a substantial majority of the time, with a target level of agreement of 70–75 percent. In fact, the commissioners' decisions agreed with the new pretrial release guidelines 65 percent of the time in Phase I and 62 percent of the time in Phase II. Agreement in a majority of cases was attained, though not at the level ideally targeted. Given the very early stages of programmatic implementation sampled, the results were relatively encouraging and believed to be on the road to effective implementation. In most of the instances when commissioners departed from the guidelines (in 78 percent of the exceptions) they noted reasons for their departures that were usually appropriate and constructive.

When agreement within categories of the guidelines was examined, it was clear that commissioners felt comfortable (74 and 71 percent agreement) with the guidelines recommendations pertaining to ROR; almost as comfortable with guidelines suggestions in cash bail ranges (68 and 62 percent of cases for the two periods); and much less comfortable with the newly created supervision zones (59 and 40 percent agreement for Type I supervised nonfinancial release and 57 and 48 percent agreement for Type II supervised nonfinancial release). This early feedback showed that the judicial decisionmakers had a difficult time adjusting to the fact that supervision would now be provided – for the first time in their experience – and their confidence decreased between the two sample periods. Put another way, and referring to specific categories of the guidelines, during Phase I, commissioners agreed with the guidelines 60 percent or more of the time in 22 of the 28 specific guidelines cells studied; by Phase II several months later, that level of agreement was reached in only 10 of the 28 cells studied.

With only historical background data (Foote, 1954; Goldkamp, 1979; Goldkamp & Gottfredson, 1985) as a point of reference, the initial conclusions of the early-stage implementation of the new 1995 pretrial release guidelines were that they first seemed to produce a reasonable detention rate, but then, without explanation, within a few months (from Phase I to Phase II) detention increased from 25 to 36 percent. Failure to appear rates among released defendants (at 26 and 23 percent, respectively) seemed reasonably low, at least compared to FTA rates that exceeded 80 percent during the height of the Federal Court intervention. A retrospective time series analysis of the impact of the introduction of the 1995 guidelines on

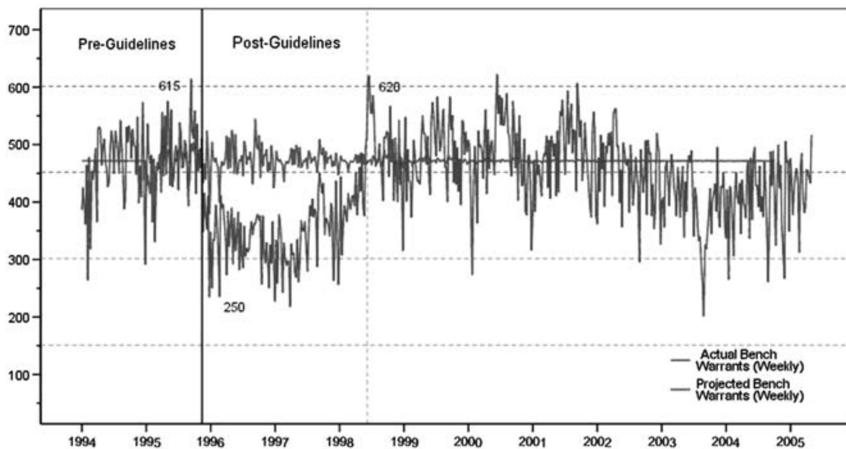

Fig. 3. Impact of Pretrial Release Guidelines on Bench Warrants.

defendant failure to appear (measured as bench warrants issued) showed at least a very positive short-term effect of the new guidelines in reducing defendant flight – one of the main constitutional aims of the pretrial release decision (Goldkamp & Vîlcicã, 2006). Fig. 3 plots the expected level of fugitive defendants compared to the actual level generated after implementation of the guidelines. However, the fugitive suppression effect had dissipated by about mid-1999 when Philadelphia launched an intensive drug enforcement operation (Operation Sunrise) (Goldkamp, Moore, & Harris, 2000; Goldkamp & Vîlcicã, 2006). Rearrest rates among defendants released through the guidelines were comparatively low, from an historical perspective at about 14 and 15 percent in the respective phases – thus, public safety as well seemed to be relatively well protected by use of the guidelines.

It appeared that full compliance with the guidelines was affected by two factors – the weight judicial leadership placed on the commissioners to follow the guidelines closely and the discomfort and skepticism the commissioners felt about the new nonfinancial release options. Although the commissioners apparently grew increasingly uncomfortable using the special supervision categories of release under the guidelines – which were key to achieving the detention reduction aim – this may have been because they were not convinced of the effectiveness of the supervision to be offered or felt that the available special options did not sufficiently address the risks or problems they perceived to characterize Philadelphia defendants. Finally, the commissioners were adapting to protect against restrictions on their

discretion – preferring to stick with what they thought the safest decisions ought to be. To the researchers at least, they appeared to be waiting out the reform, uncertain of the level of commitment actually required, and hoping that the whole political atmosphere surrounding the crowding litigation would somehow normalize. Their sense of uncertainty perhaps reflected the uncertainty of the court leadership as a whole about the possible transitory nature of the crowding crisis.

CROWDING RETURNS WITH NEW SCRUTINY OF PRETRIAL RELEASE DECISIONMAKING

With the pressures from the *Harris* litigation taken off the City of Philadelphia with its 2000 settlement (and the 2002 settlement of *Jackson*), the City's criminal justice emphasis turned to law enforcement, with a succession of initiatives targeting high drug-crime areas, such as Operation Sunrise and Operation Safe Streets. The days of the Prisons conditions litigation seemed distant almost safely behind local officials, and as attention turned away from the inmate population and confinement conditions, the inmate population climbed to over 8,000 in 2005 and nearly 9,000 inmates in 2006 (see Fig. 4). In 2005, as City officials realized that overcrowding was looming again as a major problem, the researchers were

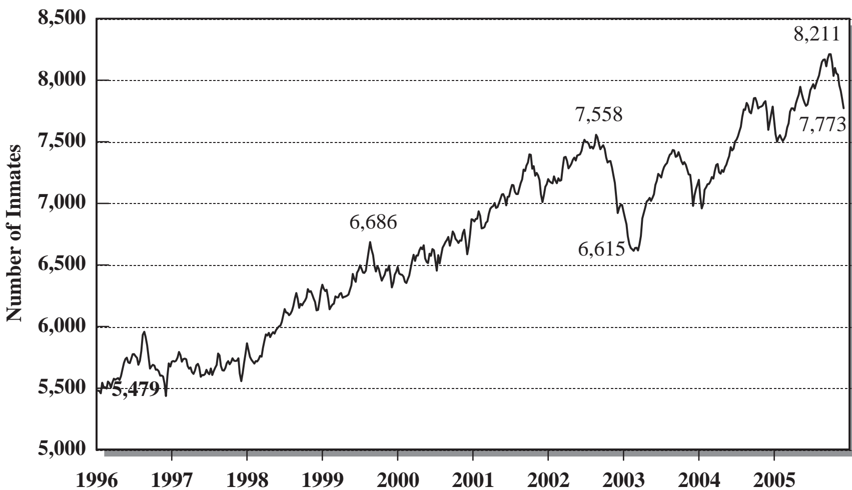

Fig. 4. Weekly Average Daily Population of Philadelphia Prisons, 1996–2005.

asked to study the factors contributing to the population build-up, including basic court functions and, especially, pretrial release practices (Goldkamp, Vîlcicã, Weiland, & Kee, 2006). The working capacity level posited in the *Jackson* case in 1977 had been 2,200 inmates; during *Harris*, discussion centered around 5,400 inmates in 1995. Even though buildings had been constructed and old facilities had been shut down, at near 9,000 inmates, the jail system was completely overtaxed and the overcrowding backed up to affect police holding facilities as well.

This 2006 research noted that a variety of upward trends, including in jail admissions, time to disposition of cases, violations of probation, and bench warrants for fugitive defendants – all contributed to the increased inmate population. But as Fig. 5 shows, once again, the majority of confinement derived from the pretrial process in one way or another. Moreover, this new review of bail practices, based on an estimated 12,333 defendants entering the courts in the period March through May 2005 (with one year follow-up), revealed that commissioners were following the 1995 pretrial release guidelines in only about half of all entering cases. Basically, the study

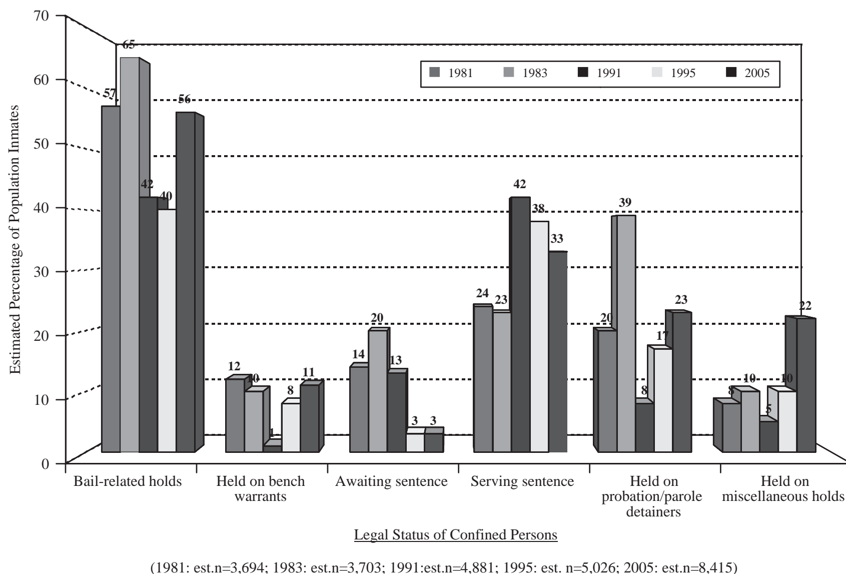

Fig. 5. Statuses of Person Confined in Philadelphia Prisons: Comparison of December 9, 1981, December 16, 1983, December 11, 1991, May 31, 1995, and November 21, 2005.

concluded – and interviews with commissioners confirmed – the guidelines now seemed nearly irrelevant. The reasons given by the decisionmakers for not following the guidelines were two: (a) that the nature of the defendant entering the system had changed (for the worse) over the last decade – a claim for which the 2006 research did not find empirical support; and (b) that the Type I and Type II conditions of release (supervision) were generally not deemed credible, with the exception of the Philadelphia Treatment Court, which had developed a very good reputation.

The analysis showed that detention appeared to be increasing – at least when measured as a proportion of the steadily increasing number of entering defendants, reaching 36 percent in 2005. Along with the greater numbers of defendants entering the system and the greater proportion being detained, defendants stayed in detention longer, as more complicated other holds and longer time to disposition in the courts slowed the system down. The percentage of released defendants rearrested for new crimes during pretrial release was comparatively low (23 percent), but higher than a decade earlier. The rate of failure to appear in court was moderately high (36 percent) – at least in relation to past studies. The pretrial release guidelines had reached a state of near irrelevance. Commissioner discretion was playing a greater role in pretrial release decisions, with the main side-effects being in higher rates of pretrial detention and somewhat higher rates of pretrial misconduct (FTA or rearrest). Detention was generated through cash bail, as before, and detention practices varied by commissioner. Similarly situated defendants were not being treated as similarly as when the guidelines had been installed in 1995.

Because the City and the court system has only recently settled its latest civil rights confinement litigation (*Bowers*), it is uncertain what emphasis will be placed on pretrial release practices in dealing with the current, burgeoning inmate population in Philadelphia as the Federal court is becoming involved once again. Judging from the past, one can predict a new scrutiny of pretrial release practices in the near future and questions about whether constructive change can come from within, or must be imposed – through court order or legislation – from without.

CONCLUSION: LESSONS TO BE DRAWN FROM JUDICIAL REFORM IN PHILADELPHIA

As the literature for nearly a century has suggested, judicial discretion and its vehicle, dollar bail, lie at the core of the quality and volume of pretrial

release and detention decisions that play such an important role in shaping the pretrial jail population and the experience of defendants released to the community. The critique of the Vera-type information-based bail reform strategy that prompted the development of the judicial guidelines strategy was based on the earlier reform's failure to engage the judiciary itself in bail reform. As an attempt to address this shortcoming, the judicial guidelines strategy was developed as an evidence-based policy approach, piloted and operated in Philadelphia primarily.

In its first generation, as "bail guidelines," the strategy was the product of a solely judicial collaboration. Research played a major role in providing baseline data in a feasibility study, in testing different conceptual models of judicial guidelines, and, in fact, implementing the first version ever through a carefully controlled field experiment. The first findings were promising. Equity of treatment of defendants was improved and pretrial detention, defendant flight and failure to appear were at least no worse at the aggregate level. Yet, through the lens of the guidelines classification, in specific categories, the guidelines produced clear improvements. In addition to providing a foundation which would allow for adjustments and improvements on a category-by-category basis, the pretrial release guidelines represented a structuring of judicial discretion, a useful decision resource, a means of accountability and visibility in pretrial release decision making, as well as a reorganization of information needed by the decisionmaker to achieve the legitimate aims of the pretrial release process.

Unfortunately for the first version of the Philadelphia judicial guidelines strategy, Federal court intervention and various emergency rules ordered by that intervention rendered the Municipal Court's exercise in rational reform inconsequential, as the wave of jail overcrowding overwhelmed court procedures. While the crowding emergency washed over the first version of the guidelines in the 1980s, ironically it resuscitated the strategy as the inmate population again reached unmanageable and unconstitutional levels in the mid-1990s. This time the collaborative, evidence-based policy process was repeated under the authority of the mayor, the leading criminal judge, both local courts, the District Attorney, and the Defender, giving the "judicial" pretrial release guidelines less of an "in-house," self-help quality and more of an externally imposed change in procedure, mandated by the overall justice system politics reacting to crowding litigation. The early data on that implementation of the 1995 guidelines, again, suggested reasonably positive results (very positive in the case of reduction in the numbers of defendants absconding), certainly a "good start." Ten years later, bail practices have come under critical scrutiny in Philadelphia once more and

the use and impact of the still-existing 1995 version of pretrial release guidelines has been studied because of an ever-worsening jail overcrowding situation and a 2006 civil jail conditions lawsuit. That review showed that, although the guidelines are institutionalized, even computerized, they are not well-utilized – at least in the manner intended – and their presumptive decisions are largely ignored.

However, use of the guidelines matters. Fig. 6 shows that shortly after implementation of the 1995 guidelines, the commissioners exhibited a reasonably high level of confidence in the guidelines. Then, as the political pressure was taken off – both in anticipation and as a result of settlement of the two jail crowding cases (in 2000 and 2002) – compliance with the pretrial release guidelines began a downhill slide, until reaching the low level of roughly 50 percent agreement at the time of the latest research in 2005. This trend downward in agreement with guidelines corresponded to the upward trend in the inmate population (see Fig. 4) and suggests that it was at least a contributing factor to the population growth. Court officials have commented that they are "out of adjustment" with a new and "tougher" type of Philadelphia defendant. Translated, this may mean that the guidelines need to develop and adopt more credible and effective category-specific release options.

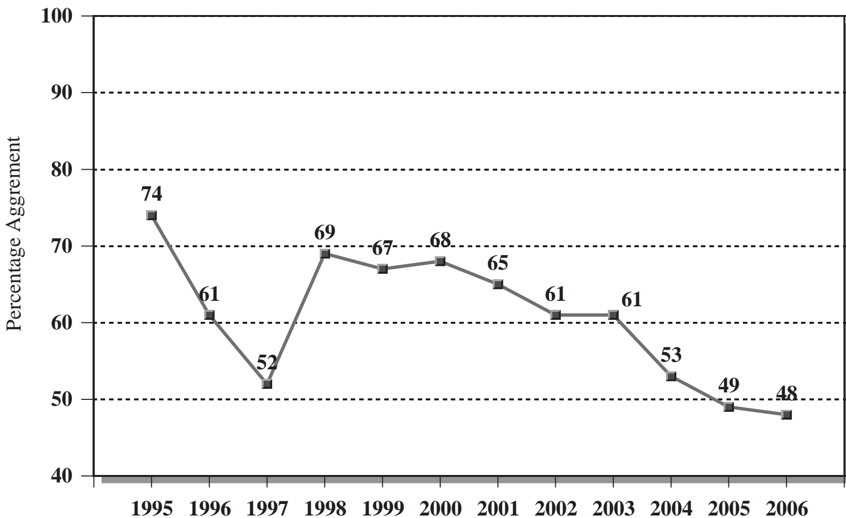

Fig. 6. Agreement with Pretrial Release Guidelines at Preliminary Arraignment, 1995–2006.

The details of the Philadelphia experience with judicial pretrial release guidelines show promise for the strategy and underlying method, though also raise cautions relating to implementation and follow-through. The first lesson to be drawn, again, is about the role played by judicial discretion in pretrial release and detention, which is central and needs to be squarely addressed by reform. In this regard, improved statistical risk schemes are only useful to the extent that they address the needs of judicial decision-makers – which are not only predictive. In developing a reform of judicial pretrial release decisionmaking, it makes sense to start with the premise that the pretrial release decision is deceptively challenging for judicial decision-makers, with little upside and a large possible downside. Its possible difficulty notwithstanding, unfettered and unassisted exercise of discretion (judicial subjectivity) at the bail stage produces a variety of undesirable side-effects – on the correctional facilities as they become overcrowded, on defendants who are detained under inconsistent principles and procedures, on the courts when they cannot be sure defendants will be present for judgment, and on the community as greater numbers of defendants are released to the community presenting uncertain threats to victims, witnesses, and the public safety.

Developed as a self-help decisionmaking tool based on a unique collaboration between the researchers and the decisionmakers, the guidelines strategy's success in its initial implementation stages – in the 1980s and later in the 1990s – attests to the fact that change is better achieved when the affected decisionmakers are centrally involved and meaningfully engage themselves in the dynamics of change. With initially positive impact documented at the early stages of implementation, the key question is how and why they weaken or fall into disuse. In the first innovation, a positive rational approach to improving pretrial release was supported by the Municipal Court judiciary, but was then overwhelmed by the unintentionally harmful side-effects of the crowding litigation that imposed external rules that subverted the original judicial reform. In the second stage of the innovation, a constructive, multi-agency approach to examination and revision of the judicial guidelines gave a broader imprimatur to the judicial strategy.

The key to the subsequent weakness of the strategy had to do with the mindset of the judicial decisionmakers (in this case, commissioners not judges) who did not have full confidence in the content of the guidelines' suggestions for releasing higher risk defendants to new supervision options in the community. The risk of adopting the innovative venture was placed on the shoulders of the front-line decisionmakers themselves as they were

instructed to follow the new guidelines. As some of the options were not effectively developed or the positive impact of other more effective release options was not well-conveyed in training or through systematic feedback, the commissioners' confidence was undermined. At the same time, the political ''heat'' was off. With cash bail still a safe option, and the community facing new crime problems, as a group the commissioners used their discretion to err in the direction of cash bail and detention, rather than to experiment with what they perceived to be risky or undeveloped community release options. By failing to provide sufficient resources to ensure effective release options and to manage the growing numbers of defendants to be released to the community, the locality guaranteed that it would have another jail crisis at a later date.

These explanations for the limits of the potential impact of judicial guidelines in Philadelphia do not involve core assumptions of the judicial guidelines methodology, but rather relate to implementation in the areas of developing options, providing periodic feedback, maintaining a system of accountability, as well as adapting to changing external circumstances (i.e., crowding litigation). Judicial leadership seems to play an inescapably important role in attempts to address problems of judicial discretion at the pretrial release stage. Judicial leadership led the developments of the guidelines strategy in both decades, and can be credited with the accomplishments that were attained. (Twice, once in 1982 and once in 1995, the courts formally voted to adopt pretrial release guidelines as official court policy.) When judicial leadership shifted its attention away from judicial reform (as the crowding crisis lessened), or the actors changed as judges moved on or retired, the pressure to hold judicial pretrial release decision-making accountable was relieved. Once relieved, the discretion of the front-line decisionmakers moved in to fill the void, and practices reverted to the ad-hoc and intuitive safety of unguided and unreviewed discretion.

One of the key features of the strategy that was not well-implemented was the feedback mechanism attached to the guidelines. The strategy was intended to produce very specific periodic feedback on the issues and outcomes of interest relating to pretrial release, detention, and decision patterns. The aim of the feedback feature was to build in a capacity for self-correction of the guidelines as difficult categories of defendants or problematic release practices could be identified and strategies could be developed to address them. Both in the 1981 and 1995 versions of the guidelines, this practice was initiated but not maintained. As a matter of implementation, to be effective, the feedback mechanism needed to be institutionalized but dynamic, and supported by sufficient staff and resources. In identifying and addressing small problems

and issues on an ongoing and category-specific basis, larger problems – with defendant flight, pretrial crime, or unnecessary detention – could be avoided "later."

Perhaps the biggest weakness of the specific content of the Philadelphia judicial pretrial release guidelines approach is one that would have to be faced in most other state-level jurisdictions as well: the role of cash bail. Although the guidelines in each of its incarnations increasingly narrowed the role of cash bail, and reduced the scope of its discriminatory economics, they did not eliminate it. The reasons for this had to do with judicial comfort (eliminating the cash option entirely would have represented such a dramatic departure from local custom, that the entire reform would certainly have been rejected). Yet, cash bail is the key vehicle of judicial discretion at the pretrial release stage. If the guidelines had instead eliminated cash bail – at least as a method for causing a defendant's detention – more emphasis could have been placed on developing category-specific release options tailored to the nature of the risks of flight and crime posed – and the necessary preparation and resources for implementation could have been addressed. These could have been adjusted and improved over time with periodic feedback. The end result could have reduced judicial discomfort by providing effective and well-tested alternatives to cash bail.

The role of the dollar is the greatest difference between pretrial release as practiced in the states at the local level and pretrial release as operating in the District of Columbia and the Federal courts. The District of Columbia and Federal laws prohibit use of cash bail to cause the detention of defendants (see also, ABA, 2002[30]). Detention and release are decided as a direct decision through an adversarial hearing at the first judicial stage. If a judicial officer cannot find a condition of release that addresses the risk of flight or crime posed by the defendant, the defendant will be held. Although not without its own challenges, this more forthright approach to pretrial release and detention – making custody a direct and clear determination – has compelling advantages, including recognition of the need for due process safeguards for the detention decision and careful deliberation of release conditions and confinement. By eliminating the central role of cash bail, however, such approaches eliminate the "wiggle room" that judicial decisionmakers in state jurisdictions currently enjoy. By eliminating the cover of cash bail, the decision becomes more explicit, visible and, by implication, the decisionmaker becomes more accountable. There are also logistical reasons why localities are discouraged from taking this direct approach, not the least of which is the fact that adversarial hearings would

be required at the very first judicial stage and raise resource implications for the courts, the prosecutor, and defense.

Courts may not have the choice to ignore the challenges of discretion posed by pretrial release decisionmaking for long. If localities cannot succeed in managing their own pretrial release and detention practices fairly, safely, and effectively, externally imposed policies are likely – the restrictions of the Federal Prison Litigation Reform Act notwithstanding. Whether legislative or in the form of court orders from crowding litigation, externally imposed rules will be less flexible and will limit judicial discretion – without the engagement of the local judiciary. The Philadelphia example may be limited – it is a single case study – but as a case study it is extensively documented. Although the research has pointed out some of the challenges of implementation, the method offers the judiciary a reasonable methodology retaining flexibility and policy control, while promoting accountability and effectiveness in pretrial release practices. In addressing judicial discretion as a matter of judicial strategy, some of the difficulties associated with American bail practices, first identified in the 1920s and 1930s, can be more effectively addressed than bail reform has yet been able to do at the local level where the bulk of pretrial detention occurs.

NOTES

1. "Guidelines" first developed as a decisionmaker focused approach in the 1970s in the areas of parole and sentencing (Gottfredson et al., 1978; Goldkamp, 1987; Blumstein, Cohen, & Tonry, 1983a, 1983b). Although guidelines gained notoriety in the area of sentencing as a legislatively imposed method for structuring judicial discretion at sentencing (e.g., Federal sentencing guidelines), they originated as a decisionmaker-oriented, self-help, action-research approach (Gottfredson et al., 1978) and first applied to parole decisionmaking. The evidence-based, self-improvement were version of guidelines was quickly overshadowed by the "popularity" (at least among law makers) of the legislatively imposed version of sentencing guidelines, a version of determinate sentencing limiting judicial discretion at sentencing (Goldkamp, 1987). "Guidelines" became decidedly unpopular among judges as a result of the diffusion of this second version.

2. These laws stimulated revisions of law in many states (Goldkamp, 1985).

3. In their first incarnation, "bail" guidelines were so named based on the academic definition of bail, which broadly referred to means of ensuring a defendant's appearance in court. In this usage "bail" included financial bail but was by no means limited to it. Principally because practitioners interpreted "bail" to mean dollar bail, the evolving judicial guidelines strategy was renamed "pretrial release guidelines," paralleling a similar shift in usage in bail reform. Note that the

Federal Bail Reform Act of 1966 (18 U.S.C.A 3141-3152 (1966)) and ABA Standards from 1968 on (ABA, 1968, 2002) referred to the "pretrial release decision."

4. In theory, bondsmen facilitate the release of defendants whose bails are set at unaffordable levels by requiring only 10 percent or some similar portion of that amount as a nonreturnable fee or premium. If defendants fail to appear in court, bondsmen are supposed to forfeit the entire amount of the original bail to the court. One of the main forms of corruption involving bondsmen over the decades has been the failure of courts to actually collect the forfeited amounts from bondsmen when defendants fail to appear – thus rendering bonding an all-profit enterprise.

5. For more extensive discussions of the literature, see Goldkamp (1979), Goldkamp and Gottfredson (1985), and Goldkamp et al. (1995).

6. This conceptualization borrows from Gottfredson and Gottfredson's (1980) study of discretion in criminal justice decisionmaking.

7. Much of the argument drew on two Supreme Court cases, *Stack v Boyle*, 342 U.S. 1 (1951) and *Carlson v Landon*, 342 U.S. 524 (1952), interpreted to support opposite positions. Dicta in *Stack* supported the notion that ensuring appearance in court was the only aim of bail and that the right to bail in the 8th Amendment was suggestive of a presumption favoring pretrial release. *Carlson*, on the one hand, was interpreted as bolstering the argument that the bail decision also had a legitimate role in considering the danger posed by defendants (even though it was a civil case involving deportation proceedings).

8. 18 U.S.C.A 3141-3152 (1966).

9. D.C. Code Ann. § 23-1321 *et seq*. (1970).

10. 18 U.S.C. §§ 3141-56 (1984).

11. 430 A.2d 1321 (D.C. 1981), *cert. denied,* 455 U.S. 1022 (1982).

12. 481 U.S. 739 (1987).

13. Although it became difficult to question the legitimacy of the "danger" prevention role of pretrial release decisions after *Salerno*, the matter of just how danger should be defined represents another area of great uncertainty. For example, should such concepts as "public safety," "threat to the community" and to "any person" be translated to mean only serious harm or injury or merely the likelihood of any type of reoffending during the pretrial release period? See Goldkamp (1985).

14. This purposely selective review of post-reform bail research does not mean to neglect other important works. See, for example, also Roth and Wice (1978), Fleming (1980), and Toborg (1981).

15. This was an extraordinary accomplishment for the times. Despite the fact that the ABA (1968) had recommended the abolition of "compensated sureties," only Oregon and Kentucky passed laws eliminating the role of the bondsmen.

16. An exception to this was found in the District of Columbia during the period prior to the introduction of preventive detention procedures when conditional release was introduced as a first-stage option with the idea that cash bail would be displaced as an initial decision. The success of this aim was never documented and the practice led to concerns that conditional release replaced personal recognizance release rather than cash bail (Beaudin, 1970–1971).

17. See the ABA's recent standards suggesting that all jurisdictions should have pretrial services agencies (ABA, 2002: Standard 10-1.10).

18. See ABA Standards (2002: 10-1.9) which warn that "the policy favoring pretrial release and selective use of pretrial detention is inextricably tied to explicit recognition of the need to supervise safely large numbers of defendants in the community pending adjudication of their cases. To be effective, these policies require sufficient informational and supervisory resources."

19. The full account of bail and pretrial release guidelines is discussed well elsewhere and in only summarized here. See Goldkamp and Gottfredson (1979), Goldkamp and Gottfredson (1985), and Goldkamp et al. (1995).

20. Predictive ("risk") instruments have a long history in pretrial release dating at least as far back as Beeley's (1927) work. The Vera point-scale was at least implicitly assumed to be an empirically based risk assessment (but see Gottfredson, 1974). A great deal of work has been done in the area of predicting pretrial flight and rearrest (e.g., see Angel et al., 1971), including as part of the judicial guidelines research. However, the problem of dealing with judicial discretion is only partly and indirectly addressed by risk-assisted recommendation schemes.

21. The judges opted for an actuarial approach to both forms of pretrial misconduct – though models showing flight and crime risk were separately developed – which meant that they were making the defendant "danger" agenda explicit at a time when it was not even recognized in Pennsylvania law. The judges made clear that this was an important concern to them in their bail decisions.

22. The risk classification of defendants was devised after considerable empirical modeling of defendant flight and crime using data from large samples of Philadelphia defendants.

23. In fact, because of the guidelines, the president judge was able to have legislation passed that created new judicial positions, bail commissioners, to preside over preliminary arraignment (first appearance) to make bail decisions according to the guidelines. This would free Municipal Court judges from initial bail duties entirely (except when acting as on-call referee judges for appeals).

24. See the remarks of the then Municipal Court President Judge Glancey explaining the circumstances in Goldkamp and Gottfredson (1985).

25. Philadelphia Court of Common Pleas, No. 2437 (Feb. 1971); *Jackson v. Hendrick*, 764 A.2d 1139 (PA Commw. Ct. 2001).

26. The one-man/one-cell rule was based on statutory law that was subsequently repealed due to the lobbying efforts of the Philadelphia District Attorney's Office.

27. No. 82-1847 (E.D. Pa 1982).

28. See "Memorandum and Order," *Bowers v. City of Philadelphia*, No. 06-CV-3229 (E.D. Pa. Jan. 25, 2007).

29. See *Bowers* at note 5: "It is clear that the 2000 agreement was reluctantly approved and jurisdiction was relinquished after 18 years of litigation not because the court had been satisfied that the job that had been successfully been completed, but rather because of the limitations that had been placed on the courts by Congress with the enactment of the PLRA (Prison Litigation Reform Act) in 1996." *Harris*, 2000 WL 1239948, at 10.

30. See ABA (2002: Standard 10-5.3 (a)): "The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay." This is adapted from 18 U.S.C. § 3142 (c) (2) (1984); D.C. Code Ann. § 23-1321(c)(3) (2001 Edition, 2003 Supp.).

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UNDERSTANDING MASS INCARCERATION AS A GRAND SOCIAL EXPERIMENT

Natasha A. Frost and Todd R. Clear

ABSTRACT

Prison populations in the United States have increased in every year since 1973 – during depressions and in times of economic growth, with rising and falling crime rates, and in times of war and peace. Accomplishing this historically unprecedented penal pattern has required a serious policy agenda that has remained focused on punishment as a goal for more than a generation. This paper seeks to understand that policy orientation from the framework of a social experiment. It explores the following questions: how does the penal experiment – which we have called the Punishment Imperative – compare to other "grand" social experiments? What were its assumptions? What forms did the experiment take? What lessons can be learned from it? What is the future of the grand social experiment in mass incarceration?

> The term "experiment," however, carries connotations quite different in the natural sciences than in social developments. It is the rule, indeed almost inevitable, that an experiment in the physical sciences does not disturb the course of the natural events with which it is concerned. Just the opposite is the case with an experiment in current social life. We are told that if an experiment in the New Deal does not turn out well, it will be dropped and something else devised. The implication is that when the experiment is

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> dropped, nothing has happened. But this is just the opposite of the fact; when an experiment is introduced into a set of social relations, these are modified, and modifications persist after the experiment has been withdrawn.
>
> – Social experiments, 1935

In the same week that New York's former (and now disgraced) Governor Elliott Spitzer announced plans to begin closing prisons in New York (Confessore, 2007), Governor Arnold Schwarzenegger, announced that California would be sending more than 7,000 prisoners to private prisons in other states to relieve overcrowding (Vogel, 2007).[1] Those contrasting incarceration policies should stand as a clear indication that what a place does in terms of prison expansion is not necessarily a reflection of what has been happening with crime in that place. Crime has been declining nationwide for more than a dozen years – indeed, over the past decade, we have seen the largest sustained declines in crime since World War II (Zimring, 2007). In keeping with the national trend, both New York and California have also seen notable declines in crime since 1993 (Travis & Waul, 2002). New York's response to the crime decline – start closing prisons; California's response – send prisoners out of state to stave off court interference (which has since followed anyway (see Egelko & Buchanan, 2009)).

Since the early 1970s, reliance on incarceration as a sanction has increased so consistently and steadily that we have reached the point where the term "incarceration" is all too frequently preceded by the word "mass" (e.g., Clear, 2007; Garland, 2001a; Gottschalk, 2006; Lynch & Sabol, 2004; Patillo, Weiman, & Western, 2004). Long gone are the days when incarceration was reserved for only the most serious, violent, or recalcitrant offenders. Gone also are the days when incarceration was used reluctantly as a last resort. We now incarcerate first-time offenders and career criminals; we incarcerate violent criminals, but also no shortage of drug and property offenders; we incarcerate the very young and the very old. Women and girls are being incarcerated at rates unprecedented in U.S. history (Frost, Greene, & Pranis, 2006). In our quest to incarcerate our way out of crime, it seems few have been spared. Evidence shows that we are not only quicker to send someone to prison but more willing than ever before to send them there for protracted periods of time (Blumstein & Beck, 2005). We are also more inclined to use the prison than any other Western democracy. Indeed, the United States has the dubious distinction of having the highest incarceration rate in the world (Pew Charitable Trusts, 2007).

We no longer simply rely on incarceration as a punishment response of limited or last resort, our commitment to a policy of incarceration is now so

entrenched that we have created the problem of mass incarceration. The penal system has always been an institution of social and political significance. Today, however, it is embedded as a cultural power. In our life of symbols, the penal system is ever-present on television, in movies, and on the written page. Mass incarceration is not just a culturally powerful symbol, but it is now a tangible fact in real lives more than was even imaginable a few decades ago. Today the United States incarcerates more than 2.3 million people – or 1 in 136 of its residents (Harrison & Beck, 2006). At least 1 in every 36 Americans now has "prison experience" (Bonczar, 2003). Prison is no longer an elusive, ominous, distant place that many fear but few ever experience. What was at one time a back-up institution, infrequently used, and a bit curious to the everyday person is now a core fact of present-day life. Unfortunately, prison and jail have become routine features in the lives of an increasing number of Americans living in the areas most affected by our incarceration policies (Fagan, 2004).

In this article, we propose that America's recent experience with incarceration might be best understood as a grand social experiment. We describe the ever-growing American use of the prison – a pattern that has now lasted longer than a generation – as a social experiment in the grand tradition of utilitarian political ideas in American history. We argue that for more than the last 30 years, American penal policy has been dominated by an ideology in which punishment became an imperative, and the prison became a penalty of choice. We call this social experiment the Punishment Imperative. By using the term "imperative," we imply a kind of structured intellectual economy in which the idea of punishment – as opposed to other ideas such as reform or reintegration – becomes so powerful that it drowns out any other voices in the discussion about penal policy. We hold that the Punishment Imperative arose when all options disappeared (or at least lost legitimacy) in the face of broad acceptance of the need for a punitive response to crime (or, more accurately, public alarm about crime). Punitive ideas became an irresistible force in post-conviction policy, and no idea could find a hearing unless it first accepted the logic of the need for more – ever more – punishment.

Unlike many grand social experiments, enacted by political leaders taking advantage of the co-alignment of forces taking place at a particular point in time, the Punishment Imperative is an experiment that has maintained strength for decades and has been embraced across the political spectrum. Nonetheless, it has been a major change in social policy enacted in order to gain certain utilitarian ends, and may thus be seen as a classic kind of grand social experiment in the pragmatic American tradition.

GRAND SOCIAL EXPERIMENTS

America, some suggest, was founded as a grand social experiment (de Tocqueville, 1990). The new country in the new world offered a new vision for what a society could aspire to and offered the first full-scale attempt to fully incorporate democratic principles into the governing structure. Alexis de Tocqueville was impressed with many aspects of the American experiment in democracy – the energy and optimism of the people, their entrepreneurial capacity, and their faith in democratic ideals. He did not declare the American Democratic Experiment a success (nor a failure). He was wise enough to know that history would have to answer that question. Rather he judged the American idea as worthy of note, interesting and exciting. For our purposes, de Tocqueville's unique evaluation of the early days of the nation remind us that founded as a social experiment, America has had a long tradition of continuing social experimentation.

We feel it is important to distinguish "grand social experiments" from "social experiments" in the traditional sense. We use the phrase "social experiment" in a higher-order way than it is frequently used in the social sciences; we mean to talk about "grand" social experiments. In a series of works, David Greenberg and colleagues (Greenberg, Kinksz, & Mandell, 2003; Greenberg & Shroder, 2004) have chronicled literal social experiments in public policy programs. They describe the design and effects of programmatic experiments in the traditional sense – those that include random assignment to treatment and control groups; the application of the "treatment condition" (whether that might be economic incentives, work opportunities, etc.) to the treatment group; measurement of outcomes of interest; and the careful analysis of those outcomes across the treatment and control groups. Greenberg and colleagues identify Heather Ross's 1960s New Jersey Income Maintenance Experiment as the very first example of the kind of experiment in which they are interested. The vast majority of social experiments that Greenberg et al. then chronicle occur in the realms of healthcare and welfare – some have provided support for a particular policy, others have demonstrated the failure of a policy to succeed on its own terms. This type of controlled social experiment – though important – is not the type of social experiment that we are referring to here.

By grand social experimentation we mean pursuing expansive social programs – in wholesale fashion – to address a social problem of some import.[2] We refer to the idea of "grand social experiments" as comprised of a higher order of policy shifts, historical moments when a rare combination of public will and political energy coalesce to change, fundamentally, the

way a dominant social concern is addressed. What happens then is less the creation of a few new programs than it is an overhaul of thinking about and strategy for a pressing problem of concern. Social experiments of this type are often controversial when implemented and frequently take some time to fully realize their potential. Grand social experiments offer seismic-like shifts in the sociopolitical ground.

Grand social experiments have three characteristics. First, they take place around a *pressing social problem*, one that so galvanizes pubic attention that it calls for a *transformative kind of action*, something that turns the status quo on its head. The immensity of the problem is defined, in part, by how substantially out of the ordinary a solution is called for. By definition, a small problem does not present itself as in need of a grand solution; only grand problems qualify.

Second, there is a *coalescence of political will and public enthusiasm* for a "new approach." What makes a grand experiment possible is not the mere fact of an overarching problem, but the companion fact that pubic frustration with the problem opens the door to new possibilities for tackling the problem – Tonry (2004c, 2006) has called this a "window of opportunity" in the policy arena. The status quo – the old way of doing business – comes to be widely seen as a failure. This, in turn, suggests that new strategies are called for. Those with political agendas offer new definitions of the underlying nature of the problem, and these new definitions promote changes in action, sometimes radical change.

Third, there is *an idea that gains momentum as a widely accepted new way of addressing the pressing problem*. Coming out of the shift in the way the problem is perceived by the broad public – the way the problem is socially "defined" – comes a logical strategy for attacking the problem. The "grand social experiment" is thus the adoption of a new, largely unproven, strategy for a high-priority social problem based on a reformulated understanding of that problem. By these criteria, it is an "experiment."

Grand social experiments gain momentum from three facts. First, the immensity of the problem, at least as it is present in the public consciousness, creates a sense that "something must be done." Second, constituencies that often oppose one another in other political contexts become aligned in this one, enabling a wide acceptance of the need not just for a new strategy, but for a particular strategy. The ordinary kinds of compromises required for political change are diminished, as the potential opposition to the "grand idea" is suppressed in the face of the coalesced forces. Third, the action itself is the solution to the problem. That is, merely by passing laws that enact the new strategy, the pressure for action is abated.

This infers that "grand" social experiments are evaluated less by their accomplishments in the long-term alleviation of the problem than they are by their ability, in the short run, to address the public demand for action.

Others have commented on this pattern. Stanley Cohen (1985, 2002) was among the first to point out that penal reform rarely solves the problem it was purportedly designed to address, but is instead directed to alleviate public alarm. In the third edition of *Folk Devils and Moral Panics*, Cohen (2002) opens his now classic work on the 1960s moral panic surrounding the Mods and Rockers by describing the phenomena:

> Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests... Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in social and legal policy or even in the way society conceives itself. (p. 1)

Goode and Ben-Yehuda (1994) expand Cohen's seminal analysis through reviewing a series of historical moral panics from the witch crazes of the sixteenth century to the crack babies of the late 1980s. Musto (2002) demonstrates that well over a century of narcotics policies were driven, in part, by increasing public demand – demand that generally followed socially constructed moral panics around drug use, often among immigrant and minority populations. Tonry (2004c) makes the same point about the more recent prison build-up based on drug laws – increasing imprisonment of drug offenders followed a moral panic about drug crime but occurred *after* drug crime began to abate. It could be argued that few of the responses to these moral panics did much to alleviate the underlying problem. Nonetheless, simply responding to each assuaged public outcry and tempered public concern.

Grand social experiments do not just calm public anxieties – they also have "results," or, more precisely, consequences. Because the experiments are grand, the results and consequences are often far-reaching and multifaceted. Some of the results are so detached in time and effort from the original social change that the link to the experiment is not obvious and is historically debatable. For these reasons, grand social experiments are "studied" rather than "evaluated" in the usual sense of that term. We can illustrate this by a brief discussion of two grand social experiments that fit our description.

Because it has frequently been argued that punishment and welfare are social policies that target the same socially marginal populations

(cf., Garland, 1985, 2001b; Beckett & Western, 2001), we review two grand social experiments that had widespread welfare reform at the center of their programs of social change. We focus on the Franklin D. Roosevelt's New Deal federalization of welfare and Lyndon B. Johnson's Great Society War on Poverty programs. These grand social experiments each sought to address what seemed like the most pressing social problems of their time (unemployment and poverty, respectively) and included a series of sweeping reforms that came about following substantial social pressure. The New Deal federalization of welfare, was launched in response to the devastating 1929 stock market crash and the Great Depression that followed (Abramovitz, 2006), and the Great Society programs of the 1960s were integral to the newly declared "War on Poverty" (Kilty & Segal, 2006).

The New Deal

In the 1930s, President Franklin D. Roosevelt launched a series of federal initiatives aimed at recovering a U.S. economy reeling in the aftermath of the 1929 stock market crash. Together these initiatives are collectively referred to as the New Deal. When the stock market crashed in 1929, the Great Depression – lasting more than six years – led to increasing cries for the federal government to do something proactive to speed the recovery of the American economy. Americans everywhere were feeling the crippling effects of an economy in crisis and, in the words of Abramovitz (2006), "the dispossessed – both middle and working class – took to the streets" (p. 24). The most deplorable living conditions and highest unemployment rates this country had ever seen generated such substantial public outcry and protest that it can only be described as a broad-based social movement. Through social protest, the poor, the unemployed, the working and middle classes were able to exert considerable political pressure on the government to get something done (Piven & Cloward, 1993). The New Deal was not simply a response to an economy in crisis, it was a response to an economy in crisis *and* a growing and increasingly vocal class of unemployed citizens demanding an immediate and far-reaching response. Tackling a problem as enormous as the one that Americans faced at the beginning of the 1930s required a radical rethinking of the structure of the U.S. economy.

By most historical accounts, the New Deal, a series of economic recovery programs launched between 1933 and 1940, actually involved two New Deals (Manza, 2000). The First New Deal was marked by an array of economic reform initiatives designed to stimulate the U.S. economy. These

policy reforms included the creation of fair competition regulations, a series of banking reforms, and the passage of the National Housing Act and the Security and Exchange Act. The Second New Deal, which began following further democratic electoral successes in 1934, included another series of federal initiatives related to banking, fair labor practices, and further regulation of industry and utilities. The second New Deal was marked most notably by the 1935 passage of Social Security Act that essentially created the federal welfare system. The Social Security Act of 1935 provided for unemployment insurance, income assistance and insurance for the old aged, and public assistance for the poor through the Aid to Dependent Children (ADC) program, which ultimately became the Aid to Families with Dependent Children (AFDC) program (Abramovitz, 2006; Manza, 2000).

Although they can be chronicled, and indeed the above is an incomplete list, the New Deal initiatives were not a series of singular economic policies enacted in isolation – each intended to address its own specific problem – rather, the New Deal was a collection of policies which together represented an attempt to create a seismic shift in the structure of the U.S. economy. There were some rapid "results" of this seismic shift. As Piven (2002) has described, the cash assistance that came as part of the First New Deal quite literally "poured out" to more than 23 million people so that, by 1935, 5% of the U.S. gross national product was going toward cash assistance and work relief programs. This initial surge in assistance that followed the First New Deal was scaled back by the Second New Deal's Social Security Act. By all accounts, the American welfare state, which was launched with the New Deal initiatives of the 1930s, was slower to develop and less comprehensive in scope than the welfare states of other comparable nations (Manza, 2000). Nonetheless, the shift in economic policy that the New Deal initiated remains with us today. Although welfare has gone through a series of reforms in the seven decades since it was established, the social security system remains largely intact.

The Great Society

In the 1930s, the United States used the New Deal initiatives to stimulate the recovery of the national economy; in the 1960s, we launched an all out "War on Poverty." While Roosevelt's New Deal economic growth initiatives established the federal welfare system in the United States, Lyndon B. Johnson's Great Society programs sought to greatly expand it. During the 1960s, the problems of social and racial inequality – made increasingly salient by the civil and women's rights movements – made their way to the

top of Johnson's national agenda. America was embroiled in an unpopular war, structural inequality was widespread, and racial tensions were at an all time high. As in the New Deal, social movements played a crucial role in the impetus for widespread social change.

The Great Society, though, was more than a set of federal initiatives aimed at a particular social problem or set of social problems, it was a vision for what America could become. In a speech given in May of 1964 to an audience at the University of Michigan, President Johnson described his vision for the Great Society:

> ...we have the opportunity to move not only toward the rich society and the powerful society, but upward to the Great Society. The Great Society rests on abundance and liberty for all. It demands an end to poverty and racial injustice, to which we are totally committed in our time. But that is just the beginning. The Great Society is a place where every child can find knowledge to enrich his mind and to enlarge his talents. It is a place where leisure is a welcome chance to build and reflect, not a feared cause of boredom and restlessness. It is a place where the city of man serves not only the needs of the body and the demands of commerce but the desire for beauty and the hunger for community. It is a place where man can renew contact with nature. It is a place which honors creation for its own sake and for what it adds to the understanding of the race. It is a place where men are more concerned with the quality of their goals than the quantity of their goods. But most of all, the Great Society is not a safe harbor, a resting place, a final objective, a finished work. It is a challenge constantly renewed, beckoning us toward a destiny where the meaning of our lives matches the marvelous products of our labor. (Johnson, 1964)

The scope and breadth of the vision for the Great Society called for expansion of social programs across multiple domains, including education, health, housing, income redistribution, public assistance, and urban renewal (Ginzberg & Solow, 1974). Programs and initiatives developed during the Great Society era included federal support in the areas of primary and secondary education, the establishment of not only Medicare (the use of social security funds to provide for health insurance for the aged) but also Medicaid (federal-state health insurance for the poor), and the passage of the landmark Economic Opportunity Act of 1964 that "made poverty itself, and not only age or physical disability, an object of government policy" (Ginzberg & Solow, 1974, p. 9). Many of these initiatives were designed to "break the cycle of poverty" and confront the problems of social and racial inequality.

The New Deal and Great Society as Grand Social Experiments

Recall that we have argued that grand social experiments have three characteristics: (1) they develop in response to the emergence of a sizeable

and pressing social problem requiring a transformative kind of action; (2) a coalescence of political will and public enthusiasm for a new approach develops; and (3) there is an idea that gains momentum as a widely accepted new way of addressing the social problem. The New Deal and Great Society each qualify as grand social experiments under these criteria. With regard to the New Deal, an economic crisis served as the pressing social problem requiring transformative action. The crisis was so acute that it became apparent that nothing less than a radical restructuring of the U.S. economy was required. The package of New Deal programs emerged as a viable solution to the economic crisis and the grand social experiment was underway. Similarly during the Great Society era, social and racial inequalities emerged as pressing social problems. Obviously social and racial inequalities were hardly new problems, but it was in the decade leading up to this time that these problems took on a new significance. We were, after all, in the midst of multiple highly visible social movements that brought stark attention to the problem of inequality. In the mid-1960s, the problem of inequality could no longer be ignored. The Great Society was offered as a vision for what America could become and the collection of opportunity programs that accompanied that vision were widely accepted as practicable ways to address poverty and widespread inequality.

From the New Deal to the Great Society to the Punishment Imperative

As Abramovitz (2006) has argued, despite some resistance, public assistance programs and economic opportunity initiatives grew through the period covering 1935 through the mid-1970s. Although conservatives fought vocally against the expansion of social programs through the 1960s, it was during the 1970s that the backlash against government spending on social welfare programs was launched in earnest. In this sense, the Great Society programs are particularly relevant to the notion of incarceration as a grand social experiment. Indeed, it has been argued that the punitive turn in criminal justice policy was largely a response to the excessive permissiveness of the welfarist approach to social problems (Beckett, 1997).

Beckett and Western (2001) have argued that social and penal policies are so tightly intertwined that together they constitute a relatively coherent "policy regime." According to this line of argument, both social and penal policies target the same group – those who are socially marginal. When social causes of marginality (poverty, unemployment, inequality, and the like) are emphasized, as they were during the Great Society "War on

Poverty'' era, we can expect to see more concerted efforts to integrate those in society who are deemed socially marginal (the poor, the unemployed, the homeless, the criminal). In these times, we tend to see expansion in integrative policies such as welfare assistance, educational and occupational opportunity initiatives, and rehabilitative programs. By contrast, when the causes of social marginality are attributed to the individual and constructed as the result of (poor) rational choices, idleness, innate badness, and the like we tend to depict the socially marginal as undeserving of our sympathy or our aid and develop more punitive and exclusionary policies for the control of these populations (see also Young, 1999). Under this conception, imprisonment, an exclusionary penal policy for dealing with those who are socially marginal, can be contrasted with welfare, an inclusionary social policy for dealing with that very same population (Beckett & Western, 2001; Western, 2006; Young, 1999).

MASS INCARCERATION AS A GRAND SOCIAL EXPERIMENT

Criminologists writing in the years prior to the beginning of the social experiment in mass incarceration certainly did not see the experiment coming. The preeminent punishment scholar, Norval Morris, argued in 1965 that the end of imprisonment was near (cited in Tonry, 2004a). In his acclaimed history of penal institutions, David Rothman (1990) suggested that we had been ''gradually escaping from institutional responses,'' and foresaw a ''period when incarceration will be used still more rarely than it is today'' (p. 273). Blumstein and colleagues (Blumstein & Cohen, 1973; Blumstein, Cohen, & Nagin, 1977; Blumstein & Moitra, 1979) relying on trends in imprisonment over the past century argued famously in the early 1970s that punishment was likely a self-regulating system. Indeed Mauer (2001) has speculated that had the social experiment in mass incarceration been announced as a concerted policy strategy for reducing crime, public outrage would have ensued. Even as rates of imprisonment began their steep uphill climb, scholars of punishment and social control remained optimistic and would never have predicted that growth in imprisonment would continue unabated for the next three decades (Clear, 2007).

To be fair, few criminologists could have known at the time that the wars on crime and drugs would be fought with such fervor and with a marked determination to enact policies that all but ensured the massive build-up in

incarceration. As Reitz (2006), recently argued "the U.S. has embarked upon one of the greatest experiments in the use of governmental coercion known to history" and has done so "without advance planning and without an articulable rationale that can be reconstructed with confidence after the fact" (p. 1793) – let alone as it was happening. This is what makes the Punishment Imperative a particularly insidious social experiment – the goal was never articulated, the full array of consequences was never considered, and the momentum built even as the forces driving the policy shifts diminished.

The Seeds of the Punishment Imperative: Public Alarm about Crime

Just as the New Deal and the Great Society initiatives were envisioned as potential solutions to the most pressing social problems of their time, so too was incarceration. In claiming that mass incarceration can be understood as a grand social experiment, we are arguing that mass incarceration can be understood as an answer – indeed perhaps the only politically viable answer – to one of the most pressing social problems facing Americans at the time. In the late 1960s, crime emerged as a social problem of increasing urgency in the American consciousness. As crime increased markedly through the 1960s and into the early 1970s, public fear of crime and the sense that informal social control was breaking down increased alongside (Garland, 2001b).

Between 1960 and 1970, the crime rate doubled. In retrospect, commentators have looked critically at this figure and found much reason to question its accuracy (see Tonry, 2004c, Ch. 5), but at the time there was no denying crime was the core concern of the day. Gallup poll after Gallup poll found that crime had risen to the top of public concerns, and the news increasingly began to feature crime stories as the dominant topic on the public mind. The rapid and multi-year rise in crime was the 500-pound gorilla of pubic policy. It is important to stress that while increasing crime rates actually may have been a "real" problem for people, especially poor people at risk of victimization, this is not what served as a foundation for the great punishment experiment. Rather, it was the way crime posed a *political* problem – and thereby offered a political opportunity – that became the basis for the great rise in punishment. Concern about crime became an orienting idea that defined political camps and political agendas, and building a platform about crime that incorporated the punitive ideal became a kind of truism in the U.S. politics.

Public Alarm Meets Political Convenience

Some (Young, 1999; Garland, 2001b) have argued that the salience of crime as a social problem was borne of increasing crime rates and an increasing sense of insecurity as we entered late modernity. Others (Beckett, 1997; Chambliss, 1999; Parenti, 1999) have argued that crime was conveniently ushered onto the American agenda for political gain in a time when the southern ''sun-belt'' republicans were looking to gain political ground. Those who maintain the latter have argued that the conservative crime control ideology was born out of a ''southern strategy'' initially launched to capture the southern white vote, but later deemed useful for securing the vote of white middle-class suburbanites. In the late 1960s, conservative politicians trying to win electoral support began to frame the problem of crime as one related to increased lawlessness associated with the excessive permissiveness of the welfarist approach to social problems. Having framed the social problems of the time in terms of increased lawlessness, conservative politicians rallied for a ''get-tough'' law and order response.

Beckett (1997) argues that the conservative strategy was first and foremost an attempt to redeem political standing among constituents after having suffered a great defeat with the success of the civil rights movement. As such, the conservative rhetoric of the time was patently racist. To appeal to southern whites, conservative politicians constructed a picture of lawlessness that clearly implied that particular groups were responsible for the increasing lawlessness. Part of the conservative strategy involved merging the image of the welfare recipient and the criminal offender and depicting both as undeserving and overly coddled by the welfarist approach. With clever use of imagery and rhetoric, criminal offenders, civil rights demonstrators, and welfare recipients were all implicated. Criminals had capitalized on the leniency of the criminal justice system and the poor on a welfare system that too readily allowed people to get ''something for nothing.'' Both the recalcitrant criminal and the opportunistic welfare recipient were allowed to flourish under excessive permissiveness of Great Society programs. Both groups also were depicted as responsible for their own condition, a notion that appealed to the renewed emphasis on individual responsibility in American culture.

The conservative strategy, which proved quite successful in securing the white vote, gained momentum as the years proceeded. As crime rates reached record highs in the early 1970s, the call to law and order, initially touted as a response to the alleged increased lawlessness of the civil rights era, turned into an all out ''war on crime.'' Conservative criminologists (van den Haag, 1975; Wilson, 1975) joined the call to arms by emphasizing

rational choice and individual responsibility as the ‘‘causes’’ of crime, and endorsing expansion in the use of imprisonment as the principal mechanism by which to effectively fight the new war on crime. The war on crime in turn gave rise to a ‘‘war on drugs.’’ Given the genesis of the tough on crime movement and its thinly veiled racist undertones, it is no accident that the wars on crime and on drugs have largely been fought in a very specific locale; the poor, urban, and largely minority community (Tonry, 1995). It should come as no surprise, and similarly was no accident, that incarceration concentrated in these very same communities (Clear, 2002, 2007; Clear, Rose, Waring, & Scully, 2003; Fagan, 2004).

A New Conceptualization of the Problem of Crime Arises

The Punishment Imperative was made possible by a pair of fundamental shifts in orientation – these included a shift in our understanding of the nature and causes of crime and a related shift in our understanding of the purpose of punishment.

Our understanding of punishment has historically been related to our understanding of the nature and causes of crime. Until the early 1970s, many believed that crime was just one of a cluster of social problems related to poverty, inequality, and lack of opportunity. The dominant criminological theories of the era that immediately preceded the build-up in incarceration tended to emphasize the social and ecological causes of crime (poverty, inequality, lack of opportunity, high rates of unemployment, social disorganization, and the like). Many would have argued that crime was an inevitable by-product of the social problems associated with vast inequality and that the Great Society’s ‘‘War on Poverty,’’ with its economic and educational opportunity programs, would also go a long way in reducing crime.

Until the 1970s, corrections had been guided by a belief in the potential for rehabilitation. Although the rehabilitative strategy had varied over the past century, a belief that rehabilitation could work – through individual change, through treating pathology, through providing educational and employment skills and opportunities – remained the backbone of the correctional orientation. All of that changed when the rising crime rates of the 1960s were met with a series of critiques of our understanding of the nature of criminal offending and calls to modify our strategies for addressing crime.

Decline in faith in the rehabilitative ideal coalesced around the publication of Robert Martinson’s (1974) now infamous article, *What Works? – Questions and Answers about Prison Reform*. In that article, Martinson reviewed an

abundance of empirical work on rehabilitative programming, and ultimately argued that with regard to rehabilitation, it seemed that nothing worked very well. Prior to the publication of this article, rehabilitation and the indeterminate sentencing schemes that typically accompany the correctional goal of rehabilitation had been attacked from both the left and right. Those on the right, who had begun to depict criminal offenders as intractable, irredeemable, and undeserving of our sympathies argued that indeterminate sentences often led to lenience in punishment and lobbied for the pursuit of more retributively oriented, deterrence-inducing punishment. In a word, this equated to calling for more certain, swift, and severe sentences that more appropriately communicated social disapproval and increased the costs associated with committing crime. Those on the left, dismayed with the amount of discretion afforded to judges and correctional authorities, argued that when the sentence was indeterminate and release was dependent upon the whim of a parole board, abuses followed.

Central to all of this was a shift away from the uneasy ideology of the Great Society notion that an individual's problem behavior comes about as a consequence of embedded social problems – namely economic and racial inequality – that act as the foundation for behavior. At question here were the core claims of a social-service platform that maintained that people in difficult circumstances find it hard to overcome the barriers of an unfair society and that the remedy is to increase fairness. In place of this general idea, a new paradigm gained momentum in which individuals were seen as responsible for their own actions, agents of their own making, whose choices were based in calculations about costs and benefits. Those rational calculations were shaped, in part, by the weaknesses on the cost side. The irony was that both models saw people who commit crime as creations, in part, of their contexts, but the ideology of punishment held that the main context of concern was not "opportunity" but "costs." Society simply did not impose enough hardship on those that engaged in criminal activity, and the result was that they did so with impunity. No work better laid bare this idea than Wilson's (1975), *Thinking About Crime*, with its admonition to stop worrying about root causes and start fighting crime by managing the risks. It was time to stop "coddling criminals" and start punishing. Feeley (2003) has described this transformation in the following way:

> Martinson's and Wilson's pieces had enormous influence in shaping subsequent crime policy. Martinson's article crystallized opposition not only to rehabilitation programs but to *social programs designed to prevent crime more generally*. Wilson's writings set forth an alternative set of concerns. Rather suddenly, social workers and traditional (i.e. structural) criminologists were out of fashion and out of favor. (p. 120–121, emphasis added)

This shift in orientation away from the Great Society and toward the Punishment Imperative was offered in an historic moment where there was a window of opportunity for a new approach to crime control.

Strategies Arise that Meld Political Interests and Lead to a Reformulated Understanding of the Problem

We saw then, in the 1970s, a seismic shift in orientation – a shift toward the Punishment Imperative. Given that criminal offenders were calculating rational thinkers choosing crime because crime paid, our approach to addressing crime had to include increasing the costs associated with committing crime. In a return to the classical school foundations of criminal justice, increasing the cost of crime involved increasing the probability that crime would result in punishment. Arguments in favor of retribution and deterrence held the day – and opposition, where it existed (cf., Cullen & Gilbert, 1982), was relegated to the stoic halls of academia.

It is almost impossible to overstate the get-tough character of the ensuing paradigm shift in criminal justice. Where crime was the question, it seemed incarceration was the answer. Twenty years on, this equation was still viable. As recently as 1996, DiIulio asked "If incarceration is not the answer, what, precisely, is the question?," and then answered his own rhetorical question: "if the question is how to restrain known convicted criminals from murdering, raping, robbing, assaulting and stealing, then incarceration is a solution, and a highly cost-effective one" (p. 17). DiIulio (1996) went on to espouse the benefits of a policy of mass incarceration:

> On average, it costs about $25,000 a year to keep a convicted criminal in prison. For that money, society gets four benefits: Imprisonment punishes offenders and expresses society's moral disapproval. It teaches felons and would-be felons a lesson: Do crime, do time. Prisoners get drug treatment and education. And, as the columnist Ben Wattenberg has noted, 'A thug in prison can't shoot your sister.' (p. 17)

THE CONTOURS OF THE GRAND SOCIAL EXPERIMENT IN MASS INCARCERATION

At year-end 2005, another decade removed from DiIulio's analysis, the number of inmates in state, federal, and private prisons eclipsed the 1.5 million mark. Add inmates housed in jails to the population of prison inmates and more than 2.3 million people are currently incarcerated

(Harrison & Beck, 2006). The grand social experiment in mass incarceration is not just manifested in the number of people currently incarcerated in prisons or jails, it is further reflected in our increasing propensity to send people to prison and the increasing ease with which we send them there for protracted periods of time (Blumstein & Beck, 1999, 2005; Frost, 2006b). Distinguishing risk of imprisonment and length of stay is crucial because these are the functional determinants of the size of prison populations (Frost, 2006b; Clear, 2007). Prison populations grow when the number of commitments to prison increase or when the length of commitments increases. Prison populations grow more quickly when *both* are increasing simultaneously.

Blumstein and Beck (1999, 2005) have provided evidence that an increasing risk of imprisonment drove much of the prison population growth in the early part of the social experiment in mass incarceration, while increasing lengths of stay became progressively more important as we approached the twenty-first century. Importantly, very little of the increase in incarceration – indeed a negligible portion – was attributable to increasing crime or increasing success at the early-stage phase of the criminal justice process. In the first of their two studies, Blumstein and Beck (1999) demonstrated that increasing crime only explained only 11.5% of the growth in imprisonment between 1980 and 1996 – and most of that was attributable to drug offending. Increasing law enforcement effectiveness accounted for less than 1% of the growth in imprisonment over the period. Almost all of the growth in imprisonment was explained by increasing risk of imprisonment (51%) and increasing lengths of stays (37%). In 2005, Blumstein and Beck extended their analysis to 2001 and partitioned the period into two separate periods. Using 1992 as a break point between 1980 and 2001, Blumstein and Beck again found that growth in crime and arrests per crime explained almost none of the growth in imprisonment (though crime did explain some of the growth in the earlier period), and demonstrated that increases in the *propensity to imprison* contributed more to growth in the early period (1980–1992), and increases in the *duration of imprisonment* contributed more to growth in the later period (1992–2001).

Additionally, state-level analyses (Frost, 2008) have demonstrated that states have varied in the extent to which they have increased the risk of imprisonment versus increasing the duration of imprisonment. The states with the highest prison populations tend to be those that experienced increases in both risk and length of stay, but states have managed to maintain relatively moderate growth in their prison populations through meeting increases in risk with decreases in length of stay and vice versa.

Understanding these distinctions is crucial to a comprehensive understanding of the Punishment Imperative because that social experiment was driven by policy choices. Prison population growth is not simply the result of increasing crime or natural momentum. Throughout the 1980s and 1990s, politicians and policymakers made conscious choices that virtually ensured the outcome that we have today. The War on Drugs generally, and the Anti-Drug Abuse Acts of 1986 and 1988 specifically, included sentencing provisions that ensured that the supply of drug offenders eligible for imprisonment would increase exponentially. Mandatory minimum sentences for drug offenses, violent offenses, weapons offenses, and habitual offending ensured that sentenced offenders would spend more time in prison than they had previously. As though mandatory sentences were not enough, almost half of the states passed three-strikes laws to provide for extraordinarily lengthy terms of incarceration for third-time violent offenders. Truth-in-sentencing, the most significant contribution of the late 1990s to punitive sentencing policy, only added insurance to our investment in keeping offenders in prison for more protracted periods of time.

The importance of considering risk and length of stay separately is further demonstrated in Kevin Reitz's recent examination of the total number of person-years we have given to imprisonment. Reitz (2006) contends that imprisonment rates – based on one day counts of prison populations – fail to fully demonstrate the impact of mass incarceration because they ''miss the reality that the essential attribute of confinement as a criminal sanction is its duration'' (p. 1788). A better approach, Reitz (2006) argued, would be to ''insist that the statistical reportage of incarceration address the amount of time that is subtracted from offenders' lives'' (p. 1788). Following his own recommendation, Reitz converted prison population growth into ''person-years'' of incarceration to expose the human costs of incarceration. Using person-year growth rather than population growth, Reitz (2006) demonstrated that in person-years, the United States sacrificed 3.5 million person-years to incarceration in the 1960s, 4.2 million in the 1970s, 7.4 million in the 1980s, 15.3 million in the 1990s, and 21.6 million in the 2000s (Reitz, 2006, Fig. 1, p. 1788). Reitz's projection for person-years of incarceration in the 2000s was premised on prison populations remaining at their 2004 level and he cautioned that the optimism that prison population growth has been slowing over the past few years was premature. Reitz was able to demonstrate that with zero growth after 2004 – or even moderate declines – the 2000s would still have the ''dubious honor'' of being the most punitive in the U.S. history.

What makes our grand social experiment in mass incarceration so remarkable is that these incarceration rates have remained strong regardless of the usual social forces that we have, for many years, thought were the source of those rates. Prison populations grew during periods when crime grew (1960–1980; 1985–1991), but also while crime fell (1981–1984, 1992–present) – they grew in times of war/conflict (1983, 1989, 1990–1991; 1995–1996, and 2001–present) and during times of relative peace (mid-1970s through most of the 1980s, 1992–1995, 1996–2001) – and they grew during good economic times (1982–1988, 1999–2001) and bad (1973, 1979, 1980–1982, 1988–1992, 2001–2003). The Punishment Imperative has been a constant for an entire generation, remaining a staple of American policy even while other aspects of the nation changed remarkably.

LESSONS LEARNED

More than 30 years into the grand social experiment in mass incarceration, we should be able to draw some conclusions and extract some lessons learned from it. We would argue that at least four general conclusions can be drawn: (1) the incarceration rate is surprisingly disconnected from the crime rate; (2) prison expansion has not met its own goals; (3) mass incarceration has exacerbated, rather than ameliorated, many of the social problems that we ended the twentieth century concerned about; and (4) mass incarceration is perhaps one of the best examples of how tightly entwined politics and punishment can become.

The Disconnect between Crime and Punishment

Perhaps no criminological fact is as agreed upon as the fact that we have not been particularly successful in our attempt to incarcerate our way out of crime. When we lock up more people, crime does not necessarily go down. As importantly, crime declines do not seem to translate into decreasing prison use. Although few would argue that crime and imprisonment are completely disconnected (there is certainly some relationship), few would alternately argue that increasing use of imprisonment is dependent on increases in crime – or that increasing use of imprisonment inevitably leads to decreases in crime.

While imprisonment has increased in every year since 1973, over that same period crime has variably increased, decreased, or stabilized. Fig. 1

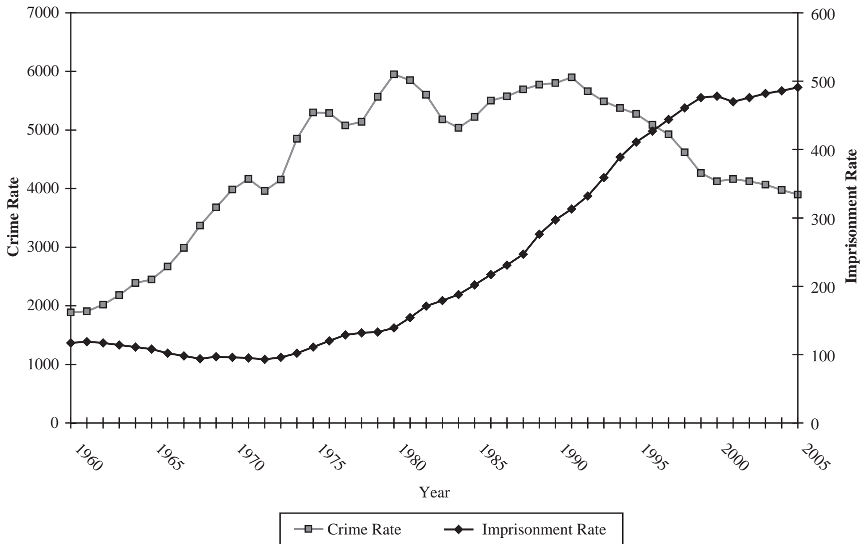

Fig. 1. Trends in Crime and Imprisonment: 1960–2005. *Source:* Pastore and Maguire (n.d).

demonstrates the disconnect between crime and imprisonment through tracking the trends in crime and in imprisonment in the United States over the past several decades.

In the 1990s, crime was on the decline regardless of what a place did in terms of incarceration (Tonry, 2004b). Places that did not dramatically increase prison populations experienced decreases in crime, places that did experienced decreases in crime. Most empirical research on the relationship between crime and imprisonment, suggests that crime (particularly violent crime) can explain some, but certainly nothing like all, of the variation in growth in imprisonment over time and across places (Blumstein & Beck, 1999; Greenberg & West, 2001; Mauer, 2001). In other words, while crime and imprisonment are clearly not completely disconnected, there is plenty of unexplained variance. Clear (2007) has previously argued:

> If it is absurd to think that prisons have nothing to do with crime, it is abidingly difficult to determine precisely how prisons affect crime. It may be that locking up a particular prisoner averts crimes that prisoner might have committed had he been free. It might also be that the desire to avoid prison makes some people decide against a temptation to engage in crime. But it cannot be the case that this is the only – indeed, even the main – way prisons are related to crime.

Indeed, the nature of the relationship between crime and imprisonment has proven to be one of the more perplexing to resolve. It is particularly troublesome that despite being in the midst of the longest and most significant crime decline since World War II (Zimring, 2007), we have not yet seen an equivalent decline in our reliance on imprisonment. Imprisonment rate growth has slowed over the past few years to be sure, but slowing growth is not the same thing as declining use. The Punishment Imperative remains in force and our grand social experiment in incarceration continues.

Failing on its Own Terms

The most important lesson we can learn from the Punishment Imperative is that it did not achieve its manifest aims. There were, at a minimum, two main objectives: to reduce crime and to reduce the fear of crime.

Crime Reduction

Stemen (2007) recently reviewed empirical studies that have estimated the crime reduction effect of incarceration. Accounting for study design, Stemen concludes that imprisonment brings at best modest reductions in crime. The most valid studies of the deterrent effect of incarceration (Levitt, 1996; Spelman, 2000a, 2000b) – those that control for simultaneity – suggest that a 10% increase in the imprisonment rate will bring about somewhere in the range of a 2–4% reduction in the crime rate (Stemen, 2007).

In grand terms, the social experiment in mass incarceration has not had much impact on crime. As Fig. 1 shows, the greatest increases in crimes preceded the growth in imprisonment. Most of the crime growth took place in the 1960s, and the first year of the current penal growth was after that time (in 1973). Since that date, crime has gone up twice and down twice, and is today about what it was in 1973. It is hard to argue from these broad trends that the penal experiment has had much impact on crime. Indeed, a growing consensus of criminological thought takes this view. On the one hand, there are several criminologists who have pointed out that the overall impact of this increase in the scale of punishment on crime has been small (Western, 2006; Zimring, 2007; Zimring & Hawkins, 1993). Some others, who were at one time more optimistic about the crime suppression impacts of growing imprisonment (Piehl & DiIulio, 1995; Piehl, Useem, & DiIulio, 1999), have concluded that to continue the growth will have at best diminishing impact on crime and at worst *accelerating* diminishing returns (Liedka, Piehl, & Useem, 2006; DiIulio, 1999).[3] Indeed, Liedka et al. (2006,

p. 272) conclude that "policy discussion should be informed by the limitation of the fact that prison expansion, beyond a certain point, will no longer serve any reasonable purpose." There is even a growing body of work that suggests the growth itself is criminogenic, creating the very crime that it is trying to prevent (Clear, 2002; Clear et al., 2003).

But the great penal experiment was only partly about crime. It was also about the fear of crime. What about that?

Fear of Crime

We would argue that any decline in public fear of crime has been less about punishment increasing than it is has been about crime decreasing. Although crime has not dropped completely off the public radar, it is no longer one of the issues that Americans identify as "most important problem" in regular Gallup polls. Throughout the 1980s and 1990s, crime consistently ranked quite high among the problems that Americans identified as the "most important problems" facing the country. Through the 1980s and into the mid-1990s, crime ranked 1 among spending priorities but, by 2006, it had been more than 5 years since crime had made the list of the top five spending priorities (Smith, 2007). Public support for spending on efforts to "halt the increasing crime rate" has waned in recent years and has more closely tracked trends in crime than it has trends in imprisonment (Fig. 2).

Ironically, even though crime is currently at its lowest point in 35 years, and although Americans no longer identify crime as a top spending priority, more than 60% of Americans still report in Gallup opinion polls that too little is being spent on "halting the rising crime rate" (Smith, 2007). Perhaps then, another lesson of the grand social experiment in mass incarceration is that there is enormous elasticity in what Americans are willing to pay for punishment. In 1972, nobody would have thought that we could have afforded this massive expansion in the use of imprisonment – and nobody would have predicted that the American public would be willing to pay for it.

Fueling Social Problems

A third clear conclusion that can be drawn from our grand social experiment in mass incarceration is that it has done nothing to alleviate related social problems. In fact there are several important ways in which it has exacerbated the very social problems that we were justifiably concerned about for the latter half of the twentieth century. Social inequality, racial

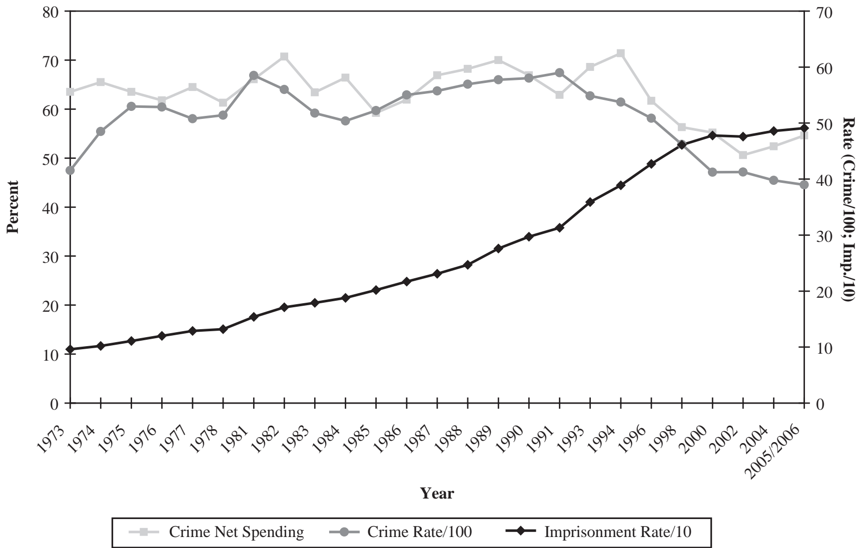

Fig. 2. Crime, Imprisonment, and Public Support for Spending on Crime Reduction, 1973–2006. *Source:* Crime Spending (Smith, 2007); Crime and Imprisonment Rates (Pastore & Maguire, n.d.).

inequality, and fiscal responsibility – all pressing concerns of late twentieth century – were each exacerbated by an over-reliance on incarceration as a solution to the crime problem. The costs of the Punishment Imperative – both socially and fiscally – are very high.

Social and Racial Inequality

Incarceration has both direct and indirect effects on social inequality. Indices of inequality – the GINI index, for example – suggest that the gap between the haves and have-nots in the United States continues to grow. Nowhere is this effect more pronounced than with regard to young men of color.

Incarceration is not equally distributed across the population. Racial and ethnic minorities, particularly young black males and increasingly young Hispanic males as well, are vastly over-represented among the U.S. prison populations. At year-end 2005, 40% of the United States' 1.5 million prisoners were black and 20% were Hispanic – in other words, more than 60% of prison populations were racial or ethnic minorities (Harrison & Beck, 2006). More than half a million blacks were serving sentences of more

than one year and more than 8% of the black male population between the ages of 25 and 29 were currently incarcerated (Harrison & Beck, 2006).

Alex Lichtenstein (2001) has argued that historically there have been two notable surges in the use of imprisonment, and that both disproportionately affected black Americans: the first, a rapid growth in the use of imprisonment across the South, followed the emancipation of slaves in the 1860s and the second followed the civil rights movement of the 1960s. Lichtenstein (2001) points out that although the scale of imprisonment might have reached unprecedented levels in the more recent period, high imprisonment rates, particularly high Southern imprisonment rates, also proliferated following the Civil War and Reconstruction. The massive build-up of imprisonment in this earlier period was also felt unevenly, with growth in black rates of imprisonment dramatically outpacing the growth in white rates of imprisonment. Reitz (2006) adds that black–white disparities in incarceration have grown steadily between 1880 and 2000 – from 3:1 shortly following emancipation to almost 8:1 in the year 2000 (see Reitz, 2006, Fig. 2, p. 1791).

In his masterful analysis of the impact of incarceration policy on the labor market and family prospects, Western (2006) shows that the consequences of incarceration have been felt disproportionately by black men, further alienating them from the labor market, making stable family formation more problematic, and ultimately increasing the economic gap between whites and blacks. Clear (2007) has shown that the high rates of incarceration, concentrated in impoverished places, has a range of negative impacts on those places, including increased rates of sexually transmitted diseases, increased rates of teenage births, and increased rates of serious juvenile delinquency. He concludes that the growing reliance upon imprisonment is a system "that feeds upon itself" exacerbating the very social problems that led to the increases in crime that enabled policy shifts toward more reliance on imprisonment in the first place.

Many others (Donziger, 1996; Mauer, 2006; Tonry, 1995) have noted the not so subtle racial undertones of some of the particularly punitive legislation – most notably the crack cocaine distinction that imposes penalties 100 times greater in magnitude for the possession of crack cocaine than for the possession of powder cocaine (Mauer, 2006). The evidence for discrimination as a causal determinant of the relationship between race and imprisonment is at best mixed (Blumstein, 1982, 1993; Langan, 1985), but intentional discrimination is not, as Tonry (1995) pointed out "the rising

levels of Black incarceration did not just happen ... they were the foreseeable effects of deliberate policies" (p. 4).

Fiscal Flexibility

For those concerned about fiscal responsibility, the social experiment in mass incarceration should be cause for concern. The social experiment in mass incarceration has certainly not been cheap. Growth in incarceration spending over the past 20 years (202%), has outpaced growth in spending on education (55%), higher education (3%), and public assistance (−60%) (Stemen, 2007). In a way, the prison system stands in line first for its budget, and everything else comes second.

Jacobson (2005) has suggested that this fiscal dominance of the penal system in the budgetary process is beginning to place pressure on political leaders whose constituents are looking for investments in other areas. Crime no longer has the salience as a top-three public worry; the economy, healthcare, and education dominate contemporary pubic concerns. But the money available for these priorities is seriously strained by the revenue requirements of the penal system.

As the national economy moved toward recession in 2001, states also began feeling the fiscal pressure. Facing serious budget shortfalls, states looked to reduce expenditures and for the first time corrections budgets, which had long enjoyed annual increases, were among those budgets to face cuts in 2002, 2003, and 2004 (Jacobson, 2005). Across the country, states began to rethink their sentencing laws with at least 30 states initiating some form of sentencing reform since 2000.

Shifting public opinion, particularly around the utility of incarcerating drug offenders, led to the passage of Proposition 200 in Arizona in 1996 and of Proposition 36 in California in 2000. Both of these voter initiatives result in the diversion of nonviolent drug offenders from prison. A cost-benefit analysis of California's Substance Abuse and Crime Prevention Act (SACPA, also known as Proposition 36) demonstrated that SACPA saved California $2.50 for every $1 spent and resulted in net savings of more than 173 million dollars in its first year (Longshore, Hawken, Urada, & Anglin, 2006). The drug offender reforms in California and Arizona are but two examples of measures, states are taking to reduce the pressure that correctional budgets exert on their budgets.

Although Americans have been willing to pay for prison expansion for more than three decades, it may be the cost of the Punishment

Imperative – and the constraints it places on spending in other areas – that ultimately provides the "window of opportunity" necessary for policy change (Tonry, 2004c, 2006).

Punishment and Politics

Although we cannot definitively identify the "causes" of prison population growth with any precision, it is certainly the case that the social experiment in mass incarceration was driven by increasingly punitive criminal justice policies that ensured that there would be prisoners to fill newly constructed prison cells. One of the more troubling features of the social experiment in mass incarceration is the way in which it has engaged politics. Evidence of the problematic ways in which punishment has engaged politics is abound. Through the 1980s and 1990s, even the slightest indication that a politician might be soft on crime signaled the death knoll for that candidate's election hopes. Demonstrating that one was appropriately tough on crime required supporting "get-tough" policies regardless of their logic, their ability to address the problems they were putatively designed to address, or their cost. Mandatory minimum sentences, habitual offender legislation, and truth-in-sentencing requirements were just a few of the many "get-tough" policies that contributed to the prison build-up.

Just as mass incarceration has engaged politics in problematic ways, politics has engaged the public in perhaps even more disturbing ways. Politicians have tended to play on the public's greatest fears to make the case for greater punishment. Indeed, research demonstrates that crime has been a bipartisan issue, and certainly under the Clinton administration as many anti-crime measures were offered to the public as under any other. The Reagan administration gave us federal sentencing guidelines and the Anti-Drug Abuse Act of 1986; the first Bush administration gave us mandatory sentencing for drug offenders; the Clinton administration offered the 85% time served for violent offenders. There is no obvious partisan pattern to the pandering. Ironically, the second Bush administration has been deescalating, offering reentry programs as a part of its Second Chance Act and faith-based rehabilitation programs, as well.

But the overall pattern is that the reforms begat by the politics of penality create the fuel for the system to grow. Voters in California decided twice – first in 1994 and then again in 2004 – that third-time serious and violent felons should face sentences of 25 years to life. California voters cast their votes with little understanding of the law, how it would work, and the

consequences it would have for corrections, for budgets, or for justice (Zimring, Hawkins, & Kamin, 2001). California's three-strikes law did not impact the California prison system in the way that some predicted it might (see Greenwood et al., 1994; Pew Charitable Trusts, 2007) – but that certainly does not mean that three-strikes laws, and other popular punitive policies, have not had consequences for prison population growth and for justice. On the one hand, prosecutors, who have gained so much in the way of discretion over the past three decades, have to subvert the law to avoid what they recognize as unjust outcomes (Tonry, 2006). And, on the other, when the law is not subverted, third-time offenders are serving sentences that are not only exceptionally long (relative to other similarly situated offenders without the strikes) but are also inversely proportional (in violation of all principles of punishment) (see Zimring et al., 2001).

Oregon's mandatory minimum sentencing initiative, also known as Measure 11, called for exceptionally long prison terms for offenders convicted of certain violent and sexual offenses (Merritt, Fain, & Turner, 2006). Sixty-five percent of Oregon's voters endorsed this initiative following an effective publicity campaign, but like California's three-strike law, the legislation did not have the impact that observers predicted it would. Merritt et al. (2006) found that prosecutions of Measure 11 offenses decreased as prosecutions for non-eligible offenses increased. The adoption of Measure 11 triggered system responses that served to minimize the impact of the legislation in practice.

California and Oregon are not alone – across the country throughout the 1980s and 1990s, voters endorsed punitive initiatives that met the objectives of the Punishment Imperative, but that were often perceived as too rigid by those responsible for meting out justice and were routinely subverted (Frost, 2006a; Tonry, 2006).

Yet the foundation laid by these laws is a cycle of penal growth. In *Imprisoning Communities*, Clear (2007) documents the empirical case for the following set of forces: New laws increase the policing of our poorest neighborhoods and more young men are caught up in the penal system as a consequence. The large volume of young black men in the system's clutches serves to reinforce the idea that safety is a problem of race, enabling legislatures to propose ever more draconian measures that are racially disproportionate in their consequences. The neighborhoods where these young men live become places with large numbers of missing men – men who are behind bars – and even larger numbers of men who have cycled through the justice system. These men arrive home from prison with reduced prospects for earnings, family participation, and with increased chances of

crime. Their children, too, have increased chances of criminal involvement as a consequence of parental incarceration. Because of the community's high incarceration rates, a range of public problems are exacerbated, from HIV-related health problems to teenage births. Labor markets are weakened, and social networks are damaged. Each of these effects of high incarceration has the tendency to increase crime rates. Higher crime rates lead to more policing and more arrests. The system feeds upon itself. It is, Clear says, the perfect storm.

WHAT IS THE FUTURE OF THE PUNISHMENT IMPERATIVE?

For more than 30 years now, policymakers have passed a constant barrage of policies that, unless repealed, virtually ensure further prison population growth. Tonry (1995) has pointed out that the myriad problems arising form these policies were not an accident; that there should be no surprises here. Any social scientist would have known of the racially and economically disproportionate effects of the policies that have led to mass incarceration, and most would have suggested that the crime control results of mass incarceration would be minimal.

There are, going forward, two story lines. One is "more of the same." Austin and his colleagues (Pew Charitable Trusts, 2007) have projected that under steady state policies, the size of the prison population will continue to grow, adding more than 192,000 more prisoners by the year 2011. Significantly, they do not have to make an assumption about crime in order to see that increase – if crime goes up, their estimate may turn out to be low. If that happens, then today's shocking statistics, such as 32% chance that a black male born in 2001 would go to prison during his lifetime, will be nostalgia for future generations (Bonczar, 2003). This is an almost unconscionable story line, but there are no reasons, absent policy action, to see it not happen.

The second story line is even more remarkable. In this story line, a weary public becomes alarmed by mass incarceration, and a political will develops to change its course. In this scenario, we begin to learn the lessons of the grand 34-year experiment in penology and change directions. We conclude by reminding the reader of the caution expressed in the extract that introduced this article. Even if we reverse course and move away from the Punishment Imperative, that grand social experiment more than three

decades in the making has profoundly affected social relations. Undoing the damage that has been done would take more than the repealing of a few of the more draconian policy initiatives – it would require, we say with full sense of the irony, a new grand social experiment in our penal system.

NOTES

1. More recently, a federal court ruled that overcrowding in California's prisons has created unconstitutional conditions. The tentative (and sure to be appealed) ruling would require that California reduces its prison population by as much as 40% over the next three years (Egelko & Buchanan, 2009).
2. Although it is possible to find plenty of instances that use the idea of a grand social experiment in scholarly work (cf., Bernard, 1996; Daniels, 2006), we are not aware of any instance in which this phrase is carefully defined. We, therefore, articulate what we mean by grand social experiment – explaining the term and identifying the criteria against which to judge shifts in social policy.
3. Diminishing returns mean that as incarceration increases beyond a certain point, adding additional prisoners to the incarcerated population will have less and less of a crime-reducing effect (see Spelman, 2000a, 2000b).

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SUPERMAX PRISONS AND THE TRAJECTORY OF EXCEPTION

Lorna A. Rhodes

ABSTRACT

Supermax prisons have proliferated in the United States since their contemporary introduction in the early 1980s and have developed a more recent trajectory in the war prison. Drawing on the work of Giorgio Agamben and Zygmunt Bauman as well as ethnographic research in Washington state prisons, this article considers the internal dynamics and history of the supermax prison in terms of bare life, exception, indifference, and "choice." Contradictory relationships within and around the supermax are contextualized in terms of the extreme and technologically sophisticated methods that make up contemporary incarceration.

Thirty years ago prisons appeared as a central feature of modernity, but one that would inevitably give way to other forms. This was the case when predictions were made about the future of incarceration and also when "the prison" was considered as a model for modern society. Whether prisons were believed not to work at all, or to work so well that a general internalization of discipline would render them obsolete, they were not expected to radically increase in number and population. In fact Gilles Deleuze argued in 1992 that "We are in a generalized crisis in relation to all the environments of enclosure – prison, hospital, factory ... everyone

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knows that these institutions are finished, whatever the length of their expiration periods" (1992, p. 4).

If this is the prison's expiration period, then it is not only stretching into the foreseeable future but taking the form of an evolution and intensification of enclosure. Most strikingly, the development of the contemporary supermax over the past 30 years – in parallel with massive growth in prisons as whole – suggests that a new form has emerged. The supermax or control prison is a specialized technology designed to isolate and "manage" that fraction of the incarcerated population considered the highest security risk. A national survey that is now 10 years old found almost 60 of these facilities, either freestanding or as control units within larger prison complexes (National Institute of Corrections, 1997). Although the extent of growth since is obscured by problems of definition, lack of information provided by prison systems, and the absence of any systematic study, it is clear that the supermax has largely replaced older forms of segregation to become a taken-for-granted element in the state and federal penal landscape.

Supermax confinement appeared throughout the 1990s largely as a matter of domestic practice, with some exporting of the model to other countries (e.g., Boin, 2001). But with the emergence of the war prison, the practice of extreme confinement inside the United States has taken on a new aspect as the prehistory, or condition of possibility, for regimes of incarceration that have severed any connection to the national criminal justice system. The 2004 announcement that Abu Ghraib would be replaced by a presumably more acceptable supermax suggests the extent to which the current use of the supermax model occurs in the context of extensive overlap between domestic and military practices (Hutchinson, 2007; Kelber, 2004; Gordon, 2006). Untethered from the specifics of criminal justice policy, these prisons emerge as exclusionary projects that do not depend on domestic political and social conditions for their proliferation. As Brown notes, "The institutional similarities between Abu Ghraib and the rise of the supermax prison mark a particularly dangerous pattern in the exploitation of punishment ... the logic of custody and incapacitation at home [is] converging with the global application of detention by the United States" (2005, pp. 986, 989).

My intent here is to explore the contradictory terrain that comes into view if we examine these supermax "enclosures" as social settings whose history and cultural logic shed light on their capacity for expansion.[1] I begin by describing the supermax as productive of what the philosopher Giorgio Agamben calls *bare life*. This term highlights the process of "stripping down" – of constituting the prisoner as nothing but his "bare," biological,

dangerous life – that lies at the center of this form of incarceration. Second, I turn to the recent origin of the supermax prison in the United States. The 1983 lockdown at Marion Penitentiary and its foreshadowing in an earlier experimental control unit mark the moment in twentieth century US history when isolation and concentration were systematized.[2] In light of more recent events, it seems significant that the Marion lockdown became a permanent state of "emergency," thus grounding the supermax in an *exception* that became the rule. Third, I consider the supermax as a social environment paradoxically defined by the antisocial and nonrelational. Constituted by a precarious *indifference* – a term I take from Zygmunt Bauman – these prisons require ongoing, though unstable and generally toxic, social relations. Finally, the trajectory of supermax proliferation coincides with that of neoliberalism. *Choice* is the coin of this realm, a cultural logic in which prisoners' "accountability," expressed in multiple iterations, is their only value.

These four terms – bare life, exception, indifference, and choice – can be seen in part as simply descriptive of what happens to prisoners in supermax confinement, and I draw on ethnographic research in Washington State prisons to ground them in specific details.[3] But my larger concern here is how each of these terms marks an area of contradiction and instability – an angle from which we can see the supermax as a site of struggles over the nature of personhood, the applicability of law, and the meaning of social relations. As the supermax expands and reaches into new territory, it is certainly necessary to trace the connections between specific abuses uncovered domestically and the practices of the war prison (Butterfield, 2004). But the mobility of these practices is the visible manifestation – when such practices do become visible – of a deeper trajectory, one with a specific starting place and well-developed logic. In exploring this starting place and logic here, I particularly want to draw attention to contradictions indicative of openings, however slight, in the monolithic aspect of these institutions. Although supermax prisons are profoundly "enclosed," perhaps these openings can provide some small purchase on how we might proceed to understand and challenge them.

BARE LIFE

Supermax prisons impose an intensive and often long-term isolation. Prisoners are kept alone in small cells for 23 or more hours a day; cells have heavy doors, opaque windows, or no windows at all; lights are on all night

and noise levels are high. Unlike earlier segregation units, these facilities tend to be brightly lit and high-tech, with the look of a featureless warehouse and the tight schedule of an assembly line speed-up. Inmates leave their cells only in restraints and under guard for brief showers and solitary exercise; what little visitation is allowed occurs in no-contact booths. Defiant or disturbed inmates are forcibly removed from their cells by ‘‘special emergency teams’’ armed with taser guns and electrified shields.

Several features distinguish supermax prisons from general population facilities. First, they are highly technologized (Rhodes, 2007). A massive support industry targets prison systems with technical innovations designed to ‘‘harden’’ these facilities, which now feature elaborate computerized surveillance systems, stun technology and Kevlar armor for response teams, and special steel moldings for cell doors. Second, supermax prisoners depend on staff for every aspect of their lives. Far more than in general population, inmates are immobilized, infantilized, and subjected to arbitrary rules and decisions. Third, unlike earlier forms of segregation, supermax confinement tends toward long terms and indeterminate sentences (Tachiki, 1995; DeMaio, 2001). Although they employ behavioral systems of reward and punishment, in practice these regimes also use ‘‘administrative segregation’’ to hold inmates indefinitely on the basis of ‘‘risk.’’ Finally, supermax prisons stand in a particular relation to public awareness. They are secretive institutions removed from the public domain, seldom admitting outsiders. At the same time, the ‘‘worst of the worst’’ – as supermax prisoners are invariably described by prison officials and the press – figure as public symbols of a predatory, violent, and racialized ‘‘other’’ for whom solitary confinement is the only possible destination.

These features have powerful effects in creating prisoners simply as bodies to be held. Unlike in earlier, more rehabilitative regimes, supermax inmates are subjects of discipline only in the rather elementary sense that such confinement references their ‘‘behavior’’; absent even the pretence that they are being prepared to return to society they become objects to be ‘‘warehoused.’’ In my ethnographic work I noted, among other effects of isolation, the way in which prisoners use their bodies as weapons against their keepers, hurling urine and feces as officers pass meal trays through the cuffports.[4] Such acts, occurring in the absence of diagnosed psychiatric illness, highlight the fact not only that prisoners are locked up with nothing but their bodies, but that they have been stripped down *to* the body. Prisoners emphasize that these gestures express the extent to which they have become ‘‘garbage,’’ or ‘‘nothing.’’ As one man said, ‘‘[The guards’] job is throw-away-the-key. I was throwing shit and pissing on them ... you’re a

piece of shit, you don't even [dare] look them in the eye" (Rhodes, 2004, p. 45). Inmates also turn to animal imagery to express the dehumanizing and madness-inducing effects of isolation and exposure. Many express shame and anger at being caged in view of "tours" – usually of prison officials or legislators – that position them like animals in a zoo. "If you choose to put these people in a box with nothing," said one inmate, "what you're gonna get out of that is stark raving animals. I've seen animals produced in this very hall. People who have just lost their total cool."

Bare life is Giorgio Agamben's description of the biopolitical aspect of the body stripped down and isolated through this kind of social exclusion.[5] On his account, bare life is a form of social death produced through a sovereign gesture of exception. This gesture creates a boundary and an "outside" to the political system, yet those who are excluded are also "inside" the system as markers of that boundary. "Exteriority," writes Agamben, "is truly the innermost center of the political system, and the political system lives off of it (1998, p. 36, also quoted by Gregory). Agamben follows Arendt in centering his analysis on the "holes of oblivion" created by the Nazis (Arendt, 1951, p. 433) and considers those camp inhabitants who had entered a state of "living death" to be the purest exemplars of the condition of bare life (Agamben, 2002). His larger point, however, is that the exclusion of "life" itself – "merely existent life, exposed and abandoned to violence" (Gregory, 2006, p. 3) – constitutes the founding gesture and biopolitical ground of the modern state.[6] This description by Andrew Norris highlights the sense in which Agamben writes of bare life as comprehensible only as something witnessed:

> According to Agamben ... bare life is mute, undifferentiated, and stripped of both the generality and the specificity that language makes possible. If it is related and compared and evaluated, that is always in the terms and in the service of what it is not: political life... [and] political life defines itself in terms of its genesis from and its nonidentity with bare life... political life is defined by its relation with the nonrelational. (Norris, 2005, p. 4)

There is a persuasive logic to Agamben's description of bare life. In the context of the supermax prison, bare life foregrounds abandonment both as the internal dynamic of these environments and as the message conveyed by their fetishized representation. The production of an abject and vulnerable "other" is thus in no way a side effect – it is not the result of a failure of rehabilitation, or the fallout from an elaborated security apparatus.[7] For Agamben, abandonment is an inevitable consequence of the separation of "inside" from "outside" at the threshold of the political body.

This threshold is energized by the prisoner's position in the territory of exception where he does not control what happens to his body – where he becomes a *nonrelational* body yet is also marked as being *nothing but* a body. Agamben emphasizes that bare life is not the product of a once-and-for-all moment of expulsion that creates a singular excluded other. Rather, as Derek Gregory notes, "The cut that severs bare life from politically qualified life is paradoxical ... and all forms of life are thereby made precarious, because the boundary that it enacts is mobile, oscillating: in a word (Agamben's word) *indistinct*" (2006, p. 4, emphasis in original).

I will return to the centrality of indistinction, but first it is important to note two issues that emerge from the notion of bare life. The first is the question of how the supermax prison fits into the more general context of Euro-American institutional history. As Erving Goffman showed in his classic *Asylums*, the process of induction into any disciplinary institution involves a stripping down to bare life – not only on the obvious bodily dimensions, as in head shaving and the removal of personal clothing, but also as a psychological process that undermines the former social self (1961). The supermax effectively "maximizes" these practices by intensifying and prolonging the isolation traditionally imposed in the induction phase of institutional admission or for relatively short-term punishment. What is different about supermax confinement, however, is that it dispenses with the traditional rationale for the practices of stripping; however much honored in the breach, earlier institutions claimed a rehabilitative purpose premised on eventual reinclusion, either in the larger society or as a member of the parallel society established within the institution (Bright, 1996). Although most supermax prisoners are in fact eventually released, supermax regimes rest on an assumption that the "bareness" of their populations is an essential trait signaling fitness for exclusion.[8] In this sense the supermax more closely resembles the earliest European institution of confinement – the leprosarium – than the later penitentiaries and "big houses" of Europe and the United States.[9]

A second issue has to do with those who actually inhabit bare life. Agamben is trying to understand the most extreme of all exclusionary environments, the concentration camp with its "living dead." Perhaps because of this his formulation runs the risk of abstracting the person altogether and thereby – at least in cases short of death camps and dungeons – erasing any contextualization beyond that of sheer witnessing. J. Bernstein writes of gradually experiencing a "feeling of repugnance" at Agamben's ethics of witnessing, with its focus on mute suffering as the threshold of the human. "At no point," Bernstein writes, "does his gaze veer off ... to the

wider terrain: from the victim to the executioner, to the nature of the camps, to the ethical dispositions of those set upon reducing the human to the inhuman'' (2004, p. 7 also quoted in Gregory, 2007). ''Bare life'' marks one starting point for understanding exclusionary projects, but it cannot encompass the complexity of the ''wider terrain'' that is the institutional and social environment of the prison. Nor is a focus on ''mute, undifferentiated'' ''life'' adequate to address the fact that ''bareness'' is resisted by many who are thrust into it. Prisoners work against the odds to try to reclaim themselves as speaking, reflective, and ultimately political beings; if forced to give up language, they engage a language of gestures. Bare life as a project of sovereignty thus has to be differentiated from what actually happens when those positioned as ''mute and undifferentiated'' reflect and act on their condition.

EXCEPTION

A 2007 article in *The Southern Illinoisan* announced that Marion Penitentiary, empty upon completion of a renovation, would briefly open its doors to tours. Referring to the ''legacy'' of Marion as the nation's first supermax prison – ''housing the most brutal, violent criminals in the nation'' – the article goes on to quote an official who ''predicts a popular tour spot will be the infamous control room [sic], at one time the most restrictive [place] in the entirety of the Federal Bureau of Prisons'' (Wiehle, 2007, p. 1).[10] The experiment that made the Marion Control Unit ''infamous'' has recently been retrieved by historian Alan Eladio Gomez, who makes a case for seeing it as an early precursor of the contemporary war prison.[11] He describes how, in the spring of 1971, the Federal Bureau of Prisons began concentrating rebellious and activist prisoners at Marion and using ''administrative segregation'' to isolate them in the Control Unit.[12] The Control Unit regime was a behavioral experiment that involved ''isolation to break or weaken emotional ties, the segregation of leaders and the use of cooperative prisoners in their place, [and] a prohibition of group activities'' – techniques appropriated from the treatment of prisoners in communist-bloc countries (Gomez, 2006, p. 63). Uncooperative prisoners were locked down in ''boxcar'' cells with soundproof doors and no natural light. The warden at the time was explicit about the political and mind-control intent of this program, stating that ''The purpose of the Marion Control Unit is to control revolutionary attitudes in the prison system and in the society at large'' (Gomez, 2006, p. 58, quoting Ralph Aron).

Eric Cummins remarks of contemporaneous changes at San Quentin that "[E]fforts continued to crush all political activity by inmates... by 1975 ... the moral discourse of the Right on crime and the criminal had come to dominate" (1994, p. 266). Gomez suggests that the 1972 experiment at Marion represents the moment at which "the contradictory (and always precarious) relationship between mid-century rehabilitation models and incarceration finally ruptured... once a permanent state of exception was normalized..." (2006, p. 78).

By 1983 Marion had experienced a series of assaults on staff and inmates that culminated in the deaths of two officers and one prisoner. On October 29th the warden declared a state of emergency. All prisoners were confined to their cells virtually around the clock, while staff systematically removed their personal property. In a 1985 report to the Judiciary Committee, David Ward and Allen Breed described a facility engulfed in violence and prisoner-set fires, with knives and other weapons secreted in cells and on the persons of inmates (1985, p. 7). Prisoners' contact with the outside world was severely limited, with no-contact visiting, restrictions on attorney visits, intrusive body searches, and close monitoring of mail; a "riot team" was imported from Leavenworth to provide special training in "controlling resistant inmates." Inmate lawsuits charged that the Bureau of Prisons and Marion staff engaged in "a systematic pattern and practice of assault, abuse, denial of access to the courts, [and] racial and religious discrimination."[13]

The emergency at Marion – the maintenance of the entire facility in lockdown status – continued until the prison converted to medium security status decades later. During this time, the "concentration model" became the preferred way of handling violence throughout US state and federal prison systems.[14] As Michael Olivero and James Roberts point out, concentration was based on the assumption that "The long-term dilemma ... [is] how to safely cage or "manage" [prisoners with nothing to gain or lose due to their long sentences] ... the BOP sees no reason for rehabilitating, educating or otherwise 'pampering' these individuals" (1987, p. 234). Segregation, isolation, stripping of personal property, and intensive monitoring of the body follow from this assumption, as necessary "management" tools for individuals regarded as different in kind, not simply degree, from the general prison population.[15]

The state of exception thus created at Marion blurred differences between crime and political action, guilty parties and bystanders, and general population and segregation. Emergency status "allowed the BOP to retaliate and punish all prisoners, whether involved or not... the BOP sent out a message to all prisoners and prison personnel throughout the country

[that it] would meet and defeat any and all opposition'' (Olivero & Roberts, 1987, p. 241). Having thus framed a zone of managed indistinction as the norm, the prison complex no longer depended on deliberate mind-control or – eventually – riot-control to gain the upper hand. Nor did it continue to depend on the rhetoric of counter-revolution. In retrospect it is clear that the right-wing backlash of the 1970s – manifested in the moral discourse on crime Cummins refers to in relation to San Quentin – set in motion a complex of practices that naturalized and bureaucratized mass incarceration, including extreme forms of confinement for dangerous others. Attempts to control ''revolutionary attitudes'' were replaced by the language of management, with the defiant inmate positioned as a recipient of ''messages'' from those in authority. Cummins ends his book on the radical prison movement in California by describing the Pelican Bay Supermax – only five years old at the time of his writing in 1994 – and noting that ''Pelican Bay is a prison designed to quell inmate anarchy inside the corrections system. Historically, the prison would appear to be a nightmarish fulfillment of ... 1971–1972 calls for special high-security prisons for revolutionary inmates ... Here at last is the [control unit] stripped of its pretense of rehabilitation'' (1994, p. 271). By 2004, the Justice Policy Center could publish a dry report entitled ''Benefit–Cost Analysis of Supermax Prisons,'' in which dollar amounts for construction are set against hospital costs saved through reduction in assaults.[16]

But just as bare life must be complicated by the fact of its imposition on human persons, a regime of exception is intersected by – not simply outside – the law. The geographer Derek Gregory points this out in his analysis of the way in which Guantanamo, which can be legally defined as both inside and outside the United States, thereby becomes a site of struggles over the law. These struggles demonstrate that the state of exception is itself far from static; rather, it needs to be ''understood as a performance, a doing'' (2007, p. 11). Gregory suggests that by attending to ''*how* passages between inside and outside, law and violence, are effected'' (2006, p. 8), we can see Guantanamo and Abu Ghraib as sites where a series of ''telescoping perspectives [international law, the law of war, the global war on terror] ... direct the politico-legal gaze through an extended series of vanishing points towards 'non-places' for 'non-people' ... '' (2007, p. 8).[17] He thus argues that in the war prison the law is far from absent; rather these spaces demand an ''involunted legalism through which the law is contorted into ever more baroque distinctions'' (2006, p. 24). The exception is thus not a '''state' ... that can be counterposed to a rule-governed world of 'normal' politics and power. It is, at bottom, a process of *juridical* othering'' (2007, p. 39).[18]

The domestic supermax operates within the US legal system and is now old enough to have accumulated legal precedents that were not present during the initial Marion emergency. These have had important consequences for the treatment of prisoners. As in Gregory's account, however, they also suggest that the supermax is intersected by contradictions that are embedded in, rather than entirely outside of, these laws. An example is the ambiguity surrounding the presence of mentally ill inmates in intensive confinement.[19] David Fathi notes that in *Madrid v. Gomez*, which was a challenge to conditions at California's Pelican Bay State Prison,

> The court found that the conditions of extreme social isolation and sensory deprivation found in the SHU [Security Housing Unit], although they 'may well hover on the edge of what is humanly tolerable for those with normal resilience,' do not violate the Eighth Amendment. However, for certain categories of mentally ill prisoners, SHU confinement was unconstitutional; '[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breath.' (2003–2004, p. 676, and quoting Madrid v Gomez [889 F. Supp. 1146, (N.D. Cal. 1995)]: 1280, 1265)

Several such rulings establish what Fathi calls an "increasingly clear judicial consensus that the Eighth Amendment is violated when the seriously mentally ill or developmentally disabled are held in supermax confinement" (2003–2004, p. 681). These rulings also offer lists of diagnostic or quasi-diagnostic categories that presumably define mental illness. But who is to decide the application of these categories in specific cases? What is the status of the decision maker – for example a psychologist – in the custodial regime of the prison? Is the decision subject to change if, for example, the inmate can be persuaded or forced to take medication? Fathi mentions that in *Jones 'El v. Berg* (164 F. Supp. 2d 1096, 1098 [W.D. Wis. 2001]), a case brought against Wisconsin's Supermax at Boscobel, "defendants initially proposed a definition of 'serious mental illness' that closely paralleled the state law definition of not guilty by reason of insanity" (2003–2004, p. 675). Similarly in Washington State, where no legal ruling has yet occurred, the assumption that insanity rests entirely on "knowing right from wrong" governs much ad hoc decision making on the placement of the mentally ill in supermax.

The status of "serious mental illness" as an exception to the rule is thus similar to the "exception" as it is described by Gregory. Mentally ill prisoners can be either inside or outside the rule of supermax confinement, according to a shifting set of criteria whose implementation varies across a number of domains, including which prison system is involved, who is qualified to decide, what behavior counts as irrational, and how long a prisoner is to be held. Daniel Mears and Jamie Watson note that "Most states do not ... typically document that their procedures for

identifying, classifying, and placing inmates in supermaxes are appropriate, well implemented or valid'' (2006, p. 257). It can be argued that although the removal of the mentally ill from supermax is an urgent matter, the legal rulings that uphold such removal also inadvertently reinforce the notion that supermax can be applied in ''appropriate'' ways to the ''normally resilient.'' Thus ambiguities surrounding the nature of insanity and the appropriateness of placement contribute to a cultural logic focused on individual fitness, while at the same time fueling struggles over who is to be excepted from this logic. In Gregory's view it is in these struggles – in other words, in indistinction – that we can find some hope for an oppositional politics that finds ''common cause'' both in legal intervention and in the ''recovery of experiences of prisoners'' (2006, p. 52).

INDIFFERENCE

In their 1984 report to the Judiciary Committee on the status of Marion following the lockdown, Ward and Breed recommended that the Federal prison system create ''an institution which incorporates the latest in technology and program features within its new concepts of control and technology'' (1985, p. 19). The Federal ADX at Florence is the culmination of this managerial project, which now traces its trajectory through many years of increasingly bureaucratized control. In the ''new concept'' supermax, staff are ''professionalized'' (i.e., trained for their jobs and tightly administered), the latest technologies require expensive maintenance, national oversight is available, and well-prepared spokespeople interact with the public. These managerial regimes depend on processes of routinization through which prisoners are objectified as a distinct and dangerous class. '''Managing' a population [constituted as less than human],'' notes Judith Butler, ''is ... not only a process through which regulatory power produces a set of subjects. It is also the process of their de-subjectivation, one with enormous political and legal consequences'' (2004, p. 98).

One such consequence is the production of social and moral indifference. Here a prisoner describes the double way in which such indifference can be expressed:

> The worst thing about [being in supermax is] that it's so impersonal. It's like we're nothing. Even though they treat us all right, you know, according to their professional code of ethics or whatever ... they have their procedures. Everything is procedure... But if they want to let you out, they can let you out at any time. It doesn't matter what level you are. They let you out as they choose to let you out.

On the one hand, "procedure" serves to create distance between staff members and the prisoner who is "nothing"; in this case, staff are not abusive ("they treat us all right"), which was precisely the outcome Ward and Breed hoped for when they recommended "program features" to diminish staff violence. On the other hand, the prisoner describes how one of these program features – the level system intended to reward good behavior with release from the unit – is arbitrarily applied in practice. Either way, the prisoner experiences an environment in which "management" remains at a constant, "impersonal" distance.[20]

Zygmunt Bauman argues that social indifference is made possible by the very bureaucracy and technology that are constitutive of modernity itself. Far from being nonsocial or antisocial, "inhumanity [must be understood as] a matter of social relationships" (1989, p. 154). Drawing on Stanley Milgram's 1974 experiments on social obedience, Bauman asks what produced a situation in which the presence of authority (in the person of the experimenter) was enough to compel the ordinary citizens who were Milgram's subjects to administer electric shocks to actors who represented the "subjects" in his experimental situation. Most important to Milgram's experiments was the degree of distance imposed between the subjects of the experiment (i.e., those being asked to administer the shocks) and their victims. If the victims were out of sight so that only their screams could be heard, compliance with the experimenter rose; if subjects were required to force the hands of the victims onto the electronic plate, compliance went down dramatically. Bauman concludes from these experiments that moral indifference is directly correlated with distance. "Defusion of responsibility and thus the neutralization of the moral urge which follows it, must ... involve ... replacing proximity with a physical or spiritual separation ... Responsibility is silenced once proximity is eroded" (1989, p. 184).

Distance in Bauman's sense is a central feature of all prisons and is reinforced in the contemporary United States through multiple architectural, symbolic, and political aspects of the prison complex. But the supermax represents a radical extension and intensification of this distancing effect. The compartmentalized supermax prisoner is displayed almost entirely as an object to the gaze rather than as a subject of interaction; even disciplinary regulation of his movements and schedule is largely absent.[21] The physical barrier of the cell – already more impenetrable than a general population cell – is buttressed by a "spiritual" distance marked by the use of restraints, strict rules governing conversation with prisoners, intensive record-keeping, the fact that staff wears uniforms while prisoners remain in their underwear, and many other features of day-to-day operation. As Bauman notes, the

"technology of action, not its substance" is embodied in these practices and it is this technology that is then "subject to assessment as good or bad" (1989, p. 160). Under extreme conditions, such as the camps that inspired Milgram's work, the social death thus produced approaches or coincides with physical death. But in most prison regimes the prisoner must be kept alive – and within the United States numerous regulations and legal rulings mandate medical treatment, exercise, dietary guidelines, surveillance of suicidal inmates and many other measures designed to do so. The complication that thus arises for "management" is that the distanced object – the prisoner – nevertheless has a human body to be fed, kept at least moderately clean, and protected from hazard. Distance must be maintained through and in the face of the *ongoing* social proximity that is an inevitable side effect of this requirement.

Thus, as with permanent emergency, indifference is something that cannot be accomplished once and for all. For example, supermax prisoners are dependent on officers for toilet paper, which can be denied, provided eventually but not when requested, or passed out in small pieces. In addition to signaling an enormous power differential, this dependence brings the body into focus as a natural object rather than an aspect of a social self and sets up a situation in which the prisoner is positioned as childlike at best and at worst a caged animal. These associations are reinforced if the prisoner denied toilet paper becomes soiled and therefore seems even less able to "care for himself." As Erving Goffman pointed out, institutional practice routinely deprives inmates of the means for the "backstage" work that preserves a social self (Goffman, 1961). At the same time, such deprivation signals the perceived dangerousness or recalcitrance of the prisoner (his position as a "problem child" in the system). In the case of toilet paper, flooding the cell (by clogging the toilet) demonstrates agency, cunning, and the capacity to incite others on his tier. No matter what happens, the staff cannot *not* relate to the prisoner. Whether they provide a whole roll at once to a compliant individual, dole out bits of paper to a "behavior problem," or engage in a "war" in which paper is the ammunition, they have to contend with the body – bare life itself – exposed in its biological needs but attached, nonetheless, to a person.

The relationship between distance and proximity in these situations is fundamentally unstable and shifting. The "managerial" use of force, for example, depends on a delicate, technologically mediated balance of physical proximity and psychological distance. Cell extractions require that emergency response teams overwhelm the inmate, with five to eight team members storming through the door with a mattress to press him against the back wall of his cell. The addition of video recording, electronic shields,

stun guns, and pepper spray serves, in the view of prison administration, to prevent direct abuse of the prisoner. But these tools of distance are themselves subject to abuses of over-proximity, as this prisoner describes:

> I've seen them go into cells and do cell extractions. You know, they just pepper spray them [prisoners], and a lot of times it's excessive too. They will spray you until you bow down pretty much is what it is. They don't really even have to spray them, but they do spray them.

Interactions of this sort are called "going to war" by supermax staff and prisoners. They resemble what Jonathan Simon describes as "New War," in which "small units ... fight a comparatively low-level but almost continuous war, largely devoid of fixed positions or territory ... New Wars allow for temporary victories and defeats" (Simon, 2001, p. 110; also see Rhodes, 2007). In the context of the prison, small scale variants of the New War appear in part an attempt to resolve – and a sign of failure to resolve – the ongoing problematic of an uneasy social distance.

Endless "New War" is an emerging possibility in the prison complex. As in the international version, "war" can readily become an ongoing managerial regime based on local skirmishes of varying harmfulness and intensity. But from the perspective of local management – at least as currently constituted in many systems – such "war" is difficult to sustain indefinitely. Prisoners must also be administered through meal delivery, medical visits, hearings, court visits, and all the other elements of institutional life. The "other" is always "here." Proximity's effects are multiple, unpredictable, and expressed through the same practices intended to produce distance. For example, prisoners and staff are required to interact regularly at hearings, during which the inmate's classification status and disposition are discussed. These events are organized around physical and symbolic distance: the prisoner is cuffed with hands behind his back, uniformed officers stand next to him, and administrators talk to him from behind a table. Here, however, an inmate describes how indifference is not, in fact, produced:

> Me and the [unit manager] we went round and round and round the first two or three [hearings], and one day I was sitting in my cell, and I wrote him a kite [note] and apologized to him because I know it stressed him out, you know. But then the same thing, I was stressed out too. Nobody come talk to me.

This man neither takes up the deferential role expected of him in the hearing, nor assumes that the administrator is indifferent to him. A second example with a different emotional tone illustrates how the practices of ongoing "war" and their grounding in the body become material for a

performance that mocks the expectations of officers and deliberately engages their attention.

> I will sit there and make fun of the police all day ... I take a cup of hot water and throw it on them. I have never done nothing [to put anything in it]. I tell them it was pee. "I peed in that." They are like, "I am gonna kill you!" Like, it was really just water.

Bauman's analysis of distance applies to the *intent* of "management": bureaucratized control aims to accomplish a steady distance – even in the face of physical proximity – through which indifference can be produced. But even these brief examples suggest that this is an accomplishment, not an established condition. The precarious boundary between prisoner and staff can be breached from either side, mocked and played with, defied by compassionate staffers and prisoners, or challenged in court.[22] Bare life, in other words, only remains nonrelational through relationships. The social fabric of supermax is made up of the negotiation of distance and proximity, with the "wider terrain" of the supermax producing the prisoner as "bare" only through ongoing *social* work. Struggles over distance and proximity are thus the content of the "management" that Judith Butler describes as de-subjectivizing, for the creation of social distance requires ongoing iteration in the face of its constant undermining by bodily proximity.

CHOICE

The contemporary correctional discourse in the United States emphasizes that prisoners have made *choices*. Historical or social contextualization is minimized in favor of an intense focus on the volitional nature of crime and the culpability of the individual.[23] Here, for example, Ward describes Alcatraz inmates from the 1950s and 1960s to argue that solitary confinement is not harmful.

> [T]hese men came away from a penal setting in which they had been given plenty of time – and with very few distractions – to think about their future prospects. [T]hey were men with strong personalities who made decisions based on rational choice ... to start calculating the costs and benefits of both past and future misconduct. (1995, p. 31)[24]

Similarly, a workbook intended as a solitary self-study guide for supermax prisoners contains this passage:

> Think about it. We have a choice for our circumstances. What choices have you made? ...[T]here were definite choices you made that caused these circumstances to visit you ... What exact choices got you here in this mess? (Rhodes, 2004, p. 74)

This insistence that prisoners have chosen to be where they are expresses a contradictory cultural logic embedded in the everyday practices of supermax confinement. The "Level" system used in these prisons – a descendent of the behavioral regime at Marion's Control Unit – is a central to this logic. The prisoner starts from an initial period (often several months minimum) in which he is given no reading material except a Bible or Koran, no radio or television, and limited visitation. Ideally, he progresses "through the levels" and is allowed "privileges"– radio and television being most valued – at each succeeding step. Refusing to cuff up, threatening or throwing at staff, and many other "behaviors" result in demotion "down" the levels.[25] In some supermax settings the greatest punishment is "isolation," a step below the lowest level in which the prisoner is held in a strip cell. In some systems the highest level provides time outside the cell without restraints, or recreation time with a few other prisoners in a common area.

But this management of prisoners according to a behavioral logic is contradicted by an intersecting logic of risk. As Crawford notes in a different context, "the power of risk can be found in the compelling illusion of control it offers" (2004, p. 522). Prison officials are reluctant to release back into general population inmates whose past behavior, reputation, psychiatric condition, presumed gang affiliation, "attitude," or in some cases past political activity make them "risky." A prisoner defined as a risk, and whose confinement offers this illusion of control, may be confined in supermax for years or even decades; in some states he may be held preemptively on suspicion of gang activity and refused release unless he "debriefs" to prison officials (Tachiki, 1995; Rhodes, 2002, 2004, pp. 163–190). Whether or not such a prisoner "behaves" while in supermax ceases to influence what happens to him, but this does not mean that he is not seen to "choose." Rather, choice is reinstated as an essential aspect of his being. He *has* chosen – to be a criminal, to commit the act originally sending him to supermax, or to "manipulate" staff – and such choices are seen as permanent. Such culpability cannot be earned away (Rose, 2000).

These contradictory logics create prisoners as choosing subjects in ways that are characteristic of neoliberal regimes (Harvey, 2005). Nikolas Rose describes how governmental systems transfer "freedom" to the individual. "Those who administer life, in prisons, asylums, factories and the like, have tried to reconcile the obligation to manage individuals with the requirement that those individuals are not slaves, but free" (1999, p. 67). The prisoner is thus understood to control his own fate by remaking himself as worthy of release. This requirement is no longer disciplinary in the earlier sense in which rehabilitation was framed as a process of internal change mediated by

a complex of institutional supports. Rather, in the contemporary prison behaviorism provides just enough "freedom" to enable compliance within a simple "on-off" model of self-control. Writing about the development of behavioral theory, Rebecca Lemov notes that what was introduced into the early laboratory experiments with animals was a "circumscribed simulacrum of freedom or choice" (2005, p. 143). Similarly, the contemporary supermax regime simply rewards or punishes behavior; the prisoner either "gets the message" or he doesn't. Thus "responsibilized," he is "obliged to be free, to ... enact [his life] in terms of choice" (Rose, 1999, p. 87). This formulation makes of the prisoner a "decider" who "calculates the costs and benefits" of his actions. Narratives that contextualize those actions (by providing "reasons," even if framed behaviorally) come to seem scandalous, a slide into "softness" and "excuses."

In Rose's formulation of responsibilization, largely middle class subjects may stand to gain – in terms of their "value" within neoliberal economic structures – by framing their lives in terms of choice. Prisoners, however, become choiceful subjects as members of an already-excluded class; they are far less likely to benefit from the "freedom" to shape their own value, and lack the opportunity to do so. "Choice" under these conditions becomes an extreme and punitive form of individualism.[26] We see this in the way supermax is represented to the outside world as only for the "worst of the worst." The implication for public consumption – with the highest profile inmates held up as exemplars – is that prisoners' crimes have sent them into lockdown status and keep them there for the protection of the community. A parallel individualizing logic within correctional operations figures the long-term prisoner – whose supermax incarceration is not necessarily related to his crime – as a cunning adversary engaged in permanent war with the system. This watchful, calculating individual is neither future citizen nor agent of the revolution. Nevertheless, he is responsibilized as perfectly fitting the conditions of his confinement.[27]

In the prison system as a whole the reckoning of accountability exists on a continuum from the infraction system with its "tickets," to courses and "programs" representing the remnants of rehabilitation, to the supermax level system, to the extreme violence reported at some US prisons (Human Rights Watch, 1999). The degree to which these methods relieve or intensify the rigors of intense confinement varies. But because the maximized individualism of choice – a kind of foreshortened self-governance – is imposed under conditions in which choice is in fact virtually absent, what happens to prisoners "on the ground" cannot reflect the neat on-off logic of this version of human nature. Instead, in struggles over the status of the

body, the influence of law, and the effects of social distance, ''choice'' is a strategy, not a fact. Framing the prisoner in such a way that his incarceration seems natural – the necessary result of his choices – requires the same ongoing work that I have described for each of these aspects of confinement.

Prisoners resist being positioned as primary carriers of moral responsibility; as this quote from an inmate reveals, the seeming clarity of choice tends to blur in context.

> Any choice you make puts you into certain situations and certain situations escalate to other situations ... it is half and half ... sometimes it just escalates out of nothing. Aw, man, I don't know! To say that I want to come here [to the control unit], that I made these choices? Oh no, believe me, that is out of line! (Rhodes, 2004, p. 251)

Prison staff often responds to descriptions like this by intensifying their insistence that highly individualized prisoners – those with ''reputations'' that speak to their capacity for autonomy – are especially suited to isolation. An officer gave this description of a prisoner who had been held in supermax for almost 10 years.

> There is not a single beat that inmate misses. He is kind of scary ... he's memorized every move we make. I would say that he could eventually come out of a control unit, but not until he is in his fifties. (2004, p. 185)

Most prisoners, however, cannot come up to this standard of ''fitness'' for a life of preventive detention. Notions of choice are in constant play, as mentally ill prisoners' incomprehension, conflicting rules, the intersecting logics of prisoners' social lives in general population, and the simplifications of the infraction and level system interject the friction of context and contradiction into a theory that aims to eliminate them.

CONCLUSION

In his discussion of the fate of environments of enclosure with which I began, Deleuze suggests that ''we are at the beginning of something'' – a new era of flexibility, dispersal, and internalized self-management (1992, p. 4). Institutional discipline, which not only held people in fixed positions but prepared them for lives lived in such positions (the school child or prisoner readied for the factory floor), is no longer needed as a template for society. In the new ''society of control,'' notes Michael Hardt, ''fixed positions have become a liability'' (1995, p. 36).[28] But even in an era in which control operates primarily through dispersal, the supermax

prison – with its insistence on the fixed position – may also represent the beginning of something. We see one side of that "something" in the domestic expansion of supermax and its justification as the appropriate final stop for those made most "accountable." The other side is coming into view in the war prison, as the most extreme practices of domestic confinement are incorporated into the governmental logics of the "war on terror."[29] This larger trajectory suggests that within the society of control, new forms of hyper-control have developed and are taking root.[30]

In this article I have suggested four ways in which such hyper-control is configured. Each of these can be seen as connected to the trajectory of neoliberalism, not only in terms of timing – the Marion emergency, less than three years into the Reagan era, occurred four years before Margaret Thatcher said that "There is no such thing as society"[31] – but also in terms of content. Bare life in supermax is a species of the bare life of abandonment elsewhere as government withdraws support from whole populations of those racialized others who can't "compete" (cf. Gilmore, 2007). Exception constitutes a mobile boundary between those within and outside citizenship, as we see in the war prison, the immigration debate, and the commercializing of organs and body products. Indifference is composed on a complex and shifting territory of essentialized compassion (Rhodes, 2005), geographic and social distance, and media proximity. And finally, "choice" figures outside the prison as the responsibilization of the population as a whole in the absence of "society." All these forms of hyper-control are premised on the liability of the fixed position for populations constructed – through a radical and negative individualism – as "fit" for immobility and enclosure.

My insistence here on the social nature of supermax confinement is in part grounded in the intimacy of the ethnographic method, which makes relationship visible even under the least likely of conditions. But it also reflects my belief that it is only by attending to this dimension – only by reinscribing the social onto the antisocial – that we have any hope of interrupting a trajectory that is grounded in a fundamental misapprehension about the nature of human beings.[32] The paradox of supermax confinement – and the reason that each of the four elements I have described cannot but result in struggles and indeterminacy – is that profoundly "segregating" the individual does not result in a true separation from society (which would be impossible in any case). Rather, it is through social relationships that the "antisocial" and "nonrelational" are contained, it is through social transmission that the cultural logic of this containment is broadcast, and it is in this broadcasting that exteriority becomes the ground

of politics. I am not suggesting that the contradictions inherent in this project and the indistinct and mobile territory that opens up once we look closely at how these contradictions play out offer any easy fix for the prospect of intensive confinement. But they do suggest that some features of extreme "enclosure" are subject to tensions, struggles, and perhaps fissures, through which it may be possible to project a different future.

NOTES

1. I have written elsewhere about the social world of supermax, the situation of mentally ill prisoners, new technologies of control, and the use of "psychopathy" as a diagnostic category in prison (Rhodes, 2002, 2004, 2005, 2007).

2. These methods first made their appearance in the silent prisons of the nineteenth century, some of them built on the panoptical model proposed by Jeremy Bentham in the 1790s (Foucault, 1979).

3. The research that forms the background for this article was made possible by a collaborative relationship between the University of Washington and the Washington State Department of Corrections that began in 1993. The project was directed by David Allen and involved practical interventions to improve the situation of mentally ill inmates as well as research in mental health and supermax facilities. Quotes from prisoners are from interviews with randomly selected supermax prisoners conducted by David Allen, David Lovell, Kristin Cloyes, Cheryl Cooke, and myself between 1999 and 2002. Human subjects procedures were approved by review boards at the University of Washington and the Washington Department of Corrections. Our research was conducted in all-male facilities, and I use the masculine pronoun to refer to prisoners throughout.

4. This is just one of the negative effects of isolation and sensory deprivation. See Rhodes (2004, 2007), Haney (2003), and Kurki and Norris (2001) for more extended discussion.

5. In *Total Confinement* I used the term *abjection* to refer to these ways in which supermax confinement highlights the physicality and vulnerability of the body (2004).

6. The controversial teleology of Agamben's larger argument is beyond my scope here. For discussion and critique of his work, see Hussain and Ptacek (2000) and Norris (2005).

7. As Ruth Wilson Gilmore argues in her exploration of the "gulag" that has developed in the state of California, mass incarceration in the United States is a method for abandoning large segments of the population, overwhelmingly people of color, and exposing them to premature death (Gilmore, 2007).

8. No nationwide information is available on the extent of long-term supermax confinement. Some federal prisoners have been held for over 20 years; in Washington State several inmates have been held for more than 10 years. In these cases the prospects for eventual release are dim. Regardless of their numbers, the existence of such long-term prisoners provides ammunition for those prison officials who argue

that there is no point using resources to rehabilitate – or even mitigate the confinement of – those who will never return either to the general population or to the outside world.

9. In *Madness and Civilization*, Michel Foucault describes the earliest forms of penal confinement in Europe as located in earlier leprosaria and characterized by the wholesale exclusion of an undifferentiated population made up of the mad, the criminal, and the poor (1965). In some ways the withdrawal of the supermax from engagement with classification and discipline suggests a return to this earlier model. Perhaps a parallel can be drawn between the European enclosure of the commons, which Foucault describes as accompanied by the earliest modern version of exclusionary confinement, and the contemporary economic policies that co-exist with large-scale detention (1965).

10. With its high-security inmates now transferred to the Federal ADX in Florence, Colorado, Marion will become a medium security facility designed for double-bunked inmates living "out of their cells from ... 6 in the morning to 10 at night" (Wiehle, 2007, p. 1).

11. Gomez describes how resistance at Marion was one aspect of the prison organizing occurring throughout the country at the time. He notes that prisoners' "political formations and ... legal strategies – developed in concert with movement lawyers at Marion – link[ed] these actions with the clandestine and aboveground political education circles, ethnic studies classes, and multiracial third-world coalitions established at institutions throughout the country in the late 1960s and early 1970s" (2006, p. 61). During this time in California, according to Eric Cummins, "huge numbers of citizens, not all of them "radicals" ... would come to support prison strikes and agitations [seeking] prison reforms and civil rights for inmates" (1994, p. viii).

12. Disciplinary segregation is a sanction imposed for violating the rules of the institution, while administrative segregation is intended to incapacitate inmates considered a threat to safe and orderly operation and is not, in theory, punitive. See DeMaio (2001), for an excellent discussion.

13. From *Bruscino and others v. Carlson and others*, CU84-4320 Class Action Complaint for Declaratory Judgment Injunction Relief and for Damages and Demand for a Jury Trial, June 29, 1984, quoted in Ward and Breed (1985, p. 12); see also Committee to End the Marion Lockdown (1992). The effect of the lockdown on violence seems to be a matter of interpretation. In their 1985 report to the Judiciary Committee, Ward and Breed note that the number of assaults did not change after the lockdown, but that there were fewer assaults with weapons and therefore less serious injuries. Writing in 1987, Olivero and Roberts concluded that the lockdown, still continuing, had failed. Citing continued assaults, as well as an inmate murdered by another in April following the lockdown, they argue that "protection does not appear to be a logical reason for continuing the lockdown" (1987, p. 240).

14. The lockdown at Marion was the first time since the closing of Alcatraz in 1963 that a whole facility was designated specifically for the "concentration" of prisoners deemed exceptionally dangerous (Ward & Werlich, 2003).

15. A prisoner lawsuit charged that Marion inmates "Are in fact being held ... in Control Unit status, but without any wrongdoing, without any prior notice of acts that would justify their placement in that status, without any period review of placement in the status and without any notice of the means by which they may be

released from that status" (*Bruscino and others v. Carlson and others*, CU84-4320 Class Action Complaint for Declaratory Judgment Injunction Relief and for Damages and Demand for a Jury Trial, June 29, 1984, quoted in Ward and Breed, 1985, p. 12).

16. To be fair, they balance their economic analysis with admission of its uncertainty and examples of costs to prisoners.

17. Gregory notes Agamben's claim that Foucault "failed to locate the 'vanishing points' to which these 'perspectival lines' [of sovereign power and biopower] converge" but points out that "in fact, however, Foucault was acutely aware of their contradictory combination and [like Agamben] argued that they coincided in ... the Third Reich" (2007, p. 3).

18. Gregory notes that in the context of the war prison this is done by withdrawing legal protections, outsourcing to regimes practicing torture, and exploiting extra-territorial sites. He points out that these are not novel nor necessarily American strategies but that "what is new is the way in which the vanishing points ... are selectively but deliberately brought into fleeting view – in a calculated gesture of intimidation – and the way in which they reveal [a] totalizing will to power" (2007, p. 40).

19. I am following Gregory's argument here that "The law is a site of political struggle not only in its suspension, but also in its *formulation, interpretation, and application* (2007, p. 5, emphasis in original). In the case of the Marion Control Unit, for example, *Adams v. Carson* eventually resulted in the immediate release of prisoners held in isolation for more than 18 months (*Adams v. Carlson*, 488F.2d 619 [7th Cir. 1973], see Gomez, 2006, p. 77), but this decision did not apply to other prisons and was, in turn, obviated by the succeeding lockdown. I have written extensively about the relationship between mental illness and supermax in *Total Confinement* (2004).

20. I am describing this from the prisoner's point of view. The staff, in this case, might argue that they are not distancing prisoners for whom they make exceptions to the level system, but rather attending to the specific contexts of their situations.

21. In traditional disciplinary institutions, and in many general population prisons today, prisoners follow a strict schedule for meals, activities, and movement around the facility. Supermax prisoners, on the other hand, are largely left alone in their cells, where they are passive recipients of meal delivery and the scheduling of officer escorts.

22. The position of prison workers and administrators who challenge the "warehouse mission" of supermax is beyond my scope here. See *Total Confinement* for a description of staff arguing for a retrieval of the "human" from the "animal" (2004).

23. The advertising campaign of the first Bush administration, featuring released prisoner Willie Horton, is an iconic example of this sort of representation.

24. The contradictory implications of this perspective can be seen in David Ward's later report to the Judiciary Committee following the Marion emergency, in which he and his coauthor suggest that "empirical research on rebellious prisoners ... suggests that resistance (not necessarily violent resistance, however) in the oppressive setting of a maximum security penitentiary may not always constitute a negative sign in terms of post-release adjustment. Some ... who insist ... in making some choices for themselves, may be better prepared to survive in the free world, ... than will be some of the compliant "model prisoners"(Ward & Breed, 1985, p. 32).

25. The supermax level system is superimposed on a parallel system of classification in use throughout the prison system.

26. I am emphasizing here the more transparent cultural referents of the notion of accountability in the mainstream political economy. The notion of "freedom to choose" may also have implications emerging from and particularly meaningful to the Christian Right. Christopher Hedges writes that "the work of 'liberty' is an ongoing process ... that frees, or eradicates, different moral codes and belief systems, to introduce a single, uniform and unquestioned 'Christian' orientation" (2006, p. 15). Accountability, in this context, means unquestioning obedience.

27. It is only in this context of "choice" that keeping the prisoner alive and the prisoner keeping *himself* alive can be framed as a mutual responsibility the breaching of which (in hunger strikes, self-mutilation, and suicide) constitutes an act of "war" against the system. Gregory describes the situation, in 2006, in which three Guantanamo prisoners "were found dead in their cells. Although the three men had been detained without trial for several years ... the commander of the prison dismissed their suicides as 'not an act of desperation but an act of asymmetric warfare against us'" (2006, p. 1).

28. Hardt makes this comment in the context of war. "The metaphorical space of the societies of control is perhaps best characterized by the shifting desert sands, where positions are continually swept away; or better by the smooth surfaces of cyberspace, with its infinitely programmable flows of codes and information" (1995, p. 36).

29. In *Governing Through Crime*, Jonathan Simon writes about "technologies of exile" that operate in schools, punitive workplaces, and the "waste management prison" (2007, pp. 172–174). Suggesting that the war on crime prefigures the governmental logics of the war on terror, he also notes that "the war on terror ... highlight[s] how metaphoric 'wars' on social threats can reshape government" (261). The supermax clearly represents one culmination of this dynamic. Although a detailed examination is beyond the scope of this article, the internal logic of supermax as I have described it here suggests linkages to the war on terror more generally – for example, through the rhetoric of "choice."

30. Recently there are slight signs – for example the closure of Maryland's supermax – that domestic enthusiasm for these prisons has slowed. But it is hard to know yet how to interpret this. As other states continue to build, supermax practices are increasingly extended into facilities with lower security designations; the overbuilding of these facilities can also result in the application of higher security classifications for prisoners to whom they would not previously have applied (DeMaio, 2001).

31. The full quote, from an interview in *Woman's Own* magazine in 1987, is "There is no such thing as society: there are individual men and women, and there are families." www.margaretthatcher.org

32. At its height during the mid-twentieth century, prison sociology emphasized the social life arising within institutions, particularly among inmates (e.g., Goffman, 1961). I have written elsewhere about verbal interaction among prisoners in supermax (Rhodes, 2005). But my primary concern here is with the larger sense in which discourses and practices associated with the social – most basically,

acknowledgement of the fundamental sociality of even ''antisocial'' behaviors and theories – constitute an irreducible aspect of the prison.

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