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Demonizing the “Enemy”: The Role of “Science” in Declaring the “War on Prisoners”

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The United States continues to confine unprecedented numbers of people inside its prisons and jails. Over the last several decades of the twentieth century, the nation became the world’s unquestioned leader in the *rate* at which it imprisons its own citizens and dramatically increased the length of the prison terms it requires them to serve.¹ Moreover, beginning in the mid-1970s, the fundamental purpose of imprisonment underwent a significant transformation. Lawbreakers began to be sent to American prisons explicitly to experience pain—to be punished—and little else. Indeed, a vigorous “penal harm” movement emerged during the last thirty-five years in which lawmakers competed with one another over finding “creative strategies to make offenders suffer.”²

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¹ See generally CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (2006), for a detailed discussion of the nature, magnitude, and consequences of the increased rates of incarceration. According to most recently available statistics, the size of the prisoner population continues to grow, and the rate of incarceration has largely stabilized at all-time high levels. HEATHER WEST & WILLIAM SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008-STATISTICAL TABLES 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>.

² Francis T. Cullen, *Assessing the Penal Harm Movement*, 32 J. RES. CRIME & DELINQ. 338, 340

Elsewhere, I have referred to the massive effort that the nation put forth during these years as a “War on Prisoners,” one waged with the kind of fierce aggressiveness that is typically reserved only for the worst enemies of the state.³ Characteristic of the wartime mentality that prevailed, few—if any—concerns were expressed about the long-term consequences of this prolonged conflict for its battle-scarred veterans or the large number of collateral casualties that it inevitably incurred. This was true even though, in this war, the vanquished were (and are) virtually all our own citizens, living in our own communities, rather than some foreign population suffering unseen in some distant land.

The declaration of the War on Prisoners was unexpected and, in retrospect, particularly untimely. It was unexpected in the sense that it entailed the sudden and unanticipated rejection of the central justification for imprisonment—the pursuit of the rehabilitative ideal—that had been in place for nearly a century. It was untimely in the sense that it reversed this venerable policy at what I will argue was precisely the moment in modern corrections history when it appeared to be poised for significant advance. Thus, the nation abandoned its commitment to the pursuit of “rehabilitation”—the notion that persons should be given meaningful opportunities to emerge from their time in prison better off than they entered—just as it was being elevated to a new and more sophisticated level.

Indeed, with astonishing speed, the rehabilitative ideal was swept aside and the course of American corrections radically reversed. Early 19th century views of the origins of crime as not only deeply individualistic but also largely intractable and even the product of biologically defective “others” were restored as core premises that helped shape the nation’s crime control and prison policies. A host of harshly punitive practices—ones entirely consistent with these previously discredited views—soon followed.⁴

The War on Prisoners itself was the product of a “perfect storm” of forces and factors that coalesced around what was portrayed as an urgent need for more severe punishments, more frequently applied. The War soon seemed absolutely necessary and unavoidable, with battle plans whose general outlines politicians hastily formulated, quickly implemented, and vigorously pursued. Unfortunately, like many wars, this

(1995); See generally Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN’S L.J. 27 (1998) [hereinafter Haney, *Riding the Punishment Wave*].

³ See generally Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87 (2008).

⁴ See generally Haney, *Riding the Punishment Wave*, *supra* note 2, for discussion of some of these policies.

one was launched with a great deal of political rhetoric and sloganeering, much of which bore only tenuous relationship to the truth.

These dramatic shifts in correctional thinking were undoubtedly "overdetermined." That is, they were the product of a whole series of changes that occurred almost simultaneously and at several different levels of society—as I say, a kind of "perfect storm." The century-old correctional commitment to rehabilitation was replaced with something called "incapacitation"—the notion that lawbreakers should be kept away from free society—"incapacitated"—for as long as possible, a policy rationale that invariably led to increasingly lengthy prison terms. The nation also revived a long-abandoned philosophical justification for imprisonment—retribution—by cloaking it in something called "just deserts" theory (calibrating the amount of prison pain a convicted person should experience exclusively on the basis of the crime for which he was being sentenced, to the near total exclusion of any other consideration).⁵

But there was quite a bit more going on. In addition to the re-framing of the intellectual justification for punishment that was being advanced by legislators, criminal justice scholars, and correctional policymakers alike, there was a corresponding reinterpretation of the very nature of criminality underway. In this, too, the nation followed a time-honored wartime tradition. When war is on the horizon—when perceived national interests and political expediency demand that outright hostilities be commenced—it is always useful (sometimes even necessary) to demonize one's enemy. As one military law commentator put it: "Whatever the objective reality, States understandably often demonize their opponents in order to shore up civilian and military morale and garner international support. For better or worse, conflicts continue to be viewed in terms of 'good' and 'evil.'"⁶

⁵ For a thoughtful discussion and critique of the role of desert in criminal sentencing, see generally Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006). The early advocates of desert-based sentencing surfaced in the late 1970s, as the War on Prisoners was just beginning to be waged. See, e.g., RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT, at xvi (1979). As the War raged, "desert-based sentencing" was offered as one of the best ways to achieve "principled sentencing." Andrew von Hirsch, *Proportionate Punishments*, in PRINCIPLED SENTENCING 195–200 (Andrew von Hirsch & Andrew Ashworth eds., 1992). See also the comments of Judge Roger Warren: "[o]ur sentencing and corrections policies have lurched from the 'rehabilitation ideal,' which predominated through the early 1970s, to the retribution-minded 'just-deserts' model, which has predominated over the last thirty years. We have essentially gone from the extreme of trying to rehabilitate everyone to the extreme of trying to rehabilitate no one." Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 633 (2009).

⁶ Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 41 (2008). The particular rhetoric by which demonization is accomplished can take different forms, and the instances in which it has been employed to incite or galvanize the public are not restricted to foreign wars. See, e.g., Jared Goldstein, *Aliens in the Garden*, 80 U. COLO. L. REV. 685 (2009); Steven Hayes et al., *Prejudice, Terrorism and Behavior Therapy*, 9 COGNITIVE AND BEHAV. PRAC. 296 (2002); Nevitt Sanford, *Dehumanization and Collective Destructiveness*, 1 INT'L J. OF GROUP TENSIONS 26 (1971).

Demonization thus stiffens the public's will and facilitates the expenditure of vast resources required to wage war. It also helps to minimize concern over mounting casualties and other ravages of the war itself. Although useful in the quest to galvanize support, however, the tactic also correspondingly heightens the risk that the war that follows may be waged with cruel excess—that disproportionate levels of aggression will be directed at the demonized enemy, moral limits exceeded, and needless suffering inflicted—all brought about and rationalized by the exaggerated magnitude of the threat at hand. Thus: “Researchers have long documented that the dehumanization of prisoners (the ‘enemy’) contributes to abuse. And clearly, over the course of history the United States (and other great powers) has demonized and dehumanized its ‘enemies.’”⁷

In this Article I analyze some of the ways in which the demonization of the enemy was accomplished in the War on Prisoners. In particular, I discuss the role of what was portrayed as “scientific” support for the increasingly widespread portrayals of criminality as not only a growing menace but also one perpetrated by predatory “others” who were uncontrollable and intractable, the worthy targets of a domestic “war.” My focus is in large part on the nature of the particular academic analyses that made their way prominently into the public and political arenas as the War on Prisoners was being declared and was eventually waged in earnest.

In this context, of course, it is always important to understand the way in which heightened attention and visibility were afforded only to certain perspectives and points of view, ones that were consistent with the political agenda that was being pressed and, eventually, the public mood that was being created. Not surprisingly, the media were enlisted to help accomplish these tasks in the run up to the War on Prisoners. They were instrumental in sounding the clarion call to battle, urging citizens to support efforts to rebuff the dire threat of crime, one that that was depicted as endangering the very security of the nation. The combination of the heightened media attention that was focused selectively on certain academic commentaries and commentators and the apparent legitimacy that “science” provided to the process of demonization served to widen public acceptance of the premises of the War on Prisoners and helped to make the War itself possible.

I. THE ANTEBELLUM ERA: REHABILITATION AND REFORM

The broadly accepted notion that prisons could and should be used to effect the reformation of prisoners dates to the inception of American

⁷ Gregory Hooks & Clayton Mosher, *Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror*, 83 SOC. FORCES 1627, 1638 (2005).

"corrections." Indeed, it motivated the construction and proliferation of the nation's first penitentiaries in the 19th century. As Zimring and Hawkins accurately put it: "It would be difficult to overstate the degree to which the concepts and vocabulary of rehabilitation have dominated discourse about the purposes and functions of imprisonment in modern American history."⁸

To achieve this reformation, inmates in the earliest penitentiaries were isolated and encouraged to "do penance" for their lives of crime. In fact, in Eastern State Penitentiary in Pennsylvania in the mid-1800s, they occasionally were visited by "moral instructors" whose goal was to "strengthen [the prisoner's] mind in the direction of virtue."⁹ By the 1860s, news of this approach had reached all the way to California, where a legislative committee expressed regret that San Quentin prisoners were afforded too few opportunities for "moral and religious instruction;" the prison accordingly took a number of steps supposedly to insure that the "spiritual regeneration" of the convicts was not overlooked.¹⁰

Although, as Nichole Rafter noted, wardens in mid-19th century American prisons fancied themselves "specialists in the treatment of offenders,"¹¹ they really had no organized body of scientific knowledge on which to draw in providing rehabilitative services of any kind. There were occasional prison officials whose devotion to one or another theory of crime led to temporary changes in the institutional regimes they administered, and even some notable improvements in the treatment of prisoners and conditions in the facilities where they were housed. However, lacking a generally agreed upon base of real knowledge on which to draw, the institutional programming took on an ad hoc quality, and typically lasted no longer than the tenure of the particular prison superintendent who devised it.

To be sure, the commitment to rehabilitation was not universally embraced in the 19th century. There were a number of prison administrators across the country who resisted calls to provide "treatment" or "programming" and never attempted to implement either; many were content to merely confine the prisoners they oversaw, or to exploit their labor with no pretense of providing any benefit to the convict workers.

⁸ FRANKLIN ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 6 (1995).

⁹ This was how phrenologist Marmaduke Sampson had described the regime at the Eastern State Penitentiary in Pennsylvania in the early 1840s. M.B. SAMPSON, *RATIONALE OF CRIME AND ITS APPROPRIATE TREATMENT* 130 (1846). Eastern State generally was regarded as the nation's "model prison" at the time, even though it was one of the facilities that Charles Dickens had famously criticized when he toured it. CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 238-39 (1842).

¹⁰ KENNETH LAMOTT, *CHRONICLES OF SAN QUENTIN* 87 (1972).

¹¹ NICOLE RAFTER, *CREATING BORN CRIMINALS* 94 (1997).

And even pro-rehabilitation "reformers" typically fell short of achieving their stated goals.¹² Nonetheless, the *idea* of rehabilitation continued to serve as a broadly accepted justification for incarceration. Thus, as historian David Rothman noted, post-Civil War prison proponents "expressed a very positive and enthusiastic commitment to the idea that prisons and asylums could accomplish rehabilitation and cure."¹³

Notwithstanding their questionable—and, at times, abysmal—record of achievement,¹⁴ enthusiasm for "rehabilitation and cure" continued to grow in the first several decades of the 20th century. Indeed, a number of important criminal justice reforms were introduced that were intended primarily to support and enhance the rehabilitative mission of the prison system. For example, the introduction of probation officers into the criminal justice system was based on the belief that "[d]iagnosis is as necessary in the treatment of badness as it is in the treatment of illness."¹⁵ Probation officers were thus charged with the responsibility of gathering a complete record of the lawbreaker's life, one that provided "a clear picture of the offender, his traits, habits, abilities, and tendencies."¹⁶ As Sheldon Glueck noted in the 1930s, the first step in any "intensive" probation investigation was to insure that "the offender [is] examined psychiatrically, psychologically, and physically, and a report of his condition from these points of view" be made.¹⁷

Here, too, rehabilitation was practiced with uneven skill and varying degrees of commitment. Yet, 20th century prison officials generally voiced support for the notion that reformation was possible and that prisoners could be successfully reintegrated back into society once their prison terms

¹² See Alexander Pisciotta, *Scientific Reform: The "New Penology" At Elmira, 1876-1900*, 29 CRIME & DELINQ. 613, 626 (1983), for a sobering account of one version of "prison treatment" carried out at a facility run by an ardent rehabilitationist—Zebulon Brockway's Elmira Penitentiary—describing the "extremely severe corporal punishment . . . administered to force conformity and maintain order."

¹³ DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 31 (1980).

¹⁴ With respect to prison education, for example, early 20th century experts declared the undertaking "a tragic failure" throughout the country, and noted that prisons "fared even worse" when it came to providing inmates with badly needed vocational training. *Id.* at 136-37. Yet, the system's "greatest failure" was said to be its inability to provide prisoners with work to do; the most reliable estimates indicated that approximately half of all prisoners were idle. *Id.* at 134-38.

¹⁵ Warren Spaulding, Speech at the Massachusetts Conference on Charities: Possibilities of a Probation System (1908), in ROTHMAN, *supra* note 13, at 57.

¹⁶ Ralph Ferris, *The Case History in Probation Service*, in PROBATION AND CRIMINAL JUSTICE 135, 140 (S. Glueck ed., 1933). This typically included arranging "for the physical and mental testing of the offender and incorporat[ing] the examiner's findings into his recommendation" to the court. ROTHMAN, *supra* note 13, at 62. Indeed, the probation officer was supposed to "be certain that each probationer received the full battery of psychological tests and the full benefits of psychological counseling." *Id.* at 67.

¹⁷ Sheldon Glueck, *The Significance and Promise of Probation*, in PROBATION AND CRIMINAL JUSTICE 16 (Sheldon Glueck ed., 1933).

had ended. Even Sanford Bates, the first director of the Federal Bureau of Prisons, and the man who presided in the 1930s over the transformation of Alcatraz into what was essentially the nation's first "super max" prison, publicly endorsed the rehabilitative ideal, noting:

I would object to putting too much emphasis upon the irreclaimability of the men who are to be sent to this institution [Alcatraz]. We should, of course, welcome an additional institution because of the opportunity for further classification that it gives us, but our prison system is built upon the hope that every man has the germ of reform somewhere in him.¹⁸

The virtually universal acceptance of the goal of prison rehabilitation in the years immediately preceding the declaration of the War on Prisoners is captured in a sweeping observation by legal commentator Francis Allen, at the end of the 1950s:

[I]n no other period has the rehabilitative ideal so completely dominated theoretical and scholarly inquiry, to such an extent that in some quarters it is almost assumed that matters of treatment and reform of the offender are the only questions worthy of serious attention in the whole field of criminal justice and corrections.¹⁹

Indeed, rehabilitation continued to be regarded as a long-established and widely accepted correctional goal well into the late 1960s and early 1970s. The still dominant model of the social welfare state and the political rhetoric that supported it were consistent with an approach to imprisonment that incarcerated people so that they could theoretically be "improved" by the experience.

Despite its long tenure as the central goal of American corrections, the rehabilitative ideal was compromised by at least three very significant limitations. The first was that, as I have alluded to above, rehabilitation was an aspiration that was too often honored only in the breach. That is, despite paying lip service to the idea of it, many prison officials did little or

¹⁸ ESCAPING PRISON MYTHS 83 (John Roberts ed., 1994).

¹⁹ Francis Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 227 (1959). Allen was no naïve supporter of the rehabilitative ideal and wrote insightfully of its pitfalls, including the way "the language of therapy" could be used "to disguise the true state of affairs that prevail in our custodial institutions," the tendency of staff to justify extreme "custodial measures" by cloaking them "in therapeutic terms," circumstances in which "increased severity of penal measures" and "lengthened periods of imprisonment" occur in the name of rehabilitation, and tensions between therapeutic intervention and individual liberty. *Id.* at 229.

nothing to insure that rehabilitation of any kind it took place within their institutions. Even in those prisons where attempts were made to implement meaningful programming, security and “custody-related” concerns were virtually always given priority in the allocation of typically scarce correctional resources. Thus, even a real commitment to rehabilitation was difficult to put into practice because program-oriented officials typically lacked funding and personnel commensurate to the task at hand.

The second limitation stemmed from the fact that, although the concept of rehabilitation had evolved considerably from the 19th and early 20th centuries—when there had been little or no scientific or intellectual underpinning to the things that were done in its name—there was still a problematic unevenness to the nature of prison programming. At the very least, of course, the pursuit of the rehabilitative ideal ostensibly required a degree of concern for the prisoner’s well-being, and prison systems that were supposedly devoted to improving the prisoners’ lot in life could not easily justify obviously or intentionally hurting them. Beyond that, however, it was difficult to hold prisons accountable for falling short of achieving the goals of rehabilitation. This was due in part to the fact that, throughout much of the first half of the 20th century, there were few agreed upon criteria for deciding “what works” and little in the way of systematic research on the effectiveness of prison programs.

The final limitation was conceptual, the product of the inherent individualism on which the very idea of rehabilitation was based. The notion that crime stemmed exclusively or even primarily from some defect in the persons that committed it was viewed in many quarters as problematic and questionable. The rehabilitative ideal assumed that prisoners were “damaged” in some way, and sought to provide prison programs that were intended to somehow “fix” them. As a result, the programs were individualistic and often therapeutic in nature. Obviously, if instead the roots of criminal behavior lay in part or whole in the social circumstances and economic conditions of its perpetrators, then conventional forms of rehabilitation were self-limiting. In that sense, individual-centered prison programs could be seen as addressing no more than one aspect of the crime problem—and not necessarily its most important. At the very least, a *comprehensive* program of crime control would need to provide programs that were directed at other terms in the equation—including social transformation and economic reform.

Somewhat remarkably, in retrospect, there were clear indications in the late 1960s and early 1970s that all three of these very serious limitations to the rehabilitative ideal were not only widely understood but also on the verge of being meaningfully addressed. Among other things, increasing attention had been brought to the lack of a national strategy of crime control and to the criminal justice system’s failure to effectively solve a

range of important crime-related problems. Increased public, political, and academic scrutiny was focused on the role of prisons in American society, and pointed questions were being asked about whether and how prison rehabilitation programs could resolve some of these issues.

In addition, beginning in the 1940s and continuing through the 1960s, prison programming was subjected to increasingly systematic study, some of which done as part of the emerging field of "evaluation research."²⁰ A database of accumulated studies made it possible to begin to empirically assess the effectiveness of prison rehabilitation programs. Several systematic literature reviews appeared in the 1970s in which literally hundreds of studies were examined and the outcomes of programs calculated. In one such review alone—discussed in detail later in this Article—nearly a thousand such studies and reports on rehabilitation programs of some sort were located that had been produced over just the preceding 30 years.²¹

Finally, there was increasingly widespread recognition that crime was in large part the product of the social and economic inequality that still plagued American society, much of which continued to be race-based. It was widely understood that no successful strategy of crime control could continue to focus only on the real or assumed problems of individual prisoners while simultaneously ignoring the larger structural forces that had influenced their behavior in society at large and that they would undoubtedly confront once released from prison.

The state of public and professional thinking about many of these issues was nicely illustrated in an important book that appeared near the end of the 1960s. In 1968, Elliot Studt, Sheldon Messinger, and Thomas Wilson published an analysis of a promising experimental program that they had initiated in a prison for young lawbreakers in California. At the outset of the book they made an assertion that was widely shared by criminal justice policymakers, legal decision makers, and members of the public alike—namely, that preparing prisoners "to be responsible members of the community when they are released from prison" was one of the major purposes of imprisonment.²² Of course, as I have noted, this view represented more than a century's worth of general commitment to the

²⁰ *E.g.*, LESLIE WILKINS, *EVALUATION OF PENAL MEASURES* (1969); *EVALUATING SOCIAL PROGRAMS: THEORY, PRACTICE, & POLITICS* (Peter Rossi & Walter Williams eds., 4th ed. 1972); *HANDBOOK OF EVALUATION RESEARCH* (Elmer Streuning & Marcia Guttentag eds., 1975); and CAROL H. WEISS, *EVALUATION RESEARCH: METHODS FOR ASSESSING PROGRAM EFFECTIVENESS* (1972).

²¹ *See generally* DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975). Although the authors of this influential study focused on only the 231 studies that met their criteria for review, their bibliography contains references to over a thousand studies in total.

²² ELLIOT STUDT, SHELDON MESSINGER & THOMAS WILSON, *C-UNIT: SEARCH FOR COMMUNITY IN PRISON 3* (1968).

rehabilitative ideal, something that, by the late 1960s, enjoyed perhaps more widespread support than at any other time in its history.

Studt, Messinger, and Wilson reported on a rehabilitation program that incorporated existing knowledge about how positive changes might be produced in individual prisoners. But their approach also reflected a subtle yet important shift in the way in which rehabilitation was being conceptualized. Thus, the authors discussed what they termed “major changes” taking place in the administration of criminal justice that favored the “increased use of probation, on the one hand, and parole and other community-based services on the other.”²³ Similarly, they acknowledged that for “committed” lawbreakers who would be spending “considerable time” in prison, it was “of major importance both to those persons and to the community that will receive them back that we do what is possible now to avoid the *customary deterioration of human capacity in prison*.”²⁴

These insights reflected an emerging consensus about prison treatment programs, one that explicitly recognized the potentially negative psychological effects of incarceration itself. Rather than focusing exclusively on the presumed pathology of prisoners to account for post-prison problems and possible recidivism, this analysis placed part of the blame on the nature of institutions in which they had been kept. It was one sign among many of a growing recognition that powerful and potentially destructive forces at work in prison, even within the very programs that were designed to help produce positive change in the name of rehabilitation.

Near the end of the book, Studt, Messinger, and Wilson highlighted another aspect of this new perspective on correctional programming. In a finding they labeled “[o]f first importance,” the authors employed an explicitly broad social perspective to understand the behavior of the prisoners in their study. Specifically, they concluded that:

[I]nmates are not inherently and massively antisocial in their orientations. When an environment existed in which the dignity of inmates as persons was respected, most C-Unit men acted in support of the values essential to community. Given legitimate means in the official program to work on their own problems with the help of staff, most inmates used the approved mechanisms in preference to sub-rosa activities.²⁵

²³ *Id.* at n.1.

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at 276.

Their emphasis on the importance of creating "an environment . . . in which the dignity of inmates as persons was respected" was part of a much broader trend in American criminal justice thinking that was just beginning to be formalized in the late 1960s. Indeed, the venerable concept of rehabilitation was being stretched beyond its individualistic limits by the optimism, social activism, and progressive policies of the day. There was growing recognition that adverse social and institutional conditions could produce a whole range of socially problematic behavior in persons who were "not inherently and massively antisocial in their orientation."

This was, after all, one of the assumptions of a very different war—the War on Poverty—that was then being waged.²⁶ At the core of the poverty-related social programs enacted by Congress at the urging of President Lyndon Johnson in the mid-1960s was the assumption that "[i]f poverty had its origin in circumstances too powerful for the individual to alter, then personal vices were more likely to be mechanisms for coping with the environment than the root causes of the individual's woe."²⁷ The public increasingly favored direct intervention to change the conditions themselves. For example, by 1967, nearly 70 percent of the American public favored setting up large-scale federal work projects to provide jobs for the unemployed.²⁸ In this atmosphere, it seemed increasingly possible to many citizens that crime was rooted in the social and economic inequality that still existed in many parts of American society.

Several important government commissions and national organizations urged large-scale reform of the nation's individualistic crime control policies and institutions, including three separate presidential commissions that were assembled in the late 1960s to address a wide range of crime-related issues. Although all three were comprised of diverse working

²⁶ President Johnson declared an "unconditional war' on poverty" in the United States on January 8, 1964. DAVID ZAREFSKY, *PRESIDENT JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY*, at ix (1986). See generally MICHAEL KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989); DANIEL KNAPP & KENNETH POLK, *SCOUTING THE WAR ON POVERTY: SOCIAL REFORM POLITICS IN THE KENNEDY ADMINISTRATION* (1971).

²⁷ ZAREFSKY, *supra* note 26, at 39. Of course, despite the social contextual and structural views on which they were based, many poverty programs suffered from the same self-limiting individualism as had traditional forms of rehabilitation. Instead of concentrating directly on the social conditions that produced and maintained poverty, the programs sometimes focused on providing opportunities for personal change and increasing "motivation" among the impoverished—for example, often offering job training but rarely jobs themselves. As one analyst noted, the general public was still more likely to enthusiastically support programs that were designed to bring about "a change in the personalities of lower-class individuals," and there was even the sense that, "government programs, no matter how innovative, must eventually become rehabilitative." James Jones, *Federal Efforts to Solve Contemporary Social Problems*, in *HANDBOOK ON THE STUDY OF SOCIAL PROBLEMS* 586 (Erwin Smigel ed., 1971). However, it soon became apparent that "in the absence of meaningful job opportunities, instilling motivation only planted seeds of frustration." ZAREFSKY, *supra* note 26, at 95. Zarefsky also showed how quickly political resistance and in-fighting managed to compromise the original vision of structural change that the originators of the War on Poverty had hoped to implement.

²⁸ ZAREFSKY, *supra* note 26, at 169, quoting the results of a nationwide Louis Harris poll, cited by Senator Joseph S. Clark, 113 CONG. REC. 27634 (1967).

groups of scholars, criminal justice analysts, and political figures, they reached broadly similar conclusions about the causes of crime and the manner in which it should be addressed.²⁹ Their policy recommendations reflected a fundamental shift in government's approach to crime control.

The first of these, the President's Commission on Law Enforcement and Administration of Justice, published a lengthy report in 1968 on the "challenge of crime in a free society."³⁰ As a first priority, the Crime Commission Report urged the nation to adopt a preventative approach to crime control—to "prevent crime before it happens"—and to achieve this goal in the following ways:

Eliminating social conditions closely associated with crime; improving the ability of the criminal justice system to detect, apprehend, judge, and reintegrate into their communities those who commit crimes; and reducing the situations in which crimes are most likely to be committed.³¹

In this regard, the Report discussed alleviating the "grinding pressures of urban slums," finding ways to rescue children from the potentially harmful environments in which they were raised, improving inner city schools, ending segregation, and providing enhanced vocational training, counseling, and increased job opportunities to young people.³² These recommendations—despite being issued in the midst of steeply rising

²⁹ Indeed, long after the commission reports appeared, scholars still acknowledged that, despite some inevitable modifications and refinement necessitated by the passage of time, they contained "the fruits of some of the best, and most representative thinking and research available," reflected "the best of the criminological tradition," and included "valuable compendia of usually solid and often still illuminating research." Elliot Currie, *Crimes of Violence and Public Policy: Changing Directions, in AMERICAN VIOLENCE & PUBLIC POLICY: AN UPDATE ON THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 47 (Lynn Curtis, ed., 1985).

³⁰ The report was finished in 1967, and published in 1968. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1968), [hereinafter CRIME COMMISSION REPORT]. The Report was sometimes referred to as the "Katzenbach Report," after Nicholas Katzenbach, who had been Attorney General for nearly two years in the Johnson Administration, and then served as the Commission's chair. The Report was over 300 pages long and was supplemented with nine separate task force reports. It concluded with over 200 recommendations simultaneously intended to improve the administration of justice and crime control efforts. The Crime Commission itself reflected a broad cross section of professional expertise and different political perspectives—including police chiefs and federal judges—and was not regarded as especially liberal at the time it was formed. Indeed, its report was criticized as a "compromise" by some liberal commentators even before it was issued. See John P. McKenzie, *The Compromise Report on Crime*, *THE NEW REPUBLIC*, Feb. 4, 1967, at 15. See generally, *CRIME IN A FREE SOCIETY: SELECTIONS FROM THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* (R. Winslow ed., 1973).

³¹ CRIME COMMISSION REPORT, *supra* note 30, at vi.

³² *Id.*

crime rates—were generally well received.³³ The Commission's message was clear: crime needed to be addressed by rebuilding the cities, eliminating slum conditions, and transforming lingering racial segregation to improve the living conditions of poor and minority citizens.

However, the emphasis on social reconstruction to reduce poverty and racial inequality was just one component in what was essentially a two-pronged approach to crime control. The second prong was based on the growing recognition that social conditions mattered as much *inside* prison as outside, and that harsh institutional environments could compromise other attempts to reduce crime. Thus, the Crime Commission set as an additional objective, after crime prevention, "the development of a far broader range of *alternatives* for dealing with offenders"³⁴ It acknowledged that there were some people who needed to be in prison, but members also worried that "there are many instances in which segregation [from society] does more harm than good." The report recommended the creation of "an entirely new kind of correctional institution" in the form of small, community-based facilities, extensive work and educational furlough programs (where prisoners returned to their facilities only at night), and "more effective treatment" for lawbreakers who needed it.³⁵

At roughly the same time, widespread concern was being voiced in other quarters about the fairness of the criminal justice system in general.³⁶

³³ As one respected academic commentator noted at the time, the crime problem would improve greatly if only the Crime Commission's recommendations for a broad set of social programs "would ever get under way." Lloyd Ohlin, *The Effect of Social Change on Crime and Law Enforcement*, 43 NOTRE DAME LAW. 834, 846 (1968) reprinted in *THE CHALLENGE OF CRIME IN A FREE SOCIETY: PERSPECTIVE ON THE REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE* 24, 36 (Leonard Levy ed., 1968).

³⁴ CRIME COMMISSION REPORT, *supra* note 30, at vii (emphasis added).

³⁵ CRIME COMMISSION REPORT, *supra* note 30, at vii–viii. See also Chapter 6 of the Crime Commission Report for the various recommendations it contained concerning corrections-related issues. The Commission's executive director, James Vorenberg, later explained the rationale for the Commission's recommendation that more extensive community-based alternatives to incarceration needed to be created by acknowledging that prisons "increase . . . frustrations and anger" and "take away [a prisoner's] responsibility for planning his life." James Vorenberg, *The War on Crime: The First Five Years*, THE ATLANTIC, May 1972, at *5, available at <http://new.theatlantic.com/past/docs/politics/crime/crimewar.htm>.

³⁶ Legal historian Lawrence Friedman noted that "[i]n retrospect, the fifties and sixties represented a peak, or high point, in a movement to make criminal justice more humane" LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 305 (1993). A number of broad analyses by legal experts appeared during those years that questioned the fairness and functioning of various aspects of the criminal justice system in the United States. E.g., RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION, AND CONTROL* (1970); Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Sol Rubin, *Disparity and Equality of Sentences*, 40 F.R.D. 55 (1966); JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966). Law review notes published during these years addressed the need for a number of criminal justice reforms, including the legal struggle to bring the constitutional rights of prisoners under the purview of the courts. E.g., Note,

Many critics questioned whether its sanctions were employed selectively to target racial minorities.³⁷ This was, of course, part of the broader recognition that, long after legalized segregation had been outlawed, the discriminatory treatment of African Americans persisted in the United States. Such discrimination took a particularly stark and unforgiving form in the criminal justice system.³⁸ These issues were highlighted in the work of a second Presidential Commission, one that had been appointed to study the causes of widespread racial conflict and unrest. Formed in response to the race-related disturbances that occurred in some 150 cities in the United States in the summer of 1967, the Riot Commission identified a set systemic problems and provided a critique of the way in which the criminal

Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962). In addition, a number of landmark United States Supreme Court cases not only effectuated significant changes in the criminal justice system but also drew the public's attention to normative deficiencies in the administration of justice. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁷ Concerns over racial unfairness in the administration of criminal justice were being voiced in a number of legal and public arenas. See generally UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, VOLUME 5 - JUSTICE (1961). In *Swain v. Alabama*, 380 U.S. 202 (1965), the United States Supreme Court began to address the issue of whether peremptory challenges were being used in a racially discriminatory manner in certain jurisdictions. See generally Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process, and Equal Protection*, 74 YALE L.J. 919 (1965). In *Lee v. Washington*, 390 U.S. 333, 333 (1968), the Court acknowledged that the state of Alabama was still engaged in officially racially segregating its prisons and jails and ended the practice. Questions about the racially discriminatory imposition of the death penalty were being raised by the NAACP Legal Defense Fund in the mid-1960s, as part of a litigation strategy that challenged the constitutionality of capital punishment. See generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973). See also Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966). Racially discriminatory death sentencing continued to be litigated and was addressed in passing in *Furman v. Georgia*, 408 U.S. 238, 310 (1972), where, for example, Justice Stewart, who concluded that "racial discrimination has not been proved" in the case, also conceded that "[m]y Concurring Brothers have demonstrated that, if any basis can be discerned for these few to be sentenced to die, it is the constitutionally impermissible basis of race." In addition, the strained relations between the police and young Black men was discussed in several controversial but widely read autobiographical accounts that elevated public awareness of these issues. See generally CLAUDE BROWN, *MANCHILD IN THE PROMISED LAND* (1965); ELDRIDGE CLEAVER, *SOUL ON ICE* (1968); MALCOLM X, *AUTOBIOGRAPHY OF MALCOLM X* (1965); JOHN HERSEY, *THE ALGIERS MOTEL INCIDENT* (1968). Also during this era, the Black Panther Party was formed in Oakland, California, in October 1966, ostensibly to "end police brutality." PAUL ALKEBULAN, *SURVIVAL PENDING REVOLUTION: THE HISTORY OF THE BLACK PANTHER PARTY 5* (2007). Indeed, three entries from the Panther's "10-point program" related directly to criminal justice issues, including a direct end to police brutality, freeing Black men from penal institutions in the United States, and a demand that Black defendants be tried only before all-Black juries. *Id.* See also Robert M. Fogelson, *From Resentment to Confrontation: The Police, the Negroes, and the Outbreak of the Nineteen-Sixties Riots*, 83 POL. SCI. Q. 217 (1968).

³⁸ The Crime Commission Report had urged law enforcement to create community-relations programs and "citizens advisory committees" in minority communities as well as to make "special efforts" to recruit minority police officers. The Report noted: "Fair treatment of every individual—fair in fact and perceived to be fair by those affected—is an essential element of justice and a principal objective of the American criminal justice system." CRIME COMMISSION REPORT, *supra* note 30, at 46. See generally AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

justice system failed to address—and in some ways contributed to—the civil disorders.³⁹

Although the Riot Commission Report did not discuss prisons specifically, its analysis and recommendations clearly focused on the structural causes of civil unrest. It emphasized the role of persistent race-based disadvantage and discrimination, the decay of the inner cities, and the racially insensitive and at times provocative policies of the criminal justice system (especially the police). Despite acknowledging that the "task of imposing penalties for many riot defendants which will deter and rehabilitate is a formidable one," Commission members counseled leniency in the aftermath of the riots. In fact, they recommended compensating those defendants who had been mistreated by the criminal justice system, suggested that their arrest records be expunged, and encouraged the use of restitution rather than incarceration wherever possible. Overall, the Riot Commission recommended that "[f]air, even compassionate attention" be given to those who had gotten caught up in the civil unrest. Its members noted that this kind of restraint was needed to "help reduce the legacy of post-riot bitterness in the community."⁴⁰

The final Presidential Commission—the National Commission on the Causes and Prevention of Violence—was formed on June 10, 1968, just a few days after the assassination of Senator Robert Kennedy.⁴¹ The Violence Commission's Final Report was filed the next year, and it too embraced an extremely progressive and clearly structural analysis of the causes of crime. Acknowledging that imprisonment alone could not significantly reduce the threat of violent crime, its crime-control proposals were related directly to many themes that had originated in the War on Poverty. Indeed, the Violence Commission opened its Report by declaring that "the way in which we can make the greatest progress toward reducing violence in America is by taking the actions necessary to improve the conditions of family and community life for all who live in our cities, and especially for the poor who are concentrated in the ghetto slums."⁴²

Although the Violence Commission recommended investing significant resources in the criminal justice system,⁴³ it gave at least equal

³⁹ OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS (1968) [hereinafter RIOT COMMISSION REPORT] (The Committee's Report was often referred to as the "Kerner Commission Report," after then Illinois Governor Otto Kerner who chaired the committee).

⁴⁰ RIOT COMMISSION REPORT, *supra* note 39, at 193.

⁴¹ See generally NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969) [hereinafter VIOLENCE COMMISSION REPORT] (The Report was sometimes referred to as the "Eisenhower Report," after Milton Eisenhower, the Commission's chair).

⁴² VIOLENCE COMMISSION REPORT, *supra* note 41, at xxi.

⁴³ For example, its recommendations led directly to the creation of the Law Enforcement Assistance Administration (LEAA), an agency that has been characterized as "the largest and longest

attention to—and recommended equally large investments in—what its members termed “social reconstruction.” Thus, the Report concluded its core statement with an observation about the “enormous set of influences” that drew many people into crime and delinquency. These influences were produced by poverty and a lack of education among persons who had no “means of escape from an oppressive urban environment” but nonetheless witnessed “often violent methods being used to achieve material success” that they were denied from obtaining through legitimate means.⁴⁴ The Violence Commission used these troubling observations as the basis for recommending large-scale improvements in the overall social welfare of the nation’s most disadvantaged citizens and the communities in which they lived.

Thus, the 1960s saw what seemed like the culmination of an increasingly widespread critique of the rehabilitative ideal that was intended to make it more effective by *broadening* its scope. On the one hand, there was a clear concession that the prison environments in which rehabilitation was commonly attempted simultaneously subjected prisoners to dehumanizing and counter-productive treatment and conditions. On the other hand, there was a frank recognition of the necessity of *social* rather than exclusively individual-level reconstruction in meaningful efforts at crime reduction.

At the same time, commentators warned against unrealistically romanticizing the nation’s past commitments to rehabilitation. In the decades that preceded the declaration of the War on Prisoners in the mid-1970s—at the height of the nation’s commitment to the rehabilitative ideal—prisons were still highly punitive in nature. In addition to the fact that many correctional institutions fell far short of providing effective programming for most of their prisoners, there were also instances in which especially intrusive and inhumane forms of treatment were justified under the guise of rehabilitation.⁴⁵ However, the rehabilitative ideal also at the same time encouraged attention to be focused appropriately on the progress (and, by implication, the plight) of prisoners.⁴⁶ As I noted earlier,

federal effort to respond to the problems of crime in America.” Alan Gordon & Norval Morris, *Presidential Commissions and the Law Enforcement Assistance Administration*, in *AMERICAN VIOLENCE & PUBLIC POLICY: AN UPDATE OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 117 (Lynn Curtis ed., 1985). The LEAA was abolished in the early years of the Reagan Administration, at the start of the 1980s.

⁴⁴ VIOLENCE COMMISSION REPORT, *supra* note 41, at 35.

⁴⁵ See generally JESSICA MITFORD, *KIND AND USUAL PUNISHMENT* (1973), for especially problematic examples. See also historian Edgardo Rotman who commented on “abuse of intrusive therapies,” including behavior modification programs that were little more than “disguised versions of highly punitive practices,” that occurred in the name of “treatment.” Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 150, 171 (Norval Morris & David Rothman eds., 1998).

⁴⁶ Indeed, in the 1930s, sociologist Thorsten Sellin described the “struggle for the individualization of penal treatment” that focused on “the make-up of the offender rather than the

a system that ostensibly was designed to provide opportunities for prisoners to improve their lot and advance their chance of post-prison success could not easily justify outwardly damaging or abusing them, at least not without explaining this apparent contradiction. As an overarching ideal, then, rehabilitation arguably still served as a kind of restraining edge against the brutal excesses of imprisonment which, to the extent to which they were identified, had to be recognized as problematic and in need of reform.

Despite the professional consensus that was reflected in the presidential commissions' recommendations—to limit the use of incarceration, improve prison conditions and programming, and broaden the rehabilitative ideal to include social and economic reform in the larger society—the proposals were met with significant resistance in some quarters. Indeed, by the end of the decade of the 1960s and the start of the 1970s, a fateful struggle had commenced over who would control the rhetoric and policies of crime control. A strong undercurrent of fear and resentment over civil unrest and an increase in violent crime rates had begun to surface. It was amplified by political interest groups intent on exploiting it. Midway through the 1970s, this changing atmosphere began to translate into policy initiatives and, almost without warning, a significant shift in criminal justice perspectives, practices, and values began to occur. It moved slowly and imperceptibly at first, but eventually gained such power and seeming inexorability during the 1980s that, as Philip Zimbardo and I characterized it much later, "it resembled nothing so much as a runaway punishment train, driven by political steam and fueled by media-induced fears of crime."⁴⁷

The policy reversals that ushered in the War on Prisoners occurred rapidly and their long-term consequences were profound. At the national level, a new political administration abandoned proposals made by President Johnson's crime commissions to implement crime control policies that emphasized large-scale social reconstruction. Policies that relied on dramatically increased rates of incarceration were introduced and relentlessly pursued instead. Inner-city poverty programs were not only quickly dismantled but—despite their brief tenure and relatively modest scale—were actually blamed by some high-ranking politicians for the inner-city violence that occurred in the late 1960s. Thus, as a successful presidential candidate in 1968, Richard Nixon had remarked, "[f]or the past five years we have been deluged by government programs for the unemployed, programs for the cities, programs for the poor, and we have

nature of his offense" as "one of the most dramatic in the history of thought." Thorsten Sellin, *The Trial Judge's Dilemma: A Criminologist's View*, in *PROBATION AND CRIMINAL JUSTICE* 99, 101 (Sheldon Glueck ed., 1933).

⁴⁷ Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 *AM. PSYCHOLOGIST* 709, 712 (1998).

reaped from these programs an ugly harvest of frustration, violence, and failure across the land.”⁴⁸ Concerns about the potentially brutalizing effects of prison life and calls for community-based alternatives gave way to massive programs of prison construction and ever-increasing prisoner populations.

It would be difficult to overstate the speed and totality with which the vocabulary, concepts, and practice of rehabilitation were abandoned in the 1970s. By the end of the decade, scholars and policymakers alike routinely rejected or ignored rehabilitation as an accepted purpose of imprisonment and substituted several other goals in its place. As one commentator described this dramatic turnaround, “[i]n less than two decades, almost everyone involved in the criminal justice system has rejected the rehabilitative ideal, described less than twenty years ago as the predominant justification of punishment.”⁴⁹

The profound shift in correctional thinking was codified by many state legislatures, which moved quickly to embrace and establish a much more punitive approach. Thus, when a determinate sentencing law was passed in California in the mid-1970s, the penal code itself included a statement to the effect that the Legislature now “finds and declares that the purpose of imprisonment for crime is punishment.”⁵⁰ In the ensuing several decades, these positions continued to harden, and prison policymakers moved even farther away from the once primary goal of rehabilitation. Soon there appeared to be near unanimity over the proposition that people should be sent to prison for punishment—that is, to cause them pain. As one commentator put it at the outset of the 1990s: “Clearly, punishment has become the prevalent objective of the system, replacing the utilitarian purpose of the avoidance of further crime by offenders,” dominating the correctional landscape “in ways the rehabilitative ideal did years ago.”⁵¹

Of course, the changed correctional policies meant that not only prisons but prisoners themselves came to be regarded in fundamentally different ways. Among other things, as Jonathan Willens summarized, because prisoners were increasingly depicted as “brutal, hardened criminals,” it was possible to ignore their inhumane treatment and minimize the long-term consequences of their harsh confinement.⁵²

⁴⁸ Sharon L. Harlan, *Women and Federal Job Training Policy*, in *JOB TRAINING FOR WOMEN: THE PROMISE AND LIMITS OF PUBLIC POLICIES* 55, 60 (Sharon Harlan & Ronnie Steinberg eds., 1989) (quoting President Richard Nixon).

⁴⁹ Michael Vitiello, *Reconsidering Rehabilitation*, 65 *TUL. L. REV.* 1011, 1012 (1991) (footnote omitted).

⁵⁰ CAL. PENAL CODE § 1170(a)(1) (West 2008).

⁵¹ Walter J. Dickey, *A Future for Research on Prisons*, 16 *LAW & SOC. INQUIRY* 101, 107 (1991).

⁵² Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962–1987*, 37 *AM. U. L. REV.* 41, 133 (1987).

Moreover, as prison itself came to be defined as an "inherently dangerous and violent" place, one without any mandate to provide positive programming intended to benefit prisoners, almost anything could be done there, including practices "which are themselves dangerous and violent,"⁵³ as long as it could be justified by the prisoners' presumably violent and dangerous natures.

As Willens put it, a "new legal prison" emerged, one that "legitimizes attacks on the prisoners, attacks on his space, his property, his body, and his pride."⁵⁴ Widespread stereotypes that cast prisoners in degraded terms implied that they did not warrant the same minimal considerations—deserve the same limits to the pain and potential harm to which they were subjected—as other persons. Indeed, by the start of the 1990s, the transformation in public consciousness was virtually complete. Although the War on Prisoners arguably had begun much earlier, it was overtly and finally officially declared in 1991, when President George Bush urged the nation to use the same "moral force and public will" that he believed had been successfully harnessed in the Gulf War, but to be marshaled this time "to free America's cities from crime."⁵⁵ Among the policies he proposed be implemented to ward off the domestic threat to our national well being was an expansion of the death penalty, admitting evidence into criminal prosecutions that had been seized illegally by the police, and a limitation of the rights of prisoners to pursue habeas corpus appeals.

II. PREPARING FOR WAR: DEFINING THE INTRACTABLE ENEMY

As I noted at the outset of this Article, as political leaders move farther from the path of negotiation and possible rapprochement toward increased hostility and an eventual declaration of war, they often encourage their constituents to perceive adversaries as intractable, beyond the bounds of reason, persuasion, or change. Demonizing the enemy is a time-honored tradition in war, and the more factual, objective, and seemingly unassailable the enemy's "otherness" can be made to appear, the more effectively the battle lines can be drawn. In fact, in marshalling public support for the War on Prisoners, intellectual contributions by several academics helped to demonize the eventual targets of this war effort. They played an important role in convincing the public that the time for reconciliation—pursuing the long-standing goals of rehabilitation and reintegration—had ended, and in legitimizing the resort to what would become outright hostile actions.

⁵³ *Id.* (emphasis omitted).

⁵⁴ *Id.*

⁵⁵ *Bush Urges War on Crime: Recycles Proposals Congress Rejected Last Year*, SAN JOSE MERCURY NEWS, Mar. 6, 1991, at 4A.

To explain the process by which this aspect of preparing for the War on Prisoners was accomplished, I focus initially on two especially influential academic contributions that were made in the mid-1970s. Together they facilitated a profound transformation in the very purpose of imprisonment, and helped commit the nation's prison system to the imposition of harsh punishment for punishment's sake.⁵⁶ They also were instrumental in preparing the country for the War on Prisoners that was in the process of being declared. More specifically, they facilitated these shifts in criminal justice goals and priorities by contributing to the demonization of the lawbreakers who would soon become the nation's "enemies" in this war, a process that, as I will show in a subsequent section, "science" would eventually be enlisted to help complete.

Although both contributions to this transformation of American prison policy are well known, they merit extended discussion here, each for somewhat different reasons. I examine the first academic treatise at some length because it has come to stand for something entirely different from what its authors actually found. And I look carefully at the second one, in the next section of this Article, not only because it helped give prominence and legitimacy to the first but also because it became an intellectual roadmap for justifying the War on Prisoners that ensued, one that effectively neutralized the War's many early critics.

This part of the run up to the War on Prisoners also illustrates the resurgence of conservative intellectuals as a formidable presence in criminal justice policymaking circles. They skillfully articulated what was portrayed as an evidence-based rationale for a largely political agenda. This tact, in turn, helped facilitate the media's misuse of "science" in reporting on the development of crime control and prison policy.⁵⁷ There

⁵⁶ Obviously, there were *many* intellectual contributions that helped to transform prevailing views of the causes of crime and to reshape the nation's preferred ways of responding to the "crime problem" that led, in turn, to the War on Prisoners. The two on which I have chosen to focus were pivotal in part because they helped legitimize the widespread undercurrent of anger and fear over crime that characterized the era, and also because they offered a seemingly dispassionate rationale for the hostility toward criminals that was being harnessed as the nation prepared for war. It is clear in retrospect that the prevailing *Zeitgeist* was both ready to receive and be further shaped by these otherwise highly academic analyses—ones that, in other times and places, very likely would have been ignored by the body politic. The media, in turn, seemed especially eager to embrace and amplify them, adding enormously to their transformative effect.

⁵⁷ See generally STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008), for an in-depth description and analysis of the sophisticated campaign waged by conservative intellectuals and interest groups to wrest control of American legal culture and decision-making apparatus from what they perceived as the "liberal legal establishment." Astute as Teles's analysis of this process is, I believe it overlooks the importance of *crime*-related policy as a critical fulcrum point from which a great deal of public dissatisfaction and malaise was leveraged to gain legitimacy and widespread support for conservative legal policies. The collection of disparate groups—"libertarians, business, social conservatives, Cold Warriors, and Southern segregationists"—that he identifies as having "fused" into the modern conservative movement were quite effective in using "crime" as a rallying cry both to coalesce and attract others to the cause. An October, 1968 issue of *TIME MAGAZINE* captured the mood on which they capitalized,

appears to have been a form of "intellectual entrepreneurship" at work here, one in which a well-funded and carefully orchestrated larger political campaign was used to "denaturalize" the existing approach to crime and punishment, "propel policy down a particular path"—indeed, to "endow actors deemed to have moral authority or expert status with added power in the policy field."⁵⁸ In this particular case, at the outset of this process, the meaning of a particular body of research was badly misrepresented in the media, and then that misrepresentation was given heightened legitimacy and further public visibility by a seemingly authoritative source (whose own questionable expertise was enhanced in the process).

As a result, and against the backdrop of the ambitious optimism of the mid-1960s, a revisionist penology emerged that assumed the essential intractability of crime and, by implication, the futility of trying to significantly reduce it (by rehabilitating its perpetrators or addressing the criminogenic social conditions that had adversely affected them). Specifically, what eventually became a kind of "nothing works movement" was launched in the mid-1970s by sociologist Robert Martinson and his colleagues in a remarkably influential article and book that critically analyzed over 200 studies of prison rehabilitation programs.⁵⁹ They concluded that despite its status as the venerable mainstay of the modern American prison, there was really no evidence that rehabilitation had ever actually "worked."

Or, at least, that was how their conclusions came to be characterized by politicians and policymakers who were eager to provide their own interpretations of the social scientists' lengthy report and by media commentators eager to amplify these provocative—and, eventually, increasingly popular—views. Indeed, the disparity between what Martinson and his colleagues actually found and what their research was used to support provides a cautionary tale about the way in which criminal justice data and their policy implications can be reinterpreted or reshaped

characterizing that year's presidential campaign as "dominated" by an obsession with law and order whose "symptoms are fear and frustration and anger." Specifically:

For millions of voters who are understandably and legitimately dismayed by random crime, burning ghettos, disrupted universities and violent demonstrations in downtown streets, law and order is a rallying cry that evokes quieter days. To some, it is also a shorthand message promising repression of the black community. . .

The Fear Campaign, TIME MAGAZINE, Oct. 4, 1968, at *1, available at <http://www.time.com/time/magazine/article/0,9171,838794,00.html>.

⁵⁸ ERIC BLEICH, *RACE POLITICS IN BRITAIN AND FRANCE* 26–27 (2003). See generally MARK A. SMITH, *THE RIGHT TALK: HOW CONSERVATIVES TRANSFORMED THE GREAT SOCIETY INTO THE ECONOMIC SOCIETY* (2007).

⁵⁹ See generally Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22–54 (1974) [hereinafter Martinson, *What Works?*]; See generally LIPTON ET AL., *supra* note 21.

in a powerful political context, coming to stand for very different propositions than those intended by the researchers themselves.

In fact—contrary to the “nothing works” proposition for which it was repeatedly cited—Martinson and his colleagues had ended a 600-page discussion of various prison and community-based rehabilitation programs in a reasonably balanced and circumspect way: “While some treatment programs have had modest successes, it still must be concluded that the field of corrections has not as yet found satisfactory ways to reduce recidivism by significant amounts.”⁶⁰ However, even this modest conclusion was not particularly well-supported by the lengthy review of the literature that preceded it. Thus, the authors failed to specify what level of “success” was needed before a program outcome could be considered “satisfactory,” or what kind of reduction in recidivism, exactly, was “significant.”

Moreover, although Martinson and his colleagues and co-authors (Douglas Lipton and Judith Wilks) certainly concluded that some prison programs clearly did not work, and excluded many others from consideration because they judged the studies that assessed them to be poorly done,⁶¹ that was hardly the entire story that their lengthy monograph actually told. Equally if not more importantly, and somehow consistently overlooked in the public commentaries that followed, the authors’ own detailed evaluation identified numerous programs that *did* produce positive outcomes. Indeed, a whole range of effective programs that involved probation,⁶² and comparatively short prison sentences⁶³ *had* proven effective. Perhaps most remarkably, despite the unremitting “nothing works” characterizations that followed their report, Martinson and his colleagues also concluded that the nature and quality of the specific programs clearly *did* matter to their success, especially when they included adequate supervision,⁶⁴ or programming that was related to the prisoners’

⁶⁰ LIPTON ET AL., *supra* note 21, at 627.

⁶¹ The review included only empirical studies that allowed for a comparison between a treatment group that experienced some sort of rehabilitation program with a control group that did not, or with a base rate of untreated participants. Moreover, the comparison had to involve some measured dependent variable or outcome (such as recidivism, institutional adjustment, educational achievement, or attitude change). LIPTON ET AL., *supra* note 21, at 4. In fact, well over 600 studies and reports on correctional programs and outcomes were excluded from the review. See generally LIPTON ET AL., *supra* note 21.

⁶² For example, they found and reported that recidivism was reduced by programs that either avoided or minimized prison sentences—such as when young offenders received intensive probation,—and when first offenders received probation rather than imprisonment. *Id.* at 27, 52–53.

⁶³ For example, recidivism was reduced in cases where youthful offenders received early release or abbreviated sentences and when adult offenders received prison sentences that were either short (a few months) or long (more than two years). *Id.* at 82, 88.

⁶⁴ Thus, reductions in recidivism occurred in programs where young offenders received adequate parole supervision. *Id.* at 149.

identified needs,⁶⁵ and especially when there was post-release follow-up and assistance.⁶⁶ Although they appeared to be especially skeptical (and appropriately critical) of psychotherapeutic approaches to rehabilitation, the authors even reported some positive findings with respect to the effectiveness of certain kinds of treatment or therapy.⁶⁷

In addition to the positive effects that various treatment programs had on recidivism, the authors also found other programs that had "worked" in different but nonetheless significant ways. For example, they reported that although "milieu therapy" did not appear to reduce recidivism, short-term milieu therapy was no worse at it than long-term incarceration and, therefore, resulted in reduced correctional costs,⁶⁸ along with other evidence that milieu therapy did "improve community adjustment to some degree."⁶⁹ Moreover, the authors reported "trends" suggesting that casework and individual counseling improved "vocational adjustment" (i.e., post-release employment),⁷⁰ that prisoners in some programs were able to improve their vocational and educational skills while incarcerated⁷¹ and that group therapy conducted in the community produced "generally favorable results in terms of personality and attitude changes."⁷²

Taken as a whole, these findings were hardly the basis on which fair-minded politicians, policymakers, or scholars should have concluded that "nothing works." Instead, the results should have led to little more than the unsurprising statement that many existing prison rehabilitation programs simply had not quite lived up to expectations. Moreover, the researchers themselves provided some well reasoned explanations for why this might be so. For one, they suggested that the challenge of providing rehabilitative services in a prison setting may have compromised the effectiveness of otherwise good programs—that "problems of organization, the training of new personnel, and the like could have been sufficient to

⁶⁵ For example, recidivism was reduced in programs where prisoners received vocational training that provided them with "readily marketable skills" and in prison programs where prisoners with certain kinds of educational backgrounds and needs received the right kind of educational training. LIPTON ET AL., *supra* note 21, at 194–95.

⁶⁶ For example, recidivism was reduced in programs in which older and more mature adult offenders received vocational training that led to post-release work in the kinds of jobs for which they had been trained. *Id.* at 195.

⁶⁷ Specifically, recidivism reductions were found for programs in which youthful prisoners who were judged "amenable to treatment" received psychotherapy that was "pragmatic" in orientation, when it was provided by therapists who were enthusiastic, interested, and concerned, and was administered in conjunction with other treatment methods, as well as for young persons who received practically-oriented treatment in the community. *Id.* at 213–14.

⁶⁸ *Id.* at 268.

⁶⁹ *Id.* at 506.

⁷⁰ LIPTON ET AL., *supra* note 21, at 337.

⁷¹ *Id.* at 343, 363.

⁷² *Id.* at 453.

cancel any gains produced by the treatments.”⁷³ They also speculated that perhaps it was the “present *narrow range* of treatment techniques” that had undermined success because certain segments of the corrections establishment had come to rely “too heavily on treatment programs designed to help persons suffering from medical or mental illness.”⁷⁴ Rehabilitation programs that erroneously equated crime with mental illness would fail to address the broader range of problems and issues that Martinson et al., along with many other scholars and researchers, believed were more closely and directly “associated with criminal behavior.”⁷⁵

In some ways, of course, these suggested explanations were entirely consistent with the perspective that led other experts to recommend the broadening—not the abandonment—of the rehabilitative ideal in the immediately preceding years. That is, prison might well not be an ideal environment in which to produce positive changes in prisoners because, as Martinson and his colleagues put it, “the current correctional environment precludes the successful application of treatment—for example, favorable attitude change cannot take place in a context of general punitiveness.”⁷⁶ Similarly, their second point—that the presumptive focus on “medical or mental illness” rather than problems shown to be actually “associated with criminal behavior”—seemed fully in the spirit of refining the goals of rehabilitation by expanding its scope. Thus, Martinson and his colleagues expressed the concern that most prison programs were too heavily devoted to a “medical model” of treatment, were “lacking in creativity,” and had neglected “new forms” of rehabilitative services that were more specifically directed at prisoner populations.⁷⁷

How could a set of conclusions that clearly seemed designed to broaden the intellectual framework of rehabilitation instead initiate its rapid demise? Part of the problem was that Martinson himself had been much less circumspect in a widely circulated article that preceded publication of his book.⁷⁸ In a popular journal of conservative

⁷³ *Id.* at 627.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.*

⁷⁶ LIPTON ET AL., *supra* note 21, at 627.

⁷⁷ *Id.* at 627–28.

⁷⁸ Indeed, his article contained the tantalizing suggestion that the government agency that had sponsored Martinson’s research on prison rehabilitation programs was trying to stop the publication of his book, as though its conclusions were somehow so explosive that public officials had sought to suppress them. Thus, Martinson told his THE PUBLIC INTEREST readers:

[F]ully a year after I had re-edited the study for final publication—the state had not only failed to publish it, but had also refused to give me permission to publish it on my own. The document would still not be available to me or to the public today had not [an attorney] subpoenaed it from the state During the

commentary,⁷⁹ he had stated his criticism of prison rehabilitation programs in stronger terms: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."⁸⁰

This was the news—reduced to the shorthand formulation that "nothing works"—that the media and certain political interest groups repeatedly and strategically chose to highlight at the time Martinson wrote it, and they continued to do so for many years thereafter. As one commentator later accurately described the larger reception that this message received: "Unlike most articles by academics, which might make ripples among scholars but rarely cross into the popular culture, this piece was an immediate sensation. Martinson became an instant celebrity, quoted by politicians and invited onto some of the most-watched TV shows in the land."⁸¹ Indeed, the phrase "nothing works" became a kind of prison-policy mantra for those intent on abandoning rehabilitation altogether. Anti-rehabilitationist, pro-punishment groups were so successful in trumpeting the alleged failures of prison programs that, within a few short years, many penologists and prison administrators across the country seemed willing to embrace the stunning conclusion that

time of my efforts to get the study released, reports of it began to be widely circulated, and it acquired something of an underground reputation.

Martinson, *What Works?*, *supra* note 59, at 23. However, as I noted, when the book was finally published, it was far more modest in its conclusions and balanced in tone than the article in which Martinson summarized its findings. Indeed, the book's senior author, Douglas Lipton, was quoted as saying that Martinson's purported summary of their research that appeared in *THE PUBLIC INTEREST* was "unauthorized and inaccurate" but that it (rather than the more careful and optimistic conclusions of the book) was used because it fit all too well with the "new 'get-tough' policy toward offenders" that was in the process of being implemented. Jeffrey Mervis, *Rehabilitation: Can It Work Now?*, 17 *APA MONITOR* 14 (1986).

⁷⁹ *THE PUBLIC INTEREST* was founded in the 1960s by a group of self-described centrist and onetime liberal academics who were skeptical of the Great Society programs of social reform that were being advocated by the Johnson Administration. Its longtime editor, Irving Kristol, called the "godfather of neoconservatism," described himself as a "disaffected ex-liberal . . . who had been 'mugged by reality' . . ." Adam Bernstein, *Editor Was Godfather of Neoconservatism*, *WASH. POST*, Sept. 19, 2009, A01. The magazine eventually became "one of the intellectual pillars of neo-conservatism." Edward Rothstein, *Mission Accomplished, a Journal Folds*, *N.Y. TIMES*, May 9, 2005, E04. As one of its contributors noted on the occasion of its demise in 2005, *THE PUBLIC INTEREST* had an "increasingly conservative bent over the years [that] quietly shaped, and then came to dominate, political discourse in America." Charles Krauthammer, *Our Own Cool Hand Luke*, *WASH. POST*, April 29, 2005, A23.

⁸⁰ Martinson, *What Works?*, *supra* note 59, at 25 (emphasis in original). Even by the end of this article Martinson had softened his critique some. He rephrased his conclusion to indicate that the data he and his colleagues reviewed had given them "very little reason to hope that we have in fact found a *sure way* of reducing recidivism through rehabilitation." *Id.* at 49 (emphasis added). But few of even the most ardent advocates of rehabilitation had ever characterized prison treatment programs as a "sure way" to reduce recidivism.

⁸¹ SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* 43 (2007).

any attempt to facilitate positive change inside prison was fundamentally flawed and doomed to fail.

In retrospect, several things can be said about the validity of the “nothing works” movement that had helped precipitate such major changes in American prison policy. Obviously, if rehabilitation had *never* worked, perhaps it really was an unworkable idea. Yet, Martinson’s critique stopped far short of proving this proposition. For one, he and his colleagues had applied a very stringent standard in deciding whether or not a program “worked.” As one commentator noted, they did not appear to consider a program to have been a real success unless it produced “positive results on every, or nearly every, occasion in which it had been implemented and researched.”⁸² Less stringent criteria would have yielded a more positive set of overall conclusions about the effectiveness of the rehabilitation programs that were being examined. In addition, there were numerous other treatment programs that Martinson and his colleagues did not include in their analysis, even though they clearly *did* work, especially when they were provided to prisoners who had the specific needs that the programs themselves were designed to address.⁸³

In addition, a number of other important limitations to the “nothing works” critique were overlooked by politicians, media commentators, and even some academic researchers who enthusiastically embraced its sweeping conclusions. For example, many—arguably most—of the programs that Martinson evaluated were compromised by chronically inadequate correctional budgets. In this sense, of course, they were not unlike most treatment programs in most prison settings. However, this

⁸² Ted Palmer, *Martinson Revisited*, 12 J. RES. CRIME & DELINQ. 133, 138–39 (1975).

⁸³ *Id.* at 137. See also Paul Gendreau & Bob Ross, *Effective Correctional Treatment: Bibliotherapy for Cynics*, 25 CRIME & DELINQ. 463 (1979). See generally, NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS (Susan Martin et al. eds., 1981) (the National Academy of Science’s review of the data concluding that the concept of rehabilitation was indeed workable but had neither been studied properly nor implemented effectively). Note also that Martinson and his colleagues had limited their review to studies published between 1945 through 1967. However, a number of authors summarized positive results for studies completed in the years after that, at least some of which were conducted in a manner equally or more sophisticated than those on which Martinson had relied. See, e.g., Paul Gendreau & Robert Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349 (1987); TED PALMER, A PROFILE OF CORRECTIONAL EFFECTIVENESS AND NEW DIRECTIONS FOR RESEARCH (1994); Joanna Basta & William Davidson, *Treatment of Juvenile Offenders: Study Outcomes Since 1980*, 6 BEHAV. SCI. & L. 355 (1988) (for juvenile treatment programs). Even more recent research confirmed the commonsense wisdom of an approach implied by but never really featured in the earlier “nothing works” analyses. These studies underscored the value of matching programs to the specific needs of participants and the importance of providing community-based opportunities and follow-up after incarceration. See, e.g., Gerald Gaes et al., *Adult Correctional Treatment*, in PRISONS 361 (Michael Tonry & Joan Petersilia eds., 1998); Paul Gendreau, et al., *A Meta Analysis of the Predictors of Offender Recidivism: What Works!*, 34 CRIMINOLOGY 401 (1996); Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* 62 FED. PROBATION 3 (1998); Santiago Redondo et al., *Crime Treatment in Europe: A Review of Outcome Studies*, in OFFENDER REHABILITATION AND TREATMENT: EFFECTIVE PROGRAMMES AND POLICIES TO REDUCE RE-OFFENDING (James McGuire ed., 2002).

meant that program failures could not sensibly be used as evidence that the principles on which they were based were invalid (any more than, say, the failures of substandard or poorly funded health care could be taken to mean that medicine in general was a worthless endeavor).

In addition, like most existing prison rehabilitation programs, the ones that Martinson evaluated were not designed to have any impact on the nature of the community *outside* prison. As long as "[t]he prison administration can do little to support an inmate, once released to the brutal, indifferent world"⁸⁴ the effects of prison rehabilitation programs are likely to be short-lived. Instead, whatever positive changes had been effected inside the institution almost certainly would erode once prisoners returned to criminogenic situations in the society at large. The use of recidivism rates as the key measure of program "success" would always mask whatever gains had occurred through rehabilitation but then had been subsequently reversed in the face of debilitating conditions in the free world.

Obviously, such "failures" would be less attributable to the weaknesses or ineffectiveness of the prison rehabilitation programs than to the strength of the criminogenic social conditions outside prison. One could certainly argue that a truly effective rehabilitation program would have to be powerful enough to "stand up" to those kinds of conditions. But that was a very different kind of critique, one that implied something about the important need for changed social circumstances—an argument that the "nothing works" policy advocates and politicians rarely if ever made.

Ironically, however, Martinson and his colleagues were among the few "nothing works" commentators who *had* conceded exactly this point. For example, they noted that prisoners often gained vocational and educational skills while in prison programs but that it was "not clear that these skills benefit the offender once he is released," in part because the programs may not be "geared to the job opportunities that are available for offenders" in the free world.⁸⁵ Moreover, they conceded that "regular academic instruction is simply not sufficient to overcome the enormous environmental and social obstacles that interfere with the reentry of 'ex-offenders' into the community."⁸⁶

Notably, Martinson himself eventually recognized the ways in which his work was being misinterpreted and his conclusions misrepresented. In a little-cited article published some five years after his highly visible position paper, he actually retracted its earlier, sweeping conclusions.⁸⁷ He

⁸⁴ Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1202 (1990).

⁸⁵ LIPTON ET AL., *supra* note 21, at 343.

⁸⁶ *Id.* at 363.

⁸⁷ See generally Robert Martinson, *New Findings, New Views: A Note of Caution Regarding*

not only wrote that “contrary to my previous position, some treatment programs *do* have an appreciable effect on recidivism,”⁸⁸ but went on to emphasize that new evidence “leads me to reject my original conclusion.”⁸⁹ And further: “I have often said that treatment added to the network of criminal justice is ‘impotent,’ and I withdraw this characterization as well.”⁹⁰ Martinson also termed the attempts that were underway to abolish the parole system—a movement that relied heavily on his earlier research for its main empirical support—as a “most extreme form of radical tinkering with the system of criminal justice.” In fact, he urged conclusions that were the opposite of ones pursued in his name, and emphasized that the “evidence that parole supervision *works* . . . is more convincing than the bare assumption that it does not.”⁹¹

Yet, Martinson’s noble attempt to correct the record went almost completely unnoticed by the press, was ignored by the politicians, and rarely acknowledged by academics.⁹² Most of these groups had already boarded the “nothing works” bandwagon Martinson had given its most decisive push, and they had taken most correctional policymakers and members of the public along with them. Martinson’s initial, uncorrected view prevailed despite his having recanted it. In fact, despite the very specific, guarded, and qualified nature of the negative conclusions reached in the original evaluative review by Martinson and his colleagues, and notwithstanding Martinson’s explicit recanting of the exaggerated version of the conclusions he had presented in his brief and preliminary popular article, the story of why and how such a dramatic revision in prison policy took place over the last quarter of the 20th century continued to be told in

Sentencing Reform, 7 HOFSTRA L. REV. 243 (1979) [hereinafter Martinson, *New Findings*]. Martinson characterized the media’s treatment of earlier conclusion this way: “I protested at the slogan used by the media to sum up what I said—‘nothing works.’ The press has no time for scientific quibbling and got to the heart of the matter better than I did. But for all of that, the conclusion is not correct.” *Id.* at 254.

⁸⁸ *Id.* at 244 (emphasis in original).

⁸⁹ *Id.* at 252.

⁹⁰ *Id.* at 254.

⁹¹ *Id.* at 257 (emphasis in original).

⁹² Thus, the same commentator who described Martinson’s earlier, intemperate and fundamentally incorrect article as the “overnight sensation” described the fate afforded the later *mea culpa* this way:

While the 1974 THE PUBLIC INTEREST article had catapulted Martinson into the spotlight, the HOFSTRA LAW REVIEW piece was a dud. Nobody in the wider political world paid the slightest bit of attention to it, and no one called Martinson for major TV interviews. In corrections, business went on as usual, which meant that, at the urging of legislators influenced by Martinson’s earlier utterances, correctional systems continued to dismantle the infrastructure of inmate programs developed over the previous decades . . .

ABRAMSKY, *supra* note 81, at 53. Tragically, Martinson committed suicide about a year after his HOFSTRA LAW REVIEW was published. *See id.*

much the same way: "[D]isenchantment . . . grew as empirical research showed little or no measurable rehabilitation effects."⁹³

One final point on the "nothing works" message that emerged from the 1970s. As I mentioned in passing above, Martinson's conclusion about the failure of correctional rehabilitation programs was open to another very different but entirely plausible interpretation from the one it had been given. It is one that is entirely consistent with precisely the set of social contextualist views that had begun to emerge in the 1960s and the early 1970s. That is, if the so-called "nothing works" data been read slightly differently, its implications could have lent direct support to the contextual and structural view of crime that was beginning to be more broadly and explicitly advanced and refined during these years. It was a view that was clearly reflected in the analyses and recommendations of the presidential commissions I cited earlier. Specifically, the kind of exclusively individual-centered programs that were evaluated by Martinson and his colleagues characteristically underestimated or ignored the powerful negative effects of the prison context in which they were administered. Moreover, they virtually always failed to address any of the criminogenic forces in the freeworld settings where program success or failure was ultimately measured. Thus, the modest results achieved by these programs may have been tempered by the inherent limitations of exclusively individual-centered rehabilitation programs, ones that operated only on individuals while simultaneously ignoring the prison contexts or situations in which these changes were supposed to occur and the free world settings in which they would have to be maintained.

Martinson had written in his more intemperate journal article that "[i]t may be... that education *at its best*, or that psychotherapy *at its best*, cannot overcome, or even appreciably reduce, the powerful tendency for offenders to continue in criminal behavior,"⁹⁴ and this was of course the implied message of intractability that so many politicians and prison policymakers seized on. But even in that article he had acknowledged that even the best prison programs might be failing because they were aimed at the wrong target. Thus:

Our present treatment programs are based on a theory of crime as a "disease"—that is to say, as something

⁹³ Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. SUPP. 623, 623 (2002). See also Paul Gendreau and Paula Smith, *Influencing the "People Who Count": Some Perspectives on the Reporting of Meta-Analytic Results for Prediction and Treatment Outcomes With Offenders*, 34 CRIM. JUST. AND BEHAV. 1536, 1536–59 (2007) (for the observation of two knowledgeable commentators to the effect that Martinson's "suggestion that 'nothing works' heralded the return of the treatment ice age in American corrections").

⁹⁴ Martinson, *What Works?*, *supra* note 59, at 49.

foreign and abnormal in the individual which can presumably be cured. This theory may well be flawed, in that it overlooks—indeed, denies—both the normality of crime in society and the personal normality of a very large proportion of offenders, *criminals who are merely responding to the facts and conditions of our society*.⁹⁵

Obviously, then, one of Martinson's major concerns—the one that was completely lost sight of as a damning indictment of rehabilitation continued to be publicly embraced and put to potent political use—was that many prison-based treatment models began with invalid behavioral assumptions that inappropriately equated crime exclusively with psychopathology. Focusing rehabilitative efforts on psychotherapeutic interventions and little else meant that such programs were often misdirected and, indeed, *were* destined to fail. Like many of his contemporaries in the mid-1970s, Martinson still seemed willing to consider a redefinition of the rehabilitative ideal that encompassed programs to address “the facts and conditions of our society.” But by then there were other forces at work to insure that few decision makers would listen.

III. REFINING THE TARGET: WAR AS COLLECTIVE SELF DEFENSE

As one knowledgeable reviewer observed a little more than a decade after Martinson's work was first published, “[h]is views were enthusiastically embraced by the national press, with lengthy stories appearing in major newspapers, news magazines and journals, often under the headline, “Nothing Works!”⁹⁶ It is difficult to fully explain why the complex picture reflected in Martinson's data was so drastically simplified and its more nuanced interpretations so readily reduced to this misleading slogan. Among the various forces operating, however, the “nothing works” movement soon became part of an emerging conservative criminology that included politically-connected and media-savvy academics.

One of them, in particular, made a significant scholarly contribution that I believe hastened the declaration of War on Prisoners considerably. A Harvard government professor, James Q. Wilson, had spent some time “thinking about crime” and, in 1975, published his thoughts in an unusually influential book.⁹⁷ Wilson's analysis helped to shift the

⁹⁵ *Id.* (emphasis added).

⁹⁶ Jerome Miller, *Criminology: Is Rehabilitation a Waste of Time?*, WASH. POST, Apr. 23, 1989, at C3.

⁹⁷ See generally, JAMES Q. WILSON, THINKING ABOUT CRIME (1975) [hereinafter WILSON, THINKING ABOUT CRIME].

fundamental terms of the academic discourse that had dominated discussions of crime and punishment for generations.

In some ways, Wilson was an unusual person to play such a key role in the reshaping of American prison policy. Trained as a political scientist rather than a criminologist, penologist, or lawyer, Wilson's academic distinction at the time came primarily from a highly regarded book he had written about the organizational structure of policing.⁹⁸ He also had been tapped as a member of the President's Commission on Law Enforcement and Administration of Justice.⁹⁹ Indeed, he wrote a commentary about the Crime Commission Report in 1967, in the same journal in which Martinson's "nothing works" article would appear several years later.¹⁰⁰ Despite having been a member of the group that authored it, Wilson reached a number of critical conclusions about the Crime Commission Report. Thus, he appeared to be unhappy with the fact that its some 200 "specific recommendations" were "not much help" in reducing crime because they were "rather obvious and not very illuminating."¹⁰¹ On the other hand, although he conceded a short time later in his review that there *were* "new ideas" in the Commission report, they were, alas, "just that—new ideas, for the most part untried and untested or, where tested, very costly in terms of either money or able personnel or both."¹⁰²

Perhaps because of his expertise on policing, Wilson seemed particularly troubled that the Crime Commission did not have more "things to say about making the streets safer,"¹⁰³ at the same time he thought it said perhaps too much about insuring "that the suspected criminal is treated fairly by the police and the courts" and even more about "provid[ing] him with maximum opportunities for rehabilitation in the correctional system."¹⁰⁴ He then conceded that that emphasis was not necessarily "as silly as it sounds"—without ever saying to whom it would sound silly or why—because "the whole report is a study of "crime prevention." Indeed, in this context, he noted that "[p]erhaps the major conclusion of the Commission—and, given its conservative membership, certainly its most

⁹⁸ See generally, JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1968) [hereinafter WILSON, *VARIETIES OF POLICE BEHAVIOR*].

⁹⁹ See *supra* notes 29–35 and accompanying text.

¹⁰⁰ See James Q. Wilson, *A Reader's Guide to the Crime Commission Reports*, 9 PUB. INT. 64 (1967) [hereinafter Wilson, *A Reader's Guide*].

¹⁰¹ *Id.* at 65.

¹⁰² *Id.* at 66.

¹⁰³ *Id.* at 74.

¹⁰⁴ *Id.*

remarkable one—is that basically crime can only be reduced by fundamental social changes.”¹⁰⁵

There was one telling passage in this commentary that, in retrospect, foreshadowed not only Wilson’s later writing about crime control but also the subsequent shift in prison policy he helped to bring about. In his 1967 article he noted: “As enlightened people, we like to think of our correctional objective as being the reformation and rehabilitation of the criminal. But there is one very strong argument in favor of detention—a person is not likely to commit a crime if he is behind bars with a guard watching him.”¹⁰⁶ In fact, that view would emerge full blown less than a decade later to become not only the core of Wilson’s penology but also the basis for a “get tough” philosophy that would dominate American corrections for the next several decades.

By 1975, Wilson had become more open to expressing his conservative views about crime and punishment. Thus, in *Thinking About Crime*, he explicitly rejected the earlier recommendations that had been made by criminologists and others who served on the previous decade’s crime commissions, including the one on which he had been a member. Although, as I noted earlier, he lacked any training in criminology, psychology, or sociology himself,¹⁰⁷ he needed only two brief pages in which to strongly condemn “perhaps all” of the other scholars with expertise in these disciplines as “speaking out of ideology, not scholarship” and being prone to “the premature conversion of opinion into policy.”¹⁰⁸ Wilson seemed to disdain sociologists most of all because, as he put it, they worked in a “profoundly subjectivist discipline” and were, after all, mostly “liberals.”¹⁰⁹

It was odd, then, for Wilson to wholeheartedly embrace sociologist Robert Martinson’s work. But he did, and in the strongest terms, describing it as “unique in its comprehensiveness” (although failing to cite any of the numerous positive findings that Martinson and his colleagues’

¹⁰⁵ *Id.*

¹⁰⁶ Wilson, *A Reader’s Guide*, *supra* note 100, at 77.

¹⁰⁷ See WILSON, *THINKING ABOUT CRIME*, *supra* note 97, at 61. He was disarmingly candid about this: “I was not in 1966 a criminologist, nor am I now. I came to crime, if I may put it that way, as a consequence of my study of police administration and its political context, and found myself labeled an ‘expert’ on crime because of that interest . . .” *Id.* However, after having been prematurely labeled an expert on crime, he did not then feel compelled to study it empirically. Instead: “Once I found myself in the crime business, I found that my ideas on the subject—apart from those formed by my empirical research *on policing*—were inevitably influenced by the currents of academic opinion about me.” *Id.* at 61–62 (emphasis added). But that was by choice; Wilson does not appear to have done a single direct empirical study of crime, before or after having attained the status of an expert on it and writing a book that would help change the course of crime and prison policy for decades.

¹⁰⁸ *Id.* at 62.

¹⁰⁹ *Id.* at 63.

comprehensive study of the issue had produced).¹¹⁰ He suggested further that it was really no wonder that prison treatment—which he caricatured as amounting to little more than “conversations with psychiatrists”—failed to rehabilitate the typical prisoner, something Wilson equated with bringing about “a transformation of his character.”¹¹¹ After all, he argued, the typical prisoner’s character was largely intractable, the result of the prisoner “having devoted a good part of his youth and young adulthood to misbehavior of every sort.”¹¹²

Once he had defined rehabilitation as a “transformation of character” that was clearly beyond the prison’s capacity to achieve—something he suggested that Martinson and others had clearly proven—Wilson’s own recommendation seemed to logically follow. Specifically, the nation needed to “abandon entirely the rehabilitation theory of sentencing and corrections.”¹¹³ Instead, the correctional system in the United States should dedicate itself to an entirely different function—“namely, to isolate and to punish.”¹¹⁴

In characteristic style, he dismissed the contrary views of any would-be “enlightened readers” who might regard his proposal as “cruel, even barbaric” by bluntly correcting them that “[i]t is not.”¹¹⁵ In fact, Wilson further instructed potential skeptics that whatever concerns they had about the harsh implications of his approach reflected little more than “a measure of our confusion” about the issue.¹¹⁶ After all, he argued, surely our society was entitled to “impose *some* costs (other than the stigma and inconvenience of an arrest and court appearance)”¹¹⁷ on those who committed crime—as if anyone had seriously argued otherwise. In any event—and here is where Martinson’s research was used to provide seemingly powerful empirical support for Wilson’s views—we needed to make “a frank admission that society really does not know how to do much else.”¹¹⁸ As one academic commentator would note, reflecting on the significance of Wilson’s assertions many years later, “in one devastating stroke, Wilson had dismissed criminology as policy irrelevant and elevated

¹¹⁰ *Id.* at 169. Wilson cited only to THE PUBLIC INTEREST article, rather than the more comprehensive book-length discussion and, even then, did not acknowledge any of the qualifications that Martinson’s more inflammatory piece nonetheless had contained.

¹¹¹ *Id.* at 170.

¹¹² *Id.* (emphasis added).

¹¹³ WILSON, THINKING ABOUT CRIME, *supra* note 97, at 172.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 173 (emphasis added).

¹¹⁸ *Id.* at 173.

imprisonment to the centerpiece of any feasible effort to reduce the victimization of innocent citizens.”¹¹⁹

Thinking About Crime catapulted Wilson to a prominent position as perhaps the nation’s most visible academic commentator on crime and punishment policy.¹²⁰ A year after the book was published, for example, Wilson was chosen by *Time Magazine* to write its Bicentennial Essay on “crime and punishment,” and he used the occasion to tell readers, categorically, that:

We now know that prisons cannot rehabilitate offenders. Hundreds of experimental studies on the treatment of criminals reach the same conclusion: no matter what form rehabilitation takes—vocational or academic training, individual or group counseling, long or short sentences, probation or parole—it does not work.¹²¹

His prescription for how to deal with the social problem of crime, in light of what he presented as overwhelming evidence that rehabilitation “does not work,” was straightforward, and very much in line with the overall message of *Thinking About Crime*. Indeed, it definitively rejected what he seemed at least open to entertaining in his discussion of the work of the Crime Commission less than a decade earlier. Now he told *Time* readers categorically that: “We will not eliminate the causes of crime nor will we rehabilitate offenders in any large numbers. But if prisons cannot rehabilitate, at least they can punish and isolate.”¹²²

¹¹⁹ Francis Cullen, *Elliott Currie: In Tribute to a Life Devoted to Confronting Crime*, 9 CRIMINOLOGY & PUB. POL’Y 19, 23 (2010). As John D. Lofton, nationally syndicated conservative columnist and former editor of the Republican weekly newsletter synthesized Wilson’s recommendations, into one simple formula: “Lock the criminals up.” John D. Lofton Jr., *One Answer to the Rising Crime Rates*, S.F. CHRON., Apr. 17, 1975, at 45.

¹²⁰ This occurred despite the fact that the book was not especially well received by a number of knowledgeable scholarly reviewers. See, e.g., Paul Rock, *Review of “Thinking About Crime,”* 19 BRIT. J. CRIMINOLOGY 80–81 (1979); Jerome Skolnick, *Are More Jails the Answer?*, 25 DISSENT 96–7 (1976). Nonetheless—perhaps in part because of the intellectual entrepreneurship Wilson’s work represented—entrepreneurship that was matched in part by the efforts of what Steven Teles has termed “network entrepreneurs” (persons “willing to invest their time and energy” to provide “a ready source of contacts across a wide range of social fields”) and “political entrepreneurs” (whose political connections allowed them make effective use of ideas they saw as furthering the “regime change” they hoped eventually to bring about)—the book was quickly embraced by politicians on the right and its message widely disseminated by the media. See TELES, *supra* note 57, at 18, 19.

¹²¹ James Q. Wilson, *Crime and Punishment*, TIME, Apr. 26, 1976, at 88. I am not sure how to account for his incorrect use of the term “experimental,” which denotes the random assignment of research participants to treatment conditions. In this context it would mean that prisoners had been randomly assigned to rehabilitation programs or not, and the measurable outcomes—presumably some index of recidivism—compared; this is something that has only been done very rarely in correctional research, and certainly not in “hundreds” of studies.

¹²² *Id.*

Although the alleged failure of rehabilitation led repeatedly to the unsupported inference that some sort of intractable defect in the "criminal personality" was to blame, no *direct* scientific data had been marshaled for the proposition that prisoners were fundamentally—indeed, characterologically—irredeemable or truly beyond the reach of prison rehabilitation programs. This inference was one that Martinson himself was at pains to dispute and disavow, arguing that "some treatment programs do have an appreciable effect on recidivism" and that, contrary to common assumption, rates of re-offending were surprisingly low.¹²³ Influential commentators like Wilson—who had couched his contrary assertions about "wicked people" in quasi-scientific terms—had neither collected nor offered any direct data of their own on the issue. Indeed, Wilson's published writing gave no evidence that he had ever systematically interviewed or directly even a single actual prisoner or other such "wicked" person.

Several academic studies and treatises soon emerged that claimed to fill this void. One purported to describe in elaborate detail the dimensions of the wickedness to which Wilson had referred, while the others focused on its origins. However, in each instance, despite the poor quality or the limited practical significance of the research, it was widely disseminated in media accounts and explicitly referenced in public and policy discussions about crime and punishment. It is difficult to avoid the conclusion that its cachet stemmed in large part from its ideological resonance with the conservative spirit of the times and the way it could be used to provide seemingly scientific corroboration for increasingly popular law-and-order views. By claiming strong empirical support for the view that criminality was not only an intractable trait but one that was biologically based and genetically transmitted, this work would help not only to solidify the move to abandon prison rehabilitation programs but also to provide indirect support for substituting increasingly harsh and more painful prison policies in their place.

IV. AN ENEMY WORTHY OF WAR: THE RETURN OF THE "CRIMINAL TYPE"

In the first such "scientific" contribution to the War on Prisoners, two clinicians—psychiatrist Samuel Yochelson and psychologist Stanton Samenow—purported to take us "inside the criminal mind" in the mid-1970s.¹²⁴ From a scientific perspective—the one that they claimed and,

¹²³ Martinson, *New Findings*, *supra* note 87, at 244.

¹²⁴ See generally, STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* (1984) [hereinafter SAMENOW, *CRIMINAL MIND*]; 1 SAMUEL YOCHELSON & STANTON E. SAMENOW, *THE CRIMINAL PERSONALITY: A PROFILE FOR CHANGE* (1976) [hereinafter YOCHELSON, *PROFILE FOR CHANGE*]; 2 SAMUEL YOCHELSON & STANTON E. SAMENOW, *THE CRIMINAL PERSONALITY: THE CHANGE PROCESS* (1977) [hereinafter YOCHELSON, *THE CHANGE PROCESS*]; 3 SAMUEL YOCHELSON & STANTON SAMENOW, *THE CRIMINAL PERSONALITY: THE DRUG USER* (1986). According to the preface

therefore, the one from which it is appropriate to judge them—Yochelson and Samenow's work was an extremely unsystematic collection of gross generalizations that were unsupported by the data they presented (including some that seemed incapable of being supported by data of any kind).¹²⁵ Yet their remarkable series of unproven, categorical statements resonated with what was becoming generally accepted set of stereotypes about the nature of crime and the persons who committed it. Yochelson and Samenow's theories were widely publicized in the mainstream media and warmly embraced by law-and-order politicians intent on capitalizing on their message.

Specifically, Yochelson and Samenow asserted that the basic thought patterns of criminals (and, by implication the structure of their brains) were fundamentally different from those of the rest of us: "Crime resides within

Samenow wrote to INSIDE THE CRIMINAL MIND, Yochelson had no specialized expertise on or experience with the topic of criminality when he began to work on it. At age 55, Yochelson commenced "what he regarded as a 'second' career in psychiatry" when he stopped "treating well-to-do corporate executives" in Buffalo, New York, and began a project treating "crooks," as he called them, at Saint Elizabeth's Hospital in Washington DC. The younger Samenow had just finished a stint working "in Michigan with inner city youths," where he admittedly "had failed in [his] treatment efforts with so many adolescents," and was looking for work. SAMENOW, CRIMINAL MIND, at xii-xiii (1984).

¹²⁵ For example, Yochelson and Samenow indicated that their conclusions were based on interviews with some 240 "criminals," 162 of which they had labeled "hard core adult criminals." YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 118. Unfortunately, they neglected to define either term. In addition, in some 1,100 pages of writing, they never bothered to describe the precise manner by which participants were selected for inclusion in their sample and, in fact, provided no details about the representativeness of the sample of "criminals" whom they interviewed. Yochelson and Samenow revealed only that the interviewees had "a wide range of backgrounds," were "of average intelligence," that the overall group consisted of "more blacks than whites" (but not how many more), ranged in age from 15 to 55 years old, and included both "drug users and nonusers" in unreported proportions. *Id.* at 4. In addition, one of their key methodological claims was incredible on its face. Specifically, Yochelson and Samenow indicated that they spent what would have amounted to an average of well over 5,000 hours per year over a 14 year period interviewing "criminals" for their research. Indeed, they reported that there were a dozen participants with whom they spent more than 5,000 hours each (or a total of over 60,000 hours spent with just 12 of the 240 participants). *Id.* at 118. This left another 228 to be interviewed over the same period during which they collected the rest of their data. In addition to the criminals themselves, however, Yochelson and Samenow reported that they also interviewed "family members, girlfriends, employers, and other people important in the lives of 'our' criminals." *Id.* at 4. By rough calculation, this would have required in the neighborhood of 14 straight years of each author working well over 60 hours per week engaged in nothing but interviewing. However, Yochelson worked alone for the first ten years of the study, and was 55 years old when he began it. These kind of outlandish estimates were apparent in other parts of the study. Yochelson gave one interviewer the impression that "each man" he studied "was a proverbial walking crime wave, having committed hundreds if not thousands of crimes during his career . . ." and that one of them had committed "more than 200,000 crimes in a 40-year career." Flora Johnson, *With Malice Aforethought*, TWA AMBASSADOR, Aug. 1979, at 80 (emphasis added). Setting aside the question of how such a statement could ever be verified, this would have entailed the commission of 14 crimes per day, literally every day, over the man's entire 40-year "career." In comments he made to SCIENCE magazine, Samenow was unfazed by the methodological criticisms that some academic researchers directed at his study, stating: "What do the experimental design people have to show in their contribution to the criminal problem?" and complaining that "Freud himself couldn't get a Ph.D. in an American university today." Constance Holden, *The Criminal Mind: A New Look at an Ancient Puzzle*, 199 SCIENCE 511, 514 (1978).

the person and is 'caused' by the way he thinks, not his environment. Criminals think differently from responsible people."¹²⁶ Although general assertions like these about the exclusively "internal" causes of crime were not new,¹²⁷ Yochelson and Samenow's were among the most extraordinary and extreme set of claims ever made about the nature of criminality. Indeed, they argued that *all* criminals—from car thieves to murderers—thought exactly alike: "[W]ithout exception, one criminal is like another with respect to (these) mental processes"¹²⁸ Moreover, *all* criminals—no matter what the number or seriousness of their past crimes—allegedly committed no less than *fifty-two* thinking errors that "pervade *all* the criminal's thinking, no matter what the issue,"¹²⁹ and "play a role in *all* that the criminal does."¹³⁰ In addition, they asserted that "lying was nearly as essential—indeed, automatic—as breathing" to

¹²⁶ SAMENOW, CRIMINAL MIND, *supra* note 124, at xiv.

¹²⁷ See, e.g., Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm*, 6 LAW & HUM. BEHAV. 191, 191–235 (1982) (for a discussion of "psychological individualism" that dominated criminal justice thinking in the 19th century); See generally RAFTER, *supra* note 11, at 94; See sources cited *infra* note 178.

¹²⁸ YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 316 (emphasis added). Indeed, they claimed that "the characteristic thinking errors" of criminals "apply in *every* case." *Id.* (emphasis added). Or: "Every criminal views himself as unique . . . [E]very criminal is a perfectionist." *Id.* at 318 (emphasis added). In fact, they thought the requirement that one must have been convicted of a crime to be a "criminal" too restrictive; for them, a criminal is "a person whose *patterns of thinking* have led to arrestable behavior." YOCHELSON, THE CHANGE PROCESS, *supra* note 124, at 3 (emphasis in original). Notwithstanding the obvious circularity—that "criminals" are both distinguished *and* defined by the same patterns of thinking—even the discredited nineteenth-century theorist Cesare Lombroso had made a distinction between types of criminals, reserving the harshest judgments for those few whose criminality he perceived to be beyond cure. Thus, Lombroso had argued that only a subset of criminals—those who were "born criminals"—were beyond redemption. As he put it: "There exists, it is true, a group of criminals, born for evil, against whom all social cures break as against a rock . . ." CESARE LOMBROSO, CRIME: ITS CAUSES AND REMEDIES 447 (Henry P. Horton trans., 1911). Yochelson and Samenow appeared to have placed nearly every criminal in this extreme category.

¹²⁹ YOCHELSON, THE CHANGE PROCESS, *supra* note 124, at x (emphasis added). In addition, Yochelson and Samenow's use of the label of "criminal" was so imprecise, empirically ungrounded, and elastic that it could encompass literally *any* behavior performed by someone to whom it was applied. Thus, when a "criminal" acted selfish and bad, it was an outward manifestation of who he really was. On the other hand, when he behaved in ways that seemed unselfish and good, such behavior was merely a ploy to advance his otherwise bad, selfish motives. Thus: "The criminal may do things for others to advance his own interests, but he *never* experiences a genuine inner sense of obligation." YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 378 (emphasis added). In addition, many of Yochelson and Samenow's contentions were self contradictory. For example, at one point they asserted that "there is a continuity in [the criminal's] thinking and actions, regardless of setting." *Id.* at 247. Then, a short time later, they stated, equally categorically, that "inconsistencies in attitude and behavior are apparent in *every* part of the criminal's life." *Id.* at 308 (emphasis added).

¹³⁰ YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 52 (emphasis added). Numerous other generalizations were equally extreme and also offered without empirical support. See, e.g., "The criminal's thinking patterns operate *everywhere*; they are not restricted to crime." *Id.* at 53 (emphasis added).

criminals,¹³¹ and that "[w]ithout exception, lying is incorporated into *every* criminal's basic makeup and is a nutrient of criminal patterns."¹³²

They asserted categorically that "[t]he criminal is a master at exercising control in *all* situations,"¹³³ and they endorsed a simplistic free-will model of behavior under which all crime represented little more than purely autonomous choice: "It is not the environment that turns a man into a criminal. Rather, it is a series of choices that he makes starting at a very early age."¹³⁴ Indeed, even though they had only interviewed persons over the age of 15, they asserted that the signs of criminality were identifiable as early as age 10, and that parents of these bad seeds were aware of their children's criminal tendencies from the start: "[F]rom a very early age, the criminal-to-be is observed by his parents as 'different.'"¹³⁵ In fact, because they believed that the signs of criminality were apparent so early in life, and had no discernible environmental cause, Yochelson and Samenow clearly implied that criminals simply were born bad, genetically programmed to think in fundamentally flawed ways that led invariably to their making evil choices.¹³⁶

¹³¹ *Id.* at 23.

¹³² *Id.* at 348 (emphasis added). They insisted that all criminals constantly made excuses for their behavior, so that *no* explanation for a criminal's actions, other than his own depravity, could ever be trusted: "We know that what the criminal tells others when he is held accountable and is looking for excuses is totally self-serving and at variance from what really occurred.." *Id.* at 246-47. "For the criminal, lying is a way of life." *Id.* at 348.

¹³³ YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 349 (emphasis added).

¹³⁴ *Id.* at 247.

¹³⁵ *Id.* at 128. In a later interview, Yochelson apparently reported that the family members of criminals "confide[d] that the child who had become a criminal had *always* been 'different' from the rest," and he reported that "often" these children had begun to steal as early as age five. Johnson, *supra* note 125, at 80 (emphasis added). Moreover, no matter how young and no matter how destructive the series of external events that might have befallen him at a tender age, the budding criminal alone was the cause of all that happened to and around him: "By his actions, the criminal child elicits responses from his parents that are different from those elicited by his responsible brothers and sisters . . . [W]e have been far more impressed by how the criminal child affects his parents than by how his parents affect him." YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 247.

¹³⁶ Yochelson and Samenow disclaimed any particular theoretical perspective on criminal behavior:

We do not attempt to derive causation . . . Going into how it all began takes us too far afield. In our early meetings (with criminal clients) we eliminate sociologic and psychologic excuses. From our point of view, any criminal who clings to a victim stance indicates his lack of commitment to change.

YOCHELSON, THE CHANGE PROCESS, *supra* note 124, at 12 (emphasis omitted). Yet, despite this disclaimer, their theoretical agenda seemed clear. Because Yochelson and Samenow summarily dismissed every possible causal factor or influence outside the criminal himself as an "excuse" that took them "too far afield," there was only one possible place left in which to localize criminality. As one reviewer put it: "The reader is left with nothing more than the vague impression that the authors apparently believe (since they attempt to derogate all significant environmental explanations) that some hereditary force or unspecified environment-hereditary interaction accounts for the 'thinking errors' of

Yochelson and Samenow also failed to defend their decision to ignore a substantial body of empirical evidence that contradicted their main thesis that crime was a simple matter of willful choice. Instead, they simply disregarded, without explanation, what was even then a fairly sizable and mounting body of scientific research on a wide range of external influences (such as discrimination, poverty, child abuse and other powerful "risk factors") that play an important role in producing criminal behavior.¹³⁷ Indeed, harsh discipline and what they apparently believed was *mistakenly* labeled as "child abuse" merely reflected the young criminal's own adverse and harmful influence over his parents, not the reverse.

Thus, Samenow insisted that a criminal "may describe beatings by a maniacal father, but not tell what he did to provoke such treatment,"¹³⁸ and further that "the parents are usually the victims, the child the victimizer—not the other way around."¹³⁹ Of course, the inescapable implication was that such children were *born* this way—with pre-existing propensities, manifested in early childhood, that mature into full-fledged criminality later in life. In the final analysis, Yochelson and Samenow concluded that the criminal mind was so fundamentally different from that of normal people that it was appropriate to describe lawbreakers as literally "a different breed."¹⁴⁰

the criminal." Richard A. Dienstbier, *Exceptions to the Rule: A Review of The Criminal Personality, Volume I: A Profile for Change*, 1 LAW & HUM. BEHAV. 207, 213 (1977).

¹³⁷ See Ann Masten & Norman Garnezy, *Risk, Vulnerability and Protective Factors in Developmental Psychopathology*, in 1 ADVANCES IN CLINICAL CHILD PSYCHOLOGY 1, 2–8., (Benjamin Lahey & Alfred Kazdin eds., 1985) (summarizing much of the early literature on the widely accepted "risk factors" model). In subsequent years, a wealth of empirical research has given rise to the field of "developmental criminology" and confirmed the crucial role of the very risks Yochelson and Samenow summarily rejected in the development of adult criminal behavior. See, e.g., Brandon Welsh & David Farrington, *Save Children From A Life Of Crime*, 6 CRIMINOLOGY & PUB. POL'Y 871 (2007); Marc Le Blanc & Rolf Loeber, *Developmental Criminology Updated*, 23 CRIME & JUST. 115 (1998); Alan Leschied et al., *Childhood Predictors of Adult Criminality: A Meta-Analysis Drawn from the Prospective Longitudinal Literature*, 50 CANADIAN J. OF CRIMINOLOGY & CRIM. JUST. 435 (2008); Robert J. Sampson & John H. Laub, *A Life-Course View of the Development of Crime*, 602 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005).

¹³⁸ These assertions were made to the general public in Stanton Samenow, *Is It Always the Parents' Fault?*, SANTA CRUZ SENTINEL, Jan. 15, 1984, at 6.

¹³⁹ *Id.* at 8. Thus, according to Samenow, as a young child, the criminal is inexplicably "sneaky and defiant," makes "life at home unbearable" for his parents, turns their "innocuous requests into declarations of war," and "rejects his parents rather than vice versa." *Id.* at 6. Moreover, as Samenow asserted categorically, again without a shred of evidence cited in support: "The school does not reject the anti-social youngster until he is impossible to deal with." *Id.*

¹⁴⁰ YOCHELSON, THE CHANGE PROCESS, *supra* note 124, at 5. They repeated this "different breed" terminology a number of times. For example, early in their first volume they asserted that they quickly came to believe that they were dealing with "a different breed of person, so different was their mental makeup." YOCHELSON, PROFILE FOR CHANGE, *supra* note 124, at 31. Here was their thumbnail sketch of this special breed:

Our subject has been a lifelong liar who cannot be believed or trusted, a practiced and secret violator in a variety of areas, an intolerant and insensitive pursuer of conquests who imposes his views and desires on others, a self-

Moreover, since the locus of criminal evil was said to be entirely internal, Yochelson and Samenow proposed only one possible target at which to direct the most forceful intervention that the criminal justice system could muster. Not surprisingly, individual criminals were portrayed as formidable opponents who resisted change at every turn. They were described as skillful, relentless, and committed to their life of criminality, and as persons who could only be changed through a process that was entirely unsympathetic, confrontational, and always painful.¹⁴¹ Indeed, Yochelson and Samenow insisted that the criminal had to be "torn down" before there could be any hope of building him back up in their image of normality (one whose dimensions they also failed to specify).¹⁴²

In another time and place, perhaps, such unsubstantiated and farfetched claims would have been dismissed as crackpot, pseudo-science. In the atmosphere of the late 1970s and early 1980s, however, despite the glaring flaws in their methodology and the extreme nature of their assertions, Yochelson and Samenow's views were widely disseminated with the enthusiastic aid of the mass media. As *Corrections Magazine* reported a few years after their publication: "The books received considerable publicity not only in the professional press but in the popular media, culminating in a segment in 1977 on CBS's '60 Minutes.'"¹⁴³ Indeed, shortly after the books had appeared in print, *Reader's Digest* praised them as providing a "startling new look" at the criminal mind through a "pioneering study" that threw "fresh light" on "hard-core criminals."¹⁴⁴ That "fresh light" revealed what the reviewer termed "a portrait of evil," including Yochelson's observation that "one of his most shocking discoveries was the sheer frequency and range of each criminal's depredations," and Samenow's warning that, unless criminals submitted to

righteous believer that he is a unique number one, an exploiter of everyone, a blamer of others, a person guided by pretensions and prejudgments instead of facts, a person whose fragmentation is so pervasive that he cannot rely even on himself, a skillful strategist who devises tactics to achieve his criminal objectives, a scorner of responsibility and a ridiculer of those who are responsible, and a person whose entire thinking apparatus is designed to achieve his antisocial objectives.

YOCHELSON, *THE CHANGE PROCESS*, *supra* note 124, at 18.

¹⁴¹ See, e.g., "Ours is not a program for raising the self-esteem of criminals. In fact, we stress the opposite . . ." YOCHELSON, *THE CHANGE PROCESS*, *supra* note 124, at 423.

¹⁴² They reported that their program of change "has its roots in a core of moral values that has endured for centuries" without talking explicitly about what those values were. *Id.* at 140. They also reported that the program was so difficult and presumably unpleasant that very few persons who began the program actually completed it: "We estimate that ten to twenty percent of the criminals who are interviewed when vulnerable will accept the program and implement it." *Id.* at 143.

¹⁴³ Denise Goodman, *Thinking Right About Doing Wrong - Do Juvenile Offenders Have 'Criminal Personalities?'* 9 CORRECTIONS MAG. 30, 31 (1983).

¹⁴⁴ Eugene Methvin, *The Criminal Mind: A Startling New Look*, READER'S DIG., May 1978, at 120-24.

his program of change "they will continue their predatory ways as long as they live."¹⁴⁵ Their research even made its way into an airline magazine distributed to on-board passengers, which devoted a long article to Yochelson and Samenow's work, praising it as offering "provocative and persuasive evidence that criminals are born, not made," and lending support to "the so-called 'hard-line' view, which believes criminals are 'born bad,' and neither mental disorders nor societal or familial influences" play a role in causing crime.¹⁴⁶

Perhaps the most unexpected reaction came from *Science* magazine, which devoted an uncharacteristically long article to summarizing Yochelson and Samenow's work. Although acknowledging that most academic researchers viewed the methodologically flawed research as "beneath their notice altogether because it lacks scientific rigor," the author of the review nonetheless characterized the "major substantive criticism" (and not the research itself) as "more ideological than scholarly."¹⁴⁷ The *Science* article uncritically quoted many of Yochelson and Samenow's most extreme generalizations (e.g., "Lying is congenital and comes as naturally as breathing"), and their portrait of criminals as "virtually devoid of any redeeming human qualities."¹⁴⁸ Replicating the same methodological (and perhaps ideological) proclivities as Yochelson and Samenow themselves, the *Science* reviewer then reported on the results of her own "survey" of experts—"a sampling of people who work in universities, hospitals, and jails" and reported that she "found *only three* who disputed the description" of criminals that Yochelson and Samenow had provided.¹⁴⁹ No mention was made of the number of respondents in the "sampling," how they were selected, or what description of "criminals" they were given with which to agree or not.

The author also noted that, within the sample, "[t]wo prominent liberals refused to be quoted," without indicating who they were or how she had arrived at that characterization of their political views. In concluding, she reassured readers that "[p]eople who work with criminals do not quibble with the fine points" of Yochelson and Samenow's work,¹⁵⁰ and noted that, among the academics who were using *The Criminal Personality* in their courses was "psychologist Richard Herrnstein of Harvard"¹⁵¹—someone whose own compatible views will be discussed in the next section.

¹⁴⁵ *Id.* at 124.

¹⁴⁶ Johnson, *supra* note 125, at 86.

¹⁴⁷ Holden, *supra* note 125, at 511.

¹⁴⁸ *Id.* at 512.

¹⁴⁹ *Id.* at 514 (emphasis added).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 513.

In addition to the role it played in changing public discourse about crime and punishment,¹⁵² Yochelson and Samenow's work had a major impact in a number of professional circles. It figured prominently in a number of popular discussions and political debates about crime control, and became influential in prison policymaking circles.¹⁵³ *Reader's Digest* quoted a psychology professor to the effect that "*The Criminal Personality* gives correctional counselors a blueprint to begin the serious work of rehabilitation,"¹⁵⁴ presumably by subjecting prisoners to the harsh regime it recommended. The *Science* article gave an even more glowing account, suggesting that "corrections officials have welcomed it with open arms," quoting various prison staff members to the effect that it was "[p]robably one of the most important studies that's been published in this area in many, many years," and concluding that "[s]ome corrections officials have seized on the ideas in the book as offering them a new way to 'get through to' the psychopathic personalities that have always turned the warmest hearts into cynics."¹⁵⁵

The professional impact of Yochelson and Samenow's ideas extended beyond the corrections establishment. For example, a review of their books that appeared in a journal for prosecutors praised it as representing "two volumes and 1100 pages of close, careful documentation . . . that criminals are bad, not mad," and ultimately supporting the conclusion that "deviant behavior" is not "caused by earlier environmental and psychological traumas" and that psychological concepts in general "should not be considered in determining the legal issue of an individual's criminal responsibility."¹⁵⁶ In fact, Samenow was the only psychologist named to President Reagan's Task Force on the Victims of Crime in the early

¹⁵² For example, one popularized account of the work credited Yochelson and Samenow with having "altered the direction of the debate on the nature of crime." Johnson, *supra* note 125, at 86. As another estimate of public impact, the editorial comment that preceded a Samenow article that was published in a nationally distributed Sunday newspaper magazine characterized his assertion—that there is little that can be done "to prevent some children from gravitating toward criminal thinking and behavior"—as one "likely to trigger a furious national debate." See Samenow, *supra* note 138, at 6.

¹⁵³ By 1983, CORRECTIONS MAGAZINE reported "growing interest in Samenow's theories" among the corrections establishment. Goodman, *supra* note 143, at 32. Another popularizer drew directly from Yochelson and Samenow to argue that very few prisoners could ever be changed (and only those few could be reached through tough, confrontational programs like the one Yochelson and Samenow had advocated) because: "Prison is not necessarily an unpleasant experience for the career criminal. He may even regard an occasional prison sentence as a kind of vacation and as an opportunity to cultivate new criminal associations." Frank Schmalleger, *World of the Career Criminal*, 2 HUM. NATURE 50, 52 (1979), reprinted in ANN. EDITIONS: READINGS IN CRIMINAL JUSTICE 1979/80, 43 (Donal E.J. MacNamara ed., 1979).

¹⁵⁴ Methvin, *supra* note 144, at 124.

¹⁵⁵ Holden, *supra* note 125, at 511, 514.

¹⁵⁶ Grover Trask, *An In-depth Examination of 'The Criminal Personality'*, 3 PROSECUTOR'S BRIEF, 54-55 (1977).

1980s,¹⁵⁷ and the public was repeatedly exposed to his opinion that "focusing on forces outside the felon is futile."¹⁵⁸

As the decade of the 1980s began, the media continued its intense focus on the menace of violent crime. The now established "fact" that criminality was largely intractable—beyond the reach of correctional professionals to fix or cure—was used to underscore the urgent need for unapologetic toughness in dealing with it.

V. DEMONIZING WITH BIOLOGY: INTRACTABILITY OPERATIONALIZED

The "scientific" claims that criminals were so fundamentally different from normal people in everything they did or thought—that they literally constituted a "different breed"—along with the assertion that their deviance was typically manifested at a very early age led logically to speculation about innate differences. As a result, the once discredited view that the perpetrators of violent crime, especially, were not only fundamentally but inherently—even biologically—different from other citizens began to be regarded as increasingly plausible.

For example, in March, 1981, the two major national news magazines both ran cover stories on violent crime that, at least indirectly, entertained the possibility of biological causation, making the prospect of going to "war" with this "new breed" of perpetrators seem increasingly reasonable, even necessary. *Time* and *Newsweek* both used similarly sensationalistic covers to attract readers to the unsettling, fear-arousing stories and language inside.¹⁵⁹ For example, *Time*'s pictured the grotesquely distorted face of a monstrous figure on its cover, beside the bold title, "The Curse of Violent Crime."¹⁶⁰ Inside, *Time*'s narrative began with this alarming assertion: "A pervasive fear of robbery and mayhem threatens the way America lives."¹⁶¹ The lengthy article contained numerous detailed descriptions of truly horrific crimes that had occurred in different parts of the country, each emphasizing the vulnerability of the victims and the savagery and unpredictability of crimes that *Time* characterized, collectively, as representing a "surge of mindless cruelty." The authors

¹⁵⁷ See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/welcome.html>.

¹⁵⁸ SAMENOW, CRIMINAL MIND, *supra* note 124, at 6.

¹⁵⁹ The sensational crime-related covers and stories were so similar that they actually prompted a NEW YORK TIMES article discussing the "coincidence." See Jonathan Friendly, *When News Magazine Covers Match, Is It a Coincidence?*, N.Y. TIMES, Mar. 22, 1981, at A56.

¹⁶⁰ Ed Magnuson, *The Curse of Violent Crime*, TIME, Mar. 23, 1981, at *1, available at <http://timeinc8-sd11.websys.aol.com/time/magazine/0,9263,7601810323,00.html>. The NEW YORK TIMES described the TIME cover illustration as "a surrealistic, semimetallic robber holding a pistol," and the NEWSWEEK cover illustration as "a picture of a revolver pointed at the reader." Friendly, *supra* note 159.

¹⁶¹ Magnuson, *supra* note 160.

described the persons responsible for the "new breed" of crime—"there is... something new about the way that Americans are killing, robbing, raping and assaulting one another"¹⁶²—this way: "Streetwise cops have no difficulty sizing up the psychology of their enemies. 'They are mean, antisocial people with macho complexes.'"¹⁶³

Newsweek's cover story, "The Plague of Violent Crime,"¹⁶⁴ was somewhat more balanced in content but equally frightening in tone. It warned readers that "random mayhem has spilled out of bounds" across the country to such an extent that "a sanctuary can become a killing ground almost at whim."¹⁶⁵ A Massachusetts judge was quoted as saying that "a state of civil war" now existed between "criminals and the law-abiding community" and the *Newsweek* writers noted that "many citizens are waging their own war" against crime "by volunteering for neighborhood patrol groups to take back control of their streets."¹⁶⁶ Like *Time*, *Newsweek* also used graphic stories of violent crimes from around the country as evidence that something fundamental had changed about the nature of criminality, warning the nation about "a shift toward gratuitous slaughter."¹⁶⁷ And, although the *Newsweek's* analysis of the problem was more complex and nuanced than *Time's*, it too ended with a note of resignation about the intractability of crime, reminiscent of James Wilson's a few years before, suggesting that the "effort to do justice is itself an age-old acknowledgment that evil exists and that we must deal with it as best we can."¹⁶⁸

The day after the *Time* and *Newsweek* cover stories appeared, the editorial page of the *Wall Street Journal* echoed their themes and, if anything, amplified their warning of impending danger. The *Journal* claimed that Americans were "deeply upset" over violent crime, which it described as "a growing presence among us." The editors suggested that violent crime was "vastly more damaging to the country's sense of wellbeing than is almost any act of corporate bribery or embezzlement . . ."

¹⁶² *Id.* at *1.

¹⁶³ *Id.* at *5.

¹⁶⁴ Aric Press, et al., *The Plague of Violent Crime*, NEWSWEEK, Mar. 23, 1981, at 46.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *1-2.

¹⁶⁷ *Id.* at *2.

¹⁶⁸ *Id.* at *5. Just a month earlier, readers of the ordinarily upbeat "lifestyle" magazine, NEW WEST, were treated to much the same message. Its editor-in-chief recounted what he characterized as "horror stories" that had "seemed to gather momentum" that winter, and he described crime as "our secret sharer, sitting on our shoulders, whispering in our ears". William Broyles, Jr., *Behind The Lines*, NEW WEST, Feb. 8, 1981, at 7. He was clear about its origins—"the major causes of violent crime lie in only one condition—the human condition" and elaborated that "[c]rime is caused by greed, envy, hatred, passion, cruelty and lust, qualities that bring to mind not the failure of society but the failure of man." *Id.* at 8. Although he conceded that social programs might be helpful, he, too, embraced "the conservative view on strengthening the workings of the criminal justice system" *Id.*

Although they asserted that "you can't hear any authorities claiming that poverty is a sufficient explanation, much less an excuse, for the brutality" that threatened the nation, the *Journal* pointed to the existence of an "underclass" that was mystifying in some respects—"we have little but the vaguest idea of how to communicate with its members," something the *Journal* thought "absolutely chilling for . . . the future of this democracy."¹⁶⁹

Thus, three of the most prominent national news publications appeared to be in complete agreement: the crime menace had severely damaged the nation's sense of well-being and placed the very future of the democracy at risk. Moreover, the persons responsible had defied "our" attempts to communicate with them; indeed, they were a "growing" but incommunicative "presence among us." What could Americans do to protect themselves? There seemed to be a consensus that past efforts at reconciliation—attempts to understand and address the root causes of this behavior—had failed, and that we could no longer afford to indulge misguided "elite opinion" that recommended "large expenditures on social programs" or analyzed the crime through some "version of social determinism." The time had come to stiffen our resolve, before it was too late. Only direct action against our common enemies would do, and this must include finding more "judges willing to convict, longer sentences, and, alas, more construction of prisons."¹⁷⁰

An often-repeated expression from this time period—that "a conservative is a liberal who has been mugged"—was reportedly a favorite of the famously tough-on-crime mayor of New York City, Ed Koch, who presided there for the entire decade of the 1980s, as the War on Prisoners gathered increased momentum.¹⁷¹ The saying was more than a humorous jab at liberals and seemed to reflect what passed for "realism" about the alleged magnitude of the crime threat and the need for a more punitive, warlike response. Yet it may have resonated less because so many liberals had actually *been* mugged and more because they and many others had come so overwhelmingly to *fear* mugging and, perhaps even more, to feel anger toward those persons whom they believed engaged in it and other forms of criminal behavior. Street criminals were increasingly regarded as mortal enemies responsible for an out-of-control national problem that

¹⁶⁹ Editorial, *Coping with Violence*, WALL ST. J., Mar. 24, 1981, at 34.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Kate Stith-Cabranes, *Fear of Discretion: Review of Philip K. Howard, Death of Common Sense: How Law is Suffocating America*, 1 GREEN BAG 209, 211 (1998) (reporting that this was one of Koch's "favorite sayings"). Koch liked to skewer liberals or anyone else who argued that crime should be addressed by eliminating its "root causes." Ed Koch, *Blacks, Jews, Liberals, and Crime*, NAT'L REV., May 16, 1994, at 35. The contention made him "mad as hell," because he insisted it came only from elites who did "not have to live with the consequences of their sentimentality." *Id.* As he put it, with characteristic crassness: "When their hearts bleed for criminals the rest of us can expect to find other parts of our bodies bleeding in due course." *Id.*

threatened good citizens everywhere. Many of those citizens were beginning to accept as fact what Koch and many other politicians would repeatedly tell them throughout the 1980s—namely, that “punishment and incarceration are the only answers we have available.”¹⁷²

To be sure, the groundwork for the War on Prisoners had been laid by the time the decade began. In fact, just a few days after the *Time* and *Newsweek* cover stories, the wire services reported not only that crime had now become the nation’s “top concern,” but also that “Americans have expressed a willingness to spend *more* money to fight lawlessness than for national defense.”¹⁷³ Indeed, Attorney General William French Smith announced the results of a White House-sponsored poll that showed citizens now gave “a higher priority to the fight against crime” than defending the nation against enemies abroad.¹⁷⁴ It was a fight that he and the Reagan Administration vowed to lead them in.

All wars need tangible, identifiable enemies, of course, and the more fearsome and threatening they can be made to appear, the easier it is to mobilize democratic sentiments against them. In this regard, the *Wall Street Journal* editors had some ideas about what the enemy in the coming domestic war—the “growing presence among us” that they felt needed to be targeted—might look like: “Writers are no longer shying away from the racial and ethnic aspects of the problem [of violent crime],” a problem with “deep cultural and demographic roots.”¹⁷⁵ The *Time* authors, also, had been explicit about this, commenting earlier that same week: “There can be no blinking away the fact that blacks are disproportionately involved in violent crime . . .”¹⁷⁶ And, like *Time*, the *Newsweek* story contained its own assertions about race, openly acknowledging that these claims would have been controversial just a few years earlier: “One fact that can’t be questioned is that a vastly disproportionate number of violent criminals are black - an observation that until recently tended to be discreetly ignored as racist.”¹⁷⁷

The incendiary implication that these “vast disproportions” in lawbreaking might stem from innate racial differences in the propensity to commit crime was indirectly buttressed by claims of a *genetic* link to criminality that also appeared in the media in the first half of the 1980s. In some ways reminiscent of frequently racialized notions about “born

¹⁷² Koch, *supra* note 171, at 35.

¹⁷³ *Crime Called Top Concern of Americans*, S. F. CHRON., Mar. 28, 1981, at 5 (emphasis added).

¹⁷⁴ *Id.*

¹⁷⁵ *Coping with Violence*, *supra* note 169, at 34.

¹⁷⁶ Magnuson, *supra* note 160, at *6.

¹⁷⁷ Press, *supra* note 164, at *3.

criminals" that were popular throughout the 19th century,¹⁷⁸ these claims were quick to be reported and prominently featured in the popular press. In fact, newspaper reports of "perhaps the most well-known and most often cited study in support of a genetic basis for criminal behavior"¹⁷⁹—one conducted by psychologist Sarnoff Mednick and his colleagues—preceded the actual publication of the study by several years. The news media accounts in 1982 claimed that Mednick had completed a major study in which he had uncovered the "strong influence of heredity" on criminality that offered "the possibility of predicting criminal behavior."¹⁸⁰ The distinctive genetic makeup of persons predisposed to crime was supposedly manifested in the form of "biological markers" that distinguished them from others. The markers were said to include unique galvanic skin responses ("the kind of response typically elicited by liars in lie detector tests"), special "brain wave patterns," and "several other nervous system responses" indicating that they were biologically and genetically "different from non-criminals."¹⁸¹

On the basis of these findings (and, again, even before they had actually been published), Mednick was quoted as recommending that "'preventive intervention programs'—including behavior modification and psychological counseling—might be used early in the lives of *potential* criminals in order to help them avoid crime."¹⁸² Lacking any direct professional experience in the criminal justice system—his genetic study was based on archival research done with a sample of children in Denmark who had been adopted between 1927 and 1947—Mednick nonetheless appeared to endorse something akin to selective or preventive detention, which he told reporters could help solve the nation's crime problem.¹⁸³

¹⁷⁸ See, e.g., RAFTER, *supra* note 11. Rafter's study of biological theories of crime from the late 18th to the early 20th century documented the ways in which "[t]he biological abnormalities attributed to born criminals changed from generation to generation as theorists encoded offenders' bodies with new signs of evil." *Id.* at 7. See also, ELOF CARLSON, *THE UNFIT: A HISTORY OF A BAD IDEA* (2001); See also ARTHUR FINK, *CAUSES OF CRIME: BIOLOGICAL THEORIES IN THE UNITED STATES, 1800–1915* (1984); See also STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).

¹⁷⁹ Jay Joseph, *Is Crime in the Genes? A Critical Review of Twin and Adoption Studies of Criminality and Antisocial Behavior*, 22 J. MIND & BEHAV. 179, 203 (2001).

¹⁸⁰ David Perlman, *New Study Links Crime to Heredity*, S.F. CHRON., Jan. 12, 1982, at 6 (reporting on Mednick's research).

¹⁸¹ *Id.* Reporters wasted no time in exploring the obvious implication from claims about racial differentials in crime rates and genetic theories of crime causation, asking Mednick if he "believ[ed] ethnic factors play any role in his genetic theories because of the known high incidence of crime among blacks." *Id.* Mednick resisted the implication, replying that he thought "adverse environmental influences far outweigh any possible significance of heredity." *Id.*

¹⁸² *Id.* (emphasis added).

¹⁸³ At the time he began to focus on criminality, Sarnoff Mednick was already a well-respected academic researcher whose work had been concentrated largely on the biological bases of mental illness, primarily schizophrenia. See generally Sarnoff Mednick, *A Learning Theory Approach to Research in Schizophrenia*, 55 PSYCHOL. BULL. 316 (1958); Sarnoff Mednick, *Breakdown in Individuals at High Risk for Schizophrenia: Possible Predispositional Perinatal Factors*, 54 MENTAL

Although he noted that "[i]f this small, active, highly disturbing group could be identified early it would have a marked effect on the crime rate,"¹⁸⁴ he did not say exactly how.

When Mednick's study finally was published in 1984, it once again received widespread media attention that featured his genetic message—that "criminals . . . inherit a biological tendency to break the law."¹⁸⁵ The differences he reported were relatively small—for example, a 5.3% higher rate of convictions among male adoptees with biological parents who had suffered criminal convictions over those whose adopted parents had been convicted of crime.¹⁸⁶ Oddly, the mere fact of having been adopted appeared to carry an equivalent criminogenic weight, as reflected in the data but not commented on by the researchers or the press.¹⁸⁷ In any event, Mednick concluded that the genetic predisposition to criminality was limited to *property* crime (so that even parents with violent convictions passed on only a predisposition to commit property-related offenses).¹⁸⁸ He did not elaborate on the biological or psychological mechanisms by which persons whose parents apparently had violent propensities would

HYGIENE 50 (1970). He does not appear to have gotten interested in criminal behavior until the mid- to late 1970s. For the most part, Mednick studied crime archivally—specifically, by analyzing the police records of a large cohort of Danish children to determine whether and how they were related to certain known characteristics of their parents (including such things as whether one or both parents was schizophrenic, psychopathic, character-disordered, or had a criminal record). *See id.* For example, as early as 1975, he and a colleague used a Danish archival data set as the basis for speculating about such things as the fate of "the offspring of the mating of a schizophrenic with a psychopath. . . ." Lis Kirkegaard-Sørensen & Sarnoff Mednick, *Registered Criminality in Families with Children at High Risk for Schizophrenia*, 84 J. ABNORMAL PSYCHOL. 197, 204 (1975).

¹⁸⁴ Perlman, *supra* note 180, at 6. In fairness to Mednick, he also apparently said that he hoped that such intervention would be "attractive and non-punitive." Unfortunately, reporters did not include his thoughts on exactly how that might be accomplished.

¹⁸⁵ *Id.* at 7 (reporting on Mednick's research).

¹⁸⁶ Sarnoff Mednick et al., *Genetic Influences in Criminal Convictions: Evidence From an Adoption Cohort*, 224 SCIENCE 891, 892 (1984) [hereinafter Mednick, *Genetic Influences*]. Mednick and his colleagues reported that when an adoptive parent had suffered a criminal conviction, 14.7% of male adoptees did as well; when the biological parent had been convicted, 20% of adoptees had. *Id.*

¹⁸⁷ In a longer version of the SCIENCE article, published as a book chapter, Mednick reported that the criminal conviction rate among his adoptive fathers was "a bit below" the 8% that he cited for men in this general age group. Sarnoff Mednick et al., *Genetic Factors in the Etiology of Criminal Behavior*, in THE CAUSES OF CRIME: NEW BIOLOGICAL APPROACHES 74, 77 (Sarnoff Mednick et al. eds., 1987) [hereinafter Mednick, *Genetic Factors*]. Yet, the crime rate for adopted sons whose parents—biological or adoptive—had no criminal convictions was 13.5%. *Id.* at 78. Thus, simply having been adopted increased the crime rate over the non-adopted population by 5.5%, as much as having a biological parent who suffered a criminal conviction. *Id.* In addition, there was another little commented upon environmental finding reported in the research; Mednick and his colleagues found that, for male adoptees, "there was a statistically significant tendency for a high level of adoptee criminality to be associated with more time spent in an orphanage awaiting adoption." *Id.* at 87–88.

¹⁸⁸ *Id.* at 90.

inherit a predisposition to violate socially constructed categories like the prohibitions against larceny or theft.¹⁸⁹

Despite the fact that even within the group of adoptees whose biological parents were said to be "chronic offenders"—those for whom the transmission of "genetic predisposition" was supposed to be the strongest—75% of the children were never convicted of any crime,¹⁹⁰ Mednick continued to advocate for early, preventive intervention in their lives.¹⁹¹ On the other hand, neither his frank acknowledgement of some of the methodological limitations of the study,¹⁹² nor the important role that

¹⁸⁹ He had speculated to reporters—although he not do so in his *Science* article or in the book chapter based on it—that children who inherited a tendency toward crime "might inherit abnormal nervous system characteristics that cause them to be less fearful of disapproval for antisocial behavior." Perlman, *supra* note 180, at 7. This appears to have been a theory with which he had been working for at least a decade. Thus, in the mid-1970s, Mednick had begun to explore the possibility that certain forms of mental illness or psychopathology resulted from inherited autonomic nervous system abnormalities that impaired avoidance learning in its victims. See generally Sarnoff Mednick, *Autonomic Nervous System Recovery and Psychopathology*, 4 SCANDINAVIAN J. BEHAV. THERAPY 55 (1975). By 1976, he and his colleagues were beginning to apply this theory to antisocial adolescents, proposing that abnormalities in their "electrodermal response rate" impeded their avoidance learning and helped explain their proclivities toward antisocial behavior. David Siddle et al., *Skin Conductance Recovery in Antisocial Adolescents*, 15 BRIT. J. SOCIAL & CLINICAL PSYCHOL. 425, 426 (1976).

¹⁹⁰ Mednick, *Genetic Influences*, *supra* note 186, at 892.

¹⁹¹ See generally *id.* Mednick was careful to report the complexities in his data, and he noted that the patterns he found meant that "a genetic influence is not sufficient to produce criminal convictions in the adoptee." *Id.* at 892. Nonetheless, he continued to advocate biological screening "to construct a predictive equation that would eventually be capable of selecting from among a cohort of first offenders those who would go on to become multiply recidivistic." Mednick, *Genetic Factors*, *supra* note 187, at 2–3. Such an equation would "provide remarkable leverage for crime prevention" if children predisposed to criminality "could be identified early enough . . ." *Id.* at 3. This leverage would entail identifying those children who had the distinctive crime-prone genetic make-up and intervening in their lives *before* they became involved in a second offense. See *id.* at 2–3. Here, too, however, no specifics were provided on the nature of these interventions in the lives of young children; nor were any explicit procedures for modifying their supposedly criminogenic nervous systems or distinctive brain wave patterns described, nor any explanation given for how the 75% of the biologically predisposed who represented "false positives" (i.e., those identified as genetically at risk but who did not engage in criminal behavior) should be handled. See *id.* at 892.

¹⁹² For example, he stated that: "simply knowing that an adoptive parent has been convicted of a crime does not tell us how criminogenic the adoptee's environment has been." Mednick, *Genetic Factors*, *supra* note 187, at 78–79. This was an important point because it meant that no precise test of the role of environment was possible in this study (something that, in fact, is not possible in any of these studies, but is rarely acknowledged by those who conduct them). See *id.* at 79. In addition, the fact that Danish adoption authorities attempted "to match certain characteristics of the two sets of parents in order to increase the likelihood that the adoptee will fit into the adoptive home" had the effect of "reduc[ing] the independence of the genetic rearing and environmental influences on the adoptee" and raised the possibility that what appeared to be a genetic influence was driven in part or whole by environmental similarities. *Id.* at 86. Another methodological problem with the study that Mednick acknowledged concerned the fact that adoptive families were routinely informed of problems that might have existed within the biological families from which the children came, and that this knowledge might even have influenced the prospective parents' choices of which children to adopt. See *id.* Although this complication did not appear affect the results, the larger issue of whether and how complexities in the process by which they adoptive parents and children were placed together was difficult to definitively address. As one critic put it: "The evidence suggests that Mednick's study was confounded by selection factors in the Danish adoption process, and it is therefore unlikely that

environmental factors played in crime causation—his concession that “regardless of genetic background, improved social conditions are likely to lead to reduction in criminal behavior”—made their way into the headlines.¹⁹³

One of the most influential and widely discussed versions of the new biology and genetics of crime appeared in a mid-1980s book that was heavily promoted in the media, co-authored by conservative academic James Q. Wilson and his Harvard colleague, psychologist Richard Herrnstein.¹⁹⁴ Together they argued that genetic and constitutional factors played a central role in criminal behavior: “[T]he average offender tends to be constitutionally distinctive . . . [and] crime cannot be understood without taking into account individual predispositions and their biological roots.”¹⁹⁵

As I noted earlier, Wilson had given a significant push to the punitive criminal justice policies that signaled the start of the War on Prisoners—especially the “nothing works” condemnation of rehabilitation—in an especially influential book published in 1975. His assertion that “[n]othing avails” in the case of the “wicked people” who were responsible for the crime problem “except to set them apart from innocent people,”¹⁹⁶ had been repeatedly cited in the popular press and treated as though it were a careful, comprehensive, empirically-based scientific conclusion. It was not. A decade later, the book he co-authored with Herrnstein was also

children with criminal family background were placed into the same types of environments as children lacking such a history.” Joseph, *supra* note 179, at 211.

¹⁹³ Mednick and his colleagues had reported in *SCIENCE* that there was also a significant causal effect of “environmental social class.” Thus, they noted: “Our finding that environmental aspects of social class life influence the relation between social class and crime suggests that regardless of genetic background, improved social conditions are likely to lead to reductions in criminal behavior.” Mednick, *Genetic Influences*, *supra* note 186, at 893. The media chose not to feature this conclusion either.

¹⁹⁴ Herrnstein was a controversial figure in psychology and staunch believer in the importance of genetic influences on complex social behavior. Among other things, in the early 1970s, he advanced the belief that the lower classes suffered from genetically-based intellectual inferiority. See, e.g., RICHARD J. HERRNSTEIN, *I.Q. IN THE MERITOCRACY*, 43 (1971). Specifically, he insisted that it was a “well-established fact that the upper and lower classes differ in their psychological make-up, for example in their measured intelligence” which, as I say, he believed was “substantially heritable.” *Id.* at 43. In the mid-1990s, in another book that received widespread media attention and generated much controversy, he restated his basic position on the genetics of intellectual inferiority and explicitly acknowledged the racial dimensions of his argument. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). The book also contained an entire chapter devoted to the purported “relationship of IQ to criminality.” *Id.* at 235. As Nicole Rafter noted *THE BELL CURVE*’s “enduring criminological significance lies in the way it, together with *Crime and Human Nature*, restored IQ to respectability, making cognitive deficits once again a variable that prominent criminologists might discuss without apology. As in the late 19th century, ‘the’ criminal again became a figure with mental disabilities.” NICOLE RAFTER, *THE CRIMINAL BRAIN: UNDERSTANDING BIOLOGICAL THEORIES OF CRIME* 209 (2008).

¹⁹⁵ JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 102–3 (1985).

¹⁹⁶ WILSON, *THINKING ABOUT CRIME*, *supra* note 97, at 209.

prominently featured in the national media, and was widely discussed in many public and political forums. Yet, like Wilson, Herrnstein—a laboratory psychologist whose formal training was in animal learning—also appeared never to have done any direct empirical research on crime or punishment; indeed, as far as could be determined from his published writing, he had never spent a single hour directly studying an actual prison or interviewing even one prisoner.¹⁹⁷

Taken as a whole, academic writing like this that claimed to have found evidence of a biological basis for criminality put an apparently scientific gloss on the harsh policies that had come to dominate the nation's approach to crime control. Of course, if criminals were *biologically* distinctive, as Wilson, Herrnstein, Mednick and some others maintained, then their criminality was not only deep-seated but likely incurable. The "wicked people" about whom Wilson had written earlier could now be depicted as "hard wired" that way. These views were entirely consistent with the more extreme "breed apart" theories of Yochelson and Samenow, and the more measured tone and prestige of these more mainstream scholars gave even greater apparent legitimacy to their ideological implications.

Accordingly, the headlines that followed the publication of Wilson and Herrnstein's book predictably featured the genetic claims it made and ignored virtually all the others. Thus, *Time Magazine's* story was entitled, "Are Criminals Born, Not Made?,"¹⁹⁸ and acknowledged that the book was "obviously an effort to discredit" the view that "crime is largely, or entirely, the by-product of poverty, racism, broken families and other social disturbances." The magazine review predictably addressed only that portion of the book that argued that a number of people "are born with 'constitutional factors' that predispose them to serious crime."¹⁹⁹

Moreover, in interviews Wilson granted after the *Crime and Human Nature's* publication, he was less circumspect about several controversial issues than he and Herrnstein had been in the book itself. Thus, although the two of them had characterized the case for hereditary influences in terms of "mounting evidence" in the pages of the book, the *Time* interviewer quoted Wilson to the effect that there was "overwhelming

¹⁹⁷ However, according to a 1981 Alfred P. Sloan Foundation Annual Report, Wilson and Herrnstein had "jointly taught a course on crime and the criminal justice system" at Harvard for several years in the late 1970s. That year, Sloan Foundation gave them a sizable one-year grant to "complete a book in which they will try to adumbrate a comprehensive theory of crime." ALFRED P. SLOAN FOUNDATION REPORT FOR 1981, at 50 (1981). CRIME AND HUMAN NATURE was ostensibly the product of that jointly taught course and Foundation support.

¹⁹⁸ John Leo & Valenice Castronovo, *Behavior: Are Criminals Born, Not Made?*, TIME, Oct. 21, 1985, at *1, available at <http://www.time.com/time/printout/0,8816,960148,00.html>.

¹⁹⁹ *Id.* at *1.

evidence" that "crime runs in families."²⁰⁰ Wilson also seemed more willing to range even farther outside his own area of academic expertise. For example, in a mid-1980s *U.S. News & World Report* article, that was headlined, "'Genetic Traits Predispose' Some to Criminality," political scientist Wilson opined not only about the psychology of criminals but also the proper therapeutic approach to take with them:

High-rate offenders begin displaying their behavior early: By third grade, in most cases, they are out of control. You don't have to bring in the criminal justice system at this point; you simply have to say, "This person has a personality-behavior problem." I can imagine helping to control disruptive behavioral traits in a quite benign way that might reduce the chances that individuals would later become a menace to society. I know some people will immediately say, "This is horrible." But it's no worse than using chemical and other forms of therapy for schizophrenics or hyperkinetic children.²⁰¹

Wilson's views appeared to have changed in another important way as well. Nearly twenty years earlier, when commenting on the Crime Commission Report that he had contributed to, Wilson had been careful to resist the potentially racially charged implications of the differential rates of crime between certain racial and ethnic groups. He even noted that "[a]t one time, public opinion held that Negroes (or Italians, or whatever) were congenitally criminal," which he said had led to an inference that he seemed to imply was incorrect or had been discredited—namely that "[t]here was no point in trying to change what was the product of bad genes or wicked souls, so only the most repressive law enforcement could keep the streets safe for decent people."²⁰² Of course, this view was very similar to some of the positions that Wilson himself would espouse just a few years later in *Thinking About Crime*.

But beyond that, in his earlier Crime Commission commentary Wilson had gone on to note that "[c]riminologists have struggled valiantly to disprove such notions" about genetic differences in criminal propensity and wrote that "criminality is not an attribute of race, genetically speaking."²⁰³ Yet, in a media interview he did in 1985, in conjunction with

²⁰⁰ *Id.* at *1.

²⁰¹ "Genetic Traits Predispose" Some to Criminality (A Conversation with James Q. Wilson), *U.S. NEWS & WORLD REP.*, Sep. 30, 1985, at 54.

²⁰² Wilson, *A Reader's Guide*, *supra* note 100, at 69.

²⁰³ *Id.*

the publication of *Crime and Human Nature*, he entertained an altogether different view:

I think it's conceivable that there are genetic differences across all ethnic and racial groups such that, for example, Japanese children are less aggressive, more placid, easier to condition; whereas Caucasian children are more difficult to condition and more aggressive. And perhaps black children are more aggressive and harder to condition generally. We can't rule out these possibilities.²⁰⁴

Five years after it was published, *Crime and Human Nature* was described by a British commentator as having caused "a sensation" that "tipped the balance from nurture to nature" in the United States.²⁰⁵ It had hardly done that. However, the biological and genetic theories that its authors endorsed and the related studies that were prominently (and often uncritically) featured in the media for more than a decade certainly contributed to shifting public opinion and sharply changed criminal justice policies.²⁰⁶ As I have tried to show, however, the status of these theories could not be explained by the quality of the scientific data on which they were based, and certainly not the practical utility of the findings themselves.²⁰⁷ In fact, the databases were often flawed or unspecified and the statistical relationships they yielded (when, in fact, quantitative data were analyzed at all) were too small to hold much practical significance for crime control or prison policy. Indeed, as one measure of this latter fact,

²⁰⁴ *Too Many of Us Are Prisoners of Crime*, USA TODAY, Nov. 13, 1985, at A11.

²⁰⁵ Jonathan Clark, *What We Lose By Neglecting the Special Relationship*, THE TIMES, May 16, 1990, at *2, available at <http://find.galegroup.com/gtx/start.do?prodId=AONE&userGroupName=22516>.

²⁰⁶ For example, as one writer described him, Wilson "was without parallel among academic commentators in articulating and legitimizing a hard-edged approach to criminal policy." ANDREW RUTHERFORD, *TRANSFORMING CRIMINAL POLICY* 15 (1996). But Wilson's influence extended well beyond academia. Thus, his "public profile continued to rise throughout the Reagan and Bush administrations, and his prolific publishing and numerous advisory roles have ensured that he remains a very considerable presence on the American criminal policy scene." *Id.* For some insight into how that broad influence might have come about, see TELES, *supra* note 57. He provides an extended discussion of the role of organization and political entrepreneurs in amplifying the ideas and broadening the influence of intellectual entrepreneurs like Wilson, and a detailed account of how effectively they accomplished this over the last several decades for explicitly political, ideological reasons.

²⁰⁷ Remarkably, in a passage near the end of their more than 600 page review of research on crime and human nature, Wilson and Herrnstein assert that a scientific understanding of criminality should be treated as fundamentally irrelevant to the criminal justice and legal process: "We know crime, like all human behavior, has causes, and that science has made progress—and will make more progress—identifying them, but the very process by which we learn to avoid crime requires that the courts act as if crime were wholly the result of free choice." WILSON & HERRNSTEIN, *supra* note 195, at 528–29.

note that some thirty years after these genetic and biological claims were first greeted publicly as “breakthroughs” in the fight against crime, it is impossible to identify a single improvement or innovation in the functioning of the American criminal justice system that resulted from them.

Moreover, the studies did not contain particularly unique or path-breaking insights on criminal behavior that would account for the media attention they received or the public and political significance attached to them. Far from offering fresh perspectives on the nature of criminality, as I have noted, they seemed highly derivative of outdated and largely discredited ideas about inherent “criminal types” that were recycled from the 19th century.²⁰⁸ In fact, the prominence of these views and the widespread media attention they attracted appeared to derive as much or more from their resonance with the politically inspired “tough-on-crime” campaigns that were already well underway. In this way, “science” was employed to help legitimize the harshly punitive atmosphere that was beginning to take shape across the country, as the War on Prisoners was being waged in earnest.²⁰⁹

Notwithstanding the glaring methodological imperfections of some of the research and limited applicability of most of the rest, this scholarship seemed to confirm many of the misleading images of criminality to which the public had been repeatedly exposed in the early stages of the War on Prisoners. Representing criminals as a “breed apart” clearly buttressed the assertion that they could not be helped in prison. In fact, depicting prisoners as fundamentally flawed, genetically defective, or “constitutionally distinctive” seemed to undermine even the *idea* of rehabilitation and to confirm the logic by which it had been rejected. It also made the harsh treatment of convicts—now a supposedly inherently damaged, wicked, “breed apart”—easier to tolerate and even to openly endorse, even as they inhabited our nation’s penal institutions in rapidly increasing numbers in the course of the War on Prisoners.²¹⁰

²⁰⁸ See, e.g., RAFTER, *supra* note 11; sources cited *supra* note 178.

²⁰⁹ Nicole Rafter recognized that “today’s biological theories can become vehicles for distinguishing between the politically worthy and unworthy,” and argued that Wilson and Herrnstein’s “contentions that inherited factors play a role in crime point toward eugenic conclusions.” RAFTER, *supra* note 11, at 238–39.

²¹⁰ Some of the wartime mentality that prevailed in the mid-1980s was captured in a newspaper article that nationally syndicated columnist Bob Greene wrote in June, 1985, under the headline “Crime, Fear and Anger.” Summarizing what he claimed “seems to be on many people’s minds” about crime, he recounted the views he reported that he heard from “so many people,” all of whom seemed to be “saying the same things” to him. Those things included: “If a man commits a terrible crime, that man should be killed as swiftly as possible, people are saying,” and “there should be no tears spilled over it,” “people want their money to be used to build more prisons. And prisons are not necessarily places where rehabilitation should take place; prisons, in many people’s minds, should—first and foremost—be warehouses where the evil elements of society are kept away from the law-abiding elements;” “Civil liberties are sometimes not as important as allowing the police to do an aggressive

In addition, the image of the strong-willed criminal type who was characterologically or even constitutionally impervious to change also implied that any significant attention given to potentially criminogenic social situations, conditions, and contexts *outside* of prison was futile and misplaced. Under the terms of the new conservative criminology, the role of social and structural determinants of criminal behavior was greatly diminished. Wicked people merely "exist," to recall Wilson's influential words; just as they were supposedly immune to external forces administered to bring about positive change inside prison, speculation about any negative changes that might have been brought about by external forces in their lives in the larger society was portrayed as fundamentally misguided. The anti-rehabilitationist analysis fed directly into a larger political movement that effectively blocked policies attempting to reduce crime by significantly transforming the social conditions that engendered it. Indeed, if crime was, in a significant measure, biologically-based, then there was little need to pursue structural solutions to inequality, to implement preventive social programs to reduce children's exposure to criminogenic risk factors, or to devise economic interventions that were designed to expand opportunities for those persons who lacked them.

Indeed, these broader "nothing works" notions resonated perfectly with and were correspondingly promoted by the conservative political establishment that was dominant during these years. Accordingly, President Ronald Reagan had an entirely compatible perspective on the crime problem, and he featured it prominently in many of his speeches. Reagan drew a chilling portrait of criminality—"a stark, staring face—a face that belongs to a frightening reality of our time: the face of the human predator . . . Nothing in nature is more cruel or more dangerous . . ." ²¹¹ In Reagan's view, crime represented an epidemic that had been allowed to flourish in an era when "liberal philosophy" had placed "too much emphasis on the protection of the rights of the accused." The criminal

job in combating crime;" "Explanations about poverty's being the root cause of crime don't impress people anymore;" "More than anything else, there is a sense of free-floating anger that life should have come to this;" and "the only people [all the others] truly find at fault are the people committing the crimes." Bob Greene, *Crime, Fear and Anger*, S. F. CHRON., June 16, 1985, at 4. At the same time, it is important to note that the public's endorsement of these harsh views was, and has always been, a matter of degree. Thus, well into the 1990s, after the War on Prisoners had been underway for a decade or more, public opinion was still decidedly mixed on the issue of rehabilitation. As one study concluded: "We do not deny that the public desires punishment and that people want to be protected from predatory criminals. It appears, however, that the public still is receptive to treating offenders; the appeal of the rehabilitative ideal remains widespread." Brandon K. Applegate et al., *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 PRISON J. 237, 253 (1997). It would have been difficult to discern that fact from the media's handling of the topic over the last several decades.

²¹¹ Dick Kirschten, *Jungle Warfare*, NATIONAL JOURNAL, Oct. 3, 1981, at 1774.

justice system had supposedly become so lenient that criminals had concluded "crime really does pay."²¹²

But there was not just a legal and political lesson to be taught; the President believed that he understood the psychology of crime as well: "Choosing a career in crime is not the result of poverty or of an unhappy childhood or of a misunderstood adolescence; it is the result of a conscious, willful choice made by someone who considers themselves above the law, who seeks to exploit . . . their fellow citizens."²¹³ Eventually, the campaign against these "willful predators" took hold and public views began to conform increasingly to the prevailing political rhetoric. The War on Prisoners raged on, with even more widespread public support and the approval of politicians from both ends of the ideological spectrum, a consensus that had been achieved in part because its premises had been validated by a selective group of academic "experts" on crime who claimed "scientific" support for their views.

CONCLUSION

Clearly, the researchers and scholarly writers who contributed to these harshly punitive policies were not part of some grand governmental conspiracy to mislead the public into taking a course of action that they all understood was unnecessary. Although I have questioned the quality of their data and the validity of their interpretations, there is no reason to doubt their sincerity in participating in what amounted nonetheless to a process of demonization that facilitated the War on Prisoners. Although there *were* other points of view articulated by scholars who opposed these characterizations and contested the growing consensus in support of the domestic war they helped bring about,²¹⁴ the media selectively focused on,

²¹² KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 49 (1997).

²¹³ *Id.* The NEW YORK TIMES described a September 29, 1981 speech Reagan gave in New Orleans to the nation's chiefs of police as containing a "tough anticrime" message. Stuart Taylor, *New Attack on Crime*, N.Y. TIMES, Sept. 30, 1981, at 28. In it, Reagan blamed the rising crime rate and the worsening economy on the "utopian presumptions about human nature" held by social reformers and he asserted "that we acknowledge the solution to the crime problem will not be found in the social worker's files, the psychiatrist's notes, or the bureaucrat's budgets. It's a problem of the human heart, and it's there we must look for the answer." Brad Knickerbocker, *Reagan Plans All-Out War on Crime—On a Tight Budget*, CHRISTIAN SCI. MONITOR, Sept. 30, 1981, at *2, available at www.lexis.com.

²¹⁴ For examples of alternative analyses written at precisely the time these war-like crime control policies were being implemented, see FRANCIS CULLEN & KAREN GILBERT, REAFFIRMING REHABILITATION (1982); ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE (1985). Currie's work contained a prescient prediction about where such policies ultimately might lead:

Much greater increases in incarceration would turn the American penal system, already swollen out of all proportion, into a homegrown Gulag of dreadful proportions . . . Further drastic increases in incarceration would

highlighted, and promoted certain analyses, opinions, and conclusions and largely ignored these others. As I have tried to show, in some instances the high level of national visibility they achieved and policymaking influence they wielded appeared to result more from the ideological resonance of the message than the actual criminal justice expertise or scientific bona fides of the messengers. And, in the case of the "nothing works" mantra itself, a distorted, misleading, and ultimately inaccurate shorthand was used by the media to caricature a much more complicated and nuanced position that even its originator felt compelled to vehemently protest (ultimately to no avail). Together these privileged and promoted assertions were used to support harsh crime control and correctional policies that were based much more on politics than science.

In the final analysis, what emerged in the course of this process of domestic war-making was a seemingly scientifically supported view of lawbreakers as profoundly "other." Whatever else it had accomplished, the critique of rehabilitation conveyed a view of prisoners as largely beyond fixing and, if they could not be reclaimed, then they would become expendable casualties in the hostilities that ensued. To be sure, the widely publicized contentions that "science" had convincingly shown criminals to be innately damaged goods who could rarely if ever be changed for the better made it that much easier for "crime control" to more readily devolve into "warfare," and for prison policies to become strategies for confining as many of these "enemies of the people" under harsh wartime conditions, for as long a time as feasible.

Policymakers eschewed social and structural explanations for criminality and the solutions they implied, preferring the harshest possible punishments instead.²¹⁵ By the 1990s, a wartime mentality prevailed, one in which our domestic enemies had become "the preeminent troublesome others in our society today—the only group capable of uniting the entire American population."²¹⁶ By casting lawbreakers in the role of the defective alien—biologically and genetically damaged goods—these images also helped to sever any empathic connection that members of the larger community might have had with them to facilitate their eventual reintegration. To the extent that such views linger in the minds of citizens and lawmakers, they threaten recently emerging new directions in crime

decimate these communities beyond recognition and would amount, in practice, to writing off a substantial part of entire generations of minority men.

Id. at 91.

²¹⁵ See generally Barbara Sims, *The Impact of Causal Attribution on Correctional Ideology: A National Study*, 28 CRIM. JUST. REV. 1 (2003); Mira Sotirovic, *How Individuals Explain Social Problems: The Influences of Media Use*, 53 J. OF COMM. 122 (2003).

²¹⁶ Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 553 (1994).

and prison policy,²¹⁷ ones seeking to reverse the nation's ever-increasing rates of imprisonment and instead to approach crime reduction through a range of social programs that address its structural causes. A ceasefire in the War on Prisoners seems long overdue, and we may be on the verge of a new period of "post-war reconstruction." It remains to be seen whether and how science—good science that is less ideologically freighted and politically expedient—can assist in these efforts.

²¹⁷ See Haney, *supra* note 3, at 91–92 n.9 for a discussion of some signs of these emerging new directions.