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## Curing America's Addiction to Prisons

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*Prisoners' Legal Services of New York*

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# CURING AMERICA'S ADDICTION TO PRISONS

David C. Leven\*

## I. Introduction

"Attica is every prison; and every prison is Attica."<sup>1</sup> So concluded the New York State Special Commission On Attica in its report, twenty years ago, one year after the Attica prison rebellion. That the rebellion occurred at Attica rather than some other prison "was probably chance," as "the elements for replication [were] all around us."<sup>2</sup>

Attica was, and is, a symbol of failure. In 1971, as today, prisons are mostly in remote locations, far from public scrutiny. "We are still warehousing human beings in fortresses plagued by racism, overcrowding and dangerous conditions."<sup>3</sup> In fact, forty states are under court order to remedy unconstitutional prison conditions.<sup>4</sup> Prisons still emphasize security rather than rehabilitation as though those existing within their walls will not return to society. Most offenders will return in less than three years.<sup>5</sup>

Our prisons have failed their inhabitants. Prisoners must endure a wasteful, if not destructive, period of their lives in an environment that makes it difficult to maintain dignity and self-esteem. Our prisons have failed society because they do not, generally, provide an experience that is likely to help offenders overcome the obstacles that led them to make mistakes for which they are now being punished. Instead, they "reinforce the violence and exploitation that many offenders were sentenced to prison for in the first place."<sup>6</sup> They have failed because they do not promote restoration, a key to successful reintegration, and nobody benefits "when offenders are more danger-

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1. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, *ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA*, at xii (1972).

2. *Id.*

3. Haywood Burns, *Attica Means*. . . , National Lawyers Guild/New York Chapter Annual Dinner, at 22 (Mar. 6, 1992).

4. THE EDNA MCCONNELL CLARK FOUNDATION, *AMERICANS BEHIND BARS* 3 (1992) [hereinafter CLARK FOUNDATION].

5. CRIMINAL JUSTICE INSTITUTE, INC., *THE CORRECTIONS YEARBOOK, INSTANT ANSWERS TO KEY QUESTIONS IN CORRECTIONS: ADULT CORRECTIONS* 17 (1992).

6. Ruth Morris, *Restorative Justice: Path to the Future*, ODYSSEY, Spring 1992, at 90.

ous when they are released than when they entered prison."<sup>7</sup> If they ever did deter crime, prisons probably do not now.<sup>8</sup> They also do not prevent recidivism.

A study of a sample of prisoners released in 1983 from prisons in eleven states indicated that 62.5% were rearrested for a new felony or serious misdemeanor, and 41.4% were returned to prison or jail.<sup>9</sup> Moreover, prisons are too costly and house many who simply do not belong inside these depressing structures.<sup>10</sup> In sum, prisons are a disastrous and costly failure in financial and human terms.

In the 1980s this nation's addiction to imprisonment as a primary way of dealing with social problems and the unlawful conduct of poor people became a serious public health and societal problem. Its numerous adverse consequences will be discussed in this Essay.

Those in power must be challenged to confront their addiction to prisons and modify their attitudes and behavior. They must open their vision to adopt and create rational strategies to restore those who have violated the law, and thereby to create a safer society. This Essay proposes that a restorative model of justice replace our failed punitive model. By changing their vision and implementing constructive reforms, policymakers can conquer an addiction that is wasting lives and billions of dollars.

## II. The Prison Population Explosion

During the last decade, in New York and the nation, the prison population skyrocketed. In 1980, there were 329,821 state and federal prison inmates. Ten years later, that number had increased by 134%

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7. *Id.*

8. "Many experts on poverty in America say that every day life in the nation's inner cities has grown so desperate and dreary that the threat of incarceration has lost much of its power to scare." Don Terry, *More Familiar, Life In A Cell Seems Less Terrible*, N.Y. TIMES, Sept. 13, 1992, at A1.

9. LAWRENCE A. GREENFELD, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONS AND PRISONERS IN THE UNITED STATES 21 (Apr. 1992).

10. New York State Corrections Commissioner, Thomas A. Coughlin, III, stated, in 1986, when the prison population was about 35,000, compared to 62,000 today "we can handle 50,000. But what if instead we want to be reasonable [and] thoughtful? . . . Does the twenty year old junkie who burglarizes belong in Attica costing us \$26,000 a year or do we do better as a society and for the kid by mandating a drug rehabilitation program." Campaign for Common Sense in Criminal Justice, *Needless and Costly Incarceration: The Misguided Plan to Add 200 New Beds at Bedford Hills Correctional Facility 2* (Mar. 1986).

City Corrections Commissioner, Catharine Abate, recently stated, "What is not recognized by the public is that society does not have the resources to continue to build more prisons for the growing number of people it is prosecuting." CLARK FOUNDATION, *supra* note 4, at 28.

to 773,124.<sup>11</sup> Last year, the rapid growth continued, increasing by 6.5% to a new record high of 823,414.<sup>12</sup> As a result, almost 1,000 new prison beds were required *each week*.<sup>13</sup>

The United States now has the highest rate of incarceration of any industrialized nation in the world; including jail inmates, there were 455 prisoners per 100,000 population. In South Africa, which has the second highest rate of incarceration, the rate is 311 prisoners per 100,000 population.<sup>14</sup>

During the 1980s, the prison population grew faster in New York than across the country, beginning the decade at approximately 21,000 inmates and ending at 51,000, a 150% increase.<sup>15</sup> The population is now almost 62,000.<sup>16</sup>

### III. The Cost Of Imprisonment

Nationwide, and in New York, the growth of our prisons has come at great expense to taxpayers. Spending on corrections is the second fastest growing item in state budgets. In New York, there has been a 13% annual rate of increase since 1986, absorbing much of the growth in state revenues.<sup>17</sup> Construction of new prison space across the country in fiscal year 1989 alone cost \$6.7 billion, a 73% increase over the previous year.<sup>18</sup> And during the last decade, per capita spending on prisons and jails has increased by 218%.<sup>19</sup>

In New York, twenty-seven prisons were opened between 1983 and 1990. Over the next thirty years, the total cost to taxpayers will be \$5.4 billion, or \$180,000 per bed, with interest on the \$1.6 billion in bonds that were issued to pay for the construction. In debt service

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11. TRACY L. SNELL AND DANIELLE C. MORTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1991, at 1 (May 1992).

12. *Id.*

13. *Id.*

14. MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: ONE YEAR LATER 1 (Feb. 1992).

15. STATE OF N.Y. DEP'T OF CORRECTIONAL SERVS., BUREAU OF RECORDS AND STATISTICAL ANALYSIS, DISTRIBUTIONS OF INMATE POPULATION AS OF MAY 5, 1980 AND JANUARY 2, 1990 (Preliminary Figures).

16. STATE OF N.Y. DEP'T OF CORRECTIONAL SERVS., BUREAU OF RECORDS AND STATISTICAL ANALYSIS, DISTRIBUTIONS OF INMATE POPULATION AS OF NOVEMBER 2, 1992 (Preliminary Figures).

17. CLARK FOUNDATION, *supra* note 4, at 5.

18. *Id.*

19. THE NAT'L COMM'N ON CRIME AND JUSTICE, A CALL TO ACTION, AN ANALYSIS AND OVERVIEW OF THE UNITED STATES CRIMINAL JUSTICE SYSTEM, WITH RECOMMENDATIONS 23 (1991).

alone, the state pays \$670 per cell, per month.<sup>20</sup> Ten years ago, New York State spent about \$840 million annually for prison operating and construction costs. Now, it costs close to \$3 billion, yearly, for total prison expenditures, a three-fold increase, which amounts to \$8 million a day.<sup>21</sup> It now takes the combined state taxes of 17 New Yorkers to keep just one inmate in prison for a year, and the taxes of 193 New Yorkers to build one cell.<sup>22</sup>

These skyrocketing costs are likely to continue. For example, based on a projected prison population of 74,000 (which now appears low) by the year 2,000, it is estimated that it will cost New York taxpayers approximately \$2.7 billion to staff a prison system in the fiscal year 1999-2000. This is more than three times the \$841 million labor cost in fiscal year 1987-1988.<sup>23</sup>

While spending on prisons in New York has dramatically increased, spending on other programs designed to help and protect the rights of offenders has decreased.<sup>24</sup> New York, like most other states, has not taken cost-saving measures to limit the growth of its prison population. For example, in 1990, California added more prisons than any other jurisdiction to what was already the country's largest prison system, and simultaneously cut funding to education by \$2 billion.<sup>25</sup> Since 1982, counties nationwide have been spending more on criminal justice than on education,<sup>26</sup> a difference that reached \$2 billion in 1988.<sup>27</sup> The dramatically increased cost of imprisonment has left little money for programs that substantially benefit many Americans.

#### IV. Who Is Going To Prison?

##### A. Far Too Many Minorities

Our current sentencing policies have resulted in the incarceration

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20. THE CORRECTIONAL ASSOCIATION OF NEW YORK, BASIC PRISON AND JAIL FACT SHEET (1991) [hereinafter PRISON FACT SHEET].

21. *Id.*

22. Jim Murphy, New York State Coalition for Criminal Justice, Update 15 (Summer 1992).

23. OFFICE OF THE STATE COMPTROLLER, STATE OF N.Y., DIV. OF MANAGEMENT AUDIT, STAFF STUDY ON THE HIGH COST OF IMPRISONMENT IN NEW YORK VS. OTHER STATES 13 (Mar. 1990).

24. For example, the budgets of the Division of Probation and Correctional Alternatives and the Commission of Correction were reduced last year.

25. LYNN S. BRANHAM, THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE 22 (Apr. 1992) (author is a member of Criminal Justice Section of the ABA).

26. WILLIAM J. CHAMBLISS, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, TRADING TEXTBOOKS FOR PRISON CELLS 3 (June 1991).

27. *Id.*

of a disproportionate number of minorities and women, primarily nonviolent offenders and offenders who are uneducated, unemployed and who have a drug problem.

According to Norval Morris, former Dean of the University of Chicago Law School, "[t]he whole law and order movement that we have heard so much about is — in operation — anti-[African American] and anti-underclass. Not in plan, not in design, not in intent, but in operation."<sup>28</sup>

Although minorities make up only a small percentage of the nation's population,<sup>29</sup> close to half of the prisoners are African-American.<sup>30</sup> Most disturbing is that nearly one in four African-American men in the United States between the ages of twenty and twenty-nine is under the control of the criminal justice system.<sup>31</sup> The difference in incarceration rates for these young minority men and white men is astonishing.

In New York, for example, African-American males, between the ages of twenty and twenty-nine, are twenty-three times more likely to be locked up than young white men. Eleven percent of African-American males between the ages of twenty and twenty-nine are confined in a New York State prison or local jail. Young Latino men are eleven times more likely to be imprisoned than young white men in New York and about 6% of young Latinos are confined in a state prison or local jail.<sup>32</sup>

One reason for this great disparity is the disproportionate impact of the "drug war" on African-Americans and Latinos. In New York, minorities comprise over 90% of those incarcerated for drug crimes, while whites occupy almost 50% of state funded treatment slots. Yet studies by the FBI and the National Institute on Drug Abuse indicate that only about 12% of the nation's drug users are African-Americans.<sup>33</sup> These disparities raise serious questions about the integrity of

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28. THE CORRECTIONAL ASS'N OF N.Y. AND N.Y. STATE COALITION FOR CRIMINAL JUSTICE, *IMPRISONED GENERATION: YOUNG MEN UNDER CRIMINAL JUSTICE CUSTODY IN NEW YORK STATE 1* (1990) [hereinafter *IMPRISONED GENERATION*].

29. Less than 25%. AMERICAN CORRECTIONAL ASS'N, *DIRECTORY: JUVENILE & ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES*, at xxvi (1992).

30. *Id.*

31. MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN IN THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3* (Feb. 1990).

32. *IMPRISONED GENERATION*, *supra* note 28, at 2.

33. CLARK FOUNDATION, *supra* note 4, at 13. But as Commander Charles Ramsey, who supervises the Chicago Police Department's Narcotics Division said, "[t]here is as much cocaine in the Sears Tower or in the Stock Exchange as there is in the [African-American] community. But those guys are harder to catch. Those deals are done in

our criminal justice system.<sup>34</sup>

### B. Primarily Nonviolent Offenders

Two-thirds of those sent to prison are convicted of property, drug or other nonviolent crimes.<sup>35</sup> This proportion is growing. In New York, for example, the total number of prison commitments increased almost three-fold from less than 8,000 in 1980 to more than 23,000 in 1990. The number of commitments for violent felonies, however, decreased from 7,926 in 1983 to 7,435 in 1990. The percentage of commitments for violent offenders accordingly decreased from 63% of the total prison commitments in 1983 to 32% in 1990. On the other hand, the number of those convicted of drug offenses increased by more than 1000% from 886 in 1980 to 10,785 in 1990. Their percentage of total prison commitments accordingly rose four-fold from 11% in 1980 to 46% in 1990.<sup>36</sup>

### C. Primarily Uneducated and Unemployed Offenders With Drug Problems

The statistics indicate that a disproportionately high number of minority men and women are sent to prison, largely for drug or other nonviolent crimes.<sup>37</sup> Other characteristics of the population are similarly revealing. For example, 40% of all state prison inmates are unable to read and only 38% have completed high school. By contrast, 85% of all men age twenty to twenty-nine, in the general population, have high school diplomas. And while 80% of the country's male population of working age is employed full-time, only 33% of prison inmates were employed full-time when they were arrested.<sup>38</sup> A recent study revealed that more than 70% of those arrested in San Diego, New York, Philadelphia and Chicago tested positive for one or more

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office buildings, in somebody's home. . . . But the guy standing on the corner, he's almost got a sign on his back. . . ." IMPRISONED GENERATION, *supra* note 28, at 5-6.

34. "Why is it that those who are white or those who are rich whose drug use is exposed often get drug treatment and often applause for getting that treatment while drug users who are [African-American] and poor so often get incarcerated?" BRANHAM, *supra* note 25, at 44.

35. JAMES AUSTIN AND JOHN IRWIN, NAT'L COUNCIL ON CRIME AND DELINQUENCY, WHO GOES TO PRISON 1 (1990).

36. PRISON FACT SHEET, *supra* note 20.

37. See, e.g., Frances X. Clines, *For No. 83-A-6607, Added Years for .35 Ounces; 20 Years After Law Mandating Prison Terms, Few of Targeted Kingpins Fill Cells*, N.Y. TIMES, Mar. 23, 1991, at B1.

38. CLARK FOUNDATION, *supra* note 4, at 12.

drugs.<sup>39</sup>

#### D. Rising Rate of Women in Prison

The number of women in prison more than tripled from 1980 to 1990, from 12,331 to 40,484. In the aggregate, 5.5% of all those incarcerated were women, compared to about 2% in 1970. During the past two decades, the female prison population grew by almost 700% while the male prison population grew by less than 400%.<sup>40</sup>

In New York, from 1980 to 1990, the number of women prisoners increased from about 600 to 2700 — a 450% increase.<sup>41</sup> The number of women incarcerated for nonviolent crimes is growing faster than the number of men incarcerated for nonviolent crimes. The “drug war” seems to be having a disproportionate impact on women. For example, the proportion of the female population imprisoned for drug offenses rose from 42.4% to 66.4% between 1987 to 1989. Male drug commitments increased from 32% in 1987 to 43.7% in 1989.<sup>42</sup> Most incarcerated women have children, and over half were victims of physical abuse either as children or adults.<sup>43</sup>

#### E. Drugs and Law Enforcement

Despite the astronomical increase in the number of people incarcerated for drug offenses in the 1980s, the war on drugs has been and will continue to be a total failure. Although more and more money has been poured into the “drug war” during the past decade,<sup>44</sup> drug use continues unabated. It is estimated that thirteen million Americans, more than 6% of the population, use illegal drugs.

Law enforcement operations have had virtually no effect on the price or availability of illegal drugs in the United States. A standard ten dollar or “dime” bag of heroin with a purity of 55% is currently available on New York City streets for five dollars. That same price could buy heroin that was only 5% to 7% pure as recently as five years ago. Crack is now being sold at an all time low of seventy-five

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39. NATIONAL INSTITUTE OF JUSTICE, DRUG USE FORECASTING, 1989 ARREST REPORTS (1990).

40. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 636 (1991).

41. STATE OF N.Y. DEP'T OF CORRECTIONAL SERVS., RECORDS AND STATISTICAL ANALYSIS.

42. THE CORRECTIONAL ASS'N OF N.Y., WOMEN IN PRISON FACT SHEET (1990).

43. RUSS IMMARIGEON & M. CHESNEY-LIND, NAT'L COUNCIL ON CRIME AND DELINQUENCY, WOMEN'S PRISONS: OVERCROWDED AND OVERUSED 6 (1992).

44. The Bush administration spent nearly \$12 billion in 1992 on the “drug war,” more than double the amount spent in 1984. Joseph B. Treaster, *20 Years of War on Drugs and No Victory Yet*, N.Y. TIMES, June 14, 1992, § 4, at 7.

cents a dose.<sup>45</sup>

Profits are too high for drug traffickers to be curtailed by law enforcement activities. Moreover, drug users are not deterred by the possibility of imprisonment. It is time to rethink our nation's policy toward drug use so that we can stop wasting tens of billions of dollars on law enforcement, the court system and prisons in a futile effort to reduce drug usage.

We must recognize that drug abuse, like alcohol abuse, must be treated as a public health problem rather than a criminal problem. We must encourage tolerance and compassion for those who use drugs, rather than condemn them. The first step in this reformation is to stop sending thousands of drug users to prison, when it would be far more humane and cost-effective to require drug rehabilitation.

In New York, legislation was enacted in 1992 that permits the court to defer, for twelve months, the sentence of a first felon convicted of a C,D, or E drug felony if the court believes that public safety does not require imprisonment and the individual could benefit from rehabilitation.<sup>46</sup> This law should be expanded to include second felony offenders, to prevent thousands of low-level drug offenders from being sentenced to mandatory terms of imprisonment when convicted of another felony within ten years of a prior felony conviction.

The cost of drug treatment is significantly less than incarceration. It costs \$30,000 per year to incarcerate an inmate in a New York State prison. Drug-free residential programs cost about \$14,000 annually per person, drug-free outpatient treatment costs about \$5,000 a year per person, and methadone maintenance costs about \$3,200 a year per person.<sup>47</sup>

Those who support treatment, including police organizations, must join together to encourage a vast increase in the number of treatment facilities for drug abusers. Treatment should be made available to all who could benefit from it.<sup>48</sup> We cannot continue to condemn drug addicts to prison, when we fail to provide them with needed medical help.<sup>49</sup>

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45. Joseph B. Treaster, *Hospital Data Show Increase in Drug Abuse*, N.Y. TIMES, July 9, 1992, at B1.

46. See Omnibus Revenue Act of 1192, AL0565, S7589, §§ 282, 283.

47. CORRECTIONAL ASS'N OF N.Y., THE CORRECTIONAL ASS'N REPORTER, June 1989.

48. Now, lower class, predominantly minority, users and dealers receive punishment and incarceration while the middle and upper classes, mostly white, go for treatment, that is wholly or partially paid for by third party insurance.

49. It has been estimated that there are 500,000 drug addicts in New York, but only 43,000 drug treatment slots. Sandra Estepa et al., *Needle Swap Programs Found To Reduce HIV Transmission*, N.Y. TIMES, June 17, 1992, at A24 (Letter to the Editor).

In addition, we should seriously consider the legalization of drugs on an experimental bases as an alternative to the failed war on drugs. Legalization would relieve our overburdened criminal justice system, including jails and prisons. It would save billions of dollars per year in law enforcement, stem or halt the growth of organized crime, and substantially reduce street violence, including drug-related homicides, robberies and burglaries. In addition, legalization would allow billions of dollars to be diverted toward drug prevention and drug treatment. It is unlikely that the legalization of drugs would, in the long run, increase drug use in America.

Indeed, a great deal might change for the better if drugs were legalized. We must recognize what drug legalization could do for society:

It is not a capitulation to the drug dealers — but rather a means to put them out of business. . . . It is not repudiation of the “just say no” approach — but rather an appeal to government to provide assistance and positive inducement, not criminal penalties and more repressive measures, in support of their approach. It is not even a call for the elimination of the criminal justice system from drug regulation — but rather a proposal for the redirection of its efforts and attention.<sup>50</sup>

## V. Prisons, Crime And Public Safety

Because prison populations skyrocketed in the 1980s, it might be conjectured that crime has now been reduced because of our incarceration policies. This is not correct.

Placing more people in prison has little effect on the rate of crime. For example, in California, there were 22,600 adult inmates in 1980. Now there are close to 100,000. Thus, the number of prisoner's increased almost 450%, while the general population increased only 25%.<sup>51</sup> However, this vast increase in incarceration did not stem the amount of crime in California. In 1980, there were 1,118,417 index crimes reported by the police. In 1990, 1,965,237 crimes were reported.<sup>52</sup> Again, the number of crimes outpaced the overall increase in the California population. If putting more people in prison is suppose to reduce crime, it certainly did not happen in California despite a huge increase in the number of prison beds. California's addiction to imprisonment has been both ineffective and expensive.

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50. Ethan A. Nadelmann, *The Case for Legalization*, in *THE CRISIS IN DRUG PROHIBITION* 42 (David Boaz ed., 1990).

51. 1990 UNITED STATES CENSUS.

52. Roger J. Lauer, *Methvin Uses Smoke, Mirrors*, *CORRECTIONS TODAY*, May 1992, at 16, 18.

These statistics, consistent with those nationwide, reveal that there is no nexus between crime and incarceration rates. Increasing the prison population simply did not reduce crime.

Clearly, incarceration has an incapacitation benefit. Those who are in prison will not generally be able to commit crimes against the public. However, we have only a limited ability to predict future criminal activity and, therefore, cannot determine how many people incarcerated would continue to commit crimes if they were simply punished in their communities. Community supervision through, for example, a home confinement program with electronic monitoring will, in many cases, prevent a criminal from committing further crimes as effectively as incarceration would.

Indeed, it is possible that the experience of prison causes releases to commit more crimes than if they had not been incarcerated. One study compared the recidivism rates of prisoners for two years following release from prison with recidivism rates of a matched group of probationers.<sup>53</sup> Prisoners were shown to have had higher recidivism rates than similar offenders who had been placed on probation: 68% of the prisoners were rearrested within the two year period whereas 63% of the probationers were rearrested.<sup>54</sup> Although the authors caution us about drawing conclusions from the data, this study and the aggregate data on crime and punishment trends demonstrate that, at the very least, incarcerating many offenders does not provide us with a safer society. In that respect, our prisons have not been a worthwhile investment.

## VI. Restorative Justice — A New Model That Will Work

The sentencing policies of the last decade resulted in an unprecedented explosion in the prison population without significantly reducing crime and without having a substantial impact on drug trafficking or usage. Building more prisons is clearly not the answer.

Instead of relying so heavily on incarceration, we can choose more rational ways to respond to offenders and still protect the public. What is required is a new vision of corrections — one that reflects a caring community rather than one oriented toward punishment.<sup>55</sup> What is required is a shift from a punishment model of justice to one that emphasizes restoration. This can begin with a recognition by the

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53. JOAN PETERSILIA ET AL., *THE RAND CORP., PRISON VERSUS PROBATION IN CALIFORNIA: IMPLICATIONS FOR CRIME AND OFFENDER RECIDIVISM* (1986).

54. *Id.* at 23.

55. We should probably dismantle our whole criminal justice system, which is so unfair, unsuccessful and largely irrational. Unfortunately, that will not happen.

public and policymakers that offenders and victims are both a part of the community and that they must be considered the focal point of a rational system of justice.

A major flaw of our current system is that offenders are treated in a manner that generally does not hold them accountable for their actions. The incarceration process does not effectively instruct offenders about the nature and extent of their wrongdoing.

Nowhere in the process are offenders given the opportunity to understand the implications of what they have done. Nowhere are they encouraged to question the stereotypes and rationalizations ("it's no big deal; they deserved it; insurance will cover it") that made it possible for them to commit their offenses. In fact, by focusing on purely legal issues, the criminal process will tend to sidetrack their attention, causing them to focus on legal, technical definitions of guilt, on the possibilities for avoiding punishment, on the injustices they perceive themselves to undergo. . . . The criminal process, then, not only fails to encourage a real understanding of what they have done; it actively discourages such a realization. And it does nothing to encourage offenders to take responsibility to right the wrong they have committed.<sup>56</sup>

For offenders, committing a crime is an experience of empowerment and for victims power is taken away. However, the justice system takes power away from both by leaving the victim out of his or her own case and by having the offender's fate decided by others. The process rarely allows a victim to experience the needed forgiveness or offenders to share that experience and to "confess, repent, turn around, take responsibility for making things right."<sup>57</sup>

Crime must thus be newly defined as a violation by one person against another rather than as an offense against the state<sup>58</sup> and the retributive paradigm needs to be replaced with a restoration paradigm. There are significant differences between the two.

The old paradigm makes the state the victim, thus placing the state at the center, leaving out the individual victim, and denying the interpersonal character of the offense. The new paradigm defines crime as a conflict between persons, putting the individuals and their relationships at center stage.<sup>59</sup>

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56. Howard Zehr, *Restorative Justice*, INTERNATIONAL ASS'N OF RESIDENTIAL AND COMMUNITY ALTERNATIVES (IARCA) JOURNAL, March 1991, at 6.

57. *Id.* at 7.

58. Mark S. Umbreit, *Mediating Conflict Among Victims and Offenders: Restorative Justice in Action*, INTERNATIONAL ASS'N OF RESIDENTIAL AND COMMUNITY ALTERNATIVES (IARCA) JOURNAL, March 1991, at 4.

59. Zehr, *supra* note 56, at 8.

The new paradigm encourages dialogue and negotiation. It encourages the victim and the offender to see one another as persons, to establish or re-establish a relationship. Additionally, rather than fixing blame and focusing on the past, the new paradigm would emphasize the *future*. It would not only encourage responsibility for past behavior but also would focus on problem-solving "on the obligations created by the offense."<sup>60</sup> Further, offenders would take responsibility for what they have done and instead of owing some kind of "abstract debt to society, paid in an abstract way by experiencing punishment, the offender would owe a debt to the victim, to be paid in concrete way."<sup>61</sup> In other words:

Restoration, making things right, would replace the imposition of pain as the expected outcome in [a] new paradigm [of] justice . . . . Instead of committing one social injury in response to another, a restorative paradigm would focus on healing.<sup>62</sup>

One alternative to incarceration that has been quite successful both in helping to restore offenders and appropriately treating victims is the Victim Offender Reconciliation Program. Victims and offenders, usually upon court referral, meet with a mediator in an attempt to resolve the dispute between them. In practice, the mediator usually meets first with the offender and victim separately. If both parties agree to participate, a meeting is scheduled.

Facts and feelings are the focus of the first part of the meeting giving victims the chance to vent their feelings for the person who violated them. Victims are often relieved to see that offenders bear very little likeness to the frightening person they may have imagined.<sup>63</sup>

Facing the person violated puts the offender in an uncomfortable position but gives the offender the chance to express remorse in a personal way. With an open discussion of their feelings, the victim and offender can interact with each other as two people rather than viewing each other as stereotypes and objects.<sup>64</sup> The interaction between the real parties in interest gives the victim the opportunity to explain how the offender's action has caused pain and provides the offender with an understanding of the hurt that the victim has suffered.

The focus of the second part of the meeting is on the losses of the victim and working out a restitution agreement.<sup>65</sup> If an agreement is

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60. *Id.*

61. *Id.*

62. *Id.*

63. Umbreit, *supra* note 58, at 5.

64. *Id.*

65. This restitution would be faster and easier to achieve than filing a civil lawsuit.

not reached (and they are in over 95% of the cases in many programs), the case is referred back to the court. If an agreement between the parties is reached but not kept, the court has the option of criminally charging the offender. Studies in Canada and the United States have found, however, that "more than 90% of victims and offenders are satisfied with the process and would like to use it again."<sup>66</sup>

These programs, which can involve violent and nonviolent crimes,<sup>67</sup> are probably so successful because offenders and victims benefit from a humanizing experience. They appropriately divert some offenders from imprisonment and are cost-effective alternatives.<sup>68</sup>

### VII. Achieving A Restorative System Of Justice

It is essential that our sentencing policies be reformulated because sentencing laws enacted in the 1980s, which were designed to increase prison sentences, to incapacitate criminals and to deter others, have failed. They have not significantly reduced crime. They have had a highly disproportionate impact on minorities and have exacted costs that have begun to restrict governmental options in other important areas and they have not ameliorated the plight of victims.

New policies must be consistent with what should be the primary goal of our criminal justice system if it is to be fair and just: to compassionately treat and restore offenders and victims and make both of them whole. The most appropriate sanctions will be the least restrictive and punitive consistent with public safety and the needs of the victim and offender. Imprisonment, jail and prison, must be reserved only for those offenders for whom a community-based sanction is inappropriate because it is not likely to restore and incapacitation is clearly necessary.

To function effectively, this new model of restorative justice requires a comprehensive and integrated system of sentencing and punishment including treatment and other means of helping offenders to lead more productive lives in their communities. Judges must have

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66. Morris, *supra* note 6, at 92.

67. The Genesee County Sheriff's Department in upstate New York, operates a Victim Offender Reconciliation Program, which involves offenders of serious and violent crimes and reported two cases involving an armed robbery and negligent homicide, where non-incarcerative sentencing packages were developed. RUSS IMMARIGEON AND VAN ZWISHOHN, CONCERNED ABOUT CRIME? A REPORT TO THE PRESBYTERIAN SYNOD OF THE NORTHEAST ABOUT CRIME, COMMUNITY AND ALTERNATIVES TO IMPRISONMENT 72-73 (1986).

68. Victim Offender Reconciliation Programs have their limitations, however. They are not used in rape, murder or drug cases.

maximum discretion to employ a wide range of options. They must be able to choose between the most widely used sanctions, probation and imprisonment.

In addition to the Victim Offender Reconciliation Program discussed above, there are numerous steps which can be taken to achieve the necessary reforms of a restorative justice system. Specifically, I make the following recommendations.

**A. Each State Should Adopt A Comprehensive Community Corrections Act**

A Community Corrections Act<sup>69</sup> should be designed to substantially reduce reliance on imprisonment by providing a wide array of sentencing options. Such options would include the following as recommended by the American Bar Association in its Model Community Corrections Act:

- Standard probation;
- Intensive supervision probation;
- Community service;
- Home confinement with or without electronic monitoring;
- Electronic surveillance (including telephone monitoring);
- Community-based residential settings offering structures, supervision, surveillance, drug/alcohol treatment, employment, counseling, and/or other forms of treatment or counseling;
- Outpatient treatment;
- Requirement of employment and/or education/training;
- Day reporting centers;
- Restitution;
- Means-based fines.<sup>70</sup>

The presumptive penalty for most offenders should be a community-based sanction. Sentencing guidelines, which give judges wide discretion, should be drafted and structured in a way to ensure that prison space is reserved only for those who must be incarcerated for the safety of the community.

Community-based sanctions have a number of advantages over incarceration. For example, if offenders are employed in the community, (1) they can continue to support their families; (2) taxes can be collected on their earnings; (3) it will usually be easier to pay restitution; (4) families can remain together; and (5) the criminogenic influ-

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69. Several states, including Michigan, Minnesota, Ohio and Oregon, have Community Corrections Acts.

70. Model Adult Community Corrections Act (1992) (American Bar Ass'n).

ences of prison or jail can be avoided.<sup>71</sup> Those who are not employed can be helped to find employment or placed in job training programs.

All offenders should be eligible for sentencing to community-based sanctions unless the court finds that the offender poses too great a danger to be permitted to remain in the community. In making such a determination, the court must consider certain factors including but not limited to (1) whether the offender has a sponsor in the community; (2) whether the offender is employed or has enrolled or can be enrolled in an educational or rehabilitative program; and (3) whether the offender has demonstrated a pattern of violent behavior.

## B. Abolish Mandatory Prison Sentences

Mandatory sentences, particularly for drug offenders and many secondary felony offenders, have been a failure.<sup>72</sup> They have resulted in long sentences for many, which are unjustified, and have distorted the charging and prosecuting functions of the courts.<sup>73</sup> Yet, community protection has not been enhanced.<sup>74</sup> A study by the United States Sentencing Commission revealed that mandatory minimums were not uniformly applied. In fact, 35% of convicted offenders did not receive the mandatory minimum. However, minorities guilty of the same conduct as whites received harsher sentences.<sup>75</sup>

Mandatory minimum sentences have been widely condemned. The Judicial Conference of the United States, the twelve Circuit Courts of Appeals or their Judicial Councils, the American Bar Association, the Federal Courts Study Committee, and other groups have called for their repeal.<sup>76</sup> And recently, U.S. District Judge Jack Weinstein, Senior Judge of the Eastern District of New York, issued the startling announcement that he would no longer handle drug cases. In a memorandum to other judges in the Eastern District, Judge Weinstein wrote:

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71. BRANHAM, *supra* note 25, at 68.

72. "The state has spent billions trying to accomodate the law-enforcement activities growing out of these [mandatory sentencing] laws, all to little or no effect." Clines, *supra* note 37 (quoting Robert Gangi, Executive Director of the Correctional Association of New York). Even the New York State Commissioner of Corrections, Thomas A. Coughlin, III, agrees that mandatory sentencing laws are counterproductive, because the State has spent millions of dollars building more prisons and yet very few drug kingpins have been put behind bars. *Id.*

73. Commissioner Coughlin favors returning to judges their sentencing discretion. Clines, *supra* note 37.

74. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CRIMINAL JUSTICE SENTENCING POLICY STATEMENT 24.

75. BRANHAM, *supra*, note 25, at 35.

76. BRANHAM, *supra*, note 25, at 35.

I need a rest from the oppressive sense of futility that these drug cases leave. . . . I have taken my name out of the wheel for drug cases. . . . This resolution leaves me uncomfortable since it shifts the "dirty work" to other judges. At the moment, however, I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade. . . . I am just a tired old judge who has temporarily filled his quota of remorselessness.<sup>77</sup>

In short, mandatory sentences have brought about needless and wasteful expenditures of taxpayer money and an enormous social cost.

### C. Prison Sentences For Felons Should Be Short And Determinate

Most offenders should not be incarcerated for more than twelve months since there is no evidence that lengthy incarceration reduces recidivism. Yet, sentences for the same crimes in different countries vary significantly, evidencing the arbitrary nature of our sentencing schemes. For example, depending on the country, a rape conviction may result in a sentence of as few as three to five years imprisonment and as many as fifty years. A sentence for armed robbery may vary from probation to fourteen years imprisonment.<sup>78</sup> In this country the average prisoner is released after 20.7 months, but in Alabama, it is 29.2 months.<sup>79</sup> If Alabama prisoners served the same amount of time as those in other states, the prison population would be reduced by 44%.<sup>80</sup>

Some offenders must be isolated from society because they are dangerous. However, we sentence even those offenders in an irrational manner. Often, they have experienced difficult lives and need help in many ways. The same kinds of programs that should be available to those in the community should also be available to these prison inmates.

### D. Shift Resources From Corrections To Crime Prevention Programs

The evidence is overwhelming that incarcerating so many does not

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77. Jack B. Weinstein, *Perspective: No More Drug Cases*, N.Y. L.J., Apr. 15, 1993, at 2. Judge Weinstein indicated that he will take drug cases for trial but will transfer the matter back to the referring judge for sentencing. *Id.*

78. Francis Gibb, *Lawyers Uncover Big Divide In Nation's Jail Terms For Rape*, LONDON TIMES, Sept. 9, 1992, at 5.

79. MAUER, *supra* note 14, at 16.

80. *Id.*

significantly reduce crime or make our communities safe. The proponents of increased imprisonment, who have succeeded in implementing policies that make this nation the leader in incarceration, should join forces with those who argue for a dramatic shift in resources. Resources should be diverted to programs that can help prevent crimes before they happen. Comprehensive research on the Head Start Program demonstrated that every dollar invested in early prevention and intervention resulted in savings of \$4.75 in remedial education, welfare and crime. Job Corps programs, public housing, crime prevention programs, and other community efforts have had similar results.<sup>81</sup>

The debates about harsher penalties and increased prison construction should be reframed to contrast the anticipated benefit of such projects with neglect and abuse prevention, school dropout prevention, mentoring, job training programs, and effective drug treatment programs.

Crime prevention investment, not investment in costly prisons, is the most cost-effective and humane approach to address a multitude of problems that plague our nation. Indeed, these investments will have more of an impact on future crime rates than expanding the criminal justice system. Our focus must shift, if we seriously desire to combat our addiction to imprisonment.

### VIII. Conclusion

Our direction in corrections needs to be swiftly changed. Billions of dollars and countless lives are being wasted by our addiction to imprisonment. This addiction has prevented us from acting responsibly and humanely. The future integrity of our criminal justice system is at stake. It is time for policymakers and citizens to summon the courage to effect change as justice demands.

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81. *Id.* at 15.

