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THE SOCIAL AND MORAL COST OF MASS INCARCERATION IN AFRICAN AMERICAN COMMUNITIES

Dorothy E. Roberts*

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INTRODUCTION: REFRAMING THE ISSUE OF RACE AND IMPRISONMENT

Radical changes in crime control and sentencing policies led to an unprecedented buildup of the United States prison population over the last thirty years.¹ By the end of 2002, the number of inmates in the nation's jails and prisons exceeded two million.² Today's imprisonment rate is five times as high as in 1972 and surpasses that of all other nations.³ The sheer scale and acceleration of U.S. prison growth has no parallel in western societies. As David Garland put it, "This is an unprecedented event in the history of the USA and, more generally, in the history of liberal democracy."⁴

The extraordinary prison expansion involved young black men in grossly disproportionate numbers. Achieving another historic record, most of the people sentenced to time in prison today are black. On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole.⁵ The gap between black and white incarceration rates, moreover, has deepened along with rising inmate numbers.⁶ African Americans experience a uniquely

1. See generally MARC MAUER, *RACE TO INCARCERATE* (1999) [hereinafter MAUER, *RACE TO INCARCERATE*]; MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995). The growth of the prison population is attributable primarily to changes in sentencing, probation, and parole policy rather than changes in crime rates. Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 4, 6 (David Garland ed., 2001) [hereinafter MASS IMPRISONMENT]. Mauer notes,

88 percent of the tripling of the national prison population from 1980 to 1996 is explained by changes in the imposition of punishment (51 percent a greater likelihood of incarceration upon conviction and 37 percent longer prison terms), while changes in crime rates explain only 12 percent of the rise.

Id. (citing Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 17 (Michael Tonry & Joan Petersilia eds., 1999)). Sentencing reforms have increased both the certainty and severity of sanctions involving incarceration, with most felons sentenced to some form of incarceration. Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 27, 27 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003) [hereinafter CRIME CONTROL AND SOCIAL JUSTICE].

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2002 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/press/p02pr.htm> (last visited Mar. 30, 2004) ("The country's prisons, jails and juvenile facilities held 2,166,260 persons at the end of last year....").

3. THE SENTENCING PROJECT, U.S. PRISON POPULATIONS—TRENDS AND IMPLICATIONS 1, 4, available at <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Mar. 25, 2004); David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT *supra* note 1, at 1.

4. Garland, *supra* note 3, at 1.

5. THE SENTENCING PROJECT, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I* (1995).

6. See Marc Mauer, *Racial Disparities in Prison Getting Worse in the 1990s*, 8 OVERCROWDED TIMES 8 (1997).

astronomical rate of imprisonment, and the social effects of imprisonment are concentrated in their communities. Thus, the transformation of prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans.⁷

The mass incarceration of African Americans coincides with a new era in criminal justice research. Social scientists are increasingly applying empirical methods to understand the impact of crime control policies and to supply data to judges, legislators, and policymakers.⁸ The distinctive features of African American mass incarceration have generated a new research agenda that reframes the typical questions asked about the racial disparity in imprisonment and that better measures the costs and benefits of prison policy. The new research also puts in striking relief the question of the morality of confining so many American citizens.

In the rest of this Introduction, I describe the distinctive features of both African American mass incarceration and the new direction in prison research examining this phenomenon. I also discuss how these empirical studies reframe the issue of racial discrimination in the criminal justice system. Part I identifies three theories that explain the social mechanisms through which mass incarceration inflicts community-level harms. Part II argues that mounting evidence of mass imprisonment's damage to African American communities should change the outcome of dominant deliberations about the moral justifications for current penal approaches to punishment. This evidence demolishes utilitarian claims that high incarceration rates uniformly benefit black communities and reveals, to the contrary, how they entrench black communities' political subordination. I conclude, therefore, that the mass incarceration of African Americans is not only morally unjustifiable, but morally repugnant.

7. See Garland, *supra* note 3, at 1-2 (describing the defining features of mass imprisonment).

8. See, e.g., Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) (advocating "a mode of judicial decision-making and academic debate that treats social scientific and empirical assessment as a crucial element in constitutional decision-making, thereby making criminal procedure decisions more transparent"); Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004) (arguing that criminal law should incorporate recent research in economics, psychology, and sociology showing how institutions, incentives, and rules affect behavior).

A. *The Distinctive Features of African American Mass Incarceration*

1. *Total numbers incarcerated.*

The first feature of mass incarceration is simply the sheer numbers of African Americans behind bars. Of the two million inmates in U.S. jails and prisons at the end of 2002, black men (586,700) outnumbered white men (436,800) and Hispanic men (235,000) among inmates with sentences of more than one year.⁹ African American women were also imprisoned in record numbers.¹⁰ As with men, there were more black women (36,000) than white women (35,400) and Hispanic women (15,000) in jails and prisons at the end of 2002.¹¹

2. *Rate of incarceration.*

The massive scale of black citizens behind bars is matched in its enormity by the rate of black imprisonment. The Sentencing Project first alerted the public to this alarming dimension of incarceration in a report issued in 1990.¹² It revealed that almost one in four black men in the United States between the ages of twenty and twenty-nine were under control of the criminal justice system, either in prison or jail, on probation, or on parole.¹³ By 1995, the Sentencing Project reported that the national rate had risen to one-in-three.¹⁴ In Washington, D.C. and Baltimore more than half of young black men were then under criminal supervision. Prison is now a common and predictable experience for African American men in their twenties. Although rates of female incarceration are far lower, "African-American women are the fastest growing segment of the prison population."¹⁵ This astounding rate of imprisonment for African Americans, moreover, departs drastically from the rate for whites. Blacks are about eight times more likely to spend time behind bars than whites.¹⁶

9. BUREAU OF JUSTICE STATISTICS, *supra* note 2, at 9.

10. *Id.* at 9. On the experience of incarcerated African American women, see PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* (2003).

11. BUREAU OF JUSTICE STATISTICS, *supra* note 2, at 9, tbl.13.

12. MARC MAUER, THE SENTENCING PROJECT, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990).

13. *Id.* at 3.

14. THE SENTENCING PROJECT, *supra* note 5, at 1.

15. Paul Butler, *Affirmative Action and the Criminal Law*, in *CRIME CONTROL AND SOCIAL JUSTICE*, *supra* note 1, at 373, 395. The number of incarcerated black women is growing faster than that of black men or the overall prison population, increasing by more than 200% between 1985 and 1995. MAUER, *RACE TO INCARCERATE*, *supra* note 1, at 125.

16. Bruce Western, Becky Pettit & Josh Guetzkow, *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF*

The War on Drugs is responsible for this level of black incarceration. The explosion of both the prison population and its racial disparity are largely attributable to aggressive street-level enforcement of the drug laws and harsh sentencing of drug offenders.¹⁷ An increasingly large proportion of new admissions for drug offenses combined with longer mandatory sentences to keep prison populations at historically high levels during the 1990s, despite declines in crime.¹⁸ The War on Drugs became its own prisoner-generating machine, producing incarcerations rates that “defy gravity and continue to grow even as crime rates are dropping.”¹⁹ In New York City, for example, drug-related arrests increased throughout the 1990s and accounted for a growing share of prison admissions during a time when felony crimes declined by almost 50%.²⁰

The population confined under tough drug laws, moreover, is composed predominantly of young, African American men.²¹ Although whites have a higher rate of illegal drug use, 60% of offenders imprisoned for drug charges in 1998 were black.²² Drug offenses accounted for 27% of the increase in the number of African American state prisoners in the 1990s, compared to a 14% increase for whites.²³ Drug enforcement, then, provided a steady supply of African American inmates to the nation’s prisons over the course of three decades and “across distinctly different crime ‘eras.’”²⁴

3. *The spatial concentration of incarceration.*

Because poor black men and women tend to live in racially and

MASS IMPRISONMENT 165, 165 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter *INVISIBLE PUNISHMENT*]; see also BUREAU OF JUSTICE STATISTICS, *supra* note 2, at 1 (at yearend 2002, 10.4% of black men age 25 to 29 were in prison, compared to 1.2% of white men in that age group).

17. See William J. Chambliss, *Drug War Politics: Racism, Corruption, and Alienation*, in *CRIME CONTROL AND SOCIAL JUSTICE*, *supra* note 1, at 295, 297-99; JEFFREY FAGAN, VALERIE WEST & JAN HOLLAND, *RECIPROCAL EFFECTS OF CRIME AND INCARCERATION IN NEW YORK CITY NEIGHBORHOODS 5* (Columbia Law Sch.l Pub. Law & Legal Theory Working Paper Group, Working Paper No. 03-54, 2003) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=392120 (last visited Mar. 5, 2004).

18. See Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 1, 1 (2002).

19. Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, in *MASS IMPRISONMENT*, *supra* note 1, at 145, 146.

20. Fagan et al., *supra* note 17, at 5. Drug-related offenses accounted for 12% of all New York State prison admissions in 1985, 31% in 1990, and 38% in 1996. *Id.*

21. See Chambliss, *supra* note 17, at 299, 301 fig.12.5.

22. *Id.*

23. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2000* 12 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf> (last visited Mar. 25, 2004).

24. FAGAN ET AL., *supra* note 17, at 9.

economically segregated neighborhoods, these neighborhoods feel the brunt of the staggering prison figures. Research in several cities reveals that the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.²⁵ As many as 1 in 8 of the adult male residents of these urban areas is sent to prison each year and 1 in 4 is behind bars on any given day.²⁶ A 1992 study, for example, showed that 72% of all of New York State's prisoners came from only 7 of New York City's 55 community board districts.²⁷ Similarly, 53% of Illinois prisoners released in 2001 returned to Chicago, and 34% of those releases were concentrated in 6 of 77 Chicago communities.²⁸ Prisoners typically return to the same communities where they lived prior to incarceration.²⁹

Using maps showing the concentration of incarceration in New York City over time, Jeffrey Fagan, Valerie West, and Jan Holland found that incarceration rates remained high or intensified by 1996 in neighborhoods that had the highest rates in 1990.³⁰ Their analysis shows not only that incarceration is persistently concentrated in New York City's poorest neighborhoods, but also that these neighborhoods received more intensive and punitive police enforcement and parole surveillance throughout a period of general decline in crime.³¹ Finding "evidence that at some tipping point, incarceration remains stable or continues to increase even as crime—the supply of individuals for incarceration—remains constant or declines,"³² the study suggests that incarceration's spatial concentration induces more incarceration.

B. *The New Direction of Prison Research*

These distinctive features of African American incarceration—the sheer numbers in prison, the high rate of imprisonment, and its spatial concentration—combine to make imprisonment a normal way of life in the

25. Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33 (2003); FAGAN ET AL., *supra* note 17, at 14. The neighborhoods I discuss in this Article are those from which prisoners come and to which they return after completing their sentences, rather than those where prisons are located.

26. Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT, *supra* note 16, at 181, 184 [hereinafter Clear, *Addition by Subtraction*].

27. FAGAN ET AL., *supra* note 17, at 14.

28. NANCY G. LA VIGNE & CYNTHIA A. MAMALIAN, URBAN INST. JUSTICE POLICY CTR., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS 46, 51 (2003), available at http://www.urban.org/UploadedPDF/410662_ILPortraitReentry.pdf (last visited Mar. 11, 2004).

29. *Id.* at 50 n.213.

30. FAGAN ET AL., *supra* note 17, at 15.

31. *See id.* at 3.

32. *Id.* at 30.

communities where it is concentrated. These residents live in “*the first genuine prison society of history*.”³³ How can researchers measure the impact of mass incarceration on these communities? Ernest Drucker approached this problem with a quantitative public health method—“years of life lost”—commonly used to measure the population impact of large-scale adverse events that affect entire populations.³⁴ He treated person-years of incarceration as years of life “lost” to estimate the magnitude of impact associated with mass imprisonment in New York State during the period from 1973 to 2002. Drucker concluded,

[T]hirty years of forced removal to prison of 150,000 young males from particular communities of New York represents collective losses similar in scale to the losses due to epidemics, wars, and terrorist attacks—with the potential for comparable effects on the survivors and the social structure of their families and communities.³⁵

A host of empirical studies conducted in the last decade explore the nature of these effects on the African American survivors of mass imprisonment. They find that incarceration has become a systemic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future.³⁶ The emerging body of research probes the consequences rather than the causes of mass incarceration and examines these consequences for the community rather than the individual. Investigating the community-level impact of incarceration helps to reframe the issues raised by the stark racial disproportionality in the nation’s prisons and the criminal justice system generally.

1. *Assessing the harm of mass incarceration v. identifying the cause of racial disparities.*

The enormous share of African Americans in the nation’s prison population is well-documented and undeniable. Until recently, the rhetorical and empirical debates about the disproportionality of black offenders have centered on its *causes*.³⁷ Official research groups in Washington State, Oregon, and Utah, for example, recently engaged in in-depth empirical examinations of the overrepresentation of minorities in the states’ criminal justice populations.

33. Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT, *supra* note 1, at 82, 107.

34. See Drucker, *supra* note 18, at 5.

35. *Id.* at 7-8.

36. See FAGAN ET AL., *supra* note 17, at 3-4.

37. See Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS. 17, 19 (2003); Andrew E. Taslitz, *Foreword: The Political Geography of Race Data in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1, 1-3 (2003). For a brief review of the “truly remarkable volume of research . . . undertaken to identify and explain racial and ethnic differences in American criminal justice outcomes,” see David F. Greenberg, “Justice” and Criminal Justice, in CRIME CONTROL AND SOCIAL JUSTICE, *supra* note 1, at 319, 325-26.

As Sharon Davies describes this effort, each state task force “attempted to determine whether those racial and ethnic gaps were the result of discriminatory processing decisions by decision-makers within the systems.”³⁸ Researchers asked a number of questions designed to ferret out any racial bias in charging or sentencing decisions:

Do white and non-white offenders convicted of similar crimes receive similar or dissimilar sentences? To the extent that dissimilarities in sentencing do exist, can they be attributed to dissimilarities in the underlying criminal behavior of the sentenced offenders? . . . Do race-neutral factors that appear to influence charging or sentencing decisions have a disparate impact on members of racial or ethnic groups?³⁹

Davies points out that the researchers assumed that the racial imbalance in state prisons was caused either by disproportionately wrongful conduct by minorities or discriminatory conduct by government actors.⁴⁰ The goal of research was to discover which causal explanation was true.

The state research groups’ causal approach reflects the public and scholarly debate about the racial disparity in mass imprisonment. One side of the debate claims that the racial imbalance is defensible because it stems from an imbalance in crime rates: African Americans are overrepresented in the prison population because they commit more crime. This view erases any problematic inequity because “representation of blacks in the criminal justice system [is] not ‘disproportionate’ to their representation among the population of *criminal wrongdoers*.”⁴¹ The other side traces the disparity to racial bias in the creation and enforcement of crime legislation, especially the War on Drugs, that targets minority neighborhoods for aggressive policing and harsh mandatory sentences.⁴² A more complex view of the problem recognizes that social and economic inequality contribute to racial differences in offending,⁴³ but this, too, concerns the reasons for the racial disparity. In the terms of this debate, the morality of racially disproportionate incarceration depends largely on identifying its causes.

The new direction in prison research moves from examining the causes of racial disparity to examining its consequences. One implication of the state research groups’ dichotomous assumption about the cause of racially disproportionate prison populations was its potential to relieve states of culpability. “[E]ach of the reports assumed that if minority group criminality

38. Davies, *supra* note 37, at 19.

39. *Id.* at 19-20 (citations omitted).

40. *Id.* at 43.

41. Taslitz, *supra* note 37, at 2.

42. See KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARRASSMENT, AND OTHER MACROAGGRESSIONS*, 26-46, 110-29 (1998).

43. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 4-5 (1999).

was the culprit, the states would be off the hook,” Davies observes.⁴⁴ Regardless of its cause, however, mass imprisonment inflicts devastating collateral damage on black communities. States are not off the hook because this damage may make mass imprisonment immoral regardless of the reasons for racially disparate rates of incarceration.



2. *Community v. individual as the focus of research.*

Another feature of past research is its identification of the individual as the focus of investigation. Most criminological research studied the impact of imprisonment on individual offenders. As Ernest Drucker notes, “[P]rison data are not normally viewed as collective events”⁴⁵ The causation-oriented studies, too, ultimately sought to attribute racial disparities to individual conduct—either “blameworthy individual behavior or blameworthy institutional actor behavior.”⁴⁶ The scale and spatial concentration of mass incarceration has forced a change in the orientation of empirical research to examine prison policy’s social impact on communities and neighborhoods.⁴⁷

This focus on community-level consequences parallels the recent shift in the sociological analysis of racial injustice from uncovering individual acts of racial bias to explaining how racial hierarchies are embedded in social institutions and practices.⁴⁸ Rather than pointing the finger at discrimination by prejudiced individuals, researchers reveal how whites benefit from “structural favoritism” built into U.S. policies, institutions, and cultural representations, that endures for generations.⁴⁹

The new empirical research should motivate a similar change in the legal analysis of mass imprisonment. The traditional challenge to racial disparities in state institutions centers on individuals: Individual claimants must demonstrate racial discrimination committed by biased government agents. Under this approach, prison inmates must prove that they were arrested, convicted, or imprisoned because of their race. Claims of state discrimination provide a weak basis for challenging mass incarceration. First, it is hard to prove racial

44. Davies, *supra* note 37, at 44.

45. Drucker, *supra* note 18, at 4.

46. Davies, *supra* note 37, at 44.

47. These studies are long overdue, as little research went into the potential impact of policies that led to prison growth: “Mass imprisonment was not a policy that was proposed, researched, costed, debated and democratically agreed.” Garland, *supra* note 3, at 2.

48. See MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER & DAVID B. OPPENHEIMER, *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); Sally Lehrman, *Colorblind Racism*, ALTERNET.ORG (Sept. 18, 2003), at <http://www.alternet.org/story.html?StoryID=16792> (last visited Mar. 26, 2004) (discussing ANDREW BARLOW, *BETWEEN FEAR AND HOPE: GLOBALIZATION AND RACE IN THE UNITED STATES* (2003)) [hereinafter *Colorblind Racism*]; Sally Lehrman, *The Reality of Race*, SCI. AM., Feb. 2003, at 32).

49. Lehrman, *Colorblind Racism*, *supra* note 48 (paraphrasing Andrew Barlow).

motivation. The disproportionate incarceration of African Americans results more from systemic factors, such as law enforcement priorities and sentencing legislation, than from biased decisionmaking in individual cases.⁵⁰ Police officers, prosecutors, and judges, moreover, rarely articulate racist reasons for their actions.

Second, it seems fair to punish individual defendants because they have usually committed a crime. This retributive rationale allowed the United States Supreme Court in *McCleskey v. Kemp*⁵¹ to uphold the death penalty despite proof of its racially biased administration. The Court reasoned that statistical evidence of discrimination did not prove that the defendant's own sentence was influenced by his race or that he did not deserve to be executed. Similarly, James Jacobs challenges liberal penologists to demonstrate that current prison policy is excessive by sorting a large sample of defendants into two groups—those who should not have been sent to prison and those who rightly deserved a prison term—and then dividing the second group into those who were sentenced excessively and those who were sentenced fairly.⁵² Because these judgments are so subjective, Jacobs concludes that prison opponents can make no legitimate claim to the moral superiority of less harsh sentencing policies. Empirical evidence of community-level harm presents a compelling moral indictment of mass imprisonment, regardless of the moral deserts of individual offenders.

In addition, the new research on community-level harm provides an important check on scholarship that emphasizes the benefits tough law enforcement provides black communities. As Randall Kennedy points out, the victims of black inmates are most likely to be black as well.⁵³ Some theorists argue that victimization by criminals poses a greater threat to the well-being of black communities than does the risk of state abuse.⁵⁴ Kennedy contends that “the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.”⁵⁵ This calculation, however, was made without empirical support and must be adjusted to take account of the new evidence of collateral damage suffered by neighborhoods where the impact of incarceration is concentrated.

50. MAUER, RACE TO INCARCERATE, *supra* note 1, at 128; JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 48-88 (1996).

51. 481 U.S. 279 (1987).

52. James B. Jacobs, *Facts, Values and Prison Policies: A Commentary on Zimring and Tonry*, in MASS IMPRISONMENT, *supra* note 1, at 165, 167.

53. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997).

54. See, e.g., *id.*; Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166 (1998) (“[T]he continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police.”).

55. KENNEDY, *supra* note 53, at 19.

I. THEORIES OF COMMUNITY HARM

Measuring harms at the community level is more complex than aggregating prison's collateral consequences for individual inmates.⁵⁶ Community harms affect more than the total number of residents who have been incarcerated. Indeed, a central focus of this research is community members other than inmates, including family members, friends, and neighbors of prisoners who suffer adverse consequences that flow beyond the prison gates.

Moreover, research examining the processes by which incarceration affects communities reveals that geographic concentration affects social relationships and norms in a way that cannot be captured by aggregating individual effects. Mass imprisonment inflicts harm at the community level "not only because incarceration, experienced at high levels, has the inevitable result of removing valuable assets from the community, but also because the concentration of incarceration affects the community capacity of those who are left behind."⁵⁷ *There is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers.*

Three main theories explain the social mechanisms through which mass incarceration harms the African American communities where it is concentrated: Mass imprisonment damages social networks, distorts social norms, and destroys social citizenship.

A. Mass Imprisonment Damages Social Networks

Consider what the clustering of imprisonment means for young people over the course of growing up in innercity neighborhoods. Each young person can see that, "over the years, the chances of being removed for a prison term mount up as the number of people he knows who are incarcerated also mounts up over time."⁵⁸ Todd Clear and Dina Rose observe:

Equally important, those who live with him and depend on him for personal or economic support—those who are located within his social network—are likely to experience a disruption in that relationship due to his incarceration. Ultimately, a multitude of social networks are damaged as different people are sentenced to prison year after year.⁵⁹

Social scientists like Clear and Rose have demonstrated that imprisoning many individuals from a single neighborhood adversely affects the entire community because of the cumulative impact of straining multiple social

56. On the collateral sanctions suffered by individual inmates, see *infra* notes 115-16 and accompanying text.

57. Clear, *Addition by Subtraction*, *supra* note 26, at 182.

58. Clear & Rose, *supra* note 1, at 31.

59. *Id.* at 31-32.

networks to which inmates belong.

The damage to social networks starts at the family level and reverberates throughout communities where the families of prisoners are congregated. Locking up someone places an immediate financial and social strain on the rest of the family.⁶⁰ An ethnographic study of male incarceration in the District of Columbia found that families “lose income, assistance with child care, and bear expenses related to supporting and maintaining contact with incarcerated family members.”⁶¹ Dealing with an incarcerated relative causes stress, both from worry about the inmate’s well-being and from tension among relatives as they struggle to survive the ordeal. These enormous burdens fall primarily on the shoulders of women caregivers, who customarily shore up families experiencing extreme hardship—“women struggling to manage budgets consumed by addictions; women trying to hold families together when ties are weakened by prolonged absence; women attempting to manage the shame and stigma of incarceration; and women trying to prevent children from becoming casualties of the war on drugs.”⁶²

Mass incarceration strains the extended networks of kin and friends that have traditionally sustained poor African American families in difficult times, weakening communities’ ability to withstand economic and social hardship.⁶³ Although deprivation of family contact may be seen as part of an individual offender’s deserved punishment, the damaging consequences to families, social networks, and communities must be added to the social costs of mass incarceration. The injury to social networks is also a counterbalance to claims that removing criminals may benefit their relatives by relieving the families of problems caused by the offenders’ antisocial behavior.⁶⁴ The type of offender has changed as a result of sentencing reforms that impose harsh prison terms

60. See Olga Grinstead, Bonnie Faigeles, Carrie Bancroft & Barry Zack, *The Financial Cost of Maintaining Relationships with Incarcerated African American Men: Results from a Survey of Women Prison Visitors*, in *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY* 61, 66 (Othello Harris & R. Robin Miller eds., 2003) [hereinafter *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY*] (finding that the average monthly cost to women of visiting, calling, and sending packages to inmates in a large state prison in California was \$292); Anthony E. O. King, *The Impact of Incarceration on African American Families: Implications for Practice*, in *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY*, *supra*, at 167, 170-73 (discussing the financial hardship, emotional and psychological distress, and strain on family relationships caused by imprisonment of a family member).

61. Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 16, at 117, 118.

62. Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT*, *supra* note 16, at 136, 147.

63. See Braman, *supra* note 61, at 118.

64. See John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in 26 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 121, 125 (Michael Tonry & Joan Petersilia eds., 1999).

for relatively minor drug offenses.⁶⁵ Increasing incarceration of first-time, nonviolent offenders, who are likely to have valuable ties to community networks and institutions, means the loss to communities is greater today in terms of the quality as well as quantity of inmates.

Sociologists have explained the damage to social networks in terms of impeding the formation of social capital. While human capital refers to an individual's own talents, social capital is the capacity of individuals and groups to achieve important goals through their connections to others.⁶⁶ Social capital flourishes most in broad networks that include "weak ties" that enable people to interact with numerous other networks in simple ways.⁶⁷ Mass incarceration not only overwhelms the small, isolated kin networks prevalent in poor communities, but also makes it harder for residents to form expansive networks that are most adept at producing social capital.⁶⁸

Some of the most devastating consequences fall on children with parents in prison.⁶⁹ A recent special report by the Bureau of Justice Statistics on "Incarcerated Parents and Their Children" reveals the startling dimensions of prisons' disruption of family ties.⁷⁰ In 1999, a majority of state and federal prisoners reported having a child under age eighteen, and almost half lived with their children prior to incarceration.⁷¹ About 2% of the nation's children—close to 1.5 million children—had a parent in prison that year, an increase of a half-million children in less than a decade.⁷² Seven percent of black children had a parent in prison in 1999, making them nearly 9 times more likely to have an incarcerated parent than white children.⁷³

Even if incarcerated parents are able to maintain contact with their children, imprisonment has a disrupting effect. Inmates can no longer take care

65. See Chambliss, *supra* note 17, at 296 (citing study showing that most prisoners were convicted of offenses that the general public think are "not very serious crimes"); William J. Sabol & James P. Lynch, *Assessing the Longer-Run Consequences of Incarceration: Effects on Families and Employment*, in CRIME CONTROL AND SOCIAL JUSTICE, *supra* note 1, at 3, 6.

66. See JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990); Clear, *Addition by Subtraction*, *supra* note 26, at 185.

67. Clear, *Addition by Subtraction*, *supra* note 26, at 188.

68. See *id.* at 189; Clear & Rose, *supra* note 1, at 36-39; Todd R. Clear, Dina R. Rose & Judith A. Ryder, *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335, 342 (2001).

69. See HUMAN RIGHTS WATCH, COLLATERAL CASUALTIES: CHILDREN OF INCARCERATED DRUG OFFENDERS IN NEW YORK (2002), available at <http://hrw.org/reports/2002/usany/USA0602.pdf> (last visited Mar. 28, 2004).

70. See CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Mar. 28, 2003).

71. *Id.* at 1 (citing that 55% of state prisoners and 63% of federal prisoners reported having a child under 18 years old).

72. *Id.*

73. *Id.* at 2.

of their children either physically or financially, placing extra economic and emotional burdens on the remaining family members.⁷⁴ Mass incarceration deprives thousands of children of important economic and social support from their fathers.⁷⁵ Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.⁷⁶

Incarcerating mothers tends to upset family life even more because inmate mothers were usually the primary caretakers of their children before entering prison. While judges used to show mothers leniency, they are now often compelled by mandatory sentencing laws to give mothers long prison terms.⁷⁷ As a result, the number of children with a mother in prison nearly doubled between 1990 and 2000.⁷⁸ Relative caregivers who fill in for incarcerated mothers receive inadequate state support and most cannot meet the increased child care expenses.⁷⁹ Children often end up in foster care and risk permanently severing their ties with their mothers.⁸⁰ One in ten mothers in state prison, for example, reported that her children were in foster care or state institutions.⁸¹ High incarceration rates among black adults and an increasing number of juvenile offenders contribute to the disproportionate removal of black children from their parents' custody.⁸² In addition to the financial and emotional strain it

74. See Hagan & Dinovitzer, *supra* note 64, at 124.

75. Studies show that many incarcerated fathers contributed to their children's financial well-being before entering prison. See *id.* at 139.

76. See Sandra Lee Browning, R. Robin Miller & Lisa M. Spruance, *Criminal Incarceration Dividing the Ties That Bind: Black Men and Their Families*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY, *supra* note 60, at 87, 91; Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59 (Katherine Gabel & Denise Johnston eds., 1995) [hereinafter CHILDREN OF INCARCERATED PARENTS]; R. Robin Miller, *Various Implications of the "Race to Incarcerate" on Incarcerated African American Men and Their Families*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY, *supra* note 60, at 3, 9; see also William H. Sack, *Children of Imprisoned Fathers*, 40 PSYCHIATRY 163, 165-69 (1977) (discussing case studies of children of incarcerated fathers and finding children exhibit antisocial and aggressive behavior after losing their fathers).

77. See KATHLEEN DALY, GENDER, CRIME AND PUNISHMENT 9-10 (1994). On the increasing incarceration of women, see Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in INVISIBLE PUNISHMENT, *supra* note 16, at 79; Richie, *supra* note 62.

78. MUMOLA, *supra* note 70, at 2. At least 75% of women in prison are mothers, and two-thirds have children under age 18. Richie, *supra* note 62, at 139.

79. See Hagan & Dinovitzer, *supra* note 64, at 143; Diane S. Young & Carrie Jefferson Smith, *When Moms Are Incarcerated: The Needs of Children, Mothers, and Caregivers*, 81 FAMILIES IN SOCIETY 130, 134 (2000).

80. See Philip M. Genty, *Termination of Parental Rights Among Prisoners*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 76, at 167, 168; Richie, *supra* note 62, at 141.

81. MUMOLA, *supra* note 70, at 4.

82. On the disproportionate involvement of black families in the public child welfare system, see DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

causes individual families, imprisoning parents broadens the reach of state supervision of black children. The criminal justice system works with the child welfare system to take custody of an inordinate number of black children, especially in neighborhoods where both systems are concentrated.⁸³

B. Mass Imprisonment Distorts Social Norms

By straining social networks, mass incarceration also affects communities' social norms. Drawing upon social disorganization theory, researchers have shown that weakening infrastructure threatens a community's foundation of informal social control.⁸⁴ Disorganized communities cannot enforce social norms because it is too difficult to reach consensus on common values and on avenues for solving common problems. Because informal social controls play a greater role in public safety than do formal state controls, this breakdown can seriously jeopardize community safety. Todd Clear found that while low levels of incarceration increase neighborhoods' public safety, "when incarceration reaches a certain level in an area that already struggles for assets, the effects of imprisonment undermine the building blocks of social order."⁸⁵ The mass movement of adults between the neighborhood and prison impedes the ability of families and other socializing groups, such as churches, social clubs, and neighborhood associations, to enforce informal social controls.⁸⁶ Clear concludes:

Well-established theory and a solid body of evidence indicate that high levels of incarceration concentrated in impoverished communities has a destabilizing effect on community life, so that the most basic underpinnings of informal social control are damaged This, in turn, reproduces the very dynamics that sustain crime.⁸⁷

Legal scholars have used social norm theory to augment the traditional economic conception of deterrence by recognizing that individuals' decisions to commit crimes are influenced by social context as well as by the price of crime.⁸⁸ Criminal behavior is shaped by individuals' perceptions of their

83. See *id.* at 200.

84. See Clear & Rose, *supra* note 1, at 36-37; Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998).

85. Clear, *Addition by Subtraction*, *supra* note 26, at 183.

86. See *id.* at 189-91; Clear & Rose, *supra* note 1, at 29; Sabol & Lynch, *supra* note 65, at 7; Robert J. Sampson, *Urban Black Violence: The Effects of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987).

87. Clear, *Addition by Subtraction*, *supra* note 26, at 193.

88. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997) [hereinafter Kahan, *Between Economics and Sociology*]; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan,

neighbors' values, beliefs, and conduct. According to these theorists, perceptions of community norms of orderliness in particular have an impact on residents' willingness to break the law. "Norms of order are critical to keeping social influence pointed away from, rather than toward, criminality," writes Dan Kahan.⁸⁹ Social norm theorists highlight the role the law plays in shaping these social influences on criminal and law-abiding behavior. The state can discourage crime by producing the right kind of social meaning through the regulation of social norms. When government authorities enforce norms of orderliness they signal to residents that the community values basic norms and is in control of the environment, thereby influencing citizens to refrain from committing serious crimes.

Social norm theorists make two kinds of arguments with respect to mass incarceration and state norm enforcement. First, they argue that mass imprisonment is ultimately counterproductive. Because of its impact on community norms, writes Tracey Meares, "the inevitable consequence of the current drug law enforcement strategy *undermines* rather than enhances the deterrent potential of long sentences."⁹⁰ Social norm theorists also rely on the social influence conception of deterrence to advocate law enforcement strategies that avoid the need for long prison sentences. Some argue that measures that maintain visible order in communities, such as New York City's quality-of-life initiative and Chicago's gang-loitering ordinance, reduce crime more effectively than costly imprisonment for violent offenses.⁹¹

Another explanation of the link between social control and violent crime focuses on neighborhood cooperation rather than neighborhood disorder. Using data from a 1995 survey of Chicago neighborhoods, Felton Earls, Stephen Raudenbush, and Robert Sampson found that the "collective efficacy" of residents—their ability and willingness to take joint action for the common good—was associated with reduced violence.⁹² Removing small numbers of disruptive residents probably facilitates neighborhood cooperation. By

Social Influence]; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

89. Kahan, *Social Influence*, *supra* note 88, at 391.

90. Meares, *supra* note 88, at 213 (emphasis in original); *see also* Meares et al., *supra* note 8, at 1191-93 (discussing empirical research showing that high rates of incarceration negatively affect the social organization of communities).

91. *See, e.g.*, Kahan, *Social Influence*, *supra* note 88, at 375-76; Meares, *supra* note 88, at 225. For critiques of the claim that order-maintenance policing deters crime, *see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

92. Robert J. Sampson, Steven W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603 (1999).

weakening beneficial social networks, however, high levels of imprisonment may ultimately reduce neighbors' collective efficacy that keeps violence in check.

A key component of the criminogenic dynamic of mass incarceration is the negative view of the justice system it generates. Social scientists have theorized, based on social control research, that people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities.⁹³ When a sizeable portion of a community has been in prison, prison loses its stigma. Noting that "African Americans are far more likely to disapprove of the police, the courts, and severe penal sentences than are whites,"⁹⁴ Todd Clear and Dina Rose tie distrust of the criminal justice system to "a kind of civic isolation, in which the workings of the state are seen as alien forces to be avoided rather than services to be employed."⁹⁵ The erosion of trust gives people less stake in law-abiding behavior. It also makes victims of crime reluctant to seek help from law enforcement, often leaving them little redress.

This distrust of law enforcement has had a profound impact on strategies for combating domestic violence in African American communities. Feminist scholars increasingly question the wisdom of relying on criminal justice remedies for domestic abuse, especially in minority communities.⁹⁶ Given the history of police brutality against blacks, many black women are reluctant to enlist law enforcement to protect them.⁹⁷ Moreover, criminal sanctions appear to have detrimental consequences for minority victims of abuse. One study shows that mandatory arrest in Milwaukee, while decreasing violence by employed, married, and white men, actually increased repeat violence by unemployed, unmarried, and African American men.⁹⁸ The authors concluded

93. See Clear, *Addition by Subtraction*, *supra* note 26, at 192-93; Clear & Rose, *supra* note 1, at 30.

94. Clear & Rose, *supra* note 1, at 42; see also Chambliss, *supra* note 17, at 302 ("[M]any in the Black community view the police as an alien occupying army rather than protectors of citizens' rights."); Tracey L. Meares, *Simple Solutions?: The Complexity of Public Attitudes Relevant to Drug Law Enforcement Policy*, in CRIME CONTROL AND SOCIAL JUSTICE, *supra* note 1, at 269 (comparing opinion data on attitudes by African Americans and whites on tough drug law enforcement at the time federal sentencing policies were enacted).

95. Clear & Rose, *supra* note 1, at 42.

96. See, e.g., Beth Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133 (2000).

97. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); Richie, *supra* note 62, at 142.

98. Lawrence W. Sherman, Janell D. Schmidt, Dennis P. Rogan, Douglas A. Smith, Patrick R. Gartin, Ellen G. Cohn, Dean J. Collins & Anthony R. Bacich, *Studies: The Variable Effect of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 139, 160 (1992).

that the policy prevented thousands of acts of violence against white women at the price of many more acts of violence against African American women.

The literature on incarceration and social norms has focused narrowly on “the role of incarceration in a systemic theory of crime, law, and social control.”⁹⁹ Researchers tend to be concerned with social norms that affect crime rates in the communities under study. The normalization of prison in community life, however, suggests that mass incarceration affects social norms more broadly. Indeed, it seems that imprisonment is now a key social institution in many black neighborhoods with pervasive influence on the development of norms. Because all of the children in these communities have some experience with prison and may expect to be behind bars at some point in their lives, prisons are part of the socialization process. “Every family, every household, every individual in these neighbourhoods has direct personal knowledge of the prison—through a spouse, a child, a parent, a neighbour, a friend. Imprisonment ceases to be the fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population.”¹⁰⁰ Incarceration is a “rite of passage” imposed upon African American teenagers.¹⁰¹

There is evidence that such extensive exposure to prisons adversely affects children’s psyches. Numerous studies, including several randomized experiments, have evaluated the impact of celebrated programs such as “Scared Straight” that attempt to deter children from a future life of crime by taking them into jails and prisons.¹⁰² At-risk and delinquent children in the original New Jersey program participated in confrontational rap sessions run by prisoners serving life sentences at Rahway State Prison that graphically depicted prison life, including stories of rape and murder.¹⁰³ These studies found that prison aversion programs did not work: Not only were they ineffective at reducing crime, but exposure to prison made children more, not less, violent than a comparison group not involved in the program.¹⁰⁴ James Finckenauer concludes that intimate familiarity with the indignities of prison

99. FAGAN ET AL., *supra* note 17, at 29.

100. Garland, *supra* note 3, at 2.

101. Jerome Miller, *Bringing the Individual Back In: A Commentary on Wacquant and Anderson*, in MASS IMPRISONMENT, *supra* note 1, at 138, 142; see also Carl S. Taylor, *Growing Up Behind Bars: Confinement, Youth Development, and Crime*, in THE UNINTENDED CONSEQUENCES OF INCARCERATION 41 (The Vera Inst. of Justice ed., 1996), available at http://www.vera.org/publication_pdf/uci.pdf (last visited Mar. 28, 2004) (suggesting a research plan to evaluate the impact of confinement on youth development).

102. See JAMES O. FINCKENAUER, SCARED STRAIGHT! AND THE PANACEA PHENOMENON (1982); JAMES O. FINCKENAUER & PATRICIA W. GAVIN, SCARED STRAIGHT: THE PANACEA PHENOMENON REVISITED (1999); Anthony Petrosino, Carolyn Turpin-Petrosino & James O. Finckenauer, *Well-Meaning Programs Can Have Harmful Effects!: Lessons from Experiments of Programs Such as Scared Straight*, 46 CRIME & DELINQ. 354 (2000).

103. See FINCKENAUER, *supra* note 102, at 3.

104. Petrosino et al., *supra* note 102, at 359-66.

does not instill healthy values, but holds “a potential for either social or emotional injury to juvenile subjects.”¹⁰⁵

Finckenauser’s speculations about why participation in the program increased delinquency suggest possible effects on children who reside in neighborhoods with high incarceration rates:

The controversial *possibility* also exists that the project actually sets in motion a “delinquency fulfilling prophecy” in which it increases rather than decreases the chances of juvenile delinquency. . . . The project may romanticize the Lifers—and by extension other prison inmates—in young, impressionable minds. Or, the belittling, demeaning, intimidating, and scaring of particular youth may be seen as a challenge; a challenge to go out and prove to themselves, their peers, and others, that they were not scared.¹⁰⁶

The negative impact of a short-term exposure to prison suggests that growing up in neighborhoods where prisons have saturated everyday life inflicts tremendous damage on children.

Researchers have not studied the impact on social norms of the sanctioned brutality experienced by the inmates themselves.¹⁰⁷ Although the notion that prisons rehabilitate inmates has evaporated from contemporary policy, the impact of prison culture on inmates’ attitudes and behavior remains an important field for investigation. An exceptional study of 1205 inmates released from federal prisons in 1987 found that moving prisoners from minimum to low security, thereby subjecting them to harsher prison conditions, roughly doubles the probability of rearrest within three years following release.¹⁰⁸ It is likely that the violent prison environment deeply influences inmates and has long-lasting effects on them after they leave prison.¹⁰⁹

Though neglected in the literature on the impact of imprisonment, the public recognizes sexual violence as a component of punishment within prisons. This acceptance is reflected in the frequent reference to rape in media

105. FINCKENAUSER, *supra* note 102, at 232.

106. *Id.* at 169-70.

107. See M. KEITH CHEN & JESSE M. SHAPIRO, DOES PRISON HARDEN INMATES? A DISCONTINUITY-BASED APPROACH 2 (2002), available at <http://mba.yale.edu/pdf/prison.pdf> (last visited Mar. 29, 2004) (noting that “little is known about the effects that imprisonment has on the lives of inmates”). On the pervasiveness of violence in prisons, see Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, in 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 205, 263-275 (Michael Tonry & Joan Petersilia eds., 1999).

108. CHEN & SHAPIRO, *supra* note 107, at 3.

109. See Rose & Clear, *supra* note 84, at 465 (“Most who study prison life believe there are significant brutalizing effects to imprisonment that impair prisoners’ inclinations to conform to the law.”); Sabol & Lynch, *supra* note 65, at 23 (“Prison environments can have negative effects on the socialization of men and may make them less fit for forming and maintaining stable [marital] unions.”); see also Patricia E. O’Connor, *The Prison Cage as Home for African American Men*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY, *supra* note 60, at 71, 80-81 (recounting an inmate’s story of stabbing a man who made sexual advances toward him after consulting with his uncle for advice on survival in prison).

accounts of prison life:

Countless mainstream and independent films about prison depict the rape of young men as business as usual behind bars, and in many films the topic is treated as comic. Newspaper columnists regularly refer casually to rape as part of the culture of our jails and prisons. . . . Boys who are arrested for property crimes or drug use can expect to be raped in jail. And we all know it.¹¹⁰

We should expect a significant impact on social norms in communities where a large proportion of residents have lived in a culture where torture, violence, and brutality at the hands of guards and inmates are the principal means of discipline.

Finally, research shows that, by skewing gender ratios, the mass removal of men from innercity communities is reshaping gender norms. The men and women Donald Braman interviewed in the District of Columbia described high incarceration rates as “both encouraging men to enter into relationships with multiple women, and encouraging women to enter into relationships with men who are already attached.”¹¹¹ Because both men and women perceive a significant shortage of men, women have less leverage in intimate relationships and are therefore more vulnerable to male exploitation. At the same time, incarcerated men often worry about the break up of family relationships while they are behind bars.¹¹² Some respond to their enforced identity as poor fathers by distancing themselves from their children, minimizing the father role in their sense of themselves.¹¹³ While state and federal governments are enforcing welfare policies that penalize poor women for raising children outside of marriage, they perpetuate a prison policy that discourages marriage and other stable relationships in these women’s communities.¹¹⁴

110. Carol Siegel, *Curing Boys Don’t Cry*, 37 GENDERS [12] (2003), available at http://www.genders.org/g37/g37_siegel.html (last visited Mar. 23, 2004). Sexual abuse of female inmates by prison guards and other correctional employees is also pervasive. See HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* (1996), available at <http://hrw.org/reports/1996/Us1.htm> (last visited Mar. 26, 2004); Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 350-51 (1998).

111. Braman, *supra* note 61, at 123, 127-28; see Clear & Rose, *supra* note 1, at 41 (“Mothers who seek adult partners are forced to compete in a declining pool of suitable prospects, and those prospects have less incentive to commit to any particular family group.”); Sabol & Lynch, *supra* note 65, at 6 (arguing that “removing large numbers of marriageable men from communities with high incarceration rates will lead to reductions in the number of families formed in those communities or to increases in the number of children born to single mothers”).

112. See MILLER, *supra* note 50, at 6; King, *supra* note 60, at 173; Brad Tripp, *Incarcerated African American Fathers: Exploring Changes in Family Relationships and the Father Identity*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY, *supra* note 60, at 17, 27.

113. See Tripp, *supra* note 112, at 28-29.

114. See Sabol & Lynch, *supra* note 65.

C. Mass Imprisonment Destroys Social Citizenship

Mass incarceration dramatically constrains the participation of African American communities in the mainstream political economy. This civic exclusion stems largely from the “invisible punishments” that accompany a prison sentence.¹¹⁵ Even first-time offenders are subject to the collateral denial of a host of citizenship rights, privileges, and benefits:

Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction he may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver's license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. . . . He will not be permitted to enlist in the military, or possess a firearm, or obtain a federal security clearance. If a citizen, he may lose the right to vote; if not, he becomes immediately deportable.¹¹⁶

Punishing offenders beyond their sentences raises serious questions about fairness to individuals because collateral sanctions may exceed the limits of retributive justice. In addition, sanctions that burden inmates after they leave prison diminish civic involvement by the *communities* to which they return. Key ways in which mass incarceration destroys social citizenship at the community level include felon disenfranchisement, labor market exclusion, and civic isolation.

1. Felon disenfranchisement.

Incarceration concretely denies citizenship rights through felon disenfranchisement laws. In most states, a felony conviction results in the loss of the right to vote either temporarily during incarceration or permanently.¹¹⁷ Forty-eight states and the District of Columbia bar inmates from voting while they are incarcerated for a felony.¹¹⁸ Thirty-two states disenfranchise felons while they are in prison as well as when they are on probation or parole.

115. See generally INVISIBLE PUNISHMENT, *supra* note 16.

116. Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 16, at 1, 5 (quoting Am. Bar Ass'n, Task Force on Collateral Sanctions, *Introduction* to Proposed Standards on Collateral Sanctions and Administrative Disqualification of Convicted Persons (Jan. 18, 2002) (unpublished draft, on file with author)); see Marc Mauer, *Invisible Punishment: Block Housing, Education, Voting*, FOCUS, May/June 2003, at 3, available at <http://www.sentencingproject.org/pdfs/mauer-focus.pdf> (last visited Feb. 25, 2004) [hereinafter Mauer, *Invisible Punishment: Block Housing*]; Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT, *supra* note 16, at 15; Wacquant, *supra* note 33, at 106-07 (discussing how mass incarceration induces “civic death” by denying prisoners access to cultural capital (ineligibility for educational loans), social redistribution (denial of welfare benefits), and political participation (felon disenfranchisement)).

117. See MAUER, *supra* note 1, at 186.

118. See Mauer, *Invisible Punishment: Block Housing*, *supra* note 116, at 4.

Fourteen of these states disenfranchise inmates for life.

A 1998 study by the Sentencing Project and Human Rights Watch documented the impact of high incarceration rates on black communities' participation in civic life.¹¹⁹ The authors estimated that 3.9 million Americans, or 1 in 50 adults, had either currently or permanently lost their right to vote as a result of a felony conviction.¹²⁰ More than a third of these disenfranchised citizens—1.4 million—were black men.¹²¹ The impact of incarceration on black political power is more dramatic when these figures are considered from a community perspective. Nearly 1 in 7 black males of voting age have been disenfranchised as a result of incarceration.¹²² The impact is especially enormous in states where exfelons are denied the right to vote: 1 in 4 black men is permanently disenfranchised in 7 of these states.¹²³

The geographic concentration of mass incarceration translates the denial of individual felons' voting rights into disenfranchisement of entire communities. Excluding such huge numbers of citizens from the electoral process substantially dilutes African American communities' voting power. "Thus, not only are criminal justice policies resulting in the disproportionate incarceration of African Americans," concludes the Sentencing Project's Marc Mauer, "imprisonment itself reduces black political ability to influence these policies."¹²⁴ This dilution in voting strength is compounded by the Census Bureau's practice of counting inmates as residents of the jurisdictions in which they are incarcerated.¹²⁵ The population inflation in predominantly white, rural districts where prisons are located generates a perverse redistribution of government aid and political apportionment to these areas and away from the African American communities from which most of the inmates come.¹²⁶ Neighborhoods with large percentages of current and former inmates lack the political clout to influence policies and demand services.

Sociologists Christopher Uggen and Jeff Manza have projected that, even accounting for lower turnout by former felons, disenfranchisement laws have

119. MAUER, *supra* note 1, at 186.

120. *Id.*

121. *Id.*

122. *See id.* (noting that 13% of black men were disenfranchised).

123. *Id.*

124. *Id.*

125. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Mauer, *Invisible Punishment Block Housing*, *supra* note 116, at 4.

126. *See* Mauer, *Invisible Punishment: Block Housing*, *supra* note 116, at 4. Paul Street refers to mass incarceration as "a form of Reverse Racial Reparations" because it "transfers wealth, census count, earnings, government dollars, voting power and even campaign finance influence away from the black and into the white community." Paul Street, *Starve the Racist Prison Beast*, ZNET (Nov. 8, 2003), at <http://www.zmag.org/content/showarticle.cfm?SectionID=43&ItemID=4471> (last visited Mar. 12, 2004).

influenced actual election outcomes, playing a decisive role in U.S. Senate and presidential races in recent years.¹²⁷ The demonstrable impact on national elections, they conclude, shows that “rising levels of felon disenfranchisement constitute a reversal of the universalization of the right to vote.”¹²⁸ Given the spatial concentration of disenfranchised felons and exfelons in inner cities, the impact on local elections is probably even greater. By denying felons the opportunity to participate in legal processes such as voting, jury service, and holding public office, moreover, mass incarceration reinforces internal social norms that treat these processes as illegitimate as well as the external perception of these communities as outside the national polity.

2. Labor market exclusion.

Mass imprisonment works to constrain black communities’ participation in the labor market as well. At the most basic level, incarceration physically keeps inmates from working. More than a million poor men confined to prisons are not counted in the nation’s unemployment statistics.¹²⁹ This means that unemployment is far worse in black communities than the official numbers indicate. These figures also highlight how incarceration depletes black communities of their workforce and income, thereby impairing their economic stability.¹³⁰ Removing large numbers of residents who engage in both legal work and crime constitutes a significant loss to local economies.¹³¹

Incarceration not only temporarily disrupts employment in black communities, it also “aggravates the already severe labor-market problems of their mostly low-income, poorly educated inmates” in lasting ways.¹³² Prison creates powerful barriers to finding legal employment by discouraging potential employers, interrupting employment history, eroding job skills, and undermining social connections to stable job opportunities.¹³³ When inmates

127. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002).

128. *Id.* at 796. Pamela Karlan points to the 2000 presidential race in Florida as a factual example of felon disenfranchisement distorting an election. See Karlan, *supra* note 125, at 1157. “Florida’s law not only excluded hundreds of thousands of ex-offenders from the polls; it also disenfranchised significant numbers of eligible voters as well due to a profoundly flawed purge process,” she writes. *Id.* at 1157-58.

129. ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 33 (1998). Combining the 762,000 black men counted in the official 1995 unemployment figures with 511,000 in state or federal prison raises the unemployment rate for black men from under 11% to almost 18%—an increase of two-thirds. *Id.*

130. See Hagan & Dinovitzer, *supra* note 64, at 134-35.

131. See Clear & Rose, *supra* note 1, at 35.

132. CURRIE, *supra* note 129, at 73; see Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410 (2001).

133. See Sabol & Lynch, *supra* note 65, at 7; Bruce Western, *The Impact of*

return from prison they typically lack the education and skills needed to compete in the labor market, and the stigma of criminal conviction makes employers extra wary of hiring them.¹³⁴ Besides reducing the opportunities inmates have for legal work, incarceration strengthens inmates' ties to criminal networks.¹³⁵ Being sent to prison completely railroads a young man's transition from school to stable employment.¹³⁶ Children who are incarcerated have virtually no chance of getting a good job when they grow up.¹³⁷ In short, a stint in prison permanently ruins most inmates' earning potential.

The spatial concentration of incarceration intensifies the scarcity of social connections to legal work within neighborhoods. This especially impedes access to jobs for youth in these communities because it decreases the pool of men who can serve as their mentors and their links to the working world.¹³⁸ One group of researchers suggests that "large numbers of idle young men recently released from prison or jail . . . may form peer groups or reference groups that offer the community few normative or social links to legitimate employment."¹³⁹ Mass imprisonment may also have a "spillover effect" by generating employment discrimination against entire neighborhoods associated with high crime or incarceration rates.¹⁴⁰

3. Civic isolation.

The extent of exclusion from both political and economic participation suggests that mass imprisonment disenfranchises communities more profoundly than the reduction in voting strength. Neighborhoods where incarceration is concentrated are cut off from civic life, both internally and externally. As discussed earlier, Todd Clear and Dina Rose theorize that mass imprisonment promotes a negative view of the justice system that reinforces

Incarceration on Wage Mobility and Inequality, 67 AM. SOC. REV. 526 (2002); Western et al., *supra* note 16, at 176.

134. See Hagan & Dinovitzer, *supra* note 64, at 136-37; Western et al., *supra* note 16, at 176. Incarceration aggravates the racial discrimination that African Americans already experience in the job market. A recent study that sent matched pairs of young black and white men to apply for entry-level job openings in Milwaukee found that having a criminal record had a greater adverse impact on black applicants than white applicants. Even more disturbing, white applicants with criminal records were more likely to receive callbacks from employers than blacks *with no criminal history*. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

135. See ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 143 (1993).

136. See Western et al., *supra* note 16, at 176-77.

137. See SAMPSON & LAUB, *supra* note 135, at 20; John H. Laub & Robert J. Sampson, *Long-Term Effect of Punitive Discipline*, in COERCION AND PUNISHMENT IN LONG-TERM PERSPECTIVE 256 (Joan McCord ed., 1995).

138. See Sabol & Lynch, *supra* note 65, at 8.

139. Western et al., *supra* note 16, at 178.

140. *Id.*

communities' civic isolation. This alienation from political institutions is relevant to residents' sense of social citizenship as well as their ability to maintain social order. Clear and Rose elaborate how community distrust of the criminal justice system leads to political ineffectiveness:

Social isolation . . . increases as residents in disadvantaged communities become more disenchanted with the state and with political processes in general. As a result, they become less adept at operating as civic citizens and more removed from the civic community, where egalitarian political relations, a social fabric of trust, and cooperation are the norm. . . . Therefore, to the extent the experience of incarceration delegitimizes social institutions in particular and political activism in general, it undermines the capacity and willingness of individuals to engage in civic citizenry.¹⁴¹

This explanation is problematic if interpreted to pin communities' political powerlessness on attitudes toward the justice system. Residents have good reason to distrust a criminal justice system that has treated them with disrespect, bias, and brutality.¹⁴² Developing a norm of trust in repressive agencies would be pathetic and self-defeating.¹⁴³ The critical insight from sociological theory is that prison policy destroys the social networks and resources necessary for communities to have a say in the political process and to organize local institutions to contest unjust policies. This concrete interference with political capacity creates and reinforces social norms that question the effectiveness of collective efforts to produce social change. Mass imprisonment impairs community structures and norms that would channel resistance to systemic injustice in productive directions.

As these communities disengage from the national political economy, the rest of society stigmatizes them as criminal, deprives them of social supports, and treats their members as noncitizens. Racial profiling illustrates the potential

141. Clear & Rose, *supra* note 1, at 42-43.

142. See, e.g., Chambliss, *supra* note 17, at 301 (noting that "[v]iolence, racial slurs, and disrespect are standard procedure in the typical arrest of minority suspects" and providing an illustration from field notes); Jodi Wilgoren & Ginger Thompson, *After Shooting, An Eroding Trust in the Police*, N.Y. TIMES, Feb. 19, 1999, at A1 (quoting African American captain in Department of Corrections as saying young people in his Bronx neighborhood view the police as "thugs with guns in blue uniforms"). See generally COLE, *supra* note 43 (discussing racial bias at all levels of the criminal justice system).

143. For example, columnist Bob Herbert reported that increased police abuse of black New Yorkers influenced the survival lessons black children learn:

Some parents and civic leaders are teaching black and Hispanic children to quickly display their hands during any encounter with the police, like little criminals. This is to show that the youngsters are not armed and therefore should not be blown into eternity at age 10 or 15 by a trigger-happy stranger in a blue uniform.

Bob Herbert, *In America. A Brewing Storm*, N.Y. TIMES, Feb. 11, 1999, at A33. While this type of socialization may reflect profound damage to children's "sense of civic justice," it also constitutes a pragmatic approach to violent law enforcement practices. Enhancing children's stake in social citizenship requires decreasing police abuse and changing policies that impair their communities' political efficacy—not teaching children to trust the police more.

for black incarceration rates to criminalize a population. Police officers routinely defend racial profiling as a useful crime detection tool that is based on the disproportionate commission of certain crimes by members of minority groups.¹⁴⁴ Police captain Marshall Frank, for example, deployed mass imprisonment to defend the practice of pulling over cars driven by black men in white neighborhoods. "Label me a racist if you wish," he wrote, "but the cold fact of the matter is that African Americans comprise 12 percent of the nation's population, but occupy nearly half the state and federal prison cells."¹⁴⁵ These statistics were similarly marshaled by commentators in defense of Bernard Goetz's vigilante shooting of four unarmed black teenagers who approached him for money on a New York City subway in 1984.¹⁴⁶ Mass incarceration seems to verify stereotypes about black criminality that originated in slavery and are part of a belief system premised on the superiority of whites and inferiority of blacks.¹⁴⁷

Researchers have demonstrated the impact of imprisonment on social norms within communities. But mass imprisonment must have a more widespread influence on values held by the entire society that strains to rationalize such an immense constraint of human freedom. As Marc Mauer and Meda Chesney-Lind caution, "[U]ltimately, a society in which mass imprisonment has become the norm is one in which questions of justice, fairness, and access to resources are being altered in ways hitherto unknown."¹⁴⁸ We can apply social norm theorizing to explain the harmful social influence of mass incarceration on the broader public. Just as visible disorder "tells" residents that the community is not enforcing norms of orderliness, the concentration of imprisonment within African American communities tells Americans that these communities are not entitled to norms

144. See Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51.

145. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71, 78 (2003) (quoting Marshall Frank, *Racial Profiling: Better Safe than Sorry*, MIAMI HERALD, Oct. 19, 1999, at 7B). On the correct use of data to assess the efficiency and justice of racial profiling, see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. (forthcoming Fall 2004), available at <http://www.law.uchicago.edu/faculty/harcourt/publications.html> (last visited Mar. 24, 2004); Harris, *supra*, at 79-82.

146. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 783 (1994).

147. See GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 256-82 (1971); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-21 (1984); see also ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 208 (1990) ("The public awareness is color-coded: white skin denotes civility, law-abidingness, and trustworthiness, while black skin is strongly associated with poverty, crime, incivility, and distrust.").

148. Mauer & Chesney-Lind, *supra* note 116, at 2.

of citizenship ordinarily expected in our liberal democracy.

II. THE MORAL SIGNIFICANCE OF COMMUNITY HARM

A. *Moving Beyond the Prison-Crime Nexus*

The research on community-level effects, including by legal scholars, tends to revolve around the relationship between prison and crime. This research reveals that mass incarceration is iatrogenic: All of the community-level effects discussed above ultimately increase criminal activity. Incarceration is no longer simply an outcome of neighborhood crime, but is integrated in the damaged social fabric of communities that produces crime. As Fagan, West, and Holland put it, incarceration is now “part of an ecological dynamic of crime in neighborhoods.”¹⁴⁹ In their study on “Reciprocal Effects of Crime and Incarceration in New York City’s Neighborhoods,” Fagan, West and Holland found positive and significant effects of prison admissions on subsequent felony crime complaints at the precinct level.¹⁵⁰ There is sound empirical grounds for concluding that the anemic incapacitative and deterrent effects of current prison policy are far outweighed by its criminogenic effects in neighborhoods where incarceration is concentrated.¹⁵¹

Research showing that mass incarceration increases crime is politically powerful. These findings demolish deterrence-based rationales for harsh sentencing policies and appeal to taxpayers’ concerns about the fiscal sanity of prison expansion.¹⁵² Proving that prisons are criminogenic interrupts the circular reasoning that supports prison growth whether crime rates go up or down, what David Downes calls “an experiment that cannot fail—if crime goes down, prisons gain the credit; but if it goes up, we clearly need more of the same medicine whatever the cost.”¹⁵³ Politicians defend the spiraling prison population on grounds that it protects law abiding citizens from crime. What is the defense of mass incarceration if it actually makes citizens more vulnerable to crime?

149. FAGAN ET AL., *supra* note 17, at 2.

150. *Id.* at 24.

151. See Clear & Rose, *supra* note 1, at 44-45.

152. It appears that the financial cost of mass incarceration to taxpayers is beginning to sway legislators toward curbing prison growth. See Fox Butterfield, *Study Calls California Parole System a \$1 Billion Failure*, N.Y. TIMES, Nov. 14, 2003, at A24; Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1; Paul von Zielbauer, *Rethinking the Key Thrown Away; As Aschroft Cracks Down, States Cut Prison Terms*, N.Y. TIMES, Sept. 28, 2003, at 41; Paul von Zielbauer, *Rikers Houses Low-Level Inmates at High Expense*, N.Y. TIMES, Jan. 16, 2004, at B1.

153. David Downes, *The Macho Penal Economy: Mass Incarceration in the United States—A European Perspective*, in MASS IMPRISONMENT, *supra* note 1, at 51, 57.

Yet it is troubling that researchers pay so much attention to the crime-generating features of mass imprisonment instead of the other harms it inflicts on African American communities. The social control approach accepts the fundamental role of state punishment in reducing crime, failing to examine critically other functions served by the prison system. Nor does the prison-crime nexus challenge sufficiently the view of these communities as sites for law enforcement rather than as sites for political resistance and self-determination. The reduction in social capital caused by prisons' weakening of neighborhood networks makes black communities less effective at achieving collective ends far beyond maintaining order. While emerging research on community-level effects of mass imprisonment has begun to revolutionize thinking on race and prison policy, it should investigate more the connection between prisons and black social citizenship rather than just the connection between prisons and crime.

B. *Mass Imprisonment and Political Subordination*

More important than mass incarceration's role in crime control is its role in controlling the social, economic, and political engagement of African American communities in the national polity. Sociological theory about the function of penal policy in government's regulation of social marginality helps to place mass imprisonment in political context. Penal institutions have historically been key components of social policy aimed at governing marginal social groups.¹⁵⁴ At times, policy regimes have emphasized the social causes of marginality and attempted to use welfare and prisons to reform and integrate socially dispossessed groups. Exclusionary regimes, such as we are witnessing in the United States today, "emphasize the undeserving and unreformable nature of deviants, tend to stigmatize and separate the socially marginal, and are hence more likely to feature less generous welfare benefits and more punitive anti-crime policies."¹⁵⁵ The contraction of the U.S. welfare state, culminating in the 1996 federal welfare reform legislation, paralleled the expansion of prisons to stigmatize innercity communities and to isolate them further from mainstream society.

Sociologist Loic Wacquant incisively extends theorizing about prisons as instruments for the management of social marginality to their particular role in U.S. racial repression.¹⁵⁶ He situates contemporary mass incarceration in a

154. Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, in MASS IMPRISONMENT, at 35; see, e.g., DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990); GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939).

155. Beckett & Western, *supra* note 154, at 36; see Malcolm M. Feeley & Jonathon Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992).

156. Wacquant, *supra* note 33.

historical lineage of “peculiar institutions” that have served to define, confine, and control African Americans—slavery (1619-1865), the Jim Crow system in the South (1865-1965), the urban ghetto in the North (1915-1968), and the “novel organizational compound formed by the vestiges of the ghetto and the expanding carceral system [(1968-)].”¹⁵⁷ Each institution prior to 1968 was undermined by the inherent contradiction of its caste divisions in a formally democratic society and eventually toppled by opposing social struggles.¹⁵⁸ Each successor regime, while preserving the U.S. racial hierarchy, encompassed a narrowing segment of the black population, with mass incarceration currently concentrated in poor innercity neighborhoods.

Wacquant explains the unprecedented expansion of prisons as “a result of the obsolescence of the ghetto as a device for caste control and the correlative need for a substitute apparatus for keeping (unskilled) African Americans ‘in their place’, for example, in a subordinate and confined position in physical, social, and symbolic space.”¹⁵⁹ By comparing key features of black ghettos and prisons, Wacquant shows a symbiosis between the two institutions that “not only enforces and perpetuates the socioeconomic marginality and symbolic taint of the urban black subproletariat,” but also “plays a pivotal role in the remaking of ‘race’ and the redefinition of the citizenry via the production of a racialized public culture of vilification of criminals.”¹⁶⁰ Ghettos and prisons are functional equivalents in that they serve the same purpose of confining a stigmatized population and are so interlocked as to form a single institutional mesh.¹⁶¹

Empirical studies of prisons’ community-level consequences provide an important elaboration of Wacquant’s analysis by showing concretely how the concentration of incarceration within ghettos excludes African Americans from social citizenship. Structural racism systematically maintains racial hierarchies established in prior eras by embedding white privilege and

157. *Id.* at 85 & tbl.1. On the parallels and relationship between the institution of slavery and the prison system, see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22-39 (2003); Alex Lichtenstein, *The Private and the Public in Penal History: A Commentary on Zimring and Tonry*, in MASS IMPRISONMENT, *supra* note 1, at 171, 173-76. Alex Lichtenstein provides an important amendment to Wacquant’s analysis by pointing out the relationship between penal policy and the regimes of slavery and Jim Crow:

[S]table incarceration rates appear in periods of white racial hegemony and a stable racial order, such as that secured by slavery in the first half of the 19th century or Jim Crow during the first half of the 20th. Correspondingly, sudden rises in incarceration, especially of minorities, tend to appear one generation after this racial hegemony has been cracked, as in the first and second Reconstructions of emancipation and civil rights.

Id. at 176.

158. See Wacquant, *supra* note 33, at 86.

159. *Id.* at 83.

160. See *id.* at 84.

161. *Id.* at 102. Wacquant points to “the fusion of ghetto and prison culture,” expressed in gangsta rap lyrics, adolescent fashions that model prison garb, and tattooing featuring prison icons, as a reflection of this institutional coupling. *Id.* at 103.

nonwhite disadvantage in policies, institutions, and cultural representations.¹⁶² Mass incarceration is the most effective institution for inscribing these barriers in contemporary community life and transferring racial disadvantage to the next generation.¹⁶³ One of its most pernicious features is its destruction of community-based resources for contesting prison policy and other systemic forms of disenfranchisement. Unlike the black urban ghetto, which “enabled African Americans to fully develop their own social and symbolic forms and thereby accumulate the group capacities needed to escalate the fight against continued caste subordination,”¹⁶⁴ prisons break down social networks and norms needed for political solidarity and activism.¹⁶⁵

■

C. Rethinking the Justifications for Punishment

The empirical evidence of community-level damage caused by the spatial concentration of mass imprisonment supports a radical rethinking of dominant justifications for prison policy and related crime control and sentencing reforms. Social science research is light years ahead of both legal theorizing and policymaking about incarceration, which have yet to grasp the monumental devastation of prison growth on people’s lives and on democratic ideals. This research reveals a profound contradiction between asserted ideals of participatory, liberal democracy and the state-enforced prison apparatus that strips communities of citizenship rights. Even this mountain of data cannot fathom the deep wound to children’s spirits inflicted by growing up under heavy supervision by the state and under suspicion by the rest of society. But empirical studies can only inform, not determine, normative judgments. It is critical to analyze the moral significance of imprisonment’s community-level collateral harms—either to evaluate the seriousness of the harms and weigh them against the asserted benefits of incarceration or to recognize that their political function is itself immoral—and to ensure that this analysis has a real impact on criminal justice policy.¹⁶⁶ Ultimately, this is a matter of political

162. See generally BROWN ET AL., *supra* note 48.

163. See Western, *supra* note 133, at 542 (noting that the U.S. penal system imposes “a systemic influence on broad patterns of social inequality”).

164. Wacquant, *supra* note 33, at 89.

165. On hip hop culture’s critique of mass incarceration as an instrument of subordination, see Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

166. These courses of action raise a number of questions that are beyond the scope of this Article. How should we measure mass incarceration’s community-level harms and against which other effects of prison policy should we weigh them? What is the moral relevance of these measurements? It might be more productive to evaluate the change in costs and benefits of alternative policies that rely less on incarceration. Moreover, policy makers might respond to evidence of community-level harms either by reducing the negative impact of prisons (e.g., by creating prison reentry programs and abolishing collateral

will, not empirical data.

In a sense, incorporating the community impact of mass imprisonment into our ethical deliberations about punishment would not depart so radically from the existing approaches. Moral philosophers have long recognized that the state must justify its deliberate infliction of suffering on certain individuals when it imposes criminal sanctions.¹⁶⁷ Utilitarian justifications for imprisonment already depend on measuring punishment's social impact. Deterrence theory posits that incarcerating offenders dissuades others from breaking the law either because it makes crime too costly or because it inculcates norms of law-abiding behavior in the general population.¹⁶⁸ Incapacitation theory justifies imprisoning offenders to increase public safety.¹⁶⁹

The escalation of African American imprisonment in particular has been defended as justified by its social benefits. Officials and scholars defend the targeting of innercity neighborhoods by law enforcement on grounds that these neighborhoods experience more harmful and visible effects of illegal drug use.¹⁷⁰ Legislators point to the social harm of innercity drug distribution, for example, as justification for the sentencing disparity between crimes involving powder and crack cocaine.¹⁷¹ However, the benefits of tough drug enforcement for African American communities cannot morally justify mass incarceration if they are outweighed by the resulting harm of social breakdown and civic exclusion in these same communities.

In addition, the current sentencing regime that generated the enormous prison population is far from individualized. Indeed, the prison explosion is largely attributable to sentencing changes that made punishment *less* individualized.¹⁷² As Marc Mauer observes in explaining prison growth, "The

penalties) or by reducing the prison population (e.g., by changing sentencing policies such as mandatory minimums for drug offenses) or both.

167. See generally Kent Greenawalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336 (Sanford H. Kadish ed., 1983).

168. See, e.g., Jeremy Bentham, *Principles of Penal Law*, pt. 2, bk. 1, ch. 3, in THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1843); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-478 (1997).

169. See, e.g., Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004) (discussing how tough federal sentences purchase significant crime control benefits); John J. DiIulio Jr., *Prisons Are a Bargain, by Any Measure*, N.Y. TIMES, Jan. 16, 1996, at A17 ("[P]risons pay big dividends even if all they deliver is relief from the murder and mayhem that incarcerated felons would be committing if free."). John DiIulio has since reversed his position on the cost effectiveness of high incarceration rates. John J. DiIulio Jr., *Against Mandatory Minimums*, NAT'L REV., May 17, 1999, at 46; John J. DiIulio Jr., *Two Million Prisoners Are Enough*, WALL ST. J., Mar. 12, 1999, at A14.

170. See, e.g., William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

171. See David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

172. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A*

most significant change within the criminal justice system is the loss of the individual in the sentencing process, as determinate sentencing and other 'reforms' have taken us from an offender-based to an offense-based system."¹⁷³ This failure is exacerbated by the virtual uniformity of plea bargaining in drug cases.¹⁷⁴ In New York, for example, more than ninety percent of drug cases involve guilty pleas rather than jury trials to determine guilt or innocence.¹⁷⁵ Far from giving offenders what they deserve, prison sentences today are determined almost entirely by nondiscretionary actuarial measures, without the individualized assessment of culpability normally contemplated by retributivism.

Proponents of tough drug sentencing, moreover, attribute the moral culpability of drug offenders to their evil infliction of social harms that are presumed to flow from illegal drug use. Sentencing policies say to offenders, "You become deserving of severe punishment when you pick up a crack pipe because it is obvious that you risk doing bad things once you begin smoking crack"¹⁷⁶ Assumptions about the social harms of drug use are supported neither by empirical evidence of its actual effects nor a theoretical analysis of the proportionality of mandatory minimum sentences to culpability.¹⁷⁷

Retrospective on the Past Century and Some Thoughts about the Next, 70 U. CHI. L. REV. 1, 12 (2003) (discussing a "new penology in sentencing guidelines and mandatory minimum sentences that allocate punishment wholesale rather than retail"); Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 101-02 (2003) (describing the development and refinement of an actuarial approach to criminal law and relating it to the theoretical shift during the twentieth century from the individualization of punishment to incapacitation theory).

173. Mauer, *supra* note 1, at 12; see Angela J. Davis, *Incarceration and the Imbalance of Power*, in INVISIBLE PUNISHMENT, *supra* note 16, at 61, 78 ("Assembly-line justice facilitated by powerful prosecutors, helpless defense attorneys, and increasingly powerless judges now characterizes the system that determines whether a person will lose his liberty or even his life.").

174. See Davis, *supra* note 173, at 68-75. Professor Davis notes that "one of the most devastating collateral consequences of the mass incarceration movement has been the waning model of the zealous defense attorney battling the prosecutor and protecting the client's liberty." *Id.* at 74. Because of the overwhelming pressure on offenders to plea bargain, "many defense attorneys have become little more than a conduit for information—conveying the prosecutor's plea offer and calculating the possible sentence after trial and after a plea." *Id.* at 73.

175. JAMIE FELLNER, HUMAN RIGHTS WATCH, CRUEL AND USUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS 34 (1997), available at <http://www.hrw.org/reports/pdfs/U/US/US973.PDF> (last visited Jan. 13, 2004).

176. Joseph E. Kennedy, *Drug Wars in Black and White*, 66 LAW & CONTEMP. PROBS. 153, 177 (2003).

177. See Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999); Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALA. L. REV. 777, 783, 793 (2000). For an extended argument on the immorality of punitive drug policy, see DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (2002).

“Unfortunately, race still affords many people the requisite level of detachment to imagine the harms and corresponding immorality of illegal drug use as being so much greater than they actually are,” Joseph Kennedy observes.¹⁷⁸

This construction of low-level drug activity as morally culpable departs dramatically from views of white illegal drug use in prior eras. Kennedy contrasts the current “epidemiological morality of drug prohibition” with the far less punitive view of alcohol and narcotics during Prohibition in the 1920s.¹⁷⁹ Prohibition, which sent mostly whites to prison, constructed drug offenses as “vice crimes” designed to prevent the detrimental social consequences of the prohibited behavior.¹⁸⁰ Recharacterizing drug crimes as vice rather than evil would permit a more transparent weighing of mass incarceration’s social consequences.

Thus, the unprecedented growth of prisons in the last three decades has been based on group rather than individualized measures. Mass imprisonment is built on a foundation of nonindividualized assessments of guilt and utilitarian assertions of its social benefits. Individual desert tends to be marshaled only to divert attention away from a thorough analysis of the social costs and benefits at stake. Prison proponents emphasize both the social benefits of imprisonment stemming from the asserted reduction in crime as well as the individual culpability of drug offenders for creating social problems but pay little heed to the social harms caused by mass incarceration.

My purpose is not to endorse the current utilitarian approach to prison policy, but to highlight its inadequacies and racial bias. A purely utilitarian calculation of mass imprisonment’s costs and benefits might weigh the harms I have discussed against the economic and political gains that white rural communities reap from colossal prison construction. Empirical research on the social harms of mass imprisonment helps to demonstrate the repressive political function of policies defended by these sorts of calculations and lends moral weight to social movements opposing policies that create more prisons.

Moreover, attention to community-level effects of mass incarceration should not overshadow the injustice to individual human beings who are punished more harshly than they deserve. Evidence of community costs should not become part of a utilitarian rationale for prison policy that ignores the human rights of those who experience the impact of punishment most directly. This evidence might serve as an additional factor in assessing the punishment an offender deserves or place an outer limit on retributive sentences.¹⁸¹

In response to the overrepresentation of aboriginal people in Canadian

178. Kennedy, *supra* note 176, at 181.

179. *Id.* at 177.

180. Taslitz, *supra* note 37, at 10 (discussing Joseph E. Kennedy, *Drug Wars in Black and White*, *supra* note 176).

181. See Butler, *supra* note 165, at 1007 (arguing that a hip hop theory of punishment is retributive with a utilitarian limit on punishment).

prisons, for example, Parliament amended Canada's criminal code to require judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances" when sentencing aboriginal offenders.¹⁸² In *R. v. Gladue*, the Supreme Court of Canada explained that the law "directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique."¹⁸³ Thus, Canadian law attempts to remedy high rates of incarceration among aboriginal people by requiring judges to take into account systemic racial injustice in their assessment of aboriginal offenders' individual deserts. At the policy level, the costs of mass incarceration might similarly place an outer limit on legislative determinations of sentences, with a preference for noncarceral alternatives, especially for low-level drug offenses.

CONCLUSION

The demise of past regimes of racial repression—slavery, Jim Crow segregation, the urban black ghetto—required the conversion of normal social arrangements into a moral question. The United States Supreme Court in *Brown v. Board of Education*¹⁸⁴ reversed the long-accepted order of "separate-but-equal" schooling when black agitation and international scrutiny revealed its immorality. For the past thirty years, the growth of the prison population has generally been accepted as a conventional law enforcement response to crime. Prisons have become enmeshed in the normal way of life in many innercity communities. Empirical research on the social consequences of incarceration in these communities and the resulting disenfranchisement of their citizens makes the moral question of mass imprisonment inescapable.

The mounting evidence of mass imprisonment's collateral damage to African American communities shows that the extent of U.S. incarceration is not only morally unjustifiable, but morally repugnant. By damaging social networks, distorting social norms, and destroying social citizenship, mass incarceration serves a repressive political function that contradicts democratic norms and is itself immoral. This state-imposed injury warrants both affirmative action in the criminal justice system¹⁸⁵ and the massive infusion of resources in innercity neighborhoods to build local institutions, support social

182. *R. v. Gladue*, [1999] S.C.R. 688 (Can.) (citing Criminal Code, R.S.C., ch. C-46, § 718.2(e)). While writing this Article, I was invited to assist attorneys in Toronto, Canada, representing two African Canadian women who were convicted of drug offenses, to develop an argument that high incarceration rates among Canadians of African descent should affect sentencing decisions. I found it ironic that the evidence I had gathered of mass incarceration's harms to African American communities would do more good for blacks in Canadian courts than those appearing before U.S. judges.

183. *Id.* at 93(6).

184. 347 U.S. 483 (1954).

185. See generally *Gladue*, S.C.R. 688; Butler, *supra* note 15.

networks, and create social citizenship.¹⁸⁶ Hopefully, the new empirical research will underscore the urgency of wrestling with this moral question before the unbridled expansion of prisons obliterates most Americans' sense of justice.

186. Susan B. Tucker & Eric Cadora, *Justice Reinvestment*, IDEAS FOR AN OPEN SOC'Y, Nov. 2003, at 2, (proposing that governments redirect criminal justice spending toward "rebuilding the human resources and physical infrastructure—the schools, healthcare facilities, parks, and public spaces—of neighborhoods devastated by high levels of incarceration").