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Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency

Craig Haney*

Notwithstanding the claims of politicians and media pundits, the health and well-being of the nation in the waning years of the 20th century are threatened less by a crime wave than a punishment wave. A punishment

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1. U.S. crime rates seem to have more or less carefully tracked the U.S. economy over the last two decades and, in recent years, have been declining in small but steady increments. See, e.g., Violent Crime Rates Remain Unchanged, U.S. Justice Dept. Report for 1994, S.F. CHRON., Apr. 18, 1996, at A4 ("U.S. crime figures essentially stayed the same in 1992 and 1993, the data showed. They have been on a roller coaster over the past 15 years, falling 20 percent between 1981 and 1986, then rising 15 percent from 1986 through 1991. . . ."). Fox Butterfield, Violent Crime Rate Drops in U.S. for 5th Straight Year, S.F. EXAM., Jan. 5, 1997, at A4 ("Serious and violent crime dropped nationwide in the first half of last year, continuing a pattern that began five years ago, according to preliminary statistics to be released . . . by the FBI."). Yet, the "crime wave" mythology is politically vibrant and enduring. See, e.g., Tupper Hull, Republicans Are Zeroing in on Crime Issue, S.F. EXAM., Feb. 27, 1994, at B1 (Republican politicians in early 1994 claimed to be "sensing 'explosive' anger about crime in California," and were set to engage in what was called "trench warfare, waged by crime victim organizations" against "criminal sympathizers" among Democratic lawmakers.). In supposed response to what was characterized as an "epidemic of carjackings and drive-by shootings," the governor of California "unveiled an anti-crime package" that included not only stiffer penalties for those crimes but also longer sentences for numerous other crimes and a proposal to try 14 year-olds charged with serious crimes as adults. See Vlue Kershner, Wilson Takes Aim At Violent Crime, New Plan Would Beef Up Penalties, S.F. CHRON., Jan. 22, 1993, at A25. It was by no means a California phenomenon. See, e.g., Linda Chavez, Crack Down Harder—Watch the Crime Rate Fall, SAN JOSE MERC. NEWS, Feb. 1, 1996, at 7B (The president of a self-described Washington "think tank" asserted to readers of her nationally syndicated newspaper article that "the major problem" in what she claimed was "the exploding violent crime rate in recent years," was the "inability to ensure that convicted criminals remain behind bars."). In fact, in a remarkable variation on the crime wave rhetoric, more and tougher prison sentences recently were advocated in anticipation of a crime wave that has not yet happened. See Fox Butterfield, Crime Panel Fears New Wave of Violence, S.F. CHRON., Jan. 6, 1996, at A7 ("Despite recent reports that crime is decreasing, violent crime in the United States is a 'ticking time bomb' that will explode in the next few years as the number of teenagers soars, an organization of prosecutors and law-enforcement experts said in a report yesterday."). The author of the report, conservative criminologist John Dilulio, expressed the concern that recent
tidal wave. Over the last twenty years, the United States has witnessed truly unprecedented growth in its punishment industry—both in the amount of pain we dispense in the name of “criminal justice” and, correspondingly, the size of what is sometimes referred to as the “prison industrial complex.” In fact, such expansion has been so spectacular and unlike anything else we have seen in the history of criminal justice in this society that even the word “unprecedented” does not quite begin to capture it. Indeed, each succeeding year of this growth has seemed more unprecedented than the year before.

The incarceration rate in the United States is now well over 600 prisoners per 100,000 citizens, a figure almost unheard of among modern, industrialized nations. Our imprisonment rate broke this seemingly unreachable barrier sometime in 1996 and, like the Energizer Bunny, it is “still going.” This abstract calculation gains greater significance when compared to that of other nations: Similar figures for countries like Sweden, Ireland, Italy, Norway, Greece, and the Netherlands are roughly one-tenth of ours. To get a sense of how quickly the punishment wave has swept over us, realize that the 600 per hundred thousand rate of imprisonment represents more than five times a rate that had remained virtually unchanged in the United States between the years 1925 and 1975. That is, the stable and more or less moderate level of imprisonment that prevailed for the fifty year period up to 1975 was followed by over a five fold increase in the little less than twenty years since.

drops in violent crime rates were nothing more than the “lull before the crime storm,” and advocated more “aggressive” crime fighting tactics to ward off the crime wave yet to come. Id.


3. For recent statistics on the remarkable growth of the U.S. prison population, see Craig Haney & Philip Zimbardo, The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment, 53 AM. PSYCHOL. (forthcoming 1998) (manuscript on file with authors). See also Incarceration in U.S. Reaches Record Level, S.F. CHRON., Sept. 13, 1994, at A6; Graeme Newman, Punishment and Social Practice: On Hughes’s The Fatal Shores, 13 L. & SOC. INQ. 337, 346 (1988) (“It is easily demonstrable that America’s use of prison is excessive to the point of barbarity, with a prison rate several times higher than that of other similarly developed Western countries.”).

4. See, e.g., Elizabeth Shogren, Record Jump in Prison Population, S.F. CHRON., Dec. 1, 1995, at A1 (explaining that in 1994-95, at the peak of the punishment wave, the one year increase in the overall prison population of nearly a hundred thousand inmates “was the largest on record”). This reflected a growth rate that “exceeded the approximately eight percent average for the past five years.” Id.


6. See Todd Clear, Harm in American Penology: Offenders, Victims and Their Communities 43, 45 (1994) (finding that between 1973 and the beginning of the 1990s, the U.S. incarceration rate increased over 200% and the amount of prison time served for violent offenses tripled). See generally John Irwin & James Austin, It’s About Time: America’s Imprisonment Binge (1994); Michael Tonry, Malign Neglect: Race,
But there is more.\textsuperscript{7} At the beginning of the 1990s a distressing fact about governmental priorities was reported: "For the first time in history, state and municipal governments are spending more money on criminal justice than education."\textsuperscript{8} In California, in 1995, the corrections budget alone surpassed the state's entire fiscal outlays for higher education.\textsuperscript{9} Nevertheless, we have continued to incarcerate so many people that even after shifting such enormous sums of money away from schools and into correctional coffers, minimally adequate, livable conditions of confinement are still lacking in a great many of our prisons.\textsuperscript{10}

Indeed, some forty US prison systems have been operating under court orders or consent decrees to reduce overcrowding either in the entire state prison system or its major institutions.\textsuperscript{11} By 1992 the federal prison system, long regarded as the standard against which other, lesser systems measured themselves, was operating at 165% of capacity.\textsuperscript{12} Currently prisons in California—the state that has spent the most money to build new facilities during this recent imprisonment binge—are still operating at about 180% of capacity.\textsuperscript{13} And none of this data reflects the significant

\textsuperscript{7} In much of what follows, I will violate the norms of scholarly writing by relying heavily on newspaper accounts for descriptions of the various punitive practices to which I advert. I do so, in part, because these stories convey the nature and tenor of these events in ways that academic treatments do not, and in part because the punishment wave is moving so quickly that scholarly accounts of its excesses cannot keep pace.

\textsuperscript{8} William J. Chambliss, Policing the Ghetto Underclass: The Politics of Law and Law Enforcement, 41 SOC. PROBS. 177, 183 (1994).

\textsuperscript{9} See Anthony Lewis, California: The Land of Prisons, S.F. CHRON., Mar. 26, 1996, at A19 ("The growth industry in California is prisons. As recently as 15 years ago the state spent six times as much on higher education as on prisons. Last year the prison budget was larger—and the disparity is going to grow."). See also Fox Butterfield, New Prisons Cast Shadow over Higher Education, N.Y. TIMES, Apr. 12, 1995, at A21; Hallye Jordan, '96 Budget Favors Prison Over College: "3 Strikes" to Eat Into Education Funds, SAN JOSE MERC. NEWS, July 8, 1995, at 1A.


\textsuperscript{11} See id.

\textsuperscript{12} See Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences, 101 YALE L. J. 1681, 1700-01, n.102 (1992) (arguing that the dramatic rise in the federal prison population can be attributed to the implementation of the federal sentencing guidelines).

\textsuperscript{13} Indeed, at one point in California's prison construction boom the state was building prisons faster than it could come up with the funds to operate them. See, e.g., Philip Matier & Andrew Ross, State Building Prisons It Can't Afford to Open, S.F. CHRON., Feb. 24, 1993, at A1 (stating that rather than opening the new, empty prisons, the state chose instead to put prisoners in already overcrowded institutions). Department of Corrections spokesman Tip Kindel explained: "What we are basically doing is maintaining the current level of overcrowding (180 percent) until we have the money to open more prisons." Id. Although
boost in prison numbers that will come from recently passed "three strikes" legislation.\textsuperscript{14} We have truly been swamped by a vast sea of prisoners larger than anything seen or contemplated before, and it promises to grow much, much larger.

The public's views on how much imprisonment is necessary, acceptable, or worth paying for have been radically transformed in the wake of the punishment wave. To take just one example of how the previously unacceptable has become commonplace, consider a recent newspaper article whose headline proclaimed: "Prison boom hasn't come; '3 strikes' predicted increase in inmate population was overstated."\textsuperscript{15} Since I was one of the people who had made predictions about the impact of "3 strikes," I was interested in how badly I had missed the mark. The upshot of the article was that some of the dire predictions that California's prison population would double by the year 2000 as a result of this new law were, in the writer's words, "wildly overstated."\textsuperscript{16} She went on to speculate about a variety of possible explanations for what she termed the "population growth slowdown" in California's prisons.\textsuperscript{17}

However, buried inside the article was this remarkable fact: California's prison population is growing at a "slowed pace" of about 10,500 net new prisoners per year!\textsuperscript{18} To put this in perspective, when I first started evaluating prison conditions in the mid-1970s, California had about 20,000 prisoners total in the entire system, less than the amount we now add over an average two year period. Indeed, 10,500 more prisoners annually is enough to fill four or five very large and very expensive new prisons (at the cost of a couple hundred million dollars per prison to build, and millions more to staff). More shocking to me than the numbers themselves is the fact that we have so easily gotten used to them. Thus, what the media apparently finds newsworthy about a draconian law that adds the equivalent of several new prisons to a single state system each year is that so few additional prisoners are involved. Indeed, meaningful perspective on imprisonment and related issues has been cast adrift on this punishment effects of this plan on prisoners did not appear to figure in the calculation, the economics of the decision were straightforward: "By packing extra inmates into overcrowded prisons, officials can cut the cost per inmate to about $12,000 a year. That is roughly half of what it costs to put inmates into a new prison." \textit{Id.}

\textsuperscript{14} Many of these new laws not only provide for life sentences upon a third criminal conviction, but also double the prison sentence for a second criminal conviction and reduce existing "good time" provisions for every term (so that all prisoners actually are incarcerated for a longer period of time). \textit{See, e.g.,} Victor S. Sze, \textit{A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost}, 28 L.OY. L.A. L. REV. 1047, 1065 (1995).

\textsuperscript{15} Mary Ann Ostrom, \textit{Prison Boom Hasn't Come; '3 Strikes' Predicted Increase in Inmate Population Was Overstated}, SAN JOSE MERC. NEWS, Mar. 7, 1995, at 1A.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}
wave, and gone so radically off course that no one can quite remember the direction in which we used to be moving, just two decades ago.

It is true, and not a wild overstatement, that over the last twenty-five years the United States has created the most punitive criminal justice system in the modern industrialized world. During this period we have competed only with Russia and South Africa for the international honor of incarcerating the most people per capita anywhere on the globe. The comparison is made more disturbing by the realization that, unlike us, these other countries have been torn by profound social and political upheaval that helps to account for their punitiveness. The United States, by contrast, is not plagued by the kind of socioeconomic instability and wrenching political change that Russia has confronted and, unlike South Africa, has no recent legacy of a brutally repressive apartheid to overcome. No, in the United States, we put more people in prison than anyone else in the world by choice; we imprison more than other societies not because we have to, but because we want to.

This leads to the other, deeper and, in many ways, more troublesome dimension to the punishment tidal wave that has swept over us in the last several decades. Virtually every serious commentator who has addressed the issue during this period has concluded that our prison system is "in crisis." Yet, this crisis is not limited to just the staggering statistics I

19. See Prison, Jail Rolls Increase 113% in 10 Years, S.F. CHRON., Aug. 19, 1996, at A6 ("The world’s highest incarceration rate has seesawed in recent years between the United States and Russia, with both far outdistancing other nations.").

20. Now that some form of domestic peace has come to South Africa, the United States and Russia are beginning to considerably lengthen their imprisonment leads. In the wake of increasing political stability in South Africa, its highest court also recently abolished the death penalty, a further indication that the country is moving in a very different direction from the United States. See South Africa Abolishes Death Penalty, High Court Rules for "Right to Life," S.F. CHRON., June 7, 1995, at Cl:

In its first major decision, South Africa’s highest court abolished the death penalty yesterday, ending a decades-old practice of executing criminals convicted of serious crimes that had once given the country one of the world’s highest rates of capital punishment. Announcing the unanimous decision, Arthur Chaskalson, president of the Constitutional Court, said: "Everyone, including the most abominable of human beings, has a right to life, and capital punishment is therefore unconstitutional."

cited a moment ago concerning the sheer numbers of persons we incarcerate. It is a crisis of cruelty, a fundamental loss of humane values on matters of crime and punishment, one so seemingly broad-based that, much like the dizzying numbers that we seem to have just gotten used to and now take for granted, no one seems to notice. Noticed or not, we now celebrate rather than merely tolerate or even lament official cruelty and the infliction of pain in our criminal justice system. The punishment wave has hit with such force that it has ripped us from the ethical moorings that once held this punitive system in check, kept us from straying beyond the moral outer limits of state-inflicted pain, and ensured that the course we set as a society for our crime control policy was guided, among many other things, by some minimal humanitarian considerations.

A few recent examples help to illustrate this point. Consider, for example, that the sheriff of Phoenix, Arizona has proudly proclaimed himself the "meanest sheriff in America" and publicly takes pride in running what he terms "a very bad jail."\(^{22}\) As one observer of the situation noted: "Forget the Bastille. With jails in dozens of communities around the country facing unprecedented shortages of beds, [Sheriff] Arpaio's 'Tent City' solution has become a modern-day symbol of the 'make 'em miserable' school of incarceration . . . ."\(^{23}\) Instead of censure, embarrassment over his antics, or calls to resign, Sheriff Arpaio immediately garnered a national platform, a broad public and political following, and a large group of volunteers whom he has deputized as his "posse," including many prominent citizens, high-ranking political figures, and the state's governor. Indeed, in the heat of his 1996 presidential campaign Republican candidate Bob Dole "spread word of [his] anti-crime package" by visiting Arpaio's notorious tented desert jail, "which offers no air conditioning and is exposed to the searing desert heat that often reaches 110 degrees in the summer . . . ."\(^{24}\) Dole was so favorably impressed during the campaign stop that, as it ended, he suggested to the media that "other cost-conscious American communities" might emulate Arpaio's innovation.\(^{25}\)

\(^{22}\) See S. Myrdan, **Hard Time: What We Have Here is a Failure to Tolerate**, SAN JOSE MERC, NEWS, Mar. 7, 1995, at 9A.


\(^{24}\) Blaine Harden, **Clinton, Dole Take Different Tacks on Issue of Crime, GOP Nominee Tours Tough Sheriff's Jail**, S.F. CHRON., Sept. 18, 1996, at A4 ("Dole was escorted through the tented jail yesterday by a fellow believer in prison hard time. Maricopa County Sheriff Joe Arpaio is 'internationally known as America's toughest sheriff,' according to briefing documents the sheriff's office gave to the Dole campaign.").

\(^{25}\) Of course, "tough talk" about crime hardly differentiated the two major 1996 presidential candidates. See, e.g., Maria L. La Ganga & Paul Richter, **Clinton, Dole Deliver Tough Talks on Crime**, S.F. CHRON., Sept. 17, 1996, at A3 ("Dole's [criminal crackdown] plan had scarcely been outlined when Clinton aides were claiming that major elements of the crime-fighting message—longer sentences, tougher treatment of juvenile offenders—had been part of Clinton's agenda.").
Arizona is not alone in celebrating cruelty. Several states recently have returned to the use of chain gangs in which thousands of prisoners—including women in at least one jurisdiction—put in leg irons and made to work on roadsides in striped uniforms while armed guards look on.\(^{26}\) One can only assume this practice is designed more to humiliate them than anything else. Other states “stretched the definition of paying one’s debt to society,” by charging prisoners “room and board” fees while they were incarcerated.\(^{28}\) Some even go to the extent of hiring collection agencies to pursue inmates who were released while still owing “back rent.”\(^{29}\) This trend ensures that a growing number of persons will be released from prison with few marketable job skills as well as immediate debts to pay—a combination with dire implications for future recidivism rates.

In California, nearly 85% of the people incarcerated for life under our new “three strikes” law were sent away for non-violent offenses, some as trivial as stealing a pizza or a loaf of bread.\(^{30}\) The California Supreme

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\(^{26}\) See Arizona Sheriff Plans Female Chain Gang, S.F. CHRON., Aug 26, 1996, at A3 (“Proclaiming himself an ‘equal opportunity incarcerator,’ Maricopa County Sheriff Joe Arpaio says he plans to put the nation’s first female chain gang to work next month. . . . Arpaio said 34 inmates already have applied for a spot on the chain gang. The applications came from women now locked up with three or four others in dank, cramped disciplinary cells.”).

\(^{27}\) See Rick Bragg, Chain Gangs to Return to Roads of Alabama, N.Y. TIMES, Mar. 26, 1995, at 9; Mireya Navarro, Florida Prisons to Revive Using Chain Gangs—But With Limits, S.F. CHRON., Nov. 21, 1995, at A7 (“Like Alabama and Arizona earlier this year, Florida is resurrecting the practice of putting prison inmates in leg irons to work under armed guard along roadsides.”); After a Year, Alabama Drops Prison Chain Gangs, S.F. CHRON., June 21, 1996, at A1 (“After Alabama revived the chain gangs last year, Florida, Arizona, Wisconsin and Iowa all adopted forms of the leg-ironed work crews.”). Ironically, Alabama was also the first to modify the practice—deciding to put prisoners in individual leg irons rather than chaining them all together. \(\text{Id.}\) However, officials stated that the policy was changed for reasons of efficiency rather than out of humanitarinian concern: the new method would allow inmates to work more “productively.” \(\text{Id.}\) As the correctional commissioner who originally crusaded in favor of the reintroducing the practice described the change: “How you do it is just a matter of technique.” \(\text{Id.}\)

\(^{28}\) Judy Pasternak, Prisons Are Becoming Landlords: Inmates in Some States Are Being Charged Monthly Rent, Though Few Can Pay, SAN JOSE MERC. NEWS, Aug. 7, 1997, at 8A. According to one prison official, “Every state’s looking for ways that they can cut budgets, and this is a way to show that they’re getting tough on crime at the same time.” \(\text{Id.}\)

\(^{29}\) \(\text{Id.}\)

\(^{30}\) See Harriet Chiang, “3 Strikes” Law Takes Tough Hit: Mandatory Sentencing Ruled Unconstitutional, S.F. CHRON., June 21, 1996, at A15 (“According to the latest state statistics, roughly 85 percent of the 15,000 inmates sentenced under the law were convicted of nonviolent crimes, including burglary, drug possession and shoplifting.”). The anecdotal evidence is even more troublesome. See, e.g., Sandra Gonzales, Three Strikes’ Law Invoked for Felon’s Address Change, SAN JOSE MERC. NEWS, Feb. 3, 1996, at 3B (In one case, out of safety concerns for their infant son, an ex-convict and his fiancee moved downstairs in the apartment complex where they lived. However, because the man failed to inform authorities of his new address he was prosecuted under the state’s sex offender registration law and given a “third strike” (that carried a 25 years to life sentence).). See also
Court has ruled that many juvenile convictions (incurred without benefit of jury trials) could qualify as “strikes,” whether or not a doubt about the minor’s fitness to be tried in juvenile court had originally been raised. The court also expedited the application of the law generally by refusing to allow defendants facing their third strikes to challenge the validity of their previous two convictions on the basis of ineffective assistance of counsel. Although this law may not have resulted in the drastic increases in prison populations that some predicted, the laws were so draconian that, in some instances, persons accused of relatively minor crimes ended their lives rather than facing the prospect of spending them in prison.

Indeed, California has contributed more impetus to the swelling punishment wave than most other states. We have led the nation in the construction of new prisons, passed one of the harshest three strikes laws in the land, and pioneered the creation of a new penal form—the “supermax” prison. In fact, a few years ago Federal District Court Judge Thelton Henderson concluded that California’s state-of-the-art “supermax” prison

Katherine Seligman, “Strike 3" for Sex Offenders? Failure to Register a Felony, Santa Clara County is Cracking Down on Violations, S.F. EXAM., Mar. 23, 1997, at C1 (“There have been cases of convictions in which the ‘third strike’ was the theft of blue jeans, a six-pack of beer or, in the case of one 60 year-old defendant, a pint of whiskey.”); Tony Perry & Maura Dolan, Justice by Geography: How 3 Strikes Add Up Depends on Where You Live, SAC. BEE, July 7, 1996, at F1; Harriet Chiang, Uneven Justice Under 3 Strikes, S.F. CHRON., Sept. 23, 1996, at A1 (“In San Diego County, a grandfather was sentenced to 25 years to life for stealing four videotapes from a Kmart store so he could sell them to buy food and diapers for his three grandchildren.”).

31. See People v. Davis, 15 Cal. 4th 1096, 1098 (1997). The court appeared to go beyond the statute itself, which required that a doubt about fitness—as evidenced by an explicit finding—had at least been raised and adjudicated. See id. at 1100. The only justification the court offered was that the inclusion of the fitness requirement in the statute would “severely limit” the Legislature’s expressed intent “to ensure longer prison sentences and greater punishment” for repeat offenders. Id. at 1102.

32. See Garcia v. Superior Court, 14 Cal. 4th 953 (1997). Of course, there are limits to how much expediency can be brought to the application of this law. For obvious reasons, “three strikes” prosecutions in most jurisdictions have proved extremely costly and time consuming. See, e.g., Raoul V. Mowatt, Millions Spent on “3-Strikes” Offenders, County Costs: Review of Cases Shows Jail Stays Longer, Charges Mostly Non-Violent, SAN JOSE MERC. NEWS, July 8, 1996, at 1A, 10A (“As inmates facing sentences of 25 years to life decide to take their chances with trials, they are also changing the complexion of the jail population.”). These effects may reverberate throughout the system as more and more younger offenders realize how much seemingly attractive deals offered in plea-bargained first cases may cost them later. Cf. One Inmate’s Tale: Haunted by an Old Plea Bargain, S.F. CHRON., Sept. 23, 1996, at A1 (explaining how inmate agreed to a 1982 attempted burglary plea as part of a plea bargain to avoid being charged with a serious felony).

33. See, e.g., May Wong, Three-Strikes Suspect Hangs Himself in Jail, SANTA CRUZ SENT., Nov. 4, 1997, at A1 (discussing how one car theft suspect facing several hundred years in prison under the three strikes law hung himself before he could stand trial). He left behind several notes explaining that his past crimes had been related to an uncontrollable drug addiction and he did not think he could endure the prospect of such a long prison sentence. Id. He was “the third inmate to commit suicide at the County Jail in 1997.” Id. “The other two were three strikes candidates.” Id. “Before 1997, the last suicide was in 1991.” Id. “Before that, there were three others from 1984.” Id.
at Pelican Bay inflicted treatment on prisoners that, in his words, "may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time."\(^34\) He barred certain categories of prisoners from being sent there because of the tendency of the facility to literally drive them crazy.\(^35\) Indeed, Henderson's opinion acknowledged that "[s]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances."\(^36\) He found in this case that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU."\(^37\)

The judge described the prison's "tremendous potential for abuse," stemming in part from the guards' "nearly total control over the inmates under their supervision," as well as the fact that the physical environment at the prison "reinforces a sense of isolation and detachment from the outside world, and helps create a palpable distance from ordinary compunctions, inhibitions and community norms."\(^38\) He pointed to the "stark steril-


\(^{36}\) Id. at 1280.

\(^{37}\) Id. at 1235. Later in the opinion the court seemed to go just a step further: "Here, the record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods." Id. at 1265.

\(^{38}\) Id. at 1160. The court found the use of excessive force took a variety of forms at the prison, including breaking one prisoner's arm by bending it back through his tray slot, guards punching prisoners in the face with closed fists and kicking them in the face and head, leaving them "hog-tied" or in fetal restraints for hours at a time, placing "naked or partially dressed inmates in outdoor holding cages during inclement weather" where they were "exposed to the elements as well as public view." Id. at 1171, unnecessarily high numbers of "cell extractions" in which teams of guards engaged in prescribed procedures that...
ity and unremitting monotony" of the interior of the prison, the fact that prisoners “can go weeks, months or potentially years with little or no opportunity for normal social contact with other people,” and that the sight of prisoners in the barren exercise pens to which they were restricted created an image “hauntingly similar to that of caged felines pacing in a zoo.”

However, although Judge Henderson found that overall conditions in the supermax units were “harsher than necessary to accommodate the needs of the institution,” the poorly developed state of Eighth Amendment doctrine left him without a basis to close the prison, or even to require significant modifications in many of its general conditions. Immediate following the court’s scathing opinion, then California Department of Corrections (CDC) director James Gomez was unchastened and unpologetic. Instead of acknowledging a shameful, embarrassing defeat, he celebrated Henderson’s opinion as a victory for the CDC simply because the judge had not shut his operation down. So, they proudly persist at Pelican Bay, unflinchingly hovering on the edge of what is humanly tolerable.

While Pelican Bay hovered on the edge, another California supermax prison, the one at Corcoran, went over it. The press reported that staff members regularly staged what were billed as “gladiator fights” between rival prison gang members. Apparently, warring gang members were re-

the court characterized as “undeniably violent maneuver[s] which can involve several weapons, including 38 millimeter gas guns, tasers, short metal batons, and mace,” id. at 1172, and that “routinely involved a strikingly high degree of force, and resulted in numerous injuries that were too often left unexplained by official incident reports,” id. at 1173, and, finally, the discharge of firearms by guards that were “used unnecessarily, and in some cases, recklessly,” id. at 1179-80, and sometimes with lethal consequences.

39. Id. at 1229.
40. Id. at 1263.
41. Cf. Haney & Lynch, supra note 34. To be sure, the judge did order significant changes in procedures governing the use of force and provision of medical and mental health treatment.
42. See Bill Wallace, Pelican Bay Prison Ruled Too Harsh, S.F. CHRON., Jan. 12, 1995, at A17 (“Representatives of the state Department of Corrections called Henderson’s ruling a ‘significant victory’ that allows them to continue using the Security Housing Unit. ‘This is a landmark decision that supports the use of SHU to segregate the most dangerous, predatory inmates who threaten the safety of staff and other inmates . . . .’”).
43. See id.
44. See Jean H. Lee, Inmates Claim Brutality at Top-Security Prison, SAN JOSE MERC. NEWS, July 14, 1996, at 3B (“In the eight years since the state built the high-tech prison . . . seven inmates have been shot dead by officers and more than three dozen have been wounded. And in June of last year, 36 inmates bused from a prison in Calipatria were beaten as they arrived at Corcoran.”). See also 30 Guards Probed in Inmate Beatings, Corcoran Prison Staff Accused of Abusing Transferees Involved in Melee, S.F. EXAM., May 26, 1996, at C5; Reynolds Holding, Accusations of Prison Coverup, Agency Cited Staged Fights at Corcoran, Guards Say, S.F. CHRON., Oct. 28, 1996, at A1 (explaining that subsequent investigation suggested that the Department of Corrections attempted to cover-up internal reports of the staged gladiator fights “at the same time the agency was citing escalating prison violence to support its requests for billions of dollars in new facilities . . . .”); Eliza-
leased into the same small prison yard with the expectation that they would attack one another.\textsuperscript{45} Secretaries, girlfriends, and new employees at the prison were invited to watch these contests from control booth windows, and correctional officers bet on the outcome.\textsuperscript{46} At least seven prisoners who were allegedly sent into battle this way lost their lives.\textsuperscript{47} They were the victims of officers, who used high powered rifles to break up fights that they had helped stage, but that had gone on too long.\textsuperscript{48}

Remarkably, after media revelations of these events brought some adverse publicity to the prison, the Correctional Officers Association, a number of other law enforcement organizations, and a variety of victims’ rights groups banded together to take out a full page add in support of the accused guards.\textsuperscript{49} “Like the vast majority of California citizens,” the ad read, “we stand with you.”\textsuperscript{50} Why? Because the prisoners who were victimized by this behavior were, in the words of the ad, “vicious, predatory,” “cold-blooded and remorseless,” people who “have no conscience,” and who, therefore, presumably deserved whatever they got.\textsuperscript{51}

In another trend that surfaced on the crest of the punishment wave, versions of “Megan’s Law,”\textsuperscript{52} presumably designed to allow citizens to take prudent precautions upon learning of a sex offender’s presence in the

\textsuperscript{45.} See Mark Arax, Tales of Brutality Behind Bars, L.A. TIMES, Aug. 21, 1996, at A1 (discussing the “gladiator fights” between rival gang members that terminated with at least some prisoners being killed by prison riflemen). “It was common practice, [several correctional officers] say, for guards to pair off rival inmates like roosters in a cockfight, complete with spectators and wagering, then sometimes shoot those who wouldn’t stop fighting.” \textit{Id.}

\textsuperscript{46.} \textit{Id.}

\textsuperscript{47.} \textit{Id.}

\textsuperscript{48.} \textit{Id.}

\textsuperscript{49.} See \textit{We Stand With You}, FRESNO BEE, Jan. 29, 1997, at A7.

\textsuperscript{50.} \textit{Id.}

\textsuperscript{51.} \textit{Id.} See also Jean H. Lee, Inmates Claim Brutality at Top-Security Prison, SAN JOSE MERC. NEWS, July 14, 1996, at 3B (quoting the Warden’s explanation for the violence: “‘I think people lose sight of why we built Corcoran,’ he said. ‘We house the bad people. And we do the best we can.’”). And, when violence at the prison skyrocketed in the midst of the publicity about the gladiator fights—a staggering “almost 50 inmate fights and dozens of shootings on the yards in November”—a Department of Corrections official seemed to blame the prisoners alone for the problem: “One thing that will change is that inmates who act up at Corcoran will go to Pelican Bay.” Reynolds Holding, Exercise Yards to Reopen at Corcoran Prison, S.F. CHRON., Dec. 28, 1996, at A17.

\textsuperscript{52.} This law, named after a crime victim in a particularly tragic New Jersey case, provided for community notification when convicted sex offenders began residing in them. See N.J. STAT. ANN. § 2C:7-1 to -11 (West 1994). See also 42 U.S.C. § 14071 (1996). Forms of Megan’s Law were passed in numerous states. Indeed, states that had failed to enact such legislation by September, 1997 risked the loss of federal crime-fighting funds and, eventually, they all complied.
community, seemed destined to provoke vigilante actions. After sheriff's departments began to "turn the release of 'high risk' offenders—those convicted of at least two violent offenses, including at least one sex offense—into a media event, calling in newspapers and broadcasters and putting up warning flyers,"53 ex-convicts were driven from their homes and back into prison.54 The practice continued, despite reports of extensive errors in the database used to identify the ex-offenders.55

Indeed, in several Northern California communities "[f]rustrated police" took matters into their own hands and devised a plan of their own after too few residents "bothered to go to police headquarters to examine the sexual-offenders database, a computer listing of serious offenders . . . ."56

In the face of this apparent lack of interest in sex offender information, the police "decided to deliver the warning more directly—in effect, mapping out for parents just where potential predators might be lurking."57 Police made "tens of thousands of neighborhood maps complete with street names but not house numbers—and triangle-shaped markers showing the rough location of all offenders living within a one-mile radius of a school" that they provided free of charge to school officials.58 Although it was left "up to the schools to determine how the maps are distributed," it was clear that they were likely to "be sent home directly with students."59

At the same time lawmakers and criminal justice authorities declared an unofficial war on adults convicted of offenses against children, they


54. See Editorial, supra note 53, at A18. See also Rick DelVecchio, Residents Want Molester Out of Santa Rosa, S.F. CHRON., July 7, 1997, at A13:

Santa Rosa residents who learned thanks to 'Megan's Law' that one of their neighbors is a convicted child molester vowed yesterday to put heat on him until he moves . . . . Neighbors became aware of [his] criminal past last week when the Sonoma County Sheriff's Office sent out a flier identifying him as one of four 'high-risk' sex offenders living in the county.

55. See, e.g., Charlie Goodyear, Errors Abound on CD-ROMs Naming Sex Felons, Addresses up to 65% Wrong, S.F. CHRON., July 16, 1997, at A13 ("Rob Stutzman, a spokesman for Attorney General Dan Lungren, acknowledged yesterday that 60 to 65 percent of the address and ZIP code information on the database is incorrect."). The Attorney General himself defended the use of the database, despite its high level of inaccuracy. Dan Lungren, Megan's Law CD-ROM—It Works, S.F. CHRON., Aug. 4, 1997, at A19 ("If there is a question about publicly identifying sex offenders, the benefit of the doubt should go to those who want to protect themselves from sexual assaults, not to those who have committed such vile crimes.").

56. E. Mark Moreno & Dan Reed, Locator Maps of Sex Offenders To Go To Parents, SAN JOSE MERC. NEWS, Oct. 30, 1997, at 1A.

57. Id.

58. Id.

59. Id.
declared a similar war on children themselves.\textsuperscript{60} Laws recently passed in many states provide for the incarceration of children in adult correctional facilities. For example, prosecutors in Florida were among the first to be given the discretion to charge children as young as fourteen as adults, and any juvenile convicted of three previous offenses there is automatically moved into adult court.\textsuperscript{61} A so-called Violent Youth Predator Act\textsuperscript{62} would virtually guarantee implementation of many of these provisions in the rest of the country by making a quarter billion dollars in federal funds available only to those jurisdictions that adopted them.\textsuperscript{63}

Cases of twelve and thirteen year-old boys being confined in high security prisons\textsuperscript{64} and calls to try a six year-old as an adult (made by, among

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\textsuperscript{60} See, e.g., Mary Anne Ostrom, Wilson Attacks Juvenile Crime, 'Scare Kids Straight': His Proposals Include a Curfew and Trying 14-Year-Olds as Adults, SAN JOSE MERC. NEWS, Apr. 10, 1997, at 1A. Presidential candidate Bob Dole drew on a variant of the crime wave imagery when he launched one of his many “soft on crime” campaign attacks. See Kids' Criminal Records Should Stick for Life, Dole Says, SAC. BEE, July 7, 1996, at A5 (“Unless something is done soon, some of today's newborns will become tomorrow’s super-predators—merciless criminals capable of committing the most vicious of acts for the most trivial of reasons,” the Republican presidential candidate said Saturday in a weekly GOP radio address.”).

\textsuperscript{61} See, e.g., Fox Butterfield, States Toughen Up Juvenile-Crime Laws, Changes Aim to Curb Offenses, But Critics Fear Effort Will Backfire, SAN JOSE MERC. NEWS, May 12, 1996, at A1 (discussing passage of tough new juvenile laws of dubious effectiveness). For example, Oregon’s new “Measure 11” imposes mandatory prison time for juveniles accused of serious offenses and also requires persons as young as 15 to be tried in adult court. \textit{Id}. However, Oregon officials charged with the responsibility of implementing the law were critical of it:

“Measure 11 is costing more with less effective results,” explains Steve Carmichael, director of Youth Services for Lane County. Before mandatory sentencing guidelines, youth arrested for what are now considered Measure 11 crimes, such as burglary and assault, were released once they were deemed reformed. “Traditionally,” says Carmichael, “there was a strong emphasis on rehabilitation.”


\textsuperscript{62} Violent Youth Predator Act of 1996, H.R. 3565, 104th Cong. (1996). By May, 1997, the funds at issue for states that agreed to treat juveniles more punitively had risen to $1.5 billion. See Jerry Gray, Bill to Combat Juvenile Crime Passes House, N.Y. TIMES, May 9, 1997, at A1. The hyperbolic specter of the crime wave was used to spur action: “Our youngest career criminals are getting away with the most heinous crimes over and over again,” Representative Porter J. Goss, Republican of Florida, said on the House floor this afternoon. \textit{Id}. However, despite increases in the percentage of violent crime committed by juveniles, “[r]ecent Federal statistics show that crime rates overall, including those tracking offenses by juveniles, are dropping.” \textit{Id}.

\textsuperscript{63} As one legal commentator put it: “The goal of the legislation is emphatically not to eliminate the federal role in shaping policy toward young offenders. Rather, its goal is to shift the direction of federal efforts from ‘justice’ and ‘delinquency prevention’ to an avowedly punitive response.” Stephen J. Schulhofer, Youth Crime—And What Not To Do About It, 31 VAL. U. L. REV. 435, 439 (1997).

\textsuperscript{64} See, e.g., Don Terry, Prison for Young Killers Renews Debate on Saving Society's Lost, N.Y. TIMES, Jan. 31, 1996, at A1.
others, the governor of the state of California) have been reported in the press. In the wake of a particularly tragic, highly publicized shooting by two Jonesboro, Arkansas teenagers, lawmakers across the country have called for juvenile justice reforms that would allow them to punish children as if they were adults, culminating in a Texas legislator’s proposal to impose the death penalty on eleven-year-olds. One news commentator described the effects of the punishment wave on the juvenile justice system as having produced “the most drastic changes to the juvenile-justice system since the founding of the first family court a century ago,” the major thrust of which has become “to get more juveniles into the adult criminal-justice system, where they presumably will serve longer sentences under more punitive conditions.”

Persons who have studied the lives of child and adolescent violent offenders know that most of them have also been the victims of the very same adults who will be incarcerated under the new laws passed in the name of protecting children. Thus, we harshly punish the perpetrators of this child abuse and then we harshly punish its childhood victims. This seems in some ways entirely consistent with suggestions made during this same period to use federal funds to place the children of welfare recipients in orphanages and, in California, to force unwed welfare mothers to place their children up for adoption. Rather than taking steps to strengthen

69. Indeed, because many juvenile offenses can be counted as “strikes” under prevailing interpretations of the three strikes legislation, we may punish them doubly if they should reoffend as adults. See Torri Minton, Juvenile Felonies Can Be Strikes, High Court Says, Wilson Lauds Ruling Handed Down in Contra Costa Case, S.F. CHRON., July 4, 1997, at A19. As Governor Wilson put it, in the wake of the decision enabling the lifetime effect of juvenile offenses in this way: “Too many of our dangerous and violent criminals started their life of crime at a young age. [The] decision ensures that adult offenders will be held responsible for their juvenile criminal actions.” Id.
70. See Roger Simon, The Newt Deal is Upon Us: the Have-Not’s Have Had It, BALTIMORE SUN, Nov. 16, 1994, at 2A (Of course, the suggestion was Newt Gingrich’s and it was quickly dismissed). But see Nina Bernstein, Orphanages, Inc.: The High Cost of No Intentions, N.Y. TIMES, May 11, 1997, at E5.
families or alleviate the suffering of children by helping their parents overcome their problems, we punish them all. Thus, the punishment wave has spilled onto the one area of the criminal justice system typically spared such excesses—the treatment we afford the most vulnerable members of our society.

Not surprisingly, the crisis of cruelty also has extended to our system of capital punishment. To be sure, as the harshest and most extreme criminal sanction the modern state can impose, the death penalty has ridden on the crest of the punishment wave. In an era where politicians compete on the basis of punitive zeal, the death penalty has become a measure of political mettle. Not only do politicians courageous enough to voice opposition to the death penalty now risk certain electoral defeat, but those whose support is not enthusiastic enough, or who do not manage to dispense with the condemned quickly enough, are also politically vulnerable.72

Lack of enthusiasm for the death penalty on the part of some members of the California Supreme Court resulted in its unprecedented transformation in 1986.73 Governors’ races in Texas have begun to turn on promises about who can kill the most Texans.74 In 1990, Democratic gubernatorial
candidate Dianne Feinstein used a brief but emotional television ad that ended by proclaiming, "she's the only Democrat who favors the death penalty."\footnote{75} Polls showed that the percentage of voters who supported her candidacy jumped by nineteen points shortly thereafter.\footnote{76} Republican presidential candidate Bob Dole actually commenced his 1996 California primary campaign with a visit to death row.\footnote{77} And, in the current governor's race, political unknown Al Checchi catapulted to statewide prominence in California with a barrage of television ads demanding what is almost certainly an unconstitutional application of the death penalty.\footnote{78}

Recently, in Florida, the electric chair they use to carry out executions—"Old Sparky" as it is affectionately known—badly burned condemned prisoner Pedro Medina.\footnote{79} Flames shot out of the hood that covered Medina's face and head, creating an apparently ghastly scene.\footnote{80} However, few if any officials closely involved with the execution process seemed troubled or embarrassed by this turn of events, or bothered to urge

\footnote{75}{George Will, supra note 72, at 68.}

\footnote{76}{Conservative political columnist George Will attributed Feinstein's primary victory directly to her stance on the death penalty: "Dianne Feinstein won California's Democratic gubernatorial primary, propelled by her stand—horribly to guilt-drenched liberal Democrats—in favor of capital punishment." \textit{Id.} Four years later, the same issue dominated gubernatorial campaigns, only with a macabre twist. Since by then governors in virtually all states supported the death penalty and none had dared to use their executive power to prevent executions from taking place, their opponents criticized them because they weren't "killing folks quickly enough." \textit{Bush Sons Whip Up Execution Fever, S.F. EXAM., Oct. 30, 1994, at A6.}}

\footnote{77}{See Carla Marinucci & Steven A. Capps, \textit{Dole Talks Tough in Visit to Death Row But GOP Senator Goofs In His Attack on Clinton's Crime Bill Record and Aides Forced to React, S.F. EXAM., Mar. 24, 1996, at A1} ("Dole told about 100 prison employees, law enforcement, officials and crime victims he would work to end lenient sentences and wanted to speed up the executions of convicted criminals on death row" by supporting habeas corpus reform. Not to be outdone on the crucial punishment question, his opponent was quick to respond: "Clinton has said he favors such reforms and the White House reiterated the support Saturday.").}

\footnote{78}{See Robert B. Gunnison, \textit{Al Checchi Goes Out on a Limb: Upping the Ante, The Candidate Wants the Death Penalty to be Extended to Serial Rapists and Repeat Child Molesters, S.F. EXAM., Feb. 8, 1998, at A3} ("Democrats know that anti-death penalty candidates simply get hammered in the general election by Republicans. So why not stake out such an extreme position that no one outflanks you? That's great—the only casualty is a little intellectual honesty, not exactly a premium in campaign mode.").}

\footnote{79}{See Grisly Execution in Electric Chair Sickens Witnesses, Flames Shoot from Convict's Head as Florida Murderer is Put to Death, SAN JOSE MERC. NEWS, Mar. 26, 1997, at 1A.}

\footnote{80}{See \textit{id.}}
a delay of the next scheduled execution until Old Sparky could be fixed.\textsuperscript{81} Indeed, the state attorney general boasted instead that the malfunctioning electric chair was a \textit{good} thing, an enhanced deterrent if you will: "People who wish to commit murder, they better not do it in the state of Florida, because we may have a problem with our electric chair" he mocked.\textsuperscript{82} A few days later a state legislator announced that he had solved the problem of inhumane executions in Florida—he shortly would be introducing a bill to return the state to use of the guillotine.\textsuperscript{83}

The punishment wave has carried us a long way, and is about to deposit us on some of the same shores that the Founding Fathers departed from several centuries ago. Remember that excessive state-sanctioned punishments played a critical role in the very origins of our nation. Indeed, the United States was settled by many persons fleeing repressive, intolerant governments in Europe (including a small number who were sent here to begin what were, essentially, convict colonies).\textsuperscript{84} The American Revolution was fought in part over extremely punitive and unjustly administered laws.\textsuperscript{85} Ironically, then, the punishment wave that has swept over the nation in the closing years of the 20th century threatens to return us to the same harsh political and psychological territory from which we started: Prison and jail conditions worse than the Bastille, the castration of sex offenders, officially-condoned vigilantism, chain gangs, locking people away in prison for life for stealing food, solitary confinement regimes that are so psychologically destructive that they drive people crazy, staged gladiator fights, calls to place the children of the poor in mass orphanages, prosecuting children as adults and confining them in adult prisons, burning people (albeit not at the stake) as an acceptable legal deterrent, calls to "bring back the guillotine," and on and on it goes.

When historians look back on these times, they will either declare

\textsuperscript{81} See id.

\textsuperscript{82} Id.

\textsuperscript{83} See Guillotine Suggested for Florida's Killers, SAN JOSE MERC. NEWS, Mar. 29, 1997, at 11A. See also Arkansas Says Triple Execution Cuts Costs, Stress, SAN JOSE MERC. NEWS, Jan. 9, 1997, at 8A (discussing how, a few months earlier, officials in the neighboring state of Arkansas were pleased with the triple execution that they had conducted in a single night). They told the press that they favored multiple executions because they were "substantially less costly" and reduced stress on prison employees." Id.

\textsuperscript{84} See De Tocqueville’s description of the early Colonists as representing “the seeds of discord and of fresh revolutions” whom the British were glad to see “dispersed afar,” in part because they had “sought refuge from [England’s] harsh laws on American soil.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 39 (George Lawrence trans., 1966).

\textsuperscript{85} Cf. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 63 (1993):

The post-Revolutionary age was an age of reform in criminal justice. The Bill of Rights codified ideas about fair trials. Reform of criminal justice was in the air. Parts of the old system seemed chaotic and barbaric. The republic seemed to need a new system, more rational, more modern, more just and humane. Reformers, on the whole, hated the death penalty, and, to a lesser degree, other punishments of the body—whipping, torture, and the like.
them a brief, draconian detour in the otherwise reasonably steady march towards a more civilized and humane system of criminal justice, or lament them as the beginning of a new era of "modern barbarism." I frankly do not know which. But this, not some mythical "crime wave," is what has swept us away over the last few decades.

SWEPT AWAY:

PUNISHMENT GROUNDSWELLS, TSUNAMIS, AND CHANGING TIDES

Thinking of the "punishment wave" in oceanic terms not only conveys its size and power but also provides some perspective on its possible origins and long-term impact. Ocean waves are caused by forces outside themselves that are often neither obvious nor present at the point of the wave's impact. Groundswells—the image most often used to describe the punishment wave (i.e., a punitive force rising from the widely shared sentiments of "the people")—are temporary phenomena that subside when the forces that produced them (gathering storms or earthquakes) abate. Tsunamis—huge waves that strike with the kind of incredible force and momentum that the punishment wave has acquired in recent years—occur in response to isolated, cataclysmic events—earthquakes—that occur suddenly and deep below the surface. Although tsunamis are often extraordinarily destructive, they are short lived and, despite the significant havoc they can wreck, effect no permanent modification in the oceanic terrain. The punishment wave that has swept over us in the last several decades shares elements of both of these distinctive patterns.

Tides, like the regular ebb and flow of existing punishment norms in our society, are also created by forces outside the ocean systems themselves—the gravitational pull of the moon and sun in relation to earth. These forces are more stable and their stability is what accounts for the regularity and recurrence of tidal patterns. Changing tides, a realignment of the stable forces that determine how and where the oceans ebb and flow, may be less dramatic than groundswells and tsunamis but, precisely because of their stability, represent a more momentous shift. Elements of the recently experienced, unprecedented punishment wave also suggest tidal change of momentous proportions—an actual realignment of the stable forces in our society that establish its patterns of punishment. In this sense, the balance of these external forces may have been altered so fundamentally that we are unlikely to ever return to the ebb and flow of punishment that existed beforehand.

In the remaining pages of this article, I briefly discuss the various forces that appear to have created and maintained this powerful punishment wave. Several different but interrelated psychological, sociological,
and political forces seem to have been at work—some the product of discrete, cataclysmic events, some created by changes occurring deep below the surface of public consciousness, and few if any obviously apparent at the point of the punishment wave’s impact.

FEAR, FRUSTRATION, AND THE DEMOCRATIC PROCESS

A recent publication of the California Policy Seminar (CPS) contains a fascinating passage that illustrates at least one of the forces propelling the punishment wave. Last year’s CPS conference, entitled the Crime Policy Project, brought together a number of academics and policymakers in an attempt to devise better ways of dealing with the problem of crime. Their final report thoughtfully addressed ways of “minimizing harm” in the state’s crime control policy. A passage of special interest appeared on its first page. Boalt Hall law professor Ed Rubin, the convenor of the seminar, described an initial meeting between himself, CPS staffers, and “a small group of California state officials and policy analysts to learn what front-line decision makers regarded as crucial aspects of the crime problem.” Professor Rubin reported that:

It immediately became apparent that the integration of citizen concerns with rational policy analysis would be crucial, because the decision makers informed us that political pressure was overwhelming all other considerations. The recently enacted “three-strikes-and-you’re-out” law had sailed through both houses of the legislature faster than any statute we have ever seen, they said. Even legislators who were centrally concerned with California’s ever-worsening financial situation had not dared to raise objections against this enormously expensive piece of legislation. There was a palpable sense, at this first meeting, that rational policy analysis, focusing on costs, on effectiveness, or on other alternatives, had been overcome by the juggernaut of public concern about crime.

Hard to imagine how or why that could be happening, isn’t it? Although there is a “please stop me before I vote to build another prison” quality to this, let’s take it at face value: Legislatures are now captive to their own enormously successful political strategy. The voting public’s


87. See id. at 1.
88. Id. at 1-15.
89. Id. at 1.
90. Id.
fear and anger, sentiments that many of the same politicians who are now claiming to be befuddled by "the juggernaut of public concern about crime" regularly amplified and mobilized to get elected, have now taken on lives of their own. Like the Sorcerer's Apprentice, however, once set in motion these powerful forces have proven difficult to control. Finding ways of neutralizing or replacing this out-of-control political strategy with a crime policy that is more humane, honest, and, in the long run, more effective, requires us to look carefully at its recent historical and psychological origins.

The last twenty or so years during which the punishment wave has been gaining in size and momentum in the United States represent a curious period in our political history. It is a period in which candidates for political office ran largely in opposition to the very governments to which they sought election. Indeed, government itself—former President Reagan had a term he liked to pronounce it as if it were a one-word political epithet, "big go'ment"—was blamed for the feeling among a growing number of citizens that they were losing control over their daily lives.91 Growing resentment over the perceived inability to assert one's personal "will," preference, or autonomy in day-to-day matters was channeled and transformed by political office-seekers and interest groups into something else: Anger at a putative lack of responsivity shown by political institutions to "the will of the people."

One branch of government especially, the judiciary, became a scapegoat for much of that frustration. As the least democratic of our major political institutions, it was the most stationary and defenseless target against which these sentiments could be directed. Courts could be portrayed as engaged in the relentless pursuit of a putatively "liberal," popularly unresponsive, and largely elitist vision of the good society that ignored the wishes of the "silent majority."92 In addition, some highly visible judicial decisions that explicitly protected "discrete and insular minorities,"93 against majoritarian domination helped fuel this resentment.


Richard Nixon's calculated courting of Dixie and his homage to "the silent majority" were designed to make Southern voters and the North's blue-collar Catholics discard their class-based ties to the Democrats and forge instead a values-based allegiance with Republicans. Presidents Reagan and Bush advanced the campaign, using issues like crime, taxes, welfare and patriotism to paint Democratic candidates as big-government elitists and drive wedges in the Democratic base.

93. The reference is to Justice Stone's famous footnote four of the Carolene Products decision. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that legislation may be subjected to higher judicial scrutiny if it restricts political processes or prejudices "discrete and insular minorities").
Thus, an implicit opposition between the courts and the will of the people was established that has been effectively exploited in the electoral politics of the last several decades.

Under this rubric, it was especially easy to criticize judicial opinions that appeared to defend and protect disenfranchised groups and extend civil rights to persons from whom they previously had been withheld. Many Warren Court decisions upholding the constitutional rights of unpopular groups (including—perhaps especially—criminal defendants) were used to symbolize this unresponsive, "out-of-touch" quality of governmental institutions that either failed to implement or actively thwarted the people's will. In many ways, it was the countermajoritarian rather than civil libertarian dimensions of these decisions that were highlighted in the political campaigns and media critiques directed against them. And since, as David Garland has argued, popular opinion about criminal justice policies is largely determined by "the ways in which 'the crime problem' is officially perceived and the political positions to which these perceptions give rise," criminal justice issues were particularly susceptible to this political in-fighting and jockeying for electoral advantage. During the last several decades, "the crime problem" was defined in terms of an inept judiciary that lacked the stern wisdom and political will to implement tough and presumably more effective solutions.

For much of the past two decades, then, the courts have continued to serve as convenient scapegoats against which popular resentments could be and were directed. As electoral lightning rods for the sparks of anger that candidates for public office were eager to ignite, the judiciary stood as a stable governmental fixture to run against. Institutional role, tradition, and temperament rendered judges less willing and able than their legislative counterparts to enter these political debates. Judicial decisions, although commonly part of the "public record," proved comparatively inaccessible when juxtaposed against the emotionally-charged political soundbites with which they competed. Unwilling or unable to explain themselves to the

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95. See id.
96. Cf. Richard Zeiger, Judgment Day For The Supreme Court: Rose Bird Faces the Ultimate Jury, 17 CAL. L. REV. 423 (1986) (discussing the difficulties in "campaigning" faced by the three California state supreme court judges voted out of office in the 1986 retention election and the meager campaign efforts organized on their behalf). See also Poulos, supra note 73 at 214. ("In contrast to the highly organized and politically astute opposition, the justices did not muster an equivalent campaign."). Cf. Grodin, supra note 73 at 366. (describing television ads in which the relatives of murder victims were shown "suggesting, or implying, that the California Supreme Court, in its unalterable opposition to the death penalty, and in defiance of the public will, had in reliance upon some unidentified technicality set the defendant loose on the streets"). Despite these inaccuracies, the justices (Grodin among them) were unable to respond and lost their judgeships largely as a result.
broad democratic constituencies who were becoming increasingly skeptical and hostile, judges became symbols onto which many people projected political frustration. Their silence was taken for arrogance in some quarters and incompetence in others.

The core principles upon which most of the civil rights decisions of the '60s and '70s were based rarely figured in the highly politicized discourse that surrounded them. Yet it was this discourse—especially when loudly amplified by the media—that was used to further excite public passions. Yale Kamisar captured the sentiments that prevailed at the outset of this period: "Not infrequently, one who dares to defend the court, or simply to explain what the court is doing and why, is asked which side he is on: The side of law and order or the side of the robber, the dope peddler and the rapist. Any defense of the court is an attack on the police."97 Indeed, over the period during which the punishment wave began to gather momentum—1965 to 1988—the percentage of persons who believed that the courts were "too lenient" rose from 48% to 82%.98

Although by no means restricted to this issue, much of the scapegoating of the courts during this period crystallized around one kind of punishment in particular—capital punishment. Because the most dramatic restrictions in the application of death penalty law that occurred in the early 1970s were judicially constructed, the death penalty became a convenient symbol of judicial leniency and the overreaching of liberal judges.99 Indeed, rather than criticizing the moral or substantive legal grounds on which judges reached their death penalty decisions, many opponents challenged the very legitimacy of the courts to dictate such outcomes in the first place.100 This was particularly true of the landmark Furman case,101 where the United States Supreme Court was portrayed as having imposed its own "soft-on-crime" agenda over the tough-minded majoritarian wishes of state legislators.102 As one legal scholar observed, Furman "provided a

99. See, e.g., John Poulos, The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances, 30 SANTA CLARA L. REV. 333 (1990) (arguing that the state legislature fashioned various death penalty statutes as part of a conscious strategy to place itself in opposition to the courts). According to Poulos, death penalty statutes enacted in the state during the 1970s "were not grounded in evolving notions of morality, justice, fairness, or public policy. They primarily reflected a single goal—the restoration of capital punishment under the federal and state constitutions. Particular death penalty legislation was enacted because it was thought to have the 'best' chance of 'withstanding constitutional attack.'" Id. at 466.
100. See Furman v. Georgia, 408 U.S. 238 (1972).
101. Id.
102. For example, in Michael Meltsner's account of death penalty litigation that occurred during these years he included a brief description of President Nixon's public reaction to
lightning rod for the argument that courts acted illegitimately.\textsuperscript{103}

The way in which the capital punishment question was handled in other countries during this same period provides indirect support for the view that the judiciary in the United States served as a political foil for office seekers who were looking for an "enemy of the people" to run against. As a number of commentators have noted, the international movement towards the abolition of capital punishment over the last several decades ran counter to the US trend.\textsuperscript{104} But the abolitionist movement succeeded in these various countries \textit{despite} public sentiment, not because of it.\textsuperscript{105} Indeed, capital punishment was ended for the most part through the moral opposition of lawmakers rather than on the basis of political expediency. Moreover, once having abolished capital punishment, these same lawmakers were loath to reinstate it, whatever its level of continuing popular support.\textsuperscript{106} Of course—and here is my point—they were not able to generate

\textit{Furman}: "In a radio address explaining [his proposal to reintroduce the death penalty], Nixon took aim at the Supreme Court majority in \textit{Furman}. He lambasted 'soft-headed judges' who were responsible for misleading Americans that 'the criminal was not responsible for his crimes against society, but that society was responsible.'" \textsc{Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment} 309 (1974). The reaction was not unlike the one that then-Governor Ronald Reagan had to a similar ruling by the California Supreme Court a few months before: "This decision makes a mockery of the constitutional process involved in establishing laws in California. . . . If it goes unchallenged, the judicial philosophy inherent in this ruling could be an almost lethal blow to society's right to protect law-abiding citizens and their families against violence and crime." \textsc{Id.} at 284.

\textsc{103. Poulos, supra note 73, at 164}. He also observed that \textit{Furman} "changed the focus of the debate on capital punishment from morality and sound public policy to the question of constitutional validity." \textsc{Id.} at 164. That debate has remained out of focus for the last two decades. It was also used very effectively as the key "wedge" issue in the 1986 California judicial retention election: "The California Supreme Court now had become the source of the People's continuing frustration with the implementation of a 'tough' capital punishment statute in the State." \textsc{Id.} at 165.

\textsc{104. Cf. Viktor Mayer-Schonberger, Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman, 43 Okla. L. Rev. 677, 678 (1990) ("[T]he number of nations which have abolished capital punishment more than doubled from 1960 to 1970, an increase matched only by that of the following decade. The 1980s saw another dramatic increase; the number of countries abolishing the death penalty grew by 91 percent.").}

\textsc{105. For example, Zimring and Hawkins have written that "the end of capital punishment nearly always occurs in democracies in the face of majority public opposition. Every Western democracy except the United States has ended executions, but we are aware of no nation where a democratic consensus supporting abolition was present when executions stopped." \textsc{Franklin Zimring and Gordon Hawkins, Capital Punishment and the American Agenda} (1986).}

\textsc{106. See Mayer-Schonberger, supra note 104, at 681: Not a single nation has reestablished the death penalty in the last ten years after abolishing it. Only two countries, Argentina and Brazil, have reestablished the death penalty in the preceding thirty years. But this happened in the wake of military coups which had violated international law on many other grounds. The return of free democracies in both countries instantly brought about the repeal of capital punishment. This reveals more than just}
political capital by reacting against judicial decisions that appeared to impose abolition on the rest of the country. Lacking "undemocratic" judicial decisions whose legitimacy could then be repeatedly called into question and used in politically-expedient campaigns, they were forced to engage the moral debate over the death penalty on its merits.

Indeed, relying on counterexamples provided by British and German legislative decisions to abolish the death penalty at a time when the majority of the citizens favored it, Zeisel and Gallup concluded that, "American legislators apparently do not have the moral independence of their European counterparts. Favoring the death penalty, moreover, is usually seen in this country as revealing a legislator's general law-and-order spirit and his or her attitude toward crime in general."

Yet, the vehemence with which this tendency has recently operated in the United States may be due at least in part to the unique historical period during which the courts (and their seemingly anti-death penalty opinions) were effectively portrayed as thwarting the popular will.

Eventually, of course, the American judiciary was brought back into the mainstream of public opinion. Judicial perspectives and popular opinion were harmonized in large part through the appointment of judges who better represented the views of public officials who were elected during this period. This corrective was perhaps most apparent in the composition and decisions of the United States Supreme Court. But the implicit, ill-conceived juxtaposition that the expedient political rhetoric of this era had established—that anyone who spoke in favor of defendants' rights also si-

a "general and consistent practice," it indicates that legislatures and governments in all of the numerous countries that have abolished the death penalty have—despite public opinion and changes within the electorate—never dared to reestablish capital punishment. They felt bound by their previous abolitionist decision.

107. Hans Zeisel & A. Gallup, Death Penalty Sentiment in the United States, 5 J. QUAN.
Criminol. 285, 287 (1989); cf. C. Roberts, "Court of Last Resort": The Assembly's Graveyard for Law-Enforcement Legislation, 8 CAL. J. 197, 197-98 (1977). Roberts' observation that California legislators privately supported the liberal actions taken by the Assembly Criminal Justice Committee during the 1960s and '70s, even though they were highly critical of them in public. She argued that "the public stance of the Assembly, as evidenced by roll-call votes on bills, is quite different from the private feelings of the members," largely because the "cry for stronger laws is fueled each year by publicity about violent crime and adverse crime statistics." Id.

108. See, e.g., David G. Barnum, The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period, 47 J. POL. 652 (1985) (analyzing supposedly countermajoritarian decisions by the Supreme Court and finding that many of them were far less out of the mainstream of popular opinion than they had been depicted). Barnum suggested, however, that the actual divergence of Warren Court decisions on defendants' rights from popular sentiment helped to account for the dramatic reversals that occurred during the 1970s in this area of constitutional law: "The pronounced character of the trend of public opinion on defendants' rights may help to explain the Burger Court's exceptional treatment of this area of civil liberties policy." Id. at 661. See generally VINCENT BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).
multaneously and necessarily spoke against “the people”—remained deeply imbedded and entrenched. Increasingly fewer judges dared challenge its illogic. Indeed, it has become a political litmus test that few officials in any branch of the government have dared to fail.

ANXIETY AND THE RAGE TO PUNISH

Emile Durkheim was the first social theorist to formalize the important role that legal punishment played in the creation of social cohesion. Societies, he said, use punishment to define who and what they are by acting with the utmost harshness against that which they are not. We bind or connect ourselves to the collective by agreeing on what we commonly hate and will not tolerate. Nations are never more focused and singular in purpose than when they are at war, and they never have a clearer vision of what unites them as a diverse people than when another diverse people threatens them.

Yet, in an increasingly complicated, confusing, shades-of-gray world, we struggle now with a greater sense of urgency to find things that are black and white. The thawing of the Cold War and the demise of the “Evil Empire,” among other things, has removed the clearest and most definitive external threats from our worldview and left a psychological void that domestic punitive excess is helping to fill. It was this spirit, for example, that George Bush announced shortly after the end of the Gulf War that he wanted to draw on the same “moral force and national will” that was evi-

109. See Robert B. Gunnison, Angry Supporters of “3 Strikes” Say They’ll Fight Back, “The Court Has Ignored Will of Voters,” S.F. CHRON., Jun. 21, 1996, at A17. Even courts whose tough-on-crime bona fides should be beyond question can not escape this wrath. For example, when a portion of the “three strikes” law was modified by the California Supreme Court to allow trial judges to impose less than the 25 to life sentences that the law provided for, the fallout followed a familiar pattern. See id. The private citizen who co-sponsored the original three-strikes initiative complained that he and the law’s other supporters had made it “pretty clear that we limited judges’ power in this statute.” Id. Limiting judicial discretion was seen as key to the operation of the law because “part of the responsibility for [felons’] return back to our streets has been in the hands of soft-on-crime judges,” despite the fact that most of the judges in question were appointed by the tough-on-crime Republican governors who had been in office continuously in California for the last 14 years. Id. Elected officials were quick to reproduce the anti-judiciary rhetoric: “‘The Supreme Court has chosen to ignore the will of the voters,’ said Assembly Speaker Curt Pringle, R-Garden Grove, ‘This decision is outrageous, high-handed, and will be opposed.’” Id. Governor Wilson—who had not only appointed a majority of the state supreme court justices who rendered the decision but many of the very trial judges whose judgment was being called into question—also chimed in: “We cannot tolerate a situation which permits judges who are philosophically unsympathetic or politically disinclined to ‘three strikes’ to reduce the strong sentences that the voters intended to impose on habitual criminals.” Id.

110. See generally EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933); EMILE DURKHEIM, MORAL EDUCATION (1933).

111. See supra note 110.

112. See supra note 110.

113. See supra note 110.
dent in that conflict to wage a domestic war on crime. Indeed, a syndicated columnist satirized the plan by encouraging the President to explore ways to bring the dazzlingly lethal military technology that had been on display against the Iraqis to bear against our criminal enemies in the inner cities. Yet, it was really the psychology rather than the technology of war that was ripe for application at home.

To the loss of external, foreign threats and the lack of definitive, unifying targets that they provide, add the epistemological and moral grayness of post-modernity—what is natural, what is constructed? What is real, what is illusion? What is worth believing in, what merits only cynical skepticism? These dilemmas make the social cohesion that comes from common or collectively shared hatreds more appealing and even more necessary. Crime is real, criminals are really evil, sympathy for crime victims is among the few remaining, unproblematically good things it is still politically correct to unequivocally feel for. Viewed from this perspective, the public’s willingness, indeed, enthusiasm for the rage to punish seems slightly more understandable, if no less ignoble and inhumane in its expression.

There is a closely related sociological force at work helping to propel our contemporary punishment wave. The United States is currently ob-

114. Ronald J. Ostrow, Bush Cites Gulf Victory in Call to Battle Crime, L.A. TIMES, Mar. 6, 1993, at A4. Indeed, a Justice Department official said “the Administration expects the Gulf victory to give a ‘major boost’ to its efforts to expand the death penalty, limit appeals by criminal defendants and broaden rules on admission of evidence seized illegally by police acting in good faith.” Id. He neglected to explain the connection between the war against the Iraqis and domestic crime control policy.

115. See Mike Royko, Smart Bombs Could Target Cities Junkies, S.F. CHRON., Mar. 17, 1991 at SZ1, available in 1991 WL 4179529. (“We have the planes, we have the keenly intelligent bombs, the profoundly intellectual missiles and the pinpoint precision. So why not send them in to take out parts of the Bronx in New York, the West Side in Chicago and all the other high-crime sections of big cities?”).

116. Psychologically, post-modern angst is quieted less by modernist discourse (to which post modernism is, after all, a reaction) than by more primitive, pre-modern themes. This is why, I believe, purely emotional, irrational, and seemingly inexplicable appeals in debates over crime and punishment continue to be effective. Cf. KENNETH J. GERGEN, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE (1991).

117. Cf. Bruce Shapiro, Victims & Vengeance: Why the Victims’ Rights Amendment is a Bad Idea, THE NATION 11, Feb. 10, 1997, at 11. As Shapiro noted, the “victims’ movement” had its origins in the early years of the punishment wave: “In 1982 [President Ronald] Reagan and Attorney General Meese convened a President’s Task Force on Victims of Crime. The task force issued a report still cited as the movement’s watershed event . . . .” Id. at 13. The report was based on the kind of emotional appeal that has fueled the movement since its inception: “It was also notable for its emotional language and absence of verifiable data—an important precedent for a movement that still largely relies on the politics of the anecdote . . . .” Id. And the movement itself has played a significant role helping to increase the size and momentum of the punishment wave: “Today one significant slice of the victims’ rights movement explicitly remains a vengeance-rights lobby, demanding faster executions and longer prison sentences and practicing a particularly vindictive brand of electoral politics.” Id.
sessed with two issues—crime (the “crime wave” rhetoric that the Hastings Women’s Law Journal symposium examined), and race (an issue that continues to grow ever more contentious, seemingly in direct proportion to the amount of political and media attention that is devoted to it). The pairing of these two obsessions—race and crime—is not coincidental. Historically, there has always been a racialized dimension to crime and punishment in this society. It has stemmed in part from the inverse correlation between color and opportunity in the United States and in part from the way in which discretionary decisionmaking in the criminal justice system—at its core, judgments about whom to define as “other”—gave vent to the racial prejudice that has continued to infect our society. Not surprisingly, perhaps, psychological research has established empirical connections between race, prejudice, and punitive criminal justice attitudes.

But now I believe there is another racialized component to the nexus between crime and punishment. It helps to explain how and why California Propositions 209 (the anti-civil rights initiative) and 187 (the anti-immigrant initiative) are connected at a deep level to Proposition 115 (the euphemistically termed “victims’ bill of rights”), and the quaintly titled “three strikes” laws. California is at the front lines of a battle over whether, and when, and how the reigns of democratic power will be handed over to an emerging popular majority that, for the first time in history, will be composed of persons of color. The demographers tell us

120. Research has demonstrated differential support for the death penalty among whites and racial minorities. See Robert Fitzgerald & Phoebe Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 LAW & HUM. BEHAV. 31 (1984); Craig Haney et al., “Modern” Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619 (1994). In fact, this empirical connection has served as the basis of a constitutional challenge to the practice of death qualification—the procedure by which persons adamantly opposed to capital punishment have been excluded from jury service in capital cases—because selecting jurors on the basis of death penalty attitudes reliably results in the under-representation of racial minorities (and women). See id. There is also research establishing a connection between various measures of racial prejudice and support for severe criminal punishments, including the death penalty. See generally Steven E. Barkan & Steven F. Cohn, Racial Prejudice and Support for the Death Penalty by Whites, 31 J. RES. CRIME & DELINQ. 202 (1994); Michael Corbett, Public Support for “Law and Order”: Interrelationships with System Affirmative Action and Attitudes Toward Minorities, 19 CRIMINOLOGY 328 (1981); Steven F. Cohn & William Halteman, Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?, 38 SOC. PROBS. 287 (1991).
that the inflection point will be reached nationally sometime over the next fifty years, but it will happen in California much, much sooner. 122

Thus, it seems more than coincidental that our state is tightening the standards by which it grants access to its institutions of higher learning—its universities—at the same time it is loosening the criteria by which it grants access to its institutions of social control—its prisons. The changes in these policies are occurring in such a way that increasing numbers of black and especially brown young people will be disproportionately denied educational opportunities at the same time members of these same groups will be disproportionately granted admission to our maximum security prisons and security housing units. 123 Keep in mind that the standards by which one gauges “fitness” to enter these very different sets of institutions are not anchored in objective fact. These “admission criteria” are socially


124. See Anthony King, The Impact of Incarceration on African American Families: Implications for Practice, 74 FAMILIES IN SOC’Y: J. CONTEMP. HUM. SERVICES 145 (1993). Based on 1991 statistics, blacks were six and a half times more likely to be imprisoned than their white counterparts. See Frank Dunbaugh, supra note 119, at 219. The United States currently incarcerates African American men at a rate that is approximately four times the rate of incarceration of black men in South Africa. See id. Thus, although the extraordinary punitiveness of the American criminal justice system is directed primarily at, and felt most acutely by, our African American citizens, the rate of incarceration of white males in the United States over the last several decades compared favorably to rates in most Western European nations, including those regarded as the most progressive and least punitive. See id. The war on drugs has functioned to worsen this disproportion. In 1984 the average prison sentence for African Americans was 28% higher than for whites, but by 1990, in the height of the war on drugs, the disparity had grown to 49%. See BARBARA S. MEIERHOEFER, THE GENERAL EFFECTS OF MANDATORY MINIMUM PRISON (1992). Indeed, in many jurisdictions, despite statistics showing the unprecedented increases in the overall numbers of prisoners over the last several decades, incarceration rates for whites have been relatively unchanged. For example, Timothy Flanagan and his colleagues found that the percentage of white prisoners in the New York state prison system declined 66% between the years 1956-89, while the percentage of black prisoners increased 25%. Timothy Flanagan et al., Compositional Changes in a Longterm Prisoner Population: 1956-89, 80 PRISON J. 15, 21 (1990). During this time period, whites also went from being a clear majority among what were termed “very long term” prisoners (those who had served more than 10 years) to a small plurality compared to increasing proportions of black and Latino inmates. See id. at 23. Growth in the number of Hispanic prisoners was even more dramatic, increasing 284% over the same time period. See id. at 21. Moreover, among very long term inmates, Hispanic representation increased a remarkable 1,263%. See id.
constructed and politically shaped,\textsuperscript{125} so that the changes that are made in them reflect social and political choices—choices to increase or decrease the relative size of the groups deemed “qualified” for either of the associated (but opposite) life outcomes.

Similarly, decisions being made with respect to governmental funding priorities reflect conscious choices to promote social control over educational opportunity.\textsuperscript{126} These priorities have been established despite reports that “a combination of tight money and growing population could shut one of every three potential students out of California’s public colleges and universities—and out of the economic benefits that come with a college degree . . . .”\textsuperscript{127} Moreover, the doors to higher education are likely to be shut differentially, along entirely predictable lines: “The students shut out of the system [and] the state’s failure to make higher education accessible to many” will result in “a growing gap between rich and poor that will probably be drawn along ethnic lines.”\textsuperscript{128}

Historically, our society has always chosen to put disproportionately fewer persons of color in colleges and universities than behind bars. As the changing demographics in the United States begin to transform the nature of democratic political power in the waning years of the 20th century, rather than taking steps to ameliorate this inequity, we have chosen to exacerbate it. Whether and for how long politicians and social policymakers can persist with this strategy of exclusion remain open questions.

A PHILOSOPHICAL RATIONALE FOR MORE PAIN: DESERTS INSTEAD OF REHABILITATION

Another important development adding to the force of the punishment wave was intellectual in nature. However, perhaps because of the way in which it was amplified by the media its impact extended far beyond the academic circles in which it originated and was first debated. In the early 1970s, sociologist Robert Martinson published a critical analysis of prison rehabilitation programs in which he asked, “what works?” and answered, essentially, “nothing.”\textsuperscript{129} His harsh assessment was categorical in nature,
seeming to imply not only that rehabilitation had not worked in the past but, in fact, because it was so conceptually flawed, could not succeed. In part because it resonated so perfectly with the political spirit of the times and the notion that liberal public officials (especially lenient judges) had been utterly ineffectual in taking the tough-minded steps necessary to control the crime problem, Martinson's thesis captivated the political and media opinion elites. 130

Its impact was swift and widespread. The idea that people were sent to prison to be rehabilitated—one of the most important intellectual and moral justifications for the widespread use of prisons dating back to the 19th century—was quickly abandoned. Indeed, almost overnight the concept that had served as a cornerstone of corrections policy for more than a century was politically and publicly discredited. We moved abruptly in the mid-1970s from a society that justified putting people in prison based on the belief that their incarceration would somehow facilitate their productive re-entry back into the free world to one that used imprisonment merely to punish criminal offenders by "incapacitating" and "containing" them behind bars, as far away from the rest of us for as long as possible.

To be sure, Martinson's critique had overlooked numerous fundamental issues, as many academic critics would eventually point out. 131 Indeed, Martinson himself seemed taken aback by the immediate and unexpectedly enthusiastic reception his ideas received, as well as by some of the extreme and extremely uncritical ways in which they were being both promoted and implemented. 132 In fact, in a little-cited article published some five years after his highly visible initial position paper, he retracted most of his earlier, sweeping conclusions. 133 However, Martinson's attempt to set the record straight was largely unnoticed by the press and the politicians who had already boarded the "nothing works" bandwagon he had helped to launch.

Of course, if people were no longer sent to prison to be changed for the better, some new and presumably improved justification was needed. At a

132. See generally Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243 (1979). He not only wrote that "contrary to my previous position, some treatment programs do have an appreciable effect on recidivism," id. at 244, but went on to emphasize that new evidence "leads me to reject my original conclusion." Id. at 252.
133. See id.
philosophical level, imprisonment was now said to further something
called “just desserts”—locking people up for no other reason than they
deserved it and for no other purpose than to punish them. 134 That is, just
desserts proponents argued that lawbreakers should be sent to prison simply
because they deserved to be punished. 135 Under dessert-based punishment
schemes, crime was to be graded and punishment apportioned according to
blame: “[P]unishment implies blame and … the quantum of punishment
connotes the amount of blame.” 136 In this system, judges became the hu-
man instruments of retribution, meting out justice by inflicting pain in pro-
portion to the nature and magnitude of the criminal transgression. In fact,
prison punishment soon came to be thought of as its own reward, serving
only the goal of inflicting pain.

Thus, academic research suggesting that rehabilitation had failed
resonated with conservative claims that criminals were essentially and un-
correctably “wicked” and needed to be treated worse rather than better.
Similarly, political calls to action over presumably rising crime rates and
demands by politicians and citizens alike for more and harsher punishment
for lawbreakers were joined with a penal philosophy that justified punish-
ment on the basis of “just desserts” or moral deservingness rather than re-
habilitative potential. And, just as belief in the perfectibility of human
nature had provided an implicit argument against the death penalty and re-
sulted in what was regarded as humanitarian reform of the criminal justice
system in the mid-nineteenth century, 137 so too did exasperation over the
apparent intractability of crime lead to renewed support for the death
penalty and other extreme punishments during the last several decades.
Thus, the pessimism that was reflected in a penal philosophy that essen-
tially gave up on the notion that criminals could be changed also contrib-
uted to the growing belief that the death penalty, as society’s ultimate ex-
pression of ”giving up” on its citizens, along with “life without parole”
sentences and harsh three strikes punishment options were necessary to
achieve an effective crime control policy. 138

134. One of its most visible and thoughtful advocates, Andrew von Hirsch, defined
“desert” as the concept that “the response to someone’s behavior should depend on the good
or bad qualities of that behavior.” See Andrew von Hirsch, “Neoclassicism,” Proportion-
ality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate, 29 CRIME
JUSTICE MODEL FOR CORRECTIONS (David Fogel & J. Hudson eds., 1981); ANDREW
VON HIRSCH, JUSTICE AS FAIRNESS: PERSPECTIVES ON THE JUSTICE MODEL (1981); ANDREW

135. See Andrew Von Hirsch “Neoclassicism,” Proportionality, and the Rationale for

136. Id.

137. See Louis Filler, Movements to Abolish the Death Penalty in the United States, 284
ANNALS AM. ACAD. POL. & SOC. SCI. 124, 131 (1952).

138. In addition, some of this pessimism was directed at prisons and prison administrators,
reflecting the belief that these institutions and the persons who ran them—perhaps like pub-
The abandonment of rehabilitation and the rise of just deserts as the justification for legal punishment had several other important consequences that added momentum to the punishment wave. In the past, society's commitment to rehabilitation served as a vague but still effective moral restraining edge that indirectly limited the amount of prison pain that could be openly delivered and would be publicly tolerated. Even though, in the long history of the concept of rehabilitation, there had been many misguided attempts to justify correctional excesses and mistreatment in its name, the notion that people were sent to prison to be helped undermined the ease and openness with which prisons could do things to prisoners that clearly hurt them. On the other hand, when the purpose of prison shifted explicitly to the infliction of pain, then doing hurtful things to prisoners appeared less questionable or problematic. Indeed, pain had become the raison d'etre of the experience. Formerly, the burden of producing a justification for a practice that inflicted pain was on the party proposing or engaging in such treatment. Subsequently, the burden was shifted to those who would limit the pain. But because there is really no objective or commonly shared metric by which pain is measured, it became increasingly difficult to articulate clear standards on how much was too much. 139

Moreover, this shift in the way people were encouraged to think about the purpose of imprisonment effected a deeper transformation in the way the topic was publicly debated. At its best, the discourse that surrounded rehabilitation had entailed a complicated inquiry into the various causes of criminality, the nature of behavioral change, the relative merits of different approaches to prison programming and therapy, and so on. These were multidimensional determinations, the sorts of things that were difficult to simplify into sound bites. They were also issues about which politicians and the public could not really pretend much expertise. Except for the kind of blanket condemnation that Martinson had delivered 140—the assertion that rehabilitation had failed categorically and the suggestion that the concept itself was bankrupt and unworkable—or the extent to which prisons were tarred with the same broad brush that politicians had used to tarnish governmental institutions generally—that they were inept at performing whatever tasks had been entrusted to them—the issue of whether prisons were doing what they were supposed to do by adequately rehabilitating a sufficient number of prisoners was too complex to easily politicize.
On the other hand, once the purpose of prison was defined as the infliction of pain, the discourse that surrounded it could be simplified in ways that facilitated its politicization. The transformation was straightforward. The focus of the judgment about whether there was too much or too little imprisonment in society shifted not only from helping to hurting but also from criminals to crimes (since all persons convicted of the same crimes were to be punished in more or less the same amounts). It turned finally into a simple question of how much pain particular crimes "deserved." This kind of question lent itself to highly public and largely political answers, involving things about which everyone could have an opinion. Indeed, the opinions themselves could really only be expressed in the essentially emotional (and easily politicized) discourse of moral outrage. In part because this kind of discourse appears "democratic"—everyone can use and understand it—public anger over particular crimes quickly became the vehicle by which punishment was further politicized. When moral outrage is the only basis upon which punishment is to be meted out and the only measure by which it is to be judged fair, the arena in which the punishing process transpires must be made more participatory and political.

Although individual criminals were supposedly eliminated from the dessert calculus (the act and not the actor were to be judged), individual crimes could be and were used as exemplars by which the amount of pain to be inflicted in general was escalated. More and more punishment was demanded in response to the moral outrage generated by each new egregious crime that the media and political interest groups brought to the public's attention. Both the press and the politicians were motivated by much the same thing: The ease with which moral outrage, as a form of intense public response, brings people to the voting booths, the newsstands, and to their television sets. Outrage generates powerful audience engagement and involvement and it provides a potent political and economic connection that can be used, depended upon, pulled on, and exploited. Unlike the discourse of rehabilitation, the discourse of dessert had the additional advantage of allowing public officials to continue to display and exploit their law-and-order bona fides. But they could only do so in the context of a political rubric that forced them to ratchet up statutory sentences to ever higher levels. The punishment wave could only gain in size and momentum as a result.

MEDIA MISEDUCATION

The increasingly dominant electronic media amplified the other powerful forces that swelled the punishment wave. Over the last several decades, the press and electronic media have been instrumental not only in telling their audiences to think (often) about crime but also in providing them with a consistent and consistently misguided framework with which
Indeed, the campaign of non-, mis-, and dis-information about crime and punishment that has been waged by political interest groups was very much aided and abetted by a vast and increasingly important and intrusive mass media that has seized upon these issues, amplified many politically-inspired distortions, and created some of their own. An atmosphere of widespread public ignorance and misconception about crime and punishment issues has resulted.

This process by which the media select the issues around which there is public awareness, debate, and concern has been termed its “agenda setting” function and has spawned a substantial amount of academic writing and empirical research. Since Walter Lippmann observed many years ago that the media played a significant role in creating many of “the pictures inside our heads,” few scholars have doubted the influential effect of media messages and images on public opinion. The media is especially powerful in shaping attitudes and beliefs about those things with which members of the public have little direct experience, such as the causes of crime and the nature of criminality. Thus, studies have documented the relationship between the amount of news coverage that is given to particular topics and the significance that the public subsequently attaches to these same topics. In addition, not surprisingly, what is reported in the local press is significantly correlated with what people in the community report reading and talking about. Similarly, this research has

141. Katherine Beckett has recently presented a compelling demonstration of the way in which the public’s assessment of the causes and seriousness of the crime problem, and the appropriateness of punishment as its best (if not only) solution, were shaped by the political and media-driven discourse that surrounded these issues. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997).


144. WALTER LIPPmann, PUBLIC OPINION (1922).

145. According to at least one survey, the media was the most important source of information about the crime problem for 90% of the respondents. See RAY Surette, MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES AND REALITIES (1992).

146. See, e.g., G. Ray Funkhouser, The Issues of the Sixties: An Exploratory Study in the Dynamics of Public Opinion, 37 PUB. OPINION Q. 62 (1973); Shanto Iyengar et al., Experimental Demonstrations of the “Not-So-Minimal” Consequences of Television News Programs, 76 AM. POL. SCI. REV. 848 (1982); Kim A. Smith, Newspaper Coverage and Public Concern About Community Issues, JOURNALISM MONOGRAPH 101 (1987). The print media appears to play an especially significant role in this process. Indeed, one study indicated that the relationship between the agenda-setting effect of television news was mediated by exposure to print media, so that general news awareness—as a function of exposure to print media—enhanced the agenda-setting effect of television news. See David B. Hill, Viewer Characteristics and Agenda-Setting by Television News, 49 PUB. OPINION Q. 340-50 (1985).

147. See L. Erwin Atwood et al., Daily Newspaper Contributions to Community Discus-
confirmed the interrelationship between the media’s agenda setting and the policy platforms that preoccupy legal and political decisionmakers. 148

Because “[t]he mass media always are on the alert for dramatic, personalized stories that will command public attention,” 149 crime is covered extensively in both print and electronic news. But the traditionally heavy media focused on crime-related topics greatly intensified during the several decades in which we have been inundated by the punishment wave. By most accounts, crime ranked among the leading topics of media coverage during this period and, correspondingly, one of the problems that the public subsequently regarded as most significant or pressing. 150

Indeed, media coverage has a powerful effect on its audience, particularly on crime-related matters. As researchers have noted, “[b]ecause most people do not have direct experience with the serious violent crimes that they most fear, the role of the media in generating such fear becomes particularly important.” 151 Studies also have demonstrated a direct relationship between the amount of newspaper space devoted to violent crime and the likelihood that neighborhood residents selected crime as their community’s most serious problem. 152 In addition, readers of newspapers with the largest amount of crime reporting also expressed higher levels of fear of crime than residents of other communities where there was less coverage. 153 Beckett’s analysis of these issues also showed the ways in which the media’s coverage of crime issues, along with the political rhetoric and policy initiatives that typically accompany it, were followed by subsequent increases in the levels of public concern about crime. 154

148. E.g. Fay Lomax Cook et al., Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policymakers, and Policy, 47 PUB. OPINION Q. 16 (1983); Fay Lomax Cook & Wesley Skogan, Convergent and Divisive Voice Models of the Rise and Fall of Policy Issues, in AGENDA SETTING, supra note 143, at 202-06. The complexity of this interrelationship was nicely captured by E. Rogers & J. Dearing, Agenda-Setting Research: Where Has It Been, Where Is It Going?, in COMMUNICATION YEARBOOK II 555 (J. Anderson ed., 1988). “Once shaped by the media agenda, the public agenda may in turn influence the policy agenda of elite decision makers, and, in some cases, policy implementation. Of course in some instances, the media agenda seems to have direct, sometimes strong, influence upon the policy agenda of elite decision makers, and, in some cases, policy implementation.” Id. at 597.

149. See Cook & Skogan, supra note 148, at 205.

150. Id. at 202-06.


152. See id.

153. See id.

154. BECKETT, supra note 141. Beckett demonstrated the mutually reinforcing causal roles of political agenda, media coverage, and public opinion with respect to crime and punishment. She analyzed the ways in which political actors over the last several decades have framed the crime problem largely “as the consequence of insufficient punishment and control,” and the media’s function in largely and uncritically amplifying that view. Id. at 27.
It is also clear that the overall amount of crime coverage, which shapes public perceptions of the nature and frequency of victimization and the magnitude of the crime problem, is not directly related to the actual crime rates that plague the communities in which it is disseminated. For example, Christopher Jencks noted a persistent tendency among the media to depict crime rates as ever increasing (or, more accurately, to report increasing but not decreasing crime rates). He offered this as one explanation for the constant perception among members of the public that crime rates are always on the rise. When this perception and the fear of crime that it generates are combined with the assertion that our failure to implement tough policies of crime control is what accounts for apparently ever-increasing levels of crime, a built-in argument in favor of increased punishment has been created.

Moreover, the ability of the news media to report balanced and representative crime-related stories is compromised by the fact that it is intimately tied to governmental sources for much of its information. A tight circle of self-interest is thus created. For example, one study reported that almost three-quarters of network news sources were political leaders or governmental officials. Others have also analyzed the role of certain governmental institutions whose public information officers provide the media with "subsidized" news stories a practice that helps to account for the frequency of crime stories as well as their lack of connection to specific crime problems in the local communities in which they are published or broadcast. One researcher found that the state department of justice was the most prolific source of press releases, as well as the source of the greatest number of subsidized news stories: Not surprisingly, stories about justice and public safety accounted for close to 50% of all subsidized stories in this particular state during the period under study. If we make the

155. See, e.g., Mark Fishman, Manufacturing the News (1980).
   The mass media... have a very selective approach to crime statistics. When crime declines, as it did in the early 1980s, editors assume the decline is only temporary and give it very little air time. When crime increases, as it did in the late 1980s, both journalists and editors see the increase as a portent of things to come and give it a lot of play.
   Id. at 99.
157. Note the introduction of a new technique that helps keep the punishment wave in motion. When decreasing crime rates become too consistent to ignore, the public is treated to dire predictions that crime will increase sometime in the future. See supra note 1 and accompanying text.
160. See id.
reasonable assumption that public information officers present news releases that reflect their state agency's point of view, then the media's crime coverage agenda will be influenced by the agenda of the state agency providing the subsidized news.  

Beckett summarized the straightforward relationship that this practice helps to explain: "Given journalists' reliance upon state sources, it is not surprising that media coverage of the crime and drug issues peaked when state activity on these issues was at its highest level." She found that not only were crime-related news stories likely to come from state-sponsored sources, but also that this reliance significantly influenced the content of the stories themselves. Thus, state-sponsored stories predominated in the media and conveyed predominately "respect for authority" interpretive packages. These repetitive media messages suggested that maximizing a potential wrongdoer's fear of punishment and holding individuals fully accountable for their transgressions were the only ways to control the human propensity for evil. The punishment wave swelled even larger.

Finally, consistently high and increasing levels of fear are produced not only by exposure to news accounts of crime and reports of increasing crime rates, but also by exposure to the kind of television crime drama that has dominated network programming over the last several decades. One

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161. Indeed, it is not only high level state agencies that have become "media savvy." One group of researchers who studied the way in which images of crime and punishment were constructed in the media noted that "[p]olice officers of all ranks are becoming increasingly oriented to the media." RICHARD V. ERICSON ET AL., NEGOTIATING CONTROL: A STUDY OF NEWS SOURCES 93 (1989). Others have commented on the reorganization of public affairs units within police departments themselves that include the hiring of "civilians experienced in journalism and public relations" to better assist in the task of managing their public, media image. RAY SURRETTE, MEDIA, CRIME & CRIMINAL JUSTICE: IMAGES AND REALITIES 58 (1992). See also Michael Hallett & Dennis Powell, Backstage with "COPS": The Dramaturgical Reification of Police Subculture in American Crime "Info-Tainment," 24 AM. J. POLICE 101, 125 (1995) (discussing how a public affairs manager conceded: "Our primary public relations tool is the media. My job is to try and manage the public image of the police department . . . .").

162. BECKETT, supra note 141, at 75.

163. Interpretive packages are frameworks that people use to make sense of and meaningfully structure complex social issues like crime, and which they employ to organize a series of events or phenomena. See WILLIAM A. GAMSON, TALKING POLITICS (1992).

164. Beckett found that a majority of the news stories she analyzed from the 1965 through 1973 came from state-sponsored sources and contained "respect for authority" interpretive packages. BECKETT, supra note 141, at 62. The percentage of stories that included respect for authority messages (62%) was more than three times the number that included the message that poverty causes crime and more than six times the number that suggested a balancing of short term enhancement of effective law enforcement while simultaneously pursuing ways to eradicate the root causes of crime. See id.

165. Indeed, as early as 1951 television critic Charles Morton could assert that "[c]riminality is still the backbone of broadcasting." Charles Morton, Accent on Living, ATLANTIC MONTHLY, Sept., 1951, at 87. But the way in which television treated the issue of criminality changed over the decades since the 1950s, and changed in ways that may have influenced attitudes toward crime and punishment. Steven Stark reviewed a number of
commentator has argued that between the years 1968-1976, precisely the period during which the punishment wave began building its momentum, television crime drama underwent something of a transformation:

[T]elevision turned back to more conservative police shows in this period . . . . Like radio in the Depression, societal unrest caused television to trigger a conservative backlash, and a number of series that legitimated “the system.” In broadcast terms, the 1970s became a broader-scale rerun of the 1930s.166

The trend continued through the decades that followed. In the 1980s, networks increased the diet of police shows served up to the viewing public and, by the mid-1980s there were twenty-eight police and private detective shows on prime time television.167 Although the societal unrest of the previous decade had abated, one motivation for television’s continued obsession with crime remained—simple profitability.168

In addition, the 1990s brought a rash of so-called “real life” police shows in which actual police officers were shown interrogating citizens, conducting searches and raids, and making arrests.169 As two analysts of this trend observed:

The emergence of “reality” television, then, may be partially explained by the increasing need on the part of [law enforcement] organizations in particular to manage their “presentation of self.” Of course, “infotainment” formats are also highly profitable because they measurably enhance ratings . . . .170

Remarkably, television production companies have given police departments virtually complete editorial control over the material that is actually

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166. Stark, supra note 165, at 260. Although the cause and effect relationship is impossible to demonstrate, note that at least one estimate based on a Gallup poll and NORC General Social Survey data indicate that support for punitive criminal justice sanctions increased steadily during the 1970s, so that there was a 14 percentage point increase from 1972 to 1980 in the number of persons desiring harsher punishments of criminals in the United States. See id.
167. See id. at 269.
broadcast,\textsuperscript{171} essentially guaranteeing that overdrawn and one-dimensional "white hats versus black hats" story lines will be repeatedly aired. Thus, both crime drama and "reality" cop shows have likely had their own important impact on public attitudes about crime and punishment.\textsuperscript{172} In as much as this kind of television programming has taught viewers that "[p]roblems came from the evil of other people, and were solved . . . by confining or killing them,"\textsuperscript{173} it too has contributed to the size of the punishment wave.

\textbf{PUNISHMENT AS PRODUCT: DISTRIBUTING PAIN FOR PROFIT}

The rise of the politically and economically powerful "prison-industrial complex"\textsuperscript{174} provided another force swelling the size of the punishment wave over the last several decades. A huge industrial enterprise emerged during these years with vested economic interests in the wielding of political power and the shaping of public opinion on its own behalf, and a growing capacity to do both. For the first time in history the political economy of prisons—the question of how much imprisonment a society thinks it needs—was shaped in significant ways by persons with broad economic interests in expanding the reach of the criminal justice system. Put simply, the corrections industry acquired the power with which to influence political decisions and public opinion that, in turn, created an unprecedented demand for its services. The line between public interest and personal aggrandizement has become hopelessly blurred, as has the distinction between governmental civic responsibility and the purely profit-oriented logic of private enterprise.

Of course, prisons have always existed in some reciprocal relationship to the larger public and private economies. The prospect of the self-sufficient or even profitable prison was part of its early promise of the penitentiary, and something that helped convince state governments to construct and maintain penitentiaries in the first place. Cheap prisoner labor, it was thought, would allow prisons to recoup some or most of their operating expenses and, perhaps, make money for those who ran them. It is a matter of some debate whether any prison system actually managed to defray a significant percentage of its operating expenses for very long, although (particularly) Southern prison lore is full of stories about prison farms that were run in such a way that wardens and others were made com-

\textsuperscript{171} For example, "[i]n a legally-binding agreement, the production company offered, up front, full editorial control of the footage to be aired to the Chief of Police and the Public Relations Officer of Nashville Metro PD . . . ." Hallet & Powell, supra note 161, at 111.


\textsuperscript{173} ERIC BARNOUW, \textit{TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION} 214 (1975).

\textsuperscript{174} See Donziger, supra note 2.
fortable if not actually wealthy. And, to be sure, there has always been a profit to be made by industries that serviced the correctional establishment, including architects and builders, security specialists, food service providers, and others who administered to the needs of the sizable groups of people who both live and work behind the prison walls.

But the punishment wave has been affected by a fundamental change in the nature of the political and economic relationship of the “prison industry” to the larger society. Some of this change stems simply from the sheer scale of the enterprise—as the size of the prison industry has burgeoned over the last several decades, it has become a formidable economic and political force. The magnitude of the economic interests at stake, the dramatic increases in the numbers of persons who are employed in corrections, and the even greater numbers employed in the larger law enforcement institutions that surround this industry (all of whom, in varying degrees, participate in this official pain delivery system and have a personal stake in its preservation and expansion), means that correctional interests must be reckoned with now in ways they were not just a few decades ago.175

Thus, the distinguished Norwegian criminologist, Nils Christie, reported disbelief on his first reading of Corrections Today, the “trade paper” of the American corrections industry.176 He was stunned by the “frankness of the relationship” depicted between the American correctional establishment and the vast industrial and commercial interests openly seeking its business.177 Christie likened it to the pharmaceutical ads that fill medical journals, but drew an important distinction: Unlike doctors, who “are supposed to be of some benefit to their patients,” the prison establishment “is an organization for the delivery of pain, here sponsored by those who make the tools.”178 Christie’s summary was to the point: “Prison means money. Big money. Big in building, big in providing equipment. And big in running.”179

In addition to the new-found bigness of the enterprise, several recent and genuinely unprecedented developments have provided corrections with another level of economic and political power, making it difficult to disentangle merely self-interested proposals for the expansion of the prison in-

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175. Donziger described the “prison industrial complex” as “a shorthand for an ‘iron triangle’ of government bureaucrats, private industry leaders and politicians who work together to expand the criminal justice system.” Id. For excellent discussions of these issues see CHRISTIE, supra note 5; BECKETT, supra note 141; and STEVEN DONZIGER, THE REAL WAR ON CRIME (1996).
176. CHRISTIE, supra note 5, at 99.
177. Id. Donziger reported that the advertising of prison goods and services in Corrections Today had tripled since 1980. Donziger, supra note 2.
178. Id. at 99-100.
179. Id. at 100.
Industrial complex from good faith attempts to generate rational crime control policies. In California, where prison guards receive salaries that are well above those of schoolteachers in the state, their union has been described as a “major new political force” that uses its “clout and generous campaign contributions to push not only for better benefits for its members but also for ever more prisons and tougher sentencing laws.” Indeed, its political action committee was second only to the California Medical Association’s in making campaign contributions in the state’s 1992 legislative campaigns. In addition, the guards’ union became “a prominent player in winning passage of the state’s ‘three-strikes, you’re out’ law, the nation’s most punitive.” Originally, the law had been opposed by lawmakers because of its enormous costs. Department of Corrections analysts predicted it would add some $2 billion per year in operating costs and lead to another massive prison building boom without any necessary, demonstrable reduction in violent crime. However, the California governor and legislature eventually cooperated to pass one of the first, and clearly the toughest, three strikes sentencing laws in the country, responding in part to pressure from the union.

The recent trend toward privatization in corrections has meant that more traditional corporate interests are beginning to view imprisonment less as a state function than as a commodity, one with private sector industry producers and investors who have a significant stake in making sure that its growth is not only maintained but maximized. The scale and profitability of the prison industry has attracted more technologically-minded companies to provide modernized prison facilities and various “advanced” devices for the surveillance, control, and restraint of prisoners. Thus, for example, invitees to the American Correctional Association’s 1998 Winter Conference, whose corporate-sounding theme was “developing a network for success,” were provided glossy advance regis-

181. See id.
182. Id.
183. See Daniel Weintraub, Ignoring Warnings, Wilson Signs “3 Strikes,” SAN JOSE MERC. NEWS, Mar. 8, 1994, at 3B. The high salaries and political clout of the guards union does not appear to have translated into higher levels of professionalism and humane treatment. Criticizing the $35 million that the Department of Corrections was slated to spend “defending prison guards against allegations of brutality and violence” in 1997 alone, the state’s legislative analyst’s office concluded that the department had no “effective and efficient program in place to deter personnel misconduct.” Reynolds Holding, State Report Blast Handling of Prisons Probe, S.F. CHRON., Feb. 20, 1997, at A1.
tration forms peppered with advertisements by companies promoting their prison-oriented product lines. Businesses hoping to become part of this successful prison network included Bell South Public Communications, offering correctional administrators “state-of-the-art capabilities” that “can grow and change with your future needs,” provided by a company that realized that prison officials “have plenty of demanding situations to deal with every day without worrying about managing costs and revenue collections for inmate phone systems and how you’re going to control illegal calling activities.” Cooper Lighting’s ad expressed gratitude for the “opportunity to be at the forefront of corrections,” and offered prison administrators “a complete lighting system package” that included “high abuse applications.” Southern Steel was proud of its past relationship to the prison industry: “Founded in 1897, Southern Steel has led the detention industry in providing quality products and unparalleled service for a century.” But they were forward looking as well: “Join us at booth 320 as we celebrate this milestone, and find out how we can meet your security needs for the next 100 years and beyond.” Finally, Adtec Detention Systems—whose company motto is “built to last a life sentence”—promised to sell attendees at the Conference “detention hardware that exceeds your expectations.”

Private industry has also been drawn to the lucrative market for security gadgetry and the hardware of surveillance and social control that the recent obsession with crime and punishment helped create. Indeed, the government has given a boost to those companies trying to establish an economic foothold in these new markets. As Beckett reported:

[T]he national Institute of Justice held a major conference last year on “Law Enforcement Technology in the 21st Century,” with special panels on “the role of the defense industry, particularly for dual use and conversion,” and “how to penetrate the law enforcement market.” It appears that these entrepreneurial activities are paying off handsomely: In its publication “Outlook 2000,” the Bureau of Labor Statistics ranked security as one of the twenty fastest growing service industries, only slightly behind data processing and computer software. 185

Note also that the prison-industrial complex purports to provide a solution to a problem that is largely socially constructed. The dimensions of the crime problem are so poorly and unreliably measured that the prison-industrial complex will prosper less by solving the problem than by investing substantial resources in creating, maintaining, and expanding its own markets. Because this segment of the industry receives direct allocations

185. BECKETT, supra note 141, at 133; cf. Donziger, supra note 2, at C3 (“Titans of the defense industry such as Westinghouse Electric and Alliant Techsystems, Inc. have created special divisions to retool their products for law enforcement.”)
of public funds, its marketing strategy must implicate political constituencies and involve direct attempts to influence public policy. For example, as William Chambliss has argued, criminal justice interests have already learned not only how to garner a top spot on governmental spending priority lists but also to very effectively preserve it:

The crime industry has become so powerful, it is virtually immune from the budgetary cuts experienced by other public services during the recent recession. On those rare occasions when a mayor or governor suggests cutting justice expenditures or even holding steady the number of police officers, propaganda, politicking and arm twisting by police officer associations . . . and lobbyists with vested interests in supplying equipment and prison facilities quickly reverse the decision.186

Even correctional administrators who have overbudgeted their own state’s correctional needs have developed a profit-making scheme to preserve their “market share” of fiscal outlays—leasing empty cells to states where overcrowding has put bedspace at a premium. In Texas, for example, thousands of inmates from distant regions of the country were sent to jails in various parts of the state “where many counties with an excess of jail cells parlayed them into out-of-state payments.”187

These forces are brought into play not only to fend off budget cutbacks but also to regularly increase the amount of funding allocated to associated prison enterprises. The Corrections Corporation of America, the nation’s largest private corrections company, reassures stockholders that it has retained “registered lobbyists who assist the company with promoting legislation” that advances its interests.188 Thus, officials for the CCA were very pleased with the 1994 federal crime bill that allocated some $9.7 billion for prison construction, describing it as “very favorable to us.”189 They were right. By 1997, media commentators were describing the company’s stock as “sizzling,” and noting that “[i]ts value has jumped almost tenfold in the last three years.”190 Recently, when CCA’s real estate investment trust had its first public offering on Wall Street, so many “money managers lined

186. Chambliss, supra note 8, at 191.
187. Inmate Abuse at “Lend-Lease” Prisons Charged, SAN JOSE MERC. NEWS, Aug. 22, 1997, at 19A. However, complaints about the abuse of out-of-state prisoners in Texas jails became pointed when an especially egregious incident was captured on video: “A videotape, made public this week, shows guards in a Houston-area jail kicking inmates from Missouri, coaxing dogs to bite them and shocking at least one prisoner with a stun gun . . . . While the videotape has become a flash point, it is far from the first time that out-of-state inmates have complained about the treatment they have received in Texas jails.” Id.
188. Donziger, supra note 2, at C3.
189. Id.
up” to invest that a large number “weren’t able to get a piece of the deal.”

One market observer called this “a telltale sign that the deal was gobbled up by major investors.”

Indeed, CCA has been so confident of its inevitable success that it has launched expensive prison construction initiatives in states without any advance guarantees that officials would agree to send convicts to them. The prospect of housing prisoners so cheaply that states save money while private investors reap profits seems too compelling to pass up for long. As one state official supporting the private prison construction in California put it: “If we build it, they will come . . . . Recidivism is high, and rehabilitation is nearly nonexistent. Our escalating [state] corrections budget is taking funds away from higher education and other programs. Let’s save some money.”

Like all industries intent on maximizing growth, this one must increase consumer needs and desires for its services in order to continue to prosper. Thus, the prison-industrial complex has a stake in the public’s fear of crime, its anxiety over personal safety, and demands for ever-increasing amounts of punishment. Unlike other more traditional businesses, however, the prison-industrial complex implicates the power of the state in inflicting pain on other citizens. This kind of activity is intensely political in nature; its expansion must always appear politically legitimate and, whenever possible, democratically mandated.

The interconnectedness of the prison-industrial complex and democratically-controlled political power is complex and murky, but profoundly influential in maintaining the size and momentum of the punishment wave. For example, consider the nexus between the prison industrial complex, behind-the-scenes political interests, and supposedly popular punishment “groundswells” that are made to appear democratically-inspired. Here is how Bruce Shapiro describes the relationship between the victims’ rights movement and the political and correctional establishment:

Often presenting itself as a grass-roots victims’ campaign, the vengeance-rights lobby is in fact integrally tied to right-wing funders and politicians. California’s Doris Tate Crime Victims Bureau—the driving force behind the state’s “three strikes” law—

191. *Prison REIT Is No Steal*, SAN JOSE MERC. NEWS, July 16, 1997, at 3C. The parent company was described as hoping “to benefit from a governmental privatization trend.” Id. As one analyst put it: “The revenue stream that you get from a prison is generally going to be pretty predictable. And, there’s definitely a strong demand for prison beds.” Id.

192. Id.


194. Id.
gets 78 percent of its funding, along with free office space and lobbying staff, from the California Correctional Peace Officers Association, the prison guards’ union, which has an obvious interest in longer, meaner sentences and is a key ally of Governor Pete Wilson. The same jailers’ association provides 84 percent of the funding for a “Crime Victims United” PAC . . . [which] gave $80,000 to Wilson’s 1992 campaign.195

A SPIRAL OF SILENCE

Public opinion theory suggests that a diversity of popular views on an issue can only survive in an atmosphere in which there are at least some contested norms among political elites and opinion leaders. Similarly, a “strong and credible counter voice” must emerge in the media “that challenges the accepted formulation of the issue”196 before differences in public opinion typically influence the policy agendas of decisionmakers. Yet, the complete absence of contested political norms and media counter voices on crime and punishment and the virtual lack of public debate among members of the public about the wisdom and necessity of ever-increasing levels of punishment has created a powerful intellectual vacuum on these issues. This vacuum has produced a force of its own—a dynamic that has been termed a “spiral of silence.”197 Specifically, the widespread but often erroneous perception that one’s opinions about crime and punishment are in the minority (or declining in general support) in turn contributes to the silencing of dissent. The result has been described as a “spiraling process which increasingly establishes one opinion as the prevailing one.”198 It has operated as an independent force increasing the size of the punishment wave.

The absence of a viable counter-voice and the spiral of silence it produced thwarted meaningful attempts to contain the flow of punishment in our society. Note that there is unfortunately no natural limit to the size of the punishment wave, no built-in restrictions on the amount of pain a society delivers in the name of civil order, retribution, or the pursuit of so-called “victims’ rights.” As Nils Christie has observed, the limits must be imposed from outside, from the exercise of our values, ethics, and moral beliefs, that lead us finally to conclude that “enough is enough.”199

199. CHRISTIE, supra note 5, at 13.
constitutional law, of course, the Eighth Amendment's ban on cruel and unusual punishment is supposed to assist us in marshalling the forces of restraint against the limitless application of pain. But a design that was built to withstand individual and isolated instances of cruel punishment has been unable to hold together under the recent, sustained pounding of such unprecedented force and momentum. The punishment wave has broken through the constitutional dam against punitive excess.

Although the significant cracks in the Eighth Amendment have only recently become apparent, the design flaws that produced them have been present for some time. Perhaps the most critical one is rooted in the Supreme Court's methodology for defining unconstitutional cruelty. The Court's approach to the issue—focusing on whether a punishment fails to serve any legitimate penological purpose, on the one hand, and whether there is evidence of widespread legislative or public repudiation, on the other—breaks down when pain is made the primary purpose of imprisonment. This methodology has faltered badly in a system where punishment has become its own reward and where cruelty is sometimes offered up as a penological purpose in its own right (rather than an unfortunate or unintended side effect). Further, the Court's unwillingness to shore up the weakened structure of the Eighth Amendment by using external supports—drawing on the opinions and practices of the other nations with whom we are accustomed to comparing ourselves or the expert views of persons who study and analyze the effects of incarceration—has kept it vulnerable. It is beginning to crumble in the face of the powerful punishment wave that has been crashing against it over the last several decades.

Similarly, the Supreme Court's tendency to look to the behavior of legislatures for guidance about how much pain is too much has proven a weak and self-limiting basis for restraint and containment. As Margaret Radin noted some years ago:

Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit. To glean a list of permissible punishments from those enacted by legislatures assumes that legislators never enact a punishment they think is, or may be, cruel or allows the legislature to define permissible punishments by its enactments. Such a view removes any role for a constitutional check.²⁰⁰

Her insight has gained significance as the political viability of elected officials has come to depend on their enthusiastic endorsement of ever-increasing levels of prison pain and greater numbers of them look to the prison-industrial complex for campaign support.

Notwithstanding the forces that have compromised legislative judgment and independence on questions of punitive excess, what about public repudiation? Despite the underlying motives cited earlier which help to explain the public’s seemingly insatiable appetite for punishment, it is difficult to accurately gauge the depth of public support in times when citizens have so little access to valid information about the nature and long-term consequences of state-sanctioned cruelty. To be sure, the widespread correctional harm that the punishment wave has brought us is no longer regarded as either “unusual” or “cruel” by many popular constituencies. Yet, the public not only has been kept ignorant of the harm that too much imprisonment can do but it also has been mistakenly convinced that cruel treatment represents a carefully considered and proven strategy of effective crime control. Many citizens have been erroneously persuaded that harsh punishment is the only viable policy to be implemented in what they have been led to believe are increasingly perilous times.

In addition, as Justice Brennan observed in Furman, traditional opinion poll results typically measure little more than public acceptance of statutory authorization, rather than what the public might choose or prefer if the range of statutory alternatives were expanded. In this context it is critical to appreciate the multiple determinants of public attitudes about punishment, including the direct role of legislative and even Supreme Court actions in creating and maintaining public opinion rather than the reverse. From this perspective, Eighth Amendment values cannot be meaningfully assessed simply by reference to jury verdicts, voting majorities, and public opinion polls showing little more than that citizens will embrace those things opinion leaders have told them are legitimate or necessary.

201. Even international points of reference concerning public repudiation are compromised by the fact that the corrections industry in the United States has begun to import the technology of penal pain with consistent and increasing success. Cf. Christie, supra note 5; Freed, supra note 12.


203. This observation is closely tied to Justice Marshall’s view that the public does not know, and the polls certainly cannot sensitize it to, the realities of the system of capital punishment in the United States. See id. It seems equally, if not more, true that the public knows very little about the realities of the prison system in the United States.

204. Elsewhere I have argued that “Supreme Court decisions—constitutional law—serve as powerful moralizing agents in American society” that provide the basis for a “symbolic legality,” the ideological core of values and beliefs that most citizens associate with law and justice in a democratic society. Craig Haney, The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process, 15 LAW & HUM. BEHAV. 183, 183 (1991). When the Court puts its imprimatur on cruel penal practices, that very fact likely influences public opinion. See also G. Sperling, Does the Supreme Court Matter?, AM. PROSPECT 91 (Winter, 1991).

CONCLUSION

Is the punishment wave likely to lose its momentum? Are there conscious strategies by which it can be walled off and contained? Is there a way to rechannel the forces that are propelling it, to take its momentum in a different direction? At times it seems as if this huge and powerful wave has created a permanent flood plain of punishment, with no abatement plan in sight, and nowhere to look for a moral compass with which to navigate these punitive waters. Like the survivors in Kevin Costner's futuristic film, Waterworld, one searches in vain for the "dry land" of humane values, and realizes that we have been awash in punishment so long that there are few people around who still remember ever having seen it, who can recall a time when the ways we thought about these questions was grounded in something more solid and substantial.

Despite their uniformly destructive effects, at least some of the forces propelling the punishment wave are likely to subside. For example, I doubt that the way in which the anger and cynicism that was directed at the judiciary happened to coincide with decisions upholding the constitutional rights of defendants actually created a permanent realignment of legal powers in our society. Yet, other forces seem less temporary and coincidental, and they probably have produced a real shift in the punishment tides. For example, the emergence of a prison-industrial complex that is so closely connected to the political and economic power structure and so intertwined with the media's obsession with crime and punishment seems to have created a new gravitational pull on the punishment tides that is both unprecedented and likely to be with us for a very long time. These deeper shifts and realignment of structural forces, combined with the politicizing of the question of pain by the courts—especially the United States Supreme Court, which has arguably abdicated its regulatory function in deference to explicitly popular, political factions—means that there are

206. That is not to say that this tired rhetoric has run its course. Indeed, despite the fact that law-and-order politicians have occupied the presidency for all but two and a half terms over the last 30 years the specter of a "liberal" federal judiciary still haunts us. Thus, seeming to ignore a mountain of statistics confirming the United States' status as perhaps the most punitive advanced Western nation on earth, conservative criminologist John Dilulio testified before Congress that our criminal justice system is still far too lenient. Citing a smorgasbord of numbers about extremely high rates of recidivism in various state criminal justice systems—that would seem to provide an indictment of overcrowded prison conditions and the lack of programming that exists inside most correctional institutions—Dilulio had a different target in mind to blame: liberal federal judges. He claimed that "[t]ender solicitude for criminals" among these folks created "revolving door justice" whereby crime-prone (unrehabilitated?) offenders continue to be released from prison. Dilulio's testimony is recounted in Mona Charen, Why Thugs Get Out of Prison, SAN JOSE MERC. NEWS, Jun. 13, 1996, at 8B. Although Dilulio's logic and real agenda may have been somewhat difficult to discern, Charen's was not: "The Dole campaign can justifiably note, though, that if President Clinton is re-elected, more [liberal federal judges] are on the way." Id.
few if any solid, impermeable limits to what can be done in the name of "corrections," even as we have abandoned any hope of ever correcting anything. There is no obvious end in sight to these combined forces that may have eroded the foundation of the Eighth Amendment forever in this struggle.

Yet, although I concede that the dynamics of the punishment wave have probably permanently shifted the distribution of penal pain in our society, there is also reason to believe that some of these recent excesses will be short-lived, and that we will return to something approximating the ebb and flow that has characterized criminal justice sanctions throughout our history. Among other things, there is some evidence that exposure to more realistic and accurate information about crime and punishment does indeed result in decreased punitiveness.\(^{207}\) In fact, this may offer one of the most realistic chances of stemming a punishment tide that has been propelled so effectively by misinformation. That is, that popular support—which looks so solid, formidable, and impossible to transform—may be dissipated by the force of widespread public education. To be sure, there has been so little meaningful discourse about crime and punishment in recent decades that it is difficult to predict what the public would do with accurate information if they were given it in amounts too substantial to dismiss or ignore.\(^ {208}\)

Democratic votes to take consistently punitive courses of action often beyond seemingly rational limits—whether by members of the electorate, legislators, or jurors—may reflect little or nothing about their analytical conclusions, informed preferences, or genuine sentiments. Because so little accurate information has been provided to the public about the real causes of crime, the long-term effects of increased prison sentences on crime rates, the racial consequences of punitive crime-control policies, and the psychological effects of prolonged confinement inside the kinds of overcrowded, dehumanized, sometimes brutal prisons we have created over the last few decades, education may be the release valve through which some of the punishment wave's powerful flow can be siphoned off.

\(^{207}\) See Jodi S. Lane, *Can You Make a Horse Drink? The Effects of a Corrections Course on Attitudes Toward Criminal Punishment*, 43 CRIME & DELINQ. 186 (1997).

\(^{208}\) Following admittedly well established legal principles, the California Supreme Court has refused to allow defense attorneys to inform jurors in three strikes cases of the life sentence implications of convicting defendants of the charges before them. See, e.g., People v. Baca, 48 Cal. App. 4th 1703 (1996); People v. Nichols, 54 Cal. App. 4th 21 (1997). Of course, attorneys attempted this in the first place because they believed that jurors would find the law—supposedly passed in response to public pressure—too draconian and nullify it by refusing to convict. "Although the [three strikes] law was sponsored by prosecutors, several cases have come to light in which jurors learned of the potential punishment, found it excessive and refused to convict despite strong prosecution evidence." *Court Denies '3 Strikes' Appeal, State Won't Let Jurors Be Told of Punishment*, S.F. CHRON., Apr. 17, 1997, at A16.
or redirected.

Indeed, public support for the punitive policies with which we have become so enamored over the last few decades does not appear to be impervious to informational input. To take just one example with which I am intimately familiar, research that my colleagues and I have conducted over the last several years indicates that a clear majority of Californians would prefer prisons that actually did something to rehabilitate prisoners instead of simply punishing them. 209 Thus, despite the fact that for a nearly two decades now the legislatively declared purpose of imprisonment has been simply to inflict punishment—a purpose that politicians assert reflects the “will of the people”—most citizens still do not ascribe to it. 210

This same representative sample of adult Californians also felt that capital punishment should be justified on primarily utilitarian grounds—on the basis of what it could accomplish—rather than simply in the name of retribution. Yet they were extremely ill-informed about how the system of capital punishment actually operates in our society, seeming to grasp relatively little of the true nature of the most extreme punishment that the state enthusiastically administers in their name. At the same time, they expressed far more interest in doing something important for the victims of crime than they did in simply punishing criminals. In this context, note that few people seem to realize or reflect on the fact that our terribly expensive system of capital punishment has been purchased at the cost of other programs that might provide more direct help to victims or better ensure that there will be fewer victims of violent crime in the future. However, when our respondents were given the assurance that persons sentenced to life in prison without parole would actually serve that sentence, and serve it in a manner that accomplished something positive for the victims of their crimes, they preferred this sanction to the death penalty in fairly dramatic numbers. 211

The above cited data came from a study that focused primarily on the death penalty, and it is difficult to know how much they tell us about the punishment wave in general. Absent increasingly honest public debates and frank discussions about the nature and consequences of harsh punishment that are free of underlying political motives and manipulation, and

209. Haney et al., supra note 120.
210. These dates are reported in Haney et al., supra note 120, at 619.
211. In a state that boasts an 80% level of support for the death penalty, a majority of citizens said that the decision whether to have capital punishment should turn on the social functions it performs. However, an equal number were wrong about most of the things that capital punishment does and does not achieve. See Haney et al., supra note 120. Despite 80% abstract support for the death penalty, fully two-thirds said that they would support life in prison if they could be assured that the convicted person stayed in prison for the rest of his life and could be made to work and allocate some percentage of his income to victim restitution. Support plummeted from 80% to something less than 25% when this option was available. See id.
devoid of simplistic and unrealistic formulas, we may never know how the public would react to more humane alternatives to the present punitive system. Yet, there is some research to suggest that knowledge may have a significant moderating effect. For example, Shari Diamond and Loretta Stalans have conducted a series of empirical studies demonstrating that inaccurate media stereotypes can be corrected and their distorting effects on sentencing decisions and punishment preferences reduced. For example, despite widespread complaints about the putative "leniency" of the courts, they found that laypersons who made sentencing decisions based on realistic fact-patterns rather than media stereotypes were actually more lenient than judges in the same cases. Other research led them to conclude that public opinion about criminal punishment was based on inaccurate impressions of the seriousness of actual criminal cases as well as the nature of actual judicial sentencing practices, both of which could be modified by providing more accurate and realistic information. In a subsequent study, Stalans demonstrated the way in which harsh punishment preferences were related to the tendency to rely on crime stereotypes, and that media-driven, unrealistic crime stereotypes could be changed by providing more realistic and representative information through other sources.

Katherine Beckett was quite correct to assert that "[t]he success of the conservative campaign for law and order reflects the fact that this discourse makes sense of and provides a 'solution' for pressing social and personal problems in ways that are compatible with popular wisdom and cultural beliefs and values." Indeed, the individualism of this discourse has strong roots in American history and the cultural and political legacies of an earlier epoch. However, the joint forces of political expediency, media amplification, and prison-industrial complex self-interest—not the punishment wave's practical value in solving the problems of contempo-

213. See id.
215. Loretta J. Stalans, Citizens' Crime Stereotypes, Biased Recall, and Punishment Preference in Abstract Cases: The Educative Role of Interpersonal Sources, 17 LAW & HUM. BEHAV. 451 (1993). See also Loretta J. Stalans & Gary T. Henry, Societal Views of Justice for Adolescents Accused of Murder: Inconsistency between Community Sentiment and Automatic Legislative Transfers, 18 LAW & HUM. BEHAV. 675 (1994) (showing that the public is decidedly ambivalent about the practice of trying juveniles in adult courts and that they are responsive to specific information—particularly abuse histories—of the children in question).
216. BECKETT, supra note 141, at 80.
rary crime—are what have increased its size and momentum over the last several decades. The nexus of power and influence that connects these interests is what now shapes the public's view of "the crime problem," and it must be addressed if the punishment wave is ever to subside. Government officials, political leaders, and correctional insiders supply much of the information upon which the media builds its representations. As long as they continue to ride this extraordinarily costly, ultimately ineffective, and terribly inhumane wave, thoughtful and meaningful crime control policies are likely to elude us.