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Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners"

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POLITICIZING CRIME AND PUNISHMENT: REDEFINING “JUSTICE” TO FIGHT THE “WAR ON PRISONERS”

Craig Haney*

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[T]he system of law adapts itself most beautifully to the demands of modern times. . . . The ideal of matching the gravity of a crime with a portion of pain has the consequence that all other basic values that courts traditionally have to weigh are forced out of the proceedings. What was a system of justice is converted into a system of crime control.

—Nils Christie1

I. INTRODUCTION

The era of mass imprisonment in the United States continues. Although there have been slight decreases in the numbers of persons incarcerated in certain parts of the country over the last few years,2 we still lock unprecedented

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2 Although the overall number of persons imprisoned in the United States at mid-year 2009 stood at an all-time high, a number of states, and the overall Western Region of the United States,
numbers of citizens inside our prison and jail cells, placing them there at rates that far outstrip those of any other nation. In fact, our overall prison population is still at or near its all-time high, a figure that is approximately five times the number of persons who were incarcerated in the early 1970s and, in some states, closer to eight times more. The last three and a half decades in the United States’ corrections history has been variously described as the “age of mass incarceration” and the “mean season” of corrections. It was a time of “penal regressions,” leading to the advent of a “new punitiveness” and finally to a newly minted “punitive state.”

Elsewhere I have suggested that this period in our nation’s history can be fairly characterized as a protracted “War on Prisoners,” one that was “waged reported slight decreases in their prisoner populations. See Heather C. West, Bureau of Justice Statistics, U.S. Dep’t of Justice, Prison Inmates at Midyear 2009—Statistical Tables 5 tbl.2 (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf.

According to the International Centre for Prison Studies, the rate of incarceration in the United States for 2010 is 743 prisoners per 100,000 people. This rate exceeds that of the nearest competitor—Rwanda—by a considerable amount; Rwanda’s incarceration rate is 595 prisoners per 100,000 people. Entire World—Prison Population Rates per 100,000 of the National Population, International Centre for Prison Studies, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Oct. 21, 2011).

California is one such example. As one of the state’s long-time political reporters, Dan Walters, observed, when California Governor Jerry Brown served his first term in the 1970s “the state had about 20,000 men and women behind bars and hadn’t built a new prison in many years.” Dan Walters, 1970s Actions on Prisons Come Back Around to Bite Gov. Brown, SACRAMENTO BEE, May 24, 2011, at 3A, available at http://www.sacbee.com/2011/05/24/3648786/pe-epfpsej-fepofjspofj-seopfj.html#mi_rss=Dan%20Walters. However, Brown responded to a perceived rise in crime in the state later in the 1970s “by signing dozens of lock-’em-up anti-crime bills. Not surprisingly, the new laws and tougher attitudes by prosecutors and judges began raising the prison population.” Id. By 2000, and continuing to the present time, the state has housed over 160,000 prisoners in its correctional facilities, eight times as many as in the 1970s. See generally Monthly Total Population Report Archive, CAL. DEPT. CORR. & REHAB., http://www.cdc.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html (last visited Oct. 22, 2011). Ironically, it was during Brown’s second stint as governor that the U.S. Supreme Court ordered the State of California to substantially reduce its prisoner population because severe overcrowding had rendered its delivery of medical and mental health care unconstitutionally deficient. Brown v. Plata, 131 S. Ct. 1910, 1947 (2011).


The New Punitiveness: Trends, Theories, Perspectives (John Pratt et al. eds., 2005).

with the kind of fierce aggressiveness that is typically reserved only for the worst enemies of the state." As is often the case, the run-up to this war was marked by inflated, overblown political rhetoric that seemed to make protracted "combat" vital to the very preservation of the nation. The march toward war was similarly facilitated by media, political, and even quasi-scientific campaigns in which the intended targets of government offensives were not just vilified but demonized and, at times, made to appear as something less than human. In the ensuing enthusiasm to do battle with newly defined domestic "enemies of the state," there were few if any concerns expressed for the consequences of the war itself on either its battle-scarred veterans or the countless collateral casualties that would inevitably result.

Indeed, as the War on Prisoners unfolded, prisons in the United States incorporated the "authoritarian" elements that Leon Radzinowicz has suggested are most commonly associated with the kind of criminal justice systems that are run by military dictatorships. At least three of the "visible features" that he suggested have characterized militaristic, authoritarian models of criminal justice clearly emerged in American corrections during this era, as prisoners became enemies with whom the nation went to war. Specifically,

[t]he criminal [was] primarily seen as an anti-social individual, in revolt against the laws of the state, a malevolent force to be broken or annihilated. . . . Retribution, intimidation and elimination [were] regarded as the dominant functions of penal sanctions. . . . [And t]he entire system of punishment, in sentencing and enforcement, [was] consistently harsh and rigid.

The dramatic shifts in correctional policy that guided strategic and tactical decision-making during the War on Prisoners were undoubtedly "overdetermined." That is, they were the product of numerous changes that occurred almost simultaneously and at several different levels of our society. In addition to the abandonment of rehabilitation and a reinterpretation of the nature of criminality, both of which I have discussed at greater length elsewhere, there was a fundamental reframing of the intellectual justification for punishment advanced by legislators, criminal justice scholars, and correctional policymakers. Indeed, a dramatically changed political landscape helped bring about several interrelated intellectual transformations in criminal justice policy that began in

13 Id. at 426.
14 See supra note 10.
the 1970s. These policy changes occurred rapidly and in tandem. Together they restructured the way in which key decision-makers came to conceptualize the purpose of the criminal justice system. In this Article, I discuss several of the most important of these changes and transformations and some of the ways that they influenced prison policy over the last several decades.

The mass mobilization that a nation must undergo in order to prepare for and engage in war is greatly facilitated when it is waged in the name of an ennobling goal. Full scale hostilities are easier to declare and sustain when they have an intellectual rationale that seems to elevate the purpose of the conflict and justify the aggressive destruction that it will inevitably bring about. The War on Prisoners was no exception. Indeed, the remarkable fact that it was being waged against the nation’s own citizens underscored the need to find an overarching intellectual justification. Moreover, just as the War on Prisoners was being declared—and seemingly as a precondition to actually fighting it—politicians and prison policymakers vehemently critiqued and ultimately abandoned the nation’s long-standing justification for imprisoning its citizens—the rehabilitative ideal.\footnote{Frederick A. Hussey & Stephen P. Lagoy, The Impact of Determinate Sentencing Structures, 17 CRIM. L. BULL. 197, 198 (1981) (“Since the turn of the century, most jurisdictions at each level of government have embraced the rehabilitative ideal . . . ”). See also Francis A. Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 226 (1959).} It had served in this capacity for more than 100 years, and now it was gone.

Historically, the rehabilitative ideal had established a seemingly positive and proper purpose for imposing the pains of imprisonment. Although prison has always represented severe punishment—sometimes punishment that is cruel and destructive—the pursuit of rehabilitation allowed prisoners to be depicted as suffering ostensibly for their own good, in order to return to free society mentally healthier, better educated, more employable, and presumably less criminally inclined than when they had left. To be sure, throughout the entire history of imprisonment, the goal of rehabilitation was rarely achieved on a widespread or consistent basis. Yet, it seemed a worthy aspiration, one that spoke to the nation’s commitment to the ideals of redemption, perfectibility, and self-improvement, and did so in a way that was fundamentally instrumental or utilitarian (i.e., rehabilitation was a means to a better end).

Obviously, the continued pursuit of the rehabilitative ideal was philosophically incompatible with the emerging view of “prisoner as enemy.” A nascent War on Prisoners could hardly be expected to marshal public support for doing fierce battle with prisoners—wartime tactics that required increasingly worse punishment to be inflicted on unprecedented numbers of them—at the same time that correctional institutions were supposedly striving to “improve” prisoners, giving them opportunities for “personal growth,” and facilitating their successful re-entry into free society—the same society that was now “taking up arms” against them.
In this Article, I explore the way that the vacuum that was created by the abandonment of the rehabilitative ideal was filled with a new justification for imprisonment. As I will suggest, what came to be called “just deserts” theory performed this function admirably, at least for a time. It not only facilitated the imposition of harshly punitive punishments that the War on Prisoners brought about, but also significantly transformed the nature of criminal sentencing in the United States. It did so in a way that largely decontextualized criminal behavior. Criminal sentences soon came to be meted out on the basis of the seriousness of the crime alone—oftentimes through formulaic methods that rigidly (even mathematically) attempted to match the supposed gravity of the conviction with the magnitude of the punishment, with little or no consideration being given to the context in which the crime occurred or the unique circumstances of the person who committed it.

Wars also have a way of changing the social and political landscapes of the societies that wage them. The changes sometimes go beyond the necessary, albeit temporary accommodations we make to the extremes of battle and exigencies of war to turn into something different and more enduring—lasting shifts in broad cultural norms and values. Here, too, the War on Prisoners was no exception. As the nation became accustomed to longer and longer prison sentences being imposed on more and more people, the norms of punishment—our sense of how much pain was appropriate to inflict—shifted accordingly. So, too, did our views of lawbreakers. Prisoners were now routinely regarded as enemies to be vanquished rather than fallen citizens whose eventual return to society was to be anticipated, planned for, and even facilitated. The concept of a “fair and just” penal sanction was gradually redefined to omit any consideration of social justice. Simultaneously, the punishment process itself was democratized in ways that opened it up to easily manipulated populist sentiments. In the final analysis, the very nature of justice was transformed. This Article examines some of the ways in which that came about.

II. ABANDONING THE REHABILITATIVE IDEAL: THE NEED FOR A NEW MODEL OF “JUSTICE”

The War on Prisoners was declared at an especially inopportune and unexpected time. In the late 1960s and early 1970s, many criminal justice scholars and policymakers were in the process of developing a broad framework for understanding crime and punishment in increasingly structural and contextual terms. On the one hand, this framework focused explicitly on the life-shaping “criminogenic” social conditions to which many lawbreakers had been exposed. On the other hand, it acknowledged the potentially harmful effects of traditional institutional interventions (i.e., imprisonment). Emerging insights about the breadth and depth of racial injustice and socioeconomic inequality in American society spurred new approaches to crime control and alternative criminal justice
responses to criminal behavior. These "progressive" intellectual trends and policy initiatives were founded on the implicit assumption that achieving a fair and effective criminal justice system would require the simultaneous and serious pursuit of social, economic, and racial justice in addition to, and sometimes instead of, traditional law enforcement responses.

Moreover—for a short time in the late 1960s at least—these new approaches had garnered enough political legitimacy and governmental support to ensure their implementation. There were several important government commissions and national organizations that urged large-scale reform of the nation's crime control policies, law enforcement practices, and penal institutions, including three separate presidential commissions that were assembled in the late 1960s to address a wide range of crime-related issues. Although each presidential commission was comprised of widely diverse working groups—one that included an eclectic mix of scholars, criminal justice analysts, and political figures—all three reached broadly similar conclusions about the causes of crime and the policies that should be implemented to better address it.

This was one of the key assumptions of the "War on Poverty" that was briefly waged during this period. At the core of the poverty-related social programs enacted by Congress at the urging of President Lyndon B. Johnson in the mid-1960s was the assumption that "[i]f poverty had its origin in circumstances too powerful for the individual to alter, then personal vices were more likely to be mechanisms for coping with the environment than the root causes of the individual's woe." David Zarefsky, President Johnson's War on Poverty: Rhetoric and History 39 (1986).

For example, scholars had begun to routinely acknowledge the importance of doing "what is possible now to avoid the customary deterioration of human capacity in prison," and propose alternatives to traditional forms of incarceration. Elliott Studt, Sheldon L. Messinger & Thomas P. Wilson, C-Unit: Search for Community in Prison 3 n.1 (1968) (emphasis added).

The first of these, the President's Commission on Law Enforcement and Administration of Justice ("Crime Commission"), published a lengthy report in 1967 on the "challenge of crime in a free society." President's Comm'n on Law Enforcement and Admin. of Justice, The Challenge of Crime in a Free Society (1967). These issues were highlighted in the work of the second presidential commission—the National Advisory Commission on Civil Disorders ("Riot Commission")—which was appointed to study the causes of widespread racial conflict and unrest. Formed in response to the race-related disturbances that occurred in some 150 cities in the United States in the summer of 1967, the Riot Commission identified a set systemic problems and provided a critique of the way in which the criminal justice system failed to address—and in some ways contributed to—the civil disorders. Nat'l Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders (1968). The final presidential commission—the National Commission on the Causes and Prevention of Violence ("Violence Commission")—was formed on June 10, 1968, just a few days after the assassination of Senator Robert F. Kennedy. The Violence Commission's report sought "to determine the causes of violence in the United States and to recommend methods of prevention. Nat'l Comm'n on the Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility xxiii (1970).

Indeed, long after the publication of the commission reports, scholars continued to acknowledge that, despite some modifications and refinements necessitated by the passage of time, they contained "the fruits of some of the best, and most representative, thinking and research available," reflected "the best of the criminological tradition," and included "valuable compendia of usually solid and often still illuminating research." Elliott Currie, Crimes of Violence and Public
Their policy recommendations reflected a fundamental shift in the government's approach to crime control. Along with emerging trends in penology that included a significant degree of accountability (through the systematic and empirical measurement of "what works"), there was a growing recognition that the limits of an exclusively individualistic and too often heavily "therapeutic" approach to prisoner change needed to be transcended. Indeed, the logic of rehabilitation was on the verge of being extended directly into the communities from which prisoners were taken and to which nearly all of them would return. Thus, the notion that communities as well as people needed to be rehabilitated in order for crime to be measurably affected was gaining increasing acceptance.

Yet, just as these broad based political programs, economic initiatives, and criminal justice reforms were being formulated and entering the first stages of implementation in the early to mid-1970s, they were suddenly abandoned and the intellectual and political trends that produced them reversed. With astonishing speed, this developing framework was replaced by a renewed commit-
ment to a ruggedly individualistic, dispositional view of crime, one that localized its causes exclusively inside the persons who commit crime. Locating the source of criminal behavior exclusively inside lawbreakers helped establish them as the “enemy.” Despicable acts were seen as having been committed by despicable people who freely chose their destructive behavior and who, therefore, fully deserved whatever harsh consequences were imposed upon them.

Because this increasingly dominant view held that the roots of criminal behavior lay in the intractably bad character of prisoners, “liberal” concerns over the potentially harmful effects of prison conditions were dismissed as exaggerated and misplaced. If prisoners were too strong to be changed for the better by prisons, the conservative argument went, they were too tough to be hurt by them as well. The search for meaningful limits to the pains of imprisonment lost momentum as the war against the intractable “criminal type” ramped up. Profoundly exclusionary policies reinforced the image of lawbreakers as profoundly “other”—in essence, enemies of a civil society for which they were unfit, not only during their period of incarceration but, by implication, afterward as well.

The abandonment of the rehabilitative ideal brought about several interrelated, significant changes in correctional practice, political policy, and public consciousness. Collectively these interrelated changes helped to transform strategies of crime prevention and control into a broadly shared wartime mentality. By explicitly and officially substituting the goal of punishment—inflicting pain—in place of rehabilitation, we implicitly removed many of the day-to-day operational limits on what could be done to prisoners inside the nation’s prisons. Putting it in the starkest and simplest terms, as the purpose of imprisonment shifted from helping to hurting prisoners—making them suffer—implicit restraints against harsh treatment eroded. So, too, did existing constitutional safeguards. That is, once the very penological purpose of imprisonment was

23 In an important sense, this ruggedly individualistic view of crime represented a return to a psychological model of human behavior that had been fashioned in the nineteenth century. Craig Haney, Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the “Formative Era,” 6 L. & HUM. BEHAV. 191, 226-30 (1982).

24 For example, many prison systems in the United States returned to the use of long-term solitary confinement, a practice that for the most part had been abandoned by the end of the nineteenth century because of the damaging psychological effects it had on prisoners. The new solitary confinement or “supermax” units that were constructed during the War on Prisoners ignored this history and were built and operated with little apparent concern for the psychological well-being of the prisoners who were housed inside. See Craig Haney, A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons, 35 CRIM. JUST. & BEHAV. 956, 969–70 (2008); Craig Haney, Mental Health Issues in Long-Term Solitary and “Supermax” Confinement, 49 CRIME & DELINQ. 124, 125–26 (2003); Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. REV. L. & SOC. CHANGE, 477, 490–91 (1997).

25 Key U.S. Supreme Court decisions reached early in the War on Prisoners contributed to the mass incarceration that was underway by signaling the Justices’ “hands off,” minimalist approach to correctional oversight. The outcomes of the cases and deferential tenor of the decisions gave
shifted to inflicting pain, it was, to say the least, "awkward" for courts to declare prison practices "cruel and unusual."

However, for at least a brief time at the outset of the War on Prisoners, the abandonment of the rehabilitative ideal created a crisis of legitimacy for American penology. The venerable notion that people were sent to prison primarily to be rehabilitated—the rationale that had served as the intellectual and moral cornerstone of prison policy since the first widespread use of these institutions in the United States in the early nineteenth century—had been abandoned so quickly that there was little or nothing to stand in its place. A new justification—or a refurbished version of an old one—would soon perform this function.

III. THE RISE OF JUST DESERTS AND THE DEMISE OF JUDICIAL DISCRETION

The shift in the purpose of imprisonment from rehabilitation to punishment per se was accompanied by a significant change in the philosophical justification for imprisonment that began in the 1970s. As I noted above, the abandonment of rehabilitation had left a temporary void in the asserted moral justification for imprisonment: If people were no longer sent to prison to be fixed or changed, why did they go? Incapacitation was often offered as a practical rationale—we now locked people up primarily to keep them away from the rest of us. In James Q. Wilson's famous formulation: "Wicked people exist. Nothing avails except to set them apart from innocent people."26 But, in its stark pragmatism, incapacitation seemed to lack a real moral underpinning. Indeed, incapacitation may have become the "dominant justifying aim of all incarceration,"

legislatures the latitude they needed to significantly increase sentence lengths and rates of incarceration, and eventually to fill the nation's prisons well beyond capacity. If the Court had adopted a different approach—for example, if the Justices had taken the simple step of prohibiting the housing of two prisoners in cells that had been designed for one or had endorsed the American Correctional Association's standards on the amount of space that should be minimally afforded to prisoners—recent prison history would have been written very differently and the War on Prisoners might have taken a different turn. See generally AM. CORR. ASS'N, STANDARDS FOR ADULT CORRECTIONAL INST. §§ 2-4129, 2-4131, 2-4132, 2-4135 (2d ed. 1981) (amended 2006) (recommending the minimum square feet of living space per prisoner under various housing circumstances). But by the end of the decade of the 1970s, a majority on the Court seemed to respond to widespread fears of crime by embracing many of the punitive views that were beginning to become so popular in the larger society. Thus, in a landmark 1981 case, the Court for the first time considered "a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment." Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (footnotes omitted). The Justices ruled that prison punishment that did not "'involve the unnecessary and wanton infliction of pain,'" were not "'grossly disproportionate to the severity of the crime,'" and were not "'totally without penological justification'" were constitutionally acceptable. Id. (quoting Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976) (citing Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)); Weems v. United States, 217 U.S. 349 (1910)) (emphasis added). See generally CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 271–302 (2006).

as Zimring and Hawkins suggested, but it was an aim rather than an aspiration or the expression of an especially laudable value. Something more was needed to rationalize and uplift our pursuit of this aim. For many people, it seemed, a more noble philosophical rationale was needed to justify the enormous expenditure of public resources and the fairly significant deprivation of liberty imposed on large numbers of prisoners—many of whom were convicted of drug offences—than, simply, that the rest of us did not want to be bothered with them.

“Just deserts theory” emerged to fill this void. Its proponents argued that there was actually a philosophical principle that could be put to work in justifying these otherwise harshly punitive policies: lawbreakers should suffer in prison simply because they deserved it. Although some desert theorists argued that punishment would set an example that also would deter others from crime, many of them acknowledged that crime control policies that depended on increased punishment appeared to have little deterrent value. As one commentator put it: “Not a single intervention that focused on enhancing the pain applied to offenders was identified as effective . . . .” But that did not stop policies designed to increasingly “enhance the pain” from being implemented, in the name of “justice” or, at least, just deserts.

In fact, desert theory was served as a philosophical principle that freed lawmakers from pesky concerns about whether their proposals to increase punishments actually “worked.” That is, the most common and purest form of the theory held that people who violated the law simply needed to suffer for their transgressions. Thus, Andrew von Hirsch defined desert theory as “the notion that the response to someone’s behavior should depend on the good or bad qualities of that behavior.” That response—in the case of behavior whose qualities were “bad”—was to unapologetically inflict pain on the person who had engaged in it.

Desert-based punishments were supposed to be determined through a calculation that graded or calibrated criminal acts according to the amount of blame they implicitly reflected: “[P]unishment implies blame and . . . the quantum of punishment connotes the amount of blame.” Under such a scheme, imprisonment served no other purpose or goal than to give offenders their just deserts. Punishment was its own reward and, as the criminal justice system embraced just deserts as one of its central goals or purposes, inflicting that punishment became the raison d’être of the nation’s prisons.

Correspondingly, the more this model gained favor with legal decision-makers, the less correctional institutions needed to concern themselves with whether or how well they effected any positive change in prisoners. Indeed,

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30 Id. at 60.
over time the just deserts formulation helped erode the sense that the nature and effects of prison conditions and operations needed to be monitored or overseen at all. Just deserts theory required only that prisons deliver pain—something few people had ever doubted such institutions could successfully accomplish. Judges, in this system, became the human instruments of retribution, meting out “justice” by inflicting pain in proportion to the magnitude of the transgression that precipitated it.

In fact, the popularity of the deserts formulations in the 1970s and 1980s coincided with another widely publicized criticism of the criminal justice system, one that, contributed to widespread sentencing reforms by changing the role of criminal court judges and greatly reducing their discretion to specify the amount of punishment that lawbreakers would receive. In 1973, Judge Marvin E. Frankel published an influential book in which he, too, railed against what he claimed were blatant failures in our nation’s approach to rehabilitation. According to Frankel, rehabilitation required that all criminals be understood as somehow “sick” and therefore in need of some sort of psychological or psychiatric “cure.” He rightly noted that no prison system could reasonably be expected to provide the range and quality of treatment that would effectively change everyone. In addition, Frankel observed that parole boards were being called upon to make important but impossibly difficult decisions about whether prisoners had been rehabilitated enough to justify their release. He explained that, “[w]e set them lofty goals of rehabilitation, but with no directions or means of achievement.”

Rather than address the problem directly—say, by broadening the concept of rehabilitation to include non-clinical approaches such as educational and vocational training and to provide parole boards with better tools with which to make judgments about a prisoner’s suitability for release—Frankel argued that we should abandon the enterprise entirely. Along with several other prominent criminal justice scholars, and the politicians who embraced their radical abolitionist proposals he, too, advocated scrapping rehabilitation as a correctional goal, and implementing a model of fixed sentences from which parole or discretionary release had been eliminated.

But Frankel’s harshest words were reserved for judges who, in his view, operated with “the almost wholly unchecked and sweeping power . . . in the fashioning of sentences.” He argued that despite a glaring lack of expertise in the actual craft of sentencing, judges were allowed to exercise a dangerous level of virtually unbridled discretion. As he put it, “[c]one need not be a revolutionist or an enemy of the judiciary to predict that untrained, unsupervised men armed

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32 Id. at 95.
34 Frankel, supra note 31, at 5.
with great power will perpetrate abuses." To support his charge of widespread sentencing abuse he provided examples of stark disparities in which presumably the same kind of criminal offense was treated with leniency by one judge and harshness by another.

Thus, consistent with the emerging perspective of the times in which he wrote, Frankel was not intent on improving the nature and quality of the rehabilitative services that were made available in prisons (so that the "lofty goals" of rehabilitation could be better realized). Nor did he attempt to prod judges into seeking better training that would increase their skill and sophistication in making sentencing decisions (so as to wield their vast powers more wisely). Instead, his goal was to eliminate sentencing disparities by essentially eliminating judicial discretion.

To do so, he recommended the implementation of legislative reforms designed to decrease flexibility in the process and increase uniformity in the outcome sentencing itself. Under his plan, newly created sentencing commissions would articulate the general purposes of punishment and then devise a set of sentencing formulas by which these purposes presumably could be achieved. All judges within a particular jurisdiction would be required to use the same formula or grid, one that set out the specific prison sentence that each type of crime presumably deserved. The latitude that any particular judge would have to vary from the mandated term in any particular case essentially would be eliminated.

Not surprisingly, Frankel’s proposals resonated with desert theorists who had argued that the amount of punishment a lawbreaker deserved should be dictated by the nature of the crime that he or she committed. The advent of a desert rationale for punishment and implementation of mandatory grid-based sentencing schemes—helped to significantly transform the role of judges in the sentencing process. In many jurisdictions, prison terms were soon being calculated solely on the basis of the nature of the crime for which a person had convicted. For example, the same mid-1970s California legislative enactment stating that "the purpose of imprisonment is punishment"—and, by implication, not rehabilitation—followed this declaration by noting that:

This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares

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35 Id. at 17.
36 Id. at 118–21.
37 See id. at 105–06, 113 (suggesting "the creation eventually of a detailed chart or calculus to be used . . . by the sentencing judge").
38 Cf. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 157 (1976) ("For a useful general critique of 'individualized' sentencing, see Marvin E. Frankel, Criminal Sentences. . . .").
that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.\textsuperscript{39}

Since virtually nothing else beyond the “seriousness of the offense” was thought to matter to the fairness of the sentence, virtually no other information was—or could be—taken into account.

IV. DESERT-BASED SENTENCING REFORMS AND THE PAINS OF IMPRISONMENT

Neither Frankel nor the desert theorists with whom his ideas were closely joined had much to say about legal or moral limits to the pains of imprisonment or the conditions of confinement in which those pains would be experienced. Thus, few of the reforms that their ideas inspired included meaningful discussions of the harsh nature or deteriorating condition of the prisons to which persons were being sent to receive their deserts, or the psychological consequences of the amount of prison punishment that now (supposedly) would be uniformly imposed. Their silence on the key issue of how to ensure at least a modicum of humane treatment for those who were suffering for their transgressions was certainly at odds with the image that both the desert theorists and the uniform-sentencing proponents had projected of themselves as “just” and “fair” reformers.

For example, penologist David Fogel contributed an evocative and persuasive phrase in support of desert theory—“justice as fairness”\textsuperscript{40}—and others wrote of desert-based sentencing as “doing justice.”\textsuperscript{41} In fairness to Fogel, his proposals sometimes did include the proviso that all inmates should live in just and humane environments and also that they be afforded many of the same rights as free citizens. Unfortunately, none of the desert-oriented sentencing models that were actually implemented in the United States—sometimes with Fogel’s work serving as inspiration—included any of these features. In addition, little or no consideration was given to the long-term effects that the punishment that it required to be uniformly meted out might have on those who were its targets—prisoners.

In fact, there were a number of other problems that allowed the deserts rhetoric to devolve into little more than a rationale for increasingly harsh treatment. For example, deserts formulations never precisely identified to whom justice should be “fair,” how exactly it should be “done,” or by what standards


\textsuperscript{40} \textit{Justice as Fairness: Perspectives on the Justice Model} (David Fogel & Joe Hudson eds., 1981); accord David Fogel, “... We Are the Living Proof...”: The Justice Model for Corrections 204 (1979).

\textsuperscript{41} See Von Hirsch, \textit{supra} note 38.
the fairness or "justice" that it supposedly dispensed could be measured. Put somewhat differently, desert theorists failed to seriously address the moral standard that should be used to decide how much pain was enough and, by implication, how much was too much.

Thus, its proponents never really articulated the outer limits of the deserts principle by defining when too much punitive "justice-as-fairness" became unfair, how we would know when that point had been reached, or what we should do when it had. Beyond establishing the proposition that all morally blameworthy persons should receive some punishment for their transgressions that should be somehow tied to the seriousness of the offense—a proposition that few if any scholars or policymakers had ever argued was problematic—references to some external and morally defensible standard or metric was needed to gauge the appropriateness of the sanctions themselves. Desert theorists, unfortunately, did not provide them.

Moreover, aside from establishing a philosophical justification for punishing lawbreakers in general, desert theory lacked a set of principles or precepts telling legal decision-makers exactly what to do next. In fact, for the theory to make any sense at all, it should have ensured uniformity in sentences between as well as within jurisdictions. That is, if justice was to be "fair" because it was organized around the philosophical principle of deservingness, then it certainly should transcend largely arbitrary jurisdictional boundaries. Unfortunately, there was no such uniformity and, practically speaking—because jurisdictions varied widely in their sentencing policies and were reluctant to change in the name of uniformity—there could be none.

For example, over a two decade period in California, the state instituted a number of criminal justice reforms designed to reduce judicial discretion and sentencing disparities. The reforms included implementing a determinate sentencing model and drastically narrowing the options that trial judges had at the sentencing stage of a criminal case. Yet, here is one judge's description of the striking inequities that continued to plague the system:

"In San Francisco, you get caught with a rock of cocaine, and you probably get probation," says Thomas Whelan, a prosecutor for 20 years before being appointed to the San Diego County Superior Court bench in 1990. "You get on a plane and get to San Diego before you're caught, and you can get life in prison." 

Indeed, desert theorists themselves consistently failed to address the question of exactly how—and exactly how comparably—punishment was being meted out in different jurisdictions. Moreover, because of differences in the painfulness of widely varying conditions of confinement that existed inside the

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different facilities to which lawbreakers within the same jurisdiction were being sentenced, there was no literal, precise comparability in the desert received, even when the sentence was formally identical. Absent a standardization of these practices and conditions, there could be none. Yet no desert theorist seriously addressed the issue of standardization at this important experiential level.

In addition to these limitations in the way in which the deserts model was conceptualized and actually implemented, there was the larger question of whether any system that looked only at the characteristics of the crime as the basis for deciding on the amount of punishment to be imposed was far too narrow in scope to be seen as “fair and just.” Moreover, desert theorists seemed oblivious to the possibility that disparities in punishment might relate logically and even morally to variations in the background of the perpetrators and the circumstances under which they committed their offense, rather than always reflecting underlying injustice. Norwegian penologist Nils Christie raised a characteristically trenchant objection: “It is an affront to my values, and I think to many people’s values, to construct a system where crimes are perceived as so important that they decide, in absolute priority to all other values, what ought to happen to the perpetrator of a particular crime.”

Moreover, by focusing so much attention on keeping sentences formally uniform or consistent, the possibility that the entire scale of punishment was becoming too painful—especially as the War on Prisoners raged on—and that, therefore, another kind of unfairness was being created was easily overlooked. As long as everyone who committed the same crime suffered in the same amount, the desert logic held, justice was done. This, too, had indirect implications for the methods by which courts could construct and apply constitutional limits to punishment based on meaningful Eighth Amendment standards. As I said earlier, because punishment was being philosophically justified on the basis of its painfulness, it became difficult to limit its “cruel” aspects. And, as desert-based sentencing models that strove for widespread uniformity became increasingly popular, fewer punishments—even very harsh punishments—stood out in ways that would mark them as “unusual.”

Some desert theorists did appear to recognize at least some of these problems. For example, desert proponent Andrew von Hirsch argued that what was required was “that a reasonable proportion be maintained between the absolute quantum of punishment and the gravity of the criminal conduct.” He also conceded that “[t]he whole question of the overall dimensions and anchoring points of a penalty scale needs further thought.” Unfortunately, desert theorists never provided much of that thought. The imprecision of the concept of desert

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43 Nils Christie, Limits to Pain 45 (1982).
45 von Hirsch, supra note 29, at 63 n.28.
led some moral philosophers to wonder whether the concept of retribution on which it was founded was really anything different from revenge or vengeance.\textsuperscript{46}

On the other hand, conservative columnist George Will made the most of this implicit connection, characterizing it as a strength rather than weakness of desert theory. It allowed him to explicitly elevate vengeance to the level of a moral principle. Thus, he argued to a national audience in the early 1980s that:

The element of retribution—vengeance, if you will—does not make punishment cruel and unusual, it makes punishment intelligible. It distinguishes punishment from therapy. Rehabilitation may be an ancillary result of punishment, but we punish to serve justice, by giving people what they deserve.\textsuperscript{47}

Will’s embrace of retribution—“vengeance, if you will”—was widely shared by others. Although there have been other justifications offered for the notion that “vengeance . . . makes punishment intelligible,”\textsuperscript{48} desert theory helped initiate and rationalize a kind of renaissance of retribution in the criminal law. The shift was so dramatic and complete that commentators looked back at the start of the twenty-first century and noted correctly that “[o]ver the past three decades, legislators have created a conversation [about punishment] in which the inclusion of principles other than retribution and revenge is virtually impossible.”\textsuperscript{49}

In addition, because desert theory required prisoners primarily to suffer rather than be rehabilitated in prison and because the movement toward uniformity in sentencing could not countenance wide variations in time served as a function of whether a prisoner appeared to have benefited from programs in which he had participated, good behavior and positive achievements in prison had increasingly little impact on how long a prisoner stayed there. This also meant that treatment and programming in many prison systems moved from the status of desirable but expendable luxuries to anachronistic irrelevancies. Even those dwindling number of correctional officials who remained committed to programming and rehabilitation were increasingly hard pressed to find the resources with which to provide them for the rapidly growing number of prisoners for whom they were responsible.


\textsuperscript{47} George F. Will, The Value of Punishment, Newsweek, May 24, 1982, at 92.

\textsuperscript{48} For example, U.S. Supreme Court Justice Antonin Scalia has famously written that “government carries the sword as ‘the minister of God,’ to ‘execute wrath’ upon the evildoer.” Antonin Scalia, God’s Justice and Ours, 123 First Things 17, 20 (2002).

\textsuperscript{49} Sara Steen & Rachel Bandy, When the Policy Becomes the Problem: Criminal Justice in the New Millennium, 9 Punishment & Soc’y 5, 5 (2007).
Although the wholesale abandonment of rehabilitation was based on very little reliable scientific data\(^5\)—and none whatsoever had been offered on behalf of substituting deserts theory in its place—the shift from one model to the other was rapid and so far-reaching as to be characterized as a Kuhnian “scientific revolution”:

The “rehabilitationist” and “just deserts” world views are paradigms, in Kuhn’s sense, which provide a coherent framework for social action and scholarship. Moreover, the change from one view to the other was prompted by a crisis that caused a shift in attitudes, values, operations, and terminology, amounting to a revolution.\(^5\)

However, both the “crisis” that precipitated these shifts and the “revolution” in thinking that followed were much more political than scientific in nature. That is, they were based less on clear empirical evidence than on a whole range of politically inspired interpretations that the evidence was given.

It should also be acknowledged that the movement toward the determinate or “fixed” sentencing schemes that were introduced during this era was initially supported by a wide range of groups, including a number of liberal criminal justice critics and prisoners’ rights advocates. They believed—correctly in a number of instances—that the rehabilitative ideal had been corrupted by allowing some of the worst forms of coercion and abuse to pass in the name of “treatment.” In this regard, for example, journalist Jessica Mitford published a scathing critique of the excesses of prison rehabilitation programs, arguing among other things that “individualized [psychological] treatment” was being used as “a device for breaking the convict’s will to resist and hounding him into compliance with institutional demands, and is thus a means of exerting maximum control over the convict population.”\(^5\) Mitford was not alone in lodging important critiques against the misuse of prison treatment or rehabilitation programs.\(^5\) Debates over the right to receive—and to refuse—treatment that surfaced in the mid-1970s sensitized the courts and correctional reformers to the inherently coercive aspects of “therapeutic intervention” in an already repressive institutional environment such as prison.\(^5\)

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\(^{50}\) See my discussion of this issue in Haney, *Demonizing the “Enemy,”* supra note 10, at 205–27 nn.59–158 and accompanying text.


\(^{52}\) JESSICA MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS 117 (1973).


\(^{54}\) Many of these debates arose in the context of mental health treatment. See, e.g., NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971); Ralph Kirk-
Critics of indeterminate sentencing and other forms of discretionary decision-making that made release from prison contingent on prisoner cooperation argued that they contributed to these abuses. However, very few such critics anticipated the unprecedented increase in the sheer amount of punishment that eventually was imposed—ironically, in part in the name of eliminating the “excesses” of rehabilitation. By the time the harsh consequences of these fixed sentencing reforms had become apparent, the reforms themselves were central to a larger, emerging political agenda. Among other things, as I will point out in the next section, they inadvertently contributed to the unprecedented politicization of the sentencing process itself, and it was too late to reverse them. Thus, notwithstanding the effective rhetoric that surrounded the basic deserts formulations, the sentencing reforms they helped to precipitate led directly to massive increases in the overall levels of prison punishment. The War on Prisoners escalated as a result.

In the course of the transformation of criminal justice policies that followed, indeterminate sentencing laws and parole systems in many jurisdictions were replaced by determinate, fixed, or flat-time sentencing schemes. For example, Congress passed the Sentencing Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984. The Sentencing Reform Act required federal judges to rely on an elaborate grid to calculate the sentences that

land Schwitzgebel, The Right to Effective Mental Treatment, 62 CALIF. L. REV. 936 (1974). Unlike the “right to treatment” on behalf of mental patients, the “right to rehabilitation” for prisoners was never as clearly established. However, two mid-1970s cases examined the legal grounds for the right of prisoners to refuse coercive treatment. In the first case, the Ninth Circuit ruled that subjecting a prisoner to an especially intrusive form of psychiatric treatment without explicit consent could “raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes.” Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (footnotes omitted). In the second case, a district court acknowledged that “procedures specifically designed and implemented to change a man’s mind and therefore his behavior in a manner substantially different from the conditions to which a prisoner is subjected in segregation reflects a major change in the conditions of confinement” that requires due process protections. Clonce v. Richardson, 379 F. Supp. 338, 350–51 (D. Mo. 1974). In addition, the use of “behavior modification” programs in mental hospitals and prisons generated significant legal controversy. For example, see the Arizona Law Review symposium that was published in the mid-1970s and devoted to the special psychological and legal issues presented by these programs. Symposium, Viewpoints on Behavioral Issues in Closed Institutions, 17 ARIZ. L. REV. 1 (1975).


they were supposed to mete out after a criminal conviction. According to the sentencing guidelines mandated specific prison terms. The Act greatly limited the factors that judges were allowed to consider whenever they sought to deviate from the prescribed sentences. In addition, it required deviations to be justified in writing, and also subjected them to appellate review.

Some members of the judiciary reacted strongly to the way in which Congress had disregarded their sentencing expertise and constrained their discretionary decision-making power. As one reviewer noted, "the proliferation of mandatory minimum sentences has driven some [federal] judges to resign and others to vent their frustration openly." But the implementation of the rigid sentencing guidelines was proceeding in tandem with a trend toward increasing the overall amount of punishment that was being inflicted on lawbreakers.

Together these policies dramatically increased the amount of punishment that was dispensed by the nation’s criminal courts. In addition, there were other reforms that increased the overall punitiveness of the criminal justice system, as the War on Prisoners continued to ramp up and new "weapons" were brought on line to target the enemy. These included the passage of various mandatory sentencing laws that required prison time to be imposed for a whole host of criminal convictions. Many states also passed mandatory enhancement provisions that automatically added prison time if certain elements—such as gun use—were proven, and repeat offender statutes that imposed extremely long prison sentences for recidivists.

This broad range of tough sentencing reforms began to be implemented in the early 1980s and continued through the 1990s; by 1994, literally every state had at least one mandatory sentencing law. Indeed, "repeat offender" laws were passed in forty-one states as well as in the federal system, and twenty-four

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states enacted “three strikes” laws that in many cases required life sentences to be imposed after a third conviction.65

Indeterminate sentencing and parole laws originally had been devised in the nineteenth century to allow for the discretionary release of prisoners who appeared to have been rehabilitated early, and for the retention of those who had not.66 As I noted earlier, neither practice now fit with the new goals of incarceration. States not only did away with indeterminate sentencing schemes because their logic—releasing prisoners on the basis of evidence that they had been successfully rehabilitated—added undesirable inequities in time served for ostensibly the “same” crime but also, for largely the same reason, because they sought to limit opportunities for parole. Early release on the basis of “good behavior” was anathema to a system in which justice was tied tightly to the nature of a prisoner’s commitment offense. By greatly restricting or eliminating “good time” provisions as well as parole, many jurisdictions ensured that prisoners would serve a much higher percentage of their prison terms before they were released.67

V. POLITICIZING PUNISHMENT AND DECONTEXTUALIZING CRIMINALITY

The shift to mandatory, determinate, and grid-based sentencing laws and the abolition of parole produced the intended consequence of removing discretion from the hands of certain criminal justice administrators who, as I noted earlier, had sometimes abused it.68 But it also had the unintended consequence of bringing prison sentencing into an openly political arena. The process by which this politicization occurred was subtle in nature, although the extremes to which it was taken were dramatic in effect.

As long as sentencing decisions were the province of presumably expert judges, prison administrators, and parole authorities—all of whom typically operated out of public view—the process remained relatively free of overt political influence. To be sure, most state judges were elected officials, prison administrators served at the pleasure of the executive branch of the state govern-

65 Daniel Kessler & Steven D. Levitt, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation, 42 J.L. & ECON. 343, 350-351 (1999).
66 For a discussion of some of the origins of indeterminate sentencing, see Haney, supra note 23.
67 By the end of the 1990s, some fourteen states had eliminated parole board releases entirely. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999). Indeed, many states passed “truth in sentencing” laws that required prisoners to serve a much higher percentage of the prison terms that they received at the time of sentencing. Id. at 2–3. By the end of the 1990s, some version of such laws had been enacted in thirty states and the District of Columbia. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 11-13 exhibit 1-5 (1998), available at https://www.ncjrs.gov/pdffiles/169270.pdf.
ment, and parole boards were typically composed of political appointees. Yet, direct political influence in any given case was more an exception than the rule that it would eventually become. This was in part because of a presumption that decisions over things like the appropriate length of a prison sentence or whether someone was a fit candidate for parole required specialized expertise, experience, and information that the lay public did not have. Individualized sentencing and parole decision-making was supposed to be based on the unique aspects of the case and sometimes complex characteristics and histories of the persons whose fates were being decided. To be sure, decision-makers sometimes—perhaps even often—lacked the necessary expertise to make such complex judgments, and they almost always proceeded without adequate resources with which to gather and analyze much needed information. They also rarely had either the option or inclination to reach creatively beyond a narrow range of standard criminal justice sentences to fashion alternatives that addressed a lawbreaker’s special needs in unique cases.

These practical limitations notwithstanding, the task of deciding on the amount of time that someone should be sentenced to serve in prison and, once there, how long they should stay, seemed ideally suited for decision-makers with at least some degree of training and expertise and who had access to detailed information about the case at hand. However, a basic truism—that “doing justice” in meting out punishment required a particularized knowledge and specialized expertise that the public presumably did not and could not have—was abandoned during the War on Prisoners. Once the offenses themselves—and the general moral condemnation and public outrage that were attached to them—became the only things in the sentencing process that mattered, the importance of in-depth, case-related information and specialized sentencing expertise was greatly reduced.

Indeed, everyone could (and seemingly did) have an opinion about how much punishment a particular crime “deserved.” The propriety of one or another punishment could now be debated openly in an increasingly politically-charged atmosphere. Public officials quickly learned that they could gain significant electoral advantage over more restrained and discreet political opponents by capitalizing on widespread fear and anger over crime—fear and anger that they often had helped to create and perpetuate. Increasing the amount of time that lawbreakers served for various and sundry crimes became a kind of political competition, with victory at the polls going to whomever could promise and deliver the most pain for the most prisoners.

Apparent “toughness” on crime-related issues—advocating more extreme forms and levels of punishment—soon became an absolute political vir-

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tue, akin to a patriotic duty that amounted to unquestioningly "supporting the troops" in the course of their War on Prisoners. Sentencing reforms that had made the harshness of the sentence a simple function of the perceived heinousness of the offense lent themselves perfectly to this political competition over increased levels of punishment. As politicians succeeded in raising the overall level of fear and anger over crime, and capitalizing on the "tough on crime" policies they offered in response, there was increasingly hostile public reaction to any criminal justice policies that smacked of leniency or restraint (no matter how promising or effective). As a result, the amount of pain administered by the criminal justice system was consistently ratcheted upwards and widely distributed on an unprecedented scale. This occurred with little or no debate over the wisdom of the policies or consideration of the way in which these new levels of punishment might be counterproductive as well as inhumane.

In addition to politicizing punishment, the new sentencing reforms passed in the course of the War on Prisoners mooted any meaningful consideration of the role of a lawbreaker's social history or the social context in which he had (mis)behaved. The question of who a lawbreaker was (and, by implication, why he or she committed the criminal offense) was explicitly excluded from consideration at the time of sentencing. As I noted earlier, focusing narrowly on the facts of the crime per se decontextualized our understanding of the nature of criminality as well as limiting sophisticated, nuanced, or in-depth inquiries into the level of culpability that should be attached to it. By making the social background of defendants and the circumstances under which crimes occurred irrelevant to the imposition of punishment, desert-based guidelines "eliminat[ed] the whole question of social justice."

These sentencing reforms also conveyed a narrow, decontextualized message to the larger society about the causes of crime. As David Greenberg and Drew Humphries observed, the "abstract moral preoccupation with the conduct of the individual offender" that had become the exclusive focus of these desert-based sentencing models diverted attention away from "the social situation of the criminal actor" as well as the structural conditions that preserved socioeconomic inequality and increased criminality among certain marginalized groups in society. By taking only the actions of individual offenders into account, they conveyed the misleading, but politically conservative, message that nothing else mattered—not to fair and just sentencing practices, effective crime control policies, nor to our understanding of the real causes of criminal behavior.

In a related way, because they required all lawbreakers within a given crime category to be treated more or less identically, these new sentencing models buttressed the notion that they were all equally culpable for what they had

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71 Christie, supra note 1, at 158.
done. This had several subtle but important consequences. One was a logical extension of the desert-based notion that the amount of punishment and the degree of moral blameworthiness could and should be equated with one another. As levels of punishment were driven up so too was the moral approbation that was attached to criminality.

In addition, the grids and guidelines that were implemented during this era of sentencing reform shifted focus away from the unique character of individual lawbreakers. Thus, even though they buttressed an individual-centered view of crime by exclusively addressing (through punishment) the person who had engaged in it, the non-criminal characteristics of that person were deemed irrelevant. Again, Christie put it best:

A political decision to eliminate concern for the social background of the defendant [as reflected in sentencing guidelines] involves much more than making these characteristics inappropriate for decisions on pain. By the same token, the offender is to a large extent excluded as a person. There is no point in exposing a social background, childhood, dreams, defeats—perhaps mixed with some glimmer from happy days—social life, all those small things which are essential to a perception of the other as a full human being.\(^{73}\)

These changes in sentencing practices and the public’s perspectives on crime had a dramatic impact on the front lines of the War on Prisoners—inside state and federal prison battlegrounds where day-to-day skirmishes occurred. As I noted above, when combined with the explicit rejection of the goal of rehabilitation, desert-based sentencing firmly established punishment as the main purpose of imprisonment and rendered treatment, education, and all other forms of prison programming increasingly superfluous. The old system had created incentives for prisoners to participate in prison programs and put some corresponding pressure on prison systems to provide them. The award of “good time” credits that reduced time spent in prison was often made contingent on evidence that a prisoner was “programming” while incarcerated, as were favorable parole considerations and even eligibility for more lenient treatment or extra privileges in prison (e.g., housing in “honor dorms,” entry into work release programs, and the like). When the new punishment-oriented, desert-based sentencing models reduced or eliminated these contingencies, the need to provide the kind of prison programming on which they had been based was correspondingly undercut.

Not surprisingly, removing both the incentive and the opportunity for institutional programming increased the levels of idleness that plagued many American prisons and intensified the debilitating effects of imprisonment. As official mandates to provide prison programs were curtailed, many administra-

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\(^{73}\) Christie, supra note 1, at 162.
tors stopped worrying about performing tasks that they were no longer budgeted for or evaluated on. The fact that prisoners serving fixed sentences that could not be shortened appreciably by earning “good time” credits had fewer incentives to take advantage of the increasingly rare opportunities to make productive changes or to develop in positive ways inside prison did not eliminate the potentially debilitating effects of the idleness to which they were subjected. Combined with unprecedented levels overcrowding, chronic idleness intensified conflict and the potential for violence inside many institutions.

There was another component to the process by which crime was decontextualized during this period. By the late 1960s and early 1970s, courts had become accustomed to receiving pretrial forensic evaluations, admitting expert testimony about the mental states of defendants, and considering sentencing recommendations from mental health professionals. However, the sentencing reforms implemented in the 1970s and thereafter operated to limit psychological input at every stage of criminal justice processing. A number of seemingly unrelated changes in criminal law doctrines combined to constrict consideration of psychological and psychiatric information in assessing guilt and assigning culpability. Because prison sentences now turned on the nature of the crime rather than the characteristics of the perpetrator and judges exercised very little discretion in the sentences they imposed, the value of forensic evaluations and psychological assessments—including psychosocial studies of a defendant’s background and social history—was greatly reduced. They were largely purged from the sentencing process.


For example:

The federal sentencing guideline revolution in the 1980s was perhaps the single most important development signaling the rise of harm and the decline of culpability in penal law. . . . The guidelines’ starkest indication of the centrality of harm is the “relevant conduct” provision, which holds defendants accountable for “all harm that resulted from” any “acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.” In many sentencing provisions involving harm, including the relevant conduct provision, the guidelines are silent on intent.


The only real exception to these trends was in death penalty prosecutions where the law allowed sometimes elaborate penalty or sentencing phases in which the background and character of the defendant was often the main focus of the inquiry to be conducted. Craig Haney, Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 351, 356–60 (James R. Acker et al. eds., 1998); Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547, 559–60 (1995). Even in this context, however, they are not always conducted or conducted properly. See, e.g., Craig Haney, Psychological Secrecy and the Death Penalty: Observations on “the Mere Extinguishment of Life,” 16 STUD. L. POL. & SOC’Y 3 (1997).
As Louk Hulsman has pointed out, the modern sentencing process produces its own "construction of reality by focusing on an incident, narrowly defined in time and place and it freezes the action there."\(^7\) Under desert-based sentencing, that incident or "frozen action" and its consequences are all that came to matter. As a result, "the individual then becomes separated out. He is in certain important ways isolated in respect of that incident from his environment, his friends, his family, the material substratum of his world."\(^8\) This decontextualization carries over to the prison experience as well, and it is what allows prisoners to be treated generically on the basis of their sentences (as determined by the magnitude of their crimes) rather than on their individual characteristics.

Among other things, then, the substitution of just deserts and incapacitation in place of rehabilitation also helped relegate concern for the general psychological well-being of prisoners and other mental health-related issues to the periphery of the new punishment-oriented prison regimes. Once prisons abandoned the goal of producing positive changes in prisoners, prison clinical and counseling staff members were placed in a much less central—indeed, a more precarious—position. Although mental health services were still needed for those prisoners who suffered from the most extreme forms of psychiatric disorders or acute breakdowns, the range of mental health problems that prisons routinely attempted to address was drastically narrowed.

Even prisoner classification—something in which clinical and program-oriented staff had once played an important role—was affected. Because there was now no longer any broad mandate for prisons to attempt to maximize the outcomes of incarceration, there was no pressing need to match inmates with the prison environments or program opportunities that were most likely to benefit them. Moreover, as the degrees of freedom that were available in making program and housing assignments were increasingly limited by overcrowding and scarce resources, assessing the needs of prisoners as they entered the prison system became superfluous; there were few if any options for addressing them. In many such systems, the classification process was quickly reduced to little more than an estimation of the security risk that a prisoner posed, a task that was typically performed by custody staff.

The same marginalizing of psychological judgments occurred at the point at which prisoners were released from prison. The kinds of psychologically oriented assessments that at least in theory had once been made about prisoners in the course of their regular parole reviews—how were they progressing over the course of their incarceration, had they benefitted from the programs that had been made available to them, were they working on a parole plan that seemed reasonably likely to result in a successful reintegration back into free

Moreover, compared to the hundreds of thousands of persons who were being sent to prison each year, these death penalty sentencing hearings were relatively few in number.


\(^8\) Id. at 683–84.
society—were rendered irrelevant by the new sentencing models that were passed in the 1970s.\footnote{Here, too, it is important to acknowledge that these judgments were often poorly made by persons who lacked the necessary training, experience, or inclination to do better. Robert Garber & Christina Maslach, \textit{The Parole Hearing: Decision or Justification?}, 1 \textit{L. & Hum. Behav.}, 261, 278–79 (1977); Christina Maslach & Robert M. Garber, \textit{Decision-Making Processes in Parole Hearings, in The Criminal Justice System: A Social-Psychological Analysis} 337, 364–65 (Vladimir J. Konečni & Ebbe B. Ebbesen eds., 1982). Maslach and Garber analyzed the decision-making of the California Adult Authority (the state’s parole board) in the early 1970s, just before it was dismantled by virtue of the introduction of determinate sentencing. They found that its parole hearings amounted to “a relatively short, diagnostic interview session that placed a heavy emphasis on psychological assessment,” but one in which very little information was shared by prisoners and hearing officers lacked the knowledge or training to make the diagnostic judgments they nonetheless rendered. \textit{Id.} at 358–59. However, acknowledging that they were not being done as carefully or correctly as they should was quite different from advocating that they should not be done at all.} Restrictions on the use of discretionary parole lessened the need for anyone to assess a prisoner’s suitability for release or make predictions about his likely adjustment once he or she left prison.

Thus, late twentieth century changes in legal doctrines and prison policies diminished the role of psychological knowledge in the criminal justice system in general and the prison system in particular. Indeed, one critical legal commentator has argued that desert theory and the closely related concept of retribution that had come to serve as primary justifications for legal punishment were attractive to the legal reformers of this era precisely \textit{because} they purged criminal justice decision-making of the taint of empirically-based social scientific disciplines: “[M]odern reformers sought to reintegrate punishment with the legal system and to reduce the criminal justice system’s involvement with social science. . . . In fact, one of the great attractions of retribution was that it did not rely upon empirical evidence for its validity.”\footnote{Samuel H. Pillsbury, \textit{Understanding Penal Reform: The Dynamic of Change}, 80 \textit{J. Crim. L. & Criminology} 726, 756–57 (1989).}

Indeed, a number of politicians also seemed eager to purge the legal system of what they perceived as an overly lenient, prisoner-oriented perspective that came from these interrelated disciplines. For example, George Deukmejian, who was the law-and-order governor of California in the early 1980s and a strong supporter of punishment for punishment’s sake, saw much wisdom in the proposals to limit or prevent judges and other legal decision-makers from relying on broader knowledge from disciplines outside the criminal justice system. Early in his first term he boasted that he had succeeded at bringing about “a renaissance of respect for the law” in part by thwarting the efforts of those who had wanted “to tie up our courts in endless litigation while they debated the deeper psychological and sociological factors at work in the criminal mind.”\footnote{\textit{Governor Credits Tougher Laws for Crime Drop}, \textit{Santa Cruz Sentinel}, Sept. 25, 1984, at C5 (internal quotations omitted).}
VI. RACE, PENAL POPULISM, AND THE POLITICS OF HYSTERIA

One final aspect of the War on Prisoners bears mentioning here. In the crass politicizing of the crime and punishment process that characterized the run up to this war, and that continued to solidify the public’s commitment to it as it was being vehemently waged, a stark juxtaposition was interposed in the debate over whether and how ferociously conflict with the enemy should be engaged. On the one hand, there was the media’s and “tough on crime” politicians’ depiction of the crime problem as threatening the very survival of the nation, one in which the enemy was portrayed as not just dangerous and depraved but representing a “new breed” of criminal who could not be contained or controlled by anything short of all-out domestic warfare. On the other hand, there was a dwindling group of “experts” who opposed the most drastic measures, counseled restraint, and recommended strategies that stopped short of outright warfare. It was composed of some progressive but increasingly vulnerable politicians, a contingent of criminal justice policymakers and professionals who were left over from the era of rehabilitation and still believed in its value, a number of (mostly federal) judges who remained concerned about violations of due process and the imposition of cruel and unusual punishment, and a smattering of academics who were willing to speak out as “conscientious objectors” against what was becoming an ever more popular war. Not surprisingly, they were depicted as “appeasers,” persons too naive, incompetent, and weak to do what was necessary to defend the nation against a menacing enemy that was poised to overrun us.

This rhetorical dynamic is a familiar feature of the process by which nations go to war. War by definition represents a radical separation from less drastic and hostile past policies. In order to make such an extreme and consequential break, the “status quo” (and those who defend it) is often depicted as not just ineffective but dangerous to national interests. Those who defend past, more “peaceful” policies that by implication prioritize the severe costs of going to battle and resist the temptation to demonize the enemy are typically discredited as uninformed, lacking “toughness,” “bleeding hearts,” and even as “sympathizers” with the enemy.

As this dynamic played out in the media and in political debates over which crime-fighting course to pursue, the consistent and frequently repeated juxtaposition of “pro-war toughness” and the fundamental “weakness” of those on the other side of the debate not only heightened public fears over crime but also helped to incite anger among citizens and to provoke demands that more punishment be meted out by tougher and more uncompromising politicians and criminal justice decision-makers. Elected officials and aspiring candidates who were on the “right” side of this debate also were able to channel widespread

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82 For a discussion of some of the ways in which these messages were conveyed in the media, in a separate but related context, see Craig Haney, Media Criminology and the Death Penalty, 58 DEPAUL L. REV. 689, 725–31 (2009).
public resentment that was based on a host of seemingly unrelated concerns and prejudices. These broader resentments were deftly combined with growing fear and anger over allegedly ineffective crime control policies, leading many citizens to clamor for the wholesale replacement of the officials ostensibly responsible for them.83

Arguing that “the people” rather than out-of-touch “experts” were better able to make the commonsense judgments that were required to prosecute this war, politicians essentially opened the punishment process up to widespread popular input. Since there were no obvious built-in limits to the punitive logic of the just deserts sentencing calculations that now guided criminal sentencing, the public was encouraged to weigh in on what it thought a particular (and usually particularly heinous) crime “deserved.” The punishment process, as well as the outcomes to which it led, became not only politicized, as David Garland has argued, but democratized. It was certainly true that, as he observed, “the balance of forces often shifted away from the logic of administration and expert decision-making towards a more political and populist style.”84

The judiciary in particular became a convenient symbol for criminal justice system-related frustrations and the “penal populism” that was correspondingly unleashed.85 Like many of the politically-inspired distortions that occurred in the 1960s and 1970s, these attempts to depict the nation’s judges as liberal or lenient were at odds with the facts. There was no evidence that judicial sentencing policies diverged significantly from past practices. In fact, incarceration rates in the allegedly liberal 1960s differed very little from those that had prevailed since the 1920s.86 Moreover, there was no evidence that judicial leniency—in those instances in which it did occur—was responsible for any net increase in crime.

Instead, it had become politically expedient during this period for some interest groups to make it appear as though liberal judges and lenient sentencing policies were the cause of rising crime rates. As a number of commentators have suggested, the political motivation for this distortion may well have been part of a strategy to mobilize the fear and anger that certain constituencies were experiencing over the social and political changes that had occurred in the 1950s and 1960s, primarily as a result of the Civil Rights Movement, and to redirect more

83 Katherine Beckett is especially instructive on the role that racial fears and resentments over civil rights played in the genesis of the “tough on crime” and War on Drugs political movements of this era. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 30–33 (1997).
entrenched opposition to other controversial legal and social policy changes that were underway in the 1960s and early 1970s. To be sure, constitutional claims for due process, equal protection, and protection from cruel and unusual punishment were being successfully lodged during these years by classes of persons who, just a short time earlier, had been excluded from making them at all. The federal judiciary, especially, had begun to play a significant role in extending a panoply of civil rights to sectors of society that had historically been denied them. Many of these judges, in turn, became easy targets for the anger and anxieties felt by certain political constituencies and interest groups who were deeply troubled by the legal changes taking place around them.

Rarely accurately characterized as principled (albeit debatable) extensions of the Constitution, these decisions were caricatured instead as acts of appeasement or capitulation, provoking even more angry responses from populist constituencies. Donald Jackson’s mid-1970s study of the “quality” of the American judiciary illustrated aspects of this dynamic at work. It began by acknowledging that what he called the “dreamy insulation” of the judiciary had been punctured by the “new floodlights of public attention [that had] been turned on them.” He was clear about the cause: “The Warren Court was the turning point. Its liberal, expansive decisions made the Supreme Court a constant focus of criticism and provoked a personal animosity that justices had never known before.” Buoyed by the swell in enthusiasm that the targeting of the judiciary had generated, politicians pressed for a war against the criminals (and the judges who insisted on coddling them); other decision-makers soon capitulated to those demands.

Katherine Beckett has convincingly demonstrated that the changes in public opinion that followed were more a product of politically-driven campaigns and selective media attention than a form of immediate popular response to changes in crime rates themselves. At the outset of the War on Prisoners—the early 1970s—the number of persons who ranked “crime” as the nation’s most important problem actually was declining and, for most of these years, was well below 10 percent of those surveyed. As late as 1982, nearly 60 percent of the American public still embraced a largely social contextual view of crime, attributing it to poverty and unemployment. But the nation was in the midst of an organized, focused campaign to blame and harshly punish individual lawbreakers, simultaneously disavowing any social contextual explanation for their criminal behavior.

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87 See generally Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994).
90 Id.
Beckett and others also have underscored the way in which the news media in the United States became heavily dependent on governmental sources for much of their information about crime-related issues. This meant that crime coverage increased when the government’s interest in the topic piqued, and that the particular messages, themes, and frameworks used to report crime-related news stories tended to reflect the government’s own view of the issues—a view that was becoming increasingly alarmist, individualistic, and punitive. The slant had real consequences for public opinion. Thus, Beckett demonstrated that between 1964 to 1974 the number of crime-related political speeches and governmental policy initiatives reported in the media and the media’s overall coverage of crime issues in general were both “significantly associated with subsequent levels of public concern” about crime; the reported incidence of crime itself, however, was not.

Julilly Kohler-Hausmann advanced a similar analysis. She emphasized that the nation’s harshly punitive response to what were perceived and reported as sharply rising crime rates reflected a policy choice, not an inevitability. After all, the presidential commissions I referred to earlier had been convened to address different aspects of the crime issue and had produced a set of consistent recommendations that were radically different from the policies of mass imprisonment that eventually were implemented. In fact, far from inevitable “reactions” to a national threat, Kohler-Hausmann suggested that “politicians proactively and creatively used the spectacle of punishing policy (among other things) to mobilize support and reshape the political terrain.” The War on Prisoners that ultimately commenced “was driven by a dialectical interaction between political elites and groups of common citizens who felt a loss of stature and privileges as economic opportunities narrowed and traditionally marginalized groups gained new rights.”

Thus, as Beckett observed:

[T]he mutual interdependence of the state and the mass media means that officials are uniquely privileged in the contest to signify social problems. This interdependence is expressed in and reinforced by media practices that lead journalists to rely on political elites for much of their information. The state, in turn, has developed and deployed an elaborate set of institutions aimed at “news management.” Officials thus enter contests over social issues with a relatively high degree of access to the mass media.

Beckett, supra note 80, at 6–7.

44 BECKETT, supra note 83, at 23 (emphasis added).

45 See Kohler-Hausmann, supra note 9, at 73.

46 Id.

47 There were, as I pointed out earlier, the Crime Commission, the Riot Commission, and the Violence Commission. See supra note 18 and accompanying text.

48 See supra notes 18–19 and accompanying text.

49 Kohler-Hausmann, supra note 9, at 73.

50 Id.
Indeed, in the wake of the Civil Rights Movement that immediately preceded the declaration of the War on Prisoners, many “common citizens” were especially resentful of the new rights they perceived being granted to one marginalized group in particular—African Americans. Lingering racial animosities facilitated their demonization as enemy “others” to be targeted with the most powerful crime-fighting weapons available, including more frequent and longer terms of imprisonment. Like Beckett and Kohler-Hausmann, Vesla Weaver has argued that racial politics were at the heart of the dramatically punitive turn that the nation’s crime policies took in the late 1960s and early 1970s, a turn that soon led to an era of mass imprisonment that I have characterized as a War on Prisoners.\footnote{Vesla M. Weaver, \textit{Frontlash: Race and the Development of Punitive Crime Policy}, 21 STUD. IN AM. POL. DEV. 230 (2007). As she concluded, “[p]unitive crime policies were born of racial struggle.” \textit{Id.} at 265. \textit{See also} Michael W. Flamm, \textit{Law and Order: Street Crime, Civil Unrest and the Crisis of Liberalism in the 1960s} (2005); Naomi Murakawa, \textit{Election to Punish: Congress, Race, and the American Criminal Justice System} (2005) (unpublished doctoral dissertation, Yale University).} She meticulously chronicled the numerous strategic initiatives—legislative and rhetorical—that Republicans and Southern Democrats in Congress employed in order to co-opt the issue of crime and to exploit it in the service of their opposition to civil rights. As one measure of their success in racializing the crime problem in the United States, note that in 1950 the prisoner population was comprised of 70 percent White inmates; however, by the year 2000 that disproportion had completely reversed, with some 70 percent of the nation’s bloated prison system comprised of Black and Latino prisoners.\footnote{Loic Wacquant, \textit{Deadly Symbiosis: When Ghetto and Prison Meet and Mesh}, 3 Punishment \& Society 95, 96 (2001).}

This was accomplished in part through one of the most significant offensives in the War on Prisoners, one waged against drug users in a major campaign commonly known as the War on Drugs.\footnote{For critical discussions of the “War on Drugs,” see \textit{Dan Baum}, \textit{Smoke and Mirrors: The War on Drugs and the Politics of Failure} (1996); \textit{James A. Inciardi}, \textit{The War on Drugs: Heroin, Cocaine, Crime, and Public Policy} (Franklin C. Graham et al. eds., 1986); \textit{Christina Jacqueline Johns}, \textit{Power, Ideology, and the War on Drugs: Nothing Succeeds Like Failure} (1992); \textit{Michael Tonry}, \textit{Malign Neglect—Race, Crime, and Punishment in America} (1995); \textit{War on Drugs: Studies in the Failure of U.S. Narcotics Policy} (Alfred W. McCoy \& Alan A. Block eds., 1992).} It took a disproportionate number of its casualties from African American communities. Indeed, as Michael Tonry concluded in the middle of this vigorous campaign, “[d]rug control policies are a major cause of worsening racial disparities in prison.”\footnote{Michael Tonry, \textit{Racial Politics, Racial Disparities, and the War on Crime}, 40 CRIME \& DELINQ. 475, 483 (1994).} Moreover, as he observed at the time, “[t]he people who launched the drug wars” had every reason to know “that the enemy troops would mostly be young minority males” who would be “disproportionately ensar[ed]” by the particular policies that were employed.\footnote{\textit{Id.} at 488.}
In fact, just a few months after Richard Nixon was inaugurated as president in 1969, the chief of his White House staff, H.R. Haldeman, revealed in his diary that Nixon had “emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”\textsuperscript{106} Implementing precisely such a plan, the Nixon Administration focused on “street crimes,” and eventually drug crimes, which they understood were easily coded as Black crimes for many resentful common citizens. Ramping up fear and anger over street crime, they promised a massive, high profile governmental response—what would eventually become, in essence, a war. It proved to be one of the most politically astute domestic initiatives that they undertook. Indeed, “[i]n the context of increasingly unruly street protests, urban riots, and media reports that the crime rate was rising, the capacity of conservatives to mobilize, shape, and express these racial fears and tensions became a particularly important political resource.”\textsuperscript{107}

Obviously, the Nixon Administration believed not only that the dormant but easily awakened “silent majority” harbored much resentment toward the civil rights advances its members perceived had come at their expense but also that these sentiments could be harnessed to their own political advantage. The criminal justice system proved an ideal arena in which to capitalize. As two commentators observed more generally, “[p]articularly during times of social change and turmoil, when levels of personal insecurity are great . . . [t]he criminal lawmaking process thus becomes a conflictual process in which politicians, responding to the real fears of the public, compete for the rewards available through the manipulation of symbolic messages.”\textsuperscript{108} Conservative politicians quickly learned to manipulate symbolic messages during this particular era of social change in part by making thinly veiled connections to these fears and then tying them to increasingly strident anti-judicial and anti-crime rhetoric and policies.\textsuperscript{109}

A common media technique relied on egregious criminal cases that were depicted graphically and emotionally and were misleadingly offered up as illustrative of widespread and excessive leniency that was said to pervade the criminal justice system. Thus, “[e]ach case, its horrible details played over and


\textsuperscript{107} KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 54 (Jerry Westby et al. eds., 2d ed. 2004).


\textsuperscript{109} Although the War on Prisoners was actively fought by politicians from across the political spectrum, it was initially declared and actively prosecuted by conservative politicians who used fear of crime to mobilize racial animosities. E.g., THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 138 (1992) (describing “a conservative politics that had the effect of polarizing the electorate along racial lines” beginning in the mid-1960s).
over again for a period of days or weeks, affirmed a growing belief about the threat of random violence to decent people who do nothing wrong and about the incompetence of the authorities to deal with it.\textsuperscript{110} These “horror stories” were typically blamed on liberal judges and “soft-on-crime” politicians, presumably the same ones who had worked to privilege the civil rights of undeserving minorities over those of hardworking middle-Americans. It was part of the powerful emotional base upon which the demand for tougher criminal laws and harsher prison sentences was founded.

Commentators critical of this technique dubbed it the “politics of hysteria,” and argued that it had created a “new American folktale of crime and justice” that was having a major effect on attitudes about crime and punishment.\textsuperscript{111} Like most good folktales, this one spoke to deep-seated feelings that were easier to acknowledge and express in symbolic terms. Many Americans felt that the institutions of government had failed them by placing their comfort and security at risk. But the fear of criminal victimization merely stood for a larger sense of vulnerability, one that included a loss of privilege, diminished levels of entitlement, and the specter of equality being wielded on behalf of groups that some regarded as clearly undeserving.

Expressions of fear and anger over crime gave these deeper insecurities and less socially acceptable complaints an outward and more legitimate form, providing a target at which feelings of resentment could be directed openly. But they also had significant distorting effects on the dynamics of crime and punishment as they eventually played out. These distorting effects “both arose from and encouraged a politics of fear that was now turning Americans away from principles that had governed their approach to law enforcement and penology for two centuries.”\textsuperscript{112}

Although the politics of hysteria had been employed since the early years of the War on Prisoners, it had perhaps its single most significant political impact on the country in 1988, when it helped determine the outcome of the national presidential election. Roger Ailes, Republican candidate George H.W.

\textsuperscript{110} ANDERSON, \textit{supra} note 66, at 7.

\textsuperscript{111} \textit{Id.} at 24. Studies of American attitudes about crime and punishment reflected this shift. Thus:

In 1972, 65.5 percent of the sample believed that the courts “were not harsh enough.” Two years later, this percentage had jumped 13 points to 78.5 percent. In subsequent years, the percentage endorsing harsher courts fluctuated but remained above this figure; it reached a high of 87 percent in 1982 and was 85.1 percent in 1994. Although this figure dropped by 7 percentage points in 1996, a stubborn reality remains: nearly four in five Americans believe that the courts in their communities are not sufficiently punitive.


\textsuperscript{112} ANDERSON, \textit{supra} note 66, at 24.
Bush’s media advisor, convinced Bush that he could energize a lackluster campaign by charging his Democratic opponent, Massachusetts Governor Michael Dukakis, with being soft on crime. The symbol chosen for this alleged softness was the Massachusetts prison furlough program and the fact that a murderer who was participating in the program had absconded from it and fled to the State of Maryland, where he committed a rape and stabbing.

In the political ad itself, television viewers saw a frightening picture of the prisoner—an African American man named Willie Horton—that depicted an “unshaven, unkempt face with slack jaw and half-closed eyes [that] looked subhuman, dirty, and dangerous,” followed by images designed to suggest that Dukakis was responsible for countless such persons being released from prison. The ad suggested that Dukakis, governor of the state of the time Horton had absconded from the Massachusetts prison system, was personally responsible for these events, as if he had participated in the decision to place Horton into the furlough program and that the tragic consequences of his placement could have been foreseen.

In fact, Dukakis had nothing directly to do with the case. He had played no role in the decision to place Horton in the work furlough program. Moreover, he was not responsible for having initiated the program itself, which had been introduced under a Republican administration and was in existence when Dukakis came into office years earlier: “The Massachusetts prison furlough system was started by Governor Dukakis’s Republican predecessor, Frank Sargent.” Indeed, the great majority of the individual states had such a furlough program, as did the federal prison system (to which Dukakis’s opponent, Bush, who was vice president at the time, was as nominally connected as Dukakis was to the one in Massachusetts). The Massachusetts program was lauded as one of the safest and most successful prison programs in operation anywhere in the country. “Virtually all prison authorities praise it, despite the occasional terrible incidents . . .”

These distortions notwithstanding, Horton came to symbolize not only the alleged “weakness” of Dukakis’s crime policies but the fears of a large contingent of voters that anything short of war represented a form of “surrender.” The imagery was powerful and effective, capitalizing on fears and prejudices that had been implanted over a much longer period of time. Political observers

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113 Id. at 232. Ironically, it was a picture that also “barely resembled William Horton, who normally paid serious attention to his appearance.” Id.
114 In addition to facing the attacks from the ads, Dukakis faced attacks from Bush, who misleadingly accused him of having let “murderers out on vacation to terrorize innocent people” and implied that Democrats could not “find it in their hearts to get tough on criminals.” Id. at 215.
116 Id.
117 Id. See also Daniel P. LeClair & Susan Guarino-Ghezzi, Does Incapacitation Guarantee Public Safety? Lessons from the Massachusetts Furlough and Prerelease Programs, 8 JUST. Q. 9, 10–11 (1991).
later concluded that it was perhaps the single most significant and persuasive piece of television advertising used in the entire 1988 presidential campaign. Indeed, it was the one ad that was thought to have ensured victory for the party and candidate that used it. Thus, as one commentator noted, although it was an “especially ugly episode of political demagogy” that “twist[ed] a tragic penal case,”118 it was particularly effective:

The tactic of the campaign committee was well calculated: according to the New York Times (November 9, 1988), “One voter in five yesterday said that the punishment of criminals was among the issues that mattered most to them, a remarkably high proportion for a Presidential election. And voters who mentioned crime as an important issue went about 2 to 1 for Bush.”119

The powerful psychological themes that were exploited in the Horton ad had become mainstays in the politics of hysteria. They had several dimensions to them. For one, the public’s fear of crime and the belief that it could only be controlled through tougher and more punitive policies was consistently reinforced and amplified by politicians and the media during the War on Prisoners. At a deeper level, the imagery that was used symbolically connected the crime problem to a host of other racially-motivated fears and not-so-subtly suggested that these concerns also had to be handled by unsympathetic, unyielding, and uncompromising politicians, legal decision-makers, and criminal justice offi-

118 Radzinowicz, supra note 7, at 437 n.33.
119 Id. at 438 n.33 (quoting E.J. Dionne Jr., Bush Is Elected by a 6-5 Margin with Solid G.O.P. Base in South: Democrats Hold Both Houses, N.Y. Times, Nov. 9, 1998, at A1, A25). The Willie Horton episode was not only instrumental in the outcome of the 1988 presidential election but also served as a cautionary tale for future generations of politicians. Thus, Tonry was right to conclude in the mid-1990s that the way that public discourse was “debased” by this episode in American politics “has made it difficult to discuss or develop sensible public policies” and that the resulting cynicism “explains why conservative politicians have been able year after year successfully to propose ever harsher penalties and crime control and drug policies that no informed person believes can achieve their ostensible goals.” Tonry, supra note 104, at 490. Its impact continues. Indeed, as a recent article in a national news magazine acknowledged more than two decades after Dukakis’s demise, badly needed reforms of the criminal justice system are still hindered by the lessons politicians took from the events:

Andrew Romano, Jim Webb’s Last Crusade: One in 31 Americans Is Lost in the Criminal-Justice System. As His Senate Career Winds Down, Webb Is Determined to Change That, NEWSWEEK, Sept. 19, 2011, at 50, 52.
cials capable of devising, implementing, and carrying out harshly punitive policies. Leaders who knew how to be tough on crime also presumably knew how to be equally tough in stemming this implicitly larger and perhaps even more threatening tide—an unruly tide of previously marginalized and disenfranchised persons clamoring for their civil rights and maybe more. There was an unstated unity of purpose that entailed neutralizing the claims of those groups—criminals and "others"—who had taken advantage of the political system and the “sympathizers” who had allowed them to do so and who now posed a threat to once unquestionably dominant interests and their conventional way of life.

The scenarios on which the politics of hysteria typically relied portrayed crime as primarily, if not exclusively, the freely chosen act of an unsympathetic, evil perpetrator, unencumbered by past history or present circumstance. Often, as in Horton’s case, the seemingly unprovoked and random nature of the act and the degree of personal violation it represented left analysts at a loss to explain it except by reference to the criminal’s own depravity. By omitting information about the perpetrator’s background and the social contextual factors that might have influenced the crime itself, these scenarios implicitly discounted the value of understanding the real causes of criminal behavior and developing effective programs to prevent it. As enemies of the state are often depicted in times of war, lawbreakers continued to be portrayed as dark and menacing figures, sometimes as monstrous, barely human forms. Because of the decontextualized way in which criminals were described, their crimes seemed to defy any structural or situational explanation.

Elected officials were not the only ones who were significantly influenced by the continuing tide of harsh rhetoric during this era. Judges were no match for the emotionally charged and politically inspired attacks that were aimed at them in the early 1970s. The constraints of the judicial role and the need to maintain the appearance of restrained impartiality meant that they were poorly positioned to respond to continuing, politically motivated attacks. However, as their critics perfected the politics of hysteria and the attacks became even more shrill, elected judges found their judicial careers in jeopardy. More broadly, the number of nuanced, thoughtful proposals about crime and punishment that were introduced in legislatures or brought before the voting public dwindled. Anyone courageous enough to advocate policies that addressed the underlying causes of criminal behavior instead of simply arguing in favor of increased punishment found that their positions were easily caricatured by more law-and-order-oriented opponents who dismissed them as naive and dangerous.

In one of the very early public indications that the War on Prisoners was being declared, the cover of Time Magazine pictured the grotesquely distorted face of a monstrous figure, beside the bold title, “The Curse of Violent Crime.” Ed Magnuson, The Curse of Violent Crime, TIME, Mar. 23, 1981, at 1, available at http://www.time.com/time/covers/0,16641,19810323,00.html. The New York Times described the Time cover illustration as “a surrealistic, semimetallic robber holding a pistol” and a similar Newsweek cover illustration as “a picture of a revolver pointing at the reader.” Jonathan Friendly, When News Magazine Covers Match, Is It a Coincidence?, N.Y. TIMES, Mar. 22, 1981, at 56.
ly soft on crime.\textsuperscript{121} When a nation is at war, those who oppose its bellicose policies are at risk of seeming not just wrong but unpatriotic.

The politics of hysteria had a lasting impact on the nature of "justice" in the United States. Levels of harsh punishment that were unheard of just a few decades earlier had become the unquestioned norm. The rhetoric with which the War on Prisoners was declared and that provided the banner under which it was fought crowded out any alternative public or political discourse. By the end of the twentieth century, a vast and punitive prison system had been erected that continued to be filled to capacity and beyond. Even a decade or more of modest but steady reductions in the crime rate did not dampen the enthusiasm for battle. The War on Prisoners raged on. Successful attempts to garner support for tougher crime control policies continued to be made through campaigns that juxtaposed the spectre of violent criminals allegedly left unpunished because of the decisions of soft-headed judges or naive criminal justice operatives. Commentators continued to make unsubstantiated claims about unspecified instances in which obviously dangerous lawbreakers still "roam[ed] freely in society without a prison sentence," arguing in favor of increased punishment and against those who would implement more moderate approaches to crime control,\textsuperscript{122} even as the nation attained the highest incarceration rate anywhere in the world and then consistently added to it.

 VII. CONCLUSION

A stark conclusion reached in the mid-1970s about the alleged failure of prison rehabilitation programs was instrumental in launching a new brand of

\textsuperscript{121} As two commentators observed:

An incumbent judge's decisions in criminal cases are easy targets for his opponents in the next election cycle, who can use almost any decision favorable to a criminal defendant, no matter how legally defensible, as grounds for portraying the incumbent as "soft on crime." As any savvy candidate knows, the public's attention is most easily captured by political advertisements accusing the incumbent of being too lenient on defendants charged with committing heinous crimes.

Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 V.A. L. REV. 719, 749 (2010) (footnotes omitted). One of the most egregious examples of this occurred in California, where the fact that the state supreme court headed by Chief Justice Rose Bird had overturned a number of death penalty verdicts in its review of the state's new and seemingly flawed death penalty statute was used as the basis of a campaign against the court on "soft on crime" grounds. John T. Wold & John H. Culver, The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability, 70 JUDICATURE 348, 349 (1987). In an unprecedented outcome, Bird and two other justices were removed from the court after voters failed to approve them in a statewide retention election. Lorie Hearn, Rose Bird, Grodin, Reynoso All Ousted, SAN DIEGO UNION-TRIBUNE, Nov. 5, 1986, at A1.

\textsuperscript{122} Thomas P. O'Brien & Derek J. Jones, A Balanced Approach for Corrections Policy Needed, 54 AM. PSYCHOLOGIST 784, 784 (1999).
penology that helped transform the American prison system. It is generally regarded as having commenced the decades-long campaign of mass imprisonment that I have characterized as the War on Prisoners. In essence, the anti-rehabilitationists contended that the hardened minds and bodies of tough-minded and unchangeable convicts were simply impervious to prison-based positive programs or treatment, as well as to whatever conditions—criminogenic or otherwise—they might have been exposed to in the free world. Rather, many politicians argued that the nation’s only hope to stem the rising tide of criminality was to declare war on its perpetrators, and to identify, contain, and incapacitate as many of these intractable, crime-prone offenders as possible.

In addition, however, a theory of “just deserts” was used to provide an important intellectual rationale for the War on Prisoners, establishing a philosophical and presumably more ennobling banner under which its soldiers could march. The government was not only doing battle with a demonized enemy that posed a significant national threat but also was pursuing a noble philosophical principle. People deserved to be treated this way, they had earned their misery, and meting out harsh punishment represented not only a form of collective self-defense but also a high moral calling. Determinate sentencing and the use of rigid sentencing guidelines correspondingly served to undermine the conceptual significance of social historical, situational, and contextual factors in understanding the underlying causes of crime and essentially to eliminate their role in determining the fair or just allocation of punishment.

Indeed, the sentencing formulas that came to dominate the American criminal justice system in the last several decades of the twentieth century formally excluded meaningful consideration of the influence of social background or history, individual life circumstances, and social contextual factors in the law’s response to criminal behavior. The very process by which courts reached decisions about specific terms of imprisonment required them to ignore these factors. In fact, judicial discretion and the presumption of expertise on which it was based were supplanted by legislative mandates and rigid guidelines that were fashioned in an openly political context, one where populist input was encouraged, pandered to, and easily manipulated. Combined with the abandonment of the goal of rehabilitation, these developments—an ostensibly philosophical justification for using prisons to inflict pain and little else, the legal decontextualizing of the nature of crime itself, and the democratizing of punishment process—formed the intellectual basis for criminal justice “reform” over the last several decades.

These changes were brought about in large part by an especially effective political strategy that amplified the public’s fear of crime and criminals, linked it to a broader set of grievances and resentments, and used the resulting popular movement to gain and solidify power. This political strategy depended heavily on making implicit connections between crime and race which, for certain groups at least, simultaneously facilitated the demonizing of criminals and the criminalizing of minorities.
In the course of this process, the public was repeatedly told that structural and social contextual explanations for deviance—indeed, any explanation that did not begin with the assumption that crime stemmed from the presumably innately depraved, fully autonomous decision-making of the persons who committed it—were little more than excuses that had been fashioned by crime sympathizers—a “criminals’ lobby,” as one law-and-order politician had termed them, whose members were akin to enemy sympathizers in the newly declared domestic war. Ironically, these views became deeply entrenched and persisted over the same period in which researchers were amassing an impressive database of carefully conducted studies that documented the causal importance of the very social historical and structural variables that the public was being taught to belittle or ignore.

Armed with a philosophical justification for harsh punishment in the form of just deserts, the pursuit of crime control policies and practices that spread and intensified the pains of imprisonment seemed the most rational and defensible response to a criminal class whose members were not only dangerous but innately wicked and irrevocably bad. It changed the way the “penal subject” was defined—seen now not only as an enemy whose fearsome characteristics were befitting of the wartime tactics and aggressive strategies that were being directed against him, but also as a decontextualized and despised “other,” an actor whose behavior lacked any humanizing or explanatory context.

The combination of the intense politicizing and racializing of crime and punishment, the widespread use of emotional images and misleading messages, and the underlying but not easily acknowledged fears and prejudices to which they appealed all had an enormous effect on prison policy in the closing years of the twentieth century. As I have argued, the entire scale of acceptable punishment was radically shifted, and our concepts of what constitutes fairness and


124 HANEY, supra note 25, at 127–29; see also supra note 76 and accompanying text. For additional information on this topic, see the studies cited in Craig Haney, Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation, 36 Hofstra L. Rev. 835 (2008).

125 As just one index of the “excessively punitive era” in which we have come to live, consider the increasingly widespread use of the sentence of “life without parole.” As the New York Times reported, although once virtually unheard of, it is now “routinely used, including in cases where the death penalty is not in play and where even an ordinary life sentence might be too harsh.” Editorial, The Misuse of Life Without Parole: Acceptable as an Alternative to the Death Penalty, Too Harsh in Other Cases, N.Y. TIMES, Sept. 13, 2011, at A26; see also ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, No Exit: The Expanding Use of Life Sentences in America 3 (2009) (reporting that approximately one out of every eleven persons in prison is serving a life sentence, with nearly one-third of them serving life without parole), available at http://sentencingproject.org/doc/publications/publications/inc_noexit/september2009.pdf. The American Law Institute’s study of the practice revealed that between 1992 and 2008—a period of consistently dwindling rates of violent crime—the number of persons serving life without parole terms tripled to over 40,000. AM. LAW INST., MODEL PENAL CODE: SENTENCING § 6.06 n. b(2) at
justice have been significantly transformed. Legal historian Lawrence Friedman described some aspects of this transformation nearly two decades ago: "The overwhelming fear of crime, the anger, the frustration, must surely be the main underlying cause. Screams of rage drown out the milder voices. The prison system bulges with prisoners." It still does. As I have tried to show, although there was much more to this process than fear, anger, and frustration, the very real screams of rage that eventually arose were amplified by the media and exploited by politicians to create a crowded, harsh, and often traumatic prison battleground.

Of course, I readily concede that the specific intellectual trends and internal shifts in the logic of punishment on which I have focused in this Article were themselves only partially responsible for the War on Prisoners that was waged during this period. To a certain extent, no broad-based punitive shift like the one that occurred over the last several decades of the twentieth century in the United States could be understood without a deep appreciation of the larger economic and political context in which it took place. Writing about a different historical period, Graeme Newman put the issue clearly:

[W]e may say that the role of intellectual technology in reform in penology is considerable. . . . However . . . we must recognize that, while academic ideas may have shaped the changes that came about, changes did not occur until the social, political, and economic conditions were ripe.”

Similarly, it would be naive to assume that the changes in the intellectual technology that I have discussed in this Article could have had appreciable, independent effects on prison policy absent a broader set of conditions that were not only "ripe" to receive them but also had a very large role in generating them in the first place.

In fact, as I have tried to show, the intellectual changes that occurred and were used to support new prison policies did not represent some natural progression or evolution in thinking about questions of crime and punishment. Rather, certain emerging political interests and factions selectively publicized and promoted what they characterized as "new thinking" about crime and punishment to transform popular discourse about these issues and solidify their

28 (Tentative Draft No. 2, 2011), available at http://ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf. Moreover, a disproportionate number (56.4%) are African American, greater even than their already disproportionate percentage of the overall prisoner population (37.5%). NELLS, supra at 11, 13.


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political power. Yet the “new” ideas were less innovative than expedient, fostered in a politically charged atmosphere and legitimized in large part because they resonated with and were useful in advancing increasingly unquestioned political views.

There have been some encouraging signs in recent years that the War on Prisoners may be coming to an end. Much attention is now being focused on the sheer expense that is required to maintain the massive prison system that we constructed over the more than three decades during which this war has been waged. In the face of a continuing fiscal crisis that has badly compromised federal and state budgets, at least some lawmakers have been forced to choose between continuing the “tough on crime” policies of the past or moving to more cost-effective “smart on crime” alternatives that rely less reflexively on prison. For example, there is recent news that even a formerly pro-prison state like Texas has reduced its overall prison population enough to undertake the almost unheard of step of actually closing a prison.

Yet budget crises can also serve as a justification for cutting services to prisoners and implementing policies that are likely to worsen their plight. Thus, in Arizona, correctional officials cited cost savings as the reason for implementing a new policy—one that, to me at least, appeared to be an extension of the mean season of correctional warfare against prisoners and their families—by requiring anyone who wished to visit a prisoner to pay a fee for the required background check.

The complex relationship between the salience of crime as a social problem, the advance of certain political agendas, and the rise of punitive attitudes among the American public has been addressed in a number of books, many of which were published in the 1990s, when its consequences were finally recognized clearly and felt acutely. See, e.g., KATHRYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND (Irving E. Rockwood ed., 1995); ANDERSON, supra note 66; BECKETT, supra note 83. For an earlier discussion of these issues, see STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY (1984).

Texas is the nation’s third largest prison system, behind California and the Federal Bureau of Prisons. State officials recently closed a 102-year-old prison that was located in Sugar Land, Texas, for largely fiscal reasons: “The Texas Legislature had agreed to end funding for the Central Unit in Sugar Land on Wednesday, and its 1,000 inmates and 300 staff have been transferred to other facilities. . . . Shutting the Sugar Land facility is expected to save the state about $12.4 million a year . . . .” Robert Stanton, Texas Closes 1st State Prison, Saves $12.4 Million, S.F. CHRON., Sept. 1, 2011, at A11, available at http://articles.sfgate.com/2011-09-01/news/29952187_1_prison-system-prison-property-land-value.


New legislation allows the [D]epartment [of Corrections] to impose a $25 fee on adults who wish to visit inmates at any of the 15 prison complexes that house state prisoners. The one-time “background check fee” for visitors, believed to be the first of its kind in the nation, has angered prisoner advocacy groups and family members of inmates, who in many cases already shoulder the expense of traveling long distances to the remote areas where many prisons are located.

Id.
Whether a ceasefire is finally declared and a post-war era in which we pursue alternative approaches to crime control that are both effective and humane is ushered in or the current budget crisis produces little more in the way of reform than prodding lawmakers into devising ways of continuing to fight on the cheap remains to be seen. With such drastically different outcomes in the balance, any hope of devising a realistic strategy to achieve a much needed, lasting peace is likely to turn on our ability to unpack the full range of intellectual changes that the War on Prisoners brought about. In the course of this process, the scope of the transformations that occurred in our conceptions of "justice" in the course of this war should not be underestimated.